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Research Handbook on Corporate Legal Responsibility

Edited by **Stephen Tully**



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Stephen Tully

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Political Science, UK*

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**RESEARCH HANDBOOK ON CORPORATE
LEGAL RESPONSIBILITY**

For my family

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Abbreviations

ACCA	Association of Chartered and Certified Accountants
ALI	American Law Institute
APELL	Awareness and Preparedness for Emergencies at the Local Level
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
ATCA	Alien Tort Claims Act
BAT	best available techniques
BPEO	best practicable environmental option
BRASS	Centre for Business Relationships, Accountability, Sustainability and Society (UK)
CA	Company Act
CA	Court of Appeal
CBCA	Canada Business Corporations Act
CBI	Confederation of British Industry
CCA	Centre for Corporate Accountability
CCA	Commercial Company Act
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEO	chief executive officer
CER	corporate environmental reporting
CESR	corporate environmental and social responsibility
CFO	chief financial officer
CGC	Corporate Governance Council
CLERP	Corporate Law Economic Reform Program
CLR	Company Law Review
CoE	Council of Europe
CORE	Corporate Responsibility Coalition
CSR	corporate social responsibility
DEFRA	Department for the Environment, Food and Rural Affairs (UK)
DTI	Department of Trade and Industry (UK)
EC	European Community
ECOSOC	Economic and Social Council (UN)
EIA	environmental impact assessment
EPA	Environmental Protection Act
ESD	ecological sustainable development
ESRC	Economic and Social Research Council (UK)

ETI	Ethical Trading Initiative
EU	European Union
EWC	European Waste Catalogue
FBI	Federal Bureau of Investigation (USA)
FOEI	Friends of the Earth International
FSC	Forest Stewardship Council
GAP	Government Accountability Project (USA)
GBE	government–business enterprise
GCA	General Corporations Act
GRI	Global Reporting Initiative
HL	House of Lords (UK)
HSE	Health and Safety Executive (UK)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IGO	international governmental organisation
ILO	International Labour Organisation
IOE	International Organisation of Employers
IPCC	Intergovernmental Panel on Climate Change (UN)
IPPC	Integrated Pollution Prevention and Control
IRS	Internal Revenue Service (USA)
ISO	International Organisation for Standardisation
JpOI	Johannesburg Plan of Implementation (WSSD)
MNC	multinational corporation
MNE	multinational enterprise
NGO	non-governmental organisation
NIEO	New International Economic Order
OECD	Organisation for Economic Cooperation and Development
OFR	operating and financial review
OHCHR	Office of the High Commissioner for Human Rights
OSHA	Occupational Safety and Health Administration
plc	public limited company
RSC	Revised Statutes of Canada
SASF	semi-autonomous social field
SD	sustainable development
SEC	Social Economic Committee (The Netherlands)
SI	statutory instrument
SME	small and medium-sized enterprise
SRI	socially responsible investment
TEU	Treaty of the European Union
TNC	transnational corporation
UK	United Kingdom
UN	United Nations

UNCED	UN Conference on Environment and Development
UNCTC	United Nations Centre on Transnational Corporations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNEP FI	UNEP Finance Initiative
UNGA	UN General Assembly
USA	United States of America
WAG	Welsh Assembly Government
WBCSD	World Business Council for Sustainable Development
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation

Foreword

Michael S. Baram

Corporate activity and influence have grown to unprecedented levels within nations and across borders, with many consequences for human wellbeing. Among the consequences are harms to health, safety and the environment which were foreseeable and avoidable. In addition, campaigns to advance human rights and ensure sustainable use of natural resources for the benefit of future generations are frustrated by corporate indifference. Yet another form of harm has reached great proportions in recent years: breach of public trust as evidenced by revelations of corporate corruption, bribery, misuse of public funds, and other criminal practices undertaken with disregard for law and ethical principles.

As a result, there is widespread concern and expression of outrage about corporate culture and behaviour, which in turn causes many to question the adequacy of our laws and other means of social control over corporate enterprise. And ultimately, questions are raised about the moral sense of our society, which shapes our laws and their means of implementation.

These harms and concerns motivate this book, a remarkable collection of informed perspectives on corporate legal responsibility, expert analyses of what the law is, and thoughtful arguments on what the law ought to be. Unlike traditional treatments which dwell on corporate responsibility to those who have a direct financial stake in its business activities as shareholders, the focus herein is on corporate responsibility for preventing harm to workers, consumers, the public and the environment, for enhancing human rights, for accomplishing sustainable development, and for restoring and keeping public trust.

