PART I

Frameworks and Contexts

1

The Culpable Corporate Mind: Taxonomy and Synthesis

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I. Genesis

This collection is concerned to examine critically, and with an eye to reform, conceptions and conditions of corporate blameworthiness in law. In so doing, it draws on legal, moral, regulatory and psychological theory, as well as historical and comparative perspectives. These insights are applied across the spheres of civil, criminal and international law. However, the collection also has a deliberate focus on the legal, equitable and statutory principles and rules that operate to establish corporate states of mind, on which responsibility as a matter of daily legal practice commonly depends. Consistently, while it engages strongly with scholarly debates, the academy is not its sole focus. Rather, I have tried to curate a collection that will also speak, clearly and cogently, to the judges, regulators, legislators, law reform commissioners, barristers and practitioners who administer and, through their respective roles, influence incrementally the development of the law at the coalface of legal practice.

This practical, doctrinal emphasis reflects the genesis of the collection in two related projects, both supported by the Australian Research Council. The first project, conducted with my long-time friend and colleague, Professor Jeannie Marie Paterson, examines the regulation of misleading conduct across common law, equity and statute.[1] The second project, Future Fellowship, aims to develop principled and practical liability models, which are effective to address corporate fraud and other egregious misconduct.[2] Beyond issues of attribution and liability, it is hoped that the latter project will provide new ways to conceptualise good, proactive corporate governance and the necessary criteria for rehabilitation when corporate actors commit wrongs.

[1] Australian Research Council Discovery Projects DP180100932 and DP140100767. For the most recent publication, which records the findings of the projects, see J Sabbagh, E Bant and JM Paterson, 'Mapping Misleading Conduct: Challenges in Legislative Design' (2022) 49 *University of Western Australia Law Review* 144.

[2] Australian Research Council Future Fellowship project FT190100475 at www.uwa.edu.au/schools/research/unravelling-corporate-fraud-re-purposing-ancient-doctrines-for-modern-times.

Out of this research, I have developed a novel model of corporate responsibility entitled 'Systems Intentionality'.[3] It has been developed through a process of considering critically existing understandings of corporate responsibility, and attribution models, testing these against difficult scenarios that reflect the modern, complex and diffused corporate defendant, and building from their identified failings a more responsive and workable model. The model has then, itself, been subjected to testing and refinement.[4] This collection forms an important part of that process.

I have charted elsewhere the series of important writings and inquiries that led me, eventually, to develop the model.[5] Building, in particular, on the writings of scholars such as Peter A French[6] and contributor Brent Fisse,[7] and Australian corporate culture and statutory unconscionability reforms, I gradually realised that it was possible to align corporate systems of conduct with corporate states of mind. Put at its most simple, Systems Intentionality proposes that a corporation manifests (in both senses of revealing and instantiating) its states of mind through its systems of conduct, policies and practices. Central to its development was the realisation that systems of conduct are inherently purposive: a point so blindingly self-evident,[8] once it is made, that it has since felt like a fraud of my own to claim that it bears any novelty. Here, contributor Mihailis E Diamantis' discussion of recipes, maps and other external decision-supports[9] provided a true 'light bulb' moment, and very useful ways to explain the model, even if my interpretation of his work has led me in a slightly different, and perhaps more doctrinally technical, direction.

A key attraction of this approach was that it built on the objective, but still fault-based, concept of 'transactional neglect' developed by Rick Bigwood,[10] and supported by Paterson,[11] for justifying a finding of unconscionable conduct, and the work of

[3] E Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; E Bant and J M 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*: Deterring 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) 39 *Company & Securities Law Journal* 259.

[4] The above publications all contain detailed worked examples, drawn from case law and law commission inquiries.

[5] See in particular Bant, 'Catching the Corporate Conscience' (n 3) 470–71.

[6] PA French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984).

[7] Some of the most influential include 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).

[8] I am pleased to report that my hairdresser considers my model to be 'obvious' – and far easier to understand than the concept of a 'directing mind and will'. She is a captive audience and has been more helpful than she knows, both in developing my ideas and how to explain them.

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

[10] R Bigwood, *Exploitative Contracts* (Oxford, Oxford University Press, 2003); R Bigwood, '*Kakavas v Crown Melbourne* – Still Curbing Unconscionability' (2013) 37 *Melbourne University Law Review* 463.

[11] JM Paterson, 'Unconscionable Bargains in Equity and Under Statute' (2015) 9 *Journal of Equity* 188.

Paterson and Gerard Brody, in interrogating how statutory unconscionability might be understood in responding to unfair business models, rather than individual instances of misconduct.[12] However, Systems Intentionality departs from these approaches in the way in which it seeks to understand these models in terms of the specific corporate mindsets which the business models declared,[13] so tying the analysis more closely to the core role performed by state of mind in unconscionable conduct.[14]

Systems Intentionality also provided a different (but ultimately, I consider, consistent) way of appreciating Fisse's influential concept of 'reactive corporate fault'.[15] His more expansive temporal framework for assessing corporate culpability is very helpful to the systems model. Systems Intentionality encourages courts and regulators to engage in qualitative assessment of corporate conduct that goes beyond a snapshot moment taken at the point at which harm occurs. On this approach, what Fisse terms 'proactive' corporate fault encompasses the corporate choices involved in coordinating steps through a 'system of conduct' to its ultimate end point. Further, Fisse's expanded temporal lens, encompassing the corporate responses to its misconduct, has prompted me to adopt a wide 'angle of focus' to identifying and then assessing systems of conduct. On my model, systems of conduct may properly encompass not only those proactive systems that directly produce harmful outcomes, but also related audit and remedial systems. Further, again building here on Fisse, it is possible and wholly appropriate to characterise systems by reference to the wholesale *omission* of audit and remedial systems. Indeed, their omission is often a choice in system design as eloquent to corporate intention as the primary system to which any mechanisms would relate.[16] A very similar view is taken by Crofts in this volume, who argues that 'Corporate governance failings should not be considered in isolation but as part of a decision-making strategy expressed in official and unofficial, formal and informal rules.'[17] This approach addresses, I think, at least one of Diamantis' criticisms of the model of Systems Intentionality, namely, that it is inapt to address 'culpably missing systems'.[18] On the contrary, I consider this aspect of the model to be one of its strengths, disabling the common 'deficiency' narrative that has, so successfully, enabled corporations to frame misconduct in terms of negligence or mistake.

I have developed and tested the model very considerably since its inception. It has been influenced immeasurably by the generous and insightful feedback of judges, regulators, law commission officers, practitioners and eminent scholars, including

[12] JM Paterson and G Brody, '"Safety Net" Consumer Protection' (2015) 38 *Journal of Consumer Policy* 331.

[13] The relationship between the model and objection approaches to finding 'intention' in other legal contexts, such as for interpretive purposes, for example, in the context of trusts, wills, legislation, and of course contracts, must await another occasion. The concept of 'declaration' of express trusts, however, seems consistent with my use of 'manifestation' of intention by corporations, and with some discussions of the concept of parliamentary intention. It is at least plausible that Systems Intentionality is consistent with, and even reflective of, a broader principle found throughout the law.

[14] Bant and Paterson, 'Systems of Misconduct' (n 3).

[15] Fisse, ch 7 of this volume.

[16] See the analysis, in particular, in Bant, 'Catching the Corporate Conscience' (n 3) 487–90; and Bant, 'Reforming the Laws' (n 3) 16–17.

[17] Crofts, ch 3 of this volume, section II.C.

[18] Diamantis, ch 10 of this volume, section III.B.

those engaged in this collection. Paterson, as always, must come in for special thanks, for her rigorous criticisms and generous encouragement. Two particular improvements to the model arising out of this collaborative process warrant identification here. First, early articulations of the model wavered in the roles for, and nature of, systems of conduct, patterns of behaviour, policies, processes and practices. It was only in writing 'Systems Intentionality: Theory and Practice' for this volume that I worked through the distinctions between these component concepts and settled the core formula: that corporations manifest their states of mind through their 'systems of conduct, policies and practices'.[19] That chapter also provides the beginnings of the litigation roadmap promised in my original Future Fellowship grant application. It sets out the meaning of the concepts and, importantly, what kinds of evidential strategies may be utilised to establish each. My later chapter, entitled 'Modelling Corporate States of Mind through Systems Intentionally' then outlines how systems of conduct (once proven) may be understood to manifest different, paradigm mental elements.[20]

Second, in debating these chapters, I was able to confirm my tentative, original position that this process is not one of 'inference' of mental states.[21] A corporation, after all, does not have a natural mind to be inferred from its conduct. This was a concern articulated by the Law Commission of England and Wales as a reason against adopting the model, at least immediately.[22] However, this concern is, I think, misplaced. Systems Intentionality involves a process of objective characterisation of corporate mental states from the features of the proven system. Here, the point is that systems of conduct are how corporations think: how they instantiate and declare their intentions. No inference of mental states is required, or not in the same way as it might be for individual intentions. Rather, courts must assess direct evidence of the alleged system of conduct and, if the system is established, characterise what it says (reveals) about the corporate mental state it instantiates. The exercise is closer to one of 'construction' of a mental state, although I think 'characterisation' is better in capturing the essence of the task. I am not sure how much hangs on this: it seems likely that many judges will not dissect the necessarily rather messy process of fact-finding and characterisation in a pedantic way. They may well be content to treat corporate persons as for individuals in inferring mental states from conduct. And, as we shall see, Diamantis argues cogently in his chapter that there is no need to distinguish between corporate and natural persons when inferring mental states. However, given that my object is to explicate as fully as possible the doctrinal and practical applications of the model, as well as its theoretical underpinnings, it seems important to clarify this aspect of its operation. This may, in turn, spur further research into and consideration of these issues, necessary to evaluate the nature and comparative benefits of the respective approaches.

That said, it is, of course, true that a system of conduct may place an individual decision-maker at its apex, so that some inquiry into that individual's mind becomes necessary and appropriate on the model of Systems Intentionality. Indeed, as we shall

[19] Bant, ch 9 of this volume.
[20] Bant, ch 11 of this volume.
[21] Bant, 'Culpable Corporate Minds' (n 3) 382, fn 156.
[22] Law Commission, *Corporate Criminal Liability* (Options Paper, 10 June 2022) [6.34]–[6.41] ('Law Commission Options Paper').

see, in my view, some attribution rules, such as the 'Identification Doctrine',[23] are largely consistent with this sort of decision-making structure and analysis. This raises the relationship between the novel model of Systems Intentionality and other models of corporate attribution and liability. The following section critically considers this question.

II. Taxonomy and Synthesis

A. Introduction

In what follows, I aim to give a sense, necessarily brief, of the range and nature of the important contributions made by authors to this collection, which examine the conceptions and conditions of corporate responsibility. The discussion will, I hope, make clear the reasoning behind the structure of the collection, as well as connections between the chapters. But I also seek to position Systems Intentionality within those themes and inquiries, and to respond (again, in brief) to some issues very helpfully identified by the contributors. This is important given the aims of the Future Fellowship project, and the need to test critically whether the proposed model is fit for purpose.

