Submission to Parliamentary Joint Committee on Corporations and Financial Services
Ethics and Professional Accountability Inquiry

Professor Elise Bant
The University of Western Australia

30 August 2023

I welcome the opportunity to make a submission to the PJCCFS Inquiry into Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry (the Inquiry). This submission has a particular (though not sole) focus on the **third term of reference**, relating to accountability mechanisms to monitor and sanction misconduct and poor performance on the part of professional services firms.

In the following, I draw upon research undertaken pursuant to my Australian Research Council Future Fellowship FT190100475. This project aims to examine and model reforms of the laws that currently inhibit corporate responsibility for serious civil misconduct: see further https://www.uwa.edu.au/schools/research/unravelling-corporate-fraud-re-purposing-ancient-doctrines-for-modern-times .

Contents

1. Outline of Submission ... 3
(a) Systems Intentionality and organisational responsibility ... 3
(b) Corporations and Partnerships ... 5
(c) Lessons from Systems Intentionality for the Inquiry ... 6
2. Systems Intentionality explained ... 7
(a) A brief outline of the model ... 7
(b) How to identify 'systems of conduct, policies and practices' ... 9
(i) The focus is on the 'real' systems ... 9
(ii) The types of internal and external evidence ... 10
(c) Systems Intentionality and Organisational Purposes, Values and Choices ... 11
(i) Intention ... 11
(ii) Knowledge ... 11
(iii) Mistake ... 12
(iv) Values and choices ... 12
3. Systems Intentionality applied: two illustrative case studies. ... 13
(a) Fees for no services ... 13
(b) Crown and anti-money laundering ... 15
4. Rehabilitation ... 17

The University of Western Australia
Law School, , Perth WA 6009 Australia
T
E
CRICOS Provider Code 00126G

1. Outline of Submission

(a) Systems Intentionality and organisational responsibility

My novel model of organisational blameworthiness is entitled 'Systems Intentionality'.[1] It posits that corporations manifest their states of mind through the systems of conduct, policies and practices that they adopt and deploy in their daily affairs. The model was discussed extensively, and endorsed, by Commissioner Finkelstein in the report of the Victorian Royal Commission into the Casino Operator and Licence.[2] It has similarly been accepted as shedding important, additional light on issues of corporate responsibility and governance in the Perth Casino Royal Commission[3] and in the Star Casino report.[4] These focussed on whether the relevant corporate entities were 'suitable' persons to hold the casino operating licences and, in that context, were of good repute, having regard to core requirements such as good character, honesty and integrity, and 'candour' in dealings with the gambling regulator and other authorities. In turn, this demanded consideration of how to identify corporate mental states, such as knowledge and intention, as well as more complex ideas of corporate culture, values, dishonesty and unconscionability.

How these questions of organisational character and culpability are to be assessed is a major challenge across all organisational forms and arguably lies at the heart of the Inquiry's work. Clearly, for example, a critical consideration for appointment of any professional services organisation is that they will conduct their work with honesty

[1] Elise Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* 63; Jeannie Marie Paterson, Elise Bant and Henry Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' (2021) 26 *Communications Law* 136; Elise Bant, 'Catching the Corporate Conscience: A New Model of "Systems Intentionality"' [2022] *Lloyds Maritime and Commercial Law Quarterly* 467; Elise Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) 39 *Company & Securities Law Journal* 259; Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' (ch 1), 'Systems Intentionality: Theory and Practice' (ch 9), 'Modelling Corporate States of Mind through Systems Intentionality' (ch 11) and, with Jeannie Marie Paterson 'Automated Mistakes' (ch 12), all in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing 2023); Elise Bant and Rebecca Faugno, 'Corporate Culture and Systems Intentionality: Part of the Regulator's Essential Toolkit' (2023) *Journal of Corporate Law Studies* (forthcoming); E Bant, 'Corporate Evil: A Story of Systems and Silences' in P Crofts, *Evil Corporations* (Routledge, 2024) (forthcoming), E Bant, 'Where's WALL-E: Corporate Fraud in the Digital Age' in H Tijo and PS Davies (eds), *Fraud and Risk in Commercial Law* (Hart Publishing, Oxford 2024) (forthcoming); E Bant, 'Corporate Mistake' in J Gardner et al (eds), *Politics, Policy and Private Law* (Hart Publishing, Oxford 2024) (forthcoming); R Faugno and E Bant, 'Corporate Culture, Conscience and Casinos' in L Campbell (ed) (forthcoming). Forthcoming publications readily available on request.

[2] State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1 (VCCOL Report) 174–8 [87]–[102], 58–9 [19]–[25]. The inquiries a parliamentary inquiry under section 143 of the Casino Control Act 1992 (NSW), undertaken by the Hon. Patricia Bergin, AO, SC (Bergin Inquiry). The report of the Bergin Inquiry (Bergin Report) was provided to the Independent Liquor and Gaming Authority (NSW) on 1 February 2021.

[3] State of Western Australia, *Perth Casino Royal Commission* (Final Report, 4 March 2022) 50–51 [1.61]–[1.64] (PCRC report).

[4] State of New South Wales, Review of The Star Pty Ltd: Inquiry under sections 143 and 143A of the Casino Control Act 1992 (NSW) (Report, 31 August 2022) Chapter 6.3.

and integrity.[5] It is here that my work plausibly takes purchase. Although it has focussed on corporate responsibility, it is founded on moral, and legal, understandings of organisational and group blameworthiness.[6] It therefore has potentially broader applications, as a means of understanding the group 'states of mind' held by organisations or associations of individuals, such as partnerships, including where these groups utilise automated processes to carry out certain group functions.

