THE UNIVERSITY OF WESTERN AUSTRALIA

Submission to the Perth Crown Royal Commission
14 May 2021

Dr Elise Bant, Professor of Private Law and Commercial Regulation
UWA Law School

This submission builds on joint research with Professor Jeannie Marie Paterson (Melbourne Law School) into the regulation of misleading conduct pursuant to Australia Research Council DP180100932 and DP140100767. It also seeks to outline and explain the implications of research under my ARC Future Fellowship FT190100475, which aims to examine and model reforms of the laws that currently inhibit corporate responsibility for serious civil misconduct, including the laws concerning corporate attribution. The details of that research are contained in E Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* (forthcoming) and Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* (forthcoming), copies of which have been provided separately to the Commission.

The submission seeks to draw out the most significant insights of that research for the purposes of the Commission's inquiry. In particular, it aims to sketch the powerful lens offered by the concept of 'systems intentionality' for considering whether Crown Perth and its associated entities named in the Commission's Terms of Reference (together, 'Crown') are 'suitable' persons to be involved in gaming operations or to hold a gaming licence (the 'suitability criterion'). It is also suggestive of relevant considerations for 'what, if any, changes would be required to render that entity suitable', in the event that the Commission comes to an unfavourable conclusion on the primary question.

1. The relevance of culpable mental states

While a range of criminal and civil forms of misconduct may be relevant in assessing the suitability criterion, it seems uncontentious that conduct that is dishonest, unconscionable or predatory will be of particular concern. This is supported by the criteria outlined in the Terms of Reference, which direct the Commission to have regard to (among other matters) 'the reputation, character, honesty and integrity of the person'. Assessment of the defendant's state of mind is a critical component of the many general law and statutory doctrines that sanction serious commercial misconduct of this kind. Examples from the civil law include the spectrum of common law and equitable fraud, including deceit, fraudulent misrepresentation, injurious falsehood, knowing receipt and assistance, and unconscionability. Under these doctrines, liability is dependent on proof of a high level of defendant culpability, which is in turn dependent on proof of the requisite internal (subjective) mental state. For example, the tort of deceit requires that the defendant has made a misrepresentation knowingly or recklessly, intending to induce reliance on the part of the victim.[1] Unconscionable dealing in equity requires the defendant to have 'taken advantage' of the plaintiff's special disadvantage: here knowledge is key to the enquiry, but courts also reference defendant dishonesty and 'predatory' intentions, amongst other mental states.[2]

[1] *Magill v Magill* (2006) 226 CLR 551.
[2] Compare *Commercial Bank of Australia v Amadio* [1983] HCA 14, (1983) 151 CLR 447, 467 (Mason J: defendant awareness of 'facts that would raise that possibility in the mind of any reasonable person'); *Kakavas v Crown Melbourne Limited* [2013] HCA 25, (2013) 250 CLR 392 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ:

The University of Western Australia
Law School, M253, Perth WA 6009 Australia
T +61 8 6488 2740
E elise.bant@uwa.edu.au
CRICOS Provider Code 00126G

As under the common law, state of mind is invoked directly or indirectly in a number of statutory prohibitions commercial misconduct, particularly those subject to criminal sanction, and accompanying remedial, redress and enforcement powers. An example is s1041G Corporations Act 2001 (Cth), which prohibits conduct that is dishonest and imposes criminal and civil sanctions for contravention. Courts considering claims of statutory unconscionability (as examined in the 'Systems of Misconduct' paper) commonly consider defendant knowledge, dishonesty, a 'predatory' intention, recklessness and deliberateness.[3] Even when a statutory prohibition makes defendants strictly liable, state of mind may play a role in remedial relief, for example, when determining the defendant's scope of liability, or through defensive or mitigating considerations such as honest and reasonable mistake, or apportionment of loss. Perhaps most importantly, as a matter of regulatory practice, the ongoing relevance of culpability is particularly apparent where civil pecuniary penalties are in play. Here, drawing on the 'French factors',[4] courts commonly look for indicia of the defendant's blameworthiness through state of mind criteria, such as the defendant's knowledge, intention, regret or contrition.

