Catching the corporate conscience: a new model of "systems intentionality"

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The law often includes state of mind elements as conditions for defendant liability for serious criminal and civil misconduct. As ongoing law reform inquiries in England and Wales, and Australia, demonstrate, this poses considerable challenges for the just and effective regulation of corporate actors. In that context, this article advocates for a new model of corporate responsibility, called "systems intentionality". This departs from the Identification Theory and other, individualistic attribution approaches by conceptualising the corporate state of mind as manifested in its systems, policies and practices. The article illustrates the model's distinctive application to a range of topical scenarios.

I. INTRODUCTION

As Shakespeare's *Hamlet* vividly illustrates, it is not possible to peer directly inside other people's minds, to identify and prove what they knew and intended at some critical moment. Other tactics must be employed, often involving inference of mental states from conduct.[1] While difficult, this inquiry is necessary and unavoidable in the law.[2] Mental states underpin a wide range of core legal, equitable and statutory rules and doctrines, as well as remedial rules and defences. Of particular interest for the purposes of this article is the law's enduring emphasis on finding a culpable state of mind on the part of defendants as a condition of attracting the stigma and severe consequences of liability for serious civil misconduct,[3] such as deceit and unconscionable conduct, as well as

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1. "The play's the thing; Wherein I'll catch the conscience of the king": W Shakespeare, *Hamlet*, Act II Sc.2. See also *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2; [2005] 1 SLR(R) 502, [35], [41–44] (Yong Pung How CJ, Chao Hick Tin JA and Kan Ting Chiu J).

2. A similar problem affects inquiries into "decision causation": E Bant and JM Paterson, "Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law" [2017] Torts LJ 1; P Birks, *An Introduction to the Law of Restitution*, rev edn (Oxford, 1989), 157 ("Will-power has no voltage").

3. P MacDonald Eggers, *Deceit: The Lie of the Law* (London, 2009), ch.1.

for regulatory offences and criminal responsibility. Here, concepts such as intention, knowledge, mistake, recklessness, dishonesty and unconscionability permeate the civil and criminal law, affecting issues from prima facie liability, through to scope of private redress[4] and civil and criminal penalty.[5] Indeed, while we might be most familiar with their *ex post* operation in the courts, these concepts also assume powerful roles in much *ex ante* regulation. An example familiar to many lawyers is the common requirement that a person be "fit and proper" or "suitable" to hold a licence to practice some regulated activity.[6] Here, the honesty or otherwise of the person will generally be a key consideration.

The undoubted challenge of uncovering defendants' culpable mental states becomes exponentially greater when dealing with corporate actors. As artificial persons, corporations have no natural mind. Yet the liability rules that apply to natural persons, and are dependent on proof of fault elements engaging the defendant's mental state, will generally apply equally to corporate defendants. In that context, it is deeply problematic that the law's main strategies for catching the corporate conscience[7] are very limited.

Recently, the Law Commission of England and Wales' inquiry into corporate criminal liability has again placed the suitability of the traditional "Identification Theory"[8] of corporate attribution under the microscope.[9] As articulated by the Commission, this "states that where a particular mental state is a required element of the offence, only the mental state of a senior person representing the company's 'directing mind and will' can be attributed to the company".[10] The approach taken in England and Wales as to who counts for this purpose is highly restrictive.[11] The board of directors, managing director, perhaps some limited senior officers, agents and delegates may be identified as the relevant repositories of the corporate will, but the pool of candidates is limited.

While the focus of the Commission is on corporate attribution for the purposes of criminal liability, precisely the same challenges arise in the civil sphere.[12] Indeed, as is well known,

4. Compare, eg, the remoteness rules for deceit and negligence: *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69; 208 CLR 388, [78] (Gummow J); *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA), 167 (Lord Denning MR); *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL), 264–267 (Lord Browne Wilkinson), 283 (Lord Steyn).

5. For the influence of concepts of culpability and "just desert" across civil and criminal pecuniary penalty jurisdictions in Australia, see JM Paterson and E Bant, "Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law", ch.10 of P Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Sydney, 2019) 154.

6. See *infra*, fn.29.

7. Literally, "with knowledge". Here, "conscience" is used as a broad label to capture the range of elements commonly associated with mental states, including normative standards, such as in the equitable doctrine of unconscionable dealing, discussed *post*, Part III(B). It is not used in the sense of some moral judgement or inner voice guiding conduct.

8. Exemplified in *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL), 713 (Viscount Haldane LC); *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 172 (Denning LJ); *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1; [1972] AC 153, 170 (Lord Reid).

9. Law Commission, *Corporate Criminal Liability* (Discussion Paper, June 2021) ("Discussion Paper"); Law Commission, Corporate Criminal Liability (Options Paper, 10 June 2022) ("Options Paper").

10. Law Commission Discussion Paper, *ibid*, [1.7] See generally Law Commission Options Paper, *ibid*, Ch.3.

11. See eg the discussion at *ibid*, [2.48–2.57] of *Serious Fraud Office v Barclays Plc* [2018] EWHC 3055 (QB); [2020] Lloyd's Rep FC 319; [2020] 1 Cr App R 28.

12. This is not to say that the content of those mental states will always align: compare *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67; [2017] Lloyd's Rep FC 561; [2018] AC 391, [63] (Lord Hughes, with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed) and J Gans, "Submission to Legal

the criminal law attribution rules, including the Identification Theory, took their lead from civil law doctrines and continue to share common features.[13] Moreover, the line between civil and criminal regulation remains stubbornly fuzzy.[14] For these reasons, among others, the Australian Law Reform Commission (ALRC) in its own, recent inquiry into corporate criminal responsibility considered that it was necessary to reform the laws of corporate attribution considering both civil and criminal jurisdictions.[15] This paper also adopts that broader perspective, the aim of which is to discern a coherent route through the thicket for more effective and just regulation of serious corporate misconduct, wherever it lies.

From this vantage point, it seems clear that the Identification Theory is so strictly circumscribed as to be largely unfit for purpose in the modern age. Of particular concern is that it is inherently incapable of addressing the commonplace phenomenon of "diffused responsibility",[16] whereby knowledge relevant to corporate misconduct is dispersed between multiple employees (and potentially sections or groupings) in a devolved or flat corporate structure, and kept below board level. This familiar factual scenario is now often further complicated by widespread corporate adoption of automated processes, such as automated payment systems,[17] where there may be very limited human involvement in the corporate activity.

As is widely understood, these characteristics necessarily challenge the Identification Theory, which is premised on hierarchical corporate structures in which the board of directors and other relevant senior officers exert considerable control over the day-to-day activities of the corporation.[18] The Identification Theory, as well as models of attribution that purport to extend or enhance its reach,[19] is also strongly affected by an "individualistic bias".[20] This requires identification of some natural person (whether a director, or some employee

and Constitutional Affairs Legislation Committee of the Commonwealth of Australia", *Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (12 December 2019).

13. C Wells, *Corporations and Criminal Responsibility* (Oxford, 2001), ch.5; S Walpole, "Criminal Responsibility as a Distinctive Form of Corporate Regulation" (2020) 35 Aust J of Corp Law 235, 238–248.

14. Eg "regulatory offences" such as those the subject of *Tesco Supermarkets* [1972] AC 153: see P Cartwright, *Consumer Protection and the Criminal Law* (Cambridge, 2001), ch.5; Wells (*supra*, fn.13), ch.1. Similar misconduct would generally be addressed in Australia through civil regulation, and civil pecuniary penalty: see eg the prohibitions on misleading conduct in Competition and Consumer Act 2010, Sch.2 (the Australian Consumer Law: ACL), ss 18, 29, 30, 31, 33, 34, 37. As Windeyer J put it, "the roots of tort and crime … are greatly intermingled": *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, 149.

15. Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019), [1.21]; Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Final Report, April 2020), [1.15], [1.25] (*ALRC Final Report*). The Australian Government is yet to respond to the ALRC's recommendations. The ALRC's expansive approach was fortified by the lack of existing, principled lines of demarcation between civil and criminal corporate regulation in Australia: see *ALRC Final Report*, ch.5.

16. B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" [1983] S Cal L Rev 1141, 1189.

17. Discussed *post*, Part III(C).

18. Wells (*supra*, fn.13), 98–101.

19. See eg the analysis developed in *Meridian Global Funds Management Asia Ltd v The Securities Commission* [1995] UKPC 26; [1995] 2 AC 500. The Australian "TPA models", which combine an expansive vicarious liability approach to conduct with a state of mind component that deems the intention of employees and agents acting for the company to be that of the company, are similarly constrained: *ALRC Final Report* (*supra*, fn.15), [6.153], [6.159]. For an important new analysis that would provide a theoretical basis for the mental attribution component of the TPA model, see M D'Souza, "The Corporate Agent in Criminal Law: An Argument for Comprehensive Identification" [2022] CLJ 91.

20. B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, 1993), ch.2; Wells (*supra*, fn.13), ch.4.

or agent, or delegate on whom corporate authority has been bestowed for this purpose)[21] whose mental state can be associated with the corporation. Neither of these premises (an hierarchical structure, or individual point of focus for knowledge) is reflective of the reality of the workings of many modern corporate actors. A consequence is that, while traditional attribution rules and their offshoots work reasonably well for smaller, simply-structured corporations, they are largely unsuited for many larger, complex corporate defendants. This is not a new observation. As Gobert put it: "One of the prime ironies of [the Identification Theory] is that it propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most."[22]

It is in this context that this paper advocates for a new model of corporate responsibility, referred to as "systems intentionality".[23] This departs from the individualistic bias of traditional identification approaches by conceptualising the corporate state of mind as manifested in its *systems of conduct, policies and practices*.[24] In so doing, it gratefully builds on the insights of legal, regulatory and philosophical scholars,[25] Australia's "corporate culture" reforms[26] and other statutory[27] and judicial[28] developments in that

21. *Northern Land Council v Quall* [2020] HCA 33; 383 ALR 378, 384 [21] (Kiefel CJ, Gageler and Keane JJ). On the distinction between agents and delegates, see Justice James Edelman, "Corporate Attribution and Responsibility" (Banking and Financial Services Law Association conference, August 2021).

22. J Gobert, "Corporate Criminality: Four Models of Fault" [1994] LS 393, 401. See also Fisse & Braithwaite, *supra*, fn.20, 47; Law Commission Options Paper (*supra*, fn.9), [3.69–3.72], [3.91].

23. E Bant, "Culpable Corporate Minds" [2021] UWAL Rev 352; E Bant and JM Paterson, "Systems of Misconduct: Corporate Culpability and Statutory Unconscionability" [2021] J Eq 63.