Another way of putting this is that the model provides an analytical tool that helps to determine the quality of culpability or, conversely, integrity manifested by organisations through their real-life (rather than purely formal, or nominal) structures and processes. It also provides concrete examples of how to identify organisational systems, and the relationship between these and the sorts of mental states that are of interest to the law. This perspective can be helpful as modern organisations are commonly arranged in legally and functionally complex ways, with core and repeated activities split across employees, departments, time, jurisdictions and related entities.[7] The law's individualistic bias means that it generally starts any search for responsibility for harm with natural individuals. But the very complexity of modern organisations means that it can be difficult to locate those on whom responsibility can sensibly rest.

Further, and perhaps more relevantly for this Inquiry, even where individuals are strongly implicated in misconduct, it is often the case that the unethical practices in which they engaged reflected organisational habits and systems. Where an individual is targeted for accountability purposes, this may well leave the malpractice in place. Thus in the corporate context, organisational wrongdoers often blame the 'bad apple' employee, or offer individual scapegoats as the repositories of fault and, therefore, responsibility.[8] Replacing that employee or delinquent officer may seem a quick and easy 'fix' for group misconduct. But where this misconduct arises out of an organisational practice or culture, replacing individuals is unlikely to change group behaviour. Rather, their successors may be expected to conform to

---

[5] A fact recognised by those entities: see, eg, PwC's and KPMG's 'statement of values' that list 'integrity' as the first: https://www.pwc.com/gx/en/about/purpose-and-values.html ; https://kpmg.com/au/en/home/about/values-culture.html .

[6] See, eg, Peter A French, *Collective and Corporate Responsibility* (Columbia University Press, 1984); Christian List and Philip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford University Press, 2011); Chris Chapple, *The Moral Responsibilities of Companies* (Palgrave Macmillan, 2014).

[7] See, for example, PwC's explanation of its global 'network' https://www.pwc.com/gx/en/about/corporate-governance/network-structure.html and sale of its government advisory business to a private equity firm for $1, to be re-born as a corporation called Scyne: see https://www.afr.com/companies/professional-services/scyne-targets-1500-more-pwc-staff-after-nabbing-117-partners-20230823-p5dyuy . The migration of 117 PwC partners to this new company, and over one thousand of its staff, again suggests a close alignment in functional practices between the two forms of organisation, although partner/executive remuneration models undoubtedly differ.

[8] See Bant, Catching the Corporate Conscience (n 1) 492, and Bant and Faugno, Corporate Culture and Systems Intentionality (n 1) for case examples.

the embedded practice or, even where ethically inclined, find the malpractice difficult to change.[9]

(b) Corporations and Partnerships

It might be considered that partnerships are intrinsically more individualistic in nature than corporations, which are broadly (if not uniformly) recognised to be legal persons that are more than the sum of their parts.[10] By contrast, at its most basic,[11] partnership liability is joint and several, and mediated through fiduciary duties owed between individual partners. There is no doubt that, as a matter of law, the core liability mechanisms are different. But as a regulatory and commercial matter, I suspect that these difference are less substantial. As a matter of social fact, [12] partnerships operate and trade as distinctive organisational entities, with their own characters, values and purposes. And I should think that, just as for corporations, communities and governments alike care that these groups get called out for behaviour that appears highly culpable in nature, and are subject to equivalent condemnation and consequences for their misconduct, as would individuals implicated in equivalent wrongdoing.[13] Certainly, one would think that procurement and debarment regimes, licensing bodies and practice boards would and should be interested in the broader group character of a firm that has been implicated in misconduct, particularly where that misconduct appears systemic.

This potential for lessons from corporate contexts to be highly salient to the current Inquiry is perhaps highlighted by the recent appointment of Crown Resorts Chair, Dr Ziggy Switkowski AO, to head the PwC Independent Review into firm culture, governance and accountability.[14] Presumably, it was well-understood that similar challenges to reforming culture and governance are present in both cases, and may be identified and remedied similarly.

---

[9] The difficult and precarious position of whistleblowers stands testament to this: see, eg, reports on KPMG whistleblowers on allegedly dishonest overcharging practices, at https://www.abc.net.au/news/2023-08-07/kpmg-consultants-overcharging-defence-four-corners/102644518 . The critical role of embedded whistleblower protection strategies is accordingly key to ethical organisational self-audit and remediation: see further https://assets.kpmg.com/content/dam/kpmg/au/pdf/2019/kpmg-australia-whistleblowing-policy.pdf
[10] For a valuable discussion of 'real' (holistic or organisational) over nominalist (individualistic) approaches to corporate identity and responsibility see E Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021).
[11] The complexity and opacity of individual firm liability structures will reflect the influence of, for example, contractual, statutory and other influences, including the terms of contracts with (for example) government departments for their services. The extent to which any of this is transparent and, accordingly, subject to public scrutiny is a matter of reported concern: see, eg, https://www.abc.net.au/news/2023-07-17/pwc-ey-kpmg-deloitte-government-10-billion/102602370 .
[12] Steven Lukes, *Durkheim: and Selected Texts on Sociology and its Method* (Macmillan Education 2013) 49–71, discussed in Micheler (n 10) 20.
[13] Penny Crofts, 'Crown Resorts and the Im/moral Corporate Form' in Elise Bant (ed, *The Culpable Corporate Mind* (n 1) 55.
[14] https://www.pwc.com.au/media/2023/pwc-announces-further-actions-230529.html .

(c) Lessons from Systems Intentionality for the Inquiry

This submission accordingly proposes that Systems Intentionality may be illuminating for assessing the nature of organisational culpability associated with recent, reported misconduct in the Australian operations of major accounting, audit and consultancy firms. It does not provide the answers, but rather the tools for getting at (or at least closer to) the truth. This is so notwithstanding that these organisations may often operate through partnership, as opposed to corporate, forms. In such cases, identifying blameworthy, individual partners seems to me to be only part of the story. If the broader organisational systems, policies and practices are geared to promote (for example) profit over integrity, as organisational values, then misconduct is likely to recur or, indeed, become part of the firm's very business model.[15] It follows that it is necessary to understand what kinds of evidence to look for, in investigating the real-life systems, policies and practices of a firm, and what these systems say about the true mind-sets of organisations under review. Parts Two and Three address these issues.