Broadly speaking, I think the contributors' analyses endorse the view that Systems Intentionality is intuitive,[24] practically workable and proceeds on a well-supported (if not universally accepted) theoretical basis. A range of essays explore the value of the model as an additional means of holding corporations to account for serious wrongdoing, against strengths and weaknesses of other approaches. Overall, the essays demonstrate the value of a pluralistic approach to corporate regulation. This multifaceted approach to corporate regulation, however, again raises the relationship between the various approaches to corporate responsibility. Pluralism is clearly less desirable, or simply undesirable, when it merges inconsistent approaches to corporate responsibility. The following discussion therefore identifies some of the most striking intersections, as well as divergences, between leading models. In this way it seeks to develop both a taxonomy of the law and to synthesise, to the extent possible, different approaches and perspectives. It will also make apparent the very considerable further work that must be done to develop a more coherent law of corporate responsibility.[25]

B. Frameworks and Contexts

The starting point for any discussion of corporate responsibility must be with some foundational understandings of the nature of a corporation. As is well known, views can

[23] Exemplified in *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane LC) (HL); *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, 172; [1956] 3 All ER 624, 630 (Lord Denning); *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1, [1972] AC 153, 170 (Lord Reid) (*Tesco Supermarkets*).

[24] Important, if one is to try to explain it to jurors.

[25] A key recommendation of the Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) [1.15], [1.25] Recommendation 5, [6.13]–[6.22] ('ALRC Final Report').

be roughly divided into two camps: the nominalist and realist.[26] Nominalists hold that corporations are abstractions of the law, or (even less helpfully, for liability purposes) 'fictions'. On these accounts, corporations are, in truth, collections of individuals, commonly conceived as bound together by private contractual or other consensual relationships. It follows that moral and legal responsibility for any wrongdoing rests with the individuals conducting or engaged in group activities. To speak of a corporation existing in its own right or having the qualities of a moral person, or as being capable of being legal responsible in its own right is a nonsense.[27] Corporate responsibility must always, therefore, be mediated through the fault of individual employees or agents of the company.

Realists, by contrast, consider that corporations have an existence separate from, and qualitatively different from, the sum of their constituent members. This is consistent with recognition of corporations as social facts.[28] On this account, corporate persons may manifest traits, cultures, values, choices, knowledge and intentions not solely derivatively through their employees and agents, but as entities in their own right. Their abilities mean that corporations are able properly to be considered moral and legal agents, a conclusion essential for justifying corporate criminal liability in particular.[29]

As the Australian Law Reform Commission (ALRC) has recognised in its very helpful report on *Corporate Criminal Responsibility* (references to which permeate this collection), the law's traditional attribution rules arguably straddle these views.[30] These rules identify individual employees or agents acting for and on behalf of the company, whose mind is treated, for the purposes of the law, as that of the corporation itself. The corporation is conceived as a distinctive entity with its own mind, choices, knowledge and intentions, but these are identified derivatively through specific human agents of the corporation. The same may be said of other statutory approaches that seek to cast the attribution net wider than directors and senior officers of the company.[31] This messy pragmatism does not, however, avoid the problem of trying to work out why, and how, it may be justified to treat corporations in terms of distinctively organisational blameworthiness. In particular, unless one has a decent account of the philosophical foundations of organisational responsibility, it may be premature or unjustifiable, or simply silly, to seek, for example, to develop doctrinal models of corporate culpability that are not

[26] The following does not attempt to summarise the subtle spectrum of views that may combine aspects of these, but rather to provide a rough picture of the background contexts against which the chapters may be more fully understood. For useful discussion of views, see E Colvin, 'Corporate Personality and Corporate Crime' (1995) 6 *Criminal Law Forum* 1; ME Diamantis and WS Laufer, 'Prosecutions and Punishment of Corporate Criminality' (2019) 15 *Annual Review of Law and Social Science* 453; ALRC Final Report (n 25) ch 4; E Micheler, *Company Law: A Real Entity Theory* (Oxford, Oxford University Press 2021) ch 1; Crofts, ch 3 of this volume.

[27] F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809; see also J Hasnas, 'Where is Felix Cohen When You Need Him?: Transcendental Nonsense and the Morality of Corporations' (2010) 19 *Journal of Law and Policy* 55.

[28] See, eg, Harding, ch 2 of this volume, section III; Diamantis, ch 10 of this volume, section IV.B.

[29] Crofts, ch 3 of this volume, section I.

[30] ALRC Final Report (n 25) [4.32].

[31] The 'TPA model', originally contained in Trade Practices Act 1974 (Cth), s 84, is the best-known and most widely copied example: see ALRC Final Report (n 25) [3.60]–[3.63], [6.123]–[6.160].

derivative of individual fault. Rather, it is likely better to seek more effective means to hold individuals who associate to account for their wrongdoing, and to concentrate on other strategies (such as performance-based models of liability) to protect those who deal with those groups of individuals. Fortunately for me, there are, indeed, powerful and cogent 'realist' accounts of moral and legal corporate responsibility, on which I have gratefully built my doctrinal liability model. Penny Crofts' essay, in particular, provides an excellent account of these, in examining the moral agency of corporations through the lens of criminal law, to which we will return shortly. However, the fact that these provide, for me, a compelling reason to conceptualise corporations in holistic terms does not remove the importance of understanding the moral responsibilities of individuals who associate.

Given these critical issues, it is fitting that the collection commences with Matthew Harding's thoughtful and thought-provoking analysis of the moral significance of associating, in 'Associations and Moral Responsibility: Some Ground-Clearing'.[32] As Harding explains, the chapter explores the moral significance entailed in individuals' associating with others, whether it be in the context of intimate associations such as families, or those towards the other end of the spectrum of communities such as churches, corporations, charities or political organisations. Harding's basic premise is that associating with others has moral implications for an individual, offering new ways for that individual to expand her moral horizons. When an individual associates with others, she commits in some sense to the shared purposes of that group.[33] This commitment exposes her to both moral rewards and risks: the opportunity to develop wholly new ways to achieve a greater range of personal and communal goods, as well as the potential to be implicated in personal and communal wrongs of a different order and moral significance. Here, Harding identifies a range of difficult issues, including: the ambiguous quality of loyalty where that loyalty is directed towards bad associational purposes; the moral implications of just 'doing your job'; the related role of whistle-blowers, who refuse simply to do their job; and the special moral obligations senior office holders of an association bear towards those who commit to the association. Harding's characterisation of the last as raising a risk of associational abuse and betrayal of trust provides a powerful, additional lens through which to assess the sorts of repeated and longstanding governance failures discussed in his chapter, and in others, in this collection.[34]

While individuals may have less or more control over the acts of the association, Harding is clear that their commitment to it necessarily and justly involves them in some share of moral responsibility for those actions. This moral responsibility is persistent and broad-based. It does not simply track formal membership. Indeed, it is not bounded temporally (a point that might be recalled when, as too commonly occurs, directors

[32] Harding, ch 2 of this volume.

[33] The commitment might be more 'thin' and hence of marginal moral significance, such as where an individual has little economic choice but to accept an offer of employment, or more 'thick', as where a person joins the Board of a company in order expressly to promote its ends. But involuntary coordination with others, as in modern slavery, entails no commitment and 'simply underscores the grave moral wrong that is done': ibid, section II.

[34] Harding discusses Rio Tinto's destruction of the Juukan Gorge and the responsibility of the Catholic Church for child sexual abuse, amongst others. See also Crofts, ch 3 of this volume, on the Crown Casino; Powles, ch 5 of this volume, on Uber and Facebook; Bant, ch 11 of this volume, on banking misconduct.

resign to 'take responsibility for' egregious corporate misconduct under their watch, thereby seemingly also washing their hands of the whole business). Associations, after all, may retain their identity over time and through considerable changes of membership and activity.[35] Consistently, Harding explores why, and how, the act of associating attracts moral responsibility for historical associational harms. Responsibility here may extend to situations where an association has the purpose to relieve victims of another's historic wrongdoing. Harding is, however, careful to note that the individual burden of remediating this broad, persistent, shared moral responsibility might vary, both in terms of its substantive content and remedial demands.

Harding also explores a range of ways in which this moral burden might differ from legal obligations.[36] Yet, as he notes, the implications for legal accounts are both important and interesting. As we shall see, the contributions of Justice Sarah Derrington and Samuel Walpole[37] and Pamela Hanrahan[38] squarely and critically examine the justifications for and boundaries of individual legal responsibility for associating. Thus Derrington and Walpole consider the common practice of sacrificing individual scapegoats as surrogates for corporate responsibility, in the context of harms involving ships. They argue for recognition of ships as legal persons: a reminder that natural and corporate persons are hardly the sum of possibilities for attributing responsibility for harms in the law. Hanrahan examines the development of what might be called scapegoat positions, created legislatively to provide ready means to hold officers to account for sins of the corporation committed 'on their watch'.[39] Both accounts provide important additional perspectives on the difficult and delicate relationship between individual and corporate accountability at the heart of Harding's essay.

On my model, individuals embedded in corporate systems of misconduct become potentially powerful witnesses to corporate fraud, rather than necessary casualties of or substitutes for corporate responsibility.[40] However, individual accountability is by no means excluded from, or foreign to, the model of Systems Intentionality. While it is not possible to address this fully here, it will be apparent that individuals will continue to be responsible, personally,[41] through existing common law, equitable and statutory routes. These include the ongoing role for negligence and accessorial liability for directors. It is also entirely possible that lower-level managers, employees and agents may be held personally responsible for harms caused while pursuing corporate activities. However, my starting position is that individual blame must reflect, and be proportionate to, that individual's genuine, personal culpability, not merely be pursued as the necessary hook

[35] As to which, see Julia Powles' chapter, in particular on Uber's strategy of distinguishing its current from former self, and relying heavily on management renewal to that end: Powles, ch 5 of this volume, section II.A.

[36] See also Pamela Hanrahan's discussion of this distinction in ch 17 of this volume, section IV.

[37] Derrington and Walpole, ch 16 of this volume.

[38] Hanrahan, ch 17 of this volume.

[39] ibid sections I and IV.

[40] Bant, 'Catching the Corporate Conscience' (n 3) 492–95; Bant, ch 9 of this volume, section II.A. See also Powles, ch 5 of this volume, sections II.A and II.B, on the critical role of whistle-blowers in holding Big Tech to account.

[41] As opposed to being the means by which the corporation is held responsible, such as through the Identification Principle.

on which to hang corporate liability, or a means to assuage public demands for 'heads on sticks'.[42] In this respect, I think, all our accounts align.

The following essay on 'Crown Resorts and the Im/moral Corporate Form'[43] turns from a concern with the nature and bounds of individual responsibility to that of the corporation in its own right. Crofts draws on realist theory to examine the moral and legal criminal responsibility of corporations, in light of the recent Australian inquiries into the Crown Resorts group.[44] As Crofts explains, the criminal law's roots in human wrongdoing have given rise to key tenets, such as that a guilty act requires a guilty mind. Criminal law is also 'a system of blaming'.[45] This necessarily requires that the subject of the criminal law be blameworthy. It follows that, without some cogent means of understanding the moral responsibility of corporations, the criminal law will continue to struggle, and fail, to hold criminogenic corporations to account.

