



M06/5075

Mr Allan Shearan MP
Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

I refer to your recent letter inviting comment on the Questions for Comment in the Discussion Paper dealing with Strict and Absolute Liability Offences.

The Authority has examined the Paper and, in general, the proposed principles set out in paragraph 56 can be supported (i.e. those relating to strict and absolute liability offences). However, some of the principles call for qualification and comment and these are set out below.

The Senate Standing Committee for the Scrutiny of Bills Report in Appendix 1 to your Committee's Paper refers to the issue raised by some Commonwealth agencies that the problem of proving the fault element for some offences which are peculiarly within the knowledge of the defendant justifies the creation of strict or absolute liability offences. Examples would be the failure to lodge documents or to provide documentary information when required by legislation. These types of situations may well require the creation of strict or absolute liability offences.

In relation to the request in paragraph 57 for comment on whether there should be a cap on monetary penalties for strict or absolute liability offences, the RTA has advised that unless such a cap is set at a high level, one cap for all legislation would seem to be impracticable given the diverse penalty amounts in different legislation. Setting a cap at a high level would seem to defeat the purpose of having a cap.

Of course, if despite the general rule referred to in principle (a)(viii) in paragraph 56, strict or absolute liability offences are created in subordinate legislation, a cap could be set in each piece of primary legislation. Indeed, caps on penalties to be created in subordinate legislation are commonly set in such legislation. See for example section 10(4) of the *Road Transport (Safety and Traffic Management) Act 1999*.

Roads and Traffic Authority



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The following more detailed comments have been provided by the RTA in respect of the proposed principles in paragraph 56:

Principle (a)(viii)

Reservations are held in respect of the principle of requiring strict and absolute liability offences to be in primary rather than subordinate legislation.

Although this principle may be appropriate for the Commonwealth legislative approach, in New South Wales serious offences, such as those contained in the Crimes Act, are usually not strict liability offences, most strict liability offences are less serious offences and therefore more likely to end up in regulations. The decision as to whether offences are to be created in primary or subordinate legislation depends on a range of factors including whether it is or is not strict liability. It may not be determinative or even the most important factor in that decision.

In New South Wales, traffic offences are in subordinate legislation and practically must be so, to enable the frequent changes required to be introduced in a timely manner.

Principle (a)(ix)

While, as far as possible, offences should depend on actions or failures to act by persons, the public interest issues in some situations call for the creation of "status" offences. These are offences by which a person is deemed at law to be responsible for the offences, regardless of whether they have in fact committed the offence, for example, parking offences, speed camera detected offences and environmental and occupational health and safety offences. An example in the road transport legislation is the chain of responsibility offences created in the nationally based provisions of the *Road Transport (General) Act 2005*.

Principle (a)(x)

It is not the practice in New South Wales legislation to make explicit whether a particular offence is one of strict or absolute liability, although it is done from time to time (see for example clause 34 of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999*).

The specific provisions in Chapter 2 of the Commonwealth Criminal Code (which deal with general principles of criminal responsibility) require Commonwealth legislation to indicate whether a particular offence is one of strict or absolute liability. However, in New South Wales Chapter 2 of the Criminal Code has not been adopted, although the substance of that Chapter was recommended by the Criminal Law Officer's Committee to the Standing Committee of Attorneys General in 1992.

In these circumstances, it may be premature to adopt this principle in isolation without adopting Chapter 2 of the Criminal Code.

Principle (b)(iv)

While the general principle that the size of monetary penalty should reflect the fact that liability is imposed regardless of any mistake of fact is supported, this is only one of the factors determining the amount of a penalty. It is noted for example that some mass, dimension and loading offences under the *Road Transport (General) Act 2005*, which are absolute offences, provide for penalties up to 500 penalty units (see Table to Division 4 Part 3.3). The public interest justification for these penalties is public safety.

The fact that a defendant guilty of a strict or absolute liability offence is a corporation is one of those factors which are relevant in determining whether a significant monetary penalty is justified. An example is the penalty for offences referred to in the previous paragraph.

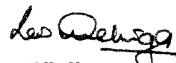
Principle (b)(v)

While it is accepted that absolute liability offences should be rare, examples do occur. For example the chain of responsibility offences identified in section 90 of the *Road Transport (General) Act 2005* are absolute liability offences on the basis of public interest justification, in this case public safety.

It is assumed that before your Committee makes its final recommendations, the views of the Attorney General on the proposed principles will be available for its consideration, particularly in light of Chapter 2 of the Criminal Code and the considerable effort involved in rewriting almost all of the regulatory offences in New South Wales to adopt principle (a)(x) of the proposed principles.

Should you wish to discuss these issues further or seek clarification, please contact the RTA's General Manager, Legal Branch, Mr Michael Najem on 9218-6694.

Yours sincerely



Les Wielinga
Chief Executive

16.08.00