PART III

Corporate States of Mind

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Modelling Corporate States of Mind through Systems Intentionality

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I. Introduction

Lord Justice Bowen famously observed that 'the state of a man's mind is as much a fact as the state of his digestion'.[1] That said, it is no easy task to identify and characterise, let alone prove,[2] the mental states of a natural person relevant for the purposes of the law. For centuries, courts have grappled with, and wavered over, the nature of core concepts such as intention, knowledge and mistake that underpin a vast swathe of statutory and general law rules. The relationship between these mental states and normative standards, such as dishonesty, unconscionability and recklessness, has been correspondingly opaque and unstable. The law's requirements for state of mind elements often differ not merely between national and state jurisdictions, but between civil and criminal law, and between general law and statutory doctrines within the one jurisdiction. They are also prone to remarkable shifts over time.

The challenge to understand defendants' states of mind for the purposes of satisfying these difficult and volatile elements becomes exponentially greater when dealing with modern, devolved and complex corporate wrongdoers to which the same elements apply.[3] A corporation has no natural mind. The traditional strategy of identifying the

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[1] *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): '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'.

[2] The question of how to prove 'systems, policies and practices', relevant to the model of Systems Intentionality, is the subject of Bant, ch 9 of this volume.

[3] I do not attempt to address here more radical options of adopting distinctively corporate liability regimes, such as strict liability strategies through outcome- or performance-based, or 'failure to prevent' approaches: see Clough, ch 18 of this volume; Willis, ch 19 of this volume. However, I do note the Australian experience

corporate mind with those of its directors, or with other employees or agents through more expansive attribution rules, remains stubbornly anchored to identification of the corporate mind with specific individuals.[4] How, then, is a court to ascertain the complex mental states necessary to satisfy elements of doctrines such as deceit or unconscionable dealing, for example when addressing a corporation comprising potentially many thousands of employees, fragmenting tasks and knowledge across dozens of semi-autonomous departments, and making increasing use of automated processes? The problem further magnifies if one accepts, as I do, the realist view that corporations are more than the sum of their human, corporate and automated parts.[5] If we are to work with the law and corporations as we find them, we need a model that permits assessments of the spectrum of required mental elements demanded across common law, equity and statute, in terms of corporations' distinctively organisational blameworthiness.

This chapter seeks to address that challenge, using the model of Systems Intentionality introduced in chapter 9.[6] It does so, first, by identifying 'test' definitions of key mental states commonly demanded by the law, including as elements of normative standards; and, second, by modelling how Systems Intentionality may be used to identify those mental elements existing in a corporation. To this end, the chapter proceeds by settling plausible 'test' definitions of general and specific intention, knowledge and mistake, and marking out their potential relationship to mixed conceptions of recklessness, dishonesty and unconscionability. As other contributors to this collection well demonstrate, these are often highly contested and evolving concepts, the meanings of which have varied, and no doubt will continue to vary, within and between jurisdictions, legal areas and across time.[7] This chapter will not seek to resolve these debates: it stays strictly agnostic as to the 'best' meanings of these ideas. However, the discussion is reasonably detailed, in order to make clear the nature and boundaries of the test definitions, including from alternative definitions, as well as from each other. The chapter then seeks

that state-of-mind elements remain stubbornly persistent, even in strict liability contexts, for example through remedial, defensive and sentencing considerations: see, eg, E Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352, 353–54, 356–58; 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 MS Donald (eds), *Statutory Interpretation in Private Law* (Sydney, Federation Press, 2019) 154. See also Crofts, ch 3 of this volume.

[4] Explored in Leow, ch 6 of this volume. Compare, eg, *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL), 713 (Viscount Haldane LC); *Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] UKPC 26, [1995] 2 AC 500 (*Meridian*); Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020) [6.153], [6.159], discussing the iterations of the Australian 'TPA models', which combine an expansive vicarious liability approach to conduct with a state-of-mind component that deems the intention of employees and agents acting for the company to be that of the company.

[5] See Crofts, ch 3 of this volume for a powerful and rigorous defence of this position.

[6] This will, it is hoped, go some way to addressing the Law Commission's concerns: see Law Commission of England and Wales, *Corporate Criminal Liability* (Options Paper, 2022) [6.42]–[6.46]. See also Bant, 'Culpable Corporate Minds' (n 3); 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 and Securities Law Journal* 259.

[7] Gans, ch 13 of this volume in particular; but see also Carroll, ch 15 of this volume and Bryan, ch 14 of this volume.

to show how Systems Intentionality may apply to meet these test definitions. This is done in order to illustrate the operation of the model and its capacity to respond to the spectrum of legal, equitable and statutory mental states and related normative standards, which may (as noted) be prone to change. Even should wholly different definitions apply, or different mental states be in issue, my aim is that this modelling should provide a solid foundation for understanding the application of Systems Intentionality to the doctrinal requirements of the law, as, when and where they are found.

II. A Spectrum of Mental States and Related Norms of Conduct

A. Intention (and Mistake, as 'Vitiated' Intention)

It is generally accepted that the concept of 'intention' is core to many forms of liability, and conceptions of culpability, across the full ambit of the law. In the words of John Finnis:

> Intention is a tough, sophisticated, and serviceable concept, well worthy of its central role in moral and legal assessment, because it picks out the central realities of deliberation and choice: the linking of means and ends in a plan or proposal for action adopted by choice in preference to alternative proposals (including to do nothing).[8]

That being (beautifully) said, as a matter of legal doctrine, there is no settled meaning of intention, which will depend on jurisdiction and context, including the terms of any statutory provision.[9] Nonetheless, a helpful starting point for unpacking this concept for current, pragmatic purposes is the sense that 'intention' involves a 'directing of the mind, having a purpose or design'.[10] A classic, lay definition is that given in by Connelly J in *R v Willmot (No 2)*: '[t]he ordinary and natural meaning of the word "intends" is to mean, to have in mind'.[11] More fulsomely, Peter A French has explained that 'saying "someone did *y* intentionally" is to describe an event as the upshot of that person's having had a reason for doing *y* which was the cause of his or her doing it'.[12] Intention in this sense connotes purpose that goes beyond mere knowledge of the nature of the act

[8] J Finnis, 'Intention in Tort Law' in J Finnis, *Intention and Identity: Collected Essays*, vol II (Oxford, Oxford University Press, 2011) 198, 198.

[9] See, eg, *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, (2017) 262 CLR 362, 369 [18] (Kiefel CJ, Nettle and Gordon JJ), 389–92, [84]–[89] (Edelman J).

[10] ibid 367, 368–69 [9], [15] (Kiefel CJ, Nettle and Gordon JJ) endorsing *Zaburoni v The Queen* [2016] HCA 12, (2016) 256 CLR 482, 489 [11] (Kiefel, Bell and Keane JJ) citing *R v Reid* [2007] 1 Qd R 64, (2006) 162 A Crim R 377, 93 [93] (Chesterman J). See also *Zaburoni* 501 [55] (Gageler J). See also *SZTAL* (n 9) 397 [101] (Edelman J).

[11] *R v Willmot (No 2)* [1985] 2 Qd R 413, (1985) 18 A Crim R 42, 418 (Connolly J), endorsed in *Zaburoni* (n 10) 488 [8] (Kiefel, Bell and Keane JJ) and *SZTAL* (n 9) 367 [9] (Kiefel CJ, Nettle and Gordon JJ), 397 [101] (Edelman J).

[12] PA French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984) 40. See also V Tadros, 'The Significance of Intentions' in V Tadros, *Criminal Responsibility* (Oxford, Oxford University Press, 2007) 212, 216: 'Acting intentionally is acting for a reason.'

and its likely consequence. I return to the relationship between intention in this sense and conceptions of knowledge and foresight in section II.B.

