This book is about Corporate Social Responsibility (CSR) and the law, a pairing which at first sight might seem a contradiction in terms. The adoption by companies of CSR policies is, after all, routinely characterised as voluntary – a matter of business going the extra mile beyond what the law requires. If CSR is self-governance by business, however, it is self-governance that has received a firm push from external social and market forces, from forces of social accountability.

At the same time law is playing a much more significant role than the image of CSR suggests, and this legal accountability – the focus of the book – is set to increase. Legal intervention should not, however, be seen as making social accountability redundant. Wider ethical standards and social and market forces are also necessary even to make legal regulation effective.

How law is being used, and by whom is also significant. Little of the new law is conventional state regulation. Law is being brought into play in subtle and indirect ways, private law is being used in innovative ways, and the initiative lies as much with private organisations as with the state. At the same time governments are using social and market forces to foster CSR. What is demonstrated in the context of corporate social responsibility is the emergence of a new, multi-faceted, corporate accountability.

Doreen McBarnet is Professor of Socio-Legal Studies at the Centre for Socio-Legal Studies, University of Oxford.

Aurora Voiculescu is Lecturer in Law at the Centre for Law, Open University.

Tom Campbell is Professorial Fellow at the Centre for Applied Philosophy and Public Ethics (CAPPE), Charles Sturt University.
THE NEW CORPORATE ACCOUNTABILITY

Corporate Social Responsibility and the Law

Edited by
DOREEN McBARNET, AURORA VOICULESCU, TOM CAMPBELL
CONTENTS

List of Contributors page ix

Introduction 1
Doreen McBarnet

PART ONE: Corporate Social Responsibility and the Law

1 Corporate social responsibility beyond law, through law, for law: the new corporate accountability 9
Doreen McBarnet

PART TWO: Bringing Law into Corporate Social Responsibility

2 Corporate social responsibility through contractual control?
Global supply chains and ‘other-regulation’ 59
Doreen McBarnet and Marina Kurkchiyan

3 Corporate social responsibility and public procurement 93
Christopher McCrudden

4 Corporate codes of conduct: moral or legal obligation? 119
Carola Glinski

5 Corporate accountability through creative enforcement:
human rights, the Alien Tort Claims Act and the limits of legal impunity 148
Doreen McBarnet and Patrick Schmidt

6 Bringing corporate social responsibility to the World Trade Organisation 177
Nicola Jägers
vi

CONTENTS

7 Meta-regulation: legal accountability for corporate social responsibility 207
CHRISTINE PARKER

PART THREE: Expanding Legal Accountabilities: Company Law and Beyond

8 Disclosure law and the market for corporate social responsibility 241
KEVIN CAMPBELL AND DOUGLAS VICK

9 The board as a path toward corporate social responsibility 279
LAWRENCE E. MITCHELL

10 The new corporate law: corporate social responsibility and employees’ interests 307
STEPHEN BOTTOMLEY AND ANTHONY FORSYTH

11 Shareholder activism for corporate social responsibility: law and practice in the United States, Japan, France and Spain 336
BRUNO AMANN, JÉRÔME CABY, JACQUES JAUSSAUD, AND JUAN PIÑEIRO

12 The other European framework for corporate social responsibility: from the Green Paper to new uses of human rights instruments 365
AURORA VOICULESCU

PART FOUR: Expanding Legal Accountabilities: Corporate Responsibility, Human Rights and the Environment

13 Changing paradigms of corporate criminal responsibility: lessons for corporate social responsibility 399
AURORA VOICULESCU

14 Corporate social responsibility and international law: the case of human rights and multinational enterprises 431
PETER MUCHLINSKI
CONTENTS

15 ‘The Norms are dead! Long live the Norms!’ The politics behind the UN Human Rights Norms for corporations  459
DAVID KINLEY, JUSTINE NOLAN AND NATALIE ZERIAL

16 Corporate environmental responsibility: law and the limits of voluntarism  476
NEIL GUNNINGHAM

17 Power and responsibility: why human rights should address corporate environmental wrongs  501
AMY SINDEN

PART FIVE: Moral and Analytical Issues in Corporate Social Responsibility and the Law

18 The normative grounding of corporate social responsibility: a human rights approach  529
TOM CAMPBELL

Index  565
Contributors

Bruno Amann is Professor in Management Sciences at the University of Toulouse. His research interests are in the areas of family business, corporate governance and property rights. He is the author and editor of several books and has published extensively in French research reviews.

