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Where's WALL-E? Corporate Fraud in the Digital Age

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Laws of corporate attribution are key to establishing the mental elements of corporate fraud at common law, in equity and under statute. Highly individualistic in focus, they search for blameworthy natural persons whose state of mind can be treated as that of the corporation. This 'Where's Wally' approach already fails in the face of complex and diffused organisational structures. As corporations increasingly adopt automated processes to pursue their corporate ends, it threatens to become wholly unfit for purpose. Using a range of topical examples, this paper explains how a new model of 'Systems Intentionality' tackles the reality of corporate fraud in the digital age, providing a principled and practical method for identifying the culpable corporate mind.

1. Introduction

Fraud has always been an unwelcome staple of commerce.[1] It comes in many guises, with a correspondingly varied array of legal and equitable doctrines ranged against it: these include deceit, fraudulent misrepresentation, injurious falsehood, unconscionable dealing and various forms of accessorial liability. These general law doctrines commonly have statutory siblings or close cousins.[2] A shared focus of all doctrines of fraud is on the state of mind with which the wrongful act is committed. Whether the misconduct is required to be deliberate, knowing, predatory, reckless, wilfully ignorant or some other reprehensible state,[3] the defendant's mindset is key.[4] This greater degree of culpability in

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[1] Peter MacDonald Eggers, *Deceit: The Lie of the Law* (Informa Law, London 2009) Chapter 1.

[2] For example, the various Australian prohibitions on misleading or deceptive conduct, unconscionable conduct and dishonest conduct: see, eg *Competition and Consumer Act 2010* (Cth) sch 2 , s18 and ss 20–1, *Corporations Act 2001* (Cth) s 1041G, discussed in 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.

[3] For example, 'malicious' as in malicious falsehood, also known as injurious falsehood: *Palmer Bruyn & Parker Pty Limited v Parsons* (2001) 208 CLR 388.

[4] It is now commonly (though not universally) accepted that normative standards such as dishonesty and unconscionability require assessment of a defendant's conduct against objective community standards, in light of the defendant's actual knowledge and intention: see Bant, The Culpable Corporate Mind (n xxx), 364-368, 379-

turn opens the door to a more generous range of remedies than may apply to lesser forms of wrongdoing[5] and, in the regulatory space, to suitably serious statutory orders such as (in some jurisdictions) civil pecuniary penalties, or fines.[6] These sorts of legal doctrines and rules are, in theory, well adapted to express the law's condemnation of the misconduct, to promote general deterrence alongside specific deterrence of repeated misconduct by the wrongdoer, and (where appropriate and available), to effect retribution on the wrongdoer.[7]

However, the rising dominance of increasingly large and complex corporations in the modern marketplace poses serious challenges to the law's effective regulation of commercial fraud. Most attribution rules, whether common law or statutory, search for a relevant individual whose mind counts for that of the corporation.[8] This game of 'Where's Wally'[9] is easily played by modern corporations seeking to minimise or avoid liability.[10] Most simply, information barriers may prevent bad news from rising to Board or managerial levels, thereby keeping the corporation's directing mind and will (and thus the corporation) safely ignorant of even ingrained wrongful, corporate practices.[11] But corporations may also employ more complex structures and processes that dissipate knowledge and hence responsibility across corporate groups, between departments and individuals.[12] The consequence is that there may be no single individual employee or agent of the defendant company who is aware of the

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38, discussing *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391; *Barton v R* [2020] EWCA Crim 575 and *Peters v R* (1998) 192 CLR 493, amongst others.

[5] On the comparison between deceit and negligence, for example, see *Palmer Bruyn & Parker Pty Limited v Parsons* (2001) 208 CLR 388, 413 [78] (Gummow J); *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA), 167 (Lord Denning MR); *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL), 264–7 (Lord Browne Wilkinson), 283 (Lord Steyn).

[6] Jeannie Marie Paterson and Elise Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law' in Prue Vines and M Scott Donald, (eds) *Statutory Interpretation in Private Law* (Federation Press, 2019) 154.

[7] E Bant and Jeannie Marie Paterson, 'Effecting Deterrence through Proportionate Punishment: An Assessment of General and Statutory Law Principles' in Bant et al (eds), *Punishment and Private Law* (Hart Publishing, Oxford 2021) 255

[8] See generally, Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) (ALRC Final Report) ch 4; Law Commission, *Corporate Criminal Liability* (Options Paper, 10 June 2022) ch 3.

[9] Martin Handford, *Where's Wally* (Walker Books, 1987).

[10] My sincere thanks to George R Skupski, 'The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability' (2011) 62 Case W Rsrv L Rev 263, 288, who discussed the use of the American equivalent 'Where's Waldo' in the Arthur Anderson's obstruction of justice trial, by defence counsel Rusty Hardin.

[11] Striking examples arose in the context of Australia's various, recent casino inquiries: see, eg 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) vol 1, 9 [48], 28 [148], 29 [155]–[156], 256 [271]; Report of the Hon. Patricia Bergin, AO, SC Report of the Inquiry under section 143 of the Casino Control Act 1992 (NSW), dated 1 February 2021 (the Bergin Report) eg, Bergin Report Volume 1 [2.8.10], [2.8.185], [3.2.80], [3.3.281], [3.4.59], [3.4.126] and Volume 2 [4.3.4], [4.5.91], [4.3.13], [4.3.114-115], [4.3.45].

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

conduct that constitutes the alleged wrong, let alone a single individual in whom conduct and culpable mental states coalesce. Aggregation or 'collective responsibility' approaches offer a pragmatic, instrumentalist solution to connecting the dots between the diffused knowledge of individuals within a corporation.[13] However, these are subject to legitimate criticism as unprincipled and unable, without further justification or development, to support findings of more complex conceptions of (diffused) intention and dishonesty.[14]

As Law Commissions in Australia and England have accepted, the consequence is that many large corporations are effectively immune from criminal responsibility for egregious, and often highly profitable, commercial misconduct.[15] As the Australian Law Reform Commission separately observed, precisely the same problems plague civil liability doctrines, including those concerned to prevent fraud.[16] A common solution therefore is required.[17]

The challenge is only heightened with increasing integration of automated processes into core business activities,[18] alongside other, more complex new technologies. Even a simple automated payment process may quickly cause an attribution inquiry to degenerate into an ad hoc and unprincipled search for a human (coder, or coding team, or software engineer, or employee who presses a button, or manager of the department in which the software is notionally situated, or other…) on which to build some foundation for corporate guilt.[19] The danger of scapegoating is real, as is the converse risk that (once again) the corporation will avoid responsibility behind executive pleas of impersonal 'systems errors'. Commonly, directors will draw attention to the fact (which may well be right) that their employees are individually honest and hardworking, while they (as directors) were personally unaware of the problem

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[13] Compare *United States v Bank of New England*, NA, 821 F 2d 844 (1st Cir 1987); *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 446 [101], 448–56 [110]–[143] (Edelman J, with whom Allsop CJ generally concurred); *R v HM Coroner for East Kent, ex parte Spooner (Herald of Free Enterprise/Zeebrugge Ferry Disaster)* (1989) 88 Cr App R 10 (QB).

