

What's A Job?

Ken Phillips

Let's jail an executive!

Everyone seems to want to throw company executives in jail these days.

It started with corporate manslaughter and occupational health and safety legislation that aimed to jail executives in the event of the death of a worker. Victoria tried it in 2002, but withdrew. The Australian Capital Territory government passed laws in 2003 leaning in this direction. New South Wales has had these laws since 2000 and wants to introduce more.

The trend continues with the Federal Government now announcing laws to jail executives who collude with competitors to fix prices and control markets.

It seems that the job of a corporate executive has become pretty dangerous. They are being targeted by powerful regulators, unions, and non-government organizations. But to understand the issues, it is necessary to understand the dilemma of the corporation.

At their core, corporations exist to make money for their shareholders. Managers run firms to make the money. Because managers don't own the firms, they are protected from financial liability if they go broke. But under the well-known agent–principal problem, managers have the opportunity to manipulate operations of the firm for personal benefit. Groups of managers can collude to rig the rules of the firm to maximize personal benefit or to engage in fraud.

In cases of fraud, the criminal law comes into play and executives can find themselves in jail. This has happened with the collapses of Enron and WorldCom in the USA. Even the USA home-

maker queen, Martha Stewart, has recently done time. Australia has its own numerous examples. Importantly, the criminal law acts to protect shareholders, consumers and other traders.

But in threatening executives with jail, the criminal law applies important protections: there is a presumption of innocence; people are held responsible for their own actions; individuals, not the collective, are charged; the prosecution must prove its case beyond reasonable doubt; there is trial before jury; rights to appeal are extensive; and so on.

The foregoing is very different to civil prosecution, where lower levels of proof apply and trial can be before a judge alone. Fines apply; not jail terms. The company as a collective can be sued and will normally suffer the financial penalty for the actions of its managers.

If justice is to be served, executives, indeed anyone, should only face jail if the principles of criminal law apply. This is where corporate manslaughter and some safety laws have gone astray.

The now defunct corporate manslaughter attempts in Victoria sought to hold the corporation as a collective criminally liable. The process of jailing would have amounted to the discovery of executive 'fall guys'. The NSW occupational safety laws breach the principles of criminal justice by presuming guilt and applying levels of proof so high as to make effective defence improbable. Trial is in a non-criminal court (the industrial relations court) and the law prevents full rights of appeal. The NSW laws are scandalous and governments who support this approach clearly reject a proper notion of justice.

Given the trend, how do the Fed-

eral Government's proposed laws rate on grounds of justice?

Quite recently, the cardboard box manufacturer Amcor discovered that several of its executives had been involved in collusive price-fixing with executives from other cardboard manufacturers. Amcor sacked the executives, disclosed the activity and took the wrath of the corporate regulator on the chin.

Companies in this situation become victims of the agent–principal problem. If executive price-fixing is undiscovered, a company and its competitors share in higher profits through higher prices than if they were competing in an unmanipulated market. Presumably, executives benefit through enhanced careers and incomes. As the law stands, however, discovery of price manipulation causes pain for corporations. They are prosecuted and fined and share prices normally drop. Executives, however, lose their jobs but little else.

The new federal laws will shift the focus. Executives who contemplate price-fixing and market-manipulating collusion must also contemplate the risk of jail. Such laws may help address the agent–principal problem. But executives deserve justice as well. The federal laws will only have credibility if the full principles of criminal justice apply. Any replication of the NSW approach deserves to be rejected.

Ken Phillips is director of the IPA's Work Reform Unit and a workplace reform practitioner.

IPA