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THE APPLICATION OF STRICT LIABILITY TO NSW FUNDING AND DISCLOSURE OFFENCES

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INTRODUCTION

The purpose of this paper is to highlight the issues surrounding criminal liability for offences against funding and disclosure laws in NSW. Whilst discussion of criminal liability generally is rather commonplace, its impact on funding and disclosure laws is yet to be examined.

Funding and disclosure laws differ across States and Territories, however, in my view, the subject of criminal liability, particularly the standard of liability, is of general import. We have code jurisdictions, such as the ACT, Queensland, Northern Territory, Western Australia and Tasmania, in which the criminal law is governed by a statutory code that has replaced the common law. In the remaining jurisdictions, NSW, South Australia and Victoria, the law is made up of both statutory offences and common law offences.

“Strict liability” is a concept found within both codified and common law jurisdictions. It refers to liability despite the absence of any fault on the part of the accused in respect of the elements of the offence.

I propose the amendment of NSW laws to introduce strict liability to (most) funding and disclosure offences. During the course of this paper I will examine why funding and disclosure offences are a suitable vehicle for strict liability and how the introduction of strict liability offences will rectify the current problems faced by the Election Funding Authority of NSW (“EFA”).

CRIMINAL RESPONSIBILITY

Every offence is made up of essential ingredients called elements. The onus of proof rests on the prosecution to prove each element of the offence beyond reasonable doubt before an accused can be convicted of an offence.

It is a general principle of criminal responsibility that offences are divided into what can be referred to as “physical elements” and “fault elements”, traditionally known as *actus reus* and *mens rea* respectively. Physical elements refer to external events, the acts or omissions that are prohibited¹. Fault elements refer to the state of mind that must be present at the time of the commission of the physical element(s)². Depending on the offence, fault may be established by proving knowledge, intention, recklessness or negligence. Generally, both the physical and fault elements must be present at the same time in order to constitute the offence.

“...it is also necessary at common law for the prosecution to prove that [the accused] knew that he was doing the criminal act which is charged against him, that is, that he knew that *all the facts constituting the ingredients necessary to make the act criminal* were involved in what he was doing” *R v Turnbull* (1943) 44 SR (NSW) 108 at 109.

ABSOLUTE AND STRICT LIABILITY OFFENCES

The general principle that fault is required can be rebutted by clear words in the statute or by necessary implication:

¹ R Hayes & M Eburn, *Criminal Law and Procedure in New South Wales* (LexisNexis Butterworths, 3rd ed, 2009).

² *Ibid.*

“There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered” *Sherras v De Rutzen* [1985] 1 QB 918 at 921.

An absolute liability offence is one which does not include a fault element, that is, that the accused knew, intended, was reckless or negligent to the fact that he/she might be committing the crime. The prosecution need only prove that the accused performed the physical elements of the offence and, once that is proven beyond reasonable doubt, the offence is made out³.

Similarly, a strict liability offence does not require proof of fault; however, a defence of ‘mistake of fact’ is available to those charged with strict liability offences (*Proudman v Dayman* (1941) 67 CLR 536).

A defence of mistake of fact requires an accused to prove on the balance of probabilities that he/she had an honest and reasonable belief in certain facts that, if true, would make the accused’s actions innocent.

“At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, ‘actus non facit reum, nisi mens sit rea’. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy...” *R v Tolson* (1889) 23 QBD 168, at 181.

FUNDING AND DISCLOSURE LAWS - THE POSITION IN NSW

The *Election Funding, Expenditure and Disclosures Act 1981* (“EFED Act”) governs political funding and disclosure in NSW. The EFED Act is somewhat unusual in that whilst numerous provisions make conduct described therein unlawful, offences are created by three discrete provisions ss96H, 96HA and 96I.

For example:

Section 95B(1) of the EFED Act provides a general prohibition against acceptance of political donations that exceed the relevant applicable cap:

“It is unlawful (subject to this section) for a person to accept a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap on political donations.”

Whilst s95B(1) makes the conduct in that section unlawful, it is actually s96HA(1) that makes a contravention of s95B(1) an offence. Section 96HA(1) provides:

³ Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW* (The Federation Press, 5th ed, 2011).

