THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMINAL CODE AMENDMENT (AGRICULTURAL PROTECTION) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable Christian Porter MP)
CRIMINAL CODE AMENDMENT (AGRICULTURAL PROTECTION) BILL 2019

GENERAL OUTLINE

1. This Bill would amend the Criminal Code Act 1995 (Criminal Code) to introduce two new offences relating to the incitement of trespass or property offences on agricultural land.

2. The first offence would apply where a person uses a carriage service to transmit, make available, publish or otherwise distribute material with the intent to incite another person to trespass on agricultural land. This offence would require that the person is reckless as to whether the other person’s trespass or related conduct could cause detriment to a primary production business being carried on on the land. A person found guilty of this offence could face up to 12 months’ imprisonment.

3. The second offence would apply where a person uses a carriage service to transmit, make available, publish or otherwise distribute material with the intent to incite another person to unlawfully damage or destroy property, or commit theft, on agricultural land. A person found guilty of this offence could face up to five years’ imprisonment, to reflect the more serious nature of the incited conduct.

4. ‘Agricultural land’ is a defined term in the Bill and means land used for a primary production business. Primary production business is defined in the Bill, and would include farming businesses, such as chicken farms and piggeries, as well as businesses operating an abattoir or an animal saleyard.

5. The Bill contains exemptions for journalists and those who are making lawful disclosures of information, including whistleblowers. Under the exemption for journalists, the offences would not apply to material relating to a news report or current affairs report which is in the public interest and is made by a person working in a professional capacity as a journalist.

6. Under the exemption for whistleblowers, the offences would not apply to conduct engaged in by a person if, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to civil or criminal liability for the conduct. For example, the offence would not apply to a person who makes a public interest disclosure in accordance with the Public Interest Disclosure Act 2013 (Cth), whistleblower protections under the Corporations Act 2001, or in accordance with other Commonwealth, state or territory whistleblower or lawful disclosure regimes.

FINANCIAL IMPACT

7. The Bill is unlikely to have a significant impact on consolidated revenue.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Criminal Code Amendment (Agricultural Protection) Bill 2019

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

2. This Bill is intended to strengthen the protections for Australian farmers against the conduct of those who incite trespass or other property offences on agricultural land.

3. The Bill would create two new offences in the Criminal Code. The first offence would apply where a person uses a carriage service to transmit, make available, publish or otherwise distribute material with the intention to incite another person to trespass on agricultural land, with a maximum penalty of 12 months imprisonment.

4. This offence would require that the offender is reckless as to whether the other person’s trespass or related conduct would cause detriment to a primary production business being carried on on the land.

5. The second offence would apply when a person uses a carriage service to transmit material to incite unlawful damage, destruction or theft of property on agricultural land, with a maximum penalty of five years imprisonment.

Human rights implications

6. The Bill engages the following rights:

- Article 12(1) of the International Covenant on Economical Social and Cultural Rights (ICESCR)—the right to health
- Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR)—the right to presumption of innocence
- Article 17 of the ICCPR—the right to freedom from interference in privacy and correspondence
- Article 19(2) of the ICCPR—the right to freedom of expression

Right to Health

7. The right to health is contained in article 12 of the ICESCR. The right states that all people have the right to the “highest attainable standard of physical and mental health”, and that State Parties should take measures necessary for the “improvement of all aspects of environmental and industrial hygiene”.

8. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to health extends to “a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”

9. The Bill promotes the right to an adequate standard of living and the right to health by ensuring a safer food system within Australia. The Bill would strengthen protections against contamination of food production and breaches of biosecurity protocols. By ensuring that perpetrators can be appropriately punished, these measures will act as a strong deterrent to actors inciting behaviours that could cause the contamination of, or interfere with, food production and/or biosecurity protocols.

**The Right to a Presumption of Innocence**

10. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

11. The Bill engages this right by applying the presumption set out in section 475.1B of the Criminal Code to the new offences. The presumption in section 475.1B provides that if a physical element of the offence consists of a person using a carriage service to engage in particular conduct, and the prosecution proves beyond reasonable doubt that the person engaged in the relevant criminal conduct, then it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct.

12. The purpose of this presumption is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often evidence that a carriage service was used to engage in the criminal conduct is entirely circumstantial, consisting of evidence, for example, that the defendant’s computer had chat logs or social media profile information saved on the hard drive, that the computer was connected to the internet, and that records show the computer accessed particular websites that suggest an association with the material saved on the hard drive.

13. The Bill relies on the Commonwealth’s telecommunications power under the Australian Constitution. Therefore, the requirement in the offence that the relevant criminal conduct be engaged in using a carriage service is a jurisdictional requirement. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, or the defendant’s culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth than those that do not.

