Systems of misconduct: Corporate culpability and statutory unconscionability

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This article considers the role of intentionality in establishing unconscionable conduct contrary to statute. Sections 21 and 22 of the Australian Consumer Law do not expressly require proof of predatory intention, deliberate advantage-taking or knowledge of disadvantage. Nonetheless, courts tend to treat such markers of culpability as inherent in the idea of behaving 'unconscionably'. These concepts have proved difficult to apply when the misconduct involves the business system of a corporation, as opposed to a 'rogue' trader or individual 'snake oil merchant'. We argue that courts applying the statutory prohibition have begun to develop a powerful concept of 'systems unconscionability', which recognises intentionality, and thus culpability, expressed through purposive systems. This profound insight has significance not only for statutory unconscionability, and its equitable relation, but for the effective regulation of broader corporate and commercial misconduct.

I Introduction

The relationship between, on the one hand, statutory unconscionability of the type found in section 21 of the Australian Consumer Law (ACL),[1] and on the other, its equitable relation of unconscionable dealing, continues to occupy courts' attention in the aftermath of the High Court of Australia decision in *Australian Securities and Investments Commission v Kobelt*.[2] While there is consensus that the statutory doctrine is distinct from, and broader than, the

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1 Competition and Consumer Act 2010 (Cth) sch 2 (ACL) s 21.

2 [2019] HCA 18, (2019) 267 CLR 1. *Kobelt* considered at length the 'substantially similar' provision in s 12CB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and is currently regarded as the leading authority on the operation of both provisions: see, eg, *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409 [333] (Griffiths J).

equitable doctrine,[3] key uncertainties over the statutory doctrine's features and operations remain. The issue on which this article focuses is the role of defendant intentionality or culpability, particularly when dealing with corporate defendants and complex business systems. As we will see, courts have continued to search for indicia of mental blameworthiness in this context: thus, common states of mind considered by courts in assessing the statutory standard include whether the impugned conduct was deliberate,[4] dishonest,[5] predatory,[6] or undertaken with sufficient knowledge of relevant disadvantage or vulnerability.[7] This focus is consistent with, and perhaps reflects an ongoing loyalty to, Equity's traditional concern with conscience (literally, 'with knowledge'). However, the enduring emphasis on finding a culpable state of mind poses a significant challenge for the statutory (and, indeed, broader general law) regulation of commercial misconduct in the modern age. More specifically, such requirements can make proving unconscionability against large corporate defendants almost impossible. This is for the simple reason that corporations lack natural minds and the current assortment of statutory and general law rules by which the mental states of natural corporate agents and employees are 'attributed' to the corporation are woefully inadequate when faced with complex and devolved corporate structures.[8]

Against that backdrop, our contention is that the developing jurisprudence concerning statutory unconscionability not only serves to clarify the provision but also provides a critical step forward in the broader search for an appropriate and tailored approach to assessing culpable corporate states of mind. In *Australian Securities and Investments Commission v National Exchange Pty Ltd*,[9] the Full Federal Court held that statutory unconscionable conduct is capable of applying to a system of conduct or pattern of behaviour.[10] This holding was subsequently embodied in statute in 2010, with an express statement in section 21(4)(b) of the ACL that the statutory prohibition on unconscionable conduct 'is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as the victim of that conduct or behaviour'.[11] These developments

3 See Part II below.

4 See, eg, *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56, (2013) 44 VR 202.

5 *Kobelt* (n 2) [59]–[60] (Kiefel CJ and Bell J).

6 ibid [116], [118], [120] (Keane J).

7 See, eg, *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, (2011) 15 BPR 29, 699; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75, (2017) 251 FCR 404.

8 See, eg, Australian Law Reform Commission, *Corporate Criminal Responsibility* (Summary Report, ALRC Report 136, 2020) 9, 14–15; Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report, Report 136, 2020) paras 6.7–6.8.

9 [2005] FCAFC 226, (2005) 148 FCR 132.

10 ibid [33] (Tamberlin, Finn and Conti JJ).

11 Explanatory Memorandum to the Competition and Consumer Legislation Amendment Bill 2010 (Cth) para 2.21. See also David Bradbury, 'Competition and Consumer Legislation Amendment Bill 2011: Second Reading Speech' (Parliament House, Canberra 15 June 2011) 5. This reflects the views of the Expert Panel who stated: 'a system of conduct or pattern of behaviour may be unconscionable, and that statutory unconscionable conduct is not limited to an examination of particular transactions': Department of

contain a profound insight that has significance not only for statutory unconscionability and its equitable relation, but for the effective regulation of broader corporate and commercial misconduct. Drawing on criminal law reform and the work of organisational theorists, Bant has argued elsewhere that it is possible to understand corporate intentionality as being manifested through a corporation's systems, policies and processes.[12] Through this lens, the idea of 'systems unconscionability' recognises intentionality *expressed through purposive systems*, rather than individual human states of mind. This systems analysis both enables statutory unconscionability to be understood in light of the objective 'construct of values and standards against which the conduct of "suitors" — not only defendants — is to be judged'[13] but also to assess that conduct in light of the defendant's intentionality.[14] This analysis gives the force and penetration to section 21(4)(b) that was evidently intended. In an age where human actors are increasingly being replaced by automated processes, this systems analysis enables us to understand and apply a principled approach to unconscionable conduct, tailored to the modern commercial world.

The article commences by tracing the persistent influence of equitable ideas of culpable mental states in the context of statutory unconscionability, and the challenges posed by those ideas when addressing the behaviour of corporate defendants. We then briefly outline our proposed model of corporate 'systems intentionality', which seeks to address the challenges of finding the elusive corporate state of mind. This provides the analytical context for the final section of the article, which reveals the ways in which this model of corporate intentionality is supported by recent Australian authorities concerning statutory unconscionability in claims of predatory or exploitative business models and practices. This rich and growing body of largely consistent jurisprudence has the potential not only to provide significant guidance on how to understand the nature and limitations of the statutory prohibition, but also to provide insights for the future efficient and principled regulation of corporate misconduct.

Innovation, Industry, Science and Research (Cth), *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct* (2010) 33. Confirming the correspondence between the statutory reform and *National Exchange* (n 9), see, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [72]–[73] (Reeves J); *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 [710], [726] (Gleeson J).

12 Elise Bant, 'Culpable Corporate Minds' (2021) 48 UWAL Rev 352.

13 *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, (2013) 250 CLR 392 [16] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

14 A similar twofold analysis is necessary for dishonesty, which adjudges conduct by reference to the standards of 'ordinary, honest people' but necessarily in light of what the defendant understood, discussed in Part II.

II Statutory unconscionability and a culpable state of mind

A Equitable foundations

The statutory prohibition on unconscionable conduct was conceived and introduced as a normative prohibition that was not identical to, but drew on, the equitable doctrine of unconscionable dealing.[15] Yet the latter has continued to exert ongoing and perhaps undue influence on the former. As Edelman J said in *Kobelt*:

> The meaning of the proscription against unconscionable conduct in s 12CB of the ASIC Act [the equivalent of ACL s 21] cannot be understood other than against its background in equitable doctrine and the repeated responses by parliaments to that equitable doctrine.[16]

This is certainly true of the traditional equitable requirement that the defendant have a relevantly culpable state of mind, the particular focus of this section.

In its modern, Australian, form, the equitable doctrine of unconscionable dealing has two main elements. First, the plaintiff must be subject to some 'special' disadvantage: as Edelman J put it, 'a disadvantage that must seriously affect their ability to make a judgment about their own interests'.[17] Secondly, the defendant must exploit or take advantage of that special disadvantage.[18] A requirement of *knowledge* is central to this second element of the doctrine of unconscionable dealing. It is the defendant's knowledge of the special disadvantage of the plaintiff and, in the face of this knowledge, the defendant's failure to take any steps to protect the interests of the plaintiff, which taints the conscience of the defendant so as to justify the court setting aside the transaction.[19]

The degree of knowledge on the part of the defendant of the special disadvantage suffered by the plaintiff, which is required to satisfy the element

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15 Trade Practices Act 1974 (Cth) s 52A inserted by the Trade Practices Revision Act 1986 (Cth), was based on Uniform Commercial Code 1952 (US) s 2-302: Explanatory Memorandum to the Trade Practices Revision Bill 1986 (Cth) para 79.

16 *Kobelt* (n 2) [279].

17 ibid [282].

18 ibid. See also *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133, (2005) 146 FCR 292 [19] (Finn J).