24. *Cf* a "functional" approach, which eschews conceptual approaches in favour of one that embraces empirical, political and social questions and assessments of the barriers to and solutions for corporate regulation: see F Cohen, "Transcendental Nonsense and the Functional Approach" [1935] Col L Rev 809; see also J Hasnas, "Where is Felix Cohen When You Need Him?: Transcendental Nonsense and the Morality of Corporations" [2010] JL & Pol'y 55. Addressing this would require another article. It may suffice for current purposes to acknowledge that the proposed model works with core legal conceptions (such as that corporations are legal persons, and penalty requires culpability) as we find them. It is, at the end of the day, inherently doctrinal, legal and practical in its approach.

25. The debt is large, but includes as leading influences: PA French, *Collective and Corporate Responsibility* (New York, 1984); B Fisse, "The Social Policy of Corporate Criminal Responsibility" [1978] Adel L Rev 361; B Fisse, "Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties" [1990] UNSWLJ 1; B Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" [1991] Syd LR 277; Fisse & Braithwaite, *supra*, fn.20; PH Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" [1991] Minn L Rev 1095; Gobert [1994] LS 393; Wells (*supra*, fn.13); WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago, 2006); C List and P Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford, 2011), ch.7; C Chapple, *The Moral Responsibilities of Companies* (London, 2014) 63; M Diamantis, "The Extended Corporate Mind: When Corporations Use AI to Break the Law" [2020] NCL Rev 893. For Diamantis' full analysis and comparison with Systems Intentionality, see M Diamantis, "How to Read a Corporation's Mind", in E Bant (ed.), *The Culpable Corporate Mind* (Oxford, 2023). The important recent work of E Micheler, *Company Law—A Real Entity Theory* (Oxford, 2021), which emphasises the routines, procedures and culture of companies as essential to their identity as autonomous and responsible actors, is also I think largely consistent with and supportive of the proposed model.

26. See Criminal Code Act 1995 (Cth), s.12.3. The statutory concept of "corporate culture" explicitly built on the seminal work of Bucy, French and Fisse: Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (Final Report, December 1992).

27. In particular, the statutory prohibitions on unconscionable "systems of conduct and patterns of behaviour" found in, for example, ACL (*supra*, fn.14), s.21 and Australian Securities and Investments Commission Act 2001 (Cth), s.12CB (ASIC Act), discussed *post*, Part III(B).

28. See *post*, at text to fn.120.

jurisdiction. It aims to offer a distinctive and doctrinally rigorous means of converting those insights into an operational liability mechanism, capable of determining specific corporate mindsets, as demanded by our spectrum of common law, equitable statutory requirements. The proposed model is aimed squarely at litigation contexts, but should also provide considerable support for the relatively successful*, ex ante* operation of Australia's corporate culture reforms, which have seen companies and regulatory authorities alike take seriously corporations' responsibility of adopting organisational systems, policies and practices that promote compliance with the law.[29]

The paper introduces the key features of the model and its advantages over other approaches to ascertaining the corporate mind, before turning to consider the model's distinctive application to a range of topical scenarios, including some contained in the Law Commission's Discussion Paper. While exhaustive analysis is not possible, the aim is to demonstrate that this model should continue to be considered seriously amongst the candidates for reform.

II. SYSTEMS INTENTIONALITY

A. Key concepts: systems, policies and practices

The basic idea behind the model of Systems Intentionality may be simply described,[30] and applies equally to corporate and natural defendants. Diamantis has explained how natural persons commonly make use of "extended mind" supports, which are external systems or cognitive aids (such as recipes, maps and notes or records) to facilitate recall and decision-making.[31] So too, I say, corporations adopt systems of conduct that enable them to make and implement decisions consistently and repeatedly, and respond purposefully to events. Indeed, having (unlike humans) no natural memory or cognitive capacity, corporations *necessarily* employ systems of conduct to direct, coordinate and manage the changing and fallible human (and other corporate) personnel that carry out corporate purposes, over time.[32] The same holds true where human elements within the system are entirely replaced by self-executing (automated) processes.[33]

The critical point is that, on my model, such systems exist in order to achieve some outcome (whether it be coordinated conduct, or consistent output). Thus, Australian courts

29. See, eg ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th edn (February 2019), 16–17, in particular principle three, which requires that a corporation should "instil … a culture …of acting lawfully, ethically and responsibly", cited in the RCCOL Report (*infra*) at 120; Parliament of New South Wales, *Inquiry Under Section 143 of the Casino Control Act 1992 (NSW)* (Report, 1 February 2021) ("Bergin Report"); Victorian Government, Royal Commission into the Casino Operator and Licence Report (15 October 2021) (RCCOL Report) 58–59 [19–25], 124–127, 174–178 [87–102], adopting the proposed Systems Intentionality analysis alongside the broader concept of corporate culture; Government of Western Australia, *Perth Casino Royal Commission* ((Final Report, 4 March 2022), 50–52 [1.61–1.64].) ("PCRC").

30. An important point when, theoretically, it should be capable of explanation to a jury.

31. Diamantis, *supra*, fn.25, 912–930.

32. *Ibid*, 917.

33. See *post*, Part III(C).

have described the concept of a system as "an internal method of working";[34] "something designed or intended in its structure".[35] On this approach, a "system of conduct" is inherently purposive in nature: a "co-ordinated body of *methods*, or a complex *scheme* or *plan* of procedure".[36] It is an organised connection of elements operating in order to produce the conduct or outcome.

Following this line of thought, once an adopted system of conduct is identified, it becomes possible objectively to assess the system to characterise the associated intention and other mental states. Here, the heart of the model is the proposition that corporations *manifest* their intentions through the systems of conduct that they adopt and operate, both in the sense that any system *reveals* the corporate intention and in the sense that it *embodies* or *instantiates* that intention. Another way of putting this is to say that corporations think through their systems—and so assessment and characterisation of the system enables us to know the corporate state of mind. No process of "inference" is required.[37] The same is true of policies and practices, which may be understood as systems operating at higher levels of generality (in the case of policies) and as arising organically (in the case of practices).[38] It becomes possible, from these humble beginnings, to determine from the nature of systems adopted by a corporate actor the spectrum of mental states commonly demanded by the law (such as general and specific intention, knowledge, mistake, recklessness, dishonesty and unconscionability).

A simple scenario illustrates the style of analysis. As it suggests, we can understand how natural individuals and corporations employ external decision-supports, and the light they shed on the users' states of mind, similarly.[39] Recall that the proposed model is that systems (and policies and practices) manifest their user's intentionality. Suppose I use a recipe as my cognitive aid, or "system of conduct". The nature of the recipe that I adopt and implement manifests (in the senses of revealing and instantiating) my purpose (here, to make a cake). Similarly, corporations use systems that reveal and instantiate their corporate purposes. Further, the subordination or supplanting of human actors[40] through adopted systems (including automated systems) does not destroy our capacity to understand the user's intention from the nature of the system that is adopted and applied. Using a programmable food processor to carry out a sequence of steps in the recipe, rather carrying out each step by hand, makes no difference to its characterisation as manifesting my intention

34. *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 266 FCR 631, 654 [104] (Allsop CJ, Middleton and Mortimer JJ).

35. *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208; 275 FCR 57 (*AGM Markets*), 122–123 [389] (Beach J).

36. *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 (*EDirect*), [72–73] (Reeves J) (emphasis added).

37. For this reason, although I think Diamantis' "inferentialist" approach, explained in Diamantis, *supra*, fn.25, and my model are closely aligned, they are not the same. Systems Intentionality explains why characterisation of the corporate system reveals its distinctively organisational state of mind—the process of characterisation therefore makes no controversial assumptions about the propriety of using inferential reasoning for corporations as if they were (contrary to fact) human: see EL Sheley, "Tort Answers to the Problem of Corporate Criminal Mens Rea" [2019] NCL Rev 773, 793. This meets the Law Commission's concern expressed in Law Commission Options Paper, (*supra*, fn.9) [6.34–6.41].

38. Addressed immediately below.

39. This is not to say that they are the same: corporations lack a natural mind, and are more than the sum of their (individual, corporate and automated) parts: see *post*, Part II(C)(ii).

40. *Cf* French, *supra*, fn.25, 40–44.

to make a cake. Further, some specific knowledge enjoyed by the user will be inherent in what is necessary for the system to function. Thus, in order successfully to implement the cake recipe, it is necessary to have a minimum degree of knowledge about the nature of required ingredients (flour, eggs, etc) and key steps (sifting, beating, folding, etc). The same goes for corporations that operate systems to achieve their organisational purposes. Nothing need be known about me personally, or the employees or corporate agents of the corporation carrying out a system, to appreciate the knowledge inherent in the system that is applied.

While the concept of a "system of conduct" is central to the model, the related concepts of "practices" and "policies" are included for completeness, to reflect the ways in which systems evolve and the levels of generality at which they operate. As a general matter, "practices" denote repetition and regularity in conduct, and hence must involve a discernible pattern of behaviour.[41] A "pattern" of behaviour may be understood as an externally observable phenomenon of repeated behaviours with shared features.[42] In my view, patterns are themselves neutral as to intention:[43] however, as Australian courts have observed, the presence of a pattern of behaviour may suggest, in turn, the existence of a system that has produced the pattern of conduct.[44] A "practice", by contrast, moves towards the concept of a "system" that manifests intentionality, through the key idea of its being a pattern of behaviour that is "habitual" or "customary". A practice is behaviour that predictably repeats (ie, is a pattern) *because* it is habitual or customary: it is a default response or reaction to some recognised condition or trigger for conduct. Certainly, on the model proposed here, a practice may be characterised as a system of conduct, where the "custom" or "habit" has crossed into the realm of an adopted process. This frequently occurs where practices arise organically or informally, then are taught or handed down to new generations of employees.[45] As this suggests, informal but embedded practices may be just as revealing of the corporate mind as documented practices (indeed, may be more revealing), such as is often found in formal "standard operating procedures".[46]

Finally, we may relate these concepts to corporate policies. As French explains, corporate policies are:[47]

41. *Oxford English Dictionary Online*, available at www.oed.com/ "practice": (a) The habitual doing or carrying on *of* something; usual, customary, or constant action or performance; conduct. Or (b) A habitual action or pattern of behaviour; an established procedure or system.

42. *Unique* [2018] FCAFC 155, [104] (Allsop CJ, Middleton and Mortimer JJ): "A 'system' connotes an internal method of working, a 'pattern' connotes the external observation of events."

43. A pattern of misconduct may be more serious than a single instance because of increased harm. That is a separate question from whether it is more serious because, to the extent that it evidences a system of conduct, it suggests that the conduct was deliberate.

44. Processes, on my account, are systems characterised at a greater, or lesser, level of abstraction—what Australian courts have described as the "abstraction of a generalisation as to method or structure of working or of approaching something": *Unique* [2018] FCAFC 155, [104] (Allsop CJ, Middleton and Mortimer JJ); see also *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* [2021] FCA 737, [515] (Stewart J). A system may comprise multiple processes. There is no a priori distinction between them.