Here, Crofts provides an extremely helpful understanding of leading theorist Chris Chapple's three criteria for organisational blameworthiness: that corporations are distinct moral agents facing moral choices; that they have power to make those choices; and they have the capacity to exercise good judgement.[46] Mapping these on to the doctrinal requirements of the criminal law, Crofts argues that, by reference to these considerations, the Australian inquiries revealed clear evidence of criminality on the part of Crown Resorts. Her detailed analysis of why, and how, this is so explores and connects the social reality of corporate personhood with critical criminal law requirements of voluntariness, causation and intentionality. In the course of so doing, Crofts' analysis repeatedly highlights the salience of corporate culture, systems, rules, structures and procedures in establishing each of these elements. Crofts concludes that, as an (im)moral corporate agent, Crown Resorts arguably merits criminal law's denunciation and sanction. Her contribution provides a compelling case for greater involvement of the criminal law in corporate regulation. In my view, it also underscores the powerful, analytical role that may be played by systems-based conceptions of corporate responsibility, seen through a realist lens.

The following two chapters consider the strategic shifts adopted by companies to limit their liability, in response to the legal frameworks in which they operate. Joshua Getzler's chapter on 'Corporate Torts in England: Limiting Liability by Capacity' considers the historical genesis, and eventual abandonment, of the ultra vires rule in the law of torts, developed as a limitation on corporate liability.[47] The limitation responded to the risks posed by general vicarious liability on the part of a company for

[42] See, eg, ME Ziffer et al, 'Royal Commission: Damming Report: The Public was Hoping for Heads on Sticks but, Instead, we got a Grinning CEO' *The Business* (4 February 2019) at https://search.informit.org/doi/full/10.3316/tvnews.tsm201902040147, for an example of the public disappointment in the wake of publication of the Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) ('FSRC Final Report').

[43] Crofts, ch 3 of this volume.

[44] Parliament of New South Wales, *Inquiry Under Section 143 of the Casino Control Act 1992 (NSW)* (Report, 1 February 2021); State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1 ('VCCOL Report'); State of Western Australia, *Perth Casino Royal Commission* (Final Report, 4 March 2022).

[45] Crofts, ch 3 of this volume, section I.

[46] C Chapple, *The Moral Responsibilities of Companies* (London, Palgrave Macmillan, 2014).

[47] Getzler, ch 4 of this volume.

the acts or wrongdoing of the agents and employees through which it acted.[48] As will be apparent, this liability approach reflects an individualistic account, in which a 'corporation is incapable of acting either rightfully or wrongfully in its proper person'[49] and so must be held responsible, derivatively, through its human agents.

Before addressing the substance of his analysis, it is worthwhile noting the aptness and broader utility of Getzler's contribution for understanding some of the key themes explored in this collection. First, vicarious liability was the initial means by which corporations were held responsible as a matter of civil law for the acts or wrongdoing of their agents. Criminal law followed this lead,[50] a point underscoring the entwined development of principles of corporate responsibility across civil and criminal divides. This shared history also, arguably, supports a unified approach to any reforms of the laws relating to attribution of corporate mental states.[51] Vicarious liability has also remained an eminently useful weapon within the armoury of the law, and influenced law reform initiatives. However, as a means of holding corporations responsible for their own, organisational blameworthiness, vicarious liability suffers from the related objections that it is indirect or derivative, and hence potentially strict.[52] Thus, where it applies, the corporation is commonly understood[53] as being held responsible for another's wrongdoing. Consistently, the approach is over-inclusive, capturing without distinction the act of a rogue employee in an otherwise well-managed and ethical company, alongside that of an employee diligently carrying out instructions essential to the corporation's predatory business model. It is also under-inclusive, unable to address the significance of a predatory system of conduct coordinated across multiple employees, departments and through automated systems. In both cases, the employee's culpability need not match that of the corporation.

As Getzler explains, corporations responded to the realities of expansive vicarious liability by adopting a range of protective strategies. The justifications for these were not always sound in light of tort creditor claims. Thus asset partitioning, to restrict liability to the registered company's subscribed or guaranteed capital, might be justified for contractual liability on the dual basis that voluntary creditors can be regarded as having notice of the limit before choosing to contract, and on pragmatic commercial benefit grounds. Neither of these translates well to the context of involuntary tort creditors.

[48] It remains contentious in Australia whether vicarious liability entails that the corporation is responsible for the act of another, or the wrong of another: see *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78, (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.

[49] Getzler, ch 4 of this volume, section I, citing JW Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 1st edn (London, Stevens and Haynes, 1907) 55.

[50] C Wells, *Corporations and Criminal Responsibility* (Oxford, Oxford University Press, 2001) ch 5; S Walpole, 'Criminal Responsibility as a Distinctive Form of Corporate Regulation' (2020) 35 *Australian Journal of Corporate Law* 235, 238–48.

[51] As opposed to procedural rules, which may legitimately differ: see ALRC Final Report (n 25) [4.92]–[4.142]. If the corporate state of mind is, indeed, a question of fact, it suggests that the nature of the inquiry should be the same across jurisdictions.

[52] cf the position of an 'innocent agent' knowingly ordered to commit a wrong by her principal: *White v Ridley* [1978] HCA 38, (1978) 140 CLR 342. In this case, the principal is directly responsible for the wrongdoing.

[53] But see C Tilley, 'Just Strict Liability' (2023) *Cardozo Law Review* (forthcoming), which offers an understanding of vicarious liability that reflects genuine organisational fault.

A different justification emerged for so-called 'defensive' asset partitioning: a company should not be held responsible for unauthorised acts outside the corporate purposes and business (such as conducted by the rogue employee or agent, mentioned earlier). Consistently with this understanding, the ultra vires doctrine transformed agents' misconduct outside the corporation's formal, legal capacity into unauthorised frolics for which it bore no responsibility. This shift sponsored obvious and undesirable managerial tactics, in particular of promoting a sharp liability distinction between formal and authorised activities, and the reality of the corporation's daily pursuits.

Getzler charts critically the passage of the doctrine into eventual obsolescence. Its demise is, I think, an important condition of Systems Intentionality, which is predicated on an expansive corporate capacity.[54] Here, the distinction between corporate purposes in the sense of capacity and purposes in the sense of intention is both doctrinally and practically important. Thus, suppose a corporation adopts and deploys a system of conduct that (on my account) manifests the aim of exploiting a target, vulnerable consumer group for profit. The fact that its formal 'purposes', as expressed in its published policies (or indeed constitutional instrument), might be public-spirited does not render the system of conduct void as ultra vires. Purposes here must be understood as reflecting corporate states of mind, not denying the corporation's capacity to engage in the misconduct. Through this lens, the system of conduct shows that the corporation's public face, the basis on which it seeks to attract investment, business and government privileges, has become deeply misleading or deceptive.[55] The statement of corporate purpose is a public expression of corporate values or character, but that cannot, and should not, be used to deny the reality of the corporation's daily aims, knowledge and standards. Thus, where a corporation should, as a matter of formal structure, only decide something by approval of the board, but in reality carries out its day-to-day purposes through devolved structures that are kept strictly below board-level, it would deny the insights offered by Systems Intentionality simply to say that this behaviour does not reflect the actions or intentions of the corporation. Rather, I see these cases as ones where the formal decision-making structures or systems are belied by the reality of the corporation's own embedded, instantiated systems of conduct and practices. The latter manifest the true corporate intentions.

This analysis may also help address the concern Getzler raises at the conclusion of his chapter, namely, the risk that growing calls for adoption, or imposition, of statements of ethical corporate purposes may unwittingly reinvigorate the doctrine of ultra vires.[56] Through the lens of Systems Intentionality, and seen as representations of corporate mental states rather than capacity, public-facing declarations of corporate ethics should indeed assist to hold corporations to account, but through doctrines concerned to regulate misleading conduct (including deceit). Of course, this view may serve to encourage Boards and managers to make real and effective efforts to embed and

[54] Most jurisdictions now accept that a corporation has the capacity of a natural person: see, eg, Corporations Act 2001 (Cth), s 124(1); Companies Act 2006 (UK), s 39. See also Walpole (n 50); ALRC Final Report (n 25) [4.20]–[4.45].

[55] See eg VCCOL Report (n 44) ch 8 on the huge discrepancies between Crown Casino's formal 'responsible gambling' policies and the realities of its practices.

[56] Getzler, ch 4 of this volume, section X.

audit, on an ongoing basis, formal systems, to ensure that the corporate walk matches the talk. However, if the doctrine of ultra vires were to be revived and strengthened, this might pose real challenges for my model. I can only join Getzler in hoping that the implications of so doing might prompt pause in any reforms in that direction.

The final chapter in Part I turns from an historical perspective of corporate evasive strategies to consider the frightening present and future challenges of Big Tech. In 'The Corporate Culpability of Big Tech', Julia Powles charts the hugely successful, liability-limiting strategies of leviathan organisations, which have emerged in response to and deploy new technologies.[57] Her analysis explains the destructive and well-organised conduct that operates to avoid, undermine and even destroy states' legal restrictions in the pursuit of profit. Powles explores the all-too-familiar narratives that accompany this behaviour, which cast it in terms of (trial and) error, accident, and the innocent and regretted by-product of an emergent and innovative industry.[58] She then applies the model of Systems Intentionality to two case studies: Uber and Facebook (now Meta). In her analysis, she explains how these giants' destructive business models can be understood in systems terms, yielding a compelling account of highly culpable corporate blameworthiness.

Powles observes in her concluding section that the ability for Systems Intentionality to hold Big Tech appropriately responsible for harmful business practices is significantly impacted by a range of factors, some of which are peculiar to this industry. As she notes, the introduction of licensing requirements would give regulators a prime, ex ante opportunity to consider whether Big Tech players are 'fit and proper' persons to enjoy the very significant benefits of continuing to operate in their markets. Crofts' chapter demonstrates that Systems Intentionality has proved to be a powerful regulatory tool in the casino context, where the licensing inquiry has been into the 'suitability' of corporate persons. The comparison may be particularly valuable given the size, scope for harms and facilitation of criminal activities in the tech sectors.[59] Other factors, such as the deliberate structuring of Big Tech business to avoid legal constraint, including across jurisdictions and through multiple corporate entities and intermediaries, may also be susceptible to challenge by regulators and courts willing to characterise the business strategy in systems terms. Michael Bryan's chapter, to which I return shortly, examines a good example of how this can be done. Business models will commonly combine networks of natural and corporate persons, acting in a coordinated way in pursuit of group goals.[60] There is no reason, in my view, to think Systems Intentionality cannot address these scenarios as effectively as it does the state of mind of a single corporation. Whether the cog in the system is a natural employee or an agent, or a related corporation, should make no difference to the mode of analysis. Here, I hope, Systems

[57] Powles, ch 5 of this volume.

[58] See also the FSRC Final Report (n 42) 136–57, for examples of similar strategies in Australia's banking sector: discussed in Bant, 'Culpable Corporate Minds' (n 3) and in Bant 'Catching the Corporate Conscience' (n 3) 487–90.

[59] Crofts, ch 3 of this volume; VCCOL Report (n 44) 58–69 [19]–[25], 124–27, 174–78 [87]–[102].

[60] Bryan, ch 14 of this volume, section III.B.