19 Rick Bigwood, *Exploitative Contracts* (OUP 2004) 249; Tony Duggan, 'Unconscientious Dealing' in Patrick Parkinson (ed), *The Principles of Equity* (2nd edn, Law Book Co 2003) 146–48. cf the leading Canadian authority of *Uber Technologies Inc v Heller* 2020 SCC 16 [85], the majority reasoning of which has been criticised (including by the minority judges: see at [164]–[167] (Brown J), [287]–[288] (Côté J) for abandoning a knowledge requirement: see also Chris Hunt, 'Unconscionability in the Supreme Court of Canada: *Uber Technologies Inc v Heller*' (2021) 80 CLJ 25. This aspect of the Court's reasoning, however, does avoid the difficult questions addressed here, an important matter given the parties to the disputed services 'contract of adhesion' were the driver and Uber subsidiaries incorporated in the Netherlands with offices in Amsterdam. It may be, however, that even on those facts, on the proposed 'systems intentionality' approach discussed below, the necessary state of mind would be disclosed by the Uber business model and standard terms.

of exploitation, has been a matter of ongoing debate. The pendulum has swung from an emphasis on subjective knowledge towards a more generous requirement, most clearly articulated in the High Court decision of *Commercial Bank of Australia Ltd v Amadio*,[20] of defendant awareness of 'facts that would raise that possibility in the mind of any reasonable person'.[21] In *Kakavas v Crown Melbourne Ltd*, the High Court pulled the pendulum strongly back towards a requirement of subjective knowledge, here including wilful ignorance.[22] Yet, in *Thorne v Kennedy*,[23] the High Court appeared to reaffirm the approach in *Amadio* by defining unconscionable conduct to include circumstances of special disadvantage of which the defendant knew *or ought to have known*.[24]

In *Kakavas*, the High Court introduced what appeared to be an additional requirement for the equitable doctrine that the defendant be shown to have acted with a 'predatory state of mind', at least in 'an arm's length commercial transaction'.[25] In so far as this element requires an intention on the part of the defendant to harm the victim,[26] it is inconsistent with cases, such as *Amadio*, which apply the doctrine to cases involving a failure to act to protect the weaker party in circumstances where the stronger party is aware that the weaker party requires assistance to protect his or her own interests.[27] To the extent that the requirement of a predatory state of mind alludes to some other requirement, the meaning of the requirement is uncertain. Subsequent decisions of the High Court addressing unconscionable conduct have failed to clearly endorse or further expound this additional element, leaving its status uncertain.[28] Indeed, in *Thorne*, a majority of the Court described the doctrine as requiring 'victimisation', 'unconscientious conduct' or 'exploitation'.[29]

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20 (1983) 151 CLR 447.

21 ibid 467 (Mason J). See also *Radio Rentals* (n 18). cf ibid 474, where Deane J said that the special disability must be 'sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" [to] procure, or accept, the weaker party's assent to the impugned transaction'.

22 *Kakavas* (n 13) [156]–[157] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

23 [2017] HCA 49, (2017) 263 CLR 85.

24 ibid [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

25 *Kakavas* (n 13) [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

26 *Bodapati v Westpac Banking Corp* [2015] QCA 7 [75] (Peter Lyons J, Holmes JA and Gotterson JA agreeing).

27 Rick Bigwood, '*Kakavas v Crown Melbourne Ltd*: Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37 MULR 463, 477, 481. See also Jeannie Marie Paterson, 'Unconscionable Bargains in Equity and under Statute' (2015) 9 J Eq 188, 198, discussing, in particular, *Amadio* (n 20) and *Bridgewater v Leahy* (1998) 194 CLR 457. See also *Hart v O'Connor* [1985] AC 1000 (PC).

28 See, eg, *Thorne* (n 23); *Kobelt* (n 2) [15] (Kiefel CJ and Bell J), [118] (Keane J), [282] (Edelman J). See also *Kobelt* (n 2) [81] (Gageler J) 'exploitation' is sufficient, [258] (Nettle and Gordon JJ) affirming passive exploitation. See also Jeannie Marie Paterson, Elise Bant and Matthew Clare, 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*' (2019) 13 J Eq 81, 96.

29 *Thorne* (n 23) [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

B Statutory unconscionability

There are two forms of prohibition on unconscionable conduct under statute. The first, not the subject of further analysis here, is section 20 of the ACL (and parallel provisions), which prohibit unconscionable conduct 'within the meaning of the unwritten law'. These encapsulate the equitable doctrine but enable additional statutory consequences, such as regulator enforcement and private rights of redress for loss or damage suffered because of the misconduct. Section 20 does not apply where section 21 is applicable and is therefore limited in scope.

By contrast, section 21 of the ACL (and equivalents, such as section 12CB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), the subject of examination in *Kobelt*) is expressly stated not to be limited by reference to the unwritten law.[30] Section 21 provides:

> A person must not, in trade or commerce, in connection with:
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> (a) the supply or possible supply of goods or services to a person; or
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> (b) the acquisition or possible acquisition of goods or services from a person;
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> engage in conduct that is, in all the circumstances, unconscionable.

Unconscionable conduct under section 21 is not defined. Section 21(4) contains a set of interpretative principles that aim to assist in the application of the section. We have seen that these include that the statutory prohibition is not confined by the unwritten law and 'is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour'.[31] Section 22 contains a list of factors to which the court may have regard in deciding if conduct is unconscionable.[32]

From its legislative history,[33] and indeed on its face, it is undeniable that the prohibition does not merely replicate the equitable doctrine of unconscionable dealing in statutory form. Australian courts have moreover repeatedly affirmed that the statutory prohibition on unconscionable conduct is not confined by the doctrine of unconscionable dealing developed in equity.[34] Thus, Allsop CJ, Middleton and Mortimer JJ explained in *Unique International College Pty Ltd v Australian Competition and Consumer Commission*[35] that the introduction of the systems unconscionability provision

30 ACL s 21(4)(a).

31 ibid s 21(4)(b), confirming the position taken in *National Exchange* (n 9).

32 *National Exchange* (n 9) [40] (Tamberlin, Finn and Conti JJ). See also *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365, (2000) 104 FCR 253 [31] (Sundberg J).

33 See also the extended discussion by in *Kobelt* (n 2) [283]–[295] (Edelman J).

34 *Radio Rentals* (n 18) [24]; *National Exchange* (n 9) [30] (Tamberlin, Finn and Conti JJ); *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17, (2009) 253 ALR 324 [113] (Foster J). See also *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196, (2011) 34 VR 536 [86]–[87] (Macaulay AJA); *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASCA 165, (2012) 268 FLR 433 [171] (Buss JA); *A-G (NSW) v World Best Holdings Ltd* [2005] NSWCA 261, (2005) 63 NSWLR 557 [21] (Spigelman CJ); *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, (2013) 303 ALR 168 [38] (Santamaria JA).

35 [2018] FCAFC 155, (2018) 266 FCR 631.

in section 21(4)(b) removed 'the necessity for a revealed disadvantage to any particular individual', although instances of conduct directed at individuals may be relevant in establishing the pattern or system.[36]

Notwithstanding its intended, independent operation, the interpretation and application of section 21 has remained strongly informed by, albeit not confined to, the equitable doctrine.[37] Of particular relevance for present purposes, the defendant's culpable state of mind has continued to play a leading role in determining when the use of stronger bargaining power moves from acceptable commercial conduct to conduct that is unconscionable. It is perhaps inevitable that the equitable doctrine would be influential on this point. The listed factors relevant to determining when conduct is unconscionable, although descriptively useful, do not of themselves provide a theme or benchmark by which offending conduct may be judged. Moreover, the very use of the term 'unconscionable' provides a deliberate reference to the equitable doctrine and the values it embraces. Here, ideas of culpable states of mind both become significant and also pose particular problems in applying the statutory prohibition to the conduct of a corporation. That is, the notion of 'unconscionability' seems to suggest conduct that pricks the conscience. For this to occur, however, a conventional understanding of 'conscience' necessitates that there be some intentionality in the defendant's conduct, or knowledge of the impact of that conduct upon a person unable themselves to protect their own interests.

The interpretative principles and identified relevant factors accompanying the statutory prohibition on unconscionable conduct in section 21 of the ACL do not specifically include a requirement that the defendant was aware of the effect of its conduct on the plaintiff.[38] Nor is there any stated requirement for an intention to predate upon or exploit the plaintiff. It is possible, and we do not wish to pre-empt the possibility, that unconscionable conduct under statute might be found in conduct that is objectively unfair or in conduct that arises from a form of wilful neglect of, or indifference to, the weaker party's circumstances.

Moreover, courts have explained that the statutory prohibition on unconscionable conduct proscribes an objective standard of conduct that breaches community values. These values have been said to include 'dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism'.[39]

This statutory focus on community-based normative standards may seem to render subjective defendant knowledge or intention irrelevant: provided that

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36 ibid [104].

37 *Kobelt* (n 2) [279] (Edelman J); Paterson, Bant and Clare (n 28) 93.

38 See extensive discussion in Jeannie Marie Paterson, 'Knowledge and Neglect in Asset-Based Lending: When Is It Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay' (2009) 20 JBFLP 18.

39 *Unique* (n 35) [155] (Allsop CJ, Middleton and Mortimer JJ). See further *Kobelt* (n 2) [14] (Kiefel CJ and Bell J), quoting *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50, (2015) 236 FCR 199 [296] (Allsop CJ). See also *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd (No 2)* [2020] FCA 802 [89].

the conduct contravenes core community values it is caught by the prohibition. While we recognise the force of this approach, we consider that the traditional equitable enquiry into defendant state of mind is not antithetical to the statutory prohibition against the proscribed standard of unconscionable conduct, and indeed is commonly probative in any inquiry into the existence of such conduct.[40] A finding of culpability carries considerable weight and culpability is typically linked to a state of mind — it is this which touches the conscience or is unconscionable.[41]

Consistently, courts have commonly considered a range of mental states, including intention or deliberateness, recklessness, actual and constructive knowledge and predatory intention, in assessing whether a defendant has engaged in conduct that is properly to be characterised as unconscionable.

