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Systems Intentionality: Theory and Practice

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I. Introduction

This chapter seeks to outline and further explain the features and operation of the model of corporate responsibility that I have developed, including in collaboration with Jeannie Paterson, in earlier work.[1] 'Systems Intentionality' is an umbrella term used to capture a broader proposition, namely that a corporation's state of mind is manifested through its systems of conduct, policies and practices. On this analysis, systems are inherently purposive: they exist to achieve certain ends. Further, those corporations that adopt and operate a system must thereby be taken to know what is necessary for the system to function. These simple insights allow us to start to piece together a more detailed understanding of the spectrum of corporate mental states required by our general law and statutory doctrines and rules, such as specific and general intention, knowledge, dishonesty, recklessness, unconscionability, mistake, and other related facts and standards.

How this is done is the subject of detailed examination in chapters 11 and 12.[2] In this chapter, the primary aim is foundational: to articulate and illustrate, with rather more precision, key concepts relevant to our enquiry, in particular the nature and features of the spectrum of behaviours signalled by the concepts of systems, policies, processes or

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[1] E Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; E Bant and JM Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* 63; 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.

[2] For early analysis of dishonesty and some discussion of knowledge and mistake, see Bant, 'Culpable Corporate Minds' (n 1) 377–85; for unconscionability, and some discussion of general intention, predatory intention, recklessness and knowledge, see Bant and Paterson, 'Systems of Misconduct' (n 1) 86–91; see also Bant, 'Catching the Corporate Conscience' (n 1) 484–89.

methods, practices and patterns of behaviour. This may allow us to identify more accurately the point at which habitual or repeated actions, for example, may take on a more purposive bent and mature into systems of conduct. The second, related aim is one of proof: how to go about establishing the existence of these varied concepts, including evidential strategies and considerations. The hope is that this combined analysis will illuminate how the model of Systems Intentionality may apply, as a matter of theory and practice, to the range of real-life scenarios that currently evade regulation through existing attribution rules.

The chapter commences by briefly outlining the genesis and features of the model of Systems Intentionality before turning to break down component elements, and the kinds of evidence (and litigation strategies) relevant to establishing each.

II. Genesis and Features of Systems Intentionality

A. Background

The genesis of the model lay in meeting twin challenges: on the one hand, the pervasive role of state-of-mind requirements in legal doctrines that seek to regulate and remedy serious corporate commercial misconduct; and on the other, the notoriously complex and yet inadequate state of the law's current approaches to identifying corporate states of mind.[3] Faced with the scale of these challenges, the proposed model draws on the insights of organisational and legal theorists, law reformers and courts regulating corporate misconduct to propose a practically workable theory of organisational culpability. The aim is for the model to enable proof of specific corporate mental states required for the application of legal doctrines, in a theoretically justified way.

As to the challenges, it is largely uncontentious (if not always fully appreciated) that assessment of the defendant's state of mind is a critical component of both general law and statutory doctrines that regulate commercial fraud. Common law and equitable doctrines include deceit, fraudulent misrepresentation, injurious falsehood, knowing receipt and assistance, and (in Australia at least) the equitable doctrine of unconscionable conduct. For example, the tort of deceit requires that the defendant has made a misrepresentation knowingly or recklessly, intending to induce reliance on the part of the victim.[4] Unconscionable conduct in equity requires the defendant to have 'taken advantage' of the plaintiff's special disadvantage: here knowledge is key to the enquiry, but courts commonly also reference defendant dishonesty, a 'predatory' intention, recklessness and deliberateness.[5]

[3] Australian Law Reform Commission (ALRC), *Corporate Criminal Responsibility* (Report No 136, 2020) ch 6.

[4] *Magill v Magill* [2006] HCA 51, (2006) 226 CLR 551.

[5] The key authorities are gathered and discussed in Bant and Paterson, 'Systems of Misconduct' (n 1), but compare *Commercial Bank of Australia v Amadio* [1983] HCA 14, (1983) 151 CLR 447, 467 (Mason J); *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, (2013) 250 CLR 392, 438–39 [156]–[157], 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85, 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

In Australia, the defendant's state of mind is also invoked directly or indirectly in a number of statutory prohibitions and enforcement responses to commercial misconduct. Thus section 1041G of the Corporations Act 2001 (Cth) (Corporations Act) prohibits conduct that is dishonest; the licensing obligation imposed by section 912A of the Corporations Act is to provide financial services 'efficiently, honestly and fairly'; and a range of statutory provisions prohibit unconscionable conduct 'within the meaning of the unwritten law', alongside more expansive prohibitions on statutory unconscionable conduct.[6] These, and many others, require proof of discrete mental states. But even when a statutory prohibition is *strict*, as in the distinctive Australian prohibition of misleading conduct within trade or commerce,[7] the defendant's state of mind may play a role in remedial relief. Thus, for example, a defendant's mental state may become relevant when determining the defendant's scope of liability, apportioning loss or through defensive considerations.[8] Perhaps most importantly, as a matter of Australian regulatory practice, the ongoing relevance of culpability is particularly apparent where civil pecuniary penalties are in play. Here, drawing on the 'French factors', courts commonly look for indicia of the defendant's blameworthiness through state-of-mind criteria, such as the defendant's knowledge, intention, regret or contrition.[9]

We might also note that state-of-mind enquiries are key to much *ex ante* regulation – for example, determining whether a corporation is a 'suitable person' to hold a licence, required to conduct some regulated business activity.[10]

As I have explained elsewhere,[11] the pervasive role for state-of-mind requirements in doctrines that regulate serious commercial misconduct probably reflects the law's longstanding concern to protect natural individuals from unmerited and overly crushing personal liability. But the classic(al) market-place rogue is a far cry from the reality of the modern, commercial miscreant. In sophisticated market economies, wrongdoers

[6] Leading expressions of the statutory prohibition are found in the Competition and Consumer Act 2010 (Cth), sch 2 (ACL), s 21 and Australian Securities and Investment Commission Act 2001 (Cth), s 12CB(1) (ASIC Act), the latter of which was the subject of *ASIC v Kobelt* [2019] HCA 18, (2019) 267 CLR 1 (*Kobelt*) and is currently regarded as the leading authority on the operation of both provisions: see eg *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409 [333] (Griffiths J).

[7] ACL (n 6), s 18; ASIC Act (n 6), s 12DA.

[8] See, eg, E Bant and JM Paterson, 'Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement' in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from* Hedley Byrne v Heller (Oxford, Hart Publishing, 2015) 159. See also Competition and Consumer Act 2010 (Cth), s 137B, which bars apportionment of liability between plaintiff and defendant when the plaintiff has acted fraudulently.

[9] See the 'French factors' developed in *Trade Practices Commission v CSR Ltd* [1991] ATPR para 41-076 and now authoritative: see eg *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761, (2011) 282 ALR 246, 250–51 [11] (Perram J); *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20, (2012) 287 ALR 249, 258 [37] (Keane CJ, Finn and Gilmour JJ); *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44, (2016) ATPR para 42–521 [122]–[127] (Edelman J).

[10] eg recent inquiries into the suitability of Crown Casino corporate group members to hold casino licences: Parliament of New South Wales, *Inquiry Under Section 143 of the Casino Control Act 1992 (NSW)* (Report, 1 February 2021) (Bergin Report); State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) (RCCOL Report); State of Western Australia, *Perth Casino Royal Commission* (Report, 4 March 2022) (PCRC).

[11] Bant, 'Culpable Corporate Minds' (n 1) 358–61.

are far more likely to be massive, massively complex, multi- and trans-national corporate institutions that sit within a web of related entities. The law's attribution rules are poorly suited to meet this reality. Thus the traditional approach of locating the corporate 'directing mind and will' in its board and senior executives works well for small companies.[12] But, ironically, it is singularly inapt for large corporations whose harmful activities might, consequently, have far greater impact.[13] Modern, complex corporations often have devolved structures, apt to create information 'silos' and to keep relevant information concerning harmful corporate activities below board level. Knowledge about the corporation's activities will often be dispersed through its lower-level employees (the corporation's 'arms and legs') who carry out its activities. Employees may number in the thousands. And they may well have no idea of how their individual role contributes to what is, overall, unlawful conduct. They are simply doing their job. This 'diffusion of responsibility' amongst natural employees and corporate structures poses a range of challenges to the law's effective regulation of commercial misconduct.[14] The picture of complexity is only enhanced when we take into account the increasing role of automated corporate processes in which no human employee is engaged.

