

SYSTEMIC UNCONSCIONABILITY AND CORPORATE INTENTION

KRISTINA STERN¹ AND SCOTT MURRAY-WALKER²

I INTRODUCTION

1. In 2024 Payne JA addressed the Commercial Law Association on the subject “*How do companies think?*”. In setting out his thesis, his Honour suggested that, when determining a company’s state of mind, the relevant question was “whose state of mind is attributable to the company”. It is now possible to address a variant on the subject matter of Payne JA’s paper by reference primarily to a case which was handed down shortly after Payne JA delivered his paper last year (and included briefly in the written paper prepared subsequently)³, the decision of the High Court, delivered on 14 August 2024, in *Productivity Partners v Australian Competition and Consumer Commission; Wills v Australia Competition and Consumer Commission*⁴ (‘*Productivity Partners*’). This decision has been described as a “striking development” heralding “a real innovation in a fundamental aspect of the law of corporations”.⁵ The innovation is the approach adopted expressly in the judgments of Gordon J and Edelman J of divining corporate intention from the system, or system of conduct, in place at the company, sometimes now described as “systemic intention”.
2. The potential significance of the shift brought about by *Productivity Partners* is apparent from its subsequent treatment by Edelman J in the High Court. In *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd*⁶ (‘*Hutchinson*’) at [67], the Court was considering whether, on the facts, it had been shown that there was an understanding within s 45E(3) of the *Competition and Consumer Act 2010* (Cth) (CCA). This provision prohibits certain contracts, arrangements or understandings affecting the supply or acquisition of goods or services that contain a provision included

¹ Judge of Appeal, Supreme Court of New South Wales. A version of this paper was delivered to the Commercial Law Association on 8 August 2025.

² Solicitor, Herbert Smith Freehills.

³ Justice Tony Payne, ‘How do companies think?’ (2024) 55 *Australian Bar Review* 33.

⁴ (2024) 281 CLR 228; [2024] HCA 27 (‘*Productivity Partners*’).

⁵ Mark Leeming, ‘Commentary on Elise Bant “Correcting the Public Conscience; Reflections on Finn and the Forgotten Trust”’ (forthcoming).

⁶ [2025] HCA 10; 99 ALJR 695 (‘*Hutchinson*’).

for the purpose of preventing or hindering the person from acquiring or continuing to acquire goods or services from another person from whom the person has been accustomed, or is under an obligation, to acquire those goods or services. Edelman J held that if such understanding had been arrived at, such that it was relevant to consider purpose, the purpose of the relevant entities would have been that of the two relevant individuals as “the ACCC did not run any case based upon systems intentionality or a purpose that could be deduced from corporate systems”. This was footnoted by reference to both *Productivity Partners* and the seminal article (considered below) by Professor Elise Bant.⁷

3. The implicit recognition by Edelman J that systems intentionality may have a place in determining the purpose for which a provision was included in a contract, arrangement or understanding for the purposes of s 45E of the CCA shows the potential breadth of the development brought about by *Productivity Partners*. It suggests that no assumption should be made that the concept of systemic intention has application only to statutory unconscionability.
4. Of particular significance is the scope for systems intentionality to provide a bridge between the increasingly digitalised operation of corporate systems and the use of artificial intelligence (AI) on the one hand, and a legal framework which has been framed on an assumption of, often determinative, human agency. Where, for example, a consequence flows from the operation of an algorithm or other entirely digitalised process, it may be difficult or impossible to show that this consequence was intended or foreseen (or even ought to have been foreseen) by any individual or to draw any inference about any individual’s state of mind. Applying traditional approaches to divining a corporate state of mind or intention, it would be necessary to show what relevant individuals knew or ought to have foreseen, known, or intended, in order to found corporate liability dependent upon establishing a particular state of mind. That is so even where intention is based upon an entity doing something with knowledge of the inevitable consequences of taking that course.⁸ Adopting a theory of systemic intention, however, may make it unnecessary to focus upon an individual’s thought

⁷ Elise Bant, ‘Systems Intentionality: Theory and Practice’ in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, 2023) 183.

⁸ See, eg, *Smith v The Queen* (2017) 259 CLR 291; [2017] HCA 19 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

processes, as corporate intention or state of mind may be found to exist irrespective of what could be shown about individual knowledge or intention. In the digital age, and more particularly in the age of burgeoning AI, that development may have far reaching consequences.

5. A shift towards systemic intentionality, and relatedly the divining of corporate states of mind from corporate systems, may require some reassessment of an approach to corporate culpability which is dependent upon normative judgments about human conduct. The traditional approach of attributing the state of mind of a relevant individual to the corporation has meant that normative judgments in respect of corporations directly reflect normative judgments made about the conduct of individuals. As Edelman J said in *Productivity Partners*:⁹

“The assessment of an objective standard of conscience must ... import an evaluation of the extent of departure from principles of interpersonal morality as reflected in the values of the Australian common law and statute”.

6. The shift in focus potentially heralded by *Productivity Partners* may also have implications for corporate liability beyond statutory unconscionability. For example, as regards dishonesty, normative judgments about corporate conduct are predicated upon judgments about how humans conduct themselves. Thus, in *Hasler v Singtel Optus Pty Ltd*¹⁰ at [124] Leeming JA (Barrett and Gleeson JJA agreeing) said:

“Dishonesty amounts to a transgression of ordinary standards of honest behaviour. It is not necessary to say anything else by way of elaboration, save to confirm that it is not necessary to demonstrate that the person thought about what those standards were. (I have paraphrased Lord Hoffmann's account in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333 at [16].)”

7. Consistent with this, claims under the first limb of *Barnes v Addy* have been said to “turn upon conscience, rather than property”.¹¹ However, if corporate knowledge or state of mind is inferred from systems or patterns of conduct engaged in, it may be that findings could be made as to corporate dishonesty on the basis of inferences as to

⁹ *Productivity Partners* (n 4) [232].

¹⁰ (2014) 87 NSWLR 609; [2014] NSWCA 266.

¹¹ *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81 [44] (Leeming JA, Bathurst CJ and Sackville AJA agreeing) (citing *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 [267]).

intention, purpose or knowledge derived from the operation of those systems and patterns without focussing upon the state of mind of any relevant individual within the corporation.

8. Whether such an approach will prove attractive is, perhaps, doubtful. It is something of a jump to make those normative judgments, and thus to find that a corporation engaged in culpable conduct, when no individual or individuals had anything approaching the requisite state of mind for culpability. For example, it is conceptually difficult to conceive of a corporation as having engaged in unconscionable or dishonest conduct in circumstances where no person within the corporation could be said to have acted unconscionably or dishonestly. As discussed below, this conceptual difficulty may mean that systemic intentionality plays only a minor role moving forwards. Alternatively, it may be that courts are willing to shift the focus of the relevant liability rules away from normative judgments traditionally made about individuals towards a normative framework specifically geared towards the conduct of the corporation itself.

II PROBLEMS OF ATTRIBUTION WHERE INDIVIDUAL CULPABILITY IS ABSENT

9. As Payne JA explained in his paper, traditionally knowledge or a state of mind has been attributed to a company based upon the knowledge or state of mind of particular human actors,¹² as for example in *Bilta (UK) Ltd v Nazir (No 2)*¹³ at [41] (Lord Mance) and [183]-[209] (Lords Toulson and Hodge) and *Anderson v Canaccord Genuity Financial Ltd*¹⁴ (*'Anderson v Canaccord'*) at [237] (Gleeson, Leeming and White JJA). Moreover, as was clarified in *Anderson v Canaccord*, this is a context specific inquiry which depends upon interpreting the relevant rule of responsibility, liability or proscription to be applied to the corporate entity.¹⁵
10. Exemplifying the significance of the state of minds of individuals within a corporation where findings are made as to a dishonest and fraudulent breach of fiduciary duty, Gleeson JA said:¹⁶

¹² Justice Tony Payne (n 3).