In some cases, a sufficiently culpable state of mind will be apparent on the facts. Thus in *Violet Home Loans Pty Ltd v Schmidt*,[42] the lender had ignored obvious irregularities in documentation and the income declarations for an application for a substantial loan on the part of a pensioner, which had been prepared by the lender's agent, and had ensured that the supplementary information was massaged.[43] The Full Federal Court considered that the lender's decision to proceed with the loan notwithstanding the problems was deliberate and attended by recklessness that revealed the moral fault necessary to support a finding of unconscionable conduct. By contrast,[44] in *Tonto Home Loans Australia Pty Ltd v Tavares*, equivalent irregularities were not plain on the face of the loan application documents. President Allsop, with whom Bathurst CJ and Campbell JA agreed, stated that the kind of 'moral tainting' necessary to permit 'the opprobrium of unconscionability to characterise the conduct of [the lender]' could not be found in the absence of 'a finding of some knowledge or complicity' on the part of the lender.[45] It was not sufficient that the lender had generally contributed to the risk of fraud on the part of a loan intermediary.

Many of the decisions on statutory unconscionability involve a stronger party presenting a low value/high cost product or a highly importune transaction to patently inexperienced or otherwise vulnerable parties.[46] In

40 cf the community standard of dishonesty: Bant (n 12); *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 [74] (the Court); *R v Barton* [2020] EWCA Crim 575, [2020] 3 R 1333 [84], [107]–[108]. Contra is *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306, (2020) 147 ACSR 266 [51] (Yates J). See also *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200, raising this issue and, at the time of writing, on appeal to the High Court *Stubbings v Jams 2 Pty Ltd* [2021] HCATrans 23 (*Jams 2* appeal).

41 A minimum 'general' intention is likely necessary: see *He Kaw Teh v R* (1985) 157 CLR 523, 569–70 (Brennan J).

42 *Violet Home Loans* (n 4).

43 ibid [62] (Warren CJ, Cavanough and Ferguson AJJA).

44 See ibid [59].

45 *Tonto Home Loans* (n 7) [293] (Allsop P, Bathurst CJ and Campbell JA agreeing). See also *Perpetual Trustee Co Ltd v Burniston (No 2)* [2012] WASC 383, (2012) 271 FLR 122 [322] (Edelman J), where Edelman J said that carelessness by lender and, to a lesser extent, the creation of structural risk by the lender 'will rarely be unconscionable conduct'.

46 *National Exchange* (n 9); *Scully* (n 34); *Australian Competition and Consumer Commission v Keshow* [2005] FCA 558, (2005) ASAL 55-142; *Lampropoulos v Kolnik* [2010] WASC 193; *Australian Competition and Consumer Commission v Excite Mobile Pty*

these cases there is typically little inquiry into the state of mind of the defendant. Notably, the facts of these cases may have been sufficiently strong to support a finding that the stronger party had actual knowledge of the vulnerable position of the weaker party with whom it was dealing.[47] They would certainly support a finding that the stronger party had constructive knowledge, in the sense of an awareness of facts that would 'raise that possibility in the mind of any reasonable person'.[48] Thus, a transaction that is 'self-evidently' unsuitable for customers may suggest that the defendant knew, or ought to have known, of the vulnerable position of its customers, and chose to take advantage of that vulnerability.[49]

In other cases, however, a breach of the statutory prohibition on unconscionable conduct will only be established by showing the provider of goods or services knew of a vulnerability or disadvantage on the part of the consumer. This will be the case where the transaction is on its face quite proper and the only complaint can be that the consumer, to the knowledge of the provider, did not understand the transaction, or that their consent was tainted in some other way.[50]

Case law further suggests that knowledge, or constructive knowledge, are not the only states of mind that may operate to inform, or satisfy, statutory unconscionability. A controversial case turning on the absence of a culpable state of mind is *Kobelt*. In that case, Kiefel CJ and Bell J appeared to suggest that evidence by defendants that they were not personally dishonest may be relevant to courts' determination of unconscionability.[51] Their reference to dishonesty was paired with 'good faith'. This likely reflects section 22(l) of the ACL, which identifies that a relevant consideration in determining statutory unconscionability is 'the extent to which the supplier and the customer acted in good faith'. The relationship between the criteria has not, however, been unpacked.[52] Also in *Kobelt*, Keane J considered that the defendant must be shown to have acted with predatory intent, consistently with Keane J's general treatment of statutory unconscionability as relevantly indistinguishable from the equitable doctrine.[53]

This analysis suggests that a court's enquiry into the mental state of a defendant for the purposes of establishing statutory unconscionability may be a complex and multifaceted undertaking. As mentioned, it is unnecessary for

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Ltd [2013] FCA 350; *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liq)* [2014] FCA 926; *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 368; *Messer v Lotus Securities Ltd* [2018] FCA 1147.

47 On the process of attributing knowledge, see *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 [35], [40], [41] (Yong Pung How CJ, Chao Hick Tin JA and Kan Ting Chiu J).

48 The standard of 'constructive notice' rejected in *Kakavas* (n 13) [150]–[162] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

49 *Cash Store* (n 46) [94] (Davies J).

50 See, eg, *Colin R Price & Associates* (n 7) [69] (Rares, Murphy and Davies JJ).

51 *Kobelt* (n 2) [31], [59]–[60] (Kiefel CJ and Bell J). cf at [210], [257]–[258] (Nettle and Gordon JJ), [310] (Edelman J). See also *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18, (2018) 352 ALR 689 [212]–[213], [222] (Besanko and Gilmour JJ); Paterson, Bant and Clare (n 28).

52 See, eg, *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421 [62] (Allsop CJ).

53 *Kobelt* (n 2) [116], [118], [120]. cf at [293] (Edelman J), citing Paterson (n 27) 209.

present purposes to identify what precise form of culpable mental state is required to satisfy statutory unconscionable conduct. This is because, wherever set, any such criterion will present a significant hurdle when addressing corporate malpractices. This is due to the toxic combination of the law's attribution rules and the nature of modern, complex corporate defendants, to which we now turn.

III The corporate mind

A The problem of 'diffused responsibility'

In what follows, we put to one side theories of vicarious liability, which hold the corporation responsible for the acts or wrongdoing of its employees.[54] Rather, our focus is on theories of corporate attribution, which hold the corporate body liable for wrongdoing in its own right. That is, the focus is on the conditions for organisational blameworthiness. The discussion also centres on the position of the corporate wrongdoer whose threshold liability rests on some culpable state of mind, not the corporation as plaintiff, nor cases of strict liability, although issues of corporate state of mind are also often relevant in these cases.[55] The discussion is not intended to be exhaustive, but rather to outline the difficulties posed for current attribution models by the modern phenomenon of diffused corporate responsibility.

Initially, courts denied outright that a corporation, as an artificial person, could be capable of having state of mind.[56] Eventually, however, courts came to accept that the intentions and knowledge of human agents of a company could be attributed to the company.[57] As is well-known, these rules of attribution as traditionally formulated are highly restrictive, usually looking for the company's 'directing mind and will' located at board or high managerial level.[58] They are sometimes described as 'derivative', in the sense that the corporation's state of mind is predicated or contingent on the mental state of some identified human actor, which is then relevantly identified as that of the corporation. These rules are also highly anthropomorphic: a corporation's directors and senior executives are conceptualised as its directing mind and will, and its employees and agents its arms and legs.[59]

While this approach works comparatively well for small companies, it makes proving fraud, including doctrines of equitable fraud such as unconscionability, against large corporations hugely complex, expensive and

54 It remains contentious in Australia whether the corporation is responsible for the act of another, or the wrong of another: see *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78, (2016) 250 FCR 136 [48]–[58] (Davies, Gleeson and Edelman JJ).

55 Examples include the corporate plaintiff who seeks to recover a mistaken payment, or plead good faith change of position, or oppose a penalty for misleading conduct that, it alleges, was unintended.

56 *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145 (HL); *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247 (HL) 251 (Lord Bramwell).

57 See *Citizens' Life Assurance Co Ltd v Brown* [1904] UKPC 20, [1904] AC 423.

58 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713.

59 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA) 172 (Denning LJ). See also *Lennard's Carrying* (n 58).

often impossible.[60] This is because of what has become known as the problem of 'diffused responsibility'. In a large corporation, it is relatively easy for directors — and through them the corporation — to avoid responsibility through delegation and the siloing of knowledge at below-board level. The directors are generally concerned with high-level, strategic direction, not day-to-day management, and a common practice is to engage in widespread delegation of tasks (including to other corporations). In that context, pleas of subjective individual or collective ignorance on the part of directors may be entirely plausible. Perhaps more difficult, delegation from the Board may not be in favour of any one human decision-maker or position. In any corporation, the humans doing the actions and the humans with the requisite knowledge or culpable state of mind are often not the same. And knowledge is often fragmented across a range of employees and managers. When to this complexity is added the increasing prevalence of automated systems and processes, the human-centric focus of the traditional model of attribution poses a significant hurdle to holding corporations responsible for unconscionable conduct.

In responding to increasing corporate complexity, more recently, courts have emphasised that the purpose of the law's prohibition will make it clear that others (lower level managers, for example, or even just ordinary employees) are, in practice, the individuals responsible for making decisions and putting into operation systems and practices on behalf of the company.[61] The seminal case is *Meridian Global Funds Management Asia Ltd v Securities Commission*,[62] in which Lord Hoffmann explained that the laws of attribution comprise 'primary' rules located

> in the company's constitution, or the principles of company law as well as by general rules, the rules of agency and vicarious liability and by special rules of attribution used to determine whose act, knowledge or state of mind were, for a particular purpose, intended to be attributed to the company.[63]

A consensus appears to be developing that these special rules are merely an application of a broader and more nuanced approach to the attribution enquiry.[64] As Beach J recently put it in *Australian Securities and Investments Commission v Westpac Banking Corp (No 2)*,[65] the 'appropriate test is more one of the interpretation of the relevant rule of responsibility, liability or

60 Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 LFMR 57, 58.

