



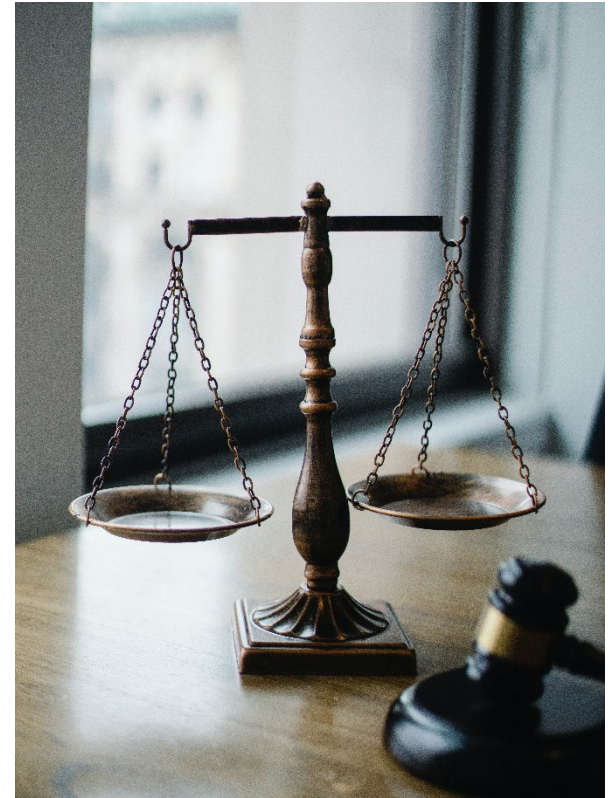
Systems Intentionality: An essential regulatory tool

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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



Individualistic attribution rules

Traditionally...

- 'directing mind and will'
- *Meridian*
- More expansive statutory rules
(eg Australian 'Trade Practices
Act' model)
- Cf vicarious liability



The Modern Corporate Context



- Have 'artificial' personhood
- 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 makes proving fraud against corporations hugely complex, expensive and often impossible.

Corporate Culture (Criminal Code)

- 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**’.
- Hugely influential as a regulatory tool in Australia
- ASX guidelines Principle 3: ‘culture of acting lawfully, ethically and responsibly’
- Explicit civil and criminal pecuniary penalty consideration
- But not successful as a liability mechanism – too uncertain!

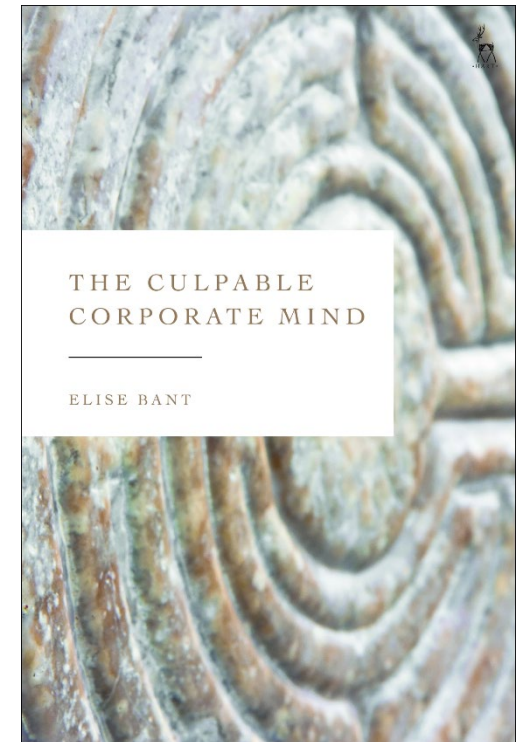
Is there a more workable model of CC?

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/>



Systems Intentionality

‘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. I.e. 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

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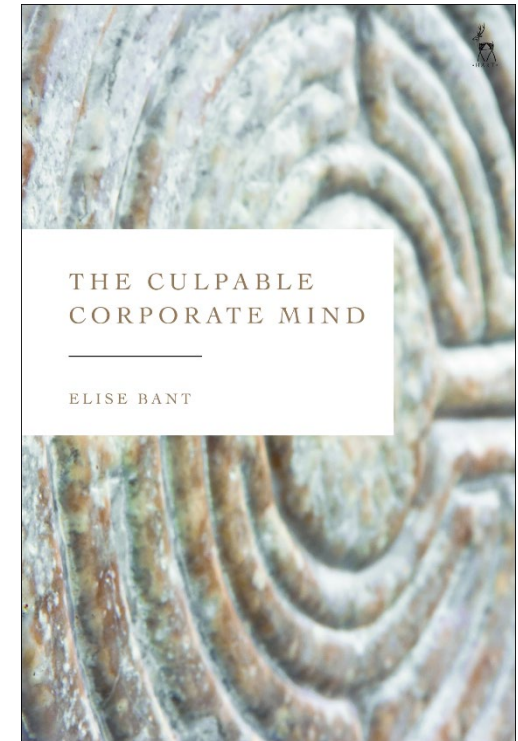
Evidence of the (real) systems