45. Chapple (*supra*, fn.24), 42, 44–46.

46. See, eg, anti-money laundering Standard Operating Procedures compared to the reality of casino cage processes in RCCOL Report, *supra*, fn.29, 174–178 [87–102] and E Bant, "Reforming the Laws of Corporate Attribution: 'Systems Intentionality' Draft Statutory Provision" [2022] C&SLJ (forthcoming). See further Chapple (*supra*, fn.25), 45.

47. French, *supra*, fn.25, 58. The current, widespread debates over corporate "purpose" could usefully draw on, and in turn inform, the model: see generally The British Academy, *Principles for Purposeful Business*

"rather broad, general principles that describe what the corporation believes about its enterprise and the way it intends to operate. Policies contain basic belief and goal statements regarding both the what and the how of corporate life, but they are not detailed statements of appropriate methods."

Similarly, on my model of Systems Intentionality, corporate *policies* manifest the corporation's overarching and high-level purposes, beliefs and values. This approaches the same sort of level of generality, or abstraction, held by the Australian conception of a "corporate culture", to which I return below. Corporate *systems* then instantiate or operationalise those policies at more granular and event- or conduct-specific levels. In this sense, corporate systems manifest a corporation's everyday intentionality.

Again, we must be careful to distinguish "formal" from "de facto" or "real-life" policies. Formal corporate policies may bear no resemblance to the policies that guide, in reality, the systems of conduct through which (on my model) a corporation manifests its everyday intentionality.[48] A corporation's formal policies (and public statements) may deviate considerably from the coal-face policies experienced by its employees as their everyday guides for action in carrying out the corporate systems of conduct. An example is "greenwashing", where a corporation's asserted environmental aspirations and values are contradicted by the realities of its applied systems and practices. A corporation may state that it values environmental protection but the reality may be that its abiding policy is one of "profit at any cost".[49] It is the latter which reveals the true (real) corporate mindset and is of chief interest here from an analytical perspective. It follows that a formal policy may be no more than a misrepresentation of the true corporate mindset.[50] It follows that, as an articulation, statement or expression of belief and values, a formal policy can be misleading or deceptive just like any other statement of fact. To find out what the corporation truly thinks, its core beliefs and values, one has to look behind the corporation's talk and examine its walk.

It may be objected that this conceptual analysis is too complex or impractical.[51] However, Australian authorities addressing that nation's widespread statutory prohibitions of unconscionable "systems of conduct and patterns of behaviour" contain detailed guidance about how to go about proving systems of conduct, and hence related concepts of policies and practices.[52] They also have developed subtle understandings of the relationship

(Report, 2019); Justice J Edelman, "The Future of the Australian Business Corporation: a Legal Perspective" [2020] TJR 199.

48. See eg *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 (*AIPE*), [696] (Bromwich J), comparing the "aspirational quality" of the defendant corporation's policies, training and induction materials with the reality of its systems of conduct.

49. Eg, the withering comparison of Crown Casino's "responsible gaming" policy, which in practice embodied a "profit at any cost" culture: RCCOL Report, *supra*, fn.29, 3 [11–12], 142 [54].

50. *Warner-Lambert Co LLC v Generics (UK) Ltd* [2018] UKSC 56; [2018] RPC 21, [171] (Lord Briggs: "a person's intention is as much a matter of fact as the state of his digestion, and this is true of corporate persons as much as of individuals"). See also *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA), 483 (Bowen LJ).

51. See *supra*, fn.24 on the functional approach.

52. For an excellent recent case traversing fully the authorities, in a manner consistent with the model, see *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2021] FCA 956 (*Phoenix*). These authorities are synthesised in E Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023). Notably, unlike the proposed model, the statutory prohibition identifies unconscionable patterns of conduct as sufficient to

between systems of conduct and corporate intentionality that are consistent with the model advanced here.[53] It is not possible here to do justice to that extensive guidance. However, as a very broad generalisation, "patterns of behaviour" generally require proof of relevantly similar and externally observable outcomes or harms.[54] These may be established through proof of individual instances of relevantly similar misconduct that are established to be representative of a wider pattern of behaviour. Patterns of behaviour may (as discussed earlier) be suggestive of the presence of a system and hence be used as supporting evidence of its alleged operation and effect. By contrast, proof of a "system of conduct" may additionally draw upon evidence that is internal to the corporation: the evidence of employees carrying out the system as to its features;[55] the content of employee and agent training and sales scripts;[56] remuneration and incentives relating to delivery of the system;[57] payment and refund terms;[58] contract terms and features;[59] complaints processes and scripts,[60] and so on. While Australian regulators, it is fair to say, initially found the shift in litigation focus from individual instances of wrongdoing to systems of misconduct challenging,[61] their subsequent successes are highly supportive of the efficacy of the proposed model.

B. Modelling corporate states of mind through Systems Intentionality

These conceptions provide courts, regulators and prosecutors with the analytical tools necessary to meet the spectrum of state of mind requirements currently found in common law, equitable and statutory doctrines and rules that regulate corporate conduct. In this aspect, the novelty of the model lies in being a work-ready and theoretically rigorous approach to distinctively organisational blameworthiness. A brief snapshot is helpful,

ground liability: this can readily be justified on the ground of increased risk of harm, rather than intentionality, although the authorities have yet to explore that distinction in justification: *cf* the ALRC proposed "systemic misconduct" offence, *infra*, fn.73.

53. See Bant & Paterson [2021] J Eq 63 and *post*, Part III(B).

54. *AGM Markets* [2020] FCA 208, 122 [387–388] (Beach J); *Unique* [2018] FCAFC 155, 654 [104], 655 [110], 672 [170] (Allsop CJ, Middleton and Mortimer JJ); *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350; *Captain Cooke College* [2021] FCA 737, [73] (Stewart J); *Australian Securities and Investment Commission v Westpac Banking Corp (No 2)* [2018] FCA 751; 266 FCA 147, 162 [25] (Beach J).

55. *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 (*AMI*), [891] (North J); *AIPE* [2019] FCA 1982, [460] (Bromwich J).

56. *Unique* [2018] FCAFC 155, 662 [133] (Allsop CJ, Middleton and Mortimer JJ); *EDirect* [2012] FCA 1045, [93] (Reeves J); *AMI* [2015] FCA 368, [686] (North J); *AIPE* [2019] FCA 1982, [525–526] (Bromwich J); *AGM Markets* [2020] FCA 208, [418–419], [429] (Beach J).

57. *AMI* [2015] FCA 368, [760], [770], [939] (North J); *AIPE* [2019] FCA 1982, [753] (Bromwich J); *AGM Markets* [2020] FCA 208, [441] (Beach J).

58. *AMI* [2015] FCA 368, [600], [682], [939] (North J).

59. *Ibid*.

60. *AIPE* [2019] FCA 1982, [83–84], [163] (Beach J); *Captain Cook College* [2021] FCA 737, [459–460] (Stewart J).

61. See *EDirect* [2012] FCA 1045; *Unique* [2018] FCAFC 155.

before addressing (in the final Part of this article) the operation of the model by reference to various worked case examples.[62]

State of mind requirements, such what counts as intention, knowledge, mistake, dishonesty, unconscionability and recklessness, will change across jurisdiction and time. But, assuming some plausible definitions of these elements as exemplars, it is possible to model how Systems Intentionality may apply appropriately to establish a range of mental states. The following are not offered as rules (given, again, that the analysis must be tailored to the presiding definition in each jurisdiction, and for each rule or offence, of each required mental state), but serve as illustrations of how a range of commonly required corporate mental states may be manifested through systems of conduct.

First, as should now be clear, on the suggested model, a system of conduct will necessarily manifest "general" intentionality to engage in the *conduct*.[63] That is the nature of a "system"—it is inherently purposive in the sense described earlier.

Second, where objective assessment of a system shows that it is apt to (objectively calculated to, designed to, of a nature to) produce some *result* or outcome, and does always or usually produce that outcome, it is open to find that the result (as opposed to the conduct) was "specifically" intended.[64] That is, the arrangement of the components of the system, its "choice architecture",[65] may be directed not merely to coordinated action (a general intention to engage in that conduct) but to producing a specific result (a specific intention).[66]

Third, and following from the preceding two points, it follows that systems of conduct do not readily manifest "accidental" or "mistaken" conduct. On the contrary, if a system is operated according to its terms, then it manifests, on the face of it, a clear and deliberate choice of conduct. I return to this below, when addressing the common, exculpatory Australian narrative offered by corporate officers of "systems errors" or administrative mistakes.[67] Contrary to this narrative, in order to find a genuine "systems error", it will generally be necessary to show that the system failed in some way: for example, the system operated by a company was not deployed or implemented correctly, including in the sense that one of its component steps was omitted or failed.

Fourth, we have seen that corporate knowledge of some facts will be implicit in, and revealed by, the features of its adopted and operated system. Indeed, given a system of conduct is, by definition, intentional, a corporation will know at least its broad outline

62. Detailed analysis is contained in E Bant, "Modelling Corporate States of Mind through Systems Intentionality" in Bant (ed.), *The Culpable Corporate Mind* (2023). This meets the concerns raised in Law Commission Options Paper (*supra*, fn.9) [6.42–6.46].

63. For the distinction between general and specific intention, see *He Kaw Teh v The Queen* [1985] HCA 43; 157 CLR 523, 569 (Brennan J); P Cane, "Mens Rea in Tort Law" (2000) 20 OJLS 533, 534; E Farnsworth, *Alleviating Mistakes* (Oxford, 2004), 87.

64. *Ibid*.

65. JM Paterson, E Bant and H Cooney, "*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies" [2021] Comms L 136.

66. The relationship between the mental state of specific intention and the mixed, normative concept of recklessness cannot be addressed here: see Bant, "Modelling Corporate States of Mind" (*supra*, fn.62). However, where only one output can be, and is in fact, produced from a deliberate system of conduct, it may comprise evidence from which specific intention can be inferred: *infra*, fn.138 and accompanying text.

67. Australian Government, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol.1, 154–157 (*FSRC Final Report*), examined in Bant, "Culpable Corporate Minds" (*supra*, fn.23), 385–387.

and the key features required for it to be deployed. This means that the starting point for any inquiry is that corporations know broadly the nature of the conduct in which they are engaged through those systems.

The relationship between these state of mind ideas may be subtle, but they are capable of interpretation and application in a sensible and workable manner. Returning to our earlier example: suppose I purport to use a cake recipe, but produce pancakes. The first few times, this may suggest an operative mistake: the system (recipe) has been implemented incorrectly. Or it may suggest that I lack knowledge of core steps within the process (I think oil is materially identical to butter). But the more I follow the same steps in practice, and I roll out pancakes (and certainly when I start charging for them), it becomes clear that my system of conduct is one for producing pancakes. In fact, if not in name, I am deploying a pancake recipe, not a cake recipe. I mean to make pancakes. And I know precisely what I am doing. The same applies with corporate systems of conduct. We assess the nature of the system, and the state of mind it manifests, from the system as implemented by the corporation. And the instantiated system may diverge from the formal system: it is the former that manifests the true corporate mindset.