From this perspective, it is unsurprising that state of mind enquiries will also be key to much ex ante regulation of commercial conduct – for example, determining whether a party is a 'suitable' to hold a licence (such as gambling, but also financial services licensing obligations such as under s 912A Corporations Act – the obligation to conduct services 'efficiently, honestly and fairly' - , consumer credit licences etc). A blameworthy state of mind suggests a greater degree of culpability and reflects poorly on character. Likewise, misconduct that is deliberate and knowing may be more culpable than misconduct that is accidental or unintended. Similar observations can be made of potentially criminal misconduct. Thus facilitating crime, such as money laundering, is a form of misconduct that rightly casts serious doubt on the character and suitability of a person. But even worse will be facilitating money laundering deliberately, or knowingly.

We may conclude that minds matter in any enquiry into the suitability criterion.

2. Corporate states of mind: the limitations of current attribution rules

It is a notorious fact that corporations like Crown do not have a natural state of mind. As the ALRC report into Corporate Criminal Responsibility concludes, the law's current attribution rules, which are designed to identify the necessarily artificial corporate mindsets, are very poorly equipped to address state of mind inquiries in the modern commercial context.[5] This is particularly the case with large and complex corporate actors such as Crown.

The traditional legal position is that a corporation's 'directing mind and will' is found in its Board of Directors.[6] What the directors know and intend, the company knows and intends. But, as is well-known, modern corporations are often structured to create information 'silos', and to keep relevant

subjective knowledge of disadvantage and, additionally, a 'predatory' state of mind); *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ: defendant knew or ought to have known); and, drawing on the equitable doctrine for the statutory prohibition on unconscionability, *Australian Securities and Investment Commission v Kobelt* [2019] HCA 18, (2019) 368 ALR 1 [59]-[60] (Kiefel CJ and Bell J: dishonesty) [116], [118], [120] (Keane J: predatory).

[3] See, eg *Australian Securities and Investment Commission v Kobelt* [2019] HCA 18, (2019) 368 ALR 1 [59]-[60] (Kiefel CJ and Bell J: dishonesty) [116], [118], [120] (Keane J: predatory); *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56, (2013) 300 ALR 770 (deliberate); *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, (2011) 15 BPR 29, 699 (knowledge).

[4] Developed in *Trade Practices Commission v CSR* [1991] ATPR 41-076 and now authoritative: see eg *ACCC v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761, [11]; *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20, [37] (Keane CJ, Pinn and Gilmour JJ); *ACCC v Woolworths Ltd* [2016] FCA 44.

[5] Australian Law Reform Commission, Parliament of Australia, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) Chapter 6 generally and [6.38].

[6] *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705, 713; *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, 172 (Lord Denning); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170 (Lord Reid).

knowledge below Board level. Knowledge about the corporation's activities will often be dispersed through its lower-level employees (the corporation's 'arms and legs') who carry out its activities.[7] In a complex corporation like Crown, employees number in the thousands. And they may well have no idea of how their individual role contributes to what is, overall, unlawful conduct. They are just doing their job.

This 'diffusion of responsibility' can ensure that a corporation's Board (and, though it, the company itself) remains ignorant of unlawful activities being carried out on its behalf, through its systems and practices. A similar problem arises where a corporation's Board issues formal policies to ban systemic misconduct that, on paper, look appropriate, but which are never implemented on the ground - nor checked by those in charge.

Nor are more modern approaches to corporate culpability, such as the *Meridian* gloss,[8] or statutory developments (eg the ALRC's identified 'TPA model')[9] better equipped to deal with large corporations and 'diffused' responsibility. The *Meridian* approach examines and interprets the relevant rule of responsibility, liability or proscription to be applied to the corporate entity, to identify the specific human actor whose conduct or state of mind counts for the purposes of the attribution enquiry.[10] This approach can have the effect of locating the relevant individual whose state of mind counts for that of the corporation well beyond the Board, amongst lower-level managers or employees. Statutory reforms such as those based on the TPA Model tend to apply expansive combinations of vicarious liability and attribution principles to extend the application of the traditional common law rules.[11] Notwithstanding, these statutory and general law developments generally still require identification of some individual human repository of fault. And concepts or processes of 'aggregation,' which could address the diffusion problem, have been met with considerable judicial caution. How, paraphrasing Edelman J, can a corporation be unconscionable, or fraudulent, (or malicious, dishonest, predatory, knowing, reckless…) when none of its employees individually hold the requisite culpable mindset?[12]

When added to this picture of complexity is the increasing use of automated and algorithmic processes, in which the role of human employees and agents are reduced or, indeed, removed entirely, we can see the scale of the problem posed by the human-centric approach of current corporate attribution rules.