Stephen Bottomley is Professor of Commercial Law at the Australian National University and Director of its Centre for Commercial Law. He is the author, with Roman Tomasic and Rob McQueen, of Corporations Law in Australia and, with Simon Bronitt, of Law in Context (Federation Press, 2005). He is editor, with David Kinley, of Human Rights and Commercial Law (Ashgate, 2002) and, with Suzanne Corcoran, of Interpreting Statutes (Federation Press, 2005).

Jérôme Caby is Professor of Corporate Finances, Graduate Business School (IAE), Université Panthéon-Sorbonne, France. He has been a faculty member there for five years and is currently Dean. He is conducting research in corporate finance mainly on corporate governance, shareholder value analysis and family business management. He has published many papers in French specialist research reviews and five books as author or editor. He is also a Managerial Editor at Pearson Education. He is monitoring research in corporate finance, and teaches postgraduate classes at Paris University, and also in international programmes codeveloped by IAE and foreign universities such as the Georgia State University, University Ain Shams (Cairo), University Galatasaray (Istanbul), UIBE (Beijing).

Kevin Campbell is a Lecturer in the Department of Accounting, Finance and Law, University of Stirling. His most recent work has been in the area of financial regulation in offshore finance centres, the attitude towards the impact of the Research Assessment Exercise among academic lawyers in the United Kingdom, the behaviour of the UK stock market, and corporate finance in the transitional economies of Central and

ix

**TOM CAMPBELL** is a Professorial Fellow in the Centre for Applied Philosophy and Public Ethics, Charles Sturt University, Canberra, where he manages the Business and Professional Ethics Program, and Visiting Professor in the School of Law, King’s College, London. He was formerly Professor of Law at the Australian National University. He is the author of *The Theory of Ethical Positivism* (Dartmouth, 1996), *Justice* (Macmillan, 2001), *Rights: A Critical Introduction* (Routledge, 2005) and co-editor of *Human Rights and the Moral Responsibilities of Public and Private Sector Organisations* (Kluwer, 2004).

**ANTHONY FORSYTH** has a PhD from the University of Melbourne, and is a Senior Lecturer and Coordinator of the Corporate Law and Accountability Research Group in the Department of Business Law and Taxation, Faculty of Business and Economics, at Monash University, Melbourne.

**CAROLA GLINSKI** is a research fellow at the Centre for European Environmental Law at the University of Bremen, Germany. She obtained her law degree from the Free University of Berlin in 1993, and passed her second state examination in law in 1996. After two years’ practice as a solicitor, she obtained a Masters Degree in Development Policy from the University of Bremen in 2000. Her research focuses on the field of European and international environmental law and on global governance, on which she has published *Environmental Justice and the South African Legal System* (Herzogenrath: Shaker Verlag GmbH, 2003) and a number of articles and book contributions.

Nicola Jägers is a senior researcher and lecturer at Tilburg University in the Netherlands. She holds a master’s degree in history and law. She obtained her PhD at the Netherlands Institute of Human Rights (SIM) in 2002. The dissertation was published as a book entitled Corporate Human Rights Obligations: In Search of Accountability (Intersentia, 2002). Moreover, she has published several articles and book contributions on the issue of corporate social responsibility. Her present research focuses on the role of non-governmental organisations in international economic institutions in the context of mainstreaming human rights.

Jacques Jaussaud is Professor of Management Sciences at University of Pau (Université de Pau et des Pays de l’Adour), France. His research interests are in the area of international management, including organisation and control of multinational companies, with a particular focus on Japan, China and other Asian countries. He has published widely in these areas in various academic journals including, in 2006, the Journal of International Management and International Management. He has co-edited several books, such as Perspectives on Economic Integration and Business Strategy in the Asia–Pacific Region (Macmillan 1997), China and India, Economic Performance and Business Strategies of Firms in the Mid 90s (Macmillan, 1998), Changing Economic Environment in Asia and Business Strategies (Palgrave, 2001) and Economic Dynamism and Business Strategy of Firms in Asia: Some Recent Developments (China Economic Publishing House, 2006).

