

Submission to Robodebt Royal Commission

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I welcome the opportunity to make a submission to the Robodebt Royal Commission. This submission has a particular (though not sole) focus on the following Terms of Reference the subject of the [Letters Patent](#) establishing the Robodebt Royal Commission:

- i(vi) approximately when the Australian Government knew or ought to have known that debts were not, or may not have been, validly raised; and**
- (j) the intended and actual outcomes of the Robodebt scheme.**

In the following, I draw upon two main research projects. The first is work undertaken with Professor Jeannie Marie Paterson (Melbourne Law School) pursuant to Australian Research Council Discovery Grant project DP18010093, into the laws regulating misleading and unconscionable conduct. The second is research undertaken pursuant to my Australian Research Council Future Fellowship FT190100475. This project aims to examine and model reforms of the laws that currently inhibit corporate responsibility for serious civil misconduct: see further <https://www.uwa.edu.au/schools/research/unravelling-corporate-fraud-re-purposing-ancient-doctrines-for-modern-times>.

Building on this research, I have developed a novel model of organisational blameworthiness entitled 'Systems Intentionality'.¹ The model was discussed extensively, and endorsed, by Commissioner Finkelstein in the report of the Victorian Royal Commission into the Casino Operator and Licence.² It has similarly been accepted as shedding important, additional light on issues corporate responsibility

¹ E Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; E Bant and JM Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* 63; JM Paterson, E Bant and H Cooney, 'Australian Competition and Consumer Commission v Google: Detering Misleading Conduct in Digital Privacy Policies' (2021) 26 *Communications Law* 136; E Bant, 'Catching the Corporate Conscience: A New Model of 'Systems Intentionality' (2022) *Lloyds Maritime and Commercial Law Quarterly* 467; E Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) *Company & Securities Law Journal* (in press); E Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' (Chapter 1), 'Systems Intentionality: Theory and Practice' (Chapter 9), *Modelling Corporate States of Mind through Systems Intentionality* (Ch 11) and, with JM Paterson 'Automated Mistakes' (12), all in E Bant (ed) *The Culpable Corporate Mind* (Hart Publishing 2023) (in press). In press publications available on request.

² State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1 (VCCOL Report) 174–8 [87]–[102], 58–9 [19]–[25].

and governance in the Perth Casino Royal Commission³ and in the Star Casino report.⁴ Although my work has focussed on corporate responsibility, it is founded on moral, and legal, understandings of organisational blameworthiness.⁵ It therefore has broader applications, as a means of understanding the group 'states of mind' held by organisations or associations of individuals, including where these groups utilise automated processes to carry out key group functions.

This submission proceeds on the basis that, consistently, the model is highly illuminating for understanding key questions posed to the Robodebt Royal Commission. In particular, it provides significant guidance on how to determine what knowledge the Commonwealth Government of the time (the Government) held concerning the Robodebt scheme, its intentions in deploying the program and, hence, the overall nature of Government blameworthiness manifested through this system of conduct. It also provides a principled lens through which to probe senior individuals' accounts of their responsibility for 'the establishment, design and implementation of the Robodebt scheme' (relevant to Term of Reference (g), among others). Finally, it suggests what sorts of steps are required in order to ensure that this shameful⁶ chapter in our nation's history is never repeated, relevant to the direction in the Letters Patent to make recommendations to 'prevent a recurrence of any failures of public administration you identify.'

³ State of Western Australia, *Perth Casino Royal Commission* (Final Report, 4 March 2022) 50–51 [1.61]–[1.64].

⁴ State of New South Wales, *Review of The Star Pty Ltd: Inquiry under sections 143 and 143A of the Casino Control Act 1992 (NSW)* (Report, 31 August 2022) Chapter 6.3.

⁵ See, eg, Peter A French, *Collective and Corporate Responsibility* (Columbia University Press, 1984); Christian List and Philip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford University Press, 2011); Chris Chapple, *The Moral Responsibilities of Companies* (Palgrave Macmillan, 2014).

⁶ *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [5] (Murphy J), extracted below at text to n 13.

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1. Factual framework for analysis

The following analysis is necessarily subject to the inquiries and ultimate determinations of the Robodebt Royal Commission. In the interim, there exist excellent analyses by experts in the field about the nature of the Robodebt automated system and related enforcement and complaint processes (together, the Robodebt scheme).⁷ I gratefully adopt their work as providing the factual framework for the analysis in my submission. For current purposes, it is only necessary to map the scheme's core positive features, before turning to assess, and explain, their significance (alongside broader, supporting processes within the scheme) for Government blameworthiness.

At its most basic, the Government put in place an automated 'debt recovery' scheme that calculated, raised and alleged debt, purportedly owed by social security recipients, on the basis of their averaged (fortnightly)⁸ income data. Averaged income involves dividing a recipient's annual income by 26. However, as is already patent from this description, averaged income data could never support an accurate calculation of recipient debt,⁹ and therefore an ethical or lawful debt recovery program. In order for it to have been a valid basis on which to proceed, recipients would need to have enjoyed stable incomes. But the targeted class of 'social security recipients' necessarily included vulnerable, financially insecure and powerless Australians whose circumstances, evidently, had already rendered them in need of financial assistance.¹⁰ That was why they were social security recipients. It was therefore obvious, from the start, that the basis for calculating debt was hopelessly inappropriate and would, inevitably, wrongly assert false debts.¹¹ Worse, it was guaranteed to exacerbate, and add further layers to, the disadvantage already experienced by certain members of the target class. Yet, in the face of these patent facts, the Government proceeded to implement the Robodebt scheme, to bring to bear against the recipients the full weight of the law, coercive debt recovery proceedings and the corresponding stress, humiliation and anguish that inevitably followed from its introduction.¹²

None of this is, I believe, disputed.

⁷ Terry Carney, 'The New Digital Future for Welfare: Debts without legal proofs or moral authority?' [2018] *UNSW Law Journal Forum* 1; Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *UNSW Law Journal* 783; *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634; Peter Whiteford, 'Debt by design: The anatomy of a social policy fiasco – Or was it something worse?' (2021) 80 *Australian Journal of Public Administration* 340.

⁸ Fortnightly, as this is the social security payment cycle.

⁹ As opposed to providing a basis for further enquiries: see Carney, 'The New Digital Future' (n 7) 2-3; Whiteford (n 7) 344 and discussion below at 6(c)(i).

¹⁰ See Carney (n 7).

