

The Corporation as Criminal and “Corporate” Individuals are too: A study of Queensland statutory provisions*

Abstract

By operation of specific statutory provisions, incorporation may not enable those individuals involved in the running of a corporation and/or the performance of the activities of the corporation to escape criminal liability for an offence committed by the corporation. In effect these statutory provisions lift the corporate veil. This paper examines some statutory provisions that exist in Queensland which impose upon an individual concurrent criminal liability for the commission of the offence by a company. As a general proposition, the statutory provisions which exist to impose liability on “corporate” individuals can be classified into three groups: (i) provisions which attach liability through representatives (ii) provisions which attach liability to directors/executive officers and (iii) provisions which attach liability to agents and employees. Within each of these groups there is diversity in the statutory approach to attaching liability and the defences available to individuals to deny their criminal liability.

Introduction

A both common law and under statute, companies can be held to be directly liable for the commission of a crime and can be found guilty of a criminal offence. By virtue of a company’s status as a separate legal personality, liability for a criminal offence should be its own and not attributable to its participants. However, this is not always the case. In particular, statutory provisions exist and lift the corporate veil to expose those involved in the running of the corporation and/or those involved in the performance of the activities of the corporation to concurrent criminal liability with the corporation. In the 1957 decision of *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*¹ Lord Denning commented that:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. ... Whether [the] intention is the company’s intention depends on the nature of the matter under consideration, the relative position of the officer or agent and other relevant facts and circumstances of the case.

These comments are reflected in many of Queensland’s statutory provisions which impose criminal liability on not only the company but its “corporate” individuals. This paper examined 32 pieces of legislation² (this is not an exhaustive list) that exist

* Kristy Richardson, Lecturer Faculty of Business and Law, Central Queensland University.

Ph: 0749306819 Fax: 0749309700 e-mail: k.richardson@cqu.edu.au

¹ [1957] 1 QB 159 at 172.

² The pieces of legislation examined were: *Business Names Act 1962*, *Workplace Health and Safety Act 1995*, *Water Act 2000*, *Vegetation Management Act 1999*, *Second-Hand Dealers and Pawnbrokers Act 2003*, *Queensland Heritage Act 1992*, *Plant Protection Act 1989*, *Pest Management Act 2001*, *Offshore*

in Queensland which are quasi-criminal pieces of legislation. As a general proposition, the statutory provisions which are identified in this paper are classified into three groups: (i) provisions which attach liability through representatives (ii) provisions which attach liability to directors/executive officers and (iii) provisions which attach liability to agents and employees. Within each of these groups there is diversity in the statutory approach to attaching liability and the defences available to individuals to deny their criminal liability. As a note of caution this paper does not discuss whether these statutory provisions have been used against individuals by regulating authorities or whether the statutory provisions may give rise to different results in terms of prosecutions. This paper merely seeks to identify that there are differences in drafting between pieces of legislation.

The First Category: Provisions Attaching Liability through Representatives

Twelve (or 37.5%) of the thirty-two acts examined contained express provisions imposing liability on the company through the acts and omissions of its representatives. These provisions would appear to have wide application in that “representative” is defined to mean an executive officer, employee or agent of the corporation. In terms of establishing a company’s breach, the acts and omission of the representatives are considered in terms of their actual and apparent authority.

In examining the statutory provisions imposing liability for the acts or omissions of representatives on a company, there are two different ways in which the provisions are drafted. The first drafting difference is in terms of the defences available. That is, there is either the defence that the company has taken reasonable steps to prevent the act or omission. Or there is the defence that the company could not, by the exercise of reasonable diligence have prevented the act or omission. There is on occasion, a second step to these defences were the company must also show that it was not in a position to influence the conduct of the representative. The second difference in drafting between the provisions examined is whether the provision defines what is meant by the term the “state of mind” of the representative so as to establish liability.