These sorts of attribution hurdles, when combined with the realities of general delegation and complexity, as well as structural strategies such as information silos, make it possible for a corporation responsible for harmful conduct to argue that, because its directors or other relevant agents were unaware of what was going on, the corporation didn't know either.

The implication is that while the corporation's behaviour might have been shameful, its conscience was clean.

---

[7] Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1189; Cristina de Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) *Washington University Global Studies Review* 547, 559–60. See also ALRC *Report into Corporate Criminal Responsibility* [1.19].

[8] Named after *Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] 2 AC 500, see especially at 91 (Lord Hoffmann). *Meridian* has been endorsed in in Australia in *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352, 355 (Callaway JA, with whom Phillips CJ and Tadgell JA agreed), cited with approval in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 445–6 [99] (Edelman J).

[9] *ALRC Report into Corporate Criminal Responsibility*, ch 3, see also 121.

[10] *ASIC v Westpac Banking Corp (No 2)* (2018) 357 ALR 240, [1660] (Beach J).

[11] *TPC v Tubemakers of Australia Ltd* (1983) 47 ALR 791, 737–8 (Toohey J).

[12] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 449 [112] (Edelman J, with whom Allsop J generally agreed at [31], but see also 438 [66] (Allsop P) and [81]–[84] (Besanko J).

3. An example: Crown and money laundering

Returning to the Commission's inquiry, we may have already seen this play out in relation to Crown. One of Commissioner Bergin's most damning findings was that Crown actively facilitated money laundering, likely worth hundreds of millions of dollars, over many years: see [3.2.153], [4.5.9], [4.5.12]. This was done through the accounts of two Crown subsidiaries, WA company Riverbank and its Melbourne counterpart, Southbank. But Commissioner Bergin also concluded that Crown was not knowingly or intentionally involved: at [3.2.169]-[3.2.170]. While this was not enough to prevent the conclusion that Crown was an unsuitable person (see further below), we may observe that the finding that Crown lacked knowledge or intention was clearly considered significant, hence the time and care taken addressing this specific issue.

Commissioner Bergin's conclusion was in part based on her finding (see discussion at [3.2.28]-[3.2.33], [3.2.168]) that 'cage staff' at Crown carried out an 'aggregation process' of individually suspicious transactions occurring through Riverbank and Southbank accounts, when entering details of the deposits into the SYCO electronic customer relationship management system. While she found that there were some inconsistencies in terms of practices, the 'evidence establishes that the cage staff, in the main, aggregated the structuring entries [the suspicious transactions] in the bank statements into a single entry of their sum total into the SYCO database': at [3.2.168]. Individual cage staff were no doubt honest and just doing their job. Nonetheless, this aggregation conduct wholly and unavoidably 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 reliant on the SYCO entries indicating the separate sums entered to identify signs of money laundering activity: see also [3.2.75], [3.2.168]. Focusing on the knowledge of those team members, Commissioner Bergin concluded that the Crown team were not turning a 'blind eye' to money laundering activity: 'They were not looking away. It was just that they could not see.'

Commissioner Bergin further describes how 'red flags and warnings' that money laundering was, or was likely to be occurring through the Riverbank and Southbank accounts were made by ANZ from 2014, and ANZ raised the aggregation process in particular in 2014/2015. Later, concerns about Crown's transaction monitoring processes led to ASB closing Southbank's accounts in 2019. Enquiries by CBA and meetings to discuss Crown's AML controls reiterated these concerns. However, there was no evidence that these concerns, brought repeatedly over many years, were 'elevated' to Crown's risk management committee, or to Board members or directors: see in particular conclusions at [3.2.47], [3.2.48], [3.2.75], [3.2.83]-[3.2.84], [3.2.88]. Had they been, it would have been impossible under traditional attribution rules for Crown to deny actual or 'blind eye' knowledge of money laundering. Conversely, a failure to convey this information protected Crown, under traditional rules, from the greater degree of culpability that would come with knowledge. Similarly, an independent review into the AML program initiated in response to ANZ concerns was hamstrung from outset by the fact that it was not advised of the existence of the Riverbank accounts or ANZ's concerns. So its report (provided to ANZ) did not address those issues: see [3.2.55].