¹¹ See eg *Prygodicz v Commonwealth of Australia* [2020] FCA 1454 [7] (Murphy J): 'it is stating the obvious to note that many people who receive social security benefits do not have a stable income'.

¹² *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [23] (Murphy J), observing the reported consequences included 'financial hardship, anxiety and distress, including suicidal ideation and in some cases suicide.' See also, eg, <https://www.legalaid.vic.gov.au/robo-debt-client-stories>

As Murphy J put it in the approval of settlement proceeding:

In the course of the proceeding the Commonwealth admitted that it did not have a proper legal basis to raise, demand or recover asserted debts which were based on income averaging from ATO data. The evidence shows that the Commonwealth unlawfully asserted such debts, totalling at least \$1.763 billion against approximately 433,000 Australians. Then, including through private debt collection agencies, the Commonwealth pursued people to repay these wrongly asserted debts, and recovered approximately \$751 million from about 381,000 of them.

The proceeding has exposed a shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration. It should have been obvious to the senior public servants charged with overseeing the Robodebt system and to the responsible Minister at different points that many social security recipients do not earn a stable or constant income, and any employment they obtain may be casual, part-time, sessional, or intermittent and may not continue throughout the year. Where a social security recipient does not earn a constant fortnightly wage, does not earn income every fortnight, or only works for intermittent periods in a year, their notional or assumed fortnightly income based on income averaging is unlikely to be the same as their actual fortnightly income. It should have been plain that in such circumstances the automated Robodebt system may indicate an overpayment of social security benefits when that was not in fact the case. Yet, in the absence of further information from social security recipients, that is the basis upon which the automated Robodebt system raised and recovered debts for asserted overpayments of social security benefits.¹³

2. Understanding strategies of denial

On their face, these facts suggest that it will be straightforward for the Robodebt Royal Commission to find high levels of knowledge, and intended conduct, with respect to the Robodebt scheme. However, we have heard, and can further anticipate, a range of exculpatory and diversionary narratives on the key questions of the Government's knowledge and intention(s). Penny Crofts has helpfully mapped a range of strategies of denial and neutralisation employed by banks (Banks) brought before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC).¹⁴ These strategies are also found with respect to the Robodebt scheme. As she explains, the narratives typically fall into three broad categories: literal denial (nothing happened); interpretive denial (something happened but it's not what you think); and implicatory denial (it happened but action is not needed and/or possible).

In the Robodebt context, literal denial is exemplified by the Government's immediate, repeated and drawn-out, refusals to admit that there was anything

¹³ *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [4]-[5].

¹⁴ Penny Crofts, *Strategies of denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2020) 29 *Griffith Law Review* 21. Importantly, as she explains, the analysis of strategies of denial was originally designed to address state actors: it is therefore highly appropriate in the Robodebt context.

wrong with the scheme.¹⁵ This strategy of denial may be seen as forming part of a broader system of denying, delaying and obstructing the legitimate claims of the victims of Robodebt. I return to this aspect of the Government's conduct below at Part 6(c). Implicatory denial is exemplified by the Government's claim that, following its eventual agreement to repay the victims of the scheme, no further inquiry into Robodebt was warranted. The 'problem' had been addressed.¹⁶

For current purposes, however, I wish particularly to focus on some more subtle tactics of interpretive denial. These are 'state of mind' narratives, which seek to diminish organisational blameworthiness by claiming, for example: that key individuals who might be expected to be responsible for the Robodebt scheme were unaware of its 'problems', their scale or details; that the 'problems' were caused by 'mistakes' in the system, administrative errors; and that the individuals associated with the introduction and maintenance of the automated system were personally hardworking and honest (and, therefore, so was the Government).¹⁷ These sorts of narratives reflect an understanding of organisational culpability that is conditional on, or dependent upon, identification of individual fault, which is then attributed to the organisation.

In the analogous corporate context, the law's search for a human locus of fault has encouraged large corporations to develop devolved and diffused structures, and information silos. These fracture knowledge between departments, teams and amongst individuals, and prevent information from being passed to formally responsible officers (such as members of the company's board of directors). The result is that, because the 'responsible individuals' in the formal corporate hierarchy did not personally know of the misconduct, the corporation's conscience is thereby whitewashed.¹⁸ This structured ignorance is highly effective as a method of reducing corporate responsibility, even for egregious and longstanding misconduct that reasonable people might expect would be obvious to 'those in charge'.

In the Robodebt context, we may expect similar strategies to be employed. Ministers may claim not to have known, appreciated or understood the nature of the system deployed within their portfolio. They may say they were not briefed fully, thereby deflecting blame onto less senior individuals, or teams (a practice of scapegoating, again very familiar from the corporate context). Members of these teams may claim

¹⁵ See, eg, <https://probonoaustralia.com.au/news/2017/10/government-rejects-findings-centrelink-robo-debt-inquiry/>; <https://www.crikey.com.au/2019/09/02/centrelink-robodebt-government-denial/> and https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Government_Response. A particular form of this denial was to say, wrongly, that the system simply continued past practice of income averaging: <https://www.smh.com.au/politics/federal/now-is-not-the-time-scott-morrison-blames-welfare-principle-also-followed-by-labor-for-robodebt-scandal-20200601-p54ye2.html> and see below at 6(c)(i).

¹⁶ <https://www.canberratimes.com.au/story/7719072/robodebt-problem-has-been-addressed-prime-minister/>

¹⁷ See Bant, 'The Culpable Corporate Mind' (n 1) 361-68.

¹⁸ A classic example is the structures and processes at the heart of Crown's anti money-laundering procedures, discussed in VCCOL (n 2) 174-8 [87]-[102].

that they also lacked knowledge or expertise to understand the nature of the system that was deployed. Judging from the sorry strategies employed in the Financial Services Royal Commission,¹⁹ we may expect that individuals will be willing to confess to extraordinary levels of hopeless incompetence, rather than accept that they had facilitated the system deliberately and with knowledge.²⁰ This sort of negligence-based narrative is often enormously effective to stave off findings of more serious individual blame and, therefore, protect derivatively the organisation for which the individuals act.

Here, Murphy J's observations on the Government's knowledge of Robodebt reflect the law's typical, cautious approach to individual (human) blame.

