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Corporate Culture and Systems Intentionality: part of the regulator's essential toolkit

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ABSTRACT

The recent Law Commission of England and Wales review of corporate criminal liability has presented a range of options to the Government to address current deficiencies in the law of corporate attribution. This article explores the nature and operation of two holistic models closely considered by the Law Commission, but which were not included in the suite: the distinctive Australian 'Corporate Culture' model and a novel model of 'Systems Intentionality'. In so doing, the analysis sheds considerable light on the comparative nature, strengths and limitations of Failure to Prevent offences, which formed a key element in the Law Commission's reform recommendations. Using the Rolls Royce Deferred Prosecution Agreement proceedings as a case study, the article demonstrates how, far from being foreign and uncertain conceptual tools, Corporate Culture and Systems Intentionality are essential parts of the regulatory toolkit that deserve further consideration given the complex reality of modern corporate defendants.

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1. Introduction

The Law Commission of England and Wales has recently rejected the distinctive, Australian concept of 'Corporate Culture' as a recommended option for consideration by the Government as a means to hold corporate actors to account for criminal misconduct.[1] As will be explained, this provides a novel, holistic approach to corporate liability, which is not dependent on

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[1]Law Commission, *Corporate Criminal Liability* (Options Paper, 10 June 2022) paras 6.34–6.41, para 1.4, ch 6 (Law Commission Options Paper).

attributing mental states of key individuals to the corporation. The Law Commission further considered, in some respects very positively, another Australian model of corporate responsibility entitled 'Systems Intentionality'.[2] This builds upon the insights underpinning the Corporate Culture reforms in a theoretically consistent manner. However, the model aims to transform those insights into a doctrinally rigorous and practically workable liability mechanism. Ultimately, the Law Commission considered that 'it might be possible to consider the use of Systems Intentionality … as a basis of liability when developing or reforming specific offences in the future'.[3] Trialling the model in this way might then help determine whether it offers a viable model for broader application. For the time being, however, the Law Commission recommended neither Australian model to the Government as an immediate reform option.

This article argues that both concepts remain important as additional tools in the armoury of options addressing corporate responsibility and deserve further consideration in light of the complex reality of modern corporate defendants. In Australia, it is true, Corporate Culture has languished as a liability mechanism because of key ambiguities in the concept as originally developed, and a lack of authoritative guidance on how to connect it to the specific state of mind elements demanded by common law, equitable and statutory doctrines. However, what may not have been fully appreciated at the time of the Law Commission's inquiry is that Corporate Culture has been enormously successful as a governance and licencing concept and remains an important part of the regulatory toolkit.

This broader operation reflects the fact that questions of defendant culpability underpin every stage of regulator enforcement: whether to proceed informally, through administrative processes or through litigation; in identifying the (criminal or civil) breaches that have occurred; in developing litigation strategies or prosecution briefs; in considering settlement; and when

[2]ibid paras 6.30–6.46. The model is developed in the following publications: Elise Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* 63; Jeannie Marie Paterson, Elise Bant and Henry Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' (2021) 26 *Communications Law* 136; Elise Bant, 'Catching the Corporate Conscience: A New Model of "Systems Intentionality"' [2022] *Lloyds Maritime and Commercial Law Quarterly* 467; Elise Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) 39 *Company & Securities Law Journal* 259; Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' (ch 1), 'Systems Intentionality: Theory and Practice' (ch 9), Modelling Corporate States of Mind through Systems Intentionality' (ch 11) and, with Jeannie Marie Paterson 'Automated Mistakes' (ch 12), all in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing 2023); Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), *Evil Corporations* (Routledge, Oxford) (forthcoming 2024); Elise Bant, 'Corporate Mistake' in Jodi Gardner et al. (eds), *Politics, Policy and Private Law* (Hart Publishing, Oxford) (forthcoming 2024).

[3]Law Commission Options Paper (n 1) para 6.54.

assessing the required level of penalties or remedial outcomes, among others.[4] At every stage, it will matter whether the misconduct was deliberate, mistaken, dishonest, reckless and so on. It follows that Corporate Culture and other attribution mechanisms play crucial parts well beyond the context of a criminal trial. Consistently, the Australian Law Reform Commission (ALRC) has emphasised the value of taking a uniform approach to the challenges of corporate attribution, rather than drawing a sharp line between criminal and regulatory offences or, for that matter, civil wrongs more broadly.[5]

Additionally, and as a consequence of developing the model of Systems Intentionality, the ambiguities that have undermined the operation of Corporate Culture as a liability tool are well on the way to being resolved. Systems Intentionality explains how Corporate Culture can be conceptualised and proven to reveal a corporation's ethos, values and beliefs. It also explains how to rehabilitate a corporation's character. These are arguably useful contributions to more coherent and effective corporate regulation. Seen from this broader perspective, rejecting Corporate Culture outright as a means of determining criminal liability runs the risk of reducing its capacity to inform and support necessarily interlocked stages in the regulatory inquiry.

Further, building on the Corporate Culture reforms, Systems Intentionality itself provides a liability mechanism that is fit for purpose in this age of massive, trans- and multi-national corporations. While it is yet to be endorsed in judicial proceedings, it has been trialled in quasi-judicial proceedings in Australia to good effect, and its operation modelled extensively academically. Both provide support for its practical and principled utility as part of the regulatory toolkit. Indeed, Systems Intentionality is arguably consistent with traditional attribution rules and explains their principled function, without degenerating into anthropomorphic fictions.

Finally Systems Intentionality also shows how the new darlings of corporate regulation, the 'Failure to Prevent' offences,[6] may be placed on a more subtle and principled footing. From the perspective of Systems Intentionality, a corporation's failure to prevent an offence is not necessarily reflective of organisational 'deficit'.[7] Rather, the presence or absence of reasonable precautions in the form

[4]Justice Robert French, 'The Culture of Compliance – a Judicial Perspective' [2003] *Federal Judicial Scholarship* 16.

[5]Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) para 1.21 (ALRC Discussion Paper); Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Final Report, April 2020) paras 1.15, 1.25 (ALRC Final Report). 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. Cf Law Commission Options Paper (n 1) para 7.9, describing regulatory offences as 'not truly criminal'. On the fuzzy boundary between regulatory and criminal offences, see Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) ch 5; Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) ch 1.

[6]These are the subject of extended consideration in the Law Commission Options Paper (n 1) ch 8.

[7]cf Law Commission Options Paper (n 1) para 6.23, discussed below.

of a corporation's systems, policies and practices says something important about a corporation's positive values and intentions. In this way, Systems Intentionality counteracts the tendency of Failure to Prevent offences to default to a low-level standard of organisational culpability, tethered to negligence. This may be important when setting penalties, among other matters.

The article commences by outlining the limitations of existing, individualistic attribution rules in holding modern, complex corporations to account for serious misconduct, which gave rise to the Corporate Culture reforms. Sections 3 and 4 then turn to explore the nature and operation of Corporate Culture and Systems Intentionality, including in light of the Law Commission's concerns. The analysis brings a fresh perspective to the strengths and limitations of Failure to Prevent offences. These are explored in Section 5 using the example of the Rolls-Royce 'Deferred Prosecution Agreement' (DPA) proceedings. Section 6 concludes.

2. Background

There is little doubt that the law's traditional approaches to corporate responsibility, both in relation to serious civil, and criminal, misconduct, suffer from serious shortcomings. We need observe only some of the most obvious, and uncontentious, to make the point.

Vicarious liability is the oldest liability mechanism and still operates in a range of jurisdictions and contexts.[8] It holds a corporation to account for the acts or wrongdoing of its agents.[9] But this clearly disengages corporate culpability from corporate liability: thus, a good corporate citizen may be held liable for the act of one 'bad apple' employee; conversely, a rogue corporate actor may be shielded from liability for egregious and longstanding misconduct, where no individual agent can be located who is responsible for the offence.[10]

Unlike vicarious liability, where the corporation is indirectly responsible for the acts or wrongdoing of its agents, attribution principles such as the

[8]ALRC Final Report (n 5) paras 4.50–4.57. 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.

[9]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) 250 FCR 136, 147–49 [48]–[58] (Davies, Gleeson and Edelman JJ). If the latter, then the individual's mental state must still be established.

[10]Wells (n 5) 152–53; Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095, 1104; William S Laufer, 'Corporate Bodies and Guilty Minds' (1994) 43 *Emory Law Journal* 647, 659; William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2006) 17–25; Mark D'Souza, 'The Corporate Agent in Criminal Law: An Argument for Comprehensive Identification' [2022] *CLJ* 91; Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) [5.3.4]. For an important and novel corrective justice explanation of strict liability, see Cristina Carmody Tilley, 'Just Strict Liability' (2022) 43 *Cardozo Law Review* 2317.