Although the chapters address diverse topics and issues, common themes lead to a coherent and compelling view of what is wrong, why and what needs to be done. Ample evidence is provided about harms caused by corporate negligence, ignorance, indifference, and knowing disregard for law and foreseeable risk. Thoughtful analyses of legal theories, laws and regulations which comprise the legal framework for corporate governance and accountability in various nations are cogently presented and illuminate the types of reforms needed. And appeals are made for adopting enlightened concepts of human wellbeing and corporate governance into law in a manner which ensures their infusion into corporate culture.

In this undertaking, the authors have had to confront unresolved issues and ambiguities, deeply rooted in western nations, regarding the status and role of the corporation in society, and individual and organisational accountability. They respond to the well-known eighteenth-century lament that the corporate wrongdoer 'has no soul to be damned, and no body to be kicked' (attributed to Edward, Baron Thurlow (1731–1806), Lord Chancellor of England, in Coffee, 1981, p. 386). They contest the narrow thesis of the law and economics school that 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it engages in open and free competition' (Friedman, 1962: 133–6). And they choose the progressive view that 'it is absurd to regard the corporation simply as an enterprise established for the sole purpose of allowing profit making . . . Every corporation should be thought of as a social enterprise whose existence and decisions can be justified only insofar as they serve public or social purposes' (Dahl, 1975: 18–19).

In their analyses and recommendations, the authors have also pragmatically considered competing national policies which frequently have the effect of diluting laws intended to promote corporate social responsibility. In the real world, progressive nations are not monotheistic. They worship economic growth and the rapid advance of risky new technologies and business ventures while at the same time espouse and try to improve environmental quality, business ethics and human wellbeing. Too often, in legislative, judicial and regulatory forums, primacy is given to the former and its corporate agents, thereby weakening constraints on corporate behaviour and encouraging corporate excess. It is to the credit of the authors that consideration of these dysfunctional circumstances has increased the value and utility of their analyses of self-regulatory systems, corporate law, civil and criminal liability doctrines, diverse types of regulation and enforcement mandates, and international resolutions.

Thus, an important agenda for legal research and law reform is provided, and the cause of advancing the standards of corporate behaviour for societal benefit is well served, by this book.

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Preface

Stephen Tully

This preface will not aspire to summarise what follows but merely attempts to locate each chapter within an overall narrative around the issue of corporate legal responsibility, sensitise readers to degrees of corporate responsiveness, point out evolving models of regulation or novel organisational forms and draw attention to distinctive stylistic features. It is evident that prospective liability remains a fundamental business consideration, perhaps second only to competitive pressures arising from the marketplace for the influence exerted over commercial behaviour. Recent years have seen, for example, the passage of the Sarbanes–Oxley Act in the United States following in the wake of the Enron collapse, the *Prestige* oil tanker disaster off the Spanish coast during 2002 and the Global Compact emanating from the United Nations. Their common thread is the proposition that corporations must bear a responsibility commensurate with their prominent social role, significant operational impacts and substantial economic privileges. That said, the notion of corporate legal responsibility is one of considerable vintage. Indeed, the merchants of antiquity well-appreciated the necessity for contractual enforcement and the orderly conduct of commercial affairs prior to the emergence of the modern nation state.

In the contemporary era the question of legal responsibility is being swept aside by renewed interest in so-called ‘corporate social responsibility’. It is currently fashionable to call upon companies to ‘go beyond legal compliance’ in a diverse range of social, economic and environmental fields. The terminology of ‘must’, ‘should’, ‘can’ and ‘will not’ have begun to accrete along a continuum of ‘responsibility’. Milton Friedman famously rejected corporate social responsibility for usurping investor funds and distracting managers from the business of profit-making. Since implementing social welfare agendas was the responsibility of good government, it was sufficient for corporations to act within the boundaries established by law. One may add that the social responsibility agenda frequently overlooks the limits of voluntarism in a market context. Law, by contrast, is uniquely applicable to all businesses, irrespective of size, location or business sector, and thereby guarantees a level competitive playing field in certain respects. Law as such also carries the additional virtue that coercive enforcement measures may be employed by governments, thus ensuring a minimum floor through which market laggards are not

permitted to fall. Chapter 9, by DiMento and Geis, recalls that criminal law, for example, cannot be detached from the mechanics of national enforcement institutions. By drawing attention to what companies should be doing, the current corporate accountability agenda devotes lesser attention to what firms are in fact obligated to do.