It is, however, one thing for the applicants to be in a position to prove that the responsible Ministers and senior public servants should have known that income averaging based on ATO data was an unreliable basis upon which to raise and recover debts from social security recipients. It is quite another thing to be able to prove to the requisite standard that they actually knew that the operation of the Robodebt system was unlawful. There is little in the materials to indicate that the evidence rises to that level. I am reminded of the aphorism that, given a choice between a stuff-up (even a massive one) and a conspiracy, one should usually choose a stuff up.²¹

My point here is that a sole, or even heavy, focus on individual fault, as a precursor to organisational blameworthiness, enables narratives of interpretive denial to be very effective.

Finally, it is helpful to consider the fact that the proactive elements of the Robodebt scheme was, in large part, carried out through an automated system. Notwithstanding the kindergarten maths involved,²² the automation aspect provides fertile ground for further strategies of interpretive denial. Given that automated systems are (properly understood) mere tools, not agents, of the deploying organisation, it follows that they cannot attract moral or legal censure in their own right.²³ Where organisational fault is assumed to be dependent upon identifying a human locus of blame, automation therefore provides a perfect deflective foil. There is little point, after all, in 'blaming' a piece of coding. Further, automated systems that cause harm are often characterised in terms of omissions and deficiencies, rather than positive terms, to further minimise blame. The system was 'poor' or 'defective', rather than part of intended misconduct. Fault, where it is admitted, is often framed

¹⁹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 139, noting the endemic narratives of 'bumbling incompetence or the product of poor computer systems', which had seriously affected the regulator, ASIC's, enforcement strategies.

²⁰ <https://www.sbs.com.au/news/article/nab-says-fees-for-no-service-not-dishonest/u838rxy95>

²¹ *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [6] (Murphy J).

²² <https://www.theguardian.com/australia-news/2020/feb/12/coalition-warned-robodebt-scheme-was-unenforceable-three-years-before-it-acted>, where Carney is reported as assessing the unlawfulness of the scheme as involving 'kindergarten law'. As Whiteford notes, dividing annual income by 26 scarcely qualifies as an algorithm: (n 7) 353.

²³ JM Paterson and E Bant, 'Automated Mistakes' (n 1).

in terms of carelessness or mistake: 'computer errors' or administrative blunders. Thus corporate CEOs appearing before the FSRC, for example, commonly labelled the 'fees for no services' misconduct, usually conducted through automated fee deduction systems, as 'accidental',²⁴ or 'systems errors'²⁵ attributable in part to 'legacy systems'.²⁶ We saw some of the same sort of language in Murphy's descriptions of Robodebt as constituting a 'massive failure of publication administration', quoted earlier.

If these negligence-based narratives are accepted, automated harms may attract less opprobrium, and hence liability, than deliberate human wrongdoing. This has significant consequences for organisational responsibility. This is a position that was criticised vigorously by Commissioner Hayne in the FSRC Final Report,²⁷ who tried to demonstrate how the 'fees for no services' cases could be understood in terms of dishonesty, using the law's traditional, individualistic attribution rules.²⁸ Yet the longstanding effectiveness of these narratives, including in the wake of Commissioner Hayne's analysis, bears testament to their continuing utility. And, in the Robodebt context, many members of the public, lacking computer literacy, many well sympathise with public servants, or Ministers, who claim that they relied on experts to design the automated system at the heart of the problem. As I will explain, however, this sort of strategy of denial should not be permitted to obscure objective assessment of the true nature of the Government's organisational blameworthiness.

3. Systems Intentionality explained

Having outlined the basic features of the Robodebt Scheme, and some of the typical exculpatory narratives that seek to reduce organisational blameworthiness, we are now in a position to consider a fresh approach to organisational responsibility. This seeks to address the challenges to holding organisations responsible for egregious misconduct in a principled and practically workable way.

In brief, my model of Systems Intentionality proposes that **corporate states of mind are manifested in their systems of conduct, policies and practices**. The suggestion I make to the Robodebt Royal Commission is that the same model can be usefully applied to other forms of organisation, including governments. In particular, it sheds considerable light on the Government's intention and knowledge manifested through the Robodebt Scheme. From these building blocks it is possible to understand

²⁴ <https://www.sbs.com.au/news/article/nab-says-fees-for-no-service-not-dishonest/u838xy95> ; <https://www.afr.com/companies/financial-services/apra-punishes-cba-s-avanteos-for-charging-the-dead-20191211-p53j3b>

²⁵ <https://www.afr.com/companies/financial-services/banking-royal-commission-amp-took-life-premiums-from-dead-customers-20180917-h15h0j>

²⁶ <https://www.investordaily.com.au/markets/40308-banks-blame-legacy-systems-for-advice-failures>

²⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Interim Report Volume 1 (2018) 108-111, 126-133. 'Platform Fees' were subject to very similar problems, and narratives, see Interim report at 133.

²⁸ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 138-9, 150-1.

the Government's level of culpability as being of the most significant, and egregious, kind.

The basic idea of Systems Intentionality is extremely simple and intuitive. Natural persons routinely use systems of conduct to guide their decision-making and, hence, conduct.²⁹ Common examples are recipes, maps and notations. These 'external decision supports' enable a person to achieve their purpose: to make a cake, find a location, or recall how to do something. Thus when I am observed applying a cake recipe, it is simple to understand that I mean (intend) to engage in baking (my intended conduct) in order to make a cake (my intended result of that conduct). Further, some of my knowledge is patent from my successful application of the recipe: I must know what flour is, the process of beating eggs and so on, in order successfully to apply the recipe-system of conduct. No mind-reading is required: we can objectively assess and understand my state of mind from the system of conduct that I deploy.

Similarly, corporations utilise systems of conduct to enable them to achieve their organisational purposes. This is necessary not least because the humans through which they act change, die, go on sick leave, get promoted and, in some cases, are replaced by corporate actors. In every case, however, the objective features of the organisation's systems manifest (in the dual senses of reveal and instantiate) its purposes in so acting. Nor does the picture change if certain steps are automated: returning to my cake example, the fact that I use a food processor for one stage in my recipe makes no difference to the ability to assess my state of mind from the system of conduct that I deploy. So too it is with corporations. And so too it is, I think, for other organisations, such as governments.

4. Systems Intentionality and the plain facts of Robodebt

This simple idea offers some powerful insights for understanding the Government's intentionality manifested by the barest outline of the system of conduct known as the Robodebt scheme.