[14] *Kojic*, ibid, Mihailis Diamantis, 'How to Read a Corporate Mind' in E Bant (ed) The Culpable Corporate Mind (Hart Publishing, Oxford 2023) xxx.

[15] Law Commission, *Corporate Criminal Liability* (Options Paper, 10 June 2022) paras 6.34–6.41, para 1.4, ch 6 (Law Commission Options Paper). Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Final Report, April 2020) Chapters 4 and 6.

[16] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) para 1.21; Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Final Report, April 2020) paras 1.15, 1.25 (ALRC Final Report).

[17] This is also highly appropriate if, as we are told, the state of a corporation's mind is a matter of fact: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) 483 (Bowen LJ); *Generics (UK) v Warner-Lambert Company LLC* [2018] UKSC 56, [2018] RPC 21 [171] (Lord Briggs).

[18] Automation itself is nothing particularly new: the old vending and ticket machine cases are prime examples: see, eg *Thornton v Shoe Lane Parking Ltd* [1970] EWCA Civ 2, [1971] QB 163. Indeed, automation is arguably only a step further along the spectrum from the ubiquitous use of 'standard operating procedures', discussed below.

[19] Bant, Culpable Corporate Minds (n xxx) 363; Jeannie Marie Paterson and Elise Bant, 'Automated Mistakes' in E Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, Oxford 2023) xxx.

generated 'by the system'.[20] The combination is devastating for both traditional and more generous but individualistic attribution approaches. As more sophisticated machine learning and artificial intelligence systems become embedded in corporate business practices, this new game of 'Where's WALL-E'[21] becomes, potentially, wildly unpredictable, unprincipled, and impractical. One of the worst forms of the game blames a non-sentient corporate tool, the AI, as being 'responsible' for the deploying corporation's wrongdoing.[22] On this narrative, the corporate escape route is assured, by shifting corporate irresponsibility to an allegedly new legal entity. Any move in that direction brings with it an array of further, dangerously effective evasive strategies: corporations may plead ignorance of the innately harmful tendencies of 'off the shelf' programs (the 'black box' problem), blame 'legacy systems' or argue that different computer systems 'did not speak' to one another.[23] In all of these narratives, the corporation presents itself as an unknowing and hence innocent, or mistaken, participant — at worst a bumbling incompetent in the brave new world of new commercial technologies.[24]

If 'the future of fraud is automated',[25] we are indeed in trouble. This prospect has caused leading commentators, reform commissions and legislatures to seek to avoid the problem of corporate attribution entirely, by shifting to strict outcome or performance-based obligations, or duty-based offences. These focus on the outcomes of the corporation's activities and whether they are fit for purpose,[26] or contravene some objective standard of conduct,[27] or fail to prevent a nominated and particularly egregious wrong on the part of an associate of the corporation.[28]

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[20] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 (FSRC Final Report) 138-139; https://pursuit.unimelb.edu.au/articles/charging-dead-clients-is-dishonest-really-who-knew .see also https://www.sbs.com.au/news/article/nab-says-fees-for-no-service-not-dishonest/u838rxy95 ; https://www.afr.com/companies/financial-services/banking-royal-commission-where-nab-went-wrong-on-fee-for-no-service-20190205-h1avui ; https://www.afr.com/opinion/cba-the-gold-medallist-of-the-big-five-for-charging-fees-for-no-service-20180418-h0yxvj

[21] Pixar, 2008, directed by Andrew Stanton.

[22] The false narrative of 'algorithmic agents' is discussedcritically in Paterson and Bant, Automated Mistakes: Vitiated Consent and State of Mind Culpability in Algorithmic Contracting' in Bant, *The Culpable Corporate Mind* (n xxx) 256, 267.

[23] See, eg https://www.investordaily.com.au/markets/40308-banks-blame-legacy-systems-for-advice-failures

[24] For a more expansive treatment of these strategies of denial, see Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), Evil Corporations (Hart Publishing, Oxford 2024) (forthcoming).

[25] Lauren Willis, 'Performance-Based Consumer and Investor Protection: Corporate Responsibility without Blame' in E Bant, The Culpable Corporate Mind (n xxx) 417, 418.

[26] Eg Australia's 'consumer guarantee' provisions: Australian Consumer Law Part 3.2 Div 1. The new 'Design and Distribution' obligations have a similar underlying principle: see Corporations Act 2001 (Cth), pt 7.8A and discussion in Willis at 433-434.

[27] Such as Australia's distinction prohibitions on misleading conduct: see below at xxx. The support for introduction of a generalised 'unfair trading' prohibition would also fit this category: see below at xx..

[28] Eg Criminal Finances Act 2017 (UK), pt 3; Law Commission Options Paper ch 8; Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth); Jonathan Clough, 'Failure to Prevent Offices: The Solution to Transnational Corporate Criminal Liability' in E Bant (ed) The Culpable Corporate Mind (n xxx) 395.

These are all important parts of an effective, pluralistic approach to containing the rogue corporate hydra.[29] But still minds matter, even in strict liability contexts. It makes a difference to regulators' overall enforcement approaches, to defence, remedy and penalty whether (for example) the contravening conduct was deliberate, knowing or mistaken.[30] It also matters for the expressive power of the law. Thus, in the recent Australian Royal Commission into misconduct in the financial services industry, Commissioner Hayne examined critically the willingness of banking executives to admit extraordinary levels of corporate incompetence rather than suffer the reputational and liability risks that would flow from characterising the impugned misconduct as dishonest.[31] In these cases, the misconduct arose from automated fee deduction systems that had taken clients' money without proper authorisation, often over long periods and in the face of repeated complaint. Consistently with the foregoing, the unlawful takings were characterised by those officers as due to 'legacy systems' and 'administrative errors'.[32] Employees were praised as hardworking and honest, while executives were readily prepared to admit to being asleep at the wheel while the misconduct occurred. This exposed the corporations to forms of liability that were less reputationally damaging than dishonesty-based contraventions.

With Rebecca Faugno, I have similarly criticised elsewhere the view that 'Failure to Prevent' models necessarily involve a lesser form of liability, grounded in organisational negligence.[33] In some cases, the predicate misconduct of the corporate associate, which the defendant corporation 'failed' to prevent, forms a key component of the defendant's own business model.[34] In such contexts, the very language of 'failure to prevent' arguably mischaracterises the nature of the wrong, which in truth smacks of organisational fraud. Consistently, it can lead to unduly favourable liability outcomes, such as through the approval of Deferred Prosecution Agreements and the conditions on which these are agreed.

