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Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World

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I. Introduction

In 1842, in the middle of the Industrial Revolution, the Birmingham & Gloucester Railway Co was convicted of failing to obey an order requiring it to construct arches over land severed by the railway.[2] In 2008, the Industrial Revolution long overtaken by the digital revolution, German company Siemens AG pleaded guilty to breaches of the US *Foreign Corrupt Practices Act* (*FCPA*), and was ordered to pay a combined total of more than US$1.6 billion in fines, penalties and disgorgement of profits.[3]

Separated by over 160 years, these cases provide convenient bookends to the multivolume history of corporate criminal liability. While historically many countries, particularly civil law jurisdictions, did not recognise the

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2 *R v Birmingham & Gloucester Railway Co* (1842) 3 QB 223.

3 US Department of Justice, 'Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines' (Press Release, 15 December 2008).

criminal liability of legal persons, the idea that a corporation could be criminally liable came to be widely accepted in common law countries. Today, driven in part by the need to comply with a number of international instruments, corporate criminal liability is widely accepted in a range of jurisdictions and legal systems.[4]

Recognition of corporate criminal liability and the effective prosecution of corporations are, however, quite distinct issues. While the United States has a history of successful corporate prosecutions, particularly for foreign corruption, this is not reflective of the wider story. Corporate prosecutions, where they occur, tend to be for relatively minor 'regulatory offences'. Allegations of misconduct in the financial sector are, more commonly, dealt with by way of 'civil penalties', while the prosecution of corporations for homicide in relation to workplace deaths has been largely unsuccessful.[5] Attempts to bring multinational corporations to account for alleged human rights violations typically result in protracted civil ligation.[6] There is, understandably, a perception that if corporations are in fact subject to the threat of prosecution, it is an idle threat.

This is not to suggest that these are simple matters. The regulation of corporations is a complex issue requiring a range of responses. However, corporate regulation is not advanced if a crucial component of the regulatory response is ineffective. For corporate criminal liability to be a real possibility, it must be underpinned by legal structures that allow the culpability of a legal person to be determined and effective sanctions imposed. Further, given the ability of corporations to act transnationally, enforcement must be supported by mechanisms that allow for effective international cooperation.

Using bribery of foreign officials as an example,[7] this chapter provides a snapshot of corporate criminal liability in Australia, and its capacity to operate effectively in a transnational world.[8] It begins with a summary of the models of liability which may be applied to corporations, followed by a discussion of corporate sanctions, and finally measures which must

4 For example, United Nations Convention against Corruption, A/58/422 (31 October 2003) UNTS Vol 2349, Art 26.

5 See, for example, *R v AC Hatrick Chemicals Pty Ltd* (1995) 140 IR 243.

6 See, for example, *Doe v Unocal*, 395 F3d 932 (9th Cir, 2002).

7 *Criminal Code Act 1995* (Cth) s 70.2 (*Criminal Code*).

8 Although the focus of this chapter is on corporations, there are of course many other types of legal persons, including unincorporated associations, trusts, partnerships and trade unions.

be adopted in order to enforce the criminal law against transnational corporations. It is argued that law reform is not only desirable, it can in most cases be easily implemented. Obstacles to transnational prosecutions are not insurmountable. This leaves the more challenging question of whether there are the resources to investigate and the will to prosecute.

II. Models of Liability

Even for those jurisdictions willing to recognise that a corporation may be a criminal, a fundamental challenge is to develop a model of liability that finds culpability in an artificial entity. This challenge has occupied courts and legislatures for over a century, with broadly speaking two models emerging.

The first is a 'nominalist' or 'derivative' theory of liability, where the liability of the legal person is 'derived' from the liability of an individual. For example, a company may be made liable for a criminal offence committed by an officer or employee of the corporation. The simplest form of derivative liability is 'vicarious liability' whereby a corporation is liable for the conduct of an individual employee or agent acting within the course or scope of his or her employment/agency, and at least in part for the benefit of the organisation. Although a simple form of liability, it does not necessarily reflect organisational fault. Nonetheless, it is applied in US federal law, including the *Foreign Corrupt Practices Act*,[9] which may go some way to explaining the relative success of US officials in prosecuting corporations for foreign bribery.

