# Ambit of 'Attempts' Act extended under new law

The following paper, by **Federal Agent Alan Sing,** Director Operations Support, Northern Region, sets out amendments made recently to the offence of 'attempt' under the provision of section 7 of the *Crimes Act 1914* to reflect recent developments in the common law and the recommendations of prominent law reform bodies.

## Attempts to commit offences against laws of the Commonwealth

Amendments to the *Crimes Act 1914,* which, *inter alia*, extended the ambit of the offence of 'Attempt' under the provisions of section 7 of the *Crimes Act 1914,* received the Royal Assent on March 15, 1995. The amendments came into forc on September 16, 1995.

Section 7 now provides:

### Attempts

(1) Any person who attempts to commit any offence against any law of the Commonwealth, whether passed before or after the commencemen of this Act, shall be guilty of an offence and shall be punishable as if the attempted offence had beei committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) A person may be found guilty even if:

(a) committing the attempted offence is 'impossible'; or (emphasis added)

(b) the person actually committed the attempted offence.

(4) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

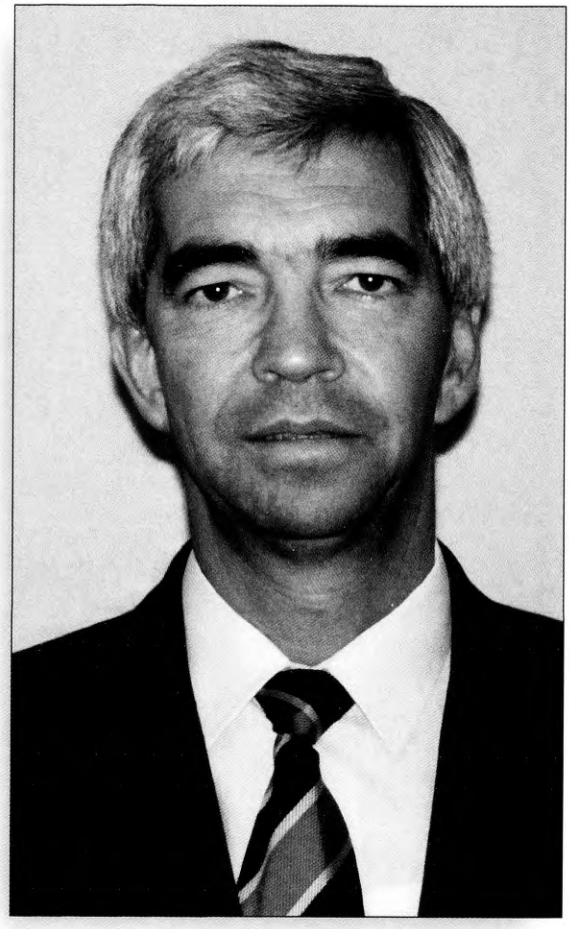
(5) Any defences, procedures, limitations or qualifying provisions that apply to an offence also apply to the offence of attempting to commit that offence.

(6) It is not an offence to attempt to commit an offence against section 5 or 7B.

### Principles of Criminal Liability

Section 4 of the Crimes Act (application of common law principles with respect to criminal liability) has also been amended and now provides:

4(1) Subject to this Act and any other Act the principles of the common law with respect to criminal liability apply in relation to offences against laws of the Commonwealth.



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(2) This section has effect despite section 80 of the *Judiciary Act 1903.*

### Explanation

Subsection 7(1) has not been amended. It creates the offence of attempting to commit an offence.

Subsection 7(2) provides the test for proximity. For the person to be found guilty of attempting an offence, the person's conduct must be more than merely preparatory. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

The test for determining when a course of conduct has progressed far enough to warrant liability has been controversial in the codified States (Queensland, Western Australia and Tasmania) and the common law jurisdictions.

Tests such as 'unequivocality', 'substantial act', 'acts of perpetration rather than preparation', and the 'last act rule' have been debated in the cases and in legal texts and articles.

