Rethinking Corporate Groups: Insights from Systems Intentionality

Elise Bant*

Abstract

Corporate groups continue to present significant challenges for corporate law and regulation. In this article, I consider the insights for group responsibility offered by a novel, holistic model of corporate responsibility entitled 'Systems Intentionality'. Recently endorsed and applied in the High Court of Australia, this model posits that corporations manifest their states of mind through their systems of conduct, policies, and practices. Viewed at a certain level of generality, corporate groups can, and often do, operate as coordinated systems of conduct. Systems Intentionality suggests that such group systems will manifest certain states of mind, typically (but not necessarily only) that of the parent. These mindsets may be relevant to establishing the parent's direct liability for harms resulting from its systems of conduct through orthodox, doctrinal routes. The model may, therefore, provide invaluable assistance towards placing group and network responsibility on more transparent and principled footing, consistent with recent, broader trends supporting direct parent liability.

I Introduction

Australian corporate law is undergoing a quiet revolution. In the recent High Court of Australia decision in *Productivity Partners Pty Ltd v Australian Competition and*

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* Professor of Private Law and Commercial Regulation, University of Western Australia (UWA) Law School, Perth, Western Australia, Australia; Professorial Fellow, University of Melbourne, Victoria, Australia. Email: elise.bant@uwa.edu.au. ORCID iD: https://orcid.org/0000-0003-2188-0521.
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Consumer Commission ('*Productivity Partners*'),[1] Gordon J and Edelman J separately endorsed and applied reasoning consistent with a novel, holistic model of corporate responsibility entitled 'Systems Intentionality'.[2] This posits that corporations manifest, in the dual sense of reveal and instantiate, their states of mind through their everyday, or de facto, systems of conduct, policies, and practices. As Gordon J put it: '[c]orporations "think" and act through systems'.[3] And as Edelman J observed, this 'systems liability'[4] approach (his Honour's preferred terminology) enables proof of state-of-mind elements relevant to corporate liability rules without requiring evidence to be brought of responsible individuals within the corporation, whose mental states can be attributed to the corporation.[5] Their Honours separately used this approach to find that the corporate wrongdoer in that case had engaged knowingly and intentionally in conduct that should be characterised as 'unconscionable' and, so, contrary to the applicable statutory prohibition.[6]

This statutory context might seem an unlikely locus for a broad-based revolution. As always, much will rest on subsequent judicial interpretation. However, it is striking that neither judge confined their reasoning to the statutory context. To the contrary, both expressed their analytical approach in general terms. Edelman J explicitly characterised the statutory prohibition as, itself, reflecting a more generally-applicable principle of direct systems liability.[7] Further, it is arguable that Gordon J's analysis was relevantly endorsed by Steward J and, separately, Beech-Jones J.[8] There is enough in the case, therefore, to warrant careful consideration of the potential implications of such systems-based reasoning for corporate responsibility.

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1 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 ('*Productivity Partners*'), especially 1047–8 [108]–[111], 1051–2 [134], 1053 [143] (Gordon J) 1061–2 [199]–[200], 1067–9 [236]–[241] (Edelman J).

2 The core of the model is set out in Elise Bant, 'Systems Intentionality: Theory and Practice' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 183 ('Systems Intentionality'), cited by Gordon J in *Productivity Partners* (n 1) 1047–8 [108]–[109]; Elise Bant, 'Modelling Corporate States of Mind through Systems Intentionality' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 231 ('Modelling'). See also Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352; Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63 ('Systems of Misconduct'), both cited by Edelman J in *Productivity Partners* (n 1) 1068 [238], 1068 [240] . The full project publications and findings are available at *Unravelling Corporate Fraud: Repurposing Ancient Doctrines for Modern Times* (Website) <https://unravellingcorporatefraud.com/>.

3 *Productivity Partners* (n 1) 1047 [108].

4 See, eg, ibid 1061–2 [199]–[200].

5 Ibid 1061–2 [198]–[200], 1069 [247]. For the common law's gradual recognition of corporate capacity to hold mental states, see Samuel Walpole, 'Criminal Responsibility as a Distinctive Form of Corporate Regulation' (2020) 35(2) *Australian Journal of Corporate Law* 235; Elise Bant, 'Corporate Mistake' in Jodi Gardner, Amy Goymour, Janet O'Sullivan and Sarah Worthington (eds), *Politics, Policy and Private Law Vol II: Contract, Commercial and Company Law* (Hart Publishing, 2025) 123 ('Corporate Mistake').

6 *Productivity Partners* (n 1) 1053 [143] (Gordon J); 1069 [242], [246] (Edelman J), applying *Australian Consumer Law* ('*ACL*') ss 21–2, in *Competition and Consumer Act 2010* (Cth) sch 2. The equivalent prohibition for financial services is *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC ('*ASIC Act*').

7 *Productivity Partners* (n 1) 1068 [238].

8 Ibid 1077 [282], 1082 [307] (Steward J); 1088 [340] (Beech-Jones J).

In this article, I confine my discussion to the potential insights offered by Systems Intentionality for the challenging field of corporate group responsibility.[9] The basic point is simple: viewed at a certain level of generality, corporate groups and networks[10] can, and often do, operate as coordinated systems of conduct. Such group systems will manifest certain states of mind, typically (but not necessarily only) that of the 'parent'.[11] These mindsets may be relevant to establishing the parent's direct liability for harms resulting from its systems of conduct. The model may, therefore, provide invaluable assistance towards placing group and network responsibility on a more transparent and principled footing.

As my analysis will demonstrate, this approach in no way requires 'piercing the corporate veil' or any of its metaphorical counterparts.[12] Rather, assessment of corporate mental states manifested through systems of conduct comprising corporate actors, or elements, proceeds as an objective exercise of interpretation or construction.[13] The mode of analysis in no way serves to deny the separate legal identity of members of corporate groups or networks associating to pursue a common business model.[14] Rather, it embraces that reality and, in so doing, ascribes to group members the responsibilities that come with legal personhood.

The argument proceeds in four stages. In Part II, I provide an overview of the recent and renewed focus on direct parent liability, including liability through agency principles. In Part III, I outline the model of Systems Intentionality, including a brief discussion of its relationship to concepts of agency and (more broadly-speaking) 'proxy' conduct. In Part IV, I consider how the model may shed light on parent knowledge and intentions manifested through coordinated systems of conduct

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9 This approach accepts that the endorsement in the High Court was necessarily partial and constrained, not least because limited to the issues arising in the case, as explored in Elise Bant and Rebecca Faugno, 'Revolution and Evolution in Corporate Law: *Productivity Partners* and Systems Intentionality in the High Court of Australia' (2025) *Australian Journal of Corporate Law* (forthcoming).

10 Corporate groups typically comprise corporations 'associated by common or interlocking shareholdings, allied to unified control or capacity to control': *Walker v Wimborne* (1976) 137 CLR 1, 6 (Mason J). As that case illustrates, however, corporate groups may be 'looser', coming in the form of coordinated business structures between independent corporations or 'networks': Christian Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press, 2018) 5. Parts IV and V below address both possibilities.

11 In this article, I use the language of 'parent' and 'holding' companies interchangeably: as explained in Part V, the nature of the shareholding interest may be an informing, but not determinative consideration.

12 Cf lifting (generally, to assess shareholdings for some purpose of the law). Inconsistent usage is common: see Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia (2001) 19(4) *Company and Securities Law Journal* 250. For one attempt at clear delineation between piercing and lifting, see *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769, 779 (Staughton LJ); cf *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, 484 [28] (Lord Sumption JSC), distinguishing 'concealment' (generally not involving piercing) and 'evasion', see also at 498 [60] (Lord Neuberger PSC).

13 Corporate mindsets are commonly treated as 'facts' in line with natural persons' mental states: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA), 483 (Bowen LJ); *Generics (UK) v Warner-Lambert Co LLC* [2019] Bus LR 360, 421 [171] (Lord Briggs JSC). On corporate minds as 'social facts', see Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) 20, discussing Émile Durkheim, *Durkheim: Rules of Sociological Method and Selected Texts on Sociology and Its Method*, ed Steven Lukes (Macmillan Education, 2nd ed, 2013) 49–71. Cf *Productivity Partners* (n 1) 1067–8 [236], 1068 [240] (Edelman J).

14 Witting (n 10) 5.

utilising corporate networks. I draw on extensive jurisprudence arising from Australia's statutory unconscionable conduct prohibitions, to which *Productivity Partners* now contributes. In Part V, I return to consider the leading Australian authorities on parent liability. In Part VI, I conclude with some brief reflections on the ramifications of my analysis for parent and corporate group members' liability.

II A Refocusing on Direct Parent Liability

The bases on which a member of a corporate group (typically, a parent) may be held responsible for acts of another (typically, a subsidiary) continue to attract significant attention and debate.[15] The reasons lie in the foundational case of *Salomon v A Salomon & Co Ltd* ('*Salomon v Salomon*').[16] This famously emancipated corporate legal identity from the identity of its shareholders.[17] Applied to corporate group structures, the separate legal identity doctrine has had profound consequences for corporate parents' liability for harms arising from subsidiaries' activities.

Parent companies will not generally be responsible for subsidiaries' misconduct. A limited and controversial exception exists where courts are prepared to 'pierce the corporate veil'. That metaphor is usually employed to refer to the circumstances in which the legal identity of a company, separate from its 'owner' and/or 'controller',[18] may be disregarded, so as to permit the corporation's liabilities to be treated as personal to the controller. One must only state it in this way to see that the circumstances in which this may occur will be limited, most obviously to circumstances where incorporation is but a dishonest sham or façade, adopted to mask the true nature of the controller's activities.[19]

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15 See, eg, Witting (n 10); Australian Law Reform Commission ('ALRC'), *Corporate Criminal Responsibility: Final Report* (Report No 136, April 2020) ('*ALRC Final Report*') 476 [10.138]; ALRC, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) ch 12; Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40(2) *UNSW Law Journal* 1175.

16 *Salomon v A Salomon & Co Ltd* [1897] AC 22 ('*Salomon v Salomon*'), discussed further below in Part V(A). While renowned on this count, common law corporations arguably pre-date the case by some centuries, and certainly the advent of chartered or registered corporations: Samuel Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press, 1973).

