



# The Commonwealth Criminal Code

## A Guide for Practitioners

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Commonwealth Attorney-General's Department  
in association with the Australian Institute of  
Judicial Administration

March 2002



The Australian Institute of  
Judicial Administration Incorporated

**THE  
COMMONWEALTH CRIMINAL CODE**

**A GUIDE FOR  
PRACTITIONERS**

COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT  
in association with the Australian Institute of Judicial Administration

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## PREFACE

Dear practitioners

It is with great pleasure that the Attorney-General's Department has been able to work in association with the Australian Institute of Judicial Administration to produce these guidelines for practitioners on the Commonwealth *Criminal Code*. The *Criminal Code* has been progressively applied to Commonwealth offences since 1997 and, subject to a short delay with a handful of offences, applied to all Commonwealth offences from 15 December 2001.

Chapter 2 of the Commonwealth *Criminal Code* was enacted in 1995. It closely follows the Model Criminal Code which was developed by State, Territory and Commonwealth criminal law advisers following nationwide consultation. Chapter 2 is concerned with the general principles of criminal responsibility - so it is relevant to all offences. The application of Chapter 2 to all offences meant that all existing Commonwealth offences had to be reviewed, and where necessary, modified before Chapter 2 could commence. That process is now complete. Practitioners will note that Chapter 2 is by no means alien as its concepts are based on the common law and in some cases provisions of the old State Criminal Codes.

However, while the concepts in the Commonwealth *Criminal Code* will often be familiar, I recognise using a criminal code will be new for many of you and that it is very important to carefully document how it relates to the existing law and is expected to operate. It is of course for the courts to deliberate on how the *Criminal Code* will actually operate. The following pages, are just guidelines, they are designed to assist practitioners, not replace the normal processes for interpreting the law. Officers in my Department, and I trust many practitioners and commentators will be monitoring decisions on the *Criminal Code* with great interest over the coming years.

It is my hope the new *Criminal Code* will bring about greater certainty, and in the end, consistency throughout Australia. It is based on the model for national consistency - the Model Criminal Code - which was created for that purpose by the nation's Attorneys-General.

Robert Cornall  
Secretary  
Attorney-General's Department  
March, 2002



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## **PART 2.1 - PURPOSE AND APPLICATION**

### **Division 2**

#### **2.1 Purpose**

The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

#### **2.2 Application**

- (1) This Chapter applies to all offences against this Code.
- (2) Subject to section 2.3, this Chapter applies on and after 15 December 2001 to all other offences.
- (3) Section 11.6 applies to all offences.

#### **2.3 Application of provisions relating to intoxication**

Subsections 4.2(6) and (7) and Division 8 apply to all offences. For the purpose of interpreting those provisions in connection with an offence, the other provisions of this Chapter may be considered, whether or not those other provisions apply to the offence concerned.

## PART 2.1 - PURPOSE AND APPLICATION

### DIVISION 2

#### 2.1 Purpose

Chapter 2 codifies the general principles of criminal responsibility in Commonwealth law. The statement of general principles is exhaustive; the principles apply to all Commonwealth offences, whether or not they are included in the *Criminal Code*.

Many of the principles are presumptive in character. So, for example, provision is made to permit legislative reversal of the presumption of innocence: 13.4 *Legal burden of proof – defence*. And though the *Code* presumes that criminal liability requires proof of recklessness at least, provision is made for the imposition of liability for negligence, strict and absolute liability: 5.6 *Offences that do not specify fault elements* and Division 6 – *Cases where fault elements are not required*. The provisions of the *Code* are not constitutionally entrenched and any of them can be overridden by Parliament in legislation which departs specifically from the structure of criminal responsibility set out in Chapter 2. Since the object of the *Code* is to provide a clear and unambiguous statement of fundamental principles of criminal responsibility it is anticipated that instances where Chapter 2 is overridden will be rare and the intention of the legislature to override its provisions, in those rare instances, will be explicit and unmistakable.

Corporate criminal responsibility provides the best known instances of Parliamentary departure from the principles of the *Code* in formulating offences. Though Part 2.5 – *Corporate Criminal Responsibility* governs corporate criminal responsibility in some offences, it has been displaced in others by alternative provisions.

#### 2.2 Application

The *Criminal Code* is expected to provide an integrated and coherent statement of the major offences against Commonwealth law. The *Code* is not intended, however, to provide a comprehensive statement of federal offences. A substantial proportion of offences – primarily those of a minor or specialised nature – remains in other Commonwealth legislation. Chapter 2 of the *Code*, which states the general principles of criminal responsibility, will extend to all Commonwealth offences, whether or not they are included in the *Criminal Code*. The date of application of the general principles varies however. Chapter 2 applies to all *Code* offences from their inception. From January 1 1997, legislation creating offences which are not included in the *Code* often made provision for *Code* principles to apply to their interpretation. It is accordingly necessary to determine whether specific provision has been made to apply *Code* principles when these non-*Code* offences are under consideration.

### 2.1 Purpose

The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

### 2.2 Application

- (1) This Chapter applies to all offences against this *Code*.
- (2) Subject to section 2.3, this Chapter applies on and after 15 December 2001 to all other offences.
- (3) Section 11.6 applies to all offences.

### 2.3 Application of provisions relating to intoxication

Subsections 4.2(6) and (7) and Division 8 apply to all offences. For the purpose of interpreting those provisions in connection with an offence, the other provisions of this Chapter may be considered, whether or not those other provisions apply to the offence concerned.

The transitional phase before Chapter 2 extends to all federal offences is short. Offences which are not subject to the provisions of Chapter 2 were brought within its scope from December 15, 2001.<sup>1</sup>

The provisions in Chapter 2 which deal with the relationship between intoxication and criminal liability were extended to all Commonwealth offences from 13 April 1998.<sup>2</sup>

### 2.3 Application of provisions relating to intoxication.

The *Code* provisions on intoxication distinguish between “self induced intoxication” and states of intoxication which occur involuntarily or as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force. Self-induced intoxication cannot provide a foundation for a plea that conduct was involuntary: 4.2 *Voluntariness*. When fault elements are in issue, the *Code* requires evidence of intoxication to be disregarded in certain circumstances: Part 2.3 *Circumstances in which there is no Criminal Responsibility*; Division 8 - *Intoxication*. These provisions apply to all Commonwealth offences from 13 April 1998 whether or not the remaining provisions of Chapter 2 apply.<sup>3</sup>

The intoxication provisions are conceptually linked to the remainder of Chapter 2. Since the intoxication provisions extend to any federal offence committed after 13 April 1998, even if the remainder of Chapter 2 does not apply, a transitional provision was necessary. The transitional phase is relatively short, since Chapter 2 applies, as a whole, to all federal offences after December 15 2001. If an issue involving intoxication arises in an offence committed in the period between 13 April 1998 and 15 December 2001, and the offence is not subject to Chapter 2, it is nevertheless permissible to take into account any of the general principles to the extent necessary to enable application of the intoxication provisions.

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1 *Criminal Code Amendment (Application) Act 2000.*

2 *Criminal Code Amendment Act 1998.*

3 *Criminal Code Amendment Act 1998.*

**PART 2.2 - THE ELEMENTS OF AN OFFENCE**

Division 3—General

- 3.1 Elements
- 3.2 Establishing guilt in respect of offences

Division 4—Physical elements

- 4.1 Physical elements
- 4.2 Voluntariness
- 4.3 Omissions

Division 5—Fault elements

- 5.1 Fault elements
- 5.2 Intention
- 5.3 Knowledge
- 5.4 Recklessness
- 5.5 Negligence
- 5.6 Offences that do not specify fault elements

Division 6—Cases where fault elements are not required

- 6.1 Strict liability
- 6.2 Absolute liability

## PART 2.2 - THE ELEMENTS OF AN OFFENCE

Part 2.2 provides the framework and conceptual vocabulary of criminal responsibility under the *Code*. Six distinct modes of criminal culpability are recognised, ranging from liability for intentional wrongs to absolute liability, which penalises inadvertent wrongdoing and permits no defence of reasonable mistake of fact. These six modes of culpability are deployed by the use of a relatively restricted conceptual vocabulary: intention, knowledge, recklessness, negligence, strict liability and absolute liability.<sup>4</sup> Offences that impose liability for intention, knowledge, recklessness, and negligence are said to impose liability for fault, while strict and absolute liability are defined as liability without fault. Most offences are a compound of fault elements and physical elements, though a minority dispense with any requirement of fault: Division 6 – *Cases where fault elements are not required*.

The *Code* provides extended definitions for each of the four fault concepts. The definitions vary in the degree to which they depart from common understanding and common usage. The technical terminology of the fault elements depends, however, on the foundation provided by undefined concepts commonly used in the moral evaluation of human behaviour.

VOCABULARY OF THE FAULT ELEMENTS			
ORDINARY LANGUAGE		DEFINED TERMINOLOGY	
1. meaning (to do an act)	5.2	1. fault element	5.1
2. belief	5.2	1. intention	5.2
3. awareness	5.3,5.4	2. knowledge	5.3
		3. recklessness	5.4
		4. negligence	5.5

The vocabulary of physical elements is even more restricted, comprising conduct, circumstances and results of conduct.

VOCABULARY OF THE PHYSICAL ELEMENTS			
ORDINARY LANGUAGE		DEFINED TERMINOLOGY	
1. act	4.1	1. physical element	4.1(1)
2. omission to act	4.1	2. conduct	4.1(2)
3. state of affairs	4.1		
4. circumstance of conduct	4.1		
5. result of conduct	4.1		

<sup>4</sup> More specialised varieties of fault are recognised in particular *Code* offences: see Part 7.2 of Chapter 2, *Theft and other property offences*. In general, however, *Code* offences utilise the four fault concepts when defining offences.

**PART 2.2 - THE ELEMENTS OF AN OFFENCE**

Division 3—General

- 3.1 Elements
- 3.2 Establishing guilt in respect of offences

Division 4—Physical elements

- 4.1 Physical elements
- 4.2 Voluntariness
- 4.3 Omissions

Division 5—Fault elements

- 5.1 Fault elements
- 5.2 Intention
- 5.3 Knowledge
- 5.4 Recklessness
- 5.5 Negligence
- 5.6 Offences that do not specify fault elements

Division 6—Cases where fault elements are not required

- 6.1 Strict liability
- 6.2 Absolute liability

Unlike the fault elements, the physical elements are defined without technicality: “act”, “omission”, “circumstance” and “result” derive their meaning from ordinary language. The terminology is intended to provide a flexible and idiomatic means for determining whether the behaviour of an offender matches the statutory description of the criminal offence.

DIVISION 3 - GENERAL

3.1 Elements

- (1) **An offence consists of physical elements and fault elements.**
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

## DIVISION 3 - GENERAL

### 3.1 Elements

All offences require proof of one or more physical elements. Most offences will require proof of a fault element – intention, knowledge, recklessness or negligence – with respect to one or more of their physical elements. Some impose strict or absolute liability with respect to one or more physical elements and there is a significant number of minor offences which impose strict liability with respect to all physical elements, dispensing with any requirement of proof of fault. The *Code* distinguishes between the physical and fault elements which define criminal offences and defences, exceptions, exemptions and qualifications which will defeat an allegation of liability, even though the elements of the offence are proved beyond reasonable doubt.

#### *3.1-A Offences consist of physical elements and fault elements:*

The *Code* distinguishes between the commission of an “offence” and the attribution of criminal responsibility for that offence. It envisages, in other words, that there will be offences for which no-one is criminally responsible: the structure of responsibility is binary. If the prosecution establishes the necessary elements, there is an “offence”, though liability may be avoided by reliance on one of the defences, excuses or exceptions to liability. These are collectively described in Part 2.3 as *Circumstances in which there is no criminal responsibility*.<sup>5</sup> It is implicit in the structure of criminal responsibility proposed in the *Code* that none of the defences requires a person charged with an offence to meet the demanding requirement that conduct be *justified* before a defence could succeed. Successful reliance on a defence *excuses* the defendant from criminal responsibility. In the conventional distinction between justification and excuse, conduct is not justified unless it was the “right thing to do in the circumstances.”<sup>6</sup> If conduct is justified, rather than merely excused, it would be inappropriate to speak of an “offence” committed by the accused. Excuses, invoked by an offender who concedes that an offence may have been committed, permit an individualised assessment of responsibility for wrongdoing. The defence of “lawful

5 However, Part 2.3 is not exhaustive in its catalogue of conditions which defeat an attribution of criminal responsibility. Many defences and exceptions to criminal responsibility are found elsewhere in the *Code* and in other Commonwealth criminal laws.

6 The view that defences which justify should be distinguished from those which merely excuse, draws its most significant support from the work of George Fletcher in two major studies, *Rethinking Criminal Law* (1978) ch10 and *A Crime of Self Defence: Bernhard Goetz and the Law on Trial* (1988) and numerous journal articles. Among Australian authorities, Stanley Yeo, *Compulsion in The Criminal Law* (1990) 105-112 presents an extended argument that the distinction is fundamental to an understanding of criminal responsibility. B Fisse, *Howard's Criminal Law* (1990) ignores the distinction; E Colvin, *Principles of Criminal Law* (2nd Ed 1991) 208-211, writing from a Canadian perspective, argues that it is alien to the common law as does JC Smith, *Justification and Excuse in the Criminal Law* (1989).

DIVISION 3 - GENERAL

3.1 Elements

- (1) **An offence consists of physical elements and fault elements.**
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

authority” in section 10.5 makes the point explicitly in its declaration that criminal responsibility is not incurred “if the conduct constituting the offence is justified or excused by or under a law.” The only references to justification in Chapter 2 occur in s5.4, in the definition of recklessness, and in s10.5 *Lawful authority*, which makes a point of conflating justification and excuse.

*3.1-B “Elements” of an offence are either “physical elements” or “fault elements”.*

The *Code* reference to “physical” elements corresponds to the more usual term - “external elements”<sup>7</sup> There is no apparent distinction in meaning between the expressions. The reference to *physical* elements of an offence should not obscure the reality that those physical elements will frequently include intangible factors. Physical elements include, in particular, the state of mind of a victim of crime, a witness or one of the imaginary arbiters of conduct who define standards of wrongdoing in the criminal law. Any of these intangible states of mind or opinion can be a defining physical element of a criminal offence. So, for example, absence of consent is a physical element in a number of the property offences in Chapter 7 - *The proper administration of Government*. In common law rape and its statutory variants, the issue of consent is said to involve the victim’s “state of mind” at the time of the offence.<sup>8</sup> In complicity, a principal offender’s state of mind is a physical element when the guilt of an accomplice falls to be considered.<sup>9</sup> Similarly, the aesthetic or moral reactions of “ordinary decent people”, which define indecency at common law, are physical elements of offences involving indecent conduct.<sup>10</sup> Physical elements of offences will also include a varied host of intangibles, such as ownership of property, marital status and absence of authorisation or entitlement in cybercrime.

*3.1-C “Fault elements” include departures from objectively defined standards of behaviour in recklessness and negligence:*

The *Code* term, “fault elements” displaces the uncertainties of common law references to “mens rea.” It is equivalent in meaning to the commonly employed textbook reference to the “mental element” in crime though “fault” is more accurately descriptive. Instances of criminal negligence will often involve circumstances in which the fault of the offender is to be found precisely in the complete absence of anything that could be described as a state of mind: the reference to “fault” is more inclusive in its implied reference

7 See Brennan J, in *He Tau Teh* (1985) 15 A Crim R 203, 233, who attributes the expression to Dixon CJ in *Vallance* (1961) 108 CLR 56 at 59. See also Fisse, *Howard’s Criminal Law* (1990) 12.

8 *Model Criminal Code: Chapter 5 - Sexual Offences Against the Person*, Report 1999, 33, 43: “consent should be seen as a positive state of mind”.

9 Chapter 2 – *General Principles of Criminal Responsibility*, s11.2(a), (b).

10 *Harkin* (1989) 38 A Crim R 296, 300 per Lee J: conduct is indecent if a “respectable” or “right-thinking” or “right-minded” or “decent-minded” person would take it to be indecent.

DIVISION 3 - GENERAL

3.1 Elements

- (1) **An offence consists of physical elements and fault elements.**
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

to the blameworthiness of conduct which violates standards of appropriate behaviour.<sup>11</sup> A degree of strain or arbitrariness is inevitable when the elements of an offence must be divided between categories of physical and fault elements. The departure from appropriate standards of care which constitutes negligence and the absence of justification for risk which is necessary for recklessness could, perhaps, have been formulated as physical elements of offences. Recklessness, in particular, is a compound concept, which joins a state of mind to a departure from acceptable standards of conduct: 5.4 *Recklessness*.

Of course, the *Code* is explicit and conclusive in its characterisation of recklessness and negligence as fault elements: 5.1 *Fault elements*. The point is of more than merely theoretical interest, however, in the analysis of other compound concepts. Dishonesty, as defined in Chapters 7 and 10 of the *Code*, requires proof of a departure from the standards of ordinary people, coupled with knowledge that ordinary people would consider the conduct dishonest.<sup>12</sup> Though dishonesty is often described as a “fault element” it is, in fact, a compound of the fault element of knowledge coupled with a physical element of departure from ordinary standards. This characterisation of dishonesty has significant consequences in the analysis of corporate criminal liability, where the issue is discussed at greater length: 12.3-K.

*3.1-D The law that creates the offence may provide that there is no fault element for one or more physical elements.*

The *Code* treats strict liability and absolute liability alike as instances of liability “without fault”: 6.1 *Strict liability*; 6.2 *Absolute liability*. Neither strict nor absolute liability requires proof of intention, knowledge, recklessness or negligence. Common law authorities are divided on the question whether offences of strict liability, which do permit a defence of reasonable mistake of fact to defeat criminal liability, must be taken to require proof of “mens rea”. Brennan J, the most prominent judicial proponent of the view that strict liability offences do require proof of common law mens rea, argued that the defence of reasonable mistake of fact could only be understood as a denial of mens rea.<sup>13</sup> The *Code* provisions in Division 6 take the opposite view. They classify strict and absolute liability, with blunt and explicit precision, as liability without fault.

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11 Fisse, *Howard's Criminal Law* (1990) 12.

12 CC 130.3 *Dishonesty*; 470.2 *Dishonesty*.

13 *He Kaw Teh* (1985) 15 A Crim R 203, 246.

DIVISION 3 - GENERAL

3.1 Elements

- (1) **An offence consists of physical elements and fault elements.**
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

*3.1-E The law that creates the offence may provide different fault elements for different physical elements:*

Most offences which require proof of fault will distinguish among physical elements those which require proof of intention as distinct from knowledge, recklessness or negligence. The designation of fault elements may be explicit as, for example, in the cybercrime offences in Chapter 10 - *National Infrastructure*.<sup>14</sup> These typically require proof of knowledge that the prohibited conduct is unauthorised, coupled with requirements of intention or recklessness with respect to other physical elements of the offence. When no specific provision is made for fault elements, s5.6 provides statutory presumptions which imply requirements of intention or recklessness: 5.6 *Offences that do not specify fault elements.*

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<sup>14</sup> See *Cybercrime Act 2001*, (Cth); *CC Part 10.7 – Computer Offences*.

**DIVISION 3 - GENERAL**

**3.2 Establishing guilt in respect of offences**

In order for a person to be found guilty of committing an offence the following must be proved:

- (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
- (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note 1: See Part 2.6 on proof of criminal responsibility.

Note 2: See Part 2.7 on geographical jurisdiction.

### 3.2 Establishing guilt in respect of offences

Section 3.2 states, in summary form, the presumption of innocence. A person is innocent of an offence until the elements of the offence are proved. Since s3.2 occurs in Part 2.2 – *The elements of an offence*, the provision has nothing to say with respect to proof of defences, exceptions, exemptions or qualifications to criminal liability for an offence. Their analysis, together with consideration of the meaning of “proof” is deferred until the concluding provisions of Chapter 2: Part 2.6 – *Proof of Criminal Responsibility*. Some preliminary points can be made however:

*3.2-A Since all offences include one or more physical elements, proof of guilt always requires proof of the physical elements required for guilt.*

*3.2-B When an offence includes one or more fault elements, the prosecution must prove fault:*

Chapter 2 of the *Code* recognises and defines four distinct fault elements: intention, knowledge, recklessness and negligence: Division 5 – *Fault elements*. That does not exhaust the range of fault elements; some offences require more specialised forms of fault. The presumption of innocence enunciated in s3.2 requires proof of any fault element required for guilt of an offence.<sup>15</sup> But not all offences require proof of fault with respect to each of their physical elements. Though 3.2(b) insists that the prosecution must prove fault, when fault is an element of the offence, it acknowledges that offences may impose strict or absolute liability with respect to one or more physical elements. So, for example, offences which involve unlawful appropriation or damage to Commonwealth property do not require proof of fault with respect to the fact that the property belongs to the Commonwealth. As to that particular element of these offences, liability is usually absolute.

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<sup>15</sup> If the provision were to be taken in isolation and subjected to literal interpretation, section 3.2(b) might be taken to mean that the prosecution may *choose* which of the fault elements it will undertake to prove: “...prove *one of the* fault elements for the physical element.” It is clear, however, that this reading would be inconsistent with the scheme of Chapter 2, in particular, the definition of fault elements in Division 5 – *Fault elements* and section 13.1 *Legal burden of proof – prosecution*. It is evident that the intended meaning of s3.2(b) can be paraphrased as follows: “[The prosecution must prove] in respect of each such physical element for which *one or more fault elements is required, the fault element required.*”

DIVISION 4 - PHYSICAL ELEMENTS

4.1 Physical elements

(1) A physical element of an offence may be:

- (a) conduct; or
- (b) a result of conduct; or
- (c) a circumstance in which conduct occurs.

(2) In this Code:

*conduct* means an act, an omission to perform an act or a state of affairs.

*engage in conduct* means:

- (a) do an act; or
- (b) omit to perform an act.

## DIVISION 4 - PHYSICAL ELEMENTS

With the exception of “conduct”, which is a portmanteau for “act”, “omission” and “state of affairs”, the physical elements of crime are not defined at all. The Model Criminal Code Officers Committee took a quite deliberate decision to avoid any attempt to define the meaning of “act”.<sup>16</sup> Section 4.1, which sets out the physical elements of an offence, marks the interface between terms drawn from ordinary usage and technical legal terms which provide the analytic framework of Chapter 2.

### 4.1 Physical elements

The physical elements of an offence are the essential ingredients of liability for an offence. Though it would be difficult to find an example in existing law, it is possible to imagine an offence consisting of physical elements alone, without any requirements of fault and without provision for any defence, exception or exemption from criminal responsibility.<sup>17</sup> Requirements of fault in criminal offences and provisions which permit reliance on defences or exceptions from liability have the dual and occasionally conflicting roles of ensuring justice for individuals and excluding the application of criminal prohibitions to conduct which involves no social harm.

*4.1-A A physical element of an offence may be conduct; or a circumstance in which conduct occurs; or a result of conduct:*

The list of physical elements which comprise the *Code* definition of an “offence” is exhaustive. If an element of an offence does not relate to fault it is, necessarily, *conduct*, *circumstance* or *result*. The permissive “may” indicates that there may be offences which include neither circumstances nor results among their defining elements. Examples can be found among the offences of threatening to cause harm, proposed in *Model Criminal Code - Ch 5: Non Fatal Offences Against the Person*.<sup>18</sup> These offences are not defined by reference to circumstances which accompany, or results which follow the act of threatening another. They are crimes of conduct alone. Though offences of this kind can be found in state or territorial law, they will be rare in the federal offences. The limits on Commonwealth legislative power imposed by the Constitution or by convention will usually require federal offences to specify some link of circumstance or consequence between the act of the offender and a constitutionally recognised Commonwealth interest. So, for

<sup>16</sup> *MCC - Ch 2: General Principles of Criminal Responsibility* (1992) 9-13.

<sup>17</sup> Consider, for example, instances of absolute liability for a state of affairs. The decision of the English Court of Criminal Appeal in *Larsonneur* (1933) 24 Crim App R 74 enunciated what is perhaps, the nearest example. Discussed: Lanham, “Larsonneur Revisited” [1976] Crim LR 276; Doegar, “Strict Liability in Criminal Law and Larsonneur Reassessed” [1998] Crim LR 791; Correspondence, [1999] Crim LR 100, JC Smith, R Doegar.

<sup>18</sup> *MCC - Ch5: 5.1.20 - Threat to kill; 5.1.21 - Threat to cause serious harm.*

DIVISION 4 - PHYSICAL ELEMENTS

4.1 Physical elements

(1) A physical element of an offence may be:

- (a) conduct; or
- (b) a result of conduct; or
- (c) a circumstance in which conduct occurs.

(2) In this Code:

*conduct* means an act, an omission to perform an act or a state of affairs.

*engage in conduct* means:

- (a) do an act; or
- (b) omit to perform an act.

example, the *Code* offence of threatening harm, unlike its *Model Criminal Code* counterpart, does specify a limiting circumstance. The offence is only committed if the person threatened is a Commonwealth official<sup>19</sup> - that being the circumstantial element of the offence “in which” the conduct of threatening another occurs.

*4.1-B Physical elements of an offence do not include absence of a defence or absence of an “exception, exemption, excuse, qualification or justification provided by the law creating an offence”:*

The quoted words, from Part 2.6 – *Proof of Criminal Responsibility*, distinguish between physical elements on the one hand and on the other, defences, exceptions, exemptions, excuses, qualifications and justifications [hereafter “defences or exceptions”]. The distinction is important for two reasons:

- *Presumptive rules requiring fault have no application to defences or exceptions:* They only apply to the physical elements of an offence: **5.6 Offences that do not specify fault elements;**
- *Presumptive rules which require the prosecution to bear the evidential burden have no application to defences or exceptions:* The prosecution bears an evidential burden only when physical or fault elements of an offence are in issue: **13.3 Evidential burden of proof- defence.**

The distinction between physical elements and defences or exceptions is obviously of considerable potential importance and, equally obviously, a source of potential difficulty. There are comparatively few guides in Chapter 2 itself to assist in drawing that distinction. Of course there are clear cases. The general defences, such as reasonable mistake of fact, duress and others, are set out in **Part 2.3 – Circumstances in which there is no criminal responsibility**. Absence of a defence is not an element of an offence. But Chapter 2 is not exhaustive in its statement of defences. More specialised defences are frequently found in Commonwealth offences. Moreover, the differences among defences, exceptions and physical elements of an offence can be contentious. If legislation allows a defendant who has a “reasonable excuse” to escape liability,<sup>20</sup> is that a defence, an exception, or a defining element of the offence? Is consent a defence or exception in section 132.8 *Dishonest taking or retention of property* or is absence of consent a physical element of the offence? Chapter 2 makes no specific provision on issues of this nature, but drafting conventions now followed by Commonwealth Parliamentary Counsel will frequently provide guidance. If a defence is provided it is usually identified as a defence. Exceptions, exemptions and

<sup>19</sup> *Criminal Code Act 1995*, s147.2 - *Threatening to cause harm to a Commonwealth public official*

<sup>20</sup> Frequent use is made of “reasonable excuse” in defining the scope of Commonwealth offences. The *Migration Act 1958* (Cth) as amended by the *Migration Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) includes many instances.

DIVISION 4 - PHYSICAL ELEMENTS

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qualifications are distinguished in many, though not all instances, by a specific direction or indication that the defendant bears the evidentiary burden. Issues of interpretation and characterisation are discussed at greater length in section 13.3 *Evidential burden-defence* and the question of fault in relation to defences and exceptions at section 5.6 *Offences that do not specify fault elements*.

#### 4.1-C “Conduct” in the Code is restricted to conduct of the offender:

Though “conduct” might seem at first to extend to the acts or omissions of another person, such as the victim of the offence, it is clear that the term refers exclusively to the acts or omissions of the offender.<sup>21</sup> If acts and omissions of a victim of crime or a third person are elements of an offence, they will be categorised as results or circumstances in which the offender’s conduct or the results of that conduct occur.

#### 4.1-D “Conduct” includes acts, omissions and states of affairs:

The concept of an “act” is not defined. In jurisdictions which adopted the Griffith Code, jurisprudential dispute over the meaning of that concept has divided courts and scholars for fifty years or more. The Model Criminal Code Officers Committee, which considered the issue at some length, was concerned that definition might risk the creation of new possibilities for confusion or unprofitable dispute, outweighing any possible gain in the resolution of existing controversies.<sup>22</sup> Though the Chapter 2 provisions bear some resemblance to s23 of the Griffith Code (Queensland), which has a long and troubled history of conflicting interpretation, the resemblance is distant and caselaw on s23 of the Griffith Code should have no direct bearing on the meaning of “act” in Chapter 2. The definitions of physical elements in Chapter 2 serve a very different set of fault provisions from those in the Griffith Code: see 5.6 - *Offences that do not specify fault element*. Of the other elements of conduct, “omissions” will only provide a basis for criminal responsibility if the defendant has failed to comply with a legal obligation to act: 4.3 *Omissions*. Liability for a “state of affairs” is an expression derived from the judgement of Brennan J in *He Kaw Teh*.<sup>23</sup> The state of being in possession of something

21 It is implicit in the *Code* that *physical elements* and *fault elements* are restricted in application to the conduct of the offender and the circumstances and results of the offender’s conduct. The restriction is obvious in the case of fault elements. The “physical elements” of crime, which comprise “conduct”, “circumstances” and “results” refer to: (1) physical elements for which a fault element is specified (Ch 2 s3.1); (2) physical elements for which a fault element is implied by the *Code* (Ch 2 s5.6) and (3) physical elements for which strict or absolute liability is imposed (Ch 2 ss6.1, 6.2). The restriction is implied in the case a physical elements. Since all applications of the terminology of “physical elements” involve culpability for a criminal offence, it follows that the term ‘conduct’ is restricted to the defendant’s conduct and has no application to the behaviour of victims or other innocents.

22 MCC - Chapter 2: *General Principles of Criminal Responsibility*, Final Report 1992, 9-13.

23 (1985) 15 A Crim R 203, 233.

DIVISION 4 - PHYSICAL ELEMENTS

4.1 Physical elements

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*engage in conduct* means:

- (a) do an act; or
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is the most frequently encountered example in which a state of affairs counts as a physical element of a crime. Other examples include offences of being found on premises for an unlawful purpose and being drunk and disorderly. Glanville Williams refers to these as instances of “situational liability”;<sup>24</sup> elsewhere they are described as “status offences”.<sup>25</sup> In general, liability is imposed for the state of affairs because it is both susceptible of proof and because it provides a more or less reliable basis for an adverse inference concerning the offender’s past, present or future conduct. There are many instances in current legislation permitting inferences of commercial intent from possession of trafficable quantities of prohibited drugs.

*4.1-E A physical element of an offence may be a circumstance in which conduct or a result of conduct occurs.*<sup>26</sup>

Though circumstances are not defined in the *Code*, the definition in the Macquarie Dictionary - “condition, with respect to time, place, manner, agent, etc, which accompanies, determines, or modifies a fact or event” - accords with usage in the *Code*: “facts” and “acts” correspond and an “event” is a happening, occurrence or result.<sup>27</sup>

#### CIRCUMSTANCES WHICH ACCOMPANY CONDUCT AND CIRCUMSTANCES WHICH ACCOMPANY RESULTS

In most situations, circumstantial elements of an offence will accompany the conduct of the offender. Frequently, the incriminating circumstance will be distinguished from the offender’s act in order to distinguish between a fault element which applies to the act and the fault element which applies to the circumstance. So, for example, the offence of threatening harm to a Commonwealth public official under s147.2 of the *Code* is constituted by the *act* of threatening a person in *circumstances* where that person is a Commonwealth official. The threat must be intentional, but liability is absolute with respect to the circumstance - the requirement that the official be employed

24 G Williams, *Textbook of Criminal Law* (2 ed, 1983) 156-158.

25 B Fisse, *Howard’s Criminal Law* (1990) 11-12. Status offences are notorious for the injustice which may be involved when liability is imposed for a state of affairs over which the offender had no control. The case of *Larsonneur* (1933) 24 Crim App R 774, is the most frequently cited example. Under s4.2, conduct cannot be a physical element of crime unless it is voluntary. In cases where liability is imposed for a state of affairs, no liability is incurred unless the state of affairs “is one over which the person is capable of exercising control”.

26 Section 4.1(1) once defined “circumstance” more narrowly as “a circumstance in which conduct occurs”. The definition was amended to its present form by the *Cybercrime Act 2001* (Cth), Schedule 1, s3.

27 Compare Queensland Criminal Code 1899, s23: “...an event which occurs by accident”.

DIVISION 4 - PHYSICAL ELEMENTS

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- (c) a circumstance in which conduct occurs, or a result of conduct occurs.

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*conduct* means an act, an omission to perform an act or a state of affairs.

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by the Commonwealth. Circumstantial elements of an offence can also accompany the results of conduct, rather than the acts, omissions or states of affairs which constitute that conduct. This possibility can be illustrated by an offence aimed at computer hackers, taken from the *Code* provisions on cybercrime: Part-10.7 *Computer Offences*. Section 477.1 prohibits conduct which results in impairment of computer data. As in the previous example of threatening an official, circumstantial limits will be imposed on the offence to keep it within accepted constitutional limits. The data must belong to the Commonwealth or some other specified link to Commonwealth interests must be shown. It is quite possible, in this offence, for the incriminating circumstance to accompany the *result* of conduct, rather than the conduct itself. Computer offences, unlike offences of threatening or causing physical harm to individuals, will commonly involve action at a distance and substantial delays between the harm and the act which causes the harm. Suppose a computer virus is launched in June and set for activation when an unwitting computer operator types the word “Christmas.” If the Commonwealth data destroyed in the ensuing computer crash did not come into existence until October and damage occurred on December 25, the circumstantial element that it was *Commonwealth* data which was destroyed does not accompany the hacker’s conduct, which occurred six months previously. It is not a circumstance “in which conduct occurs” but, rather, a circumstance “in which a *result* occurs”.

*4.1-F A physical element of an offence may be a result of conduct:*

Though Chapter 2 has nothing to say on the topic of causation, since applications of the concept are practically confined to particular offences involving damage or injury, a standard definition has been employed throughout the *Code*. A typical instance occurs in Part 7.8 – *Causing harm to and impersonation and obstruction of, Commonwealth public officials*. Section 146.2, which deals with causing harm to Commonwealth official, states that “a person’s conduct is taken to cause harm if it substantially contributes to harm.” The *Code* adopts the same definition of causation in Part 10.7 *Computer Offences*.<sup>28</sup> It is a restatement of a principle of Australian common law which would be implied in any event, without specific statutory provision.

*4.1-G A physical element of an offence may be an anticipated result of conduct or an anticipated circumstance accompanying that result:*

It is evident from the definitions of “intention” (s5.2); “knowledge” (s5.3); “recklessness” (s5.4) and “negligence” (s5.5) that the “results” of conduct

<sup>28</sup> CCs476.2 *Meaning of unauthorised access, modification or impairment.*

DIVISION 4 - PHYSICAL ELEMENTS

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may include anticipated results as well as actual results and anticipated circumstances as well as actual circumstances. These extensions of the definitions to include fault relative to future anticipated events and circumstances are of importance in a range of offences which impose liability for offences of recklessly endangering property or persons.<sup>29</sup> Liability can be imposed for recklessness with respect to a *risk* that a result or circumstance will eventuate. The offences involving unauthorised damage to computer data take this form.<sup>30</sup> The offence extends to unauthorised modification of data by a person who is reckless with respect to the risk that access to data or the operation of data will be impaired.<sup>31</sup>

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29 See, for familiar examples involving risks to persons, Model Criminal Code – Chapter 5: *Offences Against the Person*, Division 7 – *Endangerment*.

30 CC Ch 10 *National Infrastructure*, Part 10.7 – *Computer offences*.

31 See CC s477.2 *Unauthorised modification of data to cause impairment*.

**DIVISION 4 - PHYSICAL ELEMENTS**

**4.2 Voluntariness**

- (1) Conduct can only be a physical element if it is voluntary.
- (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.
- (3) The following are examples of conduct that is not voluntary:
  - (a) a spasm, convulsion or other unwilled bodily movement;
  - (b) an act performed during sleep or unconsciousness;
  - (c) an act performed during impaired consciousness depriving the person of the will to act.
- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting the offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
  - (a) involuntarily; or
  - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

## 4.2 Voluntariness

Legislatures may impose liability without fault on occasion, but all offences require proof of one or more physical elements. The definition of “physical elements” in the *Code* entails that every offence requires proof of *conduct* on the part of the defendant.<sup>32</sup> Since involuntary conduct cannot amount to a physical element of an offence, voluntariness is a fundamental requirement for criminal responsibility. That fundamental requirement is qualified however, when involuntary conduct results from mental impairment or intoxication: ss4.2(6), (7). In practice, the plea that conduct was involuntary tends to have two quite distinct applications in criminal prosecutions. The first, which will be discussed only briefly in this commentary, involves offences which require proof of both physical and fault elements. In these applications, which usually involve an offence of personal violence, the defendant claims that a violent, perhaps fatal, attack on another was involuntary and done in a state commonly described as “automatism”. If the jury is left in reasonable doubt on the voluntariness issue, the accused escapes conviction. Liability cannot be imposed for the attack though it may have been both violent and done with intention to inflict serious harm or death. Though pleas of automatism usually involve offences of violence to the person, instances involving other offences are occasionally encountered. The common feature in all is the defendant’s attempt to defeat liability for an offence by a denial of voluntary conduct in circumstances where there appears to be ample evidence of the particular form of fault - intention, knowledge, recklessness or negligence - required for conviction. The second area of application of the plea, involving offences which do not require proof of fault, is of greater potential significance in federal jurisdiction. These offences, described in Chapter 2 as “offences of strict [or] absolute liability”,<sup>33</sup> consist entirely of physical elements - conduct alone or conduct in combination with circumstances and results. Section 5.6 has no application and the prosecution is not required to prove any intentional act or omission on the part of the defendant. Though proof of fault is unnecessary in these offences, the prosecution must still prove the voluntary commission of a criminal act, a voluntary omission or voluntary involvement in a state of affairs. Automatism is unlikely to play a significant role when offences of strict or absolute liability are charged. There is a variety of other ways, however, in which the involuntariness issue can arise. The essential requirement for a successful plea that conduct was involuntary is absence of all capacity for choice.

<sup>32</sup> The “physical elements” of an offence, defined in s4.1 *Physical elements*, can include *circumstances* and *results*. The requirement of conduct is fundamental, however, since circumstances and results which are elements of an offence must be circumstances or results *of the offender’s conduct*.

<sup>33</sup> See ss6.1(1); 6.2(1). Quite distinct from these are offences which dispense with requirements of fault with respect to some particular element or elements of the offence: ss6.1(2), 6.2(2).

**DIVISION 4 - PHYSICAL ELEMENTS**

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- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting the offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
  - (a) involuntarily; or
  - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

*4.2-A Conduct is involuntary if it is beyond a person's capacity for control:*

The *Code*, like common law, distinguishes between offences committed by persons whose choices are coerced by threats or necessity and the conduct of those who simply lacked the capacity to choose whether or not to engage in forbidden conduct or comply with legal obligations. Offences induced by fear of catastrophe or threatened harm may be excused by a defence of sudden emergency, duress or self defence but the conduct of the defendant is not, in the sense required by the *Code*, involuntary.<sup>34</sup> Conduct is involuntary only “if it is [not] a product of the will of the person”: s4.2(2). In the absence of willed conduct, there is no offence. Considerations of the ways in which absence of willed conduct may be manifest requires separate consideration of acts, omissions and states of affairs:

- *Unwilled acts:* There is a broad and imprecise distinction between things we do and things which happen to us. One who collides with another when thrown from a moving vehicle *does* nothing. So also in the old example where A seizes B's hand, when B is holding a dagger, and stabs C. In these instances, the collision or the stabbing is a product of physical forces over which the person has no control.<sup>35</sup> There is no *act* of striking the victim of the collision and it is A, not B, who stabs C. In law, harms which result in this way from the operation of physical forces on a hapless defendant are said to have been done involuntarily.<sup>36</sup> But the plea of involuntariness extends well beyond those occasions when a hapless defendant cannot really be said to have done anything at all. If D strikes V by a convulsive or spasmodic movement during a fit or fever, there is an act on D's part, though it is clearly involuntary. In cases of automatism, the defendant commonly acts, in a purposeful and directed way, though the act is said to be *unwilled*. The classic instances are of violent or fatal attacks by somnambulists though the plea of automatism has a far broader range of applications in modern caselaw. Though an involuntary act is one which is “not a product of the will of the person”, it is quite apparent that these acts can be both involuntary and intentional. So, for example, a plea of automatism in murder may succeed though it is clear beyond reasonable doubt that the defendant intended to kill.<sup>37</sup>

34 Yeo, “Voluntariness, Free Will and Duress” (1996) 70 ALJ 304.

35 Liability may be based, however, on earlier voluntary conduct which led to the collision. See Leader-Elliott, “Criminal Cases in the High Court: *Jiminez*” (1993) 17 Crim LJ 61.

36 See, for example, HLA Hart, “Acts of Will and Responsibility” 90, 95-96, citing earlier, classic authorities in *Punishment and Responsibility: Essays in the Philosophy of Law* (1968). It is equally possible, in these cases, to say that involuntariness is irrelevant in these cases since there is a complete absence of any act on D's part.

37 S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 226-229 Leader-Elliott, “Cases in the High Court of Australia: *Hawkins*” (1994) 18 Crim LJ 347. Earlier caselaw often suggested that conduct which was involuntary could not be intentional. See, for example, *Radford* (1985) 20 A Crim R 388.

**DIVISION 4 - PHYSICAL ELEMENTS**

**4.2 Voluntariness**

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- (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.
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- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting the offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
  - (a) involuntarily; or
  - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

- *Unwilled omissions:* Omissions can, of course, be wilful. It is common for individuals to refrain deliberately from compliance with obligations to provide information. Often, however, omissions result from forgetfulness, apathy or procrastination. Though these omissions are in a sense “unwilled”, Chapter 2 qualifies the requirement of will. Omissions are only involuntary if the person was *incapable* of performing the required act. As in the case of involuntary acts, failure to act may result from the operation of physical forces beyond the person’s control. But involuntary omissions can also result from impairments of consciousness, cognition or physical capacity. So, for example, s197 of the *Customs Act 1901* imposes strict liability for failure to stop a conveyance when required to do so by a customs officer. The prosecution is not required to prove that the driver consciously disregarded an order to stop. Failure to do so would be involuntary, however, if an oral command was addressed to a driver who could neither hear the command nor perceive circumstances indicating that a command had been issued.
- *Unwilled states of affairs:* A state of affairs, such as possession of some incriminating item of property, may be a consequence of action or inaction on the part of the defendant. Liability is not imposed, save indirectly, for the preceding act or omission however. Instead, liability is imposed on a defendant who stands in a prohibited relationship to the state of affairs. Offences of this nature require proof of fault unless strict or absolute liability is imposed.<sup>38</sup> If that is done, the prosecution must still prove that the state of affairs was voluntary. There appears to be little or no difference between the criteria for voluntariness in omissions and states of affairs. A state of affairs is voluntary on the part of the defendant only if the person was capable of exercising control over it.

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<sup>38</sup> This is considered with the common law - see *He Kaw Teh* (1985) 15 A Crim R 203.

**DIVISION 4 - PHYSICAL ELEMENTS**

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## INVOLUNTARINESS AND CRIMINAL LIABILITY FOR A STATE OF AFFAIRS

Section 230 of the *Migration Act* 1948 imposes strict liability on the master, owner, agent and charterer of a vessel if a person without a visa is concealed on board the vessel arriving in Australia.<sup>39</sup> Since the offence does not require proof of intention, knowledge, recklessness or negligence, the defendant can escape liability only by a plea that the presence of the stowaway was beyond their control or by reliance on a defence of reasonable mistake of fact, duress, sudden or extraordinary emergency or the like. In most, and perhaps all situations, the master could be said to have the capacity to exercise control over the ship and its occupants. That is not necessarily true, however, of the owner, charterer or agent. So far as those individuals are concerned, the state of affairs might be involuntary.

### *4.2-B The prosecution must prove voluntary conduct:*

The *Code* makes voluntariness an essential element of every offence. Defendants who claim that conduct was involuntary deny that there was any offence: they do not seek to rely on a defence to liability. It follows that they not bear an evidential burden on this issue: 13.3 *Evidential burden of proof - defence*. Any allegation of an act, omission or state of affairs which constitutes an element of an offence necessarily implies an allegation that the conduct was voluntary. The voluntariness requirement is no different, in this respect, from the requirements of proof of intention with respect to conduct or recklessness with respect to circumstances or results imposed by s5.6 of the *Code*.

### *4.2-C The requirement of voluntary conduct is qualified when involuntariness results from mental impairment or intoxication:*

Though the prosecution must prove that conduct was voluntary, the burden on the prosecution may be lightened by the operation of *Code* provisions relating to mental impairment and intoxication. They require evidence in support of a plea of involuntariness to be consistent with sanity and sobriety.

- *A denial of voluntary conduct cannot be based on evidence of mental impairment:* The defence of mental impairment imposes both evidentiary and legal burdens of proof on the accused: s7.3 *Mental impairment*. In many instances of involuntary conduct, the defendant's aberrant behaviour is a consequence of mental illness or abnormality. The *Code* makes specific provision to ensure that a denial of guilt which should be expressed as a defence of

<sup>39</sup> See Item 28 of Schedule 1 to the *Migration Legislation Amendment (Application of Criminal Code) Act* 2001.

**DIVISION 4 - PHYSICAL ELEMENTS**

**4.2 Voluntariness**

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- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
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mental impairment cannot be recharacterised as a denial of voluntary conduct: s7.3(6). Evidence of mental impairment, which is broadly defined to include senility, intellectual disability, mental illness, brain damage and severe personality disorder, cannot provide grounds for a denial that conduct was voluntary. Defendants who are disordered in any of these ways must rely on the mental impairment defence if they wish to avoid liability.

- *A denial of voluntary conduct cannot be based on evidence of self-induced intoxication:* If intoxication is self induced, the prosecution is not required to prove that the defendant's conduct was voluntary: s4.2(6).<sup>40</sup> Chapter 2 does recognise a defence of accidental or involuntary intoxication: 8.5 *Involuntary intoxication*. That is, however, a true defence, and the defendant accordingly bears the evidentiary burden: s13.3(2).

#### 4.2-D *The requirement of voluntariness goes to conduct, not circumstances or results:*

Some offences of strict or absolute liability consist entirely of *conduct*. Section 230 of the *Migration Act* 1948, for example, which was mentioned above, imposes liability for being the master of a vessel in which a stowaway is concealed. There is no additional element of circumstance or result required for liability. But offences of strict or absolute liability may include, in addition to conduct, physical elements of circumstance or result. Offences of dangerous driving causing death in state and territorial law are perhaps the most familiar examples.<sup>41</sup> Since Chapter 2 restricts the plea of involuntariness to a denial that *conduct* was voluntary, a defendant who pleads absence of the capacity to control the *circumstances* or *results* of that conduct must bring that plea within the ambit of one of the defences. There is no provision for a plea that the incriminating circumstances or results came about involuntarily. A defendant who relies on a defence, rather than a denial of voluntariness, must adduce acceptable evidence in support of the defence. Failure to do so will result in withdrawal of the defence from the trier of fact. The distinction is important because the defences, unlike a plea that conduct was involuntary, share the common requirement that the conduct of the defendant was *reasonable*. Self defence, duress and extraordinary emergency require a reasonable response to the threat or emergency and mistake is no defence to offences of strict liability unless it was reasonable: Division 10 – *Circumstances involving external factors*. The same limitation applies to the defence in 10.1 *Intervening*

<sup>40</sup> Fault elements required for the offence must still be proved, however, subject to the special rules in CC s8.2 *Intoxication (offences involving basic intent)* and s8.3 *Intoxication (negligence as fault element)*.

<sup>41</sup> *Jiminez* (1992) 173 CLR 572.

**DIVISION 4 - PHYSICAL ELEMENTS**

**4.2 Voluntariness**

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- (3) The following are examples of conduct that is not voluntary:
  - (a) a spasm, convulsion or other unwilled bodily movement;
  - (b) an act performed during sleep or unconsciousness;
  - (c) an act performed during impaired consciousness depriving the person of the will to act.
- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting the offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
  - (a) involuntarily; or
  - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

*conduct or event.* Like the plea of involuntary conduct, s10.1 bars criminal responsibility for physical elements of an offence that are beyond the defendant's control. Unlike the denial of voluntariness, however, the defence is qualified by a requirement of due diligence. It is only available if it would be *unreasonable* to expect the defendant "to guard against the bringing about of that physical element". The effect of this limitation on the defence is uncertain. It is, however, a limit which has no counterpart when voluntariness is in issue. For that reason, the distinction between conduct, on the one hand, and circumstances or results, on the other, is potentially important when a defendant denies responsibility on the ground of incapacity to do otherwise. The characterisation issue, which will arise in the discussion of 5.6 *Offences that do not specify fault elements*, arises here as well.

#### INVOLUNTARY CONDUCT AND UNCONTROLLABLE CIRCUMSTANCES IN STRICT LIABILITY OFFENCES

The prosecution must prove that conduct was voluntary in order to establish that an offence has been committed: 4.2 *Voluntariness*. When incriminating circumstances or results are in issue, however, a defendant who could not help committing an offence must resort to one of the defences in Part 2.3 – *Circumstances in which there is no criminal liability*. The offence of harassing whales, contrary to s229C(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides an illustrative example.<sup>42</sup> Among other prohibited activities, it is an offence to "interfere with a cetacean" if the creature is "in the Australian Whale Sanctuary". The structure of the prohibition makes it clear that this is a prohibition of an *act* of interference in *circumstances* where the cetacean is in the Sanctuary. The Act imposes strict liability with respect to each element of the offence. Imagine a boatload of marine biologists which strays into a whale sanctuary by mistake. Whilst there, the boat collides with a baby whale. The collision is presumably an "interference" with the whale. The marine biologists commit no offence, however, if the collision was accidental and unwilled; the act of interference is involuntary. If, on the other hand, the marine biologists catch, tag and release the baby whale, there can be no doubt that their act was voluntary. If they are to escape conviction for this activity, they must seek an excuse among the defences of Part 2.3. The evidence that they were mistaken about their location might provide them with a defence, but their mistaken belief that they were not in a sanctuary must be reasonable before it could excuse their act of interference: 9.2 *Mistake of fact (strict liability)*.

42 The example is simplified in the interests of brevity, omitting some further definitional elements of the offence. A more elaborate scenario would be necessary in an advice to marine biologists about their legal liabilities

**DIVISION 4 - PHYSICAL ELEMENTS**

**4.3 Omissions**

An omission to perform an act can only be a physical element if:

- (a) the law creating the offence makes it so; or
- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

### 4.3 Omissions

There is no liability for omission in the absence of express or implied provision. Though liability for omissions can be implied, the scope of implication is limited. The omission must be an omission to perform a duty which is imposed by a law of the Commonwealth. Moral or merely contractual duties will not provide a foundation for implied liability

*4.3-A An omission to act can only be a physical element of an offence if there is express or implied provision for criminal responsibility based on an omission:*

A host of minor offences impose criminal liability for failure to fulfil statutory duties to provide information, lodge returns and the like. Penalties are usually pecuniary.

*4.3-B Implied liability for omissions is limited to duties imposed by statute:*

Most federal offences are expressed in a form which is compatible with the imposition of liability for omissions. There are exceptions of course, for some offences cannot be committed by omission: they penalise particular kinds of action, such as *impersonating* or *threatening* an official. It is common, however, to impose liability on a person who “engages in conduct” which causes some prohibited result. Other offences simply impose liability on a person “who causes” the prohibited result.<sup>43</sup> Since “conduct” includes omissions as well as acts and since neglect of any statutory, common law or moral duty can amount to a “cause” of harm, liability for omissions is possible in these offences. It is not at first apparent what limits there might be to an expansion of criminal liability for omissions by a process of creative interpretation. However, Chapter 2 does not leave the source of the duty at large. There are two circumstances in which liability for omission will be imposed. The first is the obvious case, in which “the law creating the offence makes it so”: s4.3(a). These are the offences which require fees to be paid, returns to be made and so on. Liability for omissions does not have to be explicit however. Liability can also be imposed by implicit provision. There is a limit to implication. Liability can only arise from an “omission to perform an act that *by law* there is a duty to perform”: s4.3(b). A reference to “law” in the *Code* is restricted in meaning to “a law of the Commonwealth”.<sup>44</sup>

43 See, for example, *CC* s147.1 - *Causing harm to a Commonwealth official*, and similar offences, which impose liability on a person who “engages in conduct” causing harm. Compare *CC* -Part 10.7 *Computer offences*, which impose liability on those “who cause” unauthorised access, modification or impairment.

