AN ANALYSIS AND CRITIQUE OF THE FAILURE TO PREVENT MODEL OF CORPORATE LIABILITY

RORY O'SULLIVAN*

The failure to prevent model of corporate liability has sought to address many of the challenges faced by traditional models of corporate liability when it comes to holding corporations to account for their misconduct. This article engages with judicial decisions to critically analyse the failure to prevent model as it has been introduced in the United Kingdom. This model is comprised of a modified strict liability first limb which is satisfied on the commissioning of some predicate offence by a person relevantly associated to the corporation. This is subject to the second limb which presents corporations with an opportunity to point to procedures it had in place to prevent the misconduct from occurring which may relieve the corporation from fault. The model has led to many regulatory successes which is largely attributable to its modified strict liability first limb. However, courts are still searching for a human repository of fault and applying difficult-to-define notions of culture when applying the model's second limb. This article supports the adoption of the Systems Intentionality model of corporate liability as a means of better understanding the conduct of the corporation for the purposes of the second limb of the failure to prevent model of corporate liability.

* JD (Dist), BCom, The University of Western Australia; Solicitor, Herbert Smith Freehills Kramer. The author would like to thank Rebecca Faugno, Lecturer and Dr Elise Bant, Professor in the Law School, University of Western Australia, for their invaluable comments and guidance in the drafting process. The author would also like to thank his fiancée for encouraging him to seek publication and supporting him along every step of the way. All errors remain the author's own.

I INTRODUCTION

Traditional models of corporate liability have been largely ineffective in holding corporate entities responsible for their misconduct.[1] This comes despite the prevalence of corporate wrongdoing,[2] and the continued growth of these entities in terms of number, power, and complexity.[3] A key reason for this failing is that the criminal law evolved with a concern for natural persons with natural states of mind: individuals who possess knowledge and intent.[4] Yet, corporations lack this same natural mind. This has raised conceptual and practical challenges in holding corporations to account.[5]

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[1] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 57–8 ('*Corporations, Crime and Accountability*'); Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42(4) *Sydney Law Review* 395; Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18(3-4) *Criminal Law Forum* 267. The High Court of Australia recently examined the relationship between corporate systems and processes and offending behaviour, namely unconscionable conduct, in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2024] HCA 27, [124]–[141] (Gordon J), [207]–[219] (Edelman J) ('*Productivity Partners*').

[2] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 136–45 ('FSRC'); *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1, 194 [216] ('RCCOL'); Parliament of New South Wales, *Report of the Inquiry under section 143 of the* Casino Control Act 1992 *(NSW)* (Report, February 2009) vol 1, 232 [153] ('Bergin Inquiry'); Joint Standing Committee on Northern Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Final Report, October 2021) 1–2.

[3] Australian Law Reform Commission, *Final Report: Corporate Criminal Responsibility* (Report No 136, April 2020) 30–3 ('ALRC Report 136'); Gregg Barak, *Unchecked Corporate Power: Why the Crimes of Multinational Corporations are Routinized Away and What We Can Do About It* (Taylor & Francis Group, 2017) 3–5; Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, 1993) 153–4.

[4] Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Sydney Law School Legal Studies Research Paper No 17/14, University of Sydney, February 2017) 1; ALRC Report 136 (n 3) 56 [2.31].

[5] ALRC Report 136 (n 3) 33 [1.20]; *Productivity Partners* (n 1) [199] (Edelman J).

The failure to prevent ('FTP') model of corporate liability has sought to address these challenges. Introduced in the United Kingdom in 2010, the model is a continuation of the United Kingdom's adoption of omissions liability, which follows the 'failure to disclose' and 'failure to protect' offences.[6] The FTP model has received considerable support over the following decade of its application.[7] In light of its success in holding even some of the largest conglomerates to account,[8] other jurisdictions including Australia have subsequently implemented the model.[9]

This article engages with recent judicial decisions to critically analyse the FTP model as it has been introduced in the United Kingdom. It focuses on the model's application by the courts in the United Kingdom, the extent to which the model as currently applied overcomes the issues presented by traditional, individualistic models of corporate liability, and ways in which the model might be refined. Part II examines the importance of state of mind with a focus on the criminal law context. It will then provide an overview of several traditional models of corporate liability, highlighting key issues which have largely contributed to our inability to hold corporations to account for their misconduct. Part III outlines the two limbs of the FTP model and critically analyses key cases in which the FTP model has been applied. A theme which pervades these judgments is a persistent reliance on an individualistic, anthropomorphic state of mind enquiry. This has led to the FTP model's failure to properly convey the culpability and criminality associated with wrongful corporate conduct. Part IV draws on the preceding analysis to explore

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[6] *Bribery Act 2010* (UK) ('*Bribery Act*'); *Terrorism Act 2000* (UK) ss 19, 21A, 38B; *Proceeds of Crime Act 2002* (UK) ss 330, 331; *Domestic Violence, Crime and Victims Act 2004* (UK) s 5; *Criminal Finances Act 2017* (UK) ss 45, 46 ('*Criminal Finances Act*').

[7] Select Committee on the Bribery Act 2010, House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 2019) 52 [171]; Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57, 60; Jonathan Clough, '"Failure to Prevent" Offences: The Solution to Transnational Corporate Criminal Liability?' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 395 ('The Solution to Transnational Corporate Criminal Liability'); Steven Montagu-Cairns, 'Corporate Criminal Liability and the Failure to Prevent Offence: An Argument for the Adoption of an Omissions-Based Offence in AML' in Katie Benson, Colin King and Clive Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Taylor & Francis Group, 2020) 185, 199.

[8] Clough, 'The Solution to Transnational Corporate Criminal Liability' (n 7) 396–7, citing *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249.

[9] *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (Cth) ('*Combatting Foreign Bribery Act*'); Explanatory Memorandum, Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023. See also *Malaysian Anti-Corruption Commission Act 2009* (Malaysia) s 17A. The elements that comprise the failure to prevent model, described in Part III(A) below, have varying definitions and degrees of application between jurisdictions. This article focuses on the FTP model as applied by the United Kingdom as part of the *Bribery Act 2010* (UK).

the potential for a novel corporate liability model, 'Systems Intentionality', to refine the FTP model in a principled and practically workable manner.

Although the focus of this article is on the FTP model as applied in the United Kingdom, the following discussion and analysis are also relevant for those jurisdictions which have implemented the FTP model or are seeking to do so in the near future.

II CORPORATE LIABILITY

A *Censure, State of Mind and Culpability*

State of mind considerations are central to regulating serious civil and criminal misconduct.[10] First, liability is traditionally founded upon the commissioning of an illegal act with an accompanying fault element, such as intention or recklessness.[11] These fault elements are often intertwined with a particular state of mind. For example, the High Court of Australia defined intention as having an 'ultimate purpose or design' in mind.[12] Recklessness involves a general intention to engage in particular conduct, knowledge of the outcome that that conduct may produce and the breach of a normative conduct reasonableness standard.[13] Identifying the offender's state of mind is therefore an integral component of establishing fault, and consequently, liability.[14] The defendant's state of mind is also relevant to many defences, such as honest and reasonable mistake; again, involving a mental state inquiry into what the defendant knew at the time of the alleged wrongdoing.[15]

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[10] Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352, 356–8; The Harvard Law Review Association, 'Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions' (1979) 92(6) *Harvard Law Review* 1227, 1239 ('Regulating Corporate Behavior'), citing *Morissette v United States*, 342 US 246, 254 (1952), in turn quoting Max Radin, 'Intent, Criminal' (1937) 8 *Encyclopedia of the Social Sciences* 126, 130.

[11] Glanville Williams, *Criminal Law: The General Part* (Stevens and Sons Ltd, 2nd ed, 1961) 1–2 ('*Criminal Law: The General Part*'); Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd ed, 1999) 98 ('*Principles of Criminal Law*').

[12] *Zaburoni v The Queen* (2016) 256 CLR 482, 489, cited in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [15]–[17] (Kiefel CJ, Nettle and Gordon JJ), [101] (Edelman J). See also *Automotive Invest Pty Ltd v Commissioner of Taxation* [2024] HCA 36, [112] quoting *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ).

[13] Elise Bant, 'Modelling Corporate States of Mind through Systems Intentionality' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 231, 235 ('Modelling Corporate States'); Williams, *Criminal Law: The General Part* (n 11) 53.

[14] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006) 277, cited in Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), *Evil Corporations: Law, Culpability and Regulation* (Routledge, 2024) 286, 289 ('Corporate Evil').

[15] *CTM v The Queen* (2008) 236 CLR 440, 447 [8], 453 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 491 [174] (Hayne J), 497 [199] (Heydon J); *Bergin v Stack* (1953) 88 CLR 248, 261–3

Further, where wrongdoing is established, state of mind often affects the penalty imposed by the court.[16] As a result, the state of mind enquiry remains relevant even for strict liability offences.

Second, identifying state of mind is essential for the criminal law given its coercive nature. The criminal law is a communicative tool that censures and announces publicly that a particular act is wrongful and that should it be perpetrated the actor is morally reprehensible and deserving of punishment.[17] In other words, culpable. The culpability of the actor is, in part, contingent on the actor's mental state at the time of the wrongdoing.[18] This is reflected in the Latin maxim *actus non facit reum nisi mens sit rea* ('an act does not make a man guilty of a crime unless his mind be also guilty').[19] For example, the individual who negligently destroyed property is less culpable than the individual who did so wilfully.[20] The criminal law must accurately communicate culpability not just to preserve the legitimacy and efficacy of its communicative function, but also to punish the offender appropriately, and to

(Fullagar J, Williams ACJ agreeing at 253, Taylor J agreeing at 277), citing *R v Prince* (1875) LR 2 CCR 154, 169–70 (Brett J).

[16] Elise Bant and Jeannie Marie Paterson, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Pecuniary Penalties under the Australian Consumer Law' in Prue Vines and Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) 154, 174–7 ('Intuitive Synthesis'); Andrew von Hirsch, 'The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives' (2007) 74(2) *Social Research: An International Quarterly* 413, 414–15 ('The "Desert" Model for Sentencing'); Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(3) *Melbourne University Law Review* 440, 452.

[17] Mihailis Diamantis and William Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15(1) *Annual Review of Law and Social Science* 453, 463; A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 12; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) *International Journal of Evidence and Proof* 241, 251 ('Four Threats to the Presumption of Innocence'); Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56(6) *Southern California Law Review* 1141, 1153; Penny Crofts, 'Crown Resorts and the Im/moral Corporate Form' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 55, 58 ('Crown Resorts and the Im/moral Corporate Form'); Ashworth, *Principles of Criminal Law* (n 11) 18; ALRC Report 136 (n 3) 180–181 [5.39]–[5.41]; Bant, 'Regulating Corporate Behavior' (n 10) 1241; European Commission, *Reinforcing Sanctioning Regimes in the Financial Services Sector* (Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions, 2010) 14.