14. Given this purpose of the presumption, and that the offence is not unreasonable in the circumstances and maintains the rights of the defendant, the Bill does not violate the presumption of innocence.

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The Right to Freedom from Interference in Privacy and Correspondence

15. Article 17 of the ICCPR establishes the right to freedom from interference in privacy and correspondence, specifically that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”. The remit of this right is established in greater detail by General Comment No. 16 of the Human Rights Committee. It states that such protections are “required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons”.

16. The new offences proposed under Subdivision J would criminalise the use of a carriage service to transmit material with the intention that that material be used by another person to trespass (where the person is also reckless to potential detriment to a primary production business), damage property or commit theft on agricultural land. As people would be penalised for using a carriage service to transmit material with the intention of inciting trespass and other property offences, the scope of content that end-users are able to access and share would be necessarily reduced. This would engage the rights provided by article 17, as it would limit the nature of correspondence between Australian citizens, albeit only for a narrow and specific type of material and communication.

17. The Bill’s objective is to reduce the malicious use of carriage services to encourage trespass, property damage or theft on private property. The use of a carriage service by perpetrators to communicate or share material with the intention that criminal activity occur, has the potential to contaminate food safety, breach biosecurity protocols and cause distress to members of the community. The extent to which the Bill would restrain the rights provided by article 17 is a necessary consequence of, and proportionate to, the pursuit of this legitimate objective.

18. The ready sharing of material intended to incite a crime is not the type of correspondence article 17 aims to protect. In its preamble, the ICCPR states that “the individual [has] duties to other individuals and to the community to which he belongs” and that “freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights”. The unchecked transmission of materials intended to incite trespass, property damage and theft is incompatible with the goals of the ICCPR and all other international human rights instruments.

19. The legitimacy of the Bill’s objective in the context of its interaction with article 17 is further supported by the general comments of the Human Rights Committee. Paragraph 3 of General Comment No. 16 states that “the term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.”

20. In this case, the laws proposed by the Bill are compatible with the tenets laid out by the preamble of the ICCPR. Criminalising the use of a carriage service to incite crimes against another’s property promotes the objectives of “freedom from fear” and fosters conditions “whereby everyone may enjoy his civil and political rights”. The rational

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2 UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988
connection between the limitation imposed by the Bill and its objective is established in the pursuit of the ICCPR’s overarching goals.

21. Following the logic of the general comments from the Human Rights Committee and considering the nature of the behaviour, it is reasonable to conclude that indirectly restricting access to materials intended to incite is a reasonable, necessary and proportionate means to achieving a legitimate objective; deterring the use of a carriage service to incite the commission of a crime.

*The Right to Freedom of Expression*

22. Article 19(2) of the ICCPR provides that all people “shall have the right to freedom of expression”. While the right to freedom of expression is of fundamental importance, it is not an absolute or unfettered right and therefore may be subject to certain restrictions.

23. Under article 19(3) of the ICCPR, freedom of expression may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by legislation, necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.

24. New sections 474.46 and 474.47, proposed in Schedule 1 to the Bill, would limit an individual’s right to freedom of expression. These sections would criminalise the use of a carriage service to transmit material with the intention of inciting trespass or property damage, destruction or theft, on agricultural land.

25. The offences in the Bill are intended to protect the rights of Australian farmers and prevent harm to public order and public health from property offences incited by the use of a carriage service.

26. Incitement of property offences on agricultural land has the potential to affect the rights of Australian farmers to feel safe on their properties. It also risks harm to public health through the contamination of food, and the breach of biosecurity protocols. Criminalising the use of a carriage service to transmit materials, with the intention to incite trespass, damage property or commit theft on agricultural land is a reasonable and proportionate measure to uphold rights, and protect public health.

27. In light of the above, the Bill is consistent with the right to freedom of expression. To the extent that the Bill impacts this right, that limitation is reasonable, necessary and proportionate to the objective of protecting public health and the rights of Australian farmers.

**Conclusion**

28. The measures in the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcome of the Bill.
NOTES ON CLAUSES

Preliminary

Clause 1—Short title


Clause 2—Commencement

30. Clause 2 provides for the commencement of each provision in the Bill, as set out in the table in that clause. Item 1 of the table provides that the whole of the Act would commence on the day after the Act receives Royal Assent.

Clause 3—Schedules

31. Clause 3 provides that legislation that is specified in a Schedule to the Act would be amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms.