Further, the model of Systems Intentionality suggests what sorts of remedial steps are required in order to reform delinquent firm characters and cultures, the subject of Part Four. At a high level, it suggests at least three major take-aways. The first is that mandated reform of delinquent organisations may be possible and appropriate. However, as the Casino inquiries have amply demonstrated, reform of large and complex organisations is difficult, resource-intensive, takes significant time, and requires independent oversight. The UK experience with the Rolls-Royce Bribery scandal reinforces this view.[16]

The second insight is that even wholesale leadership change may not suffice to reform a strongly delinquent group: as Commissioner Finkelstein stated: 'systemic and sustained change is needed for a culpable corporation to reform its character, as revealed through its systems, policies and processes.'[17] This challenges firm responses that concentrate on leadership renewal, at the expense of more expansive and deep cultural and systemic change.[18]

---

[15] Bant and Faugno, Corporate Culture and Systems Intentionality (n 1), examining *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249 in light of Australia's Corporate Culture provisions and Systems Intentionality.
[16] Ibid.
[17] RCCOL Report (n 2) 178, para 6.101.
[18] See, for example, PwC's emphasis on leadership change: https://www.pwc.com.au/media/2023/pwc-australia-exits-eight-partners-for-professional-or-governance-breaches.html ; https://www.pwc.com.au/media/2023/pwc-australia-appoints-new-ceo-kevin-burrowes-intent-to-divest-government-business-to-allegro-funds.html ; https://www.pwc.com.au/media/2023/open-letter-from-pwc-australia-acting-ceo-kristin-stubbins-230529.html ; https://www.pwc.com.au/media/2023/pwc-announces-further-actions-230529.html . In a difference context, again see the focus on individual responsibility in https://www.reuters.com/business/finance/uk-watchdog-fines-kpmg-24-mln-over-carillion-regenersis-audits-2022-07-25/; cf https://www.ft.com/content/d49d3943-ccaa-4540-a989-b2e3af889b40 dealing with the firm's failings in respect to the Rolls-Royce case, the subject of Bant and Faugno, Corporate Culture and Systems Intentionality (n 1).

The final lesson is that development of ethical 'paper' processes, policies and structures is unlikely to effect the required reform. Rather, the ethical change must be introduced into practice, embedded and (through appropriate audit and remedial mechanisms) maintained. This is no small task but rather requires ongoing commitment (including by key individual leaders and managers) and resources, and must be backed up by real-life consequences in the event of organisational relapse.

2. Systems Intentionality explained

(a) A brief outline of the model

Building on the distinctive Australian concept of 'corporate culture',[19] Systems Intentionality proposes that corporate states of mind are manifested in their systems of conduct, policies and practices. As I have explained elsewhere:

> 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. 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.[20]

The suggestion I make to the Inquiry is that the same model can be usefully applied to other forms of organisation, including partnerships and other firm structures.[21]

The core idea of Systems Intentionality is extremely simple. Natural persons routinely use systems of conduct to guide their decision-making and, hence, conduct.[22] Common examples are recipes, maps and notations. These 'external decision supports' enable a person to achieve their purpose: to make a cake, find a location, or recall how to do something. Thus when I am observed applying a cake recipe, it is simple to understand that I mean (intend) to engage in baking (my intended conduct) in order to make a cake (my intended result of that conduct). Further, some of my knowledge is patent from my successful application of the recipe: I must know what flour is, the process of beating eggs and so on, in order successfully to apply

[19] Criminal Code Act 1995 (Cth) s 12.3: these provide that corporate intention, knowledge or recklessness can be established by proving the existence of a corporate culture that 'directed, encouraged, tolerated or led to' the relevant misconduct (s12.3(2)(c). 'Corporate Culture', in turn, is defined in s 12.3(6) as 'an attitude, policy, rule, course of conduct or practice'. On the theoretical and doctrinal foundations for the model, see Bant, Catching the Corporate Conscience (n 1), among others.
[20] Bant, 'Modelling' (n 1) 245–46. In this way, policies are closely associated with the corporate culture or 'ethos': see Bant and Faugno, Corporate Culture and Systems Intentionality (n 1).
[21] I applied the same model to government culpability in relation to the Robodebt scheme: see my submissions, published at https://robodebt.royalcommission.gov.au/submission/published-submissions and on my website.
[22] M Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 *North Carolina Law Review* 893.

the recipe-system of conduct. No mind-reading is required: we can objectively assess and understand my state of mind from the system of conduct that I deploy.

Similarly, corporations, or partnerships, utilise systems of conduct to enable them to achieve their organisational purposes. This is necessary not least because the groups lack a naturally occurring mind, and the humans through which they act are prone to die, retire, be terminated, go on sick leave, get promoted and, in some cases, are replaced by other corporate or group actors. In order to promote predictability and some measure of efficiency in group activities, some decision-making system is required. Beyond core board structures, this is most patent in 'standard operating procedures' which openly seek to curtail and pre-determine individual discretion in carrying out some core task. In every case, however, the objective features of the organisation's systems manifest (in the dual senses of reveal and instantiate) its purposes in so acting.

Nor does the picture change if certain steps are automated: returning to my cake example, the fact that I use a food processor for one stage in my recipe makes no difference to the ability to assess my state of mind from the system of conduct that I deploy. So too it is with corporations. And so too it is, I think, for other organisations, such as partnerships. Partners both adopt practices in their own, individual work within the partnership, and deploy practices and procedures for those carrying out their purposes more expansively. The more complex the task, the more likely it is that it will comprise a range of systems, policies and processes, that operate in a coordinated way to achieve the desired result.

