



Individuals in the company are part of a greater enterprise – their acts both contribute to the corporate effect and are consequences of the corporate effect. As a result, corporate decision making is often the product of organisational policies and collective procedures, not individual decisions.¹⁶

As the ALRC concluded, the concept of organisational blameworthiness is key to conceptualisation and reform of corporate criminal responsibility in Australia – and also, I would say, to the determination of a corporation as a ‘suitable person’. Corporate culpability is not merely to be equated with the character and morals of its leading officers although, of course, they may be important factors. Indeed, a solely nominalist approach is contrary to the requirements of the Criminal Code Part 2.5, which expressly directs courts to consider ‘corporate culture’ when assessing the mental state of a corporate defendant. While this is a Commonwealth law and of limited application, it was developed following many years of intense debate and has undoubtedly had a profound influence on conceptions of corporate responsibility in this country.¹⁷ I submit that, consistently, what is required on the part of the Commission, is an assessment of Crown as a corporate entity, to assess *its* suitability to be involved in gaming activities in Australia.

5. Systems Intentionality: a proposed model

Here, my research into corporate fraud offers a fresh perspective on the culpable corporate mind and, relevantly, Crown’s organisational character as revealed through its reported conduct in facilitating money laundering. My research has identified a powerful new model of ‘systems intentionality’ emerging in Australia, which operates in addition to traditional approaches to corporate responsibility. It builds on existing ‘corporate culture’ reforms and theories of organisational responsibility to enable courts – and commissioners – to identify specific corporate states of mind (such as knowledge, intention and dishonesty) independently of individual human fault. This model sees the corporate state of mind manifested in its systems, policies and patterns of behaviour. Importantly, this model in many cases turns the familiar excuse of ‘systems error’ on its head, revealing that systemic deficiencies will often form part of a purposive arrangement, in which information silos (for example) can be understood as part of a broader and effective plan or strategy. That possibility is an important consideration that, I submit, deserves further examination in relation to Crown’s conduct and character.

Systems intentionality has a range of complementary sources that explicate and support its features and operation.

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conduct, such as dishonesty, unconscionability and recklessness, in light of this manifested state of mind.

Returning to the current Inquiry, we have seen that the Bergin Report made clear that cage staff had a practice of aggregating deposits to the Riverbank account, which actively facilitated money laundering. We may accept that these staff were individually honest, but were nonetheless cogs in a corporate process that was inherently apt to break the law. Critical to assessing Crown's state of mind is to understand whether the data aggregation practice was an adopted system and, if so, how and why the data entry system was structurally separated from the necessarily functionally dependent AML system. Whether the establishment of Riverbank as an independent corporate conduit of funds is another, systems-intentional component of what can be understood this broader series of designed, structural separations is another important issue, but which cannot be addressed here.

Here I note that the Bergin Report does not suggest that the data entry (in particular, the aggregation) practices or compliance processes evolved by accident. Although there were some inconsistencies, it concluded that cage staff adopted an aggregated process 'in the main'. Any claim of accident by Crown would have to explain how these accidents were replicated over long periods, as individual employees were replaced by new employees *trained in carrying out the requisite process*. It is open to conclude that this data entry pattern and practice evidenced a system of conduct adopted and maintained by Crown. The AML Team, by contrast, clearly adopted and carried out Crown's system of compliance checks, one predicated upon the (fatally flawed) SYCO database entries.

The next step is to consider how, and why, the data entry and AML systems were set up, maintained and operated independently of one another notwithstanding that the data entry task was critical to the effective functioning of the AML system. The Bergin Report does not identify why the systems were separated in this way. What is clear is that, over many years, there appear to have been no audits or checks carried out of the data entry (including aggregation) process in light of its (again) inherently and obviously, critical role to the effective functioning of the compliance system. This failure continued notwithstanding repeated warnings and 'red flags' raised by third parties banks (ANZ, ASB and CBL) about the aggregation process. Crown was an entity with very significant gaming experience and, indeed, expertise. The systems were of central importance in countering the endemic and notorious risk of criminal money laundering activity. Here, it is open to consider that their ongoing separation need not be understood as a matter of accident or remarkable incompetence on the part of Crown. These were longstanding systems that were, arguably, inherently purposive and necessarily related. In this light, it may and should be asked whether, seen as functionally dependent and critically important compliance systems, their continued separation was intentional.

I note there is a degree of similarity between this sort of structural isolation between functionally dependent systems and those in play in the 'fees for no services' cases, the subject of extended analysis in the Financial Services Royal Commission. In the 'Culpable Corporate Minds' article, I discuss the potential characterisation of the fees for no services systems as intentional, knowing and dishonest (emphasis added, citations omitted):

Focussing on the inherent features of the payment systems, we saw that, in one scenario, deductions were automatically made for the provision of services pursuant to a system in which no advisor had been allocated to the client. In another, FSPs charged service fees to clients notwithstanding having received notice of their death. In both cases, there was **a failure of the records of the status of clients to be calibrated against the payments deducted from their accounts. In other words, the record systems and payment systems which should have been closely linked were operating in isolation. This cannot be dismissed as mere error or the result of an unfortunate oversight. The systems were designed to remain in place over extended periods** and in respect of human clients whose circumstances would inevitably change (a feature implicit in the very idea of intermittent, renewed financial advice). Here, one starts from the position that the systems as instantiated were intended and were predicated on the knowledge necessary for the system to function (eg details of client accounts,

the necessity for continuing authorisation for deductions, the basis or reasons for the deductions and so on). The question then becomes whether (absent countervailing evidence by the defendant on these issues, for example going to mistake) the conduct was dishonest assessed against objective community standards, viewed in light of that assumed intentionality and knowledge.

Here, it is plausible that the requisite standard of dishonesty is revealed in **the period of time over which the conduct extended, which may indicate a reckless disregard** for the ongoing, lawful basis for the deductions and a blind eye being turned to the need for regular review of the payment system itself. This assessment is supported by French's insights (and consistent with Fisse's concept of reactive