In searching for the (necessarily) artificial corporate state of mind, the Australian Law Reform Commission's recent report into Corporate Criminal Responsibility confirms that Australia's current rules of attribution are notoriously complex and deficient.[15] But a chief failing can be narrowed down to one simple, central feature. With the exception of the 'corporate culture' provisions (discussed in section II.B), all approaches require identification of some individual human repository of fault on which corporate culpability depends. Where knowledge and responsibility are dispersed through departments, amongst individuals and over time, these approaches all flounder. Concepts or processes of 'aggregation', which cluster the mental states of individuals to produce a greater, corporate consciousness, could go some way to addressing the diffusion problem. But these have been met with considerable judicial caution. How, paraphrasing Edelman J, then of the Federal Court of Australia, can a corporation be unconscionable, or fraudulent, (or malicious, dishonest, predatory, knowing, reckless …) when none of its employees individually hold the requisite culpable mindset?[16] This challenge becomes even greater if one accepts (as I do) that a corporation is greater than, and different from, the sum of its parts. Aggregation may be, functionally, an effective means of holding corporations to account, but it is less convincing as a means of identifying distinctively organisational blameworthiness, on a principled basis.

[12] See, eg, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713; *HL Boulton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, 172 (Lord Denning).

[13] ALRC (n 3) [6.38]; J Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 *Legal Studies* 393, 401.

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

[15] ALRC (n 3) ch 6. cf Law Commission of England and Wales, *Corporate Criminal Liability: A Discussion Paper* (2021).

[16] *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421, 449 [112] (Edelman J). See also the discussion of aggregation in Bant, ch 1 of this volume, section II.C.

B. Systems Intentionality Outlined

Against that background, I have proposed a novel, additional model of corporate culpability. The essential proposition is that corporations *manifest* their intentions through the systems of conduct that they adopt and operate, both in the sense that any system *reveals* the corporate intention and in the sense that it *embodies* or *instantiates* that intention. Another way of putting this is to say that corporations think through their systems – and so assessment and characterisation of the system enables us to know the corporate state of mind. As will be explained, systems of conduct are key to this model because they are inherently purposive – they are objectively designed or calculated (in the sense of apt) to achieve certain ends. It follows that by adopting and implementing a system, the corporation reveals and instantiates its intention or purpose. Moreover, as Paterson and I explain elsewhere, we may justly assume that the corporation enjoys the information and knowledge required in order for the corporate system to function. From these building blocks, it becomes possible to form a clearer picture of complex mental states and standards, such as dishonesty, unconscionability and recklessness.[17]

The foundations for this model lie in the work of various scholars, reformers and courts, all concerned to meet the challenge of diffused responsibility and the conditions for organisational blameworthiness.[18] Thus it accepts the insights of Peter A French into the nature and role of 'Corporate Internal Decision' (CID) structures that go beyond the boardroom and that also reveal the corporate mindset. These include (i) the corporate lines of responsibility (the corporate 'flowchart') and (ii) corporate decision 'recognition rules' (usually found in corporate procedural rules and policies).[19] As French explains:

> [W]hen the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.[20]

The model also recognises the moral force and practical utility of Brent Fisse's concept of 'reactive corporate fault',[21] the subject of extended reflection in chapter 7. This identifies organisational blameworthiness where a corporation fails to undertake reasonable corrective or remedial measures in relation to harmful conduct undertaken by personnel on its behalf.[22] Fisse has explained that where there is an express or implied corporate

[17] See in particular, Paterson and Bant, ch 12 of this volume.

[18] In addition to those discussed in this chapter, I acknowledge particular debts to the work of C Wells, *Corporations and Criminal Responsibility* (Oxford, Oxford University Press, 2001); WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago, IL, University of Chicago Press, 2006); C List and P Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford, Oxford University Press, 2011); and C Chapple, *The Moral Responsibilities of Companies* (London, Palgrave Macmillan, 2014).

[19] PA French, *Collective and Corporate Responsibility* (New York City, Columbia University Press, 1984) 41.

[20] ibid 44.

[21] B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1195–1213.

[22] See further B Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277; 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 and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993) 47–49. Arguably,

policy to fail to take preventive or corrective reactive measures, this may reflect deliberate or reckless organisational intentionality.[23] Fisse's identification of the necessity and aptness of adopting a wider timeframe for assessment of corporate culpability is particularly helpful to, and supportive of, the systems analysis offered here. I return to the significance of time and systems at the close of this chapter.

As Rebecca Faugno observes in chapter 8, Systems Intentionality expressly builds on Australia's unique 'corporate culture' provisions. Part 2.5 of the Criminal Code Act 1995 (Cth) (Criminal Code) was itself strongly influenced by the work of scholars such as Fisse and French, and constitutes strong legislative recognition of the reality of organisational blameworthiness.[24] The provisions stipulate that corporate 'intention, knowledge or recklessness' can be established by proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.[25] 'Corporate culture' is defined as meaning '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'.[26] These provisions have failed to have their anticipated impact in practice, for a variety of reasons, discussed elsewhere.[27] For current purposes, it suffices to say that, while taking inspiration from these reforms, the model of Systems Intentionality seeks to provide a more practically workable model, capable of proving the specific doctrinal mental states required for the effective operation of common commercial rules and prohibitions.

The model also draws on Mihailis Diamantis' analysis of 'the extended mind' thesis in relation to corporations and their use of artificial intelligence (AI) systems.[28] As he explains, human use of external decision supports (like maps, recipes and notes or records) to facilitate recall and decision making parallels corporate use of AI systems. In both cases, the use of the cognitive aid or system does not alter the fact that the resultant act remains that of the human, or corporate, actor. Expanding on this analysis, Systems Intentionality proposes that, given that they lack a natural mind, corporations are necessarily and generally dependent on decision supports in the forms of systems of conduct, policies and practices, to enable and implement corporate decision making. Indeed, such corporate decision supports are essential to manage and coordinate disparate and rotating employees and other agents, who carry out corporate purposes, over time.

the concept of corporate negligence underpins the idea of corporate culture: see B Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 8 *Adelaide Law Review* 361, 373–76; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993) 29–30.

[23] Fisse (n 21) 1202.

[24] ALRC (n 3) ch 2; Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Australian Government, *Model Criminal Code* (Final Report, December 1992) chs 1 and 2, at 21 and 107.

[25] Criminal Code, s 12.3(2)(c).

[26] ibid s 12.3(6).

[27] See Bant, 'Culpable Corporate Minds' (n 1) 369–74; J Clough and C Mulhern, *The Prosecution of Corporations* (Oxford, Oxford University Press, 2002) 140–47; Faugno, ch 8 of this volume. See also Law Commission of England and Wales, *Corporate Criminal Liability* Options Paper (2022) [6.3]–[6.20].

[28] M Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 *North Carolina Law Review* 893. While Diamantis' and my approaches are sympathetic, they do diverge over their role for inference and the extent to which it is legitimate to treat natural and corporate persons similarly for that purpose. On my account, any process of inference must reflect that corporations think through their systems, rather than reflect intrinsically human, cognitive processes.

This remains true even where components of a system are automated, replacing human or corporate actors.

Finally, Australian courts addressing statutory unconscionability in the context of exploitative business models and practices have been developing a rich body of jurisprudence concerning corporate systems and intentionality, which is consistent with the model. Paterson and I have examined these authorities to reveal the light they cast on the relationship between business systems and specific corporate states of mind.[29] Chapters 11 and 12 continue that work. This chapter, by contrast, returns to plumb the same authorities, this time for their lessons on the spectrum of organisational structures and behaviours that may combine to reveal a 'system' of conduct, and the difficult related question of proof.

III. Systems within the Spectrum of Behaviours

A. The Statutory Context

It should be emphasised from the outset that the statutory prohibitions on unconscionable 'systems of conduct or patterns of behaviour' do not have, as their aim, the development of a broadly applicable mechanism for corporate responsibility such as that proposed by the model of Systems Intentionality. Indeed, as will become clear, 'patterns of behaviour' are arguably neutral as to intention. Rather, on my model, patterns of behaviour constitute evidence from which systems of conduct (and hence intentionality) can be inferred. The statutory prohibitions on unconscionable patterns of behaviour may reflect a separate and legitimate policy emphasis on harmful outputs,[30] alongside the existing concern with defendant culpability, although this question has yet to be examined in the authorities. Accepting this caveat, the authorities notwithstanding provide important support and guidance for the development of Systems Intentionality as a coherent and workable liability mechanism, applicable more broadly across extant general law and statutory doctrines, rules and standards.