Internal:

- Employee testimony (including whistleblowers)
- Internal 'scripts', training-as-delivered'
- Remuneration/reward/promotion criteria
- Complaint processes and scripts
- Audit outcomes...

External:

- Patterns of harm/commonality between victims
- Communications (including on complaints)
- Incentives and disincentives provided to participants
- Email and chat exchanges
- Audit outcomes...



Rehabilitation and Reform?



- ‘Heads on sticks’ aren’t enough!
- Root cause(s) analysis, including the contributing ‘structures, values and practices’
- **Develop**, **test**, **embed**, **audit** and **remediate** systemic reform plan
- Role of ethical and compliant practices in leaders and employees embedded in these systems
- Oversight mechanism(s) - regulators
- Time and resources... (Rolls-Royce, Crown)

Example 1: Fees for no service

Suppose this system of conduct:

- Life insurance fees and fees for financial advice are charged through automated fee deduction systems
- The default settings are to deduct fees on an ongoing basis ('choice architecture')
- Given the nature of the products (life insurance and financial advice), it is inevitable that the conditions justifying fees will change
- There are no, or no functioning, adjustment, monitoring or corrective mechanisms.

Administrative errors and organisational incompetence?

Example 2: Crown Casino



- Millions of dollars were ‘laundered’ through Crown’s accounts.
- Directors of Crown didn’t know the particular accounts existed.
- Low-level ‘cage’ staff had a ‘practice’ of aggregating payments to the accounts
- AML team were entirely separate and unaware of the practice
- No audits, no communication
- Banks’ repeated warnings about this were never reported to the directors.

Errors and incompetence, again?

Example 3: Crown Casino II

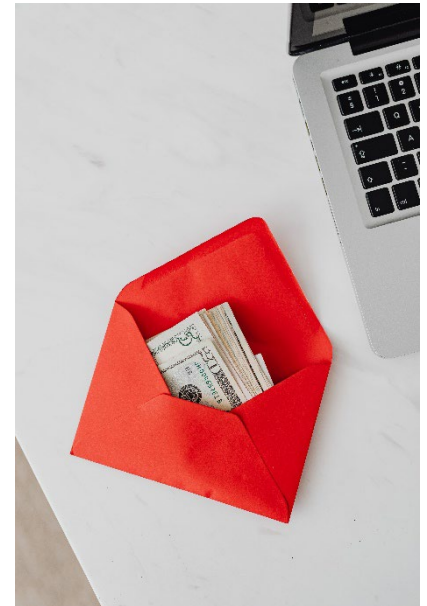


- Marketing strategy to bus elderly members of community groups to casino for day of fun.
- Various incentives to sign up (buffet, free bus, vouchers)
- For community groups to receive Crown subsidy, participants had to stay for 4-6 hours.
- No reported audit/checking of consequences, and programme ran for 20 years.
- Independent studies suggested litany of gambling-related harms resulted.
- Crown had a beautiful 'responsible gambling' policy on its website throughout.

Just bad judgement?

Rolls-Royce and FTP bribery:

- corrupt bribery **practices** were **'endemic'** across multiple jurisdictions and years
 - where an individual employee engaged in bribery resigned **'this did not lead to any change in approach from the remaining employees'**
 - characterised RR as being in **'wilful disregard'** of the offending conduct in one case
 - one corrupt dealing was framed in terms of an **'organised and considered scheme'**.
-
- Was this a culpable 'failure to prevent' – or the company's own business model? Does it matter?



Deepwater Horizon



- Deep water drilling difficult and dangerous
- Consequences of oil spills
- Macondo pipe had only one pipe-severing mechanism
- It failed due to lack of maintenance
- Despite years of notices by 3P and govt inspectors
- SI and 'reactive corporate fault'