¹³ [2015] UKSC 23; [2015] 2 WLR 1168.

¹⁴ (2023) 113 NSWLR 151; [2023] NSWCA 294 (*'Anderson v Canaccord'*).

¹⁵ Ibid [235]-[238].

¹⁶ Ibid [243].

“Equity only holds third parties who assist in a dishonest and fraudulent breach of fiduciary duty liable if they have a sufficient knowledge of the breach of fiduciary duty. In some cases, difficult questions of aggregation of knowledge held by various officers and employees of a company will arise, but for present purposes they may be put to one side. The notion at the core of the equitable principle is providing assistance to a fiduciary while having sufficient knowledge that the fiduciary is dishonestly and fraudulently breaching the fiduciary’s duty. Thus, at the core of the rules of attribution applicable for liability for knowing assistance is the state of mind of the natural persons who are regarded as providing the assistance.”

11. Similarly reflecting the significance in equity of normative judgments of human conduct, in *Consul Development Pty Ltd v DPC Estates Pty Ltd*,¹⁷ Stephen J noted:

“If a defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust the case may well be different, as it clearly will be if the defendant has consciously refrained from enquiry for fear lest he learn of fraud. But to go further is, I think, to disregard equity’s concern for the state of conscience of the defendant.”

12. In this context, issues often arise as to whether the knowledge of multiple individuals within a corporation can be aggregated. Australian courts have been reluctant to attribute a composite state of knowledge to a corporation: see in the context of statutory unconscionability, *Commonwealth Bank of Australia v Kojic*¹⁸ (*‘Kojic’*) at [62]–[63] per Allsop CJ, [118] per Edelman J (Besanko J agreeing at [69]). In *Kojic*, Allsop CJ put significance on the fact that “[n]o behaviour of any bank officer bespoke any lack of business conscience or ethics”¹⁹ and Edelman J observed that “[i]t 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”,²⁰ having earlier observed that aggregated corporate knowledge “is not a concept that can be applied in order to reach a conclusion that the corporation has acted unconscionably contrary to statutory proscriptions”.²¹

13. Allsop CJ recognised, however, that the situation might be different where there was a duty and opportunity for the individuals within the corporation to inform others of what they knew.²² Besanko J reserved the issue of aggregation of knowledge where there is

¹⁷ (1975) 132 CLR 373 at 412; [1975] HCA 8.

¹⁸ (2016) 249 FCR 421; [2016] FCAFC 186 (*‘Kojic’*).

¹⁹ *Ibid* [60].

²⁰ *Ibid* [112].

²¹ *Ibid* [89].

²² *Ibid* [66].

a duty to communicate, observing that that there were questions concerning the type, nature and extent of the duty that might lead a court to conclude that separate pieces of knowledge should be aggregated.²³ Edelman J, while also reserving this issue, suggested that unconscionable conduct by a corporation arising from a breach of a duty to communicate may instead be better understood as an unconscionable failure to ensure communication of that information, rather than as unconscionability based upon an aggregation of knowledge.²⁴

14. In the context of a claim for knowing assistance under the second limb (knowing assistance) of *Barnes v Addy*, in *Global Risk Alliance Group Services Pty Ltd v Harmer*²⁵ ('*Global Risk*') at [624], Nixon J said:

"I do not consider that the requisite knowledge of a defendant's dishonest breach of his fiduciary duties can be established, on the part of a corporation, by aggregating matters known to diverse employees or officers of the corporation where those matters were not in their totality known to any one person within that corporation, and where the matters known to any particular person were insufficient to establish such knowledge. As Devlin J observed in *Armstrong v Strain* [1951] 1 TLR 856 at 872, 'you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind'. Similarly, I do not consider that where some matters are known to one person in a corporation, and other matters to another, and it is the whole of those matters which are said to constitute suspicious circumstances, it is sound to infer, from the corporation's failure to investigate the entire combination of suspicious circumstances (which was not known to any one person), that the corporation itself had actual knowledge of the true position. However, for the reasons outlined below, I do not need to express any firm view on this issue."

15. Here, in the context where a finding of corporate dishonesty was required, Nixon J also focussed upon judgments characteristically made about individual actors, and uses the language of "a dishonest state of mind" which is seemingly tethered to the mind of a human actor within the corporation.

16. The approach exemplified in *Kojik* and *Global Risk* is one in which notions of conscience or ethics are firmly rooted in judgments as to human conduct. As set out above, such normative judgments are tied to expectations of human actors, not corporations as free-standing entities. Unless courts are willing to depart from an approach in which these normative judgments support findings as to culpability, it

²³ *Kojic* (n 18) [83].

²⁴ *Ibid* [153].

²⁵ [2024] NSWSC 79 ('*Global Risk*').

seems that inferences as to states of mind of individuals within the relevant corporation are likely, in some way, still to assume importance in species of liability, such as unconscionability or which depend upon findings of corporate dishonesty.

17. It has been suggested that the traditional approach to corporate attribution, of which *Kojic* and *Global Risk* would be examples, has a narrow and individualistic focus which fails to acknowledge that “a corporation may be greater than, and different from, the sum of its parts”²⁶ and fails to capture the complexity of modern companies in which decision making has been described as often being the product of corporate policies and procedures, rather than individual decision making.²⁷ This traditional approach has been described as ill-suited to the characteristics of modern corporations, having regard to devolved structures, information silos, the phenomenon of “group think” and the increasing use of automated processes and AI systems.²⁸

18. As Edelman J noted in *Kojic*, in the United States there is some support for aggregation of knowledge in the decision of the First Circuit Court of Appeals in 1987 in *United States v Bank of New England*²⁹ where a “collective knowledge instruction” was upheld as appropriate in circumstances where the bank’s criminal liability depended upon the bank wilfully failing to file currency transaction reports for transactions exceeding \$10,000 as part of a pattern of illegal activity. Wilfulness in that context had been held to involve knowledge of the reporting requirements and a specific intent to commit the crime. The trial judge directed the jury that there were a number of ways in which they could be satisfied as to wilfulness. Knowledge involved aggregating the knowledge of multiple bank employees. Intent involved focussing upon “the bank as an institution” with certain responsibilities and determining “whether the bank as an organization consciously avoided learning about and observing CTR requirements”, adding that this would only lead to guilt if the violations were “the result of some flagrant organizational indifference”. Rejecting the bank’s appeal, Bownes J held that:

“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components

²⁶ Rebecca Faugno and Elise Bant, ‘Corporate culture, conscience and casinos’ (2025) 33(4) *Griffith Law Review* 484, 485.

²⁷ Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) 90, 102.

²⁸ Faugno and Bant (n 26) 485.

²⁹ NA, 821 F 2d 844 (1st Cir 1987).

constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.”

19. However, as Edelman J also observed in *Kojic*,³⁰ the approach taken in *United States v Bank of New England* has not universally been followed: see eg *In re Apple Computer, Inc.*³¹ Moreover, the “aggregation” doctrine has been described as simply “perpetuat[ing] the personification of companies myth ... [and] ignor[ing] the reality that the real essence of the wrongdoing might not be what A, B, C and D did but the fact that the company had no organisational structure or policy to prevent A, B, C and D each doing what they did in a way that cumulatively amounts to a crime”.³²

III SYSTEMIC UNCONSCIONABILITY

20. Section 21(4)(b) of the *Competition and Consumer Act 2010* (Cth), Sch 2 - Australian Consumer Law (ACL) provides that it is Parliament’s intention that s 21:

“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”.

