



The New South Wales Bar Association

29 August 2006

Mr Allan Shearman MP
Chairman
Legislation Review Committee
Legislative Assembly
Parliament House
Macquarie Street
Sydney NSW 2000



Dear Mr Shearman

Strict and absolute liability offences

The Bar Association approves of the general policy expressed in the Discussion Paper No 2 and is in agreement with the general principle articulated in (a)(i) that fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter and should only ever be done if there are sound and compelling public interest justifications for doing so.

The safeguards provided in principles (a)(ii), (iii), (iv), (v), (ix) and (x) are appropriate and reasonable. Principles (a)(vii) and (viii) are worthy of support notwithstanding that they include more subjective terms as “regulatory nature”, “public safety”, “genuine administrative detail”. Read as a whole and particularly in light of (a) the policy of the principles are nevertheless clear and commendable.

The Association notes that it specifically supports the adoption of principle (a)(x) at the drafting stage as it may reduce the need for legal argument and make the nature of such offences clearer to the ordinary members of the public.

The Association endorses principle (a)(v) makes the following observations in relation to the sentencing of such offences. Principle (a)(v) appropriately recognises and retains judicial discretion in sentencing. However the fact that the courts have discretion in sentencing to ameliorate apparently harsh outcomes of strict or absolute liability should not be allowed to justify *per se* such use. Offences of strict and absolute liability should be created with intellectual honesty.

The Bar Association does not support the use of absolute liability. As Hunt J said in *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120 at 240:

“Absolute liability will not assist in preventing the sale of adulterated food where the seller honestly believes upon reasonable grounds that it is unadulterated. All that the imposition of such a liability will do is obtain a conviction for conduct which is manifestly not criminal in nature by any recognised standards of justice.”

If Parliament is minded to introduce offences of absolute liability, then principle (b)(i) is appropriate.

The Association is of the view that a cap on monetary penalties for strict and absolute liability offences would reinforce the message that liability is being imposed without proof of fault. The Association does not have a view on which such a cap might be, however it suggests that such a cap might usefully distinguish between individuals and corporations.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Michael Slattery', with a stylized flourish extending to the right.

Michael Slattery QC
President