Intentionality may provide a real path forward for group liability, consistently with developments in England and Wales.[61]

Big Tech's ploy of distancing itself from 'historic' wrongs also must be countered. The casino inquiries provide rich instances of this form of strategy, and the ways in which it can be dismantled through re-focusing on structural and systemic change.[62] Powles' sobering, final factor is the extent to which Big Tech threatens the very rule of law on which its regulation depends. While Systems Intentionality cannot resolve this challenge, what it does, I think, is render more transparent the true level of culpability inherent in the subversive practices she identifies. One can only hope that this may enable proper and considered public and political attention to come to bear on these, most destructive, corporate practices.

C. Attribution Models

From these 'big picture' essays, the collection turns to address critically both the existing and the proposed ranges of doctrinal approaches to determining the corporate mind. In '*Meridian*, Allocated Powers and Systems Intentionality Compared',[63] Rachel Leow maps the intersections between and alignment of her ground-breaking model of 'Allocated Powers',[64] the Identification Doctrine, the context-specific *Meridian* approach[65] and the model of Systems Intentionality. She also usefully, albeit necessarily briefly, considers the concept of 'aggregation'.[66] Indeed, her chapter provides the perfect narrative thread for any reader seeking to navigate the labyrinthine intersections of the law's corporate attribution rules.

As is well known, the Identification Doctrine recognises the corporate state of mind in its 'directing mind and will', commonly limited to the Board and, perhaps, other very senior executives. Leow's model, working outwards from the Identification Doctrine, and seeking to place it on better foundations, focuses on the processes by which individuals beyond the Board and senior executives are allocated the corporation's critical decision-making powers. From the standpoint of Systems Intentionality, both the Identification Doctrine and the Allocated Powers model recognise the relevance of core systems of decision making, albeit ones that centre upon key individuals. An example, given by Leow, is the rule in a corporate constitution that 'the decisions of the board in managing the company's business shall be the decisions of the company'.[67] Such 'primary rules of attribution' represent default and core decision-making structures, without which a

[61] *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294; *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2020] AC 1045. cf C Witting, 'The Corporate Group: System, Design and Responsibility' (2021) 80 *Cambridge Law Journal* 581.

[62] Above n 35.

[63] Leow, ch 6 of this volume.

[64] R Leow, 'Equity's Attribution Rules' (2021) 15 *Journal of Equity* 35; R Leow, *Corporate Attribution in Private Law* (Oxford, Hart Publishing, 2022).

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

[66] See also Diamantis, ch 10 of this volume, section II.C; and Gans, ch 13 of this volume, section V.

[67] Leow, ch 6 of this volume, section I.A.

corporation would be largely inert.[68] The synergies between our models reflect the fact that both understand corporate mental states in terms of the decision-making structures adopted by a corporation as a matter of daily practice. Further, as Leow also notes, both models align with realist conceptions of corporate personality.

Systems Intentionality is also concerned, however, with the very many cases in which the whole point of corporate systems of conduct is to remove individual choice or judgement, and hence variability, from the equation. Examples include the use of standard operating procedures and practices.[69] Corporations often adopt these sorts of systems of conduct to promote speed, predictability and certainty in coordination of conduct to achieve corporate ends. The advantages of adopting these systems, including for consistency and quality assurance purposes, is more obvious than ever in the world of Covid-19. And, of course, the increasing trend on the part of corporations to automate key processes and activities squarely makes the point. In such cases, there may be no individual focal-point or repository of the corporate powers. The whole point is that it does not particularly matter which human is embedded in the system, nor indeed whether humans are wholly or partly replaced by automated processes. The system of conduct is objectively designed (in the sense of calculated or apt) to ensure coordinated conduct of a certain quality and, in this sense, the conduct is always and necessarily intended. Choices between conduct options are part of the system design (its 'choice architecture').[70] They are pre-programmed into the system of conduct. Recognition of this feature of systems in general is why, of course, Systems Intentionality is also able to address the significance of fully automated systems for corporate conduct, where individualistic approaches struggle.[71] The analysis is the same, whatever form the system takes.[72]

Both the Allocated Powers model and Systems Intentionality privilege the 'real' or instantiated over formal systems of conduct. Thus, on Leow's model, the critical question is the individual to whom corporate powers are allocated in practice. This may be quite different from the corporate hierarchy reflected in the formal corporate flow-charts. Similarly, on my approach, we have seen that a corporation may develop glossy policies, or (at a more granular level) standard operating procedures, post these on internal or external websites, and the Board may articulate statements consistent with those policies. However, if the corporation's daily, adopted systems of conduct and practices to which these policies and procedures supposedly relate are wholly divergent from them, it is the systems of conduct and practices as *adopted and deployed* that manifest the true

[68] Subject to general law rules about the effect, for example, of shareholders in general meeting, or other statutory rules giving corporations other decision-making organs or processes.

[69] To the extent that these are a product of persons who are allocated the company's powers, they may be accommodated within Leow's model. However, Systems Intentionality renders it unnecessary to identify an individual responsible for the design of a diffused system of misconduct, or practice, adopted or operated by a corporation. The system may be understood as manifesting directly the corporate state of mind: see Paterson and Bant, ch 12 of this volume.

[70] Paterson, Bant and Cooney (n 3).

[71] Discussed in Bant, 'Culpable Corporate Minds' (n 3) 385–87; Bant, 'Catching the Corporate Conscience' (n 3) 487–90.

[72] Again, this insight has been only possible through long discussions with Jeannie Marie Paterson, for which I remain deeply grateful.

corporate state of mind, values and aims. The formal statements of purpose, intention and values become, on this account, an instance of misleading or deceptive conduct, and thereby another means to remedy and deter corporate misbehaviour.

To the extent that it reflects a principle of statutory interpretation, both Allocated Powers and the Systems Intentionality models must accommodate the *Meridian* approach. This asks, as a matter of statutory interpretation, who the responsible decision-maker is for the purposes of a particular rule or prohibition. However, I agree with Leow that it is neither possible nor desirable to apply this model more broadly to general law fields. It requires, for a start, that we are able to determine the purpose(s) of the law's regulation in every instance, as a pre-condition to identifying the relevant person(s) for the purposes of corporate attribution. Even were this possible, as earlier observed, there seems no obvious reason why the approach to identifying corporate states of mind (as opposed to the substantive doctrinal elements of those mindsets, or the procedural rules surrounding their proof) should differ between civil and criminal law, common law and equity, or for statutes where the prohibition or rule is silent on attribution issues.[73] If the state of a corporate mind is a matter of 'fact', as we are told it is,[74] then the method of ascertaining it should be the same, whatever the context. And, frankly, even if there is a fair element of theory and policy in determining that corporations have mindsets relevant to liability, it does not follow that any inquiry into that state of mind should be determined by the relevant body of law with which a corporation is engaged. As a practical matter, this renders the inquiry, already challenging, massively more uncertain, variable and functionally unhelpful. From a corporate governance perspective, for example, do we really expect, or want, corporate officers to factor potentially highly uncertain legal doctrines into their corporate flowcharts, to ensure that the relevant person for the purposes of the law's prohibition is identified and properly trained?

Finally, Systems Intentionality was developed in light of, and to address, the common modern phenomenon of diffused corporate structures, in which individual knowledge is dispersed across individuals and corporate departments, often well below Board level.[75] This poses a particular challenge for traditional attribution rules, but also any liability approach predicated on locating an individual repository of fault from which to attribute corporate responsibility. As Leow notes, whether the *Meridian* and the Allocated Powers models are susceptible to this problem depends, in part, on their approach to aggregation.

While there are probably many versions of, and explanations for, aggregation approaches, they commonly identify and combine the subjective mental states (eg intentions, knowledge, belief) and, potentially, the normative character of individuals' states of mind (eg dishonesty, recklessness, unconscionability), adding these up to amount to a greater, corporate consciousness or culpability. This seems a pragmatic

[73] cf Law Commission, *Criminal Liability in Regulatory Contexts* (Consultation Paper 195, August 2010) [5.103]–[5.104].

[74] *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).

[75] B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1189.

way forward. Thus Jeremy Gans proposes a model of aggregation to address what he sees as the intractable difficulties of establishing corporate dishonesty.[76] However, aggregation runs into the obvious, realist objection that a corporation is more than, and different from, the sum of its parts. Further, how can a corporation be dishonest, reckless or unconscionable by reference to an aggregation of individuals, none of whom individually is dishonest, reckless or unconscionable?[77] Nor is it clear how aggregation works when addressing blended human and automated systems, or fully automated systems.[78] That said, my own view is that aggregation may be better understood as an intuitive shift towards a Systems Intentionality approach.[79] Systems Intentionality explains who (and what, in the case of automated systems and other corporations) is relevant in any 'aggregation' inquiry, why they are relevant and how their individual roles bear on corporate responsibility. The acts of individuals are relevant, and can be combined, to the extent to which they reflect a system of conduct. Individuals' mental states may be relevant as part of this inquiry where these are critical to the system: an example is where a system culminates in an individual decision-maker. However, Systems Intentionality is no simple process of adding a succession or mass of individual mental states to ascertain the corporate mind. The critical questions are: (i) what is the system employed by the corporation; and (ii) what state of mind does the system manifest? Individuals and automated systems and corporations are only relevant to the extent to which they form relevantly part of the system.

As we have seen, Leow's chapter provides an invaluable point of reference for discussion of related issues and analyses. The following chapter arguably goes even further: it encapsulates and presents the latest findings of over 40 years of sustained scholarship into conceptions and conditions of corporate culpability.[80] In 'Reactive Corporate Fault', Brent Fisse revisits his powerful and influential concept, explaining its genesis and benefits, as well as its significant and ongoing impact on corporate regulation. Reactive corporate fault is an 'unreasonable failure by a corporation to take satisfactory preventive or corrective measures in response to the performance by the corporation of the physical elements of an offence or civil violation'.[81] As this makes clear, the model applies across civil and criminal law divides and concentrates on the significance of corporate responses to their misconduct. As Fisse explains, the model accepts that corporations can and do act intentionally in carrying out corporate policies. Reactive corporate fault is offered as an additional and alternative basis of corporate responsibility. It is not meant to replace models of proactive corporate fault. However, corporations are wont to plead accident, surprise and error in response to breaches. And most cases will involve allegations of corporate negligence, not intention. Fisse's point is that, in light of such limitations, corporate culpability on the part of a corporate wrongdoer is also and

[76] Gans, ch 13 of this volume, section V.

[77] *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421, 449 [112] (Edelman J) (*Kojic*).

[78] See also Diamantis, ch 10 of this volume, section II.C.

[79] See also J Clough and C Mulhern, *The Prosecution of Corporations* (Oxford, Oxford University Press, 2002) 107–08, arguing that aggregation represents a clumsy attempt to construct a model of organisational blameworthiness, a view endorsed in the ALRC Final Report (n 25) 483–84.

[80] Fisse, ch 7 of this volume; and above n 7.

[81] Fisse, ch 7 of this volume, section I.

powerfully revealed by how it responds to that misconduct. Fisse points to some specific examples of criminal and civil liability, the embryonic penalty jurisprudence, as well as the use of enforceable undertaking and deferred prosecution agreements, as expressing reactive corporate fault. He concludes by proposing statutory reforms, building on the recent ALRC proposals:[82] (i) to integrate the absence of reactive corporate fault, as a mitigating factor, explicitly into corporate sentencing considerations; and (ii) to expand the ALRC attribution reform proposals to encompass reactive, as well as proactive, precautions.