Schedule 1—Agricultural Protection

Criminal Code Act 1995

Item 1—Section 473.1 of the Criminal Code

32. Item 1 would insert new definitions of ‘abattoir’, ‘agricultural land’, ‘meat by-product’ and ‘primary production business’ into section 473.1 of the Criminal Code. Section 473.1 provides definitions for the purposes of Part 10.6 of the Criminal Code. These definitions would be used in new Subdivision J, which would be inserted by item 2 of the Bill.

33. ‘Abattoir’ is defined as a place where animals are slaughtered (whether or not for human consumption), and explicitly excludes restaurants. This definition is intended to cover abattoirs where animals are slaughtered for food, as well as for other purposes such as to make pet food, glue or leather.

34. ‘Agricultural land’ is defined to mean land in Australia that is used for a primary production business. This is intended to include pastures or paddocks that are used for a primary production business even if they are not currently in use, such as rotating pastures and barren paddocks.

35. Paragraph (a) to the definition provides that for the purposes of the definition it is immaterial if the land is also used for residential purposes. For example, the fact that land includes a family home or workers’ bunkhouse would be immaterial to determining whether it is agricultural land. This is intended to ensure that farms do not lose the protection of these offences because the land is serving multiple purposes.
36. Paragraph (b) to the definition provides that for the purposes of the definition it is
immaterial if part of the land is used for a business that is not a primary production business.
For example, the fact that a cafe, guest house or riding school operates on a farm would be
immaterial to determining whether it is agricultural land. This is intended to ensure that
farms do not lose the protection of these offences simply because the land is serving multiple
purposes.

37. ‘Crown land’ is defined as land that is the property of the Commonwealth, a State or a
Territory, or a statutory authority, but does not include land that is subject to a lease to a
person other than the Commonwealth, a State or a Territory, or a statutory authority. This
definition is necessary for the purpose of the definition of ‘Private land’ below.

38. ‘Forestry’ is defined as planting and/or tending of trees in plantation or forest that are
intended to be felled, and the felling of such trees.

39. ‘Meat by-product’ is defined to include skin, hide, tallow, meat meal and inedible
offal. This is not intended to be an exhaustive list and would include any non-meat product
resulting from the production of meat. This definition is relevant to paragraph (d) of the
definition of ‘primary production business’.

40. ‘Primary production business’ is defined via an exhaustive list of business types. This
list is intended to cover farming businesses, including those that maintain animals for the
purposes of producing meat, eggs, honey and dairy products, as well as those that grow
crops, operate an abattoir or store livestock for the purposes of sale or export.

41. Every paragraph of the definition of ‘primary production business’ requires that the
specified activity be a business. Accordingly, the definition of primary production business
is not intended to capture a hobby-farmer who, for example, keeps bees in their backyard for
personal use.

42. Proposed paragraphs (a) – (q) specify the types of businesses that fall within the
definition of primary production business. The terms ‘grazing’, ‘animal feedlots’, ‘dairy
processing facility’, ‘growing fruit’, ‘growing vegetables’, ‘growing nuts’, ‘growing crops’
and ‘viticulture’ are intended to take their ordinary meaning.

43. ‘Grazing’ is intended to cover the use of vegetation on pastures to feed and maintain
livestock, including sheep, cattle, horses, alpacas, buffalo, goats and other non-traditional
grazing animals such as camels, kangaroos and rabbits.

44. ‘Operating animal feedlots’ is intended to cover animal feeding operations, where
animals, including cattle, sheep, turkeys, goats, and pigs are fed rations to achieve liveweight
gain.

45. ‘Dairy farming’ is intended to cover the maintaining of livestock, including sheep,
cattle and goats for the business of producing milk and milk products.

46. ‘Farming animals for the purpose of producing meat or meat by-products’ is intended
to cover the maintaining of animals, including but not limited to pigs, emus, cattle, sheep,
goats, crocodiles and deer for the purpose of producing meat or meat by-products. ‘Meat’ is
intended to take its ordinary meaning, including the fresh or preserved flesh of animals.
47. ‘Poultry farming’ is intended to cover the maintaining of poultry, including chickens, quails, turkeys, emus, geese and ducks for the business of producing eggs, meat and feathers.

48. ‘Aquaculture’ is intended to cover the farming of aquatic organisms including fish, molluscs, crustaceans and aquatic plants.

49. ‘Bee-keeping’ is intended to cover the business of owning and breeding bees for their bodily produce, including honey, honeycomb and beeswax.

50. ‘Operating livestock sale yards’ is intended to cover a physical auction market where buyers and sellers trade livestock, including but not limited to cattle, sheep and pigs, and may include goat depots.

