



environmentaldefender's office newsouth wales

Submission on Discussion Paper on *Strict and Absolute Liability*

9 August 2006

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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Submitted to:

Legislation Review Committee
Parliament of New South Wales

Legislation Review Committee
Parliament of New South Wales
Macquarie St,
Sydney NSW 2000

9 August 2006

Dear Chairperson,

Strict and Absolute Liability Offences in New South Wales

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on strict and absolute liability offences in NSW. The EDO is a community legal centre specialising in public interest environmental law. The EDO has 20 years experience in litigating environmental matters and participating in environmental law reform processes. As such, our comments are given from the perspective of environmental regulation in NSW.

In summary, the EDO supports the principles in relation to strict and absolute liability offences, as set out in the Legislative Review Committee *Strict and Absolute Liability Discussion Paper No. 2* (Discussion Paper).¹ We do not support a cap on monetary penalties for such offences, and submit that monetary penalties should be appropriate to the seriousness of the crime, and the public interest in relation to environmental offences. The principles should be amended to reflect this more clearly.²

We submit that strict and absolute liability offences are essential in the environmental context on the following grounds:

1. Public interest
2. Deterrence, and
3. Ecologically sustainable development.

1. Public interest

Principle (a)(i) in the Discussion Paper states:³

“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 EDO is unequivocally of the opinion that the legal protections that form the cornerstone of our system should be firmly maintained, except where there is an overriding public interest to justify derogating from these intrinsic safeguards. We submit that the area of environmental crime invariably falls into this exception. Making a public interest exception for environmental crime is necessary for health, safety and ecological reasons. An act such as polluting a waterway for example, may have significant and long

¹ Legislative Review Committee *Strict and Absolute Liability Discussion Paper No. 2* 8th June 2006, Parliament of New South Wales.

² For example, amend principle (b)(i) and (vi) to reflect this, consistent with paragraph 35 on page 9 of the Discussion Paper.

³ Discussion Paper, page v.

term impacts within a catchment on other landholders, recreational users, community and ecosystem health.

Public policy considerations therefore dictate that environmental protection provisions should be strictly instituted and enforced, and those who cause damage to the environment be punished appropriately. The imposition of strict liability offences supports this end. There is an increasing world view that a healthy and balanced environment is an essential element of basic human rights.⁴ It is therefore clear that there are circumstances where individual rights are of disproportionate importance when compared to the paramount public interest in rigorously punishing and deterring environmental crime.

The quid pro quo for overriding individual rights in the public interest in this context is that strict liability offences: **a)** should not attract terms of imprisonment; **b)** should have a defence of honest and reasonable mistake of fact; and **c)** involve some discretion in the imposition of penalties.

a) Strict liability offences should be limited to provisions that impose monetary and regulatory penalties. We therefore support principle (a)(v) in the Discussion Paper.⁵ Denial of a defendant's freedom, without an examination of his or her mental state of mind, would be an unjustifiable and disproportionate incursion onto the personal rights and liberties of offenders. There are currently no strict liability offences in NSW which carry prison terms. Indeed, under the *Protection of the Environment Operations Act 1997* (*POEO Act 1997*), the most serious offences which carry prison terms all import a *mens rea* element. These are encapsulated under Tier 1 offences.

b) There is a common law defence available for strict liability offences - the defence of honest and reasonable mistake of fact. This defence will succeed where a defendant can show the court that he or she was under a mistaken but reasonable belief about a fact that, had it been correct, would have meant that the conduct would not have constituted the offence.⁶ This defence has been construed quite strictly by the courts and rarely succeeds. This is in keeping with the deterrence objectives of strict liability provisions. The EDO supports the court's strict approach as it must be clear to offenders that no legal loopholes can enable them to escape the consequences of their actions. However, the availability of this defence enables those polluters who are genuinely under an honest and reasonable misapprehension to escape liability at the discretion of the court. This provides a substantial common law safeguard which is consistent with the view of the Legislation Review Committee.

c) Section 241 of the *POEO Act 1997* sets out the matters to be taken into account by the court in determining sentences for breaches of its provisions. These include the extent of the harm caused to the environment, any mitigation measures taken, and the extent to which the person could foresee or had control over the causes of the harm. Moreover, section 241(2) allows the court to also take into consideration any other matters that it considers relevant. This imports a significant measure of discretion into the court's decision. Chief Justice Preston of the Land and Environment Court has indicated that the relative seriousness of the offence as well as the subjective and

⁴ G. Bates. *Environmental Law in Australia*, LexisNexis Butterworths, Australia, 2006, page 45.

⁵ Discussion Paper, page v.