We might usefully note here that French's approach provides a useful way of understanding ideas of mistake that may operate to vitiate or impair a person's intention.[13] Although courts have avoided attempting a comprehensive definition of mistake,[14] one conception is that 'a mistake is made when a person's decision is based on incorrect data'.[15] That is, adapting French's account, one of the 'reasons' for action is vitiated or impaired because it does not accord with reality. Courts have also considered that mistakes may include 'sheer ignorance' of a fact or matter relevant to the transaction. Here, in order for 'ignorance' to count, the fact or matter must relate to one of the 'reasons' for the decision. It is not enough that, had the party been aware of the existence of that fact or matter, they would (or might or could) have incorporated that fact or matter as a reason for decision.[16]

I have here adopted a definition of mistake that is connected to decision making, and hence to conduct, through causation.[17] However, it remains possible to have a passive mistake, in which the party's subjective belief on some fact or matter does not accord with reality. It may be that passive mistakes will more rarely be relevant to a defendant's culpability.[18]

Returning to my conception of intention, we have seen that on one approach, intention involves a choice directed towards some end. This is sometimes expressed in terms of desire. However, here we need to be careful. Some scholars have argued that it is possible to intend something without desiring it (or, perhaps more accurately, without finding it desirable).[19] Justice Edelman has considered that, for that reason, we need to distinguish between volitional desire (necessary for intention) and emotional desire: 'A person can desire a consequence in the sense of volitionally choosing it. Or a person can desire a consequence in the sense of emotionally wanting it.'[20] On balance, it seems plausible that the law need not require a person to desire something in an emotional sense in order to intend it in a legal sense. I proceed here on that basis.

[13] The following discussion adopts and builds on that in J Edelman and E Bant, *Unjust Enrichment* (Oxford, Hart Publishing, 2016) ch 8.

[14] *Barrow v Isaacs & Son* [1891] 1 QB 417 (CA) 425 (*Barrow*) (Kay LJ): 'Very wisely, as I presume to think, the Courts have abstained from giving any general definition of what amounts to mistake.'

[15] Edelman and Bant (n 13) 172. See also *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, 696 [28] (Lord Phillips MR): 'an erroneous belief'; *Roles v Pascall & Sons* [1911] 1 KB 982 (CA) 987 (Buckley LJ): '[a] mistake exists when a person erroneously thinks that one state of facts exists when, in reality, another state of facts exists'; *Barrow* (n 14) 420 (Lord Esher MR): '[thinking] that one thing was in existence, whereas something else was in existence'; *Westpac Banking Corporation v Hilliard* [2006] VSC 470, [211] (Hansen J): 'a positive belief in the existence of something which does not exist but also may include sheer ignorance of something relevant to the transaction in hand', approved on appeal in *Hilliard v Westpac Banking Corporation* [2009] VSCA 211, (2009) 25 VR 139, 155 [68] (Maxwell P, Dodds-Streeton JA and Osborn AJA).

[16] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, [105]–[108], [114] (Lord Walker, delivering the judgment of the Court), excluding 'mere causative ignorance' from actionable mistake.

[17] On the relevant test of causation for decision making, see E Bant and JM Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24 *Torts Law Journal* 1; Edelman and Bant (n 13) 190–94.

[18] For a potential example, see the discussion in section II.B regarding reckless inadvertence.

[19] M Moore, *Placing Blame* (Oxford, Oxford University Press, 1997) 451.

[20] *SZTAL* (n 9) 394–95 [97] (Edelman J), citing Finnis (n 8) 205.

In discussing intention in tort law, Peter Cane draws a further, helpful distinction for the current discussion, between intention in relation to conduct and intention in relation to outcome or consequences:

> [T]he most widely accepted account of the 'core' of the concept of intention in relation to conduct is based on the idea of choice; and in relation to consequences, on the concepts of aim, purpose, and objective.[21]

Similarly, I find it helpful to distinguish between the situation where a person has a 'general' intention to engage in conduct and a 'specific' intention to achieve some outcome through that conduct. Thus in the criminal law context, the High Court of Australia explained in *He Kaw Teh v The Queen*, 'General or basic intent relates to the doing of the act involved in an offence; special or specific intent relates to the results caused by the act done.'[22] A similarly honed conception of specific intention can be seen in *Zaburoni v The Queen*,[23] endorsed by the plurality in *SZTAL v Minister for Immigration and Border Protection*: 'a person intends a result when they have the result in question as their purpose'.[24]

B. Recklessness

Cane distinguishes these forms of general and specific intention from recklessness, which 'in its core sense is commonly conceptualized in terms of a risk that certain consequences will result from conduct, and indifference to that risk'.[25] While (as discussed immediately below) courts and commentators have vacillated over both the meaning of recklessness and its relationship to intention, it seems that recklessness can sensibly be understood as a complex, multifaceted concept that draws together mental states and normative judgements. Drawing on the earlier distinctions concerning intention, a plausible conception of recklessness, for current forensic purposes, combines:

(a) a general intention to engage in some conduct;
(b) knowledge or 'foresight' of the outcome that the conduct is apt to produce (often described as a 'risk' of harm); and
(c) the application of a normative standard that a decision to proceed with the conduct in light of that known risk is unreasonable.

On the first element, as Cane says:

> While the frame of mind of the intentional agent is different from that of the reckless agent in relation to the consequences of their conduct, their frame of mind in relation to the conduct

[21] P Cane, 'Mens Rea in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533, 534. See also E Farnsworth, 'Alleviating Mistakes' (Oxford, Oxford University Press, 2004) 87, distinguishing between '"action-intent" – the intent to take the action that has resulted in harm to another person and … "consequence-intent" – the intent not merely to take the action that has resulted in the harm to another person but the intent to produce that harm as a consequence'.
[22] *He Kaw Teh v The Queen* [1985] HCA 43, (1985) 157 CLR 523, 569 (Brennan J).
[23] *Zaburoni* (n 10).
[24] *SZTAL* (n 9) 372 [26] (Kiefel CJ, Nettle and Gordon JJ); see also ibid 397 [101] (Edelman J).
[25] Cane (n 21) 535.

> itself is the same – both set out to engage in the conduct, the reckless person regardless of the risk of the consequence, and the intentional person in order to produce that consequence.[26]

Perhaps due in part to this commonality in terms of general intention, in some jurisdictions, during some periods, for some purposes, recklessness has been equated with specific intention.[27] This has seemed particularly attractive where the intended course of conduct is patently likely, or certain, to produce the result that in fact occurred. Thus, Gageler J, dissenting in *SZTAL*, considered that for the purposes of the statutory provision there under consideration, 'intention' encompasses both

> where the perpetrator means to engage in conduct meaning to bring about the result adverse to the victim; and where the perpetrator means to engage in conduct aware that the result adverse to the victim will occur in the ordinary course of events.[28]

Consistently, conceptions of recklessness have sometimes been termed 'oblique intention', on the basis that a person 'must be taken' to intend the certain or highly probable consequences of his actions.[29] An example of this approach is found in section 5.2(3) of the Criminal Code Act 1995 (Cth) (Criminal Code) (emphasis added):

> **5.2 Intention**
>
> (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
>
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
>
> (3) A person has intention with respect to a result if he or she means to bring it about *or is aware that it will occur in the ordinary course of events*.

Again, I am neutral as to the 'best' meaning of recklessness. My purpose is to identify a test conception appropriate for modelling the operation of Systems Intentionality. However, in Australia at least, the current trend of judicial reasoning is to eschew 'oblique intention' as a general, 'natural' or ordinary meaning of specific intention, on the grounds that it entails a false equivalence.[30] Rather, the fact that a plaintiff knows or predicts that, in the ordinary course of events, harm will result from her (intended) actions will provide evidence from which specific intention to achieve the result may be inferred.[31] The more certain she is about the result, the stronger the inference. However, on current authority, foresight is not considered the same as specific intention. Thus, Edelman J

[26] ibid.

[27] *Vallance v The Queen* [1961] HCA 42, (1961) 108 CLR 56, 59 (Dixon CJ) citing C Kenny, *Outlines of Criminal Law* (Cambridge, Cambridge University Press, 1902) 148. See also *Peters v The Queen* [1998] HCA 7, (1998) 192 CLR 493, 522 [68] (McHugh J); M Briggs, 'Criminal Intention Revisited' (2013) *New Zealand Law Journal* 153, discussing *Police v K CA* [2011] NZCA 533 (Stevens, Roland Young and Andrews JJ).

[28] *SZTAL* (n 9) 378 [47] (Gageler J).

[29] G Williams, 'Oblique Intention' (1987) 46 *Cambridge Law Journal* 417. Examples in the authorities include *Hyam v Director of Public Prosecutions* [1975] AC 55 (HL) (Lords Hailsham, Diplock, Cross and Kilbrandon, Viscount Dilhorne); *Peters* (n 27) (McHugh J).