51. ‘Operating a registered premises’ under the Export Control Act 1982 is intended to cover export establishments that are registered under the following legislation:

- Export Control Act 1982
- Export Control (Meat and Meat Products) Orders 2005
- Export Control (Prescribed Goods — General) Orders 2005
- Export Control (Hay and Straw) Orders 2005
- Export Control (Milk and Milk Products) Orders 2005
- Export Control (Plants and Plant Products) Orders 2011
- Export Control (Eggs and Egg Products) Orders 2005
- Export Control (Fish and Fish Products) Orders 2005
- Export Control (Wild Game Meat and Wild Game Meat Products) Orders 2010
- Export Control (Poultry Meat and Poultry Meat Products) Orders 2010
- Export Control (Rabbit and Ratite Meat) Orders 1985
- Export Control (Fees) Orders 2001

52. ‘Fish processing facility’ is intended to cover operations relating to the processing of live-catch fish.

53. ‘Growing fruit’ is intended to cover the cultivation of fruit producing plants, including trees, shrubs and vines.

54. ‘Growing vegetables’ is intended to cover the cultivation of vegetable producing plants, including trees, shrubs and vines.

55. ‘Growing nuts’ is intended to cover the cultivation of nut producing plants, including trees, shrubs and vines.

56. ‘Growing crops’ is intended to cover the cultivation of plants in large quantities, including cereals, fibre and oil seeds.

57. ‘Viticulture’ is intended to cover the cultivation of grapevines.

58. ‘Forestry that is carried on on private land’ is intended to cover the planting, tending and felling of trees on private land, and is intended to exclude public land. This paragraph relies on the proposed definitions of ‘forestry’ and ‘private land’. 
‘Private land’ is defined as land that is not Crown land (as it is defined for the purposes of this Bill). The purpose of this term is to limit the application of the proposed new offences in sections 474.46 and 474.47 to relevant forestry activities occurring on private land, and not, for example, in a state or national park.

**Item 2—At the end of Division 474 of the Criminal Code**

This item would insert new Subdivision J entitled ‘Offences relating to use of carriage service for inciting trespass, property damage, or theft, on agricultural land’ into Division 474 of Part 10.6 of the Criminal Code.

**Section 474.46 Using a carriage service for inciting trespass on agricultural land**

New section 474.46 would insert an offence for transmitting materials using a carriage service to incite trespass on agricultural land, while reckless to the detriment the trespass or related conduct could cause to primary producers. This offence would apply to a ‘person’, which includes both natural and legal persons. The section would also include relevant offence-specific defences.

New subsection 474.46(1) would create an offence where a person uses a carriage service to transmit, make available, publish or otherwise distribute material with the intention of inciting another person to trespass on agricultural land while reckless to the detriment the trespass or related conduct could cause to primary producers. Paragraphs 474.46(1)(a)-(d) would outline the elements of the offence.

New paragraph 474.46(1)(a) would provide that the first element of the offence is that the offender transmits, makes available, publishes or otherwise distributes material. New paragraph 474.46(1)(b) would provide that the second element of the offence is that the conduct described in paragraph 474.46(1)(a) must occur as a result of the person using a carriage service. These elements are both required for the offence, with each serving a different purpose.

Evidence that a carriage service was used is often entirely circumstantial. For example, it may consist of evidence that:

a. the defendant’s computer had chat logs or social media profile information saved on the hard drive, or

b. the computer was connected to the internet, and that records show the computer accessed particular websites that suggest an association with the material saved on the hard drive.

Proving an intent element when the evidence of the physical element is entirely circumstantial can be difficult. In response to that difficulty, item 4 of the Bill would make section 475.1B of the Criminal Code applicable to the offence, which would mean that
paragraph 474.46(1)(b) is of absolute liability. As such, it would not be appropriate to apply the fault element of intent to 474.46(1)(b).

67. Proving that a person transmitted, made available, published or otherwise distributed material with a specific intent is far more straightforward, and could, for example, be proved by reference to the materials themselves.

68. The term ‘material’ is intended to be defined consistently with how it is used for other provisions in Part 10.6 of the Criminal Code. For the purposes of this offence, relevant material is defined broadly and may include, but is not limited to:

   a. addresses or information of primary production business;
   
   b. a website link;
   
   c. a phone call;
   
   d. posts on a social media platform encouraging trespass on agricultural land; and
   
   e. maps indicating the locations of primary production businesses.

69. It is irrelevant to the offence whether the material is already publicly available, including from government websites, online maps or a news report. Any of these types of material could be relevant to the offence if used to incite trespass.