A very brief introduction to the prohibitions provides some context for the following discussion. The seminal case on unconscionable 'systems of conduct and patterns of behaviour' is *Australian Securities and Investments Commission v National Exchange Pty Ltd*.[31] It concerned a business model that was found to have an objective 'purpose' of exploiting anticipated disadvantage. National Exchange had sent unsolicited off-market

[29] Bant and Paterson (n 1).

[30] cf ALRC (n 3) Recommendation 8, which proposes a model offence to criminalise contraventions of certain civil penalty provisions that constitute a 'system of conduct or pattern of behaviour'. As explained in E Bant, 'Reforming the Laws of Corporate Attribution' (n 1) this is not an attribution model and remains dependent upon satisfaction of independent attribution rules. For further discussion of the proposed offence, see S Walpole and M Corrigan, 'Fighting the System: New Approaches to Fighting Systematic Corporate Misconduct' (2021) 43 *Sydney Law Review* 489.

[31] *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132 (Tamberlin, Finn and Conti JJ) (*National Exchange*). See also *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, (2022) 399 ALR 409 [81] (Gordon J); Bryan, ch 14 of this volume; and Bant, 'The Culpable Corporate Mind' (n 16) 485–87.

offers to members of a demutualised company, Aevum Ltd, to buy shares at a price that constituted a substantial undervalue of their true worth. A Full Court of the Federal Court of Australia found that the offers reflected a predatory business strategy, aimed at anticipated members of a class. The business model was founded on the prediction (well-made, as it transpired) that, given the nature of the demutualised company, there would be a group of vulnerable and inexperienced recipients of the offer 'who would act irrationally from a purely commercial viewpoint and would accept the offer'.[32] Although traditional rules of attribution would likely have been satisfied in the case, the Court considered that the very design of the system was predatory in nature. Moreover, the defendant's knowledge of the presence of disadvantage in the class as a whole, albeit not in individual cases, was implicit in, and necessarily revealed by, the form of the business model. In short, the business model would only work and be profitable if inexperienced and, hence, commercially irrational sellers were present and likely to accept the unreasonably low offer.

Following *National Exchange*, Australia's federal consumer legislation was reformed to confirm the Federal Court's position that the statutory prohibition on unconscionable conduct 'is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour'.[33] This reform has prompted a surge of litigation activity by Australia's regulators concerned to rein in unconscionable business models, and consequently very helpful judicial reflections on the nature of systems of conduct and their relationship to other, similar or related business structures and behaviours. Drawing on these authorities, the following analysis will consider, first, the relationship between systems (here incorporating more granular processes and methods) and patterns, before turning to their relationship to practices and policies. Throughout, the discussion does not seek to assert definitions as a matter of some necessary, prior truth but to offer practical and helpful ways of thinking about the graduations of structured behaviours that may be present in a corporation, and which may inform a court's deliberations on corporate states of mind. As Beach J put it in *AGM Markets*,[34] here it makes sense to talk in terms of 'connotation rather than denotation to make the obvious point that the boundaries and content of the phrase [system of conduct] or its various elements are incapable of clear or exhaustive definition'.[35]

B. Systems and Patterns

In one of the earliest cases to consider the statutory unconscionability provision, *EDirect*,[36] the alleged unconscionable conduct involved 'a high pressure sales system that was directed to an unnamed group or class of persons that could be expected to

[32] *National Exchange* (n 31) 142 [43].

[33] ACL (n 6), s 21(4)(b), introduced in 2010.

[34] *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208, (2020) 275 FCR 57 (Beach J) (*AGM Markets*).

[35] ibid 148 [507], considering the meaning of the statutory phrase 'efficiently, honestly and fairly' in Corporations Act 2001 (Cth), s 912A. The same approach has been adopted throughout courts' discussions of systems of conduct or patterns of behaviour.

[36] *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [72]–[73] (Reeves J) (*EDirect*).

include members who were vulnerable or susceptible to EDirect's sales process'.[37] Justice Reeves explained the relevant concept of a 'system of conduct':

> By its ordinary meaning, a system is 'an assemblage or combination of things or parts forming a complex or unitary whole; … a co-ordinated body of methods, or a complex scheme or plan of procedure': *Macquarie Dictionary*. To similar effect, Dixon CJ said of the word 'scheme' that it 'connotes a plan or purpose which is coherent and has some unity of conception': see *Australian Consolidated Press Limited v Australian Newsprint Mills Holdings Limited* (1960) 105 CLR 473 at 479.[38]

We may pause here to observe the close connection between the concept of a 'system' and those of a 'scheme', 'plan or purpose'.

In the subsequent, seminal case of *Unique*,[39] the Full Court of the Federal Court closely examined the methods of proof required to prove an unconscionable system of conduct or pattern of behaviour, to which we will return. However, in so doing, the Court articulated the key distinction between a system of conduct and pattern of behaviour in this way: 'a "system" connotes an internal method of working, a "pattern" connotes the external observation of events'.[40] In *AGM Markets*, Beach J expanded upon this distinction. Again, the purposive nature of systems is evident, while patterns are neutral as to intention: a '"system" connotes something designed or intended in its structure; contrastingly, a pattern may be manifested without any design or intentional input.'[41] A system relates to the 'internal structure, for example, internal working, of whatever it is that has produced or reflects the conduct'.[42] A '"system" also connotes an organised and connected group or set of things that can be thought of as a complex whole. The gist is organisation and connection.'[43] A pattern, by contrast, looks to 'the external manifestation of behaviour and whether it can be characterised as a pattern'.[44] His Honour considered that

> in context the meaning of pattern is most usefully expressed as 'a regular and intelligible form or sequence discernible in certain actions or situations' (Oxford English Dictionary, meaning 11(b)). So there has to be both repetition and external discernibility.[45]

Here, we may interpose to note the *Oxford English Dictionary*'s further observation (not quoted by his Honour) that 'pattern' used in this way may signify a sequence 'on which the prediction of successive or future events may be based'.[46] That is a useful expansion in this context, indicating as it does not merely ad hoc or coincidental repetition, but also a more regular recurrence, which is the hallmark of a pattern.

On this analysis, a corporation's internal structures, methods and processes may combine and connect to articulate systems that are inherently purposeful in their nature. In everyday terms, a process or method can be understood interchangeably as simply a way of doing something, according to a defined and regular plan; a mode of

[37] ibid [88].
[38] ibid [91].
[39] *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155, (2018) 266 FCR 631 (Allsop CJ, Middleton and Mortimer JJ) (*Unique*).
[40] ibid [104].
[41] *AGM Markets* (n 34) 122–23 [389].
[42] ibid.
[43] ibid 123 [391].
[44] ibid 122 [386].
[45] ibid.
[46] *Oxford English Dictionary*, 'pattern' at www.oed.com/.

procedure in any activity or business.[47] As the Federal Court of Australia explained in *Unique*, '[a] system of conduct requires, to a degree, an abstraction of a generalisation as to method or structure of working or of approaching something'.[48] A 'system' on this account is both a generalisation and a process of characterisation or conclusion of the interactions of interrelated elements. The angle of focus required in finding a system can be correspondingly wider, or narrower. Thus a process may constitute itself a system further comprised by more granular processes and methods and, in turn, may form part of a greater whole. Systems, methods and processes are all very closely related. I do not think that it is helpful to stipulate some *a priori* difference between them: they partake of a similar character, but may be used differentially in some contexts to indicate greater, or lesser, levels of abstraction in the enquiry.

By contrast to systems of conduct, patterns of behaviour signify externally observable, repeated behaviours from which systems (and hence, on my analysis, Systems Intentionality) may be inferred. The two are closely related, albeit distinct. As Beach J observed in *AGM Markets*, a 'system of conduct' could produce a 'pattern of behaviour'. Relatedly, evidence of a 'pattern of behaviour' could enable you to infer a 'system of conduct' in some cases.[49]

On my account, this suggests that patterns are, in and of themselves, more neutral as to intentionality: they simply provide the raw materials from which (together with other factors and evidence) a system may be inferred. Of course, patterns of misconduct may be indicative of higher levels of harm than single instances of misconduct and, on that count, liable to attract greater liability.[50] But that greater liability will not necessarily be because of a greater element of intentionality associated with the conduct. By contrast, a mature system (as we have seen) is inherently purposive.