[30] eg A Kenny, 'Intention and Purpose' (1966) 63 *Journal of Philosophy* 642, critically analysing the 'presumption in law that a man intends the natural consequences of his acts'; Finnis (n 8) 212; *SZTAL* (n 9) 382 [61]–[62], 392–98 [93]–[103] (Edelman J).

[31] *SZTAL* (n 9) 372 [26]–[27] (Kiefel CJ, Nettle and Gordon JJ); *R v Moloney* [1985] AC 905 (HL) (Lords Hailsham, Fraser, Edmund-Davies, Keith and Bridge); *R v Hancock; R v Shankland* [1986] AC 455 (HL) (Lords Scarman, Keith, Roskill, Brightman and Griffiths).

in *SZTAL*, agreeing with the majority plurality,[32] stated that 'to prove an intention to produce a particular result, by the ordinary meaning of intention, it is necessary to establish that the accused meant to produce that result by his or her conduct'.[33] 'Oblique intention' by contrast, 'is not intention at all'.[34] Engaging in conduct with foresight of consequence is not the same as having those consequences in mind as the purpose or aim of the conduct, and hence it is better labelled in terms of recklessness.[35]

Harking back to the idea of intention as acting for a reason, another way of putting this (as Victor Tadros has done) is to observe that 'an agent may perform an action, knowing that it will have a certain consequence, but that consequence does not provide [a] reason for the action'.[36]

Consistently with this analysis, Edelman J has recently suggested that a principled definition of recklessness would be: (i) that the accused person foresaw the possibility of harm but proceeded nonetheless to take that risk; and (ii) that the risk was unreasonable in the circumstances known to the accused.[37] Similarly, the Criminal Law Reform Committee of the Law Commission of England and Wales proposed that recklessness arose where: (i) the accused foresaw that their act might cause the particular result; and (ii) the risk of causing that result which they knew they were taking was, on an objective assessment, an unreasonable risk to take in the circumstances known to the accused.[38]

Similarly, the current definition of recklessness in section 5.4 of the Criminal Code states:

> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

[32] *SZTAL* (n 9) 372 [27] (Kiefel CJ, Nettle and Gordon JJ), citing *Zaburoni* (n 10) 490 [14]–[15] (Kiefel, Bell and Keane JJ).

[33] *SZTAL* (n 9) 397 [101] (Edelman J).

[34] ibid 383–84 [67], 397–98 [103] (Edelman J).

[35] ibid 383–84 [67] (Edelman J).

[36] Tadros (n 12) 217. Notwithstanding this distinction, Tadros considered that where a person intentionally acts, knowing that it is virtually certain that the act will result in another's death, this should satisfy murder, albeit as an 'alternative' to intention: see ibid 217, 230. This echoes the idea of a spectrum of culpability in relation to recklessness.

[37] *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, (2021) 96 ALJR 741, 757–59 [64], [69] (Edelman J), drawing on *Aubrey v The Queen* [2017] HCA 18, (2017) 260 CLR 305, 327–29 [43]–[47], [49] (Kiefel CJ, Keane, Nettle and Edelman JJ). See also *R v G* [2003] UKHL 50, [2004] 1 AC 1034 (Lords Bingham, Browne-Wilkinson, Steyn, Hutton and Rodger). The reference before the High Court concerned whether the accused needed to foresee the probability, rather than possibility, of the harm to the victim: thus in *R v Campbell* [1997] 2 VR 585 (VSCA) (Hayne JA and Crockett AJA, Phillips CJ dissenting), the Victorian Supreme Court of Appeal (following *R v Nuri* [1990] VR 641 (VicCCA) 643 (Young CJ, Crockett and Nathan JJ)) had adopted a construction of the element of recklessness for the offence of recklessly causing serious injury under s 17 of the Crimes Act 1914 (Cth) that an accused must have foresight of the *probability and not the possibility* of relevant consequences. In dissent, Kiefel CJ, Keane and Gleeson JJ considered that the reason for the higher test of 'probability' used in definitions of recklessness in the case of common law murder 'is the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death or grievous bodily harm'. Their Honours considered it should be limited to that context. The majority, while not disagreeing with that view, considered that subsequent legislative reforms to s 17 had proceeded on the basis of the 'probability' test, precluding use of the 'possibility' formulation. Interestingly, Edelman J considered express recognition of the element of reasonableness would diminish the difference between the two formulations, a view that seems plausible.

[38] Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980) 5 [12].

(2) A person is reckless with respect to a result if:

   (a) he or she is aware of a substantial risk that the result will occur; and
   (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Here, the concept of 'unjustifiable' risk points to the application of an objective standard of reasonableness, assessed in light of the defendant's knowledge.[39]

I have thus far considered characteristics relevant to (a) and (c) of the 'test' concept of recklessness proposed at the commencement of this section. A further subtlety is what it is that the accused must have foreseen or known. Again, it seems that here a plausible distinction can be drawn between the conduct in which the accused must have acted intentionally and the result of that conduct. For the purposes of recklessness as postulated here, it will be the *result* that must have been the subject of knowledge or foresight, although again the specificity of the anticipated harm (ie to this victim, or to a category of persons to whom the victim belonged) may be the subject of further debate and will be influenced in reality by, among other matters, the terms of any applicable statutory provision on the prohibited conduct.[40] In some cases, for example, it is recklessness as to the state of mind of another person, at the time of engaging in intentional conduct, that is the gist of the prohibition.[41]

Finally, we may note that, at some points in time, and for some purposes,[42] it has been argued that recklessness should comprise, or more closely align to, a wholly objective standard of conduct. This is best exemplified in the line of House of Lords cases that considered that a person may be reckless both where that person takes a known risk and where she should have foreseen some clear risk but did not turn her mind to it.[43] The latter form relatively quickly, however, led to further, difficult enquiries, into, for example, whether the person's inadvertence to the obvious risk was itself culpable or not: here ideas of mistake, for example, might operate to mitigate her fault.[44] For present purposes, it suffices to note that states of mind appear almost inexorably to inform the assessment of the extent to which a person's conduct fails the required

[39] See, eg *R v G* (n 37).

[40] *Banditt v The Queen* [2005] HCA 80, (2005) 224 CLR 262 (Gummow, Hayne, Callinan, Heydon JJ).

[41] *Castle v R* [2016] NSWCCA 148, (2016) 92 NSWLR 17, 28 [34] (Bathurst CJ), addressing a kidnapping offence where the victim's lack of consent is a key element.

[42] See, eg, *Director of Public Prosecutions v Morgan* [1976] AC 182 (HL) 215 (Lord Hailsham), where Lord Hailsham described the mens rea for rape as 'the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no'; cf, eg, K Amirthalingam, 'Caldwell Reckless is Dead, Long Live Mens Rea's Fecklessness' (2004) 67 *Modern Law Review* 491, on the desirability of separating the fact of the mental state from its blameworthiness.

[43] *Director of Public Prosecutions v Smith* [1961] AC 290 (HL) (Viscount Kilmuir LC, Lords Goddard, Tucker, Denning and Parker); *Metropolitan Police Commissioner v Caldwell* [1982] AC 341 (HL) (Lords Wilberforce, Diplock, Edmund-Davies, Keith and Roskill); *R v Lawrence* [1982] AC 510 (HL) (Lords Hailsham, Diplock, Fraser, Roskill and Bridge).

[44] *R v Reid* [1992] 1 WLR 793 (HL) (Lords Keith, Roskill, Ackner, Goff and Browne-Wilkinson).

normative standard. We shall see that the same phenomenon is apparent in both unconscionability and dishonesty. This is not to say that it would not be impossible to untether these standards from state-of-mind requirements, as we shall see occurs in negligence. This might be a very useful approach for corporate culpability. However, the point is that courts are commonly concerned, where issues of serious culpability are in question, to ensure that the defendant's conduct warrants the censure and consequences that characterisation entails.[45] And it appears that here, a culpable mental state is regularly perceived as important. Given this, it is appropriate that our test definition reflects the state-of-mind components that pose a particular challenge for corporate regulation.