“A person who does any act that is unlawful under Division 2A [in which s95B(1) is positioned] or 2B is guilty of an offence if the person was, at the time of the act, aware of the facts that result in the act being unlawful.”

For the purpose of this discussion, the offence provisions in the EFED Act (provided in Division 5 of Part 6) are:

“96HA Offences relating to caps on donations and expenditure

- (1) A person who does any act that is unlawful under Division 2A or 2B is guilty of an offence if the person was, at the time of the act, **aware** of the facts that result in the act being unlawful (my emphasis).
- (2) A person who makes a donation with the **intention** of causing the donation to be accepted in contravention of Division 2A is guilty of an offence (my emphasis).

Maximum penalty: In the case of a party, 200 penalty units or in any other case, 100 penalty units (my emphasis).

96I Other offences

- (1) A person who does any act that is unlawful under Division 3, 4 or 4A is guilty of an offence if the person was, at the time of the act, **aware** of the facts that result in the act being unlawful (my emphasis).”

Fault is an element of an offence against ss.96HA and 96I of the EFED Act and the prosecution must prove that the accused was aware (or knew) all of the factual ingredients of the offence at the time of its commission.

Pereira v DPP (1988) 63 ALJR 1 is the foremost judgement on the standard of “knowledge” required in criminal matters:

“Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or a necessary element of the guilty mind required for the offence, it may be established as a matter of inference from the circumstances surrounding the commission of the alleged offence. However, three matters should be noted. First, in such cases the question remains one of actual knowledge: *Giorgianni v R* (1985) 156 CLR 473 at 504–7; 58 ALR 641; *He Kaw Teh* (CLR at 570). It is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge. Secondly, the question is that of the knowledge of the accused and not that which might be postulated of a hypothetical person in the position of the accused, although, of course, that may not be an irrelevant consideration. Finally, where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer's shorthand, be referred to as wilful blindness. Where that expression is used, care should be taken to ensure that a jury is not

distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt (at 3).”

The following example of a breach of the EFED Act highlights the ineffectuality of the current offence provisions.

Under s96I(1) of the EFED Act, by reference to s96C(1), it is an offence for a person to accept a reportable political donation without recording the donor’s details and issuing a receipt. The elements of the offence are:

1. The accused accepted a donation,
2. The donation was a reportable political donation required to be disclosed under Part 6,
3. The accused did not:
 - (i) Make a record of the details required to be disclosed under Part 6 in relation to the donation;

AND/OR

 - (ii) Provide a receipt for the donation (being a receipt that includes a statement required by the *Election Funding, Expenditure and Disclosure Regulation 2009* (“EFED Reg”) as to the circumstances in which the donor is obliged to disclose the donation under Part 6), and
4. The accused was, at the time he/she accepted the donation, aware of the facts that resulted in the acceptance without compliance with s. 96C(1) being unlawful.

As to element 4., the prosecution must prove that the accused was aware (knew) of the relevant facts that resulted in a breach of s. 96C(1), that is:

- (a) That the accused was aware that a donation was accepted;
- (b) That the accused was aware that he/she had an obligation to provide a receipt/make a record; and
- (c) That the accused was aware that no receipt was provided/record made.

As to (a), where there is evidence that an accused personally accepted a donation then the matter is likely to be capable of being proved (unless there is, for example, some evidence to suggest that the accused was not aware that it was a donation that was being made and thought it was some other type of payment for an unrelated purpose).

The matters that the EFA investigates are rarely that simple. In cases where a donation is made by EFT without separate notification to a person within a party (or to the candidate or elected member) – by whom was such a donation accepted? And how can the prosecution prove actual knowledge on the part of an agent who does not control the financials of the party, elected member, candidate or group and hence is unaware that a donation was made directly into the bank account?

What of a case where a cheque is sent in the mail for tickets to a fundraising event?... A receptionist opens the mail, and forwards the cheque to the person organising the fundraiser. The organiser allocates seats to the donor and forwards the cheque to finance. Finance deposits the cheque in the relevant campaign account. There are several questions that should be asked to focus the investigation and identify whether, and by whom, any breaches have occurred:

- (i) When was the donation accepted and by whom was it accepted? In this situation, it may have been accepted by the receptionist; however, it is more likely to have been accepted by the event organiser, depending on his or her allocated responsibilities, or by the finance officer who was responsible for depositing the cheque into the campaign account.
- (ii) Was a receipt issued or record made? If so, by whom? That may indicate first, who it was that “accepted” the donation – and who was aware that it was accepted - and whether they complied with s. 96C(1).
- (iii) What involvement, if any, did the official agent or a person appointed by him or her to accept donations have in the transaction? The answer may resolve whether there was a breach of s. 96C(1).