61 See *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1, [1972] AC 153.

62 [1995] UKPC 26, [1995] 2 AC 500.

63 ibid 91. *Meridian* (n 62) has been endorsed in Australia in *DPP (Vic) Reference No 1 of 1996* (1997) 96 A Crim R 513, 517 (Callaway JA, Phillips CJ and Tadgell JA agreeing), cited with approval in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 [99] (Edelman J). See also *Jin v Knox Property Investment Ltd* [2016] NZCA 565, (2016) 18 NZCPR 280 [26] (the Court); *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22, [2014] 3 SLR 329 [47]–[50] (the Court); *Moulin Global Eyecare Trading Ltd v Comr of Inland Revenue* [2014] HKCFA 22, (2014) 17 HKCFAR 218 [40].

64 *Kojic* (n 63) [96] (Edelman J), noting that the approach in *Lennard's Carrying* (n 58) was never meant to constitute 'a universal rule'.

65 [2018] FCA 751, (2018) 266 FCR 147.

proscription to be applied to the corporate entity. One has to consider the context and purpose of that rule'.[66]

Meridian demonstrates a more subtle, flexible and context-specific approach to the task of attribution. However, it remains open to a range of uncertainties and objections.[67] As Leow astutely observes, its broader lens poses real challenges where the reason for the law's intervention is highly contested, and means that different attribution rules must potentially be identified for different areas of the law, greatly increasing its complexity.[68] But even where clarified and finessed in the important manner proposed by Leow in this issue, to focus upon the delegates of corporate powers, or the positions to which decision-making has been allocated, the focus remains on identifying the relevant human whose state of mind may be attributed to the corporation. Without further refinement, it does not respond to, or address, the diffused responsibility problem.[69]

In recurrent efforts to expand and ameliorate the attribution rules, legislatures across the common law world[70] have successively introduced a plethora of different liability rules, which supplement the common law attribution rules[71] in different ways. An example is section 84 of the Trade Practices Act 1974 (Cth),[72] now replicated in section 84 of the Competition and Consumer Act 2010 (Cth). This combines a modified vicarious liability approach for the conduct component of contraventions with a generous attribution rule for the mental elements.[73] However, in this and in all civil (as opposed to criminal) law variations,[74] the model continues to require a single repository of mental fault, with the consequence that the diffused responsibility problem persists.[75]

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66 ibid [1660].

67 Ross Grantham and Bernard Robertson, 'Corporate Knowledge: Two Views on Meridian' [1996] 2 NZBLQ 63, 71. The recent DPhil dissertation of Rachel Leow takes important steps to identify and remedy these uncertainties in favour of a principle of 'materiality': see Rachel Leow, 'Companies in Private Law: Attributing Acts and Knowledge' (DPhil thesis, University of Cambridge 2017) 40–45 and ch 6.

68 Rachel Leow, 'Equity's Attribution Rules' (2021) 15 J Eq 35.

69 That said, we think Leow's thesis may helpfully assist to align traditional attribution and our proposed systems intentionality approach. Focusing on the 'position' to which decision-making has been allocated, rather than the particular individual concerned, as well as emphasis on the lines of decision-making processes or structures, enables a bridge between the two analyses. Systems intentionality is, from one perspective, merely a more granular and structural analysis of specific delegations of corporate power.

70 For a Canadian example, see the attribution rules laid out in Criminal Code (RSC 1985, c C-46) s 22. See, in particular, s 2.2.

71 *Kojic* (n 63) [109] (Edelman J).

72 The model was reiterated in a wide range of other legislation, sometimes with significant variations: see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report) (n 8) paras 3.60–3.68.

73 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719, 737–38 (Toohey J), explaining that while using similar methods to vicarious liability, the fact that the model 'deems' the relevant conduct to be that of the company itself means that it is more properly considered an attribution model.

74 Criminal Code Act 1995 (Cth) pt 2.5, which introduced a 'corporate culture' attribution model, discussed in detail in Bant (n 12).

75 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report) (n 8) paras 4.68, 6.126.

A final, distinctive method to address the problem of diffused responsibility, adopted by some US courts,[76] but treated with caution in other jurisdictions,[77] is to allow 'aggregation' of the acts and knowledge of associates who, for example, individually know of some act or practice but fail to appreciate that it forms part of broader misconduct. The Australian Law Reform Commission has observed that aggregation may better reflect the realities of modern corporate structures, indeed, the very idea of organisational fault.[78] Aggregation has also been adopted as an attribution tool in some limited statutory contexts.[79]

In Australia, the major conceptual hurdle to accepting aggregation as a method to assist with attributing mental states to a corporation was expressed by Edelman J in *Commonwealth Bank of Australia v Kojic*, a case of alleged unconscionable commercial dealing before the Full Federal Court of Australia. In that case, the plaintiff alleged that the knowledge of two officers of the defendant corporation, occupying different roles and relations to the parties involved in the loan and security transactions, should be aggregated. Edelman J stated:

> [A]n aggregation principle could undermine the fundamental question to be asked ... : "is the conduct unconscionable"? It is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably. Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so (in instances of deceit) and that a corporation has acted contumeliously where no individual has done so (in cases of exemplary damages).[80]

However, this cautiousness is neither exhaustive nor determinative of the law's capacity to move beyond individuated attribution methods to theories tailored for the reality of complex, modern organisations, such as corporate actors. It is striking that, in *Kojic*, Edelman J went on to note:

> Although this is not such a case, it is possible that there could be examples where a corporation acts unconscionably even though no individual has acted unconscionably. For instance, in a case where no individual has the knowledge required to establish wrongdoing, it might be difficult for a corporation to avoid a finding that it has acted unconscionably if it puts into place procedures intended to ensure that no particular individual could have the requisite knowledge. The same might be true if a corporation's procedures were such that those formulating them were reckless about serious consequences.[81]

These observations on the salience of corporate procedures are particularly

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76 *United States v Bank of New England NA*, 821 F2d 844 (1st Cir 1987).

77 See, in particular, *Kojic* (n 63) [101]–[149] (Edelman J, Allsop CJ generally agreeing); *R v HM Coroner for East Kent, ex p Spooner* (1987) 152 JP 115 (QB).

78 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report) (n 8) paras 2.39, 4.80–4.87, 6.52, 6.151.

79 Criminal Code Act 1995 (Cth) pt 12.3, noted in ibid paras 6.70–6.71. See also Criminal Code (RSC 1985, c C-46) s 22.1.

80 *Kojic* (n 63) [112] (Allsop CJ generally agreeing at [31], but see [64]). See also at [81]–[83] (Besanko J), accepting that aggregation may be possible where a duty and opportunity to communicate arises. For another leading discussion of aggregation in unconscionable conduct, see *Radio Rentals* (n 18) [177]–[181] (Finn J).

81 *Kojic* (n 63) [153].

astute and adept for the development of a broader theory of corporate culpability: what we might call, 'systems intentionality'. We now turn to outline this proposed model of the corporate mental state.

B Systems intentionality: A proposed model

Bant has elsewhere sketched the outlines of a proposed model of corporate culpability, which sees the corporate state of mind manifested in its systems, policies and patterns of behaviour.[82] The theory draws support from four theoretical and doctrinal sources, which explain both its features but also potential for future articulation and development.

First, it draws in particular on the work of philosopher Peter French,[83] whose seminal work examines at length the interaction between concepts of intentionality and corporations. French explains that 'saying "someone did y intentionally" is to describe an event as the upshot of that person's having had a reason for doing y which was the cause of his or her doing it'.[84] In the corporate context, these reasons for decisions are found not just with the directors, but in the broader 'Corporate Internal Decision' (CID) structure. This structure includes (1) the corporate lines of responsibility (the corporate 'flowchart'); and (2) corporate decision 'recognition rules' (usually found in corporate procedural rules and policies). These would, we consider, include Leow's identified allocation of corporate powers to individuals or positions, whose understandings may then be taken as the corporate state of mind.[85] But French's analysis goes beyond individual delegates to systems of decision-making and action, in which the problem of diffused responsibility looms large: 'When operative and properly activated, the CID structure accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision.' As he concludes:

> [W]hen the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.[86]

Bant has argued that, consistently with this approach, a corporation's state of mind is manifested[87] where it adopts a system of conduct or pattern of behaviour that results in a contravention, or is apt to (calculated to, designed

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82 Bant (n 12).

83 Peter A French, *Collective and Corporate Responsibility* (Columbia UP 1984); Peter A French, 'Integrity, Intentions, and Corporations' (1996) 34 Am Bus Law J 141. See also Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) in particular ch 8; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (OUP 2011) ch 7; James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 Leg Stud 393, 408. cf William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2006); William S Laufer and Alan Strudler, 'Corporate Intentionality, Desert, and Variants of Vicarious Liability' (2000) 37 Am Crim L Rev 1285, 1309–10.