C. Knowledge

We have seen that some conceptions of recklessness have occupied an overlapping sphere of operation with those of intention. Likewise, it is apparent that recklessness has sometimes been equated with knowledge. The seminal classification of knowledge types for the purposes of civil liability is found in *Baden Delvaux & Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*.[46] In that case, Peter Gibson J classified knowledge as falling into five categories:

(1) actual knowledge;
(2) wilfully shutting one's eyes to the obvious;
(3) wilfully and recklessly failing to undertake such inquiries as an honest and reasonable person would undertake;
(4) knowledge of circumstances that would indicate the facts to an honest and reasonable person; and
(5) knowledge of circumstances that would put an honest and reasonable person on inquiry.

Putting, again, to one side what is the 'best' understanding of knowledge and its graduations, we may observe that these categories rather freely combine mental states and standards.[47] Categories (1)–(3) are generally treated by courts as constituting 'actual' knowledge. Category (1) actual knowledge may be understood as a subjective belief concerning some fact or matter held by a person and which is objectively correct. In French's terms, it is a 'reason' concerning some fact or matter that accords with reality. Some philosophers have argued that this belief must be 'justified' to count as knowledge. This would, I think, bring in some sort of standard-based assessment, as we saw

[45] Bant, 'Culpable Corporate Minds' (n 3) 354.
[46] *Baden Delvaux & Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, [1992] 4 All ER 161, 235, 242–43 (Peter Gibson J) (*Baden Delvaux*), condemned as 'best forgotten' by Lord Nicholls in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (PC) 392 (Lord Nicholls), but alive and well in practice.
[47] *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239, (2008) 39 WAR 1, 135 [931]–[933] (Owen J); *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 454 (Nourse LJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2009) 230 CLR 89, 162–54 [171]–[178] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (*Farah*).

for recklessness, and seems an unnecessary complication for our current, taxonomical purposes.

A characterisation of category (2) as involving actual knowledge may be accepted on the basis of an inference, from a person's conduct and the broader context, that the person knows in substance the truth of the matter but tries to avoid explicit or detailed knowledge.[48] But in category (3), it is far more likely that the person does not actually know, but is acting in such a culpable way that she fails to attain the standard of honest and reasonable conduct required by law.[49] This is, in effect, an elision of knowledge with concepts of dishonesty and recklessness, echoing the elision discussed earlier in relation to the some-time treatment of recklessness as equivalent to intention. While we may be prepared in such circumstances to 'deem' the person to know the relevant fact or matter, we should be aware that this is not the same as actual knowledge, as defined for current forensic purposes.[50]

By contrast, categories (4) and (5) are broadly accepted not to constitute actual knowledge. Category (4) is commonly understood to involve 'constructive knowledge': as the label indicates, here we are clear that the person does not actually know of the relevant fact or matter but is being treated 'as if' she knew. This is, presumably, for policy reasons relevant to the particular doctrine, or because the defendant was under some obligation to make enquiries that would have revealed the true fact or matter. Finally, category (5) constitutes 'constructive notice', the most attenuated form of knowledge on the *Baden Delvaux* scale.[51] This is far removed from actual knowledge, being a circumstance where the party clearly did not know the relevant fact or matter. Here, the most that can be said was that the person was negligent in failing to enquire into known circumstances that, if she had undertaken enquiries, would have resulted in actual knowledge. We may now turn to consider rather more closely the nature of negligence.

D. Negligence

We have seen that ideas of recklessness have historically permeated understandings of both intention and knowledge, although recklessness retains distinctive, normative

[48] See, eg, *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 [27], [29]–[30], [47]–[49] (Kiefel CJ, Keane and Gleeson JJ), [145]–[146], [167]–[168] (Steward J). A similar conception appears to be entailed in 'blind-eye knowledge': see *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited and Others* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 2 WLR 170, 173 [3] (Lord Clyde): 'Blind-eye knowledge in my judgment requires a conscious reason for blinding the eye. There must be at least a suspicion of a truth about which you do not want to know and which you refuse to investigate.' See also the careful discussion ibid 178–79 [23]–[26] (Lord Hobhouse) discussing *The Eurysthenes* [1977] QB 49, 207–08 [112] (Lord Scott) ('Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye') and further at 209 [116] (Lord Scott). For further discussion of this concept and its relationship to dishonesty, see Australian Law Reform Commission, *Review of the Marine Insurance Act 1909* (Final Report, No 91, 30 May 2001) 169 [9.162]; *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129, [59]–[61], discussed in *Natwest Markets Plc v Bilta UK Ltd (in Liquidation)* [2021] EWCA Civ 680, [130]–[133] (Asplin, Andrews and Birss LJJ).

[49] *Stubbings* (n 48) [59], [80]–[81], [91]–[92], [94] (Gordon J), [160]–[163] (Steward J).

[50] R Bigwood, *Exploitative Contracts* (Oxford, Oxford University Press, 2003); T Duggan, 'Unconscientious Dealing' in P Parkinson (ed), *The Principles of Equity*, 2nd edn (Sydney, Lawbook Company, 2003) 127.

[51] Bigwood (n 50).

characteristics that mark it as a separate category of concept. In its role as a legal standard, the boundary between recklessness and negligence has been similarly unstable, in part, again, because of the unclear roles and influence of ideas of intention and knowledge.

Thus, for some jurisdictions, at some points in legal history, negligence has been understood as involving 'inadvertent' conduct that breaches a standard of care, while recklessness involves 'advertent' conduct. In the words of a leading Canadian text, 'the difference between recklessness and negligence is the difference between advertence and inadvertence: they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence'.[52] However, even without tackling the meaning of 'advertent' (commonly understood to involve 'intentional, deliberate, conscious'[53] conduct), it cannot be thought that this distinction currently reflects the state of the law in Australia.[54] Employers' failures to provide safe systems of work may often be deliberate, in the sense of reflecting a choice to engage in conduct that 'cuts corners', in contravention of a legal standard of reasonable care, in order to save money or generate additional revenue. It would be very odd for that conduct to be incapable of regulation through the law of negligence, merely because it was conduct engaged in deliberately and conscious of the risk thereby posed to workers.

Indeed, in Australia at least, it seems quite possible and acceptable for negligence to be engaged where not only the conduct was intended but also the result. Thus, in *Gray v Motor Accident Commission*, exemplary damages were considered in theory available in a case of negligence, where the defendant had driven deliberately at the plaintiff and his companions, resulting in severe injury to the plaintiff.[55] Again, there seems little reason as a matter of principle or practicality to deny the operation of the law of negligence in this context. Negligence is a standard that may apply to conduct and, indeed, to states of mind. Consistently, a person may breach that same standard through conduct so as to attract liability in negligence without any mental state at all. Advertent or inadvertent conduct may both count as negligent: the main focus of the law is on whether the defendant's conduct breached the required standard.

It seems appropriate, on this account, to adopt test conceptions of both recklessness and negligence that involve breach of a legal standard. However, my test conception of recklessness engages an additional, required baseline form of mental state, in the sense that the defendant must have chosen to engage in the conduct. This, in turn, may be contrasted with the scenario where the defendant chooses to act so as to achieve some purpose through that conduct, which we have seen may constitute specific intention.

[52] Kenny (n 27), cited in *O'Grady v Sparling* (1960), 128 CCC 1, 13; 33 CR 293, 296 [1960] SCR 804 (Kerwin CJ, Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ), discussed in M Eisen, 'Recklessness' (1989) 31 *Criminal Law Quarterly* 347, 349.

[53] *Oxford English Dictionary*, 'advertent' at www.oed.com/.

[54] See P Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) 32 *Sydney Law Review* 29, discussing the clear trend in Australian law to this conclusion, the foundations of which are laid in English cases.