21. In *Unique International College Pty Ltd v Australian Competition and Consumer Commission*³³ (*‘Unique’*), the Court emphasised particular characteristics which may be relevant to proof of systemic unconscionability:³⁴

“The notion of unconscionability is a fact-specific and context-driven application of relevant values by reference to the concept of conscience: see *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 and *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421. It is an assessment of human conduct. A system of conduct requires, to a degree, an abstraction of a generalisation as to method or structure of working or of approaching something. If s 21(4)(b) is to be engaged, it is the system that is to be unconscionable. Nevertheless, the concept of unconscionability (even of a system) is a characterisation related to human conduct by reference to conscience, informed by values taken from the statute.”

22. In this passage, the Court left opaque how inferences were to be drawn as to a corporate entity’s state of mind to the extent that may be relevant to the characterisation of a

³⁰ *Kojic* (n 18) [104].

³¹ 243 F Supp 2d 1012 at 1023 (ND Cal, 2002).

³² CMV Clarkson, ‘Corporate Culpability’ (1998) 2 *Web Journal of Current Legal Issues*.

³³ (2018) 266 FCR 631; [2018] FCAFC 155 (*‘Unique’*).

³⁴ *Ibid* [104].

system as unconscionable. However, the emphasis upon the characterisation of unconscionability as being tethered to normative standards applied to human conduct highlights the tension implicit in applying such standards to a corporate entity.

23. The focus upon “a characterisation related to human conduct” developed somewhat in *Australian Securities and Investments Commission v Kobelt*.³⁵ Gageler J explained:³⁶

“The correct perspective is that s 12CB operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct. The court needs to administer that standard in the totality of the circumstances taking account of each of the considerations identified in s 12CC if and to the extent that those considerations are applicable in the circumstances.” (footnotes omitted)

24. Nettle and Gordon JJ said:³⁷

“at least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute. The problem of indeterminacy is addressed by close attention to the statute and the values derived from it, as well as from the unwritten law.” (footnotes omitted)

25. Neither of these formulations is necessarily tethered to normative judgments about human conduct, as opposed to conduct undertaken in the relevant field of commerce.

26. The tension between individual and corporate states of mind, as relevant to statutory unconscionability, can also be seen in the following passage in the judgment of Beach J in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)*³⁸ (*ASIC v AGM*) at [373]:

“statutory unconscionability does not require only focusing on the alleged wrong doer’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

³⁵ (2019) 267 CLR 1; [2019] HCA 18.

³⁶ Ibid [87].

³⁷ Ibid [153].

³⁸ (2020) 275 FCR 57; [2020] FCA 208 (*ASIC v AGM*).

implicit values previously identified, state of mind is relevant.”

27. Whilst there is no discussion in *ASIC v AGM* of anything even approximating the concept of systemic intentionality, Beach J, when analysing why the systemic unconscionability claim should be upheld, made findings as to what the “systems put in place seem[ed] to have been designed” to do³⁹ and as to the “purpose” of the defendants (being corporations),⁴⁰ based upon the operation of the system without relying, in these findings, upon the design or purpose of any individual within the defendant corporations. Such an approach is entirely consistent with that explained by both Gordon J and Edelman J in *Productivity Partners*. It is perhaps also noteworthy that Beach J in *ASIC v AGM* characterised a “system” as something “designed or intended in its structure” whereas “a pattern may be manifested without any design or intentional input”.⁴¹ The latter would appear to comprehend a finding of statutory unconscionability as regards conduct that was not the product of any human design.

IV PRODUCTIVITY PARTNERS

28. *Productivity Partners* involved allegations of systemic unconscionability, contrary to s 21 of the ACL, in the context of the provision of vocational education and training (VET) courses by Productivity Partners Pty Ltd, trading as Captain Cook College (the College). The College was providing courses through the Vocational Education and Training Fee Higher Education Loan Program scheme under the *Higher Education Support Act 2003* (Cth). Broadly, this involved the Commonwealth paying VET tuition fees directly to the College, as the provider of VET courses, on the basis that students enrolled in the courses at a nominated census date incurred a debt to the Commonwealth in the amount of the VET tuition fees plus 20%. This debt was only repayable if the student’s earnings exceeded a prescribed amount. Whilst the case involved proceedings against the College, its parent company Site Group International Ltd (Site) and the Chief Operating Officer of Site, Blake Wills, for present purposes it is the claim against the College that is relevant.

29. The College’s business model was to use marketing and sales agents (somewhat inaptly

³⁹ Ibid [426].

⁴⁰ Ibid [439].

⁴¹ Ibid [389].

referred to as “course advisers” (CAs)), paid by commission to recruit persons to enrol in online courses offered by the College. The commission structure provided an incentive for the agents to ensure that students were in fact enrolled in courses, and that they remained enrolled past at least the first applicable census date.⁴² There was an obvious risk of misconduct by CAs, in either enrolling unsuitable students or misrepresenting the financial consequences of enrolment.⁴³ Moreover, as these were online courses with no face-to-face contact, it was difficult to guard against the risk that unsuitable students were enrolled or that students were misled by CAs.⁴⁴ There was no challenge to findings in the lower courts that “key personnel at the College” were aware of these risks.⁴⁵

30. The systemic unconscionability included changes by the College to its enrolment and withdrawal procedures, so as to remove controls which had previously protected (at least to some extent) against these risks. The first change was that the College no longer implemented outbound “quality assurance” calls, whereby a College employee would call a prospective student 48 hours after an application had been submitted, and thus at a time when the CA was no longer with the prospective student.⁴⁶ The second change was that the College abandoned its system of “campus driven withdrawals” pursuant to which unengaged and uncontactable students had been withdrawn at the College’s instigation before the first census date (avoiding them incurring any debt to the Commonwealth).⁴⁷ I will refer to these changes as the “process changes”. As the Full Federal Court found, the catalyst for these changes was that CAs were referring students to other online colleges such that the College’s revenue was declining.⁴⁸

31. The effect of the process changes was such that, within a few months, the College’s monthly revenue from fees paid by the Commonwealth had increased to be more than 5000% of what it had been, on average, in the months prior to the changes. There were also significant increases in the percentage of students at the College who enrolled in, but did not complete courses such that, during the relevant period, 99.7% of the students

⁴² *Productivity Partners* (n 4) [27].

⁴³ *Ibid* [29].

⁴⁴ *Ibid* [30].

⁴⁵ *Ibid* [31].

⁴⁶ *Ibid* [33], [37].

⁴⁷ *Ibid* [34], [37].

⁴⁸ *Ibid* [35], [46].

who passed through at least the first census date did not complete their course, and the percentage of students who passed through at least one census date but did not ever log into the learning management system increased from 27.9% to 86.5%.⁴⁹

32. An important aspect of the case brought against the College was that systemic unconscionability was alleged not just in the making of the process changes, but also in the claiming and retaining of fees from the Commonwealth in respect of students enrolled after the changes were made.⁵⁰ This shows how broad the concept of a “system” can be for the purposes of s 21 of the ACL. More particularly, all elements of the system do not need to coexist at the one time.

A Systemic Intention in Productivity Partners

33. The characterisation of the corporate purpose underlying the process changes was an important aspect of the findings of unconscionability by both Stewart J at first instance and the Full Federal Court. Thus, Stewart J found that the process changes were “driven by avarice without regard to the interests of” the students and that the College “preyed” on students’ vulnerability.⁵¹ To similar effect, the Full Federal Court (Wigney and O’Brien JJ) found that the College took advantage of known risks to gain a financial benefit to the disadvantage of unsuitable or misled students.⁵² It described the process changes as driven by sales and marketing objectives.⁵³ There were no challenges to these findings on appeal to the High Court.