On this account, systems of conduct are inherently purposive: this is the very nature of a system. An unintended system is a contradiction in terms. Language gives this away: systems are 'plans', 'strategies', or 'methods' of proceeding to some end.³⁰ Or, in the case of Robodebt, a 'scheme'. Absent proof of relevant mistake or similar (to which I return below), neither a corporation, nor a government, can sleep-walk a system of conduct.³¹ The starting point for any 'state of mind' analysis of the

²⁹ M Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 *North Carolina Law Review* 893.

³⁰ See, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [72]–[73] (Reeves J); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208 [389]–[391] (Beach J).

³¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 157: fees taken were 'part of an established system and were not matters of accident'.

Robodebt scheme, therefore, is that the Government intended to engage in that conduct, in the form of the scheme that was in fact deployed.

Further, on this account, the starting point for any inquiry into knowledge is that organisations know the nature of the conduct in which they are engaged through their systems. This means that the Government should be taken to know the core features of the Robodebt scheme, patent on its face, and essential to its operation. Here, we have seen that the key, proactive features of the scheme, patent on its face, were: (1) it was an automated scheme for calculating and raising debts; (2) premised on income averaging; (3) addressing a class of 'social security recipients'; (4) members of which would, by definition, have insecure income. It follows that, in implementing the Robodebt scheme, the Government knew that, functioning according to its terms, the system would necessarily (be guaranteed to) impose false 'debts' on members of the target class.

The position may be analogised with the 'fees for no services' scandals the subject of extended consideration in the FSRC, on which I have previously published.³² Many cases involved Bank automated fee deduction systems, which took money from customers' accounts for life insurance. From a Systems Intentionality perspective, a range of corporate knowledge is patent on the face of such a system: (1) any 'takings' from customer accounts must be authorised; and (2) being humans, the customers' circumstances might change, affecting existing authorisation. On (2), the key circumstance of which Banks were necessarily aware is that the customers may die – that is why, after all, they have life insurance. Systems Intentionality contends, therefore, that the starting point for any inquiry into Banks' knowledge for the purposes of assessing culpability (and therefore liability) is that the Banks know these basic features of the system.

A similar analysis can be applied to the plain facts of the Robodebt Scheme.

5. Systems Intentionality and exculpatory narratives around Robodebt

Before turning to consider other features of the Robodebt scheme, which shed further light on the Government's mindset, some additional, general observations may be helpful, particularly in considering how to probe, and assess, Government and associated witnesses' accounts of the Robodebt scheme.

First, the intrinsic nature of the relationship between systems of conduct and intention (or purpose) immediately suggests that close scrutiny is required of any narrative that seeks to characterise Robodebt as involving unintended, accidental or mistaken conduct. It is, of course, possible to have a genuine 'systems error', for example where an employee presses a wrong button, initiating a system of conduct. Or a human coder may make an error in transcribing a proposed system of conduct into

³² See Bant, *Culpable Corporate Minds* (n 1), Bant, 'Catching the Corporate Conscience' (n 1) and <https://pursuit.unimelb.edu.au/articles/charging-dead-clients-is-dishonest-really-who-knew>

code.³³ However, once a system of conduct is adopted and deployed, the analytical starting point is that the conduct is intended. The evidential onus then lies on the party deploying the system to substantiate any allegation of mistake or accident (for example, through an employee witness admitting to accidental deployment of the system, or admitting to a coding error). As systems of conduct generally involve repeated behaviours, any allegation of error also needs to be tested against the organisation's reaction to its repeated behaviours and, importantly, the outcomes from its system.

To return to my cake analogy, suppose that even though, formally, my recipe is one for cakes, I produce pancakes. I may claim I was mistaken in producing pancakes: there was an error in deploying the system-recipe. While this might seem plausible at first, the credibility of this claim radically reduces as the system is rolled out over time and its effects become clear. After I have produced pancakes on multiple occasions, and knowingly served them up to customers, the conclusion becomes irresistible that this is what was intended. Although I was purporting to use a cake recipe, in fact I was intending to make pancakes.

So too with Robodebt: Systems Intentionality suggests that its deployment over years stands important testament to the Government's ongoing intentions, which must be assessed in light of that longevity.

As the pancake example also shows, formal systems, policies and processes may be a far cry from the reality of the de facto (real-life) systems, policies and practices, which are deployed 'on the ground'. It is the latter that discloses the true organisational state of mind. This may also be very important in testing Government narratives of interpretive denial, in particular those that seek to characterise the scheme in terms consistent with ethical intentions. For example, consider the Government's claim that its Robodebt scheme was concerned to ensure that welfare recipients receive their proper entitlements. This was framed as ensuring the 'integrity' of welfare payments.³⁴ Properly understood, this was a statement, or representation, about the governmental purpose or intention, to be achieved through Robodebt. It was, accordingly, a statement of fact (the Government's state of mind).³⁵ Yet, as we have seen, the manifest purpose of the scheme, as deployed, could not be to maintain, or improve, the integrity of the social security system. The scheme was guaranteed, in fact, to result in false debts being issued against necessarily vulnerable Australians. So, objective assessment of the system of conduct, as instantiated, gives lie to the Government statement of its 'formal' (ethical) social

³³ *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* [2022] FCA 1115 [47] (Moshinsky J), accepting a coding error led to fees for no services, but see also [52]-[54], noting that the error was not picked up or remedied, adding to the overall level of blameworthiness. On audit and remedial mechanisms, see below at 6(b) and (c).

³⁴ See Whiteford 353-4 and Australian Government response to the Community Affairs References Committee Report: Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (2017). The 2015-16 Budget announcement emphasised this aim, naming it the 'Strengthening the Integrity of Welfare Payments' scheme.

³⁵ *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).

security policy. It is therefore open to consider that, on their face, the Government's published statements were false, and knowingly so.

In corporate contexts, a statement about a corporation's state of mind that is knowingly false is a form of fraud and, hence, consistent with dishonesty. It is unclear to me why a similar conclusion would not, and should not be open with respect to the Government's statements concerning its purposes in enacting the Robodebt scheme.

It will similarly be apparent that the analysis challenges another common (and related) organisational excuse: namely that the formal policy behind a scheme (or system of conduct) was entirely ethical (eg all about integrity of welfare payments, in the case of Robodebt) but the system of conduct was deficient in realising this policy 'on the ground'. On the model of Systems Intentionality, any analysis of organisational mindsets starts with the instantiated system of conduct; that is, with identification and characterisation of the de facto adopted and deployed system. It is this that manifests the true corporate mindset. From this perspective, again, 'formal' organisational policies that diverge markedly from the reality of the daily system of conduct suggest the presence of misleading conduct on the part of the organisation. This may be understood as deliberate (that is, deceptive) conduct where the organisation knows that the formal policy bears no relation to the reality of the system as deployed. On the bare facts of the Robodebt scheme as deployed, this conclusion is again open with respect to the Government's claims regarding the aims and values manifested by the scheme.