[55] *Gray v Motor Accidents Commission* [1998] HCA 70, (1998) 196 CLR 1, 9–10 [21]–[24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

E. Dishonesty

In the final two subsections of this section, I consider two leading norms that frequently engage with questions as to the defendant's state of mind.[56] As with the other concepts outlined so far, the nature of dishonesty has been contested and variable over time and jurisdictions, including whether it should, indeed, vary at all.[57] For a long time, dishonesty in criminal law (and for a period, for some purposes, in civil law) in both England and Australia largely followed the *Ghosh* test.[58] This adoption extended to prohibitions under statutory prohibitions such as section 1041G(2) of the Corporations Act 2001 (Cth) (Corporations Act). According to the dual test adopted in *Ghosh*, the acts in question must be dishonest according to current standards of ordinary decent people *and* the accused must have realised that they were dishonest by those standards. The second limb of the *Ghosh* test was rejected by the High Court of Australia in *Peters v The Queen*,[59] a position that it has repeatedly affirmed.[60] The test has also now been authoritatively abandoned in England as a wrong turn in the law.[61]

Similarly, courts applying civil law doctrines in which dishonesty forms a component have refused to adopt the second limb.[62] Thus the New South Wales Court of Appeal in *Hasler v Singtel Optus Pty Ltd* stated:

> Dishonesty amounts to a transgression of ordinary standards of honest behaviour. It is not necessary to say anything else by way of elaboration, save to confirm that it is not necessary to demonstrate that the person thought about what those standards were.[63]

[56] The following analysis replicates in substance that contained in Bant, 'Culpable Corporate Minds' (n 3) on dishonesty and Bant and Paterson, 'Systems of Misconduct' (n 6) on unconscionability; cf Gans, ch 13 of this volume.

[57] cf *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391, 411–12 [63] (Lord Hughes, with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed); D Lusty, 'The Meaning of Dishonesty in Australia' (2012) 36 *Criminal Law Journal* 282; J Gans, 'Submission to Legal and Constitutional Affairs Legislation Committee of the Commonwealth of Australia', *Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (12 December 2019).

[58] Named after *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689 (Lords Layne CJ, Lloyd and Eastham JJ).

[59] *Peters* (n 27).

[60] *Spies v The Queen* [2000] HCA 43, (2000) 201 CLR 603, 630–31 [79]–[81] (Gaudron, McHugh, Gummow and Hayne JJ); *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 56, (2000) 203 CLR 579, 596 [55], 608 [89] (Kirby J), 617–18 [120]–[121] (Hayne J); *Macleod v The Queen* [2003] HCA 24, (2003) 214 CLR 230, 241–43 [35]–[39], 245 [46] (Gleeson CJ, Gummow and Hayne JJ), 256 [99]–[101] (McHugh J), 264–65 [130] (Callinan J); *Polyaire Pty Ltd v K-Aire Pty Ltd* [2005] HCA 41, (2005) 221 CLR 287, 295–96 [17]–[18] (McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Farah* (n 47) 126 [73]; *Marcolongo v Chen* [2011] HCA 3, (2011) 242 CLR 546, 559 [33] (French CJ, Gummow, Crennan and Bell JJ). This has been welcomed by commentators: see, eg, M Gleeson, 'Australia's Contribution to the Common Law' (2008) 82 *Australian Law Journal* 247, 249; Lusty (n 57).

[61] *Ivey* (n 57) 416–17 [74]–[75]; *R v Barton* [2020] EWCA Crim 575, [1] (Lord Burnett CJ). See also *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129 [52]–[58] (Henderson, Peter Jackson, Asplin LJJ).

[62] For a stark example in the context of the English doctrine of 'dishonest assistance', see *Royal Brunei Airlines* (n 46) 389 (Lord Nicholls), re-interpreted in *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, 174 [35]–[36] (Lord Hutton), rectified in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333, [2006] 1 WLR 1476, 1479–80 [10] (Lord Hoffmann), and then endorsed in *Ivey* (n 57) 416–17 [74]–[75], and reiterated in *Group Seven* (n 61) [58]. In Australia, see *Farah* (n 47) 126 [73].

[63] *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266, (2014) 87 NSWLR 609, 636 [124] (Leeming JA, Barrett and Gleeson JJA concurring).

Likewise in *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited*, Kiefel CJ, Keane and Edelman JJ stated (in the context of an equitable claim of knowing assistance in a breach of fiduciary duty):

> [P]articipation in a dishonest and fraudulent breach of fiduciary duty includes knowingly assisting the fiduciary in the execution of a 'dishonest and fraudulent design' on the part of the fiduciary to engage in the conduct that is in breach of fiduciary duty. The requisite element of dishonesty and fraud on the part of the fiduciary is met where the conduct which constitutes the breach transgresses ordinary standards of honest behaviour [citing *Hasler*].[64]

This shift to a more objective standpoint is reflected in the recent amendment to the definition of 'dishonest' in section 9 of the Corporations Act, by which 'dishonest means dishonest according to the standards of ordinary people'.

This trend of reasoning might suggest that dishonesty is a wholly objective standard of conduct, similar to the Australian overarching norm against 'misleading conduct'.[65] It would be entirely possible to take that approach, particular when dealing with corporate actors, so as to obviate inquiry for liability purposes into the corporate state of mind.[66] However, on the existing state of authorities, it remains necessary to assess objectively the quality of the defendant's conduct *in light of the defendant's* actual intention and knowledge.[67] For example, the conduct in question must have been intentional rather than accidental or inadvertent. As the High Court of Australia explained in *Peters*, 'ordinary, honest persons determine whether a person's act is dishonest by reference to that person's knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done'.[68] I accordingly adopt this approach for my modelling purposes.

F. Unconscionability

Finally, I consider the ubiquitous and powerful Australian conceptions of unconscionability. In its modern, Australian form, the equitable doctrine of unconscionable dealing has two main elements. First, the plaintiff must be subject to some 'special' disadvantage that 'must seriously affect their ability to make a judgment about their own interests'.[69]

[64] *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* [2018] HCA 43, (2018) 265 CLR 1, 31 [71] (Gageler J).

[65] Competition and Consumer Act 2010 (Cth), sch 2 (ACL), s 18. See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44, (1982) 149 CLR 191, 197 (Gibbs CJ).

[66] E Bant, 'Submission No 21 to Australian Law Reform Commission', *Corporate Criminal Responsibility* (28 January 2020).

[67] *Ivey* (n 57) 416–17 [74]; *Barton* (n 61) [84], [107]–[108]; *Group Seven* (n 61). This notably contradicts the recent statement in *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306, (2020) ACSR 266, 276 [51] (Yates J) that dishonesty 'does not rely on any proof or finding of intent' and is wholly determined by reference to objective circumstances.

[68] *Peters* (n 27) 503 [15] (Toohey and Gummow JJ).

[69] *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, (2019) 267 CLR 1, 95–96 [282] (Edelman J).

Second, the defendant must exploit or take advantage of that special disadvantage.[70] The defendant's state of knowledge is key to the second element of advantage taking:

> It is the defendant's knowledge of the special disadvantage of the plaintiff and, in the face of this knowledge, the defendant's failure to take any steps to protect the interests of the plaintiff, which taints the conscience of the defendant so as to justify the court setting aside the transaction.[71]

We can therefore see that, like dishonesty, unconscionability combines normative and state-of-mind inquiries. And as we have also seen, the concept of 'knowledge' itself spans a spectrum of states. Consistently, courts assessing unconscionable dealing have variously emphasised and endorsed the spectrum of possibilities, from actual knowledge (here including wilful ignorance)[72] to defendant awareness of 'facts that would raise that possibility in the mind of any reasonable person'.[73] In *Kakavas v Crown Melbourne Limited*, the High Court of Australia introduced what appeared to be an additional requirement for the equitable doctrine that the defendant be shown to have acted with a 'predatory state of mind', at least in 'an arm's length commercial transaction'.[74] While the status of this requirement is highly uncertain,[75] if it exists, it may point to a specific intention on the part of the defendant to harm the victim.[76]

Given its ubiquity, a brief mention of the statutory prohibition on unconscionable conduct is warranted, to underscore the similar combination of normative standard and state-of-mind inquiry.[77] In its core form,[78] this prohibits conduct that is 'in all the circumstances' unconscionable, and provides a set of interpretive principles to guide

[70] ibid. See also *Australian Competition & Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133, (2005) 146 FCR 292, 297–98 [19] (Finn J) (*Radio Rentals*).

[71] Bant and Paterson, 'Systems of Misconduct' (n 6) 66; Bigwood (n 50) 249; Duggan (n 50) 146–48. cf the leading Canadian authority of *Uber Technologies Inc v Heller*, 2020 SCC 16, [85] (Abella and Rowe JJ), the majority reasoning of which has been criticised (including by the minority judges: see ibid [164]–[167] (Brown J) [287]–[288] (Côté J) for abandoning a knowledge requirement: see also C Hunt, 'Unconscionability in the Supreme Court of Canada: *Uber Technologies Inc v Heller*' (2021) 80 *Cambridge Law Journal* 25. This aspect of the Court's reasoning, however, does avoid the difficult questions addressed here, an important matter given the parties to the disputed services 'contract of adhesion' were the driver and Uber subsidiaries incorporated in the Netherlands with offices in Amsterdam. It may be, however, that even on those facts, on the proposed Systems Intentionality approach discussed in section III, the necessary state of mind would be disclosed by the Uber business model and standard terms. See also Powles, ch 5 of this volume and Bant, ch 1 of this volume, section II.C.

