*NRCoP Webinar 25 October 2022*

***Guilty Corporate Minds: old and new approaches to regulating corporate (mis)conduct***

*Additional Q&A*

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| **Q1: Parliament and law are traditional sources/influences here. But would either presenter care to muse on 'the executive' input here? Do you see changes in expectation and understanding of what a company should do, arising from the executive's actions (in WA consider, for example, Ministerial public statements following Rio Tinto and Juukan Gorge or Hancock and sponsorship decisions).** |
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| EB: Yes, great point, I do think all these broader inputs are very important in shaping commercial norms. Parliament and courts are only one source, as a matter of practice, although of course the impact of other sources of influence before courts (as opposed to shaping corporate daily practices) may be far less direct and obvious. Beyond (for example) statements of Senate inquiries and ministerial statements, Royal Commissions, for example, are a significant way of broadcasting expectations of corporate responsibility. So are public submissions to inquiries, particular where they are conveying a strong and fairly consistent message.  So are Codes, regulator guidance and other soft law sources. Indeed, regulator guidance may be, as a matter of practice, of principle importance! Hence the significance (from my perspective) of regulators having a clear sense of how corporate manifest their intentions through their systems. If regulators make clear that this is a basis on which they will proceed (in addition to more traditional common law and statutory approaches) then corporations will swiftly realise the importance of embedding ethical practices. |

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| **Q2: Would love to hear more about the ASIC vs National Exchange case and how National Exchanges knowledge of vulnerable consumers enabled their business model, what flow on effects has this had on the way other corporate bodies treat vulnerable or disadvantaged consumers?** |
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| EB: In *National Exchange*, the business model could only work (be profitable) if the target group for the low-ball offer contained inexperienced and commercially irrational members who would be tricked (misled) into thinking that the offer was at a fair price. And that is precisely what occurred. So knowledge of the presence of vulnerable persons, and even (in this case) the nature of the special disadvantage was implicit in the system. In that case, there was in fact an individual ‘directing mind and will’ who was the mastermind of it all. But of course, with larger companies (eg Crown…) that won’t always, or often, be the case. National Exchange is discussed in Bant and Paterson, ‘Systems of Misconduct: corporate culpability and statutory unconscionability’ (2021) 15 *Journal of Equity* 63, alongside a range of other cases that might be relevant to your work. The recent High Court of Australia decision in *Stubbings v Jams* 2 *Pty Ltd* [2022] HCA 6 is another example of a business model that was inherently predatory, and where knowledge of special disadvantage was implicit in the model. Gordon J’s judgment is the interesting one there – see in particular her statement at [81] and citation of… *National Exchange*! |

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| **Q3: Health professionals working in corporations are required to act only in accord with that code, but clearly the requirements of this code might conflict with the interests of shareholders. How would systems intentionality apply?** |
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| EB: Systems Intentionality is concerned with the reasoning of corporations, rather than the individual people who are embedded in (and carrying out) the system of conduct. Individual employees might have a range of reasons for acting: promotion, prestige, work ethic, loyalty to the corporation, impressing their co-worker, laziness, following instructions (including the requirements of a law, or an industry Code)… and sometimes, some workers won’t do their job and yet, overall, the system of conduct will work. And when a system of conduct is deployed, whatever the individuals think, it manifests the corporation’s intentions. This is why it should be no excuse for corporations to point to individual or group employees and say ‘see, our employees are hardworking and honest, so therefore so is the corporation’. Employees may have little idea of, or control over, the systems in which they are embedded. They are the corporation’s systems, which manifest intended conduct, for which the corporation is responsible. As to how a corporation develops its systems, and the values manifest in those systems (profit at all cost v law-abiding v benevolent v other…), no doubt there will be a lot of influences – see answer to Qu 1, and Q6 below! |

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| **Q4: Would be interested if any views on how far should regulators go in mandating what compliance systems look like? Could this relieve the corporation of taking responsibility for designing and operating an effective system?** |
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| EB: I do think it is possible for there to be a degree of direction on the part of regulators. But I also think that corporations are supposedly the experts in their business and it is for corporations to take responsibility for acting lawfully! So the onus lies on the corporation to embed systems of conduct that reflect their good corporate character – the Vic Casino Royal Commission final report is excellent on both aspects (what sorts of things can be mandated, and how systems bear on corporate responsibility).  |

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| **Q5: Can we learn anything from comparable jurisdictions about how to make our approach to regulating criminal corporate conduct more effective?** |
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| EB: To be honest, I think Australia has been leading the way for some time through its corporate culture provisions, which haven’t been a success in liability terms, but have been extremely effective as a governance/licensing concept (see, again, the leading role it plays in the Casino Royal Commissions). England’s ‘failure to prevent’ offences have been a useful addition to the regulator’s armoury, both there and elsewhere (including Australia). Note that systems of conduct again play a leading role in those offences. If a corporation has taken ‘reasonable precautions’ or demonstrates ‘due diligence’ in how it runs its business then, notwithstanding that one of its associates committed the predicate offence, the corporation has a defence. I would see this as establishing that the ‘good’ systems manifest that the corporation didn’t know of, intend or authorise/permit the misconduct, thereby establishing innocence of any wrongdoing on its own part. In my view, these sorts of recurrent patterns of reasoning (namely, that a corporation’s systems of conduct are highly relevant to questions of culpability and, conversely, good character) go to show that all corporations should be reflecting on, reviewing and remedying their systems of conduct on a regular basis.  |

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| **Q6: What is the role of shareholders in setting or monitoring systems?** |
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| EB: Shareholders can of course exert pressure on Boards to adopt more vigilant stances towards the role of systems in manifesting the corporate values, intentions and so on, through voting on bonuses etc. But there are other routes, too, for shareholders to hold their corporations to account. ‘Greenwashing’, for example, is a classic example of where corporations’ formal statements about their values are belied by the reality of their daily practices. On Systems Intentionality, this is a form of misleading conduct in trade and commerce and actionable as such! Wouldn’t take many class actions by disgruntled shareholders to send a message that corporate walk must match its talk! |

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| **Q7: Is this intentionality at play in tax avoidance cases and what should we then make of robodebt...?** |
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| EB: Ah yes, this has all potentially all sorts of implications, for understanding systems of tax avoidance, corporate groups (many of the unconscionability cases discussed in the ‘Systems of Misconduct’ article in (2021) 15 *Journal of Equity* 63 concern systems of conduct carried out by a mix of natural and corporate persons) and governments! As for the shameful case of Robodebt, please do see my submissions, posted to the website. |