This analysis of organisational knowledge, implicit in (or patent on the face of) its de facto systems of conduct, places very significant pressure on corporate and broader organisational narratives that seek to characterise the organisation as 'ignorant' (and therefore innocent) of its own conduct. We have seen earlier that 'interpretive' strategies of denial leverage information barriers and silos that prevent responsible officers (including Ministers) from actual knowledge of the corporation's misconduct. What the responsible officers does not know, the corporation (or government) does not know. Systems Intentionality repudiates this, by making clear that it is well-nigh impossible for an organisation to fail to know the essential elements of its own, intended systems of conduct.³⁶ Systems cannot be sleep-walked into successful deployment. There is no doubt, in any event, that Robodebt was the Government initiative and system of conduct. This was not the doings of some rogue element within the Government. It follows that the Government knew, at an organisational level, about the scheme, its key features, and intended these. Any narrative to the contrary must, therefore, be strongly tested.

Finally, as should now be apparent, this analysis provides a helpful basis on which to probe, sceptically, individual protestations that the natural persons associated with deploying a harmful system of conduct did not understand or intend it. It may be that natural persons that signed off on the scheme, for example, regarded it personally as regrettable or even undesirable. However, that is quite different from

³⁶ VCCOL (n 2) 174-8 [87]-[102].

saying that the scheme was not intended in its terms, or that they did not intend, through their actions, to implement the scheme to achieve Government purposes.³⁷

6. Dissecting the full Government mindset behind Robodebt

(a) Overall Conclusions

(i) Knowledge and general intention

As I have explained, on the model of Systems Intentionality, the Government knew the inherent (harmful) incidents of the Robodebt scheme and intended that conduct. The analysis also provides strong support for the view that the purpose of the Robodebt scheme was not to 'recover' overpayments, but to raise 'fresh' money from social security recipients to deploy for other, Government purposes.³⁸ This conclusion is open from objective assessment of the most basic outline of the scheme.

(ii) Reckless, unconscionable and dishonest conduct

The object of this Part is to show that, far from being a simplistic view, this conclusion is fortified by consideration of further, and again largely uncontested, features of the Robodebt scheme. Indeed, these features manifest consistently high levels of organisational blameworthiness that, if accepted by the Royal Commission, may be understood to require condemnation in the strongest terms. On this account, the Government intended to engage in the scheme notwithstanding that it would inevitably lead to a significant number of vulnerable Australians being issued with false debt notices, and thereby subjected to coercive recovery and enforcement procedures. The individual harms that this system of would engender, both financial and personal, were obvious. Further, the Government withdrew, and omitted, critical safeguards that would otherwise have offered a degree of protection to those subjected to the scheme. In my submission, these omissions are a form of 'choice architecture' that, themselves, further manifest Government values and intentions. Taken as a whole, they suggest that the Government engaged in wilfully reckless, unconscionable and dishonest conduct.

(iii) A predatory scheme

The targeting of social security recipients to raise fresh revenue may be understood, functionally, as a form of specialised taxation, which was not applied to other portions of Australian society. This discriminatory regime exacerbated the prior positions of special disadvantage already suffered by those members of the class who were subject to the assertion of false debts. In particular, it arguably preyed on their existing position of comparative powerlessness to defend themselves against the scheme. However, this existing powerlessness was also significantly exacerbated by (again) key choice architecture embedded within the scheme. This suggests a

³⁷ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 [97] (Edelman J); Bant, 'Modelling' (n 1): one can intend a consequence while thinking it undesirable or regrettable.

³⁸ Whiteford argues persuasively that the revenue supported, in a horrible irony, the upgrade of Centrelink's outmoded ICT systems: at 350.

predatory intention to engage in the system of conduct *in order to* exploit their known disadvantage, in order to generate fresh revenue.

(b) Understanding intentionality from the scheme as a whole

(i) Systems of conduct and omissions by design

The following sections explain in detail the reasoning supporting these conclusions. It is helpful, firstly, to understand that systems of conduct typically involve both proactive and reactive,³⁹ positive and omitted, elements. This has ramifications for understanding organisational intentionality. As we have seen, systems of conduct necessarily reflect a general organisational intention. Critically, however, understood as integrated steps and processes, systems of conduct will often comprise *both* positive and negative, and proactive and reactive, elements.⁴⁰ Primary (and seemingly positive) systems (for example, an automated fee deduction, or debt recovery, system) 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.⁴¹

It is, therefore, arguably a(nother) false narrative to frame organisational systems in terms of positive conduct that has, separately, been affected by unintended or careless omissions or deficiencies. Omitted processes may legitimately be understood as part of a system's overall, or broader, design. This is particularly the case when it comes to omitted audit and remedial mechanisms for systems of conduct that are objectively designed to be deployed repeatedly, over an extended period of time.

(ii) Worked example: fees for no service

A good example of the importance of reactive and omitted processes to assessing the culpability manifested by overall system design, is the automated 'fees for no services' scenario mentioned earlier. On the Systems Intentionality analysis, it is open to characterisation as a 'set and forget' model, the default setting for which manifested the corporate purpose to 'keep taking fees until manual intervention'. Thus the proactive elements of the system (the 'takings') were *prima facie* intentional conduct.

However, viewed from a broader, integrated perspective, the omitted and reactive steps associated with the automated system are also highly significant for organisational blameworthiness. In particular, the automated systems had no, or no functioning, manual audit or oversight systems to correct the inevitable

³⁹ Brent Fisse's powerful concept of 'reactive corporate fault' is highly pertinent to understanding organisational blameworthiness for harmful systems: see, eg, B Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 6 *Adelaide Law Review* 361; B Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 *University of New South Wales Law Journal* 1; B Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993).

⁴⁰ Bant, 'Systems Intentionality: Theory and Practice' (n 1).