Against this background, a new model of corporate responsibility, entitled 'Systems Intentionality' offers a way through the thicket.[35] On this account, a corporation manifests its state of mind through its de facto systems of conduct, policies and practices. This paper briefly introduces the model before showing how it might operate in a range of topical scenarios to automated and algorithmic systems of misconduct, of varying complexity. The model is shown to be versatile and practical, but also rests on solid theoretical and doctrinal foundations. The aim is to show that it provides an additional and

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[29] Fiona McGaughey, 'Regulatory Pluralism to Tackle Modern Slavery' in E Bant (ed) The Culpable Corporate Mind (n xxx) 441.

[30] Elise Bant and Rebecca Faugno, Corporate Culture and Systems Intentionality: An Essential Part of the Regulatory Toolkit' (2023) *Journal of Corporate Law Studies* (forthcoming).

[31] FSRC Final Report (n xxx) 138-139.

[32] Ibid, 139.

[33] Bant and Faugno (n xxx).

[34] Eg *Serious Fraud Office v Rolls-Royce plc & anor* (Royal Courts of Justice, 17 January 2017).

[35] In addition to those cited above, see 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* 1; Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' (ch 1), 'Systems Intentionality: Theory and Practice' (ch 9), and Modelling Corporate States of Mind through Systems Intentionality' (ch 11), all in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing 2023).

important means of holding corporate actors to account for misconduct carried out through new technologies, which gives greater effect to the expressive, deterrent and, potentially, retributive power of the laws prohibiting fraud.

2. Systems Intentionality

a. An outline of the model

A very brief outline of Systems Intentionality is adequate for current purposes. As has already been presaged, the model proposes that corporate states of mind are manifested in their adopted and deployed 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.[36]

The model is simple, intuitive, and applies equally well to natural as to corporate persons. Natural persons routinely use systems of conduct, such as recipes, directions and notations to guide their decision-making and, hence, conduct. These 'external decision supports' enable the person to achieve their purpose: to make a cake, find a location, or recall how to do something.[37] Similarly, I say, corporations utilise systems of conduct to enable them to achieve their corporate purposes. However, lacking a natural mind, this is in reality the *only* way in which corporations can engage purposefully with and in the real world. Consistently, the law provides core default rules concerning the role of the board of a company, or the shareholders in general meeting, to address the need to create foundational corporate decision-systems. These are required to transform the corporation from a passive shell to an operational legal person. Systems Intentionality arguably is consistent with these default decision-systems,[38] but simply enables identification and assessment of the mental states of corporations manifested through other, more granular and daily systems, policies and practices.

On this approach, systems of conduct are inherently purposive: indeed, an unintended system is a contradiction in terms. Thus, in ordinary language, systems are 'plans', 'strategies', or 'methods' of

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[36] Bant, Modelling (n xxx) 245.

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

[38] And hence consistent, in the main, with Leow's Allocated Powers analysis of corporate decision structures: see Rachel Leow, 'Meridian, Allocated Powers, and Systems Intentionality Compared', in Bant, *The Culpable Corporate Mind* (n xxx) 119.

proceeding to some end.[39] Further, understood as integrated steps and processes, systems of conduct will often comprise *both* positive and negative, and proactive and reactive, elements.[40] What may look like a primary system (for example, a marketing strategy or fee deduction system) itself necessarily entails 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.[41] This means that the omission of audit and remedial mechanisms, for example, may legitimately be understood as an intrinsic part of a system's overall design. This is a justifiable interpretive approach, given that systems of conduct are generally intended to roll out over time and produce repeated and consistent patterns of behaviour.[42]

It follows that, on its face, a system of conduct (being innately a strategy or plan of procedure) is necessarily intended. The evidential onus then lies on the corporation to substantiate any allegation of mistake or accident (for example, through an employee witness admitting to accidental deployment of the system).[43] Further, since a system of conduct is, by definition, intended, a corporation will know at least its broad outline and the key features required for it to be deployed. Absent proof of mistake or similar, a corporation cannot sleep-walk a system of conduct.[44] This means that the starting point for any inquiry is that corporations know the nature of the conduct in which they are engaged through those systems. That is, corporate knowledge of the key features of a system, and the fact of its operation, is implicit in its successful deployment by the corporation. This applies as much for organically developed practices as it does for systems that operationalise 'on the ground' some higher-level corporate policy.

All of this challenges familiar corporate narratives that seek to characterise the corporation as ignorant (and therefore innocent) of its conduct conducted through its own systems. For example, information barriers that prevent responsible officers from actual knowledge of the corporation's misconduct do not necessarily protect the corporation itself from that knowledge. Similarly, scapegoating individuals on

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[39] The detailed treatment by courts of these concepts, often in light of common dictionary meanings, is contained in Bant, Systems Intentionality (n xxx): see, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [91] (Reeves J).

[40] B Fisse, 'Reactive Corporate Fault' in E Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, 2023) 139; E Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' in E Bant (ed) The Culpable Corporate Mind (Hart Publishing, 2023) xxx.

[41] Bant, Corporate Evil (n xxx). 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 xxx) 192, and Bant, Taxonomy and Synthesis (n xxx) 5, 19, 23, 31..

[42] Patterns of behaviour may be coincidental and therefore are neutral as to intention, however they may indicate the presence of a causative system of conduct: see Bant, 'Systems Intentionality: Theory and Practice' (n xxx) 190-192 and *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208 (2020) 275 FCR 57 [386]-[391] (Beach J).

[43] See below at n xxx.

[44] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 157: fees for no services were 'part of an established system and were not matters of accident'.

the grounds that they have been discovered performing the corporation's own practices no longer operates as an effective diversion of organisational blameworthiness.[45]

Finally, on this approach, any analysis of corporate mindsets starts with the instantiated system of conduct; that is, with identification and characterisation of the de facto adopted and deployed system. Formal corporate policies nonetheless constitute statements of fact regarding the corporate state of mind.[46] It follows that the presence of a significant gap between formal policy, or the textbook 'standard operating procedures' of a company, and the reality of its corporate intentions and knowledge as manifested through its daily systems, policies and practices, can be understood as a form of misleading or, indeed, deceptive conduct.[47]

b. Garden-variety case examples

This section models the potential of Systems Intentionality to address more traditional circumstances of corporate fraud before turning, in the following Part, to equivalent wrongdoing accomplished through automation and more sophisticated new technologies.

A little background to the main case examples under discussion is salutary. Both involved Australia's leading consumer regulator, the Australian Competition and Consumer Commission, bringing proceedings against pharmaceutical giants. The ACCC alleged the defendants had engaged in repeated contraventions of Australia's powerful prohibition on 'misleading or deceptive conduct'.[48] As expressed in its core form, now found in s18 Australian Consumer Law:

> A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[49]

Elegant in its simplicity,[50] the hallmark of this prohibition is its strict, outcome-based character. Thus, while deceptive conduct is certainly captured, the prohibition may also be contravened accidentally, or notwithstanding that the defendant believed, on reasonable grounds, that its conduct was truthful.[51]

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[45] See Bant, Catching the Corporate Conscience (n xxx) 484, 492–95; Bant, Corporate Evil (n xxx) xxx.

[46] Above n xxx (Edgington) etc.

