

Drugs: Commonwealth Drug Offences under s 233 B of the Customs Act 1901 (after the operation of Chapter 2 of the Criminal Code Act 1995 (Cth))¹

The application of common law principles of criminal responsibility to the offence under s 233B(1)(b) of the *Customs Act* 1901(Cth) as it stood prior to the application of the *Criminal Code* required proof of *mens rea* with respect to the nature of the thing imported: *He Kaw Teh v R* (1985) 157 CLR 523.²

Chapter 2 of the *Criminal Code* enacted by the [Criminal Code Act 1995](#) (Cth), codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth: s 2.1. These provisions have applied to all Commonwealth offences since 15 December 2001: s 2.2.

The general principles of criminal responsibility in the *Criminal Code* do not adopt the common law concepts of *actus reus* and *mens rea*. Instead the *Criminal Code* defines criminal responsibility in terms of proof of the physical elements and fault elements of an offence. The physical elements of an offence may be conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs: s 4.1. The fault elements of an offence may be “intention”, “knowledge”, “recklessness” and “negligence”: s 5.1.³ (Additional fault elements may be specified for the physical elements of a given offence).

The *Criminal Code* provides that a person has *intention* with respect to conduct if he or she means to engage in that conduct: s 5.2(1). The fault element of *knowledge* requires proof of actual knowledge; a person has knowledge of a circumstance or a result if he or she is aware that it exists or that it will exist in the ordinary course of events: s 5.3. *Recklessness* with respect to a circumstance requires proof that the person is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances that are known to him or her, it is unjustifiable to take the risk: s 5.4(1).

Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element. An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1 (The law creating an offence may provide that there is no fault element for one or more of the physical elements of the offence). In the absence of specification of the fault element for a physical element, the *Criminal Code* makes provision for default fault elements: s 5.6. Intention is the default fault element for a physical element that consists only of conduct: s 5.6(1). Recklessness is the default fault element for a physical element that consists of a circumstance or a result: s 5.6(2). “Conduct” is defined in [s 4.1\(2\)](#) of the *Criminal Code* to mean “an act, an omission to perform an act or a state of affairs”.

The offence created by s 233B(1)(b) does not specify the fault element (or elements) for the physical element (or elements) that constitute it.

¹ This refers to the period after the application of Ch 2 of the *Criminal Code* (Cth) on 15 December 2001 and before the repeal of the importation and exportation offences in s 233B of the *Customs Act* by the *Law and Justice Legislation Amendment (Serious Drug Offences and other Measures) Act* 2005 No 129, 2005 Schedule 1.

² See Direction No 105.

³ See Direction No 89.3 ff.

In *R v Saengsai-Or* ([\(2004\) 61 NSWLR 135](#), [\[2004\] NSWCCA 108](#)), the Court of Criminal Appeal considered the mental element of the offence under s 233B (1)(b) of the *Customs Act* (importation of prohibited imports) in the light of the provisions of Ch 2 of the *Criminal Code*. The appellant contended that the trial Judge had erred in directing the jury in the terms of “recklessness” as defined in [s 5.4\(1\)](#). The appellant submitted that the offence created by [s 233B\(1\)\(b\)](#) contains only one physical element being that of “conduct” within the meaning of [s 4.1\(1\)\(a\)](#), namely the act of importing into Australia prohibited imports to which [s 233B\(1\)\(b\)](#) applied, so that the fault element by operation of [s 5.6\(1\)](#) was proof of intention. The Crown submitted s 233B(1)(b) was to be read as having a physical element of “conduct” (the act of importing a thing into Australia) and also a further physical element of “circumstance in which the conduct occurs” (that the thing imported is a prohibited import to which [s 233B\(1\)](#) applies). It was submitted that the fault element that applies by operation of [s 5.6](#) is “intention” for the physical element of “conduct” constituted by the act of importing and “recklessness” for the separate physical element of “circumstance in which the conduct occurs” being that the substance was a prohibited import. The Court rejected the Crown submissions, finding that the physical element of the offence created by [s 233B\(1\)\(b\)](#) is one of “conduct” alone: the act of importing into Australia any prohibited import to which the section applies. In respect of that physical element, consisting only of conduct, the Court held that the provisions of [s 5.6\(1\)](#) apply, so that intention is the fault element apposite to the offence created by [s 233B\(1\)\(b\)](#).

The reasoning in *R v Saengsai-Or* has been applied to the possession offence under s 233B(1)(c) of the *Customs Act*: see *R v Kaldor* ([\(2004\) 150 A Crim R 271](#); [\[2004\] NSWCCA 425](#), [45]).

As to drug offences under the *Criminal Code* 1995 (Cth) after the repeal of s 233B of the *Customs Act* 1901, see Direction No 105 B.