With these core understandings, it becomes possible to approach complex, blended, normative concepts such as recklessness, dishonesty and unconscionability. While, again, these are heavily contested and changeable over time and jurisdiction, they commonly combine objective standards or norms of conduct with state of mind enquiries.

Thus, recklessness commonly combines: (a) a general intention to engage in some conduct; (b) knowledge or "foresight" of the outcome that the conduct is apt to produce (often described as a "risk" of harm); and (c) the application of a normative standard that a decision to proceed with the conduct in light of that known risk is unreasonable.[68] Using this definition, where there is a system of conduct, we have seen that (a) is automatically established. Further, corporate knowledge of key aspects of the system is implicit in, and revealed by, its adoption and deployment. Consistently, it is possible, and appropriate, to assess corporate "foresight" from the obvious (patent) risks of outcomes arising from the known and intended system of conduct, or from repeated instances of harmful outcomes from application of the known and intended system, where there are no audit or remedial steps taken to respond to the materialised harm. An unreasonable decision to proceed in light of those known risks, or repeated harm, manifests recklessness. "Dishonesty", by contrast, commonly requires assessment of conduct against the standard of honest people, seen in light of the defendant's knowledge and intention.[69] Unconscionability also combines application of (variously) equitable and statutory norms of conduct in light of the defendant's knowledge and intention.[70] In each case, it is possible to understand and

68. *Director of Public Prosecutions Reference No 1 of 2019* (2021) 96 ALJR 741, 757–759 [64–69] (Edelman J), drawing on *Aubrey v The Queen* (2017) 260 CLR 305, 327–329 [43–47], [49] (Kiefel CJ, Keane, Nettle and Edelman JJ). See also *R v G* [2003] UKHL 50; [2004] 1 AC 1034 (Lords Bingham of Cornhill, Browne-Wilkinson, Steyn, Hutton and Rodger of Earlsferry).

69. *Ivey* [2017] UKSC 67; [2017] Lloyd's Rep FC 561, [74] (Lord Hughes, with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed); *Peters v The Queen* [1998] HCA 7; 192 CLR 493, 503–504 (Toohey and Gummow JJ); *Barton v R* [2020] EWCA Crim 575; [2020] Lloyd's Rep FC 368; [2021] QB 685, 1350 [84], 1354–1355 [107–108]; *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2019] Lloyd's Rep FC 319; [2020] Ch 129, [33–61].

70. Bant & Paterson, "Systems of Misconduct" [2021] J Eq 63.

assess corporate levels of culpability by reference to the model of Systems Intentionality. I return to specific examples of each, in the final Part of this article.

C. Some observations on the model

This section seeks to answer, or provide the start of answers to, what I anticipate will be frequently asked questions about the model of Systems Intentionality. These cannot be the subject of full discussion here but, where possible, I refer to places where this deeper analysis may be found.

(i) Relation to traditional attribution models

Importantly, the model is proposed by way of an additional (not exhaustive) method of determining the corporate mind. Indeed, it can be understood as largely consistent with traditional attribution approaches, provided that the latter are understood as reflecting systems of conduct.[71] Thus, it accepts that a decision by the board of directors and other decision-making structures articulated in, for example, the corporate constitution and by operation of law may validly manifest the mind and intention of the corporation.[72] From the perspective of Systems Intentionality, these are classic examples of decision systems, without which a corporation would be entirely inert: a corporate zombie. These standard (off the shelf) systems tend to channel decision-making to a single point, located in an individual or group of individuals (such as the board, or shareholders in general meeting) acting on majority vote. The model advanced here simply postulates that relevant decision-making structures that manifest the corporation's everyday mindsets are more widespread and varied. In particular, the model identifies the corporation's adopted and deployed systems of conduct and practices, which emerge organically as the corporation develops its own business activities. These may be informal, embedded systems of conduct, in which no one individual (or voting group) may carry the decisive mental state. In this respect, it is particularly well suited (but not limited) to circumstances of diffused responsibility and systemic misconduct,[73] among others.

71. The model is largely consistent with Rachel Leow's reframing of the *Meridian* approach, to focus upon the delegates of corporate powers, or the positions to which decision-making has been allocated: see R Leow, "Equity's Attribution Rules" [2021] J Eq 35; R Leow, *Corporate Attribution in Private Law* (Oxford, 2022); R Leow, "*Meridian*, Allocated Powers, and Systems Intentionality Compared", in Bant (ed.), *The Culpable Corporate Mind* (2023). Where a statutory liability principle requires the requisite state of mind to be present in a particular individual or group, this must take precedence and to this extent, the model of Systems Intentionality accommodates *Meridian* [1995] UKPC 26. However, for the reasons articulated by Leow, the model is otherwise quite divergent from the prevailing interpretation of *Meridian*. For statutory "failure to prevent" models, see *post*, Part II(C)(vi).

72. However, where the formal decision-making structures and the corporation's instantiated practices or systems of conduct are at odds, the latter manifest the true corporate state of mind: discussed *ante*, Part II(A) and *post*, Part III(D)–(E).

73. *Cf ALRC Final Report* (*supra*, fn.15), recommendation 8, which proposes a model offence to criminalise contraventions of certain civil penalty provisions that constitute a "system of conduct or pattern of behaviour". As explained in Bant, "Reforming the Laws of Corporate Attribution" [2022] C&SLJ (forthcoming), this is not an attribution model and remains dependent upon satisfactions of independent attribution rules. For further discussion of the proposed offence, see S Walpole and M Corrigan, "Fighting the System: New Approaches to Fighting Systematic Corporate Misconduct" [2021] Syd LR 489.

(ii) A realist model

The model adopts the realist view that corporations are legal persons that are more than the sum of their individual employees. Moreover, they can, and should, be treated as responsible entities on their own account.[74] It should therefore be contrasted with "aggregation" theories, which purport to combine the mental states of multiple individuals acting for or on behalf of a corporation to yield some sort of greater consciousness.[75] Indeed, as we will see below, Systems Intentionality is quite capable of explaining why, for example, a corporation may manifest intention, dishonesty or knowledge through automated systems of conduct. Rather than being human-centric, it seeks to offer a workable model of organisational blameworthiness.

(iii) A generalist model

Third, to the extent possible and appropriate, it also seeks to treat corporate persons equally with natural persons. The model is intended to operate equally across civil and criminal jurisdictions.[76] Consistently, the model accepts that conceptions of personal culpability permeate the law and that, therefore, it is helpful to find a means of determining corporate responsibility that fits in with the law's existing requirements, rather than requiring creation of a whole new body of law to deal with corporate defendants.[77] The model is therefore less radical, and more holistic, in its approach and application compared to other, corporate-specific models of responsibility, such as "failure to prevent" models (to which I return below).[78] It could, however, help inform the operation of those models, particularly where they use "due diligence" or "reasonable precautions" type defences that recognise the relevance of corporate systems, policies and processes to the issue of corporate culpability.

(iv) An emergent model

While the model clearly departs from individualistic attribution approaches,[79] I consider that the model is consistent with patterns of reasoning already evolving within the law. The analysis therefore seeks to make explicit and articulate transparently these developing and consistent trends of judicial and statutory reasoning and their potential relationship to the model. While this is most clear from the Australian corporate culture reforms, discussed next,

74. Eg Fisse & Braithwaite, *supra*, fn.20, ch.2; French, *supra*, fn.25; Chapple (*supra*, fn.25); List & Pettit, *supra*, fn.24, ch.7.

75. *United States v Bank of New England NA* (1987) 821 F 2d 844 (1st Cir); Gobert [1994] LS 393, 405. Aggregation is criticised powerfully in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 449 [112] (Edelman J).

76. This article does not seek to answer the question whether corporations should be subject to criminal law regulation: see *ALRC Final Report* (*supra*, fn.15), [5.78–5.89]; Walpole (2020) 35 Aust J of Corp Law 235, 255–261.

77. Discussed *post*, Part II(C)(vi).

78. *Ibid*.

79. Even there, it may (as discussed earlier) be consistent with some, provided they are understood in systems terms.

and its "unconscionable system of conduct and pattern of behaviour" authorities,[80] recent United Kingdom Supreme Court cases on corporate groups and the responsibility of corporate parents[81] arguably may also be consistent with the model and evidence its broader utility.

(v) Comparison to "corporate culture"

The final two observations relate to the relationship between the model and other, novel approaches to organisational blameworthiness. First, it is the ability of Systems Intentionality to meet the doctrinal requirements of the law that distinguishes it from the important "corporate culture" reforms introduced into Part 2.5 of the Australian Criminal Code Act 1995 (Cth) (Criminal Code). These similarly emphasise the importance of systems of conduct for organisational blameworthiness. Section 12.3 of the Criminal Code provides that corporate states of mind relevant to fault elements of an offence may be established where a "corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision". "Corporate culture" is then defined to mean "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place".

As the ALRC has recently observed, the corporate culture concept holds very high levels of support amongst Australian stakeholders.[82] It has certainly had a profound *ex ante* effect on corporate Australia and on *ex ante* regulatory mechanisms designed to avoid corporate misconduct.[83] Indeed, it is not overstating the position to say that it has become a dominant feature of the Australian commercial regulatory landscape[84] and reflects foundational community expectations of Australian corporate citizens.[85]

Consistently, the ALRC's recent recommendations for reform of the hodgepodge of Australian attribution and liability mechanisms embed conceptions of corporate culture in both options contained in Recommendation 7.[86] The first option endorses a lightly modified and compulsory version of the existing corporate culture provisions.[87] The second option combines expansive attribution rules that reach well beyond the "directing mind and will",

80. Discussed further *post*, Part III(B). Elsewhere, Australian courts are also starting to seize upon the significance of "business models" and "strategies" for corporate mental states: see, eg, *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2021] FCA 1008, [37–53] (O'Bryan J) (*ASIC v Westpac*).

81. *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3; [2021] 1 WLR 1294; *Lungowe v Vedanta Resources Plc* [2019] UKSC 20; [2019] 2 Lloyd's Rep 399; [2019] BLR 327; [2020] AC 1045. *Cf* C Whitting, "The Corporate Group: System, Design and Responsibility" [2021] CLJ 581.

82. *ALRC Final Report* (*supra*, fn.15), [6.49], [6.112–6.122].

83. See, eg, the recent Australian inquiries into the suitability of Crown Casino to hold a gaming licence: *supra*, fn.29.

84. Justice R French, "The Culture of Compliance—a Judicial Perspective" (Australian Compliance Institute conference, Sydney, September 2003) (an idea whose "time had come"). See also JG Hill, "Legal Personhood and Liability for Flawed Corporate Cultures" (European Corporate Governance Institute Research Paper No 19/03, 2019) available at ecgi.global/sites/default/files/working_papers/documents/finalhill3.pdf.