17 See, eg, Ross Grantham and Charles Rickett, 'The Bootmaker's Legacy to Company Law Doctrine' in Ross Grantham and Charles Rickett (eds) *Corporate Personality in the 20th Century* (Hart Publishing, 1996) 1, 8. As Justice James Allsop noted extra-curially, the Australian cases of *CSR Ltd v Wren* (1997) 44 NSWLR 463 and *CSR Ltd v Young* (1998) Aust Torts Reports 81-468 are consistent with this analysis: Justice James Allsop, 'Piercing the Corporate Veil: Recent International Developments' (FCA) [2022] *Federal Judicial Scholarship* 16, [56]–[59]. See further *Barrow v CSR* (Supreme Court of Western Australia, Rowland J, 4 August 1988) 218, discussed in Warren (n 22) 677–80. See also in New Zealand, *James Hardie Industries plc v White* [2019] 2 NZLR 49, 68 [64]. Contra is *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, 584 (Sheller JA) ('*James Hardie v Hall*'). See further Part V below. For reflections on shareholders as 'owners', see Duncan I Wallace, 'The Reality of Shareholder Ownership: For-Profit Corporations as Slaves' (2024) 47(4) *UNSW Law Journal* 1255.

18 Whether shareholdings are or should be relevant to the inquiry, beyond evidencing the shareholder's capacity to influence or control the corporation, is addressed in Parts IV and V. Similar questions arise when seeking to sheet home liability against directors.

19 See, eg, *James Hardie v Hall* (n 17) 583–4 (Sheller JA); *Prest v Petrodel Resources Ltd* (n 12) 488 [35] (Lord Sumption JSC), 503 [81] (Lord Neuberger PSC).

Three recent developments, however, point towards a more transparent, principled and effective way of addressing the challenges of group liability. First, as Chief Justice James Allsop has helpfully observed, there is increasing realisation that addressing issues of parental corporate responsibility through a doctrine of veil-piercing is unhelpful.[20]

The scope and operation of the exception are persistently obscure and shifting, consistent with the metaphor itself. More importantly for current purposes, however, any limited categories of case to which it applies need to be kept sharply distinct from the circumstances in which a controller of a company should be held responsible for the company's acts, on the controller's own account.[21] That is, it is a separate question whether and why a controller may have direct responsibility for the acts of the company. On this approach, the separate legal identity of the company (and with it, the related concept of limited liability) is by no means overlooked.[22] Rather, it is fully accepted and becomes part of the matrix of circumstances that must be considered in determining whether the controller is independently and personally liable through the application of some legal, equitable or statutory principle.

One circumstance in which direct liability may arise is where a company acts as agent of its controller:[23] here, the act of the company is treated in law as the act of the controller.[24] Consistently, the controller is directly liable for the legal consequences of that act, just as it would be if it had engaged personally in the behaviour.[25] Parent liability may also arise directly under statute,[26] or through other general law doctrines, including in conjunction with agency principles.[27]

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20 Allsop (n 17).

21 Ibid [33]. See, eg, *Prest v Petrodel Resources Ltd* (n 12) 478 [16] (Lord Sumption JSC).

22 Contrary to, eg, *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 567 (Rogers AJA) ('*Briggs v James Hardie*'), discussed in Part V(B) below; see also Chief Justice Marilyn Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2016) 40(2) *Melbourne University Law Review* 657; Jason Harris, 'Lifting the Corporate Veil on the Basis of an Implied Agency: A Re-Evaluation of Smith, Stone and Knight' (2005) 23(1) *Company and Securities Law Journal* 7, 9.

23 *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron* (2005) 91 SASR 570, 592 [96] (Besanko J) ('*Bird Cameron*'). The nature and boundaries of agency, including by reference to a (potentially) more expansive conception of 'proxy conduct', is a key issue for group liability and is addressed below in Parts III–V.

24 The many and various versions of the Australian statutory 'TPA model', which originated in the *Trade Practices Act 1974* (Cth) s 84 and includes *Corporations Act 2001* (Cth) s 769B ('*Corporations Act*'), impose direct liability on a corporation by deeming the conduct and states of mind of officers, employees and agents of the corporation to be those of the company: see *ALRC Final Report* (n 15) 225 [6.28], 251–8 [6.127]–[6.158]; *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 791, 737–8 (Toohey J). As the ALRC noted, notwithstanding that these permit some aggregation between conduct and fault, they require that a single officer, employee or agent had the requisite state of mind, as opposed to organisational or holistic, attribution approaches: *ALRC Final Report* (n 15) 251 [6.126].

25 Allsop (n 17) [33]; *Idoport Pty Ltd v National Australia Bank Ltd; National Australia Bank Ltd v OAMPS Ltd* [2004] NSWSC 695 [144] (Einstein J).

26 For United States and European Union examples, see Witting (n 10) ch 8.

27 Such as through accessorial liability doctrines (see Part IV(B)(3) and Part VI below) and negligence, the subject of *Chandler v Cape* [2012] 1 WLR 3111; *Lungowe v Vedanta Resources plc* [2020] AC 1045; *Okpabi v Royal Dutch Shell plc* [2021] 1 WLR 1294 — discussed in William Day, 'Negligence and the Corporate Veil: Parent Companies' Duty of Care to their Subsidiaries' Employees' (2014) *Lloyds Maritime and Commercial Law Quarterly* 454, 457; Nic Wilson, 'When is a Subsidiary's Negligence the Parent Company's Problem?' (2020) 26 *Canterbury Law Review* 161, 165; Martin

This renewed focus on more traditional routes to direct parent liability connects helpfully with the second, potentially important milestone in the journey towards more certain and principled treatment of corporate groups. In *CCIG Investments Pty Ltd v Schokman* ('*CCIG Investments*'), Edelman and Steward JJ engaged in careful analysis of the tortuous history of the umbrella conception of 'vicarious liability'.[28] On their Honours' analysis, this label frequently harbours three distinctive concepts. The first concept encompasses cases where a defendant's liability is primary, but founded on another party's acts or conduct, which are attributed to the defendant. Their Honours described this concept as referring, 'loosely', to agency or 'vicarious conduct',[29] and including acts forming part of a joint enterprise (and so, agreed), or procured, authorised or ratified by the defendant.[30] For clarity, in this article I use 'proxy conduct' to signify this potentially broader conduct-attribution concept.

As their Honours explained in *CCIG Investments*, this category must be sharply distinguished from a second concept: vicarious *liability* for the wrongdoing of another, a form of secondary or indirect liability.[31] Here, the claim is not that the defendant has itself engaged in the impugned conduct, or has committed a wrong: rather, the defendant is responsible for the wrongdoing of a third party. A third concept, 'non-delegable duty', again, demands separate treatment.[32]

While their Honours were concerned to 'disentangle'[33] these three conceptions for the purposes of an employer liability case, separate identification of proxy conduct has great value for current purposes. This operates as an 'attribution of conduct' (as opposed to liability) rule.[34] The rule is most clearly met where the act of one person (which could be a natural or artificial person, such as a corporation)[35] is treated in law as the act of another. In such cases, the attributed conduct becomes the foundation for assessment of the defendant's direct responsibility for the legal consequences of their own act. This is not, then, 'vicarious liability' for the wrongdoing of another, a form of secondary or indirect liability.[36] Rather, it is primary or direct liability arising from the defendant's own acts, albeit carried out by or through another.

Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19(4) *European Business Organization Law Review* 771, 775–9, 782–94.

28 *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165, 185–200 [48]–[81] ('*CCIG Investments*').

29 Ibid 185–6 [50], 187–8 [55]. The TPA model (n 24) of conduct attribution recognises a broad form of proxy conduct: see, eg *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 36–8 (Lockhart J, Sweeney and Neave JJ agreeing). 'Agent' for these purposes includes corporations: *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396, 443 [217] (Besanko J). Cf Besanko J on common law agency at 457–8 [311]–[312]; 466–9 [349]–[362] and Part IV below.

30 *CCIG Investments* (n 28) 185–6 [50]: see also at 187–8 [55], 190–1 [62], 192–3 [66].

31 Ibid 192 [65].

32 Ibid 187 [53].

33 Ibid 187 [54].

34 Ibid 187–8 [55].

35 Or another juristic person, such as the body politic of the Commonwealth of Australia: *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655, 684–5 [142] (Edelman J).

36 *CCIG Investments* (n 28) 192 [65] (Edelman and Steward JJ).

The third, conceptually related development, and the focus of this article, is to explore the potential ramification for group liability of adopting reasoning consistent with the model of 'Systems Intentionality' cited in *Productivity Partners*.[37] This model proposes that corporations manifest their states of mind through what I call their 'adopted or deployed' systems of conduct, policies and practices.[38] As Part III explains, systems of conduct typically comprise multiple elements, operating in coordinated ways. These steps are commonly performed by natural persons, corporate persons and, indeed, through non-agentic automated and algorithmic tools.[39] Where a system of conduct, however comprised, is adopted or deployed by a corporation (including, to adapt Edelman and Steward JJ's phrase, where it is procured, authorised or ratified, or adopted as part of a joint enterprise),[40] the corporation as a construct engages directly and purposively in and with the world, in a 'real' way. It is to this possibility that I now turn.

III Systems Intentionality

A *The Model Outlined*

Systems Intentionality posits that corporations, lacking natural minds, necessarily adopt and deploy systems of conduct, policies and practices to engage purposively in and with the world. The board of directors is the most fundamental of these decision-making systems.[41] Traditional attribution rules therefore focus on the board as the corporation's indubitable directing mind and will. But beyond very small and hierarchical entities, of the 'mum and dad' or 'one-person' variety, these systems are hardly sufficient to enable most modern corporations to operate successfully. So, more diffused systems of conduct are deployed, such as through devolved lines of authority,[42] or even more diffused 'standard operating procedures' and more granular and organic practices. All these processes and practices nudge, direct and coordinate behaviours on the ground, to achieve corporate purposes.[43]

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37 See above nn 1–2.

38 Formal representations of policies and practices may diverge sharply from the daily reality, with implications, for eg, for misleading or deceptive conduct liability: explained in 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, 62–7 ('Where's WALL-E').

39 Cf Justice James Edelman, 'Direct and Vicarious Liability of Corporations' in Edwin Peel and Rebecca Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (Oxford University Press, 2023) 211.

40 *CCIG Investments* (n 28) 185–6 [50]; see also at 187–8 [55], 190–1 [62], 192–3 [66]. Cf the more limited formulation expressed in *Productivity Partners* (n 1) 1068 [237] (Edelman J), discussed in Part III(B) below.

41 See further Bant, 'Corporate Mistake' (n 5); cf *Productivity Partners* (n 1) 1061–2 [199] 'also', 1068 [237] 'alternative' (Edelman J), which may suggest that systems liability is inherently different from and independent of traditional attribution rules. See also *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 1266–7 [114]–[115], 1270 [135] (Edelman, Steward and Gleeson JJ) ('*Automotive Invest*').

42 Rachel Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022) 36–7; Rachel Leow, '*Meridian*, Allocated Powers, and Systems Intentionality Compared', in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 119, 123–6 ('*Meridian*'). See also Christian Witting, 'The Place of Managers in the Corporate Governance Architecture' (2024) 24(1) *Journal of Corporate Law Studies* 267.