34. The College’s second ground of appeal in the High Court was that:⁵⁴

“the Full Court erred in holding that the College’s conduct, in removing the two system controls and operating an enrolment system without those controls, constituted unconscionable conduct in contravention of s 21 of the ACL in the absence of an intention that the risks ameliorated by those controls eventuate.”

⁴⁹ Ibid [38]–[40].

⁵⁰ Ibid [324]–[325].

⁵¹ *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] [2021] FCA 737; 154 ACSR 472 [500].

⁵² *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180; [2023] FCAFC 54 [177].

⁵³ Ibid [76].

⁵⁴ *Productivity Partners* (n 4) [8].

35. Elaborating upon this in oral submissions, Senior Counsel for the College contended:

“The intention of putting the system into place must, in our submission, be important because, at least in this case, that is the object that the systems sought to achieve. We do not intend misconduct to eventuate.”

36. As to the role of intention on the facts of *Productivity Partners*, Gageler CJ and Jagot J (Gleeson J agreeing) held that:⁵⁵

“An increase in a risk of misconduct being undetected that was reasonably foreseeable at the time of the conduct in question can be considered in determining whether conduct is unconscionable without need for any intention that the misconduct occur.”

37. The focus here is, implicitly, upon some (unstated) person, to whom that risk was reasonably foreseeable.

38. Gordon J took a different approach. Drawing on the passage from the judgment of the Full Federal Court in *Unique* (at [21] above), Gordon J (Steward and Beech-Jones JJ agreeing with this aspect of her Honour’s reasons) described the focus of s 21(4)(b) as being “less on a ‘particular event’ or transaction, and more on ‘an abstraction o[r] a generalisation as to method or structure’ of the contravener’s activities”.⁵⁶ Her Honour then elaborated upon this:⁵⁷

“A ‘system of conduct’ connotes ‘an internal method of working’ or a plan of procedure. Such a system may develop organically as a practice, operate at a level of policy or be a combination of practice and policy. Corporations ‘think’ and act through systems. Systems are inherently purposive. Systems are objectively designed to achieve certain ends; they coordinate and connect steps and processes to an end. Knowledge of certain matters is often implicit in a system – for example, that a predatory business model will only be profitable if a certain class of vulnerable customer exists and is successfully exploited.” (footnotes omitted)

39. It is this focus upon corporations thinking and acting through systems, rather than upon the states of mind of those who develop or implement it, that heralds something of a shift in focus from earlier analyses. However, her Honour’s reference here to “knowledge” is to some extent, ambiguous. On the one hand, her Honour may be identifying that those who designed or implemented the system should be inferred to

⁵⁵ Ibid [66].

⁵⁶ Ibid [106].

⁵⁷ Ibid [108].

have this knowledge. On the other hand, however, it may be that her Honour is making the more far-reaching observation that corporate knowledge may itself be inferred from a system irrespective of whether such inference can or should be drawn as to the knowledge of any relevant individual. If the latter interpretation is to be placed on her Honour's analysis, it has potential significance in any case in which corporate knowledge is the foundation of liability.

40. As to the relevance of this to unconscionability and intention, her Honour said:⁵⁸

“As Professor Bant has explained, a corporate system can be understood as a manifestation of corporate intentionality. That is, ‘corporations *manifest* their intentions through the systems of conduct that they adopt and operate, both in the sense that any system *reveals* the corporate intention and in the sense that it *embodies* or *instantiates* that intention’. And to better understand the characteristics of a system of conduct, it is often useful to reflect on related concepts such as practices, processes or methods, policies and patterns of behaviour. A ‘pattern of behaviour’ or conduct has been said to connote the external, observable repetition of events. It may signify a sequence of events on which a prediction of successive or future events may be based. In the context of the ACL, that is unsurprising. As we have seen, the court may have regard to circumstances that were ‘reasonably foreseeable’ at the time.” (footnotes omitted, emphasis in original)

41. As with the reference “knowledge” at [108], there is some ambiguity here. Is her Honour saying that inferences can be drawn as to the intention of individuals (whose thinking might be attributed to the company) from the operation or manifestation of a corporate system? That might be suggested by her Honour's reference to intention being manifested by a system being “adopt[ed] and operate[d]”, and to what was “reasonably foreseeable”. Both of those expressions might suggest a focus upon the state of mind of an individual. Alternatively, is her Honour identifying a concept of corporate intention which is entirely separate from the thinking of any individual or individuals? This second view is arguably strengthened by the fact that in the quoted passage picked up by Gordon J, Professor Bant is putting forward the “systems intentionality” model as an answer to how a corporation can be unconscionable or fraudulent (among other things) when none of its employees hold the requisite state of mind.⁵⁹

42. On the facts of *Productivity Partners*, Gordon J inferred from “the design of [the] system” (meaning the dismantling of controls previously in place) that the College

⁵⁸ *Productivity Partners* (n 4) [109].

⁵⁹ Bant, ‘Systems Intentionality: Theory and Practice’ (n 7) 187.

intended to dismantle controls which it knew minimised exploitation of students in order to increase the College's profit.⁶⁰ In this key finding her Honour relied both upon the design of the system, but also upon what the College "knew". By way of context for this finding, detailed findings as to actual knowledge had been made by Stewart J and affirmed by the Full Federal Court.⁶¹

43. When responding directly to the College's second ground of appeal, Gordon J concluded that the College's system was revealing of, and gave effect to, its corporate intention.⁶² More particularly, as the system was designed to achieve a particular end "it may be inferred that the College 'mean[t] to produce' that end", being the removal of controls on the enrolment of unwitting or unsuitable students in order to reduce the attrition rate prior to census and thereby to increase revenue.⁶³ This finding unequivocally rests upon the nature (design) of the system rather than upon the state of mind of any human actor, although for completeness we note that a similar finding is also made on the basis of the actual knowledge found by the courts below.⁶⁴

44. Like Gordon J, Edelman J held that:⁶⁵

"the heuristic of the 'actions' and 'intentions' of a corporation is not confined to the attributed actions of natural persons. A corporation might also be treated as having acted or as having an intention based upon its systems, that is, its policies, procedures or patterns of conduct."

45. His Honour described the "novelty" of corporate systems liability as being that "a corporation can be treated as having acted, and as having intentions, without those actions having been taken, or those intentions held, by any individual natural person".⁶⁶

46. Justice Edelman elaborated upon this analysis, stating that an alternative to the legal

⁶⁰ *Productivity Partners* (n 4) [111].

⁶¹ *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] [2021] FCA 737; 154 ACSR 472 [494], [496], [498]-[499]; *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180; [2023] FCAFC 54 [17], [172].

⁶² *Productivity Partners* (n 4) [143].

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid* [199].

⁶⁶ *Ibid* [200].

rules whereby a natural person's intention is attributed to a company is:⁶⁷

“[to recognise] a corporation as having ‘acted’ or as having an ‘intention’ where a system has been built with the authority of senior persons controlling the company such that the actions of automated processes, or of one or more natural persons, can be properly attributed to the corporation to the extent that they arise out of that system. The point is that actions and intentions are attributed to the corporation directly from its systems rather than from any natural person.” (footnotes omitted)

47. His Honour added, using the analogy of a football team, that recognising “group agency”, “legal rules can provide that a corporation acted even if the action cannot be attributed to the corporation from a single individual”.⁶⁸ His Honour found that the:⁶⁹

“concept of intention should be applied to a system as though the system, as a construct, were a natural person.”

48. His Honour also emphasised that intention is the reason for behaving as one does, whether as an end itself, or as the means to the end, citing observations to that effect in *OBG Ltd v Allan* [2008] AC 1 at [42],⁷⁰ where Lord Hoffman explained that “people seldom knowingly cause loss by unlawful means out of simple disinterested malice” but that it “is usually to achieve the further end of securing an economic advantage to themselves”.

