RETHINKING PUBLIC RESPONSIBILITY: INSIGHTS FROM SYSTEMS INTENTIONALITY

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Recent decades have seen a surge of interest in holistic models of corporate responsibility, which reflect and give effect to understandings of organisational blameworthiness. This article asks what insights these developments might offer for the accountability of public juristic persons, including the Commonwealth of Australia. This question is pressing not only in view of continuing concerns over outsourcing of public services, and the ongoing blurred boundaries between corporation and state, but also the increasing automation of core public functions. In this brave new world, individualistic inquiries into, for example, ministers' or officials' subjective purposes, knowledge and good faith may deflect and dilute attention away from critical inquiries into organisational fault. This article seeks to provoke engagement with these ideas through a thought experiment. It models the application of a holistic model of corporate responsibility entitled Systems Intentionality, recently approved in the High Court of Australia, to a serious example of public maladministration: the Australian 'Robodebt' scheme. This lens suggests a culpable organisational mindset that goes well beyond the individual mistakes, ignorance and incompetence claimed by ministers and senior public servants. The article concludes that the implications for public accountability through both public and private law mechanisms merit further consideration.

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I INTRODUCTION

There has never been a sharp dividing line[1] between 'private' corporations[2] and public juristic persons, such as 'the Crown' or 'the body politic of the

[1] The range of species of 'common law corporations', including the Crown and other corporations sole, are examined in Samuel Stoljar's outstanding *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press, 1973) ch 10. On Frederik W Maitland's (contrasting) analysis, the Crown was a 'corporation aggregate' in many respects like others, although it might be subject to different rights, obligations, privileges, and immunities: Frederic W Maitland, 'The Crown as Corporation' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge University Press, 2003) 41. Paul Finn's conception of the 'Public Trust', to which the eminent jurist returned repeatedly over the course of his career, famously explored this fluid boundary: see, eg, Paul D Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987); Paul D Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (The Federation Press, 1994) 131; Paul D Finn, 'A Sovereign People, A Public Trust' in Paul D Finn (ed), *Essays on Law and Government Volume 1: Principles and Values* (The Law Book Company Limited, 1995) 1; Paul D Finn, 'Claims Against the Government Legislation' in Paul D Finn (ed) *Essays on Law and Government Volume 2: The Citizen and the State in the Courts* (LBC Information Services, 1996) 25 and Paul D Finn, 'Public Trusts, Public Fiduciaries' (2010) 38(3) *Federal Law Review* 336. As Joshua Getzler has powerfully demonstrated, Finn's work advanced important conceptions of the public juristic person: see 'Personality and Capacity: Lessons from Legal History' in Tim Bonyhady (ed) *Finn's Law: An Australian Justice* (The Federation Press, 2016) 147.

[2] There is growing and widespread acceptance that Australian registered corporations owe obligations that bear a public character: see, eg, *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, especially at 293 [434] (Edelman J); Susan Watson, *The Making of the Modern Company* (Hart Publishing, 2022) 23, 33, ch 16. Cf wholly-owned public and statutory corporations: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FLR 151, 196, 197 (Finn J), discussed insightfully in Victoria Schnure Baumfield, 'Locating the Public in Australian Public Enterprise: Reinforcing the Public Objectives and Public Accountability of Australian Government-Owned Businesses' (PhD thesis, The University of Queensland, 2021) ch 3.

Commonwealth of Australia' (hereafter the Commonwealth) and the States.[3] Consistently, over recent times, there have been growing efforts to consider how and when corporations are, or should be, subject to public law. This shift reflects the fact, among other considerations, that the size, complexity and power of many modern corporate entities, including those functioning through corporate groups, mean that corporations can and do rival nation-states for both public goods and evils.[4] This lived reality lends urgency to calls to treat them as public actors for at least some purposes.[5]

Of far less focus has been the converse inquiry: that is, the lessons for public responsibility from corporate law theory and doctrine.[6] Clearly, important theoretical, political and legal differences exist between these domains. Most obviously, as a matter of convention, Commonwealth executive power ('executive government') is largely wielded by the Prime Minister, the Cabinet and the broader ministry, who are accountable to Parliament and, ultimately, the Australian public through democratic processes. Public law principles are commonly conceived to operate to audit that exercise of power, [7] a point of distinction powerfully reflected in the divergent remedial consequences.[8] There

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[3] For current purposes, adopting the analysis of *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16 [142] (Edelman J) ('*National Parks*'). See further Sebastian H Hartford Davis, 'The Legal Personality of the Commonwealth of Australia' (2019) 47(1) *Federal Law Review* 3.

[4] See, eg, Julia Powles, 'The Corporate Culpability of Big Tech' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 97. A well-known older example is the English East India Company: see, eg, Susan Watson, *The Making of the Modern Company* (Hart Publishing, 2022) 23, 33, and ch 3; William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury Publishing, 2019).

[5] The Modern Slavery reforms are an example. See Fiona McGaughey, 'Regulatory Pluralism to Tackle Modern Slavery' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 441.

[6] Professor Finn's work in the context of the 'public trust' is a striking exception, discussed valuably by Getzler: above n 1 and the subject of a forthcoming essay by the author, 'Correcting the Public Conscience: Reflections on Finn and the Forgotten Trust' (Presentation to Third Leslie Zines Symposium, ANU, 1 December 2024) ('Correcting the Public Conscience'). See also Schnure Baumfield (n 2).

[7] Stephen Gageler, 'Administrative Law within the Common Law Tradition' (2023) 53(1) *Australian Bar Review* 1, 8.

[8] For an excellent, critical analysis, see Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell et al (eds), *Public Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 45. See also Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24(3) *Australian Journal of Administrative Law* 189.

may (although this remains highly contentious)[9] be special immunities or privileges that attach to juristic persons exercising public powers. To recognise such differences does not, however, preclude the view that corporate law potentially has much to offer those interested in holding public bodies, including the body politic of the Commonwealth of Australia, better to account for serious misconduct.[10]

Most evidently, there are certain similarities in terms of liability mechanism, which bear directly on foundational questions of responsibility. In particular, 'rules of attribution have proceeded, in the case of governments, by analogy with corporate agency theory.'[11] As Edelman J has recently observed:

> The exercise of any type of power of the body politic of the Commonwealth of Australia by any Commonwealth officer, employee or other agent (including sub-agents) will, subject to any immunity from liability, be attributed to the body politic of the Commonwealth of Australia as the body on whose behalf the power was exercised.[12]

These attribution rules are necessary because, as for corporations, public juristic entities such as the Commonwealth are 'artificial' legal persons, lacking natural minds, hands and feet with which to engage purposefully in and with the world.[13] Public law actions challenging executive decision or action, therefore, 'tend to be directed against the Minister or responsible officer or agent within the relevant department'.[14] Yet this traditionally individualistic focus should not blind us to the distinctive juristic person on whose behalf these individuals act,[15] and thus the potential for recognition of its distinctively organisational blameworthiness.[16] Indeed, growing concerns that traditional accountability

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[9] Getzler (n 1) 150–154, discussing Finn's perceptive analysis of the attempts of Australian legislatures around federation to place state and federal juristic persons on equal footing with other legal persons: compare *National Parks* (n 3) [166] (Edelman J), arguing similarly that s 75(iii) of the Constitution effected 'a constitutional removal of any immunity of the body politic of the Commonwealth of Australia'. While this cannot be addressed here for issues of space, the proposed approach would support calls for fresh consideration of this question: compare, eg, *National Parks* at [15]–[26] (Gageler CJ and Beech-Jones J); [44], [47], [103]–[104], [106]-[108] (Gordon and Gleeson JJ); [155]–[160], [164], [166]–[167] (Edelman J) [262]–[265], [269] (Jagot J).

[10] See, eg, Dennis F Thompson, 'Criminal Responsibility in Government' (1985) 27 *Criminal Justice* 201; Christopher D Stone, 'A Comment on "Criminal Responsibility in Government"' (1985) 27 *Criminal Justice* 241.

[11] Hartford Davis (n 3) 6–7.

[12] *National Parks* (n 3) [145]; see also [199].

[13] Hartford Davis (n 3) 6–7.

[14] *National Parks* (n 3) [144] (Edelman J). See further Hartford Davis (n 3) 6.

[15] Cf the tort of misfeasance in public office, which has largely overlooked the possibility: below n 142.

[16] Compare *National Parks* (n 3) [107] (Gordon and Gleeson JJ).

conventions such as Ministerial Responsibility may be breaking down[17] suggest the timeliness of the inquiry. Here, moral and legal theories and principles of organisational responsibility purport to shed light on group purposes, knowledge and values,[18] which are of keen interest in both private and public spheres.[19] In the corporate context, these holistic approaches offer a corrective lens to restrictive, individualistic attribution models that focus on responsible directors or senior officers as the human face or foil of the greater group. While individual culpability remains a central concern of corporate law, holistic models reflect the lived reality that corporations are more than the sum of their parts, and bear their own cultures and characters. The same might well be said of public persons, assessed holistically and on their own account, independently of the officers, employees, and natural and corporate agents through which they operate.[20]

Adopting an organisational lens suggests some potentially interesting, shared features and lines of inquiry. For example, the core *conventions* of Cabinet and Prime Minister may be conceived of as power structures, or *practices*, to enable decision-making by the Commonwealth as an entity in the exercise of its executive powers. These core structures find echoes in the default corporate

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[17] See, eg, Judy Maddigan, 'Ministerial Responsibility: Reality or Myth?' (2011) 26(1) *Australasian Parliamentary Review* 158; Yee-Fui Ng, 'Between Law and Convention: Ministerial Advisers in the Australian System of Responsible Government' in The Commonwealth of Australia, Papers on Parliament No 68 (December 2017). The Robodebt Royal Commission provided ample further examples: below n 28.

[18] See, eg, Peter A French, *Collective and Corporate Responsibility* (Columbia University Press, 1984); Brent Fisse's seminal work on 'reactive corporate fault', ably summarised in Brent Fisse, 'Reactive Corporate Fault' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 139; Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75(4) *Minnesota Law Review* 1095; William S Laufer, 'Corporate Bodies and Guilty Minds' (1994) 43(2) *Emory Law Journal* 647; James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393; Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001); Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002); Christian List and Philip Pettit, *Group Agency*: *The Possibility, Design and Status of Corporate Agents* (Oxford University Press, 2011); Chris Chapple, *The Moral Responsibilities of Companies* (Palgrave Macmillan, 2014). See further Australia's novel 'corporate culture' provisions, on which Systems Intentionality also builds: *Criminal Code Act 1995* (Cth) s 12.3.