An example is section 216 of the *Fisheries Act 1994* which provides that:

Responsibility for Acts and Omissions of Representatives

(1) In this section:

representative means:

- (a) of a corporation – an executive officer, employee or agent of the corporation; ...

state of mind of a person includes –

- (a) the person’s knowledge, intention, opinion, belief or purpose; and

Minerals Act 1998, Nature Conservation Act 1992, Industrial Relations Act 1999, Fisheries Act 1994, Explosives Act 1999, Environmental Protection Act 1994, Electrical Safety Act 2002, Domestic Building Contracts Act 2000, Dangerous Goods Safety Management Act 2001, Contract Cleaning Industry (Portable Long Service Leave) Act 2005, Coal Mining Safety and Health Act 1999, Chiropractors Registration Act 2001, Child Care Act 2002, Biodiscovery Act 2004, Chemical Usage (Agricultural and Veterinary) Control Act 1988, Exotic Diseases in Animals Act 1981, Building Act 1975, Gene Technology Act 2001, Tow Truck Act 1973, Stock Act 1915, Marine Parks Act 2004, Liquor Act 1992, Animal Care and Protection Act 2001, and Anti-Discrimination Act 1999.

- (b) the person's reasons for the intention, opinion, belief or purpose.
- (2) Subsections (3) and (4) apply in a proceeding for an offence against this Act.
- (3) If it is relevant to prove a person's state of mind about a particular act or omission, it is enough to show:
 - a. The act or omission was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
 - b. The representative had the state of mind.
- (4) An act or omission done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by that person, unless the person proves the person took all reasonable steps to prevent the act or omission.

This provision is replicated in:

- section 119 of the *Explosives Act 1999*. Although the "state of mind" definition is not included and an additional defence that the person was not in a position to influence the conduct of the representative in relation to the act or omission is provided; and
- section 30 of the *Chemical Usage (Agricultural and Veterinary) Control Act 1988*. Similarly, the "state of mind" definition provision is not included.

The remaining provisions examined contain the defence that "the person could not, by the exercise of reasonable diligence, have prevented the act or omission of the representative." An example of such a provision is section 188 of the *Electrical Safety Act 2002* which provides that:

Responsibility for act or omission of representative

- (1) Subsections (2) and (3) apply in a proceeding for an offence against a provision, other than the obligation offence provision, of this Act.
- (2) If it is relevant to prove a person's state of mind about a particular act or omission, it is enough to show:
 - a. the act was done or omitted to be done by a representative of the person within the scope of the representative's actual or apparent authority; and
 - b. the representative had the state of mind.
- (3) An act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by the person, unless the person proves the person could not, by the exercise of reasonable diligence have prevented the act or omission.
- (4) In this section:
 - representative means:
 - (a) of a corporation – an executive officer, employee or agent of the corporation ...
 - state of mind, of a person, includes:
 - (a) the person's knowledge; and

- (b) the person's intention, opinion belief or purpose and the reasons for the person's intention, opinion, belief or purpose.

Such a provision is replicated in:

- section 94 of the *Domestic Building Contracts Act 2000*;
- section 172 of the *Dangerous Goods Safety Management Act 2001*;
- section 199 of the *Coal Mining Safety and Health Act 1999*;
- section 191 of the *Chiropractors Registration Act 2001*;
- section 158 of the *Child Care Act 2002*; and
- section 114 of the *Biodiscovery Act 2004*.

It is interesting to note that section 181 of the *Animal Care and Protection Act 2001* whilst replicating the general pattern identified above, does not refer to a representative's act or omission but rather refers to the representative's conduct. Section 181 provides:

Conduct of Representatives

- (1) This section applies to a proceeding for an offence against this Act if it is relevant to prove a person's state of mind about particular conduct.
- (2) It is enough to show:
 - (a) The conduct was engaged in by a representative of the person within the scope of the representative's actual or apparent authority; and
 - (b) The representative had the state of mind.
- (3) Conduct engaged in for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been engaged in also by the person unless the person proves:
 - (c) if the person was in a position to influence the representative in relation to the conduct – the person took reasonable steps to prevent the conduct; or
 - (d) the person was not in a position to influence the representative in relation to the conduct.
- (4) In this section:
 - engaging in conduct includes failing to engage in conduct.
 - representative means for a corporation an agent, employee or executive officer of the corporation.
 - state of mind of a person includes the person's
 - (a) belief, intention, knowledge, opinion or purpose; and
 - (b) reasons for their belief, intention, opinion or purpose.