49. Justice Edelman relied upon this analysis in rejecting the College's second ground of appeal. His Honour held that, as the claim was focussed at the level of the system, it was unnecessary for the ACCC to show that any individual chose agent misconduct or unsuitable enrolments as a means to maximise profit. This was because the College had removed the two process controls as the means adopted for the maximisation of profit. On the facts, that was sufficient to prove the College's intention that students would be enrolled notwithstanding agent misconduct or unsuitability.⁷¹

50. As for academic analysis, in *Productivity Partners* both Gordon J and Edelman J cited the chapter by Professor Bant⁷² in support of their analysis of systemic intentionality.

⁶⁷ Ibid [237].

⁶⁸ Ibid [239].

⁶⁹ Ibid [241].

⁷⁰ Ibid.

⁷¹ Ibid [247].

⁷² Bant, ‘Systems Intentionality: Theory and Practice’ (n 7).

There, Professor Bant proposes what she describes as “a novel, additional model of corporate culpability” predicated upon systems embodying and instantiating corporate intention and posits that this will assist in forming a clearer picture of corporate intention, knowledge, dishonesty, unconscionability, mistake and recklessness.⁷³ She also suggests that both knowledge and intention (as relevant to unconscionability whether in equity or under statute) may be manifested through systems adopted by a corporation.⁷⁴ For Professor Bant, systems may be relied upon in this way to “embody and reveal the overall corporate mindset” such that a finding might be made as to the state of mind of a corporation by a process which “involves characterising through an objective process of evaluation the systems of conduct through which the corporation pursues its process”.⁷⁵

51. Steve Kourabas and Cheng-Yun Tsang suggest that the reasoning in *Productivity Partners* raises interesting considerations where AI systems are relied upon to make decisions, or are an integral part of a group decision-making process, expressing the view that the analysis in *Productivity Partners* means that directors must consider the prospect of liability where a corporation adopts an AI system.⁷⁶

B Cases since *Productivity Partners*

52. As we have already discussed, Edelman J in *Hutchinson* indicated the potential for reliance upon systemic intentionality well beyond the ambit of statutory unconscionability.
53. In *Australian Securities and Investments Commission v Union Standard International Group Pty Ltd (No 4)*⁷⁷ (*‘Union Standard’*), Wigney J summarised the principles concerning statutory unconscionability as including the concepts recognised by

⁷³ Bant, ‘Systems Intentionality: Theory and Practice’ (n 7) 183-184, 187. See, also, Elise Bant, ‘Modelling Corporate States of Mind’ in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, 2023) 231, 243-245, 250; Elise Bant and Jeannie Marie Paterson, ‘Systems of Misconduct: Corporate Culpability and Statutory Unconscionability’ (2021) 15 *Journal of Equity* 63.

⁷⁴ Bant, ‘Systems Intentionality: Theory and Practice’ (n 7) 187; Bant and Paterson (n 73).

⁷⁵ Bant, ‘Modelling Corporate States of Mind’ (n 73) 246.

⁷⁶ Steve Kourabas and Cheng-Yun (CY) Tsang, ‘The Board Monitoring Function: Artificial Intelligence in the Era of Heightened Accountability’ (Law Working Paper No 856/2025, European Corporate Governance Institute, July 2025) 26-27.

⁷⁷ [2024] FCA 1481 (*‘Union Standard’*).

Gordon J in *Productivity Partners* at [107]–[110].⁷⁸ Of particular significance, this included her Honour’s identification that a system of conduct may “develop organically as a practice”, which allows for something that emerged without any human design to be characterised as unconscionable.

54. Moreover, in *Union Standard*, Wigney J drew inferences as to intention from the system of misleading advertising and promotions that his Honour found to have been used. Having found that the natural and likely consequence of the system was that it was unlikely to attract anyone with relevant knowledge and expertise,⁷⁹ Wigney J inferred that “the targeting of such people was systemic and deliberate”.⁸⁰ His Honour found that Europe FX management must have been well aware from complaints and monitoring that there were many people who came to Europe FX with a misapprehension as to what they would be trading in and that there was no evidence that management did anything to change the systems in response.⁸¹ Critically, Wigney J found that the “utilisation of a promotional or marketing system that effectively targeted relatively naïve and inexperienced traders largely produced what may be inferred to be the desired outcome”.⁸² That finding was reached without reference to the state of mind of management, albeit that the finding may have in part depended upon the findings as to knowledge of management derived from complaints and monitoring. This finding clearly formed at least part of the factual premise for Wigney J’s ultimate finding that the systems of conduct Europe FX employed, and the patterns of behaviour it engaged in, took advantage of many of its customers who were vulnerable and exposed.⁸³

55. In this way, this aspect of the reasoning of Wigney J in *Union Standard* is primarily based upon systemic intentionality, albeit in conjunction with some findings as to actual knowledge of management. In other respects, for example as regards the misconduct of Europe FX’s account managers, Wigney J made a specific finding as to the knowledge of Europe FX’ management.⁸⁴

⁷⁸ Ibid [1212]–[1215].

⁷⁹ Ibid [1263]–[1265].

⁸⁰ Ibid [1265].

⁸¹ Ibid.

⁸² Ibid [1266].

⁸³ Ibid [1458].

⁸⁴ Ibid [1416].

V OTHER APPROACHES TO CORPORATE STATES OF MIND IN THE DIGITAL AGE

56. In *Quoine Pte Ltd v B2C2 Ltd*⁸⁵ (*Quoine v B2C2*), the Singapore Court of Appeal considered a case involving two companies who were involved in transactions (which in fact were between separate counterparties) which took place in the middle of the night, conducted by way of algorithms on a cryptocurrency exchange platform. The transactions took place without any human involvement, save that involved in the creation and ongoing modification of the relevant algorithms. Certain trades were conducted by the algorithms at approximately 250 times the going rate in the market, and when it discovered this (at 6.15 am the next morning), Quoine Pte Ltd (Quoine) unilaterally cancelled the trades and reversed the settlement transactions, leading to a claim by B2C2 Ltd (B2C2) for breach of contract and breach of trust. Quoine's contentions in its defence included that the contracts underlying the disputed trades were void or voidable for unilateral mistake or void for common mistake.

57. The trial judge found that the margin traders had a mistaken belief that they were buying the securities at prices which represented or did not deviate significantly from their true market value and that finding (which was based upon the state of mind of the co-founder of one of the margin traders) was not disturbed on appeal.⁸⁶ However, the majority agreed with the primary judge that there was no operative mistake that could be relied upon by Quoine to vitiate the contracts and rejected its appeal against a finding of breach of contract.

58. In reaching this conclusion, the majority paid close attention to the nature of the trading software used by B2C2, as explained in evidence given by the designer of the software (who was also a director of B2C2 and was described by Mance J as "the proprietor of B2C2"). In particular, that it used a deterministic algorithm, which meant that it would always produce precisely the same output given the same input. This was said to be "significant" to the analysis of unilateral mistake.⁸⁷ The pricing which gave rise to the claim had occurred as a result of deliberate programming by B2C2 to deal with a lack of liquidity in the market, which meant that the B2C2 software had no or insufficient

⁸⁵ [2020] SGCA (I) 02 (*Quoine v B2C2*).

⁸⁶ Ibid [38], [40], [112], [115], [186].