[19] Gageler (n 7); James Allsop, 'Values in Public Law' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) 9; Mark Aronson, 'Public Law Values in the Common Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015).

[20] This is not to say that the acts and mental states of individuals within a body corporate are irrelevant, but that their contributions should be understood systemically. Individuals may also be held responsible for breach of positional duties (for example, directors' duties), or as accessories to the corporate wrong, or for breach of duties owed as private citizens.

decision-making systems known as Boards of Directors, which animate corporations from passive shells into purposive entities. [21] But as with corporations, these core structures are not enough to enable public juristic persons to engage purposefully with and in the world, on a day-to-day basis. Thus the Commonwealth, like corporations, must adopt more dispersed systems of conduct to achieve its ends, for example, through natural persons operating as teams in government departments or 'as has been increasingly the tendency over [more than one] hundred years, fictitious persons – corporations'.[22] Both public and private organisational forms accordingly commonly function as bureaucracies, often of considerable complexity. This in turn has ramifications for the effectiveness of traditional liability mechanisms, which (as we have seen) commonly search for the natural individual 'responsible' for the misconduct. Such individualised approaches arguably encourage corporation and body politic alike to adopt structures that diffuse knowledge and, hence, responsibility, including through information silos and barriers. They may also foster exculpatory and evasive 'strategies of denial', which seek to distance the individual and, derivatively, the public or corporate organisation from blame. Finally, and underscoring the nexus between corporate and public forms is that, increasingly, bodies politic carry out a range of executive functions through corporate entities,[23] and 'outsource' public obligations and activities to corporate service-providers.[24] All this suggests that developments in corporate law may provide useful insights for public responsibility and, conversely, blameworthiness.

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[21] It may be accepted that 'The Executive Government is not itself a legal person or "body"': *National Parks* (n 3) [144] (Edelman J). However, viewed at a certain level of generality, it constitutes a decision-making structure or system of conduct that manifests the juristic person of the 'body politic of the Commonwealth's mindsets' in exercising executive power, at a more granular, daily level (such as through Robodebt). Cf *Western Australia v Watson* [1990] WAR 248, 270 (Malcolm CJ, Brinsden and Seaman JJ); *Zentai v O'Connor (No 3)* (2010) 187 FCR 495, 587 [353] (McKerracher J); *Danthanarayana v Commonwealth of Australia* [2014] FCA 552 (28 May 2014) [111]–[112] (Foster J), recognising the utility, if 'admittedly imperfect', of the analogy: discussed in Hartford Davis (n 3) 7.

[22] *National Parks* (n 3) [104] (Gordon and Gleeson JJ), citing *Bropho v Western Australia* (1990) 171 CLR 1, 16, itself quoting *British Broadcasting Corporation v Johns* [1965] Ch 32, 78–79. See further Schnure Baumfield (n 2) ch 2.

[23] Including the 'quango' or 'qango': see, eg, the Perth Mint, operated by Gold Corporation, itself 'wholly owned by the Government of Western Australia': *The Perth Mint: Australia* (Web Page, 2024) <https://www.perthmint.com/>, which seems to all intents and purposes a business. The borderland between corporation and government here is of obdurate and cross-jurisdictional significance: see, eg, Michael Taggart, 'Corporatisation, Privatisation and Public Law' [1990] NZLRFOP 31; Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, 25 August 1998).

[24] Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (Cambridge University Press, 2019).

This article seeks to provoke engagement with this reflective perspective through a thought experiment. It takes a holistic corporate liability model entitled 'Systems Intentionality', recently endorsed in the High Court case of *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* ('*Productivity Partners*'), and which responds to the limitations of individualistic, corporate law attribution rules.[25] It then applies this lens to what has been described judicially as a 'shameful'[26] chapter in the history of the Commonwealth of Australia's public administration: the Robodebt scheme. As will be explained, the knowledge and intentions of the body politic of the Commonwealth of Australia in developing, deploying and maintaining the scheme have been crucial issues throughout. Thus, at the time of its introduction in 2016, representatives of the then-Coalition government (the Government) characterised the Commonwealth 'purpose' in deploying the automated 'debt-recovery' scheme as being to preserve the integrity of Australia's valued welfare system. As claims began to surface of harms being suffered by social security recipients through the scheme, that narrative shifted to one of 'administrative error' and mistake. Class action litigation that contributed to the scheme's eventual demise raised issues of the Commonwealth's knowledge, intentions and good faith.[27] Following the demise of the scheme in 2020, the Robodebt Royal Commission, introduced by the successor Commonwealth government, was

[25] *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27 at [108], [109], [134] and [143] (Gordon J, Steward J agreeing at [282] and [307] and Beech-Jones J relevantly agreeing at [340]), [236]–[243] (Edelman J) ('*Productivity Partners*'). While the case concerned statutory unconscionability provisions, their Honours' analyses are arguably framed in terms of more general application. The key publications for current purposes, which articulate the model, including those cited in the High Court, are: 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'); Elise Bant, 'Systems Intentionality: Theory and Practice' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 183; Elise Bant, 'Modelling Corporate States of Mind Through Systems Intentionality' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 231 ('Modelling Corporate States of Mind'); 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 ('Automated Mistakes').

[26] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, (2021) 173 ALD 277 at [5] (Murphy J) ('*Prygodicz (No 2)*').

[27] *Prygodicz (No 2)* (n 26), explained below Part 6.

charged to consider, among other matters, the knowledge and motivations of 'the Australian Government' in designing, developing and deploying the scheme.[28]

As will become clear, Systems Intentionality provides a principled, practical and potentially powerful means of addressing these critical issues, to assess the institutional culpability of the Commonwealth. The assessment provides fresh support for, and an independent way of appreciating recipients' accounts of their lived experience of the scheme.[29] Relatedly, it suggests a potential for holistic approaches of corporate responsibility to serve valuable expressive purposes in the public domain, enhancing public understanding of government responsibility *taken as a whole*, and hence facilitating public accountability through democratic processes. However, the analysis additionally has interesting, and potentially profound implications for matters of liability and law reform in both public and private law spheres. While these can only be sketched in barest outline here, the article contends that they must merit further investigation in legal systems concerned to promote coherent approaches to addressing organisational abuse of public power.

II Culpable Corporate Minds

A Minds Matter

In recent years there has been a surge of interest in the nature and regulation of corporations.[30] Of particular interest for current purposes are the waves of work directed towards foundational questions of corporate responsibility. This is evidenced by recent law reform commission inquiries in both Australia[31] and in England,[32] but also in the sustained, broad and deep body of legislative and

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[28] Commonwealth Attorney-General Mark Dreyfus, 'Letters Patent—Robodebt Royal Commission' (Letters Patent 18 August 2022); *Royal Commission into the Robodebt Scheme* (Report, 7 July 2023) ('*RRC*'). See further n 21 on the government as a decision-making structure.

[29] *RRC* (n 28) ch 10 provides a detailed account of its impacts on individuals. Beyond the evident and often severe financial repercussions, these included significant distress, trauma, anxiety and depression, suicidal ideation and suicide, as well as broader impacts on physical health, reputational damage, vilification and experience of increased and unwarranted stigma. A further consequence was that vulnerable and needy persons otherwise entitled to support resolved not to access welfare support in the future: at 340.

[30] Most notably, 'Future of the Corporation', *The British Academy* (Web Page) <https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/>.

[31] 'Review into Australia's Corporate Responsibility Regime', *Australian Law Reform Commission* (Web Page, 10 April 2019) <https://www.alrc.gov.au/inquiry/corporate-crime/>; Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 30 April 2020) ('*Corporate Criminal Responsibility Final Report*').

[32] 'Corporate Criminal Liability', *Law Commission: Reforming the Law* (Web Page)

scholarly work, which seeks to provide better means to hold corporations to account for egregious misconduct.[33] A critical focus of that work is how to identify and prove the corporate states of mind that accompanied some impugned conduct.[34]

In the civil and criminal law alike, minds matter: thus it generally makes a difference to liability, defence and remedy, among others, whether a harm arises through accident or mistake, or is deliberately, knowingly, recklessly or dishonestly inflicted. Clearly, as artificial entities, corporations lack natural minds. Unsurprisingly, then, our general law and statutory attribution rules tend to search for the natural individual whose mind can be treated as that of the corporation, for the purposes at hand.[35] But this individualistic approach is deeply limited as both a matter of theory and practice. In terms of theory, many consider that corporations must be conceptualised holistically, as a legal person that is more than (for example) the sum of its individual employees and agents, or merely some nexus of contractual relationships between individuals through which the corporation acts.[36] As a matter of practice, the dispersed structure of many corporations means that individual knowledge and other relevant mental states are often diffused among employees, teams, departments and even group entities.[37] Finding a single individual in whom relevant mental states and

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<https://lawcom.gov.uk/project/corporate-criminal-liability/>; Law Commission, *Corporate Criminal Liability: An Options Paper* (Options Paper, 10 June 2022) ('*Corporate Criminal Liability Options Paper*').

[33] For excellent independent analyses largely consistent with Systems Intentionality, and cited by Edelman J in *Productivity Partners* (n 25) [239]–[240], see Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021); Rachel Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022). Leow observes the potential value of attribution analyses for the Crown: at 230.

[34] Vicarious liability properly so-called holds the corporation responsible for wrongs of its employees or agents, rather than on its own account: see *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21, [48]–[81] (Edelman and Steward JJ).

[35] On the identification principle: *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane LC); *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, 172 (Lord Denning); *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1, [1972] AC 153, 170 (Lord Reid). Cf *Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] UKPC 26, [1995] 2 AC 500 and the dominant statutory model in Australia, the Trade Practices Act ('TPA') model. The TPA model combines an expansive vicarious liability approach to conduct with a state of mind component that deems the intention of employees and agents acting for the company to be that of the company: *Corporate Criminal Responsibility Final Report* (n 31) [6.153], [6.159].

[36] *Productivity Partners* (n 25) [240] (Edelman J); Micheler (n 33) ch 1.

[37] *Productivity Partners* (n 25) [240] (Edelman J). See further Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56(6) *Southern California Law Review* 1141, 1189; *Corporate Criminal Responsibility Final Report* (n 31) [4.68]–[4.69]; Clough and

conduct responsibility inheres is often structurally impossible. 'Aggregation' models of liability seek to overcome this problem of diffused responsibility by combining individuals' states of mind in a modular way to create some sort of greater group consciousness. These largely pragmatic approaches have been criticised as unprincipled.[38] They may also be impractical, particularly in the light of increasing automation of, and deployment of more sophisticated Artificial Intelligence to perform, core corporate functions.[39] In these scenarios, human involvement in corporate harms may be severely attenuated or absent. Aggregation and attribution models that rest upon individual mindsets are, it seems, increasingly unfit for purpose.