43 *Productivity Partners* (n 1) 1047 [108] (Gordon J). See also text accompanying n 45 below.

Systems of conduct are, on this model, always 'generally' intended, in the sense of being deliberate conduct, although whether the ends or results of that conduct are 'specifically' intended is a separate question, to be assessed objectively in light of the characteristics of the particular system.[44] The general intentionality of systems of conduct arise from the very fact of them being systems: systems, schemes, plans, strategies, processes and equivalents all exist for a purpose — at the least to produce the coordinated conduct the subject of the scheme. In the words of Gordon J, '[s]ystems are inherently purposive'.[45] Further, Systems Intentionality posits that corporations may be taken to know the critical features of their systems, required for them to deploy successfully (that is, according to their terms).[46] Otherwise, the successful deployment of a system depends upon accidental or coincidental application of its steps or elements, in the correct, synchronised way. While not impossible, this is sufficiently unlikely to warrant placing the onus of demonstrating accident or mistake onto the corporation that has deployed the system, according to its terms.

A final, and important, aspect of this process of interpretation or construction is to recognise that systems of conduct must be identified and assessed at a certain level of generality, relevant to the legal issue at play.[47] Here, the model of Systems Intentionality posits an expansive approach to identifying, then characterising, the pertinent system. As I will demonstrate in Part IV, systems of conduct commonly comprise both positive and negative (omitted) steps, as well as proactive and reactive elements (such as audit and remedial mechanisms).[48] An expansive lens is appropriate, as systems of conduct generally deploy repeatedly over time.[49] Thus, how a corporation responds to the impacts of its behaviour in the world itself reflects and sheds light on its capacities and choices as a normatively responsible juristic person.[50] In the same way, omitted steps, including here the 'default settings' that determine the way in which a system deploys at critical junctures or pressure points, are often very expressive of corporate choices, preferences and overall intentions.[51] It is the integrated system, viewed holistically and over time, that most clearly manifests the corporate intention(s).

B *Systems Intentionality and Proxy Conduct*

In the spectrum of liability mechanisms, Systems Intentionality provides a novel way of ascertaining corporate mental states manifested through their adopted or deployed

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44 See Bant, 'Modelling' (n 2).

45 *Productivity Partners* (n 1) 1047 [108].

46 Ibid.

47 Bant, 'Systems Intentionality' (n 2) 197.

48 Brent Fisse, 'Reactive Corporate Fault' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 139; Peter A French, 'The Principle of Responsive Adjustment in Corporate Moral Responsibility: The Crash on Mount Erebus' (1984) 3(2) *Journal of Business Ethics* 101.

49 See further Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), *Evil Corporations: Law, Culpability and Regulation* (Routledge, 2024) 223 ('Corporate Evil').

50 Adopting and adapting Fisse (n 48) and French (n 48).

51 Strikingly apparent in automated systems: see Bant, 'Where's WALL-E' (n 38) 69–73; Jeannie Marie Paterson, Elise Bant and Henry Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' (2021) 26(3) *Communications Law* 136, 139, 142–4.

systems of conduct. Because of this dependence on identifying 'their' corporate systems of conduct, Systems Intentionality has an analytical and conceptual connection with agency principles and (more broadly) proxy conduct.[52] This is acknowledged in the idea that corporations manifest their states of mind through their *adopted or deployed* systems of conduct, policies and practices. However, to date, this element of the model remains underdeveloped. In that context, some further, although necessarily brief observations on how systems of conduct may be construed as adopted or deployed by corporations, so that these systems can, in turn, be construed to manifest corporate mental states, is therefore warranted.[53]

First, in *Productivity Partners* Edelman J commented that corporations may be recognised as acting or having an intention

> where a system has been built with the authority of senior persons controlling the company such that the actions of automated processes, or of one or more natural persons, can be properly attributed to the corporation to the extent that they arise out of that system.[54]

While no doubt correct, this appears to suggest that only formally approved systems of conduct enable corporations to engage purposively and directly in the world.[55] However, as Gordon J put it, 'a system may develop organically as a practice, operate at a level of policy or be a combination of practice and policy'.[56] Further, a restrictive approach to the question of adoption or approval may collapse systems liability back into traditional attribution approaches, themselves dependent on responsible natural agents. It would also permit corporations to engage in strategic narratives of denial,[57] by enabling them to claim, for example, ignorance of longstanding malpractices tacitly adopted and endorsed through corporate processes (such as corporate training of employees in the practice, related bonus and promotion systems, and remedial processes)[58], on the basis that senior officers were subjectively oblivious to the problem.[59] Finally, as Leow has argued, corporate powers may be allocated or delegated in practice in ways that differ substantially from the formal corporate hierarchy.[60] This may also be true for authorisation and allocation processes themselves,[61] so that corporate 'adoption' (or authorisation or ratification) of systems of conduct may be evidenced through (for example)

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52 Cf Leow, *Corporate Attribution in Private Law* (n 42) 37, preferring an analysis based on the 'allocation and delegation' of corporate powers over agency principles.

53 See also Bant, 'Systems Intentionality' (n 2) 202–3.

54 *Productivity Partners* (n 1) 1068 [237].

55 Cf Edelman J: ibid 1061–2 [199]–[200], 1067–9 [236]–[241].

56 Ibid 1047 [108] (Gordon J).

57 Bant, 'Corporate Evil' (n 49) 225–32.

58 On 'reactive corporate fault', see above n 48 and below n 119 and accompanying text.

59 See, eg, the failures of casino executives to be alive to longstanding practices that facilitated money laundering, supported by information barriers: cf the characterisations of systemic corporate misconduct in *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019); *Royal Commission into the Casino Operator and Licence* (Report, October 2021), as discussed in Elise Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) 39(5) *Company and Securities Law Journal* 259, 274–5.

60 Leow, *Corporate Attribution in Private Law* (n 42) 41; Leow, '*Meridian*' (n 42) 125.

61 Cf statutory authorisation requirements, such as the Australian 'Banking Executive Accountability Regime' and 'Financial Accountability Regime' reforms examined in Pamela Hanrahan, 'Culpable Executives' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 373.

longstanding practices, objectively construed. Systems Intentionality therefore necessarily adopts a broad interpretive approach to the issue of adoption or deployment, including in the senses of express, implicit or apparent authorisation or ratification of the system of conduct.[62]

Second, and relatedly, Systems Intentionality recognises proxy conduct as integral to corporate existence. Lacking hands and feet, corporations must always 'conduct' their business in the world through some independent means.[63] This may certainly be through natural or corporate agents, who are separate legal entities, having independent agency. But Systems Intentionality further highlights that corporations frequently also act purposively through teams of natural and corporate agents, across jurisdictions and space, and over time.[64] Further, systems of conduct may comprise automated and algorithmic tools that cannot strictly or sensibly be described as 'agents' (at least, not in the sense of having independent agency and capacity for responsibility).[65] The term 'proxy conduct' attempts to recognise, and signal, that more expansive reality. In many cases of corporate harms generated through automated or algorithmic processes, for example, it makes little sense to search for a natural person, or team of persons responsible for deploying the system as the repository of conduct, fault and hence liability. Rather, responsibility rests with the entity that adopts and deploys the system assessed as a whole. And by assessing the default settings, guiding parameters and overall choice architecture of the automated and algorithmic system, it becomes entirely possible to identify the corporate choices, values, intentions and preferences sought to be achieved through this complex amalgam of agentic and non-agentic tools.[66]

Third, it might be possible to utilise an expansive idea of agency as proxy conduct to encompass such coordinated and complex systems of conduct. In *Productivity Partners*, Edelman J preferred to use the concept of 'group agency'.[67] On this approach, the law 'treats'[68] a corporation as having acted and having an intention 'as though the system, as a construct, were a natural person'.[69] This might also be described as 'constructive' (or, possibly, constructed) agency. However framed, we must be clear that the system is not, itself, an autonomous agent: code has no autonomy in decision-making. Rather, the point is that, *as a matter of construction*, the coordinated agentic and non-agentic elements that together comprise the system of conduct are how the corporation (itself an autonomous agent) engages purposively in and with the world.

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62 See further Part IV below. Cf *Criminal Code Act 1995* (Cth) s 12.3(2)(c): a body corporate may authorise or permit an offence where a 'corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance'.

63 Cf *Productivity Partners* (n 1) 1067 [236] (Edelman J) on the corporation as 'heuristic'.

64 Powerfully illustrated by the generational and iterative processes of developing even basic automated and algorithmic tools: see AS McConnell, *Code Complete* (Microsoft Press, 2nd ed, 2004) 502.

65 See above Part II(C); 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* (Hart Publishing, 2023) 255, 265 ('Automated Mistakes'); Bant, 'Where's WALL-E' (n 38) 57–8.

66 Paterson and Bant, 'Automated Mistakes' (n 65) 269–71; Bant, 'Where's WALL-E' (n 38) 69–73.

67 *Productivity Partners* (n 1) 1068 [239].

68 Ibid 1068 [240].

69 Ibid 1068 [241].

Fourth, while such an approach may seem novel, on closer reflection it seems clear that there is no sharp boundary between agentic and non-agentic systems of conduct, or mixed systems. Many systems of conduct seek actively to constrain the discretion or independent judgement of natural agents within the system: standard operating procedures are a well-known example. In many cases, individual employees within a corporate system of conduct will act in a purely executive capacity, applying no independent judgement at all to the task at hand. In such cases, the employee's state of mind will often be irrelevant to ascertaining the corporate intention with which some conduct occurred: whether the employee was daydreaming, motivated by malicious or mischievous inclinations, trying to do their best or worst, the primary issue will generally be whether they performed their role correctly that is, according to the terms of the system of conduct in which they were embedded. Where they have, the corporate intention is manifested.[70] Conversely, where the system has not deployed according to its terms (for example, through some step failing or being omitted), corporate mistake may be present. Depending on the nature of the system, the private and subjective mindset of the employee may be irrelevant to that assessment, as the following section shows.[71]

C *The Model Illustrated*

I have typically illustrated the operation of this model through variations on an everyday example. While the purpose of the exercise is to provide a simple entry-point to understanding Systems Intentionality, it also underscores three important aspects of the approach relevant to the current inquiry. First, the Systems Intentionality model operates consistently with common approaches to determining natural parties' mindsets relevant to individual responsibility. Second, and relatedly, it provides a principled foundation for the law's equivalent treatment of corporate and natural actors, a recurrent concern in the context of corporate law and law reform.[72] Third, it offers a powerful means of characterising systemic conduct incorporating persons, both corporate and natural, in conjunction with non-agentic elements, such as automated systems. This last aspect has particular salience for corporate groups and networks, where ideas of agency and responsibility lie at the heart of the liability challenge. As I demonstrate in Part IV, the analysis suggested in the worked, hypothetical examples both aligns with and sheds light on the developing jurisprudence of courts addressing unconscionable business systems of conduct. In this way, my analysis provides a firm theoretical and doctrinal foundation for tackling responsibility within corporate groups, the subject of Part V.

