CHAPTER 7

APPLICATION OF ABSOLUTE AND STRICT LIABILITY OFFENCES IN COMMONWEALTH LEGISLATION

Introduction

7.1 During the 40th Parliament, in addition to its legislative scrutiny work, the Committee finalised an inquiry into a specific matter referred to it by the Senate. On 28 June 2001 the Senate referred the following matter to the Committee for inquiry and report:

> The application of absolute and strict liability offences in Commonwealth legislation, with particular reference to:
>
> (a) the merit of making certain offences ones of absolute or strict liability;
>
> (b) the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability;
>
> (c) whether these criteria are applied consistently to all existing and proposed Commonwealth offences; and
>
> (d) how these criteria relate to the practice in other Australian jurisdictions, and internationally.[1]

Conduct of the inquiry

7.2 The Committee received a total of 12 submissions and held one day of hearings in Canberra on 1 May 2002. Eleven witnesses appeared before the Committee, representing six organisations. The Committee's report was tabled on 26 June 2002.[2]

7.3 The Committee received evidence from the Attorney-General's Department on Commonwealth policy and practice on strict and absolute liability. The Department advised that the *Criminal Code*, which has been progressively applied to Commonwealth offences since 1997 and which has applied to all strict and absolute liability offences from 15 December 2001, provides general principles of criminal responsibility applicable to all Commonwealth offences. Section 5.6 of the Code creates a rebuttable presumption that, to establish guilt, fault must be proven for each

---

1 *Journals of the Senate*, No. 197, 28 June 2001, p. 4439.

2 Scrutiny of Bills Committee, *Sixth Report of 2002. Application of Absolute and Strict Liability Offences in Commonwealth Legislation.*

physical element of a Commonwealth offence. If it is intended that no fault element apply then the element must be expressly provided as one of strict liability (section 6.1 of the Code) or absolute liability (section 6.2 of the Code). The difference between the two is that the defence of mistake of fact under section 9.2 of the Code is available for strict liability but not for absolute liability offences. Defences available to an accused, other than those removed by making a matter one of strict or absolute liability, remain available to him or her.

7.4 The Attorney-General's Department advised that since 1997 it had undertaken a project to harmonise existing offences to ensure that they operated appropriately under the *Criminal Code*. The exercise was designed to maintain the status quo, by making explicit the application of strict and absolute liability offences which previously were rarely expressed in this way. This often involved adjusting the wording of offences to meet the requirements of the *Criminal Code*. The Attorney-General's Department emphasised that harmonisation was not intended to be a fresh approach to the policy merits of fault, strict, and absolute liability, but was a process to determine the original character of each offence. The Department also advised the Committee that it scrutinises proposed Commonwealth strict and absolute liability offences to ensure a consistent approach across agencies.

7.5 The Committee identified a set of principles that they concluded should form the framework of Commonwealth policy and practice in relation to strict and absolute liability.

Basic principles

7.6 The Committee concluded that the following basic principles should constitute the starting point for Commonwealth policy on strict and absolute liability:

- fault liability is one of the most fundamental protections of criminal law. To exclude this protection is a serious matter;
- strict liability should be introduced only after careful consideration on a case-by-case basis of all available options. It would not be proper to base strict liability on mere administrative convenience or on a rigid formula;
- the Commonwealth *Criminal Code* should continue to provide general principles of criminal responsibility applicable to all Commonwealth offences, with a central provision being section 5.6, which creates a rebuttable presumption that to establish guilt fault must be proven for each physical element of an offence;
- the *Criminal Code* should continue to provide that the presumption that fault must be proven for each element of an offence may be rebutted only by express legislation provision under section 6.1 for strict liability and section 6.2 for absolute liability;
- the general defence of mistake of fact, with its lower evidentiary burden, is a substantial safeguard for those affected by strict liability. The *Criminal Code* should continue to expressly provide for this defence;

- the Criminal Code should continue to expressly provide that strict or absolute liability does not make any other defence unavailable;
- strict liability should, wherever possible, be subject to program specific broad-based defences in circumstances where the contravention appears reasonable, in order to ameliorate any harsh effect. These defences should be in addition to mistake of fact and other defences in the *Criminal Code*;
- strict liability offences should, if possible, be applied only where there appears to be general public support and acceptance both for the measure and the penalty; and
- strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties. The general Commonwealth criterion of 60 penalty units appears to be a reasonable maximum.