Subsection 7(2) uses the 'more than merely preparatory' test which catches cases where the defendant has taken a step beyond mere preparation towards the perpetration of the offence.

There will be cases where the distinction between preparation and perpetration will be difficult. The best solution to this problem is to leave it to the tribunal of fact. The decision in the case of *Jones [1990] 1 WLR 1057* is questionable insofar as it implied that a person who, with intent to murder a victim and escape to Spain, was not proximate under the proposed test even where he obtained a gun, shortened it to facilitate concealment, donned a disguise, and while armed and carrying Spanish money, lay in wait for his victim to arrive.

The 'substantial step' test advocated by, for example, the US Model Penal Code and Professor Glanville Williams, 'Wrong Turnings on the Law of Attempt' [1991] Crim LR 416 was considered by the Parliament but rejected as too broad because it could include acts of 'mere preparation'. Some step towards the perpetration of the offence is essential.

The test adopted by the new provision follows a number of authorities and law reform bodies: English Law Commission, Criminal Law: Attempt, and Impossibility in Relation to Attempt, Report No. 102 (1980); Law Reform Commission of Canada, Report No. 31, Recodifying Criminal Law (1987) and the Draft Bill prepared by the "Gibbs Committee".

The resultant provision was constructed with an awareness of the difficulties that exist with the definition of attempt in the codified States (the definition requires inter alia the commission of an 'overt act', short of the actual commission of the offence, to manifest the intention of the accused and consummate the crime of attempt), and the artificial distinction drawn.

These difficulties have been brought out in the cases including: Chellingworth [1954] QWN 35. In that case the accused, who had threatened to burn down a house, was found on the premises with a half empty container of petrol in his possession.

The walls and floor of the house were doused with petrol. A second container of petrol and petrol soaked rags were also found in the premises. There was no evidence to prove that the accused had tried to ignite the petrol. The court held that his actions fell short of an attempt to commit arson.

The court ruled there was no 'overt act' manifesting an intention to commit an offence, the were done 'in preparation' for the commission of the offence.

In other words, since the accused did not take the further step of igniting or trying to ignite the accelerant, his acts were regarded as merely preparatory. This decision, understandably, attracted strong criticism.

The formulation arrived at in the new section accords with the recommendations of reviews of the Criminal Code provisions carried out by the Murray Code Review and the O'Regan Code Review.

Subsection 7(3) provides that a person may be found guilty even if committing the offence attempted is impossible or the person actually committed the offence attempted. In *Britten v Alpuget (1986) 23 A Crim R 254* the defendant was charged with attempting to import cannabis into Australia. The evidence established that the defendant believed that he was importing such a substance, but the actual substance found in the concealed bottom of a suitcase collected by the defendant was not cannabis – it was a substance which was not prohibited.

If the English case of *Haughton v Smith [1975] AC 476* (which held that it was not an offence to attempt to commit an offence that was impossible to commit) were to be followed in Australia, on no possible analysis of the facts could the defendant under the existing law, be convicted for the attempted importation charge. Yet the defendant had done all in his power to commit the offence of importing prohibited drugs and was frustrated in this purpose only by the fact that the packages did not contain the drug.

The Full Court of Victoria rejected the decision in *Haughton v Smith. Britten v Alpuget* was adopted by the Court of criminal Appeal in Western australia in *R v Lee (1990) 47 A Crim R 187.*

In *R v Mai NSW CCA, 6 April 1992, unreported,* Hunt CJ said:

> I interpret the law laid down in *Britten v Alpuget* (and adopted in *R v Lee*) when applied to the general law of attempt, as being that, in circumstances where it is in fact physically impossible for the accused to commit a particular

crime, an attempt to commit that crime has nevertheless been proved if the Crown establishes:

(i) that the accused intended to do the acts with the relevant state of mind which together would comprise the intended crime (that is, if the facts and circumstances had been as he believed them to be, he would have committed that crime); and

(ii) that, with that intention, he did some act towards the commission of that crime which 'went beyond mere preparation' and which cannot reasonably be regarded as having any purpose other than the commission of that crime.

