



## *Strict Liability and Absolute Liability*

The following are extracts from *A Guide To Commonwealth Offences, Civil Penalties And Enforcement Powers*. The Guide is a resource to assist in the framing of proposed criminal offences, civil penalties and certain other enforcement provisions that are intended to become part of Commonwealth law.

***It explains why CASA and the AG's department are drafting aviation law as "strict liability" provisions. The proposed regulations will enable CASA to use their Infringement Notice System with little capability for the accused to appeal. CASA will always say you can use the Administrative Appeals Tribunal.***

AMROBA believes that CASA is more concerned with getting regulatory provisions to support the Infringement Notice System instead of using 'Strict Liability' in accordance with the guidance in this parliamentary document. We see it as very serious that fault liability is being excluded.

The Government response to the Committee's report was tabled in June 2004, and provided general support for the recommendations and principles set out in the report. Among the propositions set out in that report that accord with the approach the Government has taken in recent years, are the following:

- ***'fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter'*** (page 283)
- ***'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'*** (page 283)
- ***'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 criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) appears to be a reasonable maximum'*** (page 284)
- ***'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'*** (page 284)
- ***'strict liability may be appropriate where its application is necessary to protect the general revenue'*** (page 284)
- ***'strict liability should not be justified on the sole ground of minimising resource requirements'*** (page 284), and
- ***'absolute liability offences should be rare and limited to jurisdictional or similar elements of offences'*** (page 285).

In addition, the following guidance is given when "***strict or absolute***" liability provisions are included. It will be interesting to see how CASA is going to explain the use of each strict liability provision in the proposed "Explanatory Memorandum" that will support the proposed regulatory package.

*"If the explanatory memorandum to a Bill is not considered to provide adequate explanation for any use of strict or absolute liability, the Committee will seek an explanation from the responsible Minister.*

*2.80... The Committee usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged.*

*2.81 The Committee's general practice over the years has been to adopt the approach of the (then) Senate Standing Committee on Constitutional and Legal Affairs, as expressed in its report **The burden of proof in criminal proceedings**. In that report, the Constitutional and Legal Affairs Committee stated that it was of the opinion that:*

*no policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he [or she] has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in that role...*

*2.95 Where a person's belief at the time he or she carries out an action goes to the issue of his or her intent in performing it then the onus of proving that belief should generally be on the prosecution.*

The Guide with all its quotes of government policy and determinations, including political review committees, seems to be steering regulatory development away from the use of 'strict liability' until you get into the section that includes the use of Infringement Notice Systems. It is at this point where there seems to be a relaxation of the principle that fault liability is one of the most fundamental protections when developing criminal law.

The Guide states careful consideration with the use of strict liability and absolute liability and goes on to explain the use of 'strict liability' as follows:

**Principle:**

*Strict or absolute liability should only be used in an offence where there are well thought out grounds for this.*

**Discussion:**

**The Criminal Code reflects the same starting presumption as the common law:** *that fault must be proven for each physical element of an offence for a person to be guilty. Strict or absolute liability can only be applied by an express provision to this effect. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).*

*The application of either strict or absolute liability negates the requirement to prove fault (see sections 6.1 and 6.2 of the Criminal Code).*

- *The application of strict liability allows a defence of honest and reasonable mistake of fact to be raised.*
- *The application of absolute liability does not.*
- *The defence does not apply to circumstances where a mistake results from a lack of awareness of relevant facts.*

*Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified (see further below on the views of the Senate Scrutiny of Bills Committee).*

**Strict liability or absolute liability may apply to specific elements**

*Different considerations apply to the use of strict and absolute liability depending on how it applies to an offence. Application of strict or absolute liability to all physical elements of an offence has generally only been considered appropriate where each of the following considerations is applicable.*

- *The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.*
- *The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.*
- *There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.*

However, at this stage they introduce the outcome of an Infringement Notice System.

**Strict liability should apply to all physical elements of an offence that is subject to an infringement notice scheme,** *and therefore an offence will only be appropriate for inclusion in such a scheme if it meets the criteria above (see further Section 4.5).*

*Application of strict or absolute liability to a particular physical element of an offence has generally only been considered appropriate where one of the following considerations is applicable.*

- *There is demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element.*
- *In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact in respect of that element.*

## Jurisdictional elements attract absolute liability

- *The element is a jurisdictional element rather than one going to the essence of the offence. Absolute liability should apply to the jurisdictional element. For example, in the case of theft of Commonwealth property, the act of theft is the substantive element of the offence; while the circumstance that the property belongs to the Commonwealth is a jurisdictional element (see section 131.1 of the Criminal Code).*

## Knowledge of law problem

*Previously, some cross-references to provisions and laws in an offence provision needed to be strict liability due to the “knowledge of law” problem. However, since September 2004, subsection 9.3 (1) of the Criminal Code has provided as follows.*

*“(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.”*

AMROBA will continue to question whether there are well thought out grounds for making so many provisions subject to ‘strict liability’. As a last resort, this industry will be relying on the Senate Scrutiny of Bills Committee to review this package of legislation.

***The Scrutiny of Bills Committee** assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.*

*The committee examines all bills which come before the Parliament and reports to the Senate whether such bills:*

- 1. trespass unduly on personal rights and liberties;*
- 2. make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;*
- 3. make rights, liberties or obligations unduly dependent upon non-reviewable decisions;*
- 4. inappropriately delegate legislative powers; or*
- 5. insufficiently subject the exercise of legislative power to parliamentary scrutiny.*

AMROBA contends that many of the proposed regulatory provisions do not meet these criteria. Take the proposed Regulation 145.065 that makes documents that are not subject to parliamentary scrutiny subject to ‘strict liability’ and, we do not believe, meet the intent of government own principles.

### **145.065 Provision of maintenance services**

*(1) If a Part 145 organisation provides maintenance services, it must provide the services only in accordance with:*

- (a) **its exposition;** and*
- (b) the approval rating for each class of aircraft or aeronautical product for which the organisation is approved to provide maintenance services; and*
- (c) the approval rating for each specialist service that the organisation is approved to provide; and*
- (d) any limitations applying to an approval rating mentioned in paragraph (b) or (c); and*
- (e) **the privileges that apply to the approval rating under the Part 145 Manual of Standards.***

*Penalty: 50 penalty units.*

*(2) An offence against subregulation (1) is an offence of strict liability.*

Your Exposition will contain what CASA approves. The Exposition and Manual of Standards are included in “Strict Liability” – surely this does not meet the intent of the Guide.

This government imposed regulatory structure is of inferior quality than the regulatory structure that is being replaced. AMROBA believes that Civil Aviation (Safety) Orders, issued by CASA, should be retained as long as they were for the purpose of giving effect to the Convention and Annexes and CASRs should only contain real criminal elements.

**Ken R Cannane**  
Executive Director  
AMROBA  
[ken@amroba.org.au](mailto:ken@amroba.org.au)