These are all good examples of sustained information silos, in many cases reinforced through structural separations between related Crown activities. In each case, the communication gap or failure protected Crown under traditional attribution rules from knowledge of the inherent tendencies of its processes to facilitate money-laundering. The aggregation process was ultimately and formally acknowledged by Crown, and its impact on the AML Team's capacity to identify money laundering activities, as a result of an internal investigation in late 2020: [3.2.114]-[3.2.116] (while the Bergin Inquiry was underway: see further [4.5.44]-[.4.5.46]).

Similarly, the Bergin Report indicates that key Crown employees and officers repeatedly failed to ask relevant questions, and read relevant documents, relating to the accounts that would have revealed the

problem, and did not identify or report available warning signs further up the chain: see, eg, [3.2.48]-[3.2.50], [3.2.64], [3.2.112]-[3.2.113], [3.2.165], [4.5.44]-[4.5.57]. Commissioner Bergin characterised senior officers' individual failures to review important materials (such as the Riverbank and Southbank accounts) as 'a series of steps and decisions infected by extraordinarily poor judgment': at [3.2.166]. Remarkably, the majority of the Crown Board knew nothing of the Riverbank and Southbank accounts: see [3.2.70]. Consistently, James Packer's evidence was that, even though he was Crown Chairman and, subsequently, Director, at the time, he was kept entirely in the dark. He knew nothing about even the existence of the companies, let alone banks' warnings that the accounts showed signs of money laundering. Commissioner Bergin described the failure to advise Packer of these matters as 'inexplicable': at [3.2.185].

We may accept that some of Crown's individual employees lacked judgement or, indeed, were startlingly incompetent (see, eg, the discussion at [4.5.51]). If we attribute their states of knowledge (or ignorance: see [4.5.36]) to the corporation, either under traditional attribution rules or more generous (but still individual-oriented) approaches under *Meridian* or statutory models, that presents a certain picture of corporate blameworthiness. Given the seriousness of the criminal activity facilitated by these corporate failings, these problems (in particular, the failure of Board members to have 'astute knowledge' of the AML landscape and vigorously strive to counter money launderers, see [4.5.56]) contributed to Crown being considered to be an inappropriate person to hold a gaming licence.

But from another perspective, these 'system errors' and communication failures look like a recurrent pattern of behaviour, potentially indicative of practices designed to reduce or avoid greater responsibility through denying a more culpable corporate state of mind. Commissioner Hayne clearly described and criticised such a form of corporate strategy when considering the 'fees for no services' cases in the Financial Services Royal Commission.[13] I return to that instructive case study below.

4. An undue focus on individuals in assessing the suitability criterion

The Bergin Report emphasises the roles of individuals within Crown. For example, it cites with approval (at [4.2.15]) the Massachusetts Gaming Commission, which asserted that the corporate entity is comprised of individuals and has no independent character or morality. The corporation's responsibility must be measured by the conduct of those who lead it: the directors and senior management. Correspondingly, the Report's focus in Chapter 4, addressing the suitability review, contains detailed analysis of the conduct and character of the leading executives within Crown. It states (at [4.5.5]) that the corporate character of Crown 'is dependent upon the character of those who lead [it]', namely the directors. Following its very severe criticism of a number of these senior officers, many have since left Crown. This turnover (or 'Board renewal') has been cited by Crown in the press as a significant step forward in Crown's rehabilitation.

While this focus accords with the traditional approach to corporate responsibility outlined above, it is unduly restrictive and, arguably, runs counter to the more recent trend of corporate theory and regulation of corporations in Australia. As the ALRC explained in its report on *Corporate Criminal Responsibility*[14] the idea of corporations as simply collections of individuals (a 'nominalist' view) has now long been considered overly simplistic and, one might add, dangerously misleading. It is relatively well-established, for example, that group decision-making is not the sum of its individual parts, individuals within the group being motivated by collective aims and coordinated through group rules of recognition.[15] As the Review Committee of the Singapore Penal Code observed:

[13] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 145-151.
[14] Chapter 4, [4.25]-[4.45].
[15] See, eg, James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 *Legal Studies* 393, 408; Amy MacArthur, 'Kantian Group Agency' (2019) 154 *Journal of Business Ethics* 917, 923; James Gobert and Maurice Punch, *Rethinking*

> Individuals in the company are part of a greater enterprise – their acts both contribute to the corporate effect and are consequences of the corporate effect. As a result, corporate decision making is often the product of organisational policies and collective procedures, not individual decisions.[16]

As the ALRC concluded, the concept of organisational blameworthiness is key to conceptualisation and reform of corporate criminal responsibility in Australia – and also, I would say, to the determination of a corporation as a 'suitable person'. Corporate culpability is not merely to be equated with the character and morals of its leading officers although, of course, they may be important factors. Indeed, a solely nominalist approach is contrary to the requirements of the Criminal Code Part 2.5, which expressly directs courts to consider 'corporate culture' when assessing the mental state of a corporate defendant. While this is a Commonwealth law and of limited application, it was developed following many years of intense debate and has undoubtedly had a profound influence on conceptions of corporate responsibility in this country.[17] I submit that, consistently, what is required on the part of the Commission, is an assessment of Crown as a corporate entity, to assess ***its*** suitability to be involved in gaming activities in Australia.