Exceptions to the general pattern of drafting identified above are the *Liquor Act 1992* and the *Anti-Discrimination Act 1991*. Section 229 of the *Liquor Act 1992* provides:

Liability for Certain Offences against Act

- (1) Despite section 7 or 23 of the Criminal Code if an offence against section 155, 156, 157 or 151 is committed by a person as agent or employee, the principal or employee is presumed to have participated in the offence, may be charged with actually committing the offence and, subject to subsection (2), may be punished for the offence.
- (2) It is a defence to a charge made against a person under subsection (1) that

- (a) The offence happened without the defendant's knowledge or authority; and
- (b) The defendant had exercised due diligence to avoid the commission of the offence.

Section 132 of the *Anti-Discrimination Act 1991* provides that:

Act's vicarious liability purpose and how it is to be achieved

- (1) One of the purposes of the Act is to promote equality of opportunity for everyone by making a person liable for certain acts of the person's workers or agents.
- (2) This purpose is to be achieved by making a person civilly liable for contravention of the Act by the person's workers or agents.

Section 133 of the Act then provides that:

Vicarious Liability

- (1) If any of a person's workers or agents contravenes the Act in the course of work or while acting as agent, both the person and the worker or agent, as the case may be, are jointly and severally civilly liable for the contravention, and a proceeding under the Act may be taken against either or both.
- (2) It is a defence to a proceeding for a contravention of the Act arising under subsection (1) if the respondent proves, on the balance of probabilities, that the respondent took reasonable steps to prevent the worker or agent contravening the Act.

With the exception of the *Liquor Act 1992* and the *Anti-Discrimination Act 1991* the remaining ten pieces of legislation referred to above that contained representative provisions making the company liable via the acts of representatives, also contained provisions making the director/executive officer concurrently liable for the offence. These director/executive officer provisions are identified as a separate category of statutory provision and the second for the purposes of this paper.

The Second Category Provisions Attaching Liability to Directors/Executive Officers

The statutory provisions aimed at imposing liability upon directors and executive officers also vary in the way in which they are drafted. As for the provisions identified above, the drafting differences lay in the way in which liability attaches to directors and executive officers and the statutory defences available. For example section 29 of the *Business Names Act 1962* simply states that:

Where a person guilty of an offence against this Act (a) is a corporation any director, secretary or other officer of the corporation who was knowingly a party of the offence shall also be guilty of that offence.

Not knowing that the offence was committed is therefore the only way in which an individual can escape concurrent liability with the corporation for a breach of that Act.

Legislation which is more recent reveals a more sophisticated approach to both attaching and attributing liability and providing a defence to any criminal charge. For example section 167 of the *Workplace Health and Safety Act 1995* provides that:

Executive Officers Must Ensure Corporation Complies with Act

- (1) The executive officers of a corporation must ensure that the corporation complies with this Act.
- (2) If a corporation commits an offence against a provision of this Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision.
Maximum penalty for subsection (2) – the penalty for contravention of the provision by an individual.
- (3) Evidence that the corporation has been convicted of an offence against a provision of this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with the provision.
- (4) However, it is a defence for an executive officer to prove –
 - (a) If the officer was in a position to influence the conduct of the corporation in relation to the offence – the officer exercised reasonable diligence to ensure the corporation complied with the provision; or
 - (b) The officer was not in a position to influence the conduct of the corporation in relation to the offence.