[18] Yeung (n 16) 452, citing Andrew von Hirsch and Kathleen Hanrahan, *The Question of Parole: Retention, Reform or Abolition?* (Ballinger Publishing Company, 1979) 16; Bant, 'Regulating Corporate Behavior' (n 10) 1241; Kelly Shaver, *The Attribution of Blame: Causality, Responsibility, and Blameworthiness* (Springer-Verlag, 1985) 67–8.

[19] *R v Morris* (2002) 128 A Crim R 110, 113–14 [12], quoting *Haughton v Smith* (1973) 58 Cr App R 198, 206–7 (Lord Hailshom).

[20] As reflected in the different sentences imposed by both offences: see *Criminal Code Act Compilation Act 1913* (WA) ss 444(1)(b), 445 ('*Criminal Code* (WA)'). See also Andrew Ashworth, 'The Elasticity of Mens Rea' in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 54 ('Elasticity of Mens Rea').

respect the harm suffered by the wronged individual.[21] Understanding the offender's state of mind is essential for the criminal law to carry out these functions. This is one reason why corporations are quick to label disasters putting their reputation at risk as 'processing errors' or the result of 'poor IT infrastructure... [and] legacy system issues'.[22] It is why corporate executives repeatedly deny intent or knowledge of wrongful conduct.[23] Without these mental states, or by denying these mental states, culpability is capped at lower echelons of fault.

In the context of corporate defendants however, a sticking point in the law has been how this mental state component translates from natural persons who think, believe, plan, and scheme, to artificial corporate persons which lack a natural mind. Current laws respecting mental states evolved with a concern for natural persons with natural minds, not artificial persons.[24] Accordingly, traditional models of assessing corporate responsibility search for a human repository of fault within the corporation who represents the corporation's mental state, and from whom the corporation's liability can hang. These traditional models include vicarious liability, the identification doctrine, the *Meridian* model, the *Trade Practices Act* ('TPA') model, and the aggregation model. This article will briefly consider each in turn.

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[21] Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press Oxford, 1993) 9–12 ('*Censure and Sanctions*'); Ashworth, 'Four Threats to the Presumption of Innocence' (n 17) 247; Ashworth, 'Elasticity of Mens Rea' (n 20) 55–6; Simester and von Hirsch (n 17) 19–20.

[22] FSRC (n 2) 138–9, quoting Mr Wayne Byres (Chair of the Australian Prudential Regulation Authority) and Mr Andrew Thorburn (CEO of NAB) in response to the fees for no services scandal. See generally Penny Crofts, 'Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' (2020) 29(1) *Griffith Law Review* 21.

[23] Commonwealth, *Hansard*, Joint Standing Committee on Northern Australia, 7 August 2020, 6–7 (Jean-Sebastian Jacques, Rio Tinto Chief Executive); Commonwealth, *Hansard*, Joint Standing Committee on Northern Australia, 16 October 2020, 9–10 (Simone Niven, Rio Tinto Group Executive, Corporate Relations); Deanna Kemp, Kathryn Kochan and John Burton, 'Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change' (2023) 41(4) *Journal of Energy & Natural Resources Law* 379, 391–2; Rebecca Turner, 'Crown Perth Directors Deny Knowledge of Alleged Multi-Million-Dollar Money Laundering Account', *ABC News* (online, 30 July 2021) <https://www.abc.net.au/news/2021-07-30/crown-perth-directors-deny-knowledge-of-money-laundering-account/100332860>; Kate Holton and Georgina Prodhan, 'New Evidence Points to Cover-up at Murdoch Tabloid', *Reuters* (online, 18 August 2011) <https://www.reuters.com/article/newscorp-hacking-coverup-idUSLDE77G0FZ20110817>. See also Shaver, *Attribution of Blame* (n 18) 71: 'In the minds of the persons who ask the questions, *answerability*, not causality, is the issue.'

[24] Dixon, 'The Influence of Corporate Culture' (n 4) 1; ALRC Report 136 (n 3) 56 [2.31].

B *Traditional Models of Corporate Liability*

A person may be held responsible directly for their own wrongs, or vicariously for the wrongs of others for whom that person is responsible.[25] Originating in tort law, vicarious liability is a model of responsibility founded on the relationship between the principal and the agent, which holds the principal legally and strictly responsible for the wrongs of its agents.[26] Unlike the identification doctrine model (below), vicarious liability maintains a distinction between the principal (the corporation) and the agent (the employee) as separate legal persons.[27] As a result, the corporation is ultimately liable for the wrongdoing of another, not its own wrongdoing.[28]

Direct liability models focus instead on the liability of a company for its own wrongdoing. For example, the identification doctrine is a highly anthropomorphic approach to corporate liability which recognises the company's directors and particular senior executives as its 'directing mind and will'.[29] The states of mind of those individuals are attributed to the company, thereby reflecting a direct form of corporate liability.[30]

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[25] See generally *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21, [65] (Edelman and Steward JJ) ('*CCIG Investments v Schokman*'); *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136, 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ) ('*Pioneer Mortgage*'); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 16–8.

[26] *CCIG Investments v Schokman* (n 25) [48]–[81] (Edelman and Steward JJ); *Pioneer Mortgage* (n 25) 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ); *Lister v Hesley Hall Ltd* [2001] UKHL 22, [14] (Lord Steyn); Pamela Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095, 1102–5.

The United States has favoured the *respondeat superior* form of vicarious liability, which imputes criminal liability to the company on the basis of an offence committed by a person acting within the scope of their employment with the intent to benefit the corporation. See *New York Central & Hudson River RR Co v United States*, 212 US 481 (1909); Law Commission, *Corporate Criminal Liability: An Options Paper* (Options Paper, June 2022) 62–5 ('Law Commission Options Paper').

[27] Ross Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19(3) *Company and Securities Law Journal* 168, 171.

[28] The issues with this are discussed in greater detail in Part II(C).

[29] *Lennard's Carrying Co v Asiatic Petroleum Co* [1915] AC 705, 713 (Viscount Haldane LC) ('*Lennard's*'); *HL Bolton (Engineering) Co v TJ Graham & Sons* [1957] 1 QB 159, 172 (Denning LJ); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170–2 (Lord Reid); Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 89; Grantham (n 27) 170; Law Commission Options Paper (n 26) 27–44; *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270, 279 (Bright J) cited with approval in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

[30] The doctrine is traditionally the preferred model in the United Kingdom, as well as Canada albeit a broader version which extends to 'senior officers', see *R v Pétroles Global Inc* (2013) QCCS 4262, 42. Australia has also applied the model, see *R v Haley* [2012] TASSC 86, [29] (Wood J); *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* (2007) 71 NSWLR 471, 505–6 [234]–[237] (Beazley JA); *Hamilton v Whitehead* (1988) 82 ALR 626, 630 (Mason CJ, Wilson and Toohey JJ).

In light of various flaws the identification doctrine was modified in *Meridian Global Funds Management Asia Ltd v Securities Commission*,[31] such that attribution was instead determined based on the 'terms and policies of the substantial rule'.[32] Rather than an attribution of mental state from only the most senior company officers like the identification doctrine, the *Meridian* model determines and applies whoever's state of mind, including potentially lower-level employees, the relevant cause of action or legislative provision intended to be attributed to the corporation.[33] Making this determination is ultimately a question of statutory interpretation.

Another modified form of the identification doctrine is the Australian TPA model, which deems the conduct of company directors, employees or agents to be the conduct of the corporation.[34] First appearing in s 84 of the *Trade Practices Act 1974* (Cth), several variations have proliferated Australian Commonwealth statute.[35] In effect, both the *Meridian* and TPA model reformulations of the identification doctrine cast different sized nets to capture more or fewer agents of the corporation, depending on the relevant rule or statute in question. Fundamentally however, the search for a corporate mental state is linked to the mental state of individuals.

The aggregation model ('Aggregation') emerged as an attempt to better recognise the reality of large corporate structures, where the corporate state of mind may be located in more than one individual.[36] Aggregation seeks to address some of the shortfalls of the identification doctrine and its offshoots by amalgamating the knowledge of various individuals within a corporation and imputing the sum of that knowledge to the corporation.[37] Whilst the aggregation approach holds some

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[31] [1995] 2 AC 500, 511 (Lord Hoffmann) ('*Meridian*'); *Director of Public Prosecutions (Vic) Reference No 1 of 1996* [1998] 3 VR 352, 517 (Callaway JA); *ABC Developmental Learning Centres Pty Ltd v Joanna Wallace* [2006] VSC 171, [6]–[15] (Bell J). See generally Rachel Leow, 'Equity's Attribution Rules' (2021) 15(1) *Journal of Equity* 35, 36–42; Rachel Leow, '*Meridian*, Allocated Powers and Systems Intentionality Compared' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 119, 119–23 ('*Meridian*, Allocated Powers and Systems Intentionality Compared').

[32] *Meridian* (n 31) 511 (Lord Hoffmann).

[33] Ibid 507 (Lord Hoffmann).

[34] ALRC Report 136 (n 3) 39 [1.43], citing Duke Arlen, *Corones' Competition Law in Australia* (Lawbook Co, 7th ed, 2019) 300.

[35] See, eg, *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s 65(1); *Taxation Administration Act 1953* (Cth) s 8ZD.

[36] *United States v Bank of New England*, 821 F 2d 844, 855 (1987). See generally, ALRC Report 136 (n 3) 256–9; Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4(1) *University of California Press* 641, 661–77; Rebecca Faugno, 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 159, 161–2.

[37] Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91(5) *Notre Dame Law Review* 2049, 2069–71.

appeal, the model is not free from conceptual challenges.[38] In the context of corporate unconscionable conduct for example, Edelman J in the Federal Court's *Commonwealth Bank of Australia v Kojic* decision considered that '[i]t is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably'.[39] Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so in cases of deceit,[40] and that a corporation has acted contumeliously where no individual has done so in determining exemplary damages.[41]

C *Issues with the Traditional Models of Corporate Liability*

These traditional models of corporate liability are individualistic insofar as they equate the state of mind of one or more individuals with the state of mind of the company itself. They thereby fail to account for the corporation's own wrongdoing on a holistic level. This presents several issues.