5. Systems Intentionality: a proposed model

Here, my research into corporate fraud offers a fresh perspective on the culpable corporate mind and, relevantly, Crown's organisational character as revealed through its reported conduct in facilitating money laundering. My research has identified a powerful new model of 'systems intentionality' emerging in Australia, which operates in addition to traditional approaches to corporate responsibility. It builds on existing 'corporate culture' reforms and theories of organisational responsibility to enable courts – and commissioners – to identify specific corporate states of mind (such as knowledge, intention and dishonesty) independently of individual human fault. This model sees the corporate state of mind manifested in its systems, policies and patterns of behaviour. Importantly, this model in many cases turns the familiar excuse of 'systems error' on its head, revealing that systemic deficiencies will often form part of a purposive arrangement, in which information silos (for example) can be understood as part of a broader and effective plan or strategy. That possibility is an important consideration that, I submit, deserves further examination in relation to Crown's conduct and character.

Systems intentionality has a range of complementary sources that explicate and support its features and operation.

- The work of philosopher Peter French and other organisational theorists. This work is extensive and rigorous, and more fully expanded upon in 'Culpable Corporate Minds'. But for present purposes, the kernel of the idea is French's insight that:

  > 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.[18]

Corporate Crime (LexisNexis Butterworths, 2003) 17–8, cited in the *ALRC Report into Corporate Criminal Responsibility*, 33. For a damning assessment of 'group think', see Mats Alvesson and André Spicer, 'A Stupidity-Based Theory of Organizations' (2012) *Journal of Management Studies* 1194.

[16] Penal Code Review Committee, Singapore Government, *Penal Code Review Committee Report* (Report, August 2018) [10], citing Richard Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1982) 2 *Mountbatten Journal of Legal Studies* 31, 40, 54. For the definitive critique of methodological individualism, in the context of corporate crime, see Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993) ch 2.

[17] Justice Robert French, 'The Culture of Compliance - a Judicial Perspective' (FCA) [2003] *Federal Judicial Scholarship* 16: an idea whose 'time had come'. For evidence of its permeation internationally, see Jennifer G Hill 'Legal Personhood and Liability for Flawed Corporate Cultures' (Research Paper No 19/03, Faculty of Law, The University of Sydney, February 2019) <https://ecgi.global/sites/default/files/working_papers/documents/finalhill3.pdf >.

[18] *Collective and Corporate Responsibility* (Columbia University Press, 1984) 44.

- Consistently, the pioneering work of such scholars and reformers led to the introduction of Australia's unique 'corporate culture' provisions (Part 2.5 Criminal Code). Pursuant to these reforms, if intention, knowledge or recklessness must be shown on the part of a corporate defendant, it can be done by proving that **a corporate culture existed within the body corporate that directed, encouraged, tolerated or led** to non-compliance with the relevant provision. Of particular relevance is the definition of ***'corporate culture,'*** defined to mean 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'. This again highlights the importance of corporate policies and systems in understanding (and identifying) the corporate mind. The model of systems intentionality builds on these provisions to operationalise the concept of corporate culture, to show how it can be applied to demonstrate the particular mindsets demanded by legal, equitable and statutory doctrines and rules.
- Diamantis' analysis of the 'extended' corporate mind and AI.[19] Diamantis explains the ramifications of the intuitively powerful insight offered by 'the extended mind thesis' developed by cognitive scientists and philosophers, which is that humans commonly take advantage of external systems (for example, maps, recipes or notes) to facilitate recall and decision-making. The use of these mental extensions does not undermine the fact that the act remains that of the human. He applies this insight to the use of AI to explain how corporations may equally be responsible for acts carried out through AI systems. Taking this idea further, however, we can see that, by adopting and applying these external systems, a human can also reasonably be understood to 'know' how, and 'intend to' get to her destination, make the cake, or remember the recorded information. The use of the system manifests her intention and knowledge. Equally, a corporation must be said to know and intend the systems it generates, or adopts and applies. Indeed, corporations necessarily employ systems to facilitate their coordination and management of disparate and rotating humans and other agents, over time. In some cases (as with automated and algorithmic processes) those humans are entirely replaced by self-executing systems. From the perspective of the 'extended mind' analysis, it is entirely unremarkable to find that corporations manifest their intentionality through the systems they adopt and implement. This further suggests that, far from being a radical extension of corporate responsibility, the proposed model of systems intentionality simply makes explicit for corporations what also holds true for humans: when we draw on external systems to facilitate our decisions and recall, those systems become an extension of our mental state. Indeed, we may conclude that, for corporations, the corporate systems, policies and processes as instantiated are not a mere extension of the corporate mind but where that corporate mind naturally and necessarily resides.
- The final, and critically important, contribution comes from courts addressing statutory unconscionability in the context of exploitative business models and practices. The approach adopted in section 21 ACL (also s12CB(1) ASIC Act, as considered in *ASIC v Kobelt* and other equivalent provisions) provides:

