Rethinking Corporate Crime

James Gobert
Professor of Law, University of Essex

Maurice Punch
Visiting Professor, Mannheim Centre, London School of Economics

Butterworths
LexisNexis™
Contents

Preface v
Table of statutes xv
List of cases xix

Chapter 1 Understanding the nature and causes of corporate crime  1
A. White-collar and corporate crime  1
B. An overview of the literature  3
   1. The formative years  3
   2. New directions in research  6
   3. What have we learned?  8
C. Building the foundations  11
D. The roots of corporate criminality  14
   1. Social, economic and cultural factors  15
   2. The nature and structure of organisations  17
   3. Intent, rationality and competence  18
   4. Defence mechanisms and techniques of dissociation  21
   5. Crime-facilitative and crime-coercive industries  23
   6. Conclusions  25
E. Parameters and case studies  26
   1. Waste disposal and the TCR case: a magnet for criminals  27
   2. Road transport and the Roy Bowles case: eyes wide shut to danger  28
   3. Guinness: a conspiracy of high flyers  30
   4. The Southall rail crash: human error and systemic failure in a world of deregulation  31
F. Preview: corporate crime and the law  35

Chapter 2 Corporate criminality I: Imputed liability  42
A. Introduction  42
B. Companies and the criminal law  46
   1. Are companies fit subjects for the criminal law?  46

2. Is corporate criminal liability needed? 50
C. Corporate criminal liability: the formative stages 53
D. Vicarious corporate criminal liability 55
E. The 'identification' doctrine 59
F. Rethinking the basis of imputed corporate criminal liability: the company as accessory 70
G. Conclusions 75

Chapter 3 Corporate criminality II: Organisational fault 78
A. The picture so far 78
B. Aggregated fault 82
C. Organisational fault 86
1. Mens rea 87
   a. Intention 87
   b. Knowledge 89
   c. Recklessness 90
   d. Gross negligence 92
   e. Negligence and strict liability 94
2. Actus reus 97
D. A defence of due diligence 100
E. Legislative models 102
   1. An offence of corporate killing 103
   2. Lessons from Italy 108
F. Conclusions 113

Chapter 4 Corporate criminality III: Endangerment offences 115
A. Introduction 115
B. The relevance of results in criminal law 116
C. Results and corporate crime 123
   1. The assessment of risk 124
   2. A matter of timing 127
D. Regulatory offences 129
E. Endangerment offences 131
F. Remedial orders and other sanctions 136
G. Accessories to endangerment 138
H. The continuing relevance of harm 140
   1. Criminalisation 141
   2. Investigations 141
   3. Prosecutorial discretion 142
   4. Evidence 143
   5. Sentencing 143
I. Conclusions 144
Chapter 5  Corporate crime in an era of globalisation  146
A. The nature of the problem  146
B. Liability of a parent company for crimes of its subsidiaries  150
   1. Vicarious liability  151
   2. Complicity  153
   3. Conspiracy  155
C. Prosecutions in the host state of the subsidiary  156
   1. Prosecuting a parent company, its directors and its officers in the host state  157
   2. Prosecuting the subsidiary in the host state  160
D. Prosecutions in an international forum  162
   1. Prosecuting an MNE or its subsidiary in an international criminal forum  163
   2. Holding states accountable for human rights abuses perpetrated by MNEs  166
E. Prosecuting a parent company in its home state  169
   1. Jurisdiction  169
      a. The ‘active personality’ principle  169
      b. Universal jurisdiction  170
   2. A violation of home state law?  172
F. Conclusions  178

Chapter 6  When a company is on trial: Rules of evidence and procedure  179
A. Introduction  179
B. The choice of trier of fact: are juries appropriate?  182
   1. The Roskill Report  182
   2. The Auld Report  186
   3. ‘Justice for All’  187
   4. Crimes of corporate violence  189
C. Rules of evidence  191
   1. The hearsay rule and documentary evidence  191
   2. The privilege against self-incrimination/right to silence  196
D. The burden and standard of proof  200
E. Due diligence  204
   1. The due diligence defence under English law  205
   2. Due diligence in Italy and the United States  208
F. The impact of the Human Rights Act 1998  210
G. Conclusion  213

Chapter 7  Sentencing and sanctions  214
A. Introduction  214
B. Theory  216
   1. Theories of punishment  216
2. The applicability of the theories to companies 219

C. an arsenal of sanctions 221
   1. Fines and monetary sanctions 221
      a. The case for monetary sanctions 221
      b. Determining the amount of a fine – the Howe criteria 225
      c. Differential fines 228
      d. Are fines really the answer? 231
   2. Community service orders 233
   3. Reputation-orientated sanctions 236
   4. Restraint-orientated sanctions 239
   5. Remedial orders 242

D. An inclusive package of sanctions 245
   1. The Council of Europe recommendations 245
   2. The federal guidelines for organisational offenders 247

E. Procedures in sentencing 250
F. Conclusions 252

Chapter 8 Individual liability 253
A. Introduction: structural complexity 253
B. Liability of ordinary employees 258
C. Liability of senior supervisory personnel 263
D. Liability of directors and officers 267
   1. Legal responsibility 268
   2. Sanctions 273
      a. Imprisonment 274
      b. Disqualification 278
      c. Community service 280
      d. Combinative sanctions 281
E. Conclusions: individual and organisation 281

Chapter 9 Policing’ companies: Dilemmas of regulation 283
A. Introduction and historical background 283
B. Regulatory agencies 286
   1. Public, private and self-appointed regulators: an overview 288
   2. The role of the government 290
C. Compliance and deterrence strategies 292
D. Inspectorates and special investigatory agencies 296
   1. A conventional inspectorate: the Health and Safety Executive 296
   2. A special inter-disciplinary, investigatory agency: the Serious Fraud Office 301
E. The role of the police 303
F. Regulation in the United States 305
   1. The Food and Drug Administration 306
   2. The Securities and Exchange Commission 309
Chapter 10  Self-regulation and the socially responsible company  315
A. Introduction  315
B. Collective self-regulation  316
C. Individualised self-regulation  322
   1. Advantages  322
   2. A model  324
   3. In the event of a violation  326
   4. Pitfalls  329
   5. Legal and other effects  332
D. Corporate governance and self-regulation  336
E. Beyond compliance: the socially responsible company  342

Bibliography  347

Index  369