Faced with this reality, in many cases, corporate law reform has turned to forms of strict liability.[40] But even here, minds matter. In particular, they matter for the expressive, deterrent and, where relevant, retributive power of the law. It may make a difference to regulators' overall enforcement approaches to, and to court determinations on, matters of defence, remedy or penalty whether (for example) the contravening conduct was deliberate, knowing or mistaken.[41] Corporations care about their reputation, remedial liability and exposure to broader penalty.[42] And communities care that the social fact[43] that they know as 'the corporation' gets called out for behaviour that appears highly culpable in

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Mulhern (n 18) 90; Gobert (n 18) 394; Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Research Paper No 17/14, The University of Sydney, 21 February 2017), 5–6.

[38] Cf *United States v Bank of New England*, NA, 821 F 2d 844 (1st Cir 1987*); Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 446 [101], 448–55 [110]–[143] (Edelman J, with whom Allsop CJ generally concurred); *R v HM Coroner for East Kent, ex parte Spooner (Herald of Free Enterprise/Zeebrugge Ferry Disaster)* (1989) 88 Cr App R 10 (QB). See also Mihailis Diamantis, 'Corporate Identity' in Kevin Tobia (ed), *Experimental Philosophy of Identity and the Self* (Bloomsbury, 2022) 203. Cf Jeremy Gans, 'Can Corporations be Dishonest?' in Elise Bant (ed*), The Culpable Corporate Mind* (Hart Publishing, 2023) 273, 292–294.

[39] Paterson and Bant, 'Automated Mistakes' (n 25); Elise Bant, 'Where's WALL-E: Corporate Fraud in the Digital Age' in H Tijo and PS Davies (eds) *Fraud and Risk in Commercial Law* (Hart Publishing, Oxford 2024) 55 ('Where's WALL-E').

[40] Examples include Australia's distinctive prohibitions on misleading conduct (see, eg, *Competition and Consumer Act 2010* (Cth) sch 2, s 18 ('*Australian Consumer Law*')) or 'Failure to Prevent' offences (see Jonathan Clough, 'Failure to Prevent Offences: The Solution to Transnational Corporate Criminal Liability' in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, 2023) 395).

[41] 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.

[42] See, eg, Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt: How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32(2) *Melbourne University Law Review* 554.

[43] Emile Durkheim, *Durkheim: Rules of Sociological Method and Selected Texts on Sociology and Its Method*, ed Steven Lukes (Red Globe Press, 2nd ed, 2013) 49–71, discussed in Micheler (n 33) 20.

nature, and is subject to equivalent condemnation and consequences for its misconduct as would be a natural wrongdoer.[44]

B Corporate Strategies of Denial and State of Mind Narratives

Given that organisational mental states matter, it comes as no surprise that corporations often seek to influence how these are characterised. Here, Penny Crofts has helpfully mapped a range of strategies of denial and neutralisation employed by corporate financial service providers (FSPs) brought before the Commonwealth of Australia Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC).[45] These strategies typically fall into three broad categories: literal denial (nothing happened); interpretive denial (something happened but it's not what you think); and implicatory denial (it happened but action is not needed and/or possible).

Drawing on this work, certain forms of 'interpretive denial' are of chief interest for current purposes. These are 'state of mind' narratives, which seek to diminish organisational blameworthiness by claiming, for example that key individuals who might be expected to be responsible for misconduct were unaware of the problem, its scale or details. Where these narratives are accepted, individualistic attribution rules have the effect that the corporate conscience is whitewashed. In the context of the FSRC, this was perhaps most strikingly illustrated by the widespread FSP malpractice of taking 'fees for no services', usually through automated fee deduction systems, over very extended periods. Before the Commission, a veritable procession of corporate officers testified that they were personally unaware of the problem, that their employees were hardworking and honest individuals, and that the unlawful takings were

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[44] Penny Crofts, 'Crown Resorts and the Im/moral Corporate Form' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 55.

[45] Penny Crofts, 'Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' (2020) 29(1) *Griffith Law Review* 21, drawing on Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, 2001). The origins of the analysis in theories of state responsibility underscores its utility for current purposes.

accordingly 'accidental',[46] or 'systems errors'[47] attributable in part to 'legacy systems'.[48] Consistently, systems were cast as 'poor' or 'defective', rather than part of intended misconduct.

These endemic narratives of 'bumbling incompetence or the product of poor computer systems',[49] arguably seriously affected the regulator, ASIC's, enforcement strategies. It tended to prefer strict liability claims, and accepted mistake and negligence-based narratives for penalty and settlement purposes.[50] Both narrators and regulator were criticised vigorously by Commissioner Hayne in the *FSRC Final Report*[51] for mischaracterising what he saw as dishonest conduct as mere organisational ineptitude, to the detriment of the law's expressive and deterrent aims. He sought to demonstrate how dishonesty could be established in such cases, using the law's individualistic attribution rules.[52] Yet there can be little doubt that automated systems pose additional enforcement challenges on individualistic approaches to corporate responsibility. Given that automated systems are (properly understood) mere tools, not agents, of the deploying organisation, they cannot attract moral or legal censure in their own right.[53] Where organisational fault is assumed to be dependent upon identifying a human locus of blame, automation therefore provides a perfect deflective foil. There is little point, after all, in 'blaming' a piece of coding. Where exculpatory 'systems errors' narratives are accepted, automated harms may attract less opprobrium, and hence liability, than equivalent human wrongdoing.

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[46] 'NAB Says Fees For No Service Not Dishonest', *SBS News* (online, 26 November 2018) <https://www.sbs.com.au/news/article/nab-says-fees-for-no-service-not-dishonest/u838rxy95>; James Frost, 'APRA Punishes CBA for Charging the Dead', *Australian Financial Review* (online, 11 December 2019) <https://www.afr.com/companies/financial-services/apra-punishes-cba-s-avanteos-for-charging-the-dead-20191211-p53j3b>.

[47] James Frost and Misa Han, 'Banking Royal Commission: AMP Took Life Premiums From Dead Customers', *Australian Financial Review* (online, 17 September 2018) <https://www.afr.com/companies/ financial-services/banking-royal-commission-amp-took-life-premiums-from-dead-customers-20180917-h15hoj>.

[48] Tim Stewart, 'Banks Blame "Legacy Systems" for Advice Failures', *Investor Daily* (online, 28 October 2016) <https://www.investordaily.com.au/markets/40308-banks-blame-legacy-systems-for-advice-failures>.

[49] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 4 February 2019) vol 1, 139 ('*FSRC Final Report*').

[50] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1, 108–111, 121–133; *FSRC Final Report* (n 49) vol 1, 136–163.

[51] *FSRC Final Report* (n 49) vol 1, 112–6, 136–163.

[52] Ibid vol 1,138–9, 150–1.

[53] Paterson and Bant, 'Automated Mistakes' (n 25) 265.

C Systems Intentionality Outlined

Responding to these considerations, and adapting the seminal work of others,[54] the novel concept of 'Systems Intentionality'[55] posits a holistic, principled and workable means to determine corporate mindsets. Although newly-recognised as a matter of doctrine, it builds on and seeks to operationalise the distinctive Australian conception of 'corporate culture' as an attribution mechanism.[56] Further, the model is consistent with the insights of Australian courts applying legislative prohibitions on 'unconscionable systems of conduct or patterns of behaviour' in trade or commerce,[57] which themselves are premised on seminal principles of equity.[58] This line of authority has culminated in the recent High Court of Australia case of *Productivity Partners*.[59] While full analysis cannot be attempted here, the reasons of Gordon J (Steward J and Beech-Jones relevantly agreeing) and Edelman J, which endorse and apply this mode of reasoning, recognised direct, corporate 'systems liability' for the corporate appellant's unconscionable business practices, without requiring attribution of the actions or mental states of its individual agents or employees. Further, those reasons are not confined to the statutory context but are generally expressed

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[54] The debt is large, but includes as leading influences authors cited at n 18 and n 37 above, and Mihailis E Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98(4) *North Carolina Law Review* 893.

[55] In *Productivity Partners*, Edelman J prefers the term 'systems liability': above n 25.

[56] *Criminal Code Act 1995* (Cth) s 12.3(2).

[57] See, eg, *Australian Consumer Law* (n 40) ss 21, 22; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC, examined in Bant and Paterson, 'Systems of Misconduct' (n 25).

[58] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140–1 [33], 142–3 [43], discussed in Bant and Paterson, 'Systems of Misconduct' (n 25) 81–2. A consistent analysis is contained in *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1, 32 [81] (Gordon J) and, arguably, in the plurality decision that rested only on the equitable doctrine: at [39] (Kiefel CJ, Keane and Gleeson JJ). See also 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; and Jeannie Marie Paterson et al, 'Beyond the Unwritten Law: The Limits of Statutory Unconscionable Conduct' (2023) 17(1) *Journal of Equity* 1 ('Beyond the Unwritten Law').

[59] Above n 25. The specific parallels between the system of conduct in issue in *Productivity Partners* and Robodebt are explored in 'Correcting the Public Conscience' (n 6). The model was also endorsed and applied in *Royal Commission into the Casino Operator and Licence* (Report, October 2021) ch 6 174–8 [87]–[102], ch 18 58–9 [19]–[25] ('*VCCOL*'); *Perth Casino Royal Commission* (Final Report, 4 March 2022) 50–51 [1.61]–[1.64] ('*PCRC*'); *Review of The Star Pty Ltd: Inquiry Under Sections 143 and 143A of the Casino Control Act 1992 (NSW)* (Report, 31 August 2022) vol 1, ch 6.3. The Law Commission of England and Wales concluded its merits warranted legislative trial: *Corporate Criminal Liability Options Paper* (n 32) 83, [6.54].

statements of how corporations think and act directly in the world.[60] Finally, as discussed below, Systems Intentionality operates as a complementary adjunct to traditional attribution rules, supporting and expanding their field of operation. It does not, therefore, require wholesale overhaul or rejection of existing law and maintains (so far as is appropriate) equal treatment before the law of natural and corporate legal persons.