70. The element provided by paragraph 474.46(1)(b) is required as it is a jurisdictional element, in that it does not relate to the substance of the offence, or the defendant’s culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

71. The term ‘uses a carriage service’ is consistent with other provisions in Part 10.6 of the Criminal Code. Section 473.5 of the Criminal Code provides that the term ‘use of a carriage service’ would not capture the activities of carriers, carriage service providers, internet service providers or internet content hosts provided that for the specific conduct they are acting solely in that capacity.

72. The element provided by paragraph 474.46(1)(c) would require that when the offender undertakes the conduct described in paragraph 474.46(1)(a) they must do so with the intention of inciting another person to trespass on agricultural land. For the purposes of this paragraph ‘trespass’ is taken to have its common law meaning.

73. There is a separate offence of incitement in section 11.4 of the Criminal Code. Consistent with section 11.4, for paragraph 474.46(1)(c) to apply, the offence incited (i.e. trespass) does not need to have occurred.

74. Paragraph 474.46(1)(c) requires the fault element of intent to avoid criminalising situations where a person transmits, makes available, publishes or otherwise distributes material and inadvertently encourages trespass. For example, augmented reality games sometimes link rewards to specific geographical locations, which may include locations on agricultural lands. By including these rewards in their games, they may be inciting people to
trespass in agricultural lands to access them. These inclusions are usually inadvertent and removed on request. However, without the fault element of ‘intent’ the mere fact that the company transmitted the material that incited trespass could be sufficient to prove this element of the offence.

75. Under proposed paragraph 474.46(1)(d), the offence would only apply where the offender is reckless as to whether the other person’s trespass, or any conduct engaged in by the other person while trespassing on agricultural land, could cause detriment to a primary production business being carried out on the land. In this paragraph ‘recklessness’ is as defined in section 5.4 of the Criminal Code and ‘detriment’ is as defined in the Dictionary to the Criminal Code.

76. Recklessness is the appropriate fault element for this conduct, as under paragraph 474.46(1)(c) the person must already have intended to incite the trespass.

77. For the purposes of this element, it is irrelevant if detriment to a primary production business actually occurs as a result of incited trespass. All that is needed to satisfy this element of the offence is that the offender was aware there was a substantial risk that trespass could cause detriment to a primary production business on the agricultural land and, in having regard to the circumstances known to them, it was unjustifiable for them to incite trespass.

78. The maximum penalty for this offence would be imprisonment for 12 months. The majority of state and territory trespass offences are penalised by imprisonment of six to 12 months.

79. Under subsection 4B(2) of the Crimes Act 1914 where, as in this case, the offence is punishable by imprisonment only, the court may (provided the contrary intention does not appear in the offence, and the court thinks it is appropriate in all the circumstances of the case to do so) impose instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the term of imprisonment (in months) multiplied by five. In this case, a penalty of 60 penalty units (currently $12,600).

80. Under subsection 4B(3) where a body corporate is convicted of an offence the court may (provided the contrary opinion does not appear in the offence, and the court thinks it fit to do so) impose a pecuniary penalty not exceeding five times the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence. In this case, that would be a penalty of up to 300 penalty units (currently $63,000).

81. Given the significant harm that can be caused by agricultural trespass, including to public safety and food safety, it is appropriate that inciting individuals or groups to commit this crime attracts a period of imprisonment.

82. The proposed penalty for an offence against section 474.46 is consistent with the approach taken in section 11.4 of the Criminal Code. Section 11.4 of the Criminal Code provides for the extension of criminal responsibility to incitement of a primary offence. Under paragraph 11.4(5)(d), where a person is guilty of inciting an offence that is punishable by less than 10 years imprisonment, the inciter would be subject to either a penalty of up to three years’ imprisonment or the maximum term of imprisonment for the incited offence, whichever is the lesser.
83. Section 11.1 of the Criminal Code provides that attempts to commit the offence in section 474.46(1) would also be criminalised. An example of this would be a person who has sent an email to others requesting that they join with them in staging a sit-in at a local abattoir, however they have incorrectly typed the email addresses and the email bounced back. While the material has not been successfully transmitted, there was the intention to use a carriage to transmit material to incite another to trespass on agricultural land, reckless to the detriment that could be caused by that trespass or related conduct.

84. New subsection 474.46(2) would provide that subsection 474.46(1) does not apply if the material relates to a news report or a current affairs report that is in the public interest and is made by a person working in a professional capacity as a journalist. This subsection is intended to exempt bona fide journalism from the offence. The public interest requirement and requirement that the journalist is working in a professional capacity are intended to operate to exclude material that has been published by organisations for the purpose of inciting trespass onto agricultural land, but which purports to be journalism.

