

Corporate Criminal Liability

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The problem: Enlisting the Private Sector

Historically, insufficient compliance within business enterprises to legal requirements imposed by criminal law because of low levels of

Investigation

Prosecution

Conviction

Punishments

commitment by corporations ...

... so it is cheaper to take the risk.

The focus of recent activity has been upon shifting the costs of compliance onto the private sector.

Structure

1. Endings
2. Difficulties in the prosecution of Corporations
3. The identification doctrine
4. Respondeat superior/Vicarious liability

What punishments?

Rendering corporation insolvent? (consequences for sector? Relevance of size? Should shareholders/managers/employees take the hit?)

Debarment from public procurement?

Running company for public weal?

Preventing the corporation from being wound up?

Fines short of making corporation insolvent?
(fairness and efficacy issues?)

Continuity of (Legal)Personhood/Agency?

What if corporation changes:

- (i) its name;
- (ii) its CEO/CFO;
- (iii) its directors;
- (iv) its employees;
- (v) its shareholders?

What if it is taken over, or merges with another corporation?

Is it still the same entity?

What about?

Privilege against self-incrimination?

Legal professional privilege?

... where they do not extend to corporations?

Options for criminalising corporations

1. Identification doctrine
2. Vicarious liability / *respondeat superior*
3. No general criminal liability for corporations but:
 - (i) Specific provisions imposing liability on corporations
 - (ii) Specific provisions imposing personal criminal liability upon managers
 - (iii) General (or specific) 'failure to prevent' offences

Tesco v Natrass [1971] UKHL 1; [1972]
AC 153

Trade Descriptions Act 1968 S 11 (2):

“If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.”

House of Lords holds

Company not liable because there had been no decision by the 'controlling mind' of the company to commit the offence.

Identification doctrine

Advantages

1. Clear
2. If corporate criminal liability bad ...

Disadvantages

1. Very difficult to prove guilt especially where crime requires specific *mens rea*.
Only possible in cases like R v Smith & Ouzman Ltd (2015, but under pre-2011 law) – printers, small company.
2. Incentives to fragment power within organisation
3. Compliance costs fall disproportionately upon smaller companies.

Vicarious liability

Respondeat superior (US federal model)

Corporate liability and personal liability (both essentially vicarious) at high level in company.

3.i and 3.ii Specific Offences imposing (vicarious) liability upon managers

Eg (UK) Trade Descriptions Act 1968 s 20 'Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.' (having regard to ss 23 & 24.)

3.iii An offence of failing to prevent employees from committing or taking part in ...

Bribery - Bribery Act 2010 s.7

Tax Evasion - Criminal Finances Bill 2017 Part 3

Q is there anything special about bribery or tax evasion?

A. No – in principle there is no reason why there should not be a general offence for corporations of failing to prevent their employees committing criminal offences (within the terms of their employment).

Defences?

'Adequate procedures' defence –

Bribery Act 2010?

Ministry of Justice guidance

Tax offences?

Defence of 000

Advantages

Incentives for compliance

Effect of 'failure to prevent' offences

Prosecutions?

Very few ...

But

Leveson DPAs