First, an individualistic approach can lead to a misalignment of blameworthiness and wrongdoing. A conviction entails a finding of criminal guilt and is a means for the criminal law to censure conduct and communicate blame.[42] It is the state's strongest condemnation of conduct. A system which sends such a strong condemnatory message, which intervenes so coercively, and which restricts individual autonomy so stringently, should be accurate and fair in conveying the extent of the perpetrator's culpability.[43] This is to protect the perpetrator from unjust punishment, but also to recognise the harm that has been suffered by the victim.[44] An individualistic approach can result in an under or over communication

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[38] Jeremy Gans, 'Can Corporations be Dishonest?' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 273, 291–4.
[39] [2016] FCAFC 186, [112] (Edelman J) ('*Kojic*').
[40] *Anglo-Scottish Beet Sugar Corporation Ltd v Spalding Urban District Council* [1937] 2 KB 607, 625 (Armstrong J), quoted in *Kojic* (n 39) [113] (Edelman J); *Armstrong v Strain* [1951] 1 TLR 856, 872 (Devlin J), quoted in *Kojic* (n 39) [113] (Edelman J).
[41] *Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 135 LGERA 98, 200 [408] (Ipp J), quoted in *Kojic* (n 39) [113] (Edelman J).
[42] Simester and von Hirsch (n 17) 3–5, 10–4; Von Hirsch, *Censure and Sanctions* (n 21) 9–12; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, 2005) 61–2.
[43] Ashworth, 'Elasticity of Mens Rea' (n 20) 55–6; Jeremy Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335, 338–9. See generally regarding the principle of 'fair labelling' in the criminal law context Glanville Williams, 'Convictions and Fair Labelling' (1983) 42(1) *Cambridge Law Journal* 85 ('Convictions and Fair Labelling').
[44] Von Hirsch, *Censure and Sanctions* (n 21) 10; Ashworth, 'Elasticity of Mens Rea' (n 20) 55–6.

of culpability by the criminal law.[45] "Innocent" organisations may be held liable, thereby blamed, for the actions of rogue individuals.[46] Conversely, "bad" organisations may escape or minimise blameworthiness and liability by diffusing knowledge or replacing executives.[47] Accordingly, by focusing on the individuals as opposed to the organisation, the criminal law fails to appropriately censure corporate conduct.

Second, from a practical perspective, identifying the human within the corporation from whom the mental state can be derived is notoriously difficult.[48] This is particularly the case when large organisations with diffuse resources and horizontal organisational structures are involved.[49] Consider Crown Casino, whose anti-money laundering processes were analysed first by Patricia Bergin SC in the *Report of the Inquiry under section 143 of the* Casino Control Act 1992 *(NSW)* ('Bergin Inquiry')[50] and subsequently by Commissioner Finkelstein in the *Royal Commission into the Casino Operator and Licence* ('RCCOL').[51] Crown's casino cage staff in Melbourne and Perth recorded patron deposits into a database by aggregating multiple deposits into a single database entry. This aggregation system precluded anti-money laundering staff from identifying the number of deposits made in a single entry, and from accurately identifying the nature of those deposits including whether they reflected any money-laundering indicia.[52] Applying an individualistic approach,

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[45] ALRC Report 136 (n 3) 219 [6.7]; Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 3, 12 ('Taxonomy and Synthesis').

[46] Bucy (n 26) 1103–5, citing *United States v Hilton Hotels Corp*, 467 F 2d 1000 (9th Cir, 1972), *cert denied*, 409 US 1125 (1973).

[47] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Taylor & Francis Group, 1984) 308; Ben Butler, Lorena Allam and Calla Wahlquist, 'Rio Tinto CEO and Senior Executives Resign from Company After Juukan Gorge Debacle', *The Guardian* (online, 11 September 2020) <https://www.theguardian.com/business/2020/sep/11/rio-tinto-ceo-senior-executives-resign-juukan-gorge-debacle-caves>.

[48] Letter from Serious Fraud Office Director Mark Thompson to Chair of the Treasury Select Committee Hon Nicky Morgan MP, 16 July 2018 <https://www.parliament.uk/globalassets/documents/commons-committees/treasury/Written_Evidence/sfo-corporate-liability-160718.pdf>; Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique' (2003) 1 *Journal of Business Law* 1, 8–9.

[49] William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) 145–6 ('*Corporate Bodies and Guilty Minds*'); James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 401; Campbell (n 7) 58; Montagu-Cairns (n 7) 187, quoting Alison Saunders, 'Statement from the Crown Prosecution Service: No Further Action to be Taken on Operation Weeting or Golding', *Crown Prosecution Service* (online, 11 December 2015) <https://web.archive.org/web/20151218214838/www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/>.

[50] Bergin Inquiry (n 2).

[51] RCCOL (n 2).

[52] Ibid 83 [113]–[117], 175 [89]–[93]; Bergin Inquiry (n 2) 209 [31]–[33].

Commissioner Bergin rejected allegations that Crown was turning a blind eye to money laundering activity as 'the Crown team were looking. They were not looking away. It was just that they could not see.'[53] Crown's aggregation system precluded the identification of money laundering knowledge in any one individual. Consequently, applying an individualistic approach, Crown's liability could not be established.[54]

There is evidently a need for a model of corporate liability which is capable of assessing the corporation's own uncontaminated culpability, while overcoming the obstacles presented by modern corporate structures and conduct. The corporate culture and "Systems Intentionality" models, discussed below, attempt to do just that.

D *Organisational Models of Corporate Liability*

1 *Corporate Culture*

The corporate culture model ('Corporate Culture') is a form of organisational fault grounded in Australia's *Criminal Code Act 1995* (Cth) ('*Criminal Code* (Cth)').[55] The model is premised on the notion that a corporation's culture reflects the corporation's state of mind.[56] Accordingly, under the *Criminal Code* (Cth), a corporation whose culture leads to, directs, encourages or tolerates misconduct, or fails to require compliance with the *Criminal Code* (Cth), should be taken to have intended for that misconduct or noncompliance to have occurred.[57] In contrast to individualistic models, as a direct, organisational form of liability, Corporate Culture reflects organisational fault.[58] It is the corporation as a whole and in its own capacity that has developed its own blameworthiness, independent of any individuals.

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[53] Bergin Inquiry (n 2) 233–4 [160]–[170].

[54] In contrast, applying Systems Intentionality to the RCCOL, Commissioner Finkelstein determined that there was 'a compelling challenge to the proposition that Crown's facilitation of money laundering...was inadvertent': see RCCOL (n 2) [96]–[101].

[55] *Criminal Code Act 1995* (Cth) pt 2.5 s 12.3 ('*Criminal Code* (Cth)'); Law Commission Options Paper (n 26) 73–4.

[56] See generally Dixon (n 4); Vicky Comino, 'Corporate Culture is the "New Black": Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?' (2020) 44 *University of New South Wales Law Journal* 295; Faugno (n 36).

[57] Bucy (n 26) 1099, 1121–64.

[58] Comino (n 56) 300; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11(3) *Sydney Law Review* 468, 479.

Unfortunately, despite Corporate Culture provisions existing in Australia for some 25 years, there has not been a single case which has applied the provisions through trial to judgment.[59] It has to date been a failure as a model of corporate liability in the sense of its practical workability.[60] The reason for this is, first, culture is a vague concept which may ask more questions than it answers.[61] There must be some conceptual certainty and consistency in identifying a corporation's culture objectively. Select organisational structures, such as the corporation's incentive programs, leadership training, staff recruitment processes and conflict resolution procedures, may be of assistance in identifying culture objectively;[62] however when it comes to applying these structures to comprehensively determine culture in a consistent manner, the model is still in its infancy.[63] Second, assuming one can objectively identify a company's corporate culture, how can prosecutors translate what may be regarded as a "bad" corporate culture into a corporate state of mind and subsequent fault element? How does a "bad" corporate culture reflect negligence as opposed to recklessness, dishonesty, or intention? It comes as no surprise, therefore, that the Law Commission (England and Wales) recently rejected Corporate Culture as an attribution model for the United Kingdom.[64] Assuming a model is theoretically robust and can assess culpability, it must also be practically workable from investigation through to trial and judgment.[65] This said, the promise of Corporate Culture as a means of establishing organisational liability has not been lost on the Australian Law Reform Commission which put forward two corporate fault reform options that rely to various degrees on Corporate Culture concepts.[66]

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[59] ALRC Report 136 (n 3) 232 [6.49], 245–6 [6.108], citing Transcript of Proceedings, *R v Potter & Mures Fishing Pty Ltd* (Supreme Court of Tasmania, Blow CJ, 14 September).
[60] Law Commission Options Paper (n 26) 77 [6.20]. Cf Bucy (n 26) 1101.
[61] Faugno (n 36) 159–60; Dan Awrey, William Blair and David Kershaw, 'Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?' (2013) 38 *Delaware Journal of Corporate Law* 191, 205; Ann Wardrop, David Wishart and Marilyn McMahon, 'Regulating Financial Institutional Culture: Reforming the Regulatory Toolkit' (2016) 27(3) *Journal of Banking and Finance Law and Practice* 171, 173.
[62] Elizabeth Arzadon, 'Observations in Relation to Deloitte Culture Review of Crown: Expert Opinion' (Perth Casino Royal Commission October 2021) 10.
[63] Faugno (n 36) 159–60. Systems Intentionality, discussed in Part III(D)(2) below, provides a more nuanced and practical approach to identify fault, and identifiable components of 'culture'.
[64] Law Commission Options Paper (n 26) 77 [6.20].
[65] Consistently, the ALRC has made reform recommendations to facilitate greater practical workability, see ALRC Report 136 (n 3) 228–50.
[66] ALRC Report 136 (n 3) 228 (Recommendation 7).

2 *Systems Intentionality*

The Law Commission (England and Wales) took a more favourable stance towards Systems Intentionality, a model of corporate liability developed by Professor Elise Bant.[67] Systems Intentionality is premised on the idea that systems are relied upon by corporations to conduct their business and activities, as without these systems corporations would be largely inert.[68] Systems entail those various practices, processes, policies and checks that work cohesively to produce an outcome.[69] This includes positive elements that drive towards particular outcomes, as well as negative elements (omissions) that allow those outcomes to occur.[70] Systems inherently manifest a general intention to engage in particular conduct, as they are adopted purposively to undertake that conduct.[71] Accordingly, rather than search for a human actor, Systems Intentionality relies on objective characterisations of the corporation's deployed systems of conduct to reveal and give effect to the corporation's state of mind.[72] As put by Commissioner Finkelstein in the RCCOL: '[s]ystemic and sustained change is needed for a culpable corporation to reform its character, *as revealed through its systems, policies, and processes*'.[73]

This is not to say that what individuals knew or did is irrelevant in a Systems Intentionality inquiry.[74] This evidence remains significant as to what it shows about the company's systems as deployed on the ground; even more so where an individual is in a position of seniority with respect to the corporation or relevant system.[75] However, such evidence is not relied upon to impute the individuals' states of mind to the company. In this way, Systems Intentionality is not an anthropomorphic model, but a truly organisational model, which reflects a direct, organisational form of liability.

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[67] Law Commission Options Paper (n 26) 79–80 [6.35]–[6.36]. See generally on Systems Intentionality Elise Bant, 'Systems Intentionality: Theory and Practice' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 183, 183–207 ('Systems Intentionality Theory and Practice'). Systems Intentionality was recently (at the time of writing) applied by the High Court of Australia in *Productivity Partners* (n 1) [106]–[111] (Gordon J), [236]–[248] (Edelman J).