  A person must not, in trade or commerce, in connection with:

  (a) the supply or possible supply of goods or services to a person; or

  (b) the acquisition or possible acquisition of goods or services from a person;

  engage in conduct that is, in all the circumstances, unconscionable.

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

Section 21(4) contains a set of interpretative principles. These include statutory enactment of a principle first articulated by the Full Federal Court in the seminal authority of *Australian Securities Investments Commission v National Exchange Pty Ltd*,[20] that the prohibition on statutory unconscionability **'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'**.

Through a series of important cases analysed in detail in the 'Systems of Misconduct' article, courts have articulated a powerful and rigorous model of corporate unconscionability, using an analysis wholly consistent with the proposed model of system intentionality. Importantly, as indicated above, while this model now finds statutory expression, it is founded in general law principles (and hence is inherently suited to broader application beyond the specific statutory context). On this analysis, a corporation's internal structures, methods and processes articulate systems that are **inherently purposeful in their nature**. By contrast, **patterns signify externally observable repeated behaviours from which systems (and hence systems intentionality) may be inferred**. The two are closely related, albeit distinct. As Beach J has observed, 'a "system of conduct" could produce a "pattern of behaviour". Relatedly, evidence of a "pattern of behaviour" could enable you to infer a "system of conduct" in some cases.'[21]

Courts' analyses of unconscionable 'systems of conduct and patterns of behaviour' suggest that it is possible to delineate and prove discrete corporate mental states that are independent of individual human knowledge or culpability. Professor Paterson and I have articulated these principles thus:

(1) Where a system is designed so as to produce a kind of conduct, the system manifests general intentionality or deliberateness with respect to that conduct.
(2) Where the system is of a nature or patently likely ('predictable') to produce certain conduct, or that conduct is recurrent, and no positive steps are taken to avoid that result, the system manifests recklessness.
(3) Where the system is designed to produce a *specific* harm to specific victims, this manifests a further, predatory mindset.
(4) The defendant will have knowledge of the key factors necessary for the adopted system to function.

On this approach, a corporation's state of mind is manifested, or revealed, in the systems, policies and processes it applies.

6. Implications for the Commission's Inquiry

These sources suggest that systems intentionality is not a novel or radical concept. But it does provide a different perspective to that offered by traditional attribution principles on key incidents or characteristics on which the suitability criterion can, and arguably should, be adjudged.

Where a corporation's conduct is carried out in accordance with its instantiated (rather than purely formal or authorised) systems, policies or practices, it may be understood as corporate intentional and based on the knowledge required for that system, policy or practice to be adopted and function. The quality of the corporation's behaviour must be assessed against objective community standards of

[20] [2005] FCAFC 226, (2005) 148 FCR 132
[21] *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3)* [2020] FCA 208, (2020) 275 FCR 57 [373], [390].

conduct, such as dishonesty, unconscionability and recklessness, in light of this manifested state of mind.

Returning to the current Inquiry, we have seen that the Bergin Report made clear that cage staff had a practice of aggregating deposits to the Riverbank account, which actively facilitated money laundering. We may accept that these staff were individually honest, but were nonetheless cogs in a corporate process that was inherently apt to break the law. Critical to assessing Crown's state of mind is to understand whether the data aggregation practice was an adopted system and, if so, how and why the data entry system was structurally separated from the necessarily functionally dependent AML system. Whether the establishment of Riverbank as an independent corporate conduit of funds is another, systems-intentional component of what can be understood this broader series of designed, structural separations is another important issue, but which cannot be addressed here.