Merits of strict liability and criteria for its application

7.7 The Committee took evidence from a number of agencies who provided information on the perceived merits of the strict and absolute liability offences that they administered. In respect of the supposed merits of strict liability, Commonwealth agencies identified the following principles, some of which were qualified by the Committee:

- strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation. As with other criteria, however, this should be applied subject to other relevant principles;
- strict liability should not be justified by reference to broad uncertain criteria, such as offences being intuitively against community interests or for the public good. Criteria should be more specific;
- strict liability may be appropriate where its application is necessary to protect the general revenue;
- strict liability should not be justified on the sole ground of minimising resource requirements. Cost saving alone would normally not be sufficient, although it may be relevant together with other criteria;
- strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent. As with other criteria, however, all the circumstances of each case should be taken into account;
- strict liability may be appropriate to overcome the ‘knowledge of law’ problem, where a physical element of the offence expressly incorporates a reference to a legislative provision. In such cases the defence of mistake of fact should apply;
- two-tier or parallel offences are acceptable only where the strict liability limb is subject to a lower penalty than the fault limb, and to other appropriate

safeguards. In addition, it should be clearly evident that the fault limb alone would not be sufficient to effect the purpose of the provision;

- infringement notices should be used only for strict liability offences and are acceptable subject to the usual safeguards;
- absolute liability offences should be rare and limited to jurisdictional or similar elements of offences. In contrast to the present Commonwealth policy, absolute liability should not apply to offences in their entirety in relation to inadvertent errors, including those based on a mistake of fact; and
- absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant. Such cases should be rare and carefully considered.

7.8 The Committee concluded that the supposed merits of strict liability and criteria for its application should be subject to strong safeguards and protections for those affected.

Principles of protection for those affected by strict and absolute liability

7.9 Having considered a number of submissions, including one from the Law Council of Australia, which highlighted the adverse consequences of strict and absolute liability offences from the viewpoint of those affected by such provisions, the Committee concluded that agencies had not given enough attention to the interests of parties affected by strict and absolute liability. The Committee developed the following principles that it believed should be taken into account when deciding on the need for strict or absolute liability offences and the form that they take:

- the process of deciding whether to introduce strict liability for an offence should recognise that this may have adverse effects upon those affected. The legitimate rights of these people should be paramount and take precedence over administrative convenience and perceived cost savings in program administration;
- agencies should acknowledge that there may be areas where existing strict liability offences, or the way they are administered, may be unfair. In these cases, agencies should review the offences under the general coordination of the Attorney-General's Department;
- strict liability should not be implemented for legislative or administrative schemes that are so complex and detailed that breaches are virtually guaranteed regardless of the skill, care and diligence of those affected. Any such scheme would be deficient from the viewpoint of sound public administration;
- strict liability offences should be designed to avoid the likelihood that those affected, particularly by the issue of an infringement notice, will pay the lower penalty simply because it is easy and convenient to do so, rather than spend the money and time to pursue what might be a legitimate defence. Any agency that encouraged this tendency would be acting improperly;

- strict liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must, by necessity, rely on information from third parties in Australia or overseas. Offences that do not apply this principle have the potential to operate unfairly;
- strict liability has the potential to adversely affect small and medium enterprises. Steps should be taken to ameliorate any such consequences arising from the different compliance and management resources of smaller entities;
- any potential adverse effects of strict liability on the costs of those affected should be minimised to the extent that this is possible. In particular, parties who are subject to strict liability should not have their costs increased as a consequence of an agency reducing its costs;
- external merit review by the Administrative Appeals Tribunal, or other independent tribunal, of relevant decisions made by agencies is a core safeguard of any legislative or administrative scheme. Every agency that administers strict liability offences should review those provisions to ensure that this right is provided;
- new and existing strict liability schemes should have adequate resources to ensure that they are implemented to maximise safeguards. A lack of proper resources may result in the inadequate operation of those safeguards;
- strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning. Any such increase in powers may indicate that the legislative and administrative scheme has structural flaws;
- there should be a reasonable time limit within which strict liability proceedings can be initiated. It would be unfair to those affected if they were to be charged perhaps years after an alleged breach;
- as a general rule, strict liability should be provided by primary legislation, with regulations used only for genuine administrative detail. It would be a breach of parliamentary propriety and personal rights for regulations to change the basic framework or important aspects of a legislative scheme; and
- the use of strict liability in relation to the collection of personal information about members of the public from third parties has the potential to intrude into the legitimate rights of the people whose details are being collected. In such cases the entire process should be transparent, with all affected members of the public being notified of their rights and remedies under the Privacy Act.