Identification Principle hold the corporation directly responsible for its own wrongdoing.[11] It is, accordingly, a means of determining organisational blameworthiness. Yet it reflects a curiously limited and derivative conception of both the corporation and the nature of organisational fault. The Identification Principle typically locates the corporate 'directing mind and will' in the Board of Directors. This works well for hierarchical and small, 'mum and dad' companies, but quickly loses application 'where it is needed most'[12] – in respect of large and powerful corporations that can commit correspondingly significant harms. The Identification Principle seems sorely unfit for purpose in the modern world, where corporate structures are often more horizontal, and knowledge is commonly fractured among many employees, (corporate and human) agents, and departments, resulting in the problem of 'diffused responsibility'.[13]

The *Meridian*[14] approach casts the net for relevant natural 'alter egos' of the corporation more broadly than the Identification Principle. It asks, as a matter of statutory interpretation, who is the responsible decision-maker for the purposes of a particular rule or prohibition.[15] Statutory approaches, such as the 'Trade Practices Act (TPA) model',[16] which has been adopted repeatedly, in various forms, across Australia's statute books,[17] may cast the net more widely still. The TPA model simply deems the corporation to have the state of mind of the employee or agent who engaged in the relevant misconduct.[18] Yet all these liability mechanisms share the same difficulty: they

[11] For the Identification Principle, see *Lennard's Carrying Co v Asiatic Petroleum Co* [1915] AC 705 (HL) 713; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [1971] 2 WLR 1166 (HL); *Hamilton v Whitehead* [1988] HCA 65, (1988) 166 CLR 121. See, further, discussion in ALRC Final Report (n 5) para 4.32 and Law Commission for England and Wales, *Corporate Criminal Liability* (Discussion Paper, June 2021) para 1.7.

[12] James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 *Legal Studies* 393, 401. See also Wells (n 5) 98–101.

[13] Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' [1983] *Southern California Law Review* 1141, 1189; ALRC Final Report (n 5) [4.68] – [4.69]; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993) ch 2; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford, Oxford University Press, 2002) 90; Gobert (n 12) 394; Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Sydney Law School Legal Studies Research Paper 17/14, 2017), 5–6.

[14] Named after *Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] UKPC 26, [1995] 2 AC 500.

[15] *ASIC v Westpac Banking Corp (No 2)* (2018) 357 ALR 240, [1660] (Beach J). We share Rachel Leow's concerns that this approach is not fit for determining attribution in general law contexts: see Rachel 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, *The Culpable Corporate Mind* (n 2) ch 6.

[16] Originating in s 84 of the *Trade Practices Act 1974* (Cth).

[17] ALRC Final Report (n 5) 39 [1.43], 67[2.82], including in relation to the use of the TPA Model at 92–93, 219–22, [3.60] – [3.65].

[18] While the Law Commission considered that this was similar to a doctrine of respondeat superior, the provisions operate as direct attribution rules, rather than a form of vicarious liability: see Law Commission Options Paper (n 1) para 6.7. It may, however, be that this reflects a difference of jurisdictional opinion over whether vicarious liability is direct or indirect, and the relationship between this and the doctrine of respondeat superior: see Law Commission Options Paper at para 5.3. The ALRC's Option 2, discussed below, was to adopt the TPA model, but subject to a reasonable precautions defence.

depend upon identification of some natural person whose fault, or state of mind, counts as that of the corporation.

This search for a human locus of fault provides a ready means for corporations to limit or entirely avoid responsibility for significant misconduct. Ignorance is king and silence is golden.[19] Small wonder, then, that corporate wrongdoers often have boards that readily confess to being oblivious of rampant misconduct occurring on their watch; informal and structural information barriers arise to prevent sharing of information relevant to responsibility; informal corporate reporting lines deviate markedly from the formal corporate flowcharts, and so on.[20] All of this is very effective to reduce or negate corporate responsibility.

Further, these attribution approaches all seem to conceptualise the corporation in terms of the humans through which it acts. No doubt, the identities and character of its employees are important to the operation of a corporation. But the relationship is complex and attenuated: corporations are hardly the sum of their parts.[21] Indeed, individuals can adopt quite different aims, values and behaviours as employees than in their personal capacities.[22] And human actors are now increasingly supplemented, or supplanted, by automated processes or other corporations. This only exacerbates the theoretical and practical difficulties of conceptualising corporations in terms of natural individuals.[23]

These final points also affect, conclusively we think, the legitimacy of any simple 'aggregation' model that seeks to overcome the phenomenon of diffused corporate responsibility by adding together the states of mind of relevant individuals, to comprise a greater corporate consciousness.[24] However, it is possible that aggregation reflects an early intuition of the concept of

[19]Bant, 'Corporate Evil' (n 2).

[20]See the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) (FSRC Final Report); *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) (RCCOL Report); *Perth Casino Royal Commission* (Final Report, 4 March 2022) (PCRC Report); *Review of The Star Pty Ltd*: *Inquiry under sections 143 and 143A of the Casino Control Act 1992 (NSW)* (Report, 31 August 2022) (Star Casino Report) and Joint Standing Committee on Northern Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021) for a plethora of examples.

[21]Fisse and Brathwaite (n 13) ch 2; Wells (n 5) ch 4; Christian List and Philip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford University Press 2011). See further below n 24; see also discussion of aggregation in Parts 1 and 3(b), below, and for a fascinating discussion of the long history of real entity theories and their conceptual and normative divergences from aggregation approaches, see D Gindis, 'From Fictions and Aggregates to Real Entities in the Theory of the Firm' (2009) *Journal of Institutional Economics* 25.

[22]C Chapple, *The Moral Responsibilities of Companies* (Palgrave Macmillan, 2014), ch 1; Micheler (n 10) 22.

[23]FSRC (n 20).

[24]Compare *United States v Bank of New England*, NA, 821 F 2d 844 (1st Cir 1987); *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 446 [101], 448–56 [110]–[143] (Edelman J, with whom Allsop CJ generally concurred); *R v HM Coroner for East Kent, ex parte Spooner (Herald of Free Enterprise/Zeebrugge Ferry Disaster)* (1989) 88 Cr App R 10 (QB). See also Mihailis E Diamantis, 'Corporate Identity' in K Tobia (ed), *Experimental Philosophy of Identity and the Self* (New York, Bloomsbury, 2022) 203.

Systems Intentionality, a more promising and principled avenue for its future deployment, to which we return below.

The next section explains that acceptance of distinctively 'organisational blameworthiness' underpins not only the Corporate Culture reforms but a swathe of broader Australian legislation and reform recommendations, including the recent ALRC report into Corporate Criminal Responsibility and the model of Systems Intentionality. In that jurisdiction, therefore, a 'realist' conception of corporations is firmly established, if not universally recognised or endorsed by natural stakeholders. This article proceeds, likewise, on that basis.

3. Corporate Culture

Some thirty years ago, the Commonwealth of Australia's Model Criminal Code Officers Committee developed the Corporate Culture provisions in order to incorporate principles of organisational blameworthiness. The reforms drew on the work of leading realist corporate theorists,[25] and followed a long process of industry consultation.[26] Section 2.5 of the Criminal Code contains the provisions. Relevantly, section 12.3(1) of the Criminal Code recognises that a state of mind of 'intention, knowledge or recklessness' can be established where a body corporate 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'. The requisite authorisation or permission may be shown by:

> (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
>
> (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[27]

[25] Bucy (n 10); Brent Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 *Adelaide Law Review* 285, 285–86; Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 *University of New South Wales Law Journal* 1, 3–4; Fisse and Braithwaite (n 13). For further, important realist scholars, see below (n 79); PA French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984), 4; Peter A French, 'Integrity, Intentions and Corporations' (1996) 34 *American Business Law Journal* 141. For more recent scholarly analysis see Dixon (n 13); Bant, 'Culpable Corporate Minds' (n 2); Vicky Comino, 'Corporate Culture is the "New Black" – its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?' (2020) *University of New South Wales Law Journal* 295; Rebecca Faugno 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence' in Bant 'The Culpable Corporate Mind' (n 2) 159.

[26] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility* (Report, 1 December 1992) 107 (*Model Criminal Code*). See discussion in ALRC Final Report (n 5) 56–66; also discussion in Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 *Journal of Business Law* 1, 18.

[27] *Criminal Code Act 1995* (Cth) s 12.3(2). Note that in its Final Report the ALRC recommended repealing s 12.3(2)(d): ALRC Final Report (n 5) 245–46, again a point that indicated, to the Law Commission, a lack of confidence in the provision: Law Commission Options Paper (n 1) para 6.9.

Section 12.3(6) defines 'corporate culture' as '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'.[28]

As the Law Commission observed, key difficulties with these provisions have substantially undermined their intended use as a powerful liability mechanism.[29] (In)famously, there has been no case yet decided (positively or negatively) on the basis of the provisions.[30] There is, accordingly, no evidence of its successful use,[31] or the extent to which it may be fit for purpose. The one prosecution that did go to trial on the provisions was dismissed before it went to the jury, on grounds that included that the provisions did not address the 'dishonesty' element required by the particular offence.[32] The Law Commission noted this omission as another reason for caution regarding the reforms.[33]

The Law Commission further considered that the 'concept's lack of clarity, undefined boundaries, and high threshold in trying to capture a culture within a singular policy or practice' were all reasons why, in its view, the ALRC had advocated shifting away from the concept.[34] Practical difficulties of proof and evidence, related to its conceptual uncertainty, were accordingly significant. These same issues would likely place a significant burden on prosecutors, who might also be expected to act as 'model litigants' (and therefore only prosecute where clearly warranted).[35] Finally, there is no currently similar provision in English law,[36] meaning that any amendment would introduce a distinctively foreign implant, into potentially sterile soil.

To all these might be added that, even if the meaning of Corporate Culture could be clarified, and evidential and litigation strategies developed, it has been unclear how Corporate Culture bears on the specific doctrinal mental elements required at law.[37] What does intention, knowledge and recklessness (or dishonesty, unconscionability, or any other complex concept in which mental states form an element) look like through the lens of Corporate Culture? Put another way, how does proof of a certain corporate culture in some part, or the whole, of a company connect with specific states of mind?