These systems of conduct typically involve both proactive and reactive,[23] positive and omitted, elements. Primary (and seemingly positive) systems (for example, an automated fee deduction, or debt recovery, system) themselves necessarily entail the adoption of certain steps *and omissions of others*. It is the coordinated *set* of processes, taken as a whole, framed holistically as a system of conduct at a certain level of generality, which constitute intended conduct.[24] It is, therefore, arguably misleading to frame organisational systems in terms of positive conduct that has, separately, been affected by unintended or careless omissions or deficiencies. Rather, omitted processes may legitimately be understood as part of a system's overall, or broader, design. This is particularly the case when it comes to omitted audit and remedial mechanisms for systems of conduct that are objectively designed to be deployed repeatedly, over an extended period. This integrated perspective may assist in shedding considerable light on the culpability expressed through group processes, assessed at a higher level of generality.

Finally, just as for natural persons, the analysis leaves room for conflicting mindsets and values within the one organisation. I may be a diligent and trustworthy member of my school parent committee while cheating on my taxes: so too corporations or partnerships may manifest honest and law-abiding traits in one activity or section,

---

[23] B Fisse, 'Reactive Corporate Fault' in Bant, The Culpable Corporate Mind (n 1) 137.

[24] On the necessity to choose a greater or lesser level of generality to obtain the correct 'angle of focus' in identifying and assessing a system of conduct, see Bant, 'Systems Intentionality: Theory and Practice' (n 1) and for the implications of remedial processes, see below Part 2(b)and (c) and 3.

and dishonest and predatory mindsets in another, a point expressly recognised in Australia's 'corporate culture' definition, on which the model builds.[25] The question for liability purposes concerns the mindset with which the relevant act occurred through the particular system of conduct: broader issues of character may properly go to (for example) mitigation or prospects of rehabilitation.

(b) How to identify 'systems of conduct, policies and practices'

(i) The focus is on the 'real' systems

I have elsewhere described in detail how to identify, and prove, systems of conduct, policies and practices.[26] The critical point is that we are looking for the real-life, instantiated systems, not the purely formal, paper-based, glossy website versions. Most sophisticated firms have values statements, policies and employee processes that have been poured over by lawyers with compliance and marketing alike in mind. All too frequently, these bear little resemblance to the actual practices of the firm. A good example, again from the Victorian Casino Royal Commission, was Crown's 'responsible gambling policies'. In the words of Commissioner Finkelstein:

> Crown Melbourne had for years held itself out as having a world's best approach to problem gambling. Nothing can be further from the truth.[27]

To the contrary (and in line with the analysis prompted by Systems Intentionality), a number of its longstanding marketing schemes were objectively designed to draw visitors, often from comparatively vulnerable and culturally and linguistically diverse groups, into the casino, with the expectation that a significant proportion of these would progress from bingo to other forms of gambling, including pokies. The risks of harm were patent and, indeed, inevitable given the key elements of the programme, as implemented. Thus the Red Carpet program appeared targeted at older members of community (including CALD) groups, who were bussed to the Melbourne Casino. Participants were offered a range of incentives (such as free buffet lunch) to sign up for the scheme. In order for their community organisation to qualify for a Crown subsidy for these activities, the visitors were required to stay for four to six hours. Predictably, a number of these visitors went on to gamble extensively, including through pokies or 'electronic gaming machines' during the remainder of visits, and suffered gambling harms. One independent (non-Crown) study found that 42 per cent of participants spent more than they had planned gambling at the casino and almost a quarter planned to return to win back their losses. Some participants reported overspending so that they could not purchase medications. The Commission did not report any Crown audit or review of this program, to determine its fit with its formal responsible gambling policies. The program was eventually stopped in 2021, some two decades after its inception and in the face of the casino inquiries.[28]

---

[25] Criminal Code Act 1995 (Cth) s 12.3(6).
[26] Bant, Systems Intentionality: Theory and Practice (n 1).
[27] RCCOL (n 2) 3 [12].
[28] The scheme is discussed at length at ibid, Chapter 8 [257]-[262]. See also [263]-[268] regarding the Bingo program, which required sign-up to a loyalty program, in return for which bingo gambling was free and participants received vouchers for game tables and pokies. See also [270].

Through the lens of Systems Intentionality, the objective design of the system, apparent lack of any oversight or research by Crown into the impacts of the system on participants, and failure to react over an extended period, suggest a mindset far from the prudent and responsible corporate citizen represented through its formal responsible gambling policies. To the contrary, as Parts 2(c) and 3 explain, Systems Intentionality suggests that Crown may have taken knowing advantage of a vulnerable class for profit. This longstanding and rank divergence between the formal policy and the reality of Crown's practices may also be indicative of organisational dishonesty. Both possibilities may be highly relevant for regulatory purposes.

(ii) The types of internal and external evidence

How, then, is to one identify and assess the 'true' organisational policies, as opposed to the purely formal (and lawyer-proofed) ones?

Some evidence will be internal to the organisation: employee testimony as to their roles (underscoring the need for whistleblower protections, and seeing employees as more than just potential scapegoats for organisational harms); internal 'scripts' provided to employees to guide interactions with customers or clients; content of internal training as delivered, eg powerpoints, handouts, summaries; criteria for employee rewards and promotion; complaints processes and scripts; fee, payment and refund terms and conditions and so on.

Some evidence will be external to the organisation: patterns of harm that suggest the existence of a system of conduct; shared characteristics of persons who suffer this harm; evidence from clients or customers exposed to the system, including their experience of complaint procedures, incentives given to clients to engage in (and disincentives to disengage from) the system; copies of email and webt 'chat' exchanges; payment records and invoices received by a customer and so on.