44 *Criminal Code Act 1995* (Cth), s4; *Criminal Code* – Dictionary: “law means a law of the Commonwealth and includes this Code”. The Dictionary meaning can be displaced, of course, as “context or subject matter” requires.

**DIVISION 4 - PHYSICAL ELEMENTS**

**4.3 Omissions**

An omission to perform an act can only be a physical element if:

- (a) the law creating the offence makes it so; or
- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

It follows that the duty which provides the foundation for implied or express liability must be one imposed by Commonwealth legislation. The *Code* contains a number of offences of causing personal injury or death to United Nations officials and associated personnel and other offences of causing harm to Commonwealth officials.<sup>45</sup> These offences have no application when death, injury or other harm results from omission, for there is no statutory specification of the duties which are owed to the protected class of potential victims.<sup>46</sup> Nor does Commonwealth law specify duties to avoid causing property damage which might provide a basis for liability for offences of damaging Commonwealth property. So, for example, cybercrime offences of Chapter 10 *National Infrastructure* cannot be committed by omission.<sup>47</sup>

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45 See: CC Division 71 – *Offences against United Nations and associated personnel*, which provides a complete code of fatal and non fatal offences against the person; and also CC Division 147 – *Causing harm to Commonwealth public officials*.

46 Compare the catalogue of duties to avoid causing personal injury or death in *MCC* Chapter 2: *General Principles of Criminal Responsibility*, Final Report 1992, 19-21

47 Discussed *MCC* Ch 4 *Damage and Computer Offences* 2001 13-14.

**DIVISION 5 - FAULT ELEMENTS**

**5.1 Fault elements**

- (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.**
- (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

## DIVISION 5 - FAULT ELEMENTS

### 5.1 Fault elements

Most Commonwealth offences require proof of one or more fault elements. Offences of strict or absolute liability, which do not require proof of fault, consist of physical elements alone. Though not uncommon, they are usually specialised in their applications and penalties are minor. Chapter 2 defines four fault elements: intention, knowledge, recklessness and negligence. That list of defined fault elements does not exhaust the field of possibilities. Unlike the physical elements, which are exhaustively defined, different and more specialised fault elements than those listed in Chapter 2 are occasionally used in the definition of federal offences.

*5.1-A A fault element for a particular physical element may be intention, knowledge, recklessness or negligence:*

The fault elements defined in Chapter 2 displace the nineteenth century vocabulary of *malicious* or *wilful* wrongdoing. The articulation of criminal responsibility in terms of the physical elements of conduct, circumstance and result enables different fault elements to attach to the different physical elements of an offence.<sup>48</sup> So, for example, the Chapter 10 offence of unauthorised impairment of electronic communications between computers requires proof of an *intentional* act which causes the impairment, *recklessness* as to the risk that the act will cause impairment and *knowledge* that the impairment is unauthorised. *Absolute liability* is imposed with respect to the requirement that the communication is one sent to or from a Commonwealth computer or via a telecommunications service.<sup>49</sup>

*5.1-B Negligence is a form of criminal fault:*

Chapter 2 distinguishes sharply between negligence and strict liability, which requires the prosecution to disprove reasonable mistake of fact if there is evidence in support of that defence. Strict liability is specifically categorised as liability *without fault*: Division 6 – *Cases where fault elements are not required*. This differentiation of negligence and strict liability adopts the strongly expressed opinion of two members of the High Court in *He Kaw Teh*.<sup>50</sup> Liability for negligence and strict liability are alike, of course, in the fact that neither requires proof that the defendant was aware of the circumstances or likely results of the conduct which gave rise to criminal liability. They are alike, too, in the fact that they have no application to offences unless specific provision is made for their application by the law creating the offence. That is a consequence of s5.6(2), which sets

48 The classic exposition of the virtues of element analysis is Robinson & Grall, "Element Analysis in Defining Criminal Liability: The Model Code and Beyond" (1983) 35 Stanford LR 681. See in addition, P Robinson, "Structure and Function in Criminal Law" (1997).

49 CC477.3 *Unauthorised impairment of electronic communication*.

50 (1985) 15 A Crim R 203 at 244, per Brennan J; at 253, per Dawson J.

**DIVISION 5 - FAULT ELEMENTS**

**5.1 Fault elements**

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recklessness as the threshold requirement for liability unless displaced by specific provision to the contrary. To date, sparing use has been made of liability for negligence in offences against federal criminal law.<sup>51</sup> In Division 71 – *Offences against United Nations and associated personnel* and Division 147 *Causing harm to Commonwealth public official*, liability requires proof of recklessness at least with respect to the harm done to another.<sup>52</sup>

*5.1-C Laws creating particular offences may specify other fault elements:*

More specialised fault elements are employed in defining some federal offences. So, for example, the offence of blackmail requires proof of a demand made by a person who acts without an honest and reasonable belief that they have reasonable grounds for making a demand backed by menaces: 138.1 *Unwarranted demand with menaces*. Offences involving dishonesty make frequent use of a fault requirement of “knowledge or belief”, which was derived from the *Theft Act 1967* (UK), which provided the legislative model for the *Code* provisions. Another example can be found in Division 71 – *Offences against United Nations and associated personnel* where “recklessness” with respect to absence of consent to sexual penetration or contact is given a more extended meaning than its definition in s5.4 of Chapter 2.<sup>54</sup>

51 But see, for example, *Great Barrier Reef Marine Park Act 1975*, s38C *Contravening conditions of a permit or authority zoned area* (as amended) and the related offences which follow.

52 Compare *MCC - Ch5: Non Fatal Offences Against the Person*, ss5.1.16 - *Negligently causing serious harm*.

53 The UK origins of the Code provisions on theft and allied offences are discussed in *MCC Chapter 3: Theft Fraud, Bribery and Related Offences*, Final Report 1995 vi-vii; 1-6. UK caselaw on the fault element of “knowledge or belief” in the offence of handling stolen goods is discussed at greater length below, at **5.3-B**.

54 *CC 71.8 Unlawful sexual penetration*. The provision derives from *MCC - Ch6: Sexual Offences Against the Person*, Division 2 - *Sexual acts committed without consent*, ss5.2.6(3), 5.2.8(3).

**DIVISION 5 - FAULT ELEMENTS**

**5.2 Intention**

- (1) **A person has intention with respect to conduct if he or she means to engage in that conduct.**
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

## 5.2 Intention

The definition of intention in the *Code* combines elements of the ordinary, idiomatic meaning of the concept with a stipulated, technical meaning. When acts, omissions and states of affairs are in issue, intention bears its ordinary meaning. When circumstances or results are in issue, ordinary meaning is supplemented by stipulated extensions. Here, as elsewhere in the *Code*, the differences between *conduct* and *circumstances* or *results* are of critical importance: see discussion, 5.6 *Offences that do not specify fault elements*. The *Code* definition does not purport to be exhaustive. It is limited to intention “with respect to” the defendant’s “conduct” and the “circumstances” or “results” of that conduct. Some federal offences require proof of the intention with which a person acted, without specifying any incriminating circumstance or result. These are described as instances of “ulterior intention” in the guidelines. In offences of this nature, ordinary usage determines the meaning of intention with such additional guidance as the common law may supply.<sup>55</sup>

*5.2-A A person has intention with respect to conduct if he or she means to engage in that conduct:*

The definition commences, in effect, with a declaration that “intention” bears its ordinary meaning. To say that one *means* to do a thing or *meant* to do something is, simply, to say that it is intended or was intended. They are dictionary synonyms. In common law discourse, “intention” is sometimes extended to include possible or likely consequences or features of conduct which were a matter of indifference to the defendant. In various of his judgements, Brennan J expressed that view.<sup>56</sup> The effect of this extension is to blur or obliterate the distinction between intention and recklessness. In Chapter 2, which makes a strong distinction between intention and recklessness, intention bears its ordinary meaning in its applications to *conduct*. Legalistic extensions of meaning of intention, which will be considered below, only apply to *circumstances* and *results*. Take, for example, the *Code* offence in 270.7 *Deceptive recruiting for sexual services*. A person who deceives another with the intention of inducing entry into commercial engagement to provide sexual services is guilty of an offence. The physical element in this offence is the offender’s conduct in deceiving the other and that conduct must be intentional in the sense that is *meant* to deceive.<sup>57</sup>

<sup>55</sup> That may mean that intention extends to include consequences known by the defendant to be certain to follow their conduct. Even though s5.2(3) has no formal application it may provide a persuasive analogy. There is, moreover, common law support for the extended definition of intention in s5.2(3): *Woollin* [1998] 4 All ER 103, *Peters* (1998) 96 A Crim R 250, 270-271 (McHugh J).

<sup>56</sup> Notably, in *He Kaw Teh* (1985) 15 A Crim R 203 at 237.

<sup>57</sup> Compare Robinson & Grall, “Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond” (1983) 35 Stanford LR 681, 706-708, who would dissect “deceiving” into an act (making a statement) and a result (the other person is deceived).

DIVISION 5 - FAULT ELEMENTS

5.2 **Intention**

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- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.2-B *A person has intention with respect to a circumstance if they believe that it exists or will exist:*

In ordinary non legal usage we often distinguish between our acts and the circumstances accompanying our actions in order to express the limits of what was intended. A person who shoots a yellow dog may simply report what was done as “shooting a dog”. Such a report suggests that the fact that the dog was yellow was a matter of indifference to the agent - a mere circumstance accompanying the intended act of shooting a dog. It is possible, however, that the dog was shot *because* it was yellow. In that case, one would expect the shooter to report the fact that it was yellow in order to make the point that they intended to shoot a yellow dog. The ambiguity of these forms in ordinary speech is apparent in the perennially confusing statement, commonly found in English caselaw on rape, that the offender must intend to have intercourse without consent.<sup>58</sup> The distinction is obviously of some subtlety, though the flexibility of ordinary language usually permits us to make our meaning clear. It is raised here only to make the point that the *Code* declines to recognise the distinction between, circumstances which supply a reason for action and circumstances which merely accompany the action, when intention is required for a circumstantial element of an offence. In the terminology of the *Code*, a person who shoots a dog, knowing or believing it to be yellow, is taken to have intended to shoot a yellow dog. The circumstance is taken to be a part of what was intended, though the person may have been indifferent to the fact or even regretted that the dog was yellow.

#### INTENTION WITH RESPECT TO CIRCUMSTANCES: DECEPTIVE RECRUITING FOR SEXUAL PURPOSES

The following hypothetical illustrates the effect of s5.2(2). Section 270.7 of the *Code* makes it an offence, punishable with 7 years imprisonment, to deceive another with intention to induce entry into a commercial engagement to provide sexual services. It is a circumstantial element of the offence that the engagement will in fact involve the provision of sexual services. The defendant, who managed a small employment agency, recruited young men and women for a company which employed them under contract to act as entertainers in overseas nightclubs and other venues. The defendant became aware that the engagements which the recruits entered with the company always involved a demand that the recruit provide sexual

<sup>58</sup> Most notably, in the House of Lords decision in *DPP v Morgan* [1976] AC 182, where the requirement of intention plays a significant rhetorical role in the reasoning. In recent years, Australian courts and academic comment tend to avoid this particular confusion. The offence of rape is more often analysed as one in which liability is imposed on an offender who was *reckless* with respect to circumstance that consent to the act of intercourse was absent: see *MCC - Ch5: Sexual Offences Against The Person, Division 2 - Sexual acts committed without consent*.

DIVISION 5 - FAULT ELEMENTS

5.2 **Intention**

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- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

services in addition to the entertainment services specified in their contracts. The defendant continued to recruit for the company and deceived recruits about the nature of the services which the company would demand of them. Charged with an offence against s270.7, the defendant denied any intention to induce his victims to enter engagements for sexual services. He argued that his only objective was to earn his fee and that the nature of the services which would be demanded of the recruits was a matter of indifference or mild regret so far as he was concerned. Under the *Code*, the defendant is taken to intend to induce the other person to enter into an engagement to provide sexual services. Since the defendant believes that the engagement will include the circumstance that sexual services will be demanded, the defendant acts intentionally with respect to that circumstance: 5.2(2). Indifference to the nature of the services which victims will be required to provide is no answer.

*5.2-C A person has intention with respect to a result if they mean to bring it about or if they are aware that it will certainly occur in the ordinary course of events:*

If one *means* to cause a consequence, one *intends* that consequence. If one merely takes a conscious and unjustified risk that the consequence might occur, one may be *reckless* with respect to that consequence but it is not intended. Chapter 2 maintains the distinction between intended results and results which are merely risked. It does, however, extend the concept of intention beyond those instances where the result was *meant* to occur. If the person realised that the result was certain to follow their conduct, it is treated as intentional. The extension is controversial, for it cuts across moral distinctions which are held to be of fundamental importance by many moral philosophers and concerned citizens. Many people would argue that there is an essential moral difference, for example, between the administration of a pain-killing drug which is meant to kill a terminally ill patient and administration of the same drug, in the same dosage, with the intention of alleviating pain, though death is known to be an inevitable side effect of the drug. The question whether the criminal law should elide this distinction has been the subject of intense debate in English jurisprudence for several decades.<sup>59</sup> There, the debate has been almost exclusively concerned with the law of murder, an offence which English law has limited to death resulting from conduct which was *intended* to cause death or grievous bodily harm. Recently, in *Woollin*,<sup>60</sup> the House of Lords accepted the view that

<sup>59</sup> A resume can be found in Simester & Chan, "Intention Thus Far" [1997] Crim LR 704.

<sup>60</sup> [1998] 4 All ER 103. The decision was accepted by a majority of the Court in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.

DIVISION 5 - FAULT ELEMENTS

5.2 **Intention**

- (1) **A person has intention with respect to conduct if he or she means to engage in that conduct.**
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- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

consequences of conduct are intended if they are known to be certain, whether or not they were meant to occur.<sup>61</sup> In Australia, where the offence of murder has always been more broadly defined,<sup>62</sup> extending to killing by recklessness, the issue has excited little comment and caselaw provides no determinate guidance on the issue.<sup>63</sup> The *Code* formulation was intended to settle, by stipulation, a dispute over the legal meaning of intention that has continued without resolution for half a century.<sup>64</sup> Its practical effect on federal law is minimal. There are very few offences in which fault with respect to a result of conduct is limited to an intention to cause the result which require proof of intention with respect to a “result” of conduct.<sup>65</sup> Among the few which are limited in this way<sup>66</sup> is 71.4 *Intentionally causing serious harm to a UN or associated person*. Attempts to construct a scenario which will require recourse to s5.2(3) when this offence is in issue are bound to be fanciful. Imagine a terrorist who seeks to destroy UN headquarters by an explosive device. The terrorist knows that anyone inside the building will be killed or seriously injured. The terrorist hides a bomb in the basement and sends a warning message to the occupants. All are evacuated except for security personnel who remain to search for the device. The terrorist, who knows that some UN staff remain in the building detonates the device. Fortunately no-one is killed<sup>67</sup> but all are seriously injured. Though the terrorist might argue that the bomb was not *meant* to kill, s5.2(3) attributes intention to injure because the terrorist knew that injury would occur in the ordinary course of events.

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- 61 For a sample of divergent views on the significance of the case, see JC Smith, “Case & Comment: *Woollin*” [1998] Crim LR 890; Simester, *Murder, Mens Rea, and the House of Lords - Again* (1999) 115 LQR 17; Norrie, “After *Woollin*” (1999) Crim LR 532; Simester & Shute, “Letter to the Editor” [2000] Crim LR 205. Andrew Ashworth, a leading academic theorist of English criminal law, characterises this as the “standard formulation” of intention: see “Criminal Liability in a Medical Context: The Treatment of Good Intentions”, Chapter 8 in AP Simester & ATH Smith, “Harm and Culpability (1996)”.
- 62 The modern law of reckless murder in Australia stems from *Jakac* [1961] VR 367. Lord Irvine of Lairg provides a retrospective comparison of English and Australian law on the issue in “Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian Law of Criminal Culpability” (2001) 23 Sydney LR 5.
- 63 In *Peters* (1998) 96 A Crim R 250, 270-271, McHugh J. provided a rare instance of judicial affirmation of the view that consequences of conduct which are known to be certain are taken to have been intended.
- 64 See, for example, Glanville Williams discussion of the issue: “Intention also includes foresight of certainty” in *Criminal Law: The General Part* (1ed 1953) 35ff.
- 65 Many offences require proof of an intention to achieve a specific objective. As, for example in the string of offences in CC Division 145 – *Offences relating to forgery*, which forbid a variety of activities if accompanied by an intention to obtain a gain, cause a loss or influence the exercise of public duty or function. Since liability does not require any of these intended outcomes to occur, they are not physical elements of any offence and, hence, not “results” within the meaning of s5.2(3). The definition has no application though it may, as footnote 55 suggests, provide a “persuasive analogy”. See below: **5.2-D**.
- 66 See also the minor cybercrime offences in CC s478.1 *Unauthorised access to, or modification of, restricted data*; s478.2 *Unauthorised impairment of data held on a computer disk etc*.
- 67 Had death occurred, the terrorist would be guilty of murder without the need to have recourse to s5.2(3): CC s71.2 *Murder of a UN or associated person* does not distinguish between intentional and reckless killers.

DIVISION 5 - FAULT ELEMENTS

5.2 **Intention**

- (1) **A person has intention with respect to conduct if he or she means to engage in that conduct.**
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- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

*5.2-D Ulterior intentions: The definition of intention is not exhaustive for it has no application to intentions to achieve an objective which is not a physical element of an offence:*

Section 5.2 does not purport to provide a complete definition of the concept of intention. It goes no further than a definition of intention with respect to intending the physical elements of an offence - conduct, circumstances and results: 5.1 *Fault elements*; 5.2 *Intention*. Some offences require proof of intention to achieve an objective which does not go to any circumstance or result which forms part of the definition of the offence. Ulterior intentions characteristically take the form of a prohibition against engaging in conduct *with intention* to achieve some further objective. Since every offence requires proof of conduct, the ulterior intention is a fault element “for” conduct: 3.1 *Elements*; 5.1 *Fault elements*. The act, omission or state of affairs is itself necessarily intentional, since the offender engages in that conduct with the intention of achieving some further objective. Though liability in these offences is determined by the offender’s objective, the achievement of that objective is not itself a physical element of the offence. In these Guidelines, intentions of this kind are called “ulterior intentions”. The intention to deprive in theft is an obvious example. The offence requires proof of an appropriation of property belonging to another with the intention of permanently depriving the victim of their property: Div131.1 *Theft*. Liability for the completed offence requires neither deprivation nor the creation of a risk of deprivation. In these offences, the intention with which the offender acts is not an intention “with respect to” a circumstance or result. Offences which require proof of an ulterior intention are not uncommon in Federal criminal law.

In short, the distinguishing feature of ulterior intentions is the requirement of proof of an *intention to achieve an objective which is not a physical element of any offence*. The objective, whether or not achieved, is neither a result nor a circumstance specified in any offence and it is quite distinct from the conduct which it accompanies.

Since ulterior intentions are not defined in the *Code*, the meaning of intention in this context is determined by ordinary usage and common law.<sup>68</sup> It is arguable, though far from certain, that a requirement that the prosecution prove an ulterior intention of this nature is equivalent to a requirement of proof of purpose.<sup>69</sup> The fact that ulterior intentions are not defined in the *Code* requires special care in the interpretation of provisions relating to intoxication and corporate criminal liability: see 8.2-C and 12.3-J.

<sup>68</sup> In the offence of theft, the requirement of “intention to deprive permanently” is the subject of partial statutory definition in 131.10 *Intention of permanently depriving a person of property*. That partial definition which, incidentally, has no application to 134.1 *Obtaining property by deception*, does not bear on the issue discussed above.

<sup>69</sup> *Chew* (1991-1992) 173 CLR 526. Discussed, Groode and Leader-Elliott, “Criminal Law” in *An Annual Survey of Australian Law* 1992 (edited R Baxt and A Moore) at 199, 242-247. Compare *Model Penal Code* Proposed Official Draft, American Law Institute 1952, s2.02(2)(a) Purposely: “A person acts purposely...when... it is his conscious object to engage in conduct of that nature or to cause such a result”.

DIVISION 5 - FAULT ELEMENTS

5.2 **Intention**

- (1) **A person has intention with respect to conduct if he or she means to engage in that conduct.**
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

THE INTENTION WITH WHICH THE ACT WAS DONE: THE LIMITS OF THE *CODE* DEFINITION OF INTENTION

Section 141.1 *Bribery of a Commonwealth public official* imposes liability on those who give and those who receive bribes. One who provides a benefit to another is guilty if the benefit was provided “with the intention of influencing a public official...in the exercise of the official’s duties...&c”. An official who receives a benefit is guilty if the benefit was received “with the intention” of acceding to that influence or sustaining an expectation that the official would be influenced. It is quite possible to envisage circumstances in which benefits are given with no *purpose* to exert influence, though it is known that the receiver *will* be influenced by the provision of the benefit. And it is equally possible to envisage circumstances in which an official receives a benefit, in the knowledge that the other expects to exert influence, though it was not the official’s *purpose* to sustain that expectation. Since the requirement of intention in these offences does not relate to their physical elements - results or circumstances – the definition of intention in s5.2 has no application. In particular, the rule in s5.2(3) that a person is *taken* to intend consequences which “will occur in the ordinary course of events”, has no application though it may, as noted earlier, provide a “persuasive analogy” (see guidelines above, 5.2 Intention). The question whether proof of the intention with which the benefit was given or received is equivalent to a requirement of purpose is unsettled.<sup>71</sup>

Offences which require proof of an intention which does not relate to the physical elements of an offence are not uncommon. In general, offences are defined in this way because the objective circumstances are ambiguously poised on the margin between conduct which is harmful and conduct which is socially tolerated. It is the offender’s further intention which tips the balance between conduct which is tolerable and conduct which is criminal. In most instances, however, a fault element of intention in the definition of an offence *will* relate to physical elements of an offence.

<sup>71</sup> *Chew* [1991-1992] 173 CLR 626.

**DIVISION 5 - FAULT ELEMENTS**

**5.3 Knowledge**

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

### 5.3 Knowledge

The definition of knowledge in terms of *awareness* of what exists or will exist in future differs little, if at all, from its meaning in ordinary usage. Since lawyers are occasionally inclined to doubt the proposition, it is of interest that the *Code* makes it very clear that this fault element includes knowledge of what will exist in a future and hypothetical state of events. So, for example, one who conceals a timebomb on an airplane may be said to know that their act will kill, “in the ordinary course of events”. It is no answer for a defendant to say that they did not know that the bomb would kill because, contrary to expectation, it was discovered and defused before any harm resulted. A requirement of knowledge nevertheless sets a demanding standard for conviction. In *Code* offences of dishonesty the requirement of knowledge is often diluted by permitting conviction on proof of “knowledge or belief”.

*5.3-A A person has knowledge of a circumstance or result if they are aware that it exists or will exist in the ordinary course of events:*

Knowledge is a complex concept and the definition appears to have been intended to restrict its application to instances where the individual was *conscious*, at the time, of the circumstances or anticipated results of conduct. The definition is clearly intended to deny recourse to the discredited common law concept of “wilful blindness”, which was sometimes taken to be equivalent to knowledge.<sup>72</sup> It appears to go further, however, imposing a requirement that the offender be *aware* of the circumstances or results of conduct. Conscious awareness is not usually a necessary element of knowledge. The *Code* appears to restrict, to some extent, the range of meaning which knowledge has in ordinary usage: no-one is consciously aware, at any given time, of all that they know at that time. Blunders and accidents occur, not infrequently, because information known to the individual was not consciously recalled at the critical moment. There is an evident link, in this respect, between the Chapter 2 concepts of knowledge and recklessness, both of which require proof that the offender was *aware* of circumstances or results or the risk of their existence at the critical moment. The discrepancy between the *Code* definition of knowledge and ordinary usage of the concept is particularly marked when liability is imposed for omissions and knowledge is the required fault element: discussed 9.3-C.

<sup>72</sup> See Lanham, “Wilful Blindness and the Criminal Law” (1985) 9 Crim LJ 261; D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (2001) 383-384. But see B Fisse, *Howard’s Criminal Law* (1990) 62-63, 278-279, for a defence of constructive knowledge.

DIVISION 5 - FAULT ELEMENTS

5.3 **Knowledge**

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

### KNOWLEDGE, RECKLESSNESS AND BEING AWARE OF CIRCUMSTANCES

Offences which require proof of knowledge for conviction are comparatively uncommon.<sup>73</sup> The offences of obstruction in Ch 7, Part 7.8 - *Causing harm to, and impersonation and obstruction of, Commonwealth officials*, require proof that the offender *know* that a person who is obstructed is a public official. The *Code* accordingly requires proof that the offender was *aware* of circumstances relating to the official's status which make the impersonation or obstruction criminal. A requirement that the prosecution prove knowledge is uncompromising in the sense that a person cannot be said to know a circumstance or result unless that person is *certain* of its existence or eventuality. In cases of obstruction, that is unlikely to cause particular difficulty to the prosecution.<sup>74</sup> Elsewhere in the *Code*, the uncompromising demand imposed by a requirement of proof of knowledge is lightened by legislative requirement of "knowledge or recklessness." s270.6(2) - *Sexual servitude offences* provides an example. A person who manages or finances a business which involves the subjection of individuals to sexual servitude is guilty of an offence if they knew of the sexual servitude or if they were reckless with respect to that circumstance. The recklessness alternative permits conviction of financiers and others who maintain distance from the enterprise though the nature of the business was not known for a certainty. It remains necessary, however, to establish that the defendant was *aware of a substantial risk* that the business involves sexual servitude: s5.4(1) - *Recklessness*. Elsewhere in the *Code*, use has been made of a hybrid form of fault - "knowledge or belief": discussed below 5.3-B.

*5.3-B Some Code offences require a hybrid fault requirement of "knowledge or belief":*

A number of offences of dishonesty in Ch 7 - *The proper administration of Government*, make liability depend on proof that the person had *knowledge or belief* with respect to circumstantial elements of the offence. "Belief" is not recognised as a fault element in Chapter 2. But it does envisage the possibility that specialised fault elements will be necessary in particular contexts: 3.1 *Elements*. The offence of receiving stolen property, is a significant instance of use of this hybrid: 132.1 *Receiving*. The offence is committed if the property was received dishonestly by an offender who knew or believed

<sup>73</sup> But see the cybercrime offences in Ch 10 *National infrastructure*, Part 10.7 – *Computer offences*, which require proof of knowledge that the impairment of data or other effect in question is not authorised.

<sup>74</sup> *CC Ch 7, s149.1(3) Obstruction of Commonwealth public officials* does not, however, require proof that the "defendant was aware that the public official was performing the official's functions."

DIVISION 5 - FAULT ELEMENTS

5.3 **Knowledge**

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

the property to have been stolen. The formulation was derived from the *Theft Act 1967* (UK), which provided the original model for the *Code* offences of dishonesty. The significance of the reference to “belief” is not immediately apparent. The most obvious distinction between knowledge and belief is that one can believe, but one cannot know, something that is false in fact. The offence does not extend, however, to catch instances of dishonesty where the receiver labours under a *mistaken* belief that the property was stolen.<sup>75</sup> That may amount to an attempt to receive, but it is not receiving. It is evident that the word “belief” was meant to qualify or dilute the uncompromising requirement of knowledge in some other way.<sup>76</sup> The question whether it does so and the nature of the possible qualification or dilution is the subject of unresolved debate in English texts on theft law.<sup>77</sup> The concept of belief, like other basic concepts in the *Code*, preserves its everyday meaning. When existing or projected states of fact are concerned, the difference between knowledge and belief appears to reflect differences in the adequacy of grounds for being sure or certain about the facts. One *believes* rather than knows that something is so when the evidence is less than conclusive.<sup>78</sup> There is an element of faith in belief. In the United Kingdom, it was once suggested that the reference to belief was apt to include cases where the receiver merely suspected that goods were stolen and refrained from further inquiry. Courts have consistently rejected the suggestion. As ATH Smith points out, “suspicion differs from belief in that it connotes advertence without any definite conclusion being reached.”<sup>79</sup> A requirement of belief might be taken to require something less than the degree of conviction required for knowledge, but something more than the pallid substitute of mere suspicion. A passage from the Court of Criminal Appeal decision in *Hal*<sup>80</sup> reflects the current state of UK opinion on the shades of difference between knowledge and belief in the offence of receiving:

A man may be said to know that goods are stolen when he is told by someone with first hand knowledge (someone such as the thief or the burglar) that such is the case. Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: “I cannot say I know

75 See *Haughton v Smith* [1975] AC 476, which has never been doubted on this point. Accord, ATH Smith, *Property Offences* (1994) 30-49. *Code* s.132.1 *Receiving* puts the issue beyond doubt, for it requires the property to be stolen.

76 See JC Smith, *The Law of Theft* (8 ed, 1997) 13-41.

77 See JC Smith, *ibid*; ATH Smith, *Property Offences* (1994) 30-49. See also CR Williams & MS Weinberg, *Property Offences* (1986 2ed) 358-360, 369; compare B Fisse, *Howard's Criminal Law* (1990) 278-279

78 *The Macquarie Dictionary*: “belief” - “conviction of the truth or reality of a thing based upon grounds insufficient to afford positive knowledge”. Compare, however, the *Shorter Oxford English Dictionary*, which is puzzlingly different on this point.

79 ATH Smith, *Property Offences* (1994) 30-52. Accord, JC Smith, *The Law of Theft* (8 ed, 1997) 13-41.

80 (1985) 81 Crim App R 260, 264. See JC Smith, *ibid*, and compare ATH Smith, *ibid*, 30-53.

DIVISION 5 - FAULT ELEMENTS

5.3 **Knowledge**

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

for certain that these goods are stolen but there can be no other reasonable conclusion in the light of the circumstances, in the light of all I have heard and seen.”

Sir John Smith, who is critical of this particular attempt to fix the meaning of “knowledge or belief” concludes that judicial directions to juries should not attempt to define “belief”.<sup>81</sup> That conclusion is of small help, of course, in trials without jury. If we put to one side the uncertain guidance provided by UK authorities, consideration of the context in which the fault element of “knowledge or belief” is employed in the *Code* allow some more definite conclusions to be drawn. First and most significant of all is the fact that that “knowledge or belief” is not equivalent to recklessness. Realisation of a substantial risk that something is so does not amount to belief in that state of things either in ordinary language or in the *Code*. If liability for these offences was meant to include recklessness, the *Code* would have said so. We can add to that firm conclusion two speculative suggestions on the meaning of “knowledge” or “belief”. The first is the possibility that the reference to “belief” qualifies the requirement that an offender be *aware* that something is the case. Often we are not consciously aware of our beliefs, even when engaged in activities which manifest reliance on those beliefs - a point recognised in the *Code* in its definition of the defence of reasonable mistake.<sup>82</sup> We might infer that a person *believed* that goods were stolen from their behaviour in much the same way as we infer that a person believes their car will start from their behaviour in turning the ignition and pressing the accelerator. That inference does not entail any speculation concerning the person’s state of conscious awareness of particular facts at any particular point of time. In short, it is not necessary to address the question whether the defendant was consciously aware of the fact that the goods were stolen. The second speculation arises from the curious overlap between the definition of intention - with respect to circumstances - in s5.2(2) and “knowledge or belief” about circumstances. One who receives goods knowing or believing them to be stolen can also be said, in the terminology of the *Code*, to *intend* to receive stolen goods.

### 5.3-C *Offences of dishonesty require proof of a fault element of knowledge:*

The Code defines dishonesty by reference to the standards of ordinary people. A person is taken to be dishonest if they *know* their conduct to be dishonest according to those standards: CC s130.3 *Dishonesty*. The fault element in dishonesty is, accordingly, knowledge.

<sup>81</sup> JC Smith, *ibid*. But see ATH Smith, *ibid*, who argues that juries should not be left without guidance.

<sup>82</sup> 9.2 *Mistake of fact (strict liability)*. The defence is based on the premise that a “mistaken belief” includes beliefs which the individual was not conscious of holding at the time the offence took place.

DIVISION 5 - FAULT ELEMENTS

5.4 **Recklessness**

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

#### 5.4 Recklessness

The *Code* is constructed on the assumption that the underlying principles of criminal justice require proof of conscious advertence to the physical elements of an offence before a finding of guilt can be made. There are many exceptions of course, but that is the recognised point of departure beyond which exceptions require justification. That threshold requirement is expressed in the *Code* by the fault element of recklessness - a concept derived from the American *Model Penal Code*.<sup>83</sup> The assumption that an offence requires proof of recklessness can be displaced by a legislature of course and the *Code* makes specific provision for strict and absolute liability as alternative forms of liability which do not require proof of conscious advertence to risk. In making recklessness the presumptive threshold for guilt, the *Code* departs from the Griffith Code, which set the threshold at a point which we now recognise as strict liability. Since recklessness marks the threshold, proof of intention or knowledge will more than satisfy this threshold requirement: See s5.4(4).

##### *5.4-A Recklessness requires proof of a “substantial” risk:*

Inquiries about recklessness in criminal trials are usually retrospective. To say that a risk was substantial, it is necessary to adopt the standpoint of a reasonable observer at the time of the allegedly reckless conduct, before the outcome was known. The risk is substantial if a reasonable observer would have taken it to be substantial at the time the risk was taken. It is no answer to an allegation of recklessness with respect to a risk of some harmful result that hindsight reveals, for some reason of which the offender was quite unaware, that the harm could never have eventuated.<sup>84</sup> Since it is the *reasonable* observer who sets a standard against which the defendant will be measured, this notional figure may be in possession of more information than the defendant and will usually be endowed with far better judgement about risks than the defendant. Of course there is no liability unless it can be proved that the defendant was aware of the risk. That requirement is discussed below. The first step, however, is to establish that there was a risk and that the risk was “substantial”. The standard is obviously vague. It also involves significant conceptual problems. A finding of recklessness with respect to death is sufficient fault for murder, the most serious of offences. But recklessness is also the general presumptive threshold requirement for the most trivial of offences in federal law. The *Code* requirement of “substantial risk” appears to have been chosen for its irreducible indeterminacy of meaning. The same difficulty is apparent

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<sup>83</sup> *Model Penal Code: Proposed Official Draft* (ALI 1962) s2.02(2)(c)

<sup>84</sup> When circumstantial elements of an offence are in issue, risks will often dissolve into certainties, from the perspective of the reasonable observer. The circumstantial element of consent in rape provides the most obvious example of this. Here, inquiry into the recklessness issue is limited to the offender’s subjective appreciation of the circumstances.

DIVISION 5 - FAULT ELEMENTS

5.4 **Recklessness**

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

in the common law, which oscillates between the requirement that the anticipated result must have been “likely” or “probable” and the lesser requirement that it be merely “possible”.<sup>85</sup>

One nugget of comparative certainty can be extracted from these diverse sources. References to “likelihood” and “probability” do not mean that the risk must be one which was more likely than not.<sup>86</sup> Between these uncertain poles of likelihood and possibility, academic opinion and judicial precedent are equally diverse in their conclusions. Successive editions of *Howard’s Criminal Law* maintain the position that the requirement of *substantial* risk varies in stringency with the degree of social acceptance of the conduct which gave rise to the risk. If the conduct is without redeeming social value, anything in excess of a “bare logical possibility” is said to count as a “substantial” risk.<sup>87</sup> Other academic treatises are more circumspect, though most appear to accept that recklessness extends to “possible” risks in offences other than murder.<sup>88</sup> Professor Gillies surveys a range of offences in which recklessness is the fault element and concludes that the meaning varies with the context of application: “Some cases posit the probability test; others are satisfied with the possibility test”.<sup>89</sup> Discussion of the issue in reports issued by the Model Criminal Code Officers Committee reflects these uncertainties.<sup>90</sup>

#### 5.4-B Recklessness requires proof that the offender was aware of the risk:

Like *intention* (s5.2) and *knowledge* (s5.3), the definition of recklessness appears to have been intended to require proof of conscious awareness of risk of a particular result or circumstance. It is not enough to establish that the risk was obvious, well known or within the defendant’s past experience.

85 *Boughey* (1986) 161 CLR 10.

86 Victorian decisions on recklessness adhered for a time to the requirement that the risk be more likely than not: see *Nuri* (1989) 49 A Crim R 253. That requirement was abandoned when exposed to the testing case of Russian roulette: see *Faure* (1993) 67 A Crim R 172.

87 Fisse, *Howard’s Criminal Law* (1990) 489-491.

88 S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 183; R Muragason & L McNamara, *Outline of Criminal Law* (1997) 126 provide a useful collection of New South Wales authorities for the proposition that recklessness requires proof of possible rather than likely risks when offences other than murder are in issue. Their assertion that South Australian case law requires likelihood rather than possibility has been overtaken by subsequent case law: see *Tziavrangos v Hayes* (1991) 53 A Crim R 220. In Victoria, see *Campbell* [1997] 2 VR 585.

89 P Gillies, *Criminal Law* (4th Ed 1997) 64.

90 MCC Ch5: *Fatal Offences Against The Person* (Discussion Paper 1998) 53-59; MCC Ch2: *General Principles of Criminal Responsibility* 29-31 Compare the offence of rape, in which any realisation of any risk at all that the victim has not consented must count as “substantial”: MCC Ch5: *Sexual Offences Against the Person* 67-91. The case of rape is atypical however. The offence involves recklessness as to a known circumstance - absence of consent - rather than a contingent future event. Moreover the provisions on sexual offences substantially modify the definition of recklessness: see Division 2 - *Sexual Offences Committed Without Consent*.

DIVISION 5 - FAULT ELEMENTS

5.4 **Recklessness**

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

That is, at best, evidence of recklessness.<sup>91</sup> To be aware of a risk is to be conscious of it and, in the absence of consciousness of risk, the case is one of negligence at most. So, for example, it is highly unlikely that a motorist who causes a catastrophic explosion by lighting a cigarette while filling a car with petrol at a service station could be described as reckless with respect to that risk. In the absence of any indication that the motorist was bent on suicide, the obvious explanation of the motorist's conduct is an *absence* of awareness of the risk. Smokers may be said to gamble with their lives in the long run, but they rarely gamble on the chance that the next cigarette will kill them instantly.

#### 5.4-C Risk taking may be justified:

Conduct which involves a substantial risk will not amount to criminal fault if the risk was justifiable in the circumstances. There is very little case law on the possibility of justification. In *Crabbe*,<sup>92</sup> which concerned recklessness as a fault element in murder, there was passing mention of the defence of necessity, which might justify a surgeon's decision to undertake a risky operation which provided the only hope of prolonging the victim's life. However, claims that a risk was justified will be rare. In practice, the exercise of discretion in the selection of cases for prosecution will usually ensure that any claim of justification for risk taking is without substance. In cases where the issue of justification might arise, it will tend to be subsumed under the defences of duress or sudden or extraordinary emergency: 10.2 *Duress*; 10.3 *Sudden or extraordinary emergency*. These defences are excuses, which require a less demanding standard of human fortitude than justification. The requirements of both defences are satisfied if the conduct of the individual was a "reasonable response" in the circumstances – a standard that permits the defendant to be judged by reference to the frailties of ordinary, reasonable human beings.<sup>93</sup> The need to face the question whether a risk was *justified* simply does not arise if the conduct of the accused was a reasonable response to a threat made by another person or to a sudden or extraordinary emergency. The twin filtering devices of prosecutorial discretion and the pre-emptive role of the excuses probably account for the complete absence of reported cases in which a charge of reckless wrongdoing was defeated by a plea of justification. Though the point is of theoretical rather than practical interest, it should be noted that the claim of justification is not available if the consequence or circumstance was intended or known to be certain to accompany or follow the defendant's conduct in the ordinary course of events.<sup>94</sup>

91 See, in particular, Ch 2, s9.1(2).

92 (1985) 156 CLR 464.

93 See, for example, *Zecevic* (1987) 162 CLR 645.

94 See, in particular, the implications of Ch 2, s5.4(4), which permits proof of intention in lieu of recklessness.

DIVISION 5 - FAULT ELEMENTS

5.4 **Recklessness**

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.4-D *A person may be reckless with respect to a risk of an actual or anticipated result of their conduct:*

Like intention, recklessness is a state of mind which can extend to results which may or may not come to pass. Prior to the event, the individual is reckless with respect to the *risk* that some harmful result may follow. Some offences of recklessness impose liability for causing harm and in these, liability requires proof of recklessness with respect to the harm. In other offences of recklessness, however, liability is imposed for creating a risk of harm, though the harm may never eventuate. In these offences the risk is itself the incriminating result of the offender's conduct.<sup>95</sup>

5.4-E *A person may be reckless with respect to a risk of an actual or anticipated circumstance of their conduct:*

Most offences are a compound of conduct and circumstance. So, for example, it is the circumstance that goods are stolen that makes it criminal for someone to receive them with knowledge of their provenance. In the absence of legislative provision on the issue of fault, the prosecution must prove recklessness - awareness of a substantial risk - with respect to the incriminating circumstance: s5.6(2). However, if the offence requires proof of intention or knowledge, more is required than mere awareness of a substantial risk that the circumstances exists or will come to pass. Circumstances are *intended* only if the offender *believes* that they exist or believes that they will come into existence: s5.2(2). Circumstances are *known* if the offender is *aware* that they exist or will come into existence: s5.3.

#### CORRUPTING BENEFITS: THE CASE OF RECKLESS BRIBERY

The bribery provisions of the *Code* distinguish between intentional bribery, the more serious offence, and reckless bribery: 141.1 *Bribery of a Commonwealth public official*; 142.1 *Corrupting benefits given to, or received by, a Commonwealth public official*. The lesser offence requires proof that the benefit "would tend to influence a public official...in the exercise of the official's duties". The prosecution must prove recklessness with respect to the fact that the benefit has that tendency.<sup>96</sup> Recklessness, that is to say, with respect to a risk which may never eventuate in harm. The fact that the provision of the benefit has that tendency is a circumstance which accompanies the offender's conduct.

<sup>95</sup> The *Model Criminal Code* offers illustrative examples. Chapter 5 - *Non Fatal Offences Against The Person* proposes a series of offences committed by individuals who recklessly endanger another's life or limb: The prohibited "result", in these prohibitions, is the "danger of death" or "danger of serious harm" caused by the offender's conduct. See *MCC* ss5.1.25 *Recklessly endangering life*; 5.1.26 *Recklessly endangering serious harm*. In the *Commonwealth Code*, 135.1(5) *General dishonesty* and 474.1(3) *General dishonesty with respect to a carriage service provider*, characterise loss and risk of loss alike, as *results* of the offender's dishonest conduct.

<sup>96</sup> The requirement of recklessness, which is not stated in the provision, is supplied by 5.6 *Offences that do not specify fault elements*.

DIVISION 5 - FAULT ELEMENTS

5.4 **Recklessness**

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.4-F *An offender is only reckless with respect to circumstances or results of their own conduct:*

In *Code* usage the term “result” is confined to the results of the *offender’s* conduct. Accordingly, the offender cannot be reckless with respect to the results of another person’s conduct, nor can the offender be reckless with respect to the circumstances of another person’s conduct. However, some offences impose liability on offenders whose conduct creates a risk of criminal activity by others. The best known examples are prohibitions against conduct which *facilitate* the commission of crime by another. These crimes are, in effect, crimes of inchoate complicity.<sup>97</sup> One can imagine, for example, a legislative provision which makes it an offence to sell a weapon to another in circumstances where provision of the weapon might enable the other to commit an offence. In the definitional structure of the *Code* the weapon seller cannot be said to be reckless with respect to the conduct of the customer. In these prohibitions the fault element of recklessness, manifest in the offender’s conduct, attaches to the *risk* that the other person will cause harm. Creation of that risk can be considered to be a *result* of the offender’s conduct. Offences which take this form will be comparatively rare. They find a place, however, in prohibitions directed at controlling conduct in organised networks of potentially criminal activity. Money laundering offences provide the most obvious examples.

#### RECKLESS FACILITATION OF CRIME BY ANOTHER; THE MONEY LAUNDERER

It is anticipated that new legislation for money laundering offences will supersede existing provisions in the *Proceeds of Crime Act 1987* (Cth). It is likely that the proposed offences will include an offence of dealing with money or other property in a way which results in a substantial risk that the money or property will become an instrument of crime in the hands of another. Suppose, for example, a case in which the offender lodges money in an account to which a drug dealer has access and from which it can be expected that illicit drug purchases will be funded. Quite apart from any possible liability as an accomplice or conspirator, a legislature may seek to impose liability for conduct that *facilitates* the trafficker’s illicit activities. The risk that the account will be used in this way could be described as result of the offender’s act of lodging money in the account. It could also be described as a circumstance accompanying that act. Nothing turns on the distinction between circumstance and result here. Either way, liability can be imposed for conduct which is reckless with respect to circumstances which present an opportunity for criminal activity by another person.

<sup>97</sup> Ch 2 s11.1(7) *Attempt*, follows the common law and bars liability for an attempt to become an accomplice or an attempt to conspire.

DIVISION 5 - FAULT ELEMENTS

5.5 **Negligence**

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances;  
and
- (b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

## 5.5 Negligence

The definition of criminal negligence is a statutory paraphrase of a passage from the judgement of the Victorian Court of Criminal Appeal in *Nydam*.<sup>98</sup> It is a complex composite test, devised by a court which was concerned to mark, with as much clarity as possible, the difference between reckless murder and manslaughter by gross negligence. The same concern over the need to distinguish between recklessness and negligence is evident in the commentary on negligence in *MCC Ch2: General Principles of Criminal Responsibility*.<sup>99</sup> In large part that concern accounts for the markedly different style of the definitions of recklessness and negligence. Prohibitions against negligent conduct are inarticulate, referring as they do to rules which are unknown until after the event.<sup>100</sup> Though the concept of negligence plays a role in the formulation of offences of unlawful homicide and injuries to the person, it has few other applications. In general, Commonwealth criminal law tends to avoid prohibitions requiring proof of negligence. In more serious offences, the tendency has been to prefer prohibitions that are more specific in their requirements than a blanket prohibition of negligence. In lesser offences, it has become common to specify the forbidden activity and qualify the prohibition by permitting a defence of “reasonable excuse”.

### *5.5-A A person may be negligent with respect to conduct, circumstances or results:*

Unlike recklessness, which has no application to conduct, negligence extends to acts, omissions and states of affairs. Liability can be imposed, that is to say, for conduct that is negligent in its manner of performance. So, for example, the *Code* permits offences of careless but not reckless driving. Since recklessness requires awareness of risk, it is always necessary to specify the circumstance or result of which the offender must be aware.

### *5.5-B The Code recognises only one degree of criminal negligence.*

The definition is intended to distinguish between negligence in civil actions for damages and negligence which justifies the imposition of criminal punishment. Since most practical applications of the concept of negligence are limited to conduct which causes physical injury or death, with primary emphasis on the crime of manslaughter, it has been generally accepted that the level of negligence must be gross or shocking in its departure from standards of reasonable behaviour. There was, indeed, considerable resistance on the part of English and Australian courts to the idea that criminal liability

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98 [1977] VR 430

99 pp30-33.

100 See B Fisse, *Howard's Criminal Law* (1990) 496-497.

DIVISION 5 - FAULT ELEMENTS

5.5 **Negligence**

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances;  
and
- (b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

might be imposed for negligence of any degree.<sup>101</sup> Insistence that negligence be gross was meant to blunt the argument that justice requires advertent wrongdoing before criminal liability is imposed. The *Code* definition of negligence is, of course, circular. That too is a legacy of English caselaw.<sup>102</sup> If it is read literally, the circularity of the definition might be interpreted to have the effect of removing the original requirement that negligence be gross or shocking. It is likely, however, that the common law background will continue to govern understanding of the meaning of negligence. There is a more significant consequence of the fact that criminal negligence is defined as that degree of departure from reasonable care which would justify criminal punishment. Chapter 2 leaves little or no conceptual space for the possibility that there might be two or more grades of criminal negligence.<sup>103</sup> However, it is possible to provide for a halfway house, between the negligence standard of s5.5 and strict liability. Minor offences which impose liability without fault for one or more physical elements, frequently permit a defence of “reasonable excuse”. The standard of behaviour required is less demanding than strict liability but more demanding than mere avoidance of negligence.

*5.5-C The defence of reasonable mistake of fact has no application when an offence requires proof of negligence:*

Since negligence requires a “great falling short” of standards of reasonable care, proof that a person was unreasonably mistaken in their appreciation of risks or appropriate precautions is not proof of negligence. The threshold of liability is set far higher than it is in offences of strict liability. The difference is clearly illustrated by comparing the fault required for manslaughter and the strict liability offences of dangerous driving causing death or serious injury.<sup>104</sup> Conversely, it is not open to an accused charged with an offence requiring proof of negligence to require an additional instruction to the jury on a defence of reasonable mistake of fact. Common law and Chapter 2 coincide in holding that proof of negligence necessarily defeats any claim that harm resulted from reasonable error.<sup>105</sup>

101 Passages in the judgement of Smith J in *Holzer* [1968] VR 481 represent the high point, among reported Australian cases, of this tendency. Not until the decision of the High Court in *Wilson* (1993) 61 A Crim R 63 was the pale spirit of subjectivity allowed to rest.

102 See, in particular, *Bateman* (1925) 19 Crim App R; *Andrews* [1937] AC 576.

103 *MCC* Ch2: *General Principles of Criminal Responsibility* suggested, somewhat faintly, that the degree of negligence required can vary according to the nature of the offence in question. In its original version in *MCC* s203.4 the concluding words of the definition permit liability for negligence if “the conduct merits criminal punishment for the offence *in issue*”. Though the concluding words in italics do not appear in s5.5 *Negligence*, it is still faintly arguable that liability for more serious offences requires proof of a more marked departure from the standard of the ordinary person than does liability for a minor offence. It is unlikely that a court would accept an argument of this nature. The question whether common law recognises degrees of negligence is discussed in Leader-Elliott, “Criminal Cases in the High Court: *Jiminez*” (1993) 17 Crim LJ 61; See in addition *Taafe*: (1998) 102 A Crim R 472.

104 Leader-Elliott, *ibid*.

105 *Osip* (2000) 116 A Crim R 578.

**DIVISION 5 - FAULT ELEMENTS**

**5.6 Offences that do not specify fault elements**

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

## 5.6 Offences that do not specify fault elements

Section 5.6 is the central switchpoint in the *Code* scheme of fault provisions. The general effect of the section can be quickly sketched. If the statute creating an offence makes no reference to fault when specifying a physical element of the offence, Chapter 2 requires the prosecution to prove intention or recklessness with respect to that physical element. There is, in other words, a presumption that the offence requires proof of one or other of these varieties of fault. (The question of which of those fault elements must be proved - intention or recklessness - can be deferred for the moment while the remaining details of the scheme are sketched.)

The presumption that the prosecution must prove intention or recklessness will be displaced if the legislature specifies the variety of fault required for the offence. It will also be displaced by a provision which imposes strict or absolute liability with respect to a particular physical element of the offence. Since the provisions in s5.6 apply when legislation is silent on the issue of fault, they are commonly described as “default” provisions. That description is slightly misleading, suggesting as it does that s5.6 is there to rectify legislative oversights. In practice, omission to make specific reference to fault elements is often a result of conscious reliance on s5.6 by the drafter.<sup>106</sup>

The rule that specification of a fault element “for” conduct will bar the application of s5.6 raises an issue of interpretation. A significant number of Commonwealth offences prohibit conduct undertaken with the intention of achieving some further objective. Examples include offences requiring proof of an “ulterior intention”: discussed 5.2-D. So, for example, 131.1 *Theft* requires proof of an appropriation of property belonging to another “with the intention of permanently depriving the other of the property”. Does such an offence specify a fault element “for” the conduct of appropriation? Offences of ulterior intention almost invariably take the form of a prohibition against engaging in conduct *with the intention* of achieving some specified objective. The offence of incitement in s11.4, which requires proof that the offender urged the commission of a crime coupled with proof of an intention that the crime be committed, is an exception more apparent than real. The requirement that the offender urge the commission of the offence *with* the intention that the offence be committed is implicit in the offence of incitement. Do these offences specify a fault element for the conduct in question? Is the intent to deprive permanently a fault element “for” appropriation in 131.1 *Theft* or obtaining in 134.1 *Obtaining property by deception*? Two considerations compel the conclusion that the ulterior intention is a fault element “for” conduct. The first is the clear implication in Part 2.2 of Chapter 2 that fault elements cannot exist in isolation: a fault element is, necessarily, a fault element *for* a physical element. The second is the requirement which is almost always expressed in these offences of conduct done or permitted

<sup>106</sup> Consider, for example, CC s477.3 *Unauthorised impairment of electronic communication*. The physical elements of the offence include an act which causes unauthorised impairment of electronic communications. Though the provision requires proof of knowledge that impairment is unauthorised, no fault element is specified for either the act which causes impairment or the impairment itself. Section 5.6 accordingly requires proof of an intentional act (ss1) coupled with recklessness as to the risk of impairment (ss2).