⁸⁷ Ibid [15].

input from the order book, which in turn triggered a “deep price” for sell orders which it generated on the platform. The lack of liquidity occurred because Quoine changed some login passwords for operating systems on the platform but did not make necessary changes to the program, which meant that the program could not access market data to generate new orders. This led to the platform’s order book thinning out, which in turn caused the platform to think that the margin traders were in margin sell-out position, triggering margin calls. This resulted in the securities being bought at increasingly higher prices to fulfil the margin call.⁸⁸

59. As regards deterministic programs, where one contractual party was mistaken, the majority held that the state of mind of the other contracting party, being whether it had actual or constructive knowledge of the mistake or had unconscionably taken advantage of the other party, should be determined by having regard to the state of mind of the programmer or person running the algorithm.⁸⁹ The majority explained:⁹⁰

“... a deterministic computer program or algorithm is bound by the parameters set by the programmer, and can (and generally will) only do what the programmer has programmed it to do. Given a particular input, it will produce a particular output; on each occasion, the output should and will be the same if the former does not change. Therefore, when it comes to assessing the state of knowledge that is to be attributed to the parties at the time of a contract made by way of deterministic algorithms, the relevant inquiry cannot be directed at the parties themselves, who had no knowledge of or direct personal involvement in the formation of the contract. Rather, working backwards from the output that emanated from the programs, we are driven to assess the relevant state of knowledge by examining that of the programmers.”

60. What is thus clear is that the majority approached the question of corporate state of mind by reference to the acts of designing and modifying the algorithm. It was that, rather than the operation of the system, from which corporate intention and knowledge was gleaned.

61. As to the time when the state of mind of the programmer was relevant, the majority held that it was from the point of programming up to the point that the relevant contract was formed. The extension of this time beyond the point of programming was

⁸⁸ Ibid [18], [27]-[29].

⁸⁹ Ibid [97], [99].

⁹⁰ Ibid [98].

because:⁹¹

“there may be situations where a programmer or the person running the algorithm who did not contemplate the relevant mistake at the point of programming came to learn of it subsequently before the contract had been formed, and yet allowed the algorithm to continue running, intending thereby to take advantage of the mistake.”

62. As to the kind of mistake that might suffice, the majority held that programmers “are not expected to be prophets”.⁹² Thus, the relevant enquiry as to unilateral mistake was:⁹³

“when programming the algorithm, was the programmer doing so with actual or constructive knowledge of the fact that the relevant offer would only ever be accepted by a party operating under a mistake and was the programmer acting to take advantage of such a mistake?”

63. On this basis, the majority found there was no basis for Quoine to rely upon unilateral mistake at common law or equity as the deep prices had not been programmed with the awareness or intention of taking advantage of a mistaken bid by a counterparty or entering into a contract on that basis.⁹⁴ In this regard, it is of significance that there were no grounds for concluding that the programmer had ever turned his mind to the relationship between margin traders and those who loaned them money or had programmed the pricing with margin trades in mind. Thus, he could not have programmed the software with knowledge (or should be taken to have had knowledge) of the opportunity for exploitation of a mistake that was created by its operation in this operational context.⁹⁵

64. As is apparent, B2C2’s corporate state of mind was tested by reference to the state of mind of the programmer. In determining the issues raised in the case, the majority emphasised that the enquiry had to be made in the context of the actual conduct, namely algorithmic contracts with no face to face contact, rather than (as contended for by Quoine) by considering a hypothetical meeting on the trading floor based on information available to humans at the relevant time.⁹⁶ This is of some significance to

⁹¹ Ibid [99].

⁹² Ibid [102].

⁹³ Ibid [103].

⁹⁴ Ibid [117(b)].

⁹⁵ Ibid [119], [123].

⁹⁶ Ibid [104].

the potential analysis of the state of mind of a corporation in the context of AI and algorithmic systems. It supports an approach that takes account of the practical realities of how the system developed and operated rather than seeking to approach the issues by reference to a hypothetical scenario in which the system was developed or administered by individuals with actual knowledge and substantive input.

65. The majority held that it was relevant on the question of motive in programming the deep prices, and therefore unconscionability,⁹⁷ that the programmer did not consider that there was a real possibility of “orders placed on the Platform at the deep prices being filled”.⁹⁸ Moreover, in addition to the finding outlined above at [63] as to the programmer’s cognisance of margin traders when programming the deep prices, it was found that the programming was in part for an entirely legitimate purpose of ensuring that the B2C2 system remained operational in circumstances of illiquidity.⁹⁹ Thus, although the inclusion of deep prices in the program was “opportunistic”,¹⁰⁰ this was not a case where the system could only have been operated to achieve a harmful purpose, nor one where it was designed to exploit a mistake such as that which occurred.
66. There is of course a potential complication if corporate knowledge is taken to be that of a programmer. Albeit that in *Quoine v B2C2*, the programmer was also a director of B2C2, the person or persons programming software may in other cases be at some level removed from the operation of the relevant corporate entity. Thus, as was accepted on the evidence in *Quoine v B2C2*, a programmer may well not be aware of all the vagaries of how a particular algorithm might function in the relevant operational environment. Whether or not the knowledge of others in a corporation who are aware of such matters should be aggregated with the programmer’s knowledge was not a question which arose in *Quoine v B2C2*.
67. As to whether there was any unilateral mistake at common law, the majority held that there was no operative mistake as to the prices at which the trading contracts were entered into because the price was “arrived at by operation of the parties’ respective algorithms, and it was common ground that these had operated as they were meant

⁹⁷ Ibid [118], [127].

⁹⁸ Ibid [121].

⁹⁹ Ibid [120].

¹⁰⁰ Ibid [127].

to”.¹⁰¹ The mistake on the part of Quoine was properly characterised as an assumption as to the circumstances under which the trading contracts would be concluded, which did not give rise to a right to relief at common law.¹⁰²

68. As to common mistake, the majority found that the programmer, and thus B2C2, did not hold a mistaken belief that the trades were being transacted under normal market conditions.¹⁰³ In so finding, the majority relied upon the fact that:¹⁰⁴

“[B2C2] had placed its sell orders for ETH at prices of 9.99999 BTC and 10 BTC to 1 ETH on the Platform because the intentionally pre-programmed deep price of 10 BTC to 1 ETH in the PureQuote strategy took effect”.

69. As is apparent, the corporate knowledge of B2C2 was tested not by reference to what relevant individuals within B2C2 actually thought at the time of the trades, but upon knowledge of the programmer as to how the algorithm was intended to work.

70. The dissenting judgment of Mance J in *Quoine v B2C2* also contains significant observations as to the question of divining corporate states of mind from the design or operation of its systems. For his Honour, the question raised by the case was:¹⁰⁵

“Do conventional legal principles work, or may they need to adapt, when traders hand their affairs to computers operating by algorithm?”

71. Mance J agreed that there was no actual mistake because “of the very fact that the transactions were effected by computers operating mechanistically according to algorithms, leading inexorably, although blindly, to such transactions”.¹⁰⁶ However, his Honour considered that the trading contracts were voidable by reason of unilateral mistake in equity, because there was a fundamental mistake, this was known to the parties as soon as the computerised transaction came to their attention, no relevant third party interests intervened and the mistake could readily be rectified.¹⁰⁷ He found that the usual focus of the enquiry in cases of unilateral mistake on “the actual state of mind

¹⁰¹ Ibid [115].

¹⁰² Ibid [115].

¹⁰³ Ibid [117(a)], [122], [129].

¹⁰⁴ Ibid [129].

¹⁰⁵ Ibid [152].

¹⁰⁶ Ibid [182].

¹⁰⁷ Ibid [183].

and conduct of human beings involved in the making of the contract” as and when the contract is made was “by definition impossible” in the context of a contract made between “computers programmed by humans”.¹⁰⁸.