⁴¹ 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, *ibid*.

consequence that, given clients would die, the authorised fees would inevitably degenerate into unlawful takings. This is, of course, precisely what occurred. This broader angle of focus is entirely appropriate, given that the system was designed to roll out over a long period of time, with respect to many customers, to the substantial benefit of the corporation.⁴²

Seen from this more holistic perspective, it is open to conclude that where an organisation deploys positive elements of a system that are objectively apt, or indeed guaranteed, to produce a harmful outcome, and omits audit or remedial processes, this omission can be understood as a matter of corporate choice. The organisation deploying the system is reckless from the outset as to the results, in that it evinces a choice not to care about the inevitable harm that will result. The same conclusion may be open where an adopted system repeatedly results in harms, brought to the attention of the corporation, yet no steps are taken to investigate and correct the deployed system. Further, in some cases, it will be open to conclude that the harmful outcome is intended (in the sense of chosen, rather than desired), so that the system manifests a predatory mindset.

(c) Salient broader features of the scheme

Applying this form of analysis to the Robodebt scheme, what are the relevant, broader features of the scheme that help us to assess the Government's state of mind? The following is offered as an illustrative, not exhaustive, list.

(i) Removal of human oversight and individual assessment

We have seen the patent, proactive elements of the automated scheme manifested Government knowledge that, inevitably, vulnerable Australians would be the subject of false allegations of debt. This was the consequence of the deliberate decision to use income averaging as the basis for asserting, raising and then enforcing debt.

However, it is additionally, and strongly, relevant that the Robodebt scheme *removed* existing and protective processes involving human oversight. Previously, Centrelink had used automated income averaging as a *first step* in inquiring into individual recipient entitlements.⁴³ Used in this preliminary way, and subject to further human oversight and investigation, income averaging was a rough and ready but appropriate first step to full examination of each individual recipient's position. It was apt to promote the integrity of the social welfare system. Under Robodebt, by contrast, income averaging became the primary basis on which debt was calculated, raised, asserted and recovered. From the perspective of Systems Intentionality, this radical⁴⁴ break from existing practice, and introduction of a new process, arguably reflects a clear organisational choice.

⁴² On the temporal perspective, see above nn 37-38.

⁴³ Above (n 9).

⁴⁴ Carney, 'The New Digital Future' (n 7) 3, 9-10.

(ii) Reversal of onus

Consistently, under the Robodebt scheme, the Government sought to shift the practical onus of proof of debt to recipients.⁴⁵ It therefore fell to individuals subjected to false debt allegations generated by income averaging to bring evidence proving that the asserted debt was not due. In my view, it is possible to see this shift as a necessary concomitant of the automation of the social security debt system. Removal of human oversight transferred (or 'outsourced'⁴⁶) the audit process to the victim. This, again, reflected a deliberate Government choice, made with knowledge of the nature of the processes being omitted, and the nature of the processes by which they were replaced. This included the knowledge that income averaging would inevitably produce false debts.

(iii) A retroactive and insurmountable evidential hurdle

The true nature of this shift in onus, as a matter of practice, also needs to be appreciated and may warrant further investigation. Whiteford⁴⁷ explains how recipients were directed to online portals to check the information on which asserted debts were raised, and to provide supporting evidence disputing the debt. In many cases, this required retrieval of records going back many years. Given that recipients were not, at the time of original receipt of social security payments, required to keep records of payments for years, this necessarily introduced for many recipients a retroactive and insurmountable evidential hurdle. This is not to mention the unwarranted 'assumptions' of stable internet access implicit in the system as designed, and that it was possible for recipients to source alternative wage records from past employers.

(iv) Removal of limitation period

Further, the Government *removed* the existing 6 year limitation period for asserting debts against social security recipients.⁴⁸ This only exacerbated the new evidential and procedural hurdles facing recipients. Inevitably, it also exacerbated the existing (and known) states of recipient vulnerability. It also reinforces what appears to be the unequal (discriminatory) treatment of recipients pursuant to Robodebt, compared to other government debtors.

(v) Penalties

In addition to new evidential and procedural hurdles facing recipients, the Robodebt scheme imposed a penalty for any 'failure' of recipients to 'engage' with Centrelink over the asserted debt.⁴⁹ This occurred, for example, where Australians had successfully moved off social security and into employment, so had failed to update

⁴⁵ Ibid, 3-8, explaining the correct 'default' position, namely that there is no recipient debt unless Centrelink establishes its existence and size, consistently with the requirements of the fortnightly rate calculation imposed by legislation.

⁴⁶ Whiteford (n 7) 345, quoting the Commonwealth of Australia, Senate Community Affairs Reference Committee Report (Final Report, 2017), *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare Systems initiative*.

⁴⁷ Ibid.

⁴⁸ Ibid, 345.

⁴⁹ Ibid, 348.

their contact details. Again, this represents a new feature of the debt recovery system and, on Systems Intentionality, a deliberate design choice.

(vi) Garnishing tax returns

Consistently with the reversal of onus, the Government proceeded through garnishing processes to enforce the debt unilaterally.⁵⁰ This practice meant that the scheme was, to a degree, self-executing, rather than being subject to tribunal or judicial review and, if sustained, enforcement. This approach also had the consequence of further reducing the financial capacity of recipients to challenge the asserted debt, for example by seeking professional advice. Given the already disadvantaged position of many recipients, this may be expected to have had a significant impact.

(vii) Litigation strategies

In my view, it is open to conclude that the Government adopted a largely consistent approach to applications for legal review of asserted debts, which (1) reduced the extent to which successful challenges were placed on the public record, while (2) actively defending and maximising the benefit obtained by the Government through having unlawfully raised false debts, through a range of tactics of denial and delay.⁵¹ The following examples draw particularly on Whiteford's analysis,⁵² but are selected by me for their particular relevance for discerning Government intentions manifested by the Robodebt scheme.

The Administrative Appeal Tribunal heard, eventually, a significant number of challenges to the asserted debts. Precisely how many is not clear, in part because first instance decisions are not published and because of overall lack of Government transparency on this point. We may assume that many recipients of false assertion of debts paid (or did not challenge the garnishing of tax returns), rather than face the Government's debt recovery processes. Where debts were challenged in the AAT, however, the Government actively defended proceedings, notwithstanding the patent unlawfulness of income averaging. What is further notable is that the Government never appealed any of the first instance determinations that resulted in debts being reduced or annulled. As only appeal decisions are reported, this practice had the consequence that none of these determinations were made public. This practice created an information silo around Robodebt challenges and had an obvious and inherent chilling effect on potential claims.