[28]Note the ALRC proposal to pluralise the terms 'attitude', 'policy' and 'rule', and to replace 'takes' with 'take' in ALRC Final Report (n 5) Recommendation 7 Option 1, 228.
[29]Law Commission Options Paper (n 1) para 6.7. See also discussion from paras 6.8–6.20.
[30]ibid para 6.7, citing ALRC Final Report (n 5) para 6.108.
[31]ibid para 6.14.
[32]*R v Potter* (2015) 25 Tas R 213; J Gans, 'Can Corporations be Dishonest?' in Bant, 'The Culpable Corporate Mind' (n 2) ch 13; cf Bant, *The Culpable Corporate Mind* (n 2) ch 11. See also discussion of dishonesty below at Part 3(B).
[33]Law Commission Options Paper (n 1) para 6.8.
[34]ibid para 6.7.
[35]ibid paras 6.18–6.19.
[36]ibid para 6.16.
[37]Bant, 'Culpable Corporate Minds' (n 2). For early identification of this critical issue, see Laufer, 'Corporate Bodies and Guilty Minds' (n 10) 669.

Given this catalogue of failings, it is unsurprising that the Law Commission felt it prudent to remove Corporate Culture from the table of reform options. Indeed, what might be surprising is that the provisions continue to enjoy 'overwhelming' support within Australia's commercial and legal communities.[38] But this need not be understood solely as a quirk of Australian commercial character, the regulatory equivalent of its enthusiasm for Australian Rules football. Rather, Corporate Culture remains stubbornly useful as a governance concept and, relatedly, for broader regulatory purposes.[39] True, it has never been used as a mechanism for allocating primary liability. But it looms large in directors' and managers' minds as they chart and implement a company's directions.[40] It forms part of the baseline expectations of listed companies.[41] It underpins inquiries into whether a corporate person is 'suitable' or 'appropriate' to hold a licence.[42] More broadly, it intimately informs regulator enforcement strategies.[43] And it is thoroughly embedded in the public consciousness as a legitimate and helpful means of assessing corporate character.[44]

Consistently, it is on one view (not the Law Commission's) telling that the ALRC recommended the Commonwealth Government choose between two reform options relating to attribution of corporate fault, both of which arguably incorporated concepts of Corporate Culture, though at different stages of the accountability process.[45]

[38] ALRC Final Report (n 5) 232.

[39] The Law Commission noted support for the model in regulatory contexts: Law Commission Options Paper (n 1) para 6.24. See also paras 6.25–6.29.

[40] See below at n 52.

[41] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th edn, February 2019) 16–17 (ASX Guidelines), in particular Principle 3, which requires that a corporation should 'instil … a culture … of acting lawfully, ethically and responsibly'.

[42] See RCCOL Report (n 20); PCRC Report (n 20); Star Casino Report (n 20).

[43] Successive Chairs of the Australian Securities and Investments Commission (ASIC) have highlighted ASIC's 'regulatory interest in culture', over the past decade and a half: ASIC Commissioner John Price, 'Book Launch: "Managing Culture: A Good Practice Guide"' (Speech, ASIC, 12 December 2007). See also, for example, ASIC Chair James Shipton, 'Keynote Address' (Speech, Centre for Economic Development of Australia event, Melbourne, 27 June 2019); ASIC Chairman Greg Medcraft, 'Corporate Culture and Corporate Regulation' (Speech delivered to the Law Council of Australia BLS AGM seminar, Melbourne, 20 November 2015); John Price, 'Outline of ASIC's Approach to Corporate Culture' (Speech, AICD Directors' Forum: Regulators' Insights on Risk Culture, Sydney, 19 July 2017).

[44] See, eg, 'Crown Must Reform its Corporate Culture' (*The Age*, 9 February 2021) <https://www.theage.com.au/national/victoria/crown-must-reform-its-corporate-culture-20210209-p5710m.html> accessed 27 January 2023; Sam McKeith, 'Corporate Culture, Not 'Bad Apples' to Blame at Star, Inquiry Told' (*The Sydney Morning Herald*, 17 June 2022) <https://www.smh.com.au/national/nsw/corporate-culture-not-bad-apples-to-blame-at-star-inquiry-told-20220617-p5aul2.html> accessed 27 January 2023; Charles Livingstone, 'Illegal, Improper, Unacceptable: Revelations About Crown's Casino Culture Just Get Worse' (*The Conversation*, 9 July 2021) <https://theconversation.com/illegal-improper-unacceptable-revelations-about-crowns-casino-culture-just-get-worse-164084> accessed 27 January 2023, all of which are aimed at public readership.

[45] ALRC Final Report (n 5) Recommendation 7.

Option One involved minor (albeit useful), technical amendments to the Corporate Culture provisions, to improve their workability.[46] These included amendments to make clear that they are not dependent on proof of commission by an individual of a complete, predicate offence.[47] It also recommended that the existing section 12.3(2)(d) be repealed, on the ground that 'it is inappropriate to require proof beyond reasonable doubt of the non-existence of a particular culture in order to attribute liability to a corporation'.[48] However, this need not be understood[49] as decrying the broader value of corporate culture as means of determining corporate culpability. Rather, the reform responded to perceived difficulties with connecting *omitted* cultures and corporate responsibility for misconduct. The relationship between omissions and responsibility, including for causation inquiries, is a familiar, albeit not insuperable, challenge for the law. We explain below how this challenge can be addressed in light of the advances on Corporate Culture developed through Systems Intentionality.

The ALRC's Option Two involved a modified version of the TPA Model, amended to include a 'reasonable precautions' defence.[50] This defence directs attention, as do the Corporate Culture provisions, to the corporation's policies, rules, courses of conduct and practices. The Law Commission separately noted the overlap between Corporate Culture and 'Failure to Prevent' offences, with which Option Two evidently has much in common. Also like that model, Option Two hinges upon identifying an individual who engaged in the relevant conduct, with the relevant mindset. As the ALRC noted, this second option accordingly would not address the diffused responsibility problem.[51]

This review of the ALRC recommendations suggests that, far from shifting away from Corporate Culture, the ALRC strongly endorsed it, and noted the comparative failing of the individualistic liability limb of its second option for reform.

What, then, can explain the persistence and impact of the Corporate Culture concept in Australia, in the face of its notorious limitations?

First, as a governance concept, Australian commercial actors have embraced the challenge of understanding (giving meaning to) and using Corporate Culture.[52] Reflecting PwC's 2021 observation that 'culture's time has

[46]ibid Recommendation 7 Option 1. These include amending the definition of 'corporate culture' to include the plural as well as the singular and, for the avoidance of any possible confusion, replacing the idea of 'due diligence' with 'reasonable precautions'.
[47]ibid paras 6.56–6.60.
[48]ibid 6.69.
[49]cf Law Commission Options Paper (n 1) paras 6.9, 6.20.
[50]ALRC Final Report (n 5) Recommendation 7 Option 2, 14, 228, 233.
[51]ibid para 6.126.
[52]See, for example, publications by ASIC (https://asic.gov.au/regulatory-resources/corporate-governance/directors-and-corporate-culture/) and the Australian Institute of Company Directors (https://www.aicd.com.au/organisational-culture/business-ethics/change/culture-wins.html). A swathe of prominent Australian companies actively and publicly promote their positive corporate culture. See for example, National Australia Bank (https://www.nab.com.au/about-us/careers/people-culture); FMG (https://www.fmgl.com.au/about-fortescue/our-culture) and Woodside (https://www.woodside.com/careers/our-culture).

come',[53] there is a veritable cottage industry of Corporate Culture consultants and associated experts, for example, that will investigate, analyse, and suggest remediation strategies for defective cultures.[54] A significant body of academic work, albeit arising in the business and management, rather than legal contexts, has also developed.[55] This research and practice may not meet the technical needs of the legal (and specifically litigation) communities, but they provide useful examples of the range of understandings of the concept. For example, in the recent Australian casino royal commissions, Crown Casino engaged a series of Corporate Culture reviews by Deloitte, the reports from which were considered by the commissions.[56] The Perth Casino Royal Commission itself commissioned a further analysis of the Deloitte Final Report by an independent Corporate Culture expert.[57] These reviews exposed two different approaches to assessing Corporate Culture. One approach, adopted as part of Deloitte's organisational culture review, focused on the subjective understandings and lived experience of Crown's overall culture from the perspective of its employees.[58] This involved an assessment of culture on the basis of a comprehensive survey of the subjective views of Crown staff, interviews with board members and senior

[53]'Culture Rises Up The Leadership Agenda Yet Major Gap in Attitudes Between Senior Management and Rest of Workforce Greater Than Ever – PwC Global Culture Survey' (PwC 2021) <pwc.com.au/media/2021/global-culture-survey-2021-australia.html>, reflecting an observation made as far back as 2003 by Justice Robert French: French (n 4), 'an idea whose time has come and which has a useful role to play in corporate law enforcement'.

[54]See for example corporate culture consulting, advisory and remediation services offered by a plethora of consultants and experts, such as The Culture Equation (https://thecultureequation.com.au/); EY (https://www.ey.com/en_au/corporate-culture); Holistic Services Group (https://www.holisticservices.com.au/organisational-culture-change/); Deloitte (https://www2.deloitte.com/au/en/pages/financial-services/articles/culture-leadership-analytics-matter-more.html), and Keogh Consulting (https://keoghconsulting.com.au/business-transformation/organisational-culture/).