Given its role as an additional responsibility model, how does the concept of reactive corporate fault fit with other approaches? Rebecca Faugno argues that the concept informed the introduction of Australia's corporate culture provisions, and agrees with Fisse that it is recognised repeatedly, albeit intuitively and in an undeveloped manner, in that jurisdiction's penalty jurisprudence.[83] Leow observes that neither the *Meridian* nor Allocated Powers models readily accommodates inquiries into reactive corporate fault.[84] This is because their time frame for assessing the corporate state of mind falls when the act of misconduct occurs. However, if the culpability inquiry is partitioned into proactive and reactive fault, it is possible, though not theoretically comfortable, for it to operate alongside more restrictive and individualistic approaches. As Fisse's proposed statutory amendments make clear, the model will provide cogent support for approaches that combine strict liability mechanisms with a 'reasonable precautions' defence.[85] Defining 'precautions' to include reactive precautions (such as remedial and disciplinary steps) would provide courts with a more explicit and principled basis for incorporating the sorts of considerations that they already do implicitly and intuitively. Finally, I have previously explained the contribution that Fisse's expanded temporal viewpoint makes to understanding the theory and practice of Systems Intentionality. Indeed, depending on the angle of focus taken to identifying the system, my model potentially encompasses and assesses in combination both proactive and reactive processes as part of a larger system of conduct. This may be particularly appropriate, for example, when dealing with 'set and forget' automated fee deduction systems, which are set in place without any mechanisms to respond to the inevitable risks of harms arising from their operation.

We have seen that reactive corporate fault is a good fit with Australian conceptions of corporate culpability. This is most evident (albeit not expressly acknowledged) in its recognition of corporate culture. As defined in section 12.3 of the Commonwealth Criminal Code 1995 (Cth) ('Criminal Code'), corporate culture means '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'. This is a distinctively organisational model of blameworthiness. As Leow explains, this means that some alternative models cannot readily accommodate conceptions of corporate culture.[86] An example is *Meridian*, which focuses on the laws that apply to

[82] See ALRC Final Report (n 25) Recommendation 7, ch 6.

[83] R Faugno, 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence', ch 8 of this volume.

[84] Leow, ch 6 of this volume, sections III.A and III.B.

[85] Clough, ch 18 of this volume; and in section II.E of this chapter.

[86] Leow, ch 6 of this volume, section II.D.

corporations, rather than the internal decision-making structures and practices of a corporation. We have seen that *Meridian* identifies the relevant person to be treated as the corporation's alter ego from the policy and purpose of the law to be enforced. This person may have no role within the decision-making structures of the corporation, although this might be expected from a rational system of regulation.[87] Even if they do, any inquiry into the decision-making structure of the corporation is only a matter of evidence, not doctrine. By contrast, the policies and practices of a corporation that encourage or authorise corporate misconduct lie at the heart of both Allocated Powers and Systems Intentionality models. Again, such a conclusion has implications for developing a rational and coherent law of attribution.

As Rebecca Faugno observes in 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence', 'The concept of "corporate culture" has become pervasive in the Australian corporate regulatory landscape.'[88] However, this is not because it has been a success as a primary liability mechanism.[89] Rather, as a test of general blameworthiness, it has had particular traction in licensing and pecuniary penalty spheres. Her essay focuses on the latter to develop what I think is the first, detailed, doctrinal account of corporate culture.

After a brief review of the history of the corporate culture provisions, Faugno's essay interrogates their theoretical foundations through the medium of seminal scholarship, including that of Fisse. This enables her to identify common markers of corporate culture: a corporation's hierarchy and structures; its formal and de facto policies (and the gaps between them); its systems of conduct; audit and adjustment mechanisms; discipline and reward systems; training and compliance programmes; and patterns of behaviour across those parts of the corporation relevant to the wrongdoing in question. Faugno then employs those markers as reference points in her exhaustive analysis of the treatment of corporate culture considerations in the context of civil penalties jurisprudence arising in the context of statutory misleading conduct and unconscionable conduct.

As she explains, corporate culture was identified as a key sentencing consideration for both civil and criminal pecuniary penalties long before the introduction of the corporate culture provisions.[90] It may therefore be expected that courts will have developed mature understandings of the concept and its bearing on corporate culpability. What is striking from Faugno's analysis is the extent to which that expectation is disappointed. Courts generally have failed to articulate what is meant by 'corporate culture'. Consistently, they have used it as a criterion of general blameworthiness, rather than as a means to identify specific and relevant mental states. This is so notwithstanding that the 'deliberateness' and 'knowledge' with which misconduct occurs are also express factors in the sentencing process. Further, Faugno's analysis suggests that courts have preferred form over substance in assessing the significance of markers such as training programmes for sentencing purposes. Courts have, however, clearly been alive

[87] cf Hanrahan, ch 17 of this volume, section II.

[88] Faugno, ch 8 of this volume, section I.

[89] A point made colourfully and powerfully in Jeremy Gans' chapter: Gans, ch 13 of this volume. See also Law Commission Options Paper (n 22) [6.14]–[6.20].

[90] *Trade Practices Commission v CSR Limited* [1990] FCA 521, [1991] ATPR 41-076.

to the relevance of reactive corporate fault in the assessment of corporate culpability for sentencing purposes. This includes the presence of admissions of liability, cooperation with the regulator and remedial programmes. The potential significance of audit systems has been less well recognised. Finally, Faugno notes that courts have emphasised, if not consistently, the relevance of repeated prior misconduct, and systematic misconduct, as relevant to culpability. In all these respects, however, the jurisprudence remains embryonic.

Courts' reluctance to connect ideas of corporate culture to specific corporate mental states may reflect the dominant understanding of sentencing as involving an holistic assessment and 'intuitive synthesis' of a range of relevant factors, to settle an overall level of blameworthiness.[91] However, it may also reflect the view that corporate culture remains unworkable as an attribution tool. This means that it cannot effectively be used by regulators in argument, or the court in its deliberations, as a means to determine the specific mental states (such as deliberateness and knowledge) relevant to sentencing. Faugno's contribution is so valuable precisely because fundamental doubts remain over what corporate culture entails, and hence its indicia and (in turn) its manner of proof.

In that context, my following chapter, entitled 'Systems Intentionality: Theory and Practice', seeks to show how the model, which builds upon the realist insights offered by corporate culture, is, by contrast, quite workable. After introducing the model, it turns to explore and articulate more precisely the key concepts of 'systems of conduct, policies and practices'.[92] It then details how these may be proved. This includes evidential strategies and challenges. The aim is to provide the first part of a litigation roadmap for regulators, judges, practitioners and other parties seeking to use the concept, at the coalface of practice. The second part of this roadmap is contained in my later chapter on 'Modelling Corporate States of Mind through Systems Intentionality'.[93] This seeks to demonstrate how proven systems may manifest and satisfy the doctrinal requirements of specific mental elements, relevant to corporate responsibility. The analysis is supported by, and can be read in conjunction with, a range of publications that provide case studies of Systems Intentionality in practice.[94] This body of work now includes the chapter written with Paterson on 'Automated Mistakes' in this volume.[95]

Part II of the collection concludes with Diamantis' chapter on 'How to Read a Corporation's Mind'.[96] Diamantis joins Leow in offering a very helpful overview of the comparative strengths, weaknesses and relationships between a range of attribution models. In addition to his novel 'inference theory', these include 'the control group test' (a close relative of Identification Theory), '*respondeat superior*'

[91] The leading authorities and method of reasoning in the civil context are analysed in JM Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law' in P Vines and S Donald (eds), *Statutory Interpretation in Private Law* (Leichhardt, Federation Press, 2019) 154.

[92] Bant, ch 9 of this volume.

[93] Bant, ch 11 of this volume.

[94] Above n 3.

[95] Paterson and Bant, ch 12 of this volume.

[96] Diamantis, ch 10 of this volume.

(a form of vicarious liability), 'collective knowledge' (aggregation) and Systems Intentionality. Given the very significant influence of his work on my thinking, it is perhaps unsurprising that Diamantis considers Systems Intentionality generally to be an improvement upon the other models, particularly at the point of sentencing. However, Diamantis identifies a range of important concerns about its operation. It is worthwhile considering, albeit briefly, the nature of these concerns, before turning to discuss the form of inferential reasoning that he considers resolves these in a principled and practical way.

The issue of 'culpably missing systems' was addressed earlier.[97] Here I am reasonably confident that the answer to the problem is contained within the phrase: seen as culpable choices and in systems terms, there is no difficulty in incorporating these into the analysis, to good effect.

Another is the difficulty that Systems Intentionality may have in addressing 'out of character wrongs'.[98] I think the concern here is that Systems Intentionality is predicated on identifying some realised system of conduct, policy or practice. That is, of course, true. A corporation acting in a wholly random way will not readily accommodate this analytical model. Other routes to liability must be found. As Systems Intentionality is not an exclusive model, this remains possible. And we may question how common randomly generated harms might be, at least when dealing with larger corporations. I suspect that many 'random' harms may turn out on closer inspection to result from systems of conduct. This connects with the broader need to question corporate narratives of accident and mistake. However, I do think it is also important to emphasise that Systems Intentionality should work just as well to address the corporate fault manifested in the *first* instantiation of a corporate system as that of a well-established system. As explained in chapter 9, 'patterns of behaviour' may provide potential *evidence* of the presence of a system but they are not prerequisites.[99] Indeed, a system of conduct should be able to be the subject of injunctive and other relief *before* it has even been rolled out (for example, where a whistle-blower alerts regulators to the imminent commencement of a deceptive marketing campaign). The culpability manifested by that adopted system should also inform regulators' enforcement options, such as whether to proceed administratively, the forms of legal claims that may apply, and penalty and other ramifications. A regulator need not wait until a system of conduct is deployed, or deployed repeatedly, to act.

Two further concerns raised by Diamantis are related. These are that Systems Intentionality has an inherent tendency to shift to a strict liability approach and, consistently, is inapt to address the range of complex mental elements demanded by the law. Both to a degree respond to the fact that Systems Intentionality involves an objective assessment, and characterisation, of the pleaded system. First, there is the concern that this objective viewpoint may suggest a degree of corporate omniscience that is unfair. Diamantis poses the scenario where a corporation makes a product that is inherently harmful.[100] At T1, science is yet to discover this fact. At T2, internal

[97] Section I.
[98] Diamantis, ch 10 of this volume, section III.A.
[99] Bant, ch 9 of this volume, section III.B.
[100] Diamantis, ch 10 of this volume, section III.C.

reports circulate within the corporation identifying the risk of harm, still as yet scientifically unproven. The corporation continues production without any adjustment to the processes of production or sale. T3 marks the point at which the danger is scientifically proven beyond doubt. Diamantis' concern is that Systems Intentionality dictates that the corporation has knowledge at T1. Any other conclusion requires us to advert to the actual knowledge of individuals within the corporation. However, I do not think this is so. At T1 the corporation has (on my model) knowledge of the existence of the product: this is inherent, after all, in its deliberate production. However, the quality of the product is another matter. Dangerousness arguably is at least partly a normative assessment that must be made in light of broader, scientific evidence.[101] It is more akin to the process of assessing conduct as 'dishonest', which is a complex combination of assessments of knowledge and intention against objective standards. Further, there are different aspects of the production process that may be relevant for culpability purposes. Contrary to Diamantis' analysis, I have earlier explained that Systems Intentionality suggests that the wholesale omission of audit processes, including around safety, may be understood as a corporate choice. This choice may well manifest a reckless disregard for consumers' safety and a 'profit at any cost' attitude, consistently with Diamantis' own preferred characterisation of the corporate culpability involved. Second, there is no doubt that more work remains to be done in modelling Systems Intentionality by reference to different scenarios and mental-state elements. Precisely how the system operates, and the angle of focus that is adopted for regulatory purposes, will be important questions for regulators and prosecutors to investigate.[102] Importantly, however, as this discussion itself demonstrates, the model does not force the assessor into adopting either a strict liability or indiscriminate liability position. Further, in my view, it prompts the right, specific questions to be asked to ascertain the true nature of corporate culpability.