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with the specified ulterior intention. It follows that s5.6(1) has no application in these offences. It is displaced because an offence of ulterior intention *does* “specify a fault element for a physical element which consists only of conduct”.

Section 5.6 has no application to “exceptions, exemptions, excuses, qualifications or justifications provided by the law creating the offence”.<sup>108</sup> Nor does it apply to defences in Part 2.3 – *Circumstances in which there is no criminal liability*. The Code distinguishes the elements of the offences from defences and exceptions which are collectively designated by the term “matters” which go to liability.<sup>109</sup> The question whether a particular requirement for guilt is an element on the one hand or a matter of defence or exception on the other can involve difficult issues of interpretation. Those issues are discussed at greater length in the commentary on Part 2.6 – *Proof of Criminal Responsibility*. For present purposes it is sufficient to say that the difference between elements and defences or exceptions depends on the incidence of the evidential burden of proof. In summary:

- *Fault elements can only apply to physical elements of offences:* 3.1 *Elements*; 5.1 *Fault elements*.
- *It follows that s5.6 can only apply to physical elements of an offence:* it has no application to defences or exceptions. The prosecution bears the legal and evidential burdens of proof of both physical elements and any fault elements supplied by s5.6: 13.1 *Legal burden of proof-prosecution*;
- *When a matter of defence or exception is in issue, the defendant bears the evidential burden:* 13.3 *Evidential burden of proof-defence*.
- *Matters on which the defendant bears an evidential burden are not elements of an offence:* See s13.1(1) and (2), distinguishing between “elements” and “matters”. So also, s13.3 *Evidential burden of proof – defence*.

The application of s5.6, with its consequential requirement that the prosecution must prove fault, depends in this way on provisions which determine the incidence of the burden of proof.

There is a significant conceptual divide between ss5.6(1) and ss5.6(2). The first subsection is concerned with *conduct* - acts, omissions and states of affairs. In the absence of legislative provision, ss5.6(1) requires the prosecution to prove that the conduct was *intentional*. The second subsection is concerned with the *results* of conduct and accompanying *circumstances*. When the second subsection applies, the prosecution must prove *recklessness* with respect to incriminating circumstances or consequences. As a consequence of this division, it is necessary to determine whether a physical element is a circumstance, a result or an act before s5.6 can apply. In the discussion which follows, this is called the “characterisation” issue or problem.

<sup>108</sup> See Ch 2, Part 2.6 - *Proof of Criminal Responsibility*, s13.3(3).

<sup>109</sup> *Ibid*.

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It is necessary to be clear from the outset that there is nothing in the *Code* to require a court to limit the meaning of the word “act” to a mere physical movement.<sup>110</sup> Many prohibitions proscribe complex acts. If it is an offence to sign a cheque in circumstances where the account is empty, *signing a cheque* is the act done by the offender. Nothing in the *Code* requires a court to dissect the act of signing a cheque into a catalogue of physical movements, consequences of those movements and circumstances in which they occur. The prohibitions of the *Code* make full use of the resources of ordinary language in proscribing complex activities.

*5.6-A In the absence of legislative provision, the prosecution must prove intention with respect to conduct and recklessness with respect to circumstances or results:*

The operation of the provision is more easily explained with the aid of a simplified version of offences in Chapter 7, Division 136 – *False or misleading statements in applications*. As one might expect, Commonwealth criminal law contains a number of offences imposing liability on those who give false information to government agencies. The example that follows involves simplified versions of two of these offences.<sup>111</sup> Suppose the Commonwealth government were to enact a simple prohibition in the following form: *A person is guilty of an offence if the person makes a false statement to a Commonwealth public official in an application for a licence*. No fault elements are specified for this string of physical elements. Section 5.6 accordingly applies and the physical elements of the offence must be characterised in order to determine whether intention or recklessness is required for each of these elements.

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110 Compare Robinson & Grall, “Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond” (1983) 35 Stanford LR 682, 719-725, who argue that this atomistic conception of human action should be accepted as a central interpretive presumption in their proposals for a reconstruction of the *Model Penal Code*, ALI 1962. The objection to the Robinson & Grall program is the extreme technicality which it can produce in the interpretation of offences. There are significant differences between Part 2.2 – *The elements of an offence* and corresponding provisions in the Model Penal Code which justify a different and less technical approach to interpretation.

111 Ch 7, Division 136 – *False or misleading statements in applications*.

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Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

PRESUMPTIONS OF FAULT IN THE ABSENCE OF LEGISLATIVE SPECIFICATION			
PHYSICAL ELEMENTS CHARACTERISED		CODE	IMPLIED FAULT ELEMENTS
ACT	<i>Make a false statement</i> <sup>112</sup>	5.6(1) applies	<i>Intention</i> to make a false statement
CIRCUMSTANCE	<i>In application for licence</i>	5.6(2) applies	<i>Recklessness</i> as to the nature of the transaction
CIRCUMSTANCE	<i>To a Commonwealth officer</i>	5.6(2) applies	<i>Recklessness</i> for circumstance that person is a Commonwealth officer

But it is utterly unlikely that the prohibition would take this form. The legislature would be expected to displace most of the applications of s5.6 by specific provisions dealing with fault. To begin with an obvious point, there is no reason to make the prosecution prove that an offender appreciated the distinction between a State and Commonwealth officer as an element of the offence. So long as the offender was reckless with respect to the risk that the person was a government official, whether state or federal, that should be sufficient for conviction. It is appropriate to impose absolute liability with respect to the merely jurisdictional requirement that the false statement is made to a *Commonwealth* official. Other refinements are possible. Perhaps the prohibition should be more responsive to degrees of wrongdoing. The legislature might choose (as it did in reality) a more discriminating form of prohibition – one that will distinguish between a more serious offence for those who *know* they are peddling untruths and a lesser offence for those who are merely reckless with respect to the risk. If the simple prohibition is refined in this way and divided into two offences, the physical elements required for liability have to be dissected. Fault elements or absolute liability must be specified for those elements of the offence that are not to be subject to the presumptions of s5.6.

<sup>112</sup> It is open to argument, in a prohibition of this nature, that the 'act' of *making a false statement* is, in reality, an 'act' of *making a statement*, coupled with the 'circumstance' that *the statement is false*. The issue arises in common law statutory interpretation, no less than it does under the Code. See, for example, *He Kaw Teh* (1985) 15 A Crim R 203, 256 per Brennan J, who characterises 'importing narcotic goods into Australia' as an act, rather than an 'act' of *importing goods*, coupled with a 'circumstance' – *goods are narcotic*. Compare Robinson & Grall, "Element Analysis in Criminal Liability: The Model Penal Code and Beyond" (1983) 35 Stanford LR 681, 719ff, who present a strong case in favour of narrowing the meaning of 'act' to bodily movements and the like. So also, P Robinson, *Structure and Function in Criminal Law* (1997) 25-7. Their proposals have not found strong support in UK or Australian conventions of legislative interpretation. Compare Glanville Williams, *Textbook of Criminal Law* (2ed) 77. Legislative grammar and layout, coupled with commonsense, provide the best guides in practice. If the legislature has not chosen to distinguish between the making of the statement and the fact that the statement is false it is unnecessary, in the absence of any implied legislative intention or policy, to divide the act of making a false statement into two distinct physical elements of act and circumstance.

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**5.6 Offences that do not specify fault elements**

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Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

PRESUMPTIONS OF FAULT DISPLACED BY LEGISLATIVE SPECIFICATION			
PHYSICAL ELEMENTS CHARACTERISED (Displacements marked in bold)		CODE	IMPLIED FAULT ELEMENTS (Displacements marked in bold)
<i>ACT</i>	Make statement	5.6(1) applies	<i>Intention</i> to make statement
<i>CIRCUMSTANCE</i>	(1) <b>Statement is false</b>	5.6(2) displaced	<b>Offence (1) <i>Knowing</i></b> the statement false. [Penalty] 12 months
<i>CIRCUMSTANCE</i>	(2) <b>Statement is false</b>	5.6(2) displaced	<b>Offence (2) <i>Reckless</i></b> as to falsity of statement [Penalty] 6 months
<i>CIRCUMSTANCE</i>	In application for licence	5.6(2) applies	<i>Recklessness</i> as to the nature of the transaction
<i>CIRCUMSTANCE</i>	To a public official	5.6(2) applies	<i>Recklessness</i> for circumstance that the person is an official
<i>CIRCUMSTANCE</i>	<b>Who is a Commonwealth official</b>	5.6(2) displaced	<b><i>Absolute liability</i></b> for circumstance that it is a <b>Commonwealth official</b>

The interpretive process required by s5.6 is analogous to that which was meant to occur in the application of s23 of the Griffith Code, adopted in Queensland and Western Australia. Though the analogy can be drawn, it is one that is likely to result in confusion rather than illumination if any attempt is made to transfer particular decisions from one context to another. The jurisprudence of s23 of the Griffith Code is not distinguished for its clarity or ease of application. Despite superficial similarities, s5.6 of the *Code* serves very different purposes from those originally intended for s23.<sup>113</sup> Moreover the statutory contexts of application are very different: s5.6 of the *Code* is embedded in a far more articulate code of general principles than s.23 of the Griffith Code.

113 The two most significant differences, for present purposes are: (a) Section 23 of the Queensland Criminal Code determines the borderline between offences which require proof of advertent fault and offences of strict liability with respect to a circumstantial or result element: Section 5.6 determines the borderline between offences which require proof of intention and offences which require proof of recklessness with respect to the circumstantial or result element; (b) Section 23 of the Queensland Criminal Code is said to have no application to offences requiring proof of negligence: Section 5.6 applies to offences which require proof of negligence in the absence of contrary legislative provision. In particular, s5.6(1) presumes that negligence as to circumstances or results requires proof of an intentional act or omission.

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Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

5.6-B *If no fault element is specified for conduct, the prosecution must prove that the act, omission or state of affairs was intended:*

Since there are differences in the way s5.6 applies to acts, omissions and states of affairs, it is necessary to deal with each of them separately. There are two distinct contexts of application for the rule. Both are familiar in their common law applications. Conduct is to be distinguished from circumstances and conduct is to be distinguished from its results. The distinction between conduct, circumstances and results may be more or less strongly marked in the formulation of the criminal offence.

- *Act and Circumstance:* It is almost always possible to draw a distinction between an act and its accompanying circumstances, if one is minded to do so. The “intractable difficulties” (see box) encountered in common law characterisation are reduced though not entirely eliminated in the federal criminal law. In many offences, act and circumstance are distinguished and a fault element is specified for the circumstance. So, for example, in s136.1 *False or misleading statements in applications*, there are two offences which proscribe the *act* of *making a statement in an application* when accompanied by the *circumstance* that the statement is misleading. As a consequence of s5.6(1), each offence requires proof that the offender *intended* to make a statement in an application - a requirement which is unlikely to prove onerous in practice. Recourse to s5.6(2) is unnecessary, in this instance, since specific provisions is made for fault relating to the incriminating circumstance. The more serious of the two offences requires proof that the offender *knew* the statement to be misleading; the less serious requires proof of *recklessness*. The s5.6(1) requirement of proof of intention with respect to acts will have more demanding applications in the following offences:
  - (a) *CC 147.2 Threatening to cause harm to a Commonwealth public official:* The *act* which is proscribed is one of *mak(ing) a threat to cause...harm to...(a)...person*. Section 5.6(1), coupled with s5.2(1), requires proof that the offender *meant* to threaten another person. It is not sufficient to establish that a defendant realised that another person might feel threatened by conduct or even that they realised that the other would certainly feel threatened. If the conduct was not *meant* to bear the character of a threat, it will not fall within the prohibition. The structure of the prohibition makes it abundantly clear that the status of the person threatened is a circumstantial element of the offence.

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**5.6 Offences that do not specify fault elements**

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Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

- (b) *CC 132.8 – Dishonest taking or retention of property*: A person who “dishonestly takes...property belonging to a Commonwealth entity”, without consent, is guilty of an offence if the property is worth more than \$500 or if the deprivation would cause substantial disruption to Commonwealth activities. The offence is obviously meant to catch the dishonest “borrower” who cannot be convicted of theft because there is no intention to cause permanent deprivation. The requirements of taking without consent, property in excess of \$500 and likelihood of substantial disruption are all clearly circumstantial elements of the offence. Fault is not specified, so s5.6(2) requires proof of recklessness with respect to these elements. It is equally obvious that s5.6(1) requires proof that the *act* of “taking property” was intentional, in the sense that the person *meant* to take property. But does the requirement that the property “belong to a Commonwealth entity” count as circumstance or as a part of the offender’s act? An offence which requires proof that the offender *meant to take Commonwealth property* is narrower in its coverage than one which counts the ownership of the property as a mere circumstantial element of the offence. On the latter interpretation, s5.6(2) applies and the task of the prosecution is considerably lightened since it is sufficient to prove recklessness with respect to ownership of the property.

It is likely that a court would conclude, in this instance, that the conduct element of the offence does not extend beyond *taking property* and the fact that it is Commonwealth property which is taken is a “circumstance in which conduct occurs”: 4.1 *Physical elements*.

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THE “INTRACTABLE DIFFICULTIES” OF CHARACTERISING ACT AND CIRCUMSTANCE AT COMMON LAW: DRUG TRAFFICKING AND RAPE

In *He Kaw Teh*,<sup>114</sup> Brennan J referred to the “intractable difficulties” involved in distinguishing between acts and circumstances in common law interpretation of statutory prohibitions. His extended consideration of the issues involved in that case provided the basis for the central provisions in the *Code* on criminal responsibility. Section 233B(1)(b) of the Commonwealth *Customs Act* 1900 declares that any person who “imports...into Australia any prohibited imports...shall be guilty of an offence.” *He Kaw Teh* brought several kilograms of heroin into Australia in a false bottomed suitcase. The question at issue before the High Court was whether s233B(1)(b) required proof that he knew that there was heroin in the suitcase. For Brennan J, the first step was to determine whether the legislature had proscribed an act accompanied by a circumstance (*import a substance* (act) + (circumstance) *substance being heroin*) or the *act of importing heroin*. He concluded that importing heroin could not be split into act + circumstance: “the character of the act involved in the offence depends on the nature of the object imported”. It followed, in his view, that the prosecution must prove that *He Kaw Teh* intended “to do the whole act that it is prohibited”.<sup>115</sup>

In a surprising and extended analogy, Brennan J went on to speculate on the question whether absence of consent in rape was an essential or integral part of the act proscribed or a circumstance accompanying the act of intercourse. He suggested that the offence might be characterised as a proscription of an *act of intercourse*, when accompanied by the *circumstance* that consent was not given for the act. If it were characterised in that way, a court applying the common law might conclude that wise social policy required it to impose strict liability with respect to the circumstance. If, on the other hand, the offence were to be characterised as a prohibition of an indivisible *act of intercourse without consent*, it would follow that the prosecution must prove that the accused *intended intercourse without consent*. Brennan J left the characterisation issue unresolved.

114 *He Kaw Teh* (1985) 15 A Crim R 203, 238.

115 *Ibid* 247. The quotation is taken from the dissenting judgement of Dixon CJ in *Reynhoudt* (1962) 107 CLR 381. The conclusion that the prosecution must prove intention with respect to the act proscribed is based on the strongest of the three mens rea presumptions which Brennan J discovered in common law interpretive practice: *ibid*, 246. Strictly speaking, the analysis in terms of act and circumstance was unnecessary. Had Brennan J not concluded that the nature of the substance imported to be essential to the character of the act prohibited, he would still have held that the prosecution must prove that *He Kaw Teh* knew that the suitcase contained heroin: *ibid* 248.

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Though the judgement provides essential background for an understanding of the structure of the fault elements in Chapter 2, there are significant differences between Chapter 2 and the common law which dissipate the “intractable difficulties” which Brennan J described. In particular:

- (a) Chapter 2 makes the distinction between intention and recklessness explicit. Brennan J characteristically merges them in his judgement;
- (b) Imposition of strict or absolute liability no longer requires courts to divine legislative intention. These forms of liability will only be imposed when they are specified in the legislation which creates the offence: Ch 2, Division 6 - *Cases where fault elements are not required*.
- (c) And, finally, the stakes are lower. When characterisation of acts and circumstances - or acts and results - is necessary under the *Code*, the question at issue is whether s5.6(1) (intention) or s5.6(2) (recklessness) applies. This is a circumscribed choice between two varieties of advertent fault. It does not involve the significant policy choice faced by the High Court in *He Kaw Teh*, between liability without fault and liability for recklessness.

- ***Act and result:*** Characterisation of acts and results is inherently less problematic than characterisation of acts and circumstances. That is a consequence, in part, of the comparative rarity of criminal prohibitions against *causing* harm. Once outside the familiar territories occupied by offences involving injury to persons or property, imposition of criminal liability for causing harm is not common. Most criminal prohibitions are directed against activities which are considered harmful in themselves, activities which are intended to cause harm and activities which involve a risk of harm. In offences which do require proof of harm, prohibitions typically impose liability on an individual if their “conduct causes...harm”. This is the pattern followed in Division 71 – *Offences against United Nations and associated personnel*, which sets out a familiar range of offences against the person. Other offences avoid the reference to “conduct” and simply impose liability on offenders who “cause a loss...[or]...risk of loss”<sup>116</sup> There is no essential difference between the formulations. In these offences, liability requires proof of an intentional act which results in injury, damage or loss. That is a necessary but not a sufficient condition for liability. Liability for the result of that act requires proof of fault with respect to that result, unless the

<sup>116</sup> CC 135.1 *General dishonesty* s135.1(5) and 474.1 *General dishonesty with respect to a carriage provider*, s474.1(3).

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offence is one of strict or absolute liability.<sup>117</sup> Any intentional act or omission which substantially contributes to the proscribed result will do, so long as fault requirements with respect to the result are satisfied. Both of the s5.6 presumptions are likely to be engaged in such a case:

- (a) 5.6(1) requires proof of an intentional act or omission which causes the proscribed result;
- (b) 5.6(2) requires recklessness with respect to the proscribed result.

These two requirements are necessarily linked in a single inquiry. To prove recklessness with respect to a result, the prosecution must prove that the defendant was aware of a substantial risk that their act or omission would cause that result. One cannot determine what risks might have been realised by the defendant unless one first determines what the defendant did or omitted, and with what intention.<sup>118</sup>

So, for example, liability for an offence of causing injury recklessly in a case involving a gunshot wound may require a court to go back in time, tracing events in a causal regression, in order to find an intentional act which could provide a basis for liability. If the gunshot wound was not inflicted intentionally,<sup>119</sup> it may have resulted from a shot fired intentionally but meant to threaten rather than hit. If that possibility is closed the case may be one in which injury resulted from an intentional act of *pointing* the gun.<sup>120</sup> The South Australian Court of Criminal Appeal approached the limits of causal regression in *Hoskin*<sup>121</sup> when it accepted that injury to the victim resulted from her assailant's intentional act of tugging at the stock of a sawn off shotgun in an attempt to extricate it from the waistband of his trousers. The court remarked that none of the offender's earlier acts of buying

117 Offences of dangerous driving causing death or injury in existing state and territorial legislation typically imposes strict liability for fatal or injurious consequences. See *Jiminez* (1992) 59 A Crim R 1, discussed Leader-Elliott, "Cases in the High Court: *Jiminez*" ((1993) 17 Crim LJ 62.

118 So also when legislation displaces s5.6(2) and requires proof of negligence with respect to a result. D is negligent if that intentional act (or omission) involved a "great falling short in the standard of care...&c": 5.5 *Negligence*.

119 Of course, proof that the victim was shot intentionally would more than satisfy a requirement of reckless injury: s5.4(3).

120 Cases which discuss liability for injury or death resulting from *pointing* a gun or knife include: *Ryan* (1967) 121 CLR 205; *Demerian* (1988) 33 A Crim R 44, 454-456; *Hind & Harwood* (1995) 80 A Crim R 105; *Ainsworth* (1994) 76 A Crim R 127; *Bollen* (1999) 99 A Crim R 510; *Fitzgerald* [1999] QC 109. For a dissenting view, see "Case & Comment, *Fitzgerald*": (2000) 24 Crim LJ 383.

121 (1974) 9 SASR 531.

**DIVISION 5 - FAULT ELEMENTS**

**5.6 Offences that do not specify fault elements**

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

the gun, sawing off the barrel and stock and concealing what remained of it in his trouser leg could be said to have caused injury to his victims. The only limit on the search for an intentional act that will provide the basis for guilt is that it must be an act which can be said to have *caused* the harm.

#### COMMON LAW CHARACTERISATION OF ACT AND RESULT

Section 5.6 of the *Code* provides a statutory formulation of common law interpretive practice in construing statutory offences of causing harm. Common law practice is exemplified in *Nuri*.<sup>122</sup> The defendant struggled with a police officer after he was arrested for burglary. He attempted to seize the officer's loaded revolver from its holster. He had hold of the gun with both hands. The officer, who also held the gun with both hands, managed to keep it in its holster. He tried to keep one hand over the trigger guard to prevent an accidental discharge. A passing taxidriver and a second police officer eventually subdued Nuri who was charged under s22 of the Victorian *Crimes Act 1958* with recklessly endangering life.<sup>123</sup> On these facts, it was highly unlikely that the prosecution could establish that the defendant's act of seizing the officer's revolver was done with the intention of causing death or serious injury. The Court of Criminal Appeal distinguished the fault elements required to establish guilt on these facts:

- (a) *intention* with respect to the act of attempting to wrest control of a loaded gun from the officer;
- (b) *recklessness* with respect to the risk that the death might result from the defendant's act of seizing the revolver and attempting to wrest it from the officer.<sup>124</sup>

If the struggle for possession of the revolver had resulted in injury or death, the same two step analysis would be necessary in order to determine whether the defendant was guilty of murder or recklessly causing serious harm

The same analysis applies whether the offence in question requires proof of intention, knowledge, recklessness or negligence with respect to the result. It is worth emphasis that the *Code* assumes that liability for negligence will always require proof of some intentional act (or omission) on the part of the offender. Displacement of that assumption requires specific provision.

<sup>122</sup> (1989) 49 A Crim R 253

<sup>123</sup> The offence is virtually identical to those in *MCC - Ch5: Offences Against the Person*, s5.1.25

<sup>124</sup> Accord, *Hoskin* (1974) 9 SASR 531.

**DIVISION 5 - FAULT ELEMENTS**

**5.6 Offences that do not specify fault elements**

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

*5.6-C An omission which is a physical element of an offence must be intentional:*

Legislation imposing a duty may limit liability for a breach to the case of intentional omission. Part 5 of the Commonwealth *Trade Practices Act 1974*, which forbids misleading or deceptive conduct in trade or commerce makes special provision for omissions. Deception may be accomplished by “refraining, otherwise than inadvertently”<sup>125</sup> from providing truthful information. That provision merely articulates the s.5.6(1) requirement of intention. Frequently, however, legislatures will seek to impose liability for *inadvertent* omissions. Since s5.6(1) applies when legislation is silent on the issue of fault requiring proof of recklessness, specific provision must be made to impose liability for inadvertence.

*5.6-D States of affairs which are physical elements of an offence must be intentional:*

Offences which impose liability for a state of affairs relating to the offender are not uncommon. The defining feature of these offences is that liability is imposed on a person for *being* in a forbidden state or *being* in a forbidden relationship to a thing or person. Possession offences provide the most familiar examples.<sup>126</sup> Crimes of being in possession of a thing, with or without some further intention, are ubiquitous in federal, state and territorial law. The *Code* offence in 132.7 *Going equipped for theft or a property offence*, is typical of many which base liability on an ulterior intention coupled with possession of some unspecified object.<sup>127</sup> So far as the physical element of the offences is concerned, possession of any article at all is sufficient. In offences of this kind, where guilt depends on the intended use of the object, s5.6(1) adds nothing to the fault requirements specified in the offence. The section is likely to have its primary field of application in the case of offences in which penalties are imposed for possession of a thing, without any requirement of ulterior intention as to its use.

Prior to the enactment of the *Code*, courts were frequently required to determine whether an inscrutable prohibition of possession required proof of fault.

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<sup>125</sup> *Trade Practices Act 1974* (Cth) s4(2).

<sup>126</sup> *He Kaw Teh* (1985) 15 A Crim R 203, 233 per Brennan J: “Having something in possession is not easily seen as an act or omission; it is more easily seen as a state of affairs”.

<sup>127</sup> For other examples, see MCC Ch4: *Damage and Computer Offences*, ss4.1.10 and summary of offences in Part 4.2, *Computer Offences*.

**DIVISION 5 - FAULT ELEMENTS**

**5.6 Offences that do not specify fault elements**

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

The *Code* requirement of intention, as a presumptive fault element for conduct, bars liability for unwitting possession, in the absence of legislative provision to the contrary.<sup>128</sup> The problem of characterisation, encountered when liability is based on an act or omission, is unlikely to arise in offences which prohibit a state of affairs. Human behaviour can usually be dissected and analysed in various configurations of act, omission, circumstance and result but a “state of affairs” appears to be a unitary conception. If the legislature has specified a state of affairs and imposed criminal liability on a person by virtue of their relationship to that state of affairs, each of the factors which go to make up the state of affairs is equally essential, equally integral to its existence. Suppose a legislature prohibits possession of a bird of a protected species. In the absence of any provision which excludes s5.6(1), the offence would be taken to require proof that the offender intended to possess a bird of that species. Of course it is possible to make an explicit distinction between the state of affairs and an accompanying circumstance. So, for example, a legislature might create a special offence of being in possession of stolen property. This notional offence might distinguish two physical elements of the offence: (a) the state of affairs of being in possession of property and (b) the circumstance that the property was stolen. Once the distinction is made, the fault elements for act and circumstance must be distinguished. In the absence of specific provisions which exclude fault, s5.6(2) requires proof of recklessness with respect to the circumstance.

#### INTENTION, POSSESSION AND STRICT LIABILITY FOR A STATE OF AFFAIRS AT COMMON LAW

Section 233B(1)(c) of the Commonwealth *Customs Act* 1901 imposes liability on a person who “has in his possession...any prohibited imports”. In *He Kaw Teh* (1985) 15 A Crim R 203 a majority of the High Court accepted the view that a conviction for possession of a prohibited object requires proof of an intention to exercise control over the object. The prosecution was required to prove that He Kaw Teh knew there was *something* in the false bottom of his suitcase. The

<sup>128</sup> The fault element appropriate to possession is intention, rather than knowledge. See, for example, the decision in the High Court in *Saad* (1987) 29 A Crim R 20. Of course, an intention to possess an object of type A is often inferred from the fact that the defendant was in control of the object and knew that it was a type A object. It does not follow, however, that the fault element is really knowledge. For it is also possible to infer an intention to possess an object of type A from the fact that the defendant was in control of the object and believed it possible that it was an object of type A. Consider the case of the amateur drug chemist who succeeds, against the odds, in manufacturing amphetamines. The chemist possesses the drug intentionally, as soon as manufacture is complete, though at that point utterly uncertain whether or not the experiment succeeded.

**DIVISION 5 - FAULT ELEMENTS**

**5.6 Offences that do not specify fault elements**

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Court divided, however, on the further question whether the prosecution was required to prove that He Kaw Teh knew that the object in the concealed compartment was a narcotic drug.<sup>129</sup> The question whether guilt required proof of knowledge of the nature of the substance was never resolved. For some members of the court, the possession offence in s233B(1)(c) required fault with respect to the existence of the thing, but imposed strict liability with respect to its nature. If this was the correct view of the offence, a courier who brought heroin into Australia in a false bottomed suitcase, in the mistaken belief that the false compartment contained some other kind of contraband - watches, weapons or whisky - would be guilty under s233B(1)(c) of possessing heroin. Since the courier was bent on committing another offence, the mistaken belief, however reasonable, would not bar conviction for possession of heroin.

The *Code* would resolve this impasse by requiring the legislature to make an explicit choice to impose liability without fault, if that is the preferred policy. In the absence of specific provision imposing strict or absolute liability, s5.6(1) requires proof that the offender knew the nature of the substance, before conviction for possession.

*5.6-E If legislation is silent on the issue of fault, recklessness is the fault element for a circumstantial element of an offence:*

Though s5.6(2) creates a statutory presumption requiring proof of recklessness with respect to circumstances and results, many federal offences make the fault requirements explicit in their formulation of the requirements for liability. This is particularly apparent in *Code* offences like those in Ch 7, Part 7.2 - *Theft and other property offences*. Many require proof of “knowledge or belief” with respect to circumstantial elements of the offence. Section 132.1 *Receiving*, is typical: the offence is committed when the offender “dishonestly receives stolen property, knowing or believing the property to be stolen”. There are occasional instances on reliance on the presumption in the *Code*,<sup>130</sup> but the majority of offences make explicit distinctions between acts and circumstantial elements and specify fault

129 *He Kaw Teh* (1985) 15 A Crim R 203 at 213,218 per Gibbs CJ, with whom Mason J agreed, (unnecessary to decide); at 248-251 per Brennan J (prosecution must prove that D knew the substance to be a narcotic drug); at 260-261 per Dawson J (prosecution is not required to prove that D knew the substance to be a narcotic drug). Wilson J dissented on the issue of possession.

130 See, for example, the minor offences in CC 132.8 *Dishonest taking or retention of property*, which are limited in their application to property of a certain value or character. Since fault is not specified for these circumstances, s5.6(2) implies a requirement of recklessness. So also in the circumstantial elements of the offences in CC 142.1 *Corrupting benefits given to, or received by, a Commonwealth public official*.

**DIVISION 5 - FAULT ELEMENTS**

**5.6 Offences that do not specify fault elements**

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

elements, so excluding the application of s5.6(2). Among federal offences outside the *Code*, specification of fault elements may be less common, so increasing the number of occasions when recourse to s5.6 is necessary.

*5.6-F If legislation is silent on the issue of fault, recklessness is the fault element for a result which is a physical element of an offence:*

In most *Code* offences which impose liability for causing harm, resort to s5.6(2) is unnecessary as fault elements for the offences have been specified. The provisions in *CC - Division 71 - Offences against United Nations and associated personnel* and *Ch 7 - Division 147 Causing harm to Commonwealth officials* are typical. The concluding comment to the preceding paragraph is equally appropriate here. Federal offences outside the *Code* may rely more heavily on s5.6(2) to supply the missing fault element for the incriminating result.

*5.6-G Proof of intention or knowledge will satisfy a requirement of recklessness:*

This rule, which forms part of the s5.4 definition of recklessness, simply expresses the principle that the more serious forms of criminal fault include the less serious. In an offence requiring a fault element of recklessness, as a consequence of specific provision or statutory implication from s5.6(2), proof that the defendant intended the result or knew that it would certainly occur, displaces the need to prove recklessness. It follows that the question whether the conduct was *justified* will not arise, if the result was known for certain or intended. There will remain, of course, the possibility of reliance on one of the defences in Ch2: Part 2.3 - *Circumstances in which there is no criminal responsibility*.

**DIVISION 6 - CASES WHERE FAULT ELEMENTS ARE NOT REQUIRED**

**6.1 Strict liability**

- (1) **If a law that creates an offence provides that the offence is an offence of strict liability:**
  - (a) **there are no fault elements for any of the physical elements of the offence; and**
  - (b) **the defence of mistake of fact under section 9.2 is available.**
- (2) **If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:**
  - (a) **there are no fault elements for that physical element; and**
  - (b) **the defence of mistake of fact under section 9.2 is available in relation to that physical element.**
- (3) **The existence of strict liability does not make any other defence unavailable.**

**6.2 Absolute liability**

- (1) **If a law that creates an offence provides that the offence is an offence of absolute liability:**
  - (a) **there are no fault elements for any of the physical elements of the offence; and**
  - (b) **the defence of mistake of fact under section 9.2 is unavailable.**
- (2) **If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:**
  - (a) **there are no fault elements for that physical element; and**
  - (b) **the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.**
- (3) **The existence of absolute liability does not make any other defence unavailable.**

## DIVISION 6 - CASES WHERE FAULT ELEMENTS ARE NOT REQUIRED

The *Code* recognises two forms of liability without fault. Liability is *strict* with respect to a particular physical element of an offence if it is unnecessary to prove fault, but a defence of reasonable mistake of fact with respect to that element bars liability for the offence: 9.2 *Mistake of fact (strict liability)*. Liability is *absolute* with respect to that element when the prosecution is not required to prove fault and reasonable mistake of fact is no excuse. Terminology has varied in descriptions of these forms of liability. Chapter 2 resolves the terminological issue by stipulation.<sup>131</sup> Liability is “strict” to the extent that the prosecution is absolved from the obligation to prove intention, knowledge, recklessness or negligence with respect to one or more elements of the offence. The defence of reasonable mistake of fact remains open, as do the other general defences “Absolute” liability is an accepted and conventional misnomer. Proof of fault is unnecessary of course. But apart from the defence of reasonable mistake of fact, which is barred, the full range of *Code* defences is available when liability is absolute.

Section 6.1 distinguishes between an *offence of strict liability* and offences in which strict liability is imposed with respect to some, though not all, physical elements. The same distinction appears in s6.2, which distinguishes between an *offence of absolute liability* and an offence which imposes absolute liability for some, though not all, physical elements. Though it has been common to ignore these distinctions in general references to “offences of strict liability” and “offences of absolute liability” there are comparatively few offences which fit the first of these descriptions and hardly any which fit the second. It is far more common to encounter offences which dispense with fault requirements for some, but not all, physical elements. Section 5.6(1) expresses a fundamental principle that the act, omission or state of affairs which lies at the core of the offence must be intentional. Most offences require proof that the offender *did* something and did it intentionally, though strict or absolute liability may be imposed for circumstances or results of that act of which the offender was completely and perhaps excusably ignorant. When Commonwealth legislation dispenses entirely with any requirement of proof of fault for each element of the offence, so creating an *offence of strict or absolute liability*, it does so by explicit provision.

<sup>131</sup> The *Code* terminology of strict and absolute liability reflects usage established in *He Kaw Teh* (1985) 15 A Crim R 203 at 209-210 per Gibbs CJ, 252-253 per Dawson J. See also, *Zecevic* (1987) (1987) 162 CLR 645., *Yorke v Lucas* (1985) 158 CLR 661. Compare B Fisse, *Howard's Criminal Law* (1990) which continued the practice of earlier editions in which strict and absolute liability are treated as synonymous terms. But see: P Gillies, *Criminal Law* (4ed 1997) 80ff, which adopts modern usage.

### DIVISION 6 - CASES WHERE FAULT ELEMENTS ARE NOT REQUIRED

#### 6.1 **Strict liability**

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

#### 6.2 **Absolute liability**

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

## 6.1 Strict liability

Strict liability is a mode of criminal responsibility defined by the absence of any requirement of fault, coupled with the availability of the defence of reasonable mistake of fact, in addition to the general defences. The *Code* implicitly rejects attempts to rationalise strict liability as a form of liability for negligence, which might require the prosecution to prove a generalised absence of care or due diligence.<sup>132</sup> The defining features of strict liability are the absence of any requirement of fault, whether for all or some of the physical elements of an offence, coupled with the provision of the defence of reasonable mistake of fact. Most of the general defences in Chapter 2, Part 2.3 - *Circumstances in which there is no criminal liability* are also available.<sup>133</sup>

*6.1-A Specific provision is necessary before strict liability can be imposed with respect to physical elements of an offence.*

When liability is strict with respect to an element of an offence, the prosecution is not required to prove intention, knowledge, recklessness or negligence with respect to that element. An offence does not impose strict liability unless the “law that creates the offence provides” that liability is strict. This requirement of express provision is reinforced by 5.6 *Offences that do not specify fault elements*, which requires proof of fault when the law creating an offence fails to specify fault elements.

*6.1-B Reasonable mistake of fact is a defence when liability is strict:*

Since strict liability is defined by the range of possible defences, and the defence of reasonable mistake of fact in particular, rather than any positive requirement of fault, further discussion is deferred to: 9.2 *Mistake of fact (strict liability)*.

## 6.2 Absolute liability

Absolute liability and strict liability are alike in the absence of any requirement that the prosecution prove intention, knowledge, recklessness, negligence or any other variety of fault. The sole difference between these modes of criminal responsibility is that absolute liability does not even permit a defence of reasonable mistake of fact. Absolute liability is comparatively

<sup>132</sup> Compare *He Kaw Teh* (1985) 15 A Crim R 203 at 243-244 per Brennan J and at 253 per Dawson JJ. For the contrary view, see B Fisse, *ibid*, 512: “for practical purposes, liability to conviction subject to a defence of reasonable mistake of fact may be equated with liability based on negligence.” See, in addition, *ibid*, 504, 522, 616 on “due diligence” or “reasonable precautions”. Compare *Wilson* (1992) 61 A Crim R 63 at 66-67, per Mason CJ, Toohey, Gaudron and McHugh JJ on the development of negligence as a fault element in manslaughter.

<sup>133</sup> Some of the provisions in Part 2.3 – *Circumstances In Which There Is No Criminal Liability* are not, in fact “defences”. See, in particular: 9.1 *Mistake or ignorance of fact* and 9.5 *Claim of right*. When liability is strict or absolute, the application of these “defences” will be barred or restricted.

### DIVISION 6 - CASES WHERE FAULT ELEMENTS ARE NOT REQUIRED

#### 6.1 **Strict liability**

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

#### 6.2 **Absolute liability**

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

uncommon in state and territorial law. Instances commonly involve displacement of the common law defence of reasonable mistake of fact by specialised statutory defences which may narrow the scope of the common law defence or place the burden of proof on the accused.<sup>134</sup> In Commonwealth law the imposition of absolute liability, though frequently encountered, is usually restricted to those elements of offences which mark the constitutional or conventional limits of Commonwealth criminal jurisdiction. So, for example, *CC 147.2 - Threatening to cause harm to a Commonwealth public official*, requires proof of a threat to a person whom the offender knew to be a public official. Liability is absolute, however, with respect to the circumstance that the official is employed by the Commonwealth, rather than a state or territory. It may often be the case that offenders against provisions of this kind act in complete ignorance of the fact that their conduct causes injury to Commonwealth rather than state or territorial interests. But ignorance or mistake on this score, however rational or however common, ordinary, expected or “reasonable”, is no excuse at all. The fact that the victim of criminal conduct was a Commonwealth rather than state or territorial official marks a jurisdictional boundary; it is not a distinction which bears on culpability.

*6.2-A Specific provision is necessary before absolute liability is imposed with respect to physical elements of an offence.*

When liability is absolute with respect to an element of an offence, the prosecution is not required to prove intention, knowledge, recklessness or negligence with respect to that element. Liability is not absolute unless the “law that creates the offence provides” that liability is absolute: s6.2(1), (2). This requirement of express provision is reinforced by 5.6 *Offences that do not specify fault elements*, which requires proof of fault when the law creating an offence fails to specify fault elements.

*6.2-B Reasonable mistake of fact is not a defence when liability is absolute:*

Liability without fault and without even the possibility of a defence of reasonable mistake of fact is occasionally imposed when legislatures seek the deterrent effect of automatic penalties for breach of statutory offences dealing with safety hazards. Sometimes absolute liability is imposed in legislation which then goes on to provide a set of specialised defences, which usually cast the burden of proof on the defendant.<sup>135</sup> In Commonwealth law, provisions which impose absolute liability usually do so with respect to a

<sup>134</sup> See, for example, *Allen v United Carpet Mills PL* (1989) VR 323; *Holloway v Gilport PL* (1995) 79 A Crim R 76. For references on defences of “due diligence” which often accompany the imposition of “absolute liability”, see S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 351-352.

<sup>135</sup> For an instance in pre-Code law, see *Chief of the General Staff v Stuart* (1995) A Crim R 529 (defence of “reasonable steps”).

### DIVISION 6 - CASES WHERE FAULT ELEMENTS ARE NOT REQUIRED

#### 6.1 **Strict liability**

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

#### 6.2 **Absolute liability**

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

physical element which marks a jurisdictional boundary between matters of Commonwealth and state or territorial competence. There is no necessity or justification for a requirement of proof of fault or the provision of a defence of reasonable mistake with respect to matters of this kind.

**Part 2.3 - Circumstances in which there is no criminal responsibility**

Division 7—Circumstances involving lack of capacity

- 7.1 Children under 10
- 7.2 Children over 10 under 14
- 7.3 Mental impairment

Division 8—Intoxication

- 8.1 Definition - self-induced intoxication
- 8.2 Intoxication (offences involving basic intent)
- 8.3 Intoxication (negligence as fault element)
- 8.4 Intoxication (relevance to defences)
- 8.5 Involuntary intoxication

Division 9—Circumstances involving mistake or ignorance

- 9.1 Mistake or ignorance of fact (fault elements other than negligence)
- 9.2 Mistake of fact (strict liability)
- 9.3 Mistake or ignorance of statute law
- 9.4 Mistake or ignorance of subordinate legislation
- 9.5 Claim of right

Division 10—Circumstances involving external factors

- 10.1 Intervening conduct or event
- 10.2 Duress
- 10.3 Sudden or extraordinary emergency
- 10.4 Self-defence
- 10.5 Lawful authority

## **PART 2.3 - CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY**

The “circumstances in which there is no criminal liability” are collectively described in the *Code* as “defences”.<sup>136</sup> These include all the defences of general application, ranging from absence of criminal capacity to duress and extraordinary emergency. Defences which are limited in their application to particular areas of law, do not appear in Chapter 2. Self defence takes its place in Chapter 2 as a defence of general application because it is not limited in its applications to offences against the person: 10.4 *Self Defence*. It extends to excuse the commission of offences against property when the offence was prompted by a perceived necessity for self defence.<sup>137</sup> Common to all the general defences is the requirement that the defendant bear an evidential burden: 13.3 *Evidential burden of proof - defence*. If the defendant cannot produce evidence in support of the defence and nothing appears in the prosecution case to support it, the court will disregard any possible application of the defence. A defendant who seeks to be excused on the ground of mental impairment bears the additional burden of persuading the court affirmatively, on the balance of probabilities, that mental impairment excuses the offence.<sup>138</sup>

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136 See “Note” to Ch 2, Part 2.3 and s13.3 - *Evidential burden of proof - defence*.

137 Discussed *MCC*, Ch 4: *Damage and Computer Offences*, Report (2001), 83-85.

138 Ch 2, s13.3(2).

**DIVISION 7—CIRCUMSTANCES INVOLVING LACK OF CAPACITY**

**7.1 Children under 10**

A child under 10 years old is not criminally responsible for an offence.

**7.2 Children over 10 but under 14**

- (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.
- (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.

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## **DIVISION 7 - CIRCUMSTANCES INVOLVING LACK OF CAPACITY**

### **7.1 Children under 10**

Section 7.1 states that a child under 10 is not criminally responsible for an offence. This is now the standard in every State and Territory.

### **7.2 Children over 10 but under 14**

Subsection 7.2(1) provides that a child aged 10 years or more but under 14 years of age can only be criminally responsible for an offence if the child knows that their conduct is wrong. Subsection 7.2(2) provides that the prosecution has to establish awareness of wrongdoing beyond a reasonable doubt. This codifies existing law.

DIVISION 7 - CIRCUMSTANCES INVOLVING LACK OF CAPACITY

7.3 Mental impairment

- (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:
  - (a) the person did not know the nature and quality of the conduct; or
  - (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
  - (c) the person was unable to control the conduct.
- (2) The question whether the person was suffering from a mental impairment is one of fact.
- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.
- (4) The prosecution can only rely on this section if the court gives leave.
- (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
- (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
- (7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
- (8) In this section:

*mental impairment* includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
- (9) The reference in subsection (8) to *mental illness* is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

### 7.3 Mental impairment<sup>139</sup>

A person is not criminally responsible for the commission of an offence if, at the time the offence was committed, the person suffered from a mental impairment which precluded criminal responsibility.

*Mental impairment and criminal responsibility:* The relationship between criminal responsibility and mental impairment is not left at large. Mental impairment has no effect on culpability unless, as a consequence of the impairment, the person:

- did not know the nature and quality of the conduct constituting the offence; or
- did not know that the conduct was wrong; or
- the person was unable to control their conduct.

Section 7.3(1) is based on the principles derived from the rules propounded by the House of Lords in *McNaghten*,<sup>140</sup> in 1843. The McNaghten rules have been extended, however, by the provision of an excuse for a person whose conduct was beyond their control, as a consequence of mental impairment. The first of the tests for determining criminal responsibility in s7.3(1) paraphrases the first of the *McNaghten* rules. Unlike some earlier Australian codifications of the first McNaghten rule, which require proof that insanity deprived the defendant of the *capacity* for knowledge,<sup>141</sup> the *Code* simply requires proof that the defendant did not know the nature and quality of their conduct. The second of the tests amplifies the original *McNaghten* requirement that the mental impairment deprive the defendant of knowledge that the conduct was wrong. A defendant who knows that reasonable people consider the conduct to be wrong is taken to know that it is wrong, no matter what the defendant's personal convictions or personal morality on that score.<sup>142</sup> However, a person who is unable to reason with a moderate degree of sense and composure cannot be said to know how others might judge the defendant's conduct. The *Code* adopts the formulation of the test used by Sir Owen Dixon in his jury direction in *Porter*, in 1933.<sup>143</sup> The extension of the defence to include those who are

139 Discussion of 7.3 *Mental Impairment* is limited to a brief account of the ways in which the Code provisions depart from existing law or of choices made in selecting among alternative and competing models of the defence. S Bronitt and B McSherry, *Principles of Criminal Law* (2001), Ch4 "Mental State Defences" present an invaluable general account of current variations among Australian jurisdictions. The supporting arguments for the Chapter 2 formulation of the defence are canvassed in some detail in *MCC*, Chapter 2: *General Principles of Criminal Responsibility* 35-49.

140 (1843) 10 Cl & F 200; 8 ER 718.

141 S Bronitt and B McSherry, *Principles of Criminal Law* (2001), 201-202

142 See the comprehensive review of authorities in *Chaulk* (1991) 62 CCC (3d) 193.

143 (1933) 55 CLR 182; approved *Stapleton* (1952) 86 CLR 358. The formulation has also been adopted in the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) s20(1)(b).

DIVISION 7 - CIRCUMSTANCES INVOLVING LACK OF CAPACITY

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- (2) The question whether the person was suffering from a mental impairment is one of fact.
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- (4) The prosecution can only rely on this section if the court gives leave.
- (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
- (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
- (7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
- (8) In this section:

*mental impairment* includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
- (9) The reference in subsection (8) to *mental illness* is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

unable to reason with a moderate degree of sense and composure about right and wrong does not go so far as to excuse those who *know* their conduct to be wrong but lack any feeling, understanding or moral appreciation of its wrongfulness.<sup>144</sup> The third of the tests, which has no common law counterpart, allows mental impairment to excuse when the effect of the impairment is that the defendant cannot control their conduct. Here Chapter 2 follows the majority of Australian jurisdictions which have enacted similar extensions of the McNaghten Rules.<sup>145</sup>

The McNaghten Rules require proof of a “disease of the mind” as a foundation for the defence. Common law and statute have widened the applications of the concept of “disease of the mind” and the *Code* provision incorporates these developments in its definition of “mental impairment”, which includes senility, intellectual disability, mental illness, brain damage and severe personality disorder: s7.3(8). The *Code* goes beyond Australian law in other jurisdictions in recognising the possibility that a mental impairment defence can be based on evidence of severe personality disorder.<sup>146</sup> The concluding provision, which defines “mental illness”, adopts a common law formula derived from the judgement of King CJ in *Radford*.<sup>147</sup>

*The prosecution may allege mental impairment as an alternative to guilt:* In modern caselaw on mental state defences, mental impairment is frequently alleged by the prosecution in answer to a defendant’s denial of fault or a defence of automatism or other claim of involuntariness.<sup>148</sup> In this respect, mental impairment stands apart from the other defences. A defendant who escapes conviction because of mental impairment gains no more than a qualified acquittal and remains liable to the imposition of custodial or other controls. The *Code* adopts and extends the common law, allowing the prosecution to seek a special verdict of acquittal on the ground of mental impairment with the leave of the court: s7.3(4). Since the special verdict may be sought by the prosecution and resisted by the accused, it is necessary for the court to reach an affirmative conclusion that mental impairment is the only ground for acquittal before the special verdict can be returned: s7.3(5). The question whether the defendant’s mental state at the time of the offence is one of mental impairment is a question of fact for the court: s7.3(2).

*A mental impairment defence must be proved on the balance of probabilities:* The burden of persuasion rests on the proponent of the defence, whether it be the defendant or prosecution. The standard of proof is the same, whether

144 *Willgoss* (1960) 105 CLR 295.

145 S Bronitt and B McSherry, *Principles of Criminal Law* (2001), 201-203.

146 *Ibid* 207-208.

147 (1985) 42 SASR 266, 274. See also, *Falconer* (1990) 171 CLR 30, 53-4 on the question whether the defendant’s mind was healthy or unhealthy.

148 S Bronitt and B McSherry, *Principles of Criminal Law* (2001), 229-238.

DIVISION 7 - CIRCUMSTANCES INVOLVING LACK OF CAPACITY

7.3 Mental impairment

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- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.
- (4) The prosecution can only rely on this section if the court gives leave.
- (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
- (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
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*mental impairment* includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
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the defendant or prosecution seeks the special verdict: s7.3(3). The rule takes the traditional form of a “presumption” that the defendant was not mentally impaired at the time of the offence. So far as the prosecution is concerned, the proof provisions of 7.3 *Mental impairment* are an exception to the proof provisions in Part 2.6 – *Proof of Criminal Responsibility*.<sup>149</sup>

*Priority of defences:* The remaining provisions on mental impairment are meant to ensure that defendants who were mentally impaired at the time of the offence cannot avoid the special verdict by relying on evidence of their mental impairment to deny a fault element. A defendant who seeks to deny that their conduct was voluntary cannot do so if the only ground for denial is evidence of mental impairment: 4.2 *Voluntariness*; s7.3(6). Once again, the *Code* formulation follows Australian common law.<sup>150</sup> The *Code* departs from the common law, however, by providing that evidence of mental impairment cannot provide a basis for a denial of intention or other fault elements.<sup>151</sup> So, for example, a mentally ill defendant who killed in consequence of a delusion that their victim was a ghost or zombie would not be able to escape liability on the ground that there was no intention to kill a person: s7.3(7).<sup>152</sup> Application of these rules, which deprive the defendant of the chance of an unqualified acquittal, requires the trial judge to determine whether the evidence excludes any possibility that the defendant was mentally sound at the time of the offence. If it is possible that a reasonable jury might not be satisfied, on the balance of probabilities, that the defendant’s mental state was one of impairment, as defined in the *Code*, evidence of that mental state is admissible to support a denial of voluntariness or fault: s7.3(3).

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149 See 13.1 *Legal burden of proof – prosecution* and 13.2 *Standard of Proof – prosecution*: the latter provision makes explicit reference to the need for exceptions to the standard of proof required of the prosecution.

150 S Bronitt & B McSherry, *ibid* 229-227; *Hawkins* (1994) 179 CLR 500; discussed, Leader-Elliott, “Cases in the High Court of Australia: *Hawkins*” (1994) 18 Crim LJ 347.

151 *Ibid*.

152 The rule about insane delusions derives from the original *McNaghten* formulation: discussed, S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 213-218.

DIVISION 8 - INTOXICATION

**8.1 Definition—self-induced intoxication**

For the purposes of this Division, intoxication is self-induced unless it came about:

- (a) involuntarily; or
- (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

**8.2 Intoxication (offences involving basic intent)**

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous *occasion*.

**8.3 Intoxication (negligence as fault element)**

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

## DIVISION 8 - INTOXICATION

To avoid the irritation of constant qualification, references to “intoxication” in this commentary are restricted to intoxication by alcohol, unless otherwise specified. Most cases in which intoxication bears on criminal responsibility involve alcohol or drugs which are substantially similar to alcohol in their effects on cognition and physical co-ordination.<sup>153</sup> The impairments of cognition and physical co-ordination caused by alcohol are generally familiar and, indeed, are not normally an appropriate subject for expert evidence. So too are the disinhibiting effects of alcohol on levels of aggression and foolhardiness. When the effects of other and less familiar drugs are in issue, expert evidence is essential if the effect of intoxication on criminal responsibility is to be considered by a jury.