Sometimes, key, positive features of a system will be obvious and part of the explicit marketing materials of a firm, as in the Red Carpet marketing strategy. In other cases, as in the 'fees for no services' scandal discussed below, the shape of the system quickly emerges from customer complaints. Often, however, it will be more difficult to determine reactive features of a system – in particular, the *omission* of audit and remedial processes. Again, client evidence of responses to complaints will be useful here. But often this aspect will require interrogation of the organisation, which cannot always be expected to be candid about its systems choices. Here, Systems Intentionality suggests that an organisation that cannot point to clear, embedded processes for identifying and remediating obvious risks of harm from the positive elements of a system has chosen to omit those processes.

This brief summary suggests the importance of having some independent, and well-resourced regulatory or oversight body, which may provide means for this evidence to emerge, enabling closer scrutiny, inquiry and, potentially, action. How this scrutiny can be achieved when professional consulting contracts and arrangements are

frequently subject to confidentiality and other transparency challenges is a serious issue, and hopefully one to which this Inquiry will bring its attention.[29]

(c) Systems Intentionality and Organisational Purposes, Values and Choices

Once a system of conduct is identified, it becomes possible to assess the organisational state of mind that it reveals and instantiates.

(i) Intention

Here, the starting point is that systems of conduct are inherently purposive. Everyday language gives this sense: systems are 'plans', 'strategies', or 'methods' of proceeding to some end.[30] Absent proof of relevant mistake or similar (to which I return below), neither a natural person, nor a corporation, nor a partnership, can sleep-walk a system of conduct.[31] The starting point for any 'state of mind' analysis of some organisational practice, therefore, is that the organisation intended to engage in that conduct.

(ii) Knowledge

Further, on this account, the starting point for any inquiry into knowledge is that organisations know the nature of the conduct in which they are engaged through their systems. Recall the cake example: I cannot successfully implement the recipe-system without knowing the ingredients and understanding the processes involved. So too a firm should be taken to know the core features of its practices, patent on their face, and essential to their successful operation.

This analysis of organisational knowledge, implicit in (or patent on the face of) its de facto systems of conduct, places very significant pressure on narratives that seek to characterise the organisation as 'ignorant' (and therefore innocent) of its own conduct. So too it provides a helpful basis on which to probe, sceptically, individual protestations that the natural persons (including partners) associated with deploying a harmful system of conduct did not understand or intend it. It may be that natural persons that signed off on, or performed a harmful practice, for example, regarded it personally as regrettable or even undesirable. However, that is quite different from saying that the practice was not intended in its terms, or that they did not intend,

---

[29] See also n 11. Failure to prevent offences are attractive for this reason, placing the burden on the corporation (by way of defence to the commission of the offence) to show how it had appropriate systems, policies and practices in place to prevent the misconduct by its associates: for a discussion of the strengths and weaknesses of this approach, see Bant and Faugno, Corporate Culture and Systems Intentionality (n 1), available on request and J Clough, ''Failure to Prevent Offences': The Solution to Transnational Corporate Criminal Liability?' in Bant, The Culpable Corporate Mind (n 1) 395 and L Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 *Law and Financial Markets Review* 57.

[30] See, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [72]–[73] (Reeves J); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208 [389]-[391] (Beach J).

[31] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 157: fees taken were 'part of an established system and were not matters of accident'.

through their actions, to implement the practice to achieve the organisational purposes.[32]

(iii) Mistake

So too, this analysis places pressure on allegations that some harm resulting from a system of conduct was a mistake.[33] Of course, it is possible for an organisation's intentions to be vitiated through a genuine 'systems error', for example where an employee presses a wrong button, initiating a system of conduct. Or a human coder may make an error in transcribing a proposed system of conduct into code.[34] However, once a system of conduct is adopted and deployed, the analytical starting point is that the conduct is intended. The evidential onus then lies on the party deploying the system to substantiate any allegation of mistake or accident (for example, through an employee witness admitting to accidental deployment of the system, or admitting to a coding error). As systems of conduct generally involve repeated behaviours, any allegation of error also needs to be tested against the organisation's reaction to its repeated behaviours and, importantly, the outcomes from its system.

To return to my cake analogy, suppose that even though, formally, my recipe is one for cakes, I produce pancakes. I may claim I was mistaken in producing pancakes: there was an error in deploying the system-recipe. While this might seem plausible at first, the credibility of this claim radically reduces as the system is rolled out over time and its effects become clear. After I have produced pancakes on multiple occasions, and certainly once I have served them up to customers for profit, the conclusion becomes irresistible that this is what was intended. Although I was purporting to use a cake recipe, in fact I was intending to make pancakes.

So too with firm malpractices: Systems Intentionality suggests that their deployment over time stands important testament to the firm's ongoing intentions, which must be assessed in light of that longevity.

(iv) Values and choices

In sum, objective assessment of the elements and design of a firm's systems, policies and processes will reveal the organisational purposes and understandings. These will also manifest the corporate values and choices that inform the 'choice architecture' of the system. Organisational values and choices often become most apparent at key ethical pressure points in a system's design, for example, where a desired result can be achieved in different ways that raise different risks of direct or ancillary harm. Choice of one avenue over another reveals the corporate values and preferences. For example, in the 'Red Carpet' example given earlier, the length of time of participants' stay at the Casino on which community groups' subsidies depended spoke loudly of the corporate intention, namely to encourage prolonged gambling activity, and valuing profit over responsible gambling (or harm minimisation). Similarly,

[32] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 [97] (Edelman J); Bant, 'Modelling' (n 1): one can intend a consequence while thinking it undesirable or regrettable.
[33] For detailed discussion, see Bant, Corporate Mistake' (n 1), available on request.
[34] *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* [2022] FCA 1115 [47] (Moshinsky J), discussed below in Part 3(a).

the 'default settings' of systems (the systems settings that apply in the absence of some further, ad hoc intervention) loudly declare corporate decisions to preference one value over another. Thus, I have previously explained with others how Google's location-tracking default settings have at times preferenced profit over privacy considerations, and (on this model of analysis) knowingly so.[35] Similarly, omission of audit and remedial procedures for systems, policies and practices that are expected to deploy repeatedly and over an extended period of time itself reflects an organisational choice. Where the risk of unremediated harm is obvious and significant, omissions or passivity in design take on a powerful normative significance. These points are well-illustrated in the following case examples.