Another form of derivative liability is the so-called 'attribution' or 'identification' doctrine. In contrast to vicarious liability, the individual on whom liability is based must be of sufficient standing that they may be said to represent the entity; for example, the Board of Directors and other senior officers of a company such as the CEO, managing director, and the like. Because this person is said to *be* the company for these purposes, the company is said to be liable in its own right.[10]

9 US Department of Justice and the US Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* (2012) 27.

10 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

Although applied in a number of common law countries, the identification doctrine has proved to be hopelessly inadequate in prosecuting medium to large corporations for serious crimes, particularly in the context of workplace deaths.[11] In modern decentralised organisations senior officers may be removed from the relevant conduct, with considerable authority often vested in 'middle-managers'. For this reason, some jurisdictions have defined the relevant person more broadly. For example, in Australia the Commonwealth *Criminal Code* provides for a form of attribution based on the conduct of a 'high managerial agent', defined as 'an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy'.[12]

Even if the scope of derivative liability is expanded, it is still dependent on individual liability. This is particularly problematic in large organisations where it may be difficult to prove individual responsibility. In contrast, 'realist' or 'organisational' models of liability seek to reflect the culpability of the organisation itself; for example, by its policies and the way in which it is structured.

A particularly clear example is found in Pt 2.5 of the *Criminal Code* which applies to federal offences including bribery of foreign officials under s 70.2. In addition to liability based on attribution, it imposes liability on corporations based on the concept of 'corporate culture', defined to mean 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.[13] Although an ambitious example of organisational liability, it has yet to be applied in practice. It may be that prosecutors are wary of basing prosecutions on such a novel and nebulous concept,[14] and it is notable that there have been no successful prosecutions for foreign bribery in the 15 years since the current laws were enacted.[15]

11 See generally, Jonathan Clough, 'A Glaring Omission? Corporate Liability for Negligent Manslaughter' (2007) 20 *Australian Journal of Labour Law* 29, 32–33.

12 *Criminal Code* s 12.3(6).

13 Ibid.

14 Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 144.

15 Law Council of Australia, Submission to the Senate Economics Reference Committee Inquiry into Foreign Bribery, 24 August 2015.

In contrast, one of the simplest and potentially most effective forms of organisational liability is liability for omissions. That is, where a legal person is under a legal obligation to act, its failure to discharge that obligation can be established without finding fault in an individual. This may then be combined with a fault element such as negligence, or a defence of due diligence to reflect organisational fault. For example, under s 7 of the *Bribery Act 2010* (UK), where an associated person engages in bribery, the organisation is liable for failing to prevent it. However, this liability is subject to a defence where the company can prove that it had in place adequate procedures designed to prevent such conduct.

The above discussion provides only a brief summary of the various ways in which criminal liability may be imposed on corporations. From a reform perspective, the challenge is not so much finding new models of liability, it is applying those models consistently and appropriately. For example, although Pt 2.5 of the *Criminal Code* provides a default model of liability for federal offences, no such state provision exists, leaving them to rely on the demonstrably inadequate common law.[16] If a particular model is found to be ineffective, it may be amended. Pt 2.5, for example, is excluded from some competition law provisions in favour of other models of liability.[17]

III. Sanctions

Although criminal liability without an effective sanction is largely a symbolic gesture, the sentencing of corporations has typically been neglected in law reform. While a corporation cannot be rehabilitated or deterred in the same way as a person, it does not mean that these concepts do not apply to corporations.[18] For example, an emphasis on organisational fault provides a means by which change can be brought about at an organisational level.