There is a variety of ways in which intoxication can have a bearing on the attribution of criminal responsibility. The issue is most likely to arise in charges involving injury to the person or damage to property. In general, evidence of intoxication tends to reinforce the case for the prosecution. If the defendant was under the influence of alcohol, the most likely inference is that injury was inflicted intentionally or damage done intentionally as a consequence of drunken aggression.<sup>154</sup> When offences of negligence or strict liability are charged, evidence of intoxication by any substance that impairs cognition or co-ordination will similarly tend to reinforce the prosecution case. But intoxication also impairs the capacities to perceive and interpret reality and to coordinate actions to intended objectives. These incapacities can have an obvious bearing on criminal responsibility when the prosecution must prove that the defendant was aware of a risk or intended a consequence. Contrary to appearances, a drunk who takes the wrong umbrella when leaving a restaurant may not have given way to a sudden impulse to steal a better umbrella; the taking may have been a simple mistake, the drunk having lost the capacity for fine distinctions of colour or quality. In cases of extreme intoxication, Australian courts have taken the view that the person can be deprived of the capacity to act voluntarily.

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<sup>153</sup> But see *Viro* (1978) 18 ALR 257 for an unusual instance of reliance on heroin intoxication.

<sup>154</sup> The potential benefits to the prosecution from attempts to base a defence or denial of liability on evidence of intoxication are frequently remarked. See, for example: *Ainsworth* (1994) 76 A Crim R 127, 138-139, per Gleeson CJ.

DIVISION 8 - INTOXICATION

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- (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

8.2 **Intoxication (offences involving basic intent)**

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous *occasion*.

8.3 **Intoxication (negligence as fault element)**

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

Intoxication is usually a voluntary indulgence undertaken for pleasure, recreation or relief from pain or care. Since the condition is voluntary, few jurisdictions are prepared to allow incapacity resulting from intoxication to excuse without qualification. There is no uniformity – there is indeed a rich and confusing variety – among the ways in which states and territories limit pleas of incapacity voluntarily incurred as a consequence of intoxication.<sup>155</sup> The *Code* imposes relatively few limits on the purposes for which prosecution and defence may rely on evidence of intoxication. In Federal jurisdiction, where most offences will not involve personal violence or the cruder varieties of crime against property, the issue will not arise often.

The most significant of the privative provisions in the *Code* is the rule, discussed earlier, that evidence of self induced intoxication cannot be considered when a defendant claims that conduct was involuntary: 4.2 *Voluntariness*. That prohibition applies no matter what the offence charged. The privative rules in Division 8 - *Intoxication* are far more limited in their applications. The general principle is that evidence of intoxication, whether or not self induced, will be considered whenever it is relevant to the determination of intention, knowledge, recklessness, negligence or other fault elements. The exceptions to the general principle take the same form as the voluntariness rule. The *Code* declares that evidence of self induced intoxication “cannot be considered,” in certain circumstances, when intention<sup>156</sup> or belief<sup>157</sup> is in issue. It is important to notice that this exclusionary rule, which is limited in its possible applications, restricts prosecution and defence alike.

If the state of intoxication was not self-induced, as for example when the defendant was tricked into consuming an intoxicating substance, the rules which prevent consideration of evidence of intoxication cease to apply. Chapter 2 goes even further, however, when intoxication is not self-induced, allowing a defence of “involuntary intoxication”. A person whose state of intoxication was not self-induced must be acquitted if the offence with which they are charged is a result of that state of intoxication.

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155 S Bronitt & B McSherry, *Principles of Criminal Law*(2001) 238-254.

156 s8.2(1).

157 s8.4(4).

**DIVISION 8 - INTOXICATION**

**8.1 Definition—self-induced intoxication**

For the purposes of this Division, intoxication is self-induced unless it came about:

- (a) involuntarily; or
- (d) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

### 8.1 Definition - self-induced intoxication

The *Code* distinguishes between self-induced intoxication and “involuntary” intoxication.<sup>158</sup> The distinction provides the essential foundation for a set of rules which require courts either to exclude evidence of intoxication or impose standards of reasonable and sober conduct when determining criminal liability. So, for example, liability for negligence is determined by reference to the standard of a “reasonable person who is not intoxicated”: s8.3(1). These privative rules and objective standards only apply, however, to self-induced intoxication. The distinction between self-induced and involuntary intoxication also provides the basis for a defence, which has no common law counterpart: s8.5 *Involuntary intoxication*.

*8.1-A Intoxication is not self induced if it is involuntary or a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.*<sup>159</sup>

The catalogue of conditions which can defeat an attribution of self induced intoxication is exhaustive but generous in its amplitude. Apart from the reference to involuntary intoxication, the catalogue bears an obvious resemblance to some of the defences in Part 2.3 - *Circumstances in which there is no criminal liability*. It would be unwise to make too much of the resemblance. It is probably safe to conclude that the reference to “involuntary” intoxication, in s8.1, can be elucidated by reference to the criteria for “voluntary” action in s4.2. It is quite clear, however, that the question whether intoxication was induced by *duress* or *sudden and extraordinary emergency* will be governed by quite different criteria from those which determine the application of the defences of duress and sudden or extraordinary emergency in ss10.3 and 10.4. The question at issue here is not whether an accused was compelled to commit an offence. It is whether duress or an emergency compelled or induced the defendant to become intoxicated. For similar reasons, the complexities of the s9.2 *Reasonable mistake of fact (strict liability)*, are unlikely to find application when the question is whether intoxication was self-induced or the result of “reasonable mistake”. Legislation which creates offences of strict liability requires individuals to exercise reasonable forethought in order to avoid inadvertent criminality. Though s8.1 declares that intoxication is self-induced if it is the product of an *unreasonable* mistake, the precautions required to avoid intoxication are very different from those required to avoid committing a

<sup>158</sup> Section 8.5 refers to intoxication which is not self induced as “involuntary”. In this context, however, involuntariness does not correspond in meaning to the s4.1 definition of conduct which is “not voluntary.” With this a caveat, the commentary will follow Chapter 2 and refer to intoxication which is not self induced as “involuntary intoxication”.

<sup>159</sup> The definition of self induced intoxication is repeated twice in Chapter 2, in ss4.2(7) and 8.1.

**DIVISION 8 - INTOXICATION**

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- (a) involuntarily; or
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criminal offence. In any event, the inclusion of *accidental* intoxication provides a supplementary ground for denial that intoxication was self-induced. The criteria which govern the availability of defences can provide no more than distant analogies when the question is whether or not a state of intoxication was self induced. Intoxication resulting from the use of *force* against the defendant is self-explanatory. Case law drawn from the related provision in s28 of the Queensland *Criminal Code*, which permits a defence of insanity to be based on “unintentional” intoxication, may be persuasive, but no more than persuasive, in determining whether intoxication was involuntary or self-induced under the *Code*.<sup>160</sup>

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<sup>160</sup> On the concept of intentional intoxication, see RS O'Regan, *Essays on the Australian Criminal Codes* (1979) 71-72; *Corbett* [1903] St R Qd 246, 249, per Griffith CJ; *Parker* (1915) 17 WAR 96; *Nosworthy* (1983) 8 A Crim R 270 at 274, per Wickham J. The decision in *Bromage* (1990) 48 A Crim R 79 suggests the possibility of involuntary intoxication resulting from a synergy of environmental pollutants combined with moderate alcohol consumption to produce an immoderate degree of intoxication. Section 28 of the Queensland Code was amended in 1997 to ensure that the defence of unintentional intoxication was barred to a defendant like Bromage, who “to any extent intentionally caused himself or herself to become intoxicated or stupefied”: see *Carter's Criminal Law of Queensland* (12ed 2001), Edited: MJ Shanahan, MP Irwin, PE Smith) 236-237. Compare generally, PE Hassman, “Annotation: When Intoxication Deemed Involuntary so as to Constitute a Defence to a Criminal Charge” (1973) 73 ALR 3d 195.

**DIVISION 8 - INTOXICATION**

**8.2 Intoxication (offences involving basic intent)**

- (1) **Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.**
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

## 8.2 Intoxication (offences involving basic intent)

In general, evidence of intoxication is admissible and relevant when fault is in issue. It is likely to prove particularly cogent when the prosecution must prove recklessness. Since normally cautious individuals are often prepared to take substantial risks when intoxicated, it is usually safe to infer from evidence of intoxication that the defendant discounted known risks for the sake of some immediate gain or gratification. When intention is in issue, in offences involving violence to the person or property, the tendency for alcohol to reduce inhibitions against aggression will usually tend to support the prosecution argument that the defendant *meant* to inflict harm. It is also true, of course, that intoxication impairs our capacities to perceive the existence of risk, to appreciate the magnitude of risk and to co-ordinate our actions and intentions. In a minority of cases, evidence of intoxication will lend credibility to the defendant's denial that risks were known or that harm was intended. So, for example, a fatal shot fired after a drunken altercation might have been meant to warn or intimidate rather than strike the victim. Or perhaps the defendant did not mean to discharge the gun. Evidence of intoxication can make the possibility of an accidental discharge or a mistaken hit more credible. To take another example, persistence in an unwelcome sexual advance, which appears to evince a determination to proceed in the face of rejection, regardless of the victim's wishes, might have continued in a spirit of alcoholic optimism. Perhaps the defendant really did believe that the victim had given his or her consent. None of these effects of intoxication on human performance are mysterious or subtle: they are well known to almost all adult members of the community from personal experience or observation of friends, family or associates. Determination of the issue of criminal responsibility when there is conflict over intentions or conscious risk taking may be of the utmost difficulty, requiring recourse to the presumption of innocence when certainty is unattainable, but the inquiry involves concepts and criteria which are familiar to most members of the Australian community.

The comments which follow have the objective of explaining the ways in which Chapter 2 departs from the common law.

Chapter 2 reformulates the English common law distinction, which received its canonical statement in *DPP v Majewski*,<sup>161</sup> between offences of basic and specific intent. However, the provisions are significantly different in their effects from English common law.

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161 [1977] AC 480.

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Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

The English concept of “specific intent” has no counterpart in Chapter 2 and “basic intent” is given a restricted definition. As a consequence, the decision of the House of Lords in *Majewski* and its progeny, are of little or no use in determining the application of the *Code* provisions. The most important of these is the declaration that evidence of self induced intoxication cannot be taken into consideration when the prosecution must prove “a fault element of basic intent”: s8.2(1). Elucidation of the privative effect of this rule requires an explanation of the meaning of “basic intent”. It is helpful to begin with a statement of the occasions when evidence of self induced intoxication *can* be considered on the issue of fault.

*8.2-A Evidence of intoxication, whether or not self induced, can be considered when determining fault relating to circumstances or results:*

The physical elements of an offence are conduct, circumstances or results. The *Code* provisions on intoxication require a distinction to be drawn between conduct elements of an offence and circumstantial or result elements. When evidence of intoxication would have a rational bearing on proof of intention, knowledge, recklessness, negligence or any other fault element relating to an incriminating *circumstance* or *result* of conduct, the court must give consideration to that evidence. The fact that the defendant was intoxicated can lend credibility to a denial of intention, knowledge or recklessness. Drunks are ill co-ordinated, lack judgement and make mistakes. Depending on the circumstances, these decrements in performance can displace the usual inference that anyone of normal intelligence must have known what they were doing or must have intended the consequences of their actions: s9.1(2). Evidence of intoxication may, in a similar fashion, lend support to an assertion that an incriminating consequence or circumstance was accidental rather than intended or consciously risked. When negligence, rather than recklessness or intentional wrongdoing is in issue, evidence of self induced intoxication will, for obvious reasons, almost invariably favour the prosecution case.

*8.2-B Evidence of self induced intoxication is not to be considered when the prosecution must prove intention with respect to an act, an omission or a state of affairs:*

This is the effect of the rule that evidence of self induced intoxication must be disregarded when “basic intent” is in issue. Basic intent is merely the familiar fault element of intention in its application to the *conduct* constituting an offence.<sup>162</sup> Liability under the *Code* is always based on proscribed conduct - on proof of one or more acts, omissions or on a state of affairs. In most offences, the prohibition of conduct will usually require

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<sup>162</sup> *Code* s5.2(1): “A person has intention with respect to conduct if he or she means to engage in that conduct”.

DIVISION 8 - INTOXICATION

8.2 Intoxication (offences involving basic intent)

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous *occasion*.

proof of accompanying circumstances or results in order to constitute the offence. In some offences, the fault element required for conduct elements of the offence will be specified. In s.270.3 *Slavery offences*, for example, a person who “intentionally...possesses a slave” or who “intentionally...enters any transaction involving a slave” is guilty of slavery. In many offences, however, the fault elements for conduct are not specified. In the absence of any provision in the law which creates the offence, Chapter 2 requires proof that the act, omission or state of affairs was intentional: s5.6(1). It is this requirement of intention with respect to *conduct*, whether the requirement is express or implied, which is the subject of the exclusionary rule that evidence of intoxication must be disregarded when “basic intent” is in issue. So, for example, the offence in 147.1 *Causing harm to a Commonwealth public official* requires proof both of an intentional act<sup>163</sup> which results in harm to the official and an intention to cause that harm. Defendant A, when charged with the offence, might deny guilt on the ground that the act which caused the harm was not intentional but the result of a stumble, twitch or spasm. Evidence of intoxication cannot be considered in support of Defendant A’s claim that the act was not intentional, for this is a denial of basic intent. It is otherwise, however, when Defendant B denies an intention to cause harm. Suppose, for example, that Defendant B’s act, which caused the harm, was meant as a drunken practical joke. Defendant B does not deny that the act was intentional. The claim is rather that it was never intended to have serious consequences. Since this is a denial of intention with respect to a result, rather than conduct, evidence of Defendant B’s intoxication can be considered by the court. To that extent at least, the effect of the provision is reasonably apparent. On further consideration, however, the distinction between Defendant A and Defendant B evaporates. Defendant A, who says that the act causing harm was a mere stumble, twitch or spasm can equally well deny that there was any intention to cause harm. Once the denial is reformulated in this way, there is no impediment to reliance on evidence of intoxication. The same conclusion follows in all offences which require proof of fault with respect to a result. If the act causing the result was not intentional, the result is not intentional either.

The practical effect of s8.2(1) appears to be confined to offences which do not require proof of fault with respect to a result of conduct. Even here, however, further qualifications are necessary for offences which require proof of an ulterior intention.

*8.2-C Evidence of intoxication, whether or not self induced can be considered when determining whether the defendant acted with ulterior intention:*

Earlier in these Guidelines, in the discussion of the concept of intention, reference was made to offences which require proof of ulterior intentions: see 5.2-D. In these offences:

- liability requires proof that the offender engaged in the proscribed conduct with the intention of achieving some further objective;

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<sup>163</sup> No provision is made for liability based on omission: 4.3 *Omissions*.

DIVISION 8 - INTOXICATION

8.2 Intoxication (offences involving basic intent)

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous *occasion*.

- the object of the offender's intention is neither a result nor a circumstance specified in the definition of the offence.

The most familiar examples, though offences of this nature are not uncommon, are theft and related offences, which require proof of intent to deprive permanently.<sup>164</sup> If property is appropriated with that intention, liability does not depend on proof that anyone suffered deprivation or even a risk of deprivation: the intention to deprive is sufficient for guilt. Can evidence of intoxication, though self-induced, be taken into account when ulterior intention is in issue? An example makes the nature of the issue plain. A person apparently caught shoplifting in a government publications outlet might concede that the publication was appropriated intentionally but deny that the appropriation was done with intent to deprive permanently. That denial of the ulterior intention might gain in credibility if accompanied by evidence that the defendant was fuddled from taking too many pills and simply forgot to pay for the publication. That conclusion that evidence of intoxication can be considered depends, however, on the proposition that ulterior intentions are not a variety of basic intent. It is immediately apparent that the definition of basic intent in s8.2(2) casts doubt on that conclusion. The definition declares that basic intent is a "fault element of intention for a physical element that consists only of conduct". Ulterior intentions are, of necessity, fault elements "for a physical element that consists only of conduct". In the shoplifting example, the intention to deprive permanently must relate to the act of appropriation: 5.2-D. There is nothing else to which it could apply, for there is no circumstance or result involving loss or deprivation of the property. Theft extends to cases where there is not even a *risk* of loss or deprivation.

Though the problem is immediately apparent, it is equally apparent that s8.2(1) cannot have been intended to deny recourse to evidence of intoxication when ulterior intentions are in issue. That would run counter to the House of Lords decision in *DPP v Majewski*<sup>165</sup> and every other common law authority on intoxication and criminal liability. No common law court has ever barred reliance on self-induced intoxication when liability depended on proof of ulterior intent. Though Parliament certainly meant the *Code* to change the common law, it is highly unlikely that it meant to turn it upside down.

Resolution of this apparent contradiction can be achieved by insisting that "intention" in the definition of "basic intent" is identical to "intention with respect to conduct" in s5.2(1): "A person has intention with respect to conduct if he or she means to engage in that conduct".<sup>166</sup> The shoplifter cannot rely on evidence of intoxication to support a denial of intention to

<sup>164</sup> Though familiar, theft is not entirely typical of offences which require proof of ulterior intention. The concept of "permanent deprivation" and, by extension, the concept of intent to deprive permanently has acquired a technical meaning in the *Code*. See CCs131.10 *Intention of permanently depriving a person of property*.

<sup>165</sup> [1977] AC 442.

<sup>166</sup> Invoking *Criminal Code Act* (1995), s4(1) "Expressions used in the *Code*... that are defined in the Dictionary... have the meanings given to them in the Dictionary." The Dictionary defines "intention" by reference to 5.2 *Intention*.

DIVISION 8 - INTOXICATION

8.2 Intoxication (offences involving basic intent)

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous *occasion*.

appropriate the publication. That evidence *can* be considered, however, when the court comes to consider whether the publication was appropriated with intent to deprive permanently. The privative rule in s8.2(1) is limited in its applications to intention as defined in 5.2 *Intention*. That definition, as we have seen, is not complete and does not include the ulterior intention with which the act was done: 5.2-D.

*8.2-D Consideration of evidence of self induced intoxication is permissible in support of a claim that conduct was accidental:*

Section 8.1(3) is an exception to the general rule that evidence of self induced intoxication has no part to play when the defendant denies that conduct was intended. There is no defence of accident in the *Code*: a defendant's claim that conduct was accidental is no more than a denial that the conduct was intended. The provision merely permits a defendant to introduce evidence of intoxication in support of a claim that the conduct was not intended because it was really an accident. It is obvious that the concept of "accident" must bear a limited meaning if the exception is not to swallow the rule.<sup>166</sup> The subsection draws an implicit distinction between a denial of intention based on a claim of mistake or ignorance of fact and a denial based on a claim of accident,<sup>167</sup> permitting reliance on evidence of intoxication to support a claim of accident but not a claim of mistake or ignorance. There is no doubt that a distinction can be drawn. There is a difference, for example, between hitting a Commonwealth official by mistake and hitting the official by accident: one who hits another by accident doesn't really intend to do anything at all. The distinction is nonetheless fine – more dependent on considerations of linguistic nicety than differences in blameworthiness or responsibility. It is important to remember that the provision for accident is an exception to the rule excluding reliance on evidence of intoxication: the exception is likely to be narrowly construed. Any attempt to determine how such a distinction between mistake and accident would work in practice would be premature. Opportunities for elucidation in caselaw are likely to be rare. Conduct which provides the basis for most Commonwealth offences is rarely the result of accident. If

<sup>166</sup> Little or no assistance can be derived from consideration of the defence of accident in s23 of the Queensland *Criminal Code* and its counterparts in other Australian jurisdictions: see *Kapronovski*(1973) 133 CLR 209 at 231 per Gibbs J. Authorities on the defence are collected in *Carter's Criminal Law of Queensland*, op cit, 216-219. The Queensland *Code* distinguishes between *accident*, which provides an excuse for an incriminating *event* and a denial that the *act* which caused those consequences was willed. It is quite impossible to map this structure onto the Commonwealth *Criminal Code*.

<sup>167</sup> Consider, for example, the relationship between the defences of reasonable mistake of fact and accident in ss23 and 24 of the Queensland *Criminal Code*. This complex distinction rests on an equally complex distinction between accident and mistake in ordinary language: see J Austin, "A Plea for Excuses", in *Philosophical Papers* (1961, eds Jo Urmson and G J Warnock 123, 132-133). Dictionaries are of little help here: *The Macquarie Dictionary* (3rd ed, 1997) defines "accident" as (1) an undesirable or unfortunate happening; casualty, mishap (2) anything that happens unexpectedly, without design or by chance (3) the operation of chance...."

DIVISION 8 - INTOXICATION

8.2 Intoxication (offences involving basic intent)

- (1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
  - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous *occasion*.

one is careful to distinguish between things done by mistake and things done by accident there will be few occasions when it will be possible to say, for example, that a document was signed by accident, or a false statement was made by accident or property appropriated by accident. Accident is a more characteristic excuse in offences which involve the gross physicality of damage or injury.

*8.2-E Consideration of evidence of self induced intoxication is permissible to establish the existence of a mistake in a defence of reasonable mistake of fact:*

Section 8.2(4) has no bearing on proof of basic intent. The provision is limited in its effects, applying only to the defence of reasonable mistake of fact in offences which impose strict liability: 6.1 *Strict liability*. A defence of reasonable mistake of fact will fail, of course, if the mistake is not reasonable and evidence of self induced intoxication will usually tend to destroy any prospect of successful reliance on the defence.<sup>168</sup> It is nonetheless possible for an intoxicated person to make a reasonable mistake and in such a case, however unlikely, to gain an acquittal. Subsection 8.2(4), together with the attendant qualifications in ss(5), is meant to preserve the possibility of acquittal in such a case. The provision was inserted from motives of extreme caution, to avoid any suggestion that a defendant who relies on a defence of reasonable mistake must fall at the first hurdle if they seek to rely on evidence of intoxication to support the claim that a mistake was made. Of course, the prosecution is equally entitled to rely on evidence of the defendant's intoxication to defeat the defence at the second hurdle, by proving the mistake to have been unreasonable.

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<sup>168</sup> CC s8.4(2) makes special provision for cases involving involuntary intoxication.

**DIVISION 8 - INTOXICATION**

**8.3 Intoxication (negligence as fault element)**

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.**
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.**

### 8.3 Intoxication (negligence as a fault element)

Negligence requires proof of a “great falling short” of the standard of care expected of a reasonable person in circumstances where there is a “high risk” of incriminating circumstances or results: 5.5 *Negligence*. The standard against which the offender is judged is that of a reasonable person who is not intoxicated. The rule is obvious and conforms to general common law principle, which declines to vary the standard in negligence according to the offender’s capacity to take care.<sup>169</sup> Variation of the standard *is* permitted, however, when intoxication is involuntary rather than self induced. In that case, the *Code* requires an allegation of negligence to be measured by the standard of a reasonable but intoxicated individual.

*8.3-A Evidence of intoxication, whether or not self induced, is admissible to prove negligence:*

Since intoxication tends to diminish awareness of risks, concern that risks might eventuate and the capacity to avoid harmful outcomes, evidence that an accused was intoxicated will tend to establish the gross deviation from standards of reasonable care required for negligence.

*8.3-B The standard of care required is varied if intoxication was involuntary:*

If there is evidence of involuntary intoxication, the defendant must be judged by the standard of a “reasonable person intoxicated to the same extent as the person concerned”. Though evidence of the intoxicating effects of alcohol is generally not admissible, expert evidence would almost certainly be admissible to inform the court of the likely effects of *involuntary* intoxication. These effects are not a matter of general community knowledge. The defendant’s performance will be measured against that of a reasonable person in a similar state of involuntary intoxication. Since proof of negligence still requires “a great falling short” of the required standard, evidence of involuntary intoxication will defeat an allegation of negligence in cases where the capacities of the reasonable person would have been seriously impaired, if intoxicated to the same extent. There is obvious difficulty in measuring the degree to which the defendant’s conduct might be said to depart from such a compromised standard of reasonable behaviour. It is likely, however, that the need to use the reasonable drunk as a measure will rarely arise, even if there is cogent evidence of involuntary intoxication. A reasonable person who is intoxicated and aware of that state of intoxication will simply desist from activities which require care, if it is possible to do so.<sup>170</sup> The offender who blunders on, when a reasonable drunk would desist, breaches the standard. The really difficult issue is only likely to arise if there is cogent

<sup>169</sup> *Richards & Gregory* [1988] 2 VR 1.

<sup>170</sup> The issues are the subject of exhaustive discussion in *Barker v Bourke* [1970] VR 884.

**DIVISION 8 - INTOXICATION**

**8.3 Intoxication (negligence as fault element)**

- (1) If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.**
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

evidence that a reasonable person, intoxicated to the same extent as the defendant, might have been unaware of their state or unable to avoid the necessity for engaging in the conduct.

DIVISION 8 - INTOXICATION

8.4 Intoxication (relevance to defences)

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:
  - (a) each physical element has a fault element of basic intent; and
  - (b) any part of a defence is based on actual knowledge or belief;evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

#### 8.4 Intoxication (relevance to defences)

Many of the defences in Part 2.3 - *Circumstances in which there is no criminal liability*, require evidence of the beliefs which prompted the defendant to engage in the conduct which provides the basis for the charge. Reasonable mistake of fact, self defence, duress and sudden or extraordinary emergency are typical in this respect. Most of the defences require, in addition, that the belief be true or, if mistaken, that the mistake be reasonable in the circumstances: 9.5 *Claim of right* and 10.4 *Self defence* are exceptions which allow an acquittal to be based on unreasonable belief.<sup>171</sup> With one exception, Chapter 2 does not exclude reliance on evidence of self induced intoxication by the defendant or the prosecution, when defences are in issue. In particular, Chapter 2 permits reliance on evidence of self induced intoxication to support a claim that the defendant's action was prompted by a mistaken belief about the circumstances. If, however, the defence is one that requires reasonable grounds for a mistaken belief, a defendant who was voluntarily intoxicated will be held to the standard of a reasonable and sober person. Evidence of self induced intoxication which can serve the defendant's cause in the first leg of the defence will usually strengthen the prosecution case when the second issue, whether the belief was reasonable, is reached. The requirement of reasonable grounds will be relaxed if the defendant's state of intoxication was not self induced.

The provisions were intended to exclude consideration of self-induced intoxication when a defendant relies on evidence of self defence in answer to certain minor offences. They make use of the distinction, often encountered in Chapter 2, between the conduct elements of the offence and elements that can be characterised as circumstances or results: 3.1 *Elements*. The extent of this exclusion is likely to involve debate. To elucidate the exclusionary effects of the provisions it is necessary to begin with the cases in which evidence of self induced intoxication *can* be considered when defences are in issue.

*8.4-A Evidence of intoxication, whether or not self induced, can be considered when knowledge or belief is relevant to a defence:*

Most defences to criminal liability are based on the defendant's *belief* that the conduct constituting the offence was necessary, justified or permissible.<sup>172</sup> Evidence that the defendant was intoxicated will be irrelevant if the defendant's belief was true. However, if the defence is founded on a claim of mistaken belief, evidence of intoxication is usually relevant, for it will tend to enhance the credibility of the defendant's story, particularly if the mistaken belief was stupid and unreasonable.<sup>173</sup>

<sup>171</sup> Note, however, 7.3 *Mental impairment*. In cases of delusion caused by mental impairment, the delusion cannot provide the basis for a plea of self defence, or any other of the defences.

<sup>172</sup> Ch 2, s10.5 *Lawful authority* is the exception.

<sup>173</sup> Compare Ch 2, s9.1(2) on fault elements, which reiterates commonsense in its declaration that the more unreasonable the tale of mistake, the less likely it is that the person is telling the truth.

DIVISION 8 - INTOXICATION

8.4 Intoxication (relevance to defences)

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:
  - (a) each physical element has a fault element of basic intent; and
  - (b) any part of a defence is based on actual knowledge or belief;evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

*8.4-B In defences which require reasonable belief, the belief must be one which a reasonable and sober person might have held:*

The following defences are available only if the defendant held a *reasonable* belief in the existence of facts which provide a basis for the defence: 9.2 *Reasonable mistake of fact*; 10.2 *Duress*; 10.3 *Sudden or extraordinary emergency*. The exceptions, which permit a defence to be based on an unreasonable mistake, are 9.5 *Claim of right* and 10.4 *Self-defence*. Whenever reasonable belief is required for a defence, sober and intoxicated defendants are held to the same standard of reasonableness, so long as the state of intoxication was self induced: see below 8.4-D. The first of the two exceptions, which permit a defence to be based on an unreasonable belief, is claim of right, which can be based on an unreasonable belief in the existence of a right to possession or ownership of property: see 9.5 *Claim of right*. A plea of self defence can also be based on an unreasonable and mistaken belief. Self defensive action is excused if it is a reasonable response to the threat which the defendant perceived, no matter how unreasonable that perception. Evidence that the defendant was intoxicated can lend credibility to the claim that force was used against another in the mistaken belief that harm was threatened.

*8.4-D When a defence requires evidence of reasonable belief, the standard of reasonableness is varied when the state of intoxication was involuntary:*

The measure of reasonableness in cases of involuntary intoxication is that of a reasonable person intoxicated to the same extent as the defendant. The rule is similar in effect and intention to the variation of standard when offences of negligence are charged and the defendant pleads involuntary intoxication: see above 8.3-B.

*8.4-E In offences which consist of conduct alone, evidence of self induced intoxication is excluded when a defence requires consideration of the defendant's beliefs:*

Section 8.4(4) is an exception to the general rule, in s8.4(1), that evidence of intoxication is generally admissible and relevant when a defence depends on the defendant's beliefs. The exception was intended as a symmetrical counterpart to s8.2(1), which bars consideration of self-induced intoxication when a fault element of "basic intent" is in issue. Section 8.4(4) excludes evidence of self-induced intoxication from consideration when defences to "crimes of basic intent" are in issue. The intended effect of the provision is more easily explained with the aid of an example which compares the effect of these parallel exclusionary rules on a plea of self defence.<sup>174</sup> Consider the case of two defendants, each charged with violation of a simple prohibition

<sup>174</sup> The exception is potentially relevant as well in certain applications of 9.5 *Claim of right* which, like self defence, can be based on an unreasonably mistaken belief. For reasons given in the text, it is unlikely that the exception will have any practical application to Commonwealth offences.

DIVISION 8 - INTOXICATION

8.4 Intoxication (relevance to defences)

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:
  - (a) each physical element has a fault element of basic intent; and
  - (b) any part of a defence is based on actual knowledge or belief;evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

against making a threat to harm another person. In such an offence, the *Code* would require proof that the conduct of the defendant was intended as a threat: s5.6(1). This is a fault requirement of basic intent and s8.2(1) would apply:

- *Defendant A denies that there was any intention to threaten:* A says that the apparent threat was really only a joke, and intended as such. Section 8.2(1) applies and A cannot rely on evidence of intoxication to bolster the credibility of the denial that the conduct was meant to threaten.
- *Defendant B claims that the threat was made in the mistaken belief that it was necessary for self defence:* Here the threat was made intentionally. But self defence will provide an excuse, if the threat was a reasonable response to the threat perceived by B. The defence is still available, even if B's perception of the threat was utterly unreasonable. Section 8.4(2) merely denies recourse to evidence of intoxication which might be expected to make that claim more credible. If it is otherwise apparent that D acted on a mistaken apprehension of danger, exclusion of evidence of intoxication may make very little difference to the outcome.

The potential applications of the exception are extremely limited: it can only apply to offences where "each physical element has a fault element of basic intent". It appears, indeed, that it may have no application in Commonwealth offences. If the exception is given its literal meaning, it has no application in offences which include among their physical elements, circumstances or results.<sup>175</sup> Since almost all offences under the *Code* do include circumstances, and some include results among their elements, evidence of intoxication is almost always admissible to support a claim of mistaken belief which might otherwise have been rejected as unbelievable.

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<sup>175</sup> The conclusion follows as a consequence of the definition of terms: s 8.4(4) limits the exception to offences in which "each physical element has a fault element of basic intent". (1) Hence the exception cannot apply to offences which include physical elements for which basic intent is not a fault element; (2) But "basic intent", as defined under s8.4(5), can only apply to an act, omission or state of affairs - "conduct"; (3) Hence offences which include circumstances or results among their elements are not affected by the exception.

DIVISION 8 - INTOXICATION

8.4 Intoxication (relevance to defences)

- (1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.
- (2) If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:
  - (a) each physical element has a fault element of basic intent; and
  - (b) any part of a defence is based on actual knowledge or belief;evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.
- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance or with respect to a result is not a fault element of basic intent.

## INTOXICATION, DELUSIONS OF SELF DEFENCE AND OBSTRUCTION OF A COMMONWEALTH OFFICIAL

The limited effect of s8.4(4) can be illustrated by a hypothetical based on s149.1 *Obstruction of Commonwealth public officials*. It is an offence to obstruct, hinder, intimidate, or resist Commonwealth officials in the performance of their duties. For brevity and simplicity, discussion can be limited to a hypothetical in which an official is obstructed by the defendant, who acted in the drunken belief that obstruction was necessary for self defence. The offence requires proof that the person obstructed was known to be a public official.<sup>176</sup> Since no other fault element is specified, the prosecution must prove an intentional act of obstruction: see s5.6(1). In this offence, *obstruction of an official* is a “physical element that consists only of conduct”: see s8.2(2). The intention to obstruct required by s5.6(1) is therefore “a fault element of basic intent”. Suppose the case in which a Customs official, acting in the course of duty, attempted to search Donald Defendant for contraband drugs. Donald, who was quite innocent of any involvement with drugs, was intoxicated. He misunderstood the official’s purpose and took the attempt to conduct a search as an unwelcome sexual advance, under colour of official action. He clenched his fists and threatened the officer with violence if he came any closer. In this offence, s8.2 *Intoxication (offences involving basic intent)*, requires the court to disregard evidence of Donald’s intoxication on the question whether he intended to obstruct the officer. Since the obstruction took the form of an obviously intentional threat, this particular exclusion is of little moment. It appears, however, that Donald *can* rely on evidence of his state of intoxication in support of his plea of self defence. Alone among the provisions of Division 10 - *Circumstances involving external factors*, s10.4 permits self defence to be based on an honest though unreasonable belief in threatened harm. Donald must be acquitted if his threatened attack on the official was a reasonable response to the peril which he perceived, however unreasonable that perception of threatened peril. Evidence that Donald was intoxicated lends credibility to his claim that he misunderstood the official’s purpose and believed that he was threatened with harm. Section 8.4(1) permits the evidence to be considered on that question, unless the exception in s8.4(4) applies. The exception has no application, however, for this offence includes the circumstantial element that the person obstructed is an official.

<sup>176</sup> See *CC Dictionary* defining “public official” The category includes officers, employees and independent contractors employed by Commonwealth, state and territorial governments.

**DIVISION 8 - INTOXICATION**

**8.5 Involuntary intoxication**

A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

## 8.5 Involuntary Intoxication

The defence of involuntary intoxication has no counterpart at common law.<sup>177</sup> In England, the Court of Appeal recognised the defence in *Kingston*,<sup>178</sup> in 1994, but the House of Lords rejected the decision as an innovation without precedent.<sup>179</sup> The *Code* provision is based in part on the Court of Appeal decision in *Kingston*, which had its supporters and opponents among English legal commentators.<sup>180</sup> Of more significance, perhaps, for the development of the *Code* defence, is the example provided by the involuntary intoxication defence in s28 of the Queensland Criminal Code and its counterparts in other Griffith Code jurisdictions.<sup>181</sup> Involuntary intoxication is a true defence, like duress or self defence, which excuses a defendant though the prosecution proves voluntary commission of the physical elements of the offence and the fault elements, if any, required for conviction. In practice, the defence is restricted in its applications to cases involving impulsive acts of violence and destruction or appropriation of property. The Queensland decision in *Walsh*<sup>182</sup> provides an example. A young man celebrated a win by his football team with his mates. In the course of the celebration he drank from a glass which may have been laced with a hallucinogenic drug. After the celebration he returned to his home in the early hours of the morning, took a knife from the kitchen and went to a neighbour's house. He told the occupant, a woman who had known him since he was a child, that he had locked himself out of his own house and did not want to wake his parents. When she began to take linen from a cupboard, to make a bed for him, he attacked her with the knife and inflicted multiple stab wounds. He was acquitted of attempted murder, and lesser offences, on the ground that his state of involuntary intoxication left him unable either to control his conduct or appreciate that he was doing wrong.<sup>183</sup>

*8.5-A The defence of involuntary intoxication is excluded if intoxication was self induced:*

Self induced intoxication is defined in s8.1 *Definition-self induced intoxication*.

177 See *Barker v Bourke* [1970] VR 884 at 890.

178 [1994] QB 81.

179 [1995] 2 AC 355.

180 Critics include Sir John Smith in "Case and Comment: *R v. Kingston*" [1993] Crim LR 784 (Ct App); "Case and Comment: *R v. Kingston*" [1994] Crim LR 846 (HL). Among those who welcomed the defence, see: Gardiner, "Uncontrollable Intention in Criminal Law" (1994) 110 LQR 8; Sullivan, "Current Topic: Involuntary Intoxication and Beyond" [1994] Crim LR 273.

181 The Queensland *Code* defence is discussed in Leader-Elliott, "Intoxication Defences: The Australian Perspective" in S Yeo, *Partial Defences to Murder* (1990) 216-244.

182 *Peter Walsh*, 1984 unreported decision of the Queensland Supreme Court. The case is recounted in *The Courier Mail*, 3, 4, 7 & 18 July 1984, 15 January 1985. Discussed, Leader-Elliott, *ibid*.

183 Amendments to the Queensland *Criminal Code* since 1985 would probably deprive a latter-day Walsh of his defence: see MJ Shanahan, MP Irwin, PE Smith, Carter's Criminal Law of Queensland (12 ed, 2001) 236-237 on the intended effect of s27(2).

**DIVISION 8 - INTOXICATION**

**8.5 Involuntary intoxication**

A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

8.5-B *Involuntary intoxication is a complete defence if the conduct which constitutes the offence resulted from the state of intoxication:*

The critical issue is the requirement that intoxication *cause* the conduct which constitutes the offence. In this respect, the defence follows the Court of Appeal in *Kingston*,<sup>184</sup> rather than the Queensland Criminal Code, in which the defences of intoxication and insanity share the same criteria for determining the effect of mental incapacity on criminal responsibility.<sup>185</sup> Chapter 2 provides no definition or criterion for determination of the causal issue. It is possible that the test of causation employed at various points in the Code when causation provides a ground for liability, will be adopted here.<sup>186</sup> Involuntary intoxication might be said to *result* in criminal conduct if it *substantially contributed* to the commission of the offence in question.

8.5-C *The defendant bears the evidentiary burden:*

Since involuntary intoxication is a defence, a plea of involuntary intoxication will be withheld from the jury unless it has an adequate foundation in the evidence before the court: 13.3 *Evidential burden of proof - defence*. The effects of involuntary intoxication and the potential for that state to cause uncharacteristic conduct are well outside the bounds of common knowledge. In practice, expert testimony will almost certainly be required in all cases to lay an evidentiary basis for the defence. The claim that criminal conduct was caused by involuntary intoxication involves, as a necessary corollary, an implied claim that the conduct is not characteristic of the accused and would not have occurred, but for the state of intoxication. To that extent, a defendant who relies on the defence places their character in issue.<sup>187</sup> The necessity for reliance on expert evidence can be expected to encourage courts to take a broad view of the evidence and make the fate of the defendant depend, to some extent at least, on their past record.

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184 [1994] QB 81.

185 Queensland Criminal Code s28(1). Compare American *Model Penal Code* - Proposed Official Draft ALI 1962, s2.08 *Intoxication*, which adopts essentially the same criteria.

186 See, for example, CCs146.2 *Causing harm*, which defines causation in offences involving harms to Commonwealth public officials. It is arguable that the mere fact that intoxication substantially contributed to the crime is not sufficient to provide a complete defence.

187 See Sullivan, Current Topic: Involuntary Intoxication and Beyond" [1994] Crim LR 273; Compare Leader-Elliott, "Intoxication Defences: The Australian Perspective" in S Yeo, *Partial Defences to Murder*(1990) 237.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.1 Mistake or ignorance of fact (fault elements other than negligence)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:**
  - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and**
  - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.**
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.**

**9.2 Mistake of fact (strict liability)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

Note: Section 6.2 prevents this section applying in situations of absolute liability.

## DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE

Most Chapter 2 defences are excuses which do not come into play until the prosecution has established all of the physical and fault elements necessary to constitute an offence: 3.3 *Establishing guilt in respect of offences*. In traditional terminology, the defences combine a confession to the charge that an offence has been committed with a claim that guilt is avoided by reason of the defence. Division 9 contains three exceptions to this generalisation. Section 9.5 - *Claim of right*, consists of two distinct provisions, only one of which is a true defence. It opens with the statement that a defendant who relies on claim of right is not criminally responsible if the mistaken claim would “negate a fault element” required for the offence. It is obvious that this provides no advantage to an accused which is not already inherent in the definition of the original offence. The provision goes on to provide a true claim of right defence, though it is one which is more restricted than its common law counterpart. Section 9.1 - *Mistake or ignorance of fact (fault elements other than negligence)*, is similar in its apparent lack of exculpatory effect. That is not to say that these two provisions have no effect at all. It is possible, for example, that they appear to favour defendants when, in reality, they ease the task of the prosecution in proving fault. This speculative possibility will be taken up below. The third of the exceptions is s9.3 - *Mistake or ignorance of statute law*, which declares that mistake or ignorance of a statutory provision relating to an offence is no excuse if the physical and fault elements are established. The rule is different, however, when a defendant relies on mistake or ignorance of subordinate legislation. Section 9.4 - *Mistake or ignorance of subordinate legislation* provides a true defence for individuals who commit offences as a consequence of inadequate publication of subordinate legislation.

The most important of the defences based on mistake or ignorance is s9.2 - *Mistake of fact (strict liability)*. As its name indicates, it provides the definitional content for strict liability as a form of criminal responsibility without fault: 6.1 *Strict liability*.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

- 9.1 Mistake or ignorance of fact (fault elements other than negligence)**
- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:**
    - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and**
    - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.**
  - (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.**

### 9.1 Mistake or ignorance of fact (fault elements other than negligence)

Mistake or ignorance of fact is an unnecessary inclusion among the defences. The Model Criminal Code Officers Committee conceded that the provision was redundant. It was included because it was felt that it would tend to clarify the operation of the *Code* provisions and that it would be unlikely to generate confusion or error: “In part the Committee was influenced by the fact that the *Code* will speak to a wider audience than lawyers.”<sup>188</sup> In view of its intended purpose, as an informative redundancy, it is unlikely to play any significant role in the development of *Code* jurisprudence.

*9.1-A Mistaken belief or ignorance may negative intention, knowledge or recklessness:*

The proposition is obvious and in no need of elaboration.

*9.1-B A tribunal of fact may consider whether belief or ignorance was reasonable in the circumstances:*

The provision is unusual in statute law, though Victorian rape legislation, permits the inference that the defendant knew the victim had not consented if a mistaken belief that the victim had consented would have been unreasonable in the circumstances.<sup>189</sup> Chapter 2 generalises that approach to all offences which require proof of intention, knowledge or recklessness. Unlike the Victorian provision, which *requires* the trier of fact to consider whether the mistaken belief was reasonable, s9.2 is permissive. It does not go beyond the unexceptionable proposition that a claim of ignorance or mistake is more rather than less credible if mistake or ignorance would have been reasonable in the circumstances. If the capacity for reasonable behaviour of the individual in question was limited by some disability, whether permanent or temporary, involuntary or self induced, no adverse inference can be drawn from the fact that mistake or ignorance was unreasonable in the circumstances.<sup>190</sup>

*9.1-C Issues of intention, knowledge, recklessness cannot be withheld from the jury:*

Since 9.1 *Mistake or ignorance of fact* is described in the *Code* as a “defence”, it might seem to follow that the defendant bears an evidential “burden of adducing or pointing to evidence that suggest(s) a reasonable possibility” that their conduct was not accompanied by the fault element required for the offence.<sup>191</sup> In true defences, which excuse rather than deny the existence

<sup>188</sup> MCC - Ch2: *General Principles of Criminal Responsibility* (Final Report 1992), Commentary 55.

<sup>189</sup> *Crimes Act 1958* (Vic), s37(1)(c).

<sup>190</sup> Special provision has been made, however, to exclude evidence of self induced intoxication in some circumstances: Division 8 – *Intoxication*.

<sup>191</sup> Ch 2, s13.3 - *Evidential burden of proof - defence*.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

- 9.1 Mistake or ignorance of fact (fault elements other than negligence)**
- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:**
    - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and**
    - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.**
  - (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.**

of the elements which comprise the offence, a court is required to withhold the defence from the jury if the defendant fails to discharge the evidential burden: s13.3 *Evidential burden – defence*. Since s9.1 is not a true defence, failure to carry the evidential burden neither requires nor permits the court to withdraw issues of fault from the jury.

The prosecution is still required to “prove every element of an offence relevant to the guilt of the person charged.”<sup>192</sup> Though a defendant charged with an offence requiring proof of intention, knowledge or recklessness adduces no *evidence* of mistake or ignorance the issue of fault still goes to the jury which must consider all the evidence relevant to the issue.

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<sup>192</sup> *Ibid*, s13.1 - *Legal burden of proof - prosecution*.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

Note: Section 6.2 prevents this section applying in situations of absolute liability.

## 9.2 Mistake of fact (strict liability)

Chapter 2 envisages that strict liability will only be imposed by express provision: 6.1 *Strict liability*. Two consequences follow from a declaration that liability is strict with respect to one or more elements of an offence:

- the prosecution is not required to prove fault with respect to a strict liability element; and
- a defence of reasonable mistake of fact is available to a defendant who can produce evidence in support of the defence.

Reasonable mistake of fact, like most Chapter 2 defences, preserves the fundamental principle that an accused is innocent until guilt is proved beyond reasonable doubt. If relevant evidence is given in support of the defence, the prosecution is required to persuade the jury that there was no mistake or that the mistake was unreasonable. In the absence of evidence of reasonable mistake, the defence will be withdrawn from the jury: 13.3 *Evidential burden of proof – defence*. The defence has no application to a physical element of an offence when intention, knowledge, recklessness or negligence must be proved for that element.

### 9.2-A *The defendant must have made a mistake:*

Ignorance, no matter how reasonable or understandable in the circumstances, is no excuse. The *Code* follows the much debated recommendation of the Model Criminal Code Officers Committee that “ignorance should not be included because this would make strict liability more like negligence, thus eroding the higher standard of compliance set by strict liability”.<sup>193</sup> Though mistake and ignorance tend to merge in ordinary usage,<sup>194</sup> the *Code* insists that one cannot be mistaken about facts unless one has first “considered whether or not facts existed”. The apparent intention of the provision was to impose what is, in effect, a duty of inquiry in circumstances where conduct might result in commission of a strict liability offence. The resulting tension between the recognition of a defence based on reasonable mistake and the denial of any defence based on reasonable ignorance is apparent in the further qualification of that distinction in 9.2(2). If the situation in which the offence occurred had arisen on a previous occasion, a consideration of the facts on that occasion will absolve the defendant from the need to consider

193 *MCC - Ch2: General Principles of Criminal Responsibility* (1992) Commentary, 55. Compare C Howard, *Strict Responsibility* (1963) 95: “If the basis of the law is negligence, which is clearly true of the Australian reasonable mistake rule, it is necessary only to be able to regard a failure to make inquiries as negligent.”

194 Often we speak of “mistake” when explaining how it is that our intentions misfired. Mistakes of this nature may or may not be preceded by consideration of the facts. So, for example, I may place salt in my tea “by mistake.” But this is just the sort of thing I do precisely because I didn’t think what I was doing and didn’t consider the facts. Compare J Austin, “A Plea For Excuses” in *Philosophical Papers* (1961, edited JR Umson & GJ Warnock), 123, 132-133, 143-150.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

Note: Section 6.2 prevents this section applying in situations of absolute liability.

the facts again, when the offence occurred. A person who lends a car to a friend, after checking their driving licence, will not lose the right to plead reasonable mistake simply because the inquiry was not repeated a fortnight later, when the car was lent again to the same borrower, whose licence had lapsed. An honest and reasonable belief that *nothing had changed* can provide the basis of a defence of reasonable mistake.<sup>195</sup>

#### IGNORANCE AND MISTAKE IN CRIMES OF STRICT LIABILITY AT COMMON LAW

New South Wales case law lends support to the *Code* rule that ignorance, whether reasonable or not, cannot provide the basis for a defence of reasonable mistake of fact. Courts have taken the view that “inadvertence” is not enough for the defence: there must be evidence of “the existence of an actual or positive belief”<sup>196</sup> or an “affirmative belief”.<sup>197</sup> Taken together, these dicta suggest that inarticulate beliefs are not sufficient, even though they may be founded on reasonable expectations and assumptions.<sup>198</sup> Similar tendencies are apparent in state and territorial jurisdictions which have adopted versions of the Griffith Code: the defence of reasonable mistake of fact does not extend to reasonable ignorance.<sup>199</sup> Common law jurisdictions enjoy more flexibility in applications of the defence of reasonable mistake. It is possible that New South Wales courts might apply the requirement of an actual or positive belief selectively to some offences of strict liability and not to others. This additional complication was introduced by Gleeson CJ in *State Rail Authority v Hunter Water Board*.<sup>200</sup> It appears that the answer to the question whether the defendant can be said to have been mistaken, rather than merely ignorant, may depend on the statutory offence charged: “The word ‘mistake’ is, itself, ambiguous. Suppose, for example, that a person permits someone who is in fact unlicensed to drive that person’s car. The owner...may have a positive belief that the driver is licensed, or, having considered the matter in a general way, may be of the view

195 *MCC - Ch2: General Principles of Criminal Responsibility* (1992) Commentary 55, describes the rule as a codification of “the rule in *Mayer v Marchant* (1973) 5 SASR 567, regarding a belief that a state of affairs is continuing.” Here, as elsewhere in the *Code*, “belief” appears to refer to tacit as well as explicit beliefs.

196 *Von Lieven v Stewart* (1990) 21 NSWLR 52 at 66-67, per Handley JA.

197 *State Rail Authority v Hunter Water Board* (1992) 65 A Crim R 101 at 104-105 per Gleeson CJ. The leading discussion of the issue is to be found in *Mayer v Marchant* (1973) 5 SASR 567.

198 See Fisse, *Howard’s Criminal Law* (1990) 504, for cases which express a contrary view.

199 See, for example, *Cervantes PL v State Electricity Commission of Western Australia* (1991) 5 WAR 355.

200 *State Rail Authority v Hunter Water Board* (1992) 65 A Crim R 101.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

Note: Section 6.2 prevents this section applying in situations of absolute liability.

that there is no particular reason known to the owner why the driver should not be permitted to drive, or might simply not trouble to think about the subject at all. In any of these cases, the owner might well say that he or she was surprised to learn subsequently that the driver was unlicensed. However it is another thing to say that the owner had made a mistake about the matter...It seems clear enough that, of the three states of mind just described, the first would, in the present context, be accepted as a mistake of fact and the third would not. *Whether the intermediate possibility would also be accepted might depend upon a closer examination of the particular case and a consideration of the legislative purpose in creating the offence.*<sup>201</sup>

*9.2-B The mistake must be about facts:*

The *Code* makes no attempt to reform or clarify existing law on the distinction between reasonable mistake of fact, which excuses, and reasonable mistake of law, which does not.