Turning to this initial, illustrative task, and as Diamantis has explained, natural persons commonly adopt external mind supports to assist them to achieve their ends: recipes, maps and notes are common examples.[73] From the perspective of Systems Intentionality, these are all systems of conduct that help nudge, direct or coordinate the person's activities towards a certain end (or ends). Thus, a cook who deploys a novel cake recipe thereby manifests (in the dual sense of reveals and

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70 See further ibid 1068 [240].
71 Bant, 'Corporate Mistake' (n 5) 134–41.
72 See, eg, *ALRC Final Report* (n 15) 32 [1.17]–[1.18], 34 [1.22].
73 Mihailis E Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98(4) *North Carolina Law Review* 893, 900, 912.

instantiates) their intentions.[74] No mind-reading or brain surgery is involved: their performed system of conduct manifests their general intention (to engage in baking) and their specific intention (to bake a cake of a certain kind).[75]

Importantly, for current purposes, this analysis is not affected by interposition of agents or automated elements into the picture. It does not matter if (for example) the step of beating an egg and folding in flour is done by hand or food processor. Nor if a young family member or carer assists. Nor if the carer is actually employed by a third-party service provider, paid by the cook pursuant to separate contractual arrangements, subsidised by the government. Nor if the carer performs the required task correctly by accident, or by mistake, or in order to annoy another, or because the carer believes (maliciously and incorrectly) that the prescribed steps will guarantee the failure of the baking process. None of these details detract from our ability to identify that the cook means to bake, and to bake a cake. Where the system deploys correctly (that is, according to its terms), those intentions are both revealed and realised.

Further, certain knowledge is patent from the cook's successful deployment of the recipe. Where performed personally, it is reasonable to conclude, in the absence of evidence to the contrary, that the cook must know what the elements and steps are, required to produce the cake. Otherwise, its success (that is, deployment in accordance with its terms) depends on happy accident, or perhaps the cook's intuition or memory (notably, back-ups that are not available to the artificial corporate person). Where automated or agentic steps are interposed, those steps reflect the cook's choice, of which they are necessarily aware. And given that the cook's overall intention remains the same, it is fair to assume that the necessary knowledge is also embedded or transferred as required throughout the system (for example, through appropriate programming of the machine, or supervision/direction of the employee). Otherwise, achievement of the cook's general and specific intentions is largely dependent on good fortune — again not impossible, but unlikely.

Finally, to reiterate, it is the system of conduct *as deployed* that manifests the cook's intention, and the system of conduct should be viewed and assessed in holistic terms. Primary (and seemingly positive) systems themselves necessarily entail the adoption of certain steps and omissions of others: two eggs, not one; baking, not frying; testing before resting. Suppose, for example, the cook purports to be following a classic cake recipe, however they produce pancakes. The cook may claim a 'mistake' or 'systems error' in the sense outlined earlier: some step (or, perhaps, steps) somewhere in the system has been omitted or otherwise failed to deploy according to the terms of the formal recipe. However, the analytical starting point through the lens of Systems Intentionality is that the system of conduct *as deployed* appears objectively to be a pancake recipe. On this analysis, omitting steps of (for example) creaming butter and sugar, required to produce the classic cake, need not be seen as a simple matter of omission reflective of carelessness, error or

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74 This pronoun is deliberate, to encompass non-binary genders.

75 Courts accordingly 'infer' the natural person's subjective mindset from these acts. By contrast, as corporations enjoy no natural mind, the process is always an objective one of construction: on the distinction, see Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 3, 23–4. Cf *Automotive Invest* (n 41) 1266–7 [114]–[115], 1270 [135] (Edelman, Steward and Gleeson JJ).

accident, but an active design choice and highly reflective of the cook's true state of mind. Consistently, on the model of Systems Intentionality, the cook bears the onus of proving mistake. Moreover, the initial characterisation of the recipe as manifesting an intention to make pancakes is fortified and becomes irresistible where the system repeats over time, and no change is made to 'correct' the error. Just like the 'omission' to include a key step in the cake recipe, the cook's failure to react to correct the claimed error is likewise eloquent of and consistent with the initial characterisation.

This does not mean there is no room for a genuine 'systems error', although demonstrating it in the case of a single instance of deployment will be challenging.[76] The cook may be able demonstrate, for example, that their normally reliable food processor broke down, or a family member may confess to deliberately sabotaging the mixture. Here, it will make sense to talk of there being a 'systems error' or mistake. And notably, this will be the case even if no subjective mistake is present on the part of any natural agent engaged in the cooking process, and it is nonsensical to talk of mistake on the part of the kitchen appliance. It is the deployed system of conduct that manifests the cook's state of mind, including mistake.

Subject to two caveats, effectively the same analysis holds true for corporations that deploy systems of conduct to achieve their ends. The first is that, lacking natural minds, the fact-finding process is always, strictly speaking, one of construction, not inference.[77] Second, the corporation cannot supplement or substitute its decision-making with memory or intuition, in the same way as can a cook. It can only 'think' and act through its systems.[78] And it is highly unlikely that corporate systems of conduct, which tend to deploy repeatedly over time, will successfully deploy ('successful' in the sense of according to their terms) by accident or mistake. At the least, the onus lies on the corporation to explain how it was ignorant of what was, after all, its own system, and how any pleaded 'mistakes' arose. In this context, corporate systems of conduct serve as a highly reliable window into the corporate mind.[79]

IV Corporate Systems of Conduct: Business Models and Networks

A *Introduction and Overview*

How can this theoretical model shed light on liability in corporate groups? Here, the model of Systems Intentionality is informed by a rich vein of case law applying (largely) statutory prohibitions on 'unconscionable systems of conduct' found across

[76] Where the recipe/process is deployed repeatedly, by contrast, a prompt change to correct the step evidences a 'responsive adjustment' reflective of the mistake, and the cook's true intention: see above n 48.

[77] See above n 75.

[78] *Productivity Partners* (n 1) 1047 [108] (Gordon J).

[79] Witting (n 42) 11 n 65 argues that it is the only window.

a range of trading contexts.[80] These cases typically address problematic business models (or schemes, strategies or systems of conduct) that are contrary to fair trading practices. Courts have invariably been concerned to identify the corporate states of mind and related normative standards such as dishonesty, recklessness and, of course, unconscionability, revealed through those malpractices. And, relevantly for current purposes, systems of conduct not infrequently involve coordinated behaviours between natural and corporate agents (corporate 'networks'), as well as automated and algorithmic elements. *Productivity Partners* is the latest and most significant contribution to that body of jurisprudence.

The case law authorities suggest that courts already engage in a rigorous process of assessing corporate intentions and knowledge manifested through systems of conduct comprising (amongst other elements) corporate networks. What is more, courts' approaches to these questions have been largely consistent with that supported by Systems Intentionality. For the purposes of this article, the implication from this conclusion is both simple and striking: what works for systems of conduct involving corporate *networks* should also work, as a matter of theory, for corporate *groups*. This possibility is the focus of Part V.

Some key lessons emerge from the unconscionability authorities, which are illustrated through particular case examples in the following section. First, taken as a whole, the cases underscore the point made above in Part III(B), that corporations necessarily engage in proxy conduct. Second, courts' approaches to existing principles of 'agency'[81] in the unconscionable system of conduct cases have, typically, been broad.[82] In general, the critical characteristic is that one (natural or corporate) person acts on behalf of the corporation, as part of its impugned system of conduct, in relation to some matter or dealing.[83] Third, and relatedly, this agency can be limited to some facet of the business: for example, to natural or corporate agents who 'canvass' or 'introduce' consumers for the defendant business and then step away from the process.[84] Fourth, however, the principal must have some degree

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80 See, eg, *ACL* (n 6) ss 21–2; *ASIC Act* (n 6) ss 12CB, 12CC. For analysis of a wide range of these cases, see Bant and Paterson, 'Systems of Misconduct' (n 2); Bant, 'Systems Intentionality' (n 2). Cf *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1, 32 [81] (Gordon J), see also (on the equitable doctrine) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ); Michael Bryan, 'Asset-Based Lending: A Case Study in Unconscionable Systems of Conduct' in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, 2023) 295.

81 See, eg, *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* (2018) ATPR ¶42-615, 46,070–1 [282]–[287] (Gleeson J) ('*Cornerstone Investment*'), cited with approval in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3*) (2019) ATPR ¶42-655,47,761–2 [29] (Bromwich J) ('*ACCC v AIPE*').

82 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (No 3)* (2021) 154 ACSR 472, 500–1 [113] (Stewart J), approved on appeal *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180, 290 [357] (Wigney and O'Bryan JJ).

83 *Cornerstone Investment* (n 81) 47,071 [284], 47,072–3 [300]–[301] (Gleeson J). See also *Australasian Brokerage Ltd v Australian and New Zealand Banking Corporation Ltd* (1934) 52 CLR 430, 451–2 (Dixon, Evatt and McTiernan JJ).

84 *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699, 29,742–3 [178] (Allsop P, Bathurst CJ and Campbell JA agreeing) ('*Tonto Home Loans*'), cited with approval in *Cornerstone Investment* (n 81) 46,071 [287] (Gleeson J).

of control, 'requisite for the purpose of the role',[85] in order for the agent relevantly to act 'on behalf of' the principal and, accordingly, to form part of the principal's system of conduct. Clearly, given these are network cases, proof of control does not depend on evidence of some interlocking shareholdings, or common directorships, between corporate principal and its agent(s).[86] As will be discussed in Part V, this striking feature suggests a pathway through the thicket, towards a more principled approach to direct corporate parent liability. Fifth, the unconscionability cases evidence that while senior officers of a corporation may have known of, or expressly authorised, the impugned system of conduct,[87] the terms of the overall arrangement (the 'actual' authority) may be express, or implied from the conduct of the principal and agent and the circumstances of the case, including the course of business between agent and principal.[88] The fact, for example, that the written contract of appointment expressly excludes agency is not determinative of the question.[89] The principal may further be responsible for acts that are within the 'apparent' or ostensible authority of the agent. Indeed, as I will argue, the fact that agents behave badly, even in breach of express (formal) agency terms, does not mean they do not form part of the principal's business model, for which harmful, external consequences, the principal is responsible.[90]

Rather than focusing on the formal terms of individual agency arrangements, therefore, courts have been willing and able to construe the impugned system of conduct, and the corporate state of mind it manifests, as a whole. In this task, 'identification, assessment and characterisation of the system of conduct is, by reference to the totality of the circumstances, both internal and external to the corporation'.[91]

The final, key lesson to be derived from these authorities for the related sphere of corporate groups concerns the broad range of evidence going to the real-life systems, policies and practices may be available to aid the process of interpretation of construction.[92] Typically, employee testimony, internal scripts, remuneration and promotion criteria, complaints processes, audit outcomes and the corporate responses to those outcomes, and default settings on automated programs will furnish salient evidence of the system of conduct adopted and deployed by the corporation. External evidence may include patterns of outcomes, communications (including incentives and disincentives) between the corporation and external

85 *Tonto Home Loans* (n 84) 29,742 [177].