[47] See, eg, section 18 ACL (prohibition on misleading or deceptive conduct in trade or commerce); *Magill v Magill* (2006) 226 CLR 551, 567 (Gleeson CJ) 574 (Gummow, Kirby and Crennan JJ) (tort of deceit).

[48] Although embedded in consumer protection legislation, the prohibition applies to all transactions 'in trade or commerce', regardless of the status of the plaintiff as consumer or trader. It may be enforced by the independent regulator where no person has, actually, been misled, and where no loss has been suffered. It also gives rise to a smorgasbord of remedies for consumers seeking redress for loss or damage suffered because of the misleading conduct. It constitutes, accordingly, a powerful commercial norm in the Australian marketplace: see, among others, E Bant and J Paterson, 'Limitations On Defendant Liability For Misleading Or Deceptive Conduct Under Statute: Some Insights From Negligent Misstatement' in K Barker, W Swain and R Grantham (eds), *The Law of Misstatements: 50 Years on from* Hedley Byrne v Heller (Hart Publishing, 2015) 159; E Bant and A McCracken, 'Returning to Sample the Remedial Smorgasbord for Misleading Conduct' (2022) UWA Law Review 113.

[49] CCA Schedule 1 (n xxx).

[50] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 [947] (Rares J): see also [948] and J Sabbagh, E Bant and JM Paterson, 'Mapping the Law of Misleading Conduct: Challenges in Legislative Design' (2022) *UWA Law Review* 144 on the proliferation of variations on this core prohibition.

[51] *Parkdale Customer Built Furniture Pty Ltd v Puxu Pty* Ltd (1982) 149 CLR 191, 197 (Gibbs CJ).

There is no requirement of any intention to mislead on the part of a defendant, nor any other fault element. The contravention lies in the simple fact that the impugned conduct was 'misleading… or likely to mislead'. The omission of any fault element from the prohibition means the common corporate strategies discussed earlier, such as those that diffuse and compartmentalise individual knowledge, and hence responsibility, well below Board level, are significantly less effective. Consistently, the prohibition has given regulators like the ACCC a powerful and flexible tool to address a spectrum of commercial misconduct, including those arising from new technologies.[52]

Yet, notwithstanding its strict character, regulator claims engage both directly and indirectly with questions of defendant culpability in misleading consumers.[53] The indirect influence of fault considerations in regulator action is considerable, including how contravening conduct is framed, whether it attracts administrative, civil or criminal enforcement strategies and the availability and content of any negotiated outcomes.[54] Further, Australian courts have developed a range of criteria that inform the award of civil (and criminal) pecuniary penalties for contraventions of key statutes, which also apply to certain forms of misleading conduct. These 'French factors'[55] include the state of mind with which a defendant contravened the statutory prohibition, for example, whether the misconduct was deliberate, knowing or mistaken, as well as mixed normative conceptions such as dishonesty and recklessness.[56] The presence or absence of remorse or contrition is another factor.[57] It follows that while regulators may be able to avoid questions of culpability at the liability stages of enforcement litigation, it inexorably affects the penalty phase (including on the amounts of agreed penalty).

Traditional attribution rules may be expected to influence adversely regulator efforts to characterise defendant misleading conduct as deliberate, knowing or dishonest. Preferring strict liability or negligence-based litigation options might be comprehensible as a considered price for securing baseline corporate liability: a bird in the hand is better than two in the bush, after all. However, this enforcement strategy risks removing a critical, reputational incentive to corporate rehabilitation and good conduct.[58] Further, these enforcement strategies potentially leave a damaging gap between community and legal characterisations of the nature of the misconduct.[59] This is quite apart from the clear impact on the range of penalty and other orders that may be given in response to the misconduct. The chosen pharmaceutical

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[52] JM Paterson, E Bant and H Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring misleading conduct in digital privacy policies' (2021) *Communications Law* 136.

[53] As do private claims for redress: see Bant and Paterson, Limitations on Defendant Liability (n xxx).

[54] Bant, Culpable Corporate Minds (n xxx) 361-364;

[55] First articulated in Trade Practices Commission v CSR [1991] ATPR 41-076.

[56] JM Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to award Civil Penalties under the Australian Consumer Law' in P Vines and S Donald (eds) *Statutory Interpretation in Private Law* (Federation Press, Leichhardt 2019) 154.

[57] *Australian Securities and Investments Commission (ASIC) v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2021] FCA 1008, (2021) 156 ACSR 614 [45] (O'Bryan J): see further R Carroll, 'Corporate Contrition' in Bant, The Culpable Corporate Mind (n xxx) 315.

[58] See, eg, Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Business Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32 *Melbourne University Law Review* 554

[59] Bant, Culpable Corporate Minds (n xxx) 363.

cases powerfully illustrate these subversive tendencies, as well as the corrective potential of a Systems Intentionality approach.

In the first case, Nurofen pain relief products were distinctively packaged, and priced, by reference to claimed differences in pain relief. Thus products said to 'target' period pain, back pain and the like were branded distinctly, and were more expensive, than the garden-variety, everyday product. Yet the operative ingredients were identical.[60] While individual instances of consumer harm were small (a matter of a few dollars), the profits enjoyed through this repeated misconduct were very great.[61]

Throughout, the corporate offender characterised its conduct as 'innocent' and, hence, in terms of 'deficiencies' and organisational negligence.[62] The ACCC did not allege in pleadings or submissions that the conduct was deliberate or reckless. At first instance, this made a significant difference to penalty.[63] Overruling this approach, the Full Federal Court determined that state of mind was a matter relevant to penalty, whether pleaded or not.[64] In substantially increasing the penalty, the Court observed that the company had engaged in a deliberate marketing strategy apt to influence consumers for its commercial benefit, thereby, at the least 'courting the risk of contravention'.[65] It also noted that the deliberate persistence with the strategy for five years, in the face of pointed and correct criticism, was inconsistent with any conception of 'innocent' misconduct.[66] While the Court refrained from finding a deceptive state of mind on these facts, Systems Intentionality explains how and why it is possible, and appropriate, to sharpen the Court's observations. On this approach, it becomes open to conclude that the marketing scheme constituted a deceptive ploy, which manifested the corporation's considered and knowing decision to mislead consumers into paying more for an identical product. This would have demanded a more stringent level of penalty, and one that took better account of the profits enjoyed from the stratagem.[67]

First, a general intention to engage in the conduct constituting the sales strategy flows from seeing it as a strategy or scheme. As such, it is necessarily purposive: a combination of steps arranged in a certain way, a method or plan of procedure. Further, a finding of a specific intention to mislead is open because the combination of features of the strategy (distinctive packaging, identical active ingredient, and differentiated price based on false distinctive operation) could have no other objective purpose than to

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[60] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 [5]-[6] (the Court), increasing on the regulator's appeal the penalty awarded in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424.

[61] ibid [7] and [43].

[62] ibid [116].

[63] ibid [117].