Diamantis' ultimate, preferred position is to employ the same, garden-variety process of inferring mental states for humans in respect of corporations. He explains the fascinating cognitive science behind inference of humans' mental states and argues that precisely the same process is routinely undertaken by natural people when considering corporate mental states. This resonates strongly with Crofts' analysis of the realist intuition and popular corporate commentary.[103] This sort of question was front of mind when first developing my basic cake-baking scenario, itself building on Diamantis' discussion of recipes, maps and notes as 'external decision supports'.[104] The scenario posits that I use a cake recipe as my cognitive aid or 'system of conduct'. The nature of the processes that I adopt manifest my purpose (to make a cake). Similarly, corporations use systems that manifest their corporate purposes. Indeed, lacking a natural mind, they cannot use anything else (hence the need for basic decision systems, such as that the decision of the Board is the decision of the corporation). This raises the question, though, whether the process of 'characterising' my intention to bake a cake from the fact of my deployment of a cake recipe is simply a process of inference? Or is something else,

[101] Gans, ch 13 of this volume, section IV.
[102] Bant, ch 9 of this volume, sections III.B and IV.A.iv.
[103] Crofts, ch 3 of this volume, section II.A.
[104] For the most recent iteration, see Bant, 'Catching the Corporate Conscience' (n 3) 472–73, 477.

or additionally, potentially going on? Ultimately, my view is that humans and corporations are relevantly different. We may properly use both inference of mental states and Systems Intentionality with natural persons. With corporations, which have no natural mental state to infer, we must characterise (or construct) that intention. As a practical matter, little might seem to hang from the question.[105] However, it does seem to me that I should be able to explain why theoretically, and how doctrinally and evidentially, we read the corporate mind on my model. And in light of my responses to Diamantis' concerns, I suspect that everyday people may be able readily to understand their intuitive processes of 'inference' in systems terms.

D. Corporate States of Mind

In Part III the collection turns to consider corporate states of mind in light of these models. The challenge here is to test how conceptions of corporate culpability translate into law in practice. Consistently, Part III commences with 'Modelling Corporate States of Mind through Systems Intentionality',[106] which starts by setting out some common judicial understandings of key mental elements, such as intention, knowledge and mistake, as well as mixed normative states such as dishonesty, recklessness and unconscionability. This discussion is not designed to provide 'best' meanings of these elements but rather prototype definitions by reference to which Systems Intentionality may be applied. Incidentally, the discussion may also help the reader, I hope, to navigate and consider Part III more generally. Chapter 11 continues by demonstrating the distinctive operation of Systems Intentionality by reference to these sample understandings. It concludes by demonstrating the process of characterisation through a worked example.

In 'Automated Mistakes: Vitiated Consent and State of Mind Culpability in Algorithmic Contracting', Paterson and I build on the analysis in the previous chapter in two major ways.[107] The first is to identify the additional challenges posed by algorithmic contracting for individualistic models of corporate attribution. The second is to explore the insights offered by Systems Intentionality in this context. The chapter does this through examining, first, the doctrinal state of mind elements required for rescission of contracts on the grounds of mistake and unconscionable conduct. It then turns to consider the algorithmic contracts the subject of the Singapore Court of Appeal decision in *Quoine Pte Ltd v B2C2 Ltd* (*Quoine*).[108] We argue that once algorithmic contracting is understood in terms of systems of conduct, it becomes possible to inquire into and characterise the salient features of the particular system that was deployed. We also explain the dangers of treating algorithms as agents: this is simply contrary to reality and leads in unprincipled and unnecessary directions. Systems Intentionality, by contrast, enables us to engage in complex and subtle characterisations of the corporate

[105] The approaches adopted by the High Court of Australia in *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, (2022) 399 ALR 409 (*Stubbings*), the subject of Michael Bryan's chapter, similarly suggest little might rest on this, as a matter of practice.

[106] Bant, ch 11 of this volume.

[107] Paterson and Bant, ch 12 of this volume.

[108] *Quoine Pte Ltd v B2C2 Ltd* (*Quoine*) [2020] 2 SLR 20.

mental states manifested through automated and machine learning systems, without doing violence to existing doctrines and principles. Its application also promotes fair trading practices and good corporate governance.

In 'Can Corporations be Dishonest?',[109] Gans charts the unhappy voyage of the prosecution's case in *R v Potter*.[110] In the course of so doing, he identifies the precise rocks against which Australia's novel corporate culture provisions foundered, and considers whether the prosecution case could have been salvaged through taking alternative liability routes. As he demonstrates, conceptions of dishonesty can be highly subtle. Whether they need always be so is a matter on which minds, courts and legislators might legitimately differ. However, it must be right that, whatever definition is adopted, a model of corporate culpability in the realist tradition must be capable of addressing its elements. Gans argues powerfully that here, the corporate culture provisions, found in section 12.3 of the Criminal Code, were doomed to failure. The provisions do not expressly mention dishonesty, for a start. That might be addressed by taking the sort of interpretive approach to dishonesty I adopt in chapter 11, by which (i) the quality of the defendant's conduct is assessed objectively (ii) in light of her knowledge and intention.[111] Both these latter states of mind are explicitly mentioned in section 12.3(1). On this approach, the section offers a modular approach to corporate culpability, in which courts may use the corporate provision to assess any mental states comprising those elements or any combination of them. Gans considers and rejects this possibility: on his account, dishonesty is, ultimately, a state of mind, but a highly complex one.[112] The objective assessment is of whatever it is that the defendant knows, believes, fears, intends, and so on, and these are not physical elements, although they will need to be assessed in light of surrounding circumstances.

This analysis leads Gans to the startling conclusion that corporations cannot be dishonest pursuant to the corporate culture provisions. It further suggests that the problem may lie in organisational models of blameworthiness, which do not sufficiently, or at all, focus on individual human fault. Gans explores this possibility by reference to other statutory liability models, as well as the ALRC's proposed options for reform to the corporate culture provisions.[113] After concluding that these also fail the workability test, particularly against the common, corporate problem of diffused knowledge, Gans proposes a way forward. Here, the reform model is the aggregation provision contained in section 12.4 of the Criminal Code, which currently applies to negligence. Gans argues that considering the various, subjective states of mind of particular individuals in the organisation is important, indeed central, to determining whether it is dishonest.[114] His model provision also emphasises the importance of both adequate management and supervision, and functioning information systems within a corporation, in assessing the question of dishonesty. Viewed through the lens of Systems

[109] Gans, ch 13 of this volume.
[110] *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015) 464.
[111] Bant, ch 11 of this volume, sections II.E and III.A.v.
[112] Gans, ch 13 of this volume, section IV.
[113] ALRC Final Report (n 25) Recommendation 7, ch 6.
[114] cf Diamantis, arguing aggregation works most cleanly with knowledge; *Kojic* (n 77).

Intentionality, these are good, if not complete, markers of systems of conduct relevant to assessing the corporate state of mind, in all its complexity.

Bryan's chapter on 'Asset-Based Lending: A Case Study in Unconscionable Systems of Conduct' provides an excellent, further doctrinal testing ground of corporate culpability.[115] It considers the most recent application by the High Court of Australia of the equitable doctrine of unconscionability to what might be justly called a predatory business model.[116] While the statutory prohibition on 'unconscionable systems of conduct' was also argued, only Kiefel J addressed its operation.

As Bryan explains, the case is striking for the readiness of all judges to strike down a business model that

> shielded lenders from any knowledge of a borrower's personal and financial circumstances. The obvious purpose of the system was to create an information barrier between lender and borrower in order to prevent the *Amadio* knowledge requirement [for the doctrine of unconscionable dealing] from being satisfied.[117]

On Bryan's analysis, the plurality judgment 'inferred' knowledge of the plaintiff's special disadvantage from two characteristics of the business model. First, the system could only apply to 'unbankable' borrowers. Second, it employed structural 'artifices' (such as the interposition of intermediaries, and the use of pro forma certificates of independent professional advice, from associates of the lender) to protect itself from knowledge of the individual borrower's particular circumstances of disadvantage. Indeed, as he identifies, the case has very significant implications for two common avoidance techniques employed by lenders. The first is the interposition of shell companies as a formal 'borrower', to bring the arrangement outside of protective consumer legislation: 'The drafting trick that enables the lender to escape the frying pan of the Code may land the lender in the fire of equity's unconscionability jurisdiction.'[118] The second is equity's willingness to examine the substance of so-called independent professional advice, including the role of the advisor within the broader lending system, over time.

As Bryan notes, viewed as a case on systemic misconduct, *Stubbings* further demonstrates that statutory 'systems of conduct' extend beyond the corporate internal structures to networks of individuals that lack any formal, group legal personality. I would also add, as previously mentioned, that it demonstrates the potential for Systems Intentionality to apply to networks of individuals and corporations, such as might operate in a corporate group.[119] While it remains necessary to identify the defendant against whom the claim can be brought, provided that it can be said that the system is one adopted or employed by the defendant, it is no barrier that the system integrates multiple actors (and automated systems) towards some end. This is wholly consistent with the very many other cases of statutory unconscionable conduct that have addressed business models that utilised third-party service providers as part of the core business.[120]

[115] Bryan, ch 14 of this volume.
[116] *Stubbings* (n 105).
[117] Bryan, ch 14 of this volume, section III.A.
[118] ibid.
[119] Section II.B.
[120] See Bant and Paterson, 'Systems of Misconduct' (n 3).

Bryan concludes that there is a strong argument for the continued relevance of equity in such scenarios, notwithstanding the broad ambit of the statutory unconscionability prohibition. I would agree, but go one step further. In my view, the plurality decision is, in substance, entirely on all fours with the form of reasoning that would be adopted through application of the model of Systems Intentionality. Even this short summary of Bryan's excellent analysis makes that clear. The separate judgment of Gordon J, which expressly considered the statutory prohibition, only serves to reinforce that point.[121] If correct, this provides significant support for the view that Systems Intentionality may readily grow from its statutory roots in corporate culture and unconscionable systems of conduct to other areas of the law. If the model can be applied readily in the field of unconscionable conduct, where courts' enquiries into defendants' mental states are extremely subtle, then there seems reason to hope that it might be put to good use elsewhere.