85. *FSRC Final Report* (*supra*, fn.67), vol.1, ch.1.

86. *ALRC Final Report* (*supra*, fn.15), [6.43–6.46]. *Contra* is Law Commission Options Paper, (*supra*, fn.9) [6.3–6.20], rejecting it as a reform option.

87. *Ibid*, [6.55–6.122].

with a separate defence of "reasonable precautions",[88] which must necessarily direct attention towards corporate systems, policies and processes.

Yet, the corporate culture provisions have largely failed, in practice, as an *ex post* liability model. There are two particular challenges. The first is the uncertainty over what kinds of evidential strategies and proofs are required to prove a relevant corporate culture for the purposes of the statutory provisions.[89] The second (and arguably more difficult) is the connection between that concept and the specific mental states required by some aspects of the law, such as knowledge and intention.[90] While the reforms recommended by the ALRC remove some impediments to its application, they do not address these core issues, solutions to which may be expected to develop incrementally through judicial decision.[91] For this to occur, however, requires prosecutors on whom rests the burden of being "model litigants" to face the challenge of initiating test litigation without the benefit of explicit guidance on how the reforms might operate in practice.

It is here that the model of Systems Intentionality offers a clear way forward. As explained earlier, its aim is to provide concrete doctrinal methods to operationalise, or render practically workable, the collective insights offered by these law reforms and the work of the scholars on which they rest.

(vi) Is strict liability preferable?

Finally, and before proceeding to the worked examples, I pause to consider the comparative features and merits of strict liability regimes. The difficulties surrounding traditional approaches to corporate attribution, and the challenges of shifting one's focus from individualist to systemic misconduct as required for the proposed model, might seem to make these a simpler, third option. Strict liability regimes appear to have the advantage of concentrating on the objective quality or outcomes of the conduct of corporations, as opposed to the corporate state of mind. In Australia, a leading example is the core statutory prohibition on misleading conduct.[92] Here, the defendant's fault or intention in engaging in the misconduct is generally irrelevant to the initial stage of ascertaining a contravention: liability in this sense is strict.[93]

Functionally, outcomes-based approaches (such as "failure to prevent") regimes share this strict liability character, although they are squarely framed at prohibited

88. *Ibid*, [6.123–6.150].

89. Law Commission Options Paper (*supra*, fn.9) [6.14–6.20], rejecting corporate culture as an option for reform. The level of difficulty is a matter of some debate: *cf* V Comino, "'Corporate Culture' is the 'New Black'—Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions" [2020] UNSWLJ 295; C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge, 2011), 232; JHC Colvin and J Argent, "Corporate and Personal Liability for 'Culture' in Corporations?" [2016] C&SLJ 30. Here the insights from Systems Intentionality on proof of systems, policies and practices may be very useful: see Bant, "Systems Intentionality", *supra*, fn.52.

90. Bant, "Culpable Corporate Minds" (*supra*, fn.23), 369–374; GR Skupski, "The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability" [2011] Case W Res L Rev 267, 304. See also Laufer, *supra*, fn.25, 59.

91. *ALRC Final Report* (*supra*, fn.15), [6.109].

92. See ACL (*supra*, fn.14), s.18, a prohibition which is replicated across a wide array of specific and general Commonwealth and State statutes.

93. *Parkdale Customer Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; 149 CLR 191, 197 (Gibbs CJ).

outcomes rather than expressed as statutory norms.[94] Thus, "failure to prevent" models typically combine an expansive vicarious liability framework with a "due diligence" or "reasonable precautions" defence available to the corporation.[95] Typically, stand-alone vicarious liability (of the kind adopted under the US doctrine of *respondeat superior*[96]) is subject to objection on the ground that it uncouples the liability of the corporation from any conception of organisational blameworthiness.[97] Thus, one human "bad apple" can cause a corporation to be held liable for harms that it took every reasonable step to prevent. Conversely, this method can enable corporations to shirk blame for egregious organisational failures: for example, by pinning substantive blame on a single employee; re-characterising vicarious liability for the purposes of blame as a kind of purely formal liability; or by evading liability altogether where no single human repository of fault can be identified.[98] The "failure to prevent" model usefully addresses the gap between vicarious corporate liability and organisational blameworthiness through the provision of a defence, which allows the corporation to show that it lacked culpability in terms of its processes.[99] I return to this below. But it is noteworthy that both vicarious and "failure to prevent" models generally require identification of a guilty individual employee or (in the case of failure to prevent) broader "associate" of the company, for whose wrong the defendant company is vicariously liable.[100] To that extent, neither model escapes the problems of diffused responsibility, noted earlier. On the other hand, both serve to make the corporation strictly liable, at first instance at least, for the wrongdoing that it failed to prevent.

On these standards- and outcomes-based approaches, it might seem possible to avoid the corporate state of mind enquiry, at least at the liability stage. The success of both the misleading conduct regime in Australia, and the "failure to prevent" models of liability, attest to the utility of including these amongst the options for reform. However, it has been doubted that shifting solely to a strict liability framework expresses appropriately the level of denunciation, and serves to deter, egregious corporate misconduct of the kind under consideration in this article.[101] Saying that a corporate actor is vicariously

94. Licensing requirements often partake of this strict character: see eg National Consumer Credit Protection Act 2009 (Cth), s.24, pursuant to which a person is prohibited from providing credit services without a licence.

95. See eg Bribery Act 2010, ss 1, 6 and 7; Criminal Finances Act 2017, ss 45 and 46; Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth), cl.8. Law Commission Options Paper (*supra*, fn.9), Ch.8.

96. See *New York Central & Hudson River Railroad Co v United States* (1909) 212 US 481. In England, see *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146; *R v ICR Haulage Ltd* [1944] KB 551; *Moore v I Bresler Ltd* [1944] 2 All ER 515. In Australia, vicarious liability was applied by the High Court in *R v Australasian Films Ltd* (1921) 29 CLR 195 and *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163.

97. Wells (*supra*, fn.13), 152–153; Bucy [1991] Minn L Rev 1095, 1104; D'Souza [2022] CLJ 91; Law Commission Options Paper (*supra*, fn.9) [5.34–5.41], [6.23]. For an important and novel corrective justice explanation of strict liability, see C Tilley, "Just Strict Liability" [2022] Cardozo L Rev (forthcoming).

98. See, eg, WR Thomas, "Corporate Criminal Law is Too Broad—Worse, It's Too Narrow" [2020] Ariz St LJ 505, 545–565; Cartwright, *supra*, fn.14.

99. C Wells, "Corporate Failure to Prevent Economic Crime—A Proposal" [2017] Crim LR 426; L Campbell, "Corporate Liability and the Criminalisation of Failure" [2018] LFMR 57.

100. It remains contentious in Australia whether vicarious liability entails that the corporation is responsible for the act of another, or the wrong of another: see *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78; 250 FCR 136, 147–149 [48–58] (Davies, Gleeson and Edelman JJ); Edelman [2020] TJR 199. If the latter, then the individual's mental state must still be established.

101. See eg *FSRC Final Report* (*supra*, fn.67), vol.1, 139–150.

liable for another's wrong, or has engaged in misconduct for which it is strictly liable, may signal or express quite different levels of condemnation and culpability from saying that it engaged in that misconduct deliberately, or knowingly.[102] I return to this problem, reflected in a prevalent corporate habit of blaming "systems errors" for courses of misconduct, below.[103]

In any event, the Australian experience, certainly in relation to misleading conduct, has been that considerations of defendant culpability inevitably re-enter the frame of inquiry at remedial (for example, remoteness and apportionment)[104] and penalty stages. Australia has, for example, a very well developed civil pecuniary penalties jurisdiction, in which courts setting the level of fine commonly look for indicia of the defendant's blameworthiness—even in strict liability contraventions such as misleading conduct—through (amongst other factors) state of mind criteria, such as the defendant's knowledge, intention,[105] regret or contrition.[106] Similarly, the "failure to prevent" models are generally coupled with due diligence or reasonable precaution defences, in which corporations' systems of conduct must again be identified and assessed. These effectively recognise that corporate blameworthiness should inform liability.[107] Presumably, any corporate financial penalties imposed will involve examination of the range of fault manifested by those systems, policies and practices.

Besides, a wholly objective strategy is not supported on the authorities for core legal and equitable norms such as dishonesty and unconscionability. As we will see below, in both cases, the objective quality of the defendant's conduct must be assessed by reference to the person's knowledge about the circumstances of the conduct, or the intention with which the act was done. Minds matter. Further, removing (in favour of strict liability regimes) state of mind considerations from the spectrum of legal, equitable and statutory doctrines and rules that regulate corporations would either involve large-scale reforms or the separate treatment of corporate from natural defendants. While this can, no doubt, be done, a legitimate question is whether such wholesale reform is required or desirable.

Again, the point is that the Systems Intentionality model allows us to address meaningfully and practically the specific mental states and standards that already pervade

102. *Cf* Tilley [2022] Cardozo L Rev (forthcoming).

103. Discussed *post*, Section III(C).

104. E Bant and JM Paterson, "Limitations on Defendant Liability for Misleading or Deceptive Conduct under Statute: Some Insights from Negligent Misstatement", in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from* Hedley Byrne v Heller (Oxford, 2015) 159.

105. See the "French factors" developed in *Trade Practices Commission v CSR Ltd* [1991] ATPR § 41-076 and now authoritative: *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246, 250–251 [11] (Perram J); *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249, 258 [37] (Keane CJ, Finn and Gilmour JJ); *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44; [2016] ATPR § 42–521. *Cf ALRC Final Report* (*supra*, fn.15), recommendations 9–11. For an example of judicial reasoning consistent with Systems Intentionality in this context, see *ASIC v Westpac* [2021] FCA 1008.

106. On contrition, see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25, 64 [159] (Jagot, Yates and Bromwich JJ); *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148, [50] (Mortimer J); *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 3)* [2021] FCA 170; 150 ACSR 185, 221–222 [139–141] (O'Bryan J). See also the discussion in Paterson & Bant, "Intuitive Synthesis", *supra*, fn.5.

107. *ALRC Final Report* (*supra*, fn.15), [6.43–6.44], [6.46].

the law, without requiring significant amendment of, or departure from, existing, doctrinal, state of mind requirements.

III. APPLICATION OF SYSTEMS INTENTIONALITY TO KEY SCENARIOS

A. Introduction

In this section, I move to outline the application of the proposed model to a range of key scenarios. The analysis suggests the ramifications of the Systems Intentionality analysis are both concrete and profound. The model addresses the problem of diffused responsibility in a principled and practically workable way, which is attuned to the spectrum of organisational blameworthiness. Relatedly, it enables us to look past the distractions and sleights of hand that otherwise may be employed (very effectively) by corporations to avoid responsibility, by reference to traditional attribution rules. Chief among these corporate strategies is to take advantage of information silos within a devolved structure, in order to support a claim of board (and, hence, corporate) ignorance of the impugned conduct. This stratagem is generally effective as, while ignorance may support a finding of negligence on traditional attribution approaches, it is much more difficult for ignorance to provide the foundations for findings of deliberateness or other, more culpable, mental states. By contrast, the Systems Intentionality model adjusts the law's inquiry away from a sole focus on individual knowledge and intention, to consider the implications of organised methods of conduct that coordinate potentially many individuals (or perhaps none, in the case of automated systems) and that are adopted to achieve the corporation's ends.