[72] *Kakavas v Crown Melbourne Limited* [2013] HCA 25, (2015) 250 CLR 392, 438–39 [156]–[157] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[73] *Commercial Bank of Australia v Amadio* [1983] HCA 14, (1983) 151 CLR 447, 467 (Mason J); cf *Amadio* (n 73) 474 (Deane J); *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85, 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[74] *Kakavas* (n 72) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[75] See, eg, *Thorne* (n 73); *Kobelt* (n 69) 17–18 [15] (Kiefel CJ and Bell J), 48 [118] (Keane J), 95–96 [282] (Edelman J); *Kobelt* (n 69) 36 [81] (Gageler J) 'exploitation' is sufficient, 84–85 [258] (Nettle and Gordon JJ) affirming passive exploitation; and now *Nitopi v Nitopi* [2022] NSWCA 162, discussing the trend of High Court authority. See also JM Paterson, E Bant and M Clare, 'Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: *ASIC v Kobelt*' (2019) 13 *Journal of Equity* 81, 96.

[76] *Bodapati v Westpac Banking Corporation* [2015] QCA 7 [75] (Peter Lyons J, Holmes and Gotterson JJA agreeing).

[77] This discussion draws on Bant and Paterson, 'Systems of Misconduct' (n 6).

[78] See, eg, ACL (n 65) s 20; Australian Securities and Investments Commission Act 2001 (Cth) s 12CB (ASIC Act).

courts in assessing impugned conduct. Importantly for current purposes, these include that the statutory prohibition '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'.[79] The interpretive principles also include a list of factors to which the court may have regard in deciding if conduct is unconscionable.[80] These include whether the defendant acted 'in good faith', thereby potentially engaging an inquiry into the defendant's state of mind, as well as an objective standard. In assessing the statutory standard, courts commonly consider a range of further factors that relate to the defendant's mindset, including whether the impugned conduct was deliberate,[81] dishonest,[82] predatory,[83] or undertaken with sufficient knowledge of relevant disadvantage or vulnerability.[84]

Again, the precise degree of knowledge or kind of intention need not detain us here. What we can observe is that the concept combines a normative standard, which is assessed by reference to the defendant's state of mind. So, however framed, the state-of-mind component must be capable of being established with reference to corporate defendants.

III. Systems Intentionality and Mental States

A. States of Mind and Norms

i. A Recap of Systems Intentionality

We are now, finally, in a position to model the operation of Systems Intentionality in respect of each of the main test forms of mental state and associated standard. To recap, Systems Intentionality conceptualises the corporate state of mind as manifested in its systems of conduct, policies and practices. Chapter 9 explains that a 'system of conduct' is the internal method or organised connection of elements operating to produce the conduct or outcome. It is a plan of procedure, or coherent set of steps that combine in a coordinated way in order to achieve some aim (whether conduct or, additionally, result). A 'practice' involves patterns of behaviour that are habitual or customary in nature. A practice may cross over into a system, where the 'custom' or 'habit' has become an embedded process or method of conduct. Finally, corporate 'policies' partake of the same nature of systems, but can be understood as generally operating at a higher level of generality. These manifest overarching and high-level purposes, beliefs and values.

[79] ACL (n 65) s 21(4); ASIC Act (n 78) s 12CB(4).

[80] ACL (n 65) s 22; ASIC Act (n 78) s 12CC.

[81] See, eg, *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56, (2013) 44 VR 202, 221 [62] (Warren CJ, Cavanough and Ferguson AJJA).

[82] *Kobelt* (n 69) 30–31 [59]–[60] (Kiefel CJ and Bell J).

[83] ibid 47–49 [116]–[120] (Keane J).

[84] See, eg, *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, (2011) 15 BPR 29, 699 (Campbell JA); *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75, (2017) 251 FCR 404 (Rares, Murphy and Davies JJ).

They embody and reveal the overall corporate mindset, which is then instantiated or operationalised through corporate systems at more granular and event- or conduct-specific levels.

In what follows, it is important to recall that the inquiry is not a process of 'inference' of the corporation's mental state, in the same way as might apply to an individual: after all, the corporation lacks a natural mind. Rather, it involves *characterising* through an objective process of evaluation the systems of conduct through which the corporation pursues its purposes. The particular corporate state of mind will be hugely dependent, therefore, on the nature of the system, policy or practice the subject of the inquiry. However, the necessarily generalised discussion should help illustrate the kinds of features and inquiries that will bear on the existence of specified corporate mental states, by reference to the model of Systems Intentionality.

ii. General and Specific Intention

Turning, therefore, to its practical application to the specific, doctrinal mental states discussed earlier, we may commence with the central conception of 'intention'. Here, the distinction drawn earlier between intention as choice of *conduct* and intention in terms of chosen conduct *directed to certain results* is very helpful when thinking about Systems Intentionality. As to the first, some systems are rigid and direct actions to a predefined outcome: for example, pay $*x* on date *y*. Other systems may allow those acting within the system a degree of choice. But even here, the system may deploy a 'choice architecture': the design or features of the choices that are available.[85] These kinds of systems allow a degree of participant choice, but though default settings and other strategies nudge participants into making predetermined choices.

I suggest that both of these kinds of systems, and indeed the combinations in between, manifest general intention – the systems express a choice as to how to direct conduct. And a system can be said to do this even if a person performing some part of, or role within, the system can at times decide to act in a different way, or can decide to perform their allocated task for a variety of reasons.[86] The general capacity of the system to prompt a certain kind of choice should be sufficient for this purpose of finding intention. As French expresses it (albeit in terms of higher-level policies):

> When 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.[87]

Where the system choices are coordinated so as to produce some specific outcome, or a likelihood of a specific outcome, I consider that the system manifests specific intentionality. The design of the system is necessarily assessed objectively, by reference to its elements and the outputs that are determined, or strongly influenced, by

[85] 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.
[86] French (n 12) 44.
[87] ibid.

the coordination of those elements as part of the system.[88] Where the system is apt to (calculated to, designed to, of a nature to) produce some outcome, and does always or usually produce that outcome, it is specifically intended.

Here, the analysis may seem to elide specific intention and foresight, contrary to the previous analysis. We saw earlier that 'oblique' intention has been used both in general law and under statute to capture cases where a natural person's (generally intended) course of conduct is patently likely, or certain, to produce the result that in fact occurred. The High Court of Australia has explained that, in this case, the better analysis is that the course of conduct is evidence from which intention can be inferred. Adapting this approach for a corporate context, where only one (or effectively one) output can be, and was in fact, produced from the corporation's deliberate system of conduct, it is reasonable to characterise the system as geared, or organised, to produce that outcome. Another way of putting this, in terms more redolent of purpose, is to say that, in some cases, there can be no other explanation for the system of conduct than that it was designed to achieve a certain outcome.[89]

Where the system of conduct is apt to produce a range of outcomes, only one of which is harmful, is the harmful outcome also specifically intended? It seems plausible that a system of conduct may be designed (of a nature, calculated) to achieve a range of consequences or results. Again, to recall French, 'saying "someone did *y* intentionally" is to describe an event as the upshot of that person's having had a reason for doing *y* which was the cause of his or her doing it'.[90] Where the system of conduct was a reason for producing the harmful result, this suggests that corporate intention to produce that result may be present. This conclusion may be strengthened where the system was apt to produce the harmful outcome it produced, and the achievement of that outcome was consistent with corporate policy (eg a delinquent policy of 'profit over compliance').[91] The result may not be 'desired' but it is 'intended'. However, I consider (following Brent Fisse) that this conclusion will be fortified where the harmful result is repeated through the system of conduct and, notwithstanding having capacity to address the harm, no steps are taken to prevent that result.[92] It may also be the case that where a system is introduced that is intended to operate over a long period of time, and which necessarily entails repeated acts that will inevitably (if not always) result in significant harm, the omission of responsible audit and adjustment mechanisms may form part of the system 'as designed'. That is, the omission of adjustment mechanisms that are integral to

[88] To look for some human designer on whom to hang corporate intention for the system would be to replicate the problematic approach this model seeks to avoid: see further Paterson and Bant, ch 12 of this volume.