This conclusion is fortified by the concluding chapter in Part III. Robyn Carroll's ground-breaking assessment of 'Corporate Contrition' is, to my knowledge, the first extended treatment of the topic.[122] As she explains, contrition and remorse are, for the law's purposes, interchangeable concepts that inform a wide range of legal inquiries, in a variety of areas. Yet the phenomenon of corporate contrition is both judicially contentious and almost wholly theoretically unexplored. In her analysis, Carroll draws on social and psychological theories to examine the meaning and functions of contrition, before applying these understandings to the fields of criminal sentencing, civil and criminal pecuniary penalties, and damages awards. This enables her to identify the roles played by contrition and how courts judge its presence, or absence, in the case of individual defendants.

From that base, Carroll turns to consider corporate contrition in particular. Her analysis endorses the realist conception of the corporation. As she explains, 'genuine' corporate remorse requires a process of attribution that inevitably raises a range of difficult doctrinal and evidential questions. Carroll examines the factors that courts routinely consider when engaging in sentencing of corporate defendants. These complement, and extend, those identified by Faugno.[123] Interestingly, in this context at least, courts are alive to the ease with which corporate executives, as the directing mind and will of the defendant, may mouth empty words of contrition and apology. Courts look, therefore, to other indicia of remorse. These factors all reflect the intuitive force of Fisse's concept of reactive corporate fault:[124] they include, for example, the speed and efficiency of remedial responses, voluntary reporting of misconduct and

[121] See in particular [81]: 'It may be inferred that the system *assumed* that some borrowers and guarantors would be vulnerable in a sense capable of enlivening that jurisdiction [cf *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132, 142–43 [43] (*ASIC v National Exchange*)]. But the lenders' system sought to "immunise" the lenders against that assumption being known to be true because knowledge of its truth would inevitably attract the court's equitable or statutory jurisdiction to set aside the transactions. That was unconscionable.' (Emphasis and authority in original.)

[122] R Carroll, ch 15 of this volume.

[123] Faugno, ch 8 of this volume, section IV.B; and section II.C of this chapter.

[124] Fisse, ch 7 of this volume.

actions taken to address the causes of the misconduct. Importantly, these will often involve introducing systemic change, such as setting up 'systems, processes, procedures or education'[125] by which a corporation manifests its intention to 'change its ways'. Carroll concludes by considering the ALRC's recent reform proposals to codify corporate sentencing factors[126] and why, contrary to those proposals, contrition should expressly be included. Her essay shows that corporate contrition can be given meaningful content and operation. It may also helpfully inform the award of proposed non-monetary penalty orders, including disclosure and corrective orders.[127]

E. Alternative Approaches

Part IV of the collection moves away from attribution models to consider alternative approaches to holding corporations responsible for serious misconduct. Again, given the traditional approach of emphasising individual responsibility for corporate wrongdoing, it makes sense to begin with chapters that probe the lure, and risks, of this approach.

As previously mentioned, Derrington and Walpole's chapter on 'Culpable Ships' is particularly concerned to identify, and reform, the practice of criminalising seafarers for maritime breaches.[128] As they note, the use of scapegoats is particularly troubling, given that many incidents arise from circumstances and factors well beyond the control, or position description, of the identified individual. After a careful introduction to the Admiralty jurisdiction and criminal procedures, the authors examine the reasons supporting the practice. These are familiar: on the one hand, there is the need to denounce and deter serious and harmful misconduct; on the other, there are the significant challenges of bringing responsibility home to the ship owner, or operator, often hidden in another jurisdiction, behind a web of corporate entities and intermediaries.

Against that background, Derrington and Walpole outline the attribution options for holding corporate ship owners and operators criminally liable, as well as alternatives such as 'failure to prevent' and 'duty-based' offences. However, the authors chiefly focus on a little-explored but time-honoured option: proceeding directly against the ship itself. They argue that ships are juristically similar to realist conceptions of corporations, and there is a long legal (and linguistic) history of treating the ship herself as both the source and limit of liability. Understanding the traditional actions in rem against the ship as reflecting the ship as legal person is also consistent with key features of the Admiralty jurisdiction, which cannot be explained if they are regarded as purely procedural devices, used to seize the vessel in order to force the owner to court. As they note, this approach also finds support in the law of civil forfeiture, itself founded in the ancient

[125] *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FCA 37 [81] (Banks-Smith J).
[126] ALRC Final Report (n 25) Recommendations 10 and 11, ch 8.
[127] ibid Recommendation 12.
[128] Derrington and Walpole, ch 16 of this volume.

law of 'deodand'. Thus both historical and instrumental perspectives support that the ship be held responsible for its misconduct. As they acknowledge, the aim of making this shift is to provide a means of enforcement when those who own and operate the vessel are hidden, themselves, behind legal and jurisdictional structures and strategies. Recalling Bryan's essay, it might be wondered how those structures and strategies might fare if subjected to analysis through the lens of Systems Intentionality.[129]

Hanrahan's following chapter on 'Culpable Executives' dovetails thematically with 'Culpable Ships' in considering the vexed question of how, and why, individuals should be held responsible for corporate misconduct.[130] As she says, punishing one person for the sins of the collective challenges some of the most basic tenets of liberal jurisprudence.[131] Yet there remain powerful and public calls for 'heads on sticks' when corporations break the law, particularly where those breaches are flagrant and repeated. How, then, to determine the principled boundaries of individual responsibility?

Clearly, executives who can be considered co-offenders or close accessories to the misconduct should be within the frame. Hanrahan is, by contrast, particularly concerned to address the position of executives whose main fault is that corporate law-breaking occurred on their watch. Notwithstanding being 'remote' to the wrong, the law may still seek to sanction the executive for corporate wrongdoing, in pursuit of deterrence.[132] But it is a particular type of deterrence, underpinned by what Hanrahan calls an 'enrolment' rationale.[133] This seeks to threaten or exact penalties in order to encourage the executive, and others in her position, to take steps promoting compliance, so as to 'exhibit improved risk-management behaviour'.[134] Yet, as she notes, in a corporate context, the conditions for law-breaking will often have been established 'by many hands over time'.[135] This runs the clear risk that the enrolment rationale only makes sense in addressing executives as a group. Yet it seeks to do so by encouraging individuals to use their influence to change others' behaviour.

Hanrahan focuses her analysis on role-related executive liabilities: that is, liabilities that come with the office. These can be contrasted with general liabilities, such as accessorial liability, that in theory apply to any person who satisfies the elements of the claim. Hanrahan outlines and illustrates different forms of role-related responsibilities, before turning to consider two recent Australian proposals for expanding this form of executive liability. Here, Hanrahan joins a number of the contributors in using the ALRC's recent reform recommendations as a prism through which to interrogate her topic. The ALRC's Proposals 9 and 10 were interim proposals, which were dropped from the final report.[136] They were characterised by the Commission as adopting a 'failure to prevent' model, albeit one directed at executives rather than

[129] Bryan, ch 14 of this volume; and sections II.B and II.C of this chapter.
[130] Hanrahan, ch 17 of this volume.
[131] cf Harding, ch 2 of this volume, dealing precisely with this problem.
[132] Hanrahan, ch 17 of this volume, section II.
[133] ibid sections I and III.A.
[134] ibid section I.
[135] ibid section IV.
[136] Australian Law Reform Commission, Corporate Criminal Responsibility (Discussion Paper No 87, 2019).

the corporate offender. The basic idea was that executives who were in a 'position to influence, and prevent' misconduct should be subject to a civil penalty, unless they had taken reasonable precautions to prevent the contravention. As Hanrahan observes, the concept of a person of 'influence' was too vague for this purpose. Executives might not even realise they qualify until too late. Moreover, the proposals reversed the onus of proof. While some might find this tolerable when it comes to corporations, the potentially crushing effect for natural individuals was of concern. It was therefore, perhaps, unsurprising that the proposals did not go further.

By contrast, Australia's Financial Accountability Regime (FAR) looks set to impose obligations on specified financial institutions to identify and name 'accountable persons' as part of their own accountability mapping obligation. These individuals will be registered with the Australian Prudential Regulation Authority and must comply with a series of bespoke obligations. These include taking reasonable steps in conducting their responsibilities to prevent matters arising that would result in a 'material contravention' of specified legislation.[137] Failure to meet these obligations exposes the individual to potentially serious penalties, including disqualification. Hanrahan argues that adopting this approach risks sacrificing the individual's rights and protections based on an 'enrolment' rationale, the theoretical foundations for which remain shaky. Moreover, role-related penalties are often characterised as civil or administrative in character, removing important procedural safeguards that would apply to criminal conviction.

From these individuated models of liability, we turn to consider one of the most successful reform options. 'Failure to prevent' models have been gaining traction from initially restricted fields of operation, in particular through the model adopted in section 7 of the Bribery Act 2010 (UK), to being seen as a useful, more generalised liability model. In '"Failure to Prevent" Offences: The Solution to Transnational Corporate Criminal Liability?', Jonathan Clough explains how they may offer a principled and practical step forward in the enforcement of corporate liability for transnational crimes.[138] Transnational crimes pose a particular challenge for enforcement, given the offences tend to be committed across jurisdictions and, again, often involve webs of related entities and extended supply chains, as well as intermediaries and agents. We have seen similar challenges in the context of Bryan's[139] and Derrington and Walpole's[140] chapters in particular. As Clough notes, amongst its other attractions are that the 'failure to prevent model' avoids the problem of attribution entirely. There does need to be a predicate offence (albeit not a conviction) committed by an individual or corporation that is an associate of the defendant corporation. To that extent, there may again need to be engagement with attribution principles. However, provided this is demonstrated, and the offence is one for which there is a comparable crime in the home jurisdiction, the common approach taken by 'failure to prevent' models is that the onus then falls on the defendant to show that it had 'adequate procedures' in place to prevent

[137] Financial Accountability Regime Bill 2021 (Cth), ss 10, 11.
[138] Clough, ch 18 of this volume.
[139] Bryan, ch 14 of this volume.
[140] Derrington and Walpole, ch 16 of this volume.

the commission of the offence. Clearly, these need not have been successful in order for the defence to succeed.

Clough makes the important point[141] that this form of offence is not derivative. Rather, the defendant corporation is responsible for the independent wrong of failing to prevent the nominated offence. As we have seen in Hanrahan's chapter, there are important reasons not to reverse the onus of proof where this may affect natural individuals.[142] However, Clough argues persuasively that these are far less cogent in the corporate context, and for this form of offence.[143] In particular, a corporation's systems and procedures will be within its peculiar knowledge and control. Consistently, liability reflects true organisational blameworthiness. Clough expands on this point by exploring the level of culpability reflected in this form of offence. As he notes, beyond the failure to have in place adequate procedures, which itself may be understood as a 'negative model of wickedness',[144] regard must be had to the very serious offences, and harms, resulting from the corporate failure.