Importantly, however, the model may also prevent the converse risk of scapegoating of employees and agents who are merely carrying out the corporate business model.[108] Many employees, after all, may have little capacity to form a judgement about their role within a complex business system. As we will see below, it appears to be an extraordinary feature of identification models of responsibility that it can be easier to earmark individuals for liability than the corporation who benefits from their endeavours.

Finally, the broader perspective offered by Systems Intentionality provides a ready and appropriate means for regulators to capture harmful business models and unfair trading practices, without being required (as on existing approaches) to prove manifold individual instances of the same wrongdoing, or for individuals to make use of group litigation procedures. Where there are patterns of misconduct, this will often reveal the presence of a system designed to, or apt to, produce that misconduct. Systematic misconduct may also cause more widespread harms that warrant special denunciation and deterrence.[109] The Systems Intentionality model provides a principled and efficient means of identifying, prosecuting and deterring this sort of repeated misconduct.

108. E Gold, "Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie" [2005] UQLJ 251, 253; discussed insightfully in Justice SC Derrington and S Walpole, "Culpable Ships", in Bant (ed.), *The Culpable Corporate Mind* (Oxford, 2023).

109. *ALRC Final Report* (*supra*, fn.15), fn.15, recommendation 8; Walpole & Corrigan [2021] Syd LR 489.

In what follows, I explore these and related advantages through scenarios that explain the operation of the model of Systems Intentionality.

B. Predatory business models

As discussed, Systems Intentionality allows regulators to connect the dots between repeated misconduct and to identify, as a result, a potentially more accurate picture of the degree of corporate culpability in play. This is apt, given not only that repeated conduct is likely to be more harmful in effect, but also that it reflects an engaged and blameworthy mental state. Correct characterisation of the nature and degree of organisational blameworthiness can be important not only in terms of primary liability but in terms of remedy and penalty. Here, the experience of Australia's regulators in regulating what can be called predatory business models is salutary. Importantly, while the following reforms are now embedded in statute, they developed through judicial exegesis from cases addressing systemic misconduct.

In general terms, there are two main forms of Australian prohibition on unconscionable conduct under statute.[110] A number of provisions across key statutes prohibit unconscionable conduct in trade or commerce "within the meaning of the unwritten law".[111] Such prohibitions reflect the autonomous equitable doctrine, which demands proof of exploitation of special disadvantage.[112] The statutory reiteration, however, operates as a gateway for additional consequences to those available in equity, such as regulator enforcement and private rights of redress for loss or damage suffered because of the misconduct. This form of prohibition can be placed to one side for present purposes.

By contrast, a companion prohibition on statutory unconscionability, again incorporated across the statute books, is expressly stated not to be limited by reference to the unwritten law.[113] It prohibits conduct that is "in all the circumstances" unconscionable and provides a set of interpretative principles to guide courts in assessing impugned conduct. Importantly, for current purposes, these include that the statutory prohibition "is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour".[114] The interpretative principles also include a list of factors to which the court may have regard in deciding whether conduct is unconscionable.[115] These include whether the defendant acted "in good faith". In assessing the statutory standard, courts commonly consider a range of further factors that relate to the defendant's mindset, including whether the impugned conduct

110. The following discussion draws on the detailed analysis in Bant & Paterson, "Systems of Misconduct" [2021] J Eq 63.

111. See eg ACL (*supra*, fn.14), s.20; ASIC Act (*supra*, fn.27), s.12CA.

112. See eg *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447, 467 (Mason J) 474 (Deane J); *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85, 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133; 146 FCR 292, 297–298 [19] (Finn J); *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, [39] (Kiefel CJ, Keane and Gleeson JJ) [91], [94] (Gordon J), [155] (Steward J).

113. See eg ACL (*supra*, fn.14), s.20; ASIC Act (*supra*, fn.27), s.12CB.

114. ACL (*supra*, fn.14), s.21(4); ASIC Act (*supra*, fn.27), s.12CB(4).

115. ACL (*supra*, fn. 14), s.22; ASIC Act (*supra*, fn.27), s.12CC.

was deliberate,[116] dishonest,[117] predatory,[118] or undertaken with sufficient knowledge of relevant disadvantage or vulnerability.[119]

The legislative reforms to incorporate "systems of conduct and patterns of behaviour" within the statutory prohibition may appear novel. Importantly, however, they reflect and endorse judicial insights first articulated by the Full Federal Court of Australia in *Australian Securities and Investments Commission v National Exchange Pty Ltd*.[120] And, equally importantly, courts have continued to develop a rich body of jurisprudence that need not be understood as tethered to specific statutory reforms but, rather, are fit for purpose and appropriate to apply more broadly where systems of conduct are in play.[121] In any event, as we have seen, the unconscionable systems of conduct law is not some stranded oasis in a desert of like ideas: the corporate culture provisions and related reforms, themselves supported by rigorous legal and moral theories of organisational blameworthiness, all point in a similar direction.

The founding case on unconscionable "systems of conduct and patterns of behaviour" provides a good example of the sorts of factual scenario to which the model may helpfully apply. National Exchange had sent unsolicited off-market offers to members of a demutualised company, Aevum Ltd, to buy shares at a price that constituted a substantial undervalue of their true worth. Notwithstanding the fact that a correct range of values for the shares was disclosed on the second page of the offer document, 257 shareholders accepted the offer. The Full Federal Court of Australia, comprising Tamberlin, Finn and Conti JJ, explained that "National Exchange set out to systematically implement a strategy to take advantage of the fact that amongst the official members there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer".[122] This is an example of a system that had an objective "purpose" of exploiting anticipated disadvantage: the very design of the system was predatory and systems intentional. Another way of seeing this is to observe that the business model could only be profitable in the event that it took advantage of a vulnerable group. This is an example of where, on my model, the system manifested a specific and predatory intention. Consistently, corporate knowledge of the presence of disadvantage on the part of some

116. See eg *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56; 44 VR 202, 221 [62] (Warren CJ, Cavanough and Ferguson AJJA).

117. *Australian Securities and Investment Commission v Kobelt* [2019] HCA 18; 267 CLR 1, 30–31 [59–60] (Kiefel CJ and Bell J).

118. *Ibid*, 47– 49 [116–120] (Keane J).

119. See eg *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; 15 BPR 29, 699; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75; 251 FCR 404.

120. *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132 (*National Exchange*), 140–141 [33] (Tamberlin, Finn and Conti JJ).

121. Leading authorities include *EDirect* [2012] FCA 1045; *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709 (*Get Qualified*); *Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 (*Cornerstone*); *Unique* [2018] FCAFC 155; *AIPE* [2019] FCA 1982; *AGM Markets* [2020] FCA 208; *Stubbings* [2022] HCA 6, [76–84] (Gordon J) [111–124], [133], [167], [173] (Steward J, using the system to demonstrate unconscionable conduct in equity). For a very useful review and application of the authorities, see *Phoenix* [2021] FCA 956. There are also signs of similar conceptions developing outside this context: see *ASIC v Westpac* [2021] FCA 1008, [37–47] (O'Bryan J).

122. *National Exchange* [2005] FCAFC 226, [43]. See also *Stubbings* [2022] HCA 6, [81] (Gordon J) [167–168] (Steward J).

shareholders (albeit not in individual cases) was implicit in the business model. That is, the corporation must have known of the presence of a class of disadvantaged shareholders, and the nature of the forms of vulnerabilities shared by that class, to adopt and operate the business model for profit.

As explained, the Australian Parliament's subsequent introduction of s.12CB(4) reflected the position adopted in *National Exchange*.[123] The "systems" provision has now been the subject of extended consideration by courts in response to sustained enforcement activity by Australian regulators. The range of predatory business models that have been successfully targeted vary hugely, and with them the manifested corporate spectrum of mental states. A rich vein of cases has involved vocational education and training scams, which sought improperly to profit from the Commonwealth Government's Vocational Education and Training funding schemes.[124] Others involved medical scams.[125] Yet others involved financial services and products of varying complexity.[126] Yet, while the factual (and hence statutory[127]) contexts have varied, it is striking that courts' analyses of the range of corporate mental states manifested by those systems are consistent with the synopsis given earlier.[128] These provide a wealth of examples demonstrating the practicality and utility of the proposed model.

C. "Systems errors"

The recent Australian *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*[129] heard evidence from a series of directors of large Australian banks, in which they admitted that the corporations had been deducting (through automated fee deduction systems) fees for no services, generally over very long periods of time.[130] These officers typically (1) denied personal knowledge of the misconduct; (2) asserted the individual honesty and work ethic of the employees caught up in the misconduct; and (3) blamed "poor systems and carelessness"[131] or "administrative errors", in a way that sought to recharacterise the behaviour as involving mistakes "in the system".

This sort of strategy effectively plays on the individualistic bias of existing attribution rules and improperly confounds the corporation with its employees. Moreover, it inevitably undermines effective, public denunciation of the misconduct and both

123. *EDirect* [2012] FCA 1045, [72–73] (Reeves J).

124. *Get Qualified* [2017] FCA 709; *Cornerstone* [2018] FCA 1408; *AIPE* [2019] FCA 1982; *Phoenix* [2021] FCA 956.

125. *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368, esp at [95] (North J).

126. *AGM Markets* [2020] FCA 208; *Stubbings* [2022] HCA 6.

127. The Australian habit of reiterating core prohibitions across multiple statutory contexts defies rational explanation or summary: see E Bant and JM Paterson, "Misleading Conduct Before the Federal Court of Australia: Achievements and Challenges", in P Ridge and J Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Sydney, 2018) 165.

128. Discussed at length in Bant & Paterson, "Systems of Misconduct" [2021] J Eq 63.

129. *FSRC Final Report* (*supra*, fn.67).

130. *Ibid*, 136–157.

131. *Ibid*, vol.1, 139. See eg M Neil, "NAB Says Fees for no Service not Dishonest", in *Guardian News* (26 November 2018), available at www.nambuccaguardian.com.au/story/5778688/nab-says-fees-for-no-service-not-dishonest/.

specific and general deterrence. Thus, studies into corporate responsibility indicate that corporations' perceptions of the reputational risks of misconduct will often be influential in deterring corporate misconduct.[132] Where conduct is characterised as involving mistake or systems errors, this expresses a wholly distinct and significantly lower level of blameworthiness.[133] Commissioner Hayne considered that this sort of sustained misconduct was open to being characterised as dishonest and in contravention of the statutory prohibition of "dishonest conduct".[134] Recall, however, that such standards combine objective characterisations of conduct with mental components. Dishonesty generally requires courts to assess objectively the quality of the defendant's conduct *in light of the defendant's* actual intention and knowledge.[135] How, then, does the Systems Intentionality model meet this challenge?