The challenge is to determine what more may be required to enable a pattern to be understood as evidencing a system. In thinking further about this relationship, two additional distinctions may be of assistance. While the concept of a 'system of conduct' is central to the model, the related concepts of 'practices' and 'policies' are analytically useful to direct courts' and regulators' (among others) attention to the ways in which systems evolve, and to the levels of generality at which they operate.

C. Practices

Again drawing on the *Oxford English Dictionary*, a 'practice' connotes:

> (a) The habitual doing or carrying on *of* something; usual, customary, or constant action or performance; conduct. Or (b) A habitual action or pattern of behaviour; an established procedure or system.[51]

The *Oxford English Dictionary* notes that, in a more obsolete form, a practice could refer to a scheme or trickery, or stratagem.

[47] ibid 'process', 'method'.

[48] *Unique* (n 39) 654 [104]. See also *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* [2021] FCA 737 [515] (Stewart J) (*Captain Cook College*).

[49] *AGM Markets* (n 34) 123 [390].

[50] cf ALRC (n 3) Recommendation 8

[51] *Oxford English Dictionary* (n 46) 'practice'.

On these meanings, a practice offers something of a bridge between a pattern and a mature system. By definition, a practice must involve repetition and regularity, and hence must partake of the nature of a pattern. But it seems plausible that a practice may capture behaviours that go beyond a pattern, because of the key idea of its being 'habitual' or 'customary'. To go back to the idea of a pattern being more than an ad hoc coincidence of like behaviours, because of its requiring some element of regularity and predictability, a practice presents as a yet stronger form of patterned conduct. A practice is one that predictably repeats *because* it is habitual or customary: it is a default response or reaction to some recognised condition or trigger for conduct. Further, a practice may clearly be indicative of a system, where the 'custom' or 'habit' has crossed into the realm of an adopted process.

Here, however, we should be careful not to assume that, for the purposes of the idea of Systems Intentionality, only practices endorsed through a formal rule of recognition (for example, approval by a board of directors) will count. Instantiated or de facto practices that are 'passed on' through generations of employees, for example, may be precisely the sort of behaviours that may constitute or give rise to, or evidence, an adopted system. The existence of employee or agent incentives (such as bonus or commission systems, or promotions) that reward conduct consistent with the system of conduct may similarly support a finding of an adopted system.[52] As Bromwich J explained in *AIPE*,[53] 'a system of conduct or pattern of behaviour may emerge over time without having been expressly articulated. It need not have been deliberately adopted or planned.'[54] The concept of an adopted practice was, I think, used in this sense in *ASIC v Westpac*,[55] a case involving statutory unconscionable conduct. In that case, ASIC alleged that during the relevant period, Westpac traded with the sole or dominant purpose of manipulating where the Bank Bill Swap Rate was set. That purpose was said to be manifested in a 'Rate Set Trading Practice' that was 'in existence and implemented generally'.[56] The case failed for want of appropriate evidence as to the existence of the alleged practice. We return to such challenges of proof in section IV. But it seems clear that the Court accepted that, had the alleged practice been established, it could have been apposite to reveal the relevant corporate purpose.[57]

D. Policies

Patterns and practices, then, lie towards one end of the spectrum of behaviours. At the other end of the spectrum, it seems helpful to think about 'policies' as being an

[52] For example, where 'churning' practices align with and are supported by commission incentives.

[53] *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 (Bromwich J) (*AIPE*).

[54] ibid [174].

[55] *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751, (2018) 266 FCR 147 (Beach J) (*ASIC v Westpac*).

[56] ibid 158 [10]–[11].

[57] See also *Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Co Arrangement) (No 3)* [2019] FCA 72, (2019) 368 ALR 441, 552 [677]–[678], 553 [682] (Colvin J), upheld on appeal, *Ali v Australian Competition and Consumer Commission* [2021] FCAFC 109, (2021) 394 ALR 227 (*Ali*), a case involving a tightly directed smaller corporation, but which analysis could transfer over to larger corporate structures with more dispersed structures and lines of responsibility.

articulation of intention and therefore overtly and singularly concerned with the defendant's state of mind. Again, however, as with the relationship between systems, processes and methods, it seems that policies can be conceptualised at greater and lesser levels of abstraction or specificity. Thus French considers policies to be

> rather broad, general principles that describe what the corporation believes about its enterprise and the way it intends to operate. Policies contain basic belief and goal statements regarding both the what and the how of corporate life, but they are not detailed statements of appropriate methods.[58]

On this analysis, policies manifest or express overarching corporate purposes, belief and intentions. This is similar to, and occupies a similar level of abstraction as, the concept of 'corporate culture'. On my model, systems then instantiate or operationalise those policies at more granular and event- or conduct-specific levels. A similar conception is reflected in the *Collins English Dictionary* definition of policy: 'A policy is a set of ideas or plans that is used *as a basis* for making decisions, especially in politics, economics, or business.'[59]

We may accept that, in some cases, a policy will operate at a high level and will inform (be a 'basis'), rather than comprise, the detailed decision-making elements that we may expect to find in a system. Examples might be policy statements by a corporation around fair trade, equal opportunity and the like. While these are statements of intention or belief, we might expect related systems that reflect those high-level intentions to be far more grounded and specific in nature and to direct decisions and actions on a day-to-day basis.

Similarly, the *Cambridge Dictionary* defines a policy as

> a set of ideas or a plan of what to do in particular situations that has been agreed to officially by a group of people, a business organization, a government, or a political party.[60]

This is more specific than French's definition, as it conceives that a policy may articulate specific responses, or guide decisions with particularity, in defined scenarios. However, it seems nonetheless possible to draw a distinction here between an adopted policy that counts as a statement of intention, an 'idea' or plan, and the operationalisation of that intention, at ground level, through some implemented system. That said, the relationship between a policy and a system will, again, depend to some degree on the level of abstraction at which they are viewed. Thus, for *Merriam-Webster*, a policy is

> a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.[61]

This appears materially identical to my conception of a system.

Here, it may be helpful, again, to pause and consider the all-too-familiar phenomenon of 'formal' corporate policies that bear no resemblance to the systems through

[58] French (n 19) 58.

[59] *Collins English Dictionary*, 13th edn (Glasgow, HarperCollins, 2018) 'policy' (emphasis added).

[60] *Cambridge Dictionary*, 'policy' at https://dictionary.cambridge.org/dictionary/english/policy. cf *Oxford English Dictionary* (n 46) 'policy': 'A principle or course of action adopted or proposed as desirable, advantageous, or expedient; esp one formally advocated by a government, political party, etc. Also as a mass noun: method of acting on matters of principle, settled practice. (Now the usual sense.)'

[61] *Merriam-Webster Dictionary*, 'policy' at www.merriam-webster.com.

which (on my model) a corporation manifests its intentionality.[62] For my purposes, it suffices to say that we can usefully distinguish between formal and de facto (actual, real) policies. It is the latter that is of chief interest here from an analytical perspective. A corporation's true or genuine policies express or articulate its mindset as a matter of fact, albeit often at a relatively high level of generality.[63] A formal policy may be no more than a misrepresentation of the actual corporate mindset. This is not to say, however, that the fact that a corporation formally expresses its intentions in terms wholly removed from the reality of its systems of conduct is irrelevant to enquiries into corporate misconduct. The statement may constitute misleading conduct, as in cases of 'green-washing', where the corporation's professed environmental purposes are contradicted by its instantiated systems of conduct. Remembering that policies are (on this analysis) articulations, statements or expressions of intention; they can be misleading or deceptive just like any other statement. To find out what the corporation truly thinks, its core beliefs and values, one has to look behind the corporation's talk and examine its walk.

E. Synthesis

In drawing this discussion to a close, we can see that at one end of the behavioural spectrum we have policies that articulate the corporate mindset, systems that manifest them and may be comprised of more specific processes and methods of conduct that may, themselves, constitute more granular systems. Key to determining the correct frame of reference will be to ask clearly what is the required level of abstraction to meet the law's concern. This is where regulators' and private plaintiffs' litigation strategies will prove critical, in articulating the ambit of the relevant corporate system of conduct relevant to the law's enquiry.