Systems Intentionality proposes that **corporations manifest their states of mind through their systems of conduct, policies and practices** . The basic idea is extremely simple and intuitive. As Diamantis has explained, natural persons routinely use systems of conduct to guide their decision-making and, hence, conduct.[61] Common examples are recipes, maps and notations. These 'extended mind supports' enable a person to achieve their purpose: to make a cake, find a location, or recall how to do something. Building on this idea, a natural person may be understood to manifest their state of mind through the system of conduct that they adopt and deploy. Thus when a cook is observed applying a cake recipe, it is simple to conclude that they mean (intend) to engage in baking (their 'generally intended' conduct) in order to make a cake (their 'specifically intended' result of that conduct). No mind-reading is required: their intentions are manifested through the system of conduct that they deploy, objectively assessed. Further, some of their knowledge is patent from successful deployment of the recipe: the cook must know what flour is, the process of beating eggs and so on, in order successfully to apply the recipe-system of conduct.

Systems Intentionality further posits that, understood as a set of integrated steps and processes, systems of conduct will often comprise *both* positive and negative, and proactive and reactive,[62] elements.[63] Primary (and seemingly positive) systems themselves necessarily entail the adoption of certain steps *and omissions of others*. Beating, not whipping; baking, not frying; testing before resting. It is the coordinated *set* of processes, taken as a whole, framed holistically as a system of conduct at a certain level of generality, which constitute intended

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[60] *Productivity Partners* (n 25) [108] (Gordon J: 'Corporations "think" and act through systems.') and [199], [237]–[238] (Edelman J), the latter expressly noting that the concept of 'systems liability' is 'recognised' in the statutory unconscionability prohibition.

[61] Diamantis (n 54).

[62] Fisse (n 18).

[63] Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), *Corporate Evil* (Routledge, 2024) 223. This point is well illustrated by *Productivity Partners*, where a Vocational Education and Training College removed protective processes in order to promote the enrolment of 'unwitting and unsuitable' students and, hence, boost college revenue: see, eg, above n 25 [111], [134] (Gordon J), [200], [247], [248] (Edelman J).

conduct.[64] This means that omitted (including removed) processes may legitimately be understood as part of a system's overall, or broader, design. They reflect the choice architecture of the system.

Relatedly, as systems of conduct generally involve repeated behaviours, often over extended periods, the nature of a system should be assessed in light of its user's reactions or responses to its deployment, including the system outcomes.[65] To return to the cake analogy, suppose that even though, formally, the recipe is one for cakes, the cook produces pancakes. They may claim to be mistaken in producing pancakes: there was an error in deploying the system-recipe. While this might seem plausible at first, the credibility of this claim radically reduces as the system is rolled out over time and its effects become clear. After the cook produces pancakes on multiple occasions, and certainly once they have served them repeatedly to customers, the conclusion becomes irresistible that this is what was intended. Although the cook was purporting to use a cake recipe, in fact they were intending to make pancakes.

Systems Intentionality posits that these simple ideas apply powerfully to corporate persons, which utilise systems of conduct to enable them to achieve their organisational purposes. Indeed, lacking a natural mind or memory, this is, arguably, the only way for corporations to achieve their purposes.

Viewed through this lens, the Board of Directors and shareholders in general meeting are default and core corporate decision-making systems, required to transform a corporation from a dormant shell to an active legal person. But of course more granular systems are required for daily corporate life. As Rachel Leow observes, key decision-making powers are often allocated as a matter of practice throughout corporations, including to low-level employees.[66] Beyond such corporate systems with apex individual decision-makers, in many scenarios, the whole point of a system of conduct is to pre-empt and pre-determine individual judgement. A good example is the widespread use of

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[64] *Productivity Partners* (n 25) [108]–[110] (Gordon J), adopting the analysis in Bant, 'Systems Intentionality: Theory and Practice' (n 25). On the necessity to choose a greater or lesser level of generality to obtain the correct 'angle of focus' in identifying and assessing a system of conduct, see Bant, 'Systems Intentionality: Theory and Practice' (n 25) 197.

[65] Fisse (n 18); Bant, 'Modelling Corporate States of Mind' (n 25).

[66] Rachel Leow, 'Meridian, Allocated Powers, and Systems Intentionality Compared', in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 119. See also Christian Whitting, 'The place of managers in the corporate governance architecture' (2024) 24(1) *Journal of Corporate Law Studies* 267-299.

standard operating procedures to govern core corporate conduct. These more granular systems are necessary not least because the humans through which corporations act may be more or less competent, change, die, go on sick leave, get promoted and, in some cases, be replaced by corporate actors.

In all cases, Systems Intentionality proposes that the organisation's systems manifest (in the dual senses of reveal and instantiate) its purposes in so acting, and the organisational knowledge with which it engages in that conduct. Nor does the picture change if certain steps are automated: returning to the cake example, the fact that the cook uses a food processor for one stage in the recipe makes no difference to our ability to assess their state of mind from the system of conduct that they deploy. So too it is with artificial persons, such as corporations.

D Systems Intentionality Applied

From these simple foundations it becomes possible to characterise a full range of mental states, as well as related normative conceptions, from a corporation's various systems, policies and practices.[67] The 'fees for no services' scandal discussed earlier illustrates the form of analysis, and counter-narrative it provides to evasive corporate strategies of interpretive denial.[68]

First, through the lens of Systems Intentionality, we have seen that corporate systems of conduct are inherently purposive: they exist in order to achieve some end(s). Thus a system always manifests a 'general' intention, in that the corporation must intend to engage in the (coordinated) conduct that occurred. This analysis immediately places pressure on any exculpatory narrative that seeks to characterise the deployment of automated systems as involving unintended, accidental or mistaken conduct. It is, of course, possible to have a genuine 'systems error', for example where an employee presses a wrong button, initiating an automated system. Or a human coder may make an error in transcribing a

[67] *Productivity Partners* (n 25). Corporations may manifest different mental states and culpability through different systems of conduct, a point expressly recognised in the corporate culture definition adopted in *Criminal Code Act 1995* (Cth) s 12.3(6). This is, of course, also true of natural persons: one could be a loyal friend, helpful member of the school parents' committee, and diligent scholar, yet cheat on one's taxes.

[68] See further Bant, 'Culpable Corporate Minds' (n 25) 385; Bant, 'Where's WALL-E' (n 39) 70; Bant, 'Corporate Evil' (n 63) 225.

proposed system of conduct into code.[69] However, once a system of conduct is adopted and deployed, the analytical starting point is that the conduct is generally intended. The evidential onus then lies on the party deploying the system to substantiate any allegation of mistake or accident.

Second, certain organisational knowledge will be patent from the key features of the system of conduct, as deployed. Thus, for example, many fees for no services cases involved FSP automated systems which (1) took money from customers' accounts for (2) life insurance. These features disclose a range of corporate knowledge: (1) any 'takings' from customer accounts must be authorised; and (2) being humans, the customers' circumstances might change, affecting existing authorisation. On (2), the key circumstance of which FSPs were necessarily aware is that their customers may die – that is why, after all, they hold life insurance. Systems Intentionality contends, therefore, that the starting point for any inquiry into FSPs' knowledge for the purposes of assessing culpability (and therefore liability) is that the FSPs knew these basic features and necessary incidents of their systems.

Further, we have seen that Systems Intentionality suggests that systems of conduct should be assessed in an integrated manner at a certain level of generality, to capture related positive and negative, proactive and reactive elements. Through this more expansive lens, the FSP automated processes become open to characterisation as 'set and forget' systems, the default settings for which manifested the corporate purpose to 'keep taking fees until manual intervention'. Here, responsible FSPs' *omission* of any functioning, manual audit or oversight systems to correct the (inevitable) consequence that, given some clients would die, the authorised fees would (inevitably) degenerate into unlawful takings, becomes highly significant. Their continuation over long periods and in the face of customer complaints is likewise eloquent as to corporate culpability.

Seen from this more holistic perspective, it becomes open to conclude that where an organisation deploys positive elements of a system that are objectively apt, or indeed guaranteed, to produce a harmful outcome, and omits audit or remedial processes, this omission can be understood as a matter of corporate choice. Proceeding with the deployment of the system, and persisting in the face

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[69] *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* [2022] FCA 1115, [47] (Moshinsky J), accepting a coding error led to fees for no services, but see also [52]–[54], noting that the error was not picked up or remedied, adding to the overall level of blameworthiness. See further Bant, 'Where's WALL-E' (n 39) 71.

of inevitable harm to customers, is revealed as knowing and deliberate misconduct.

As Commissioner Hayne observed, knowingly engaging in 'unlawful takings' smacks of organisational dishonesty, not ineptitude.[70] Systems Intentionality provides a ready analytical means to support this intuition, in a practically workable way.

III ROBODEBT

What insights might this approach offer in answer to the Royal Commission's inquiry into 'the Australian Government's (here, the Commonwealth's) organisational knowledge, intentions and overall blameworthiness, arising from and in relation to the Robodebt scheme?[71]

A The Core Features of the Robodebt Scheme

It is salutary to commence by identifying the core, positive features of the Robodebt scheme.[72] The relevant context is that welfare entitlements to income support in Australia have long been calculated as a matter of both law and practice by reference to *actual* fortnightly income. Where overpayments occur, they can be recovered. In mid-2016, the Commonwealth changed its welfare practice (but not the law)[73] by introducing an automated 'debt recovery' scheme that calculated, raised and asserted debt for overpayments, purportedly owed by social security recipients, on the basis of their *averaged*, fortnightly income data. Averaged income involved dividing a recipient's actual annual income by 26.

For this to have been a reliable factual basis on which to proceed, recipients would need to have enjoyed stable incomes. But the targeted class of 'social security recipients' necessarily included financially unstable Australians. That was why they were social security recipients.[74] It followed that averaged income

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[70] Above n 51. See also *Productivity Partners* (n 25) and above n 63.

[71] See further 'Correcting the Public Conscience' (n 6).

[72] For accounts all consistent in these essentials, see: *Prygodicz (No 2)* (n 26) [4]–[5] (Murphy J); *RRC* (n 28); Terry Carney, 'The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?' [2018] *UNSW Law Journal Forum* 1 ('The New Digital Future'); Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *UNSW Law Journal* 783; Peter Whiteford, 'Debt by Design: The Anatomy of a Social Policy Fiasco' (2021) 80(2) *Australian Journal of Public Administration* 340.

[73] Individual knowledge and advice about whether legislative change was required to support Robodebt was a key issue before the Commission.

[74] *Prygodicz (No 2)* (n 26) [5] (Murphy J): 'It should have been obvious to the senior public servants charged with overseeing the Robodebt system and to the responsible Minister at different points that many social security recipients do not earn a stable or constant income.' Cf *RRC* (n 28) Preface.

data could never support an accurate factual basis for an automated debt recovery scheme.[75] Notwithstanding, the Robodebt scheme was deployed. It was finally brought to an end in May 2020.