3. Systems Intentionality applied: two illustrative case studies.

(a) Fees for no services

The 'fees for no services' scandals the subject of extended consideration in the FSRC, provide a clear example of the value to be obtained from a Systems Intentionality analysis.[36] As is well-known, many such cases involved Bank automated fee deduction systems, which unlawfully took money from deceased customers' accounts for life insurance. On a traditional, individualistic approach to corporate responsibility, automated systems pose a particular challenge. It is difficult and sometimes impossible to identify individual employees who sensibly can be held responsible for harms caused by automated activities. And in the 'fees for no services' scenarios, Banking executives denied any subjective understanding of the systems, characterising resultant harms in terms of incompetent 'administrative errors', rather than knowing or intended conduct. Without more, this presented a serious challenge to rigorous legal characterisation of this longstanding and seemingly egregious misconduct, reducing it all to hopeless incompetence.

From a Systems Intentionality perspective, another view becomes possible. A range of corporate knowledge is patent on the face of even the most basic elements of such systems. Most obviously, (1) any 'takings' from customer accounts must be authorised; and (2) being humans, the customers' circumstances might change, affecting existing authorisation. On (2), the key circumstance of which Banks were necessarily aware is that the customers may die – that is why, after all, they have life insurance. Systems Intentionality contends, therefore, that the starting point for any inquiry into Banks' knowledge for the purposes of assessing culpability (and therefore liability) is that the Banks know these basic features of their life insurance fee deduction systems.

Taking a broader and integrated perspective, which encompasses audit and remedial functions, further insights emerge. Here, it is open to characterise Banks as having deployed 'set and forget' systems, the default settings for which manifested the corporate purpose to 'keep taking fees until manual intervention'. However, in

---

[35] Paterson, Bant and Cooney (n 1).
[36] See Bant, Culpable Corporate Minds (n 1), Bant, Catching the Corporate Conscience (n 1) and https://pursuit.unimelb.edu.au/articles/charging-dead-clients-is-dishonest-really-who-knew

that context, the *omission* of any functioning manual audit or oversight systems becomes highly significant: it meant that there was no means to correct the (inevitable) consequence that, given clients would (inevitably) die, the authorised fees would (inevitably) degenerate into unlawful takings. This is, of course, precisely what occurred. This broader angle of focus to capture audit and remedial systems is entirely appropriate, given that the systems were designed to roll out over a long period of time, with respect to many customers, to the substantial benefit of the corporations.

Finally, the burden lies on the deploying organisation to substantiate any allegation of 'mistake' on its part in deploying and reaping the benefits of its intended conduct. In one case, involving penalty proceedings for contraventions arising from automated fee deductions for other forms of financial service, Moshinsky J of the Federal Court accepted a director's evidence that a human coding error had caused the unlawful takings.[37] However, his Honour expressed concern about the paucity of evidence on how the error arose.[38] Systems Intentionality explains why further explanation was appropriate and, indeed, necessary to justify the allegation of corporate mistake. Default settings of an automated system manifest corporate choices and an individual coder is unlikely accidentally or randomly to exercise that kind of substantive discretion, at a critical functional juncture, on behalf of the corporation, unaided by direction or guidance.[39] In any event, as the judge further observed, any human mistake did not explain why there were no audit or remedial systems in place to identify and address the error as the system played out in practice.[40] Here, as we have seen, Systems Intentionality sees the omission of processes patently required for an ethical and lawful system as manifesting corporate choice and intended conduct. Again, and at the least, the corporation manifested a culpable indifference to the real risk of harms arising from its unmonitored, automated system.

Seen from this more holistic perspective, it is open to conclude that where an organisation deploys positive elements of a system that are objectively apt, or indeed guaranteed, to produce a harmful outcome, and omits audit or remedial processes, this omission can be understood as a matter of corporate choice. Consistently, authorities concerned with the statutory unconscionable 'systems of conduct' provisions suggest that such systems may manifest recklessness or 'callously

---

[37] *ASIC v AMP* [2022] FCA 1115 (n 34) [47] (Moshinsky J). This analysis is taken from Bant, Where's WALL-E (n 1).
[38] ibid [52]–[53].
[39] See K Low and E Mik, 'Lost in Translation: Unilateral Mistakes in Automated Contracts' (2020) 136 *Law Quarterly Review* 563, 567-568, distinguishing between the coder's technical task of writing the program and the client's commercial judgment in setting the transactional parameters; see also As S McConnell, *Code Complete* (2nd ed, Washington, Microsoft Press, 2004) 112-13 on the 'myth of stable requirements', when reality requires recurrent consultation with clients to achieve their ends as systems evolve: see also at 217.
[40] *ASIC v AMP* [2022] FCA 1115 (n 34) [54] (Moshinsky J). McConnell, ibid, Chapters 22 and 23 makes clear the critical and unavoidable need for testing and debugging with even the most carefully conceived automated system.

indifference'[41] from the outset as to the results, in that it evinces a choice not to care about the inevitable harm that will result. The same conclusion may be open where an adopted system repeatedly results in harms, brought to the attention of the organisation, yet no steps are taken to investigate and correct the deployed system.[42] Further, in some cases, it will be open to conclude that the harmful outcome is intended (in the sense of chosen, rather than desired), so that the system manifests a predatory mindset.