Here I note that the Bergin Report does not suggest that the data entry (in particular, the aggregation) practices or compliance processes evolved by accident. Although there were some inconsistencies, it concluded that cage staff adopted an aggregated process 'in the main'. Any claim of accident by Crown would have to explain how these accidents were replicated over long periods, as individual employees were replaced by new employees *trained in carrying out the requisite process*. It is open to conclude that this data entry pattern and practice evidenced a system of conduct adopted and maintained by Crown. The AML Team, by contrast, clearly adopted and carried out Crown's system of compliance checks, one predicated upon the (fatally flawed) SYCO database entries.

The next step is to consider how, and why, the data entry and AML systems were set up, maintained and operated independently of one another notwithstanding that the data entry task was critical to the effective functioning of the AML system. The Bergin Report does not identify why the systems were separated in this way. What is clear is that, over many years, there appear to have been no audits or checks carried out of the data entry (including aggregation) process in light of its (again) inherently and obviously, critical role to the effective functioning of the compliance system. This failure continued notwithstanding repeated warnings and 'red flags' raised by third parties banks (ANZ, ASB and CBL) about the aggregation process. Crown was an entity with very significant gaming experience and, indeed, expertise. The systems were of central importance in countering the endemic and notorious risk of criminal money laundering activity. Here, it is open to consider that their ongoing separation need not be understood as a matter of accident or remarkable incompetence on the part of Crown. These were longstanding systems that were, arguably, inherently purposive and necessarily related. In this light, it may and should be asked whether, seen as functionally dependent and critically important compliance systems, their continued separation was intentional.

I note there is a degree of similarity between this sort of structural isolation between functionally dependent systems and those in play in the 'fees for no services' cases, the subject of extended analysis in the Financial Services Royal Commission. In the 'Culpable Corporate Minds' article, I discuss the potential characterisation of the fees for no services systems as intentional, knowing and dishonest (emphasis added, citations omitted):

> Focussing on the inherent features of the payment systems, we saw that, in one scenario, deductions were automatically made for the provision of services pursuant to a system in which no advisor had been allocated to the client. In another, FSPs charged service fees to clients notwithstanding having received notice of their death. In both cases, there was **a failure of the records of the status of clients to be calibrated against the payments deducted from their accounts. In other words, the record systems and payment systems which should have been closely linked were operating in isolation. This cannot be dismissed as mere error or the result of an unfortunate oversight. The systems were designed to remain in place over extended periods** and in respect of human clients whose circumstances would inevitably change (a feature implicit in the very idea of intermittent, renewed financial advice). Here, one starts from the position that the systems as instantiated were intended and were predicated on the knowledge necessary for the system to function (eg details of client accounts,

the necessity for continuing authorisation for deductions, the basis or reasons for the deductions and so on). The question then becomes whether (absent countervailing evidence by the defendant on these issues, for example going to mistake) the conduct was dishonest assessed against objective community standards, viewed in light of that assumed intentionality and knowledge.

Here, it is plausible that the requisite standard of dishonesty is revealed in **the period of time over which the conduct extended, which may indicate a reckless disregard** for the ongoing, lawful basis for the deductions and a blind eye being turned to the need for regular review of the payment system itself. This assessment is supported by French's insights (and consistent with Fisse's concept of reactive corporate fault) of the need for corporate operating systems or processes, whether manual or automated, to be informed by a '**principle of responsive adjustment': the capacity to review and adjust the processes to ensure they are performing in the way that is required and expected**. French regards this principle as an important component or foundation for the corporation as a moral person. 'Simply, to be a moral person is to be both an intentional actor and an entity with the capacity or ability to intentionally modify its behavioural patterns, habits or modus operandi' to respond to revealed harmful behaviours or fault. We may accept that where a corporation has the capacity to review and correct processes that cause harm, repeated contraventions of the law through those processes on this view become intentional in character. However, it is also arguable that, **where an process is introduced that is (objectively) intended to operate over a long period of time, and which necessarily entails repeated acts** (here, deductions from client accounts) **that require ongoing justification, yet omits any appropriate adjustment mechanisms, the corporation is directly responsible for that operation, and may be open to being adjudged dishonest in the failure to ensure appropriate mechanisms or adjustments**. To adopt and maintain a 'set and forget' system of this nature may be regarded as objectively dishonest, particularly where the defendant is a sophisticated commercial entity with considerable experience (indeed, expertise) in this form of activity.