Principles for the sound administration of strict liability

7.10 The Committee concluded that, in addition to conceptual safeguards, schemes of strict liability should also be administered in a way that provides maximum protection for those affected:

- administration of strict liability in the form of non-legislative procedures may have as significant an effect as Acts and regulations. Such non-legislative matters should therefore be subject to the same protections and safeguards as the legislative structure of the scheme;
- licence holders who hold a licence on condition that they comply with an Act may be prejudiced by the inappropriate use of strict liability to vary, suspend, cancel or not renew their licence. Processes in relation to licences should be conducted in a transparent manner with adverse decisions subject to external independent merits review;
- compliance records have the potential to operate unfairly to the detriment of those affected. Such records should be subject to comprehensive safeguards, including a limit on what they may include, access by those to whom a record relates, and the ability to require deletion of stale or incorrect information;
- professional indemnity insurance in the context of strict liability penalties, especially those caused not by the putative offender but by third parties who may be overseas, has the potential to operate unfairly. Agencies should be sensitive to this problem and consult with industry groups on ways to alleviate its consequences;
- comprehensive internal review procedures are an essential safeguard for strict liability. As with other aspects of administration of strict liability these should be transparent and detailed, clearly providing a process which is both independent and credible;
- the use of infringement notices should include safeguards for those affected, including detailed prescription of the form of a notice. The form itself should indicate all of the safeguards to which it is subject;
- consultation with industry is essential before any decision to introduce or vary strict liability, with the valid concerns of industry being taken into account. Industry consultation should be genuine, not a formality to legitimise plans already finalised;
- it is undesirable if a strict liability scheme includes a large number of offences creating a substantial pool of contravening behaviour, resulting in selective and possibly inconsistent enforcement. To avoid this, agencies should ensure that enforcement guidelines are detailed and unambiguous and accompanied by adequate training;
- every scheme of strict liability should be administered through detailed, binding guidelines, which should be agreed between the relevant agency and industry and tabled in both Houses. Breach of the guidelines by an agency should preclude prosecution of those affected by the breach; and
- every scheme of strict liability should be subject to an independent review 12 months to two years after its commencement, with further review depending on the findings of the first review. Industry should be given the fullest opportunity to participate in each review.

Application of criteria to existing and proposed Commonwealth strict and absolute liability offences

7.11 The Committee concluded that the application of criteria to Commonwealth strict and absolute liability should be subject to the following principles:

- the harmonisation process, with its focus on maintaining the status quo in relation to strict and absolute liability in light of the introduction of the *Criminal Code*, has been a useful exercise by the Attorney-General's Department;
- the Attorney-General's Department should have a mandatory role in coordinating laws proposed by all Commonwealth agencies that provide for strict or absolute liability, with the object of ensuring a consistent approach;
- the Attorney-General's Department should undertake this function to the extent that it does not do so already; and
- the Attorney-General's Department should coordinate a new major project to analyse the substantive policy merits of existing harmonised strict and absolute liability offences. The object of the project should be to amend these provisions where necessary to achieve consistency of safeguards across all agencies.