At the other end of the spectrum lie patterns of behaviour from which it may be possible to discern the presence of a system. Patterns provide the raw material of regular and repeated actions for further analysis. As will be explained, the presence of patterns of behaviour may bolster or support a finding of a system by being consistent with it, and to evidence implementation, for example, of a policy. However, a pattern is not itself a system, though it may provide evidence of one. A practice, by contrast, displays habitual patterns of behaviour in response to certain prompts. These straddle the space between patterns and systems: the more established and articulated a practice is, the more likely it is that the practice constitutes a system, or part of a system. We can conceive of practices in this sense as combining external expressions of internal processes and methods.

[62] See, eg, the discussion in *AIPE* (n 53) [696] of the 'aspirational quality' of the defendant corporation's policies, training and induction materials, and the gulf between these and what actually occurred on the ground. See also the perceptive discussion of Google's 'Don't be evil' corporate motto in P Crofts and H Van Rijswijk in *Technology: New Trajectories in Law* (Abingdon, Routledge, 2001) ch 4.

[63] *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) 483 (Bowen LJ), noting that 'the state of a man's mind is as much a fact as the state of his digestion … A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.' See also *Generics (UK) v Warner-Lambert Company LLC* [2018] UKSC 56, [2018] RPC 21, [171] (Lord Briggs): 'a person's intention is as much a matter of fact as the state of his digestion, and this is true of corporate persons as much as of individuals'.

An example of the subtle interactions that may be engaged in thinking about these concepts is *ACCC v Jayco*.[64] The Australian Competition and Consumer Commission (ACCC) alleged that in four instances, Jayco Corp prioritised resolving consumer complaints about defective recreational vehicles (RVs) under their manufacturer warranty, rather than pursuant to the more expansive statutory consumer guarantees. The ACCC alleged that this conduct was unconscionable, in that it favoured repair over replacement or refunds, contrary to consumers' statutory rights. While there were some common components of the individual instances of unconscionable conduct, the ACCC did not seek to show an unconscionable 'system of conduct'. Rather, the allegations made by the ACCC about the conduct of Jayco Corp in these specific instances were set against the background of 'circumstances of a general nature, and what were alleged to be the practices of Jayco Corp in dealing with consumer complaints'.[65] It seems, therefore, that evidence of general practices was here being used to buttress findings of individual instances of misconduct.[66] In that case, witnesses for the manufacturer and for the sales agents testified as to their complaints practices. They affirmed that there was 'no formal policy, such as any written policy' around warranty claims. Nor was there an 'informal policy' to prefer repairs to refunds or replacements. Rather there was a 'practice' to assess each case on its merits. Here, the point seems to be that the practice to assess each case on its merits meant that there was no practice of preferencing repair over replacement, and certainly no policy or 'requirement' to that effect. Importantly, those findings were part of what allowed the judge to conclude that decisions to repair rather than refund were not shown to have been made in 'conscious bad faith' or an 'objective absence of good faith' so as to support a finding of unconscionable conduct.[67] This is consistent with the approach adopted in *ASIC v Westpac* and the taxonomy suggested here.

IV. Proving Systems Intentionality

The proposition that I have been developing is that corporate systems manifest corporate intentionality, and that it is possible to understand more precisely what characteristics a system bears through reflecting on related concepts such as practices, processes or methods, policies and patterns of behaviour. How, though, does one go about establishing a system, including by reference to these related phenomena? Here, the body of cases concerned with statutory unconscionable 'systems of conduct or patterns of behaviour' is again a rich source of insights. In this section, I break the analysis into two parts: first, the approach or 'theory of the case' that may be adopted to prove the presence of a system and, through it, Systems Intentionality; and second, the kinds of evidence that may be appropriate and available to support that case.

[64] *Australian Competition and Consumer Commission v Jayco Corp Pty Ltd* [2020] FCA 1672 (Wheelahan J) (*ACCC v Jayco*).
[65] ibid [790].
[66] On this, see further section IV.A.ii–iv.
[67] *ACCC v Jayco* (n 64) [802], [820], [833], [840], [858].

A. The Theory of the Case

In the following discussion, there are interlocking issues of evidence and procedure, which I will deal with functionally, as they might arise when bringing a case. The aim here is to flesh out, as a matter of practice, how one would go about proving a system for the purpose of ascertaining corporation intentionality.

i. Pleadings: A Question of Connecting the Dots

At the outset, a striking feature of more recent cases in the Australian line of authorities addressing unconscionable 'systems of conduct or patterns of behaviour' is regulators' deliberate adoption of the 'concise statement' over the traditional statement of claim, to set out the nature of the case against the defendant company. This considered shift has been guided by courts, which have noted the narrative advantages offered by the concise statement in articulating the connected elements and purpose of the alleged system.[68] Thus in *Unique*, the Full Court commented that the regulator's statement of claim suffered from a 'certain deconstructed and particularised' character.[69] What was needed was articulation of the 'holistic interrelationship between all the factors, both as they affect the individuals and the system or pattern of behaviour'.[70]

This is the advantage afforded by the concise statement. As Allsop CJ explained in *ASIC v ANZ*:

> The question whether a body of conduct has in all the circumstances been unconscionable in the statutory sense … is not amenable to pleading 'a cause of action' constituted by 'material facts', with some distinction between them and mere 'particulars' of such. Rather, the better approach is to understand what the plaintiff says are the 'connected circumstances that ought to influence the determination of the case' … As in a bill in equity, the plaintiff should set out a well-drafted narrative of the facts and circumstances and of the wrong or grievance that constitutes the real substance of the complaint. The statement, concisely but fully expressed, should contain all the facts to be proved at the appropriate level of generality or specificity, without prolixity, as to make meaningful the grievance …[71]

The concise statement allows regulators to paint a nuanced picture of the connected elements and methods of the system as a whole, set at the correct level of abstraction for the purposes of the law in question. This can include the defendant's motive for acting. As Bromwich J explained in *AIPE*, this pleading may provide 'an important holistic dimension to [the] case'.[72] Proof of motive may 'contextualise and explain, as well as contribute to the proof of'[73] the alleged system, helping to explain, for example, 'why

[68] Led by Allsop CJ in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284, (2019) 139 ACSR 52 (*ASIC v ANZ*). See also *AIPE* (n 53) [34], [159]–[160].
[69] *Unique* (n 39) 640 [42].
[70] ibid.
[71] *ASIC v ANZ* (n 68) 53 [2]–[3].
[72] *AIPE* (n 53) [161].
[73] ibid.

conduct or practices were carried out in a particular way or persisted with in the face of known problems'.[74]

ii. Reasoning from Particular to General and Back Again

It is, of course, not enough clearly to articulate the alleged system: it must also be proved. The concise statement cannot be used, by itself, as a 'construct to inappropriately distort the analysis'.[75] Here, our simple starting point is that misconduct that results from a system will generally recur: after all, it is in the nature of systems that they are adopted in order to regulate and promote repeated behaviours to some valued end. This is also why patterns of behaviour may be indicative of a system and why practices are similarly salient.

This means, however, that there will be two main approaches to proving a system. One starts from the observable, repeated outcomes and works backwards. This approach analyses instances of individual misconduct or harms indicating misconduct, assesses their objectively apparent common features, regularity and so on, to discern a pattern of misconduct and, through it, the potential presence of a system. Examination of repeated misconduct, with shared and salient characteristics, may indicate the presence of a pattern, itself suggestive of a practice, as a staging post on the route to finding a system. A simple hypothetical example might involve discovery of new levels of a certain kind of pollutant in a river, traceable to a pipe that leads to the defendant's factory. The fact of pollution involving a certain combination of waste being repeatedly discharged into the river is suggestive of a pattern of behaviour, which may indicate the presence of an habitual practice of dumping, which may indicate the presence of a system of conduct. Whether this is so depends on the range of available evidence and the inferences that may legitimately be drawn from the nature of the pattern supported by that evidence. Closer to the authorities on which this chapter rests, a regulator may receive a large number of complaints from vulnerable consumers about being induced to sign up for 'free' education courses by a named provider, on topics that they are ill-suited to undertake, through a combination of incentives such as free laptops or cash. If the course transpires not to be free, but rather benefits the provider through attracting significant government fees, while saddling the consumer with considerable debt, for the provision of a course they had little capacity to complete, these shared features may be suggestive of a pattern of misconduct. Through further investigation, the pattern may be found to reflect poor business practices, or even a system of misconduct supporting a predatory business model.