David Kinley holds the Chair in Human Rights Law at Sydney University Law School. He is author of numerous texts and articles in the field of human rights generally, and specifically in the area of the interaction of human rights with the global economy. He has also advised and worked with many different governments, corporations, non-governmental organisations and international organisations on a variety of international human right law matters.

Marina Kurkchiyan is a Research Fellow in Socio-Legal Studies at the University of Oxford, and a Fellow of Wolfson College. Previously she has held appointments at the London School of Economics, the University of Michigan at Ann Arbor, and Yerevan State University in Armenia. She is an empirical sociologist who specialises in legal culture and regulation, and she has conducted empirical research in many countries including the Ukraine and Russia. As a consultant to the World Bank, the Department for International Development, the Open Society Institute and the United
List of Contributors

Nations Development Programme, she has completed a number of official reports. Her academic papers dealt with various aspects of development, law and social structure such as education, poverty relief, the informal economy and health care. Her recent work is reported in Economic Crime in Russia (edited with Alena Ledeneva), (Kluwer Law International, 2000), Law and Informal Practices (edited with Denis Galligan), (Oxford University Press, 2003), and The Armenians: Past and Present in the Making of National Identity (edited with Edmund Herzig), (Routledge Curzon, 2004).

Doreen McBarnet is Professor of Socio-Legal Studies at Oxford University, and a Fellow of Wolfson College. She joined the Centre for Socio-Legal Studies after some years as a Lecturer in Sociology at Glasgow University where she graduated in History and Sociology. Her research has addressed various areas of law, beginning with doctoral work on the criminal justice process. However, her main interest for many years now has been business and the law, particularly in the context of corporate finance, tax avoidance, creative accounting and corporate responsibility, and she taught the core course on Corporate Responsibility for the MBA at Oxford’s Said Business School. Her publications include the books Conviction (Macmillan, 1981, 1983), Creative Accounting and the Cross-Eyed Javelin Thrower (Wiley 1999) with C. Whelan, and Crime, Compliance and Control (Ashgate, 2004). Her work for the current book is based on research funded by an ESRC professorial fellowship, and she has been awarded the CBE for services to social science.

Christopher McCrudden is Professor of Human Rights Law and Fellow and Tutor in Law, Lincoln College, at Oxford University, and Overseas Affiliated Professor of Law, University of Michigan Law School. He is a Member, in the Office of the First Minister and Deputy First Minister, Panel of Experts on the Single Equality Bill (2003–) and a Member of the Procurement Board of Northern Ireland (2003–) and of the European Commission’s Expert Network on the Application of the Equality Directives (1986–2003). He is member on the Editorial Board of several journals, including the Oxford Journal of Legal Studies, the Law in Context Series (Cambridge University Press), the International Journal of Discrimination and the Law, the Journal of International Economic Law, and European Public Law. He has published numerous journal articles, is the author (with Sandra Fredman and Mark Freedland) of An EU Charter of Fundamental Rights (Sweet & Maxwell, 2000) and has edited Anti-discrimination Law (Ashgate/Dartmouth, 2004).
Lawrence E. Mitchell is John Theodore Fey Research Professor of Law at The George Washington University Law School and the Director of the Sloan Program for the Study of Business in Society. He is author of *Corporate Irresponsibility: America’s Newest Export* (Yale University Press, 2001), which became the subject of much attention in the United States and Europe. For six years he practised corporate law in New York City. He is the editor of *Progressive Corporate Law* (1995). Professor Mitchell has done substantial work in using economic sociology to address corporate law issues.

