



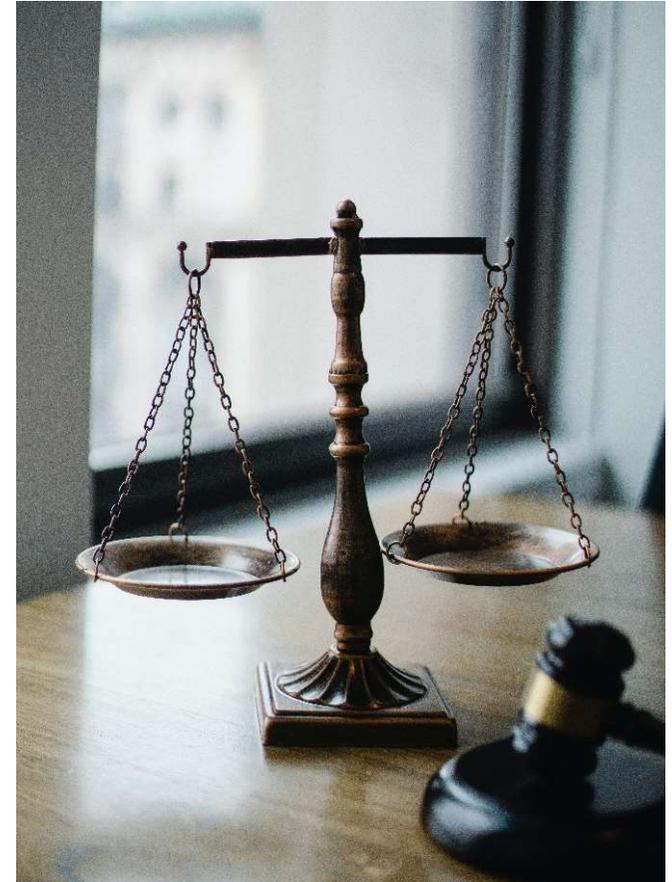
# Corporate Culture and Systems Intentionality

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# For regulators:

## Minds matter at every stage of enforcement

- Whether to take informal/administrative/litigation routes
- Identifying potential breaches or contraventions
- Developing litigation strategies and prosecution briefs
- In considering settlement
- Assessing appropriate penalty/remedial outcomes



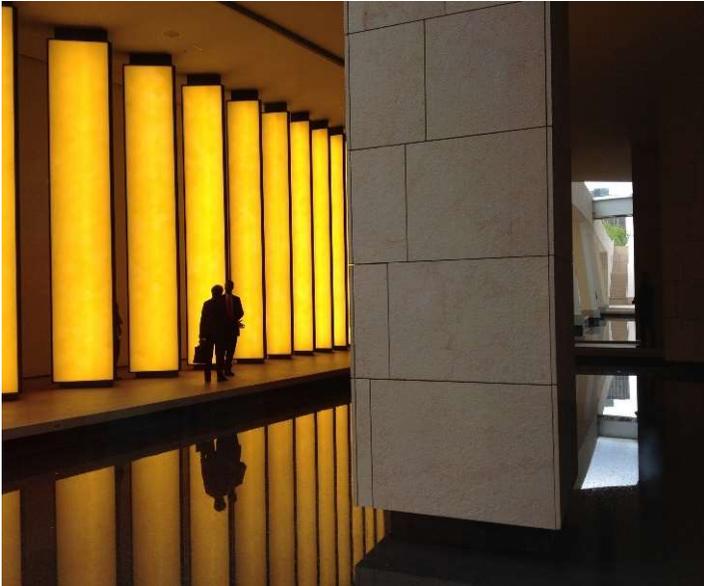
# The attribution rules...

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- Cf Vicarious liability
- ‘directing mind and will’ (*Bolton, Lennard’s Carrying*) (largely directors, board and senior execs) Perfectly fine for small cos...
- *Meridian*: who is the responsible decision-maker for the purposes of the particular rule/prohibition (statutory interpretation only?)
- **More expansive statutory models**: eg Australian ‘TPA model’ that deems the company to have the state of mind of whichever employee or agent engaged in the offending conduct.

All essentially individualistic – the ‘**where’s Wally**’ problem.

# BUT, in the modern corporate context



- No natural brain
- Massive, multinational corporations with devolved structures
- Information silos
- The human actors through which a corporation acts change, leave, get promoted, die...
- ‘Group think’
- Automated processes

The traditional emphasis on the human face of corporations has made proving fraud against corporations hugely complex, expensive and often impossible (FSRC, Crown Casino Royal Commissions, Law Commission inquiries in Aust and Eng)

# Aggregation?

It is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably. Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so (in instances of deceit) and that a corporation has acted contumeliously where no individual has done so (in cases of exemplary damages).