[55]For some recent examples from a very extensive and well-established literature, see Gary B Gorton, Jillian Grennan and Alexander K Zentefis, 'Corporate Culture' (2022) 14 *Annual Review of Financial Economics* 535; Eric Flamholtz and Yvonne Randle, *Corporate Culture: The Ultimate Strategic Asset* (Stanford University Press 2011); Kai Li, Feng Mai, Rui Shen, Xinyan Yan and Itay Goldstein, 'Measuring Corporate Culture Using Machine Learning' (2021) 34 *The Review of Financial Studies* 3265; Andreas Bath and Sasan Mansouri, 'Corporate Culture and Banking' (2021) 186 *Journal of Economic Behaviour and Organisation* 46; Luigi Guiso, Paola Sapienza and Luigi Zingales, 'The Value of Corporate Culture' (2015) 117 *Journal of Financial Economics* 160 and Carmen Tanner, Katharina Gangl and Nicole Witt, 'The German Ethical Culture Scale (GECS): Development and First Construct Testing' (2019) 10 *Frontiers in Psychology* 1667.

[56]Crown Resources Limited engaged Deloitte to carry out an assessment of Crown's corporate culture. Deloitte produced four reports: 'Crown Culture Review – Current State Culture – Final Report' (Deloitte July 2021) (Deloitte Final Report); 'Culture at Crown Survey – Survey Results – Demographic Detail' (Deloitte September 2021); 'Crown's Draft Ethical Compass and Aspirational Culture' (Deloitte August 2021) and 'Crown Organisational Culture Review – Draft Culture Change Roadmap' (Deloitte August 2021). Deloitte also produced for Crown a 'Crown Culture Review – Culture Measurement and Reporting Framework' (August 2021), Detailed Project Plan (27 August 2021) and Crown Culture Change Program – Change Management Strategy (September 2021). See discussion in PCRC Report (n 20). For consideration of the Deloitte reports, see RCCOL Report (n 20) and PCRC Report (n 20) paras 564–608.

[57]Elizabeth Arzadon, 'Observations in relation to Deloitte Culture Review of Crown: Expert Opinion' (PCRC October 2021) (Arzadon Report).

[58]Deloitte's four reports as above (n 56).

executive personnel, employee focus groups, and document analysis.[59] The other approach adopted a more objective and potentially more tailored analysis.[60] Consistently with Section 2.5, this second approach focused on the corporate culture within functional parts of the Casino, responsible for different forms of misconduct, as evidenced in their policies, rules, courses of conduct or practice.[61] While both approaches are no doubt useful from a governance perspective, the latter is particularly promising as a way of providing more concrete and objectively ascertainable markers of corporate culture.[62] The recognition by the Royal Commissions that the Casino's culture could be reformed, and the framing of recommendations to bring about that reform, further illustrate both the potential utility of Corporate Culture as a governance and regulatory tool, and the possibility for the concept of Corporate Culture to be practically applied.[63]

Further, while it is true that the Corporate Culture provisions have not been used successfully in liability proceedings, Corporate Culture is embedded as a key consideration in civil and criminal pecuniary penalty proceedings. For example, civil penalty regimes under the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') and Australian Consumer Law ('ACL')[64] allow a court discretion, in the event of contravention of certain provisions, to order payment of 'a pecuniary penalty the court considers appropriate'.[65] The courts' determination of an 'appropriate' civil penalty is guided by a multi-factorial decision-making process, with one relevant factor being 'whether the company has a corporate culture conducive to compliance with the Act'.[66] This brings notions of Corporate Culture squarely into consideration. In the context of penalties jurisprudence

[59]Deloitte Final Report (n 56) 7.
[60]Arzadon Report (n 57).
[61]ibid, in particular 25–29.
[62]This latter approach is also more consistent with concepts of corporate culture as developed by leading scholars: see discussion in Part 2 below. For detailed consideration of the conceptions of corporate culture adopted by the PCRC and RCCOL, see Rebecca Faugno and Elise Bant, 'Corporate Culture, Conscience and Casinos' (forthcoming).
[63]See for example RCCOL Report (n 20) 12; PCRC Report (n 20) 167.
[64]The ACL is a self-contained legislative instrument, annexed as Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL).
[65]*Australian Securities and Investments Commission Act 2001* (Cth) s 12GBB(3) (ASIC Act); ibid s 224(1). The civil penalty regimes are contained in chapter 5–2 division 1 of the ACL and part 2 division 1 of the ASIC Act.
[66]French J in *Trade Practices Commission v CSR Limited* set out a list of factors for guiding the court's exercise of discretion in determining penalty: *Trade Practices Commission v CSR Limited* (1991) ATPR 41–076 (*CSR*), 152–53, 54 (French J). Note the factors are not exhaustive: *Australian Competition and Consumer Commission v Visa Inc* (2015) 339 ALR 413. For consideration of the multi-factorial decision-making process, often referred to as 'intuitive' or 'instinctive' synthesis, see Elise Bant and Jeannie Marie Paterson, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Pecuniary Penalties under the Australian Consumer Law' in Prue Vines and Donald M Scott (eds), *Statutory Interpretation in Private Law* (Federation Press 2019) 154 and see also discussion in, eg, Cam H Truong and Luisa F Alampi, 'Increased Civil Pecuniary Penalties – The "Cost of Doing Business" or an Effective Deterrent?' (2020) 28 *Australian Journal of Competition and Consumer Law* 21.

concerning misleading or deceptive conduct or unconscionable conduct under the ASIC Act or ACL, analysis suggests that to date courts have not expressly articulated the meaning of 'corporate culture' or a 'culture of compliance'.[67] Nor have they given concrete guidance as to how a company's culture should be evaluated.[68] Nevertheless, consideration of the final form of penalties ordered, the facts supporting those penalties and judicial reasoning in reaching a penalty determination provides some insight into indicia adopted by the courts in evaluating a corporation's culture. Notably, courts show a tendency to assess culture by reference to objective evidence of the existence of 'educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention'.[69] Courts have also taken account of cooperation with the regulator, internal procedures, the systematic nature of conduct, the wrongdoer's response to prior similar contraventions (or in other words, reactive fault),[70] and indicators of corporate 'attitude' or state of mind.[71] While still very under-developed, judicial consideration of aspects of Corporate Culture for these purposes provides a foundation for putting flesh on the bones of the statutory concept.

Finally, legal scholars have been advancing understandings of Corporate Culture as a conceptual and practical model for determining corporate intent. The Corporate Culture provisions were expressly modelled on the scholarship of Pamela H Bucy and Brent Fisse.[72] Bucy proposes that a corporation has a distinctive 'ethos', separate from the personal ethos of the individuals involved, and that a corporation should be held criminally liable only if its ethos encourages the wrongful conduct.[73] Brent Fisse's model of reactive corporate fault is similarly holistic, though according to Fisse, what matters is not what a corporation's policies require but rather 'what it [a corporation] specifically proposes to do to implement a programme of internal discipline, structural reform, or compensation' following commission of the actus reus.[74] Conceptions of Corporate Culture have been further developed by the work of moral philosopher Peter A French, who considers that a corporation's intentionality can be found in its Corporate Internal Decision structure, or in other words, 'the way by which [the corporation] makes decisions and converts them into actions'.[75] Analysis of this body of scholarship elicits a series

[67]Faugno (n 25).
[68]ibid.
[69]This being the wording used by French J in setting out the initial iteration of factors to consider in determining penalty: *CSR* (n 66) 152–3, 154 (French J).
[70]For the most recent account of this influential concept see B Fisse, 'Reactive Corporate Fault' in Bant, 'The Culpable Corporate Mind' (n 2) ch 7.
[71]Faugno (n 25).
[72]*Model Criminal Code* (n 25) 107, 113.
[73]Bucy (n 10).
[74]Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468, 506.
[75]French, 'Collective Corporate Responsibility' (n 25) 151; see also 41–44.

of key markers of Corporate Culture.[76] These include a corporation's hierarchy and structures, both centralised and decentralised; corporate policies, both formal and as instantiated, as representative of corporate goals, values and intentions; systems of conduct for achieving corporate purposes; discipline and reward systems; audit and adjustment mechanisms; training and compliance programmes; and patterns of behaviour, across parts of the corporate structure relevant to the wrongdoing in question. These indicia of culture are relevant both as they existed before the wrongful conduct, and as they were implemented or adjusted in response to the conduct. More recently, and building on the insights of Bucy, Fisse and French, Elise Bant has proposed a novel and more targeted approach to Corporate Culture, capable of supporting findings of discrete forms of corporate states of mind.[77] It is to this Systems Intentionality model that we now turn.