However, in all Australian jurisdictions the sentencing options that may be imposed on a corporate defendant are determined by the relevant offence, typically a fine. While a financial penalty may be an appropriate sanction in many cases, the sentencing judge has limited ability to tailor

16 See, for example, *ABC Developmental Learning Centres Pty Ltd v Wallace* [2007] VSCA 138.
17 *Competition and Consumer Act 2010* (Cth) s 6AA.
18 Clough and Mulhern, above n 14, 186–87.

the penalty to achieve sentencing outcomes. In this respect, Australian legislation falls behind some international examples. The French Penal Code, for example, makes provision for a range of sanctions applicable to legal persons.[19] Similarly, the United States Sentencing Guidelines contain sophisticated guidance for trial judges in sentencing organisations.[20] While it is beyond the scope of this chapter to discuss them in detail, it is important to give some sense of the range of sanctions that may be applied to legal persons.

A. Monetary penalties

Fines are a common form of sanction against legal persons, and may provide an effective deterrent. In many cases the fine to be imposed is set as a multiple of that applicable to a natural person. Although in some cases a fine may simply be absorbed as a business cost, the impact of a monetary penalty may also be felt by 'innocent' third parties such as employees, shareholders and consumers. A challenge is therefore to set the appropriate level of penalty to be applied. For example, s 70.2 of the *Criminal Code* provides that where a body corporate is found guilty of bribing a foreign official, the maximum penalty to be imposed is the greatest of 100,000 penalty units, three times the value of the benefit obtained, or 10 per cent of the annual turnover of the body corporate during the relevant period.

B. Adverse publicity

For corporations with a significant reputation, publicising its offending may have a significant deterrent impact both on the organisation itself and others. It may also have an important educative effect, making other entities, stakeholders and the community aware of the illegality of the relevant conduct.

C. Probation

As part of its sentence, a corporation may agree to comply with certain undertakings and to be subject to a period of supervision. Such conditions may be remedial, aimed at making good the harm caused by the

19 Articles 131–39.

20 United States Sentencing Commission, *Federal Sentencing Guidelines Manual,* Ch 8.

commission of the offence, or rehabilitative; that is, requiring steps to be taken in order to ensure organisational change. As such conditions would generally be subject to the supervision of the court or regulator, they are potentially a powerful mechanism for achieving organisational change.

D. Disqualification or disestablishment

A legal person that has committed an offence can be disqualified from engaging in certain activities, or can be disqualified from government contracts or funding. At the most extreme end, a corporation may be disestablished; the equivalent of capital punishment. Given the serious secondary impacts of such a sanction, it is likely to be applied rarely; for example, to organisations with no legitimate purpose.

As with models of liability, the reform challenge in relation to corporate sanctions is less to do with available options, and more to do with consistency and availability. Many of the sanctions outlined above are found in various pieces of legislation, but their availability is limited to contraventions of those acts.[21]

IV. Transnational Crime

A crucial feature of the success of modern corporations is their ability to operate transnationally, with companies in one jurisdiction operating in other jurisdictions through subsidiaries or other related entities. Combined with the doctrine of separate legal personality, this has allowed corporations to derive global profits while distributing corporate risk. For example, in 2016 German company Siemens AG employed approximately 351,000 people, in over 200 countries, generating revenues of €79.6 billion.[22] Imposing criminal liability on such corporations presents considerable legal challenges. In addition to ensuring that local corporations may be prosecuted for conduct occurring outside the jurisdiction, it is also important that law enforcement agencies are able to cooperate effectively to investigate and prosecute transnational corporate crime. Three particular issues that should be considered are jurisdiction, the liability of corporate groups, and mutual assistance.

21 See, for example, *Crimes Act 1900* (ACT) s 49E; *Competition and Consumer Act 2010* (Cth) s 86C.
22 Siemens AG, *About Siemens*, www.siemens.com/about/en/.