The other approach attacks the presence and features of a system head-on, by seeking to establish the connected internal methods, structures and processes that result in harmful outcomes. This approach will seek to identify the interacting elements of the component steps said to comprise the organised methods and processes that make up a system. The focus is on the 'structure and operation of business itself'[76] rather than

[74] ibid.

[75] *ASIC v Westpac* (n 55) 162 [25].

[76] JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2020) 44 *Journal of Consumer Policy* 1, 9.

on the harmful individual outcomes, although the latter may (as explained earlier) shed light on the nature of the business practices.

Each approach involves quite different litigation strategies, although (as will become apparent) combinations of the two may operate to good effect.

iii. Option 1: Proving a System through Patterns of Behaviour

We have seen that patterns of conduct involve externally observable, repeated events. In *AGM Markets*, Beach J explained that, in looking for a 'pattern', courts will be looking for 'two or more instances of identical or similar behaviour … sufficient to infer a pattern'.[77] His Honour's ensuing discussion suggests that the precise number required to show a pattern will depend on a range of factors, including the degree of similarity between individual instances, the number of similar instances, examples of counter-instances and the size of the total pool of instances. In addition, the presence of other, independent evidence as to an alleged system (to which we will return), which would be consistent with the instances being related, would also support the existence of a pattern. That is, evidence as to a system that would be consistent with the salient, shared behaviours that are alleged to constitute a pattern may confirm that these are repeated behaviours, rather than simple coincidences or behaviours that are not relevantly similar. Finally, as his Honour further observed, it is false to consider that a corporation's behaviour might fall only into a pattern or not: some parts of the corporation's conduct may exhibit a pattern and some not; a pattern may be found in some regions of a corporation's operations and not others; between some parts of a corporation, between different personnel and so on. But these divisions (or levels of abstraction) should flow naturally or truthfully from the corporation's inherent structures and operations, not be 'super-imposed artificially and retrospectively from a regulator's or litigator's perspective'.[78] This insight is particularly important when dealing with large corporations, which may have different systems operating in different departments. What is intended in one space may not be intended in another. That does not mean the purposive conduct demonstrated in one form of business dealing is any the less real and relevant.

For the purposes of proving a system through a pattern of behaviour, it is not only necessary to show that a repeated number of relevantly similar, shared behaviours has occurred. It is also necessary to show that the pattern displayed by those instances is representative of the alleged wider pattern (and through it the system). As we have seen, there may be other independent evidence of the alleged system that accords with the pattern. But in the absence of such evidence, or to bolster the cogency of the case, it may be necessary or appropriate to extrapolate from the proven repetitions of behaviour, to show that the individual instances reflected, or were consistent with, the alleged broader pattern. In *Unique*, the ACCC sought to prove an unconscionable pattern of behaviour through individual examples of unconscionable conduct. While the regulator failed, the Full Federal Court explained that this was not because a pattern cannot be proved through individual instances. Rather, the issue was that 'if one wishes to move from the

[77] *AGM Markets* (n 34) 122 [387].
[78] ibid 122 [388].

particular event to some general proposition of a system it may be necessary for some conclusions to be drawn about the representative nature or character of the particular event.'[79] This required:

> First, the selection of evidence of individual consumers through a random or representative process, with the process disclosed on the evidence. Second, the use of evidence about a reasonable number of individual consumers so that, even if intuitively, a Court could exclude hypotheses of coincidence or lack of representativeness, and could, because of the number of individual consumers about which evidence was led, safely perceive a 'pattern'.[80]

In that case, the ACCC's allegation of an unconscionable pattern of behaviour on the part of a vocational education provider largely rested on the evidence of six customers, supported by a range of broader evidence to which we will return. The consumers affected by the defendant's business numbered over 3,600. Even if these individual six cases shared common characteristics, the Court needed to have a proper basis for considering they were representative of a wider pattern of behaviour.[81] A similar problem with reasoning from single instances to (in that case) an alleged 'practice' arose in *ASIC v Westpac*. There, the learned judge rejected the financial service regulator ASIC's allegation concerning the existence of the alleged Rate Set Trading Practice, being unwilling

> to infer from the isolated instances on the specific four occasions that I have identified or from the totality of the evidence that there was a pattern or system such as to give rise to such a practice. Further, to characterise such isolated examples as in and of themselves constituting such a practice over the relevant period would be to prefer form over substance and to allow the pleader's construct to inappropriately distort the analysis.[82]

Conversely, in *Unique*, the Full Federal Court cited *IMB Group*[83] as an example of how a sample of conduct, taken randomly from a greater pool, could be seen as properly representative of a pattern of behaviour (or, indeed, disprove an alleged pattern). In *IMB Group*, the ACCC alleged that the defendant had engaged in statutory unconscionable conduct through the marketing and sale of an investment scheme, which involved the sale of investment policies to individuals. At trial, the ACCC called 15 of the 70 witnesses it originally proposed to call in support of its allegation concerning a pattern of unconscionable conduct. The respondent proposed to call another 439. A total of 3,200 policies were sold. The trial judge disallowed leave to call so many witnesses; instead, a district registrar selected 40 at random. Drawing on that evidence, the judge rejected the ACCC's case. This process of selection was endorsed by the Full Federal Court in *Unique* as one way in which a representative sample could be taken.[84]

A difficult question arises whether the use of individual instances in this way, to show a pattern of behaviour or system of conduct, constitutes the use of 'tendency' evidence and hence the subject of special procedural rules and limitations.[85] In *Unique*,

[79] *Unique* (n 39) 654 [104].

[80] ibid 655 [110]. See also *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (*Excite Mobile*); *Captain Cook College* (n 48) [73].

[81] *Unique* (n 39) 672 [170].

[82] *ASIC v Westpac* (n 55) 162 [25].

[83] *Australian Competition and Consumer Commission v IMB Group Pty Ltd (in liq)* [2002] FCA 402, (2002) ATPR (Digest) para 46–221 (*IMB Group*).

[84] *Unique* (n 39) 656–67 [116]–[118].

[85] Evidence Act 1995 (Cth), s 97 (Evidence Act).

the Full Court noted[86] that the ACCC could have relied on what occurred at four sites with six particular students, all of which shared certain characteristics, as a basis to extrapolate about what occurred in respect of other sites with similar students. But the question is what material facts that evidence would be brought in order to prove. If it was brought in order to show that other individual consumers were the subject of similar unconscionable conduct, that would be an example of tendency evidence. However, if the evidence is brought in order to prove the existence of a system of conduct as the fact in issue, that will not be tendency evidence.[87] The individual examples are direct (albeit limited) evidence of the alleged system. It is going beyond an allegation of a propensity to engage in a certain type of behaviour (that is, tendency evidence), to establish a system that, if implemented, would have been consistent with the conduct evidenced in the particular case. As explained by Sackville J in *Jacara*,[88] cited with approval in *Unique*, '[t]he evidence of the system makes it more likely that the fact in issue … occurred, independently of the agent's propensity to act in a particular way'.[89] Similarly, in *AMI*,[90] the ACCC successfully argued that the use of single instances in that case, in tandem with direct evidence of the alleged system, to establish a business model was not to say that the defendant engaged in that conduct all the time, or that

> this is what you would find if you randomly sampled any instance of time during the period … We simply say, and mean, that [the defendants] did certain things generically and certain things 170 times, and that those things, taken together (or separately or in more limited combination) reflected their intention – their 'model', and therefore their attitude towards consumers.[91]

iv. Option 2: Proving a System Directly

The alternative approach is to bring direct evidence as to the internal structure and elements of the system. Here, the evidence of relevant individual instances can still be relevant, not as evidence of a pattern (as discussed in the previous section) but as illustrations of the operation or instantiation of the system.[92]

Recall that a pattern relates to externally observable events while a system relates to the internal structures and connections between related methods and processes. It is possible to bring evidence of a system not only through analysis of a pattern, but also through evidence of those internal policies, processes, methods and structures.[93]

[86] *Unique* (n 39) 679 [204].
[87] Evidence Act (n 85), s 94(3).
[88] *Jacara Pty Ltd v Perpetual Trustees WA Ltd* [2000] FCA 1886, (2000) 106 FCR 51.
[89] ibid 67 [67], cited in *Unique* (n 39) 679 [206].
[90] *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 368 (*AMI*).
[91] ibid [95] (North J), cited in *Unique* (n 39) 661 [130].
[92] *AIPE* (n 53) [174], where it was noted that 'it is difficult for an applicant to build a "system" case on a relatively small number of individual examples without (at least) proving how those examples were selected. But such examples may nevertheless be relevant, if only as illustrations confirming the effects of a business model.' See also *Ali* (n 57) [232].
[93] *Captain Cook College* (n 48) [76]. In that case, an overarching 'profit maximisation purpose' (on my analysis, a policy) explained the introduction of changes to an enrolment system that 'significantly weakened existing protections': ibid [523]. While corporate knowledge of this effect was established through the statutory attribution rule, it would in any event have been manifested through those system changes, on the analysis advocated here.