[68] Bant, 'Systems Intentionality Theory and Practice' (n 67).

[69] Bant, 'Modelling Corporate States' (n 13) 245; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, [389]–[391] (Beach J) ('*AGM Markets*').

[70] Rebecca Faugno and Elise Bant, 'Corporate Culture, Conscience and Casinos' (2024) 33(4) *Griffith Law Review* 484, 492.

[71] Bant, 'Systems Intentionality Theory and Practice' (n 67) 183–207.

[72] Ibid 187.

[73] RCCOL (n 2) 178 [101] (emphasis added).

[74] Bant, 'Taxonomy and Synthesis' (n 45) 10.

[75] Elise Bant, 'Corporate Mistake' in Jodi Gardner et al (eds), *Politics, Policy and Private Law: Volume II: Contract, Commercial and Company Law* (Bloomsbury, 2025) 123, 139–41.

Systems Intentionality's analytical starting point is that by deploying the relevant system the corporation intended to undertake the conduct that as a matter of course resulted from that system.[76] From here, a corporation can be held liable for substantive criminal offences. Recall that Crown's systematic aggregation of deposits and separation of business units meant no individual could be identified with the requisite knowledge or mental state to find fault on the part of Crown.[77] However, knowledge of the outcome that this system produces can be identified through an objective assessment of what Crown knew about the system in order for it to operate. Specifically, it was open that Crown knew that aggregating deposits and separating business units would substantially impair (if not completely undermine) its capacity to identify money laundering.[78] This comes particularly in light of the numerous third party warnings of the possibility of Crown's aggregation system facilitating money laundering.[79] Applying Systems Intentionality, Crown's system evinces both a general intention to engage in deposit aggregation and knowledge of an outcome that that conduct would produce. From these two building blocks a fault element, be it recklessness, maybe even intent, begins to take shape.

It follows that Systems Intentionality may serve to better identify components of 'culture' as those systems that comprise the corporation, and to translate those components into fault elements. Furthermore, Systems Intentionality could also act as a standalone model of corporate liability. Nevertheless, while the Law Commission (England and Wales) commented positively on Systems Intentionality, it ultimately preferred the FTP model.[80]

III THE FAILURE TO PREVENT MODEL OF CORPORATE LIABILITY

A *FTP Model Overview*

1 *Section 7(1) offence*

The FTP model is an organisational, omissions-based model of corporate criminal liability that was introduced in the United Kingdom as part of the *Bribery Act 2010* (UK) ('*Bribery Act*').[81] The FTP model follows the omissions path to liability which

[76] Bant, 'Systems Intentionality Theory and Practice' (n 67); Bant, 'Modelling Corporate States' (n 13) 246–7.
[77] See above Part II(C).
[78] Leow, 'Meridian, Allocated Powers and Systems Intentionality Compared' (n 31) 135.
[79] Bergin Inquiry (n 2) 181–2 [185], 210 [38]–[39].
[80] Law Commission Options Paper (n 26) 82–3 [6.51]–[6.54].
[81] *Bribery Act* (n 6). See generally Campbell (n 7); Celia Wells, 'Corporate Failure to Prevent Economic Crime: A Proposal' (2017) 6 *Criminal Law Review* 426; Jeremy Horder and Gabriele Watts, 'The Scope of Liability for Failure to Prevent Economic Crime' (2021) 10 *Criminal Law Review* 851.

the United Kingdom has adopted in other areas of the law including the 'failure to disclose' offences, and 'failure to protect' offences.[82] Section 7(1) of the *Bribery Act* makes a corporation's failure to prevent bribery a criminal offence. The offence requires the commissioning of a predicate offence (bribery) by an 'associated person',[83] for the purpose of obtaining or retaining business or an advantage for the corporation. The corporation is strictly liable for its failure to prevent this predicate offence occurring.

Section 7 has resulted in a number of high profile successes.[84] The United Kingdom's Serious Fraud Office ('SFO') successfully prosecuted Sweett Group plc in 2016 and Skansen Interiors Ltd in 2018, both for failing to prevent bribery under s 7.[85] Furthermore, the SFO entered into deferred prosecution agreements ('DPAs') with Standard Bank plc in 2015,[86] Sarclad Ltd in 2016,[87] Rolls-Royce plc in 2017,[88] and Airbus SE in 2020,[89] all in connection with failures to prevent bribery.

These successes are largely attributable to the FTP model's modified strict liability nature. The removal of fault from the positive limb of the offence reduces the distinction between various criminal conduct. For example, it is the fault element of intent that separates murder from manslaughter.[90] This removal presents prosecuting agencies with fewer evidential demands, supposedly leading to fewer opportunities for acquittal and fewer grounds for appeal.[91] This is particularly advantageous as against large, complex, multi-jurisdictional conglomerates who are often capable of insulating themselves from liability.[92] To illustrate, in 2016 the SFO commenced an investigation into Airbus which was suspected of failing to prevent

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[82] *Terrorism Act 2000* (UK) ss 19, 21A, 38B; *Proceeds of Crime Act 2002* (UK) ss 330, 331; *Domestic Violence, Crime and Victims Act 2004* (UK) s 5; *Criminal Finances Act* (n 6). See generally Andrew Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *Law Quarterly Review* 606.

[83] A person who is performing services on the corporation's behalf: see *Bribery Act* (n 6) s 8.

[84] Clough, 'The Solution to Transnational Corporate Criminal Liability' (n 7) 396–7.

[85] *Serious Fraud Office v Sweett Group plc* (Crown Ct (Southwark), Beddoe J, 19 February 2016); *R v Skansen Interiors Ltd* (unreported, 2018, Southwark Crown Court) ('*Skansen*').

[86] *Serious Fraud Office v Standard Bank plc (now known as ICBC Standard Bank plc)* (Preliminary) [2016] Lloyd's Rep FC 91 ('*Standard Bank*'). On deferred prosecution agreements generally, see Campbell (n 7) 59.

[87] *Serious Fraud Office v Sarclad Ltd* (Preliminary) (Crown Ct (Southwark), Leveson LJ, 8 July 2016) ('*Sarclad*'); *Serious Fraud Office v XYZ Ltd* [2016] Lloyd's Rep FC 517 ('*XYZ*').

[88] *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249 ('*Rolls-Royce*').

[89] *Director of the Serious Fraud Office v Airbus SE* [2021] Lloyd's Rep FC 159 ('*Airbus*').

[90] *Criminal Code* (WA) (n 20) ss 279, 280.

[91] Ashworth, 'Elasticity of Mens Rea' (n 20) 68–9; Andrew Simester, 'Is Strict Liability Always Wrong?' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press, 2005) 26–7.

[92] See Part II(C) above.

bribery.[93] To give a sense of the scale and complexity of the investigation, Airbus is a corporation registered in the Netherlands and is the ultimate parent company of the Airbus Group. Airbus conducted operations through various subsidiaries and the predicate offences involved Airbus, its subsidiaries, and third-party intermediary corporations. The investigation involved over 30.5 million documents,[94] and covered bribery offences in numerous countries across Asia and Africa.[95] President Sharp aptly described Airbus as possessing a 'complex corporate history and structure'.[96] Nevertheless, in 2020 the SFO and Airbus reached a DPA which was ultimately approved by President Sharp in *Director of the Serious Fraud Office v Airbus SE* ('*Airbus*').[97] *Airbus* thereby reflects the practical workability that the FTP model offers, which can overcome many of the evidentiary challenges faced by prosecution agencies even when prosecuting large, multi-jurisdictional, and highly diffused conglomerates.

Notably, this s 7 offence (and the FTP model more generally) is not a model of liability attribution.[98] The failure to prevent bribery is an offence in and of itself, distinct from the predicate offence that occurred. This is an important feature for recognising the offending corporation's own blameworthiness, as opposed to the corporation merely being attributed with the blameworthiness of another actor.

2 *Section 7(2) defence*

Section 7(2) of the *Bribery Act* imports the second limb of the FTP model; a defence where the corporation proves on the balance of probabilities that it had in place adequate procedures designed to prevent associated persons from undertaking bribery.[99] This second limb encourages corporations to invest in precautions that proactively guard against the commissioning of offences.[100]

[93] *Airbus* (n 89).
[94] Ibid [36].
[95] Ibid [3].
[96] Ibid [15].
[97] *Airbus* (n 89); Serious Fraud Office, 'SFO Enters into €991m Deferred Prosecution Agreement with Airbus as Part of a €3.6bn Global Resolution' (Media Release, 31 January 2020).
[98] ALRC Report 136 (n 3) 296 [7.63].
[99] *Bribery Act* (n 6) s 7(2).
[100] ALRC Report 136 (n 3) 297 [7.68], 298 [7.74].

The UK Ministry for Justice provided guidance on the precautions a corporation can take (the 'Guidelines').[101] Many of these precautions and principles are not particularly novel. They are consistent with the systems, policies and processes analysed through a Systems Intentionality analysis; the organisational structures that are indicative of a corporation's culture; not to mention with common sense for guarding against the commissioning of bribery (or at least one would hope so of a global conglomerate executive). President Leveson in approving Rolls-Royce's reformed ethics and compliance procedures in *Serious Fraud Office v Rolls-Royce plc* ('*Rolls-Royce*')[102] alluded to many of these principles.[103] His Honour noted the inclusion of independent compliance officers and business divisions; the use of both internal and external due diligence, and ongoing monitoring of intermediary cooperation; the implementation of procedures tailored to specific high-risk scenarios with the provision of guidance for those operating in those scenarios; and the creation of risk assessment resources and guides to support business approval decision-makers.[104] Further, his Honour identified that ethics and compliance training should familiarise employees with the policies and procedures, with more regular training for those tasked with anti-bribery and corruption monitoring and investigations.[105] These policies, procedures, and training were to be continually reviewed and updated to ensure they are embedded in on the ground practices and continue to operate as intended.[106] However, the mere existence of policies, procedures and training is insufficient. In the context of the *Bribery Act*, these precautions must be 'adequate',[107] which, somewhat unhelpfully from the perspective of achieving consistency and uniformity, is interchanged with 'effective'[108] or 'appropriate' in the Guidelines and various judgments in which the FTP model in applied.[109] Nevertheless, a theme that emerges from the courts and the Guidelines is an outcome-focussed approach,[110] which focuses on the compliance

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[101] Ministry of Justice, 'The Bribery Act 2010: Guidance' (Government Guidance, 2011) ('Bribery Act Guidelines'). See also Ministry of Justice, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (Government Guidance, 2017). Australia has also released guidance on establishing adequate 'procedures': see Attorney-General's Department, 'Guidance on Adequate Procedures to Prevent the Commission of Foreign Bribery' (Media Publication, 2024).
[102] *Rolls-Royce* (n 88).
[103] Ibid [44], [129]–[131].
[104] Ibid.
[105] Ibid.
[106] Ibid [130].
[107] *Bribery Act* (n 6) s 7; *Sarclad* (n 87) [23], [41]; *Airbus* (n 89) [5]; *Standard Bank* (n 86) [20].
[108] *Sarclad* (n 87) [45], [62].
[109] *Sarclad* (n 87) [80]; *Airbus* (n 89) [100], [119]; *Rolls-Royce* (n 88) [87], [93]; *Standard Bank* (n 86) [46]; Bribery Act Guidelines (n 101).
[110] Bribery Act Guidelines (n 101) 20.

systems that have in fact been deployed and achieve an end, as opposed to those systems that are merely preached or are 'cosmetic' in their effect.[111]

Consider *Serious Fraud Office v Standard Bank plc* ('*Standard Bank*'),[112] which involved Standard Bank failing to prevent a USD $6 million payment to Tanzanian government officials. The payment was allegedly a bribe to secure Standard Bank's financing services for a Tanzanian government initiative.[113] Standard Bank and the Standard Bank Group more widely both had a number of anti-bribery policies, procedures and committees in place at the time of offending.[114] Nevertheless, those policies lacked clarity and had not been communicated or reinforced to the relevant staff.[115] Accordingly, Standard Bank staff were unable to appreciate the bribery and corruption risks associated with the transaction. When put into practice, Standard Bank's precautions had negligible impact on predicate offending, and accordingly, it was unable to raise a defence.