85. This exemption is an offence-specific defence as described in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. In line with that guide, an offence-specific defence is appropriate in this circumstance as this is not a matter that is central to the question of culpability for the offence.

86. The defendant bears an evidential burden in relation to subsection 474.46(2). In line with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers this is appropriate as the defendant would be best placed to raise evidence that they are working in a professional capacity as a journalist.

87. New subsection 474.46(3) would provide that subsection 474.46(1) does not apply to conduct engaged in by a person if, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to civil or criminal liability for the conduct. For example, the offence would not apply to a person who makes a public interest disclosure in accordance with the Public Interest Disclosure Act 2013 (PID Act), or under other Commonwealth, state or territory whistleblower or lawful disclosure regimes.

88. Notes are included to make it clear that a public interest disclosure under the PID Act or the whistleblower protections in the Corporations Act 2001, is conduct to which the exemption would apply. The PID Act creates a legal framework for disclosures by Commonwealth public officials, while the Corporations Act 2001 includes a legal framework for disclosures by company employees and officers.

89. This is intended to clarify that the offence does not apply to, for example, whistle blowers who make protected disclosures of information relating to instances of animal cruelty on agricultural land under whistleblowing laws.

90. This exemption is an offence-specific defence as described in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. In line with that guide, an offence-specific defence is appropriate in this circumstance as this is not a matter that is central to the question of culpability for the offence.

91. The defendant bears an evidential burden in relation to subsection 474.46(3). In line with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement
Powers this is appropriate as the defendant would be best placed to raise evidence that their conduct was lawfully protected under a law of the Commonwealth, State or Territory.

92. New subsection 474.46(4) would provide that new subsection 474.46(3) does not limit section 10.5 of the Criminal Code which provides for that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law. This has been included to avoid any risk that the interpretation of 474.46(3) could impact on section 10.5 of the Code.

93. Additionally, as they have not been excluded, the general defences in Chapter 2 of the Criminal Code will apply to this offence.

Section 474.47 Using a carriage service for inciting property damage, or theft, on agricultural land

94. New section 474.47 introduces a new offence for using a carriage service for inciting property damage, or theft, on agricultural land. Unlike the proposed offence in section 474.47, this offence would not require proof that the inciter was reckless as to possible detriment. This is due to the fact that by inciting property damage or theft, potential detriment is assumed. This offence would apply to a ‘person’, which includes both natural and legal persons.

95. New subsection 474.47(1) would create an offence where a person uses a carriage service to transmit, make available, publish or otherwise distribute material with the intention of inciting another person to unlawfully damage property, unlawfully destroy property or commit theft of property on agricultural land. Paragraphs 474.47(1)(a)-(c) would outline the elements of the offence.

96. New paragraph 474.47(1)(a) would provide that the first element of the offence is that the offender transmits, makes available, publishes or otherwise distributes material. New paragraph 474.47(1)(b) would provide that the second element of the offence is that the conduct described in paragraph 474.47(1)(a) must occur as a result of the person using a carriage service. These elements are both required for the offence, and each serves a different purpose.

97. The element provided by new paragraph 474.47(1)(a) is connected to the element provided in paragraph 474.47(1)(c) which requires that the offender commits the conduct described in 474.47(1)(a) with a specific intent. Without this element, it would instead be necessary to prove that the offender used a carriage service with that specific intent. However, evidence that a carriage service was used is often entirely circumstantial. For example, it may consist of evidence that:

   a. the defendant’s computer had chat logs or social media profile information saved on the hard drive, or

   b. the computer was connected to the internet, and that records show the computer accessed particular websites that suggest an association with the material saved on the hard drive.

98. Proving an intent element when the evidence of the physical element is entirely circumstantial can be difficult. In response to that difficulty, item 4 of the Bill would make
section 475.1B of the Criminal Code applicable to the offence, which would mean that paragraph 474.46(1)(b) is of absolute liability. As such, it would not be appropriate to apply the fault element of intent to 474.46(1)(b).

99. Proving that a person transmitted, made available, published or otherwise distributed material with a specific intent is far more straightforward, and could, for example, be proved by reference to the materials themselves.

100. The term ‘material’ is intended to be defined consistently with how it is used for other provisions in Part 10.6 of the Criminal Code. For the purposes of this offence, relevant material is defined broadly and may include, but is not limited to:

   a. addresses or information of primary production business;

   b. a website link;

   c. a phone call;

   d. posts on a social media platform encouraging trespass on agricultural land;

   and

   e. maps indicating the locations of primary production businesses.

