

## BOOK REVIEW

### **The Prosecution of Corporations by Jonathan Clough and Carmel Mulhern (Oxford University Press, 2002)**

This is an extremely welcome publication written by the winning combination of, respectively, a current university scholar and a corporate lawyer with one of Australia's most prominent telecommunications corporations. As such, the book has authors with sound academic credentials who have conducted some meticulous research, but who also show an appreciation of the practical impediments associated with imposing criminal liability on corporations in the twenty-first century. By combining legal analysis with the identification of procedural and evidentiary problems facing those who seek to prosecute corporations, the book achieves its objective well.

The authors are quick to make the point that this is not a book concerning corporate crime in the sense of illegal conduct engaged in by company officers for personal gain. Rather, it is about the ways in which corporate entities themselves can be regulated through the use of criminal prosecution and punishment. As such, the discussion could have delved more fully into the nature of crime itself to help the reader understand whether it is indeed appropriate for corporate entities to be subject to this regulatory system. One could take the view, for example, that punishment can really only be meted out to human actors and that any sanctions imposed on corporations should have their effect through the individual culpability of company officers. Although the authors explain why individualistic criminal responsibility may be inappropriate, they fail adequately to deal with the argument that any punishment imposed on corporations ultimately affects shareholders and employees who might be unaware of the illegal conduct committed, and unable to take action to prevent it.

The book did, however, provide a comprehensive and critical review of the various sentencing options open to courts when dealing with corporate defendants. Although the use of publicity as a sanction was included, it would have been appropriate to explore certain restorative approaches that seek to change behaviour through reintegrative means. Because corporate image is of such importance, shaming could arguably be a constructive means of changing corporate behaviour.

Some reference is made to public perceptions of crime committed by corporations, but detailed analysis of the seriousness of such offences was not really addressed. There is – substantial empirical research on how the public ranks different types of crime in terms of perceived seriousness, and in recent times corporate crime (including crimes by corporations) has achieved higher scores than in the past. By reviewing such research, the question of the appropriateness of imposing criminal liability on corporations could have been

further explored – although, of course, public perception is only one factor to be considered when proscribing certain types of behaviour.

The content of the book remains fairly focused on legal questions of interpretation and definition, and a criminologist may lament the absence of any attempt to quantify the nature and extent of corporate criminal prosecutions in Australia in recent years. The few instances in which quantitative information on corporate prosecutions in Australia was provided were that just over one per cent of defendants sentenced in Victorian Magistrates' Courts were corporations, and that there were fourteen civil penalty actions commenced under the *Corporations Act* between 1993 and 1998. It would, for example, have been possible to collate statistics on the number and value of investigations and prosecutions undertaken by agencies such as the Australian Federal Police, the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions to give an idea of the scale of the problem, in addition to examining court data from the various Australian jurisdictions.

The substantive sections of the book deal with questions of investigation, prosecution, and sentencing of corporations, drawing illustrations primarily from the operation of the ASIC, the Australian Competition and Consumer Commission and the Australian Taxation Office. The chapters dealing with investigations and the problems of obtaining evidence highlight well the difficulties associated with applying criminal investigation regulations designed for dealing with individual suspects to corporate entities. One important omission in the current legislative framework, for example, is that an Australian corporation can avoid prosecution simply by dissolving itself – an approach not possible in the United States. Other chapters provide sound legal analysis of the common law and statutory principles behind imposing liability on corporations (including a fascinating account of the history of corporate criminal responsibility and a justifiably critical commentary on the corporate liability provisions of the *Criminal Code Act 1995* (Cth)). In these chapters a great deal of detailed information is provided that would make the book a useful tool for legal practitioners.

One omission, however, concerns the absence of discussion of the problems associated with the use of electronic evidence in investigations and prosecutions. Because modern corporations invariably have their documentary records maintained electronically, the need to understand the scope of search and seizure powers relating to digital files is of critical importance. An examination, for example, of the many computer forensic issues that arise in prosecutions such as how to deal with gigabytes of data and how to disaggregate relevant from irrelevant material from a hard drive would have been useful. Such practical problems arise regularly in recent investigations undertaken by regulators.

A further omission is the failure of the book to address the problems of reporting criminal conduct involving corporations and how to encourage and to protect whistleblowers, particularly those who come from within the miscreant organisation. In the case of individual liability, the problems of public interest

disclosure have created considerable practical difficulties and it would have been helpful for these issues to have been canvassed in connection with corporations as alleged wrongdoers.

While acknowledging that this book is primarily focused on legal rather than policy analysis, a fuller understanding of the practical impediments to prosecuting corporations could have been shown. In particular, the relatively low level of funding provided to police and prosecution agencies means that violent crime often takes priority over financial crime. If serious fraud or intellectual property crime is beyond the budget of many investigatory and prosecution agencies, then taking on corporations has an even lower priority. The problem here is that punishment becomes ad hoc and is imposed on so-called high profile cases, sometimes unfairly.

Nonetheless the authors identify some excellent targets for reform, particularly concerning the problem of determining when to invoke criminal sanctions on corporations as opposed to the vast array of alternative regulatory responses. It is to be hoped that prosecution agencies will take up the challenge to reform their prosecution policies so as to clarify precisely when corporations should be subject to criminal proceedings. Other more challenging suggestions such as the creation of a single Commonwealth corporate enforcement agency, while rationally justifiable, may take many years to win currency, although the newly constituted Australian Crime Commission could arguably take on this role with an appropriate amendment to the definition of 'serious and organised crime' in its legislation.

Although the cover presentation of the book is somewhat bland with the misty scales of justice that adorn many books to do with the law, it has a clear, if rather small typeface set in pages with very narrow margins – but sensible use of headings.

The style of writing is remarkably uniform throughout which is often difficult to achieve in jointly-authored works-though the authors do share similar professional backgrounds and have been educated in similar ways by their mentors at Monash University. Their expression is erudite and their style clear which makes reading this detailed book a pleasure. There are also some pithy and well-chosen quotes to liven-up new sections. The authors show a balanced appreciation of weighing the needs of the state to respond effectively to illegality against the rights of individuals to be protected against excessive displays of investigatory power. Such a balance is obviously difficult to maintain but the authors can be strident in voicing criticism where individual rights have been found to have been infringed.

Although a lengthy bibliography is included, it failed to include all the material cited throughout the text and in footnotes, which was unfortunate. Some authors' names were also misspelt. Another minor problem was the convention of citing cases in footnotes without referring to the note in which they were first cited, thus making it difficult to locate the full reference.

Jonathan Clough and Carmel Mulhern are to be commended for writing such a thorough and timely account of the many problems associated with prosecuting corporations. One can only hope that their suggested solutions will be considered carefully and promptly by policy makers and legislatures throughout the country, as they have identified many anomalies of both procedure and form that should arguably no longer be tolerated in Australia.

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