*9.2-C The mistake may relate to circumstantial or result elements of the offence:*

The defence requires a mistaken belief in *facts* which are, in some way, inconsistent with the existence of the circumstance or result which makes the conduct an offence. The most familiar applications of the defence occur in cases where the mistake relates to circumstantial elements of the offence charged. Consider, for example, the sexual offences proposed in the Model Criminal Code, Ch 5: Division 3 - *Sexual Acts Committed against or with children*. Strict liability is imposed with respect to age in a number of these offences. A defendant's mistaken belief that a child sexual partner holds a driving licence would provide the basis for a defence, if that belief was reasonable, when attainment of the age for a driving licence would be inconsistent with the incriminating circumstance. It makes no difference in such a case that the defendant may have been ignorant of the law relating to sex with minors and quite unaware of the significance of their belief concerning the age of the child. In this instance, the mistaken belief relates to an existing fact. Though the mistaken belief in this instance relates to an existing fact, any mistake of fact, whether it relates to the past, present or future, may provide a basis for the defence. Though most instances of strict liability relate to circumstantial elements of an offence, strict liability is also imposed on occasion with respect to results of conduct. Offences of causing death or injury by culpable driving provide familiar instances in state and territorial law. Criminal prohibitions against conduct which causes pollution

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<sup>201</sup> *Ibid*, 104. Gleeson CJ. Emphasis added.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

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  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
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  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

also take this form.<sup>202</sup> Of course, mistakes about what will happen in the future necessarily depend on beliefs about present circumstances. One rehearses the reasons why a harmful result cannot occur or one takes precautions to ensure that it will not. Reasonable beliefs about existing circumstances provide the ground for reasonable mistakes of fact about what will happen in the future.

*9.2-D The mistaken belief must contradict one or more of the physical elements of the offence charged:*

Reasonable mistakes about circumstantial elements of an offence often concern present or past facts. In the typical example of sexual offences against children, a person who contemplates sexual intercourse with a partner who might not have reached the age of consent ought to take particular care to inquire about existing facts. So far as criminal responsibility is concerned, there is no need to consider what might happen after intercourse occurs: the intended sexual partner cannot become any younger. But circumstantial elements which make conduct criminal are not invariably located in the present or past. Chapter 2 envisages that liability will be imposed, on occasion, for conduct which only becomes criminal at a later time, when an incriminating circumstance comes into existence.<sup>203</sup> In an example discussed earlier the point was made that the effects of criminal conduct are often long delayed and it is quite possible that the incriminating circumstance may not occur until long after the acts or omissions which constitute the conduct element of the offence: see above 4.1-E. Strict liability may also be imposed for the *results* of conduct. When liability is imposed for results or future circumstances, a defence of reasonable mistake of fact will depend on the defendant's beliefs relating to precautions or preventive factors. Reasonable mistake of fact will provide a defence for an accused who was convinced, on reasonable grounds, that the incriminating result could not occur. However, mistake is no excuse if the defendant knew that the

202 See s16(1) *Clean Waters Act* 1970 (NSW) (since superseded by s120, *Protection of the Environment Operations Act* 1997 (NSW)); discussed in *State Rail Authority v Hunter District Water Board* (1992) 65 A Crim R 101 at 104, per Gleeson CJ: "The offence of polluting waters has been described as a 'result offence....'" It has been suggested that the common law defence of reasonable mistake of fact is restricted to mistakes about circumstances. D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (3ed 2001) 454-455. The suggestion appears to have been intended to open a field for the application of a common law defence of "due diligence". Whatever the merits of that suggested limitation of the common law defence, it has no shred of support in the *Code*. Discussed at 4.1-E. Compare B Fisse, *Howard's Criminal Law* (1990) 516.

203 Ch 2, *Division 5 - Fault elements*. Definitions of intention, knowledge and recklessness make explicit provision for circumstances which "exist or will exist".

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

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  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

preventive factors might prove illusory or that precautions might fail. The standard set by the defence of reasonable mistake of fact is absolute in the sense that it requires a reasonable belief that incriminating results will not occur and incriminating circumstances will not exist. It makes no difference that a reasonable person might have considered the risk worth taking. The defence only excuses if the defendant made a reasonable mistake: it is not a defence of reasonable behaviour or due diligence. This rigour is softened to some extent by the provision of a defence which excuses accidental breach of provisions which impose strict or absolute liability: 10.1 - *Intervening conduct or event*.

#### STRICT LIABILITY FOR FUTURE CIRCUMSTANCES OR RESULTS AND THE LIMITS OF THE DEFENCE OF REASONABLE MISTAKE OF FACT

Criminal responsibility for offences of possession depends, as Brennan J remarked in *He Kaw Teh*,<sup>204</sup> on “what the person who has possession does in relation to the thing possessed”. When liability for possession depends on an incriminating circumstance, the act which results in possession of the thing in question may precede the circumstance which brings possession within the scope of the prohibition. So, for example, in *Geraldton v Munro*,<sup>205</sup> a fisherman was convicted of possession of underweight crayfish tails. The conduct which resulted in possession of the underweight tails necessarily preceded the circumstance that the tails which came into the defendant’s possession were underweight. The fisherman’s defence of reasonable mistake of fact failed. Though precautions had been taken it was conceded that it would be “utterly unreasonable” for the defendant to believe that the checking system would detect all undersized fish. Since reasonable precautions are rarely perfect, the defence of reasonable mistake of fact will fail to protect some individuals who do take reasonable measures to comply with the law. The case has been a mainstay of the argument that common law should extend the defence of reasonable mistake of fact to include “due diligence”.<sup>206</sup>

204 (1985) 15 A Crim R 204, 233.

205 [1963] WAR 129.

206 See B Fisse, *Howard’s Criminal Law* 521-522. Compare D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (2001) 454-455, who argue for a defence of “due diligence” when strict liability is imposed for “results”.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

9.2-E *A mistaken belief in a state of facts which would amount to a different offence from the one charged is no excuse:*

The defence is not available unless the defendant's conduct would not have been a criminal offence, had the mistaken belief been true. In this respect the *Code* reflects common law principle though the application of that principle is more limited in its effects in Commonwealth than State or Territorial law. The well known case of *Reynhoudt*,<sup>207</sup> which involved the offence of assaulting a police officer in the due execution of duty, provides an apt example of the common law principle. A majority of the High Court held that the offence imposed strict liability with respect to the status of the victim of the assault.<sup>208</sup> Though reasonable mistake of fact could excuse the offence, both common law and the *Code* restrict the defence to a mistaken belief in a state of facts in which "the conduct could not have constituted an offence." Take the case of an assault on a plain clothes officer. At common law, a reasonable mistake concerning the officer's status could not excuse an offender if the assault was itself unlawful; but reasonable mistake would excuse a defendant who believed that the plain clothes officer was an unlawful assailant. This restriction on the defence is open to criticism when the offence charged is very much more serious than the offence which would have been committed had the mistaken belief been true. Though the common law has been subjected to criticism on this account,<sup>210</sup> courts have been unmoved by the criticism. Chapter 2 accepts the prevailing common law view that a reasonable mistake which merely goes to the nature or degree of the criminal offence is no excuse. Commonwealth criminal law allows the defence a wider scope, however, than State and Territorial law. That is a consequence of the fact that the reference in s9.2(1)(b) to an "offence" must be taken to refer only to *Commonwealth* offences.<sup>211</sup> It follows that reasonable mistake can excuse a defendant charged with a Commonwealth offence though their conduct would have violated state or territorial law, had the mistaken belief been true. The effect can be illustrated by the *Code* provisions in Division 71 – *Offences Against United Nations and Associated Personnel*, which closely parallel the original form of the offence of assaulting a police officer. Each of these offences imposes strict liability with respect to the UN status of the victim of the attack. Since Commonwealth law, unlike state and territorial law, does not include a general offence of assault or harm, a reasonable mistake about the status of the victim will, in most cases, excuse a gratuitous attack. Reasonable mistake would not excuse the infliction of harm, however, if the defendant mistook a UN official for a

207 (1962) 107 CLR 381.

208 The legislation was subsequently amended to require proof of knowledge of the officer's status: *Crimes Act 1958* (Vic) s31.

210 B Fisse, *Howard's Criminal Law* (1990) 521.

211 See *Criminal Code Act 1995* (Cth) s4 *Definitions* and the *Code Dictionary*, which defines "offence" as "an offence against a law of the Commonwealth".

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.2 Mistake of fact (strict liability)**

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**
  - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
  - (b) had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:**
  - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and**
  - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.**

Commonwealth official. Though the *Code* does not recognise a general defence of assault or harm to another, it does impose liability for attacks on its own personnel.<sup>212</sup>

*9.2-F The mistake must be reasonable:*

The requirement of a reasonable mistake implies the existence of a measure or standard of reasonableness. Common law authorities provide little guidance on the meaning of the reasonableness standard. In the law of self defence, the common law concedes that a reasonable mistake is one which it was reasonable for the defendant to make in the circumstances.<sup>213</sup> The standard set in self defence is responsive, to some extent at least, to the situation of a defendant who may have been required to act on the instant to an apparent threat. It is uncertain whether common law requires or permits the same flexible approach when a defendant pleads a defence of reasonable mistake to an offence which imposes strict liability. That is a consequence, in part, of the fact that strict liability is rarely if ever imposed to regulate conduct which is undertaken in circumstances of panic or stress. Chapter 2 does offer implicit guidance on the issue. Since the defence of reasonable mistake requires evidence that the defendant “considered whether or not facts existed”, the question whether a mistake was reasonable must depend on the circumstances in which that consideration could take place.<sup>214</sup> It is implied that the mistake must be one which it was reasonable to make in the circumstances. It is unlikely, however, that the standard will be reduced for individuals whose capacity for reasonable judgment is limited or impaired.<sup>215</sup>

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212 *CC* Part 7.8 – *Causing Harm To, And Impersonation And Obstruction Of, Commonwealth Public Officials*.

213 *Zecevic* (1987) 162 CLR 645.

214 The implication becomes explicit in ss(2) when account must be taken of defendants whose reasonable mistakes are based on an earlier consideration of the circumstances.

215 *Richards and Gregory*[1988] 2 VR 1.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.3 Mistake or ignorance of statute law**

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.**
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:**
  - (a) the Act is expressly or impliedly to the contrary effect; or**
  - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.**

### 9.3 Mistake or ignorance of statute law

In general, ignorance or mistake about the existence or application of legislation creating an offence is no excuse. That familiar general principle is qualified, however, by two provisions which allow mistake or ignorance of law to defeat criminal responsibility in certain circumstances. The first of these refers to the possibility that Parliament might provide a defence, excuse or exception to liability for individuals whose breach of a statutory prohibition results from mistake or ignorance of law. The second provision simply reiterates the “truism” that a defendant’s mistake or ignorance of law might make it impossible for the prosecution to establish fault.<sup>216</sup> Perhaps the most familiar application of that truism occurs in offences that require proof of conduct affecting “property belonging to another.”<sup>217</sup> There is no doubt that the prosecution must establish fault with respect to this requirement for liability and fault cannot be established if the defendant’s conduct resulted from a mistake or ignorance relating to ownership of the property in question. Mistakes or ignorance about ownership will often result from ignorance or mistake of law. If the law in question is statutory, an application of s9.3(2)(b) overlaps the provisions in 9.5 *Claim of right*: discussed below, 9.5-A.

The possibility that reliance on ignorance or mistake of law might permit a person to escape liability because the prosecution cannot prove fault has prompted the legislature to impose strict liability in many instances when physical elements of an offence involve mixed issues of law and fact. Strict liability permits a defence of reasonable mistake of fact: 9.2 *Mistake of fact (strict liability)*. Though the defence of reasonable mistake can extend to include mistakes about mixed issues of law and fact, it is limited by requirements of conscious enquiry and the exercise of reasonable judgement: 9.2-A, 9.2-F.

*9.3-A A person who was ignorant or mistaken about the law defining an offence is not criminally responsible if that law permits mistake or ignorance of its provisions as an answer or excuse:*

Section 9.3(2)(a), like a number of other provisions in Division 9, does no more than make explicit principles that would otherwise be implied. Legislative provisions which make specific provision for ignorance or mistake of law as an answer or excuse for otherwise criminal conduct are rare. Implied provision for defences which permit reliance on mistake or ignorance of law

<sup>216</sup> As to “truism”, see the commentary to the United Kingdom Draft Criminal Code: *Codification of the Criminal Law* (Law Commission No 143, 1985), para 9.1 Clause 25(1) *Ignorance or mistake negating a fault element*. The corresponding provision in Chapter 2 was derived from this source: see Model Criminal Code: Chapter 2 - *General Principles of Criminal Responsibility*, Final Report 1992 59.

<sup>217</sup> See, in particular, offences of theft and dishonest obtaining of property belonging to another in Ch 7 – *The proper administration of Government*.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.3 Mistake or ignorance of statute law**

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.**
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:**
  - (a) the Act is expressly or impliedly to the contrary effect; or**
  - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.**

is more common. Defences such as 9.2 *Mistake of fact (strict liability)* will extend, on occasion, to include instances where the mistake of fact arises from a mistake or ignorance about the law.<sup>218</sup>

*9.3-B Ignorance or mistake of law may negate a fault element that applies to a physical element of an offence:*

Like s9.1 *Mistake or ignorance of fact (fault elements other than negligence)*, s9.3(2)(b) does not provide a defence or exception to liability. If the prosecution cannot establish the elements of an offence, nothing has occurred which requires an excuse or the protective shelter of an exception. The subsection merely provides an explicit statement of principles which are implicit in Part 2.2 – *The Elements Of An Offence*.<sup>219</sup> In this context, the issue is not whether the defendant's mistake was reasonable or unreasonable: enquiries about fault are quite distinct from any consideration of the question whether there is an excuse for breach of a prohibition.<sup>220</sup>

Though these principles are clear, the question whether ignorance or mistake of law provides a ground for denying fault will always require careful dissection of the offence in issue. Prior to the *Code*, occasions when ignorance or mistake of law could defeat an allegation of fault have been rare. It is not anticipated that they will occur with greater frequency when Chapter 2 sets the parameters of criminal responsibility.

Cases where ignorance or mistake of law provides the basis for a denial of fault share the common feature that a legal concept defines or characterises a fact which constitutes, in part or whole, a physical element of an offence. Examples include offences:

- involving conduct violating rights in “property belonging to another”;
- demanding a rental payment which “is irrecoverable [in law]”;<sup>221</sup>

218 See, for example, the statutory defence under provisions (since superseded) of the *Health Insurance Act 1973* (Cth), at issue in *P*(1986) 21 A Crim R 186; discussed, Leader-Elliott “Case and Comment: *P*” (1987) 11 Crim LLJ 112. For general discussion of the difficult issues arising from the distinction between mistakes of fact and mistakes of law, see Fisse, *Howard's Criminal Law* (1990) 505-511.

219 Compare s25 (1) of the UK Draft Criminal Code Bill (1985) (Law Com. No143), which simply declares that “Ignorance or mistake whether of fact or of law may negative a fault element of an offence”. The Law Commission Report on the Draft Bill, para 9.1, notes that the provision, “states a truism. . . . ‘ignorance of the law is no excuse’ is a popular aphorism with a good deal of power to mislead. It seems worthwhile to enshrine in the Code the truth that a mistake as to the law equally with one as to fact, can be the reason why a person is not at fault in the way prescribed for an offence.”

220 Section 5.4 *Negligence* is an exception in this respect.

221 *Iannella v French* (1967-1968) 119 CLR 84. Note, however, that the Court divided, two of four judges holding that ignorance or mistake of law concerning rent restrictions provided a basis for a denial of fault.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.3 Mistake or ignorance of statute law**

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.**
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:**
  - (a) the Act is expressly or impliedly to the contrary effect; or**
  - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.**

- making a “false [tax] return”;<sup>222</sup>
- acting as an auditor of a company “when disqualified [by law] from appointment to that office”.<sup>223</sup>

In each of these examples a circumstance specified as an element of the offence is defined or characterised, in part or whole, by statutory criteria. For example, it is a fact that a director of a company is disqualified from acting as an auditor. It is a fact that rent which exceeds the specified maximum is “irrecoverable”. But these are facts which are constituted or characterised by statutory criteria. Ignorance or mistake about those criteria will provide a basis for denial of intention, knowledge or recklessness with respect to a circumstantial element of the offence.

#### FAULT AND ERROR OF LAW WITH RESPECT TO A CIRCUMSTANTIAL ELEMENT OF AN OFFENCE

Facts which constitute physical elements of an offence may be defined, in part, by legislative criteria. The fact that a rental payment is “in excess of...the maximum rental”<sup>224</sup> or the fact that a tax return is “false” or “misleading” may depend on statutory criteria which define what is excessive, false or misleading. So also in many instances where liability is imposed for omission. If a statute creates a duty,<sup>225</sup> the fact that a person omitted that duty is a fact defined and constituted by the legislature. So, for example, an omission to file a tax return is a fact constituted by statutory criteria which define the incidence of the obligation. If legislation does not impose strict or absolute liability with respect to these physical elements of the offence, the prosecution is required to prove fault. When physical elements are characterised in part or whole by legislative criteria, ignorance of those legislative criteria can provide the foundation for denial of fault.

A decision from the New Zealand Supreme Court provides an illustration of the general principle.<sup>226</sup> A farmer submitted tax returns to the Tax Commissioner in which he stated that income received from sales of livestock was received in the tax year when buyers paid for the stock, rather than the year in which the sales occurred. The farmer’s returns failed to match the requirements of the *Land and*

222 *Donnelly v Inland Revenue Commissioner* [1960] NZLR 469.

223 See Draft Criminal Code Bill (1985) (Law Com. No143), Schedule 1 - *Illustrations* s25.

224 See *Iannella v French* (1967-1968) 119 CLR 84, in which the Court divided on the issue.

225 The case is different when there is an omission of a duty to take care of another or to avoid injury. In these instances the law usually recognises and provides a sanction for an existing moral duty.

226 *Donnelly v Inland Revenue Commissioner* [1960] NZLR 469; cited and discussed, in *Iannella v French* *ibid*, 108, 115-116, (Windeyer J).

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.3 Mistake or ignorance of statute law**

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- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:**
  - (a) the Act is expressly or impliedly to the contrary effect; or**
  - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.**

*Income Tax Act 1924* and he was charged with an offence of “wilful[ly] mak[ing] a false return...in relation to...his...liability to taxation”. He believed, wrongly, that his return did conform with legal criteria for a correct return. The High Court held that the false return was not made *wilfully* since the farmer had “no knowledge of its inaccuracy as a fact affecting liability to taxation”. The decision rests on the principle that one cannot know a statement to be false unless one knows the criteria which distinguish truth from falsity. The same result would follow under Chapter 2, unless strict or absolute liability was imposed. A *Code* offence would not, of course, require proof of wilful falsity. However, a simple prohibition against making a statement of income which was false would require proof of recklessness with respect to the risk that the statement might be false: 5.6 *Offences that do not specify fault elements*.

The question whether ignorance or mistake of law will provide a basis for a denial of fault always involves an issue of statutory interpretation. A variation on the preceding example makes the point. Suppose the farmer had made no return at all and had been charged with an offence of “failing to provide a statement of income in relation to his liability to taxation”. If the prohibition says no more than this, the farmer commits no offence if he was ignorant or mistaken about his legal obligations. Section 5.6(1) of the *Code* requires proof that an act or omission was intentional, unless provision is made for some other form of fault. Clearly he cannot *intend* or *mean* to omit to make a return unless he realises that a return might be required: but see 9.3-C, below.

*9.3-C Knowledge of facts and mistake or ignorance as to their legal significance – the problem of omissions:*

Liability for conduct is often imposed for failure to obtain a permit or to comply with other procedures which make it lawful to engage in that conduct. So, for example, it is an offence under the *Financial Transaction Reports Act 1988* to transfer money in excess of a specified sum out of Australia unless a report is made to certain officials.<sup>227</sup> In these offences liability is imposed for an act accompanied by the circumstantial absence of a report. If no specific reference is made to fault, the prosecution must prove recklessness or knowledge with respect to the omission to make a report. It is arguable, in such a case, that the defendant *does* know that no report has been made.<sup>228</sup> Though ignorant of the statutory requirement the defendant, if asked, could answer immediately and with unerring accuracy that there

<sup>227</sup> *Financial Transaction Reports Act 1988* (Cth), s15.

<sup>228</sup> Proof of knowledge is equivalent to proof of recklessness: Ch 2 s5.4(4).

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.3 Mistake or ignorance of statute law**

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.**
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:**
  - (a) the Act is expressly or impliedly to the contrary effect; or**
  - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.**

had been no report.<sup>229</sup> For example, people who never play golf undoubtedly *know* that they have not played golf in the last three days, though their knowledge of that fact is unlikely to have been the subject of conscious reflection before the question is asked. If ordinary usage of the concept of knowledge were to prevail, ignorance of the existence of a legal obligation is no answer to the charge, for the defendant knows the fact. To allow the defendant to escape liability in such a case would be tantamount to a requirement that the prosecution prove knowledge of the law. Though the argument has considerable persuasive force, it is unlikely to prevail against the restrictive definition in 5.3 *Knowledge*, which requires the prosecution to prove that the defendant was consciously aware of the omission: discussed 5.3-A. In practice, the prosecution would be required to prove knowledge of the legal obligation in order to establish knowledge of the omission. If the defendant was ignorant or mistaken about the existence of the law which required a report, it is highly unlikely that the prosecution could establish that the defendant was consciously aware that a report had not been filed.

*9.3-D Statutory references and cross references do not form a part of the physical elements of an offence:*

Statutes which impose liability for failure to meet a legal obligation or to conform with legal restrictions on action will usually make specific reference to provisions elsewhere in that or another Act which impose the obligation or restriction. So, for example, an offence involving possession of a forbidden recreational drug may take the form of a prohibition against “possession of a Schedule 3 substance”. In the absence of any specified fault elements, the prosecution must prove possession accompanied by an intention to possess a drug named in Schedule 3.<sup>230</sup> However, Chapter 2 does not require proof that an offender knew that it was Schedule 3 of a particular Act which designated the drug as one which it was unlawful to possess. There is no need to prove that the offender was aware of the statutory name or designation of the drug. Facts are distinguished from their statutory references or designations. This is also the case if a statutory obligation to provide a report of a transaction is expressed in terms which simply require the person to “provide a report of a [designated transaction] in accordance with the requirements of Schedule X”. Liability for omission to provide a report does require proof that the conduct of the defendant was intentional: see s5.6(1). It follows that a defendant who fails to provide a report is not liable unless the obligation to provide a report was known or suspected. One cannot intend an act or omission unless one knows what it is that one intends. It does not follow, however, that the prosecution must prove knowledge of the statutory reference which identifies the obligation.

<sup>229</sup> *Taib; ex parte Cth DPP* (1998) 158 ALR 744.

<sup>230</sup> Ch 2 – 5.6(1).

DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE

9.4 Mistake or ignorance of subordinate legislation

- (1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:
  - (a) the subordinate legislation is expressly or impliedly to the contrary effect; or
  - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence; or
  - (c) at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.
- (3) In this section:

*available* includes available by sale.

*subordinate legislation* means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

#### 9.4 Mistake or ignorance of subordinate legislation

Ignorance or mistake as to the existence of subordinate legislation creating an offence is no excuse. The rule for subordinate legislation is cast in identical terms to the rule for statutes, but provision is made for a true defence in the exceptional case where the subordinate legislation has not been published. The defendant is excused if

- copies of the subordinate legislation have not been available, whether by sale or otherwise, to the public or to persons likely to be affected by it; and
- the defendant could not have become aware of the existence of the offence even if due diligence had been exercised.

The reference to “subordinate legislation” means an instrument of legislative character made under or in force under an Act. This will apply to regulations, orders, statutory instruments and the like.

Since this is a defence, not a denial of any fault element which the prosecution is bound to prove, the defendant bears the evidential burden: 13.3 *Evidential burden of proof – defence*. The defendant must adduce evidence both that the subordinate legislation was not published and that its content could not have been ascertained by the exercise of due diligence.

Section 22(3) of the Queensland Criminal Code provides a similar defence, though it is narrower in scope than the *Code* provision. Under the Queensland Criminal Code, ignorance or mistake relating to a statutory instrument is no excuse if it has been published in the Government Gazette. The *Code* provision, which applies when “copies of the subordinate legislation have not been made available to the public or persons likely to be affected,” would not bar the defence simply because the legislation has been published in the Government Gazette.<sup>231</sup>

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<sup>231</sup> As to the intended effect of the provision, see Model Criminal Code, Chapter 2: *General Principles of Criminal Responsibility*, Report 1992, 59, citing *Watson v Lee* (1979) 144 CLR 374, 408 (Mason J).

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

## 9.5 Claim of right

The simplest instances in which claim of right bars liability are those where a charge of theft is defeated on the ground that property was appropriated by the defendant in pursuit of a mistaken claim to ownership. Apart from these typical instances of its application, the effect of claim of right on criminal responsibility in state and territorial law remains uncertain and contested. Chapter 2 limits but does not resolve common law uncertainties over the potential applications of claim of right as a ground for denying criminal liability or responsibility. Section 9.5 includes two quite distinct claim of right provisions, only one of which is a defence in the sense that it excuses the commission of an offence.<sup>232</sup> In the first of these provisions, which applies to offences which include “a physical element relating to property”, claim of right defeats liability if it would “negate a fault element” for a physical element of an offence. In this guise, it is really no more than a specialised mode of denying that the prosecution has established the elements of the offence. Section 9.5(1) states a truism very similar in its effects to 9.1 *Mistake or ignorance of fact (fault elements other than negligence)* and 9.3 *Mistake or ignorance of law*. Like those provisions, 9.5 *Claim of right* was meant to *supplement* application of the principles in Part 2.2 - *The Elements Of An Offence*. Claim of right was not intended to modify or displace those principles: see 9.5–B.

Reliance on s9.5(1), the first limb of the provision, is most likely when offences of dishonesty are in issue.<sup>233</sup> Chapter 2 gives less scope for reliance on claim of right to deny fault than existing law in state and territorial jurisdictions. This restriction on the protective scope of a claim of right is a consequence of the abandonment of the antiquated statutory terminology of “wilful” or “malicious wrongdoing,” which provide a statutory foothold for claim of right in state and territorial law.<sup>234</sup> The vocabulary of fault in the *Code* strips the fault elements of much of the evaluative content of the older terminology.<sup>235</sup>

In its second guise, in s9.5(2), claim of right goes beyond mere denial of fault. It provides a true defence which is limited in its application to offences which do not include any physical elements relating to property or the use of force against another.

232 See the commentary in *MCC - Ch2: General Principles of Criminal Responsibility*, 61, on “the ‘defence’ of claim of right”.

233 Ch7: *The proper administration of Government*, contains most of the offences of dishonesty; see, in addition, Ch10: *National infrastructure*, in which dishonesty is a defining element in a range of prohibitions against fraud on postal or telecommunications services.

234 See *Walden v Hensler* (1987) 29 A Crim R 85, per Brennan J at 92, providing examples where claim of right negated “unlawfully and maliciously maiming and wounding” (four sheep); “unlawfully and wilfully” killing with “wilful and wanton intention” (one pigeon); “wilfully and maliciously, that is to say with a wicked mind” (obstructing a mine). Compare, however, G Williams, *Textbook of Criminal Law* (2ed 1983) 456–457

235 A related provision does occur in *MCC - Ch6: Damage and computer offences*, s4.1.12 *Claim of right*, but this is an autonomous defence which owes nothing to s9.5.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

SECTION 9.5(1) NEGATING FAULT	SECTION 9.5(2) EXCUSING FAULT
1. Applies only to offences which <i>do</i> include a physical element relating to property	1. Applies only to offences which <i>do not</i> include a physical element relating to property
2. Claim based on a mistaken belief about proprietary or possessory right	2. Claim based on a mistaken belief about proprietary or possessory right
3. Applies only when the mistaken belief negates a fault element	3. Applies only when commission of the elements of the offence was a necessary consequence of an exercise of the illusory right
4. Restricted to offences which do not involve the use of force against a person	4. Restricted to offences which do not involve the use of force against a person

*9.5-A Mistaken belief in a claim of right can provide a ground for denying fault:*

Rearrangement of the text of 9.5(1), which occurred between the initial and final drafts of the *Code*, has created a problem of interpretation at the outset.<sup>236</sup> The provision is meant to bar criminal responsibility when a mistaken *belief* about a proprietary or possessory right is inconsistent with an imputation of fault. In its present form, however, the provision states that claim of right bars criminal responsibility if the existence of the *right*, which the defendant wrongly believed to exist, would be inconsistent with the imputation of fault. This can only be taken as an ellipsis - which was meant to express the idea that a mistaken *belief* in the existence of a proprietary or possessory right can negate a fault element of the offence. There is no ambiguity here, for there is no plausible alternative meaning which the provision could bear.

*9.5-B Claim of right, like 9.1 Mistake or ignorance of fact (fault elements other than negligence) and 9.3 Mistake or ignorance of statute law, supplements the fault provisions of Part 2.2 – The elements of an offence:*

Mistake or ignorance, whether of law or fact, can provide grounds for a denial of fault when the defendant is charged with an offence of appropriating or damaging property “belonging to another”. If the defendant is unaware of the other’s right to the property, as a consequence of mistake or ignorance, fault elements or knowledge or recklessness with respect to the victim’s rights to the property cannot be established. That conclusion follows from the provisions of Part 2.2 – *The elements of an offence*. The provisions on mistake or ignorance of fact or law and claim of right in Part 2.3 –

<sup>236</sup> Compare the draft provision in *MCC - Ch2: General Principles of Criminal Responsibility*, s309 *Claim of right*.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

*Circumstances in which there is no criminal responsibility*, provide a partial expression of the fundamental principles of liability in Part 2.2. It is a partial rather than complete expression because there will be circumstances in which fault cannot be proved though none of the provisions in Part 2.3 (*Circumstances in which there is no criminal responsibility*) has any application.

Consider the following restrictions on the scope of the Part 2.3 provisions on mistake or ignorance when fault is in issue:

- *Section 9.1 has no application to ignorance or mistake on a matter of law.*
- *Section 9.3(2)(b) only applies to mistakes or ignorance respecting Commonwealth statute law:* In practice, unwitting appropriation or damage to property belonging to another is more likely to result from mistake or ignorance relating to *common law*.
- *Section 9.5(1) only applies to mistaken beliefs about a proprietary or possessory right:* It has no application in circumstances where an unwitting appropriation or damage results from ignorance rather than mistake.<sup>237</sup> Moreover the claim of right provision has no application to offences “relating to the use of force against a person”.

The potential effects of mistake or ignorance on liability depend on the definition of the particular offence in question.<sup>238</sup> Taken singly or in combination, the provisions of Part 2.3 do not exhaust the circumstances in which failure to appreciate the nature or extent of the property rights of another may bar proof of fault. The paragraph which follows, on offences which require proof of dishonesty, outlines some of the ways in which mistake or ignorance relating to proprietary or possessory rights can defeat an allegation of fault.

#### *9.5-C Claim of right and offences of dishonesty:*

Dishonesty is defined in Ch7 of the *Code*: s130.3 *Dishonesty*:

For the purposes of this Chapter, **dishonest** means:

- (a) dishonest according to the standards of ordinary people; and
- (b) known by the defendant to be dishonest according to the standards of ordinary people.

<sup>237</sup> In view of the careful Chapter 2 distinctions between “mistake” and “ignorance” in ss9.1, 9.2, 9.3, 9.4, it is clear that the restriction of 9.5 claim of right to cases involving mistake, rather than ignorance, was quite deliberate.

<sup>238</sup> That conclusion follows from the division, fundamental to the structure of Chapter 2, between the issues of liability (Part 2.2 – *The Elements Of An Offence*) and criminal responsibility (Part 2.3 *Circumstances In Which There Is No Criminal Responsibility*). If the elements of offence cannot be established, pursuant to Part 2.2, the provisions dealing with responsibility in Part 2.3 have no application.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

The definition does not appear in the UK *Theft Act* 1968, which provided the model for the Australian codification of offences of dishonesty. Instead, it is a statutory redaction of the prevailing English common law criteria for dishonesty, commonly described as the “*Feely/Ghosh* test,” in commemoration of the two cases from which it was derived.<sup>239</sup> The definition has excited continuing controversy in the United Kingdom and in Australia, where the High Court declined to accept its application in the offence of conspiracy to defraud.<sup>240</sup> That controversy will not be canvassed here, since the *Code* has declared its allegiance to the *Feely/Ghosh* test.<sup>241</sup> It is apparent that there are three quite distinct ways in which a defendant might claim that a mistake about proprietary or possessory rights barred criminal responsibility:

- *When the defendant exercises a mistaken claim of right to the property in question:* If the defendant takes or obtains property in pursuit of a mistaken claim to ownership, the prosecution may be unable to prove fault with respect to the requirement that the property was owned by another.<sup>242</sup>
- *When the conduct of the defendant does not violate the ordinary person’s standards of honesty and dishonesty:* A person who believes, rightly or wrongly, that they have a proprietary or possessory right against another person may take other property in satisfaction of that right. Though the taking was without consent, it is possible in such a case that a jury or court might conclude that the taking is not dishonest by the standards of ordinary people. It might be taken to fall within the boundaries of the ordinary person’s tolerance for self help remedies.
- *When the defendant is unaware that their conduct does violate ordinary standards of honesty and dishonesty:* Since dishonesty requires proof that the defendant *knew* their conduct to violate ordinary standards, it is possible that a misguided belief in the right to pursue a proprietary or possessory right might blind a defendant to the fact that their conduct violated ordinary standards.

239 *Feely*[1973] 1 QB 530; *Ghosh* [1982] QB 1053.

240 The High Court decision in *Peters* (1998) 96 A Crim R 250 (see also *Spies* (2000) 113 A Crim R 448) provides the basis for the modern Australian debate. See CR Williams, “The Shifting Meaning of Dishonesty” (1999) 23 Crim LJ 275; A Steel, “The Appropriate Test for Dishonesty” (2000) 24 Crim LJ 46.

241 MCC - Ch3: *Theft, Fraud, Bribery and Related Offences*, Report 11-29

242 A mistaken claim to ownership by the defendant, however sincere, will not invariably defeat an allegation that the defendant knew the property to belong to another. Property can “belong” to more than one person under the *Code*: see Ch7 – *The Proper Administration Of Government*, s130.2, *When property belongs to another*. It is quite possible for a person who owns property to steal that property from a person who has possession or control of the property.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

In none of these instances is reliance on claim of right strictly necessary to support the defendant's denial of guilt. The defendant, who does not seek to excuse an offence, instead denies that any offence occurred. The first is a straightforward denial of fault; the second a denial of a circumstantial element of the offence and the third is another denial of fault.

Belief in the existence of a proprietary or possessory right is no answer to an allegation of dishonesty unless that belief is inconsistent with the imputation of fault. It is quite possible for a person to take action in pursuit of a claim of right in circumstances where they know very well that ordinary people would consider their action to be dishonest. Beliefs in legal entitlement, whether true or false, can provide a powerful incentive to indulge in oppression and sharp practice. In the *Code* offences of dishonesty, this potential for conflict between the defendant's claim of right and the statutory formulation of the *Feely/Ghosh* test is resolved in favour of the ordinary person's standard of honesty.

It is possible, in other words, for a person to commit an offence of dishonesty in circumstances where the conduct is motivated by a claim of right. That is a consequence of the fact that claim of right has no effect unless it negates a fault element - in this case, knowledge that the conduct is dishonest according to the standards of ordinary people. Since dishonesty is exhaustively defined, claim of right cannot extend or modify that definition in its application to particular offences. If the offender knows their conduct to be dishonest by those standards, the fact that they acted in pursuit of a claim of right is no answer to the charge. Instances will be highly unlikely to arise of course, but it would be arrogant for lawyers to assume that conduct based on a well founded legal claim provides an irrefragable guarantee against an ordinary person's condemnation of that conduct as dishonest.

The *Code* definition of dishonesty is in sharp contrast with the Victorian law of theft, where claim of right does form part of the definition of honesty. In Victoria, the *Feely/Ghosh* test, which never achieved statutory recognition, has been rejected by the Victorian courts.<sup>243</sup>

*9.5-D Claim of right provides a defence of indeterminate scope to offences which do not involve property or the use of force against a person:*

Section 9.5(2) permits a true claim of right defence, which goes beyond mere negation of fault elements, in offences which involve neither force nor violation of property rights. Since claim of right is a true defence in these circumstances, rather than a mere denial of a fault element, it can excuse

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<sup>243</sup> *Salvo* [1980] VR 401; *Peters* (1998) 96 A Crim R 250. Compare *Balnaves* (2001) 117 A Crim R 85 in which the SA Court of Criminal Appeal followed *Peters*, *ibid*.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

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  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

even if liability is strict or absolute.<sup>244</sup> The defence is available in the following circumstances:

- An offence which does not:
  - i require proof of a physical element relating to property;<sup>245</sup> or
  - ii “relat[e] to the use of force against a person”;
- The defendant’s conduct must arise “necessarily out of the exercise of the proprietary or possessory right that [the defendant] mistakenly believes to exist”.

Though the Chapter 2 claim of right defence in s9.5(2) bears some resemblance to claim of right in state and territorial laws, it is hedged with restrictions, some of which have no counterpart in those laws. Existing common law and decisions pursuant to the codified defence of claim of right in s22 of the Griffith *Code* provide some indication of the potential applications of the Chapter 2 defence, but do not determine its effect. The restriction of the defence to offences which do not include a physical element which relates to property departs from Australian common law and the Griffith *Code*.<sup>246</sup> So too does the requirement that the “offence aris[e] necessarily out of the exercise of the proprietary or possessory right”. At common law or under the Griffith *Code*, claim of right can excuse a creditor who deceives in order to obtain money owed by a recalcitrant debtor.<sup>247</sup> Section 9.5(2) has no application in such a case, for the defendant does not purport to exercise a proprietary or possessory right. Even if that hurdle could be surmounted, the defence has no application unless the deceiver

244 It has been suggested that s9.5(2) is subject to the same limitations as 9.5(1) and does nothing more than state the truism that mistaken pursuit of a claim of right is not an offence if the mistake “negated a fault element of the offence”. The brief commentary on the provision in *MCC Chapter 2 – General Principles of Criminal Responsibility* (1992) 61, may be taken to lend some support to that suggestion. There are at least two reasons for rejecting the suggestion: (a) s9.5(2) is not in terms limited to cases where mistake negates fault and; (b) it is difficult to see what point there could be in 9.5(2) unless it was intended to add something to the existing principle in 9.5(1). That said, it is not apparent why s9.5(2) should be restricted in its applications to offences which do not require proof of a “physical element relating to property” or to circumstances in which the defendant’s claim of right is *mistaken*.

245 The partial definition of property in Ch7 – *The Proper Administration Of Government*, s130.1, *Definitions*, provides limited guidance here.

246 In *Pearce v Pascov* [1968] WAR 66, 72, Virtue J suggested that the s22 Griffith *Code* defence of claim of right is limited to offences involving “deprivation of or interference with the proprietary or possessory rights of the true owner or person in possession.” That suggestion was rejected by a majority of the High Court in *Walden v Hensler* (1987) 29 A Crim R 85, per Deane J at 99; Toohey J at 113 and Gaudron J at 118, 120. Dawson J expressed no opinion on the issue. Only Brennan J at 94-98 accepted this restriction on the scope of the defence under the Griffith *Code*. He agreed that claim of right was not limited in this way at common law. Accord, D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (3ed 2001)

247 *Langham* (1984) 12 A Crim R 391. See, in addition, *Pollard* [1962] QWN 13.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

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  - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

was *mistaken* about their proprietary or possessory rights. And, finally, the deception in such a case cannot be said to arise *necessarily* out of the exercise of any claim of right. Deception is a tactic one may choose in pursuit of one's rights; however it is no way necessary to their exercise.

Speculation on potential applications of the *Code* defence suggests various possibilities, among them claims based on mistaken beliefs relating to rights, immunities or privileges arising from native title and associated cultural or spiritual rights.<sup>248</sup>

Since this is a defence, not a denial of any fault element which the prosecution is bound to prove, the defendant bears the evidential burden: 13.3 *Evidential burden of proof – defence*.

*9.5-E Section 9.5 Claim of right does not negate criminal responsibility for an offence that relates to the use of force against a person:*

So far as defensive applications of claim of right are concerned, pursuant to s9.5(2), the exception requires no explanation. An offender who attacks another in the exercise of mistaken belief that the attack is necessary to the exercise of a proprietary or possessory right cannot resort to claim of right to defeat a charge of assault.<sup>249</sup> However, such an offender can escape conviction for robbery. State and territorial law recognise claim of right as a defence to a charge of robbery or other offences of dishonesty involving force or threats of force. The same conclusion follows under the *Code*. The conclusion that there is no robbery in such a case is inescapable, though a majority in the New South Wales Court of Criminal Appeal decision in *Fuge*,<sup>250</sup> on common law claim of right, recently expressed disapproval verging on outrage at the prospect.<sup>251</sup> Sections 132.2 *Robbery* and 132.3 *Aggravated robbery* both require proof that the offender was engaged in theft of property. Since theft requires proof of a dishonest appropriation of property by an offender who was aware that it might belong to another, reliance on a mistaken claim of right can provide grounds for a denial of fault: 9.5-C. If the prosecution cannot establish the fault elements of theft, the charge of robbery must fail.

248 The Model Criminal Code Officers commentary on claim of right contains a tantalising reference to the fact that they considered these issues "in some detail". The commentary provides no indication of their views: Chapter 2 – *General Principles of Criminal Responsibility*(1992) 61. See *Walden v Hensler* (1987) 29 A Crim R 85 and, for a recent exploration of the difficult issues involved, *DPP Reference (No 1 of 1999)*(1999) 105 A Crim R 489.

249 Note, however, that force employed to *defend* property may be excused under s10.4 *Self defence*.  
250 [2001] NSWCCA 208.

251 *Ibid*, per Heydon J, "astonishing"; per Sully J an "absurdity" which requires 'prompt and specific legislative correction'. Wood CJ, who reviewed the authorities on claim of right, did not join in these expressions of disapproval.

**DIVISION 9 - CIRCUMSTANCES INVOLVING MISTAKE OR IGNORANCE**

**9.5 Claim of right**

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  - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

It should be noted that this conclusion does not follow from the existence of s9.5 *Claim of right*. The concluding provision can be taken to evince an intention to deny recourse to the section in any offence which includes a physical element involving the use of force.<sup>252</sup> But reliance on s9.5 is unnecessary to defeat the charge: the conclusion that a mistaken belief in a proprietary or possessory right might bar conviction for robbery is a simple consequence of the requirement that the prosecution first prove the elements of a theft.

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<sup>252</sup> Note, in this connection, the difference between the formulation of the s9.5(3) exception in the Model Criminal Code provision, 309 *Claim of right* and its counterpart in Chapter 2 of the Criminal Code. *MCC*: "This section does not negate criminal responsibility for the use of force against a person": *Code*: "This section does not negate criminal responsibility for *an offence relating to* the use of force against a person." (Italics added).

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

**10.1 Intervening conduct or event**

A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

- (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
- (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

## DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS

### 10.1 Intervening conduct or event

The defence of intervening conduct or event is limited in its applications to physical elements of an offence for which strict or absolute liability is imposed: s6.1. *Strict Liability*; s6.2 *Absolute Liability*.

Though the prosecution is not required to prove fault with respect to the physical element of the offence in question, criminal responsibility is not incurred if that element resulted from either the conduct of another person or an event over which the defendant could not be expected to exert control. The *Code* follows the canonical common law formulation of the defence by Bray CJ in *Mayer v Marchant*.<sup>253</sup>

It is a defence to any criminal charge to show that the forbidden conduct occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he or she could not reasonably have been expected to guard.

The defence is available when any physical element of the offence – an act, omission, state of affairs, circumstance or result – is brought about by or as a consequence of some extraneous and uncontrollable event or conduct of another. It is evident that the requirement of an *intervening* event or conduct was not meant to restrict the defence to events or conduct which “come between” the defendant’s conduct and other physical elements of the offence.<sup>254</sup> Since s10.1 refers to the potentially exculpatory effect of *intervening conduct*, it is apparent that the defence can be based on the failure or omission of some expected action by another person. For example, a failure on the part of a manufacturer to sterilise food preparation utensils could provide the basis for a defence of intervening conduct for a retailer charged with selling contaminated food.

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<sup>253</sup> (1973) 5 SASR 567.

<sup>254</sup> The OED and Macquarie dictionaries both recognise that an intervening event may be one which comes between an initial act and a subsequent state of affairs or one which is merely extraneous to the anticipated course of affairs.

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- (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

The defence can supplement a denial that an offence of strict or absolute liability was committed voluntarily: see s4.2 *Voluntariness*. In offences which impose strict liability, it will also supplement the operation of the defence of reasonable mistake of fact: s9.2 *Reasonable mistake of fact (strict liability)*. That defence is available to a defendant only if there was, in fact, a mistake. Mere ignorance, no matter how reasonable, cannot provide grounds for a defence of mistake. This rigidity in the defence of reasonable mistake is palliated by the availability of the defence of intervening conduct.<sup>255</sup> The defence will excuse defendants who simply failed to anticipate those unpredictable and unavoidable events which bring their conduct within the scope of criminal prohibition.

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<sup>255</sup> See B Fisse, *Howard's Criminal Law* (1990) 522, n68, 523-526.

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

**10.2 Duress**

- (1) **A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.**
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
  - (a) a threat has been made that will be carried out unless an offence is committed; and
  - (b) there is no reasonable way that the threat can be rendered ineffective; and
  - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

## 10.2 Duress

Duress excuses a person who is compelled to commit an offence by threats. Chapter 2 abrogates many of the common law restrictions on the defence.<sup>256</sup> Unlike the common law, the *Code* does not limit duress to circumstances involving a threat of death or serious injury. There is no restriction on the nature of the threatened harm. The Model Criminal Code Officers Committee accepted the view advanced by Professor Stanley Yeo:

Once a person is under the influence of a threat, whatever he or she does depends on what the threatener demands. The crime demanded might be trivial or serious, but it has no necessary connection with the type of threat confronting the accused. Policy reasons would, however, insist that the accused's response was reasonably appropriate to the threat.<sup>257</sup>

Like common law, Chapter 2 imposes an objective standard, limiting the class of those who can rely on the defence. There are three objective criteria, each of which employs the concept of reasonableness as a limit on the defence:

- *The threat must be real or reasonably apprehended as real:* Unlike s10.4 *Self defence*,<sup>258</sup> duress is not available to a defendant who is unreasonably mistaken in their apprehension of harm;
- *The threat must be unavoidable:* The defence is barred if reasonable measures to avoid or neutralise the threat were available to the defendant;
- *The defendant's response to the threat must be reasonable in the circumstances:* The defence of duress is barred if commission of an offence in compliance with the demand was not a reasonable response to the threat.

It is implicit in the last of these criteria that individuals faced with a threat of harm must sometimes endure the threatened harm rather than comply with the demand and commit the offence.

These criteria displace the common law test, which limits duress to circumstances in which a "person of ordinary firmness of mind" might have reacted in the same way as the defendant.<sup>259</sup>

<sup>256</sup> For recent accounts of the common law, see S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 310-324; D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (3ed 2001) 788-807; P Gillies, *Criminal Law* (4ed 1997) ch16. See too Professor Stanley Yeo's monograph, *Compulsion in the Criminal Law* (1990).

<sup>257</sup> S Yeo, "Private Defences, Duress and Necessity" (1991) 15 Crim LJ 139 at 143.

<sup>258</sup> Compare s10.4 *Self defence*, which permits acquittal in cases where the defendant responds to an unreasonable apprehension of threatened harm.

<sup>259</sup> See D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (3ed 2001) 794-801 on the confusion between provocation and duress resulting from their common use of the reactions of the "ordinary person" as a criterion for exculpation.

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

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  - (a) a threat has been made that will be carried out unless an offence is committed; and
  - (b) there is no reasonable way that the threat can be rendered ineffective; and
  - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Common law does not permit a defence of duress to excuse murder or attempted murder. In its report on Chapter 2, the Model Criminal Code Officers' Committee argued that there was no principled ground limiting the application of the defence in this way. The objective criteria, which require reasonable belief in the threat, and a reasonable response, should ensure that...the defence could not be lightly invoked<sup>260</sup> when murder or attempted murder are in issue. Though the Committee's recommendation was not expressed in any of the provisions of Chapter 2, it has been accepted by the Commonwealth. In Chapter 4 of the *Code*, 71.2 *Murder of a UN or associated official* imposes no barrier against reliance on a defence of duress.

The defence is not available when the threat is made by a person, or their agent, with whom the defendant has joined an association for the purpose of engaging in conduct of the same kind as that demanded. Common law and the Griffith Code place a similar, though apparently more restrictive limitation on the defence. They would deny a defence of duress when the defendant joined an association with another in the awareness of a *risk* that co-ercion might be employed to induce participation in an offence.<sup>261</sup> The Chapter 2 defence of duress, by contrast, is barred only if the defendant shares the *purpose* of the principal to engage in criminal conduct of that kind.

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260 Model Criminal Code, Chapter 2: *General Principles of Criminal Responsibility* (Report 1992) 65.

261 See s31(4) Queensland and Western Australian *Criminal Codes*. On the common law, see *Palazoff* (1986) 23 A Crim R 86, 94 (Zelling ACJ); *Baker & Ward* (1999) 2 Crim App R 335.

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

**10.3 Sudden or extraordinary emergency**

- (1) **A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.**
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
  - (a) circumstances of sudden or extraordinary emergency exist; and
  - (b) committing the offence is the only reasonable way to deal with the emergency; and
  - (c) the conduct is a reasonable response to the emergency.

### 10.3 Sudden and extraordinary emergency

Subsection 10.3(1) provides a person is not criminally responsible for an offence when conduct constituting the offence is carried out in response to circumstances of sudden or extraordinary emergency.

The usual term for this defence at common law is “necessity”. Chapter 2 amalgamates principles underlying the common law of necessity and its equivalent in s25 of the Griffith Code and restricts the application of the defence to circumstances of “sudden or extraordinary emergency.”

In the notes in his Draft Code, Sir Samuel Griffith stated:

This section gives effect to the principle that no man is expected (for the purposes of the criminal law at all events) to be wiser and better than all mankind. It is conceived that it is a rule of the common law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the common law rules as to excuses for an act which is prima facie criminal.<sup>262</sup>

Like 10.2 *Duress*, the defence of sudden or extraordinary emergency imposes an objective standard, limiting the class of those who can rely on the defence. There are three objective criteria, each of which employs the concept of reasonableness as a limit on the defence. With necessary adaptations for differences in subject matter, the criteria are the same as those which determine the availability of a defence of duress:

- *The emergency must be real or reasonably apprehended as real:* The defence of sudden or extraordinary emergency is not available to a defendant who is unreasonably mistaken in apprehending a situation of emergency;
- *The emergency must be unavoidable by lesser means:* The defence is barred unless commission of the offence was the only reasonable way to deal with the emergency;
- *The defendant's response to the emergency must be reasonable in the circumstances:* The defence is barred if commission of an offence was not a reasonable response to the emergency.<sup>263</sup>

It is implicit in these criteria that individuals faced with an emergency must sometimes suffer the consequences or allow them to occur, rather than commit an offence which will avert the emergency.

Like duress, the defence of sudden or extraordinary emergency is a general defence, available even to a charge of murder or attempted murder.

<sup>262</sup> Queensland Parliamentary Papers (CA 89-1997).

<sup>263</sup> Subsection (2) paras (b) and (c) state overlapping conditions. Their focus is slightly different: (2)(b) is concerned with instrumental necessity while (2)(c) expresses the requirement of a proportionate response to the circumstances of emergency.

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

**10.4 Self-defence**

- (1) **A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.**
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
  - (a) to defend himself or herself or another person; or
  - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
  - (c) to protect property from unlawful appropriation, destruction, damage or interference; or
  - (d) to prevent criminal trespass to any land or premises; or
  - (e) to remove from any land or premises a person who is committing criminal trespass;and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
  - (a) to protect property; or
  - (b) to prevent criminal trespass; or
  - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
  - (a) the person is responding to lawful conduct; and
  - (b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

## DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS

### 10.4 Self defence

Conduct which would otherwise amount to an offence is not criminal if it is done in self defence. Chapter 2 extends the application of the defence beyond circumstances involving a threat of personal harm. A plea of self defence is also available when action is taken to defend property or to repel or remove trespassers. That enlargement of the range of interests which are included within the plea of self defence is paralleled by a corresponding enlargement of the range of offences which can be excused by a plea of self defence. Though it is often assumed that self defence is limited in its applications to offences which involve the use of force, Chapter 2 imposes no limit of this kind on the range of offences for which self defence might provide an excuse or justification. A judicious lie might amount to a far more effective defensive measure than a resort to force as, for example, when property is threatened with unlawful appropriation. If the lie was told in circumstances which could amount to an offence, there is no apparent reason why a defendant should not resort to s10.4 to excuse or justify their conduct.

Conduct is only excused on the ground of self defence if it was a reasonable response to threatened harm. The defendant is judged, however, on their own perceptions of the threat. An unreasonable mistake can provide the basis for a complete defence.