[64] The Full Federal Court noted at ibid [78], [96] and [134]-[136] that the company had engaged in a deliberate marketing strategy apt to influence consumers for its commercial benefit, thereby, at the least 'courting the risk of contravention': a hair's-breath from a systems analysis.

[65] ibid [136].

[66] ibid [134].

[67] The defendant's profit derived from the breach is a key consideration when considering the level of penalty: *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44, [2016] ATPR ¶42-521 [126] (Edelman J). In *ACCC v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424, (2016) 343 ALR 327 [64], Edelman J considered that it would be preferable to focus on the revenue earned from breach.

trick consumers into paying more for a relevantly identical payment. Further, the corporation must be taken to know these critical features (packaging, ingredients, price) of what was, after all, its strategy. The corporate intention and knowledge of the falsity of the representation is therefore patent on the face of the corporation's own strategy. Reinforcing this assessment of deliberately misleading conduct, the strategy was maintained over many years, across multiple jurisdictions, and in the face of repeated individual, regulator and public complaint.[68] The corporation's 'reactive corporate fault' to a scheme intended to apply over an extended period is consistent with a deceptive specific intention.[69] Indeed, the failure to audit and remediate the strategy, including in the face of repeated complaint, simply reinforces the level of corporate indifference to its own deliberate wrongdoing. This warrants a very different level of penalty from that which accompanies gross carelessness, recklessness or even deliberate 'courting the risk'.

A relevantly identical marketing strategy was subsequently carried out with the re-branding of Voltaren Osteo Gel. [70] For five years, pharmaceutical companies Novartis and then GlaxoSmithKline misleadingly marketed and sold Osteo Gel as being specifically designed for treating pain and inflammation caused by osteoarthritis, and more effective than their other product, Emulgel. Again, the truth was that both products had the same active ingredients. Consumers were charged significantly more for Osteo Gel than Emulgel. Again, the conduct was hugely profitable.

Through the lens of Systems Intentionality, here, if anything, the intention manifested by the corporate strategy was even more transparent than in the Nurofen case. This is because the Voltaren marketing strategy involved *removing* existing, helpful information about the common osteo-arthritic pain relief properties from the original generic packaging, so that it only appeared on the Osteo Gel product.[71] This choice to remove the information could hardly be accidental, whatever its marketing managers and team members might say, and (indeed) subjectively believe. It was a key aspect of the corporation's rebranding strategy. Taken with the price difference, it seems clear that the *corporate* intention had been knowingly to mislead consumers into paying more for a relevantly identical product. This was conduct that was 'deceptive… or likely to… deceive'.

Notwithstanding, in penalty proceedings the learned judge characterised the conduct as 'negligent', up until publication of the Nurofen liability judgment, after which it was characterised as 'knowingly courting the risk'.[72] Indeed, in one respect, where misleading comparisons were maintained on a website, his Honour considered the misconduct nearer to 'innocent'.[73] In reaching this view, his Honour

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[68] [2016] FCA 424 [74]-[84], including reference to https://www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2010/nurofen .

[69] Above n xxx.

[70] *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724.

[71] ibid [17].

[72] ibid [45].

[73] ibid [26] and [54].

was influenced by confessions of error on the part of the corporate solicitor, who valiantly took it upon herself to take responsibility for the 'omission' to correct the website.[74]

These cases illustrate both the strengths and limitations of strict liability approaches to corporate responsibility. On the one hand, the corporations were found liable for misleading conduct, notwithstanding their exculpatory narratives of mistake and unintended carelessness. They were subject to significant penalties for that conduct. These results reinforce the core Australian norm against misleading commercial conduct and give effect to the statutory purpose of deterrence, to a degree. Systems Intentionality, however, would arguably enable regulators and courts to recognise the deliberateness and true level of culpability entailed in this conduct. This would invigorate the (largely neglected in practice) prohibition against conduct that is 'deceptive… or likely to deceive,' with consequences for penalty and deterrence. In this way, Systems Intentionality may assist to support and complement strict liability approaches to activate the full range of legal doctrines and rules that operate to counteract corporate fraud.

Further, Systems Intentionality is capable of ready application to equivalent scenarios from the online marketplace. Consider, for example, subscription services that have a simple online sign-up process but make it virtually impossible to unsubscribe.[75] Again, it may be impossible and inappropriate to search for a responsible individual who has ordered, signed off on and/or created the subscription process, to determine the corporate intention. It is entirely likely that no-one exists, or can readily be found, who can be the human hook on which to hang corporate responsibility. To undertake the 'Where's Wally' inquiry may be time-consuming, expensive and, ultimately, fruitless. By contrast, through the lens of Systems Intentionality, even a simple comparison of the relative complexity of the two processes, such as the number of steps required, may assist significantly in determining corporate intention. And this is so well before engaging in any analysis of the corporate intentionality manifested by more subtle 'dark patterns' [76] and other manipulative strategies (to which we return below). An overly complex 'unsubscribe' process, particularly when contrasted with simple sign-up steps, clearly manifests a corporate intention to deter consumers from unsubscribing, and a willingness to keep consumers locked into transactions and financial commitments that the consumers (through their effort to unsubscribe) signal that they no longer want or can afford. This corporate strategy, manifested through the website design, may constitute unfair or unconscionable conduct.[77] The knowledge and intention patent on the

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[74] ibid. This resembles a kind of voluntary scapegoating, deflecting responsibility from the corporation on to the individual: see discussion in S Derrington and S Walpole, 'Culpable Ships' in Bant, The Culpable Corporate Mind (n xxx) 351, 357, 371.

[75] An example of 'forced continuity': see eg Consumer Policy Research Centre, Manipulative online design: Dark patterns in Australia https://cprc.org.au/dupedbydesign/ 20 and Digital Platform Services Inquiry, Interim Report 5 (n xxx) 64.

[76] These commonly involve user interfaces, the design of which operates to confuse and manipulate consumers into certain action: see, eg ACCC, Digital Platforms Inquiry Final Report 26 July 2019 424-25; ACCC, Digital Platform Services Inquiry Third Interim Report, 28 October 2021, p 57, J Lugeri and L Strahilevitz 'Shining a Light on Dark Patterns' (2021) 13 *Journal of Legal Analysis* 44; Consumer Policy Research Centre 'Duped by Design. Manipulative online design: Dark patterns in Australia https://cprc.org.au/dupedbydesign/ Paterson, Bant and Cooney (n xxx).

[77] On the necessity of setting the normative expectations or standards for the digital age, see below at xxx.

face of the system may assist courts both making findings of contravening conduct and in setting penalties commensurate with the corporation's true culpability.