Peter T. Muchlinski is the Professor of Law and International Business at Kent Law School, University of Kent. Prior to rejoining KLS he was the Drapers’ Professor of Law in the Law Department of Queen Mary and Westfield College, University of London, from 1998 to 2001. He specialises in international and European business law, competition law, law and development and commercial regulation. His more recent work concentrates on the social dimension of the regulation of international business, with emphasis on human rights and multinational enterprises and upon the impact of globalisation upon legal research methodology. He is the author of *Multinational Enterprises and the Law* (Blackwell Publishers, 1995, revised paperback edition 1999) and (with Julia Black and Paul Walker) editor of *Commercial Regulation and Judicial Review* (Hart Publishing, 1998). In 1990 he qualified as a barrister in the field of commercial and European law and is a door tenant at Brick Court Chambers, London. He acts as a principal adviser to the United Nations Conference on Trade and Development (UNCTAD) on investment issues. During the period of June–October 2003 he worked at UNCTAD in Geneva as a Senior Legal Expert in the Division on Investment Technology and Enterprise Development.

Justine Nolan lectures in international human rights law at the University of New South Wales, Sydney, and is the Deputy Director of the Australian Human Rights Centre. She specialises in examining the relationship between human rights and business. Prior to joining UNSW, she was the Director of the Business and Human Rights programme at the Lawyers Committee for Human Rights in the United States (now Human Rights First), where she worked closely with a number of multinational corporations and the United Nations in developing and implementing mechanisms for protecting human rights in business operations.

Christine Parker is Senior Lecturer in the School of Law at the University of Melbourne, Australia. She is author of *The Open Corporation:*

JUAN PIÑEIRO is Professor of Corporate Finance at the University of Santiago de Compostela, Spain. He has published extensively in Spanish, English and French and is the co-author of several books including, most recently, Corporate Social Responsibility (Palgrave, 2006), Sustainability Accounting and Reporting (Springer, 200), Analisis y cálculo de las Operaciones Financieras (Torculo, 2003). He is also coordinator of the journal, Revista Galega de Economia, and co-editor of Revista de Gestao Portuaria, Ambiental e de Negocios do Brasil.


AMY SINDEN is an Associate Professor at Temple University Beasley School of Law and a member scholar of the Center for Progressive Reform. Her recent academic writings have criticised the misuse of economic theory in environmental law, arguing against the use of cost-benefit analysis in environmental standard setting and countering claims that private property rights can solve environmental problems in the absence of government regulation. She has also written about the application of classical human rights norms to environmental conflicts. Her articles have appeared in a number of books and academic journals, including the Iowa Law Review, the University of Colorado Law Review, and the Harvard Environmental Law Review.

DOUGLAS VICK died in a tragic accident before this book reached publication. He was a Lecturer in Business Law in the Department of Accounting, Finance and Law, Stirling University, and also a Visiting Fellow with the Stirling Media Research Institute. Prior to that, he held the post of Honourable Abraham L. Freedman Teaching Fellow and Lecturer in Law at Temple University School of Law in Philadelphia, Pennsylvania. He was also an Associate Attorney in the Litigation Department of Pepper, Hamilton and Scheetz, a large Philadelphia law firm, and he was a Law

Aurora Voiculescu is Lecturer in Law at the Open University and an Associate Research Fellow at the Centre for Socio-Legal Studies, Oxford University. Between 1999 and 2003 she was a British Academy Post-doctoral Fellow in Law at Lincoln College, Oxford University. Her teaching, research work and publications are in the area of human rights, in particular in connection with collective and corporate agency and responsibility. In this context, her research focuses on the interplay between human rights discourse and global market agencies such as transnational corporations and intergovernmental economic and financial institutions. She is on the Editorial Board of the *Journal for Commonwealth Law and Legal Education*. She is the author of *Human Rights and Political Justice in Post-Communist Eastern Europe: Prosecuting History* (Edwin Mellen Publisher, 2000).

Natalie Zerial has a law degree from the University of Sydney where she worked as a research assistant for Professor David Kinley, and also spent one semester on academic exchange at the University of Cornell, where she worked as a research assistant for Associate Professor of Law, and Director of the Cornell Death Penalty Project, John Blume. She also did clinical work with lawyers from the Centre for Constitutional Rights on Guantanamo Bay litigation. In 2007 she is the tipstaff for Mr Justice Windeyer of the New South Wales Supreme Court.