A specific example of the "fees for no services" misconduct provides a helpful illustration. From 2015 to 2019, AMP group companies (collectively, "AMP") charged dead people life insurance fees and fees for financial advice through automated fee deduction systems, when it had no right to do so.[136] Among other claims, the Australian financial regulator, the Australian Securities and Investment Commission (ASIC), has alleged that, through this behaviour, AMP contravened its statutory obligations to act "efficiently, honestly and fairly" under s.912A of the Corporations Act 2001 (Cth) and engaged in unconscionable "systems of conduct and patterns of behaviour" under s.12CB of the Australian Securities and Investments Commission Act 2001 (Cth).[137] Concepts of honesty and unconscionability are thus both in the spotlight.

For current purposes, the critical feature of the automated fee systems was that they were set to deduct fees on an ongoing basis. Yet, given the nature of the products (life insurance and financial advice), it was inevitable that the conditions justifying fees would

132. C Parker and V Lehmann Nielsen, "How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*" [2008] MULR 554.

133. *FSRC Final Report* (*supra*, fn.67), 138–140, 150.

134. *Ibid*, 154–157, discussed in Bant, "Culpable Corporate Minds" (*supra*, fn.23), 385–387. ASIC's criminal case against AMP, leveraging from the *FSRC Final Report*, has recently been withdrawn on the advice of the Commonwealth Director of Public Prosecutions: see Australian Securities and Investments Commission, "21-173MR ASIC Finalises Investigation into AMP Financial Planning 'Fees For No Service' Criminal Conduct" (Press Release, 17 July 2021), available at asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-173mr-asic-finalises-investigation-into-amp-financial-planning-fees-for-no-service-criminal-conduct/. The civil proceedings against AMP remain on foot, discussed immediately below. We can only speculate whether this decision was made on the basis of perceived difficulties with satisfying the mental component of the statutory offence. Section 1041G(2) of the Corporations Act 2001 (Cth) at that point adopted the *Ghosh* test of dishonesty: *R v Ghosh* [1982] QB 1053, 1064 (Lord Lane CJ for the Court). This definition is now amended through s.9 of the Corporations Act 2001 (Cth), bringing it into line with the approach of the High Court of Australia and English authorities, cited immediately below.

135. *Ivey* [2017] UKSC 67; [2017] Lloyd's Rep FC 561, [74] (Lord Hughes, with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed); *Peters v The Queen* [1998] HCA 7; 192 CLR 493, 503–504 (Toohey and Gummow JJ); *Barton v R* [2020] EWCA Crim 575; [2020] Lloyd's Rep FC 368; [2021] QB 685, [84], [107–108]; *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2019] Lloyd's Rep FC 319; [2020] Ch 129, [33–61].

136. For extended discussion of this misconduct across the financial services sector, see *FSRC Final Report* (*supra*, fn.67), 154–157.

137. See Australian Securities and Investments Commission, "Concise Statement", Concise Statement in *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd*, VID of 2021, 29 July 2021. See also *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421, [14], [45] (Allsop CJ).

change and require active review, in order to avoid the systems of conduct degenerating into a series of unlawful takings. AMP's automated fee deduction systems were subject to no, or no functioning, adjustment, monitoring or corrective mechanisms.

On the model of Systems Intentionality, systems of conduct necessarily manifest general intentionality. Viewed in this light, the design of the automated system reveals AMP's choices of conduct in deducting the fees. This analysis would demand that any plea, on the part of AMP, that the misconduct arose through "systems errors" be supported by further evidence that the system was not deployed or implemented correctly. Yet, to the contrary, the fee deduction systems on the face of it were working as designed and reflected deliberate conduct on the part of AMP.

Further, even if we accept the initial failing—not having a process for adjusting to changed circumstances—was unintentional, the absence of any effective system for overseeing and auditing outcomes arguably itself reflects an intentional decision not to "care" about the accuracy of payments.

In some cases, and jurisdictions, a specific intention may be inferred where an inevitable outcome is reached through deliberate conduct.[138] Here, it is possible to take a broader, encompassing view of AMP's system,[139] as comprising both the automated deduction processes, and related adjustment and audit mechanisms. On this view, the absence of remedial mechanisms to prevent the inevitable unlawful takings may suffice to support an inference of specific intention where these takings occurred. That is, the combination of ongoing takings and omission of any responsive mechanisms may be seen as coordinated and intended conduct. This conclusion may be fortified where the outcome is consistent with a corporate policy that promotes profit over compliance,[140] in circumstances where the system of conduct omits any mechanism to avoid that inevitable (if not constant) outcome. Certainly, once AMP was notified of the problem, and yet continued to run its automated system, the inference of specific intention in cases where the unlawful takings occurred becomes irresistible.

Further, the level and nature of AMP's knowledge as to key facts or matters relevant to its culpability can readily be inferred from the nature of the fee deduction systems. At its simplest, AMP was charging through its automated systems insurance and advice fees for *human* clients. Humans' circumstances change: AMP must be taken to know this. This is why clients take up life insurance and periodically require new financial advice. And clients die. When they do, AMP would clearly, evidently and inevitably have no right to charge insurance premiums or for advice that could never be received. AMP must also be taken to understand this. It is, after all, an expert in the field with decades of experience behind it.

138. *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362, 372 [26–27] (Kiefel CJ, Nettle and Gordon JJ); *R v Moloney* [1985] AC 905 (Lords Hailsham of St Marylebone, Fraser of Tullybelton, Edmund-Davies, Keith of Kinkel and Bridge of Harwich); *R v Hancock; R v Shankland* [1986] AC 455 (Lords Scarman, Keith, Roskill, Brightman and Griffiths).

139. The correct angle of focus, or level of abstraction, to view an alleged system is the subject of extended discussion in Bant, "Systems Intentionality", *supra*, fn.52.

140. Commissioner Hayne considered that the "root cause" of the "fees for no service" cases was "greed": *FSRC Final Report* (*supra*, fn.67), 138. Another, more specific cause was the tendency to prioritise revenue and fee generation over the conditions that justified those earnings: *ibid*, 139.

This corporate knowledge provides the necessary context in which to assess AMP's unlawful takings against the concepts of recklessness, dishonesty and unconscionability. From the perspective of Systems Intentionality, AMP deliberately and knowingly engaged in conduct that was apt (indeed, certain) to produce unlawful takings. This may manifest recklessness. It may also suffice to establish dishonesty. Honest persons (particularly, one might think, expert banks) do not deliberately take others' money regardless of their consent. Similarly, in Australia, the systems of conduct readily manifest statutory unconscionability.[141] To adopt the words of Bromwich J in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*:[142]

"The conclusion that the conduct overall was unconscionable would be more readily reached if such an outcome was either *intentional or sufficiently predictable or recurrent to require overt steps to be taken to minimise the chance of it* occurring."

Here, the analysis has suggested that AMP deliberately continued to take money from clients in circumstances where it knew that the conditions for lawful takings would, at some point, inevitably cease to apply and had no appropriate audit or remedial mechanisms in place to minimise or correct the consequential, unlawful taking. These conclusions of dishonesty and unconscionability are fortified by AMP's failure, upon being notified of the problem, to stop deducting fees until the problem was fixed.[143] Rather, AMP continued to operate the systems, and take profits.

D. Corporate disavowal of repeated employee misconduct

Here I move to examine two final categories of case, nominated by the Law Commission in its Appendix to the Discussion Paper, as being ones where "a wider basis of corporate criminal liability … might have permitted further lines of enquiry".[144] I have chosen these as being emblematic of the sorts of scenario that might commonly arise and confound traditional attribution approaches and which illustrate the different, and valuable, perspective offered by Systems Intentionality.[145] My purpose (in keeping with the Commission's focus) is to identify what lines of enquiry would have been prompted through application of the model. The following comments are necessarily brief and indicative, given the modest level of detail contained in the given Law Commission examples.

The first scenario involves the case of "Action 4 Employment, 2015". As described by the Commission:

141. *Cf Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421, [62] (Allsop CJ), characterising similar misconduct as not honest, rather than dishonest.

142. [2019] FCA 1982, [80] (Bromwich J) (emphasis added). See also *AIPE* [2019] FCA 1982, [84].

143. A clear example of Fisse's concept of reactive corporate fault: for his most recent treatment, see Brent Fisse, "Reactive Corporate Fault", in Bant (ed.), *The Culpable Corporate Mind* (2023).

144. Law Commission (*supra*, fn.9), Appx 1 [1.1].

145. On the other scenarios, see E Bant, "Corporate Criminal Liability" (Submission to Law Commission of England and Wales Inquiry into Corporate Criminal Liability, 17 August 2021).

1.2 …Ten employees of the company Action 4 Employment ("A4E") pleaded guilty to, or were convicted of, offences relating to submitting false documents for the purposes of the Department for Work and Pensions' "Inspire to Aspire" employment and training scheme. The 167 false claims submitted led to a loss of £289,000 on a contract with the DWP worth £1.3 million.

1.3 The judge described the fraud as "systemic" and said it had operated over a considerable period of time. However, the company to return any sums through the criminal proceeding. The Chief Executive of the company said it had a zero-tolerance policy towards fraud and that money had been set aside to ensure the taxpayer lost nothing. He said that the offences "do not reflect the way this company operates or the values of our 2,100 staff, whose honesty and integrity are much valued".

This is an example of where the focus of the prosecution appears to have been on individual employees, but the description suggests the possibility of a wider and entrenched *practice* adopted for the benefit of the corporation, reflecting, on the Systems Intentionality analysis, potentially a high degree of corporate blameworthiness.

First, addressing the CEO's disavowal of the misconduct, this echoes the corporate strategy adopted in the "fees for no services" cases. Here, as there, neither the Chief Executive's statement of the personal honesty of wider staff, nor any claim of his personal ignorance of the practice, is determinative of the corporate state of mind. Rather, the focus of the Systems Intentionality analysis is what *corporate* state of mind is manifested by *its* instantiated systems of (mis)conduct.

So far as the CEO's claimed corporate "zero-tolerance" policy towards fraud, a *formal policy* (expressing the corporate beliefs, values and overall mindset) may comprise empty words, and simply fail to reflect the true corporate mindset, as manifested on the ground, in its day-to-day behaviour. Rather, the reality of instantiated corporate *systems of conduct* may be consistent with and manifest a higher-level *de facto policy* that prioritises profit over honesty and compliance. Here, I should also note that the fact that the system is not adopted across a company, but is restricted to one section or portion, does not necessarily rebut corporate culpability otherwise manifested through the system. A corporation, like a natural person, may be honest with respect to some aspects of its activities and dishonest with respect to others. Where it is acting dishonestly, it cannot thereby avoid liability by pointing to other areas where it is compliant.