3. Systems Intentionality and Automated Fraud

With this understanding of the model in action, we are now in a position to turn to consider the potential for Systems Intentionality to shed light on corporate fraud in the digital age. Recall, here the potential for traditional attribution rules to hold corporations to account is greatly reduced, because individuals within the corporation may have little or no involvement in, or knowledge of, the workings of automated systems that increasingly underpin core business activities. Further, as we will see, the advent of new technologies opens up a range of ways in which corporations may engage in serious commercial misconduct. Not all of these will necessarily be counteracted through Systems Intentionality alone. However, what the model does provide is a different means of understanding the intentionality manifested through these systems. This may have a helpful effect on regulators' and courts' capacities to bring to bear existing and new doctrinal avenues for redress, to better effect.

a. Automated Systems and Mistake

First, it is salient to observe that determinate automated systems perform according to their programmed instructions, with no margin for variation once deployed. That rigidity means that if a corporation's automated program is deployed and operates according to its terms, it constitutes the corporation's intended conduct: there is little margin for deviation or 'error'. The onus will then fall on the corporation to demonstrate how and why the conduct was accidental, or mistaken.[78] Possible contenders for genuine systems errors are where a system deploys in circumstances for which it was not designed, for example because a human mistakenly presses a button, or through some sort of internal malfunction. Thus Robert Goff J hypothesized a scenario in which a computer had 'gone mad' and repeatedly paid out in error as an example of corporate mistake.[79]

What are less like to be relevant are director (or other, potentially relevant employee) pleas of ignorance of the system or its features. Thus in the Australian case of *Electric Life Pty Ltd v Unison Finance Group Pty Ltd*,[80] a director of the plaintiff corporation put in place an automated payment system with respect to the hire of various goods under a contract with the defendant. The automated system operated, according to its terms, long after the contract had drawn to a close, the goods had been retired from use and, indeed, misplaced, assumed discarded. The corporation's claim for restitution of the post-contractual payments on the grounds of mistake failed. While this result might seem counter-intuitive, Systems Intentionality emphasises that the director's subjective, mistaken belief that the system would end with the contract contradicted the clear terms of the authorised payment system.[81] The director could not, retroactively, change those terms nor claim, on behalf of the corporation, some retrospective

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[78] See further Bant, 'Corporate Mistake' in J Gardner et al (eds), *Politics, Policy and Private Law* (Hart Publishing, 2024) (forthcoming) and Bant, Modelling (n xxx) 248.

[79] *Barclays Bank v WJ Simms Son & Cooke (Southern)* [1980] QB 677, 697.

[80] [2015] NCSWCA 394.

[81] ibid, [71]

error. Nor was the company bookkeeper's mindset relevant: he had no authority to change the automated system and, in any event, had no subjective understanding as to its purpose or terms.[82]

On the characterisation most favourable to the plaintiff, the default setting for the automated system was 'keep paying until manual intervention'. But no process existing to trigger that intervention: no reminders, warnings, audit systems or other means other than the chance recollection of the director to check, or another employee to notice and query the payments (as ultimately occurred). Indeed, the omission of any manual oversight of the system, including any audit and review mechanisms, arguably also reflected a corporate choice. The fact that this proved unexpectedly costly in the long term did not negate that the fact that it was part of a deliberate corporate decision to automate the process. Misprediction is not mistake,[83] and courts are concerned not to reward undue risk-taking, even where there is an operative mistake.[84] Automation carries economic risks as well as rewards, which a corporate arguably accepts in its adoption and deployment.[85]

b. Default Settings and Corporate Intentionality

It is also helpful to observe that automated systems are not necessarily, or quintessentially, different to other human-based systems of conduct. It is striking that, in many cases, the daily systems of conduct adopted by corporations with respect to their natural employees operate to remove individual judgement (and thus unpredictability) from the corporation's core activities, essential to its purposes. An example is the widespread use of 'standard operating procedures'. When embedded into daily practice,[86] these guide, nudge or direct the employees within the system to respond to environmental prompts (eg the receipt of payment to an account, or an invoice, or a customer complaint) in a pre-determined way. That is, the employees' individual choices to act are, effectively, made for them in advance. Indeed, where an employee plays some purely clerical role within a corporate system, cases suggest that what matters is not what the employee subjectively thought, understood or believed in carrying out their role but simply whether their part within the process was carried out in conformity with the system's objective elements or design.[87] These clerical default settings in the corporation's processes are usually made at critical junctures, to ensure the corporation's priorities and interests are protected. The consequence is that these default settings loudly declare the corporation's intentions and values. Nor is it plausible for

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[82] Compare, ibid, [60]-[61], [72].

[83] P Birks, An Introduction to the Law of Restitution (Oxford, Clarendon Press, 1985) 147; *Dextra Bant & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 [29].

[84] *Re Griffiths* [2008] EWHC 118, [2009] Ch 162, discussed in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [98], [113] and J Edelman and E Bant, Unjust Enrichment (Hart Publishing, Oxford 2016) 174–75.

[85] Bant, Corporate Mistake.

[86] An important caveat. Where, by contrast, the formal SOPs vary wildly from the corporation's embedded practices, they are likely to be mere window-dressing, a form of misleading conduct as to the corporation's true intentions and values. This is often found where important questions of corporate compliance are in issue: the formal SOPs may roundly declare a responsible and ethical corporate citizen quite at odd with the reality manifested through its daily practices: see, eg *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) on Crown's responsible gaming, anti-money laundering and junket practices. The AML practices are discussed further in Bant, Reforming the Laws (n xxx) 274.

[87] Bant, Corporate Mistake (n xxx) xxx, discussing *Kelly v Solari* 9 M&W 54; 152 ER 24 and *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590.

corporations to deny knowledge of these foundational corporate choices, which underpin the deployed system.

This perspective is readily transferrable to automated systems and their default settings. A range of examples arose in Australia, where Banks admitted deducting unauthorised payments from customers through automated fee deduction systems.[88] In one, common scenario, the payments were for life insurance. Patent on the face of the payment deduction system, and therefore known to the corporation, were the facts that: (1) the clients were natural persons (who might die, therefore sought insurance); (2) that their circumstances may well change, such as through death; (3) on such changes, deductions would cease to be authorised; (4) the system therefore required audit and adjustment mechanisms, to ensure that the deductions did not, inevitably, result in unlawful takings.[89] Yet, the banks omitted these mechanisms: again, arguably, a matter of corporate choice. Here, the automated default setting most favourable to the defendant was 'keep taking until manual intervention'. Yet there were no, or no working manual check processes to prevent the system degenerating into unlawful takings. That the design choices of the automated system, included the omitted steps, manifested a corporate intention to prefer profits over lawfulness, is reinforced by assessment of the corporate responses to notification of the unlawful takings. By and large, these involved continuing the practice while the corporation 'investigated' the conduct. Again, given that these were 'set and forget' systems, intended to operate over extended periods, it is legitimate to consider the corporate response to notice of problems with it, in assessing the nature of corporate culpability manifested by the objective features of the system, viewed holistically.

As with *Electric Life*, it is arguably neither here nor there for corporate responsibility that individual directors or employees were subjectively unaware of the problem. These were the corporation's own intended actions, and corporate knowledge of the salient facts was inherent in and patent on the face of the system it deployed. The onus lay on the corporation to explain how the system had failed to deploy as designed, so as to warrant a finding of corporate mistake. From this perspective, and in the absence of exculpatory evidence, the corporate-conscious decision to proceed to roll out an unsupervised system that was guaranteed to cause unlawful takings showed a reckless indifference to the client's rights and, indeed, smacked of dishonest conduct.