This form of statutory provision with the statutory defence of exercised reasonable diligence or not in a position to influence the conduct of the corporation is replicated in:

- section 828 of the *Water Act 2000*;
- section 29A of the *Plant Protection Act 1989*;
- section 122 of the *Pest Management Act 2001*;
- section 443 of the *Offshore Minerals Act 1998*;
- section 136 of the *Marine Parks Act 2004*;
- section 219A of the *Fisheries Act 1994*;
- section 199 of the *Electrical Safety Act 2002*;
- section 95 of the *Domestic Building Contracts Act 2000*;
- section 173 of the *Dangerous Goods Safety Management Act 2001*;
- section 262 of the *Coal Mining Safety and Health Act 1999*;
- section 192 of the *Chiropractors Registration Act 2001*;
- section 159 of the *Child Care Act 2002*; and
- section 115 of the *Biodiscovery Act 2004*.

In other acts the provisions attaching liability to executive officers and directors replicate subsections (1) to (3) above to establish the offence committed by the director. However, there are differences in terms of the defences offered under the statutory provisions and some sections have deeming provisions. The question of whether the drafting of these provisions is more than just semantics has not been examined and is beyond the scope of this paper. Notwithstanding, examples of the differences in the drafting of the statutory defences available include (i) the

reasonable steps defence, (ii) the without knowledge defence and (iii) the without consent or connivance defence. Examples of each of these defences follow.

(i) The reasonable steps defence.

Section 117(4) of the *Explosives Act 1999* provides that “it is a defence for an executive officer to prove

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence – that the officer took reasonable steps to ensure the corporation complied with the provision; or
- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.”

The defence of reasonable steps and not in a position to influence the conduct of the corporation is also contained in:

- section 493(4) of the *Environmental Protection Act 1994*; and
- section 30A(4) of the *Chemical Usage (Agricultural and Veterinary) Control Act 1988*.

(ii) The without knowledge defence:

Section 162 of the *Nature Conservation Act 1992* provides that “it is a defence for an executive officer to prove that (a) the corporation’s offence was committed without the officer’s knowledge or consent and (b) the officer took all reasonable steps to ensure that the corporation complied with the Act.

Other provisions containing this defence include:

- section 112(5) of the *Second-Hand Dealers and Pawnbrokers Act 2003* which provides that “it is sufficient for the executive officer to prove that the act or omission that was the offence was done or made without the officer’s knowledge despite the officer having taken all reasonable steps to ensure the corporation complied with the provision”; and
- section 51 of the *Building Act 1975* which provides that “where an offence against this Act is committed by a body corporate each member of the governing body of that body corporate shall be taken to have committed the offence and may be punished for the offence accordingly, in addition to the body corporate, unless the member proves that the member had no knowledge of the commission of the offence or could not have prevented its commission by the exercise of reasonable diligence.”

(iii) The without consent or connivance defence:

Section 42 of the *Exotic Diseases in Animals Act 1981* and section 45 of the *Stock Act 1915* provide that:

Liability for Offence by Corporations

- (1) Where a corporation offends against this Act each and every one of the following persons shall be deemed to have committed the offence, and shall be liable to be proceeded against and punished accordingly, namely:
 - (a) The managing director, manager, or other governing officer, by whatever name called, and every member of the governing body, but whatever name called, therefore; and
 - (b) Every person who in Queensland manages or acts or takes part in the management, administration or government of the business in Queensland in the corporation;
- (1A) This section applies so as not to limit or affect however the liability of a corporation to be proceeded against and punished for an offence against this Act committed by it.
- (2) No person who is proceeded against pursuant to this section shall be convicted if the person satisfies the court that the offence was committed without the person's consent or connivance and that the person exercised all such diligence to prevent the commission of the offence as the person ought to have exercised having regard to the circumstances.

And by contrast, section 41 of the *Tow Truck Act 1973* provides no statutory defences to an executive officer.