Another example is *Airbus*, where the global conglomerate Airbus was charged with multiple instances of failing to prevent bribery in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana over a four-year period.[116] At the time of offending, Airbus had been awarded an anti-corruption compliance certificate for its anti-bribery compliance program design.[117] In light of this, Airbus was supposedly an outstanding corporate citizen. Yet Airbus staff were deliberately circumventing both Airbus' internal and external compliance procedures.[118] President Sharp subsequently concluded that 'Airbus *did not prevent*, or have in place at the material times adequate procedures *designed to prevent*' the offences.[119] Despite Airbus' awards, its precautions as instantiated on the ground were inadequate.

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[111] William Laufer, 'Corporate Liability, Risk Shifting, and the Paradox of Compliance' (1999) 52 *Vanderbilt Law Review* 1341; Kimberly Krawiec, 'Organisational Misconduct: Beyond the Principal-Agent Model' (2005) 32(2) *Florida State University Law Review* 571, 580; Brandon Garrett, 'Structural Reform Prosecution' (2007) 93(4) *Virginia Law Review* 853, 876; Todd Haugh, 'The Criminalization of Compliance' (2017) 92(3) *Notre Dame Law Review* 1215, 1217–18.

[112] *Standard Bank* (n 86).

[113] See Part III(B) below for a more detailed description of *Standard Bank*.

[114] *Standard Bank* (n 86) [20]; Statement of Facts, *Serious Fraud Office v Standard Bank plc (now known as ICBC Standard Bank plc)* (Preliminary) (Crown Ct (Southwark), Leveson LJ, 30 November 2015) [191]–[197] ('*Standard Bank Statement of Facts*').

[115] *Standard Bank* (n 86) [20]; *Standard Bank Statement of Facts* (n 114) [199].

[116] See Part III(B) below for a more detailed description of *Airbus*.

[117] Statement of Facts, *Regina v Airbus SE* (Crown Ct (Southwark), Dame Sharp, 31 January 2020) [24] ('*Airbus Statement of Facts*').

[118] *Airbus* (n 89) [65].

[119] Ibid [5] (emphasis added). President Leveson makes a similar distinction between precaution outcome and design: see *Standard Bank* (n 86) [20].

Evidently, the courts are assessing the relevant precaution's adequacy based on how it is deployed and operated, and on the outcome that is achieved.[120] To be 'adequate' the precaution must achieve an objectively ascertainable outcome: that is, the rolled-out precaution must have a demonstratable impact on predicate offending. The mere existence of precautions is insufficient. Such an approach has a notable advantage. Corporations like Airbus may avoid liability by establishing 'cosmetic' systems that are prima facie robust, particularly to the untrained eye, but knowingly insufficient and destined to fail.[121] Assessing adequacy based on what the rolled-out system achieves, as President Sharp has done, overcomes this cosmetic compliance issue.[122]

The outcome-focussed application of the FTP model's second limb imposes a high burden on corporations seeking to rely on the defence. Even more so given that the interpretation of 'adequate' appears to be assessed post-offence, rather than in light of the circumstances at the time.[123] This approach of hinging 'adequacy' on a hindsight assessment of the success of the precautions — in a failure to prevent case where those precautions necessarily failed — suggests the limb may lack utility. This was precisely the concern contemplated by the House of Lords Select Committee in their 2019 post-legislative scrutiny report:

> We therefore have to decide whether, notwithstanding what was intended, there is a danger that 'adequate' in the Bribery Act will be interpreted too strictly, so that a company which had in place anti-bribery procedures in all the circumstances but did not in fact prevent bribery taking place might be unable to avail itself of this defence. We think such an interpretation is very unlikely…any judge would surely instruct the jury to take the surrounding circumstances into account.[124]

As it turns out, such a direction was not passed on to the jury in *R v Skansen Interiors Ltd*, the first contested s 7 case.[125] In light of the language implemented by the judges above in *Rolls-Royce* and *Airbus*, it appears the Select Committee's concern may have eventuated. Without greater direction from the courts, the language of s 7(2) by itself appears insufficient to provide any real assistance to corporations.

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[120] Such an outcome-based conceptualisation of adequacy is further demonstrated by the judgments in both *Sarclad* (n 87) [45], [62] and *Airbus* (n 89) [119], noting that in both cases the adequacy standard was re-characterised as 'effective'.
[121] See above n 110.
[122] Bant, 'Corporate Evil' (n 14) 296.
[123] As is the language used by the comparable provisions in the *Criminal Finances Act 2017* (UK); see ss 45(2)(b) and 46(3)(b).
[124] Select Committee on the Bribery Act 2010, House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 2019) [210], see also [204].
[125] Ibid [203]; *Skansen* (n 85).

B *An "Organisational" Model of Liability*

Recall that the FTP model is not a model of liability attribution, but an offence that is distinct from, albeit contingent on the commissioning of, a predicate offence. Consistently, in the process of determining culpability for the purposes of penalty assessment, President Leveson in *Rolls-Royce* distinguished the fault of the mid-ranking Rolls-Royce employees who were responsible for the predicate corrupt conduct, and that of Rolls-Royce itself which was responsible for the failure to 'instil within the wider business a culture of compliance'.[126] This reflects the inherent distinction between the fault of the individuals responsible for the predicate offending and the fault of the corporation who is responsible for failing to prevent those predicate offenders. Further, it demonstrates that in applying the FTP model, the courts are adopting an organisational blame approach to liability and looking at the corporation's culpability more holistically.

Furthermore, while the FTP model does not require fault in the positive sense (ie it had knowledge or intent of the predicate offence), a lack of fault is still relevant under the second limb. Accordingly, the FTP model is not a "no fault" liability model. Notably, the approach to organisational blame adopted by President Leveson above relies on corporate culture as a descriptor of the corporation's fault: specifically, the lack of a 'culture of compliance'.[127] This judicial reliance on corporate culture to characterise fault is a recurring theme through several cases that apply the FTP model.[128] Despite the vagueness and practical difficulties with the concept of corporate culture discussed above,[129] in each of these cases the courts have identified the corporation's culture (or lack thereof) in order to determine the corporation's culpability for the purposes of sentencing and deciding whether to approve a DPA.[130] This suggests the courts have been capable of identifying this supposedly elusive concept.[131] Furthermore, the courts were able to translate the identified culture into a specific mental state. For example, President Sharp

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[126] Ibid [102].

[127] Comparable characterisations of culture have been made by Australian courts in the context of the Australian Consumer Law: see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2017] FCA 1251, [118] (Markovic J); *Australian Competition and Consumer Commission v Domain Name Corp Pty Ltd* [2018] FCA 1269, [51] (McKerracher J).

[128] *Sarclad* (n 87) [62]; *Rolls-Royce* (n 88) [102]; *Standard Bank* (n 86) [21]; *Airbus* (n 89) [65].

[129] See Part II(D)(1) above.

[130] *Airbus* (n 89) [108]; *Rolls-Royce* (n 88) [104]; *Sarclad* (n 86) [62]; *XYZ* (n 87) [50]; *Standard Bank* (n 86) [21].

[131] As Australian courts have done for decades in applying the presence or absence of a 'culture of compliance' as one of the 'French factors' to be taken into account at sentencing in civil penalties jurisprudence: see *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076, [42] (French J).

concluded that Airbus had a culture of 'permitting' bribery, indicating knowledge.[132] President Leveson referred to both Rolls-Royce and Sarclad as having a culture of failing to act 'wilfully', thereby suggesting corporate knowledge and intent.[133] Meanwhile, Standard Bank lacked an anti-corruption culture.[134] President Leveson reinforced that while Standard Bank had not acted intentionally, the risks should have been anticipated, thereby suggesting knowledge of the surrounding circumstances.[135]

Unfortunately, while the courts have adopted organisational liability language through corporate culture, analysis of key decisions suggests that the approach taken by the courts to identify this culture follows an individualistic methodology. Specifically, courts show a reliance on the identification of (predominantly senior) individuals within the corporation who possess relevant knowledge and who engage in specific conduct in order to conclude on the relevant corporate culture. Some examples follow.