84 French, *Collective and Corporate Responsibility* (n 83) 40.

85 Leow, 'Equity's Attribution Rules' (n 68).

86 French, *Collective and Corporate Responsibility* (n 83) 44.

87 Sheley plausibly criticises arguments that corporate intention may be *inferred* from these factors for assuming (again) that corporate and human intention can usefully be analogised:

to, of a nature to) contravene, the conduct element of some civil law prohibition. Here, we note that the purpose or design of a system is not dependent on foreseeability viewed from the perspective of human participants in the process, but rather involves an assessment of its inherent features. On this approach, we look to what a corporation routinely and systematically does, and what its systems are objectively apt to produce, to ascertain what it knows, intends or is reckless towards.[88]

A second influence in developing the proposed model of 'systems intentionality' is the pioneering work of scholars[89] and reformers,[90] which led to the introduction of Australia's unique 'corporate culture' provisions. These articulate a ground-breaking conception of organisational fault for the purposes of attribution of intention, knowledge or recklessness with respect to corporate criminal liability. Part 2.5 of the Criminal Code relevantly provides:

> **12.3 Fault elements other than negligence**
>
> (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
>
> (2) The means by which such an authorisation or permission may be established include:
>
> ...
>
> (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
>
> (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
>
> ...
>
> (6) In this section:
>
> ...
>
> "***corporate culture***" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

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see Erin L Sheley, 'Tort Answers to the Problem of Corporate Criminal Mens Rea' (2019) 97 NC L Rev 773, 793.

88 cf estoppel, where the question whether a statement is 'calculated' to induce reliance points to its objective aptitude or nature: see, eg, *Redgrave v Hurd* (1881) 20 Ch D 1 (CA) (Sir Jessel MR), explained in *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68 (CA) 72–73 (Lord Esher MR). See also *Freeman v Cooke* (1848) 2 Ex 654, 154 ER 652, 656 (Parke B); *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 327 (the Court).

89 In addition to French, key intellectual figures included Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn Law Rev 1095; Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 Syd LR 277; Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 UNSWLJ 1; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (CUP 1993) 47–49.

90 Criminal Law Officers Committee Attorney-General's Department (Cth), *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility: Final Report* (December 1992) chs 1–2, 21, 107 (CLAC Report). See also Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (2017) Sydney Law School Legal Studies Research Paper No 17/14, 7 <http://ssrn.com/abstract=2921698>.

The novel focus on corporate culture as a source of corporate culpability has had a significant impact on the regulation of corporations in Australia, within both criminal and civil spheres. It reflects a profound insight, namely that in many cases, the real problem is not what any one person did, knew or intended, but that the corporation's overall or localised systems, policies, practices and procedures were highly flawed and inherently likely to encourage or result in misconduct. It also recognises the problem of complex, dispersed and decentralised corporate structures discussed earlier.[91] Yet, this important reform has arguably failed to realise its potential for a range of practical, doctrinal and legislative reasons, and has been the subject of no authoritative consideration by courts.[92] The proposed model of 'systems intentionality' aims to operationalise the concept of a deficient corporate culture, by providing a practical, workable method of proving required corporate mental states, which is consistent with the insights from the corporate culture reforms but are more readily translated to the specific doctrinal requirements of the law.[93]

A third source of insight is also a powerful source of comfort that the proposed model aligns with broader principle and, indeed, requires no legislative intervention for courts to recognise and implement. It comes from Mihailis E Diamantis' analysis of the 'extended' corporate mind and artificial intelligence (AI).[94] Diamantis explains the ramifications of the intuitively powerful insight offered by 'the extended mind thesis' developed by cognitive scientists and philosophers, which is that humans commonly take advantage of external systems (eg, maps, recipes or notes) to facilitate recall and decision-making. The use of these mental extensions does not undermine the fact that the act remains that of the human. He applies this insight to the use of AI to explain how corporations may equally be responsible for acts carried out through AI systems. Taking this idea further, however, we can see that, by adopting and applying these external systems, a human can also reasonably be understood to 'know' how, and 'intend to' get to her destination, make the cake, or remember the recorded information. The use of the system manifests their intention and knowledge. Equally, a corporation must be said to know and intend the systems they generate, or adopt and apply. Indeed, for our purposes, the critical, further insight to be drawn from this analysis is that corporations necessarily employ systems to facilitate their coordination and management of disparate and rotating humans and other agents, over time. In some cases (as with automated and algorithmic processes) those humans are entirely replaced by self-executing systems. From the perspective of the 'extended mind' analysis, therefore, we may conclude that it is entirely

91 CLAC Report (n 90) ch 1, 105.

92 Detailed in Bant (n 12).

93 See, eg, the criticisms of Skupski that the concept of corporate culture provides a mere 'smell test' and cannot be translated to the key and specific mental indicia of intention, knowledge and recklessness: George R Skupski, 'The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability' (2011) 62 Case W Rsrv L Rev 263, 304. See also Laufer (n 83) 59.

94 Mihailis E Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 NC L Rev 893. For his approach to attribution more generally, see Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91 Notre Dame L Rev 2049.

unremarkable to find that corporations manifest their intentionality through the systems they adopt and implement. This suggests that, far from being a radical extension of corporate responsibility, the proposed model of systems intentionality simply makes explicit for corporations what also holds true for humans: when we draw on external systems to facilitate our decisions and recall, those systems become an extension of our mental state. Indeed, we may argue that, for corporations, the corporate systems, policies and processes as instantiated are not a mere extension of the corporate mind but where that corporate mind naturally and necessarily resides.

The final source of inspiration for development of the proposed model comes from courts addressing statutory unconscionability in the context of what might be termed exploitative business models and practices. As the following discussion explains, here we observe courts broadening their focus from the knowledge or intention of individuals, which may be attributed to corporate defendants through general or statutory attribution rules, to defendant intention manifested through the defendant's very systems of conduct and patterns of behaviour. This approach still recognises the importance of culpable states of mind, but conceptualises these in organisational terms.[95] Importantly, while the statutory scheme gives clear form and additional guidance to this conceptualisation, as we have seen, its roots lie in courts' own analysis of statutory unconscionable conduct.[96] This suggests that the proposed model of systems intentionality is far from incapable of judicial development. To the contrary, in its evolving jurisprudence concerning systems unconscionability, Equity shows a principled pathway forward, not only for statutory unconscionability, but for the effective regulation of corporate misconduct more broadly. It hence merits close examination, to which we now turn.

IV Systems unconscionability and the corporate state of mind

A Intentionality through business systems

As we have seen, there are undoubtedly cases of statutory unconscionable conduct involving corporate defendants in which relevant knowledge, intention, dishonesty or predatory state of mind may be evidenced on the facts, in such a way as to satisfy traditional, or statutory, attribution rules, even without express discussion or analysis by the courts. Customer's vulnerabilities may be obvious[97] and the dealing manifestly disadvantageous to persons in their situation.[98] These features might be consistent with implicit findings of the requisite culpable mental state on the part of relevant

95 Importantly, the analysis applies equally as well to business systems employed by individuals, such as Mr Kobelt, as to corporations.

96 *National Exchange* (n 9) [33] (Tamberlin, Finn and Conti JJ); *EDirect* (n 11) [72]–[73] (Reeves J).

97 See, eg, *Scully* (n 34); *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [2013] ATPR 42-447, the latter discussed below on this point.

98 See, eg, *Cash Store* (n 46), discussed in Paterson (n 27) 203.

individuals for the purposes of corporate attribution. However, this method, founded on traditional relational exploitation, fails to give full credit to the statutory jurisdiction under section 21(4)(b) of the ACL to relieve against unconscionable conduct founded on the defendant's very system of conduct or pattern of behaviour.

As the following discussion will show, this provision directs courts, instead, to consider the culpable qualities of the defendant's conduct manifested in its business model, practice or system. As explained earlier, there are two issues here. One involves an objective assessment of the business' conduct viewed against community norms of fair trading practices: a pleading of an unconscionable 'system of conduct or pattern of behaviour' necessarily directs courts' attention to assess this conduct element. However, the other element, which is the main focus of this section, concerns the state of mind of the defendant engaged in that conduct. And here we find courts developing the idea of systems intentionality: that the system itself may reveal the required culpable mental state, in the inherent design of the business system, structure or practice. For example, a business model may, by its very design, be aimed at a vulnerable group[99] and in this sense display the necessary element of intentionality (whether or not any individual within the defendant corporation is aware of any customer suffering from special disadvantage); or the product design or associated marketing strategy itself may be intrinsically and necessarily misleading,[100] harmful or risky;[101] or sales may be pursued through some ruse or deception inherent in the business' practices.[102]

Such a systems approach to the requisite mental element of statutory unconscionability may be particularly potent when dealing with larger corporate defendants. It disengages the enquiry from a search for natural repositories of the requisite blameworthiness to an enquiry into organisational culpability. Nor is this shift without precedent. The New South Wales Court of Appeal, for example, recognised the distinctively organisational focus required in cases of corporate unconscionability in *PT Ltd v Spuds Surf Chatswood Pty Ltd*,[103] a case involving unconscionable conduct under the Retail Leases Act 1994 (NSW):

> [A] corporation can engage in what a reasonable observer might properly regard as unethical behaviour even though no individual officer or employee acts with conscious impropriety ... The ethical quality of a corporation's behaviour must be assessed by reference to the actions of the corporation itself.[104]

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99 See, eg, *National Exchange* (n 9), discussed in the next section.

100 See, eg, *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd* [2019] FCA 676, (2019) 371 ALR 396; *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424, (2016) 343 ALR 327, subject only to a different penalty result on appeal in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, (2016) 340 ALR 25.

101 See, eg, *Scully* (n 34); *Cash Store* (n 46).

102 See, eg, *Lux* (n 97), discussed in the next section.

103 [2013] NSWCA 446.