A. Jurisdiction

Although criminal law is typically local in operation, extraterritorial liability may be imposed on corporations for conduct occurring outside the jurisdiction. Typically this is based on the 'nationality principle' where liability is imposed on a corporation incorporated in the jurisdiction for conduct occurring anywhere in the world. For example, an Australian corporation may be convicted of bribery even if the conduct constituting the offence occurred wholly outside Australia.[23]

B. Corporate groups

In many cases, legal persons will act through subsidiaries or other related entities. It may therefore be necessary to consider whether one organisation may be made liable for the conduct of other organisations. For example, a parent company may be made liable for bribery by a subsidiary incorporated in another jurisdiction.

In some cases it may be possible to impose liability on the parent for being an accessory to the offence, or for conspiring to commit the offence. Alternatively, liability may be imposed where a corporation can be shown to have exercised control over another entity,[24] or for failing to prevent the commission of an offence by an associated entity.[25]

C. Mutual legal assistance

Effective prosecution of transnational crime often requires significant international cooperation. However, challenges may arise where, for example, a country does not recognise the criminal liability of corporations, but chooses to impose administrative liability. In such cases, a request for assistance may be refused in the absence of dual criminality. It is therefore important for countries to consider the extent to which they are able to provide assistance in relation to civil and administrative proceedings where this is consistent with their domestic legal system.[26]

23 *Criminal Code* s 70.5. See also *Bribery Act 2010* (UK) s 7(5).
24 For example, US *Age Discrimination in Employment Act* (29 USC § 623(h)).
25 For example, *Bribery Act 2010* (UK) s 7(5).
26 UN General Assembly, United Nations Convention against Corruption, A/58/422 (31 October 2003) UNTS Vol 2349, Art 43(1).

V. Conclusion

This chapter began with two events illustrating the arc of corporate criminal liability over the past century and a half. The use of bookends as a metaphor was, to some extent, inapposite if it suggests that the evolution of corporate criminal liability is over. Such liability will continue to evolve, particularly in its application to transnational criminal activity. In other respects the metaphor is apt as the prosecution of Siemens, and others like it, illustrate that with appropriate structures in place even large transnational corporations can be effectively prosecuted.

Law reform should focus on ensuring that these mechanisms are in place across the range of corporate activity, including transnational operations, so that the focus can move from whether it can happen, to whether it should. In the Australian context, there is a need for a review of models of corporate criminal liability. The corporate liability provisions of Pt 2.5 of the *Criminal Code* provide a sophisticated default model of liability that is rarely used. This would be an ideal starting point for considering the impediments to its use, and whether alternative forms of liability should be imposed in specific areas of corporate activity. Such a review could also consider whether extraterritorial legislation is appropriate in certain cases, and the mechanisms by which liability could be imposed on corporate groups. The importance of such reforms is equally applicable to the states, where corporate criminal liability is often dependent on the inadequacies of the common law. In the context of sentencing reform, a simple and potentially highly effective reform would be for each jurisdiction to provide for a separate section of their sentencing legislation dedicated to corporate offenders, outlining the sanctions available and principles to be applied.

Not surprisingly, political interest in corporate criminal liability ebbs and flows as a result of specific concerns such as workplace deaths,[27] cartel behaviour[28] and, most recently, foreign corruption.[29] While this can produce important reform outcomes, there is the danger of a piecemeal approach and a missed opportunity to look at corporations as a class of

27 *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT).

28 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (January 2003).

29 Attorney-General's Department, *Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (Public Consultation Paper, April 2017).

offender across a range of offences. Ensuring that all corporate offences are supported by an effective model of liability, backed by appropriate sanctions, would provide the essential foundation for effective prosecutions, and clarity for business as to the basis on which they are to be held liable. Australia has been a leader in this field in the past. Reform of corporate criminal liability would not only improve the quality of corporate regulation domestically, it would allow Australia to play a leading role in international efforts to tackle the use of legal persons in the commission of transnational crimes.

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