Thus, it was held in *Britten v Alpuget* that a person who was in possession of a substance when he arrived in Australia which he believed was a prohibited import, but was in fact another substance which was not prohibited, is guilty of an attempt to import a prohibited import into Australia contrary to s 233B(1)(b), and it was held in *R v Lee* that a person who is in possession of a small quantity of heroin in a parcel addressed to him and sent from overseas is guilty of attempting to obtain possession of the substantial quantity of heroin, which 'he believed' that parcel contained, contrary to s 233B(1)(c) of the *Customs Act 1901,* notwithstanding that the parcel had been intercepted by the authorities and a major portion of the heroin had been removed before its delivery to him. In each case, the fact that it was physically impossible for the accused to achieve the particular crime which he had intended to commit was irrelevant (emphasis added).

Subsection 7 (3) recognises the correctness of the decisions referred to above. The prime consideration is the intention (the 'evil mind') of the accused. Provided that the intention is accompanied by an act towards the commission of the intended crime which goes beyond mere preparation and cannot reasonably be regarded as having any other purpose other than the commission of that crime.

Subsection 7(4) provides that a person who is found guilty of attempting to commit an offence cannot be subsequently charged for the completed offence. This subsection is based on the "doctrine of merger" which says that where the same facts constitute both a felony and a misdemeanour, the misdemeanour "merges" into the felony and hence, for all intents and purposes, disappears.

Subsection 7(5) provides that any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

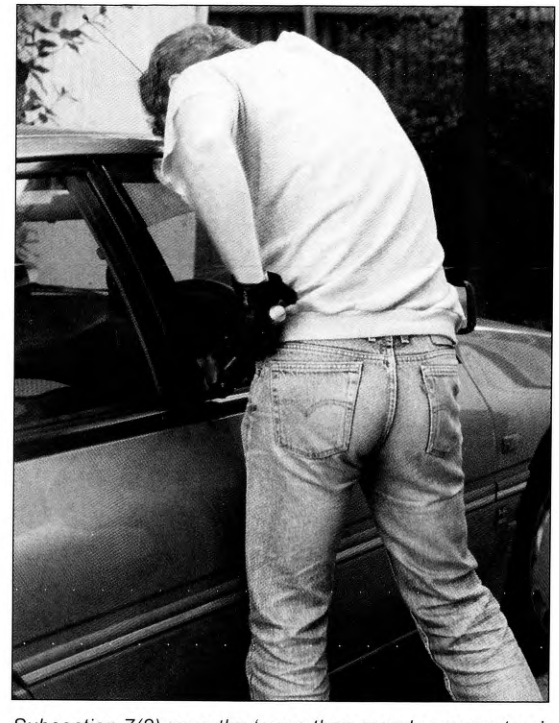
Subsection 7(6) provides that there can be no offence of attempt in relation section 5 of the *Crimes Act 1914,* (aiding and abetting, etc.) or to section 86 (conspiracy).

### Application of the common law

The amendments to subsection 4(1) of the *Crimes Act 1914* apply the principles of the common law, with respect to criminal liability to 'all' persons accused of federal offences. The repealed section 4 only applied these principles to offences against the *Crimes Act 1914.* Any other offence was dealt with according to the prevailing law of the particular State or Territory where it was committed. For example, a person committing a non-Crimes Act federal offence in Victoria, a common law jurisdiction, was treated differently to a person committing the same offence in Queensland, a codified jurisdiction.

Subsection 4(2) provides that the section applies despite section 80 of the *Judiciary Act 1903.* This provision applied the relevant State and Territory laws to courts exercising Federal jurisdiction.

The explanations of the new provisions have been, in the main, extracted from the Explanatory Memorandum to the Amendment Bill. A reading of these explanations indicates that the reference to section 7B of the Crimes Act in section 7 (6) of the new provision should in fact be a reference to section 86 (conspiracy). Section 7B does not exist. This apparent printing error will require legislative amendment.



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