The defence has no application in cases where the defensive action was a response to conduct which the defendant knew to be lawful. Moreover, death or serious injury, if caused intentionally, cannot be excused if the defendant's use of deadly force was undertaken in defence of real or personal property.

*10.4-A Self defence can excuse conduct which would otherwise amount to an offence if done in defence of a person, defence of property or prevention of trespass to real property:*

Chapter 2 extends the meaning of "self defence" well beyond ordinary usage. It includes defence of a stranger and extends to action taken to prevent or terminate unlawful imprisonment. Self defence also extends to defence of real and personal property and prevention of trespass or removal of trespasses from land or premises.

*10.4-B Self defence extends to include conduct which results from an unreasonable misapprehension of threatened harm:*

Unlike 10.2 *Duress* and 10.3 *Sudden and extraordinary emergency*, both of which require a reasonable apprehension of threatened harm, self defence is available even in circumstances where the defendant responded to an *unreasonable*

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

**10.4 Self-defence**

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  - (c) to protect property from unlawful appropriation, destruction, damage or interference; or
  - (d) to prevent criminal trespass to any land or premises; or
  - (e) to remove from any land or premises a person who is committing criminal trespass;and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
  - (a) to protect property; or
  - (b) to prevent criminal trespass; or
  - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
  - (a) the person is responding to lawful conduct; and
  - (b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

apprehension of harm.<sup>264</sup> The more unreasonable the tale of mistake, however, the more likely it is that it will be rejected by a the trier of fact as incredible.<sup>265</sup>

*10.4-C Self defence does not excuse conduct unless it was a reasonable response to the perceived harm:*

Though the defendant is allowed the benefit of the defence when action is taken in response to an honest albeit unreasonable perception of threatened harm, the *response* to that perceived harm must be reasonable

*10.4-D Unless harm to a person or imprisonment is threatened, self defence cannot excuse intentional infliction of death or really serious injury:*

Section 10.4 follows common law in its recognition that there are circumstances in which deadly force might be an excusable response to “injury, violation, or indecent or insulting usage”.<sup>266</sup> Self defence against threatened harm to the person does not require equality between the threat and the response. However, when interests other than personal safety are threatened, s10.4 limits the defence. It has no application in cases where death or personal injury is intentionally caused in defence of real or personal property, but there is no barrier to reliance on the defence when the charge is one of *attempting* to cause death or serious harm in defence of property.

*10.4-E Self defence cannot excuse the intentional use of force against a person who is known to be acting lawfully:*

Self defence cannot excuse the use of force in order to avoid a threat of personal injury, property damage or trespass to land which is known to arise from the lawful conduct of another person. So, for example, conduct which would contravene one of the provisions in Ch7 - Division 147 – *Causing harm to Commonwealth public officials* cannot be excused on grounds of self defence if the victim of the offence is known to be acting lawfully. Note the distinction between self defence against lawful conduct and self defence against conduct which is merely excusable. So long as the defendant does no more than is reasonable in the circumstances, defensive measures can be taken against threats by individuals who are known to be irresponsible by reason of immaturity or mental impairment.

<sup>264</sup> Compare s15D, *Criminal Law Consolidation Act 1935* (SA) and s46 *Criminal Code Act 1924* (Tas) which adopt the same approach. This acceptance of subjectivity is modified, however, when an unreasonable apprehension of harm is the result of self-induced intoxication: 8.4 *Intoxication (relevance to defences)*.

<sup>265</sup> Compare 9.1 *Mistake or ignorance of fact (fault elements other than negligence)*. Though the provision, which is concerned with fault rather than defences, has no application in such a case, the same principle applies, as a matter of commonsense.

<sup>266</sup> *Howe* (1958) 100 CLR 448, 460 (Dixon CJ).

**DIVISION 10 - CIRCUMSTANCES INVOLVING EXTERNAL FACTORS**

**10.5 Lawful authority**

A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.

### 10.5 Lawful Authority

Chapter 2 contains “all the general principles of criminal responsibility that apply to any offence”: s2.1 *Purpose*. Accordingly it was necessary to provide a general defence which will excuse or justify conduct which is authorised by law. The law in question must be a law of the Commonwealth: *Dictionary*. Typical examples for an application of s10.5 are those provisions which confer investigatory powers on police and other officials, and permits for the import or manufacture of weapons, explosives or drugs...&c. The reference to conduct which is justified or excused “by or under a law” recognises that the authorisation may be indirect or implied, rather than explicit.<sup>267</sup>

As in other defences, the defendant bears the evidentiary burden: s13.3 *Evidential burden of proof – defence*. Once the defence is raised by evidence, the prosecution must prove beyond reasonable doubt that the conduct was not authorised.<sup>268</sup>

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<sup>267</sup> Lawful authority is not to be confused with the defence of “reasonable excuse” which is recognised in a number of federal offences. See *Henshaw v Mark* (1997) 95 A Crim R 115 on the distinction between the defence of reasonable excuse and lawful authority under s15D of the *Crimes Act* 1914. An example of lawful authority is found in Part 1AB, *Crimes Act* 1914 which is concerned with authorisation of police controlled operations.

<sup>268</sup> Compare s15D, *ibid*, which placed the burden of proving lawful authority on the defendant.

**Part 2.4—Extensions of criminal responsibility**

Division 11

- 11.1 Attempt
- 11.2 Complicity and common purpose
- 11.3 Innocent agency
- 11.4 Incitement
- 11.5 Conspiracy
- 11.6 References in Acts to offences

## PART 2.4 - EXTENSIONS OF CRIMINAL LIABILITY

### DIVISION 11

#### 11.1 Attempt

For simplicity and brevity, the discussion which follows refers to the offence which the defendant is charged with attempting as the “principal offence”.

An attempt to commit an offence is punishable to the same extent as the principal offence. Liability for attempt is implied whenever a new offence is enacted, unless there is specific provision to the contrary<sup>269</sup> or liability for attempt is incompatible with the nature of the principal offence.<sup>270</sup> Offences can be attempted by omission no less than by active conduct, though instances of attempt by omission are likely to be rare.<sup>271</sup> Conduct must be “more than merely preparatory” before it can provide a basis for conviction of attempt and it must be intentional. Circumstances and results which are elements of the offence must be either intended or known. In the large majority of offences, which require recklessness at most, the fault requirements for conviction of the attempt are more demanding than the fault requirements for the completed offence.

Neither success nor impossibility of success is a barrier to conviction for attempt.

*11.1-A Liability for attempt requires proof of intention or knowledge with respect to each physical element of the principal offence:*

Section 11.1(3) has two distinct effects when the defendant is charged with an attempt:

- *Fault must be proved with respect to each physical element of the principal offence:* Though the principal offence may dispense with fault requirements, strict and absolute liability have no application when an attempt to commit that offence is charged;

<sup>269</sup> For an instance where liability for attempt is barred, see the cybercrime provision in Chapter 10 – *National Infrastructure*; Part 10.7 – *Computer Offences*, s477.1 *Unauthorised access, modification or impairment with intent to commit a serious offence*. Liability for an attempt to commit this offence is barred because it is itself a preparatory crime.

<sup>270</sup> The obvious examples are offences of causing injury or death by negligence.

<sup>271</sup> Reference to “conduct” throughout s11.1 *Attempt* implies liability for omission as a consequence of the definition in 4.1 *Physical elements*. See, in addition, *MCC – Ch 2: General Principles of Criminal Responsibility* (1992) 77: “The Committee decided that it should be possible to commit an attempt by an omission...”. Instances of attempt by omission are likely to involve a principal offence which requires proof of a result. The classic example would be an attempt to murder a child by withholding food or medical treatment: *Bubb* (1850) 4 Cox CC 457 and B Fisse, *Howard’s Criminal Law* (1990) 413.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.1 Attempt

- (1) **A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.**
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

- (4) A person may be found guilty even if:
  - (a) committing the offence attempted is impossible; or
  - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

- *Fault in attempts is limited to intention and knowledge:* Though the principal offence requires recklessness or negligence with respect to one or more physical elements, liability for an attempt to commit the offence requires proof of intention or knowledge with respect to that element.

Each of these principles reflects the prevailing tendency of the common law.<sup>272</sup>

Provision for intention and knowledge as alternative forms of fault when attempt is charged avoids some problems which might otherwise arise under the heading of “impossibility” (for discussion of other impossibility problems, see below 11.1-E). A significant number of federal offences impose liability for conduct accompanied by knowledge of an incriminating circumstance. The *Crimes Act* offence of destroying evidence is typical.<sup>273</sup> The offence is committed when a person intentionally destroys a document or any other potential piece of evidence, “knowing that...[it] is or may be required in evidence in a judicial proceeding”. Since truth and knowledge are indissolubly linked, the requirement of knowledge implies the need to prove that there was some real prospect that the thing destroyed would be required in court proceedings. However, when attempt is charged, that restriction on liability is outflanked. So long as the defendant destroys a document, or other potential evidence, in the *belief* that it will be required, the defendant acts intentionally with respect to the incriminating circumstance: 5.2 *Intention*. Since intention can substitute for knowledge in attempt, it is no answer to the charge that the defendant’s belief may have been utterly unfounded.

#### *11.1-B Offences of absolute or strict liability can be attempted:*

In offences which impose absolute or strict liability, the prosecution is not required to prove fault with respect to some or all physical elements of the offence: Ch 2: Division 6 – *Cases where fault elements are not required*. The rule is different, when an attempt to commit one of these offences is charged: the prosecution must prove intention or knowledge with respect to each element of the principal offence.

<sup>272</sup> On fault in liability for attempts to commit offences of strict or absolute liability, see B Fisse, *Howard’s Criminal Law* (1990) 391-393. The second issue – can liability for an attempt be based on proof of recklessness with respect to one or more elements of the principle offence? – is contested. Fisse, *op cit*, 386-390, argues that recklessness should suffice for a the attempt if the principal offence requires recklessness. Caselaw does not support that position: see the High Court dicta in *Georgianni* (1985) 156 CLR 473 and *Knight* (1992) 63 A Crim R 166, 170-171 (Mason CJ, Dawson & Toohey JJ; contra Brennan & Gaudron JJ 176).

<sup>273</sup> *Crimes Act* 1914 (Cth) s39.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.1 Attempt

- (1) **A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.**
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- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

- (4) A person may be found guilty even if:
  - (a) committing the offence attempted is impossible; or
  - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

*11.1-C Conduct must go beyond mere preparation to commit an offence before it can amount to an attempt:*

Common law requires conduct *proximate* to the completed offence before liability is imposed for attempt. The common law requirement of proximity in attempts is the subject of continuing and unresolved contention. A variety of “tests” have been proposed by courts and commentators to determine when preparation ends and the criminal attempt begins.<sup>274</sup> Chapter 2 abandons all these attempts to state a test and poses the issue in stark terms. The question is simply: Was the conduct of the defendant “more than merely preparatory”?<sup>275</sup> The question requires a conclusion of fact to be drawn in the light of all the circumstances of the case. The South Australian Supreme Court decision in *O’Connor v Killian*<sup>276</sup> anticipates the *Code* provision and provides an example of its application to the offence of attempt to obtain by false pretences. There is common law authority that the question whether the defendant has gone beyond mere preparation must be judged on the facts as the defendant perceived them.<sup>277</sup> So, for example, a person who imports a bag of oregano in the belief that it is cannabis is guilty of an attempt to commit the offence of importing a prohibited substance: compare “impossibility”, below 11.1-E. Though nowhere near commission of the offence in reality, the would-be smuggler has passed well beyond mere preparation in their own mistaken conception of the facts.

*11.1-D Success is no answer to a charge of attempt:*

At common law, a person charged with an attempt cannot escape liability on the ground that the offence has been completed.<sup>278</sup> So also under the *Code*. The rule is one of common sense. If success were an answer to a charge of attempt, a trial judge would be required to instruct a jury to acquit a defendant entirely in circumstances where they were convinced beyond reasonable doubt that the offence was *either* attempted *or* completed but uncertain which of the two conclusions was true.

274 S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 437-441 provide a brief account of some of the competing alternatives. Also see B Fisse, *Howard’s Criminal Law* (1990) 393: “a number of judicial efforts have been made to lay down a workable test of proximity, but none of them can be regarded as successful.”

275 The test adopted follows a number of authorities and law reform bodies: English Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt*, Report No 102 (1980) at paras 2.48-2.49 and s.1(1) of the *Criminal Attempts Act* (UK) 1981; Law Reform Commission of Canada, Report No. 31, *Recodifying Criminal Law* (1987) at 45.

276 (1984) 15 A Crim R 353.

277 *Britten v Alpogut* (1986) 23 A Crim R 354; discussed: Leader-Elliott, “Case & Comment: *Britten v Alpogut*” (1987) 11 Crim LJ 182.

278 *Prior* (1992) 65 A Crim R 1; B Fisse, *Howard’s Criminal Law* (1990) 414.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

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- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

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- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

*11.1-E Impossibility of success is no answer to a charge of attempt:*

Chapter 2 confirms the emergent common law consensus that a person can be convicted of attempt though completion of the offence was impossible in the circumstances.<sup>279</sup> Nor is impossibility a ground for concluding that the conduct of the defendant was not sufficiently *proximate* to the completed offence. The rule that impossibility of success does not bar conviction for attempt implies that the proximity issue is to be determined on the defendant's perception of the facts: 11.1-C.

As long as it can be said that the defendant is attempting an offence known to the law, Chapter 2 provides no basis for a distinction between "legal" and "factual" impossibility.<sup>280</sup> Neither legal nor factual impossibility is a barrier to conviction for an attempt. That proposition should be distinguished, however, from the rule in s11.1(6) that "defences, procedures, limitations or qualifying provisions that apply to an offence apply equally to the offence of attempting to commit that offence": discussed below, 11.1-F.

*11.1-F Defences, procedures, limitations or qualifying provisions that apply to an offence apply equally to the offence of attempting to commit that offence:*

Most applications of the principle are obvious: self defence, duress and sudden or extraordinary emergency will excuse both assault and attempted assault. If Parliament chooses to impose a limitation period for prosecution of an offence, the limitation applies equally to the pendant offence of attempt. Applications of the principle cause no problem in these cases because the distinction between defences or procedural rules and the elements of an offence are obvious. Applications of the principle in cases involving "limitations" or "qualifying provisions" require more care. Take a simple example first of all. In state and territorial jurisdictions the traditional form of the prohibition against unlawful abortion takes the following form: "Whosoever, being a woman with child, unlawfully administers to herself...&c."<sup>281</sup> A woman who took an abortifacient drug in the mistaken belief that she was pregnant cannot be held guilty of the offence of course: pregnancy is an essential circumstantial element of the offence. Suppose she is charged instead with an attempt to commit the offence. It seems

279 See *Britten v Alpogut* (1986) 23 A Crim R 354 (Vic); *Prior* (1992) 65 A Crim R 1 (NT); *Mai & Tran* (1992) 60 A Crim R 49 and *Isaac* (1996) 87 A Crim R 513, 521 (NSW); *English* (1993) 68 A Crim R 96 (WA). South Australia, where the authority of *Haughton v Smith* [1975] AC 476 was accepted in *Collingridge* (1976) 16 SASR 117 and *Kristo* (1989) 39 A Crim R 86, awaits an occasion to reconsider the issue.

280 See S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 352-363 for a recent discussion of this much discussed issue. The authors suggest that the *Code* provisions permit conviction for attempts to commit "imaginary crimes", *ibid* 355. The criticism is, with respect, misplaced. Liability for attempt is limited to attempts to commit offences, as defined in Ch 2, Part 2.2 – *The Elements of an Offence* and the particular provisions which set out their elements. The offence must be one known to the law. The impossibility rule is qualified moreover by s11.1(6).

281 See, for example, s82 *Crimes Act* 1900 (NSW).

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.1 Attempt

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highly unlikely that the common law would permit conviction of an attempt in these circumstances. Since the attempt and completed offence are equally punishable at common law,<sup>282</sup> the legislative rationale for restricting the offence to pregnant women applies with equal force to the attempt. If a provision such as s11.1(6) were to govern the interpretation of the offence it would reinforce that inference of legislative intention. The pregnancy limitation is a “limitation or qualifying provision” which governs the offence and the attempt alike. The Commonwealth *Customs Act* provisions on narcotic drugs contain a similar, though more contentious example. There is no doubt that a person who packs a parcel of oregano in a hollow walking stick and brings it into Australia, in the mistaken belief that it is cannabis, is guilty of an attempt to import cannabis, a prohibited import;<sup>283</sup> impossibility of success is no answer to a charge of attempted importation. Suppose, however, that this incompetent is charged with one of the offences of attempted possession of a prohibited drug contrary to s233B(1).<sup>284</sup> In each of these possession offences, conviction of the principal offence requires proof that the drug was “imported into Australia in contravention of this Act”. That limitation or qualification on liability for the principal offence should equally apply to the attempt so as to bar the possibility of conviction. The legislative rationale for the exception is the same, whether the attempt or completed offence is in issue.

The contentious nature of the issues involved in marginal applications of the principle in s11.1(6) are particularly apparent in the recurring problem of the receiver or fence, who accepts goods in the mistaken belief that they are stolen.<sup>285</sup> Australian common law probably holds that impossibility is no barrier to conviction of the fence for attempted receiving: 11.1-E. The same conclusion follows under the *Code*, where s132.1 *Receiving* requires proof of dishonest receipt of “stolen property knowing or believing the property to be stolen. Though the principal offence requires proof that the property was stolen, it is unlikely that this requirement can be said to amount to a “limitation or qualifying provision” which applies equally to the attempt.

What then of the ubiquitous provisions which limit liability for federal offences to criminal activity involving Commonwealth property, personnel, buildings or other subjects of Commonwealth concern? There can be no liability for the completed offence, of course, unless the Commonwealth

282 Even in jurisdictions where a distinction is drawn between punishment for the principal offence and the attempt, it would be stretching credulity to suggest that the legislature intended the limit to apply only in cases where the principal offence was charged.

283 *Customs Act* 1901 (Cth) s233B(1)(b). So held, *Britten v Alpogut* (1986) 23 A Crim R 354.

284 *Ibid.*, ss(1)(c), (caa), (ca).

285 Debate on the question spans the 20th century and transcends localised criminal jurisprudence. See *People v Jaffe* (1906) 78 NE 169 (New York); *Donnelly* [1970] NZLR 980 (NZ); *Haughton v Smith* [1975] AC 476 and *Anderton v Ryan* [1985] 2 WLR 908(UK); *English* (1993) 68 A Crim R 96 (WA).

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.1 Attempt

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- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

- (4) A person may be found guilty even if:
  - (a) committing the offence attempted is impossible; or
  - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

connection is proved. And clearly there is no liability for an attempt if the defendant had neither an intention to commit an offence relating to subject matter protected by federal law nor any belief on that score. Suppose, however, that a thief steals a car in the mistaken belief that it is a Commonwealth car. Or suppose an assault is made on a state or territorial police officer in the mistaken belief that the officer is a member of the Australian Federal Police. In these instances, the requirement of a Commonwealth connection is a “limitation or qualifying provision which applies to [the] offence” and prosecution for an attempt to commit one of the *Code* offences will fail.<sup>286</sup>

*11.1-G “Special liability provisions” which apply to the principal offence apply as well to the attempt:*

The Dictionary to the *Criminal Code* provides a definition of these provisions. There are three kinds of special liability provision:

- Those which impose *absolute* liability for one or more but not all of the physical elements of an offence; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew* a particular thing; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew or believed* a particular thing.

Special liability provisions have only one purpose in the *Code*. They relieve the prosecution from the need to prove fault with respect to elements of the offence which establish Commonwealth jurisdiction. Section 11.1(6A) extends the effect of the special liability provisions to the attempt.

Crimes against humanity aside, federal offences are limited by the need for a connection between the offence and a subject matter of Commonwealth constitutional concern. In many instances the link will be established via physical elements of the offence. So, for example, the offence of theft is limited to property which belongs to a Commonwealth entity: s131.1 *Theft*. Receiving is limited in the same fashion: s132.1 *Receiving*. Bribery is limited to bribery of Commonwealth public officials: Part 7.6 – *Bribery And Related Offences*. In these examples, the circumstance which defines the offence as a subject for Commonwealth concern is, at the same time, a physical element of the offence.<sup>287</sup>

It follows that proof of recklessness with respect to the Commonwealth connection would be necessary, pursuant to 5.6 *Offences that do not specify fault elements*, unless provision is made to relieve the prosecution of the burden. Since the existence of a Commonwealth connection usually has no bearing on the

<sup>286</sup> The case is different, however, if the subject matter of the projected offence exists. So, for example, if the offender intends to steal the Commonwealth car driven by Jones, the AFP officer who lives down the road or intends to attack Jones, a mistaken attack on the wrong person or a mistaken appropriation of the wrong car *will* amount to an attempt to commit a federal offence.

<sup>287</sup> Ch 2: 4.1 *Physical elements*.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.1 Attempt

- (1) **A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.**
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

- (4) A person may be found guilty even if:
  - (a) committing the offence attempted is impossible; or
  - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

blameworthiness of defendant's conduct, special liability provisions are used to avoid the necessity for proof of fault with respect to the existence of the connection.<sup>288</sup> In theft, liability is absolute with respect to the requirement that the property in question belong to the Commonwealth: s131.1(3). In bribery it is unnecessary for the prosecution to prove that the defendant *knew* that the official was a Commonwealth official [s141.1(2)] and in receiving it is unnecessary to prove that the defendant *knew or believed* that the property belonged to the Commonwealth: s132.1(2A).

*11.1-H The penalty for attempt is the same as the penalty for the offence attempted:*

At common law, the penalties for attempt were not fixed. Legislation in most state and territorial jurisdictions now limits the penalty for attempt to some fraction of the penalty for the completed offence.<sup>289</sup> In South Australia, for example, an attempt draws a maximum penalty of two thirds of the maximum penalty for the principal offence, in the absence of contrary provision.<sup>290</sup> New South Wales, like the Commonwealth, sets the same maximum penalty for the attempt as it does for a completed offence. Though in practice an attempt usually draws a lesser sentence than a completed offence, the distinction is not always observed. In offences of fraud and trafficking in drugs, for example, there is often no difference in the degree of culpability between the completed offence and the attempt.

*11.1-I Conviction for attempt bars subsequent prosecution for the completed offence:*

There is common law authority for the proposition that a person convicted of the principal offence cannot also be convicted of an attempt to commit that offence.<sup>291</sup> Section 11.1(5) deals with the converse situation, where the prosecution seeks a conviction for the principal offence though the offender was convicted earlier of the attempt. Prosecutorial motives for launching the second prosecution might include the discovery of new evidence or the delayed occurrence of an element of the principal offence as, for example, when the victim of an attempted murder dies as a consequence of the defendant's attack. Whatever the motive, Chapter 2 forbids a second prosecution.

*11.1-J Liability for attempt does not extend to complicity or conspiracy:*

Though there is some common law support for the suggestion that liability can be imposed for an attempt to become an accomplice or attempted conspiracy,<sup>292</sup> the *Code* does not permit further extension of these extended forms of liability by application of the law of attempt.

<sup>288</sup> Compare Ch 4 : Division 71 – *Offences against United Nations and associated personnel*, which imposes strict liability with respect to the requirement that the offences be committed against UN and associated personnel.

<sup>289</sup> S Bronitt & B McSherry, *Principles of Criminal Law* (2001), provide a useful comparative table.

<sup>290</sup> *Criminal Law Consolidation Act 1935* (SA) s270A(3).

<sup>291</sup> *Wesley Smith v Balzary* (1977) 14 ALR 681.

<sup>292</sup> B Fisse, *Howard's Criminal Law* (1990) 412-413. See, in addition, *Ransford* (1874) 13 Cox CC 9 (attempted incitement);

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

## 11.2 Complicity and Common Purpose

Liability as an accomplice is derivative in the sense that it depends on proof that another person or persons combined with the defendant to commit the offence. Frequently the relationship will involve commission of all of the elements of the offence by a principal offender with the support and encouragement of the accomplice. It is also possible for individuals to combine in the commission of an offence as joint principals who will divide the conduct elements between them, each carrying out a part of the offence.

Unlike attempt, incitement and conspiracy, complicity is not an independent offence. The accomplice is convicted of the same offence as the principal offender and is liable to the same penalty as the principal. The verdict does not specify whether the person was convicted as a principal or an accomplice. Though English common law permits an accomplice to be convicted of a higher crime than the principal in the first degree,<sup>293</sup> the *Code* appears to preclude that possibility. The accomplice is guilty of the same offence as the principal.<sup>294</sup>

Since complicity is not an offence in its own right, it cannot be the subject of a charge of attempt, incitement or conspiracy. However, would-be accomplices in failed criminal endeavours can be guilty of incitement, conspiracy or as accomplices in attempts to commit the principal offence.

Like the law of attempt, complicity requires proof of fault with respect to each element of the principal offence, though the principal offence may impose strict or absolute liability. The prosecution must prove that the defendant intended to aid, abet, counsel or procure the commission of an offence. If that can be proved, an accomplice who is reckless with respect to the risk that the principal will commit further offences can be convicted of those offences as well, if they eventuate. Liability as an accomplice is avoided if the defendant makes a timely and effective withdrawal from the criminal enterprise.

*11.2-A Common law determines the meaning of the words "aids, abets, counsels or procures the commission of an offence":*

The Model Criminal Code Officers' Committee considered and rejected proposals to extend or restrict the traditional grounds for imposing liability on an accomplice.<sup>295</sup> So far as the conduct element of complicity is concerned, *Code* and common law employ a common conceptual vocabulary and caselaw in common law jurisdictions has continuing relevance when the conduct element of complicity under the *Code* is in issue.

293 *Howe* [1987] 2 WLR 568 [HL] overruling *Richards* [1974] QB 776.

294 Section 11.1(1): An accomplice in "*an offence* [committed] by another person is taken to have committed *that offence*" (italics for emphasis).

295 *MCC, Ch 2: General Principles of Criminal Responsibility* (Final Report 1992) 87.

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### Division 11

#### 11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

*11.2-B The conduct of an accomplice must in fact aid and abet, counsel or procure:*

Conduct will amount to aiding, abetting or counsel though it cannot be said to have *caused* the commission of the principal offence. To *procure* an offence, however, is to cause or bring it about: 11.3-C. The requirement that the conduct of the accomplice amount “in fact” to aid, abetment or counsel, reflects the common law requirement that an accomplice “manifest...assent to [the principal offender’s] actions in a manner which promotes their performance....”<sup>296</sup> It follows that counsel and abetment cannot amount to complicity unless the principal offender was aware of the defendant’s attempts to promote the criminal activities of the principal. However, liability as an accomplice can be incurred by a person who *aids* the commission of an offence, though the principal is completely unaware of the contribution made by the accomplice.<sup>297</sup> Omission to perform a duty may amount to complicity by way of encouraging the performance of an offence by a principal offender who takes the omission as a tacit permission or, in the alternative, as aid to the principal offender.<sup>298</sup>

*11.2-C Liability for complicity in an offence is not incurred unless the offence is committed:*

Since accomplice liability is derivative rather than direct, the prosecution must prove commission of the offence by the other person. Though proof of guilt is necessary, *conviction* of the other offender is not a prerequisite for conviction of the accomplice. The accomplice can be convicted though the other offender is never brought to trial or gains an acquittal.

The principle of innocent agency supplements complicity, permitting conviction of a person who procured criminal conduct by another in circumstances where that person is innocent of any offence: s11.3 *Innocent agency*.

*11.2-D Conviction of an offence does not require the offender to be identified as either a principal or an accomplice:*

In many instances the offence will be committed by an identifiable principal offender with the accomplice playing a subsidiary role by providing counsel or aid. However, identification of offenders as either principals or accomplices is unnecessary for the purposes of conviction. The accomplice and principal are both “taken to have committed [the] offence”: ss(1). There are two situations in which separation of the roles of principal and accomplice is unnecessary:

<sup>296</sup> B Fisse, Howard’s Criminal Law (1990) 326; P Gillies, *Criminal Law* (4ed) 160, JC Smith, “Aid, Abet, Counsel or Procure” in *Reshaping the Criminal Law* (edited P Glazebrook, 1978) 120, 132-133.

<sup>297</sup> Ibid. See also *Ready & Manning* [1942] VLR 85; *Larkins v Police* [1987] 2 NZLR 282.

<sup>298</sup> P Gillies, *Criminal Law* (4ed) 186.

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

- *Where it is uncertain whether the defendant was principal or accomplice:* Conviction of the principal offence is returned if it is established beyond reasonable doubt that the defendant was either principal or accomplice; it is unnecessary to determine which of those roles was played by the defendant.<sup>299</sup>
- *Where two or more individuals combine their activities, each engaging in conduct which amounts to complementary elements of an offence:* Common law describes offenders as joint principals when they divide the performance of the criminal conduct among themselves. For example, D1 may deceive V so as to enable D2 to take delivery of goods pursuant to the deception: s134.1 *Obtaining property by deception*. Recognition of the possibility that offenders may be guilty as joint principals under the *Code* is implicit rather than express. When each participates in the criminal conduct so that the conduct elements of the offence are divided between them, each plays the role both of principal and accomplice.

*11.2-E Liability as an accomplice requires proof of intention to aid, abet, counsel or procure the commission of an offence:*

Intention in complicity is intention “with respect to conduct”: 5.2 *Intention*. It follows from s5.2(1) that the prosecution must establish that the accomplice *meant* to aid, abet or counsel the principal or procure the commission of the offence. Recklessness with respect to a risk or likelihood that conduct might provide aid, encouragement, counsel or otherwise promote the commission of an offence is not a basis for conviction. The *Code* reflects the dominant common law view of the essential fault element in complicity.<sup>300</sup> The requirement of an intention to aid, abet, counsel or procure the commission of an offence by the principal does not have to refer to a specific offence. Liability as an accomplice is incurred when the principal commits an offence “of the type” which the accomplice meant to promote: s11.2(3)(a). The language of the *Code* formulation goes no further than common law authorities in providing criteria for determining what constitutes a “type” of offence.<sup>301</sup>

299 See *Cramp* (1999) 110 A Crim R 198 for a discussion of cases on alternative grounds for conviction; See also, S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 405-409.

300 *Giorgianni* (1985) 156 CLR 473 is generally taken to require proof that an accomplice acted with the object or purpose of promoting the activities of the principal offender. See S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 390-391; Bronitt, “Defending *Giorgianni* – Part Two: New Solutions for Old Problems in Complicity” (1993) 17 Crim LJ 305. Compare B Fisse, *Howard’s Criminal Law* (1990) 330-331, 336-337 arguing, against *Giorgianni*, that liability for complicity should be incurred whether D intends to promote an offence or is merely reckless as to the risk that D’s conduct will have that effect.

301 See *Bainbridge* [1960] 1 QB 129; *Stokes & Difford* (1990) 51 A Crim R 25; *Ancuta* (1990) 49 A Crim R 307 and other common law authorities. Discussed: S Bronitt & B McSherry, *ibid*, 394-396.

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.2 **Complicity and common purpose**

- (1) **A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.**
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6A).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

It is necessary to emphasise that the liability of an accomplice is not restricted to offences of the type which the accomplice intended to promote. Proof that the defendant intended to promote *an* offence by a principal offender opens the door to liability for other offences committed by the principal. Common law extends accessorial liability to any offence which can be said to be within the scope of the offenders' "common purpose". Section 11.2 reformulates the doctrine of common purpose as a form of liability for recklessness: see 11.2-F.

*11.2-F An accomplice who was reckless with respect to the risk that the principal would go on to commit additional offences is guilty of those offences if they eventuate:* Accomplices, who intentionally promote the commission of an offence by another, become hostages to fortune. Once they aid, abet, counsel or procure a particular type of offence, the accomplice can incur liability for any other type of offence committed by the principal.<sup>302</sup> The fault element of recklessness rather than intention governs liability for the additional offences. The requirements for this extension of liability can be summarised. An accomplice who meant to promote commission of offence of type A, is liable for offence of type B, committed by the principal offender, when:

- Conduct meant to promote offence A "in fact"<sup>303</sup> aids, abets, counsels or procures the commission of offence B by the principal offender; and
- The accomplice is reckless with respect to a substantial risk that their conduct would aid, abet, counsel or procure the commission of offence B by the principal offender; and

The requirement of recklessness in this extended form of liability does not, in the usual run of cases, require proof that the accomplice was reckless with respect to the *results* of their conduct on other individuals. Liability for aid, abetment and counsel is imposed because these activities *promote* or *conduce* to the commission of the principal offence; the prosecution is not required to show that the conduct of the accomplice *caused* the principal to act.<sup>304</sup>

Accessorial liability pursuant to the common purpose rule for the additional offence committed by the principal requires proof that the accomplice engaged in conduct which provided aid, counsel or procurement coupled with recklessness with respect to the elements of the principal's offence, which include each of the physical and fault elements which constitute the principal offender's liability. The common purpose rule is unusual because

<sup>302</sup> The *Code* departs from the High Court decision in *Miller* (1980) 32 ALR 321 (HC) which permitted the prosecution to rely on the common law doctrine of "common purpose" to convict Miller of murder though it could not be shown that he meant to promote any offence at all.

<sup>303</sup> The requirement in s11.2(2)(a) that conduct amount to aid, abetment, counsel or procuring "in fact" governs all applications of complicity.

<sup>304</sup> Complicity by *procuring* the commission of an offence by another *does* involve a causal link between the conduct of the accomplice and commission of the offence by the principal: discussed **11.3-C**.

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6A).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

it includes, among the circumstances which constitute the physical elements of complicity, the conduct, intentions and knowledge or state of awareness of another person – the principal offender.

COMMON PURPOSE AND DERIVATIVE FAULT IN THE CODE: CAUSING HARM TO A COMMONWEALTH PUBLIC OFFICIAL

The *Code* imposes liability both for threatening and causing harm public officials: 147.2 *Threatening to cause harm to a Commonwealth public official*; 147.2 *Causing harm to a Commonwealth public official*. Each offence requires proof that the conduct of the offender made the threat or inflicted the harm because of the official's status or performance of their duty. A hypothetical based on these offences illustrates the extended liability imposed by the *Code* formulation of the doctrine of common purpose.

Neptune, a drug runner, entered Australian waters with a quantity of prohibited drugs in weighted containers secured to the keel of his yacht. Federal police, acting under lawful authority, sought to board the yacht and search for contraband. When the officers approached the yacht and identified themselves, Neptune told Tarr, his deckhand, to hold them off while he went below and released the weighted containers. He handed a rifle to Tarr and said, "Threaten but don't shoot. I don't want any injuries." While Neptune was below deck, an officer attempted to board the yacht. Tarr threatened to shoot him. When the officer persisted in his attempt, Tarr struck him with the butt of the rifle, breaking his jaw.

Tarr is obviously guilty, as the principal offender, of both offences. It is clear from the circumstances of the case that he threatened the officer and caused the injury in response to the officer's performance of a official function. As Neptune both aided and counselled the threat, he is liable for that offence as an accomplice under s11.2(3)(a). The common purpose rule provides a basis for convicting Neptune of the more serious offence of causing harm to a public official, though he wished to avoid any injury to the officers. Since his provision of the weapon used to inflict the injury amounted to "aid" [s11.2(2)(a)], he would be liable as Tarr's accomplice, pursuant to the common purpose rule in s11.2(3)(b), on proof that he was reckless with respect to the risk that Tarr would commit the offence. Liability under the rule would require proof that he knew for certain or was "aware of a substantial risk" [5.4 *Recklessness*] of each of the elements of Tarr's offence. In particular:

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Division 11

11.2 Complicity and common purpose

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- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

- Recklessness with respect to the risk that Tarr would intentionally cause harm to the officer [s147.1(b) & (c)];<sup>305</sup>
- Recklessness with respect to the risk that Tarr would cause the harm because of the officer's status or performance of his official duty [s147(1)(e)].

Each physical and fault element of the additional offence committed by Tarr is a circumstantial element of Neptune's liability as an accomplice under the common purpose rule in s11.2(3)(b). The requirement of proof of Neptune's recklessness with respect to Tarr's intentions, motivation or awareness of the circumstances of his action is another example of the extended application of the term "physical element": discussed 3.1-B.

The common law doctrine of common purpose is satisfied on proof that the accomplice realised that commission of the additional offence was "possible".<sup>306</sup> In the *Code*, however, reliance on recklessness in the formulation of common purpose requires proof that the accomplice realised that there was a "substantial risk" that the principal would commit the additional offence. The nature of the difference, if any, between *Code* requirement of "substantial risk" and common law "possibility" is discussed at 5.4-A.

*11.2-G Liability as an accomplice is not incurred by a person who makes an effective withdrawal from commission of the offence:*

Common law recognises that withdrawal can bar conviction as an accomplice.<sup>307</sup> The *Code* requires the erstwhile accomplice to terminate their involvement in the offence and to take all reasonable steps to prevent the commission of the offence: s11.2(4). The statutory criteria for termination or withdrawal reflect the requirements of the common law test proposed by Gibbs J, as he then was, in *White v Ridley*.<sup>308</sup> The Model Criminal Code Officers' Committee listed examples of what might amount to reasonable steps to prevent commission of the offence: "...discouraging the principal offender, alerting the proposed victim, withdrawing goods necessary for committing the crime (eg a getaway car) and/or giving a timely warning to an appropriate law enforcement authority."<sup>309</sup> The requirement

<sup>305</sup> The offence of causing harm to a Commonwealth public official is committed only if the harm is caused intentionally: s147.1(c).

<sup>306</sup> The origin of the common law rule is the much debated decision in *Johns* (1980) 143 CLR 109. Discussed: S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 418-422; D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (2001) 1362-1365.

<sup>307</sup> P Gillies, *Criminal Law* (4th ed) 176, B Fisse, *Howard's Criminal Law* (1990) 350-352.

<sup>308</sup> (1978) 21 ALR 661, 669.

<sup>309</sup> *MCC*, Chapter 2: *General Principles of Criminal Responsibility*, Final Report 1992, 91.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

of *reasonable* steps is an implied concession that withdrawal or termination is still possible though attempts to prevent the offence prove to be ineffectual. There will be cases, that is to say, where the defendant escapes liability though the principal offender goes on to commit the offence, relying on assistance provided by the defendant before withdrawal.

Since the defendant may escape liability though each of the requirements for complicity are proved, it is apparent that termination or withdrawal takes the form of a defence or excuse, rather than a denial of liability: discussed 3.1-A.<sup>310</sup> Withdrawal or termination will not be considered by the court unless the defendant can point to evidence in support of the excuse: s13.3 *Evidential burden of proof – defence.*

*11.2-H The common law doctrine of “acting in concert” has no counterpart in the Code:*

At common law offenders who “act in concert” in the commission of an offence are said to be parties to a “joint criminal enterprise”.<sup>311</sup> The New South Wales Court of Criminal Appeal gave a succinct and authoritative statement of the doctrine in *Tangye*.<sup>312</sup>

[W]here two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise....A joint criminal enterprise exists when two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express....A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed.

In its current version, enunciated by McHugh J in the High Court decision in *Osland*,<sup>313</sup> the essential defining element of the doctrine of acting in concert is that liability is taken to be direct rather than derivative. Since the conduct of each of the participants in a joint enterprise is attributed to each of the others, all are taken to be principal offenders.<sup>314</sup> If A and B agree to steal a vehicle belonging to C, each is taken to have appropriated the vehicle

<sup>310</sup> Withdrawal or termination pursuant to s11.2(4) can be characterised, under s13.3(3), as an “excuse provided by the law creating an offence”

<sup>311</sup> Discussed: S Bronitt & B McSherry, *Principles of Criminal Law* (2001), 404-411; D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (2001), 1331-1334, 1362-1365; P Gillies, *Criminal Law* (4ed), 177.

<sup>312</sup> (1997) 92 A Crim R 545; 556-557 endorsed by McHugh J in *Osland* (1999) 159 ALR 170.

<sup>313</sup> *Osland* (1999) 159 ALR 170.

<sup>314</sup> *Ibid*, 189 (McHugh J), 238 (Callinan J).

## **PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

### Division 11

#### 11.2 Complicity and common purpose

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- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

though one keeps watch while the other drives the vehicle away. The doctrine has no existence under the *Code*. The argument in support of that assertion is short and conclusive.

- The *Code* “contains all the general principles of criminal responsibility that apply to any offence”; it cannot be supplemented by extraneous principles imported from the common law: s2.1 *Purpose*;
- Liability under the *Code* requires proof of:
  - i “such physical elements as are, under the law creating the offence, relevant to establishing guilt”: s3.2 *Establishing guilt in respect of offences*; or
  - ii conduct which matches the requirements of s11.2 *Complicity* and s11.3 *Innocent agency*.
- These possibilities exhaust the grounds for imputation of criminal conduct under the *Code*. Complicity is a derivative form of liability and the doctrine of innocent agency is restricted to instances where criminal conduct is *procured* by the principal.

Since the doctrine of joint criminal enterprise, or acting in concert, is taken to be a form of *direct* liability, it is incompatible with the structure of the *Code* and has no place in Commonwealth criminal jurisprudence.

*11.2-1 “Special liability provisions” which apply to the principal offence apply as well to the liability of an accomplice:*

The Dictionary to the *Criminal Code* provides a definition of special liability provisions. There are three varieties:

- Provisions which impose absolute liability for one or more but not all of the physical elements of an offence; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew* a particular thing; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew or believed* a particular thing.

Special liability provisions have only one purpose in the *Code*. They relieve the prosecution from the need to prove fault with respect to elements of the offence which establish Commonwealth jurisdiction. Section 11.2(6) extends the effect of the special liability provisions to complicity. An identical provision appears in 11.1 *Attempt* where it is discussed at greater length in 11.1-G.

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.3 Innocent agency

A person who:

- (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
- (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

### 11.3 Innocent Agency

The principle of innocent agency permits conviction of an offender who uses another as their instrument to commit an offence. In the 19<sup>th</sup> century English case of *Michael*,<sup>315</sup> a mother gave a vial of poison to her baby's nurse, told her it was medicine and asked her to administer it to the baby. The mother intended the baby to die. The nurse did not comply with the request, but her five year old son found the vial and administered the fatal dose. In circumstances such as these, the principle of innocent agency imputes the act of the innocent child to the mother. Since the mother intended the death of her baby and the act of administration of the poison by her unwitting agent is taken to be her own act, she is guilty of murder. The principle also extends to include cases where the principal is excused from liability on grounds of insanity or the like.<sup>316</sup> The principle is an adjunct to complicity, enabling conviction of an instigator in circumstances where the guilt of an individual who engaged in the proscribed conduct cannot be established.

*11.3-A Conduct of another person which constitutes a physical element of an offence may be attributed to a defendant who procured that conduct:*

The principle applies whether the conduct of the agent encompasses all or only some physical elements of an offence. If A induces an unwitting dupe to take goods belonging to B from a storeroom and bring them to A, the conduct of the dupe is attributed to A. The same conclusion follows in circumstances where the unwilling agent is induced to collect the goods by threats. If A was dishonest, intending to deprive B of the goods without consent, the offence of theft is complete when the dupe collects the goods. So also when a drug importer uses the services of an unwitting carrier to bring a prohibited drug into Australia.<sup>317</sup> The offence is complete when the carrier enters Australia with the prohibited drug. In these instances, the principle applies though nothing done by the offender matches the conduct elements required for guilt. If, on the other hand, A posts a fraudulent order for goods to B and sends the unwitting dupe to collect the goods, the offence of obtaining by deception is constituted by combining A's conduct in deceiving B with the conduct of the dupe, who obtained the goods.

*11.3-B A defendant who has a personal defence, immunity or exemption from liability is not liable for the conduct of their innocent agent:*

The principle is formulated in terms which absolve a defendant from liability unless the conduct of the innocent agent "would have constituted an offence

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315 (1840) 169 ER 48.

316 *Matusevich* (1977) 137 CLR 633; *Demerian* [1989] VR 97.

317 *White v Ridley* (1978) 140 CLR 342.

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.3 Innocent agency

A person who:

- (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
- (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

on the part of the procurer if the procurer had engaged in it". Section 11.3 implicitly rejects the decision in *Cogan & Leak*,<sup>318</sup> which held that a husband could be convicted of rape committed through the agency of an unwitting dupe though, at that date, a husband was immune from conviction for rape of his wife.<sup>319</sup> Under the *Code* formulation of the innocent agency principle, attribution of the conduct of the dupe to the husband would not "constitute" the offence of rape. An example of more practical importance is provided by federal offences which can only be committed by Commonwealth public officials. In these, the principle of innocent agency does not permit conviction of a person who is not a Commonwealth official. Suppose, for example, a defendant compelled a Commonwealth official by threats amounting to duress to engage in the conduct proscribed in the *Code*, Ch 7, s142.2 *Abuse of public office*. Though the conduct of the official can be attributed to the defendant, whose activities were actuated by the requisite dishonest intention to derive a benefit, liability does not follow. If the defendant is not an official, an essential element of the offence is missing.

*11.3-C The conduct of another is procured by an offender when it is intentionally caused or brought about:*

Dictionary definitions of procuring, in the relevant sense, require a causal link between the act of the procurer and the conduct of the other person.<sup>320</sup> That requirement of a causal link differentiates procuring from abetment, or the provision of aid or counsel. So, for example, a motor car passenger who plies the driver with alcoholic beverages, aids and abets the driver's offence of driving under the influence. If the passenger administers the alcohol surreptitiously, however, in circumstances where the driver is unaware of their state of intoxication, the resulting offence is *procured* by the passenger.<sup>321</sup>

Australian caselaw is consistent with the suggestion that a causal link is required though the distinctions between procuring conduct and abetting, counselling or aiding conduct remain obscure.<sup>322</sup>

318 [1976] 1 QB 217.

319 Discussed JC Smith, "Aid, Abet, Counsel or Procure" in *Reshaping the Criminal Law* (edited P Glazebrook, 1978) 120, 134-135. The need to rely on the principle of innocent agency is outflanked, however, if rape is defined as an offence of *causing* sexual penetration of another without consent: see *Hewitt* (1996) 84 A Crim R 440; Hubble, "Rape by Innocent Agent" (1997) 21 Crim LJ 204.

320 The *Macquarie Dictionary* adds to the causal definition of procuring, "especially [when the consequence is brought about] by unscrupulous or indirect means".

321 *Attorney General's Reference (No 1 of 1975)* [1975] QB 773.

322 See, in particular cases on related issues involving exclusionary rules of evidence when undercover police or their agents trick or trap suspects into criminal conduct: *Ridgeway* (1995) 184 CLR 19, 37 (The discretion to exclude evidence arises in circumstances where police engage in "conduct which intentionally procures the commission of a criminal offence by another"). See in addition: *O'Sullivan v Bastian* (No2) [1948] SASR 17, 26, *Rice v Tricouris* (2000) 110 A Crim R 86 (Conduct of a vendor, who sells prohibited goods, is procured by the purchaser.) Compare JC Smith, "Aid, Abet, Counsel or Procure" in *Reshaping the Criminal Law* (edited P Glazebrook, 1978) 120, 135: "To sum up, it seems the law probably is that: (i) 'procuring' requires causation but not consensus; (ii) 'abetting' and 'counselling' require consensus but not causation; and (iii) 'aiding' requires actual assistance but neither consensus nor causation".

**PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY**

Division 11

11.3 Innocent agency

A person who:

- (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
- (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

*11.3-D Reliance on the principle of innocent agency does not require proof that the agent was innocent:*

The principle is meant to merge seamlessly in its applications with s11.2 *Complicity and common purpose*.<sup>323</sup> Though the name of the principle suggests that it can only apply when the agent is an innocent, the suggestion is misleading. Section 11.1 is not limited to cases involving innocent agents - the heading of the section is a convenient and familiar name for the principle which does not determine its applications.<sup>324</sup> Viewed in this light, s11.3 is an extension of the law of complicity and, in particular, of s11.2(5), which declares that liability as an accomplice can be incurred even though “the principal offender has not been prosecuted or has not been found guilty”. That provision presupposes that proof of the guilt of the “principal offender” is a prerequisite for conviction of the accomplice, though the principal offender cannot be brought to justice. The principle of innocent agency dispenses with that presupposition, subject to one requirement: the defendant must be proved to have *procured* the conduct of the other as their agent: 11.3-C.

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323 MCC, Ch 2: *General Principles of Criminal Responsibility* (1992 Final Report ) 93: The section overlaps with complicity”.

324 *Acts Interpretation Act* 1901 (Cth), s13(3); headings to sections are not a part of the Act.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.4 Incitement

- (1) **A person who urges the commission of an offence is guilty of the offence of incitement.**
- (2) For the person to be guilty, the person must intend that the offence incited be committed.
- (2A) Subsection (2) has effect subject to subsection (4A).
- (3) A person may be found guilty even if committing the offence incited is impossible.
- (4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
- (4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
- (5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Penalty:

- (a) if the offence incited is punishable by life imprisonment—imprisonment for 10 years; or
- (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment—imprisonment for 7 years; or
- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more—imprisonment for 5 years; or
- (d) if the offence is otherwise punishable by imprisonment—imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
- (e) if the offence incited is not punishable by imprisonment—the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.

#### 11.4 Incitement

Incitement, like attempt and conspiracy, is a separate and distinct offence from the offence which is the subject of incitement. Attempt, incitement and conspiracy can overlap in their applications to criminal conduct. One who sends a hired thug on an unsuccessful foray to injure a Commonwealth public official incites an offence, conspires with the thug and attempts the offence, for the offender has gone beyond mere preparation to commit an offence against 147.1 *Causing harm to a Commonwealth public official*. Unlike attempt and conspiracy, however, incitement is not punishable with the same severity as the principal offence.

Though incitement is a preparatory offence, akin to attempt, there is no impediment to conviction of incitement in circumstances where the principal offence has been committed.<sup>325</sup> In practice, incitement which succeeds in its object will usually result in conviction for the principal offence as an accomplice. Unlike conspiracy, which cannot be attempted, it is an offence to attempt to incite another.<sup>326</sup> However, there can be no liability in the converse cases of incitement to conspire, incitement to attempt or incitement to incite.<sup>327</sup> The extensions of criminal liability for preparatory crime cannot be piled one on the other in an infinite regress.

Since the prohibition of incitement penalises communication, restricting freedom of expression, liability is narrowly limited to communications which are intended to promote the commission of an offence. Incitement does not extend to instances of recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of crime.

*11.4-A A person who urges another to commit an offence, with the intention that the offence be committed, is guilty of incitement:*

The restriction of liability to circumstances in which the defendant “urges” the commission of an offence narrows the common law, which traditionally imposed liability for incitement when the offender “counsels, commands or advises” the commission of an offence.<sup>328</sup> The Code formulation was intended to emphasise the necessity for proof that the activity of the defendant

<sup>325</sup> Hence the absence of any need for a provision equivalent to ss4(b) in 11.1 *Attempt*, which permits conviction of attempt though the offender may have succeeded in committing the offence.

<sup>326</sup> Section 11.1 *Attempt* exempts complicity and conspiracy from its provisions in ss(7). Incitement remains subject to the prohibition against attempt.

<sup>327</sup> Section 11.4 *Incitement*, ss(5).

<sup>328</sup> Glanville Williams, *Criminal Law: The General Part* (1961) 252. Section 7A of the Commonwealth *Crimes Act* 1914 provides a blanket prohibition: “incites to, urges, aids or encourages”. Compare the UK Draft Criminal Code (1985) s51(1), “encourages”; Model Penal Code, ALI Proposed Official Draft 1962, s5.02(1), “encourages or requests”.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

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- (4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
- (5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Penalty:

- (a) if the offence incited is punishable by life imprisonment—imprisonment for 10 years; or
- (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment—imprisonment for 7 years; or
- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more—imprisonment for 5 years; or
- (d) if the offence is otherwise punishable by imprisonment—imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
- (e) if the offence incited is not punishable by imprisonment—the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.

was meant to encourage the commission of the offence: The Model Criminal Code Officers Committee “was concerned that some courts have interpreted ‘incites’ as only requiring that D causes rather than advocates the offence”.<sup>329</sup> Since the conduct element of incitement is urging another to commit an offence, it follows that the prosecution must prove that the offender *meant* to urge the other to commit an offence: 5.2 *Intention*.

The requirement of intention that the offence be committed in ss(2) reinforces the implications which arise from the prohibition against “urging” the commission of an offence. This is a requirement of ulterior intention, not intention: discussed 5.2-D. Intention accordingly bears its ordinary meaning here, requiring proof that it was the offender’s object to induce commission of the offence incited.