⁶ G. Bates. *Environmental Law in Australia*, LexisNexis Butterworths, Australia, 2006, page 240.

personal circumstances of the defendant are relevant considerations in exercising judicial discretion.⁷ Judicial discretion in imposing penalties should not be limited by a low cap for serious environmental crime. As noted by the Supreme Court of South Australia in the case of *Piva v Brinkworth* 1992,⁸

Mitigating factors can be allowed for, but the emphasis on general and individual deterrence remains a vital consideration.

Principle (a)(vi) states that monetary penalties should be assessed on a case by case basis “having regard to lack of fault”. As noted above, this principle should be augmented to reflect the importance roles of public interest considerations and deterrence.

For further discussion of appropriate penalties for environmental offences, please refer to the EDO *Court Imposed Fines and their Enforcement: Submission to the NSW Sentencing Council*, 8 June 2006.⁹

2. Deterrence

In addition to punishment, an important public policy rationale behind the imposition of legal culpability without an investigation of the mental state of an offender is to deter individuals and corporations from engaging in future conduct that is likely to cause environmental harm. There must be a clear message to those that pollute that they will be prosecuted rigorously and that no legal loopholes or avenues exist to allow them to escape legal responsibility for their acts. This is especially pertinent in relation to corporations.

Corporations often participate in large-scale activities that have the potential to cause catastrophic and widespread environmental damage. As such, the regulatory regime must establish a significant disincentive for these corporations to pollute. This requires two things: **a)** substantial and targeted penalties, and **b)** an increased likelihood of being caught and successfully prosecuted.

a) The financial consequences of pollution need to exceed the potential profits. Deterrence will be undermined if financial penalties are inadequate. For example, a relatively low penalty will have a minimal impact on the annual budget of a large industrial company, and may in fact be written off as a ‘cost’ of doing business. Imposing a lower monetary cap is inappropriate for environmental crime where large financial disincentives are needed to deter corporations and individuals who would otherwise profit from their illegal acts.

Strict and absolute liability provisions in legislation ensure that certain breaches of environmental protection legislation by corporations will result in automatic liability. To provide an effective deterrent these provisions must contemplate significant financial consequences, and utilise innovative and effective penalties, for example publication orders that target the reputation on which a corporation’s viability ultimately depends.¹⁰ Penalty provisions for strict liability offences should therefore provide for: large up-front

⁷ The Hon. Justice Brian J. Preston. *Principled Sentencing for Environmental Offences*. Environmental Defenders’ office Annual Conference, Sydney, 26 May 2006.

⁸ 59 SASR 92 at 96.

⁹ This is available on the EDO website at: <http://www.edo.org.au/edonsw/site/policy.php>.

¹⁰ See the range of orders now available under the *Protection of the Environment (Operations) Act 1997*.

penalties, daily penalties for ongoing offences, and penalties that may be tailored specifically to negate any profits made.

b) Second, and of equal importance, criminological studies show that likelihood of being caught is often a greater deterrent than potential penalty. Strict liability offences encourage Government agencies who may otherwise be 'risk adverse' to take action. Strict liability provisions therefore play an important role in creating effective deterrence.

3. Ecologically Sustainable Development

Strict liability offences in the environmental arena are necessary to ensure the maintenance of the environment for future generations and the conservation of biodiversity. The deleterious effects of pollution and environmental degradation on fauna, flora, land, air and sea are scientifically irrefutable. Such impacts are contrary to NSW Government policy to promote the concept of ecologically sustainable development. As noted by the Chief Justice of the Land and Environment Court Brian Preston: "compliance with the law is necessary for the achievement of ecologically sustainable development."¹¹ To this end, and to ensure that Australia complies with its international obligations, offences relating to the environment must be rigorously enforced and discouraged.

Summary

Environmental crime can have serious and far-reaching consequences, and the public interest in punishing and deterring such crime is paramount. While EDO supports fault liability as a fundamental safeguard in criminal law generally, in relation to environmental crime strict and absolute liability offences are appropriate. Such offences provide a significant deterrent and simplify effective enforcement, especially for corporations who are generally the largest polluters. EDO supports the inclusion of the defence of honest and reasonable mistake of fact as a safeguard in liability provisions; and emphasises that imprisonment is not an appropriate punishment for strict and absolute liability offences. We do not support a low cap on monetary penalties, and in fact, support recent increases in penalties under the *POEO Act 1997*, and hope that these legislative provisions will provide appropriate punishment and an effective deterrent against environmental crime.

If you require further information, please contact Rachel Walmsley on 02 9262 6989 or rachel.walmsley@edo.org.au.

Yours sincerely,
Environmental Defender's Office

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¹¹ The Hon. Justice Brian J. Preston. *Principled Sentencing for Environmental Offences*. Environmental Defenders' Office Annual Conference, Sydney, 26 May 2006.