86 See above n 10 quoting Mason J in *Walker v Wimborne*.

87 *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709, [179], [190] (Beach J) ('*Get Qualified*').

88 See, eg, *Cornerstone Investment* (n 81) 46,063 [221]–[222], 46,063 [225]–[227] (Gleeson J); *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* [2022] VSC 13, [3088] (Elliott J), cf [3091]–[3092]; *Australian Securities and Investments Commission v Union Standard International Group Pty Ltd (No 4)* [2024] FCA 1481, [1719]–[1725] (Wigney J).

89 *Cornerstone Investment* (n 81) 46,071 [286]. See also *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 142–4 [463]–[469] (Beach J).

90 *ACCC v AIPE* (n 81) 47,763 [33] (Bromwich J). See further, Sarah Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133(January) *Law Quarterly Review* 118.

91 *Productivity Partners* (n 1) 1048 [110] (Gordon J).

92 Ibid. See further Bant, 'Systems Intentionality' (n 2) 203–7; *Productivity Partners* (n 1) 1048 [110] (Gordon J).

parties, including consumers, and the testimony of external parties subjected to the system of conduct.

Overall, the picture that emerges is one where the defendant's responsibility arises directly through systems of misconduct performed by agents, teams of agents, together with other tools or means, which are identified, through a process of interpretation or construction, as forming part of the defendant's own business model and, hence, manifesting its states of mind.

B *Case Examples*

Three leading cases arising from the Commonwealth Government's troubled VET FEE-HELP funding scheme illustrate the analysis.[93]

1 *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)*

In *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* ('*Cornerstone Investment*'),[94] Gleeson J addressed a Vocation Education Training ('VET') provider's business model to sign up students to various educational programs. Consistently with the then-applicable Commonwealth scheme, and Empower's own published target demographic, Gleeson J found that Empower targeted areas with significant populations of persons of low socio-economic status to recruit its students.[95] The defendant's recruitment was carried out through third-party marketing and recruitment agents, variously corporate and individual in nature, which themselves subcontracted dozens of additional 'entities'.[96] Some marketers also engaged 'brokers' to assist them in their work.[97] Unlike some authorities involving unconscionable systems of conduct,[98] there were no scripts, training programs or equivalents in evidence, issued by Empower, to prove Empower's corporate knowledge and approval of agents' specific forms of misconduct.[99] Nor did the consumer regulator, the Australian Competition and Consumer Commission ('ACCC') allege that any particular officer of Empower was aware of any specific instance of misconduct on the part of any particular recruiter.[100]

Nonetheless, Gleeson J held that Empower engaged in an unconscionable system of conduct in enrolling students through the recruitment agents. Empower's enrolment system had a number of positive and negative (or omitted) elements. First, the published 'target' demographic (that is, the group from which Empower intended

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93 See also *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631; *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd* [2021] FCA 956.

94 *Cornerstone Investment* (n 81).

95 Ibid 46,039 [13], 46,069 [272], 46,119 [750].

96 Ibid 46,047–8 [79]–[92].

97 Ibid 46,042 [36], 46,049 [102], 46,054–5 [148], 46,069 [269].

98 See, eg, the 'conversation guide' and 'objection handling guide' given to employees and independent contractors in *Get Qualified* (n 87) [95], [102], [105]–[113], [133], [135], [139]–[140], [160], [355]–[357], [405].

99 *Cornerstone Investment* (n 81) 46,119 [750].

100 Ibid 46,063 [220]–[222].

to recruit customers) of its recruitment business model included disadvantaged communities.[101] Further:

> There is no evidence of instructions or recommendations made to Empower's recruiters about areas that they should target for enrolments. However, the fact that Empower's enrolments tended to come from disadvantaged communities is consistent with Empower's target demographic. In those circumstances, it is more likely than not that Empower's recruiters generally attempted to recruit students from Empower's target demographic as a result of Empower's encouragement to do so.[102]

Third, a key feature of the overall recruitment model was for marketers and recruiters to promise and provide consumers with 'free' laptops and financial incentives.[103] Empower admitted to providing the financial outlay for certain laptop and gift vouchers,[104] which meant there was 'no reason to doubt' that Empower was aware of these stratagems, employed by marketers, to attract enrolments.[105] Mentions of cash incentives for 'referring a friend' and for computers were also included in Empower's marketing materials.[106]

Fourth, this direct assistance and corresponding corporate knowledge were coupled with Empower's appointment of recruiters 'who were practically untrained, who received no [*Australian Consumer Law* ('*ACL*')[107]] training and were remunerated on a commission basis for securing enrolments'[108] and involved 'unsolicited consumer agreements,' again without any process for ensuring compliance with *ACL* requirements.[109] In Systems Intentionality terms, these 'omissions' were critical aspects of the design of Empower's enrolment business model, system or strategy, assessed holistically.

Gleeson J concluded that Empower's system, comprising these components, 'reflected a callous indifference to the considerations of consumer protection',[110] including the risk of recruiter misconduct in the pursuit of substantial benefits to Empower.[111]

2 *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*

A similarly complex and devolved system of conduct arose in *Australian Competition and Consumer Commission v Australian Institute of Professional*

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101 Ibid 46,063 [226], approved by its sole director and shareholder, Mr Yang.
102 Ibid 46,069 [273].
103 Ibid 46,039 [12], 46,045 [67]–[69].
104 Ibid 46,044 [57]–[58].
105 Ibid 46,063 [225]–[226].
106 Ibid 46,063 [227].
107 *ACL* (n 6).
108 *Cornerstone Investment* (n 81) 46,119–20 [751].
109 Ibid. See also *Australian Competition and Consumer Commission v Titan Marketing Pty Ltd* [2014] ATPR ¶42-480 ('*Titan Marketing*').
110 *Cornerstone Investment* (n 81) 46,119 [750], see also 46,119–20 [751]. Likely, a form of recklessness: Bant and Paterson, 'Systems of Misconduct' (n 2) 88; Bant, 'Modelling' (n 2) 235–9, 250.
111 See also *Titan Marketing* (n 109), discussed in *Cornerstone Investments* (n 81) 46,117–18 [739] (Gleeson J).

Education Pty Ltd (in liq) (No 3).[112] Here, Bromwich J considered that the obvious risks of exploitation inherent in the VET FEE-HELP scheme meant that

> [a]n enrolment process that predictably produced, or even encouraged a situation in which such unsuitable consumers became enrolled would invite close scrutiny to see whether that was, in all the circumstances, unconscionable. The conclusion that the conduct overall was unconscionable would be more readily reached *if such an outcome was either intentional or sufficiently predictable or recurrent to require overt steps to be taken to minimise the chance of it occurring*.[113]

Here, in response to the introduction of the VET scheme, the Australian Institute of Professional Education ('AIPE') entered into contracts with 35 independent 'service providers' who engaged an unknown number of sub-contractors and other entities to perform the work. Only some of these were known to and authorised by AIPE.[114] The 'service providers' were engaged to market AIPE courses to potential students and attract enrolments. They earned commissions for 'referrals' (tellingly, defined as enrolments that lasted until the census date, at which point AIPE earned the Commonwealth fee).[115] AIPE monitored referrals and would terminate service providers who did not meet minimum monthly referral requirements.[116] Similar due diligence did not attend their training or oversight of their recruitment activities. As in *Cornerstone Investment*, the providers were untrained in terms of Australia's consumer law requirements. Highly incentivised to sign up students, many engaged in patterns of misconduct. These involved visiting low socio-economic communities to recruit disadvantaged or vulnerable students, engaging in misleading conduct and offering incentives (such as cash and credits) to sign up, or for getting others to sign up, as well as promising the ubiquitous 'free' laptops.[117]

Following the introduction of its recruitment strategy, enrolment numbers with AIPE exploded. By contrast, AIPE's staffing levels to service those students did not change.[118] A large number of complaints, including as to agent misconduct, did not lead to any significant changes, notwithstanding that they were reported to the Chief Executive Officer ('CEO') of AIPE (on traditional attribution approaches, part of its directing mind and will).[119]

As with the other cases, AIPE's 'system of conduct' comprised a combination of integrated acts and omissions, employees, agents and sub-agents. After observing that the recruiters played a central role in AIPE's business, and acted within the scope of their actual or apparent authority for its benefit, Bromwich J observed:

> In any event, the applicants submit, and I accept, that even if the conduct of some of the recruiters was not the conduct of AIPE under s 139B(1)(a), it does not follow that such conduct is outside or irrelevant to the system of conduct or pattern of behaviour alleged. *AIPE's enrolment system involved the*

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112 *ACCC v AIPE* (n 81).
113 Ibid 47,775 [80] (emphasis added); see also 47,776 [84].
114 Ibid 47,755 [10], 47,759 [24].
115 Ibid 47,759 [24].
116 Ibid.
117 Ibid 47,763–4 [34].
118 Ibid 47,897–8 [690].
119 Ibid 47,913 [760]. Systemically, this reflects 'reactive corporate fault': see above n 48.

> *implementation of its decisions and actions, which facilitated and encouraged conduct in the field by reference to the structure of the written contracts with the agents, the payment of large commissions and the lack of processes … to ensure that only consumers who were suitable were enrolled as students.*[120]

Through the lens of Systems Intentionality, this is exactly and precisely the point. Key to AIPE's enrolment system, as deployed, was the conduct of unsupervised, untrained and highly incentivised recruiters to recruit students from inherently vulnerable consumer groups, coupled with a lack of functional internal audit and complaint processes and practices.[121]

Bromwich J further found that AIPE's CEO and senior staff well knew of the recruiter problems and that many of the students engaged through their conduct were simply incapable of undertaking AIPE's courses.[122] This reinforced his Honour's findings concerning AIPE's manifested knowledge and intentions. However, such findings may also support separate accessorial liability on the part of the responsible officer, and associated companies, as occurred in *Productivity Partners*,[123] to which I now turn.