An example of a deeming provision included in a section for executive officers is section 60A(5) of the *Vegetation Management Act 1999* which provides that for the purposes of the section “executive officer, of a corporation, means a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.” This additional section is replicated only in:

- section 59E of the *Queensland Heritage Act 1992*;
- section 673(3) of the *Industrial Relations Act 1999*; and
- section 132(5) of the *Contract Cleaning Industry (Portable Long Service Leave) Act 2005*.

In terms of director liability, an interesting provision contained in the *Contract Cleaning Industry (Portable Long Service Leave) Act* is section 133. Section 133 is entitled “**Liability of Directors for Amounts**” and provides:

- (1) This section applies if:
 - (a) A corporation is convicted of an offence against a provision of this Act; and
 - (b) A penalty for the offence is imposed on the corporation; and
 - (c) The amount of the penalty is not paid within the time required for its payment.
- (2) The liability to pay the penalty attaches to:
 - (a) Each individual who was a director of the corporation when the offence was committed; and

- (b) Each individual who is a director of the corporation when the penalty was imposed.
- (3) The liability to pay a penalty or an amount applies regardless of the status of the corporation, including for example, that the corporation is being or has been wound up.
- (4) If the liability attaches to 2 or more persons, the persons are jointly and severally liable.

Of the legislation examined only four pieces of legislation contained statutory provisions imposing concurrent criminal liability on agents and employees. That is the third category of statutory provision that was identified in the legislation examined.

The Third Category: Provisions Attaching Liability to Agents or Employees

Section 44 of the *Stock Act 1915* and section 43 of the *Exotic Diseases in Animals Act 1981* contain the following provisions:

Liability for offence by agent or employee

- (1) Notwithstanding sections 7 and 23 of the Criminal Code or any other Act or law or rule of law or practice, where a person commits an offence against this Act as an agent or employee, the principal or employer, as the case may be, of that person shall be deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with committing the offence.
- (1A) It is immaterial that the offence was committed without the authority or contrary to the instructions of the principal or employer.
- (2) A person is not liable to be convicted for an offence against this Act committed by the person as an employee if the person satisfies the court that the offence was committed while the business of the person's employer was being conducted under the personal superintendence of that employer or of a manager or other representative of that employer, and that the offence was committed with the knowledge of that employer, manager or representative.
- (3) Save as provided by subsection (2) this section applies so as not to prejudice liability imposed under the Act on pay person by whom an offence against this Act is actually committed.

In contrast section 29 of the *Plant Protection Act 1989* simply states that:

A person is not liable to be convicted for an offence against this Act committed by the person as an employee if the person satisfies the court that the offence was committed while the business of the person's employer was being conducted under the personal superintendence of that employer or of a manager or other representative of that employer, and that the offence was committed with the knowledge of that employer, manager or representative.

Conclusion

From this examination of Queensland legislation, the issue of corporate criminal liability and the concurrent imposition of liability on the individuals of the corporation have been highlighted. This examination has identified three categories of provisions used by legislators to impose criminal liability. However, this examination has also identified that there are differences in drafting not only between the three categories identified but within the categories themselves. Whether these differences are deliberate; in the sense that different areas of the law require different mechanisms by which to call upon the lifting of the corporate veil to expose the inner workings of the corporation so as to make practical differences or are mere semantics is an avenue for further examination. However, it is of interest note that David Goddard in his chapter entitled *Corporate Personality – Limited Recourse and its Limits* in the text *Corporate Personality in the 20th Century*, published to celebrate the 100th anniversary of the decision in *Salomon v A Salomon & Co Ltd*³ suggests that the area of criminal liability for corporations and their representatives is an area in which “there is a strong case for consistent and principled formulations.”⁴

³ [1987] AC 22 (HL).

⁴ David Goddard, ‘Corporate Personality – Limited Recourse and its Limits’ in Ross Grantham and Charles Rickett (eds), *Corporate Personality in the 20th Century* (1998) 11, 43.