As to (b), the question is not whether or not the party agent or official agent knew they were required by s. 96C and the EFED Reg to provide a receipt/make a record. Those requirements are questions of law, not questions of fact (the distinction can be a difficult one). The question is whether or not the official agent or party agent knew that they were in a position that required them to discharge the obligation to provide a receipt for a donation or make a record of it.

Relevant evidence that the person knew they were in a position of official agent and that that required them to provide receipts or make records may include a record of their acceptance of appointment, records of their attendance at official agent training, attendance at seminars, whether they have previously performed other acts as official agent.

As to (c), a receipt can be signed by the official agent, party agent or a person appointed by the official agent or party agent. An example of when the accused might not be aware that a receipt was not provided may be where there is confusion between an official agent and person appointed as to who is responsible for issuing the relevant receipt.

The prosecution’s strongest evidence of this element would be direct evidence in the form of an admission made by the accused during a recorded interview. Without an admission, the prosecution would need to rely on other evidence, most likely of a circumstantial nature.

Where all the evidence is circumstantial, it may be possible to draw inferences to prove the relevant awareness (or knowledge). However, it is necessary that the inference of guilt be the *only* rational inference available in the circumstances. If the accused is able to put forward a rational explanation consistent with innocence, (for example, “I have appointed another person to accept political donations and believed he/she had recorded the details of the donation and issued a receipt”) it is likely that the prosecution would fail (*Hodge* (1838) 168 ER 1136).

To date, the EFA is yet to commence a prosecution under ss96HA or 96I of the EFED Act as a consequence of advice received that there was insufficient evidence, in each case, to prove the commission of the offence.

THE CASE FOR STRICT LIABILITY

Strict and absolute liability offences are generally “*of a regulatory nature and where it is particularly important to maximise compliance (eg public safety or protection of the environment)*”⁴.

In its Report on the Application of Absolute and Strict Liability Offences, the Commonwealth Standing Committee on the Scrutiny of Bills enunciated principles relating to the merits of strict liability and criteria for its application which included⁵:

1. 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;
2. 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; and
3. Strict liability may be appropriate where its application is necessary to protect the general revenue.

The ACT Attorney General gave a similar statement of general approach to the ACT Standing Committee on Legal Affairs⁶ with the following addition:

4. “In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can be justifiably excluded. The rationale is that professionals engaged in [the matter being regulated] as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations”.

1. Regulatory offences

“Regulatory offence” is often used in contrast to “real offence”, which intimates that offences classed as regulatory are not really criminal. Regulatory offences are often referred to as crimes that, without the provisions criminalising them, are not wrong in themselves (“*malum prohibita*”). In comparison, real crimes are morally wrong and are seen as such even without legislative prohibition—(“*mala in se*”). This argument can be discredited by a cursory

⁴ *Strict and Absolute Liability: Discussion Paper*, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW]: The Committee, 2006.

⁵ *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Sixth Report of 2002. Senate Standing Committee on the Scrutiny of Bills at 284. 26 June 2002.

⁶ *Strict and Absolute Liability Offences*. Report 7. ACT Standing Committee on Legal Affairs at 8. February 2008.

examination of regulatory offences in NSW. Dangerous Driving, for example, is a regulatory offence and yet few if any people would argue that it is *malum prohibita*.

The most common distinction between real and regulatory offences is the difference in the application of general principles of criminal law, such as criminal liability, to the offences.

Ramsay argued that three factors characterise regulatory offences⁷:

(a) Sanctions of strict liability

The application of strict liability to regulatory offences is the tendency rather than the rule. Courts are more willing to interpret particular offences to be of strict liability because they are perceived to be regulatory offences.