All of this provides an analytical toolkit to examine firm misconduct, to determine the manifested degree of organisational culpability. Suppose, for example, there are practices within a partnership that routinely permit undisclosed conflicts of interest in the pursuit of fees. These practices manifests group choices, knowledge, values and intentions, in the absence of proof of some plausible mistake.

(b) Crown and anti-money laundering

The second example arises from the Crown Casino inquiries.[43] These found that Crown actively facilitated money laundering through its Riverbank and Southbank accounts, likely worth hundreds of millions of dollars, over many years.[44] Notwithstanding, the initial Bergin Report concluded that Crown was not knowingly or intentionally involved.[45] Commissioner Bergin found that Cage staff at Crown carried out an 'aggregation process' of combining individually suspicious transactions occurring through Riverbank and Southbank accounts, when entering details of the deposits into the SYCO electronic customer relationship management system.[46] Even assuming (as may likely have been the case) that these staff were individually quite honest, the practice of aggregation significantly and inevitably undermined other Crown employees' (the Anti Money-Laundering Team, or AML Team's) capacity to do their jobs of spotting money laundering activity. This is because the AML Team was, as a practical matter,[47] largely reliant on the SYCO entries accurately indicating the separate deposits, to identify signs of money laundering activity.[48] Focusing on the knowledge of those AML team members, Commissioner Bergin concluded that the Crown team (and thus Crown) were not turning a 'blind eye' to money laundering activity: '[t]hey were not looking away. It

[41] Cf *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq)* (No 4) [2018] FCA 1408 [751] (Gleeson J) and *ACCC v Australian Institute of Professional Education Pty Ltd (in liq)* (No 3) [2019] FCA 1982[80]–[84] (Bromwich J), examined in Bant and Paterson 'Systems of Misconduct' (n 1) 88–90. The Red Carpet program appears to reflect this sort of mindset.
[42] Bant and Paterson, ibid.
[43] Bergin Report (n 2); RCCOL Report (n 2); PCRC Final Report (n 3). This analysis repeats Bant, Reforming the Laws of Corporate Attribution (n 1) 274-275.
[44] Bergin Report (n 2) 232 [3.2.153], 543–4 [4.5.9], 544 [4.5.12]; RCCOL (n 2) 172–174 [6.70]–[6.86], PCRC Final Report (n 3) 438 [8.43]–[8.49] [8.150]–[8.157].
[45] Bergin Report (n 2) 234 [3.2.169]–[3.2.170]. The PCRC Final Report simply notes Crown's concession that it 'inadvertently' facilitated money laundering: (n 3) 450 [8.150]. The analysis then focuses on 'deficiencies' in the systems and individual managerial 'failures'.
[46] Bergin Report (n 2) 209 [3.2.28]–[3.2.33], 234 [3.2.168].
[47] Cf PCRC Final Report (n 3) 462 [8.231]; Brown (n 112) [133], [137], [163] and testimony on 28 September 2021, PCRC transcript, pp 4641-4642, 4707-4712; Vasula Kessell, Amended Witness Statement, *Perth Casino Royal Commission* (1 October 2021) [59a].
[48] Bergin Report (n 2) 218 [3.2.75], 234 [3.2.168].

was just that they could not see.'[49] And (unsurprisingly) the Casino Board was entirely ignorance of this misconduct on its watch. The end result was that Crown's misconduct fell towards the hopelessly incompetent, rather than actively dishonest, end of the spectrum of culpability.

Adopting my model of Systems Intentionality, the Victorian Royal Commission considered another view to be open from these same facts.[50]

First, the Cage aggregation and related reporting practices arguably were 'systems of conduct' adopted and implemented by Crown.[51] On that basis, any claim by Crown of accident (or that the actions were unauthorised conduct by rogue employees) would have to explain how these accidents were replicated over very long periods, as individual employees were replaced by new employees *trained in carrying out the requisite aggregation process*.

Second, a striking aspect of the system's architecture was that the data entry and AML systems were set up, maintained and operated independently of one another. This was so notwithstanding that the Cage data entry task was critical to the effective functioning of the AML system. Further, there were no, or no effective, audits or checks carried out of the deposit data entry (including aggregation) process.[52] Cage staff were not trained, or trained adequately, to look for suspect deposit patterns, nor the importance of reporting these separately for AML purposes.[53] These failures continued despite repeated warnings and 'red flags' raised by third party banks with Crown about the aggregation process, and notwithstanding Crown's decades of experience and touted expertise as a casino operator.

Applying the model of systems intentionality, Crown's adopted and implemented data entry and AML systems were necessarily purposive, in the sense that Crown intended generally to act through those systems of conduct. Further, on this model, Crown would be taken to know the patent features of those systems, and that, unless something changed, these were guaranteed to fail to detect money laundering activities. It is, accordingly, analytically significant that the conduct was maintained over a very long period of time, without any, or any effective, audit or attempts to connect (and hence correct) the two systems. Conversely, the very conduct that the systems (seen together) were formally designed to guard against, was, as a matter of practice, actively facilitated.