104 ibid [110] (Sackville AJA, McColl and Leeming JJA agreeing).

B Formative authorities

In this context, the key starting point in our story of innovative judicial, then legislative, reform is *National Exchange*, commonly identified as the source of the systems unconscionability provisions. National Exchange had sent unsolicited off-market offers to members of a demutualised company, Aevum Ltd, to buy shares at a price that constituted a substantial undervalue of their true worth. Notwithstanding the fact that a correct range of values for the shares was disclosed, albeit on the second page of the offer document, 257 shareholders accepted the offer. Although the defendant's conduct did not, in the end, fall foul of section 12CC of the ASIC Act,[105] a unanimous Full Court of the Federal Court found the conduct to be unconscionable.

An issue before the Court was that the offer did not specifically target identified consumers who suffered from known, special disadvantage. For this reason, the judge at first instance had concluded that the conduct was not unconscionable. Rather, the offer reflected a business strategy of approaching members as a whole, on the basis that the class would likely contain inexperienced and vulnerable persons, many of whom (given the nature of the demutualised company) would be elderly, and who had not purchased their Aevum shares, so could be anticipated to be lacking in commercial share trading experience. On appeal, Tamberlin, Finn and Conti JJ emphasised the distinction between the statutory and equitable conceptions of unconscionability and explained:

> 'Unconscionable conduct', on its ordinary and natural interpretation, means doing what should not be done in good conscience. In a case where the discrepancy in price and value is great, as in the present case, and the conduct is systematically and directly focused on vulnerable but unnamed members, some of whom who can be expected to accept the offers, such conduct can reasonably be described as being against good conscience. The targeted offerees in this case could reasonably be expected to include persons who are unacquainted with share values, inexperienced in trading their interests, lacking in commercial experience and some of whom act inadvertently and are elderly ...
>
> ...
>
> National Exchange set out to systematically implement a strategy to take advantage of the fact that amongst the official members there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer. They were perceived to be vulnerable targets and ripe for exploitation, as they would be likely to act inadvertently and sell their shares without obtaining proper advice, and they were a predictable class of members from whom Tweed [the 'controller' of National Exchange] could procure a substantial financial advantage by reason of their commercially irrational conduct. This is not a case of shrewd commercial negotiation between businesses within acceptable boundaries. The conduct can properly be described as predatory and against good conscience. This is not a case of obtaining a low price by shrewd negotiation. It is predatory conduct designed to take advantage of inexperienced offerees. The primary emphasis is on the conduct of the offeror towards the offeree

105 This was because the members' sales of shares were not themselves 'for the purpose of trade or commerce', as required by s 12CC(8).

in deciding whether conduct is unconscionable ...[106]

Two key points may be taken from this discussion, relevant to the current analysis. First, it made clear that it was unnecessary to identify specific plaintiffs suffering from a known, special disadvantage in order to identify statutory unconscionable conduct. This was later confirmed by the statutory amendments, as we have noted. Secondly, the required character of unconscionability could be found in the defendant's very business model. Here, the court's reasoning discloses close consideration of the objective quality of the conduct, but also suggests a sense of corporate purpose and design expressed through the particular, adopted system. We might take this case as an important example of where a system was found to have an objective 'purpose' of exploiting anticipated disadvantage: that is, a case where the very design of the system was predatory and systems intentional, and where knowledge of the presence of disadvantage (albeit not in individual cases) was implicit in the business model. The offer itself was so palpably uncommercial it was inferred no one who knew what they were doing would accept it. From this the court was prepared to find that National Exchange was engaged in a systematic course of behaviour that was unconscionable.

Following this case, and consequential statutory amendment, courts have taken the opportunity to examine the circumstances in which 'unconscionable conduct can involve systematic conduct directed to a group of unnamed persons with common characteristics'.[107] This attention has yielded a number of important insights. Our focus for current purposes is what we consider to be a gradual exploration by courts of the conceptual links between corporate systems, intentionality, and statutory unconscionability. The following discussion also acknowledges the need to distinguish between 'the concepts of "system of conduct" and "pattern of behaviour", and on the other hand the mode of proof of such concepts'.[108] Full exploration of the latter question must remain for another day.[109]

In one of the earliest cases to consider the systems unconscionability provision, *Australian Competition and Consumer Commission v EDirect Pty Ltd*,[110] the alleged system involved 'a high pressure sales system that was directed to an unnamed group or class of persons that could be expected to include members who were vulnerable or susceptible to EDirect's sales process'.[111] Reeves J explained the nature of the 'system of conduct' that must be established:

By its ordinary meaning, a system is "an assemblage or combination of things or

106 *National Exchange* (n 9) [33], [43].

107 *EDirect* (n 11) [70] (Reeves J).

108 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208, (2020) 275 FCR 57 [385] (Beach J). Some cases are more focused on the latter issue: see, eg, *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 [58]–[59], [62], [163] (Bromwich J).

109 For an initial examination, see JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 J Consum Policy 1.

110 *EDirect* (n 11).

111 ibid [88] (Reeves J).

> parts forming a complex or unitary whole; ... a co-ordinated body of methods, or a complex scheme or plan of procedure": *Macquarie Dictionary*. To similar effect, Dixon CJ said of the word "scheme" that it "connotes a plan or purpose which is coherent and has some unity of conception": see *Australian Consolidated Press Limited v Australian Newsprint Mills Holdings Limited* (1960) 105 CLR 473 at 479. Thus, at this first step, the ACCC has to prove that the critical features of EDirect's sales process described in paras 15 and 16 of its statement of claim occurred in a combination such as to constitute a scheme or system. It will not be sufficient for it to prove that each of those features is present in a number of EDirect's telemarketing calls. Rather, it has to show that the critical features are present in combination in a sufficient number of those calls that it was more likely than not that EDirect had designed and operated that combination as a "high pressure sales" system.[112]

We can immediately note the close connection between the concept of a 'system' and the concepts of the corporate 'plan', 'purpose' and 'design'. Although the system of high-pressure sales tactics was not established on the facts, Reeves J found that evidence of the telemarketing scripts was relevant to establishing that there was a telemarketing system for EDirect. This was done without apparent need for identification of approval by the Board of EDirect: the fact that the scripts were issued to sales persons was enough.[113] Here, we may understand that this was an 'instantiated' system that manifested the corporate purpose or design, albeit not one of the requisite character to attract the court's opprobrium as unconscionable.

In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*,[114] the Australian Competition and Consumer Commission (ACCC) brought an action alleging statutory unconscionability against the defendant. Its case centred on a number of discrete door-to-door sales of vacuum cleaners to elderly women by Lux representatives, in the customer's home. The salespeople attended the customers' homes by prior appointment, to carry out a 'free service' of the customer's existing Lux machine. The ACCC's case was that this stratagem was a deceptive ruse, to enable the sales representatives to gain access to the customers' home and then persuade them, through a subtle process of demonstration and discussion, to purchase a new machine. At first instance, the trial judge rejected the regulator's arguments that the defendant's conduct was unconscionable, emphasising that the representatives' *individual behaviour* must be found to be unconscionable. Jessup J observed that some elements of the alleged unconscionable conduct

> relate to institutional aspects of the respondent's modus operandi, while others relate to the individual interactions between the respondent's representatives and the householders to whom they sold vacuum cleaners. While both levels are important in understanding the applicant's case, it should be made clear at the outset that the allegations of unconscionable conduct made by the applicant ultimately come down to *the conduct of the respondent's representatives in their dealings with the householders*.[115]

In rejecting the ACCC's complaint, the judge emphasised the staff responsible

112 ibid [91].
113 ibid [93].
114 [2013] FCA 47, (2013) 133 ALD 134.
115 ibid [13] (emphasis added).

for arranging the initial appointments had no personal knowledge of the customers' characteristics.[116] Nor was the fact that the customers were elderly women of itself a form of 'special disadvantage' for the purposes of the doctrine of unconscionability.[117] The women involved were all independent and capable. The judge also rejected the characterisation of the maintenance check as a 'ruse', emphasising that the individual salespersons subjectively intended to perform a maintenance check of each customer's cleaner, even though they might also be 'incentivised' to make a sale.[118] We can observe that this form of reasoning closely aligned the statutory doctrine with its equitable counterpart.

On appeal, however, the Court found that each of the appealed cases involved unconscionable conduct.[119] From the perspective of systems intentionality, the Court of Appeal's analysis is strikingly different: it expressly laid emphasis on the 'institutional' aspects of the misconduct.[120] The business system was unlawful and the law it breached was in place for the very purpose of protecting consumers from being exploited due to a recognised position of situational vulnerability.[121] This was not just an *ad hoc* breach, but a business model founded on the prohibited conduct.

Here, we can observe a striking shift from the need to identify personal disadvantage on the part of individual victims, to acceptance that the defendant's business model could itself generate disadvantage and be relevantly exploitative. By contrast with the individuated approach of the trial judge, none of the highlighted factors require subjective bad faith, or predatory intention on the part of the salesperson — an important factor given the expressive power of the law. The target of denunciation here is not (necessarily) the individual, but the business model that the individual happens to be carrying out, on the particular occasion.[122] Consistently, the Court emphasised the predatory features of the sales process: these included the 'deceptive ruse' (carried out by other Lux employees, as part of the overall sales strategy) that tricked the women into allowing the sales person into their home; the failure of those sales representatives to comply with statutory requirements designed to protect consumers in door-to-door transacting; and the bargaining advantage obtained through gaining entry into the home. While the individual sales representatives might well appreciate the nature of the sales practices in which they participated, unlike for the trial judge, this was not a critical factor in the Court's reasoning. And to the extent that intentionality or knowledge of disadvantage was required, this was a matter of corporate, not individual, culpability and was manifested in the system itself.