B Strategies of Denial

From the outset of its operation, concerns were raised regarding the accuracy of the automated system, and its harmful impacts on welfare recipients. In response, Government ministers and spokespersons offered a range of 'strategies of denial', of kinds familiar from the FSRC. Thus 'literal denial' was exemplified by immediate and persistent refusals to admit that there was anything wrong with the scheme.[76] An example of 'implicatory denial' was the claim that, following the Commonwealth's eventual agreement to repay the victims of the scheme, no further inquiry into Robodebt was warranted. The 'problem' had been addressed.[77]

But again, for current purposes, it is the state of mind strategies of 'interpretive denial' that are of chief interest. In the class action judgment, Murphy J's observations on the Commonwealth of Australia's knowledge of the scheme reflect the law's traditionally individualistic focus and, hence, susceptibility to this strategy-type:

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[75] As opposed to providing a basis for further enquiries: see Carney, 'The New Digital Future' (n 72) 2–3; Whiteford (n 72) 344 and discussion below Part V(A).

[76] See, eg, Luke Michael, 'Government Rejects Findings From Centrelink Robo-Debt Inquiry', *Pro Bono Australia* (online, 12 October 2017) <https://probonoaustralia.com.au/news/2017/10/government-rejects-findings-centrelink-robo-debt-inquiry/>; Chris Woods, 'Denial, Anger, Bargaining: How the Government Deals with Robo-Debt Controversy', *Crikey* (online, 2 September 2019) <https://www.crikey.com.au/ 2019/09/02/centrelink-robodebt-government-denial/>; *Australian Government Response to the Community Affairs References Committee Report: Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (Report, September 2017) ('*Australian Government Response to the Community Affairs References Committee Report*'). A particular form of this denial was to say, wrongly, that the system simply continued past practice of income averaging: Max Koslowski, '"Now Is Not the Time": Scott Morrison Blames Welfare Principle Also "Followed by Labor" For Robo-Debt Scandal', *The Sydney Morning Herald* (online, 1 June 2020) <https://www.smh.com.au/politics/federal/now-is-not-the-time-scott-morrison-blames-welfare-principle-also-followed-by-labor-for-robodebt-scandal-20200601-54ye2. html> and below Part V(A).

[77] Gerard Cockburn and Doug Dingwall, 'Robodebt Problem "Has Been Addressed", No Need For Inquiry: Prime Minister Scott Morrison', *The Canberra Times* (online, 30 April 2022) <https://www.canberratimes.com.au/story/7719072/robodebt-problem-has-been-addressed-prime-minister/>.

> It is, however, one thing for the applicants to be in a position to prove that the responsible Ministers and senior public servants should have known that income averaging based on ATO data was an unreliable basis upon which to raise and recover debts from social security recipients. It is quite another thing to be able to prove to the requisite standard that they actually knew that the operation of the Robodebt system was unlawful.[78]

Unsurprisingly, given its focus on 'the Australian Government's' knowledge and intention(s), exculpatory state of mind narratives repeatedly surfaced before the Robodebt Royal Commission.[79] Ministers claimed not to have known, appreciated or understood the nature of the system deployed under their portfolio, or were not briefed fully, thereby deflecting blame onto their departments.[80] Consistently, former Prime Minister Morrison placed responsibility for initiating the scheme squarely on the Public Service[81] and gave testimony that the failure of senior public servants to pass on legal advice making clear the legal problems with the scheme was 'distressing'.[82] Senior members of these teams also claimed that they lacked knowledge or expertise to understand the nature of the system that was deployed.[83] Consistently with the strategies employed in the FSRC, individuals were willing to confess to extraordinary levels

[78] *Prygodicz (No 2)* (n 26) [6] (Murphy J).

[79] See, eg, Alexandria Utting, 'Ex-Minister Stuart Robert "Takes Responsibility" for Robodebt Implementation, Admits Defending it Despite Knowing it Could be Unlawful', *ABC News* (online, 2 March 2023) <https://www.abc.net.au/news/2023-03-02/qld-robodebt-scheme-government-royal-commission-stuart-robert/102034796>.

[80] Luke Henriques-Gomes, 'Robodebt Inquiry: Scott Morrison Says It's "Distressing" Ministers Not Warned About Scheme's Legal Risks', *The Guardian* (online, 14 December 2022) <https://www.theguardian.com/australia-news/2022/dec/14/robodebt-inquiry-scott-morrison-didnt-ask-about-schemes-legality-because-of-faith-in-department>. Cf Catie McLeod, 'Scott Morrison Was Warned Robodebt Scheme Would Require Legislative Change in 2015', *News.com.au* (online, 7 December 2022) <https://www.news.com.au/finance/economy/australian-economy/scott-morrison-was-warned-robodebt-scheme-would-require-legislative-change-in-2015/news-story/65b03e90d407794 454d0ffa743013764>.

[81] *RRC* (n 28) 31.

[82] Ibid, 107. Commissioner Holmes considered this failure was attributable to the pressure placed on those public servants by the Government and Mr Morrison to deliver expected budget savings, in which Robodebt was a key element: at 107.

[83] A position strongly at odds with the competence and honesty displayed by frontline staff: see, eg, Utting (n 79); Luke Henriques-Gomes, '"I Can't Forget": Frontline Worker Gives Searing Indictment of Robodebt As Architects of Scheme Due to Give Evidence', *The Guardian* (online, 22 February 2023) <https://www.theguardian.com/australia-news/2023/feb/22/i-cant-forget-frontline-worker-gives-searing-indictment-of-robodebt-as-architects-of-scheme-due-to-give-evidence>.

of hopeless incompetence and lack of basic curiosity, rather than accept that they had facilitated the system deliberately and with knowledge.[84]

Additionally, and despite the kindergarten maths involved,[85] the automated nature of Robodebt provided fertile ground for further strategies of interpretive denial. Similarly to the 'fees for no services' cases, individuals were prepared to acknowledge 'errors' or 'omissions' in the administration or implementation of the automated system, which could be 'refined' or improved',[86] as opposed to knowledge of its inherent design and inevitable impacts. Murphy J's assessment of Robodebt as constituting a 'massive failure of public administration'[87] is consistent with these sorts of characterisations.

Notwithstanding, in the Robodebt Royal Commission report, Commissioner Holmes concluded that there was enough evidence of individual wrongdoing, including 'dishonesty and collusion', to warrant civil action[88] or criminal prosecution in some cases.[89] Reflecting the seriousness of these forms of culpability, former Prime Minister Morrison swiftly responded by forcefully

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[84] Cf 'NAB Says Fees For No Service Not Dishonest' (n 46); Ciara Jones, 'Former Department of Human Services Secretary Tells Royal Commission She Had A "Lack of Curiosity" Regarding Robodebt Lawfulness', *ABC News* (online, 11 November 2022) <https://www.abc.net.au/news/2022-11-11/qld-robodebt-scheme-government-royal-commission-fraud-dhs/101596282>.

[85] Luke Henriques-Gomes, 'Coalition Warned Robodebt Scheme Was Unenforceable Three Years Before it Acted', *The Guardian* (online, 12 February 2020) <https://www.theguardian.com/australia-news/ 2020/feb/12/coalition-warned-robodebt-scheme-was-unenforceable-three-years-before-it-acted>, where Carney is reported as assessing the unlawfulness of the scheme as involving 'kindergarten law'. As Whiteford notes, dividing annual income by 26 scarcely qualifies as an algorithm: (n 72) 353.

[86] See, eg, Ciara Jones, 'Alan Tudge Tells Robodebt Royal Commission He Was Not Responsible For Department's Failures to Ensure Scheme Was Lawful', *ABC News* (online, 1 February 2023) <https://www.abc.net.au/news/2023-02-01/qld-robodebt-scheme-government-royal-commission-fraud/ 101910062>; Andrew Brown, '"Massive Failures" on Robodebt Rollout', *The New Daily* (online, 30 January 2023) <https://thenewdaily.com.au/news/national/2023/01/30/massive-failures-robodebt-rollout/>. Cf *RRC* (n 28) 160, 172–173, 177–8.

[87] *Prygodicz (No 2)* (n 26) [5].

[88] The possibility of actions for misfeasance in public office are flagged: *RRC* (n 28) 659.

[89] Ibid, Preface. The details of these are addressed in sealed recommendations. The National Anti-Corruption Commission initially resolved not to pursue the RRC referrals: <https://www.nacc.gov.au/ news-and-media/national-anti-corruption-commission-decides-not-pursue-robodebt-royal-commission-referrals-focus-ensuring-lessons-learnt>. Now, see <https://www.nacc.gov. au/news-and-media/national-anti-corruption-commission-investigate-robodebt-referrals>. The Australian Public Service Commission's Taskforce to investigate breaches of the APS Code of Conduct found 12 people to have breached the Code on 97 occasions. Four public servants were sanctioned, one of whom had already retired. The Agency Heads at the centre of Robodebt, and responsible for multiple breaches, were not subject to sanction, as no longer holding those positions: <https://www.apsc.gov.au/about-us/working-commission/who-we-are/media-releases-and-statements/statement-australian-public-service-commissioner-robodebt-centralised-code-conduct-inquiry>.

rejecting any allegations of knowing misconduct, or lack of good faith, on his part.[90] No doubt other individuals will be similarly robust in their defence, should such be required. Whether any further actions follow, the broader implications for current purposes are clear. For governments as for corporations, a sole, or even heavy, focus on individual fault as a precursor to organisational responsibility may encourage narratives of interpretive denial. Where accepted, these have profound consequences for the expressive, deterrent and retributive operation of the law.

IV SYSTEMS INTENTIONALITY AND THE CORE OF ROBODEBT

A Intention and Knowledge

This conclusion prompts the hypothetical question: how would the Commonwealth of Australia's blameworthiness as a juristic person be assessed through a holistic model of corporate responsibility like Systems Intentionality?

Firstly, through this lens, we have seen that systems of conduct are inherently purposive: systems are 'plans', 'strategies', or 'methods' of proceeding to some end.[91] Or, in the case of Robodebt, a 'scheme'. As explained earlier in the fees for no services scenarios, an organisation cannot sleep-walk a system of conduct.[92] The starting point for any 'state of mind' analysis of the Robodebt scheme, therefore, is that it manifested an intention on the part of the Commonwealth to engage in that conduct, in the form of the scheme that was in fact deployed. Assertions of 'mistake' on the part of the Commonwealth therefore required substantiation, a question to which we return below.