Sarclad Ltd made and exported steel manufacturing technology to Asia.[136] Over nine years, Sarclad procured 28 out of 74 contracts (representing £17.24 million or 15.81% of total turnover) in foreign jurisdictions through the payment of bribes.[137] Another 18 contracts were regarded as suspicious.[138] Sarclad achieved this by engaging intermediary agents within the relevant foreign jurisdiction to offer and pay the bribe on behalf of Sarclad.[139] President Leveson characterised Sarclad's corporate culture over the relevant time period as a 'wilful disregard as to the commission of offences by employees or agents with no effort to put effective systems in place...there was no attempt on the part of Sarclad to put effective systems in place and there was a wilful disregard as to the need to do so'.[140] President Leveson is thereby capable of identifying a mental state on the part of Sarclad. The corporation had knowledge of the need to install effective systems. Its lack of effort to do so reflected wilful blindness as to this need.[141] However, while this

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[132] *Airbus* (n 89) [108].
[133] *Rolls-Royce* (n 88) [104]; *Sarclad* (n 87) [62]; *XYZ* (n 87) [50].
[134] *Standard Bank* (n 86) [21].
[135] Ibid [21], [47]–[48].
[136] Statement of Facts, *Serious Fraud Office v Sarclad Ltd* (Preliminary) (Crown Ct (Southwark), Leveson LJ, 8 July 2016) [6] ('*Sarclad Statement of Facts*').
[137] *Sarclad* (n 87) [7], [21]; *XYZ* (n 87) [7], [9].
[138] *Sarclad* (n 87) [7]; *XYZ* (n 87) [7].
[139] *XYZ* (n 87) [8].
[140] *Sarclad* (n 87) [62].
[141] *Baden Delvaux & Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, 235, 242–3 (Gibson J) ('*Baden Delvaux*'), endorsed in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (unreported, Gleeson CJ, Gummow,

characterisation reflects culpability on the part of Sarclad as an organisation, President Leveson relied on several indicia to reach this conclusion which were tied to individual knowledge and actions within Sarclad. For example: 'approving the offering of bribes was an accepted way of doing business for the company over the relevant time period and knowledge of such conduct was held, and authorised, *namely by senior executives who represented its controlling mind*'.[142] Further, Sarclad's wilful disregard as to the need to establish effective anti-bribery and corruption systems was 'evidenced by the seniority of those involved'.[143]

This reliance on the identified knowledge and actions of the relevant corporation's senior staff is further demonstrated by President Leveson's *Rolls-Royce* judgment. Rolls-Royce was charged with five counts of failing to prevent bribery across various foreign jurisdictions over several years.[144] President Leveson described Rolls-Royce as exhibiting 'a culture of wilful disregard of the commission of [bribery] offences'.[145] President Leveson's conclusion was based on the noted involvement of 'controlling minds of the company' in the predicate bribery and corruption conduct, as well as the knowledge of that conduct held by Rolls-Royce's employees over a two year period.[146] Further and in particular, his Honour noted that the newly introduced 'senior management and those responsible for the strategic direction of Rolls-Royce are different to those [who were previously] responsible for the running of the company (and its culture) during the period when the events... occurred'.[147] Evidently, his Honour's conceptualisation of corporate culture is that it is run by senior management. Accordingly, the identification of knowledge and actions of, at the least senior management, is necessary to make a finding of an impugnable corporate culture.

Recall *Airbus*, where Airbus was charged with failing to prevent bribery offences in Malaysia, Sri Lanka, Taiwan, Indonesia, and Ghana between 2011 and 2015. President Sharp identified 'a corporate culture which permitted bribery by Airbus business partners and/or employees to be committed throughout the world'.[148] Again, while this culture connotes responsibility on the part of Airbus, President Sharp relies on a highly individualistic approach to arrive at this conclusion. For

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Callinan, Heydon and Crennan JJ, 24 May 2007) [174]–[178] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[142] *Sarclad* (n 87) [60] (emphasis added).

[143] Ibid [46], [62].

[144] *Rolls-Royce* (n 88) [97], [102]–[107].

[145] Ibid [104].

[146] Ibid [4], [35], [104].

[147] Ibid [51].

[148] *Airbus* (n 89) [65].

example, while the identities of individuals involved in the investigation were anonymous, President Sharp made clear that their identities had been disclosed privately so that her Honour could 'assess their comparative seniority *and, thus, the responsibility of Airbus*'.[149] President Sharp identified that Airbus' policies and compliance procedures were easily and deliberately bypassed or breached by 'a number of very senior, senior and other employees, including employees with compliance responsibilities'.[150] This noting of seniority permeates her Honour's reasoning, with individuals involved in the offences labelled as 'senior'[151] or 'very senior'.[152] Accordingly, Airbus' corporate culture and corporate responsibility are ultimately contingent upon the identification of knowledge and involvement of senior officers within the company.

An assessment of individuals is not an issue in its own right in the determination of corporate blameworthiness. This is particularly the case for individuals who have a central role in the establishment or operation of a particular system, policy or practice. However, to properly identify organisational blameworthiness on the part of the corporation, these individuals should be used as indicia of the intent behind the corporate system, policy or practice, as opposed to the individual's mental state being anthropomorphically applied as the corporation's own.

President Sharp's identification of relevant individuals to conclude on corporate responsibility is consistent with her Honour's conceptualisation of corporations as mere artificial shells rather than morally responsible agents in their own right.[153] To substantiate this her Honour cited President Leveson's judgment in *Serious Fraud Office v Tesco Stores Ltd*,[154] where his Honour stated: '[i]t is important to underline that a company is a structure which can only operate through its directors, employees and agents. Stripping out the human beings, a company itself can have no will or ability to decide how it should behave.'[155] Despite the increasing commentary and movement towards models of organisational liability,[156] this preserved

[149] Ibid [13] (emphasis added).
[150] Ibid [65].
[151] Ibid [44], [47], [55].
[152] Ibid [44], [65].
[153] Cf *Productivity Partners* (n 1) [108] (Gordon J), where her Honour describes corporations as thinking and acting through their systems. See also Celia Wells, *Corporations and criminal responsibility* (Oxford University Press, 1993) 151; Christian List and Philip Pettit, *Group Agency: the possibility, design, and status of corporate agents* (Oxford University Press, 2011); ALRC Report 136 (n 3) 132–5; Bant, 'Taxonomy and Synthesis' (n 45) 3; Crofts, 'Crown Resorts and the Im/moral Corporate Form' (n 17).
[154] [2017] 4 WLUK 558.
[155] *Airbus* (n 89) [77], quoting *Serious Fraud Office v Tesco Stores Ltd* [2017] 4 WLUK 558, [53] (Leveson LJ).
[156] See, eg, Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 1).

conceptualisation of corporations as mere shells is ultimately limiting our ability to understand and control aberrant corporate activities and personalities.

Standard Bank[157] provides a somewhat different scenario. The Government of Tanzania sought to raise finance for its 'Five Year Development Plan'.[158] Standard Bank and its sister company Stanbic Bank Tanzania Ltd ('Stanbic') submitted a proposal to the Tanzanian Government in February 2012, quoting a combined fee of 1.4% of gross proceeds raised. This fee was increased to 2.4% in September 2012 with the additional 1% (approximately USD $6 million) going to a 'local partner', Enterprise Growth Markets Advisors Ltd ('EGMA').[159] No documents demonstrated that EGMA had any role associated with the proposal to represent any consideration for the US $6 million.[160] Further, EGMA's chairman was a serving member of the Tanzanian Government.[161] The SFO alleged that the USD $6 million was a bribe serving to induce senior Tanzanian government members to favour Standard Bank's and Stanbic's proposal to secure their role in financing the Five Year Development Plan. Standard Bank was allegedly responsible for the failure to prevent this intended bribery committed by senior officials of Stanbic as a result of 'the inadequacy of its own compliance procedures and failure to recognise the risks inherent in the proposal'.[162] President Leveson was reluctant to describe Standard Bank's culture as wilful as his Honour did in both *Sarclad* and *Rolls-Royce*. This was a result of the inability of 'the evidence [to] demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves'.[163] His Honour subsequently re-asserted: 'I repeat: the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe',[164] and again, 'Standard Bank's employees involved in the transaction did not express adequate awareness about the bribery risks in the transaction'.[165] Accordingly, as individuals within Standard Bank lacked knowledge and intention, Standard Bank itself could not be attributed with knowledge or intention. In contrast, but with consistent reasoning, President Leveson concluded with respect

[157] *Standard Bank* (n 86).
[158] Ibid [9].
[159] Ibid [10].
[160] Ibid [12].
[161] Ibid [10].
[162] Ibid [26].
[163] Ibid.
[164] Ibid [46].
[165] Ibid [48].

to Stanbic that knowledge of the likely effect of the bribe on public officials was 'well understood at least by two senior executives of Stanbic *and, thus, Stanbic*'.[166]

So what was Standard Bank's culture? In contrast to a wilful or permissive culture, Standard Bank was at fault because 'an anti-corruption culture was not effectively demonstrated'.[167] This stemmed from Standard Bank's failure to identify and respond to obvious bribery and corruption risks, which should have been anticipated given 'Standard Bank's experience in emerging markets'; the fact that Standard Bank's deal team was 'fully aware' that the payment was a significant one; and that Tanzania had been identified by international bodies as having a high bribery risk.[168] While each of Sarclad's, Rolls-Royce's and Airbus' respective fault stemmed from individuals who had knowledge of bribery and corruption, Standard Bank's fault was connected with individuals *lacking* this knowledge. In sum, President Leveson's characterisation of Standard Bank's mental state is akin to constructive knowledge.[169] Again, this conclusion is founded upon the knowledge (or in this case the lack thereof) of individuals within the corporation.

In light of the above, at first glance the FTP model's strict liability nature tends to present it as an attractive alternative for avoiding the problems associated with state of mind enquiries and attribution.[170] Yet as illustrated above, despite the FTP model's strict liability nature the courts have nevertheless explored corporate states of mind in order to decide on DPA approval and penalty determination. The courts' reliance on knowledge and actions of individuals in assessing the corporate mental state means that issues that plague many of the individualistic traditional models of corporate liability remain inherent in the FTP model. In particular, the possible misalignment between a corporation's true blameworthiness and its culpability as communicated by the criminal law. Two examples of this follow.

First, the corporation is in a position to control its own exculpatory narrative by implementing structural information silos. In asserting Standard Bank's lack of intention, President Leveson repeatedly noted the inability to identify individuals within the corporation with the requisite knowledge and intent.[171] This stemmed from Standard Bank's 'unclear' anti-corruption policies and anti-corruption training that was 'not reinforced effectively'.[172] While these factors led to a failure to

[166] Ibid [47] (emphasis added).
[167] Ibid [21].
[168] Ibid [47]–[48].
[169] *Baden Delvaux* (n 144) 235, 242–3 (Gibson J); Bant, 'Modelling Corporate States' (n 13) 239–40.
[170] See Part II(C) above.
[171] *Standard Bank* (n 86) [26], [46], [48].
[172] Ibid [20].

demonstrate an 'anti-corruption culture', the culpability and fault (arguably negligence) associated with this falls short of the more intentional 'culture of wilful disregard' seen in *Sarclad* and *Rolls-Royce*. By implementing information silos and insulating employees from knowledge of relevant facts and risks, corporations may impair the courts' ability to determine a culture of compliance, and accordingly, cap their liability at lower echelons of fault.

Second, the connection of individuals to corporate fault leads to a revolving door of executives which partially frees the corporation from blame.[173] As identified by President Leveson in *Standard Bank*, a factor in his Honour's decision to award the DPA was 'the fact that [Standard Bank] in its current form is effectively a different entity from that which committed the offence'.[174] His Honour used identical language in *Sarclad*, and both his Honour and President Sharp used similar reasoning in *Rolls-Royce* and *Airbus* respectively.[175] Yet, in line with ideas of Systems Intentionality, if the cause of offending or anti-compliance culture is a systemic issue resulting from the nature of the industry, the corporation's strategic plans and procedures, or its relationships, then a change in personnel will not necessarily, and certainly not alone, be sufficient to correct or improve these causal factors.[176] The culpability communicated by the criminal law is connected to the fault of individuals and is no longer aligned with the corporation's actual culpability, which in truth is tied more to its internal systems.