A further, striking occurrence is that, shortly after Professor Terry Carney's five AAT determinations that debts raised through income averaging were unlawful, the Government determined not to review his AAT membership.⁵³ It is undisputed that Professor Carney had engaged in eminent and longstanding service on the Tribunal.

⁵⁰ Ibid, 349.

⁵¹ See also the considered assessment of Carney, 'The New Digital Future' (n 7) 9, on the wholesale failure of Centrelink to act as a 'model litigant'.

⁵² Ibid.

⁵³ Whiteford provides a very helpful, and illuminating, Robodebt timeline: Whiteford (n 7) 346.

Three claims were also brought in the Federal Court. At the first directions hearing in the Masterton case, the Government accepted the individual's, original declared income.⁵⁴ The consequence of this late admission was that there was no debt and therefore, according to the Government, no justiciable issue. As a result, there was no final ruling and no published decision.

In the second, Amato case, the Government eventually withdrew the debt but refused to pay interest on the unlawfully exacted sum. This meant that the Government enjoyed the benefit of using unlawfully exacted sums. It may be valuable for the Robodebt Royal Commission to explore how frequently this occurred. It is possible this was a more generalised, and lucrative practice. The Government eventually conceded that income averaging was unlawful a week before the Amato case came to trial in November 2019. Given that income averaging could patently never support accurate debt recovery on its own, this concession came very late in the day.

Consistently, the third (class) action brought in the Federal Court was actively defended by the Government through various interlocutory proceedings⁵⁵ until, eventually, the Government settled the claim on a 'no liability' basis in November 2020. This was a full year after the Federal Court in the Amato case had made clear that debts raised through income averaging were unlawful. Settlement avoided the airing of, and ultimate judgment on, a range of critical matters, including whether the Government should be the subject of exemplary damages awards. This would in part depend on findings of deliberate or reckless conduct, in contumelious disregard of the recipients' rights.⁵⁶ I return to this outstanding question below.

(d) The true purpose manifested by Robodebt

A range of these broader features are truly Kafka-esque: for example, the reversal of onus, the inevitability that wage records would be systemically unavailable, combined with the removal of limitation of action protections, presented many recipients with an impossible task of defending their rights. However, these need not be seen as reflecting a pointless and irrational bureaucracy. From the perspective of Systems Intentionality, these processes embedded within the Robodebt scheme operated in a coordinated way to promote effectively the Government's true purpose. And, given that it is patent from the system that its purpose was not to recover genuine overpayments, the obvious, alternative purpose was to generate fresh revenue.

Seen in this light, as integrated elements of the scheme, the features of reverse onus and structural hurdles to challenging the false debts operated to ensure effective

⁵⁴ <https://www.smh.com.au/national/centrelink-wipes-robo-debt-at-centre-of-test-case-20190505-p51kac.html>

⁵⁵ See *Prygodicz v Commonwealth of Australia* [2020] FCA 1454; *Commonwealth of Australia v Prygodicz* [2020] FCA 1516, in which leave to introduce claims for exemplary damages was given. Even at the 11th hour, the Government claimed that it would have a 'juristic reason' to retain any payments where the alleged and unlawful debt fortuitously coincided with a real and lawful debt, owed by the recipient: see eg [2020] FCA 1454 [11] (Murphy J) and [2021] FCA 634 [60]-[72] and [149]-[154] (Murphy J).

⁵⁶ *Lamb v Cotogno* (1987) 164 CLR 1, [8].

and optimal revenue-raising from recipients. This was reinforced and made more explicit through collection processes, including penalty, garnishment and litigation strategies. Indeed, seen as a rational system of conduct that operated to achieve Government ends, it is possible to understand something further. This is that the system *would not be successful in achieving the aim of revenue-raising unless a substantial proportion of those subject to false debt claims were unwilling, or unable, to dispute them successfully*. The broader features of the scheme were, in that light, not only well-suited to promoting that purpose, but necessary features of it.

(e) The Government's knowledge and intention

Systems Intentionality strongly suggests that these objective features of the Robodebt scheme, assessed holistically, manifest the following, specific, Government states of mind:

- The Government knew that income averaging would necessarily generate false debts;
- The Government knew that this would impose false debts on vulnerable members of the class of recipients;
- The Government chose to remove processes of human oversight that could operate to prevent, audit and remedy the raising and enforcement of false debts;
- The Government chose to place the burden of disproving asserted debts on recipients;
- The Government deliberately put in place a range of structural hurdles and practices to recipients challenging unlawful debts, and removed existing protections;
- In light of these known and intended features of the scheme, the Government's true purpose, manifested by the scheme, was to generate fresh revenue from social security recipients.
- In light of its knowledge, and the objective purpose of the scheme, the Government falsely and knowingly misrepresented the purpose behind the scheme as concerned with welfare integrity.

It is worthwhile reiterating that, from the perspective of Systems Intentionality, none of the scheme features arose by chance or accident: they represent organisational choices in system design. This is most blatant where those features reversed or removed previous ethical and just systems, policies and practices. However, Systems Intentionality suggests that the overall design of the system, in any event, shows a coordinated and consistent set of processes designed to achieve the end of raising new revenue.

Further, if this system of conduct was carried out by a corporation in trade or commerce, with a view to profit, it would, in my opinion, be open to be classified as reckless, unconscionable and dishonest. Further, it may be understood as manifesting a predatory mindset, in which the harm suffered by victims of false debts was specifically intended. These very serious conclusions would warrant the award of exemplary damages, if available, or indeed civil or criminal penalties under various statutes. If the facts on which this analysis is based are sustained upon further

investigation by the Robodebt Royal Commission, it is unclear to me why a different assessment of the level of culpability involved should apply with respect to the Government. The basis on which these conclusions are open are as follows.

(f) Recklessness

As I explain elsewhere,⁵⁷ a good working definition of recklessness may be understood to combine: (a) a general intention to engage in some conduct; (b) knowledge or 'foresight' of the outcome that the conduct is apt to produce (often described as a 'risk' of harm), and (c) the application of a normative standard that a decision to proceed with the conduct in light of that known risk is unreasonable. Where there is a system of conduct, (a) is (by definition) established, for the reasons given earlier. Further, organisational knowledge of key aspects of the system are implicit from its deployment, as we have seen. Consistently, it is possible, and appropriate, to assess organisational 'foresight' from the objectively obvious (patent) risks of outcomes arising from the known and intended system of conduct, or from repeated instances of harmful outcomes arising from application of the known and intended system, where there are no audit or remedial steps taken to respond to the materialised harm. An unreasonable decision to proceed in light of those known risks, or repeated harm, manifests recklessness.