*11.4-B The Code imposes liability for an attempt to incite an offence against Commonwealth law:*

Liability for incitement requires proof of communication, since one cannot urge another to a course of action unless the other is conscious of the defendant’s command, request, plea or shouts of encouragement. However, failed attempts to communicate an incitement are punishable as an attempt to incite<sup>330</sup> and punishable to the same extent as if the incitement had been communicated.

*11.4-C Impossibility of success is no answer to a charge of incitement:*

English common law would allow impossibility to defeat a charge of incitement.<sup>331</sup> In Australia, the emergent common law consensus that impossibility is no answer to a charge of attempt would probably persuade courts in most jurisdictions to adopt the same rule for incitement. The issues which arise for discussion of the effect of impossibility are essentially the same, whether incitement or attempt is in issue: discussed 11.1-E. The *Code* declares that a person can be convicted of incitement though it is impossible to commit the principal offence: ss(3). So long as it can be said that the defendant urged the commission of an offence known to the law, there is no ground for distinction between “legal” and “factual” impossibility. Though impossibility is no answer to a charge of incitement, ss(4) provides that “defences, procedures, limitations or qualifying provisions that apply to an offence apply equally to the offence of attempting to commit that offence”: discussed below, 11.4-D.

329 *MCC, Ch 2: General Principles of Criminal Responsibility*, Final Report 1992, 93. The reference to causation here is colloquial rather than accurate. The Committee was concerned to avoid liability for incitement where D’s activities merely provided a resource or occasion for an offence by others.

330 The same result obtains at common law: *Ransford* (1874) 13 Cox CC 9; *Crichton* [1915] SASR 1.

331 *Fitzmaurice* [1983] QB 1083; *DPP v Nock* [1978] AC 979.

## PART 2.4—EXTENSIONS OF CRIMINAL RESPONSIBILITY

### Division 11

#### 11.4 Incitement

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- (4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
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- (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more—imprisonment for 5 years; or
- (d) if the offence is otherwise punishable by imprisonment—imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
- (e) if the offence incited is not punishable by imprisonment—the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.

*11.4-D Defences, procedures, limitations or qualifying provisions that apply to an offence apply equally to the offence of incitement to commit that offence:*

This limiting principle is common to attempt, incitement and conspiracy. Difficulty is unlikely to be encountered when a person charged with incitement claims the benefit of a defence or procedural limitations. The issue of potential difficulty, as in attempts, is whether a particular defining element of an offence is a “limitation or qualifying provision” which bars liability both for the completed offence and the incitement. Applications are discussed above: 11.1-F.

*11.4-E “Special liability provisions” which apply to the principal offence apply as well to the liability for inciting that offence:*

The Dictionary to the *Criminal Code* provides a definition of special liability provisions. There are three varieties:

- Provisions which impose absolute liability for one or more but not all of the physical elements of an offence; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew* a particular thing; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew or believed* a particular thing.

Special liability provisions have only one purpose in the *Code*. They relieve the prosecution from the need to prove fault with respect to factors which establish Commonwealth jurisdiction over the offence. Section 11.4(4A) displaces the usual rules which govern the proof of fault in federal offences. An identical provision appears in s11.1(6A) *Attempt* where it is discussed at greater length in 11.1-G.

*11.4-F The penalty for incitement is determined by the penalty for the offence incited:*

Unlike attempt and conspiracy, which are punishable with the same severity as the principal offence, maximum penalties for incitement are determined by a statutory scale of lesser penalties.

Due to the length of s11.5, in this case it is more convenient to use smaller text.

### 11.5 Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

- (2) For the person to be guilty:
  - (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
  - (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
  - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
  - (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

## 11.5 Conspiracy

Conspiracy, like incitement and attempt is an offence distinct from the principal offence which is the subject of the conspiracy. As in incitement and attempt, the essential element in liability is intention that an offence be committed. Unlike those offences, liability for conspiracy requires proof that the intention was shared, by at least one other person.

The *Code* follows common law and permits conviction of a corporation for conspiracy.<sup>332</sup> The conditions which govern liability of the corporation are, of course, significantly different from those which will govern the liability of an individual actor: Part 2.5 – *Corporate Criminal Responsibility*.<sup>333</sup>

The charge of conspiracy has been described as “an increasingly important weapon in the prosecutor’s armoury”.<sup>334</sup> Courts and legal texts temper the benefits which the charge offers to the prosecution with warnings against its potential for oppression and injustice.<sup>335</sup> The effect of these warnings is apparent in the report accompanying *MCC*, Chapter 2: *General Principles of Criminal Responsibility*,<sup>336</sup> which provided the model for 11.5 *Conspiracy*. The *Code* provisions on conspiracy include three procedural protections which distinguish it from the other preparatory offences:

- Offences which are punishable by imprisonment for less than 12 months or a fine of 200 penalty units<sup>337</sup> cannot be the subject of a charge of conspiracy [11.5(1)];
- Commencement of proceedings for conspiracy requires the consent of the Director of Public Prosecutions [11.5(8)].
- Courts are empowered to dismiss charges of conspiracy if they are of the view that the interests of justice require dismissal [11.5(6)]. The most likely occasion for use of this power is when conspiracy is charged in lieu of a substantive offence.<sup>338</sup>

Just as 11.2 *Complicity* is extended by 11.3 *Innocent agency*, so also conspiracy is extended by provisions which permit one conspirator to be convicted though other parties to the criminal agreement escape conviction: **11.5-G/H**.

332 *ICR Haulage* [1944] 1 KB 551; *Simmonds* (1967) 51 Cr App R 316.

333 The question whether there can be conspiracy “where the conduct of one human actor is alleged as the basis for a conspiratorial agreement between that actor and the corporate employer” is discussed in B Fisse, *Howard’s Criminal Law* (1990) 611-614.

334 *Nirta* (1983) 10 A Crim R 370, 377 (Gallop J).

335 Discussed: B Fisse, *Howard’s Criminal Law* (1990) 375-381; L Waller & CR Williams, *Brett, Waller and Williams – Criminal Law* (8ed 1997) 531-534

336 Final Report 1992, 97: “As a further indication of its concern that the crime of conspiracy has been abused, or has led to abuse, the Committee agreed that there should also be procedural restrictions on conspiracy charges.”

337 Penalty units are defined in s4AA of the *Crimes Act* 1914.

338 *Hoar* (1981) 148 CLR 32.

Due to the length of s11.5, in this case it is more convenient to use smaller text.

### 11.5 Conspiracy

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Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

- (2) For the person to be guilty:
  - (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
  - (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
  - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
  - (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

The *Code* offence of conspiracy is identical, in all significant respects, with s86 of the *Crimes Act* 1914, which was amended in 1995 to match the conspiracy provisions of the *Model Criminal Code*.

*11.5-A Liability for conspiracy requires proof that the defendant entered an agreement with another person with the intention that an offence would be committed, pursuant to the agreement:*

The physical element of the offence is entry into an agreement<sup>339</sup> - conduct which involves, of necessity, an intentional act.<sup>340</sup> That act must be accompanied by an ulterior intention, shared by at least one other party to the agreement, that an offence will be committed pursuant to the agreement.<sup>341</sup> The definition in 5.2 *Intention* has no application: discussed 5.2-D. The *Code* requirement of intention that the offence be committed faithfully reflects Australian common law. Recklessness with respect to the risk that another party to an agreement might commit an offence in pursuit of agreed objectives is not sufficient for conviction of conspiracy.<sup>342</sup>

It is possible that the requirement of intention “that an offence would be committed” will give renewed life to an argument associated with the discredited doctrine that impossibility bars conviction for conspiracy: discussed 11.5-I. The decision of the NSW Court of Criminal Appeal in *Barbottis*,<sup>343</sup> which involved a charge of conspiracy to receive stolen goods, revisits these issues.<sup>344</sup> Police set a trap for a suspected receiver of stolen goods, baited with cigarettes donated by a cigarette company. The defendants were caught when they agreed to buy the cigarettes from an undercover police officer who told them that the cigarettes were stolen. A majority of the Court held that there was no conspiracy on the ground that there was

339 At common law, the nature of the distinction between fault and physical elements in conspiracy has been the subject of perennial debate: see S Bronitt & B McSherry, *Principles of Criminal Law* (2001) 450-451, quoting M Goode, *Criminal Conspiracy in Canada* (1975) 16: “[T]he concept of actus reus is an elusive one, particularly in the area of criminal, conspiracy, so much so, in fact, that it may well be possible to say that the crime has no distinguishing mental and physical elements.” So far as the *Code* is concerned, the difficulties appear to be overstated: “Entering an agreement” is something one *does*: it is no more problematic, as a physical element of an offence, than absence of consent or deception.

340 D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (4ed 2001): “Agreement by its nature must be intentional: one cannot agree recklessly or negligently”. See, in addition Ch 2, s5.6(1) which implies a requirement of intention for conduct elements of an offence.

341 Coincidence of criminal intention is not enough. Each conspirator must be aware, at the least, of a substantial risk that another shares their intention to commit the offence. That conclusion is implied by the requirement of agreement between conspirators and reinforced by the consideration that B’s intention to commit the offence is a *circumstance* of A’s liability as a conspirator, so calling s5.6(2) into operation.

342 *Gerakiteys* (1984) 153 CLR 317; discussed Bronitt & B McSherry, *Principles of Criminal Law* (2001) 463-464. 343 (1999) 82 A Crim R 432.

344 Related cases on the law of attempt to receive stolen goods display the same equivocations: See *People v Jaffe* (1906) 78 NE 169 (New York); *Donnelly* [1970] NZLR 980 (NZ); *Haughton v Smith* [1975] AC 476 and *Anderton v Ryan* [1985] 2 WLR 908(UK); *English* (1993) 68 A Crim R 96 (WA).

## Commonwealth Criminal Code

Due to the length of s11.5, in this case it is more convenient to use smaller text.

### 11.5 Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

- (2) For the person to be guilty:
  - (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
  - (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
  - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
  - (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
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no intention to commit an offence. On the majority view, the defendants intended to receive a particular lot of 50 cartons of cigarettes that was not, in fact, stolen. Hence, it was concluded by the majority, they did not intend to commit an offence. Gleeson CJ dissented vigorously. There is little point in canvassing, yet again, the arguments for and against this characterisation of the defendant's intentions. The literature is voluminous and the *Barbottis* case provides a more than adequate account of its complexities.<sup>345</sup> The issue is raised again in these guidelines because it continues to divide courts and it has not been resolved in the *Code*:

- Though s11.5(3)(a) declares that impossibility is not a barrier to conviction for conspiracy, the issue in this case is not one of impossibility: Gleeson CJ (who dissented) and Dunford J (of the majority) were in agreement on that point. For them, the issue was whether the prosecution could prove the fault element of intention to commit an offence;
- The *Code* lends itself to the suggestion that different considerations govern the outcome depending on whether an attempt or conspiracy is charged in cases where the receiver's trap is baited with goods which are not stolen. When attempt is charged, the question is whether the prosecution can prove "intention or knowledge in relation to each physical element of the offence attempted". In conspiracy the question is whether the defendant(s) intended "that an offence would be committed".

It is certainly arguable that the difference in the description of fault elements in attempt and conspiracy should *not* lead to different outcomes. Whatever the merits of that argument, the continuing history of division in courts and in legal comment suggests that the issue remains, for the present at least, unresolved.

#### *11.5-B Offences of absolute or strict liability can be the subject of conspiracy:*

In offences which impose strict or absolute liability, the prosecution is not required to prove fault with respect to some or all physical elements of the offence: Ch 2: Division 6 – *Cases where fault elements are not required*. When conspiracy is charged, however, the prosecution must prove entry into an agreement with the intention that an offence will be committed, pursuant to the agreement. The requirement of intention extends to each physical element of the offence, displacing strict or absolute liability. The *Code* reflects the common law on the fault required for conspiracy to commit offences which impose strict or absolute liability.<sup>346</sup> The requirement of

<sup>345</sup> See in addition, Leader-Elliott, "Case & Comment: *Britten v Alpogut*" (1987) 11 Crim LJ 182.

<sup>346</sup> See *Churchill v Walton* [1967] 2 AC 224; *Kamara* [1974] AC 104, 119 per Lord Hailsham LC: "...mens rea is an essential ingredient in the crime of conspiracy. This mens rea consists in the intention to execute the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts which render the conduct illegal."

Due to the length of s11.5, in this case it is more convenient to use smaller text.

### 11.5 Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

- (2) For the person to be guilty:
  - (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
  - (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
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  - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
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- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
  - (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
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fault is subject, however, to an exception when elements of the offence which establish a link with Commonwealth jurisdiction are in issue; it is suspended for the “special liability provisions”: 11.5-K.

*11.5-C Conspiracy requires two or more people to agree to commit an offence:*

There is no conspiracy if only one of those who enter an agreement to commit an offence intends that it will be committed. An *agent provocateur* can entrap an offender into incitement [s11.4], which is a unilateral offence, but not a conspiracy, which requires agreement.

Though s11.5(2)(a) and (b) require two or more individuals to agree on the commission of a crime, it is quite consistent with these requirements that only one offender is guilty of conspiracy. Unlike common law, the *Code* permits a party to the agreement to avoid liability for conspiracy by timely withdrawal [s11.5(5)]. Effective disengagement from liability by one conspirator does not absolve the other from criminal liability. Moreover, defences or excuses which exculpate one party to a criminal agreement will not vicariously confer immunity on another: 11.5-G.

*11.5-D Conspiracy requires proof of an overt act in pursuance of the conspiracy:*

The *Code* departs from common law, which does not make the occurrence of an overt act an essential element of the conspiracy.<sup>347</sup> The Model Criminal Code Officers Committee justified this addition to the physical elements constituting the offence on the ground that “simple agreement to commit a criminal offence without any further action by any of those party to the agreement [is] insufficient to warrant the attention of the criminal law”.<sup>348</sup> Apart from the requirements that the overt act must be “overt” and done “pursuant to the agreement”, no criteria for identifying the overt act are specified.

It is sufficient if the overt act is done by any party to the conspiracy. When the overt act is done by a person other than the defendant it is a circumstantial element of the defendant’s liability. Though s5.6(2) requires proof of recklessness with respect to the other’s act that requirement will rarely, if ever, be an impediment to conviction. Since conspiracy requires proof of an intention that the offence be committed, fellow conspirators necessarily intend that active members of the conspiracy engage in overt acts in pursuance of the agreement. Proof of that intention satisfies the fault element for the circumstantial overt act.<sup>349</sup>

<sup>347</sup> Rogerson (1992) 174 CLR 268.

<sup>348</sup> MCC, Ch2: *General Principles of Criminal Responsibility* (Final Report 1992) 101. The requirement of an overt act was adopted from the US Model Penal Code, Proposed Official Draft 1962, s5.03(5).

<sup>349</sup> Ch 2, s5.4(4) provides formal warrant for acceptance of intention in lieu of recklessness.

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### 11.5 Conspiracy

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- (a) committing the offence is impossible; or
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  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
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  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
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- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
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- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
- (a) withdrew from the agreement; and
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- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

The requirement of an overt act marks the point beyond which withdrawal from the agreement or termination of the defendant's role will not bar liability for conspiracy: 11.5-E.

*11.5-E Liability as a conspirator is not incurred by a person who makes an effective withdrawal from the conspiracy:*

Common law conspiracy is complete on entry into the agreement to commit an offence. Introduction of the requirement of an overt act, as a formal element of *Code* conspiracy, has the consequence that there is an interval between the conspirators' agreement and the first overt act in pursuance of the agreement, when the offence has not yet been committed. Withdrawal from the agreement during this interval can provide the defendant with a defence or excuse for entering the conspiratorial agreement. Withdrawal must be accompanied, however, by "reasonable steps to prevent commission of the offence". The requirements for effective withdrawal are the same as those in the related defence of withdrawal from complicity: discussed 11.2-G.

There is a potentially significant distinction between withdrawal in conspiracy and withdrawal in complicity, when parties have made an agreement to commit an offence. The accomplice avoids liability for the principal offence if an effective withdrawal is made at any time before commission of the planned offence. In conspiracy, however, the period of grace is far more limited. The conspirator must withdraw before another conspirator begins, by some overt act, to put the agreement into effect. Defendants who withdraw and avoid liability for complicity may leap from the frying pan into the fire. A timely withdrawal from complicity may be too late to avoid liability for conspiracy. The penalty for the conspiracy is the same, of course, as the penalty for complicity in the complete offence.

Since the defendant may escape liability though each of the requirements for conspiracy are proved, it is apparent that termination or withdrawal takes the form of a defence or excuse, rather than a denial of liability.<sup>350</sup> Withdrawal or termination will not be considered by the court unless the defendant can point to evidence in support of the excuse: 13.3 *Evidential burden of proof – defence*.

*11.5-F A person "for whose benefit or protection an offence exists" cannot be guilty of conspiracy to commit that offence:*

Laws designed to protect children against sexual predators are the most obvious instances where agreement to commit the offence will not result in criminal liability for the prey.<sup>351</sup> Whether or not a person belongs to the

<sup>350</sup> Withdrawal or termination pursuant to s11.2(4) can be characterised, under s13.3(3), as an "excuse... provided by the law creating an offence"

<sup>351</sup> *MCC*, Chapter 2: *General Principles of Criminal Responsibility* (1992) 103.

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### 11.5 Conspiracy

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  - (c) each other party to the agreement is at least one of the following:
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    - (ii) a person for whose benefit or protection the offence exists; or
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- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

class of those “for whose benefit or protection an offence exists” is a question which may often be open to argument.<sup>352</sup> Offences which take this form are, in any event, rare in federal jurisdiction. No corresponding limitation is placed on the potential liability of members of the protected classes who are charged with complicity [s11.2] or incitement [s11.4].

*11.5-G Liability for conspiracy is incurred though the other party to an agreement to commit an offence is not criminally responsible:*

The essential elements of conspiracy are an agreement by two or more individuals to commit a criminal offence and an overt act by one of them, in pursuance of the agreement. When two individuals agree together to commit a crime it is quite possible that only one of them will be criminally responsible for entering the agreement. The immunity of one of the conspirators does not confer vicarious immunity on the other:

- Personal defences available to one of the parties to the criminal agreement will not enure to the benefit of the other. Liability for conspiracy is incurred by a person who enters an agreement to commit an offence with a person entitled to a mental impairment defence,<sup>353</sup> duress and other general defences;
- A party to the agreement who commits an overt act in pursuance of the agreement, after the other has withdrawn is guilty of conspiracy: discussed 11.5-E;
- A party to an agreement to commit an offence with a person for whose benefit or protection an offence exists is guilty of conspiracy: discussed 11.5-F.

*11.5-H A defendant charged with conspiracy may be convicted though the offence cannot be proved against others:*

The *Code* follows Australian common law<sup>354</sup> and permits conviction of one of several parties to an alleged conspiracy though the charge cannot be proved against the remaining parties to the agreement. No distinction is drawn between joint and separate trials of the alleged conspirators. Acquittal of

<sup>352</sup> *Keane* (12997) 95 A Crim R 593 and, for a sceptic's view of the concept of immunity for protected classes in relation to complicity, see B Fisse, *Howard's Criminal Law* (1990) 352-353.

<sup>353</sup> *Matusevich* (1977) 125 ALR 117; *Demirian* [1989] VR 97.

<sup>354</sup> *Darby* (1982) 148 CLR 668.

Due to the length of s11.5, in this case it is more convenient to use smaller text.

### 11.5 Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
- (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
- (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

others charged with conspiracy will not protect the remaining defendant unless a finding of guilt “would be inconsistent with their acquittal” [[s11.5(4)(a)].<sup>355</sup>

The provisions which allow conviction of a conspirator though the charge cannot be proved against others are, necessarily, addressed as much to appellate tribunals as to the court which will try the charge of conspiracy against a defendant.

*11.5-I Impossibility of success is no answer to a charge of conspiracy:*

The rule is expressed in terms identical to its expression in the offences of attempt [s11.1(4)(a)] and incitement [s11.4(3)]. Here, as in those provisions, the *Code* confirms the emerging common law consensus that a person can be convicted of the preparatory offence though completion of the principal offence is impossible:<sup>356</sup> discussed 11.1-E. The proposition that impossibility does not bar conviction for conspiracy should be distinguished from the rule that “defences, procedures, limitations or qualifying provisions that apply to an offence apply also to...conspiracy to commit that offence” [s11.5(7)]: discussed 11.5-J. It should be distinguished as well from the argument that the “intention to commit an offence”, necessary for a conspiracy conviction, might be absent in certain cases where commission of the offence was impossible: discussed 11.5-A. In short, impossibility is no answer to a charge of conspiracy. But arguments that were once presented under that description may be redeployed in another guise.

*11.5-J Defences, procedures, limitations or qualifying provisions that apply to an offence apply equally to the offence of conspiracy to commit that offence:*

Application of the principle to defences and procedural provisions unlikely to cause difficulty. Duress will excuse a defendant who was compelled to

<sup>355</sup> Compare *Darby*, (1982) 148 CLR 668 per Gibbs CJ, Aickin, Wilson and Brennan JJ: “[T]he conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand, notwithstanding that the latter is or may be acquitted *unless in all the circumstances of the case* his conviction is inconsistent with the acquittal of the other person. In our opinion such a determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject”. [Italics added] The *Code* provision will be read, no doubt, with this slightly fuller statement of the criterion in mind.

<sup>356</sup> In *DPP v Nock* [1978] AC 979, the House of Lords held that impossibility barred conviction for conspiracy. Australian rejection of the closely related doctrine of impossibility in attempts [see 11.1-E] probably extends to conspiracy as well. See *Sew Hoy* [1994] 1 NZLR 257; *Barbottis* (1995) 82 A Crim R 432. The latter decision is perhaps equivocal on the issue. The Court divided: Gleeson CJ (in dissent) and Dunford J agreed that modern caselaw on impossibility in attempts applied to conspiracy and concluded that impossibility was not an answer to a charge of conspiracy. But Smart J, the other member of the majority, was of the view that the cases on impossibility in attempts had no application to conspiracy (452).

Due to the length of s11.5, in this case it is more convenient to use smaller text.

### 11.5 Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

- (2) For the person to be guilty:
  - (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (2A) Subsection (2) has effect subject to subsection (7A).
- (3) A person may be found guilty of conspiracy to commit an offence even if:
  - (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
  - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
  - (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

agree to the commission of an offence and a statutory limitation period for prosecution of an offence applies equally to the pendant offence of conspiracy. In these cases the distinction between defences or procedural rules and the elements of an offence are obvious. Applications of the principle in cases involving “limitations” or “qualifying provisions” require more care. The issues encountered are the same, in all essential respects, as in the parallel provisions for attempt [s11.1(6)] and incitement (s11.4(4)): discussed 11.1-F.

*11.5-K “Special liability provisions” which apply to the principal offence apply as well to conspiracy:*

The Dictionary to the *Criminal Code* provides a definition of these provisions. There are three kinds of special liability provision:

- Those which impose *absolute* liability for one or more but not all of the physical elements of an offence; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew* a particular thing; or
- Provisions which relieve the prosecution from the need to prove that the defendant *knew or believed* a particular thing.

Special liability provisions have only one purpose in the *Code*. They relieve the prosecution from the need to prove fault with respect to elements of the offence which establish Commonwealth jurisdiction. Section 11.5(7A) extends the effect of the special liability provisions to conspiracy to commit the offence. The issues encountered are the same, in all essential respects, as in the parallel provisions for attempt [s11.1(6A)] and incitement (s11.4(4A)): discussed 11.1-G.

### 11.6 References in Acts to offences

- (1) A reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.
- (2) A reference in a law of the Commonwealth (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.
- (3) Subsection (1) or (2) does not apply if a law of the Commonwealth is expressly or impliedly to the contrary effect.
- (4) In particular, an express reference in a law of the Commonwealth to:
  - (a) an offence against, under or created by the *Crimes Act 1914*; or
  - (b) an offence against, under or created by a particular provision of the *Crimes Act 1914*; or
  - (c) an offence arising out of the first-mentioned law or another law of the Commonwealth; or
  - (d) an offence arising out of a particular provision; or
  - (e) an offence against, under or created by the *Taxation Administration Act 1953*;does not mean that the first-mentioned law is impliedly to the contrary effect.

### 11.6 References in Acts to offences

The provision is essentially one of drafting convenience. It ensures that references in Commonwealth laws to Commonwealth offences include references to the crimes of 11.1 *Attempt*; 11.4 *Incitement* and 11.5 *Conspiracy*. Since 11.2 *Complicity and common purpose* and 11.3 *Innocent agency* are not offences in their own right, no provision for those extensions of liability is necessary.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

- 12.1 General principles
- 12.2 Physical elements
- 12.3 Fault elements other than negligence
- 12.4 Negligence
- 12.5 Mistake of fact (strict liability)
- 12.6 Intervening conduct or event

## **PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

### **DIVISION 12**

Part 2.5 states general principles of corporate criminal responsibility to govern the great majority of criminal offences. It will not cover all offences however. Part 2.5 is displaced, in a number of instances, by special provisions for attributing physical or fault elements of particular offences to corporations. So, for example, the *Trade Practices Act 1974*, Part XIC – *Telecommunications access regime*, which contains a number of offences, concludes with s152EO, which supplants the provisions of Part 2.5 of the *Code*. So also in offences against the *Ozone Protection Act 1989*.<sup>357</sup> The principles of Chapter 2 of the *Code* will apply elsewhere, however, unless displaced by specific legislation.

To avoid unnecessary repetition, references to corporate “employees, agents or officers” have been abbreviated, where appropriate, to “agents”.

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<sup>357</sup> See ss6A, 65 *Ozone Protection Act 1989* (Cth).

## **PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

### Division 12

#### 12.1 General principles

- (1) This *Code* applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

## 12.1 General principles

The fundamental principle of corporate criminal liability is that the *Code* applies to bodies corporate in the same way as it applies to individuals. The general principles of liability including, in particular, those in Part 2.2 – *The elements of the offence*, apply to corporations and individuals alike. Since those general principles are all stated in language reflecting their development as principles of individual responsibility, translation and adaptation is required when corporate wrongdoing is in issue. The rules set out in Part 2.5 translate fault elements as they apply to individuals into their corporate equivalents. Chapter 2 defences in 9.2 *Mistake of fact* and 10.1 *Intervening conduct or event* are varied and restricted in their application to corporations. However, there will remain a need to fashion concepts developed for determining individual responsibility to the contours of corporate wrongdoing. Section 12.1, which declares that *Code* provisions are to be modified when necessary for this purpose, is a clear legislative invitation to courts to use a measure of creativity in the exercise of their interpretive powers. It is an unusual provision and one that has no counterpart elsewhere in the *Code*.

The principal changes effected by the *Code* provisions on corporate criminal responsibility spring from the utilisation of a principle of “organisational blameworthiness”.<sup>358</sup> To a considerable degree, issues of individual responsibility of employees, agents and officers of the corporation have been distinguished from the issue of corporate criminal responsibility.

There is a corollary of some significance. Since corporations which engage in crime will be implicated, usually by the acts and omissions of their individual, in most instances, human agents, it is necessary to impose limits on the extent to which their conduct or fault can be attributed to the corporation. The concept of “due diligence,” which has no role to play when the liability of individuals is in issue, forms part of the ensemble of criteria which determine the limits of organisational blameworthiness: see ss12.3(3) and 12.5 *Mistake of fact (strict liability)*.

*12.1-A The Criminal Code applies to corporations in the same way as it applies to individuals:*

This is the most fundamental of the principles governing corporate criminal liability. It is obvious, however, that *Code* provisions must be adapted or modified when corporate liability is in issue. Though the conduct elements of offences – acts, omissions or states of affairs – may be brought into existence directly, by corporate action or inaction, most offences committed by corporations will result from the acts and omissions of corporate agents. In

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358 See: B Fisse, *Howard's Criminal Law* (1990) 605 for critical comment on Part 2.5 - Corporate Criminal Responsibility, see Colvin “Corporate Personality and Criminal Liability” (1995) 6 Criminal Law Forum 1, 36; Woolf, “The Criminal Code Act 1995(Cth) - Towards a Realist Vision of Corporate Criminal Liability” (1997) 21 Crim LJ 257.

## **PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

### Division 12

#### 12.1 General principles

- (1) This *Code* applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

the general run of offences, the prosecution will find it necessary to rely on rules which permit the attribution of an agent's acts and omissions to the corporation. When fault is in issue, rules for attributing the fault of agents to the corporation are essential in all cases. The *Code* accepts the premise that an attribution of intention, knowledge and recklessness cannot be made in the absence of proof of fault on the part of some individual agent of the corporation. The innovation introduced by the Chapter 2 provisions is to be found in the degree to which they accept a principle of corporate organisational responsibility for the conduct of individuals.<sup>359</sup> Acceptance of that principle is evident in five distinct contexts of application:

- Attribution of acts and omissions of any corporate agent to the corporation, so long as they are within the actual or apparent scope of employment or authority: s12.2 *Physical elements*;
- Attribution of the intentions, knowledge or recklessness of any corporate agent to the corporation, if commission of the offence in issue is an expression of a corporate culture of non-compliance, or of failure to maintain a corporate culture of compliance, with the law: s12.3(2) *Fault elements other than negligence*;
- Attribution of negligence to a corporation in circumstances where no individual agent of the corporation is negligent: s12.4 *Negligence*;
- When liability is strict, corporations which fail to exercise due diligence in management or supervision are barred from vicarious reliance on an agent's reasonable mistake of fact: s12.5 *Mistake of fact (strict liability)*;
- When liability is strict or absolute, corporations cannot rely on acts or omissions of an agent, no matter how unpredictable, to provide a basis for a defence of intervening conduct or event: s12.6 *Intervening conduct or event*.

*12.1-B A body corporate may be found guilty, as a principal offender, of any offence of general application:*

The principle that corporations are subject to all criminal prohibitions of general application is supplemented by s4B of the *Crimes Act* 1914, which permits a fine to be imposed on a corporation for an offence which requires imprisonment of individual offenders. There are some offences, however, which a corporation cannot commit as a principal because liability is restricted to particular categories of person. Obvious examples are the *Code* offences which can only be committed by a "Commonwealth officer".<sup>360</sup>

<sup>359</sup> B Fisse, *Howard's Criminal Law* (1990), 601.

<sup>360</sup> *CC* 139.2 *Unwarranted demands made by a Commonwealth public official*; s142.2 *Abuse of public office*; &c.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

12.1 General principles

- (1) This *Code* applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

So far as offences of general application are concerned there is no impediment to conviction of a corporation.<sup>361</sup> The acts of individuals who are employed by a corporation or who act as its agents or officers, are imputed to the corporation if the acts are within their apparent scope of employment or authority: s12.2 *Physical elements*. So, for example, there is no impediment to corporate conviction for the *Code* offence of impersonating a Commonwealth public official: s148.1. The conduct of the impersonator can be imputed to the corporation. The full range of Chapter 2 fault elements – intention, knowledge, recklessness and negligence can be imputed to a corporation. A corporation can conspire with its own agents; it can be an accomplice in offences committed by its agents and it can incite the commission of a crime by an agent. Whatever doubts there may have been at common law on these issues,<sup>362</sup> they have been dissipated by the *Code*. The significance of derivative corporate liability for conspiracy or complicity may diminish in importance, however, as a consequence of the acceptance of a principle of organisational responsibility in Chapter 2. There is no need to resort to these extensions of criminal liability if the corporation can be charged as a principal offender.

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361 For a discussion of the uncertainties of the common law on the issue of offences which can be committed by a corporation, see B Fisse, *Howard's Criminal Law* (1990), 609; P Gillies, *Criminal Law* (4ed 1997) 132-134.

362 B Fisse, *ibid* 611-612.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

## 12.2 Physical elements

In the large majority of offences, it is impossible for a corporation to engage in conduct<sup>363</sup> unless it does so via the medium of a human agent. To return to an earlier example, though a corporation might commit the offence of impersonating a Commonwealth officer, it could not achieve that feat without the co-operation of one of its own employees, agents or officers. Section 12.2 is not exhaustive; it is limited to the attribution of physical elements of offences committed by a corporate agent. In some offences, the conduct elements of an offence can be attributed to a corporation directly as acts or omissions of the corporation itself. Instances of direct attribution are not uncommon in existing law. So, for example, a corporation causes environmental pollution if it permits the escape of pollutant from its plant.<sup>364</sup> In these instances is not necessary to discover some particular individual or set of individuals whose actions or inaction might have resulted in pollution before attributing the conduct of causing pollution to the corporation. Liability may indeed arise from corporate omission to appoint some individual whose responsibility it was to ensure that the pollutant did not escape. Nor is direct attribution of conduct elements of an offence to a corporation limited to omissions. In some offences, the corporation is the active agent, as in offences of “sale” or “trading” in prohibited goods.

Section 12.2 attributes “physical elements” of an offence “committed by” a corporate agent to the corporation. The reference to physical elements “committed by” the agent implies that only conduct elements are attributed to the corporation under this provision. Circumstantial elements of the offence are taken to be circumstances in which the *corporation* engaged in the attributed conduct. Results are taken to be the results of the conduct attributed to the corporation.

*12.2-A Acts or omissions of an employee, agent or officer of a corporation may be physical elements of an offence committed by the corporation:*

In many instances, the activities of corporate agents will involve the commission of offences both by the corporation and the agent. However, that is not invariably the case. Agents may be immune from criminal responsibility though their actions result in corporate liability. When Chapter 2 speaks of “physical elements of an offence committed by an employee”,

<sup>363</sup> Ch2, s4.1(2) “engage in conduct” means “to do an act or...to omit to perform an act”.

<sup>364</sup> *NSW Sugar Milling Co-Operative Ltd v Environmental Protection Authority* (1992) 59 A Crim R 6; *Environmental Protection Authority v Shell Co* [2000] NSWCEC 132 30 June 2000. See, in addition, instances of corporate liability for what P Gillies, *Criminal Law* (4ed 1977) 146, calls “situational offences.” These correspond to *Code* liability for conduct consisting of a “state of affairs”: s4.1 *Physical elements*.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

it refers to the physical elements of the offence for which it is sought to hold the *corporation* responsible. So, for example, it is apparent from s12.4 *Negligence*, that the criminal conduct of a corporation may be an assemblage of particular acts and omissions by diverse agents of the corporation none of whom, individually, engage in the forbidden conduct.<sup>365</sup>

*12.2-B The acts and omissions of an employee, agent or officer of a corporation are attributed to the corporation if they are within the actual or apparent scope of employment or authority:*

The *Code* adds little to existing, common law criteria for determining the actual or apparent scope of employment or actual or apparent authority. But 12.3 *Fault elements other than negligence*, which is primarily concerned with the attribution of fault elements to corporations, suggests that corporate agents include:

- persons who are expressly, tacitly or impliedly given permission or authorisation to commit an offence by the board of directors: s12.3(2)(a);
- persons who are expressly, tacitly or impliedly given permission or authorisation to commit an offence by a “high managerial agent” of the corporation: s12.3(2)(b).

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<sup>365</sup> Compare B Fisse, *Howard's Criminal Law* (1990), 592-593: “For instance, where unlawful homicide is committed in the context of a large manufacturing company's activities, many individuals may have participated in the background events leading to V's death but the contribution of any one person may have been too minor to warrant prosecution.”

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

**corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

### 12.3 Fault elements other than negligence

The statement of general principle which opens Division 12 declares that the “*Code* applies to corporations in the same way as it applies to individuals.” The principle is immediately qualified by the recognition that the language of individual responsibility will have to be adapted to the contours of corporate criminal responsibility. Section 12.3 provides an explicit set of rules for attributing the fault elements of intention, knowledge and recklessness to corporations. States of mind that provide the basis for a finding of individual fault are given corporate equivalents. The rules include familiar common law principles which impute to the corporation the intentions, knowledge or recklessness of the board of directors or high managerial agents. The rules go well beyond the familiar, however, by permitting fault to be imputed to a corporation which maintains a culture of non-compliance with the law in question or fails to maintain a culture of compliance.

The rules for the imputation of fault in s12.3 are limited in their application to intention, knowledge and recklessness. Negligence is the subject of specific provision in s12.4. Negligence aside, s12.3 is far from exhaustive in its coverage of fault elements. Many Commonwealth offences, in the *Code* and in general legislation, utilise other forms of criminal fault in the regulation of particular areas of criminal activity. So, for example, in 138.1 *Unwarranted demand with menaces* - the offence commonly known as blackmail - liability depends on proof of the offender’s *absence of belief* that there were reasonable grounds for either making the demand or reinforcing it with menaces. Absence of the requisite belief is clearly a fault element required for the offence and it is equally clear that this is not a variety of fault which can be equated with intention, knowledge or recklessness. The fact that s12.3 makes no specific provision for unusual fault elements does not mean that absence of belief cannot be attributed to a corporation. The opening injunction of Part 2.5, to modify the language of individual responsibility to fit the contours of corporate liability, should enable a court to conclude that corporations can act with the fault required for the offence of demanding with menaces. If particular varieties of fault can be brought within the rules set out in s12.3, however, there are obvious advantages of clarity and certainty. Dishonesty, which plays so large a role in the regulation of corporate conduct, is the obvious case in point. Analysis of the concept reveals that it is, in reality, a compound of the familiar fault element of knowledge, coupled with a circumstantial element. As a consequence, the rules of attribution in 12.3 do extend to the fault element in dishonesty: this is discussed below 12.3-K.

A similar, though more intractable, problem arises in offences which make use of *ulterior intentions* as a fault element defining liability. In these offences, it is very arguable that 12.3 does *not* permit the ulterior intention of an agent to be attributed to a corporation. The argument, if accepted, frustrates the objects of s12.3. The issue requires resolution. With this caveat, the

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

**corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

discussion which follows assumes that the contrary argument will not prevail and that s12.3 *does* permit the ulterior intentions of an agent to be attributed to a corporation. The issue is discussed in more detail below at 12.3-J.

*12.3-A Fault elements of intention, knowledge and recklessness are not attributed to a corporation unless an agent acted with intention, knowledge or recklessness:*

Section 12.3 attributes fault to a corporation if it authorised or permitted the “commission of an offence”. The language of the provision suggests that there must be an offence committed, before fault is attributed.<sup>366</sup> If that is the case, it will be necessary to prove intention, knowledge or recklessness – as the case may require – against an agent of the corporation before any of those fault elements can be attributed to the corporation. An alternative view of the provisions is possible. Professor Eric Colvin argues that the fault elements of intention, knowledge or recklessness can be attributed to a corporation in the absence of any evidence that an agent of the corporation acted intentionally, with knowledge or recklessly: “The fault element...can be located in the culture of the corporation even though it is not present in any individual”.<sup>367</sup> On this view, s12.3 goes well beyond the invention of a corporate equivalent for the intention, knowledge or recklessness of an individual agent of the corporation. The corporate culture provisions are taken to require the attribution of these fault elements to a corporation in the absence of fault on the part of any individual. Though it is possible that the provisions were intended to have this effect, the practical difficulties of implementing such an interpretation seem insurmountable. The better view is that intention, knowledge and recklessness cannot be attributed to a corporation unless an agent acted with intention, knowledge or recklessness. Take the simple example of a corporation engaged in the construction industry which fails to ensure that its workers maintain adequate safeguards against injury or death. It fails to maintain a culture of compliance with safety standards. A rigger is killed by a crane driver who breaches those standards. There is no doubt that the corporation could be held guilty of manslaughter in such a case: 12.4 *Negligence*. But murder? The problem, which Professor Colvin remarks, is the absence of any apparent difference between corporate intention, corporate knowledge, corporate recklessness and corporate negligence. Failure to maintain a “corporate culture that required compliance with the relevant provision” provides a basis for attributing intention, knowledge or recklessness to a corporation. The only way in which one can

<sup>366</sup> The remaining provisions in s12.3 are consistent with this interpretation. The provisions which attribute the fault of the board of directors or “high managerial agents” to the corporation require proof that they acted with the requisite intention, knowledge or recklessness: s12.3(2)(a) & (b). The provisions which attribute fault to a corporation which fosters a corporate culture of non-compliance or fails to foster a culture of compliance appear to be limited to circumstances in which the offence is committed by an agent of the corporation: s12.3(4).

<sup>367</sup> E Colvin, “Corporate Personality and Criminal Liability” (1995) 6 Criminal Law Forum 1, 36. Compare Woolf, “The Criminal Code Act 1995(Cth) - Towards a Realist Vision of Corporate Criminal Liability” (1997) 21 Crim LJ 257.

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

**corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

differentiate between corporate murder and corporate manslaughter is by reference to the question whether the corporate agent – the crane driver – acted with the appropriate fault element for murder. To attribute intention to kill, or recklessness to the corporation, it would be necessary to show a corporate culture of non-compliance or a corporate failure to maintain a culture of compliance, among its agents, with the law against *murder*. The problems are even more apparent when the fault element of an offence takes the form of ulterior intent: see below 12.3-J.

#### ATTRIBUTING FAULT TO A CORPORATION: BRIBING A FOREIGN OFFICIAL WITH INTENT

The *Code* makes it an offence to bribe foreign officials in the pursuit of business advantage: 70.2 *Bribing a foreign official*. The prosecution must prove, among other fault elements, that a benefit was given to a foreign official with intention of influencing the exercise of official duties in order to obtain a business advantage. It is not necessary to prove that any business advantage was obtained in fact: liability for this offence requires proof of an ulterior intention: discussed 5.2-D. A corporation which turned a blind eye to its agents' consistent practice of bribing officials to secure business for their employer would be equally guilty with those agents. The existence of a corporate culture of non-compliance or of corporate failure to maintain a culture of compliance is the corporate equivalent of the agent's intention to secure a business advantage. In this scenario, the corporation tacitly authorised "the commission of the offence": s12.3(1). Suppose, however, that it could not be proved that the agents conferred benefits with the intention of securing any business advantage. They did so, let us say, with the intention of deriving some personal advantage for themselves. As before, the corporation tacitly encourages the practice or fails to discourage it. There is, in such a case, no offence on the part of the agents and no offence on the part of the corporation.

The foreign bribery example, which can be generalised to many other offences, is consistent with the view that the corporate culture provisions merely provide a corporate *equivalent* to the intentions, knowledge or recklessness of an agent of the corporation. In the absence of proof of a particular variety of fault on the part of the individual, however, the corporate culture provisions have no application. They require proof that the corporation tacitly encouraged individuals to commit the offence. If there is no evidence of an offence on the part of the agent, there is no basis for the allegation of a corporate culture of non-compliance or corporate failure to maintain a culture of compliance.

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

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**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

*12.3-B Fault elements of intention, knowledge and recklessness required for guilt must be attributed to a corporation that authorised or permitted the commission of the offence:*

The legislative instruction is mandatory. It appears that authorisation and permission are meant to be taken as near synonyms: an offence is “permitted” when permission is given to some individual to commit that offence. The word does not seem to extend more generally to include simple failure to prevent the occurrence of the offence.<sup>368</sup> Authorisation of an offence and permission for it to occur are corporate equivalents of the states of mind which provide the basis for attributing the fault elements of intention, knowledge or recklessness to individuals. It is important to notice that the Chapter 2 conception of corporate fault does not distinguish among the fault elements of intention, knowledge and recklessness.<sup>369</sup> Authorisation or permission will provide the basis for attributing each and all of these fault elements to the corporation. When corporate fault is in issue, they are treated as a collectivity. It follows that the distinction between crimes requiring proof of intention and crimes requiring proof of recklessness, a distinction which can be used to mark different grades of criminality when individual liability is in issue,<sup>370</sup> is elided when corporate liability is in issue.

*12.3-C A corporation may authorise or permit the commission of an offence expressly, impliedly or tacitly:*

The opening statement of general principle in s12.3(1) adds little if anything to existing law. It does provide the foundation for the extended applications of authorisation and permission which follow.

*12.3-D Authorisation or permission for the commission of an offence may be given by the board of directors:*

Section 12.3(6) defines the board of directors as the body, whatever it may be called, which exercises the executive authority of the corporation. Section 12.3 reiterates the common law doctrine of “direct corporate liability” in

<sup>368</sup> The words “expressly, tacitly or impliedly” in s12.3(1) appear to qualify both “authorised” and “permitted,” suggesting that it is *permission* which must be given expressly, tacitly or impliedly. The inference that “permitted” is used in the sense of giving permission is strengthened by ss(2) and (3), which clearly equate offences permitted with offences for which permission was given.

<sup>369</sup> Distinguish the effect of s12.3(5) which bars the attribution of fault elements of intention or knowledge to a corporation, pursuant to ss2(a) and (b), when the board of directors or high managerial agent are merely reckless with respect to the commission of an offence. That provision merely limits the means of proving authorisation or permission. It does not limit the *effect* of proof that the offence was authorised or permitted. That effect is the attribution of the collectivity of fault elements - intention, knowledge and recklessness - to the corporation

<sup>370</sup> Though frequent in state and territorial law, examples are comparatively rare in the *Code*. See, however, Ch 7, Part 7.4 – *False or misleading statements*, in which distinctions are drawn between offences which require proof of knowledge and offences which require proof of recklessness.

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

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**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

which the corporation is identified with its board of directors.<sup>371</sup> The board of directors may implicate the corporation in criminal activity if they personally engage in criminal conduct, or if they authorise or give permission to another to do so. It will be necessary, however, to prove that the directors acted with intention, knowledge or recklessness with respect to the physical elements of the offence or authorised its commission intentionally, knowingly or recklessly.<sup>372</sup>

*12.3-E Authorisation or permission for the commission of an offence may be given by a high managerial agent:*

Common law extends the identification of the corporation with its board of directors to include senior officers of the corporation. Once again, Chapter 2 reiterates common law doctrine, which found its most significant expression in the House of Lords decision in *Tesco Supermarkets v Natrass*.<sup>373</sup> A high managerial agent may implicate the corporation in criminal activity if the agent personally engages in criminal conduct or authorises or gives permission to another to do so. It will be necessary, however, to prove that the high managerial agent acted with intention, knowledge or recklessness with respect to the physical elements of the offence or authorised its commission intentionally, knowingly or recklessly.<sup>374</sup> The limits of attribution under this head are inherent in the notion of a “high managerial agent”. Chapter 2 summarises common law criteria<sup>375</sup> for distinguishing between those senior officers whose states of mind can be counted as those of the corporation and those who do not have a share in the corporate *mana*.<sup>376</sup> A high managerial agent is defined, in s12.3(6), as an “employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy”. The importance of those limits is much reduced, however, by the provisions on corporate culture which follow.

371 P Gillies, *Criminal Law* (4ed 1997), 138: “The direct liability doctrine (also referred to, variously, as the ‘alter ego’ or ‘identification’ doctrine, or as the ‘primary’ corporate liability doctrine). . .”

372 Note, however, that neither *intention* nor *knowledge* are attributed to the corporation under ss2(a) or 2(b) where the board of directors or high managerial agent were merely *reckless* with respect to the criminal conduct or to the risk that they might be taken by an agent to give authorisation or permission to commit the offence: s12.3(5), discussed **12.3-G**.

373 [1972] AC 153.

374 Neither *intention* nor *knowledge* are attributed to the corporation under ss2(a) or 2(b) where the high managerial agent was merely *reckless* with respect to the criminal conduct or to the risk that their conduct might be taken give authorisation or permission to commit the offence: s12.3(5): discussed **12.3-G**.

375 As to which, see the discussion in P Gillies, *Criminal Law* (4ed 1997), 141-144.

376 B Fisse, *Howard’s Criminal Law* (1990), 601.

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### 12.3 Fault elements other than negligence

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- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
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  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
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**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

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*12.3-F The fault of a high managerial agent is not attributed to a corporation which exercised due diligence in an attempt to prevent that agent from engaging in criminal conduct or giving authorisation or permission to another to commit the offence.*

Chapter 2 draws a significant distinction between the board of directors and high managerial agents. Any criminal activity undertaken by the board is attributed to the corporation. In the case of high managerial agents, however, their derelictions are only *presumed* to be attributable to the corporation. The presumption can be rebutted. If the fault of a high managerial agent is imputed to a corporation, s12.3(3) permits an affirmative defence of due diligence if appropriate measures were taken to restrain the criminal activities of the high managerial agent: on affirmative defences, see 13.4 *Legal burden of proof – defence*.

*12.3-G Recklessness on the part of the board of directors or a high managerial agent does not establish corporate fault elements of intention or knowledge:*

Proof of recklessness is not the same as proof of intention or knowledge, whether corporate or individual criminal responsibility is the subject of inquiry. If an offence requires proof of corporate intention or knowledge, s12.3 permits the intention or knowledge of the board, or of a high managerial agent, to be attributed to the corporation. Intention and knowledge are interchangeable – the corporation will be taken to have *known* a circumstance if the board or agent *intended* it. But the provision does not permit intention or knowledge to be attributed to a corporation if the board or high managerial agent was merely reckless with respect to a circumstance or result. Though the provisions are not explicit on the point, it can be inferred that similar restrictions apply when the corporate culture provisions are invoked. Some Commonwealth offences are graded in seriousness, requiring intention for the more serious offence and recklessness for the less serious offence.<sup>377</sup> If the offence requires intentional wrongdoing, proof that the corporate agent possessed the requisite intention will be necessary before the corporation can be convicted of the more serious offence. There is no other way of distinguishing between corporate intention and corporate recklessness and it cannot be assumed that the difference in seriousness between the two offences counts for nothing, simply because a charge is brought against a corporation rather than an individual.

*12.3-H Authorisation or permission for the commission of an offence may be inferred from proof of a corporate culture of non-compliance:*

The corporate culture provisions in ss12.3(2)(c),(d), extend the concept of corporate authorisation and permission well beyond the limits imposed at

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<sup>377</sup> See, for example, Ch7, part 7.4 – *False or misleading statements*.

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- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
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- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
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common law by *Tesco Supermarkets v Natrass*.<sup>378</sup> The fault of any agent in the corporation, no matter how minor or peripheral their role, can be attributed to the corporation when these provisions apply. In that sense, corporate forms of fault are quite distinct from the states of mind of individuals within the corporation. As Fisse remarks, “Corporate policy is the corporate equivalent of intention and a corporation that conducts itself with an express or implied policy of non-compliance with a criminal prohibition exhibits corporate criminal intentionality.”<sup>379</sup> In the *Code*, authorisation and permission are taken to be the expression of corporate policy. But, negligence aside, Chapter 2 still requires proof of intention, knowledge or recklessness on the part of some human agent if fault is to be attributed to the corporation.<sup>380</sup>

The concept of corporate culture is defined in ss12.3(6) as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.”<sup>381</sup> Of course, policies of non-compliance may be overt in cases where a high managerial agent has authorised past breaches of the law, leading to an expectation that future breaches will be condoned: s12.3(4)(a).<sup>382</sup> It is perhaps more likely, however, that the policy will be tacit or implied. Chapter 2 invites courts to consider the reasonably founded views of ordinary employees on the attitudes of management to compliance when drawing conclusions about corporate culture: s12.3(4)(b).<sup>383</sup> The prosecution may,

378 [1972] AC 153.

379 B Fisse, *Howard's Criminal Law* (1990), 606.

380 Section 12.3 is consistent in its insistence that fault is attributed to the corporation when it gives authorisation or permission for *the commission of an offence* by an agent. In the absence of an offence committed by an individual, the provision gives no basis for the attribution of fault to a corporation. Notice, however, that the inferences drawn from the existence of corporate policy of non-compliance can go beyond the statutory establishment of express, tacit or implied authorisation or permission for the commission of an offence. Proof of such a policy will also tend to establish the necessary fault element on the part of the individual: see: Field & Jorg, “Corporate Manslaughter and Liability: Should we be going Dutch” [1991] Crim LR 156, 159: “[T]he policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation.”

381 Compare B Fisse, *Howard's Criminal Law* (1990), 605-606.

382 Note that it is *not* open to the corporation to escape the attribution of fault on this ground by proof that it had exercised due diligence in an attempt to control its high managerial agents: s12.3(3).

383 Compare B Fisse, *Howard's Criminal Law* (1990), 607: “[A] policy of non-compliance could be deemed to exist where an employee connected with the commission of the offence charged has reason to believe that the company expected him to act as he did and that complaining about the matter would be ineffective or would provoke retaliatory action against him....The focus is not merely on the proclamations about compliance made at the board of directors or top level management but on the perceptions of the middle and lower level employees by whom the external elements of corporate offences are typically committed.”

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### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
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- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

**corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

in this way, lead evidence that the unwritten rules of the corporation tacitly authorised non-compliance with the law, whatever the formal appearances of compliance.