4. Systems Intentionality

A. Outline

Building on the important realist insights from the Corporate Culture provisions, Australia's statutory unconscionability authorities[78] and leading realist scholarship,[79] Systems Intentionality proposes that corporations manifest their states of mind through their de facto 'systems of conduct, policies and practices'. Systems, policies and practices are not terms of art, but are everyday concepts readily comprehensible to all. Drawing on standard dictionary definitions, as well as affirming judicial discussion, these have been explained elsewhere, as follows:

> A 'system of conduct' is the internal method or organised connection of elements operating to produce the conduct or outcome. It is a plan of procedure, or coherent set of steps that combine in a coordinated way in order to achieve some aim (whether conduct or, additionally, result). A 'practice' involves patterns of behaviour that are habitual or customary in nature. A practice may cross over into a system, where the 'custom' or 'habit' has become an

[76]Faugno (n 25) part III.
[77]See Bant citations at (n 2).
[78]See ACL s 21.
[79]The debt is large, but includes as leading influences: French, 'Collective Corporate Responsibility' (n 25) Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 8 *Adelaide Law Review* 361; Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (n 25); Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277; Fisse and Braithwaite (n 13); Bucy (n 10); Gobert (n 12); Wells (n 5); Laufer, 'Corporate Bodies and Guilty Minds' (n 10); Laufer 'Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability' (n 10); List and Pettit (n 21) ch 7; Chapple (n 22); Mihailis E Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 *North Carolina Law Review* 893. The important recent work of Micheler (n 10) which emphasises the routines, procedures and culture of companies as essential to their identity as autonomous and responsible actors, is also we consider largely consistent with and supportive of the proposed model, and provides important insights for its further development: see, in particular [1.4.3] –[1.4.4], [5.3.5]–[5.3.8].

> embedded process or method of conduct. Finally, corporate 'policies' partake of the same nature of systems, but can be understood as generally operating at a higher level of generality. These manifest overarching and high-level purposes, beliefs and values. They embody and reveal the overall corporate mindset, which is then instantiated or operationalised through corporate systems at more granular and event- or conduct-specific levels.[80]

At its most basic, Systems Intentionality identifies the corporate mindset in its corporate decision-making structures or supports. It contends that, just as natural persons use recipes, directions and other external decision-supports to help them achieve their purposes,[81] so too corporations utilise systems of conduct to enable them to achieve their corporate purposes. However, unlike natural persons, this is the *only* way in which corporations can do so (other than acting entirely randomly and trusting to chance). Corporations lack a natural mind, or memory, so are wholly dependent on systems of conduct to engage purposefully in and with the real world. Another way of saying this is that corporations think through their systems.

It follows that by undertaking an objective assessment of these systems, we can characterise the corporate state of mind. Properly understood, this is not a process of 'inferring' mental states, in the same way as we routinely do for natural persons. This possibility was rightly a concern of the Law Commission: a corporation lacks a natural mind, after all.[82] Rather, consistently with the artificial personhood of corporations, the exercise is closer to 'construing' the corporation's mental state from the objective features of the proven system.[83]

As recognised repeatedly in a series of Australian inquiries into casino operators, far from being a revolutionary approach to corporate responsibility, this approach is largely consistent with general law attribution principles, as well as the Corporate Culture provisions.[84] Further, we would add, it helps to explain these in principled terms, without defaulting to anthropomorphic metaphors. Thus from the perspective of Systems Intentionality, the Identification Principle recognises a core (indeed, default) decision-making system, used to guide the corporation's conduct through its employees: the Board of Directors. Shareholders voting in general meeting is another. Without these 'primary' attribution rules, a corporation would be a mindless shell, unable to do anything. These cannot, however, be the sum total of corporate decision-structures, except in the most primitive of corporate persons. At any

[80] Bant, 'The Culpable Corporate Mind' (n 2) ch 11.
[81] M Diamantis, 'The Extended Corporate Mind' (n 79). See also M Diamantis, 'How to Read a Corporation's Mind', in Bant, 'The Culpable Corporate Mind' (n 2) ch 10.
[82] Law Commission Options Paper (n 1) paras 6.34–6.41, cf Diamantis, ibid, and Bant, 'The Culpable Corporate Mind'(n 2).
[83] Bant, 'The Culpable Corporate Mind' (n 2) ch 1.
[84] RCCOL Report (n 20) paras 87–102, paras 19–25; PCRC Report (n 20) paras 57–64; Star Casino Report (n 20) ch 6.3.

scale, a more complex or granular set of systems are required for a corporation's everyday activities, in order for it to be able to pursue its purposes successfully.

Consistently (we consider) with this analysis, Rachel Leow has persuasively argued that 'primary' attribution rules are best understood in terms of an allocation of the company's core decision-making powers.[85] These are how corporations decide to act on critical, big-picture issues. Her 'allocated powers' thesis then focusses attention upon the processes by which individuals beyond the Board and senior executives are allocated the corporation's powers, which are necessary for the corporation to operate on a daily basis. Consistently with Systems Intentionality, her thesis shows that corporate mental states must be understood in terms of the de facto decision-making structures adopted by a corporation as a matter of daily practice.[86]

Eva Micheler has recently contributed a further understanding of corporate decision-making, again we believe largely consistent with this model. On her account, company law facilitates organisations to take autonomous decisions, by providing a procedural framework for the corporation's operations. This includes providing roles for participants and assigning powers to those roles, to enable corporate decision-making.[87] In this way, the law both recognises and contributes to the social phenomenon of organisations, including those that operate through companies, which are characterised by the habits, routines, processes, procedures, tacit knowledge and culture that human social interaction brings about.[88]

While Leow's analysis focuses on the individual assignees of decision-making power within a corporation's structure and Micheler explains the facilitative role of company law, Systems Intentionality also recognises diffused corporate decision-making arrangements, such as those contained in standard operating procedures, or that develop organically through employees' practices. These operate to guide (or nudge, or direct) individuals' choices or judgements about how to act in certain, identified, circumstances, without necessarily having a human decision-maker at their apex. Rather, decisions are influenced or pre-determined in the system of conduct.[89] Consistently, the model also captures wholly automated systems of conduct. Here, the system settings, in particular the 'default' settings that arise at

[85] Above (n 15): for her own view on the alignments between the models, see Leow, 'Meridian, Allocated Powers, and Systems Intentionality Compared' (n 15).
[86] The 'Corporate Internal Decision' structures: see French, *Collective and Corporate Responsibility* (n 25) 41–44.
[87] Micheler (n 10) 29–30.
[88] Ibid, 20 and 29.
[89] The extent to which individual agency continues within a system is likely to depend on the nature of the system itself: for a discussion of the debates, see Micheler (n 10) [1.4.3]; for an analysis of the authorities concerning 'clerical errors' compared to the role of individuals exercising active judgement, see Bant 'Corporate Mistake' (n 2).

crucial ethical and legal junctures, can be eloquent to corporate choices and intentions.[90] Since corporations also think through these systems, objective assessment of the system features allow us to understand the corporate state of mind. As will be plain from automated systems, this assessment is not dependent upon the subjective motivations or understanding of any individuals embedded within the system, although, it may serve as a useful tool for testing, sceptically, individual narratives of subjective ignorance or mistake.[91]

B. Systems Intentionality and corporate mental states

From these relatively simple foundations, it is possible to build complex and nuanced pictures of corporate mental states.[92] As the Law Commission notes, this is critical for the utility of the model in practice.[93] Importantly, extensive academic modelling, trialled with a range of legal and regulatory stakeholders, suggests the analysis can accommodate a wide range of specific definitions of states of mind, relevant for particular doctrines, at a particular time and for the particular jurisdiction at hand.[94] It does this by identifying the relationship between Systems Intentionality and core concepts of general and specific intentionality, actual knowledge and mistake. These enable users to develop, in a modular way, understandings of more complex mixed (normative-mental) concepts such as dishonesty, recklessness and unconscionability. This capacity bridges the gap between Corporate Culture and specific mental states, noted earlier, and also suggests how the omission of 'dishonesty' may be readily overcome.[95]

While this detailed modelling cannot be replicated here, a brief overview may give a sense of the possibilities offered by Systems Intentionality. The starting point for its analysis is that corporations manifest (that is, reveal and instantiate) their *general* intention through their adopted systems of conduct. Australian cases suggest that corporate systems of conduct are inherently purposive: they combine steps in a coordinated way to some

[90] Paterson, Bant and Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' (n 2); Jeannie Marie Paterson and Elise Bant, 'Privacy Erosion by Design: Why the Federal Court Should Throw the Book at Google over Location Data Tracking', (*The Conversation*, 19 April 2021).

[91] Elise Bant, 'Submission to Robodebt Royal Commission' (Royal Commission into the Robodebt Scheme, October 2020).

[92] Precisely how the model might map on to different mental states is addressed elsewhere: see Bant, *The Culpable Corporate Mind* (n 2) ch 11.

[93] Law Commission Options Paper (n 1) para 6.42, doubting whether the model could reach the kinds of specific knowledge required to prove most offences.

[94] See in particular Bant, *The Culpable Corporate Mind* (n 2) ch 11 and Bant and Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (n 2).

[95] Bant, *The Culpable Corporate Mind* (n 2) ch 9; cf Gans (n 32). In Bant, 'Reforming the Laws of Corporate Attribution' (n 2), Bant suggests amendment to the Corporate Culture provisions to align them with Systems Intentionality, replacing the listed elements with 'state of mind'.

end.[96] This is the very nature of such a system. Consistently, systems are conceived as 'plans', 'strategies', or 'methods' of proceeding to some end.

This immediately has significant implications for corporate claims of 'mistaken', 'unintended' or 'accidental' conduct that results from a system of conduct. Genuine 'systems errors' are possible, for example where a system of conduct is mistakenly deployed through the touch of a button. And coincidentally repeated conduct may not reflect a system. But once a system of conduct is prima facie established,[97] the analytical starting point is that the conduct is intended. The evidential onus then lies on the corporation to substantiate any allegation of mistake or accident.[98]

Since a system of conduct is, by definition, intended, a corporation will also know at least its broad outline and the key features required for it to be deployed: 'Absent proof of mistake or similar, a corporation cannot sleep-walk a system of conduct'.[99] Corporate knowledge of the key features of a system, and the fact of its operation, is therefore implicit in its successful deployment. This applies as much for organically developed practices as it does for systems that operationalise 'on the ground' some higher-level corporate policy.