On these criteria, and in light of the earlier analysis of the Robodebt scheme, the scheme manifested serious recklessness on the part of the Government with respect to the rights of vulnerable Australians. The scheme was intended, its key elements well understood because patent on its face and necessary for its successful deployment, and the risks of the scheme were equally obvious. Indeed, the scheme was guaranteed to cause harm of the kinds that in fact occurred. The Government's choices to omit, or remove, audit and workable remedial steps reinforces this view.

(g) Unconscionability

Further, it is arguable that the scheme was unconscionable because, as explained, the Government knew that the target class of recipients the subject of Robodebt contained members who would be subjected to false asserted debts, that this would exacerbate their existing positions of special disadvantage and put in place processes calculated (in the sense of objectively apt) to make it as difficult as possible for their rights to be protected. Knowing exploitation of position of special disadvantage is the archetype of unconscionable conduct. Were the Government a corporation and the recipients consumers, there is little doubt, in my view, that it would have also contravened the statutory unconscionable 'system of conduct' provisions.⁵⁸ Although outside that context, the substance of the Government's conduct merits characterisation in these serious, normative terms.

⁵⁷ Bant, 'Modelling' (n 1).

⁵⁸ On both equitable and statutory unconscionability, see Bant and Paterson, 'Systems of Misconduct' (n 1).

(h) Dishonesty

An inquiry into dishonesty generally requires us to assess objectively the quality of a person's conduct in light of the defendant's actual intention and knowledge.⁵⁹ The conduct in question must be dishonest according to current standards of ordinary decent people. It is not relevant to ask, or consider, whether the person themselves subjectively appreciated that the conduct was dishonest by ordinary standards.⁶⁰

Adjudged by these criteria, the Robodebt scheme clearly fell well short of the standards of honesty, which are properly expected of governments. This is disclosed most clearly by the reversal and removal of prior, ethical practices, such as the reversal of onus and associated processes, detailed earlier. That this conduct was knowing and intended supports an overall assessment of organisational dishonesty.

(i) A predatory mindset

Finally, a predatory mindset may be understood as involving an intentional decision to engage in conduct *in order to* exploit the known disadvantage of a vulnerable person, or class of persons. That is, the aim or purpose of the person's conduct is exploitation of the kind that actually occurred, with the harms it brings. This is arguably one of the most culpable states of mind identified in the law. Examples of this form of mental state, again using the lens of Systems Intentionality, are where, for example, a business model is only able to generate a profit if a vulnerable class of consumers exist who are taken advantage of through the effective operation of the business model.⁶¹ Another example would be where a business model is objectively designed to create new, or exacerbate existing, special disadvantage that will enable, or increase, business profits.⁶²

Through this lens, and based on the assumed factual framework for analysis, the Robodebt scheme arguably manifested a predatory purpose on the part of the Government. As explained earlier, the scheme could only operate to achieve its purpose of raising fresh revenue by manufacturing false debts, enforcing these against recipients, who were known to be in a position of special vulnerability and unable (both because of innate powerlessness but also because of the design features of the scheme) to protect their rights. To put it another way, the scheme would only be successful in achieving the aim of revenue-raising if a substantial proportion of those Australians subject to false debt claims were unwilling, or unable, to dispute them successfully. This required the Government to introduce new

⁵⁹ *Peters v The Queen* (1998) 192 CLR 493, 503 [15] (Toohey and Gummow JJ).

⁶⁰ The so-called second limb of *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689 has now been rejected: see eg *Peters v The Queen* (1998) 192 CLR 493; [2014] NSWCA 266, (2014) 87 NSWLR 609, 636 [124] (Leeming JA, Barrett and Gleeson JJA concurring); *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 [74]–[75]; *R v Barton* [2020] EWCA Crim 575, [1] (Lord Burnett CJ). See also *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129 [52]–[58] (Henderson, Peter Jackson, Asplin LJ).

⁶¹ *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132 [33], 142–43 [43], discussed in Bant and Paterson, 'Systems of Misconduct' (n 1) 81–82. A consistent analysis is contained in *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 [81] (Gordon J).

⁶² Paterson and Bant, 'Automated Mistakes' (n 1).

processes that enabled that purpose to be achieved, and to remove protective processes that impeded that purpose. This is precisely what occurred.

This is, I appreciate, a staggering conclusion to reach with respect to the Government. But it seems clearly open on the facts, and may even be demanded. Such a conclusion brings shame not only on the Government, but on every Australian purportedly represented by the Government, and on whose behalf this scheme was purportedly introduced.

7. Conclusion

In conclusion, in considering the questions of Government knowledge and intention, central to its responsibility for the Robodebt scheme, it is critically important to investigate and assess the scheme (the applied systems, policies and practices) as a whole. The automated debt-generation aspect is only one, albeit a vitally important, component. Also directly relevant are the surrounding (including omitted and removed) audit and remedial processes, which worked together, in a coordinated way, to achieve the true purpose of the scheme.

I submit that the analysis also provides an important means to probe, and assess, exculpatory narratives, both for Governmental blameworthiness but also the claims of relevant individuals within the Government who seek to deny or negate their personal responsibility for what occurred.

Finally, the analysis provides a means of understanding what is required in order to ensure that this egregious chapter in Australia's history is never repeated. It is not enough to change governments, or the Ministers, ministerial staff, or senior persons from relevant departments, although these steps may of course assist. Close attention must also be paid to other necessary conditions for ethical governance and these are, I submit, found in the systems of conduct, policies and practices that are deployed for public, or purportedly public, ends. It is only if these are reformed and subject to appropriate audit and remedial processes that we can be sure that this episode will never be repeated. Audit processes here include transparent publication of AAT and other relevant decisions that enable governments, and those subject to them, to understand the impact and legality of government policies and programs.⁶³ It includes maintaining the independence of these institutions and appointing (and maintaining) members on merit. I hope that the proposed Commonwealth Integrity Commission⁶⁴ may provide another, effective mechanism. What evidently cannot be done is to leave these matters to individuals entrusted with the ethical government of our most vulnerable and powerless, in the hope that they will carry out their duties.

⁶³ Carney, 'The New Digital Future' (n 7) 14.

⁶⁴ <https://www.ag.gov.au/integrity/publications/commonwealth-integrity-commission-bill-exposure-draft>