101. It is irrelevant to the offence whether the material is already publicly available, including from government websites, online maps or a news report. Any of these types of material could be relevant to the offence if used to incite trespass.

102. The element provided by paragraph 474.47(1)(b) is required as it is a jurisdictional element, in that it does not relate to the substance of the offence, or the defendant’s culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

103. The term ‘uses a carriage service’ is consistent with other provisions in Part 10.6 of the Criminal Code. Section 473.5 of the Criminal Code provides that the term ‘use of a carriage service’ would not capture the activities of carriers, carriage service providers, internet service providers or internet content hosts provided that for the specific conduct they are acting solely in that capacity.

104. The element provided by paragraph 474.47(1)(c) would require that when the offender undertakes the conduct described in paragraph 474.47(1)(a) they must do so with the intention of inciting another person to either:

   • unlawfully damage property on agricultural land

   • unlawfully destroy property on agricultural land, or

   • commit theft of property on agricultural land.

105. ‘Unlawfully damage property’ is intended to be consistent with how the phrase is interpreted for other provisions within the Criminal Code. The inclusion of ‘unlawfully’ is intended to ensure that lawful damage such as authorised tree lopping for the upkeep of powerlines is not unintentionally captured by this offence.
106. ‘Property’ is intended to take its ordinary meaning and includes real property, personal property, money, electricity or a wild creature that is tamed, kept in captivity or reduced (or in the course of being reduced) into the possession of a person. This is consistent with Chapter 7 of the Criminal Code.

107. ‘Theft’ is not intended to take the definition of theft provided in the Dictionary to the Criminal Code, as that definition only relates to theft of Commonwealth property. Instead, when a person commits theft is defined in subsections 474.45(5) – (8).

108. There is a separate offence of incitement in section 11.4 of the Criminal Code. Consistent with section 11.4 of the Code, for paragraph 474.47(1)(c) to apply, the offence incited does not need to have occurred.

109. Intention is the appropriate fault element for 474.47(1)(c), as the offence is not intended to cover situations such as when a farmer emails instructions to a pilot to dust crops on their property but gives the incorrect coordinates and a neighbour’s field is sprayed. While damage may occur in such a circumstance, it is not the mischief this offence is designed to punish.

110. The maximum penalty for this offence is imprisonment for five years. The majority of state and territory property damage and theft offences are penalised by imprisonment of five to 10 years. Given the significant harm that can be caused by agricultural property damage and theft, including to public safety and food safety, it is appropriate that inciting people or groups to commit these crimes attracts a period of imprisonment.

111. The proposed penalty for an offence against section 474.47 is consistent with the penalty for the incitement offence under section 11.4 of the Criminal Code. Section 11.4 of the Criminal Code provides for the extension of criminal responsibility to incitement of a primary offence. Under paragraph 11.4(5)(c), where a person is guilty of inciting an offence punishable by imprisonment for between 10 and 14 years, the inciter would be subject to a penalty of up to 5 years imprisonment.

112. Under subsection 4B(2) of the Crimes Act 1914 where, as in this case, the offence is punishable by imprisonment only, the court may (provided the contrary intention does not appear in the offence, and the court thinks it is appropriate in all the circumstances of the case to do so) impose instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the term of imprisonment (in months) multiplied by five. In this case, a penalty of up to 300 penalty units (currently $63,000).

113. Under subsection 4B(3) where a body corporate is convicted of an offence the court may (provided the contrary opinion does not appear in the offence, and the court thinks it fit to do so) impose a pecuniary penalty not exceeding five times the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence. In this case, that would be a penalty of up to 1500 penalty units (currently $315,000).

114. Due to section 11.1 of the Criminal Code attempts to commit the offence in section 474.47(1) would also be criminalised. An example of this would be a person who has sent a message on a social media platform to a friend requesting their assistance with stealing chickens from a nearby chicken farm, however their friend has deleted their account. While the material has not been successfully transmitted, there was an intention to use a
 carriage to transmit material to incite another to trespass on agricultural land and steal property.

115. New subsection 474.47(2) would provide that subsection 474.47(1) does not apply if the material relates to a news report or a current affairs report that is in the public interest and is made by a person working in a professional capacity as a journalist. This subsection is intended to exempt bona fide journalism from the offence. The public interest requirement and requirement that the journalist is working in a professional capacity are intended to operate to exclude material that has been published by organisations for the purpose of inciting property damage on agricultural land, but which purports to be journalism.

116. This exemption is an offence-specific defence as described in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. In line with that guide, an offence-specific defence is appropriate in this circumstance as this is not a matter that is central to the question of culpability for the offence.