This perspective suggests it may be possible that Crown's conduct through the related data entry (aggregation) and compliance (AML) systems, discloses a comparative and high level of corporate (independently of derivative, individual) culpability on the part of Crown. We have seen that, from the features described in the Bergin Report, it is open to conclude that Crown's adopted and implemented data entry and AML systems (by definition, as systems) were purposive, in the sense that Crown intended generally to act through those systems of conduct. It may be worth here repeating that the longer the cage staff and AML team practices were maintained and repeated, the more difficult it is to deny that they formed part of systems of conduct that display or manifest **general intentionality** on the part of Crown.

Crown must be further taken to **know** what is inherent in those systems: namely that they were critical to guarding against the notorious and ongoing risk of money-laundering and were necessarily inter-dependent.

From this purposive perspective, the fact that the data entry process involved aggregation, was structurally separated from the AML system in the way described, with the inevitable consequence that the latter could not function to identify transactions consistent with money laundering activity, is also consistent with general intentionality with respect to, and knowledge on the part of Crown of, that combined conduct.

In terms of the level of corporate culpability manifested by these systems, adjudged against community standards, we can again note that the systems were maintained over a very long period of time, without audit or attempts to connect the two. There were no inherent adjustment mechanisms in either system to address their faults, with the consequence that the very conduct that the systems (seen together) were supposed to avoid were actively facilitated. Warnings and red flags provided spontaneously by expert third parties were repeatedly ignored or not acted upon. This arguably manifests at the least a highly reckless attitude towards money laundering. But, arguably, the Bergin Report's description suggests a level of culpability that goes beyond recklessness. From the perspective of systems

intentionality, we have seen that Crown must be taken to understand the inherent incidents of the systems it adopts and carries out. In this case, the unchecked, intentional and longstanding aggregation process, on which the AML system depended, actively *and necessarily* facilitated money laundering. Seen from an integrated systems perspective, the compliance checks carried out by the AML Team were guaranteed to fail. Where systems that are inherently liable 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 accidental) conduct. This is open to being construed as dishonest conduct.

The conclusion, suggested by a systems intentionality analysis, that Crown may have knowingly (and dishonestly) assisted criminal money laundering activity was rejected by Commissioner Bergin, as described above, in part on the basis of repeated communication failures between individuals and because of the ignorance of key individuals (such as James Packer and other directors) of the existence or nature of the systems. But while individual (or even all) directors or senior managers might have oblivious of the systems in play, that is not the key question for the Royal Commission. The key question is whether *the corporation* is a 'suitable person'. The inquiry cannot and must not stop with its human figureheads. And through the lens of systems intentionality, it is plausible that very high levels of sustained corporate culpability were present. This possibility merits further and rigorous investigation.

7. Conclusion

In conclusion, my submission in the broad is that, throughout this Inquiry, the Commission would benefit strongly from adopting the perspective of systems intentionality, in addition to more traditional approaches to corporate culpability, when assessing the primary issue posed by the suitability criterion. I would also suggest that this perspective is highly relevant when assessing, as stated in the Terms of Reference, 'what, if any, changes would be required to render that entity suitable' in the event that the Commission comes to an unfavourable conclusion on the primary question. Board renewal is not enough. Nor is it enough for senior management to articulate new policies or processes apt to produce lawful conduct unless those systems are enacted on the ground. On the approach advocated in this submission, systemic change must be made, and sustained, in order for a culpable corporation to 'reform' its character, as revealed through its systems, policies and processes. In considering the requisite rehabilitation of Crown's character, the concept of systems intentionality suggests that moral persons (including moral corporate persons) must have in play effective processes to review and adjust systems of conduct that are liable to cause harm or breach the law. In a casino, the risk of money laundering is a critical and endemic problem that requires robust proof of effective audit (including whistleblower protection) mechanisms that are given effect to and, in turn reviewed and adjusted for effectiveness, on an ongoing and active basis. Without robust systems in place designed to produce lawful conduct, and without supporting mechanisms that identify and are responsive to identified problems, the corporation remains an unsuitable person to be involved in gaming operations or to hold a gaming licence.