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THE PROSECUTION OF CORPORATIONS

**By Jonathan Clough and Carmel Mulhern
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Corporate liability for crime seems to have come of age in the last decade. It has found a niche in the rich jurisprudential seams of the general part of criminal law. Shifts in the political and social frameworks of blame seek to place responsibility for untoward events at the door of organisations rather than at those of individuals, leading to the use of criminal sanctions rather than, or in addition to, civil remedies. Globalisation, which may lead to pressures for convergence and harmonisation of laws, constitutes an important factor influencing the modern debate about corporate accountability. The growth of transnational corporations, the product of the dismantling of nationalistic anti-competitive measures and the general deregulation movements in the US and other major economies from the 1980s onwards, has transformed the entire architecture of legal control of business activities. National, international and supra-national political institutions and legal regimes are all implicated. Concerns about the reach and power of global corporations, their involvement in fraud, economic crimes, corruption, health and safety breaches and environmental depredations are reflected in the appearance of corporate criminal liability on national and international law reform agendas.¹

Corporate bodies have long been subject to the criminal law in common law jurisdictions. In that sense Clough and Mulhern deal with established principles in their comprehensive (albeit concise) monograph, *The Prosecution of Corporations*. But the longevity of the idea of corporate liability belies its marginal status. The principles underpinning it have rarely been considered at the appellate level, and until recently it has been a topic largely ignored by major writers and theorists. As the authors point out, the twentieth century could be seen as the century of the corporation, and it would be surprising if such a central feature of social and economic life were to have escaped the ever-increasing grasp of criminal law. Perhaps it is surprising that it has remained at the margins for so long. Clough and Mulhern supply a much needed integrated survey of the corporate prosecution and sentencing regime in Australia.

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¹ See further, C Wells, *Corporations and Criminal Responsibility* (2001) Ch 7.

The Prosecution of Corporations successfully combines an analysis of the principles underlying both the regulatory and the common law approaches to corporate liability. All jurisdictions have a raft of provisions that specifically regulate aspects of business, such as health and safety at work, trading standards, control of financial institutions and so on. What differs between jurisdictions is the legal mechanism selected. In some jurisdictions, such as those in Australia, regulation of this sort is partly enforced as a branch of criminal law. Specialist agencies pursue prosecutions, which partly explains the Cinderella status of corporate liability principles. At the same time, there has been a growing expectation that corporations will be liable for ‘classic’ criminal law offences as well. Those jurisdictions that have adopted the administrative route do so in the main because criminal liability for corporate groups has been historically unacceptable as a matter of principle. Criminal law in these jurisdictions addresses individual human agents, and it is not uncommon for individual directors of corporations to be held personally accountable for negligently caused deaths.

It is important to have an understanding of the institutional framework in which corporate prosecution sits. Whether the criminal, quasi-criminal or administrative model is adopted, the regulatory system will form part of a larger four-part institutional structure.² On one side, there are controls intrinsic to technology: such matters include design, safety procedures, and worker training. While many such regimes are not specifically legal, they are nonetheless regulated through scientific and technological practices. Secondly, there exist administrative controls including health and safety regulatory regimes as well as specific legislative provisions. These national differences form part of the business considerations determining the best location for the manufacture and production of goods, although moves towards convergence and harmonisation of business regulation are gradually reducing these differences. Public institutions for absorbing and spreading losses, health care systems and welfare services comprise the third layer, and private law the fourth.

Clough and Mulhern provide a descriptive rather than an explanatory account of the regulatory and criminal aspects of this structure. They are not concerned with the processes that influence prosecution and sentencing decisions. In a brief compass, they successfully cover the key topics that might arise whenever a corporation is the subject of a criminal investigation, prosecution and trial. The focus is on Australia but there is reference of course to other common law jurisdictions, particularly those of England and Wales, and the United States. A thirteen page introduction surveys whether corporations rather than individuals should be prosecuted, and whether liability should be civil or criminal. This is followed by a detailed section on the structure for the investigation and prosecution of corporate crime, outlining

² See M Galanter, ‘The Trans-national Traffic in Legal Remedies’ in Shelia Jasanoff (ed), *Learning from Disaster* (1994) 133–57.

the different regulators and their powers in the collection and use of evidence. This is an area often overlooked in the normative literature on corporate liability. The familiar territory of common law principles of liability is then discussed. The analysis here is robust and the authors are rightly critical of judicial attempts to capture appropriate principles to underpin the liability of an artificial entity such as the corporation. Statutory models are then pursued in the fourth section. The US Model Penal Code and the *Criminal Code Act 1995* (Cth) are highlighted but there is also a perceptive discussion of the role of due diligence defences and of civil penalties. This section concludes with a discussion of corporate manslaughter. In some ways this is an odd place to find this topic and it perhaps demonstrates something of a tension in the authors' focus that runs through the book as a whole. The final section discusses sentencing options, underlining the book's achievement in providing a thorough and, in many ways, practical overview of the whole field.

Let me return now to my suggestion that there is perhaps a confusion of aims in *The Prosecution of Corporations*. It is both reasonable and fair to judge any book on the claims its author(s) make for it. Clough and Mulhern state in their Preface that this is a scholarly text that they hope will also be useful to practitioners. But perhaps halfway between a scholarly and a practitioners' work, this book provides an overview that can be used for the purpose of introducing those unfamiliar with a field to the main arguments and strands of debate, a synthesis and organisation of material, rather than a contribution that moves our understanding forward. That of course begs a large question — moving forward our understanding of what? The discussion of corporate manslaughter that features at the end of the chapter on 'Statutory Models of Corporate Criminal Liability', is a summary of the development of corporate manslaughter at common law. But, rather than consider the forces that have led to corporate manslaughter prosecutions, the section concentrates on the failings of the common law in dealing with this concept. The complex normative and analytical relationship between corporate manslaughter and the regulation of health and safety, the management of risk, and perception about both, is not touched upon.³

The influence of campaigning organisations at the national and international level on the spread of corporate liability is considerable. Similarly, the impact of international agreements, such as the OECD Convention on Bribery and Corruption, provides a significant factor in the landscape of corporate control. While Clough and Mulhern have spread their analysis across a broad area of domestic law and enforcement, they have had here to sacrifice an opportunity to

³ An incidental point is that it is not correct as is suggested at page 171 that corporate manslaughter has not been endorsed in the common law. It has clearly been accepted in England and Wales since the P&O case and more recently in Attorney General's Reference No 2 of 1999 (the Southall rail crash).

reflect on the forces behind the development of that field. Their book is a useful description of the characteristics of the grain that has grown, rather than of the climate patterns or agricultural policies that led to its seeds being sown in the first place.