Secondly, applying the Systems Intentionality analysis to the reported facts, reveals indicia of deliberate corporate misconduct, at least sufficient to trigger further inquiry. This is because the widespread and longstanding practice may indicate the presence of a system of conduct and, hence, manifest the corporation's intention in relation to that conduct. As explained earlier, ad hoc practices may become embedded so that they evolve into corporate systems of conduct. This is often demonstrated where a practice is taught or passed on, over generations of employees, and is acknowledged or endorsed through incentives and de facto rules of recognition. Evidence relevant to the establishment and nature of such a system would include statements of employees detailing its nature and how they were trained in the practice, reporting and audit mechanisms related to the practice, evidence of the reported "targets" set for employees and whether these had compliance conditions attached, the financial benefits to the company from the practice, the duration of the practice and corporate responses to the practice (for example whether there existed incentives or rewards consistent with the practice, or any disciplinary measures related

to the practice). The focus then turns to what corporate state of mind may be revealed, embodied or manifested by such a longstanding and widespread "systemic" practice.

Here, as we have seen, the level of corporate culpability exposed by such a practice need not be characterised solely in terms of negligence. Rather, if the practice constituted a system of conduct, that would support a conclusion of corporate general intentionality in respect of the conduct that occurred. Recall that systems are inherently purposive: a plan, process or strategy that connects the dots between individual steps to some end. That arranged conduct must always be generally intended and, hence, will tend to indicate that the conduct was not accidental or made by mistake.[146]

On this basis, it may also be open (depending on the detailed facts of the case, and conceptual definition of the fault element) to characterise the system as reckless. Again utilising the earlier definitions, the conduct was corporate-deliberate, was of a nature, or patently likely, to produce false claims, the misconduct was recurrent, and that there was no, or no effective, adjustment mechanism to audit and correct harmful results of the system. Evidence may go further and support a finding of dishonesty, particularly if the exclusion of audit mechanisms was a matter of "choice architecture" in how the system was monitored for compliance, in the same way as for the AMP case discussed previously.

In sum, Systems Intentionality suggests that the reported facts strongly support further inquiry, beyond the individual employees, into the corporation's culpability.

Conversely, the company's reported decision to return the money is also relevant to ideas of "reactive corporate fault".[147] We have seen earlier that organisational blameworthiness is revealed where a corporation fails to undertake reasonable corrective or remedial measures in relation to harmful conduct undertaken by personnel on its behalf. Where, by contrast, a corporation responds quickly and appropriately to remedy and prevent harms resulting from its systems of conduct, this may suggest corporate contrition and rehabilitation, relevant as mitigating factors, or even that the original misconduct was careless rather than reckless or dishonest. However, more information would be required to assess this factor. Thus, in the "fees for no service" cases examined earlier, Australian financial services providers provided redress only after long periods of "investigation" of their patently deficient automated systems, which continued to charge customers unauthorised fees in the interim, further perpetuating harms. There, the considerable delays associated with the corporate acts of redress arguably do not manifest contrition or reduced culpability, but rather reinforce a mindset prioritising profit over compliance and deliberate misconduct.[148]

E. The importance of practices: scapegoating and corporate accountability

The final example also focuses on the relevance of embedded practices for corporate responsibility. The Law Commission's discussion paper cites a series of scenarios involving manipulation of the London Interbank Offered Rate ("LIBOR") and the Euro Interbank Offered Rate ("EURIBOR"). As the Commission explains:

146. *ASIC v Westpac* [2021] FCA 1008, [35–48] (O'Bryan J).
147. Fisse, *supra*, fn.143.
148. Discussed *ante*, Part III(C).

1.33 …LIBOR and EURIBOR are benchmark interest rates used as a reference for financial transactions and products. They are calculated using submissions from banks. Each bank's submission should reflect its assessment of the rates at which it can borrow unsecured funds from other banks. In 2017, it was estimated that LIBOR was used as a reference rate in financial contracts with a value of US$300 trillion.

1.34 The SFO's investigations were primarily concerned with whether LIBOR and EURIBOR had been manipulated for the benefit of positions taken by derivatives traders within the banks concerned. This would have had the effect of increasing the profits of the banks.

These cases instanced by the Commission are striking as involving successful individual prosecutions, while the banks profiting from that misconduct remained safe from criminal prosecution. In that context, the Law Commission posits whether adopting a vicarious liability framework (such as that used in the United States, where prosecutors had comparative success in pursuing corporate defendants) or failure to prevent offence, would advance prosecutors' capacity to hold the banks to account.[149] Here I would caution that, while it may do so, corporate liability would still depend on targeting (and potentially scapegoating) individual employees, who may well have had limited understanding of their role in the greater scheme of things and were simply doing their job. Moreover, the individualised approach fails to capture the real scope of the problem, which lies in widespread practices of misconduct, potentially reflective of Systems Intentionality.

These risks are reflected in the outline of cases provided by the Commission. Thus, in relation to the "Barclays (US Dollar LIBOR)" scenario, the Commission summary states that:[150]

"At trial, one of the defendants contended that 'the *practice* of asking the submitters to put in a rate which suited the traders was so *widespread* throughout the trading floor that senior management must have been aware of it or condoned it'. As a result, he said, it 'was reasonable to believe that this was acceptable practice and not thought to be improper'. In support of this, he claimed that he had *learnt this practice from his mentors*, who were also manipulating the rate, and used email and telephone communications for these purposes despite knowing they were monitored for compliance purposes" (emphasis added).

If this evidence were substantiated, the highlighted features would be indicative of an embedded, persistent and taught or modelled practice that may constitute a system of conduct, strongly supporting corporate "general" intention on the Systems Intentionality approach. As in the Australian unconscionability cases, the employee's evidence of the practice potentially gives powerful insights into the nature of the corporate system, which in turn could enable prosecutors to hold the corporation appropriately to account.[151] Conversely, targeting the individual through criminal proceedings because the corporation cannot be reached risks scapegoating and permitting the true source of the unlawful practices to go unpunished. Yet this is precisely the risk posed by the current attribution rules. As the Commission observed: [152]

149. Law Commission Discussion Paper (*supra*, fn.9), 71, Appx 1 [1.35], [1.44–1.46].
150. *Ibid*, Appx 1 [1.37].
151. See, eg, *Phoenix* [2021] FCA 956, [288–291] (Perry J).
152. Law Commission Discussion Paper (*supra*, fn.9), Appx 1 [1.38].

"Prosecutors say that it was not possible to prosecute Barclays due to the identification principle. The individuals involved were middle and senior-ranking but not at Board level. There was insufficient evidence against anyone senior enough to constitute a directing mind and will".

Similarly, the "Barclays and Deutsche Bank (EURIBOR)" scenario outlined by the Commission cites the evidence of former employees about a widespread and *coordinated* practice of manipulating benchmark investment rates.[153] Some of these middle-ranking employees were successfully charged, while the banks were not. Through the Systems Intentionality approach, such evidence becomes a valuable route to corporate responsibility, rather than leaving liability with middle-level cogs in the corporate machine. It also provides a framework for understanding the significance of the reported "inadequate systems and controls"[154] that, according to the Financial Conduct Authority, allowed the misconduct to go unchecked. On the proposed model, these audit failures reflect "reactive corporate fault", which may be consistent (depending on further facts and applicable definitions) with corporate recklessness. Indeed, they could potentially reveal a more "specific" corporate intention to benefit from the practice, for example if their omission was a matter of "choice architecture", which would be consistent with a finding of corporate dishonesty.

Finally, the Commission gives the example of Mr Tom Hayes, who was convicted of eight counts of conspiracy to defraud involving LIBOR rigging, in the "Yen LIBOR: UBS and Citibank" scenario. Echoing a now familiar theme, the Commission reports that his evidence was that he subjectively considered that his actions were not dishonest because "what he did was common practice",[155] was actively encouraged by his employers, and was consistent with his employer's instructions. Such evidence is consistent with, and warrants further enquiry into, a broader practice reflecting an adopted, de facto corporate system of conduct. The Systems Intentionality approach also allows courts to understand why such employees' individual understandings of "honesty" are not determinative of the question of *corporate* culpability. However, that same employee's (mis)understanding may provide a good reason to draw on the witness' evidence of the practice to help build a picture of corporate liability, rather than to provide a weapon in criminal proceedings against the individual employee. The model also provides a clear lens through which to interrogate and understand the degree of culpability manifested by what the Commission describes as "the routine and widespread manipulation" of the rate, which was "not detected by UBS's compliance department or the group internal audit".[156] Again, this failure is potentially suggestive of recklessness, but further may be adjudged dishonest if the system not only was apt to produce the unlawful conduct and no, or no appropriate, steps were taken to prevent that unlawful conduct, but the system was designed to ensure that relevant information was not relayed to responsible officers or otherwise acted upon.

In concluding this section, I note that the argument here is not that individual wrongdoers may not warrant prosecution in some (perhaps even many) scenarios. However, it seems to me to be problematic for individual (seemingly often mid-level)

153. *Ibid*, [1.42–1.48].
154. *Ibid*, [1.47].
155. *Ibid*, [1.52].
156. *Ibid*, [1.55].

employees to be targeted for engaging in widespread and sustained practices, for the clear benefit to the company, because the corporation itself is out of reach, and "someone must pay" for the systemic misconduct. It seems far better to recognise that systems of misconduct reflect corporate purposes and, accordingly, to hold the corporation itself to account. From this perspective, employees who form part of the system of misconduct provide valuable sources of evidence as to its features and operation, and help lift the lid on the culpable corporate mindset.

IV. CONCLUSION

This article has sought to explain why the model of Systems Intentionality should continue to be considered amongst the candidates for reform of the existing approaches for determining the corporate state of mind. The model is grounded in principled theories of organisational blameworthiness, is practically workable, and meets the problem of "diffused responsibility" that challenges (and too often defeats) traditional identification doctrines and their offshoots. It is also "fit for purpose" in the modern age, where corporate conduct is increasingly transacted through automated systems. As the worked examples show, it is possible for the model to meet existing doctrinal state of mind requirements while offering a real tool for regulators seeking to clamp down on systemic misconduct. And finally, it may provide a more just means of holding corporations responsible. Here, we have seen that the current rules may influence prosecutors to target lower-level, but accessible, individuals in preference to the corporation for whose benefit they act. These individuals are often not sufficiently high up in the corporate food chain to realise, or be able to engineer, the tangible benefits of blissful ignorance of the systems in which they are embedded. Currently, corporate structures and information silos enable those seen as part of the corporate "directing mind and will" to enjoy the personal and professional benefits of attribution rules that, simultaneously, whitewash the corporate state of mind. It is high time we consider a legal "play" that will catch the corporate conscience.