Accordingly, we are faced with the circular argument that in determining whether an offence is one of strict liability, consideration is to be had as to whether it is a regulatory offence. In determining whether an offence is a regulatory offence (for regulatory offences are neither natural nor legal things) consideration is to be had as to whether strict liability applies. It is outside the ambit of this discussion to explore the circular logic here revealed, suffice to say that the relevant NSW funding and disclosure offences are “regulatory offences” but are not strict liability offences.

(b) A specialised bureaucracy (not the police or the DPP) under a duty to enforce regulatory criminal law involving the exercise of discretion by the agency in the implementation and enforcement of those laws

Some regulatory agencies are empowered to prosecute particular crimes; however, regulatory crimes are not exclusively within the prosecutorial power of a regulatory agency. Further, it is a central role of all prosecutors, of both real and regulatory offences, to exercise discretion as to whether to proceed to prosecution (see Prosecution Guidelines of the Office of the Director of Public Prosecutions).

(c) The courts involved in the day to day implementation of regulatory criminal law exercise summary jurisdiction

Almost all regulatory offences are summary. Summary offences are those that are usually heard in the Local or Magistrate’s court; however, in NSW for example, certain summary offences can be heard in the Supreme Court of NSW exercising its summary jurisdiction. The difference, apart from procedural matters, being the maximum penalties that can be handed down in each court. Personal experience confirms that, in practice, most regulatory offences are heard in the Local Court.

To summarise, offences against the EFED Act are mostly of a technical nature, many being *malum prohibita*, the EFA is empowered to prosecute pursuant to s111(5) of the EFED Act and offences are summary pursuant to s111(1) of the EFED Act. There is, therefore, a

⁷ I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart, 2nd ed, 2007).

compelling argument (and in fact, it is already assumed) that offences against the EFED Act are regulatory offences.

2. Difficultly in proving fault

As previously mentioned, it is difficult to prove knowledge or “awareness” in such matters due to the inherent nature of political parties as well as parties’ (and candidates’) corporate structure and hierarchy during the campaign period. The difficulty the EFA has experienced in enforcing the EFED Act has rendered the legislation ineffective where offences go unpunished (*Alphacell Ltd v Woodward* [1972] AC 824).

3. To protect the general revenue

The EFA is responsible for the distribution of funding to parties, elected members, candidates and groups through the Elections Campaign Fund, the Administration Fund and the Policy Development Fund. Any offence that results in the accused receiving public money for which he/she is not entitled is a scourge on the public revenue.

4. Regulatory offences pertaining to professions

In NSW, and similarly in other States, Territories and the Commonwealth, certain professionals and industry associations are subject to strict liability offences.

Company directors are held to a standard of strict liability for certain offences against the *Corporations Act 2001 (Cth)*, examples being, s.191 (obligation to disclose material personal interest), s.195 (restriction on being present or voting) and s438B (assistance to external administrator). Further, the *Corporations Act 2001* imposes secondary liability on a director where the corporation has contravened the legislation. This is strict liability - if the corporation is liable, the director is automatically deemed liable as well (subject to available statutory defences). Examples of Commonwealth legislation imposing strict liability on directors include:

- The Australian Consumer Law (for example, offences relating to unfair practices and product safety and product information);
- Work, health and safety legislation;
- Environmental laws; and
- Taxation laws.

Work, health and safety legislation and environmental protection legislation create strict liability offences for categories of people in addition to directors. Most air safety regulations in regards to operators of aircraft are enacted as strict liability offences. Traffic offences are mostly strict liability offences. Doctors are subject to strict liability for offences under the *Health Practitioner Regulation National Law (NSW)*. Sole traders and businesses that are involved in the preparation and sale of food are subject to strict liability for certain offences against the *Food Act 2003 (NSW)*. Accountants are subject to strict liability for certain offences under the *Tax Administration Act 1953 (Cth)*. Trustees of superannuation funds are

subject to strict liability for certain offences under the *Superannuation Industry (Supervision) Act 1993 (Cth)*.

These are, of course, “regulatory offences” for which there is a considerable degree of public interest and need for public protection. They are also industries in which those involved should be expected to know and understand their powers and obligations.