In one case, involving penalty proceedings for contraventions arising from automated fee deductions for other forms of financial service, Moschinsky J of the Federal Court accepted a director's evidence that a human coding error had caused the unlawful takings.[90] However, his Honour expressed concern about the paucity of evidence on how the error arose.[91] 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 on behalf of the corporation,

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[88] These scenarios are discussed further in Bant, Culpable Corporate Minds (n xxx) 385; Bant, Catching the Corporate Conscience (n xxx) 487 and Bant, Corporate Evil (n xxx).

[89] FSRC Final Report (n xxx) 154–157.

[90] *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* [2022] FCA 1115 [47] (Moschinsky J).

[91] ibid, [52]-[53].

unaided by direction or guidance. 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.[92] 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.

Quoine Pte Ltd v B2C2 Ltd is a case where default settings again were key, this time to determine whether the defendant knowingly took advantage of an alleged mistake made by traders on a crypto currency exchange.[93] The plaintiff's exchange platform had lost liquidity, with the result that it no longer was generating market prices. The defendant's trading algorithm was pre-programmed to revert to a 'deep price' in that event. The Singapore Court of Appeal found that there was no evidence to support the view that this deep price was set to take advantage of trader mistakes: to the contrary, it was, evidently, a default mechanism that was designed to protect the defendant should the platform lose liquidity, an event that occurred due to the plaintiff, not defendant's fault. In that case, it was possible, fortuitously, to point to the testimony of the individual human coder, whose innocent intentions both represented and exonerated the company mindset. However, Systems Intentionality explains how the same conclusion was possible from objective assessment of the algorithm settings, in particular the conditions that triggered application of the deep price.[94]

Finally, the Australian case of *ACCC v Google* provides further illustration of the significance of seeing default settings in terms of corporate choices, which manifest corporate values, preferences and intentions.[95] In that case, the regulator alleged (among other matters) that Google misled consumers who were concerned to control privacy settings over the steps required to protect their location data. In truth, consumers needed to ensure two default settings were switched to 'off [do not collection location data]'. The first, which was readily identifiable, was already switched to 'off'. Another was far less easy to identify and locate, requiring users to navigate a number of screens and bearing no clear labelling to indicate that it hosted the relevant setting. This second default setting was set to 'on [collect data]'. This difference is significant, potentially signalling a corporate preference to harvest data, consistently with its core business model, rather than protect consumers' privacy. It would have been, one would think, a simple matter for Google to have both default settings switched to 'off' from the outset, if it really valued consumers' rights to protect their information and to choose whether to share personal data. On this analysis, it would have been open to the Federal Court to go beyond its finding of misleading conduct,[96] to conclude that Google had acted deliberately to mislead consumers in relation to the second default setting, with a view to its greater profit and, therefore, acted deceptively.

c. Ambiguous Systems of Conduct

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[92] ibid, [54].

[93] *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20.

[94] Paterson and Bant, Automated Mistakes (n xxx) 255, 266, 270-271.

[95] *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367.

[96] The detailed analysis is contained in Jeannie Marie Paterson, Elise Bant and Henry Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' [2021] *Comms L* 136.

The previous discussions illustrate how corporate states of mind may be revealed and instantiated through automated systems. Thus automated systems of conduct manifest general intentions, placing pressure on allegations of corporate mistake. Default settings may also be eloquent to corporate choices at key ethical pressure points, revealing the corporate values, preferences and intentions. In such cases, the key design features or elements of the system will readily manifest the corporate mindset.

In others, however, courts may need to draw on more extensive, contextual evidence to assess or characterise the particular system and through it, corporate intentionality. An example is *Australian Competition and Consumer Commission v Uber BV*, where Uber's pricing estimate algorithm generally significantly overestimated the cost to customers of using taxis affiliated with the Uber ride service. This meant that its Ubertaxi fare estimates, displayed on the Uber app, were not representative of the likely fare range and, accordingly, were inherently likely to mislead consumers of those services. On one view, this systemic over-estimation operated to Uber's financial benefit, by providing a disincentive to customers choosing the Ubertaxi service that, after all, supported competitor business. Further, Uber did not monitor the functionality of the algorithm to ensure the accuracy of estimates.[97] Consistently, the market for the service declined over time and, on becoming the subject of regulatory proceedings, was discontinued.[98] On this view, the charging system could have been seen as manifesting a deliberate ploy to undermine that competition through misleading conduct.[99]

O'Bryan J considered whether the system operated to suppress demand for taxi services in the context of considering what 'loss or damage' had flowed from the misleading conduct. His Honour noted that the parties had provided no evidence on that question,[100] nor on why suppression of taxi demand would benefit Uber (given that, presumably, other ride options may remain open to customers).[101] This left open an alternative interpretation, or characterisation of the corporate mindset manifested through the system, consistent with Uber's pleaded position: the problem was unintentional and manifested a genuine corporate mistake.

By contrast, Uber was found to have corporate knowledge of the existence and likely impact of certain cancellation notices issued to customers, which wrongly warned of cancellation fees when, in fact, these did not apply. His Honour considered that these were likely to benefit Uber, as they would deter some customers from continuing with the cancellation process. However, this finding was supported by evidence of Uber carrying out controlled testing of the effect of similar cancellation notices on customers, and subjective knowledge of this testing on the part of certain senior managers.[102] While his Honour's findings hinged on employees' knowledge, Systems Intentionality would instead focus on the testing systems deployed by the corporation as manifesting patent corporate knowledge of the problem. This approach supports the finding that the corporate decision to continue in any event with the

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[97] [57]. O'Bryan J considered that the problem only 'became apparent' to Uber after a related entity received a notice from the regulator.

[98] [60].

[99] On the issue of state of mind, see [18] and [100][101], which adopts an individualistic approach to corporate attribution.

[100] [17]

[101] [108].