The Law Commission rightly highlighted that the capacity of Systems Intentionality to identify corporate knowledge will be key to its success. It posited a case where:

> A – say a firm's head of customer relations – knows that a firm's debtor will default on a payment due to be made. B, the financial director, has no reason to know that the debtor will default, but does know that without the payment the company will no longer be a going concern. The debtor does indeed default, but D, the Chair, unaware of this, makes a statement that the company is a going concern.

It considered that while a process of 'aggregation' of employees' knowledge, dispersed through a corporation, may suggest corporate knowledge that it is not a going concern, it is unlikely to sustain a finding that the company intended to make a statement that it knew to be false.[100]

However, as explained earlier, Systems Intentionality is not a process of random or simple aggregation. This is evident from its potential to apply to automated systems, and systems involving corporate actors. Rather, individuals (and automated processes and corporations) are only relevant to the inquiry to the extent to which they form relevantly part of a coordinated

[96]The detailed treatment by courts of these concepts, often in light of common dictionary meanings, is contained in Bant, *The Culpable Corporate Mind* (n 2): see, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045, [91] (Reeves J).

[97]The Australian authorities also contain a wealth of insights on how to prove 'systems of conduct': see Bant, 'Systems Intentionality: Theory and Practice' (n 2).

[98]See below at n 99.

[99]Bant, 'Submission to Robodebt Royal Commission' (n 91), citing FSCR Final Report (n 20) vol 1, 157: fees for no services were 'part of an established system and were not matters of accident'.

[100]Law Commission Options Paper (n 1) paras 6.44–6.45.

set of steps or processes: that is, a system of conduct. That system then manifests what the corporation knows and intends. This may be a better way of understanding the reasons for, and limits of, any 'aggregation' inquiry. Individuals' aggregated knowledge is only relevant to the extent to which it bears on their role within a system of conduct. In the Law Commission example, it seems likely that the relevant individuals do not form part of a coordinated process or system of conduct. Their roles are not connected, either intrinsically or in relation to the particular event. It follows that the individuals' separate understandings will not manifest corporate knowledge. The position might be different if the corporate accounts team received notice of the debtor's default. Where any statement about the financial position of the company necessarily depends on the state of its accounts, the director may certainly be considered personally reckless to make the representations without checking. Normal procedure (the daily system) would be to act on the basis of the account. Where, by contrast, systems are in place to prevent 'bad news' flowing upwards from accounts to the Board, it is possible to go further and say that the corporation itself made the statement recklessly or with blind-eye knowledge.[101]

Finally, as we have seen, systems of conduct necessarily reflect a general corporate intention. Critically, however, understood as integrated steps and processes, systems of conduct will often comprise *both* positive and negative, and proactive and reactive, elements.[102] Primary (and seemingly positive) systems (for example, a marketing strategy, fee deduction system, or provision of educational services) themselves necessarily entail the adoption of certain steps *and* omissions of others. It is the coordinated *set* of processes taken as a whole, framed holistically as a system of conduct at a certain level of generality, which constitute intended conduct.[103] It follows that omitted steps and processes may legitimately be understood as a deliberate and intrinsic part of a system's overall design.

This more expansive temporal framework for assessing corporate culpability also encourages qualitative assessment of corporate conduct that goes beyond a snapshot moment taken at the point at which harm occurs. This may have significant implications for assessing a corporation's (specific) intention to produce some particular outcome from its (generally) intended conduct. As

[101] cf Law Commission Options Paper (n 1) para 6.45: 'One might go so far as to suggest that a system of dispersed knowledge which makes it likely that such misleading statements might be issued could be said be one "designed" to make misleading statements'. The relationship between the accounts system and public statements on corporate finance made by the director would be important here. This is similar to the analysis accepted in the RCCOL Report in relation to Crown's anti money laundering processes: at ch 8, see in particular pp 438 and 450–55.

[102] Fisse, 'Reactive Corporate Fault' (n 70); Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' in *The Culpable Corporate Mind* (n 2).

[103] On the necessity to choose a greater or lesser level of generality to obtain the correct 'angle of focus' in identifying and assessing a system of conduct, see Bant, 'Systems Intentionality: Theory and Practice' (n 2).

explained elsewhere, where only one (or effectively one) output can be, and was in fact, produced from a corporation's deliberate system of conduct, it is reasonable to characterise the system as geared, or organised, to produce that outcome. Another way of putting this, in terms more redolent of purpose, is to say that, in some cases, there can be no other explanation for the system of conduct than that it was designed to achieve a certain outcome.[104] This conclusion may be fortified, however, where a system is introduced that is intended to operate over a long period of time, and which necessarily entails repeated acts that will inevitably (if not always) result in significant harm. Here, omission of appropriate audit and adjustment mechanisms may be understood to form part of the system 'as designed'. From this perspective, the omission of adjustment mechanisms that are integral to avoiding inevitable harms may signal that the corporation intends to implement a harmful system.

This insight highlights the practical and legal significance of integrating audit and remediation processes at the point of system design and deployment. It also emphasises the need to have mechanisms to identify and correct organic corporate practices as they evolve. Adopting such processes may reflect a prudent and responsible corporate mindset. Conversely, where corporations omit obvious precautions, this need not merely be understood in terms of deficit and organisational negligence. It can manifest a far more culpable and active state of mind: a dishonest intention to take fees for no service, for example, or a reckless decision not to care about likely harms resulting from a system of conduct. In some cases, it may even manifest a specific intention to produce the harm in the name of profit. This has implications for understanding 'Failure to Prevent' offences, to which we return below.

C. Corporate Culture as 'policy': theory and practice

We saw earlier that Corporate Culture, as a governance tool, has flexible content that may be assessed in a variety of ways. In that context, its elasticity is not necessarily problematic, as it may be helpful to take a multifaceted approach to promoting positive corporate cultures. In the civil and pecuniary penalty context, courts have arguably managed with an under-developed conception of Corporate Culture because of the fact that they are engaging in a multi-factorial process of 'intuitive synthesis', to settle penalties in light of, among other considerations,[105] the corporation's overall culpability. But for

[104]For examples that would demonstrate this intentionality, see the branding marketing campaigns *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724.

[105]Other considerations include the need for specific and general deterrence and, in the case of criminal penalties, punishment: see Bant and Paterson, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Pecuniary Penalties under the Australian Consumer Law' (n 66).

liability purposes, precise findings are necessary. Does this mean Corporate Culture is not fit for purpose as a liability tool?

From the perspective of Systems Intentionality, we consider that Corporate Culture as a liability tool most closely resembles what Systems Intentionality identifies as corporate 'policy'. French has described corporate policies as:

> 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.[106]

On this approach, policies operate at a higher level of generality than the day-to-day systems of conduct and organic practices that guide corporate activities 'on the ground'. They manifest beliefs, values and purposes that can be expected to have a significant overall effect on how more granular systems are developed and operated. They manifest the corporate ethos, or culture, that guide the corporation's daily decisions.

From this perspective, Corporate Culture seen as 'policy' may have a range of valuable roles in determining corporate liability. For example, formal corporate policies (such as ones that often underpin publicly facing 'statements of value'[107] and, in Australia, reconciliation action plans[108]) constitute statements of fact regarding the corporation's values, belief and purposes. These are representations of fact as to the corporate state of mind.[109] It follows that the presence of a significant gap between formal policy and the reality of its corporate culture can be construed as a form of misleading or deceptive conduct.[110] This may be relevant to and actionable not only by regulators, but also by parties who (for example) decided to deal with or invest in a company because of its touted 'green' ethos, or ethical procurement policies, which turn out to be wholly at odds with the reality of its daily practices. In this way, Corporate Culture, as viewed through the lens of Systems Intentionality, can give teeth to legal frameworks that lack direct enforcement mechanisms.[111]

As this example suggests, identification of the real-life policies of a firm can also help interpret the nature of its daily systems (and vice-versa). It may, for example, help to determine contesting narratives of formal and real-life

[106]French (n 25) 58.
[107]ASX Guidelines (n 41).
[108]Tyson McEwan, 'Holding Corporations to Account for their Supplier Diversity Commitments in Reconciliation Action Plans' (2023) (forthcoming).
[109]*Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) 483 (Bowen LJ); *Generics (UK) v Warner-Lambert Company LLC* [2018] UKSC 56, [2018] RPC 21 [171] (Lord Briggs).
[110]See, eg, s 18 ACL (prohibition on misleading or deceptive conduct in trade or commerce); *Magill v Magill* (2006) 226 CLR 551, 567 (Gleeson CJ) 574 (Gummow, Kirby and Crennan JJ) (tort of deceit).
[111]See, eg, Fiona McGaughey, 'Regulatory Pluralism to Tackle Modern Slavery' in Bant, 'The Culpable Corporate Mind' (n 2) ch 20.

practices offered through documentary and witness accounts. That is, it may serve as a principled means of settling contested evidence. This can work both to exculpatory and inculpatory effect. Thus, an ethical policy of 'honesty above profit' can be expected to guide the development and implementation of corporate systems at crucial design points. For example, in designing an automated fee deduction system, a corporate culture that privileges honesty over profit would be likely to prompt the corporation to develop audit and remedial processes protective of customers. Its chosen default settings would be something like 'take no fees unless clearly authorised'. A responsible corporate culture may not only reduce the risk of harms, but also serve to reduce corporate blameworthiness in the event that harm does occur. This is because the corporate culture and systems design together strongly suggest that any harm was unintended, or a mistake. By contrast, a 'profit at any cost' culture may be expected to characterise audit processes as unnecessary and expensive and promote default settings to 'take fees until manual intervention'. The reality of this corporate ethos may help courts and regulators assess the state of mind manifested through the automated system, as explained earlier.