3 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*

Productivity Partners involved a VET provider, Captain Cook College, that chose to remove certain safeguards from its student enrolment systems.[124] These protective processes were designed (in the sense of apt, or 'geared') to protect 'unwitting and unsuitable' students from being enrolled in its courses through third-party recruiters' misconduct.[125] The safeguards had been effective, resulting in around half the students withdrawing before census date — and therefore before the College became entitled to matched Commonwealth funding, and recruiters earned their commissions. With their removal, College (and recruiter) earnings skyrocketed.[126]

On Gordon J's systemic analysis, the College's revised system of enrolment was 'geared towards "profit maximisation" that was necessarily, and inevitably, adverse to, and at the expense of, student interests'.[127] The College knew the risks (indeed, reality) of agent misconduct — that is why it had the safeguards in place. The dismantling of those controls manifested its intention to reap profits at the expense of students, in full knowledge of the foreseeable, likely and indeed inevitable consequences for the students involved.[128] This was conduct that was, in all the circumstances, unconscionable.

Edelman J, in separate reasons, adopted a similar analysis and also found the College's conduct was unconscionable. On the question of intention, his Honour

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120 Ibid 47,763 [33] (emphasis added).
121 Ibid 47,798–9 [171].
122 Ibid 47,912–13 [757]–[760].
123 *Productivity Partners* (n 1). See also *Get Qualified* (n 87) [7] (Beach J).
124 *Productivity Partners* (n 1) 1031–2 [35]–[37] (Gageler CJ and Jagot J).
125 Ibid 1034 [49] (Gageler CJ and Jagot J), 1056 [156] (Gordon J).
126 Ibid 1032–3 [38]–[41] (Gageler CJ and Jagot J).
127 Ibid 1052 [134].
128 Ibid 1053 [143], see also 1048 [111].

noted that while it might be accepted that the College did not 'desire' its agents' misconduct,[129] or the enrolment of unsuitable students, as ends 'good' in themselves, the College's (revised) system of enrolments manifested its choice to adopt agent misconduct or unsuitable student enrolments as the means to the ultimate end of maximising profits.[130]

Finally, and although this can only be sketched here in barest outline, it is noteworthy that both Gordon J and Edelman J found that the CEO of the College, a Mr Wills, was knowingly concerned in or party to the College's misconduct. It followed that its parent company, Site, of which Mr Wills was also the Chief Operating Officer, was similarly liable as a corporate accessory.[131] As this makes apparent, systems-based reasoning in no way precludes individual, positional responsibility on the part of responsible officers for misconduct that occurs on their watch. It may also support accessorial corporate liability. Both are matters of considerable interest for corporate group responsibility.

C *Conclusion: Corporate Business Models and Networks*

Through the lens of Systems Intentionality, these cases illustrate how corporations may adopt and deploy systems of conduct that involve teams of agents, individuals, employees, volunteers, corporations, automated and algorithmic elements. These systems of conduct manifest (in the dual sense of reveal and instantiate) the corporate states of mind. In identifying and characterising such corporate systems, Systems Intentionality proposes, consistently with the authorities, that the discrete contractual terms and relationships between corporation and actors within its system must not distract from assessing the overall nature of the corporation's system, viewed holistically and the level of generality relevant to the law's inquiry. Agent misconduct may give rise to claims by their corporate principal for breach of contract (a possibility raising, among other issues, interesting questions of, for example, waiver or consent to breach). But that is a quite separate question from whether the agent's conduct can be attributed to the corporate principal, so as to provide the factual foundations for direct parent liability vis-à-vis third parties.[132] Indeed, contrary to formal, contractual appearances, agent misconduct may be central to a corporate system of conduct. Consistently, automated and algorithmic elements are not even actors and have no legal relationship at all with the corporations that deploy them. They are simply tools. Yet they too may shed powerful light on corporate choices and preferences.[133] Further, individuals who know of and facilitate corporate systems of misconduct may be independently responsible as accessories, as may be associated corporations. Additional examples can be given of courts applying

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129 On the approach taken to agency, see above n 67.

130 *Productivity Partners* (n 1) 1069 [242], [246]; see also 1053 [143] (Gordon J).

131 Ibid 1061 [193]–[194] (Gordon J), 1074–6 [275], 1077 [279]–[280] (Edelman J). The final penalty decision contains reflections on the role of the parent in inducing the misconduct, relevant to the kind of analysis offered here: *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (in admin) (No 6)* [2025] FCA 542, [85]–[87] (Stewart J).

132 Worthington (n 90) 132–9.

133 See, eg, the 'fees for no services' scandals, which were the subject of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (n 59) vol 1, 133–40, 154–7, discussed in Bant, 'Where's WALL-E' (n 38) 70–3, illustrated in *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* (2022) 407 ALR 1.

reasoning largely consistent with this analysis, involving complex, multi-agent and non-agentic contributions.[134] Systems Intentionality provides a new theoretical and doctrinal framework for explaining and supporting those intuitions. It also provides a means of exploring new routes to corporate responsibility. Thus, McGaughey has powerfully argued that, by extension of this form of reasoning, multinational corporations that incorporate modern slavery within their operations and supply chains may be found knowingly, recklessly and even deliberately to have done so.[135] Suppose a retailer sells clothing brands within Australia for consistently bargain-basement prices, where the key manufacturing process occurs in a jurisdiction well-known within the industry to engage in modern slavery practices. The retailer must (structurally, as a matter of its inherent business model) know that there is a strong risk, or even likelihood, or even certainty (depending on, for example, the sale price and the source jurisdiction concerned) that modern slavery infects its supply chain. Where a corporation in that kind of case fails to engage in due diligence, this need not be characterised solely in terms of negligence. The decision not to investigate is more than accident or omission: it is a conscious corporate choice not to inquire, smacking of the sort of 'callous indifference' to which Gleeson J referred.[136] This mindset stands in stark contrast to the prudent and active inquiring mindset demanded by modern slavery regimes, which require corporations to develop, adopt and deploy systems of conduct directed to identifying and mitigating modern slavery. This assessment of organisational culpability may have great significance, where modern slavery regulations are supported by penalties,[137] for procurement and debarment regimes,[138] as well as broader reputational and regulatory respects.[139]

V Returning to Corporate Groups

A *Introduction and Overview*

In the previous Part, I explained how courts' developing understandings of corporate responsibility manifested through complex corporate systems of misconduct are consistent with, and illustrate, the analysis supported by Systems Intentionality. In this Part, I explore the striking implication of the discussion, namely that if the analysis works in the context of multi-agent business models, corporate networks,

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[134] See, eg, the Rolls-Royce bribery and 'failure to prevent' litigation, the subject of extended analysis in Elise Bant and Rebecca Faugno, 'Corporate Culture and Systems Intentionality: Part of the Regulator's Essential Toolkit' (2024) 23(2) *Journal of Corporate Law Studies* 345.

[135] Fiona McGaughey, 'Regulatory Pluralism to Tackle Modern Slavery' in Elise Bant, *The Culpable Corporate Mind* (Hart Publishing, 2023) 441, 453–4.

[136] See above n 110 and accompanying text.

[137] Recommended in the *Report of the Statutory Review of the Modern Slavery Act 2018 (Cth): The First Three Years* (Final Report, 2023) and Australian Institute of Company Directors ('AICD'), Submission to the Attorney-General's (Cth), *Consultation on Strengthening the Modern Slavery Act 2018 (Cth)* <https://www.aicd.com.au/news-media/policy-submissions/2025/aicd-submission-on-strengthening-modern-slavery-act.html>.

[138] Fiona McGaughey, Rebecca Faugno, Elise Bant and Holly Cullen, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143.

[139] Note also the Organisation for Economic Co-operation and Development ('OECD') emphasis on the importance of embedded systems of conduct, policies and practices for responsible entities: see, eg, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, 2023) 17 [15] on due diligence systems <https://doi.org/10.1787/81f92357-en>.

and supply chains, it is difficult to see why it cannot work with corporate groups. Indeed, through this systemic lens, it becomes possible to probe from a new, principled basis, cornerstone authorities under Australian law concerning the responsibility of parent companies for harms inflicted through their subsidiaries.

In the following section I undertake this task, revealing some judicial analysis consistent with a Systems Intentionality approach. But systemic reasoning has been irregular and, arguably, undermined by repeated and sustained confusion over the relevance of 'interlocking shareholdings' and 'shared directors' as criteria for parent responsibility. As the unconscionability case law authorities demonstrate, the fact a subsidiary is largely or wholly owned by its parent cannot be a precondition for direct principal/parent responsibility. Rather, the central question is whether the harm resulted from the parent's system of conduct (of which the subsidiary formed part). Interlocking shareholdings are only relevant to the extent that they usefully bear on that more precise issue. Shared directorships between parent and subsidiaries may likewise also be relevant, where these served to promote or embed a parent's harmful system of conduct, policy and practice through a subsidiary. Further, as I demonstrated in the previous Part, the range of evidence germane to the existence, nature and operation of a parent's alleged system of conduct goes far beyond shareholdings and directorships. This full range of evidence can and should usefully be drawn upon to find a principled basis for direct parent liability.

A more focused inquiry into the parent's adopted or deployed system of conduct, and the subsidiaries' role within it, yields important insights. The first is implicit in the preceding discussion: the simple facts of dominant shareholdings or shared directorships cannot *of themselves* make the subsidiary an agent of the parent *for the purposes of the particular impugned transaction or event*. The question, rather, is whether the harm resulted from the parent's adopted or deployed system of conduct, of which the subsidiary was part. If the parent did adopt or deploy a system of conduct through its subsidiary, then this system of conduct constitutes the parent's purposive conduct, and will manifest its states of mind, in the ways described and illustrated earlier. But the nature and operation of the parent's system of conduct must first be positively ascertained.

This was, after all, a key insight from *Salomon v Salomon*.[140] The mere fact that Mr Salomon owned almost all of the shares in the boot-making company, and was its sole director, did not mean that the company thereby operated as his agent.[141] The company was set up by Mr Salomon lawfully and without fraud. From the date of incorporation, it was its own juristic person. It purchased Mr Salomon's hitherto profitable boot-making business, which it conducted on its own account. Intervening strikes and a 'great depression' in the trade caused the business to fail, notwithstanding the efforts of Mr Salomon.[142] None of these facts could support a finding that it served as his agent, let alone was a mere 'alias', or instrument of some personal fraud on his part.[143]

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140 *Salomon v Salomon* (n 16).