Thus in *Keshow* (cited in *Unique*), the regulator used individual examples of unconscionable conduct to show a pattern of behaviour, but also testimony from the natural respondent about his business model.[94] The latter is an example of evidence of the internal system – and the quite different witnesses that will become relevant. Third-party victims here may not be able to give the internal perspective required.[95] Where that is so, relevant evidence must come from the corporation itself, though its employees, documentation and so on. We will return to the range of relevant types of evidence in section IV.B.

Importantly, it may not be enough to prove the existence of system design or architecture, in order for it to manifest corporate intentionality – there must also be evidence that the system as designed was adopted, and possibly instantiated or applied. Otherwise, the system may constitute a mere 'formal', albeit particularised, policy that does not reflect the true corporate mindset. It is conceivable that there may be cases where an adopted system produces no discernible pattern of results: for example, a system may be halted by injunctive relief before it has been rolled out. But in most cases, it will be likely that both instances of externally observable events (patterns) and systems evidence will be required. This is because, unless the system can be shown to have operated in practice, it will be unclear whether it manifests the corporation's true state of mind. For example, as discussed in section IV.B.ii, a regulator may bring evidence of dishonest, predatory or unconscionable business strategies in the form of the defendant's company's sales scripts, which appear designed to be used by its sales agents or employees. However, adoption of the business strategy is not strongly evidenced through evidence of the mere existence of the scripts, which may be open to be dismissed as early drafts or discontinued models. However, if the scripts are, in fact, issued to the corporation's sales agents, the agents are trained or audited in relation to them, and the agents sufficiently follow the scripts in practice, the system as designed clearly has been adopted and instantiated. Here the corporate mindset is fully revealed.

Thus in *EDirect*, the ACCC's allegations concerned EDirect's conduct in relation to eight identified consumers. Alongside these instances of alleged individual unconscionable conduct, the ACCC also ran an 'unconscionable system of conduct' case. Aside from evidence about the transactions relating to the eight consumers, there was also evidence of the scripts of the sales component of the telemarketing calls, and there were recordings of 3,000 calls to potential customers. Reeves J said the

> fundamental issue … [is] whether the ACCC has shown that the critical features of EDirect's sales system as pleaded in its statement of claim were present *in combination* in a sufficient proportion, or number, of the recordings such that it has proved, on the balance of probabilities, that the high pressure and relentless system which is central to this issue, existed as a fact.[96]

Conversely, however, we must also understand that the fact that a system did not result in the planned result on one or more occasion does not necessarily rebut or undermine the

[94] *Australian Competition and Consumer Commission v Keshow* [2005] FCA 558 [76] (Mansfield J) (*Keshow*), cited in *Unique* (n 39) 655–56 [112]–[114]; *Captain Cook College* (n 48) [153]–[154].

[95] See the discussion of potential evidential gaps in *AIPE* (n 53) [164]–[165].

[96] *EDirect* (n 36) [107].

existence of an instantiated system. Thus a predatory business model may be applied to an intended target but fail to yield the desired outcome, for example because the victim turned out to be less vulnerable, or more protected, than anticipated. The system here must be distinguished from successful realisation of its aim or purpose. As explained in *AMI*, in the context of an unconscionable system of conduct:

> Proof of unconscionable conduct depended on what AMI and NRM did, whether or not it had an effect on the individual patient. For instance, some of the Annexure B patients did not enter into agreements at all. That did not mean that, for example, in using high-pressure selling techniques in attempting to procure contracts, AMI and NRM did not engage in unconscionable conduct.[97]

Similarly, the fact that particular features or elements of the system may vary or evolve over time, and between transactions, is not necessarily decisive against its existence and overall purpose.[98] Again, much will come down to the level of abstraction at which the system is alleged and thus sought to be proved. Here, the regulator's challenge is to ensure that the system is drawn sufficiently precisely and at the appropriate level of generality, or narrowness, to meet the law's criteria and to tailor its litigation strategy to that end.

v. Synthesis

To summarise, this section has been concerned to distinguish between two different litigation strategies, both of which aim to prove a corporation's system and, hence, its state of mind. One involves a process of inference from external patterns of behaviour; the other direct evidence of the internal structures, processes and methods that combine to form the alleged system. Regulators may, and do, usefully combine elements of both to prove adoption and operation of purposive systems of conduct. In the next section we turn to consider the kinds of evidence that may be brought in support of each approach. Of course, the range and kinds of evidence will be as varied as the systems they seek to prove. However, my thought is that by giving examples of the different kinds of evidence, and their usages, we may further understand and be in a position to realise a workable model of corporate Systems Intentionality. Again, I draw on examples from the consumer law prohibitions on unconscionable systems of conduct or patterns of behaviour, although I consider that the insights these offer may be adapted and applied more broadly.

B. Evidential Strategies

i. Patterns

When seeking to prove a pattern of behaviour, we have seen that courts look for repeated instances of conduct or outcomes that have shared characteristics or features. We have

[97] *AMI* (n 90) [939]–[942], cited in *Unique* (n 39) 661–62 [131].
[98] *AIPE* (n 53) [45]–[51]; *Ali* (n 57) [213] (Allsop CJ, Besanko and Perram JJ).

also seen that repeated conduct must be representative of the relevant class of case to which the alleged system would inherently apply. The alleged system and evidence of pattern must align.

It follows that if an alleged system operates at a high level of generality (as in one case, a sales process targeting any man suffering from impotence) then other more specific, shared features (age, level of education, literacy, race, cultural background, the circumstances or location of transacting and so on) may be largely irrelevant, or less relevant, to the enquiry.[99] In a case involving alleged manipulation of consumers to sign up for educational courses for which they are poorly suited, those personalised criteria may be far more pertinent.[100] A degree of forensic choice must therefore be exercised in discerning the relevant, shared features of the pattern of behaviour that indicate the presence of a system of conduct and hence the kind of evidence that may be appropriate. As the Court explained in *AIPE*:

> The more general or abstract the system or behaviour that is alleged and proven, the harder it may be to establish that it has the character of being unconscionable for want of necessary detail to show that is so, or that it has the necessary pervasive and proscribed character. By contrast, too granular an approach may more readily demonstrate isolated instances of contravening conduct, but may fall short of showing that any overall proscribed system or behaviour took place. That process of characterisation forms part of the evaluative exercise required to be carried out.[101]

Relevant evidence of patterns of behaviour will reflect the objective, outcomes-orientated nature of the enquiry. In the context of an alleged sales system, it could include oral testimony or other evidence of consumers' engagement with the system;[102] recordings, for example, of individual cases of sales transactions said to be consistent with, and evidence of, the alleged system in practice;[103] copies of email exchanges or web 'chat' exchanges with, or testimony from, individuals the subject of the alleged system of conduct;[104] payment records (eg receipts) issued to the consumer; unusual or distinctive features of any contracts concluded with the consumer consistent with the alleged practice;[105] incentives offered to consumers to engage in, and disincentives to disengage from, the sales process;[106] and evidence as to relevant, shared features of consumers, or of the circumstances of transacting,[107] said to be reflective of the nature of the system.