Second, Systems Intentionality proposes that corporations necessarily enjoy knowledge of the core components of the systems of conduct they deploy, patent on their face, and essential to their operation. Again, the fees for no services cases were eloquent on this point. In the case of Robodebt, the equivalent key, proactive features of the scheme, patent on its face, were: (1) it was an automated scheme for calculating, raising and asserting debts; (2) premised on income

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[90] Paul Karp, 'Scott Morrison Rejects Robodebt Royal Commission Findings But Won't Say If He Was Referred for Prosecution', *The Guardian* (online, 7 July 2023) <https://www.theguardian.com/australia-news/2023/jul/07/scott-morrison-rejects-robodebt-royal-commission-findings-but-wont-say-if-he-was-referred-for-prosecution>.

[91] See, eg, *Productivity Partners* (n 25) [108] (Gordon J); *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045, [72]–[73] (Reeves J); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 122–3 [389]–[391] (Beach J).

[92] *FSRC Final Report* (n 49) vol 1, 157: fees taken were 'part of an established system and were not matters of accident'.

averaging; (3) addressing a class of 'social security recipients'; (4) members of which would, by definition, have insecure income. It follows that, functioning according to these terms, the system would patently and inevitably impose false 'debts' on members of the target class. All this was well-understood by the Commonwealth, through the lens of Systems Intentionality.

Further, none of these essential features altered from the time of Robodebt's introduction to its eventual demise. It follows that the Commonwealth intention manifested through that scheme also remained the same, throughout. But what was that manifested purpose? In more precise language, what was the specific intention or intended result expressed and instantiated through the scheme? Government representatives had claimed that the scheme was concerned to ensure that welfare recipients receive their proper entitlements. This was framed as ensuring the 'integrity' of welfare payments.[93] This was, arguably, a representation of fact (the Commonwealth's state of mind and, in particular, its specific intention).[94]

However, a systemic analysis highlights that, far from promoting the integrity of the social welfare system, the scheme was guaranteed to result in false debts being issued against necessarily vulnerable Australians. Systems Intentionality suggests that this certainty in outcome was a matter of corporate knowledge, being patent on the face of the automated system as (objectively) designed and deployed. On that basis, published statements as to the Commonwealth's purpose were false, and known to be so as a matter of institutional or organisational knowledge.[95] I return to identify more precisely the Commonwealth's purpose manifested by the Robodebt scheme, and the implications of this for assessment of its overall culpability, below.

B Mistake and Other Narratives of Interpretive Denial

We saw earlier that Government representatives raised a range of 'state of mind' narratives of interpretive denial, including individual mistake and ignorance of the problems with the scheme. Where traditional, individualistic

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[93] See Whiteford (n 72) 353–4; *Australian Government Response to the Community Affairs References Committee* Report (n 76). The 2015–16 Budget announcement emphasised this aim, naming it the 'Strengthening the Integrity of Welfare Payments' scheme.

[94] *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) 483 (Bowen LJ); *Generics (UK) v Warner-Lambert Company LLC* [2018] UKSC 56, [2018] RPC 21 [171] (Lord Briggs).

[95] Cf *Magill v Magill* (2020) 226 CLR 551; *Nocton v Lord Ashburton* [1914] AC 932, addressing the tort of deceit.

attribution rules apply, these are effective to avoid or minimise organisational liability. Through the lens of Systems Intentionality, by contrast, corporate narratives of 'mistake' in deploying a system must be substantiated. Further, it is well-nigh impossible for an organisation to fail to know the essential elements of its own, intended systems of conduct.[96] Systems cannot be sleep-walked into successful deployment. Finally, a corporation's ongoing intentions must be assessed not only in light of the primary features of its system, but with regard to its deployment over time, and the organisation's responses to that deployment. It follows that the cogency of claims or 'systems errors' or mistake necessarily withers over time, in the face of no change to the system, as deployed. As the pancake example earlier showed, formal systems, policies and processes may also be a far cry from the reality of the de facto (real-life) systems, policies and practices, which are deployed 'on the ground'. It is the latter that discloses the true corporate mindset.

From this perspective, the fact that the core of Robodebt remained the same throughout its deployment strongly militates against a finding of corporate-Commonwealth error or accident. Nor can this assessment be countered by another, related strategy of interpretive denial: namely that the formal policy behind a scheme (or system of conduct) was entirely ethical and/or lawful, but that there was an error or deficiency in its 'administration' or 'implementation'.[97] On the model of Systems Intentionality, any analysis of organisational mindsets necessarily starts with the instantiated, deployed system of conduct. It is this that manifests the true corporate mindset. From this perspective, rather than being exculpatory in consequence, the presence of 'formal' organisational policies that diverge markedly from the reality of the daily system of conduct suggest misleading conduct on the part of the organisation. This may be understood as deliberate (that is, deceptive) conduct where the organisation knows (as it will generally do) that the formal policy bears no relation to the reality of the corporate system as deployed.

V Dissecting The Full Commonwealth Mindset Manifested By Robodebt

The previous analysis suggested that, through the lens of Systems Intentionality, the core elements of the Robodebt scheme manifested the Commonwealth's knowledge that, inevitably, vulnerable Australians would be

[96] *VCCOL* (n 59) ch 6, 174–8 [87]–[102].

[97] Above n 86.

the subject of false allegations of debt, and a corporate-deliberate decision to proceed nonetheless. What are the relevant, broader features of the scheme relevant to exposing the Commonwealth's full organisational mindset? As explained earlier, this more expansive, integrated approach is appropriate given that systems of conduct typically deploy repeatedly over time, and so any analysis must take account of the spectrum of integrated positive and negative, proactive and reactive elements. The following is offered as an illustrative, not exhaustive, list of these broader processes.

A Broader Features of Robodebt

1 Removal of human oversight and individual assessment

A striking feature of the scheme was its radical break from existing practice, in the form of *removal* of existing and protective processes involving human oversight. [98] Previously, the welfare department (Centrelink) had largely used automated income averaging as a first step in inquiring into individual recipient legal entitlements, which were (as explained previously) based on their actual income.[99] Used in this preliminary way, and subject to further human oversight and investigation, income averaging was a rough and ready but appropriate first step to full examination of each individual recipient's true income position. It was apt to promote the integrity of the social welfare system. Under Robodebt, by contrast, income averaging became the primary basis on which debt was calculated, raised, asserted and recovered.

2 Procedural changes

Consistently, the Government shifted the practical onus of (dis)proof of debt to recipients.[100] It is possible to see this shift as a necessary concomitant of the automation of the social security debt system. Removal of human oversight transferred (or 'outsourced'[101]) the audit process to the recipient.

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[98] Carney, 'The New Digital Future' (n 72) 3, 9–10. See also above n 63.

[99] Above, text following n 72; *RRC* (n 28) xxiv, 38, 122, 181.

[100] Carney, 'The New Digital Future' (n 71) 3–8, explaining the correct 'default' position, namely that there is no recipient debt unless Centrelink establishes its existence and size, consistently with the requirements of the fortnightly rate calculation imposed by legislation. On this approach, it may be that this reversal of onus was also, and independently, unlawful. See also *RRC* (n 28) 332, 365, 392.

[101] Whiteford (n 72) 345, quoting Senate Community Affairs References Committee, Parliament of Australia, *Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (Report, June 2017).

The true nature of this shift in onus, as a matter of practice, also needs to be appreciated. Recipients were directed to online portals to check the information on which asserted debts were raised, and to provide supporting evidence disputing the debt.[102] In many cases, this required retrieval of records go back many years. Given that recipients were not, at the time of original receipt of social security payments, required to keep records of payments, this necessarily introduced for many recipients a retroactive and insurmountable evidential hurdle. Other, similar design assumptions include that recipients would have ready and reliable access to the internet, and could source alternative wage records from past employers.[103]

3 Enforcement strategies

Finally, the Commonwealth arguably adopted a largely consistent approach to litigation enforcement processes with respect to asserted debts, which (1) maximised the debt pool subject to enforcement; (2) reduced the extent to which successful challenges were placed on the public record, while (3) actively defending all benefit obtained through the scheme.[104] The following are eloquent examples.

Firstly, the Robodebt scheme imposed a penalty for any 'failure' of recipients to 'engage' with Centrelink over the asserted debt.[105] This occurred, for example, where Australians had successfully moved off social security and into employment, so had failed to update their contact details. Notably, there was no obligation to keep Centrelink appraised of changes of address in those circumstances.

Secondly, and consistently with the reversal of onus discussed earlier, the Commonwealth adopted garnishing processes to enforce the debt (including penalties) unilaterally.[106] This practice meant that the scheme was, to a degree, self-executing, rather than being subject to tribunal or judicial review and, if sustained, enforcement. This approach had the consequence of further reducing

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[102] *RRC* (n 28) 328; Whiteford (n 72) 345.

[103] Exemplified by the evidence of Scott Morrison: Emilie Gramenz, 'Scott Morrison Tells Robodebt Inquiry He Was Given "Very Explicit Advice" Scheme Didn't Need Legislation', *ABC News* (online, 14 December 2022) <https://www.abc.net.au/news/2022-12-14/scott-morrison-fronts-robodebt-inquiry/ 101771092>. Cf *RRC* (n 28) 329.

[104] Cf *RRC* (n 28) 297, 298. See also the considered assessment of Carney, 'The New Digital Future' (n 72) 9, on the failure of Centrelink to act as a 'model litigant'; *RRC* (n 28) xxxviii, 553, 559.

[105] Whiteford (n 72) 349; *RRC* (n 28) 328.

[106] Whiteford (n 72) 349; *RRC* (n 28) xxiv.

the financial capacity of recipients to challenge the asserted debt, for example by seeking professional advice.[107]

Thirdly, the Commonwealth *removed* the existing 6-year limitation period for asserting debts against social security recipients.[108] This appears to have constituted unequal treatment of recipients pursuant to Robodebt, compared to other, alleged Commonwealth debtors.

Finally, the Administrative Appeal Tribunal heard, eventually, a significant number of challenges to the asserted debts. Precisely how many is not clear, in part because first instance decisions were not published but also because of lack of Commonwealth transparency on this point. It is reasonable to assume that many recipients of false assertion of debts paid, or did not challenge the garnishing of tax returns, rather than face the debt recovery processes. What is beyond doubt is that, where debts were challenged in the AAT, the Commonwealth practice was to actively defend proceedings. Further, it never appealed any of the first instance determinations that resulted in debts being reduced or annulled. As only appeal decisions are reported, this practice had the consequence that none of these determinations were made public. This practice created an information silo around Robodebt challenges and had an obvious and inherent chilling effect on potential claims.[109]

Three claims were eventually brought in the Federal Court. At the first directions hearing in the *Masterton* case, the Commonwealth accepted the individual's original declared income.[110] This late admission meant that there was no debt and therefore, according to the Commonwealth, no justiciable issue. As a result, there was no final ruling and no published decision.