Recommendations

7.12 The Committee made four recommendations to the Government regarding the application of strict and absolute liability offences in Commonwealth legislation:

1. The *Criminal Code* provisions relating to strict and absolute liability are appropriate and adequate and do not require amendment at this time.
2. The *Legislation Handbook*[3] should require agencies to abide by the above principles when developing new or amending legislation which includes strict or absolute liability. The Attorney-General's Department should coordinate this process.
3. The Attorney-General's Department should coordinate a new project to ensure that existing strict and absolute liability provisions are amended where appropriate to provide a consistent and uniform standard of safeguards. This should also be included in the *Legislation Handbook*.
4. Agencies should take into account the above principles in the day-to-day administration of strict and absolute liability offences. The principles should be included where applicable in agency guidelines.[4]

---

3 Department of the Prime Minister and Cabinet, *Legislation Handbook*, May 2000, Canberra.

4 Scrutiny of Bills Committee, *Sixth Report of 2002*, p. 289.

Government response

7.13 The Government's response to the Committee's report was tabled in the Senate on 17 June 2004.[5] The Government welcomed the Committee's *Sixth Report of 2002*, noting that the use of strict and absolute liability is necessary in certain circumstances for ensuring the effective application and prosecution of Commonwealth offences. However the Government recognised that 'no fault' liability should only be applied in instances where it is necessary and appropriate.

7.14 The Government advised that it:

> …recognises and values the need to maintain fundamental concepts of criminal law liability, such as the need for the prosecution to prove beyond a reasonable doubt both the physical and fault elements of criminal offences. The *Criminal Code* reflects the common law and Commonwealth policy position that a person should only be guilty of an offence if the prosecution can prove fault (intention, knowledge, recklessness or negligence) for each element of the offence. The only exceptions to this position are where there is express legislative provision that an offence or element of an offence carries absolute or strict liability.[6]

7.15 In respect of the four recommendations made by the Committee, the Government fully accepted only one of them, namely recommendation one, which indicated that the Committee considered that the *Criminal Code* provisions relating to strict and absolute liability were appropriate and adequate and did not currently require amendment.

7.16 In relation to the Committee's second recommendation, that the *Legislation Handbook* should require agencies to abide by the principles outlined elsewhere in this chapter when developing new or amending legislation that includes strict or absolute liability, the Government recognised the merits of regulating the application of strict and absolute liability by principles. However, the Government did not accept the need to require agencies to comply with the principles set out by the Committee, arguing that 'decisions should continue to be made by reference to the specific provisions of each piece of legislation'.[7]

7.17 The Government did, however, indicate that:

> any departure by an agency from these principles should be justified to the Minister for Justice and Customs when seeking his approval and in the

---

5 *Journals of the Senate*, No. 149, 17 June 2004, p. 3518.

6 Government response to the Senate Standing Committee for the Scrutiny of Bills *Sixth Report of 2002 – Application of Absolute and Strict Liability Offences in Commonwealth Legislation.* p. 2.

7 ibid. p. 3.

> Explanatory Memorandum to the relevant Bill. Parliamentary scrutiny allows Government decisions to be reviewed.[8]

7.18 The Government's response also provided some specific comments on the principles outlined by the Committee.[9]

7.19 The Government did not accept the Committee's recommendation that the Attorney-General's Department should coordinate a new project to ensure that existing strict and absolute liability provisions are amended, where appropriate, to provide a consistent and uniform standard of safeguards (recommendation 3). The Government asserted that this was not necessary as:

- the *Criminal Code* harmonisation project had achieved a significant degree of certainty and consistency in the application of strict and absolute liability;
- agencies were already required to consult with the Attorney-General's Department and seek the agreement of the Minister for Justice and Customs on the criminal law aspects of legislative proposals, which promotes greater consistency;
- all existing strict and absolute liability provisions had been subject to parliamentary scrutiny; and
- no evidence was available to support a conclusion that any of the existing strict and absolute liability schemes were operating in a way that was not intended at the time the enabling legislation was passed.[10]

7.20 The Government partially accepted the Committee's fourth recommendation, that agencies should take into account, in the day-to-day administration of strict and absolute liability, the principles identified by the Committee. The Government response indicated that:

> Subject to the comments made in the Government's response to recommendation 2 [on individual principles], the Government agrees that agencies should take into account the principles outlined in the Committee's Report. However, any decisions on how those guidelines should be adopted or promulgated within an individual agency should rest with that agency. [11]

8 ibid.

9 ibid. pp. 3-6.

10 ibid. pp. 6-7.

11 ibid. p. 7.