72. In these circumstances, Mance J said that:¹⁰⁹

“[t]he key question is, therefore, whether the law of unilateral mistake falls to be applied in a manner which leaves out of consideration circumstances which are normally central to its application, simply because the parties entrusted their dealings to computers which can have no such consciousness. In my opinion, it does not and should not. The law must be adapted to the new world of algorithmic programmes and artificial intelligence, in a way which gives rise to the results that reason and justice would lead one to expect. The introduction of computers no doubt carries risks, but I do not consider that these include the risk of being bound by an algorithmic contract, which anyone learning of would at once see could only be the result of some fundamental error in the normal operation of the computers involved. Computers are outworkers, not overlords to whose operations parties can be taken to have submitted unconditionally in circumstances as out of ordinary as the present.”

73. For Mance J, the conundrum of finding what knowledge of the mistake B2C2 had was solved by “considering what B2C2’s actual state of mind [as derived from the human proprietor of B2C2] would have been, given knowledge of the circumstances of the transactions as and when they occurred”.¹¹⁰ Mance J said that this “is a test which relates what actually occurred to natural human reactions, given knowledge of what occurred”.¹¹¹ Thus, for Mance J the question of corporate knowledge should be analysed on the artificial hypothesis of what would have been known had the case arisen from trading between human actors. It is also of some interest that Mance J also focussed upon the need for the law to address issues with computer exchanges in a manner that corresponds both with “the clear justice of the case” and with “the natural expectations of reasonable traders”, thus giving weight to the states of mind of those using computer system, not just of those who have programmed them.¹¹²

74. Mance J characterised the species of knowledge upon which he based liability as being neither constructive nor actual knowledge, describing both of these as things which depend “on human involvement during the relevant transaction”. Rather, the knowledge

¹⁰⁸ Ibid [185].

¹⁰⁹ Ibid [193].

¹¹⁰ Ibid [178], [194].

¹¹¹ Ibid [194].

¹¹² Ibid [196].

upon which he relied was knowledge which would have arisen had the actual transactions been foreseen or had there been human involvement at the time of the transactions, noting that there was such actual knowledge of mistake as soon as the transactions were discovered. Given this “novel situation”, in which “the law needs to fashion an appropriate principle”, he said that unconscionability “cannot and should not have a role”. In any event, he considered it clearly unconscionable for a trader to retain the benefit of the transactions.¹¹³

VI QUESTIONS AS TO THE SCOPE TO INFER CORPORATE OF STATES OF MIND FROM A SYSTEM OR PATTERN FOLLOWING *PRODUCTIVITY PARTNERS*

75. As is apparent, there are likely to be many instances in which the traditional approach to divining corporate states of mind proves challenging given the increasing digitisation of corporate operations and decision-making. Having regard to this, there is a real likelihood that the approach taken by Gordon J and Edelman J in *Productivity Partners*, and potentially also that taken by both the majority and Mance J in *Quoine v B2C2*, will receive further attention. There are, however, a number of questions which must be resolved moving forwards.
76. *First*, for the purpose of inferring a corporation’s state of mind from a system or pattern, is it necessary that the liability rule in issue is predicated upon a system or pattern of conduct? The relevant liability in *Productivity Partners* was under s 21 of the ACL. Whilst s 21(4)(b) confirms that liability under s 21 is capable of arising by reason of a system of conduct or pattern of behaviour, that does not mean that systemic unconscionability is the subject of any discrete, or separate, prohibition under the ACL. Given this, there is no real reason why the analysis of systemic intention set out above could not apply to other corporate states of mind, in particular corporate knowledge (subject always to this being appropriate given the particular substantive rule in issue and nuances of the factual context).
77. *Second*, as already discussed, does the analysis of Gordon J and Edelman J in *Productivity Partners* support inferences as to corporate *knowledge* (as opposed to intention or purpose) being drawn from corporate systems and patterns? The

¹¹³ Ibid [204]-[205].

observations of Gordon J in *Productivity Partners* at [108] would certainly suggest so, but this is by no means certain given that, on the facts of that case, there was no real doubt as to the knowledge of relevant individuals within the corporation.

78. *Third*, how should corporate intention or knowledge be inferred from the operation of systems within a corporation? Such knowledge or intention might be inferred from corporate systems or patterns in at least three ways. One is that the fact of the pattern or conduct might itself be the basis for an inference that relevant individuals at the corporation designed or knew how the system was designed irrespective of any finding as to what any individual knew of the system or conduct. Where a relevant individual within a corporation has consciously designed a system to act in an unconscionable fashion, it is relatively easy (as in *Productivity Partners*) to make the normative judgments sufficient to found liability. This might be because the design of the system enables an inference to be drawn as to the intention of those who designed it, or it may be because there is evidence as to why the system was designed in the way it was. Similarly, where the operation or output of a system is monitored and the system continues to operate notwithstanding what is apparent from that monitoring, that may itself be a basis upon which corporate intention or knowledge is inferred.

79. Moreover, it may be possible to rely upon failure by the corporation to monitor the output or operation of systems or to introduce safeguards once it is apparent that the system produces the relevant consequence. An analogous basis of culpability is described by Brent Fisse as “reactive corporate fault”, and he describes this as “an expression of ordinary attitudes toward corporate reactive behaviour”.¹¹⁴ Failures by a corporation to take precautions against an algorithm producing particular consequences has already been relied upon in litigation in Australia. Indeed, the pleaded case of the ACCC in ongoing litigation it brings against Meta alleges misleading and deceptive conduct against Meta as regards fake celebrity endorsement advertisements, based in part upon allegations that Meta was aware of complaints about these advertisements and that Meta could have taken safeguards to reduce the prevalence of such ads or

¹¹⁴ Brent Fisse, ‘Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions’ (1983) 56 *Southern California Law Review* 1141, 1197.

issued warnings.¹¹⁵

80. A second way in which corporate systems or patterns might found corporate intention or knowledge might be that corporate knowledge or intention is inferred from those systems or patterns without recourse to an individual's state of mind in a number of situations. The most obvious example is a system that is intentionally designed to take advantage of vulnerable counterparties, in which case the very design of the system will evidence "a deliberateness that establishes culpability".¹¹⁶ Assessed objectively, and without even considering the state of mind of the person or persons who designed it, Professor Bant suggests that the design of the system could support an inference that the system was calculated to produce a particular outcome:

"where only one (or effectively one) output can be, and was in fact, produced from the corporation's deliberate system of conduct, it is reasonable to characterise the conduct as geared, or organised, to produce that outcome".¹¹⁷

81. Normative judgments akin to those which are traditionally the basis of liability might be premised upon the decision to adopt the system,¹¹⁸ or to do so without ensuring that there are appropriate checks or monitoring in place to avoid the undesirable outcomes.

82. A third way in which corporate systems may found an inference as to corporate knowledge is that the fact of information being fed into the corporate system might be relied upon to form an inference as to corporate knowledge irrespective of whether that knowledge was drawn to the attention of any individual within the corporation or whether any individual had a duty to acquire such information. The judgments of Gordon J and Edelman J do not address this third possibility. However, such an approach might find some support in the judgment of Mance LJ in *Quoine v B2C2* to the extent that his Lordship approached the question of liability by reference to the

¹¹⁵ *Australian Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc.)* (No 3) [2024] FCA 890; *Australian Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc.)* (No 4) [2025] FCA 1084 [27]-[28].

¹¹⁶ Jeannie Marie Paterson and Elise Bant, 'Automated Mistakes: Vitiating Consent and State of Mind Culpability in Algorithmic Contracting' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 255, 270. See also May Fong Cheong and Mini Zou, 'Resolving Wrongs in Algorithmic Contracting: Applications of the Doctrines of Unconscionability' (2025) 48(4) *UNSW Law Journal* 1399, 1420.

