

Risk, Culpable Business Failure and Reckless Trading.

Law Reform Commission, Dublin Castle,
November 3rd, 2016.

Enforcement and Corporate Offences: Culpable Risk

- Presenting a distinction between entrepreneurial risk taking (good) and operational risk management at a point of insolvency, illiquidity or where additional debt is incurred (requires scrutiny).
- Law Reform Commission Issues Paper 8-2016.
 - Nyberg identified “groupthink”...the “suppression of contrarian views”... and the “exclusion of more prudent and risk averse views”.
 - Honohan identified a “focus on verifying risk management rather than adopting an independent assessment of risk”

Provenance of our current reckless trading provisions.

- Cork Committee Report (Insolvency Law and Practice, Report of the Cork Review Committee (Cmnd. 8558, 1982, para. 198) “...the aims of a good modern insolvency law are....to recognise the effects of insolvency are not limited to...creditors....[and to recognise]...other interests in society are vitally affected.”
- 1990 Companies Act s. 297A:
 - Addition to pre- existing fraudulent trading provisions.
 - Now included in S. 610 Companies Act 2014.
- Similar to UK wrongful trading provisions s.214 IA 1986.
- See also NZ reckless trading provision s. 135 Companies Act 1993
- South African ss. 22 and 77 2008 Companies Act (replaces older legislation).

Reckless trading-some flaws.

- Confuses objective and subjective assessment of risk.
- Deemed reckless trading provides a simple but confusing alternative to legislative framework.
- S. 610 repeats defence originally available in 1990 Act in s. 610(8).
- Interpreted accordingly in *Re Hefferon Kearns* [1993] 3 IR 177 and in *Re PSK Construction Ltd.* [2009] IEHC 538

Objective assessment of risk and the criminal law.

- What an individual knew or ought to have known regarding the risk- is there an objective obligation to identify a risk of loss? (operational).
- What an individual ought to have done once the risk was identified- is there an obligation to react in an objectively assessable manner to a risk?
- Are these standards amenable to criminal sanction?

Civil v Criminal liability?

- Standard of proof. (And Constitutional due process).
- Sanction and collection of monies.
- Enforcement and resources.
- Deterrence or Compensation.

Organisational v Individual culpability.

- Difficulties with organisational models of culpability.
- Importance of the individual decision maker.
- Focus on the individual to enforce standards of behaviour and personal culpability.

Proposals for a way forward.

- Honohan: legal framework sufficient if it had been enforced.
- Redraft reckless trading:- remove s. 610 (8).
- Redraft provisions regarding 'deemed reckless trading'.
- Reconsider range of petitioners s. 610 (1).
- Remove s. 610(4)(b).

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- *Re PSK Construction Ltd* [2009] IEHC 538
- *Bank of India v Morris* [2005] EWCA Civ 693, [2005] 2 BCLC 328
- *Manifest Shipping Company Limited v Uni-Polaris Company Limited* [2003] 1 AC 469.
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