[102] [104]-[106].

cancellation notice system was knowing and, consequently, highly culpable, but importantly avoids the need to undertake or solve the Where's Wally puzzle.

d. More complex scenarios

What, though, of more complex artificial intelligence (AI) systems, such as those that engage 'machine learning' to optimise performance of allocated tasks? In her recent, powerful essay on the topic, Lauren E Willis identifies a range of striking scenarios in the consumer context where AI systems may be programmed to collect and experiment on data to achieve 'micro-targeted, ever-changing digital actions and communications algorithmically optimised for profit.' [103] Unconstrained by natural ethical boundaries, or fear of external sanctions, AI systems have a proven potential to promote unsuitable transactions at the expense of consumers.[104] This is not a matter of some evil AI intention: the algorithm is simply a tool[105] that is coded to harvest and experiment with relevant information to yield the instructed outcome – often, maximum profit. It is, however, a highly effective tool that may gather and experiment with vastly greater data, and try wildly more variable design options, with micro-targeted success, than a human designer. This elevates the risk of harm to new levels, across a greater range and number of transactions.[106]

Where such systems result in harmful transactions, the 'Where's Wally' question becomes fanciful. It may well be impossible at the outset for relevant responsible officers, employees or agents of the deploying corporation to know what the AI system will identify as relevant factors. That is, after all, part of the attraction of AI: its capacity to identify data combinations that yield more profitable outcomes than human designers could ever achieve. Indeed, the predatory nature of AI designs may be all but impossible to prove through ex post human analysis: as Willis observes, AI systems may be processing hundreds of data points simultaneously, meaning that it is impossible for human analysts to determine which correlations counted for which transaction. This in turn may mean that the central causation question for most liability purposes - did this conduct cause harm - is unanswerable. [107] Further, the original coders of an algorithm may be wholly unaware of the purpose to which the program will eventually be put: 'off the shelf' algorithms may be employed to ends or in support of businesses that the coders never envisaged.[108] Underscoring the problem, automated systems are increasingly being designed and distributed by other AI systems, not even human coders.[109] The 'black box' problem here seems close to an insuperable barrier to corporate responsibility.

Faced with this reality, Willis urges alternative approaches, such as performance-based obligations, which turn from intention-based regulation to the effects of AI-dependent corporate actions on consumers.[110] As conceded at the outset of this paper, this makes a lot of sense. Frankly, given the rate

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[103] Willis (n xxx) 419.
[104] ibid, 420, 422.
[105] Paterson and Bant, Automated Mistakes (n xxx) 267.
[106] Willis (n xxx) 419-424.
[107] ibid, 423.
[108] ibid 422.
[109] ibid, 419.
[110] ibid, 424.

of change in technology-driven and -enhanced commercial harm, it is likely that only a pluralistic approach is likely to have any real impact.

However, even here, seeing the intentionality manifested by corporate systems of conduct may be of considerable assistance to regulators, legislators and judges. Consider the case where a corporation deploys a machine learning tool in the marketplace, without incorporating any means to predict, identify, audit or correct harmful outcomes. Even at this very high level of generality, it is possible to characterise the system is manifesting some interesting states of mind, relevant to corporate responsibility. First, the tool's deployment represents (in the absence of evidence to the contrary) a deliberate decision. Secondly, the omission of any monitoring or responsive processes itself shapes the nature of the primary (or positive) elements of the machine-learning system: that is, the system is not simply a 'machine-learning system', but an 'uncontrolled machine-learning system'. Thirdly, the omission of any processes by which the primary system's operation can be monitored and corrected itself reflects a corporate choice. We may pause here to note, as does Willis, that it is implausible that it is, somehow, inherently impossible to build in control mechanisms for machine-learning AI.[111] Fourthly, there must be some baseline purpose or goals that direct the machine-learning system: what is in learning to do? In a for-profit entity, it is safe to assume (in the absence of evidence to the contrary) that these ends include maximising profit. But if that is the only goal, it means that (again) there has been a corporate choice to pursue profit unconstrained by considerations that would promote legal and ethical conduct.

Viewed in this way, the scenario arguably manifests from the outset a corporate willingness to court the risk of massive non-compliance with the law in the pursuit of profit. From this perspective, it may not be a complete, defensive answer to liability for a corporation to say that there is no proof of individual harm caused by the AI (the causal problem identified earlier). Systems Intentionality throws on to the corporation the onus of showing that its very deployment of an unbounded system is not inherently highly culpable. It can readily do this by proving evidence of appropriately embedded and audited boundaries, going some way to assisting with the information asymmetry that too often confounds regulators seeking to patrol misconduct by corporations deploying new technologies. However, to the extent that it cannot do so, its inability underscores its culpability.

That being said, the ability of Systems Intentionality to hold corporations to account for reckless deployment of AI systems of conduct depends, in significant part, on the willingness of courts to assess its intended and knowing conduct against appropriately stringent, normative standards.[112] Thus, in one Australian case, a judge considered that the defendant corporation's deliberate manipulation of consumer choice through targeted advertising, derived from data harvested through its misleading conduct, was not in itself harmful.[113] Consumers might find targeted advertising helpful, or welcome. On that approach, it may be unlikely that the conduct would contravene that jurisdiction's prohibition on unconscionable conduct, notwithstanding that it constitutes deliberate and knowing exploitation of

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[111] ibid, 438.

[112] For a baseline, 'deconstructed' conception of recklessness, see Bant, Modelling (n xxx) 235-9.

[113] *Australian Competition and Consumer Commission v Google LLC (No 4)* [2022] FCA 942 [39] (Thawley J). For a powerful analysis to the contrary, see Tegan Cohen, 'Regulating Manipulative Artificial Intelligence' (2023) 20 SCRIPT*ed* 203.

the fruits of misleading conduct. Unconscionability has tended to be reserved for commercial conduct that shocks the judicial conscience: a high and often conservative bar, that errs in favour of entrepreneurial enterprises.[114] For this reason, among others, calls for the introduction of a prohibition on unfair trading have gathered pace.[115] These seek to re-set the baseline commercial standards that would be applicable in many AI contexts. Such a prohibition would help enormously in finding (for example) that deliberate and knowing manipulation of consumer consent manifested through sophisticated 'dark patterns' was reckless, dishonest, or unconscionable. Systems Intentionality would operate in tandem with that kind of development, as well as others (such as Failure to Prevent offences, and responsible officer stipulations) that seek to shift back on to corporations the responsibility for the full lifecycle of products and services, past the point of sale.

4. Conclusion

Systems Intentionality is not some silver bullet that will slay all forms of corporate fraud. However, it does provide a principled and practical means of interrogating corporate culpability in the digital age. In particular, it avoids the increasingly ad hoc and irrelevant search for the human mastermind behind the misconduct. Where there is such a Moriarty, there is no difficulty with seeing her as the apex decision-maker behind the corporate conduct, consistently with the model. However, Systems Intentionality recognises that corporations frequently act through dispersed systems that pre-program conduct options, in a way that reflects deliberate corporate choices. These make transparent the corporate values and preferences, often at critical legal and ethical junctures. Even where complex machine learning systems are involved, objective assessment of their core features at point of deployment is likely to reveal important insights into corporate intentionality. All of this helps to navigate and, where appropriate, debunk tried-and-tested corporate narratives of mistake and accident. In this light, Systems Intentionality warrants inclusion as an additional weapon in the law's armoury against corporate fraud.

[114] Paterson et al, 'Does Australia Need an Unfair Trading Prohibition'

[115] ACCC, Digital Platform Services Inquiry Third Interim Report, 28 October 2021, p 66; ACCC, Digital Platform Services Inquiry Fourth Interim Report, 28 April 2022, p 5; ACCC, Digital Platform Services Inquiry, Interim Report 5, September 2022, Recommendation 1, p61 ; Duped by Design (n xxx).