141 Ibid 31, 33–4 (Lord Halsbury LC), 35 (Lord Watson), 43 (Lord Herschell), 51–3 (Lord Macnaghten) 56–7 (Lord Davey).

142 Ibid 49 (Lord Macnaghten).

143 Ibid 42 (Lord Herschell), 50 (Lord Mcnaghten), 56 (Lord Davey).

That a subsidiary cannot be assumed to have acted as agent of the parent is therefore clear. Conversely, as the unconscionability authorities also make clear, a more focused attention on the subsidiary's role within a parent's system of conduct highlights that it is unnecessary (as some corporate group case law authorities have suggested) for subsidiaries to be shown to be agents *for all times and all purposes*, in order for their conduct to be attributed to the corporate parent. Corporate actors who serve as sometimes-agentic elements of a principal's system of conduct may well have other independent business activities. That fact should be no bar to the principal's responsibility, where the agent can be shown to have acted, relevantly for the purposes of the claim in issue, as part of the parent's own system of conduct.

With a renewed focus on the existence, nature and operation of the parent's system of conduct, it becomes possible to lay the foundations for direct parental liability on traditional, doctrinal bases, as the following discussion shows.

B *The Key Case Law Authorities*

A leading case in the story of corporate parent responsibility is *James Hardie & Co Pty Ltd v Hall.*[144] The question for current purposes was whether the defendants, James Hardie & Co Pty Ltd and its holding company, James Hardie Industries Ltd, owed a duty of care to the plaintiff employee of a New Zealand subsidiary, James Hardie & Co (NZ) (the subsidiary). At first instance, Judge O'Meally had concluded that each defendant exercised influence over the subsidiary's operations of the New Zealand factory where the plaintiff worked, and through which he contracted asbestosis.[145] This influence was exercised through directions and recommendations to the Board of the subsidiary, which would 'not infrequent[ly]' be adopted and followed by the subsidiary.[146] The totality of the evidence, including of the published histories of the companies, showed that they operated as part of an integrated 'single administrative, manufacturing and technical entity'.[147] Judge O'Meally considered that although the plaintiff was not an employee of the defendants, the 'administrative structures' of the defendants placed them in a relationship of proximity to the plaintiff.[148] Strikingly, this was not founded on the mere fact that the holding company held some 95% of shares in the subsidiary. Rather, the defendants were liable on their own accounts, for the relationship of proximity created through their acts of influence. The fact that the New Zealand subsidiary may also separately owe a duty of care to its employee did not affect that influence and its consequences.

This sort of reasoning is consistent with the analysis I advocate in this article. However, on appeal, Sheller JA (with whom Beazley and Stein JJA concurred) found it 'difficult to distinguish this approach from a reliance upon the undoubted control that the Holding Company, with 95 per cent of the shares, had over [the subsidiary]'.[149] The lines between 'lifting the corporate veil', agency and imposition

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144 *James Hardie v Hall* (n 17), discussed perceptively by Allsop (n 17) [60]–[61].

145 *Putt v James Hardie & Co Pty Ltd* [1998] NSWDDT 1, [89], [134] ('*Putt v James Hardie*'); *James Hardie v Hall* (n 17) 561, 564.

146 *Putt v James Hardie* (n 145) [89]; *James Hardie v Hall* (n 17) 561.

147 *Putt v James Hardie* (n 145) [89]; *James Hardie v Hall* (n 17) 562. See also *Putt v James Hardie* (n 145) [147]; *James Hardie v Hall* (n 17) 563–4.

148 *Putt v James Hardie* (n 145) [147]; *James Hardie v Hall* (n 17) 564.

149 *James Hardie v Hall* (n 17) 579.

of duties on members of a corporate group arising out of the degree of control or influence exercised over another actor were 'easily blurred'.[150]

Here, his Honour referred with approval to the decision *Briggs v James Hardie & Co Pty Ltd* ('*Briggs v James Hardie*'), where Rogers AJA admitted to similar difficulty in reconciling the so-called agency exception[151] with the principle of limited liability. In that case, two companies (Hardies and Wunderlich) held equal shares in the corporate owner and operator ('Asbestos Mines') of an asbestos mine in Baryulgil, New South Wales. Mr Briggs contracted asbestosis after working in the mine for about six years. He argued that Hardies and Wunderlich were his employers during the relevant period, as they exercised complete control over Asbestos Mines as the corporate vehicle for their joint venture.[152] Rogers AJA reluctantly[153] concluded that the idea 'that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic'.[154] If accepted, 'the principle of limited liability in relation to the activities of subsidiaries would be left in tatters'.[155] Further, on that basis, the decisions in leading authorities in *Industrial Equity Ltd v Blackburn* ('*Industrial Equity*')[156] and *Walker v Wimborne*[157] should have been different.[158]

Addressing these points in turn: first, where one person *exercises* (as opposed to having some general capacity to exercise) 'complete dominion and control' over another *in relation to some transaction or dealing*, that other party it is highly like to constitute the agent, or even the alter ego,[159] of the controller. In such circumstances, the controller acts directly, albeit through another. In such circumstances, the other actor is little different to an automated program coded to carry out the controller's wishes, entirely without any discretion: a mere tool of the controller.[160]

Second, the direct liability analysis I advocate here, and seemingly adopted by Judge O'Meally, by no means requires piercing or lifting the corporate veil.[161]

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150 Ibid 579–80.

151 As explained above in Part II, this is not, properly speaking, an exception to the related principles of separate legal identity and limited liability.

152 *Briggs v James Hardie* (n 22) 567.

153 Ibid eg, 558–9, 577–81, leaving open a 'more principled approach' (at 577) that allowed a claim in negligence against Hardies and Wunderlich: at 577–8, 580–1.

154 Ibid 577. This observation has been accepted repeatedly: see, eg, *Varangian Pty Ltd v OFM Capital Ltd* [2003] VSC 444, [142] (Dodds-Streeton J). See also *Bird Cameron* (n 23) 596 [110]–[111] (Besanko J), the subject of analysis on this point in Anil Hargovan and Jason Harris, 'The Relevance of Control in Establishing an Implied Agency Relationship Between a Company and its Owners' (2005) 23(7) *Company and Securities Law Journal* 459.

155 *Briggs v James Hardie* (n 22) 567.

156 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567('*Industrial Equity*').

157 *Walker v Wimborne* (n 10).

158 *Briggs v James Hardie* (n 22) 577.

159 For important analysis of an independent equitable conception of corporate alter ego liability, see Jamie Glister and Calida Tang, 'Corporate Alter Ego Liability in Equity' (2024) 47(4) *UNSW Law Journal* 1071, examining the developing jurisprudence arising from *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296. The seemingly close relationship between this developing jurisprudence and the analysis here offered demands further attention, but must await another occasion.

160 Paterson and Bant, 'Automated Mistakes' (n 65) 265.

161 See above Part II.

The subsidiary's independent legal personhood is no more denied, or pierced, than that of the third-party recruiters in the unconscionability cases. Rather, the parent is being held responsible for its own system of conduct carried out through, inter alia, its subsidiary.

Third, the issues in play in both *Industrial Equity* and *Walker v Wimborne* were quite different to those in issue in *Briggs v James Hardie* and, in turn, in *James Hardie v Hall*. In *Industrial Equity*, the Court held that, absent legislation, a holding company was only entitled to declare dividends over profits held by the holding company, and could not notionally accrue or claim the profits held by members of the wider group.[162] The legislative allowance of consolidated or group accounts in the interests of financial transparency did not mean that the profits of the subsidiary were those of the holding company.[163] This must be right. To find otherwise would entail simply ignoring the separate legal identity of the group members, or recognising some single, overarching corporate group entity.[164]

Likewise, *Walker v Wimborne* rightly emphasised that the question whether director of company A had acted in the best interests of that company could not be answered by reference to the interests of company B or the broader corporate group. It had to be answered by reference to the interests of company A.[165] This is not to say that the interests of company A cannot be informed by wider group interests, but that the proper lens for the purposes of the director's inquiry must faithfully be focused upon the interests of the company for which the director acted on the occasion in question.

In *Briggs v James Hardie* and *James Hardie v Hall*, by contrast, deployed dominance and control went to the heart of the very question in issue, namely whether there were circumstances that gave rise to a duty of care directly between the defendants and the plaintiff. On this question, in *James Hardie v Hall*, Sheller JA recognised that, as in an earlier authority of *CSR Ltd v Wren*,[166] 'the system of work and the working conditions on the factory floor' were key to the finding of a duty of care between parent and subsidiary.[167] In the language of Systems Intentionality, control and dominance are matters that inform whether and how the subsidiary's working conditions were the result of — indeed part of — the parent's system of conduct.[168] In *CSR Ltd v Wren*, the working conditions on the factory floor were found to be CSR's systems of conduct and practices, which reflected CSR's

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162 *Industrial Equity* (n 156) 576–7 (Mason J, with whom Stephen, Murphy and Aickin JJ separately concurred).

163 Ibid.

164 *Briggs v James Hardie* (n 22) 577. See also *Federal Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325, 343–4 [62] (French CJ, Heydon, Crennan and Bell JJ); Jason Harris and Anil Hargovan, 'Corporate Groups: The Intersection Between Corporate and Tax Law — *Commissioner of Taxation v BHP Billiton Finance Ltd*' (2010) 32(4) *Sydney Law Review* 723.

165 *Walker v Wimborne* (n 10) 6–7 (Mason J).

166 *CSR Ltd v Wren* (n 17) 464 (Powell JA) 483–4 (Beazley and Stein JJA).

167 *James Hardie v Hall* (n 17) 583.

168 If the subsidiary's, the parent may still attract direct liability, for example as an accessory: cf *Lifestyle Equities CV v Ahmed* [2025] AC 1, 19–24 [24]–[40] (Lord Leggatt JSC, with whom Lords Lloyd-Jones, Stephens and Richards JJSC and Lord Kitchin agreed) on the analogous accessory liability of directors for wrongs committed by their company.

knowledge and intentions with respect to the workings of the factory.[169] Those conditions therefore provided important factual findings relevant to proximity, duty and breach.

Sheller JA however emphasised that critical to the reasoning in *CSR Ltd v Wren*, was the fact that the foreman and manager of the factory was a CSR employee. This 'direct control' over the operational aspects of its subsidiary's factory meant that there was no question of lifting the corporate veil. By contrast, in *James Hardie v Hall* his Honour considered that the plaintiff was employed by the subsidiary, and the relationship between the defendants and the subsidiary was not a mere façade. At most, the defendants 'were in a position to insist that proper workplace standards were maintained'.[170] These facts were sufficient to distinguish the cases.