C *Fair Labelling and a Convergence of Criminal and Civil Law*

The criminal law has a communicative function that censures particular wrongful conduct, which reflects its expressive and retributive nature.[177] Comparatively, civil law penalties principally deter relevant conduct and induce compliance.[178] It is this communicative function of the criminal law which largely distinguishes it from its

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[173] As put by 'Standard Bank Employee G' (emphasis added), 'I think most seasoned bankers would be wise enough to know that if [a compliance breach] was caused by you or your team, *you would have been shown the door very quickly and the bank would have used you as the scapegoat*.' See *Standard Bank Statement of Facts* (n 114) 51; *Corporate Crime in the Pharmaceutical Industry* (n 47) 308; Laufer, *Corporate Bodies and Guilty Minds* (n 49) 145–6; Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 1) 40.

[174] *Standard Bank* (n 86) [34].

[175] *Sarclad* (n 87) [43]; *Rolls-Royce* (n 88) [49]–[51]; *Airbus* (n 89) [76]–[78].

[176] Simon Bronitt, 'Rethinking Corporate Prosecution: Reviving the Soul of the Modern Corporation' (2018) 42(4) *Criminal Law Journal* 205, 206.

[177] See above n 16.

[178] *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [55], citing *Trade Practices Commission v CSR Ltd* [1990] FCA 762, [40] (French J).

civil law counterpart.[179] The proven prosecutorial advantages of the FTP model come at a cost from the perspective of the criminal law fulfilling its communicative function. As fault is removed from the criminal offence, a conviction for failing to prevent may capture any of a number of states of mind, thus rendering the criminal law less capable of communicating graduations in offenders' culpabilities.[180]

Consider and contrast the cases of *Sarclad* and *Standard Bank*. *Sarclad* involved 28 contracts procured through the payment of bribes with another 18 suspected of the same.[181] As noted by President Leveson, this misconduct was significantly graver than Standard Bank's, 'which concerned the failure to prevent a single (albeit very substantial) incident of bribery by a sister company in the same corporate family'.[182] There is also a stark difference in the mental states of the two companies. Discussed above,[183] Sarclad had a culture of wilful disregard reflecting an intention to facilitate bribery. Comparatively, Standard Bank is better characterised as possessing constructive knowledge of the surrounding risks and circumstances, with President Leveson repeatedly emphasising the absence of intention. Nevertheless, both Sarclad and Standard Bank were charged with, and agreed to, DPAs respecting, the same offence of failing to prevent bribery. The culpability communicated by the offence itself was equal, reflecting a stifled ability of the criminal law to accurately communicate blame and graduations in culpability. This removal of fault reflects a convergence of criminal and civil regimes.[184]

Civil regulation as a means of controlling corporate conduct has considerable support, as noted by the ALRC: '[w]here breaches occur, the initial response should be to persuade and educate [the corporation] as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation.'[185] However the convergence of civil and criminal regimes has issues.[186] First,

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[179] Easton and Piper (n 42) 61–2, 162; Bucy (n 26) 1106, 1114–16; Von Hirsch 'The "Desert" Model for Sentencing' (n 16) 414.
[180] Elise Bant, 'Where's WALL-E? Corporate Fraud in the Digital Age' in Paul S Davies and Hans Tjio (eds), *Fraud and Risk in Commercial Law* (Hart Publishing, 2024) 55. Notably, this offends the 'fair labelling principle', where an offence should accurately characterise the offender's wrongdoing, harm, and culpability: see Ashworth, 'Elasticity of Mens Rea' (n 20) 56; Horder (n 43) 338–9; Williams, 'Convictions and Fair Labelling' (n 43) 85, 91; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.
[181] *Sarclad* (n 87) [7], [21]; *XYZ* (n 87) [7], [9].
[182] *XYZ* (n 87) [22].
[183] See Part III(B) above.
[184] Bant, 'Regulating Corporate Behavior' (n 10) 1369.
[185] Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) [2.40]–[2.70]; ALRC Report 136 (n 3) 169 [5.7], 178 [5.31]; Law Commission Options Paper (n 26) 172–4 [11.87].
[186] ALRC Report 136 (n 3) 172 [5.15]–[5.16], 174–5 [5.21]–[5.23]; Law Commission Options Paper (n 26) 174–5 [11.88].

convergence contributes to over-complication of the corporate regulatory system, impairing the ability of both law enforcement to prosecute and corporations to comply.[187] As identified by Commissioner Hayne in the context of the Financial Services Royal Commission:

> The more complicated the law, the easier it is for compliance to be seen as asking 'Can I do this?' and answering that question by ticking boxes instead of asking 'Should I do this? What is the right thing to do?' And there is every reason to think that the conduct examined in this report has occurred when the only question asked is: 'Can I?'.[188]

Second, convergence erodes the expressive nature of the criminal law and provides corporations with an out for serious criminal conduct.[189] In combination with the strategies of denial which corporations regularly implement to downplay the culpability associated with their malfeasance,[190] an environment is created where corporations can soften the significance and criminality of their misconduct.[191] The criminal law has an important role in delineating and censuring the most serious wrongful conduct. As corporations have repeatedly shown a capacity for such conduct,[192] the author considers that the development of any corporate criminal liability model must preserve this function.

IV SYSTEMS INTENTIONALITY AND THE FTP MODEL

The following section explores Systems Intentionality as a model of corporate liability which has the capacity to determine graduations in corporate mental states free of any individual within the corporation.[193] This enables corporations to be held to account for their own blameworthy conduct in an organisational sense, and in turn, facilitates the preservation of criminal and civil law regimes as separate systems of law. As will be shown, the nuance of Systems Intentionality also facilitates accommodation for mistake and bona fide error.[194] Further, with Systems

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[187] ALRC Report 136 (n 3) [3.48], [5.18]–[5.23].
[188] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 290.
[189] ALRC Report 136 (n 3) 167 [5.1]; FSRC (n 2) 433 (Commissioner Hayne).
[190] See Part II(A) above.
[191] Penny Crofts, 'The Horror of Corporate Harms' (2022) 38(1) *Australian Journal of Corporate Law* 23.
[192] Braithwaite (n 47); Barak (n 3).
[193] Elise Bant and Jeannie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63, 90–1.
[194] Bant, 'Modelling Corporate States' (n 13) 248–9.

Intentionality's recent judicial application in Australia,[195] one can now point to the practical workability of the model.

A *Assessing Graduations in Fault and State of Mind*

Systems Intentionality commences with a general intention to engage in conduct, as the establishment and operation of a system is inherently purposive.[196] Systems Intentionality then relies on objective facts, such as the existence or non-existence of precautions, to establish a specific fault element and state of mind.[197] This is necessary to depict grades of culpability. An inability to determine graduations of mental states places fault elements such as specific intention, recklessness, unconscionability, or dishonesty beyond the realm of corporate liability. The criminal law would thereby be unable to accurately convey blame.

Consider Systems Intentionality's potential to identify specific intent. Professor Bant describes specific intention arising where a system 'is apt to (calculated to, designed to, of a nature to) produce some outcome, and does always or usually produces that outcome'.[198] This conclusion is stronger where there are no or few other alternatives but for that specific outcome to occur from the conduct.[199] Applying this to *Australian Securities & Investments Commission v National Exchange Pty Ltd*,[200] National Exchange sent unsolicited off-market offers to members of a demutualised company (Aevum Ltd) to buy their shares substantially below market value.[201] The offers were sent to specific vendors on the basis that the members had not paid for the shares so would be more likely to sell and less likely to understand the true value of their shares.[202] The offer was accepted by 257 members.[203] The Full Court of the Federal Court of Australia found that 'National Exchange set out to systematically implement a strategy to take advantage of the fact that amongst the official members there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer'.[204] National Exchange's system — sending unsolicited under-value offers to commercially inexperienced individuals — objectively manifested knowledge of the vulnerabilities of a specific

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[195] *Productivity Partners* (n 1) [106]–[111] (Gordon J).
[196] Ibid [108] (Gordon J); Bant, 'Modelling Corporate States' (n 13) 245–6.
[197] See Part II(D)(2) above and associated footnotes.
[198] Bant, 'Modelling Corporate States' (n 13) 247.
[199] Ibid.
[200] [2005] FCAFC 226 ('*National Exchange*'), discussed in Bant, 'Systems Intentionality Theory and Practice' (n 67) 189–90.
[201] *National Exchange* (n 203) [3].
[202] Ibid [33], [43].
[203] Ibid [3].
[204] Ibid [43].

group of people and a predatory intention to exploit those vulnerabilities. This is because the system could only work (the offers would only be accepted) if those vulnerable people existed and the model functioned to exploit their vulnerabilities. Therefore, through Systems Intentionality, National Exchange's system of conduct manifested a specific, predatory intent.[205]

A comparable example is *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*. Captain Cook College (the 'College') relied upon marketing and sales agents to recruit students for its online tuition courses.[206] The College remunerated agents on condition that the student passed the census date (the point at which the student incurred a tuition debt).[207] Further, the courses were conducted online.[208] This business model bore the risk that a student would enrol in the course, then disengage with studies, but pass the census date such as to incur a debt. The College had two processes in place to guard against this risk. First, an outbound 'quality assurance call' to ensure the student understood their commitment and financial obligations.[209] Second, a withdrawal mechanism by which students with insufficient attendance would be withdrawn from the course.[210] In April 2015 the College removed both of these processes.[211] Before the removal, all students who passed the census date were maintaining contact with the College and were engaging in their studies, however the College had declining enrolments and profitability.[212] After the removal, enrolments increased significantly with the College's monthly revenue by December having surged by 5000%.[213] However, the College had 1859 students pass the census date (thereby owe tuition fees) then fail to maintain any contact with the College.[214] The High Court of Australia concluded that the College had engaged in unconscionable conduct contravening s 21 of the Australian Consumer Law.[215] Justice Gordon's judgment provides a useful illustration of Systems Intentionality.[216] Her Honour concluded that the College's removal of the systems was designed to achieve an end: to increase enrolments of 'unwitting and unsuitable students' to increase revenue.[217] Further, that this was an

[205] Bant, 'Systems Intentionality Theory and Practice' (n 67) 189–90.
[206] *Productivity Partners* (n 1) [26]–[27].
[207] Ibid [27].
[208] Ibid [29]–[30].
[209] Ibid [33].
[210] Ibid [34].
[211] Ibid [37].
[212] Ibid [35].
[213] Ibid [35]–[41].
[214] Ibid [39].
[215] Ibid [11] (Gageler CJ and Jagot J), [144] (Gordon J), [200] (Edelman J), [340] (Beech-Jones J).
[216] Ibid [96]–[195] (Gordon J).
[217] Ibid [143], [156].