It was Voltaire who first wrote, “*With great power comes great responsibility*”. Those who stand for political office, our local government councillors and Members of Parliament, are conferred great responsibility. Electors expect their representatives to conduct themselves according to the law, to know their duties and obligations and to be held to a high standard in the execution of those duties and obligations. Our elected members are the law-makers, they are responsible for regulating your use of the roads, your use of land, both private and public, your obligations as a doctor, accountant and company director and, your obligations under the criminal law. It is not unreasonable to seek to hold elected members and political parties to the same standards as accountants, doctors and directors. Elected members must know the law as it relates to them, both in their powers and in their obligations.

It is apropos to consider those additional factors that the court takes into account when determining whether an offence is one of strict liability (as per Brennan J in *He Kaw The v R* (1985) 157 CLR 523).

Gravity of punishment

As a general rule, the more serious the offence and the penalty attached, the less likely the courts are to view it as an offence of strict liability. In *B v DPP* [2000] 2 AC 428 at 464 Lord Nicholls stated:

“The more serious the offence, the greater is the weight to be attached to the presumption [that *mens rea* is required], because the more severe is the punishment and the graver the stigma which accompany conviction.”

The vast majority of offences under the EFED Act are punishable by fine only, while a small number carry a term of imprisonment as the maximum penalty. It is my position that only those offences that are punishable by fine should be made strict liability offences.

Will the imposition of strict liability promote the objects of the legislation and deterrence?

In *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1 Lord Scarman stated (at 14) that a court will be concerned with whether strict liability “*will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.*”

The objects of the EFED Act are frustrated by the requirement to prove fault for offences under ss96HA and 96I. As discussed, the current standard of liability precludes enforcement and is therefore self-defeating. A corollary is that the legislation has little deterrent effect.

Strict liability, it is argued, will promote the objects of the EFED Act and at the same time promote deterrence by strengthening the EFA’s enforcement capabilities. Firstly, the threat of

prosecution in and of itself will be a significant general deterrent once prosecution is a viable option. Secondly, a successful prosecution will have significant specific and general deterrence across both local government and State participants.

It is argued that the imposition of strict liability goes to ensuring that (a professional) does everything possible to see that important regulatory legislation is carried out (*Alphacell v Woodward*). A conviction will disqualify the incompetent and corrupt from participating in public office, whilst repeated convictions will discourage the incompetent from certain undertakings and ensure that the competent stay competent.

CONCLUSION

Funding and disclosure laws in NSW are inadequate. Contraventions of the provisions have not, to date, been prosecuted due to the difficulty in proving knowledge on the part of the accused for each element of the offence. The standard of liability does little to promote the objects of the EFED Act when breaches such as exceeding donation and expenditure caps, accepting donations from prohibited donors and failure to maintain a separate campaign account go unpunished. Further, there is little deterrent value to enforcement provisions that are not applied.

NSW funding and disclosure laws are a suitable vehicle for strict liability. They are regulatory offences; this is not to advocate that they are less serious than “real crime”, but rather that they relate to an area of law in which there is considerable public interest. They are summary offences, which limits the maximum penalty that can be imposed by a court when sentencing an offender. There are four offences in the EFED Act that are punishable by terms of imprisonment (up to a maximum 2 years), the remainder are punishable by fine to a maximum of 40 penalty units if proceedings are brought in the Local Court (200 penalty units if proceedings are brought in the Supreme Court in its summary jurisdiction). It is not proposed that offences for which the maximum penalty is imprisonment should be strict liability offences. It is proposed that only those offences punishable by way of fine should be subject to strict liability.

It must also be remembered that the defence of honest and reasonable mistake of fact is available for offences of strict liability. This protects people who have committed the physical elements of an offence from conviction if they honestly and reasonably believe in certain facts that, if true, would make their actions innocent.

Doctors, company directors, accountants, shop owners and drivers, to name but a few, are subject to strict liability. Why then should the people who legislate not be held to the same standard? Positions of such power and responsibility require people who know and understand their responsibilities and obligations. The community is entitled to expect elected members, parties and other political participants to be aware of their duties under the EFED Act and to be held accountable for breaches of those duties. The community is entitled to protection from incompetent and corrupt political participants.

Funding and disclosure are integral to the political system. It is essential that laws regulating the funding and disclosure regime promote compliance and support enforcement. Breaches of funding and disclosure laws degrade the system. Laws that fail to address such breaches are self-defeating.

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