In the second, *Amato* case, the Commonwealth eventually withdrew the debt but refused to pay interest on the unlawfully exacted sum.[111] This meant that

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[107] *RRC* (n 28) 333–5.
[108] Whiteford (n 72), 345; *RRC* (n 28) 508.
[109] The Commonwealth's decision not to renew Professor Carney's appointment to the AAT, following his five determinations of the unlawfulness of Robodebt, may reflect the same mindset: see Whiteford's illuminating Robodebt timeline on this, above n 72 at 346.
[110] Cameron Houston and Chris Vedelago, 'Centrelink Wipes "Robo-Debt" at Centre of Test Case', *The Sydney Morning Herald* (online, 5 May 2019) <https://www.smh.com.au/national/centrelink-wipes-robo-debt-at-centre-of-test-case-20190505-p51kac.html>; *RRC* (n 28) xxviii, 288–296.
[111] *RRC* (n 28) 298.

it enjoyed the benefit of using unlawfully exacted sums.[112] The Commonwealth eventually conceded that income averaging was unlawful shortly before the *Amato* case came to trial in November 2019.[113] Given that income averaging could patently never support accurate debt recovery on its own, this concession came very late in the day.

Consistently, the third (class) action brought in the Federal Court was actively defended through various interlocutory proceedings[114] until, eventually, the Commonwealth settled the claim on a 'no liability' basis in November 2020. This was a full year after the Federal Court in the *Amato* case had made clear that debts raised through income averaging were unlawful. Settlement avoided the airing of, and ultimate judgment on, a range of critical matters, including whether the Commonwealth should be the subject of exemplary damages awards. This would in part depend on findings of deliberate or reckless conduct, in contumelious disregard of the recipients' rights.[115] This outstanding question is addressed briefly in the final Part.

B The Commonwealth's Specific Purpose Manifested by Broader Robodebt Features

A range of these broader features are truly Kafka-esque: for example, the reversal of onus, the inevitability that wage records would be systemically unavailable, combined with the removal of limitation of action protections, presented many recipients with an impossible task of defending their rights. However, these need not be seen as reflecting a pointless and irrational bureaucracy.[116] From the perspective of Systems Intentionality, these processes embedded within the Robodebt scheme operated in a coordinated way to promote effectively the Commonwealth's purpose. And, given that it is patent from the system that its primary purpose was not to recover genuine overpayments, the obvious, alternative purpose was to generate fresh revenue. [117]

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[112] It would be valuable to know how frequently this occurred. It is possible this was a more generalised and lucrative practice.

[113] *RRC* (n 28) 316.

[114] See *Prygodicz v Commonwealth of Australia* [2020] FCA 1454; *Commonwealth of Australia v Prygodicz* [2020] FCA 1516, in which leave to introduce claims for exemplary damages was given. Even at the 11th hour, the Government claimed that it would have a 'juristic reason' to retain any payments where the alleged and unlawful debt fortuitously coincided with a real and lawful debt, owed by the recipient: [2020] FCA 1454 [11] (Murphy J); [2021] FCA 634 [60]–[72], [149]–[154] (Murphy J).

[115] *Lamb v Cotogno* (1987) 164 CLR 1, 8.

[116] On Kafka and organisational intention, see Bant, 'Corporate Evil' (n 63).

[117] Whiteford argues persuasively that the revenue supported, in a horrible irony, the upgrade of Centrelink's outmoded ICT systems: (n 72) 350.

Seen in this light, as integrated elements of the scheme, the features of reverse onus and structural hurdles to challenging the false debts operated to ensure effective and optimal revenue-raising from recipients. This was reinforced and made more explicit through collection processes, including penalty, garnishment and litigation strategies. Indeed, seen as a rational system of conduct that operated to achieve Commonwealth ends, it is possible to understand something further. This is that the system *would not be successful in achieving the aim of revenue-raising unless a substantial proportion of those subject to false debt claims were unwilling, or unable, to dispute them successfully*. The broader features of the scheme were, in that light, not only well-suited to promoting that purpose, but necessary features of it.[118]

Finally, it is worthwhile reiterating that, from the perspective of Systems Intentionality, none of the scheme features arose by chance or accident: they represent knowing organisational choices in system design. This is most blatant where those features reversed or removed previous ethical and just systems, policies and practices. However, Systems Intentionality suggests that the overall design of the system, in any event, shows a coordinated and consistent set of processes designed to achieve the end of raising new revenue.

C The Government's Normative Culpability Manifested by Broader Robodebt Features

It is fruitful to consider further what normative standards might be engaged by this knowing and intended conduct. Here, had the scheme been carried out by a corporation in trade or commerce with a view to private profit, as opposed to public 'revenue', Systems Intentionality supports a damning assessment of organisational culpability.[119]

As explained elsewhere,[120] a good working definition of recklessness may be understood to combine: (a) a general intention to engage in some conduct; (b) knowledge or 'foresight' of the outcome that the conduct is apt to produce (often described as a 'risk' of harm); and (c) the application of an objective, normative standard that a decision to proceed with the conduct in light of that

[118] For analysis of the striking similarities to the scheme in *Productivity Partners* (n 25), see 'Correcting the Public Conscience' (n 6).
[119] See especially Bant and Paterson, 'Systems of Misconduct' (n 25); Bant, 'Modelling Corporate States of Mind' (n 25).
[120] Bant, 'Modelling Corporate States of Mind' (n 25).

known risk is unreasonable. Where there is a system of conduct, (a) is (by definition) established, for the reasons given earlier. Further, corporate knowledge of key aspects of the system is implicit from the system's successful deployment, again as discussed. Consistently, it is possible, and appropriate, to assess organisational 'foresight' from the objectively obvious (patent) risks of outcomes arising from the known and intended system of conduct, or from repeated instances of harmful outcomes arising from application of the known and intended system, where there are no audit or remedial steps taken to respond to the materialised harm. An unreasonable decision to proceed in light of those known risks, or repeated harm, manifests recklessness.[121]

On these criteria, the Robodebt scheme manifested serious recklessness with respect to the rights of vulnerable Australians. The scheme was intended, its key elements well understood because patent on its face and necessary for its successful deployment, and the risks of the scheme were equally obvious. Indeed, the scheme was guaranteed to cause harm of the kinds that in fact occurred. The Commonwealth's choices to omit, or remove, audit and workable remedial steps reinforce this view.

Does the analysis support findings of organisational dishonesty? As a matter of civil and, indeed, criminal doctrine, it is widely accepted that an inquiry into dishonesty generally requires: (a) objective assessment of the quality of a person's conduct; (b) in light of the defendant's actual intention and knowledge.[122] The conduct in question must be dishonest according to the current standards of ordinary decent people. It is not relevant to ask, or consider, whether the persons themselves subjectively appreciated that the conduct was dishonest by ordinary standards.[123] On this approach, the knowingly false narratives around the ethical (integrity) purpose of the scheme may well be considered to contravene the standards of honesty expected of our public institutions.

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[121] Cf the 'callous indifference' shown by business models in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [751] (Gleeson J); *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982, [80]–[84] (Bromwich J), examined in Bant and Paterson, 'Systems of Misconduct' (n 25) 88–90.

[122] *Peters v The Queen* (1998) 192 CLR 493, 503 [15] (Toohey and Gaudron JJ).

[123] The so-called second limb of *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689 has now largely been rejected across the board: *Peters v The Queen* (1998) 192 CLR 493, 522 (McHugh J); *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 636 [124] (Leeming JA, Barrett and Gleeson JJA concurring); *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2017] UKSC 67, [2018] AC 391[74]–[75]; *R v Barton* [2020] EWCA Crim 575, [1] (Lord Burnett CJ); *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129 [52]–[58] (Henderson, Peter Jackson, Asplin LJJ).

Further, it is arguable that, if transported to a commercial context, the scheme would be adjudged unconscionable both by reference to the equitable concept, and by reference to the Australian community standards embodied in the statutory prohibition.[124] Here, the Commonwealth knew (because patent on the face of the scheme) that the target class of welfare recipients contained members who would be subjected to false asserted debts, and that this would exacerbate their existing positions of special disadvantage. Further, the Commonwealth put in place processes calculated (in the sense of objectively apt) to make it as difficult as possible for recipients' rights to be protected. Knowing exploitation of position of special disadvantage is the archetype of unconscionable conduct in equity. Were the Commonwealth a corporation and the recipients consumers, it would likely have also contravened the statutory unconscionable 'system of conduct' provisions.[125]

Finally, a predatory mindset may be understood as involving an intentional decision to engage in conduct *in order to* exploit the known disadvantage of a vulnerable person, or class of persons. That is, the specific aim or purpose of the person's conduct is exploitation of the kind that actually occurred, with the harms it brings. This is arguably one of the most culpable states of mind identified in the law. Examples of this form of mental state, again using the lens of Systems Intentionality, are where, for example, a business model is only able to generate a profit if a vulnerable class of consumers exist, members of which will be taken advantage of through the effective operation of the business model.[126] Another example would be where a business model is objectively designed to create new, or exacerbate existing, special disadvantage that will enable, or increase, business profits.[127]

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[124] The subject of 'Correcting the Public Conscience' (n 6). See further *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447, [23]; *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 274 [298] (Allsop CJ); *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133, 154 [89] (Allsop CJ, Besanko and McKerracher JJ). See further Bant and Paterson, 'Systems of Misconduct' (n 25) and Paterson et al (n 58).

[125] See 'Correcting the Public Conscience' (n 6). See further Bant and Paterson, 'Systems of Misconduct' (n 25).

[126] Above n 58.

[127] Paterson and Bant, 'Automated Mistakes' (n 25) 270.

Through this lens, and based on the described factual framework for analysis, the Robodebt scheme arguably manifested a predatory purpose on the part of the Commonwealth. As explained earlier, the primary purpose manifested by the scheme was to raise fresh revenue. This end was achieved through manufacturing and enforcing false debts, against recipients who were known to be in a position of special vulnerability and unable (both because of innate powerlessness but also because of the design features of the scheme) to protect their rights. To put it another way, the scheme would only be successful in achieving the aim of significant revenue-raising if a substantial proportion of those Australians subject to false debt claims were unwilling, or unable, to dispute them successfully. This required the Commonwealth to introduce new processes that enabled that purpose to be achieved, and to remove protective processes that impeded that purpose. This is precisely what occurred.