*12.3-I Authorisation or permission for the commission of an offence may be inferred from corporate failure to create and maintain a corporate culture of compliance:*

The *Code* treats proof of absence of a culture of compliance and proof of the existence of a culture of non-compliance as equivalent grounds for the conclusion that the corporation gave its authorisation or permission for the offence. The provisions facilitating proof of a culture of non-compliance are equally applicable to proof of failure to establish a culture of compliance: s12.3(4).

*12.3-J Section 12.3 permits attribution of ulterior intentions to a corporation:*

Earlier sections of the Guidelines discuss offences which make use of an *ulterior intention* as a fault element defining liability: see 5.2-D. The *Code* offence, 70.2 *Bribing a foreign official*, is an example of an offence defined by reference to an ulterior intention. A benefit given to a foreign official can amount to a bribe, if the benefit was given “with the intention of influencing the...official” in order to secure a business advantage. Since the offence requires proof of a fault element of intention, s12.3 permits the corporate agent’s intention to influence an official to be imputed to their corporate principal. It is true the agent’s ulterior intention does not fall within s5.2 *Intention*. But the definition in that provision does not exhaust the meaning or application of intention as a fault element. References to “intention” in s12.3(1) accordingly include ulterior intentions. Though the *Dictionary* which concludes the *Code* declares that “*intention* has the meaning given in section 5.2”, definitions in the *Dictionary* give way when “context or subject matter...indicates or requires”.<sup>383</sup> The s5.2 definition is displaced in this instance: there can be no reason to exempt corporations from liability for offences which require proof of an ulterior intention. Many, like the offences in the foreign bribery provisions, are peculiarly appropriate for use against errant corporations.

*12.3-K Dishonesty is attributed to a corporation, pursuant to s12.3, if the corporation gives authorisation or permission for an offence of dishonesty:*

No mention is made of dishonesty in s12.3, which is exhaustive in its catalogue of the fault elements which may be attributed to a corporation, but s12.3 is not the only avenue to the attribution of fault to a corporation. The fundamental principle governing corporate liability is found in s12.1, which requires *Code* provisions to be applied (with whatever modifications

<sup>384</sup> Section 4(1) of the *Criminal Code Act 1995* applies the *Dictionary* definitions to terms used in federal offences unless context or subject matter requires otherwise. Also, compare 8.2-C, discussing intoxication and ulterior intentions where it was concluded that “intention” in s8.2(1) is limited by 5.2 *Intention*.

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

**corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

may be necessary, to corporations in the same way as they apply to individuals). It is possible that dishonesty might be attributed to a corporation without reference to the provisions of s12.3. However, in view of the large number of offences of dishonesty that involve corporate misconduct, it is preferable to avoid sailing into totally uncharted waters. Closer consideration of the meaning of dishonesty, as it is defined in the *Code*, permits the conclusion that s12.3 does indeed provide the basis for attributing dishonesty to a corporation. That conclusion, it should be said, is based on the definition of dishonesty in Chapter 7 – *The proper administration of government*, which deals with theft, fraud and related areas of criminal behaviour. It may not follow in the same way, if dishonesty is defined differently or not defined at all in other offences which do not fall within Chapter 7. Section 130.3 *Dishonesty* defines the concept as an amalgam of two distinct elements. First, the conduct in question must be “dishonest according to the standards of ordinary people.” Second, the conduct must be “known to be dishonest according to the standards of ordinary people”. It is apparent that the fault element here is “knowledge”. The “standards of ordinary people” are, in fact, a physical element of those offences that require proof of dishonesty: see 3.1.2.<sup>385</sup> Nothing in the *Code* requires “dishonesty” to be characterised as a fault element and nothing in the *Code* forbids dissection of this compound concept into its component elements. The fault element in these offences is knowledge. Like knowledge of any other physical element of an offence, s12.3(2) provides the criteria for attributing an individual’s knowledge that conduct violated the standards of ordinary people to a corporation. The hypotheticals which follow illustrate the attribution of the fault element in dishonesty to a corporate employer.

#### INTENTIONAL AND DISHONEST CORPORATE BRIBERY

It is an offence against *Code* s70.2 to bribe a foreign public official and an offence against s142.1, to bribe a Commonwealth public official. The first of these offences requires proof that a benefit was conferred with intent to derive a business advantage;<sup>386</sup> the second requires proof that a benefit was conferred or offered “dishonestly”. This difference between offences which are very similar in other ways, provides a useful illustration of the effect of the provisions of Part 2.5 in the attribution of corporate fault elements. Suppose a corporation,

<sup>385</sup> Compare, for example, the concept of indecency at common law: conduct is indecent if “respectable” or “right thinking” or “right minded” or “decent-minded” people would take it to be indecent: *Harkin* (1989) 38 A Crim R 296, 300 per Lee J. There can be no doubt that indecency is a physical element of the offence.

<sup>386</sup> *CC* s70.2(1)(c) illegitimate benefit conferred or offered “with the intention of influencing a foreign public official...in order to...obtain or retain business...&c”.

Due to the length of s12.3, in this case it is more convenient to use smaller text.

### 12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

**board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.

**corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

**high managerial agent** means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Buttons PL, manufactures uniforms. The corporation wanted to renew contracts to manufacture military uniforms for the Commonwealth government and for the government of New Zealand. Donald is an executive of Buttons PL who is responsible for negotiating renewal of its contracts with the two governments. In each set of negotiations, Donald offers a government official a benefit:

*(a) CC 70.2 Bribing a foreign public official:* The offer made by Donald, an employee acting within the apparent scope of his employment, is attributed to Buttons PL as a physical element of the offence: s12.2 *Physical elements*. The fault element – intention to influence an official of the New Zealand government in order to retain the business – will be attributed to Buttons PL if Donald was a high managerial agent and if he acted with that intention: s12.3(2)(b). Buttons PL will escape the attribution of fault, however, if the corporation can prove that it exercised due diligence and endeavoured to prevent its employees from offering bribes: S12.3(3). If Donald is not a high managerial agent his intention to influence the official can still be attributed to the corporation, if a corporate culture of non-compliance or a failure to establish a corporate culture of compliance can be proved: s12.3(2)(c) & (d).

*(b) CC 142.1 Corrupting benefits given to...a Commonwealth public official:* Once again, the offer which Donald made to the official is attributed to the corporation. The prosecution must establish that the offered benefit would ‘tend to influence a public official’: s142(1)(b). It must also be established that the offer was “dishonest according to the standards of ordinary people”: s130.3. These requirements all relate to the physical elements of the offence. The fault element of the offence – *knowledge* that the offer of a benefit was “dishonest according to the standards of ordinary people” – can be attributed to the corporation in exactly the same way as intention in the previous example.

There is a significant difference between the examples. In the second, where Buttons PL cannot be held liable unless Donald knew his conduct to be dishonest, the corporation escapes liability if Donald was ignorant or mistaken about the ethics and legality of business bribes.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

**12.4 Negligence**

- (1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
  - (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of the body corporate has that fault element;that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

## 12.4 Negligence

There is a strong distinction between proof of corporate negligence and the other forms of corporate fault in Part 2.5. Intention, knowledge and recklessness each require proof that a particular employee, agent or officer of the corporation realised the nature of the conduct in which they were engaged and the risk that circumstantial and consequential elements of the offence existed or would eventuate. Negligence, which is a marked or gross failure to meet required levels of care, does not require proof that risks were known or contemplated by either the agent or the corporation. Instead, the prosecution must prove departure from the standard of care which would be exercised by a reasonable person in the circumstances: 5.5 *Negligence*. Unlike s12.3, which bases the attribution of corporate fault on a finding of individual fault, s12.4 permits a finding of negligence against a corporation in circumstances where none of its agents were guilty of negligence.

*12.4-A The criteria for a finding of corporate negligence are the same as the criteria for negligence by an individual:*

Negligence requires proof of a “great falling short of the standard of care that a reasonable person would exercise,” coupled with a “high risk” of incriminating circumstances or consequences: 5.5 *Negligence*. The departure from reasonable standards must be sufficiently marked and the risk sufficiently high to justify the imposition of criminal punishment. It is implicit in the provisions that the standard against which the defendant corporation is to be judged is the standard expected of a reasonable corporate actor.<sup>387</sup> The liability of the corporation for failure to take care is not constrained by the possibly limited capacities of its agents.

*12.4-B The conduct of employees, agents and officers may be considered in the aggregate, when corporate negligence is in issue:*

Chapter 2 is quite explicit in its recognition of the principles of organisational or collective blameworthiness. Corporate negligence may arise from an aggregation of particular failures of foresight and precaution none of which, taken singly, would justify the imposition of criminal punishment: “Where fault is pervasive throughout an organization, and where the contribution of any one individual to the disaster is but a small part of a complex whole, the temperate course is to rely on corporate liability rather than prosecute a few scapegoats.”<sup>388</sup>

<sup>387</sup> There are two significant grounds for the implication: (a) corporate negligence can be imposed in the absence of negligence by individual employees, agents or officers (s12.4(2) and (b) corporate negligence can be proved by establishing absence of adequate “corporate management, control or supervision” and “failure to provide adequate systems for conveying relevant information to relevant persons within the body corporate”: s12.4(3). These criteria require reference to standards of appropriate *corporate* behaviour. See also, B Fisse, *Howard’s Criminal Law* (1990), 614.

<sup>388</sup> B Fisse, *Howard’s Criminal Law* (1990), 593-594.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

**12.4 Negligence**

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

*12.4-C Evidence of inadequate corporate management and failure to provide adequate information systems are evidence of corporate negligence:*

The criteria for corporate negligence in s12.4(3) are the same as those defining absence of due diligence in 12.5 *Mistake of fact (strict liability)*. It should not be assumed, however, that negligence and “failure to exercise due diligence” are the same thing when corporate liability is in issue. Section 12.4(3) is an evidentiary provision. Though it suggests some criteria for corporate negligence, it is not exhaustive. There are other ways in which corporate negligence can be established. And, though the criteria for corporate negligence overlap with failures of due diligence, the standard of care required of the corporation is different. Negligence, unlike failure to match the due diligence standard, requires a great falling short of a reasonable standard, in circumstances of high risk: 5.5 *Negligence*.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

**12.5 Mistake of fact (strict liability)**

- (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
  - (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
  - (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

### 12.5 Mistake of fact (strict liability)

Chapter 2 requires specific provision before strict liability is imposed. A declaration that liability is strict with respect to an offence or a particular physical element of an offence, displaces the prosecution obligation to prove fault with respect to some or all physical elements of the offence: 6.1 *Strict liability*. Though the prosecution has no need to prove fault when strict liability is imposed, s9.2 *Mistake of fact (strict liability)* permits the accused to rely on the defence of reasonable mistake of fact. Adaptation of the defence is necessary if a corporation is to rely on reasonable mistake. Though s12.5 permits a corporation to share, vicariously, in the potential benefits of a mistake made by an employee, agent or officer, it places significant limits on that reliance. The defence of reasonable mistake, which must be disproved by the prosecution when individual criminal responsibility is in issue, is transformed into an affirmative defence that the corporation must prove on the balance of probabilities. The fact that a corporate agent made a reasonable mistake is not sufficient to exculpate the corporation. The corporation must take the further step of proving that it exercised due diligence in the supervision of the agent. The due diligence limit is an expression, in yet another guise, of the pervasive principle of organisational blameworthiness.

*12.5-A Reasonable mistakes of fact by corporate employees, agents or officers can be attributed to the corporation:*

When strict liability is imposed with respect to the physical elements of an offence, the defence of reasonable mistake is not available to a person who is merely ignorant, no matter how reasonable their ignorance may be. Since mistaken belief is required, corporate reliance on the defence is necessarily vicarious, requiring evidence that some particular agent held a belief in facts which would have made the conduct in question innocent. Of course, the defence is barred if the belief is both mistaken and unreasonable. The requirement that the belief be “reasonable” appears to refer to a belief that would be reasonable for the individual in question to hold in the circumstances. But reasonableness from the agent’s point of view is not determinative. The defence fails if the agent’s mistake resulted from a lack of due diligence on the part of the corporation, however reasonable it may have been for someone in the agent’s circumstances.

*12.5-B The defence of reasonable mistake is not available to a corporation unless the agent who made the mistake engaged in the conduct which constitutes the offence:*

It is quite possible to envisage circumstances in which breach of a prohibition occurs as a consequence of conduct by a number of corporate agents. That may often be the case, for example, in violations of provisions which impose strict liability for environmental pollution. The fact that one of more

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

12.5 Mistake of fact (strict liability)

- (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
  - (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
  - (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

corporate agents may have laboured under a reasonable mistake of fact will not provide the corporation with a defence of reasonable mistake of fact if others, whose conduct constituted the offence, were merely ignorant.<sup>389</sup>

*12.5-C A corporate defence of reasonable mistake of fact requires proof of due diligence:*

The reasonable mistakes of corporate agents may be a consequence of corporate mismanagement, failures in training or failure to disseminate information for their guidance. The corporation is required to maintain a standard of due diligence in management and information policy. Since s12.5(1)(b) requires the corporation to “prove” due diligence, it bears the legal burden of proof of due diligence: 13.4 *Legal burden of proof – defence*. Considered as a *corporate* defence reasonable mistake of fact is, at least in part, an affirmative defence.

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<sup>389</sup> This appears to be the logical consequence of the fact that the “conduct” to which reference is made in the opening to s12.5(1) (conduct that would...constitute an offence) is not the same as the “conduct” to which reference is made in para (a) (“...employee...who carried out the conduct”). The first reference is to *corporate* conduct, which may be an aggregation of different acts and omissions of different individuals, attributed to the corporation pursuant to s12.2 *Physical elements*.

**PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY**

Division 12

**12.6 Intervening conduct or event**

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

## 12.6 Intervening conduct or event

When strict or absolute liability is imposed for one of more physical elements of an offence, the prosecution is not required to prove fault with respect to those elements. When liability is absolute, the defence of reasonable mistake of fact is barred. Absolute and strict liability can be imposed only by specific provision: s6.1 *Strict liability*; s6.2 *Absolute liability*. However, the general defences are still available. There is, in addition, the defence of intervening conduct or event, which is limited in its application to offences of strict or absolute liability: s10.1 *Intervening conduct or event*. The defence supplements the plea of involuntary behaviour: 4.2 *Voluntariness*. A person who commits an offence which imposes strict or absolute liability is excused if those elements of the offence for which strict or absolute liability is imposed came about as a consequence of events or the actions of others which were beyond the control of the defendant. The defence is limited to circumstances in which the defendant could not reasonably be expected to guard against the commission of the offence. The defence is adapted to corporate criminal responsibility by imposing a further limitation: a corporation has no defence of intervening conduct when the unexpected and uncontrollable conduct in question is that of an employee, agent or officer of the corporation.

*12.6.A A corporation cannot rely on the Code defence of intervening conduct if the conduct is that of a employee, agent or officer of the corporation:*

The conduct of employees, agents and officers will be attributed to the corporation if it is within the actual or apparent scope of employment or authority: 12.2 *Physical elements*. It makes no difference that the conduct may have been disobedient to instructions, unpredictable and unavoidable by the exercise of due diligence. In offences which require proof of fault, allegations of liability for the unpredictable and uncontrollable conduct of mavericks will be defeated, in most cases, by prosecution failure to prove corporate fault. However, when liability is strict or absolute, corporate criminal responsibility can be incurred for the unpredictable criminal activities of corporate agents.

*12.6-B The defence of intervening conduct or event will fail if the corporation could have taken reasonable precautions to avoid liability:*

The defence is not available if the defendant could “reasonably be expected to guard against” the occurrence of elements for which strict or absolute liability is imposed: s10.1(b). In cases where a corporation seeks to rely on the defence, it is likely that this qualification will operate similarly to the “due diligence” limit on the corporate defence of reasonable mistake of fact. Unlike that defence, however, no provision is made to require a corporation to prove reasonable precautions as a prerequisite to reliance on the defence. The prosecution must prove, beyond reasonable doubt, that it would have been unreasonable to expect the corporation to guard against the intervening conduct or event.

**PART 2.6—PROOF OF CRIMINAL RESPONSIBILITY**

Division 13

- 13.1 Legal burden of proof—prosecution
- 13.2 Standard of proof—prosecution
- 13.3 Evidential burden of proof—defence
- 13.4 Legal burden of proof—defence
- 13.5 Standard of proof—defence
- 13.6 Use of averments

## PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY

### DIVISION 13

Section 3.2 of Chapter 2 opens with the statement that conviction of an offence requires proof of both physical elements and fault elements, if fault is required for guilt. This restates, in statutory form, the fundamental principle declared by Lord Sankey in *Woolmington v Director of Public Prosecutions*,<sup>390</sup> that the obligation cast on the prosecution to prove guilt is “the golden thread always to be seen throughout the web of the English criminal law.” Part 2.6 – *Proof of Criminal Responsibility*, articulates the rules which give content to that general principle. In the absence of specific provision to the contrary, the prosecution must persuade the jury or judicial fact finder beyond reasonable doubt of the existence of each element of the offence charged. The obligation to persuade the fact finder is conventionally described as the “legal burden” of proof: s13.1(3). It is apparent that the prosecution also bears the burden of adducing evidence of the existence of each element of the offence, though that requirement is left unstated and arises by necessary implication. Failure to adduce evidence which would justify conviction results in a ruling that the defendant has no case to answer.<sup>391</sup> The allocation of the burdens of proof is different when *defences* to criminal liability are in issue; the legal and evidential burdens are usually divided between the prosecution and the defence. One who relies on a defence to criminal liability does not deny an element of the offence.<sup>392</sup> Defences only come into contention when the prosecution can prove the elements of the offence. A defendant who wishes to rely on a defence must raise the issue in the first place by adducing or pointing<sup>393</sup> to evidence in support of the defence. If there is evidence for the defence, the prosecution must take up the legal burden and persuade the jury or judicial fact finder beyond reasonable doubt that the defence is unfounded in law or fact. Imposition of the evidential burden on the defendant is not restricted to the recognised defences. The defendant is also required to bear the burden of adducing evidence of any “exception, exemption, excuse, qualification or justification” which would reduce or avoid liability for the offence: s13.3(3).

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390 (1935) AC 462.

391 For a useful discussion, followed by a direction to acquit on the ground that the evidence could not sustain a conviction of murder, see *Jamie Norman Smith* (1993) 117 A Crim R 298.

392 Ch 2, Part 2.2-*The Elements of an Offence*.

393 The party who bears the evidential burden when a defence is in issue may meet that requirement by eliciting testimony or adducing other evidence in support of the defence. It is also possible to carry the evidential burden by pointing to material in the prosecution case which supports the defence: on adducing evidence and pointing to evidence, see s13.3(6).

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

### 13.1 Legal burden of proof - prosecution

The legal burden of proof which rests on the prosecution requires proof beyond reasonable doubt of each element of the offence and disproof beyond reasonable doubt of any defence, exception, exemption, excuse, justification, or qualification. The principle is, of course, presumptive. The legislature can, by specific provision, shift the legal burden to the defendant: s13.4 *Legal burden of proof – defence*.

*13.1-A The prosecution bears the legal burden of proving every element of an offence:*

The provision implies that the prosecution bears the evidential as well as the legal burden of proof of the elements of the offence charged. Elements are distinguished from defences, exceptions, exemptions, excuses, qualifications and justifications on which a defendant may rely to avoid criminal responsibility. A defendant who seeks to rely on a defence or exception bears the evidential burden.

*13.1-B The prosecution bears the legal burden of disproving any matter on which the defendant has discharged an evidential burden of proof:*

Section 13.1(2) refers implicitly to the provisions of s13.3 *Evidential burden of proof – defence*. These provisions require the defendant to bear the evidential burden in relation to defences, exceptions, exemptions, excuses, qualifications and justifications [hereafter “defences or exceptions”]. Once the evidential burden is discharged, however, the prosecution must prove beyond reasonable doubt that the accused is not entitled to the defence or exception. So far as defences are concerned, Chapter 2 merely restates common law. But Chapter 2 has taken a significant step beyond the common law in relieving the accused of the legal burden of establishing the existence of “exceptions, exemptions and qualifications”. In *He Kaw Teh*<sup>394</sup> the High Court overturned caselaw which held that the accused must prove a defence of reasonable mistake on the balance of probabilities. It left intact, however, a common law exception to the *Woolmington* principle which permitted courts to impose both evidential and legal burdens on the accused when an exception, exemption or qualification was in issue.<sup>395</sup> The *Code* curtails the power of courts to

394 (1985) 15 A Crim R 203

395 *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594. The common law exception to *Woolmington* was paralleled by ss14 & 15D of the *Crimes Act* 1914 (Cth), which imposed the legal burden of proof of an “exception, exemption, proviso, excuse, or qualification” on the defendant in summary trials and, in all trials for offences against Commonwealth law, the legal burden of proof of “lawful authority or excuse... permission.” The provisions are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (No. 24, 2001) Schedule 1. From 24 May 2001 the provisions have no application to offences to which Chapter 2 applies: see item 1 of schedule 1, item 4 of schedule 51 and subsections 2(2) and (3) of Act 24 of 2001.

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

fashion exceptions to *Woolmington* in this way. A legislature may, of course, decide to impose the legal burden on an accused and require proof, on the balance of probabilities, of a defence or exception. To achieve that effect, however, the legislation must be specific in terminology and intention: see s13.3(1).

### 13.2 Standard of proof - prosecution

The standard of proof required of the prosecution, both when elements of an offence must be established and when the prosecution bears the burden of disproving defences or exceptions to liability, is proof beyond reasonable doubt. That demanding standard should neither be explained nor defined when instructions are given to a jury<sup>396</sup> though paraphrase is permissible.<sup>397</sup>

### 13.3 Evidential burden of proof – defence

The defendant must adduce or point to evidence in support of a defence or a matter of exception, exemption, excuse, qualification or justification. Failure to do so justifies an instruction to the jury to disregard the possible existence of the defence or exception or, in trial without jury, a conclusion that the defence or exception need not be considered.

*13.3-A Express provision is necessary before the defendant is required to bear the legal burden of proof:*

Section 13.3 opens with a declaration that the “burden of proof that a law imposes on a defendant is an evidential burden only”, unless s13.4 *Legal burden of proof*, applies. That section sets out three statutory formulae by means of which the legal burden may be imposed on the defendant. The opening provision in s13.3(1) adds a measure of reinforcement to the requirement that a reversal of the legal burden requires express language.

*13.3-B The evidential burden on the defendant may be discharged by evidence adduced by the accused, the prosecution or the court:*

Section 13.3(4) restates common law in its declaration that the evidence which supports a defence or exception may derive from the prosecution case or as a consequence of intervention by the court. For example, evidence adduced by the prosecution to support a charge of causing serious harm to another may suggest the “reasonable possibility” [s13.3(6)] that the harm was done in self defence.

<sup>396</sup> *Green* (1971) 126 CLR 28. For a recent discussion, see *ALJ* (2000) 117 A Crim R 370.

<sup>397</sup> See, for example, *Burrows* (1937) 58 CLR 249 at 256, per Latham CJ: a reasonable doubt is “a doubt such as would be entertained by reasonable men [and women], recognising their responsibility to the accused and the law.”

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

*3.3-C When one of the defences in Part 2.3 is in issue, the defendant will usually bear the evidential burden:*

Section 13.3(2) makes an exception for the s7.3 defence of mental impairment in its statement of general principle. The reason for the exception is that mental impairment, alone among the defences in Part 2.3 - *Circumstances in which there is no criminal responsibility*, may be alleged by either the prosecution or defendant. If the prosecution proposes a special verdict of not guilty on grounds of mental impairment, as an alternative to conviction, the prosecution bears both the evidential and persuasive burdens of proving absence of criminal responsibility on this ground. If the accused seeks a special verdict, the accused bears both burdens. There is a second, implied, exception to the general rule. In earlier sections of the commentary, it was suggested that s9.1 *Mistake or ignorance of fact (fault elements other than negligence)* is not in fact a defence at all. The provision, which was included in Chapter 2 from an abundance of caution, merely declares that the fault elements of intention, knowledge and recklessness may be defeated by evidence that the accused was unreasonably mistaken or ignorant in some pertinent respect. Since the prosecution bears the legal and evidential burden of proving fault elements [s13.1 *Legal burden of proof – prosecution*] the defendant does not bear an evidential burden when mistake or ignorance are in issue. The rule in s13.2(2) is subject to a similar exception in some circumstances when s9.5 *Claim of right* is in issue. When claim of right amounts to no more than denial of the fault element required for an offence of dishonesty the prosecution, not the defendant, bears the evidentiary burden of proving fault.

*13.3-D A defendant who seeks to rely on an “exception, exemption, excuse, qualification or justification” bears an evidential burden in relation to that matter:*

Section 13.3(3) parallels the rule that the defendant bears the evidentiary burden when Chapter 2 defences in Part 2.3 *Circumstances in which there is no criminal responsibility* are in issue. The references to “excuse” and “justification” can be taken to apply to specialised defences found in particular chapters of the *Code*. For example, the defendant is required to bear the evidential burden when relying on “reasonable excuse”, a defence frequently employed in federal legislation.<sup>398</sup> In general, excuses and justifications are readily recognisable. That cannot be said of exceptions, exemptions and qualifications. Though the distinction drawn in the *Code* between “elements” and matters of defence or exception parallels a familiar common law distinction,<sup>399</sup> the criteria which govern its application are

<sup>398</sup> See, for examples, *Australian Trade Commission Act 1985* (Cth), as amended by *Foreign Affairs And Trade Legislation Amendment (Application Of Criminal Code) Act 2001* (Cth), Schedule 1—Amendment of Acts.

<sup>399</sup> *Baronian v Potter Constructions* (1979) 22 SASR 215; *Phillips v Cassar* [1979] 2 NSWLR 430; *Macarone v McKone, ex parte Macarone* [1986] 1 Qd R 284; *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594; *Sheehan* (1999) QCA

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

not apparent in Chapter 2 itself. In practice, a measure of certainty has been achieved by adopting standardised drafting techniques in framing offences, which distinguish between elements and matters of defence or exception.

*13.3-E The distinction between elements and exceptions, exemptions and qualifications is determined by “the law creating the offence”:*

The ambiguity inherent in references to “elements of an offence” was the subject of discussion earlier in this commentary: see 3.1 *Elements*. It is quite clear that reliance on one of the “defences” in Part 2.3 - *Circumstances in which there is no criminal responsibility* does not involve any denial of the “elements of the offence.” It is equally clear that defences elsewhere in the *Code* or federal statutes do not involve any denial of the elements of the offence. The status of “exceptions, exemptions, excuses, qualifications and justifications”, to which Chapter 2 refers, is far less certain.<sup>400</sup> When criminal liability is imposed for breach of a statutory obligation, it is often possible to conclude that a statutory exception to liability defines the content of the obligation and, hence, defines the physical elements of the offence. Absence of an exception may, in this way, be characterised as an element of the offence. For example, legislation which prohibited television advertisements for cigarettes made an exception for accidental or merely incidental appearances of material advertising cigarettes. In *DPP v United Telecasters*,<sup>401</sup> the High Court held that this was a “qualification, exception or proviso” which defined or formed a “part of the total statement of the obligation”. The prosecution was therefore required to bear both the evidential and legal burdens of proving that the exception did not apply.<sup>402</sup> If one puts this in the language of the *Code*, the physical elements of the offence of advertising would be taken to include absence of accidental or merely incidental transmission. At common law, the distinction between exceptions which relate to an element of the offence and exceptions which do not requires an interpretive characterisation of the provision. Though the *Code* provisions provide no more guidance than the common law on the characterisation issue, the area of dispute has been reduced:

- Unlike common law, the Chapter 2 requires specific provision before the *legal* burden of proof relating to an exception is shifted from the prosecution to the defendant;

<sup>400</sup> Ch 2, s13.3(3). See too s11.6 and corresponding provisions in the sections which follow, which refer to “limitations and qualifying provisions.”

<sup>401</sup> *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594; *Sheehan* (1999) QCA

<sup>402</sup> *Ibid.*

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

- In practice, Commonwealth legislative drafting conventions will often provide a reliable indication of the occasions when “the law creating the offence” shifts the evidential burden relating to an exception from the prosecution to the defendant: see discussion box. It is apparent, however, that adherence to the conventions to signal the existence of a matter of exception is not invariable.

#### SHIFTING THE BURDENS OF PROOF: COMMON DRAFTING CONVENTIONS

Provisions in the *Migration Act* 1958 (Cth) as amended by the *Migration Legislation Amendment (Application of Criminal Code) Act* 2001, provide a useful parade of examples in which drafting conventions are employed to distinguish among elements, defences and exceptions and to allocate burdens of proof. These drafting conventions give content to the *Code* declaration that “the law creating the offence” determines whether a requirement for guilt is an element of the offence, a defence or an exception. Common practice, widespread in Commonwealth law since the *Criminal Code Act* 1995 was proclaimed to come into operation on 1 January 1997, is to make use of interpretive notes, appended to the prohibitions.<sup>403</sup> The offences in s21 *Failure to comply with a s18 notice*, s229 *Carriage of non citizens to Australia without documentation* and s230 *Carriage of concealed persons to Australia*, provide a typical conspectus of drafting techniques:

1. *Notes indicating defences:* s21(1A) provides defences of reasonable excuse and incapacity for compliance. The provision is followed by the note: “A defendant bears an evidential burden in relation to the matters in subsection [(2) or (2A)] (see subsection 13.3(3) of the *Criminal Code*).”
2. *Notes indicating exceptions:* See the exceptions to liability in s230(2) and (2A), which are followed by a note in the same form as the preceding one.
3. *Absence of a note is an indication, which is not conclusive, that a requirement for guilt is an element, not an exception:* Section 229(1) opens with the declaration that the master, owner, charterer and operator of a vessel which brings a non-citizen into Australia is guilty of an offence unless the non citizen falls within one of five

<sup>403</sup> See *Acts Interpretation Act* 1901 (Cth) ss13 and s15AB *Use of extrinsic material in the interpretation of an Act*. Section 15AB(1) and (2)(a) permit reference to marginal and other notes to resolve ambiguity.

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

special categories. Though the provision takes the grammatical form of an exception, it is arguable that it was intended to spell out the elements of the offence. If so, it is for the prosecution to bear both the evidential and legal burdens of proof that the non-citizen does not fall within any of the categories of exemption.<sup>404</sup> However, the contrary view is also arguable.

4. *Specific legislative language is necessary to shift the legal burden:* Section 229(5) provides a range of “defences” for the master, owner, charterer and operator of a vessel which brings non-citizens into Australia. These are followed by the declaration, in ss(6), that “a defendant bears a legal burden in relation to the matters in subsection (5)”.

*13.3-F The evidential burden is discharged if a defendant can adduce or point to evidence suggesting a reasonable possibility of the existence of a defence, exception, exemption, excuse, qualification or justification:*

Section 13.3(4), coupled with the definition of “evidential” burden in ss(6) sets a standard of “reasonable possibility” for the defendant when matters of defence or exception are in issue. This proposition is complementary to the definition of the legal burden which rests on the prosecution to disprove a defence or exception: s13.1(2). If there is evidence suggesting a reasonable possibility of a defence or exception, the prosecution must prove beyond reasonable doubt that the defence or exception has no application. It is uncertain whether the same standard of reasonable possibility is meant to apply when it is the *prosecution* which bears the evidential burden.<sup>405</sup>

*13.3-G The question whether an evidential burden has been discharged is one of law:*

Section 13.3(5) restates common law. There are two issues for the trial court. The first is whether the evidence can provide a sufficient legal foundation for the defence. The second is whether there is a reasonable possibility that the factual foundation for the defence is true. So, for example, s9.2 *Mistake of fact (strict liability)* has no legal basis unless there is evidence of a mistake: ignorance, however reasonable, is not enough and the defence will be withheld from the jury. Even if there is evidence of a mistake a court might rule that any jury would be certain to conclude that the mistake was utterly unreasonable. In that event the defence is once again withheld from the jury.

<sup>404</sup> Absolute liability is imposed with respect to these elements of the offence: s229(3) *Migration Act 1958* (Cth) as amended by the *Migration Legislation Amendment (Application of Criminal Code) Act 2001*.

<sup>405</sup> Chapter 2 contains no definition of “evidential burden” in relation to proof of elements of the offence by the prosecution. Section 13.3(6) defines “evidential burden” in relation to “matters”, not “elements” and it occurs in a section which is specifically directed to the evidential burden resting on the *defence*. Compare s13.1(3) which is similarly limited to the legal burden on the *prosecution* of disproving a “matter”, rather than an “element”.

Due to the length of s13.1 - 13.5, in this case it is more convenient to use smaller text.

### 13.1 Legal burden of proof—prosecution

- (1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

- (3) In this Code:

*legal burden*, in relation to a matter, means the burden of proving the existence of the matter.

### 13.2 Standard of proof—prosecution

- (1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

### 13.3 Evidential burden of proof—defence

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this *Code*:

*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.

### 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

### 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

### 13.4 Legal burden of proof – defence

Exceptions to the *Woolmington* principle that the prosecution must prove guilt beyond reasonable doubt are comparatively rare in Commonwealth law. The *Code* has, indeed, strengthened the presumption of innocence in s13.4 and extended its operation by requiring the prosecution to disprove exceptions, exemptions and qualifications: s13.3 *Evidential burden of proof – defence*.

*13.4-A Express and specific legislative provision is necessary before a legal burden of proof is imposed on the accused in relation to a defence or exception to liability:*

The *Code* requires an express declaration in legislation creating an offence before the legal burden is shifted from the prosecution. A legislative provision that the defendant bears “the burden of proof” of a matter is not sufficient to shift the legal burden; it will be taken to mean the defendant bears the evidential burden: ss13.3(1); 13.4.

### 13.5 Standard of proof – defence

If the defendant bears the legal burden of proof in relation to a matter, it is discharged if the trier of fact is satisfied on the balance of probabilities of the existence of the defence or exception.

**PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY**

**13.6 Use of averments**

A law that allows the prosecution to make an averment is taken not to allow the prosecution:

- (a) to aver any fault element of an offence; or
- (b) to make an averment in prosecuting for an offence that is directly punishable by imprisonment.

### 13.6 Use of averments

Averment provisions permit an allegation of fact or of mixed fact and law to discharge the prosecutor's evidential burden. They do not impose either an evidential or legal burden on the defendant and averment by the prosecution, where it is permitted, is merely prima facie evidence of the matters alleged.<sup>406</sup> Averment provisions are comparatively rare in Commonwealth law. Section 255 of the *Customs Act* 1901 (Cth) is a typical, if elaborate, example. It provides that an averment of fact or of mixed fact and law is prima facie evidence of the fact averred. The section states that an averment in a *Customs Act* prosecution does not alter the burden of proof and has no bearing on the credibility or probative value of evidence given in support or rebuttal of the allegation in the averment. Chapter 2 imposes two limits on the use of averments:

- (a) Fault elements must not be averred; and
- (b) Averments must not be used in prosecuting an offence that carries a sentence of imprisonment.

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<sup>406</sup> *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 507-508 per Dixon J: Averment "does not place upon the accused the onus of disproving the fact upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus." See, in addition, *Macarone v McKone, Ex parte Macarone* [1986] 1 Qd R 284.

**Part 2.7—Geographical jurisdiction**

Division 14—Standard geographical jurisdiction

14.1 Standard geographical jurisdiction

Division 15—Extended geographical jurisdiction

15.1 Extended geographical jurisdiction

15.2 Extended Geographical Jurisdiction Category B

15.3 Extended Geographical Jurisdiction Category C

15.4 Extended Geographical Jurisdiction Category D

Division 16—Miscellaneous

16.1 Attorney-General's consent

16.2 When conduct taken to occur partly in Australia

16.3 Meaning of 'Australia'

16.4 Result of Conduct

## PART 2.7 - GEOGRAPHICAL JURISDICTION

The provisions in Part 2.7 commenced on 24 May 2001 and differ from the rest of Chapter 2 of the *Code* in that they do not concern responsibility for offences. Part 2.7 should be a substantial improvement over the previous position under section 3A of the *Crimes Act 1914*. The position in relation to the geographical reach of all new offences will be much more precise. This is particularly appropriate for Commonwealth offences, many of which are focused on activities which occur either partly or wholly outside Australia.

Part 2.7 provides a range of jurisdictional options.<sup>407</sup> From May 24 2001 new offences will fall within one or other of the available options. Provision can also be made to subject offences enacted before that date to the jurisdictional provisions of Part 2.7.<sup>408</sup> If the offence only requires a narrow territorial based geographical jurisdiction, then section 14.1 will automatically apply without reference to the issue. However, if it is desired that the offence should reach outside Australia sections 15.1 to 15.4 provide for a selection of options for extended geographical jurisdiction ranging from covering Australian citizens for what they do anywhere in the world (category A); to citizens and residents for what they do anywhere in the world (category B); and finally to anyone anywhere regardless of citizenship or residence (category C) -except where it is not unlawful in the other place - and category D - regardless of whether it is lawful elsewhere).

The purpose of Part 2.7 is to clarify, and to provide in an orderly way for, the geographical application of Commonwealth offences. There are several instances where the geographical reach of Commonwealth offences is not clear, or where general application provisions are not adapted to the purpose of particular offence provisions. Commonwealth offence provisions are usually enacted to give effect to a specific governmental purpose. Depending on that purpose, and considerations of international law, practice and comity, it might be appropriate for an offence to have a broad or narrow application.

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<sup>407</sup> Commonwealth law, as expressed in Part 2.7 *Geographical Jurisdiction*, diverges markedly from both existing and proposed State and territorial jurisdictional provisions. In particular, Part 2.7 in Chapter 2 of the Commonwealth *Criminal Code* diverges markedly from its counterpart in Part 2.7 of the *Model Criminal Code*. The *MCC* provisions and differences between them and their federal counterparts are discussed in *MCC*, Chapter 4: *Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction*, Report 2000, 110-116; 217-279.

<sup>408</sup> The provisions envisage the possibility of retrospective application, to offences enacted before May 24 2001: see, ss14(1)(b), and 15.1, 15.2, 15.3 and 15.4, each of which opens with the declaration that the section applies "If a law of the Commonwealth [so] provides".

Due to the length of s14.1, in this case it is more convenient to use smaller text.

### 14.1 Standard geographical jurisdiction

- (1) This section may apply to a particular offence in either of the following ways:
  - (a) unless the contrary intention appears, this section applies to the following offences:
    - (i) a primary offence, where the provision creating the offence commences at or after the commencement of this section;
    - (ii) an ancillary offence, to the extent to which it relates to a primary offence covered by subparagraph (i);
  - (b) if a law of the Commonwealth provides that this section applies to a particular offence—this section applies to that offence.

Note: In the case of paragraph (b), the expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

- (2) If this section applies to a particular offence, a person does not commit the offence unless:
  - (a) the conduct constituting the alleged offence occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (c) all of the following conditions are satisfied:
    - (i) the alleged offence is an ancillary offence;
    - (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
    - (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: A defendant bears an evidential burden in relation to the matters in subsection

- (3). See subsection 13.3(3).

### Defence—primary offence

- (3) If this section applies to a particular offence, a person is not guilty of the offence if:
  - (aa) the alleged offence is a primary offence; and
  - (a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (b) there is not in force in:
    - (i) the foreign country where the conduct constituting the alleged offence occurs; or
    - (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.
- (4) For the purposes of the application of subsection 13.3(3) to an offence, subsection (3) of this section is taken to be an exception provided by the law creating the offence.

(Subsection (5) contains a defence similar to subsection (3) in relation to ancillary offences.)

#### 14.1 Standard geographical jurisdiction

Section 14.1 enables standard geographical jurisdiction to be applied to a particular offence by an express provision to that effect. However, express application will not be necessary for offence provisions commencing at or after the commencement of section 14.1, where standard geographical jurisdiction will apply unless contrary provision is made. The same form of jurisdiction will also govern the related ancillary offences which include 11.1 *Attempt*, 11.4 *Incitement*, 11.5 *Conspiracy* and liability as an accomplice or for acts of an innocent agent.

The situations where a particular case falls within standard geographical jurisdiction are detailed in ss14.1(2). This is done by reference to ‘conduct’ and ‘result’. These expressions are used in conformity with their meaning as physical elements of the offence in question: 4.1 *Physical elements*. In particular, reference to a “result” in Part 2.7 does not refer to consequences or collateral effects of the defendant’s conduct, unless they are elements of the offence: 16.4 *Result of conduct*.

Standard geographical jurisdiction will be satisfied if the conduct constituting the alleged offence occurs wholly or partly in “Australia” (defined in section 16.3 *Meaning of Australia*) or wholly or partly on board an “Australian aircraft” or an “Australian ship” (see the definitions in the **Dictionary**).

The jurisdictional requirements will also be satisfied if a *result* of the conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship. As noted, this condition of jurisdiction can only be satisfied where a ‘result’ is an element of the offence. Only a few Commonwealth offences have a ‘result’ in that sense, so the ‘result’ basis for jurisdiction will only be applicable to those offences. An example might be:

- (a) an offence of destroying an aircraft where the conduct which caused the destruction occurs outside Australia but the actual destruction of the aircraft (say a foreign aircraft) occurs in Australia, or
- (b) an offence of obtaining something by deception where the deceptive conduct occurs outside Australia but the thing is obtained in Australia.

In the case of an ‘ancillary offence’, such as attempt, incitement or conspiracy, it may be that the conduct occurs wholly outside Australia and there is no relevant ‘result’ in Australia of the ancillary offence itself. In that case, by virtue of proposed paragraph 14.1(2)(c), the jurisdictional requirement might still be satisfied by reference to the primary offence, for example where a defendant incites a person, in a foreign country, to commit an offence and the person commits that offence (the primary offence) in Australia *or* the defendant *intends* that the primary offence be committed in Australia.

Due to the length of s14.1, in this case it is more convenient to use smaller text.

### 14.1 Standard geographical jurisdiction

- (1) This section may apply to a particular offence in either of the following ways:
  - (a) unless the contrary intention appears, this section applies to the following offences:
    - (i) a primary offence, where the provision creating the offence commences at or after the commencement of this section;
    - (ii) an ancillary offence, to the extent to which it relates to a primary offence covered by subparagraph (i);
  - (b) if a law of the Commonwealth provides that this section applies to a particular offence—this section applies to that offence.

Note: In the case of paragraph (b), the expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

- (2) If this section applies to a particular offence, a person does not commit the offence unless:
  - (a) the conduct constituting the alleged offence occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (c) all of the following conditions are satisfied:
    - (i) the alleged offence is an ancillary offence;
    - (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
    - (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: A defendant bears an evidential burden in relation to the matters in subsection

- (3). See subsection 13.3(3).

### Defence—primary offence

- (3) If this section applies to a particular offence, a person is not guilty of the offence if:
  - (aa) the alleged offence is a primary offence; and
  - (a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - (b) there is not in force in:
    - (i) the foreign country where the conduct constituting the alleged offence occurs; or
    - (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.
- (4) For the purposes of the application of subsection 13.3(3) to an offence, subsection (3) of this section is taken to be an exception provided by the law creating the offence.

(Subsection (5) contains a defence similar to subsection (3) in relation to ancillary offences.)

Provision is made in ss14.1(3) for a defence where standard geographical jurisdiction is satisfied but the conduct occurs wholly in a foreign country, for example where only a 'result' occurs in Australia or (in the case of an ancillary offence) the primary offence is intended to occur in Australia. The defence will apply if there was no offence in the country where the conduct occurred corresponding to the Commonwealth offence charged. The inquiry is not into whether the particular conduct alleged would have amounted to an offence of some kind or other under the law of the other country. Therefore it need not be relevant that in the other country there is an applicable defence, relating, for example, to age, nationality or other capacity. The inquiry is into whether the other country has under its law a corresponding offence. 'Corresponding' does not mean 'exactly the same' but means 'of a corresponding kind'. For example, if the charged offence was bribing an Australian official, a corresponding offence of the other country could be bribing an official of that country. If the charged offence was destruction of (or theft of) Australian government property and the other country had not legislated specifically for government property, a corresponding offence could be simple destruction of (or theft of) property. The same principles apply to ancillary offences (ss14.1(5) and (6)).

### DIVISION 15—EXTENDED GEOGRAPHICAL JURISDICTION

#### 15.1 Extended geographical jurisdiction—category A

- (1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
- (a) the conduct constituting the alleged offence occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
    - (i) at the time of the alleged offence, the person is an Australian citizen; or
    - (ii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
  - (d) all of the following conditions are satisfied:
    - (i) the alleged offence is an ancillary offence;
    - (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
    - (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

((2) - (5) deal with the defences and are not reproduced here.)

**DIVISION 15—EXTENDED GEOGRAPHICAL JURISDICTION**

This includes the categories A, B, C and D. A being the most limited extension, D being the broadest.

**15.1 Extended geographical jurisdiction - category A**

Where this category of jurisdiction applies, jurisdiction will be satisfied if a requirement for 'standard geographical jurisdiction' is met *or* the alternative requirement in s15.1(c) is met. That alternative requirement is met if at the time of the alleged offence the person charged with the offence was an *Australian citizen or was a body corporate* incorporated by or under a law of the Commonwealth or of a State or Territory ('a national').

As in ss14.1, there is a defence in proposed ss15.1(2) which may be available depending on the law of a foreign country where the conduct has wholly occurred. However, that defence is not available if jurisdiction is to be exercised under ss15.1(c) on the basis of the person's nationality.

### 15.2 Extended geographical jurisdiction—category B

- (1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
- (a) the conduct constituting the alleged offence occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
    - (i) at the time of the alleged offence, the person is an Australian citizen; or
    - (ii) at the time of the alleged offence, the person is a resident of Australia; or
    - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
  - (d) all of the following conditions are satisfied:
    - (i) the alleged offence is an ancillary offence;
    - (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
    - (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

**((2) - (5) deal with the defences and are not reproduced here.)**

### 15.3 Extended geographical jurisdiction—category C

- (1) If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
  - (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

**((2) - (5) deal with the defences and are not reproduced here.)**

### 15.2 Extended geographical jurisdiction - category B

This category of jurisdiction is the same as under category A, except that a further possible basis for jurisdiction is added in ss15.2(1)(c)(ii). This is that at the time of the alleged offence the person was a *resident of Australia*. The defence in ss15.2(2) is in the same terms as the defence in ss15.1(2). It may be available if jurisdiction is to be exercised on the basis of residence, but not if jurisdiction is to be exercised on the basis of nationality.

### 15.3 Extended geographical jurisdiction - category C

Category C jurisdiction is *unrestricted*. It applies whether or not the conduct or the result of the conduct constituting the alleged offence occurs in Australia. However, by virtue of ss15.3(2) a *defence may be available depending on the law of a foreign country where the conduct occurs*. The defence is in the same terms as in ss15.1(2) and 15.2(2) and is not available if the person charged is of Australian nationality.

## **PART 2.7 - GEOGRAPHICAL JURISDICTION**

### **15.4 Extended geographical jurisdiction—category D**

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

## **DIVISION 16—MISCELLANEOUS**

### **16.1 Attorney-General's consent required for prosecution if alleged conduct occurs wholly in a foreign country in certain circumstances**

- (1) Proceedings for an offence must not be commenced without the Attorney-General's written consent if:
  - (a) section 14.1, 15.1, 15.2, 15.3 or 15.4 applies to the offence; and
  - (b) the conduct constituting the alleged offence occurs wholly in a foreign country; and
  - (c) at the time of the alleged offence, the person alleged to have committed the offence is neither:
    - (i) an Australian citizen; nor
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.
- (2) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence before the necessary consent has been given.

#### 15.4 Extended geographical jurisdiction - category D

Category D jurisdiction is *unrestricted* and is in the same terms as in ss15.3, except that there is *no foreign law defence* corresponding to that in ss15.3(2).

### DIVISION 16—MISCELLANEOUS

#### 16.1 Attorney-General's consent

The purpose of section 16.1 is to require the Attorney-General's consent where a prosecution is to be brought in reliance on Part 2.7 and the conduct constituting the alleged offence occurs wholly in a foreign country and the person charged or to be charged is not of Australian nationality or, if a body corporate, the body corporate is not incorporated under a law of the Commonwealth, or of a State or Territory.

In such cases it may not be appropriate for a prosecution to proceed in Australia even if the usual criteria for a prosecution are met. It is intended that the Attorney-General will have regard to considerations of international law, practice and comity, international relations, prosecution action that is being or might be taken in another country, and other public interest considerations and decide in his or her discretion whether it is appropriate that a prosecution should proceed.

There is also a standard provision enabling a prosecution to be initiated before consent is given (ss16.1(2)). If another Commonwealth law requires consent to the institution of a prosecution, it will be necessary for consents to be obtained under both provisions.

## PART 2.7 - GEOGRAPHICAL JURISDICTION

### 16.2 When conduct taken to occur partly in Australia

#### *Sending things*

- (1) For the purposes of this Part, if a person sends a thing, or causes a thing to be sent:
  - (a) from a point outside Australia to a point in Australia; or
  - (b) from a point in Australia to a point outside Australia;that conduct is taken to have occurred partly in Australia.

#### *Sending electronic communications*

- (2) For the purposes of this Part, if a person sends, or causes to be sent, an electronic communication:
  - (a) from a point outside Australia to a point in Australia; or
  - (b) from a point in Australia to a point outside Australia;that conduct is taken to have occurred partly in Australia.

#### *Point*

- (3) For the purposes of this section, point includes a mobile or potentially mobile point, whether on land, underground, in the atmosphere, underwater, at sea or anywhere else.

### 16.3 Meaning of Australia

- (1) For the purposes of the application of this Part to a particular primary offence, Australia has the same meaning it would have if it were used in a geographical sense in the provision creating the primary offence.
- (2) For the purposes of the application of this Part to a particular ancillary offence, Australia has the same meaning it would have if it were used in a geographical sense in the provision creating the primary offence to which the ancillary offence relates.
- (3) For the purposes of this Part, if a provision creating an offence extends to an external Territory, it is to be assumed that if the expression Australia were used in a geographical sense in that provision, that expression would include that external Territory.
- (4) This section does not affect the meaning of the expressions Australian aircraft, Australian citizen or Australian ship.

## 16.2 When conduct taken to occur partly in Australia

This provision is directed to the situation where a thing is sent to or from Australia. If a person, while outside Australia, sends a thing to Australia (for example by mailing a parcel) or causes it to be sent (for example by arranging for another person to mail a parcel), that action of the person might be conduct constituting an offence, and by virtue of subsection 16.2(1) it is conduct that is taken to have occurred partly in Australia. On that basis, an alleged offence could be within the jurisdiction provided by sections 14.1(1), 15.1(1), or 15.2(1). (It would not matter if the sending of a thing from Australia would otherwise be conduct *wholly* within Australia, because those subsections do not distinguish between conduct occurring wholly or partly in Australia.)

Moreover, such conduct would not be conduct ‘wholly outside Australia’ or ‘wholly in a foreign country’ within the meaning of those expressions in Part 2.7, for example for the purposes of the defences in ss 14.1(3), 15.1(2), 15.2(2) or 15.3(2).

Ss16.2(3) has a corresponding effect to ss16.2(2) where what is sent or caused to be sent is an electronic communication. An ‘electronic communication’ is defined in the **Dictionary**. However, an electronic communication is only within the subsection if it is sent or caused to be sent ‘from a point outside Australia to a point in Australia’ or ‘from a point in Australia to a point outside Australia’. That limitation could exclude some broadcast transmissions, although an email to multiple recipients, for example, would be a number of communications sent to a number of points. Ss16.2(3) gives an inclusive definition of ‘point’.

## 16.3 Meaning of ‘Australia’

The purpose of this section is to bring the operation of the jurisdiction provisions in this Part into line with the scope of particular offence provisions. ‘Australia’ when used in a geographical sense may be given different meanings in different statutes. For example, sometimes it will include some or all of the external Territories, sometimes it will not. For the purpose of this Part, the meaning of ‘Australia’ will depend on the meaning it would have if used in the relevant offence provision.

**PART 2.7 - GEOGRAPHICAL JURISDICTION**

**16.4 Result of conduct**

A reference in this Part to a result of conduct constituting an offence is a reference to a result that is a physical element of the offence (within the meaning of subsection 4.1(1)).

#### 16.4 Result of conduct

This section makes it clear that, in this Part, a reference to a result of conduct is a reference to a result in the sense of a physical element of an offence as provided in ss4.1(1): 4.1 *Physical elements*. Therefore 'result' is not to be interpreted as meaning a consequence or effect following from or caused by an offence but not forming an element of the offence. The destruction of an aircraft is a result and an element of the offence of destroying an aircraft. However, a consequence of that offence in the form of collateral damage to other property or a loss to an insurance company would not be an element of the offence and hence could not provide a basis for geographical jurisdiction.