'inevitable consequence' of this action from which 'it may be inferred that the College "mean[t] to produce" that end. And it did.'[218] Her Honour identified a specific intent on the part of the College without needing to point to an individual to do so.[219]

Recklessness is another fault element relied upon by many fault-based offences.[220] As Professor Bant argues, through a Systems Intentionality lens the failure of a corporation to amend a system in light of repeated harms may manifest a recklessness as to their occurrence (or arguably even a specific intention to produce those harms).[221] Recall that Crown arguably had knowledge of both the possibility of money laundering and the unreasonable risk of that outcome occurring by aggregating deposits.[222] This knowledge was reinforced by the repeated warnings from banks of money laundering red flags.[223] In light of those known risks Crown proceeded with, and failed to update, its aggregation system. This arguably reflects recklessness as to the occurrence of money laundering, or even a specific intent to facilitate money laundering.

Systems Intentionality thereby has the capacity to assess graduations of states of mind which can be analysed by the courts to assess culpability in a more nuanced manner.[224] Proof of knowledge or culpability on the part of an individual is not required, though depending on the role of an individual within the corporation's systems and processes, individual understanding may in some (but not all) instances be valuable evidence of the corporation's embedded systems, policies and practices. Accordingly, Systems Intentionality may serve the courts in applying the FTP model by providing greater clarity on the circumstances in which individual states of mind may be relevant, clarifying the ways in which they are relevant, and avoiding an overreliance on individuals to establish state of mind.

Considering this function, it is worth highlighting that Systems Intentionality is not necessarily a standalone model. Rather, it may benefit other models of liability by providing a more nuanced means to identify state of mind.[225] For example, the analysis of systems of conduct and patterns of behaviour may serve as indicia of organisational culture, replacing the need to focus on conduct and mental states of

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[218] Ibid [143], quoting *Smith v The Queen* (2017) 259 CLR 291 at 319–320 [57].
[219] Ibid [111].
[220] See, eg, *Criminal Code* (Cth) (n 55) s 103.1 (financing terrorism), s 115.4 (recklessly causing serious harm); Bant, 'Modelling Corporate States' (n 13) 235–9.
[221] Bant, 'Modelling Corporate States' (n 13) 247–8.
[222] See Part II(D)(2) above and associated footnotes.
[223] Bergin Inquiry (n 2) 181–2 [185], 210 [38]–[39].
[224] Bant, 'Modelling Corporate States' (n 13) 245–53.
[225] Bant, 'Taxonomy and Synthesis' (n 45) 7–29.

individuals in making these culture determinations.[226] With respect to the FTP model, Systems Intentionality analysis may evidence the corporate state of mind behind failure to prevent the predicate offence. No longer would the offence be a mere failure to prevent, but rather an intentional or reckless failure to do so.

The courts in the United Kingdom have already relied on systems-like language in the FTP model's application. *Sarclad*, *Airbus* and *Rolls-Royce* all feature conduct described as accepted business practices and systems of conduct.[227] In *Rolls-Royce* the 'extensive systematic bribery and corruption' was a result of, inter alia, the multi-jurisdictional instances of bribery which were spread across Rolls-Royce's business divisions and were persistent over 24 years.[228] Airbus' 'established business practice' comprised bribery which 'took place over many years', 'extend[ed] into every continent in which Airbus operate[d]' and which was 'endemic in two core business areas'.[229] In *Sarclad*, President Leveson found the 28 contracts which involved bribes to be a 'conspiracy involv[ing] a course of systematic conduct over eight years. It implicates seven agents in as many jurisdictions, generated some £6.5 million of gross profit (£2.5 million net) and caused detriment to other potential competitors. It was, therefore, part of Sarclad's established business conduct.'[230] The courts are inherently adopting systems language, particularly where there is a pattern of behaviour over an extended period of time. A Systems Intentionality-like approach is also seen through the outcome-focussed interpretation and assessment of the FTP model's second limb precautions defence, which is consistent with Systems Intentionality's focus on embedded systems, policies and practices.

B *Some Worked Examples involving Systems Intentionality and the* Bribery Act

In *Rolls-Royce*, Rolls-Royce was charged (among other offences) with failing to prevent bribery pursuant to s 7 of the *Bribery Act*. This included, first, engaging an intermediary company to pay bribes to a competitor and an Indonesian state-owned company to win a long-term service agreement with that company in an open

[226] Australian courts have interpreted and applied these concepts following their insertion into the *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(4)(b). See, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [88] (Reeves J); *AGM Markets* (n 69) [385]–[392] (Beach J).
[227] *Rolls-Royce* (n 88) [35]; *Sarclad* (n 87) [7], [34], [60]–[61]; *XYZ* (n 87) [7], [22], [49]; *Airbus* (n 89) [60].
[228] *Rolls-Royce* (n 88) [35].
[229] *Airbus* (n 89) [60], [64].
[230] *Sarclad* (n 87) [7], [34].

competitive tender.[231] Second, engaging an intermediary to make payments to Nigerian public officials to gain favour towards winning supply agreements for two oil and gas projects in Nigeria.[232] Third, engaging an intermediary to make payments to Garuda senior employees to secure engine and aircraft supply contracts.[233] This conduct all occurred between 2011 and 2013.

A pattern involves examining the external manifestations of behaviour to determine whether an intelligible sequence can be derived such that it may be possible to predict further behaviour.[234] Rolls-Royce persistently secured (or was in a position to secure) high value contracts with foreign corporations and governments through the payment of bribes via intermediaries to key decision-makers.[235] A pattern of behaviour is discernible from these outcomes. In isolation, patterns are merely occurrences of outcomes and neutral as to intention.[236] However, systems of conduct are designed such that its various components and processes work cohesively to produce those outcomes.[237] The existence of a pattern of behaviour, like Rolls-Royce's above, supports the conclusion that there is an underlying system of conduct which is purposefully producing the pattern of outcomes, or that is reckless as to their occurrence.[238] Specifically, Rolls-Royce was operating in areas that it knew were prone to corruption.[239] There was knowledge of corrupt intermediary behaviour and a pattern of bribery conduct.[240] Comparable to Crown, Rolls-Royce's failure to address the risks of bribery despite the knowledge held by the corporation manifests recklessness, or alternatively a specific intention, as to the facilitation of bribery. This recklessness is held by Rolls-Royce at an organisational level, separate from the state of mind of any one or more individuals involved in Rolls-Royce's operations.

How does this function in the context of a one-off event where no pattern of behaviour exists? Consider the case of a single bribe as occurred in *Standard Bank*. Professor Bant has described a system of conduct as 'the internal method or

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[231] *Rolls-Royce* (n 88) [103]; Statement of Facts, *Serious Fraud Office v Rolls-Royce plc* (Crown Ct (Southwark), Leveson LJ, 17 January 2017) [191] ('*Rolls-Royce Statement of Facts*').
[232] *Rolls-Royce* (n 88) [104]; *Rolls-Royce Statement of Facts* (n 234) [209].
[233] *Rolls-Royce* (n 88) [105]; *Rolls-Royce Statement of Facts* (n 234) [234].
[234] *Unique International College Pty Ltd v Australian Competition and Consumer Commission & Anor* (2018) 362 ALR 66, [104]; *AGM Markets* (n 69) [386] (Beach J); Bant, 'Systems Intentionality Theory and Practice' (n 67) 190–2.
[235] *Rolls-Royce* (n 88) [35].
[236] Leow, 'Meridian, Allocated Powers and Systems Intentionality Compared' (n 31) 126.
[237] Bant, 'Modelling Corporate States' (n 13) 245; *AGM Markets* (n 69) [389]–[391] (Beach J).
[238] *AGM Markets* (n 69) [390] (Beach J).
[239] *Rolls-Royce* (n 88) [102], [105].
[240] Ibid [105]; *Rolls-Royce Statement of Facts* (n 234) [208], [259].

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).'[241] Standard Bank lacked audits, approval checks or a clear compliance policy despite these being critical to compliance with financial crimes laws and obligations.[242] These omissions are a design choice which in cohesion with the high risks of bribery inherent in the context of the transaction manifests an intention to facilitate, or a recklessness as to the occurrence of, bribery.

Recall one of the issues with the second limb of the FTP model, at least in how it has been applied to date, is that the outcome-focussed approach of the defence largely negates the defence even where there was a mistake or bona fide error. Assume for example that Airbus and its award-winning compliance precautions was genuinely an outstanding corporate citizen.[243] What if Airbus was merely undermined by rogue agents? Where there is a failure of the deployed system, the court must determine whether the offence was inevitable because it was unforeseeable, unavoidable, a mistake, or a system error; or alternatively, because the precautionary measure was deliberately insufficient. The adequate precautions limb of the FTP model may be better served through an analysis of a corporation's systems, policies and processes. The capacity for Systems Intentionality to assess corporate state of mind, specifically to pinpoint knowledge or intent, may provide the necessary nuance to the FTP model to properly provide a safeguard against rogue employees and bona fide mistakes.[244]

Systems Intentionality provides valuable insights into determining graduations in mental states at an organisational as opposed to an individualistic level. A focus on the objective, deployed systems and practices as opposed to the individuals within a corporation may assist courts in pinpointing specific mental states, and to more accurately establish culpability and fault. By doing so, corporations can be held to account for their own blameworthy conduct, while the criminal law's function of expressing moral obloquy can be preserved. Appreciating the need for a practically workable model of corporate liability, which the FTP model has proved itself to be,

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[241] Bant, 'Modelling Corporate States' (n 13) 245.
[242] *Standard Bank* (n 86) [20]–[21]; *Standard Bank Statement of Facts* (n 114) [199]–[200].
[243] See Part III(A)(2) above.
[244] Bant, 'Corporate Mistake' (n 75); Jeannie Marie Paterson and Elise Bant, 'Automated Mistakes: Vitiated Consent and State of Mind Culpability in Algorithmic Contracting' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 255–71.

the examples discussed also point to Systems Intentionality as such a workable model.

V CONCLUSION

Year after year, corporations have proven themselves capable of inflicting significant harms on our communities, while insulating themselves from liability. This is partly because they choose to, and partly because they are allowed to.

The absence of a positive fault element in the FTP model better enables regulators to hold corporations to account no matter the size, complexity, or power. However, this does not ground the FTP model in the realm of no fault liability models. The corporation can still identify the absence of fault by pointing to procedures it had in place that were designed to prevent the commissioning of the underlying misconduct.

Systems Intentionality offers a more nuanced approach to identifying these procedures by focusing on the embedded systems, policies and practices as adopted and implemented by the corporation, rather than on those cosmetic procedures or those individuals who comprise the corporation. Accordingly, Systems Intentionality can support the development of the FTP model as a truly organisational and effective model of imposing criminal liability.