116 ibid [12].
117 ibid [14].
118 ibid [16].
119 *Lux* (n 97).
120 ibid [25].
121 ibid [10].
122 A similar approach is found in *Professional Education* (n 108) [581]–[584], in separating the character of Ms Benton from the system she helped to deliver.

C The VET scheme cases: Laying bare the corporate mind

The meaning of the systems unconscionability provisions, and their relationship to ideas of intentionality, has been further closely analysed and developed in a series of cases involving alleged vocational education and training scams, which sought improperly to profit from the Commonwealth Government's VET-FEE-HELP scheme. Given the rich seam of authorities generated by this scheme, and mined in this article, it merits very brief explanation. Unfortunately, the scheme was inherently ripe for creating further disadvantage on the part of already vulnerable consumers, and for creating opportunities for exploitation by unscrupulous VET providers.[123] This is because it provided that a registered student would incur a VET-FEE-HELP debt to the Commonwealth of 120% of the fee, even if he or she did not complete any part of the unit in which he or she had enrolled and he or she was incapable of completion. Even worse, the relevant VET provider was paid by the Commonwealth for the unit once the relevant census date passed, whether or not it was completed or provided, with no quality assurance measures whatsoever. Additionally, beyond a limited requirement to disclose the basic features of the government scheme, there were no restrictions around the method of attracting student enrolments, such as prohibitions on commission-based recruitment. Given the scheme was explicitly targeted at encouraging consumers from underrepresented and underprivileged backgrounds to enrol into VET programs, the stage was set for an explosion of predatory sales and marketing practices.

Out of this highly regrettable state of affairs has come an important line of authority addressing the distinction between unconscionable systems and patterns, the relationship between the two and, we consider, their bearing on corporate states of mind. In the foundational case of *Unique*,[124] the ACCC's claim of systems unconscionability failed largely because it had failed to adjust its theory of the case from one concerned with (allegedly repeated) individual cases of exploitation of special disadvantage, to one concerned with an unconscionable 'system of conduct or pattern of behaviour'.[125] The important guidance provided by the Full Federal Court concerning the distinctive evidential strategy required in this context is examined elsewhere.[126] As explained earlier, the appropriate mode of proof of these concepts is a separate enquiry from the current discussion. For present purposes, the significance of the case lies in the Court's authoritative clarification that a '"system" connotes an internal method of working, a "pattern" connotes the external observation of events'.[127] Building on this insight, in *Australian Securities and Investments Commission v AGM Markets*

123 See, in particular, the acerbic evaluation of Gleeson J in *Cornerstone* (n 11) [7]. See also ibid [72]–[93] (Bromwich J).

124 *Unique* (n 35).

125 ibid [2], [110], [218] (Allsop CJ, Middleton and Mortimer JJ).

126 Paterson and Bant (n 109).

127 *Unique* (n 35) [104] (Allsop CJ, Middleton and Mortimer JJ), cited with approval in *Professional Education* (n 108) [151].

Pty Ltd (in liq) (No 3)[128] (itself a case involving financial, rather than education, services) Beach J further explained that a '"system" connotes something *designed or intended in its structure*; contrastingly, a pattern may be manifested without any *design or intentional input*'.[129] A system relates to the 'internal structure, for example, internal working, of whatever it is that has produced or reflects the conduct'.[130] Its essence is 'organisation and connection' of elements within a complex whole.[131] A pattern, by contrast, looks to 'the external manifestation of behaviour and whether it can be characterised as a pattern'.[132] And a pattern is, at base, 'a regular and intelligible form or sequence discernible in certain actions or situations'; 'there has to be both repetition and external discernibility'.[133]

Beach J's expression of the relationship between systems and intention closely correlates with the proposed model of systems intentionality. On this analysis, a corporation's internal structures, methods and processes articulate systems that are inherently purposeful in their nature.[134] By contrast, patterns signify externally observable repeated behaviours from which systems (and hence systems intentionality) may be inferred. The two are closely related, albeit distinct. As Beach J observed: 'a "system of conduct" could produce a "pattern of behaviour". Relatedly, evidence of a "pattern of behaviour" could enable you to infer a "system of conduct" in some cases'.[135]

Beach J's exegesis is particularly striking given his earlier, careful examination, in the same case, of the role of intention, knowledge and state of mind in relation to statutory unconscionability:

> [S]tatutory unconscionability does not require only focusing on the *alleged wrongdoer's or its officers'* or employees' state of mind, whether actual intention or knowledge or what it ought to have known. It is a broader *objective evaluation of behaviour* including the causes and reasons for such behaviour and its effect or likely effect. But the subjective state of mind of the alleged contravener whether actual or constructive is relevant to the broader sense. Although I am concerned with a normative notion of conscience, the boundaries and content of which are informed by the explicit and implicit values previously identified, state of mind is relevant.[136]

This passage serves to demarcate and explain the relationship between the objective, normative standard of unconscionability and the defendant's state of mind.[137] As explained earlier, both are required: the one must be assessed in light of the other. But Beach J's analysis is also consistent with the view that the corporation's state of mind may be established independently of a derivative model, which we have seen is limited to attributed knowledge or understanding of its relevant natural officers or employees.

In the earlier case of *Australian Competition and Consumer Commission v*

128 *AGM Markets* (n 108).
129 ibid [389] (emphasis added).
130 ibid.
131 ibid [391].
132 ibid [386].
133 ibid.
134 See ibid [391].
135 ibid [390].
136 ibid [373] (emphasis added).
137 Discussed in Part II above.

Get Qualified Australia Pty Ltd (in liq) (No 2),[138] Beach J had examined another example of system unconscionability, which incorporated unfair sales tactics (such as applying pressure and a false sense of urgency) and misleading conduct, this time on the part of a business operating as an intermediary between consumers and registered training providers. As Gleeson J later observed in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)*,[139] Beach J's conclusion of unconscionability was based on Get Qualified Australia's (GQA) 'training, directions, instructions and incentives', with very little attention paid to the case of individual incidents.[140] This systemic misconduct was well-known to and encouraged by GQA's senior management,[141] hence satisfying traditional attribution requirements. Yet Beach J's discussion also suggests that the relevant intentionality was manifested in the very systems themselves: thus a 'deliberate' systemic failure to disclose relevant information to consumers until after payment was found in the scripts issued to third party agents acting for GQA.[142] While human attribution was therefore satisfied, arguably a more direct form of corporate intentionality was also inherent in the adopted system itself.

A similar analysis was adopted in *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd*.[143] Acquire admitted conduct in contravention of section 21 of the ACL in relation to telemarketing calls it made to eight unemployed job seekers, and also that the contravening conduct was not that of rogue employees but rather was a core part of its business model.[144] Acquire accepted that its sales system 'courted the risk' of contravening the ACL.[145] In setting the penalty for this misconduct, Murphy J considered that 'Acquire's business model was based on maximising the number of enrolments it was able to achieve for its Clients and thereby maximise the fees payable to it. Acquire's conduct in that regard was deliberate and overt'.[146] Evidence of the system, and the deliberateness of Acquire's misconduct, was found in the misleading and aggressively persuasive scripts issued to its employees and in its systems of incentives.[147] Acquire admitted that its senior management team was 'involved' in devising the sales system, but this seems to have been treated by Murphy J as an additional, exacerbating factor, on top of the defendant's deliberate, unconscionable conduct manifested in those systems.[148]

These decisions are consistent with, and illuminating for, the proposed theory of systems intentionality. As they suggest, in all cases, the requisite corporate state of mind might (or might not) also be found through traditional

138 [2017] FCA 709.
139 *Cornerstone* (n 11).
140 ibid [738].
141 *Get Qualified* (n 138) [179], [190].
142 ibid [161].
143 [2017] FCA 602.
144 ibid [3] (Murphy J).
145 ibid.
146 ibid [81].
147 ibid [82]–[85].
148 ibid [85].

or statutory attribution methods, derived through relevant natural executives or employees acting for the corporation. However, these methods arguably sit alongside and complement a more strictly organisational analysis, which focuses on the instantiated systems, policies, processes and patterns of the corporation, which in turn manifest (or, in the case of patterns, evidence) its institutional state of mind.

