



Corporate Crime Podcast Series – Episode 8 – Transnational Crime

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Nadine Davidson-Wall: Hello and welcome to the next episode in the Australian Law Reform Commission podcast series where we are talking about corporate criminal responsibility in Australia. I'm Nadine Davidson-Wall, Communications Co-ordinator at the ALRC and I'm joined by Tess Van Geelen, a Legal Officer at the ALRC. In the recent Corporate Crime Inquiry, Tess looked into the regulation of transnational crime, and some of the ways that Australian companies can be held responsible for their involvement in offshore human rights violations. Tess, can you walk us through the background to this issue, and how it fits into the corporate crime inquiry?

Tess Van Geelen: Thanks Nadine. This aspect of the inquiry arose out of the Terms of Reference that we received from the Attorney-General, which specifically asked us to consider the potential application of the Commonwealth Criminal Code to extraterritorial offences by corporations. Currently, a number of offences under the Criminal Code apply extraterritorially to some degree. This means that if an Australian company engages in conduct like slavery, human trafficking, tax evasion, or financing terrorism in other countries, they can still be prosecuted for it here under Australian law.

NDW: So how much of a problem is this among Australian companies operating overseas?

TVG: In the past century, globalisation has really opened up international trade, and Australian companies are now connected to supply chains that spread over multiple jurisdictions around the world. While most people would agree that businesses are fairly heavily regulated in Australia, that's not necessarily the case in a lot of other countries. Over the years, there has been fairly steady stream of reports from civil society, governments, and the UN documenting alleged cases of Australian companies engaging in misconduct overseas. These allegations have ranged from things like child labour and slavery, irreversible environmental destruction, and forced evictions of communities to make way for mining developments, for example.

As I mentioned, a lot of this conduct is already criminalised in Australia, even when it happens overseas. But in the course of our inquiry, we found almost no examples of Australian corporations that had been successfully prosecuted for this kind of conduct. Given how widespread it seems to be in the global economy, this suggests that the criminal offences we have in place are not very effective at preventing this type of abuse.

NDW: So what did the ALRC ultimately recommend to address these issues?

TVG: Given the wide scope of the Reference, we had to think carefully about how to tackle this aspect, and a lot of people working in this area would agree that you could run an entire inquiry into this issue alone. One of the challenges we ran into quickly was the realisation that,

while criminal law has an important role here, it also has some serious limitations. In light of that, we ended up responding in two parts: in the first, we recommend amendments to the criminal law to improve its capacity to prevent transnational crime. In the second part we suggest that the Government undertake a much broader inquiry that can look into other non-criminal regulatory options, and how they might complement the criminal law in this space.

NDW: Let's start with the first part. What changes did the ALRC recommend for the criminal law?

TVG: We recommended that the Government consider introducing a 'failure to prevent' type offence for certain existing extraterritorial offences, modelled on the failure to prevent foreign bribery offence that is currently before Parliament. Under this model, a corporation can be held liable for failing to prevent certain misconduct by associates acting on its behalf.

NDW: So how would that make the criminal law more effective in this space?

TVG: One of the major barriers here is that the criminal law has particularly high evidentiary standards that are difficult or impossible to meet when the relevant conduct happened overseas. These standards are designed to protect the liberty of individuals being prosecuted by the state, but in the context of a multinational corporation, the balance of power is very different, and these standards seem to skew too far in limiting the effectiveness of criminal regulation. Under the failure to prevent offence, if an associate (like an employee, agent, or subsidiary) of an Australian corporation has engaged in something like slavery overseas, then the corporation will be deemed liable. You no longer have to prove that the corporation itself also *intended* to engage in slavery.

NDW: What can a company do to ensure it isn't liable, then?

TVG: The corporation will have a defence if it can prove that it had in place reasonable measures designed to prevent that type of misconduct by its associates. That way, corporations are encouraged to take proactive responsibility for the actions of their associates – and the particular risks created by their activities – but if they have reasonable compliance procedures in place and a rogue employee disregards all that to engage in misconduct anyway, then the company won't be liable for that.

NDW: Okay. So can you tell us a little more about the second part of the ALRC's recommendations on transnational crime?

TVG: As I mentioned, we found that the criminal law can be quite limited in responding to the full spectrum of misconduct that corporations might get up to overseas. While things like slavery and trafficking are criminalised, global supply chains can have a variety of harmful impacts on people and communities, and the company at the end of the chain in Australia may have different levels of knowledge, involvement or influence over those practices. We naturally want to minimise the incidence of human rights violations in the production of goods entering the Australian market, but since the criminal law has such a high evidentiary standard, the vast majority of this harm doesn't fall within the scope of criminal regulation in practice.

NDW: So if misconduct is not addressed by criminal regulation, are there other non-criminal forms of regulation that can be used?

TVG: Yes. In the last couple of decades we've seen a lot of progress both at the international and domestic levels in developing new ways of dealing with the human rights impacts of multinational businesses. In the Final Report, the ALRC outlines a number of non-criminal regulatory mechanisms, like due diligence obligations, transparency regimes, and non-judicial dispute resolution forums.

NDW: What about the new Modern Slavery Act that was introduced a couple of years ago? Why isn't that enough to solve this problem?

TVG: The Modern Slavery Act was a step in the right direction, but it wasn't particularly ambitious legislation. It doesn't actually require corporations to do anything about modern slavery in their supply chains. It only asks them to report on any risks they're aware of, but even if they fail to report altogether there are no penalties. The Act is also narrowly limited in scope. As I mentioned earlier, there are a huge variety of ways businesses can impact on communities and ecosystems apart from slavery. The Act might help to get businesses used to the idea of thinking about human rights, but the Government should ultimately undertake a much broader review into business and human rights, and think about which of these other mechanisms we can implement to ensure that corporations that profit from abuse are held accountable for that.

Of course, there has already been a huge amount of work done in this space by Australian civil society, and interest from Government has ebbed and flowed over the years. What we tried to do in Chapter 10 of the report was highlight all that work that had been done so far, and bring it together into a clear, simple roadmap for the Government indicating what the next steps should be. It's important that we don't think it was all wrapped up with the Modern Slavery Act – there is still a lot of work to do in this space, and we hope this roadmap will help to move us along the path.

NDW: Thanks for walking us through transnational crime landscape and the ALRC's recommendations on corporate criminal responsibility.

TVG: My pleasure.

NDW: To find out more about this important issue, you can download the Final Report on the Australian Law Reform Commission website. You can also join the conversation on Twitter and Linked In. I invite you to join us for our next podcast episode which dives into Individual Liability.

Download the Corporate Criminal Responsibility Final Report:
<https://www.alrc.gov.au/publication/corporate-criminal-responsibility/>