Systems Intentionality accordingly helps clarify the operation of Corporate Culture as a liability mechanism. It also complements its ex ante and ex post operation as a governance and remedial tool. We have seen earlier that Australian commercial actors see Corporate Culture as key to good governance. There has also been a lively debate in Australia over whether, and how, regulators and courts can require remediation of bad corporate cultures. However, seen through the lens of 'systems, policies and practices', the necessary steps for good corporate governance and, conversely, rehabilitation become clear. Board and management education and, where necessary, renewal clearly remain relevant: these are key components of good corporate decision-making. But evidently, having a decent board in place will not suffice to correct a bad corporate conscience. Rather, there must be comprehensive review and remediation of the systems of conduct, policies and practices that led the corporation to offend. These are likely, in many cases, to go well beyond the board, to the implicated daily processes of the corporation. This corrective approach requires not merely 'article' reforms, but for ethical changes to be introduced, embedded and (through appropriate audit and remedial mechanisms) maintained. As Commissioner Finkelstein put it, 'systemic and sustained change is needed for a culpable corporation to reform its character, as revealed through its systems, policies and processes'.[112] It follows that there is no 'quick fix' for serious corporate misconduct, complete when directors resign or prosecutors manage to produce

[112]RCCOL Report (n 20) 178, para 6.101.

'heads on sticks'.[113] Rather, corporate rehabilitation takes time, resources and oversight to embed ethical systems of conduct, policies and practices.

The ALRC has shown considerable appetite for introducing this sort of systems-based approach to corporate penalty, recommending probation and corrective orders directed to corporate processes and practices. Oversight of any probation or corrective programme would be carried out by independent monitors, funded by the delinquent corporation.[114] The Crown Casino group of companies provide fascinating case studies of what it takes to reform what arguably were criminogenic corporations. By the time of the Victorian Royal Commission report in 2021, large-scale systems reform was underway. Notwithstanding, a 'special manager' was appointed to monitor the rehabilitation of the casino operator for two years.[115]

This approach arguably reflects a systems-based approach to corporate culpability. As the Victorian government stated at the time of the appointment:

> The Special Manager will have unprecedented powers to oversee Crown for the next two years, the power to direct the Board to take particular action or refrain from taking action, and have unfettered access to the casino, its books and records.
>
> This type of corporate oversight has never been seen before in Australian corporate history, with Commissioner Raymond Finkelstein QC indicating the Special Manager *should be the ultimate decision maker* at Crown Melbourne and oversee all aspects of the casino's operations.[116]

Similarly, an independent monitor was appointed with respect to the group's operations in Western Australia, following the Perth Casino Royal Commission's recommendations.[117]

All of this has relevance for understanding the nature and operation of Failure to Prevent models of corporate offending. As will be seen, far from

[113]Often a popular outcome: see, eg, Aleks Vickovich and Joanna Mather, 'Industry Funds Want More Westpac Heads on Sticks' (*Financial Review*, 2 December 2019) <www.afr.com/companies/financial-services/industry-funds-want-more-westpac-heads-on-sticks-20191129-p53fg5> accessed 27 January 2023; 'Banking royal commission: Regulators urged to get "heads on sticks"' (*The Australian*, 10 February 2019), <https://www.theaustralian.com.au/business/banking-royal-commission/banking-royal-commission-regulators-urged-to-get-heads-on-sticks/news-story/acfa5cce43eea535b82070cf55d066e2> accessed 13 June 2023.

[114]ALRC Final Report (n 5) paras 8.94–8.98.

[115]Melissa Horne, 'Royal Commission: Sweeping Reforms Needed for Crown' (Media Release, 26 October 2021) <www.premier.vic.gov.au/royal-commission-sweeping-reforms-needed-crown> accessed 27 January 2023.

[116]ibid, emphasis added.

[117]Tony Buti, 'Independent Monitor Appointed to Oversee Casino Remediation' (Media Release, 12 October 2022) <www.mediastatements.wa.gov.au/Pages/McGowan/2022/10/Independent-Monitor-appointed-to-oversee-casino-remediation.aspx> accessed 27 January 2023. A similar approach was taken with the Star Casino, again emphasising the systemic and sustained nature of the required reforms: see, eg, Nick Nichols, 'The Star's Independent Monitor Heaps The Pressure on Cooke to Bring Casino Group Back Into Line' (*Business News Australia*, 24 October 2022) <www.businessnewsaustralia.com/articles/the-star-s-independent-monitor-heaps-the-pressure-on-cooke-to-bring-casino-group-back-into-line.html> accessed 27 January 2023.

being the foreign transplant, Systems Intentionality is arguably consistent with the nascent conception of organisational blameworthiness underpinning the Failure to Prevent models. However, Systems Intentionality enables regulators and courts to articulate the quality of culpability more accurately. This may be important for the expressive power of the law, as well as for deterrence, punishment and rehabilitation.

5. Failure to Prevent Offences

In contrast to its reticence towards the Corporate Culture reforms, the Law Commission was very favourably disposed towards Failure to Prevent offences. These have been successfully implemented for some years in England and taken up in other jurisdictions such as Australia.[118] A major attraction is that they appear to avoid the problem of attribution entirely. The first limb typically requires commission (albeit not conviction) of a stipulated predicate offence by an associate of the defendant corporation. This may require engagement with attribution principles, depending on the nature of the specified wrong. Once satisfied, however, the onus then falls on the defendant to show that it had 'adequate procedures' or 'reasonable precautions' in place to prevent the commission of the offence.[119] The defendant corporation is then directly responsible for the independent wrong of failing to prevent the nominated offence.

This model of liability therefore also reflects organisational blameworthiness. The corporation is not vicariously responsible for the predicate offence, but on its own account. Moreover, as the defence operates in a binary manner, it appears to avoid the complex questions that have dogged Corporate Culture, while still promoting good corporate governance. And it is clearly practically workable. Consistently, the main questions addressed by the Law Commission concerned the best form for the models, and how broad their scope of application should be.[120]

[118]The ALRC Discussion Paper initially supported adopting a more generalised attribution modelled on Failure to Prevent offences. This option was abandoned for the final report. However, Failure to Prevent offences remain an important part of the overall regulatory toolkit. See ALRC Final Report (n 5). For excellent analyses of this form of liability, see Jonathan Clough 'Failure to Prevent' Offences: The Solution to Transnational Corporate Criminal Liability?' in Bant, 'The Culpable Corporate Mind' (n 2) ch 18; Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 *Law and Financial Markets Review* 57 and Micheler (n 10) [5.3.5]–[5.3.6].

[119]The Law Commission recommended a defence of 'having put in place such prevention procedures as it was reasonable to expect', with the defendant organisation bearing the onus of proof: Law Commission Options Paper (n 1) paras 1.43, 8.38. Note that this is different from the 'adequate measures' variant of the defence adopted in the Bribery Act 2010. For discussion see also Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL 2017–19, 303), paras 172–211.

[120]Law Commission Options Paper (n 1).

In preferring Failure to Prevent over Corporate Culture, the Law Commission recognised that there was a degree of overlap between the models. However, it emphasised that:

> under Failure to Prevent offences, the company is not convicted of the positive act of committing the crime. The Failure to Prevent mechanism recognises that the company did not commit the crime – an individual within it did – but that the company shares a degree of blameworthiness for not preventing the wrongdoing. This is a weaker form of liability.[121]

In our view, this characterisation points to a significant weakness in the model as a responsibility mechanism. As is clear from the earlier analysis, such models frequently capture misconduct that is far more serious than a mere failure to prevent another's wrongdoing. Rather, the 'omission' of reasonable precautions may be a matter of corporate choice to promote specifically intended corporate ends, as part of broader systems design or development. In many cases, therefore, when seen through the lens of Systems Intentionality, the language of corporate 'failure' itself fails to reflect that the offending was potentially deliberate and properly attributable to the corporation, on its own account.[122] By framing corporate blameworthiness in terms of negligence, the danger is that corporate wrongdoers will be inappropriately labelled, with consequences for the expressive, deterrent and retributive functions of the law.