[89] Examples, in my view, include the branding marketing campaigns in the Nurofen and Voltaren cases, which could have no other purpose than to deceive customers into paying a premium for what is, in truth, a product no different from the generic, and much cheaper, product: see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, (2016) 340 ALR 25 (Jagot, Yates and Bromwich JJ); *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724 (Bromwich J).

[90] French (n 12) 40.

[91] Said to be the 'corporate culture' at play in the Crown Casino group of companies, in the Victorian Royal Commission: see State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report October 2021) vol 1, 142–54 [52]–[113].

[92] B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1195–202.

avoiding identified harms signal that the corporation intends to implement a system in which some inevitable outcomes will not be prevented, as a matter of choice.

iii. Mistake

We have seen that, on the foregoing analysis, a system of conduct will always and necessarily manifest 'general' intentionality. That is the nature of a 'system' – it is inherently purposive. Given this, the starting position when addressing instantiated systems of conduct is that they are not manifesting 'accidental' or 'mistaken' conduct. If a system is operated according to its terms then it manifests, on the face of it, a clear choice of conduct. This runs contrary to the familiar exculpatory narrative of 'systems errors' often (at least in the Australian context) surrounding long-standing systems of misconduct (including, but not limited to, 'set and forget' automated systems).[93]

In some cases, corporations may claim that the outcome of a system of conduct (as opposed to the conduct itself) was 'unintended' or a 'mistake'. These sorts of claims must be treated with some caution. As for the law of unjust enrichment, a claimed 'misprediction' (that is, where a person is in possession of all the correct, current data but predicts incorrectly what will happen in the future) is not necessarily an exculpatory or vitiating factor: it may simply indicate that the party proceeded with conduct in the face of known risks about the outcome of that conduct.[94] This suggests that claimed 'mispredictions' should rarely operate as a get-out-of-jail-free card. In any event, I consider that ideas of 'misprediction' are better avoided in the context of Systems Intentionality, because these may encourage a search for subjective understandings of individual employees associated with the system, rather than to understand the inherent incidents of the system itself.

Finally, Paterson and I have suggested that there is an emerging and growing body of authority supporting the view that where a system is of a nature or patently likely (and in that limited sense objectively 'predictable') to produce certain conduct, or the conduct is recurrent, and no positive steps are taken to avoid harm resulting from the conduct, the system manifests recklessness.[95] Indeed, we saw in the previous section that, in some cases, a failure to correct repeated harm may, over time, support a finding of specific intention. The fact that a harm is not desired does not mean that it was not relevantly intended, or the result of corporate recklessness.

Importantly, it will not necessarily be exculpatory for the purposes of mistake for a company to demonstrate that, for example, directors were individually 'ignorant of' the existence and nature of some adopted and deployed corporate system. It is well established in the law of unjust enrichment in both Australia and England that, in order for ignorance to give rise to a mistake, it must have informed a positive but incorrect assumption on which a decision was based. It is not enough to claim that 'but for' being

[93] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 154–57, discussed in Bant, 'Culpable Corporate Minds' (n 3) 385–87; E Bant, 'Catching the Corporate Conscience' (2022) *Lloyd's Maritime and Commercial Law Quarterly* 467, 487–90.

[94] Edelman and Bant (n 13) 174–79.

[95] Bant and Paterson, 'Systems of Misconduct' (n 6).

ignorant of some fact or matter, a different course of action would have been adopted. Mere causative ignorance does not count.[96] Moreover, on the Systems Intentionality approach, we are wholly justified in rejecting directors' claims that their ignorance can shield the corporation from knowledge of what are, after all, *its own embedded practices, or longstanding systems of conduct*, often performed in accordance with a real-life corporate policy of profit over compliance.

What, then, does a genuine mistake look like from the perspective of Systems Intentionality? In essence, the preceding analysis suggests that a genuine 'systems error' may arise where the system operated by the company is not deployed correctly or implemented correctly, including in the sense that one of its component steps is omitted or fails (an error 'in the system'). An example of a systems error in deployment may be where an individual employee presses a button that puts into operation a system in circumstances for which it was not designed.[97] An example of an error 'in the system' may be where some components of a system fail due to external factors, such as a labour strike or electricity shortage. An example of an internal error 'in the system' might be where a rogue employee substitutes one step in the system for another. Again, however, we need to be careful. As chapter 9 explains, a single employee's practice of omitting, for example, some step in a formal system (for example, a 'standard operating procedure') may develop into a widespread practice that simply changes the nature of the corporate system *as implemented*. It is the operated or instantiated system that manifests the corporation's intentionality. As this suggests, systems audit and maintenance is an intrinsic part of corporate responsibility for the systems it intentionally deploys.

iv. Knowledge

Given this approach to mistake, how is corporate 'knowledge' revealed in the context of a system of conduct? On the foregoing analysis, actual corporate knowledge (*Baden Delvaux* Category (1)) of some facts will be implicit in, and revealed by, the features of the system that it operates. Given a system of conduct is, by definition, intended, a corporation will know at least its broad outline and the key features required for it to be deployed. This means that the starting point for any inquiry is that corporations know the nature of the conduct in which they are engaged through those systems.

Will a corporation always have knowledge of the outcomes produced by its systems? This will depend, I think, on the nature of the system. Where a system is designed to produce a specific sort of outcome (for example, a cheap but defective product), so that the outcome is specifically intended, knowledge of that outcome produced from operating the system of conduct is implicit in the system. Further, where the company has engaged in a specific transaction with a particular client or party through its system of conduct, knowledge of the occurrence of that transaction (albeit not necessarily

[96] Edelman and Bant (n 13) 173–74.

[97] E Snodgrass, 'The University of Kentucky Accidentally Sent 500,000 Acceptances to a Program that Usually Only Accepts 35 Students' *Insider* (9 April 2021) at www.insider.com/university-of-kentucky-sends-500000-accidental-acceptances-2021-4 (accessed 1 September 2021). My thanks to Rachel Leow for drawing this case to my attention.

the identity of the particular client) must be implicit in the application of the system. Knowledge of some features of specific parties transacting with the corporation may be implicit in the system of conduct. Thus, where a predatory business model depends on and anticipates the existence of a class of consumer that shares particular vulnerabilities, likely to fall prey to the scheme, it is open to find corporate knowledge of both the existence of that target group sharing those characteristics, and the fact of its transacting with vulnerable customers sharing those characteristics through its system of conduct.[98]

However, where there is a variety of outcomes likely to be produced from a system, the corporation's form of knowledge may range down the *Baden Delvaux* scale. We have seen there that these tend to combine state-of-mind inquiries (such as knowledge of certain facts and general and specific intention) with concepts of dishonesty, recklessness and negligence. In this respect, while negligence is a squarely objective standard, we have seen that dishonesty and recklessness involve a further combination of state-of-mind elements and an objective, normative assessment.

v. Recklessness, Dishonesty and Unconscionability

Turning to this final category, we have seen that recklessness, dishonesty and unconscionability combine various conceptions or elements of intention and knowledge with objective norms or standards of conduct. Although these are complex and layered inquiries, armed with the foregoing analysis, it becomes possible to break the mental elements and normative components into analytically distinct stages.

Thus, I suggested earlier that a plausible, working definition of recklessness may be understood to combine:

(a) a general intention to engage in some conduct;
(b) knowledge or 'foresight' of the outcome that the conduct is apt to produce (often described as a 'risk' of harm); and
(c) the application of a normative standard that a decision to proceed with the conduct in light of that known risk is unreasonable.

Where there is a system of conduct, (a) is established. Further, corporate knowledge of key aspects of the system are implicit from its deployment, as we have seen. Consistently, it is possible, and appropriate, to assess corporate 'foresight' from the objectively obvious (patent) risks of outcomes arising from the known and intended system of conduct, or from repeated instances of harmful outcomes arising from application of the known and intended system, where there are no audit or remedial steps taken to respond to the materialised harm. An unreasonable decision to proceed in light of those known risks, or repeated harm, manifests recklessness.