Although not its chief focus, Clough's essay makes clear the justifications for assessing corporate culpability in systems terms. It is arguable that Systems Intentionality supplements this position, and the operation of the model, in two ways. The first is it provides significant guidance on how systems, policies and processes may be conceptualised and proved. The second is that it fortifies the model's intuition of culpability, by explaining how systemic 'deficiencies' can be understood in positive (active) terms. As explained earlier, a corporate decision not to have in place adequate procedures reflects just that: a choice. Systems Intentionality suggests that, depending on the angle of focus adopted when addressing harmful business models, it is not only the proactive procedures that may be core to the model but also the reactive mechanisms that monitor and remedy resultant harms as they are identified. These may manifest a corporate intention not to investigate, to turn a blind eye to obvious predatory practices, recklessness or other serious levels of culpability that are not properly labelled in the language of 'deficiency'.[145] Thus suppose a business imports and sells dirt-cheap clothing in an affluent country, which is manufactured in another jurisdiction notorious for wage exploitation. If the business has no systems in place to monitor, audit and remediate its supply chains, this absence says something very clear about the corporate values and intentions, which arguably should not be framed in terms of mere ignorance or omission. We return to this theme shortly, in relation to Fiona McGaughey's chapter.

The penultimate chapter in the collection is 'Performance-Based Consumer and Investor Protection: Corporate Responsibility without Blame' by Lauren E Willis.[146] Like the 'failure to prevent' offences, performance-based regulation seeks to avoid entirely the problems of attribution. However, it does so by focusing on the quality

[141] cf Bant, 'Catching the Corporate Conscience' (n 3), where I arguably mis-frame it as a form of vicarious liability – it is strict, but not derivative or vicarious.

[142] Hanrahan, ch 17 of this volume, sections III.A and IV.

[143] See also ALRC Final Report (n 25) [4.85]–[4.96].

[144] Clough, ch 18 of this volume, section V, citing P Crofts 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42 *Sydney Law Review* 395, 422.

[145] See section I.

[146] Willis, ch 19 of this volume.

of outcomes experienced by a business's customers, including consumers and retail investors. Willis explores in this context the novel Australian Design and Distribution Obligations,[147] as well as the UK's Consumer Duty.[148] In its report into *Corporate Criminal Responsibility*, the ALRC recently explored what it called 'duty-based liability', which seems to be a similar concept.[149] This approach is most familiar from workplace safety legislation.[150] In both cases, the approach mandates a particular standard or outcome that must be reached by businesses, leaving to them, however, how this is achieved.

A particular concern for Willis is the rise of integrated artificial intelligence (AI) within business models, which may operate to trick, manipulate and predate upon consumers and investors in new and unexpected ways. Willis rightly points to the challenges this poses for individualistic attribution approaches. Searching for the human repository of fault on whom responsibility for the harmful algorithm(s) can be settled is likely to be difficult and arbitrary. And, as Willis notes, increasingly, automated systems are being designed and distributed by other AI systems. This poses two particular challenges for attribution: first, given that the corporation's employees may not know that its systems are harming consumers, any mental-state requirements may be impossible to meet; and, second, because an AI system can produce innumerable 'personalised' versions of online or robotic interactions, it may not be possible to identify precisely the mechanism by which the corporation caused any particular consumer or investor harm. Willis identifies the second as posing a particular 'black-box' problem: the corporation's employees may not know how its machine learning algorithms are affecting the corporation's interactions with consumers.

One response to this is to say, through the lens of Systems Intentionality, that a corporate decision to deploy technology to generate maximum profit from consumers, which it has no means, or intention, of auditing, is itself highly reckless.[151] Willis rightly notes that this possibility may be dependent on the extent to which courts demand evidence that the relevant system is inherently apt to harm customers, or produce a particular form of harm.[152] This again raises the black-box problem. However, the degree of knowledge of a particular system's features need not be great for Systems Intentionality to bite. An example is where a default setting in a program is set to an option that is inherently likely to benefit the company at the expense of, or through harm to, its customers.[153] Another is where a system is programmed to explore the most profitable

[147] Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth), incorporated into pt 7.8A of the Corporations Act 2001 (Cth).

[148] Financial Conduct Authority, Consumer Duty Instrument 2022, FCA 2022/31.

[149] ALRC Final Report (n 25) ch 7.

[150] ibid [7.178]–[7.196].

[151] Explored in Bant, 'Culpable Corporate Minds' (n 3) 385–87; Paterson, Bant and Cooney (n 3); and Bant, 'Catching the Corporate Conscience' (n 3) 487–90; as well as Bant, ch 11 of this volume, and Paterson and Bant, ch 12 of this volume.

[152] The same problem arises for the Design and Distribution Obligations and Consumer Right reforms: see Willis, ch 19 of this volume, section V.

[153] Bant, 'Culpable Corporate Minds' (n 3) 385–87; Paterson, Bant and Cooney (n 3); and Bant, 'Catching the Corporate Conscience' (n 3) 487–90; as well as Bant, ch 11 of this volume, and Paterson and Bant, ch 12 of this volume.

means of generating sales through data harvesting and direct engagement with customers, without any oversight or redress mechanisms. The corporation can be taken to know these critical features of what are, after all, its systems employed for its benefit. Regulators similarly may be able to ascertain important 'choice architecture' embedded in a digital system that renders transparent the corporate intentions. And as Willis herself notes, 'it is not credible that AI systems cannot be controlled'.[154] The choice to deploy AI without appropriate control programming is just that. If the program cannot be controlled, it should not be deployed, or should be tested and improved until it can. Here, there seems clear potential for a reinforcing effect between performance-based regulation and Systems Intentionality.

However, there is also no doubt that regulators currently lack expertise in new technologies that impede enforcement. And litigation against Big Tech, as we have seen, is notoriously difficult to prosecute with success.[155] In this context, outcome-based regulation is an important, additional avenue to hold corporations to account, and to promote good (or, at least, not bad) customer outcomes. Further, as Willis notes, performance-based regulation, Systems Intentionality and Fisse's concept of reactive corporate fault all share a common interest in the corporate responses made to the occurrence of those outcomes. These regulatory models therefore operate in a mutually reinforcing way. The same may be said for 'failure to prevent' models, although these (as explained earlier) require a predicate offence, which may itself raise attribution issues. Willis argues, however, that performance-based obligations avoid having the need in these models to assess whether executive assurances of opaque or unknowable 'reasonable precautions', or remedial 'adjustments', are genuine and effective. As Faugno notes, courts' interest to date in assessing the substance, as opposed to form, of remedial programmes, and their capacity to monitor these on an ongoing basis, are limited.[156] Willis explains that this remains a critical limitation of the new Design and Distribution Obligations and Consumer Duties, both of which demand only 'reasonable' or 'all reasonable' steps to be taken. Clearly, it is important that courts and regulators are prepared to go beyond bland executive assurances: Carroll's chapter suggests that courts have the capacity to do so, if they have the will.[157]

The final chapter in Part IV, and in this collection, really epitomises the lessons learned through the earlier essays. McGaughey's 'Regulatory Pluralism to Tackle Modern Slavery' focuses on one of the most egregious and longstanding forms of commercial misconduct.[158] Modern slavery practices tend to showcase all the worst features of corporate evasive tactics: claims of corporate (executive) ignorance, fortified through devolved corporate group structures, interposition of intermediaries and agents, spread across jurisdictions. We have seen that Clough's chapter explores the

[154] Willis, ch 19 of this volume, section VI.

[155] Powles, ch 5 of this volume.

[156] Faugno, ch 8 of this volume, section IV.B.iii. Were 'corrective' orders to become part of the courts' usual toolkit, a key question would remain the monitoring and enforcement mechanisms, such as through a 'recognisance'. An alternative would be probation orders: see ALRC Final Report (n 25) [8.64]–[8.98].

[157] Carroll, ch 15 of this volume; and section II.D of this chapter.

[158] McGaughey, ch 20 of this volume.

'failure to prevent offence' as a key to combatting this sort of egregious transnational crime.[159] As McGaughey shows, the current regulatory landscape would be boosted enormously by such a reform, and by embracing a pluralist approach. Currently, the reform mechanisms are weak, not least because of an uncoupling between criminal responsibility and business reporting requirements. Businesses are obliged to report on what they are doing to assess and address their risks of modern slavery, both with their immediate operations and in extended supply chains. But there are, in general,[160] no penalties associated with lack of compliance. This reflects both an assumption that modern slavery is endemic to supply chains, and that businesses are unaware of it. Some have suggested that there is a conundrum in both encouraging corporations to investigate and reform their supply chains and, on the other hand, potentially penalising them when they uncover slavery. 'Enforcement' is left to consumers, shareholders and broader civil society, who are assumed to be capable, and resourced, to monitor and respond to reporting failures (and reported instances of slavery practices within supply chains). The disclosure obligations in any event only apply to larger entities. Small businesses that engage in slavery practices are not subject to their requirements. Ironically, as small businesses, they are more likely to be the subject of successful prosecution on traditional attribution principles.[161] Other approaches are more promising perhaps, but require government action. Examples include import bans and public procurement and debarment regimes.[162]

Against this background, McGaughey asks whether, and how, Systems Intentionality may assist in informing a better regulatory regime. Here, she notices the potential for the analysis to capture culpable corporate groups and broader networks, mentioned earlier in relation to Bryan's chapter.[163] It also provides a means both to counter the dominant narrative of well-meaning ignorance and to understand modern slavery requirements in terms of a more 'enquiring and responsible corporate mindset'.[164] Thus corporations that apply business models that yield levels of profit only possible if slavery is present in their supply chains can be taken to understand that fact.[165] 'Ignorance' quickly takes on another, more culpable aspect. Drawing on the ALRC proposals, McGaughey identifies that 'failure to prevent' offences may be used in tandem with civil 'human rights due diligence' obligations to provide a more effective regulatory mix.[166] We have seen earlier in this section how Systems Intentionality provides a means to buttress both options.

[159] Clough, ch 18 of this volume.

[160] The new Western Australian debarment regime is an exception: see Procurement Act 2020 (WA), pt 7. Public procurement here is a potential powerful incentive to good corporate citizenship. See further F McGaughey et al, 'Public Procurement for Protecting Human Rights' (2022) 47 *Alternative Law Journal* 143; ALRC Final Report (n 25) Recommendation 15.

[161] J Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 *Legal Studies* 393, 401.

[162] See n 159.

[163] Bryan, ch 14 of this volume; and section II.B.

[164] McGaughey, ch 20 of this volume, section IV.

[165] The case is on a par with *ASIC v National Exchange* (n 120), discussed in Bant and Paterson, 'Systems of Misconduct' (n 3) and Bant, 'Catching the Corporate Conscience' (n 3) 486–87.

[166] See particularly ALRC Final Report (n 25) [10.104]–[10.124].

III. Conclusion

In concluding this chapter, it will be apparent that the contributions to the collection add significantly to our understanding of existing conceptions of corporate culpability and the conditions for better regulatory responses to its presence and harmful consequences. Clearly, however, much remains to be done. Some work is academic: McGaughey, for example, rightly calls for 'further robust empirical, theoretical and doctrinal research on effective regulatory regimes for tackling modern slavery'.[167] Some advancements, however, will be dependent on the other legal communities identified at the outset of this chapter. My hope is that this collection will make clear the value of further, mutual collaborations, for the enduring benefit of all persons, natural and artificial alike.

[167] McGaughey, ch 20 of this volume, section IV.