[99] *AMI* (n 90), cited in *Unique* (n 39) 662–63 [133]. See also *Ali* (n 57) [233]–[235], [283], [294] where the 'so-called "business model" was a largely consistent approach to extract money from a group of people by falsely representing to them (conformably with documents given to them) that moneys would be used in a particular way, when it was not intended to do so'. Here, the Court considered the individual attributes of the victims were less relevant, given that all were entitled to assumed a baseline of honest conduct.

[100] *Unique* (n 39) 663 [135]–[136], 666 [153], 670 [162].

[101] *AIPE* (n 53) [60].

[102] ibid [527]; *AMI* (n 90) [940].

[103] See, eg, *AMI* (n 90) [113], [360]; *EDirect* (n 36) [9], [92]–[94]; *Excite Mobile* (n 80); *AIPE* (n 53) [59], [163].

[104] *AIPE* (n 53) [60].

[105] For example, the long-term contracts in *AMI* that were without medical justification and unnecessary to protect the legitimate interests of suppliers: *AMI* (n 90) [133], [600].

[106] *Australian Securities and Investments Commission v Forex Capital Trading Pty Limited, in the matter of Forex Capital Trading Pty Limited* [2021] FCA 570 (Middleton J) (*ASIC v Forex*).

[107] *AIPE* (n 53) [60].

ii. Systems

Evidence of the internal elements of a system, by contrast, is likely to come from the corporation itself (although some external evidence may also be available where transferred to third parties – an example would be information given to a consumer about the corporate complaints process). Examples of potentially relevant categories of evidence are: testimony from employees carrying out the system as to its incidents and operation;[108] the content and delivery of employee or agent training to carry out the corporation's activities (here including scripts, guides, presentation materials and summaries) relevant to the system;[109] the conditions and nature of remuneration and incentives relating to delivery of the system;[110] payment and refund terms and any related contract terms and features;[111] complaints processes and complaints scripts;[112] the nature of automated and digital systems, such as the use of particular software;[113] and refund scripts. Careful use of expert evidence may provide a means of connecting or confirming elements of the system: for example, features of a system may take on a certain connected character when viewed in light of changes to government policy, taxation rules or the like.[114]

Regulators have had mixed success in using expert evidence to demonstrate the existence of a system of conduct. Courts are loath to stereotype, for example, residents of specific low socioeconomic communities as inherently vulnerable, and this might be suggested by bringing expert evidence of the demographic features of locations in which an allegedly exploitative system of conduct was employed.[115] In *AIPE*, an allegedly predatory business model sought to take advantage of consumers' lack of education and experience to persuade them (through cash and 'free' laptop incentives, among other strategies) to sign up for vocational education courses for which they were unsuited. Bromwich J explained the fine line that must be taken in using this form of evidence:

> [E]vidence about the demographic composition of a body of consumers is capable of founding or supporting a conclusion about how a business model was designed or how it operated. Clearly, there are considerable difficulties with a case that assumes that individual consumers are vulnerable because they are indigenous, or because they live in areas with sizeable populations of low socio-economic status. However, it cannot be controversial that there are correlations between indigeneity and low socio-economic status, on the one hand, and lack of the education and experience needed to look after one's interests on the other. Depending on the surrounding circumstances, if a business concentrates on areas of low socio-economic status or with large indigenous populations in recruiting customers, that may (at least in some cases) be taken to indicate a strategy of preferring customers who are vulnerable; and that

[108] See *AMI* (n 90) [891]. See also *AIPE* (n 53) [460] and following.
[109] *Unique* (n 39) 662 [133]; *EDirect* (n 36) [93]; *AMI* (n 90) [686]; *AIPE* (n 53) [525]–[526]; *AGM Markets* (n 34) [418]–[419], [429].
[110] *AMI* (n 90) [760]–[770], [939]; *AIPE* (n 53) [753]; *AGM Markets* (n 34) [441]; *ASIC v Forex* (n 106) [77].
[111] *AMI* (n 90) [600], [682], [939].
[112] *AIPE* (n 53) [83]–[84], [163]; *Captain Cook College* (n 48) [459]–[460].
[113] *AGM Markets* (n 34) [424].
[114] The government policy behind the ill-fated VET-FEE Help scheme is an example: see discussion in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 [7] (Gleeson J) and AIPE (n 53) [72]–[93] (Bromwich J).
[115] *Unique* (n 39) 656 [115], endorsing the views of Mansfield J in *Keshow* (n 94) [87].

> may be an ingredient of unconscionability. At least, the presence of disadvantaged or vulnerable people in the target audience makes it more important for recruitment to be conducted consistently with proper notions of consumer protection.[116]

The use of 'summaries of evidence'[117] and other statistical tools in support of allegations of systems or patterns of conduct must also be carefully designed and deployed. In *EDirect*, we have seen that the ACCC alleged that the defendant conducted a 'high pressure sales' system. It put into evidence sales scripts that, on their face, gave a degree of support to the alleged system, for example by presenting 'choices' to the customer that both involved the customer's signing up. But these scripts needed to be coupled with recordings to demonstrate that the scripts were applied, or at least evidence from a sufficient sample of customers consistent with the application of the scripts.[118] Further, on their face, the scripts could not establish other elements of the pleaded system, such as that salesmen spoke over customers, avoided answering direct questions, and kept customers on the phone for unreasonable periods of time so as to create a sense of overall urgency and pressure.[119] The recordings that were available to the Court to assess these elements were limited. Officers of the ACCC had reviewed more samples of recordings and purported to summarise their features for the Court. But the assessment criteria were very subjective, involving 'value judgments such as: "speed", "avoid direct answers" or, most significantly, "urgency/pressure"'.[120] These went beyond summaries of evidence and were better characterised as submissions. These opinion-based documents, which seek to present a conclusion based on an exercise of judgement, applied to primary evidence, can be contrasted with use of information summaries, such as simple application of arithmetical formula.[121] The review also failed to show that the identified factors suggesting pressure were sufficiently shared, or characteristic of the sales calls, to reveal a system of pressure marketing.

iii. Timing and Inference

Finally, in drawing this discussion to a close, the issue of timing must be addressed. We have seen that it is possible for a practice to develop that, over time, evolves into an adopted system of conduct. It is in the nature of such a system that it might have no clear starting date, compared to a system that is actively designed and rolled out through (for example) issuing instructions and training to employees in the steps and processes of the system. And it may be that there is not always contemporaneous and continuous evidence of the system in operation.

Australian courts, addressing this challenge in the context of unconscionable systems of conduct, have taken a practical approach.[122] Thus in *AIPE*, witnesses gave evidence

[116] *AIPE* (n 53) [174].
[117] Evidence Act (n 85), s 50. See also *Captain Cook College* (n 48) [461], [469]–[471].
[118] *EDirect* (n 36) [93].
[119] ibid [95].
[120] ibid [103]. See further *Idylic Solutions Pty Ltd & ors – Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 568, 24 [63] (Ward J) (*Idylic*).
[121] *Idylic* (n 121) 29–30 [78].
[122] See also *Captain Cook College* (n 48) [524], [534].

of the alleged system by reference to their practices and activities while employed by the defendant. The defendant asserted that the Court could draw no conclusions as to the existence of the system prior to their employment. Justice Bromwich rejected the argument, noting that this

> way of viewing organisational change may be seen to be far removed from ordinary human experience and the repetitive nature of tasks related to such things as marketing and enrolment. This is not tendency or coincidence evidence, but direct evidence able to support inferences about a system.[123]

Given that systems are embedded and repeat, it may be legitimate to infer that an extant system was representative of conduct at an earlier point in time, and also after the departure of relevant employee witnesses.[124] Evidence that a corporation is slow to review or audit processes, evidence of complaint responses and so on may bolster that inference, in the usual way.

V. Conclusion

This chapter had two aims: to clarify the nature and meaning of the essential concepts of 'systems of conduct, policies and practices' that underpin Systems Intentionality; and to explicate, as a matter of legal practice, how these may be proved. As will be clear, beyond being a discussion of academic interest, I hope that the chapter may provide a useful road map for practitioners, barristers, regulators and the judiciary seeking guidance on the operation of the model of Systems Intentionality in litigation practice. This reflects my longstanding project aim to develop a theoretically sound and practically workable model that is 'fit for purpose' as a means to call corporations to account for highly culpable misconduct. How it may be employed to address the specific doctrinal mental states required for the effective operation of common commercial rules and prohibitions is the subject of chapter 11.

[123] *AIPE* (n 53) [465].
[124] ibid [465]–[466].