[98] *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132 [33], 142–43 [43], discussed in Bant and Paterson, 'Systems of Misconduct' (n 6) 81–82. A consistent analysis is contained in *Stubbings* (n 48) [81] (Gordon J). See also *Australian Securities and Investments Commission v Westpac Securities Administration Limited* [2021] FCA 1008, (2021) 156 ACSR 614 (*Westpac Securities*) [39], [47] (O'Bryan J), analysed in Bant, 'Reforming the Laws of Attribution' (n 6).

Dishonesty assesses the quality of conduct against the standard of honest people, seen in light of the defendant's knowledge and intention. Unconscionability also combines application of (variously) equitable and statutory norms of conduct in light of the defendant's knowledge and intention. This inquiry tends to be heavily dependent on the particular facts of the case. However, some examples of how this assessment may be undertaken conclude the next subsection of this chapter.

vi. A Case Study

Here, I seek to give a necessarily brief but, it is hoped, meaningful analysis of how Systems Intentionality may shed light on state-of-mind inquiries, through a worked example.[99]

In *Australian Securities and Investments Commission v National Australia Bank Limited*,[100] National Australia Bank Limited (NAB) introduced a programme whereby

> unlicensed 'Introducers' would 'spot' prospective customers and 'refer' them to bankers; if the bank then advanced a loan, the Introducers were rewarded by a payment – the bigger the loan, the bigger the reward.[101]

For most of its 19 years' lifespan, the programme had no quality assurance (for example, Introducer or banker training) or audit processes, and visited no consequences on those engaged in carrying out its programme for non-compliance with the law.[102] The programme resulted in huge benefits to the bank in the form of increased loan business and associated profits,[103] as well as widespread examples of unlawful practices on the part of individual Introducers, as they scrambled to generate commissions. This individual misconduct included forgery, inclusion of false information in loan application documents and conflicts of interests. NAB's formal compliance policies were routinely honoured in the breach.[104] The conduct was only 'detected' by NAB when whistleblowers spoke up.[105]

Notwithstanding the scale of the problem, the Australian Securities and Investments Commission (ASIC) only brought proceedings in relation to 25 of the thousands of Introducers the subject of the programme. NAB admitted a range of the alleged contraventions of the prohibition under section 31 of the National Consumer Credit Protection Act 2009 (Cth) on a holder of Australian Credit Licence from conducting business with an unlicensed person, as well as the licensing obligation under section 47(1)(a) and (d) to do all things necessary to ensure authorised credit activities are engaged in 'efficiently, honestly and fairly'. In settling a civil pecuniary penalty of $15 million for the

[99] For further, worked examples of real cases, see Bant, 'Culpable Corporate Minds' (n 3); Bant and Paterson, 'Systems of Misconduct' (n 6); Paterson, Bant and Cooney, '*Australian Competition and Consumer Commission v Google*' (n 85); Bant, 'Catching the Corporate Conscience' (n 93); Bant, 'Reforming the Laws of Corporate Attribution' (n 6).

[100] *Australian Securities and Investments Commission v National Australia Bank Limited* [2020] FCA 1494.

[101] ibid [1] (Lee J).

[102] ibid [51].

[103] ibid [150].

[104] On this, see Bant, ch 9 of this volume.

[105] *National Australia Bank* (n 100) [148].

misconduct, Lee J expressed concern about the limited scope of ASIC's enforcement action. His Honour further stated:

> The conduct engaged in by NAB as a corporate entity was not deliberate. But this means that the deterrence needs to be such as to motivate changes to the *systems* underlying the contravening conduct. By that I mean compliance reporting, governance structures and systems integrations. While there was no evidence of the involvement of senior members of the organisation participating in or having knowledge of the contravening conduct, it is also not the case that proactive steps were put in place, such as adequate training or systems, to prevent the conduct from occurring in the first place.[106]

Here, the Systems Intentionality analysis points to a significantly different enforcement approach and, consequently, a different assessment of the nature and degree of culpability manifested by NAB through the programme.[107] On this approach, the point is not that compliance systems needed overhaul, although this certainly was the case. Rather, Systems Intentionality identifies the 'Introducer programme' *itself* as a system of misconduct that reflects a deliberate corporate strategy or method of generating loan business and, indeed, profits.[108] Importantly, proof of corporate culpability through this mechanism does not require proof on the part of ASIC of the thousands of Introducers, their individual knowledge, intentions and misconduct. Rather, its focus is on the proving the system of misconduct itself, which was abundantly clear on the materials before Lee J.[109] Nor does the apparent, personal ignorance of NAB's directors and senior officers of the programme and Introducer misconduct operate as a factor reducing corporate blameworthiness. NAB did not (and could not) deny that the Introducer programme was its programme and operated to its benefit. The programme was its system of conduct. And its system of conduct manifested its corporate values, intention and state of mind.

Turning to the specific mental states manifested by the programme, it can be accepted on the Systems Intentionality approach that the particular instances of Introducer misconduct may not have been the aim of the programme: in this sense, it may be that NAB held no *specific* intention to produce the resultant Introducer misconduct. However, the conduct of the programme itself, including its problematic features, certainly was deliberate or 'generally' intended. Consistently, on this analysis, the corporation must have been aware of the broad nature of its longstanding system of conduct, namely a commission-based use of unlicensed and untrained 'spotters' to generate loan business. Without these critical features, the programme could not be deployed successfully to the benefit of NAB. Further, this programme necessarily generated a very high risk of unlawful outcomes, which were realised repeatedly, yet NAB continued with it for 19 years, without any effective audit or compliance programme. Here, omission of audit and compliance mechanisms seems reflective of a design choice – at the very least, a decision not to care about the inevitable harm that would result to some customers through being engaged in loan products for which they were unsuited or did not need.

[106] ibid [152].
[107] An important contrasting case, and reasoning, is found in *Westpac Securities* (n 98), examined in Bant, 'Reforming the Laws of Corporate Attribution' (n 6).
[108] *Westpac Securities* (n 98) [150].
[109] See Bant, ch 9 of this volume.

On the foregoing analysis, general intention and actual, corporate knowledge of the key features of the system are established. Further, the system of conduct arguably manifests 'recklessness' as previously defined. It manifested:

(a) a general intention to engage in the programme;
(b) knowledge or 'foresight' of the patent risk of Introducer misconduct, repeatedly realised, with no audit or compliance mechanisms to address that risk or repeatedly realised harm; and
(c) application of a normative standard suggests that NAB's decision to proceed with the conduct in light of that known risk was wholly unreasonable. Here, the applicable standard is that of an honest, expert bank.

On this account, NAB is clearly open to be adjudged reckless. It is further open to being assessed as having failed to perform its services 'honestly' as required by section 912A,[110] and as having engaged in statutory unconscionable conduct. On the latter, and to adopt the words of Bromwich J in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*:

> The conclusion that the conduct overall was unconscionable would be more readily reached if such an outcome was either *intentional or sufficiently predictable or recurrent to require overt steps to be taken to minimise the chance of it* occurring.[111]

It is plausible to consider that for an expert bank to adopt and maintain a programme for profit that contains a patent risk of repeated and widespread harm to customers, and unlawful conduct, is to fall well below the standards of honest and fair conduct that underpin our financial system.

IV. Conclusion

Chapter 9 examined the theoretical concepts of systems of conduct, policies and practices that underpin Systems Intentionality and how these may be proved as a matter of litigation practice. This chapter has, in turn, sought to show how Systems Intentionality may then apply to meet a range of plausible test definitions of corporate mental states. This analysis further demonstrates, I consider, the practical utility of the approach and its capacity to respond in a nuanced and principled way to the spectrum of doctrinal state-of-mind formulations that appear across common law, equity and statute. Chapter 12 demonstrates that this utility extends to automated and algorithmic contexts. While I have, throughout, focused on the role of Systems Intentionality as a liability mechanism, there seems no reason, in principle, why similar analytical and evidential methods cannot apply successfully to address corporate mental states wherever they arise: as elements of corporate plaintiff claims (such as for the recovery of mistaken payments), in defensive and remedial contexts, or as part of ex ante regulation.

[110] cf *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421 [62], characterising misconduct as not honest, rather than dishonest.
[111] *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 [80] (Bromwich J) (emphasis added).