By contrast, Systems Intentionality suggests that the fact that another company employed the plaintiff could not thereby stop the 'system of work' in *James Hardie v Hall* from being the defendants' own system, if that was indeed the case. Thus, it made no substantive difference to the worked example in Part III(C) that the cook's carer was employed through a government scheme, or that third-party recruiters were appointed through a jumble of opaque and uncertain arrangements as described in Part IV. Any formal contractual arrangements between the deployer of the system and the agentic elements of the system should not be permitted distract from characterisation of the system of conduct, as deployed, as a whole. Further, the findings of Judge O'Meally seemed apt to shed light on the presence of such a system, although further evidence, such as the substance of parental policies around work practices (that is, the real-life systems or practices) would have shed additional light. Any system would necessarily manifest the defendants' knowledge of the circumstances and risks to which employees, such as the plaintiff, were exposed. And failure to act (far from being a less culpable aspect of parent involvement) could legitimately be considered to be part of that system, assessed at a certain level of generality. Contrary to the findings of Sheller JA, therefore, the analysis of Judge O'Meally in *James Hardie v Hall* did not give mere 'lip service'[171] to the integrity of the corporate veil, but rather adopted the separate legal identity of parent and subsidiary as part of the matrix of circumstances that informed his inquiry into proximity. On the other hand, the fact (as fact it is) that the subsidiary was a separate legal identity did not thereby require dis-attribution of the parent.[172] Yet this was arguably the consequence of Sheller JA's analysis.

Two final matters warrant emphasis, by way of conclusion. In *Briggs v James Hardie*, Rogers AJA asked rhetorically 'If exercise of dominance be at least part of the test, what degree of dominance is required? If so, what is the extent of reliance on the parent that is required to be shown?'[173] First, a relationship of 'dominance', or conversely reliance, may be relevant to issues of causation raised by the specific doctrine in issue. For example, it may suggest that that the parent made a significant contribution to the subsidiary's corporate decision to engage in conduct that harmed

169 *CSR Ltd v Wren* (n 17) 464 (Powell JA) 483–4 (Beazley and Stein JJA).
170 *James Hardie v Hall* (n 17) 581, see also at 583.
171 Ibid 581.
172 See *Lifestyle Equities CV v Ahmed* (n 168) 22 [35] (Lord Leggatt JSC).
173 *Briggs v James Hardie* (n 22) 576 (citations omitted).

the plaintiff.[174] But, as explained earlier, through the lens of Systems Intentionality, 'dominance' also directly informs the question of whether the parent had adopted and/or deployed the system of conduct carried out (in part) by the subsidiary. This has some significant, practical ramifications. On this approach, the precise shareholding of a parent in its subsidiary is of marginal, evidential significance. While it might suggest the *potential* for dominance or control, what is of greater, indeed critical, significance is whether and how the subsidiary's conduct *through which the harm occurred* formed part of the parent's own system of conduct. Here, by analogy with the 'unconscionable system of conduct' cases, the fact that a parent has issued or overseen, or adopted training practices for the subsidiary in the system or business model in issue, or imposed and embedded relevant policies that nudge, direct or coordinate its behaviours and the like, all bear on this issue.[175] Shared directorships, or controlled directorships, whereby the parent takes control of the decision-making of a subsidiary by issuing instructions to the subsidiary on matters relevant to the particular harm the subject of the claim will also be relevant to this question. If the analysis discloses that the harm resulted from the parent's system of conduct, then the parent's system of conduct will manifest certain intention and knowledge, which can readily be characterised.

Second, and relatedly, Systems Intentionality makes clear (and the unconscionable systems of conduct authorities illustrate)[176] that it should not it have been considered fatal to the claim in *James Hardie v Hall* that a subsidiary may act independently from time to time, or even repeatedly.[177] Rather, the question is whether the subsidiary formed part of the parent's system of conduct *on the occasion in issue*. Where it did, analysis of its role is important to identify and then characterise the parent's system of conduct and, with it, the parent's corporate mindset. This may then inform the parent's liability, on its own account.

VI Conclusion

In this article, I have sought to contribute to the search to find a more principled and practical means of determining responsibility within corporate groups, considered as complex 'systems of conduct'. Systems Intentionality suggests that, in some cases, and for some circumstances, parent corporations may adopt and deploy systems of conduct to which their subsidiaries contribute, and through which harms occur. Such systems will manifest the parent's states of mind, which may bear on the parent's direct responsibility pursuant to some common law, equitable and statutory doctrine. In this way, Systems Intentionality does not provide an exhaustive solution or 'silver bullet' to the problems posed by corporate groups, but rather may serve to support

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174 Elise Bant and Jeannie Marie Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24(1) *Torts Law Journal* 1, 10–11, 15–22.

175 Cf Chris McGrath, 'Implications of the United Kingdom's Approach for Parent Company Liability in Australia' (2021) 38(8) *Company and Securities Law Journal* 577, 577–8; Petrin and Choudhury (n 27) 777–8.

176 Bant, 'Systems Intentionality' (n 2) 202–3, discussing *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 368, [939]–[942], cited in *Unique International College Pty Ltd v ACCC* (n 93) 661–2 [131] (Allsop CJ, Middleton and Mortimer JJ).

177 *James Hardie v Hall* (n 17) 583. See also Cf *Bird Cameron* (n 23) 594–7 [108]–[115] (Besanko J).

existing laws, as well as design of proposed reforms[178] in a principled way that does not do violence to core principles of corporate law.

While these cannot be explored here except in barest outline, the ramifications of my analysis may require some rethinking of common assumptions of corporate practice. On this approach, for example, shifting funds within a corporate group in order to defeat claims against the subsidiary may not operate as some sort of 'get out of jail free' card for the parent.[179] Direct parent liability relating to the harm caused by the subsidiary[180] may remain, although the precise nature of that liability will need to be carefully and separately established.[181] A key question here will be whether and how the subsidiary's harmful behaviour on the instance(s) in question formed part of the parent's own system of conduct. It is here that evidence of overarching and more granular parental policies that influenced, nudged or contributed towards the conduct resulting in the harm will be critical. However, these will not be the only source of relevant evidence. As I have shown, a wealth of caselaw exists on how to prove systems of conduct and the bearings these have on a range of corporate mental states commonly relevant to liability.[182] Commonly dealing with business models that incorporate multiple corporate agents and networks, these learnings should be readily transferable to the group context.

Consistently, the Systems Intentionality analysis suggests how and why accessorial or joint group liability may be possible and appropriate in some circumstances, just as it may be for natural persons who are engaged in connected activities.[183] Again, corporate knowledge and intention manifested through combining or coordinating (mis)conduct in some way will often be important in determining the nature of that liability.[184] This can be addressed through assessing the system of conduct to which the corporate accessory contributed.

Further, the analysis provides another means of thinking through when and whether it may be necessary or appropriate to regard a corporate group as a separate

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178 See, eg, Witting (n 10) chs 9, 11; Petrin and Choudhury (n 27) 782–9; Helen Anderson, 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform' (2009) 33(2) *Melbourne University Law Review* 333, 359–66.

179 See, eg, Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to be Kicked' (2005) 27(2) *Sydney Law Review* 339; Witting (n 10) ch 4 ('Insolvent Entity Case Studies').

180 There may also, of course, be claims arising from the act of procuring a transfer of funds to defeat the subsidiary's creditors or other direct liabilities.

181 Similarly, the fact that the parent may be liable does not mean that the subsidiary is thereby excused: for similar discussion in the context of 'dis-attribution fallacy' of directors who have procured or assisted their company to breach some duty, see *Lifestyle Equities CV v Ahmed* (n 168) 22 [35], 22–4 [37]–[40], 27 [52], 35–6 [81]–[85] (Lord Leggatt JSC). Cf *Keller v LED Technologies Pty Ltd* (2010) 268 ALR 613, criticised in Stefan Lo, "Dis-Attribution Fallacy and Directors' Tort Liabilities" (2016) 30(3) *Australian Journal of Corporate Law* 215.

182 Discussed above in Part III.

183 Peter Edmundson, 'Sidestepping Limited Liability in Corporate Groups Using the Tort of Interference with Contract' (2006) 30(1) *Melbourne University Law Review* 62; Peter Edmundson and James Mitchell, 'Knowing Receipt in Corporate Group Structures' (2005) 23(8) *Company and Securities Law Journal* 515. See also Witting (n 10) 406–12. Cf equitable alter ego liability of the kind analysed by Glister and Tang (n 159).

184 This need not be the same mental state as required for the primary tortfeasor: see *Lifestyle Equities CV v Ahmed* (n 168) 37–40 [86]–[98] (Lord Leggatt JSC).

legal entity in and of itself.[185] To the extent that coordinated systems of conduct are deployed by a parent company, or accessory liability follows from group companies' individual contributions to systems of misconduct, then liability may be sensibly sheeted home to extant corporate individuals, without the necessity for recognising some greater, collective group agent in which responsibility resides. The model may, however, helpfully inform developing theories of 'group enterprise' liability,[186] which also emphasise coordinated conduct between group members as a basis for an extended form of joint liability.

Finally, as Justice Allsop observed, and as is amply supported by the 'unconscionable systems of conduct' jurisprudence, a more nuanced approach to corporate group responsibility has the potential to make more transparent the range of risks that must be assessed by boards of group companies:

> If the best way of running and managing a business or businesses organised by subsidiary companies in a group involves group-wide policies promulgated, supervised, directed and enforced by officers of the parent, not to be actively involved in such policy promulgation, supervision, direction and enforcement will or may involve business risk; to be so actively involved may involve or heighten liability risk.[187]

[185] See, eg, *Qintex Australia Finance Ltd v Schröders Ltd* (1990) 3 ACSR 267, 269 (Rogers J) discussed in Robert Baxt and Timothy Lane, 'Developments in relation to Corporate Groups and the Responsibilities of Directors: Some Insights and New Directions' (1998) 16(8) *Company and Securities Law Journal* 628, 629. Cf statutory provisions permitting consolidated or group financial statements, group reporting and disclosure (*Corporations Act* (n 24) ch 2M) and 'pooling' orders for insolvency purposes (*Corporations Act* (n 24) s 579E(1)). See also, eg, *Corporations Act* (n 24) s 187, which allows a director of a wholly owned subsidiary to act in the interests of the parent company in some circumstances.

[186] Cf, eg, *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd* (1995) 18 ACSR 566, 568–569 (Macrossan CJ, Fitzgerald P and Davies JA); *James Hardie v Hall* (n 17) 579–80 (Sheller JA, Beazley and Stein JJA concurring); Witting (n 10) 174–85; Martin and Choudhury (n 27) 789–91. Leading proponents include Adolf Berle, 'The Theory of Enterprise Liability' (1947) 47(3) *Columbia Law Review* 343; Phillip Blumberg, *The Multinational Challenge to Corporation Law* (Oxford University Press, 2nd ed, 2012); Phillip Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37(3) *Connecticut Law Review* 605. There is an interesting comparison also to be made between 'group enterprise' theory and theories of 'aggregation' in the corporate attribution context.

[187] Allsop (n 17) [70], see also at [64].