VI Conclusion: Looking Forward

This article has conducted a thought experiment, namely to consider the key state of mind questions in issue in the Robodebt Royal Commission through the lens of the holistic model of corporate responsibility entitled Systems Intentionality. This is not in order to exclude or trivialise traditional accountability mechanisms.[128] Rather, it prompts us to engage with the distinctive, public juristic person on whose behalf individual ministers and (in turn) their departmental officers act, and thus the potential for recognition of its distinctively organisational blameworthiness. On this approach, it will be important to consider not only the contributions of individual ministers and senior public servants to Robodebt, but the broader elements of the scheme (the applied systems, policies and practices) as a whole. The automated debt-generation aspect is only one, albeit a vitally important, component in this inquiry. Also directly relevant are the surrounding (including omitted and removed) audit, enforcement and remedial processes, which worked together, in a coordinated way, to achieve the true purpose behind the scheme. Approached in this way, it is possible to come to a deep understanding not only of the nature of organisational knowledge and intention manifested, but the culpability expressed through, the Robodebt scheme.

[128] Above n 20. Indeed, holding officers to account for breaches of their positional obligations is likewise critical for ethical and lawful corporate conduct: see further Bant, Corporate Evil (n 63).

While full discussion cannot here be attempted, the analysis provides insight into what is required in order to rehabilitate a public entity in such circumstances.[129] It is not enough to change governments, or the Ministers, ministerial staff, or senior persons from relevant departments, although these steps will certainly assist.[130] Close attention must also be paid to other necessary conditions for ethical governance: these lie in the systems of conduct, policies and practices that are deployed for public, or purportedly public, ends.[131] This is reflected in Commissioner Holmes' first Recommendation: 'to design policies and processes with emphasis on the people they are meant to serve'.[132] It is only if these are reformed, tested before deployment and subject to appropriate audit and remedial processes that such an episode will never be repeated. Audit processes here likely include transparent publication of administrative law and merits decisions that enable governments, and those subject to them, to understand the impact and legality of Commonwealth policies and programs.[133] This includes maintaining the independence of these institutions and appointing (and maintaining) members on merit. The new National Anti-Corruption Commission[134] may provide another mechanism.

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[129] In the corporate context, see Bant and Faugno (n 41) 371.

[130] The liability implications of individuals associated with the scandal to date have been limited: see n 89 and, eg, 'Statement by the Australian Public Service Commissioner on the Robodebt Centralised Code of Conduct Inquiry', *Australian Public Service Commission* (Media Statement, 13 September 2024) <https://www.apsc.gov.au/working-aps/integrity/robodebt-code-conduct-process/statement-commissioner-centralised-code-conduct-inquiry-final-report> and 'Robodebt scheme was a 'failure of government' – but who paid the price?', *ABC Radio National* (Audio recording, 17 September 2024) <https://www.abc.net.au/listen/programs/latenightlive/rick-morton-robodebt/104363362>.
Again, *Productivity Partners* is instructive on the potential for a holistic approach to corporate responsibility to support strong, accessorial liability for individuals implicated in the organisation's wrongdoing: above n 25.

[131] The same conclusion underpinned the Casino Royal Commissions, all of which went far beyond 'management renewal' to require deep and sustained systems change: *VCCOL* (n 59) ch 6, 178 [101]; *PCRC* (n 59). See also Bant and Faugno (n 41) 371, examining *Serious Fraud Office v Rolls-Royce plc & anor* (Royal Courts of Justice, 17 January 2017).

[132] *RRC* (n 28) xiii.

[133] Carney, 'The New Digital Future' (n 72) 14. The replacement of the Administrative Appeals Tribunal by the Administrative Review Tribunal on 14 October 2024 responded to the Robodebt failures: see, eg, speech of Justice Kyrou, 'Mechanisms in the ART Bill to Thwart Robodebt-type Maladministration' (Speech, Australian Academy of Law, 18 March 2024) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kyrou/>.

[134] Established under the *National Anti-Corruption Commission Act* 2022 (Cth). See, however, n 89.

Of course, the implications of this analysis do not begin and end with Robodebt. Most obviously, this sort of public misconduct is not a peculiarity of the Australian body politic. The English Horizon Post Office scandal bears a strong resemblance to Robodebt.[135] Indeed, in that case, it seems that corporate and 'Crown' entities are at the point of convergence: here, the value of the analysis must be close to indisputable. Through this lens, and in light of the length of time (some 20 years) over which the system was deployed, in the face of rising concerns, complaints and evidence of human suffering, the Horizon scheme suggests an even more remarkable organisational bloody-mindedness. There, Sub-Post Masters were subject to allegations of theft, false accounting and fraud, on the basis of a deeply flawed automated accounting system called Horizon. A range of broader features of this scheme, including the vehement Post Office (Crown corporation) narratives of denial, and brutal use of enforcement processes, are similar.[136] Examining this case through the lens of Systems Intentionality might similarly draw into sharp focus the true nature of Crown culpability in play.

Beyond causing uncomfortable questions for public bodies, including for broader issues of law reform, there is more immediate and doctrinal potential for this analysis. On the side of private law, it may help support and (in some cases) reinvigorate existing doctrines, better to hold Commonwealth and other public entities to account. In Robodebt itself, the hugely successful group litigation proceedings settled, in effect, on the basis of claims in unjust enrichment and restitution.[137] Being strict liability claims, these largely avoided the state of mind problems that might affect alternative claims, although state of mind enquiries potentially re-emerge for defences such as good faith change of position.[138]

However, state of mind issues were front and centre for claims for exemplary and aggravated damages, seemingly made both in response to the claims in

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[135] *Post Office Horizon IT Inquiry* (Web Page) <https://www.postofficehorizoninquiry.org.uk/>.

[136] Nick Wallis, 'Marshall Spells It Out: Speech to University of Law', *Post Office Trial: Reporting the Post Office Horizon Scandal* (Blog Post, 4 June 2021) <https://www.postofficetrial.com/2021/06/marshall-spells-it-out-speech-to.html>.

[137] The claims included mistake, total failure of consideration, compulsion or duress *colore officii*, and *Woolwich*-style claim for restitution of unlawfully exacted monies: see *Prygodicz (No 2)* (n 26) [142] (Murphy J).

[138] The theoretical availability of this to public entities was the subject of submission before the High Court of Australia, but ultimately not the subject of decision: see Transcript of Proceedings, *Cessnock City Council ABN 60 919 148 928 v 123 259 932 Pty Ltd ACN 123 259 932* [2024] HCATrans 8 and *Redland City Council v Kozik* [2024] HCA 7.

unjust enrichment and the parallel claim of negligence.[139] In Australia at least, exemplary damages potentially serve as a powerful expressive tool of the law against abuse of public power. They are not limited to nominate torts, having been awarded, for example, in respect of negligence.[140] Rather, the remedy arguably responds to the factual nature of the defendant's conduct, including the state of mind with which the impugned conduct occurred. While it would require some considerable judicial resolution, exemplary damages could, therefore, conceivably be awarded for egregious and wrongful exaction of taxes or revenue pursuant to the *Woolwich* principle[141] or some broader policy reason for restitution. As a matter of precedent, they certainly could be awarded for a highly culpable breach of a duty of care. In either case, direct systems liability models such as Systems Intentionality could be the means for ascertaining the requisite culpable mindset on the part of the public legal person.

Beyond remedies, holistic models of public responsibility may also enliven other, more targeted forms of claim. The tort of misfeasance in public office, for example, has a long but largely unsuccessful history of operating to correct abuses of public power.[142] Courts generally assume that the tort requires identification of an individual official responsible for the misconduct, and who holds the requisite, highly culpable mindset.[143] This combination has been fatal for most claims.[144] By contrast, the present analysis points to how the tort could be enlivened to hold the Commonwealth directly liable,[145] and how the requisite

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[139] *Prygodicz v Commonwealth of Australia* [2020] FCA 1454 [47]–[64] (Murphy J) and *Commonwealth of Australia v Prygodicz* [2020] FCA 1516 [18], although cf [34] (Lee J), allowing amendments seeking exemplary and aggravated damages.

[140] *Gray v Motor Accident Commission* (1998) 196 CLR 1. For analysis of the role(s) of punitive and exemplary damages in private law, see Elise Bant et al (eds), *Punishment and Private Law* (Hart Publishing, 2021).

[141] Named after *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, [1992] 3 All ER 737.

[142] See generally the seminal articles by Mark Aronson: 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1 ('A Very Peculiar Tort'); 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427. This possibility is further explored in 'Correcting the Public Conscience' (n 6).

[143] Eg *Emanuele v Hedley* [1998] FCA 709; (1998) 179 FCR 290, 300 [36] (Wilcox, Miles and RD Nicholson JJ).

[144] Kit Barker and Katelyn Lamont, 'Misfeasance in Public Office: Raw Statistics from the Australian Front Line' (2021) 43(3) *Sydney Law Review* 315.

[145] Suggested by Aronson, 'A Very Peculiar Tort' (n 142) 49. This would also require a parallel shift in focus from the holding of public office, to the holding and exercise of public power on the part of the public juristic entity.

mental states could be established, as a form of organisational blameworthiness.[146]

Finally, in the public law sphere, and particularly in this age of government outsourcing, bureaucratic power, complexity and opacity, a model of direct liability such as Systems Intentionality provides a means to interrogate meaningfully the values, purposes and knowledge manifested by public programs and practices, including those that utilise corporate service vehicles, or automation, for their delivery. As demonstrated in the Robodebt context, this may facilitate important vindicatory and expressive aims of the law, by calling out the true nature of systemic maltreatment of members of the public. In these important, practical respects, it may serve the democratic process well. However, to the extent that public law doctrines and remedies themselves necessitate engagement with ideas, for example, of good faith, purpose and knowledge, Systems Intentionality offers a new analytical toolkit, that goes beyond individual ministers and their senior assistants, to hold public juristic entities responsible, on their own, organisational account.

Investigating, let alone realising, this potential involves engaging with a wide range of issues of very considerable complexity. As acknowledged at the outset, significant theoretical, political, and legal difference exist between the domains. Yet it seems plausible from even this modest thought experiment, that the broader undertaking is desirable. It may even be demanded, if we think it worthwhile to develop coherent approaches, across the public and private law divides, to addressing the organised abuse of public power.

[146] While targeted 'malice', in the sense of deliberately seeking to harm a particular plaintiff through known, unlawful conduct, might be difficult on the facts of Robodebt, a predatory intention to engage in unlawful conduct against a known *group* is open, and certainly 'reckless indifference': see further Aronson, 'A Very Peculiar Tort' (n 142) 18–25.