(Edelman J, *Kojic*)

But, notes a possible exception is where **the company's systems are structured actively to avoid 'connecting the dots' between the knowledge of relevant individuals...**



## Criminal Code Part 2.5

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- Provides that corporate **intention, knowledge or recklessness** can be demonstrated where a **corporate culture** 'directed, encouraged tolerated or led' to misconduct
- CC = '**an attitude, policy, rule, course of conduct or practice**'.
- Recognises a concept of truly organisational fault
- **But** limited to Cth criminal sphere, provision has never been properly tested, has been excluded from most areas where it could usefully operate... and what does 'culture' entail, anyway?
- More importantly, **how does 'corporate culture' connect to specific doctrinal elements of 'intention', knowledge 'dishonesty' etc?**
- Understandably, Law Commission rejected it as option....

# BUT!

- CC remains hugely influential in Australia as a regulatory (if not litigation) tool
- Use in licensing and Royal Commission inquiries
- ASX guidelines Principle 3: ‘culture of acting lawfully, ethically and responsibly’
- Embedded as a key factor for civil and criminal pecuniary penalty (fines) proceedings
- Vibrant cottage industry of CC experts and advisors
- Key indicia of good and bad CC are well-recognised
- Firmly embedded in the Australian public consciousness as a legitimate means of determining corporate culpability

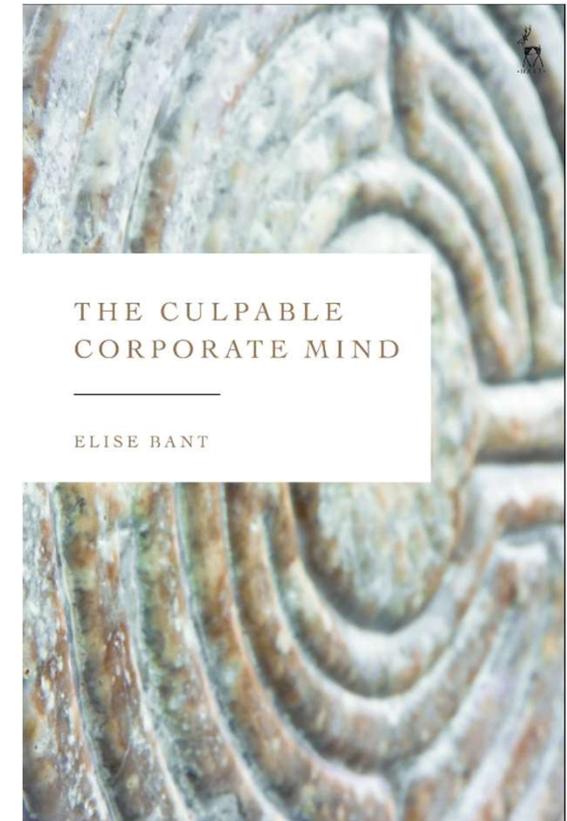
Is it possible to develop a workable litigation model of CC?

# Systems Intentionality

**‘Corporations manifest their state of mind through their systems of conduct, policies and practices.’**

- A ‘system of conduct’ is a *plan of procedure*, or internal *method*
- A ‘practice’ may develop organically, commonly involving habitual or ‘customary’ patterns of behaviour
- A ‘policy’ operates at a higher level of generality, manifesting overarching purposes, beliefs and values. Closest to Corporate Culture.

<https://unravellingcorporatefraud.com/>



‘Corporations manifest their state of mind through their systems of conduct, policies and practices.’

- A corporation’s system of conduct both *reveals* the corporate intention and *embodies* or *instantiates* that intention. Ie corporations think through their systems – and so, assessment and characterisation of the system enables us to know the corporate state of mind.
- Systems are inherently purposive: they co-ordinate and connect steps and processes *to some end*
- Knowledge of certain matters will be implicit in the system: eg a predatory business model that will only be profitable if a certain class of vulnerable consumers exists and is successfully exploited (*ASIC v National Exchange*).

<https://unravellingcorporatefraud.com/>



## Support for the model:

- Legal and moral philosophy into nature of corporate responsibility (PA French, Bucy, Fisse...)
- Corporate Culture reforms
- Australian statutory unconscionable 'system of conduct or pattern of behaviour' jurisprudence
- Victorian and Perth casino royal commissions
- Emergent in reasoning more broadly...eg Australian penalties jurisprudence



What about the 'Failure to Prevent Offences'?

# Failure to Prevent

FTP offences generally have 2 limbs:

- Commission (but not necessarily conviction) of a **predicate offence** by an **associate** of the defendant company
- Onus then falls on defendant company to show that it had '**reasonable precautions**' or '**adequate procedures**' in place

Law Commission recommended consideration of their broader use:

- Seem to avoid problem of attribution entirely
- Reflect genuine (but lesser) organisational blameworthiness (FTP)
- Work in practice!
- Not foreign to the jurisdiction, compared to CC and SI



# So...

Should we therefore accept that RR's 'failure to prevent' is 'less egregious than an offence of bribery... because... the operative minds of the company are not involved in the predicate offence'?

Did the endemic bribery practices manifest RR's true state of mind?

SI and CC seem wholly consistent with the substance of Lord Leveson's reasoning, but point to a greater level of culpability on the part of RR... and transparency?

Note the consequence(s) for liability but also good corporate governance.