It is in this respect that the *Research Handbook on Corporate Legal Responsibility* makes such a valuable contribution as a telling reminder that legal responsibility is both the beginning and end point for corporate social responsibility. For entrepreneurs to assume unanticipated responsibilities in circumstances where administrative structures are weak, corrupt or ineffective is disproportionate and misguided from a practical point of view. That said, the prospect of non-governmental organisations (NGOs) exercising those regulatory functions formerly undertaken by governments is persuasively addressed in considerable detail by Sullivan (Chapter 16). The adoption by corporations of private voluntary initiatives in the nature of codes of conduct, guidelines, performance standards or certification schemes which encourage greater decision-making transparency through public reporting or independent verification may be no substitute for (and could ultimately weaken) law's authority. Community expectations which circumscribe the propriety of commercial conduct are authoritatively delineated in law. Strict legal compliance is therefore the litmus test underlying sustainable financial profit for any given company, the supreme indicia of public trust and determinative of the social licence to operate. Or is there more to the relationship between social and legal responsibility than first meets the eye? The contribution made by Foster to this volume (Chapter 1) is particularly instructive on how the historical evolution of the juristic personality of corporations has a recurring relevance for current debates.

This handbook brings together the work of more than 20 leading academics, practitioners, campaigners and policy-makers from North America, Europe and Australia. I am quite satisfied that collectively the chapters cover the full gamut of issues associated with corporate legal responsibility and deservingly highlight some of the flavour of its multifaceted complexity. Each contributing author takes contemplative stock of the rudimentary cases or materials pertaining to his or her field but also identifies prominent institutions or leading sources of information to which interested readers may refer. The aggressiveness with which each author addresses corporate legal responsibility varies: some chapters are valuable as introductory pieces whereas others exhaustively critique particular legal doctrines or legislative amendments. Any questions raised in one chapter are frequently complemented by answers contained within another. All authors were mandated to describe the broad theoretical framework pertaining to their speciality, provide an overview of its historical evolution, accurately portray the contemporary legal position, assess

the advantages and disadvantages of a particular approach and identify influential public policy considerations with a view to predicting future developments. Beyond the similarities demanded by 'house style', no attempt was made to impose any particular editorial expectations. That said, both well-established commentators and newly-emergent voices were expected to present a comprehensive account of relevant information in a succinct style which is comprehensible to the layperson as much as the well-informed. The outstanding legal review contained in the chapter by Wells (Chapter 8), for example, is the epitome of clarity in the expression of extremely complex ideas.

The thought-provoking chapters contained within this handbook are timely and necessary contributions to an ever-growing domain. Indeed, this compilation confirms the emergence of a distinct subdiscipline which draws together threads from other well-established and related fields (particularly economics, strategic management, accounting and sociology) around a common question. Thus the peculiarly legal responsibility of corporations need not be a field dominated exclusively by lawyers. Emphasis properly lies upon the term 'responsibility' and not merely in the sense of accountability but also in respect of the actual or envisaged commercial role. That said, the contribution made by this volume is distinctively (and unreservedly) legal. It may be recalled that corporations are incorporeal entities that owe their very existence to the law and whose behaviour is governed by that discourse. The treatment of substantive legal topics such as tort (Tully: Chapter 7) or criminal law (MacPherson: Chapter 11) is noteworthy for recourse to the comparative method. Furthermore, the utility of empirically grounded research is convincingly demonstrated in the contribution made by Frater (Chapter 12): commercial attitudes to such nebulous concepts as sustainable development employed to underpin legal frameworks become spurs to greater operational efficiency in the context of waste management practices.

The handbook illustrates that conceptual precision is required for a multiplicity of interrelated theories, whether they be governance, stakeholder or partnership, and our understanding of regulation is no exception. It is by no means a given that corporate economic responsibility, corporate environmental responsibility or corporate social responsibility can (or indeed should) be ensured through corporate legal responsibility. The character of law as a reactionary response to deviant commercial practices is considered at length by Aiolfi and Pieth (Chapter 22) with reference to bribing foreign public officials. Whereas law as prescription is government led, the challenge of moulding clumsy legal doctrines around market dynamics suggests the idiosyncrasies and limitations of a strictly instrumentalist approach. Consider, for example, the prospects of criminal law seeking to temper the profit motive with worker or consumer safety, a question thrown into stark relief in the chapter by