Again, where corporate systems that are inherently guaranteed to cause harm (for example, by facilitating criminal behaviour) are adopted and set in train, over a very long period of time, without mechanism for review or adjustment, it becomes possible to see the corporation as knowingly facilitating that risk through its intended (not

---

[49] ibid 234 [3.2.169].
[50] RCCOL Report (n 2) 174–8 [87]–[102], 58–9 [19–25]; PCRC Final Report (n 3) 50–51 [1.61]–[1.64]; Bant, Culpable Corporate Minds (n 1) 385–7; Bant and Paterson, Systems of Misconduct (n 1) 85–91.
[51] RCCOL Report (n 2) 83 [3.115], 90 [3.165].
[52] See also PCRC Final Report (n 3) 455 [8.185].
[53] Ibid, 457–459 [8.194]–[8.210].

accidental) conduct. On this characterisation, a corporation's conduct may be open to being construed not only as reckless, but as dishonest.

4. Rehabilitation

In the face of systemic wrongdoing, what can be done? Typical responses include 'board and management renewal', sometimes referred to colloquially as 'heads on sticks'. But as explained previously, this is unlikely of itself to yield change, or lasting change to delinquent group behaviour. Rather, rehabilitation of culpable corporations, partnerships or sub-groups within these requires overhaul of the systems, policies and practices that contributed the misconduct. This means that they must be re-developed along ethical and lawful parameters, tested, embedded and deployed, then subject to rigorous audit and remedial mechanisms.

Further, all these steps comprise each 'system of conduct': it is not plausible (for example) to deploy an unsupervised system responsibly. Audit and adjustment must be factored in from the start, as must testing. This is most obvious in the case of automated and algorithmic systems[54] but is arguably more generally applicable. Systems of conduct usually are designed to roll out repeatedly over time and this, inevitably, means that aspects of the system may become unfit for purpose, unethical or unlawful. A decision to deploy a system without having in place appropriate means to audit and remediate it for flaws is (in my view) itself a culpable organisational choice. How culpable depends on a range of factors, including the likelihood and seriousness of resultant harm. There are many examples from repeated 'stolen wages' scandals, where automated salary payment systems underpaid workers over years. Management pleas that the problem was due to 'legacy' software, or external changes in wage laws that post-dated its deployment, merely underscore the point that the choice to deploy an unsupervised and automated system of conduct is just that: a choice. If the corporation cannot afford to maintain ethical automated systems then a reversion to more rigorous, manual methods is necessary, themselves of course requiring appropriate training, checking and audit mechanisms.[55]

The Crown Casino Royal Commissions contain a wealth of readily-accessible material on how corporate characters may be reformed, to instil ethical and lawful cultures that promote development and maintenance of good systems, policies and practices. Rebecca Faugno (UWA Law School) and I have developed detailed analyses of these, which we will be pleased to provide to the Inquiry, should they be of interest.[56] At a high level of generality, however, required corporate values or attributes include honesty, integrity, and 'candour' or transparency with relevant

---

[54] McConnell (n 39) on the critical need for testing and de-bugging, prior to and after deployment of any system.
[55] See, eg, the thoughtful discussion in, https://www.smh.com.au/business/workplace/wage-theft-when-chief-people-officers-forget-workers-and-their-rights-20230601-p5dd2l.html
[56] Faugno and Bant, Corporate Culture, Conscience and Casinos (n 1). We have also considered the recent Rolls-Royce bribery scandal and associated regulatory action as a powerful case study: its findings echo and reinforce the lessons from the Crown Casino inquiries: see Bant and Faugno, Corporate Culture and Systems Intentionality (n 1).

regulatory and government authorities and the public. These can be instilled into delinquent organisations through a careful process of rehabilitation, which includes:

- Analysis of the root cause(s) of the misconduct, in particular the 'system of influences' that bring about misconduct,[57] including the contributing organisational 'structures values and practices';[58]
- Development of a reform plan to the organisation's systems, policies and practices to bring them into alignment with the core values;
- The reform plan must include rigorous testing and assessment/audit mechanisms that can assess whether the planned changes will, and will continue, to work;
- These systemic reforms must be embedded into the organisation's daily activities;
- Development of ethical and compliant practices in leaders and managers, that align with, and will reinforce, the reformed systems, policies and practices;
- Development of ethical and lawful individual employee practices, so that their contributions to organisational practices align with and reinforce the reformed systems, policies and practices;
- Independent oversight, or a means for independent oversight, of the reform process;
- A realistic time-frame during which a delinquent organisation may be considered on probation; and
- Ongoing and significant commitment of organisation resources to the reform task.

The last two cannot be overstated. Real organisational change takes time, and the more widespread and complex the toxic organisational culture(s) the longer, more difficult and expensive it becomes. In that context, the need for ongoing and independent oversight becomes obvious, lest the delinquent organisation return to type, once out of the spotlight of media and regulator/client attention. This seems a critical part of the Inquiry's work. I would simply add here that, from the perspective of Systems Intentionality, having appropriate (and appropriately resourced) oversight mechanisms for the delivery of publicly-funded services, for government ends, itself manifests a commitment to certain public values. Conversely, having no, or no adequate oversight mechanisms also manifests choice and preference of other values.

Finally, it is often asserted that good corporate culture cannot be mandated. This is a big topic that would require another separate submission to address. However, suffice to say that courts already order compliance and culture training, and reform of identified delinquent processes, as part of civil penalty orders.[59] Once conceived in systems terms, it is not difficult to see how these sorts of orders might be more

[57] VCCOL Report (n 2), ch 5 [33].
[58] ibid, ch 4 [80] – [83].
[59] See, eg, *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69 [256]-[262] (Lee J).

regularly made and expanded, including in the forms of licensing and probation/agreed penalty conditions. How such orders can be 'supervised' is another big question but, again, the casino inquiries suggest it would not be impossible to devise appropriate mechanisms.

I hope these submissions are helpful in informing the Committee's Inquiry, and welcome any questions or discussion that may render them of more assistance.

Elise Bant
30 August 2023

The University of Western Australia
Law School, , Perth WA 6009 Australia
T
E
CRICOS Provider Code 00126G