Preface

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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 deservedly 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

Pemberton (Chapter 10). Perhaps Sabapathy's (Chapter 13) sceptical conclusion for the role of law has considerable justification, particularly in view of the 'legal acrobatics' required to hold corporations to account. Law can also be considered to be the byproduct of a process of communication or dialogue whereby various actors conclude negotiated outcomes. The unfolding account in the chapter by Stamhuis (Chapter 15) illustrates how novel processes such as interactive regulation blur the boundaries between self-regulation and command-and-control approaches. For some corporations, lawmaking becomes an opportunity to assume a leading role in shaping the architecture of corporate governance.

Given the undeniable legal deficiencies which have been identified by the critical assessments contained in the present volume, one may also wonder whether law reform should properly constitute the all-too-frequent solution. The truth of the matter is that tinkering with the nuts and bolts of law is often easier said than done. Consider, for example, recent efforts such as the Company Law Review within the United Kingdom in light of the systematic critique offered in the chapter by Parry (Chapter 4). The scope for legal innovation as an interim measure for resolving contemporary dilemmas is a point well made by Ruane (Chapter 6). The chapter prepared by Paz-Ares (Chapter 3) goes one step further to evaluate the phenomena of cross-pollinating national legal systems with respect to director duties in Latin America. It is therefore a continuing role and responsibility for legislators, courts and lawyers to design and enforce a stable and predictable legal environment which is simultaneously conducive to economic progress and social growth. To facilitate rather than unduly hinder market operations, legal standards must be reliable, relevant and above all workable. The initiatives adopted by inter-governmental institutions in the labour and environmental fields and evaluated in the chapters by Kim (Chapter 18), and Barbut and Van der Lugt (Chapter 20) are particularly informative in this regard.

Although the handbook clarifies the strengths and weaknesses of the applicable legal framework, it is still, however, far from an exhaustive coverage. This is partly due to the severe restrictions of length imposed upon contributors but also because, as observed above, significant strands of corporate responsibility are discernible within a broad range of subjects. The interdisciplinary nature of corporate legal responsibility naturally lends itself to worthwhile perspectives from accountants, auditors, sociologists and political scientists. As much is suggested by the insights offered through a gender perspective in the chapter by Martin-Ortega and Wallace (Chapter 17) as well as the enlightening pragmatism of activists such as Bennett and Burley (Chapter 21) confronted with the task of countering corporate power. Additional commercial opinions on how executives tackle the challenges posed by legal compliance and the temptations of regulatory avoidance would

be welcome, as well as informed discussion on the process of translating legal constraints into management strategies. What is really going on within the boardroom? Although corporate perspectives are presented or implied in several chapters, it is also worth remembering that corporations are not homogeneous. 'The firm' is frequently perceived as a ravenous one-dimensional ogre and the struggling corner store or inspired entrepreneur is often neglected. Such questions could frame a subsequent research agenda and readers will observe that the handbook omits a chapter entitled 'Conclusions'. Instead they will encounter the origins and development of various legal approaches, given an accurate sense of the way in which law addresses the question of corporate accountability and are provided with several analytical examples. For example, the chapter by Wijnants (Chapter 19) is a frank assessment of the likely impact of European environmental law upon commercial behaviour from the perspective of a legal practitioner.

The ongoing need to tweak an imperfect fit between occasionally conflicting policy objectives and legal frameworks means that the regulatory environment will evolve as much as the amorphous corporate form. However, the fundamental concepts surrounding corporate legal responsibility will remain immutable. The fixed points on this particular compass include the core *raison d'être* of the corporation, its fundamental organisational structure and the significance of the national legal context. The fourth consideration is the question of responsibility to whom, an overarching theme for all the contributors to this handbook. Any classical treatise on corporate legal responsibility would ordinarily be expected to cover the interface between corporations and traditional rights-holders such as employees, shareholders, suppliers and consumers. However, a more nuanced depiction of 'responsibility' within the routine day-to-day working relationships of any given firm must also convey the concept of an 'extended enterprise'. This handbook imaginatively extends the web of relationships beyond mere contracting to encompass novel 'stakeholders' such as public interest organisations, commercial peers, industry bodies and the wider community. Although these actors self-evidently drive the regulatory agenda, the challenge of broadening the notion of corporate responsibility with all due deference to legal efficacy and policy priorities is ably illustrated in the chapter by Goulding and Miles (Chapter 5). Consider also the consequences for corporate accountability when an employee crosses the divide to become an enforcement mechanism in the contribution made by Gold (Chapter 14). Horrigan (Chapter 2) encapsulates extremely well the sense of what overall is at stake:

Acting primarily in the interests of shareholders and without regard to or even at the expense of the interests of other stakeholders, including those who might have contributed something directly to the prosperity of the corporation, such as employees, financiers, creditors and people using the corporation's products, must

be justified within a coherent conceptual framework of corporate relationships and the responsible exercise of corporate power.

With this objective in mind, readers need not start at the beginning and work their way methodically through to the end. Such a process would be interesting for revealing differing perceptions of the role of law, an author's assumptions on the nature and purpose of the corporation and their grasp of the subtle distinctions at play between liability, accountability and responsibility. The nature of a continuing dialogue is such that none of the views expressed herein are necessarily endorsed by any other contributor. As a reference work, readers are encouraged to dip into each self-contained chapter as they see fit. The structure of the handbook is as follows. Those chapters which sketch out the broad theoretical and conceptual background such as corporate legal personality, corporate governance and directors duties are located in Part I. Part II evaluates the substantive grounds for corporate responsibility under civil and criminal law within the North American and Commonwealth jurisdictions and critiques legal techniques such as the doctrine of attribution. Part III offers several insights into different mechanisms of corporate accountability such as novel regulatory processes (interactive regulation, codes of conduct and social reporting), risk management and the influential role of NGOs. Finally, Part IV presents distinctively international perspectives on topical questions of corporate legal responsibility (corruption, labour standards, environmental protection and sustainable development) and includes an analysis of several ongoing initiatives from international organisations.

The *Research Handbook on Corporate Legal Responsibility* is a collection of works illustrating the similarities and differences in the attempts made by lawyers and others to come to terms with a very exacting problem. As a useful guide in this ever-evolving dimension of modern business reality, this volume will enjoy a wide and engaged readership. Corporate legal responsibility is, and will remain, an important arena for the scholarly research community, students, legal practitioners, policy-makers and most importantly corporate executives.

Finally, I take this opportunity to individually thank each of the hard-working and committed contributors without whom this handbook would not have materialised as well as Luke Adams, Kate Emmins, Nep Athwal and Caroline McLin and all their colleagues at Edward Elgar for their constant support and encouragement.