This danger is well illustrated, we consider, by the Rolls-Royce DPA proceedings. In his important judgment, which ultimately approved the DPA,[123] Sir Brian Leveson went through the 'devastating'[124] litany of long-standing bribery practices carried out by Rolls-Royce across multiple jurisdictions and over many years.[125] Rolls-Royce played a 'leading role in organised, planned, unlawful activity over a very substantial period of time'.[126] Many of the counts brought against Rolls-Royce concerned offences of conspiracy to corrupt, because they addressed acts of bribery involving senior employees, whose knowledge as 'directing minds and wills' could be attributed to the company.[127]

However, a number of counts were brought as 'Failure to Prevent' offences. As Sir Brian explained, 'Critically, a senior employee (or controlling mind) is not implicated with the result that the predicate offence of bribery

[121] ibid para 6.23.
[122] cf ibid 8.13.
[123] *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249 ('Rolls-Royce judgment'). See also *Serious Fraud Office v Standard Bank plc* [2016] Lloyd's Rep FC 102 and *R v Serious Fraud Office* [2018] EWHC 856 (Admin), [2018] 1 WLR 4557.
[124] Rolls-Royce judgment (n 123) [4].
[125] ibid [97].
[126] ibid [97].
[127] ibid [4].

cannot be established'.[128] Yet, the disclosed details of these cases suggest deeply embedded systems of conduct that undoubtedly were engaged in by employees across a range of levels and areas. Lord Leveson himself described the corporation's corrupt practices and culture as 'endemic'.[129] Here, it is telling that, in one case, the main Rolls-Royce employee dealing with a corrupt executive of a customer company resigned from Rolls-Royce. Sir Brian expressly noted that 'this did not lead to any change in approach from the remaining employees'.[130]

This is the point, of course. Corporations that adopt systems of conduct, policies and practices to achieve their ends do so to enjoy the consistency and certainty that it brings. It does not matter if an employee resigns, or is sick, or on holidays: the corporate business carries on regardless. The corporate business model does not, in fact, depend on individual judgement or choice but reflects the corporate judgement and choice. And where that business model is corrupt, the corrupt purpose is deeply embedded in the corporation's de facto systems of conduct, policies and practices.

In that context, consider Sir Brian's observation (consistent with the Law Commission view) that:

> failing to prevent bribery is less egregious than an offence of bribery or corruption not least because although it represents a serious failure of corporate governance, the operative minds of the company are not involved in the predicate offence.[131]

Such conclusions arguably perpetuate the paradoxical operation of traditional attribution rules in shielding corporations from responsibility for their longstanding misconduct. After all, the 'endemic' bribery practices at the heart of the DPA proceedings were not carried out by rogue operators, acting on their own account. This was how Rolls-Royce conducted business in a range of jurisdictions, to its considerable benefit. Indeed, while the particular employees might have been rewarded for their part through remuneration or promotion, this likelihood only goes to highlight that these were the corporation's own practices.

Further, while it might be argued that, in some cases, compliance officers within Rolls-Royce advised against the practices, the fact that they largely continued, regardless, is significant. These were longstanding and embedded patterns of behaviour that reflected the corrupt corporate culture of the relevant Rolls-Royce division. Here, it is arguable that the corrupt part of the corporate body should not notionally be excised and sutured, so as to diminish the corporation's overall responsibility. Rather, just as a natural person may

[128]Rolls-Royce judgment, Annexure A ('Rolls-Royce Annexure') [83].
[129]Rolls-Royce judgment (n 123) [48].
[130]Rolls-Royce Annexure (n 123) [159].
[131]Rolls-Royce judgment (n 123) [93].

be an honest member of their school parents' committee but cheat on their taxes, so too a corporation may be honest in some aspects and thoroughly dishonest in others. The one should not operate automatically to offset the other.[132] At best, it should be a matter that goes to prospects of rehabilitation.

Systems Intentionality also casts a different, and searching, light on the law's approach to calculating penalty in light of the levels of culpability shown by the Failure to Prevent offences. Here, Sir Brian saw the 'failure of governance' in each case to be the same, resulting in concurrent penalties being imposed for each of the respective divisions' Failure to Prevent offences.[133] As seen from the perspective of Systems Intentionality, by contrast, these 'failures' were how the company's corrupt intentions were positively manifested. These were, accordingly, better seen as separate offences of corruption and should have been sanctioned in that way. The fact that senior officers were not caught with their hand at the tiller did not stop these practices from belonging to the corporation and manifesting its intentionality.

Indeed, it is arguable that Sir Brian intuited the significance of corporate systems, policies, and practices when discussing whether a deferred prosecution agreement could be justified, in light of the corporation's egregious and longstanding misconduct. He stated:

> On the other hand, I accept that Rolls-Royce is no longer the company that once it was; its new Board and executive team has embraced the need to make essential change and has deliberately sought to clear out all the disreputable practices that have gone before, creating new policies practices and cultures.[134]

This expresses powerfully the conditions for organisational blameworthiness and, relatedly, rehabilitation. As Sir Brian went on to explain, consistently with the insights of Systems Intentionality and the approach later adopted by the Australian casino inquiries, the DPA terms must reflect the challenge faced by Rolls-Royce in continuing and sustaining its corporate rehabilitation. Thus, for a period of five years, the company must complete a compliance programme following the recommendations and under the supervision of its 'independent specialist', Lord Gold, at Rolls-Royce's expense.[135] These built on the extensive measures taken to reform 'corporate compliance' in the lead-up to the DPA.[136]

For corporations proactively seeking to reduce the risk of liability, questions of corporate compliance and corporate rehabilitation arise also at the ex-ante

[132]This analysis clearly has implications for corporate groups.
[133]Rolls-Royce judgment (n 123) [94]; see also [112].
[134]ibid [62].
[135]ibid [131].
[136]ibid [43]–[47].

stage. Corporations may seek to be good corporate citizens from the outset, or at least adopt practices that significantly reduce their likelihood of engaging in wrongful conduct. Here, we make two key observations. First, that the Failure to Prevent model at this preventive stage again shares common themes with Systems Intentionality and Corporate Culture. For Failure to Prevent offences, the minimum focus for company managers, directors and their advisors should be on what needs to be done to enliven the 'reasonable procedures' defence.[137] The UK HM Revenue and Customs identifies six 'flexible and outcome-focussed' guiding principles for companies, in the context of the UK offence of failing to prevent criminal facilitation of tax evasion.[138] The principles are proportionality of risk-based prevention procedures, top-level commitment, risk assessment, due diligence, communication (including training) and monitoring and review[139] – factors which bear similarity to the indicia of Corporate Culture discussed above and would be reflective of the adoption of appropriate systems of conduct, policies and practices. Second, stakeholders have highlighted the need for further guidance as to the scope and content of the 'reasonable procedures' defence.[140] It is here that Systems Intentionality offers a conceptually and practically more targeted and coherent approach. Applying insights from Systems Intentionality, a corporation seeking to avoid liability would be well-advised to adopt, embed and audit systems of conduct, policies and practices the elements of which are tailored to ensure compliance. Conversely, understanding that the 'choice architecture' of systems manifests explicitly the corporate values and intentions, and that these are notorious once the system is implemented, reinforces the reputational and liability risks of poor systems design.

At the end of the day, we suggest that the Failure to Prevent model, as reflected in Lord Leveson's reasoning, appears to share much in common with Corporate Culture and Systems Intentionality. Far from being foreign concepts that would be difficult to transplant to English soil, it seems plausible that their seeds are already germinating in this context. We have argued, however, that the Australian approaches are better able to reflect the distinctive level of culpability arising from corporate systems of conduct, policies and practices than their blunter cousin. Notably, recognition of 'defective' systems of conduct in terms of Systems Intentionality would not, thereby, mean that truly negligent misconduct would always be re-cast in intentional terms. However, it would allow and explain when this is appropriate and

[137]The Law Commission recommended a 'reasonable procedures' defence: see n 119 above.
[138]HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (Government Guidance, 1 September 2017) 18; Facilitation of Tax Evasion Offences (Guidance About Prevention) Regulations 2017 (UK) SI 2017/876. See also discussion in Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42 *Sydney Law Review* 395, 411–18.
[139]HM Revenue & Customs (n 138) 16–30.
[140]As noted by the Law Commission Options Paper (n 1) para 8.38.

necessary. As Sir Brian's judgment demonstrates in a range of places, existing legal reasoning already stands on the cusp of recognising the intentionality manifested by corporate systems. Thus, in one instance, he characterised the corporate 'failure' in terms of a 'wilful disregard' of the offending conduct.[141] A case of direct corruption was framed in terms of an 'organised and considered scheme'.[142] Systems Intentionality explains the significance of these assessments for the corporation's culpability, with consequences for liability, penalty, rehabilitation and the expressive power of the law.

6. Conclusion

Given the challenges of corporate attribution, it is readily understandable why corporate responsibility approaches that build on strict liability mechanisms are such popular options for law reform. Australia's iconic prohibitions on misleading conduct are leading examples. But they come with a price for the expressive, deterrent and retributive power of the law. Nonetheless, there are ways of mitigating that cost. In Australia, courts recognise that, at the point of penalty, the defendant's state of mind inevitably informs the analysis. Likewise, we have argued, a defendant's state of mind necessarily informs the culpability inquiry for Failure to Prevent offences and for other regulatory questions, such as the appropriateness of DPAs. It is, accordingly, critical to have a principled means of assessing the corporate conscience that can see past individualist attribution approaches.

Corporate Culture and Systems Intentionality explain how this can, and should, be done. These provide holistic models of corporate liability, which are consistent with but also expand traditional attribution approaches. Additionally, they provide means to support other novel approaches to corporate wrongdoing, such as the Failure to Prevent model, by rendering these more explicit as to the nature of the corporate culpability expressed. On both counts, the Corporate Culture and Systems Intentionality models are practical and principled approaches to corporate liability, fit for purpose in a modern age.

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[141]Rolls-Royce judgment (n 123) [104].
[142]ibid [114].

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