In *Cornerstone*, Gleeson J addressed a VET provider's business model, the purpose of which was to profit(eer) from the Commonwealth's VET FEE-HELP scheme, by signing up consumers through incentives such as 'free' laptops and cash payments,[149] in order to maximise the financial benefit obtainable under the government scheme. The respondent, then trading as Empower Institute, engaged third party recruiters to sign up the students. Unlike *Get Qualified* and *Acquire*, Empower disclaimed (and the ACCC did not establish, beyond the case of cash and laptop incentives) knowledge of the recruiters' (and their employees') specific methods employed to obtain those enrolments. In that context, Gleeson J reflected at length on the various requirements for corporate knowledge of the recruiters' activities. As her Honour explained, the ACCC did not allege that any particular officer of Empower was aware of any specific instance of misconduct on the part of any particular recruiter, which must generally be found to establish corporate knowledge.[150] However, her Honour found that Empower was itself responsible for systems unconscionability. The laptop and cash incentives required financial outlay by Empower, which meant there was 'no reason to doubt' that Empower was aware of these stratagems, employed by recruiters, to attract enrolments.[151] Additional features of the defendant's business model that informed the assessment were that it employed recruiters 'who were practically untrained, who received no ACL training and were remunerated on a commission basis for securing enrolments'[152] and involved 'unsolicited conduct agreements', again without any process for ensuring compliance with ACL requirements.[153]

Gleeson J considered that this system reflected a 'callous indifference'[154] to the consumer protection considerations, rather than a 'deliberate design' to take advantage of vulnerable consumers. In reaching this conclusion, Gleeson J distinguished the instant system from that involved in *Get Qualified*.[155] Importantly, however, it seems clear from Gleeson J's analysis in *Cornerstone* that callous indifference (likely a form of recklessness), deliberate misconduct, and specific, exploitative intention (perhaps more akin to a specifically predatory intention) could be manifested through the corporate system, rather than found derivatively through individual officers' mental states. In both cases, from this perspective, the conduct itself was clearly deliberate, even if not (on Gleeson J's analysis) the quality of that

149 *Cornerstone* (n 11) [68]–[69].
150 ibid [221]–[222].
151 ibid [225]–[226].
152 ibid [751].
153 ibid.
154 ibid [750]–[751].
155 ibid [751]. See also *Australian Competition and Consumer Commission v Titan Marketing Pty Ltd* [2014] FCA 913, discussed in ibid [739].

conduct. Here, we might again reflect on the lessons from dishonesty, namely that moral obtuseness on the part of a natural or corporate defendant as to the quality of its conduct is no excuse for what is otherwise intentional behaviour. As Gleeson J concluded:

> [W]here the system [is] directed to enrolling students from a disadvantaged sector of the community — who were vulnerable to being misled or deceived — in order to accrue very substantial financial benefits to Empower, and where the system reflect[s] a callous indifference to the consumer protection considerations ... a conclusion that, by its operation of that system, [the defendant corporation] engaged in conduct that was, in all the circumstances, unconscionable is justified.[156]

Similarly, in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*,[157] Bromwich J considered that the obvious risks of exploitation inherent in the VET-FEE-HELP scheme meant that

> [a]n enrolment process that predictably produced, or even encouraged a situation in which such unsuitable consumers became enrolled would invite close scrutiny to see whether that was, in all the circumstances, unconscionable. The conclusion that the conduct overall was unconscionable would be more readily reached if such an outcome was either *intentional or sufficiently predictable or recurrent to require overt steps to be taken to minimise the chance of it occurring*.[158]

Consistently with the proposed model of systems intentionality, and the foregoing analysis of authorities, Bromwich J may be drawing important distinctions between mental states. Where a system is designed so as to produce a kind of conduct, the system may be understood to manifest the requisite element of general intentionality or deliberateness with respect to that conduct. Where, by contrast, the system is of a nature or patently likely ('predictable') to produce certain conduct, or has happened previously (and so is 'recurrent'), and no positive ('overt') steps are taken to avoid that result, the system manifests recklessness. Both systemic mental states are sufficient for statutory unconscionability. Where, by contrast again, the system is designed to produce a specific harm to specific victims, this may be understood to manifest a predatory state of mind. Consistently with this analysis, Bromwich J distinguished between, on the one hand, the proven corporate

> motive to deliberately enrol students who would not be likely ever to partake of study and to keep them enrolled until the census date, or at least deliberately to keep and maintain in place an enrolment system which produced that outcome,

and on the other, proof of 'an intention to produce a particular outcome'.[159] The latter was unnecessary to show the relevant systems unconscionability.[160]

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156 *Cornerstone* (n 11) [751].
157 *Professional Education* (n 108).
158 ibid [80] (emphasis added). See also at [84].
159 ibid [167].
160 ibid.

D Synthesis: Systems unconscionability and intention

Drawing together the strands of this analysis, the authorities suggest that the proposed model is capable of reflecting nuanced assessments of corporate culpability, of different kinds. We have seen that some systems are designed so that the conduct they produce can only be treated as intentional, as discussed in *AGM Markets*, *Professional Education*, *Get Qualified* and *Acquire*. Systems that patently will produce certain conduct, in circumstances where no steps are taken to avoid that outcome, display recklessness, as in *Cornerstone* and *Professional Education*. Drawing on insights from *Cornerstone* and *Professional Education*, we have identified that a more specific predatory mindset may be revealed through analysis of the defendant's adopted system. A case in point might be the foundation case of *National Exchange*, where the conduct had no explanation other than to take advantage of the vulnerabilities of the target audience. *Lux* may be a similar example on its facts of a business method that had no valid reason other than to trick consumers. Relatedly, we have also seen how defendants' knowledge of critical factors may be implicit in their adopted business model, again as in *National Exchange* and *Lux*. This subtlety suggests that the proposed model of systems intentionality is entirely capable of responding to and reflecting the law's fine-grained distinctions between different degrees of culpability.

In light of these features and authorities, the model presents an important, additional method of ascertaining the culpable corporate mind. Moreover, there is, on our analysis, good reason to think that the model of systems intentionality supported by this line of cases can, and should, apply in other, appropriate contexts.[161] While these cannot be explored here, they clearly include cases of statutory unconscionability under other legislative regimes (for example, in the provision of financial services, as in *AGM Markets*).[162] But the model will also, we consider, support more transparent and effective regulation of corporate misconduct where other standards, such as the obligation to act 'honestly',[163] or prohibitions on 'dishonest' conduct are engaged.[164] It will also enable courts considering penalty awards, even in relation to strict liability claims, such as misleading conduct, better to identify and assess corporate culpability in the sentencing process. Here, courts

161 See, eg, *ACN 117 372 915* (n 46) [95] (North J), quoting with approval the ACCC's closing submission which argued that Advanced Medical Institute's adopted system 'reflected their intention — their 'model', and therefore their attitude towards consumers'. An appeal against the finding of unconscionability was dismissed in *NRM Corp Pty Ltd v Australian Competition and Consumer Commission* [2016] FCAFC 98. The submissions were again cited with approval in *Professional Education* (n 108) [151] (Bromwich J), on the presence of a 'system' rather than on the inference of intentionality. The analysis is potentially relevant to the *Jams 2* appeal (n 40), although whether it is argued remains to be seen. See also *Integrated Securities No 3 Pty Ltd v Creatrix Web Development & Online Marketing Solutions Pty Ltd* [2021] NSWSC 596 for another potential example.

162 Eg, in ASIC Act, s 12CB.

163 As in *Australian Securities and Investments Commission v National Australia Bank Ltd* [2020] FCA 1494.

164 For examples, see *ASIC v Australia and New Zealand Banking Group* (n 52); the 'fees for no services' scenarios the subject of *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1, 136–64; Bant (n 12).

commonly look for indicia of the defendant's blameworthiness through (amongst other factors) state of mind criteria, such as the defendant's knowledge, intention, regret or contrition.[165] The approach notably also enables understanding of how the outputs of automated systems may be unconscionable, or otherwise highly culpable, in the absence of human intervention or agency.[166] And finally, while the examples we have examined involved unconscionable systems in business-to-consumer dealings, there is no reason why the same approach cannot apply to business-to-business transactions. It follows that the ramifications of the model for corporate responsibility more broadly are, potentially, very significant.

V Conclusion

We have long known that Equity is not past the age of child-bearing.[167] But, of course, we must also be mindful of Bagnall J's 'oft-repeated apophthegm'[168] that 'her progeny must be legitimate — by precedent out of principle'.[169] In this article, we have argued that courts seeking to adapt Equity's longstanding concerns with conscience to the statutory prohibition on unconscionable dealing have, indeed, elucidated a principled approach to organisational misconduct. The resultant concept of 'systems unconscionability' reveals an important truth, namely that corporate states of mind can be discerned through their adopted and implemented systems. These systems may disclose both the corporation's purpose(s) and the knowledge necessary for the particular system to function. Moreover, this systems-based analysis enables courts to identify graduations of mental state: some systems of conduct or patterns of behaviour may manifest or evidence a specific predatory intention to achieve a particular form of harmful outcome; others may reveal a more general intention to act in a certain way that constitutes misconduct; other systems may reveal a callous disregard for patent and inherent risks of harmful consequences. Through the emerging line of authority, this principled analysis opens the way for courts to develop, consistently with precedent and principle alike, a broader theory of corporate conscience that is independent of its natural employees and agents, and is fit for purpose in the modern age.

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165 *National Australia Bank* (n 163) [142] (Lee J). See the 'French factors' developed in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 and now authoritative: see, eg, *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761, (2011) 282 ALR 246 [11]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20, (2012) 287 ALR 249 [37] (Keane CJ, Pinn and Gilmour JJ); *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44.

166 As to this, see Jeannie Marie Paterson and Elise Bant, 'Automated Mistakes' in E Bant (ed), *The Culpable Corporate Mind* (Hart Publishing) forthcoming.

167 *Eves v Eves* [1975] 1 WLR 1338 (CA) (Lord Denning MR); Sir Raymond Evershed, 'Equity Is Not to Be Presumed to Be Past the Age of Child-Bearing' (1953) 1 Syd LR 1.

168 Cited with approval in relation to the limits of unconscionable conduct in *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd* [2012] VSCA 103 [134] (Nettle and Neave JJA, Bell AJA agreeing).

169 *Cowcher v Cowcher* [1972] 1 WLR 425 (Fam) 430 (Bagnall J).