117. The defendant bears an evidential burden in relation to this subsection. In line with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers this is appropriate as the defendant would be best placed to raise evidence that they are working in a professional capacity as a journalist.

118. New subsection 474.47(3) would provide that subsection 474.47(1) does not apply to conduct engaged in by a person if, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to civil or criminal liability for the conduct. For example, the offence would not apply to a person who makes a public interest disclosure in accordance with the Public Interest Disclosure Act 2013 (PID Act), or under other Commonwealth, state or territory whistleblower or lawful disclosure regimes.

119. Notes are included to make it clear that a public interest disclosure under the PID Act or the whistleblower protections in the Corporations Act 2001 is conduct to which the exemption would apply. The PID Act creates a legal framework for disclosures by Commonwealth public officials, while the Corporations Act 2001 includes a legal framework for disclosures by company employees and officers.

120. This is intended to clarify that the offence does not apply to, for example, whistleblowers who make protected disclosures of information relating to instances of animal cruelty on agricultural land under whistleblowing laws.

121. This exemption is an offence-specific defence as described in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. In line with that guide, an offence-specific defence is appropriate in this circumstance as this is not a matter that is central to the question of culpability for the offence.

122. The defendant bears an evidential burden in relation to this subsection. In line with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers this is appropriate as the defendant would be best placed to raise evidence that their conduct was lawfully protected under a law of the Commonwealth, State or Territory.

123. New subsection 474.47(4) would provide that new subsection 474.47(3) does not limit section 10.5 of the Criminal Code which provides for that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or
under a law. This has been included to avoid any risk that the interpretation of 474.47(3) could impact on section 10.5 of the Code.

124. New subsections 474.47(5) – (8) provide for when a person commits theft for the purpose of this section. This definition is consistent with common law, and is consistent with the definition of theft in the Dictionary to the Criminal Code, except that theft for the purposes of section 474.47 need not (and probably does not) relate to Commonwealth property.

125. Subsection 474.47(8) provides that sections 131.2 to 131.11 apply (with appropriate modifications) in determining whether a person commits theft of property (within the meaning of section 474.47). It is important to note that one of these modifications is the removal of the requirement that the property be Commonwealth property.

126. Additionally, as they have not been excluded, the general defences in Chapter 2 of the Criminal Code will apply to this offence.

*Section 474.48 Implied freedom of political communication*

127. Subsection 474.48(1) makes clear that new Subdivision J would not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political communication.

128. New section 474.48(1) clarifies the application of existing section 15A of the *Acts Interpretation Act 1901* (AIA) to the extent that it operates with respect to the implied freedom of political communication. Section 15A of the AIA reflects the fact that legislation should be read and construed subject to the Constitution. Where Parliament enacts legislation that would be construed as exceeding the legislative power of the Commonwealth, it is nevertheless a valid enactment to the extent it is not in excess of that power.

129. Subsection 474.48(1) makes clear that new Subdivision J is not intended to operate to the extent it might impermissibly burden the implied constitutional freedom of political communication, and preserves the operation of the Subdivision to the extent it is not in excess of Commonwealth constitutional power.

130. Subsection 474.48(2) is included in the Bill to ensure that subsection 474.48(1) would not affect the interpretation of, or limit the scope of, section 15A of the AIA.

**Item 3—Subsections 475.1A(1) and (2) of the Criminal Code**

131. This item amends subsections 474.1A(1) and (2) to provide that the defences provided in section 475.1A, that National Relay Service employees and emergency call persons are not criminally responsible for specific conduct if they engage in that conduct in good faith in the course of that person’s duties, also apply to the offences in new Subdivision J.

132. These defences are appropriate as, for example, an emergency call person could direct firetrucks responding to a fire to use the shortest route to stop further damage being caused by the fire even though that route would cross another person’s agricultural land and is likely cause damage. It is appropriate that this kind of conduct is excused from these offences.
Item 4—Paragraphs 475.1B(1)(a) and (2)(a) of the Criminal Code

133. This item amends section 475.1B of the Criminal Code to provide that the presumption set out in section 475.1B, that conduct is engaged in using a carriage service, will apply to new Subdivision J. The purpose of this presumption is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct.

134. This presumption provides that, in relation to the element of the offences that a carriage service was used, if the prosecution proves beyond reasonable doubt that the person engaged in the relevant criminal conduct, then it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct.

135. This is appropriate because the requirement that a carriage service was used to engage in the criminalised conduct in new Subdivision J provides the relevant jurisdictional connection for the offence. A jurisdictional element of the offence is an element that does not relate to the substance of the offence, or the defendant’s culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth than those that do not.