¹¹⁷ Bant, 'Modelling Corporate States of Mind' (n 73) 247.

¹¹⁸ See, eg, Paterson and Bant (n 116) 265, 269-271.

hypothetical construct of assumed human actors.

83. Moreover, it might be suggested that it is difficult to see why a company which is provided with information should not be attributed with knowledge of that information merely because its processes are automated, or digitised, and do not involve the intervention of any human actor. As against that, as can be seen in *Kojic* and *Global Risk*, courts may be reluctant to find culpability where the knowledge which would underpin the normative judgment upon which culpability has traditionally been based cannot be pinned on any individual. The same considerations apply to the two other inferences as to corporate knowledge discussed above.

84. *Fourth*, to what extent is systemic intentionality inconsistent with the normative judgments which traditionally form the basis for liability rules based upon notions of conscience or conscionability. In this regard, the reliance upon systemic unconscionability in *Productivity Partners* did not involve any jarring, given that the system of conduct, and its consequences, were clearly known to the relevant individuals within the corporation. It is perhaps more doubtful that systemic unconscionability will be relied upon in cases where it is not possible to make the usual normative judgments about the conduct of any individual within the corporation, as is apparent from the approach taken in the cases we discuss at [9]-[18] above.

85. It might, however, be suggested that changing corporate conditions require changes to the courts' focus upon normative judgments tethered to the conduct of individuals.¹¹⁹ As Professor Bant has argued:¹²⁰

“Most attribution rules, whether common law or statutory, search for a relevant individual whose mind counts for that of the corporation. This game of ‘Where’s Wally’ is easily played by modern corporations seeking to minimise or avoid liability.

...

The challenge is only heightened with increasing integration of automated processes into core business activities, alongside other, more complex new technologies. Even a simple automated payment process may quickly cause an attribution inquiry to degenerate into an ad hoc and unprincipled search for a human (coder, or coding team,

¹¹⁹ See, also, [89]-[90] below.

¹²⁰ Elise Bant, ‘Where’s WALL-E? Corporate Fraud in the Digital Age’ in Paul S Davies and Hans Tjio (eds), *Fraud and Risk in Commercial Law* (Hart Publishing, 2024) 55, 56-57.

or software engineer, or employee who presses a button, or manager of the department in which the software is notionally situated etc) on which to build some foundation for corporate guilt.” (footnotes omitted)

86. *Fifth*, whether corporate intention can be inferred from the operation of a corporate system might depend upon whether the corporation intended the system, for example a computerised system or algorithm, to define the company’s operations or was only intended to implement them. This distinction was identified as important to the process of contractual interpretation of smart contracts by the UK Jurisdiction Taskforce in its Legal Statement on Cryptoassets and Smart Contracts. This taskforce said that where a smart contract subsists solely in unambiguous code, then the objective process of contract interpretation might involve nothing more than deciding whether “the parties intend to be bound by the code – whatever it does”.¹²¹ A similar approach might be taken to determining subjective intention, which suggests that evidence as to the intention or knowledge of individuals within the corporation might be relevant to the question whether, and if so how, the operation of a system could support inferences as to a corporate state of mind.
87. *Sixth*, and relatedly, it is likely that evidence as to the state of mind of relevant people within a corporation will be relevant to the extent that they might say that they never anticipated or intended the system to operate in the way that it did. Whilst this evidence might not necessarily be determinative of corporate intention, and questions might arise as to whose state of mind is to be attributed to the company as well as to aggregation of states of mind for this purpose, it is likely that there will be cases where that evidence is given weight. An example is as to whether or not the trading corporations contemplated that trades could be transacted at prices greatly in excess of market in *Quoine v B2C2*, considered above.
88. *Seventh*, how is a corporate state of mind to be ascertained in respect of systems involving AI or algorithms which may operate independently of human design and intervention. Some such systems are “deterministic”, in the sense that they are programmed to behave in a particular way which can thus be predicted. However, other such systems are unpredictable, in that they are both uncertain, meaning there is an inability to predict outcomes with certainty, and emergent, being the manner in which

¹²¹ UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (November 2019) [152].

complex systems can interact both with other steps in the code and with inputs, leading to outcomes that could not be predicted when looking at any one of the subparts in isolation.¹²² The consequence is what has been described as an “erosion of the direct nexus between human intent and system behaviour”.¹²³

89. As regards such technologies, Lord Sales writing extra-judicially has commented that “with the increasing sophistication and independence of such programs, it might soon seem inappropriate to look back at the minds and expectations of their human creators”.¹²⁴

90. Similarly, given that the corporate law’s strategies to regulating corporate decision making are currently tailored to human decision-makers,¹²⁵ it may be that these strategies are not currently equipped to address a situation where “the ‘thinking’ behind corporate misconduct has been offloaded to automated systems” as liability typically requires evidence of a culpable corporate mental state.¹²⁶ In the absence of developments addressing this lacuna, corporations may be able to reduce their exposure to liability by decreasing the level of human involvement in their operations (and indeed may be incentivised to do so).¹²⁷ This issue will only become more pressing as the use of AI in corporate boardrooms continues to increase.¹²⁸

91. The challenges to liability rules arising from corporate use of such technology have also been highlighted by Lauren Scholz:¹²⁹

“The law does not currently provide [a] liability-bearing conduit between the choices made by a sophisticated algorithm and the conscious intent of the individual or

¹²² Alicia Solow-Niederman, ‘Administering artificial intelligence’ (2020) 93 *Southern California Law Review* 633, 663-670.

¹²³ Maarten Herbosch, ‘Liability for AI Agents’ (2025) 26(3) *North Carolina Journal of Law and Technology* 391, 393.

¹²⁴ Lord Sales, ‘Being a Supreme Court Justice in 2030’ (Seminar Paper, Law and the Digital World Cour de Cession Seminar, 16 April 2021) [15].

¹²⁵ Florian Möslin. ‘Robots in the boardroom: artificial intelligence and corporate law’ in Woodrow Barfield and Ugo Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar Publishing, 2018) 649, 651.

¹²⁶ Mihailis E. Diamantis, ‘The Extended Corporate Mind: When Corporations Use AI to Break the Law’ (2020) 98(4) *North Carolina Law Review* 893, 898-900.

¹²⁷ *Ibid.*

¹²⁸ Sergio Alberto Gramitto Ricci, ‘Artificial Agents in Corporate Boardrooms’ (2020) 105 *Cornell Law Review* 869, 871; Kourabas and Tsang (n 76) 4.

¹²⁹ Lauren Scholz, ‘Algorithmic contracts’ (2017) 20 *Stanford Technology Law Review* 128, 132

corporation using it.”

92. To similar effect, Lord Sales has suggested that, in AI, the machine is itself “interposed between any human agency and what it, the machine, does”, noting that “[a]gency, in the sense of intelligence-directed activity performed for reasons, is fundamental to legal thought”.¹³⁰ He suggests that these developments might require a “move away from the fetishisation of consent as the basic justification for contracts”, towards allowing fair and reasonable standards of economic exchange to govern.¹³¹ Perhaps the same might be said of notions of intention or knowledge which have been developed by the courts by reference to humans rather than machines or systems.

VII CONCLUSION

93. The significance of the analysis of Gordon J and Edelman J in *Productivity Partners* remains uncertain. As considered above, in varying ways this approach might potentially enable normative judgments, such as those traditionally required for the imposition of liability on the basis that conduct was against conscience, to be made against corporations without the need to apply those judgments to the conduct of any relevant individual within the corporation. Such a development could have real import in cases involving AI and algorithms, given the challenges such cases pose for traditional approaches to attribution of a state of mind to a corporation. Given that these systems may act and make decisions in way that, in the past, only humans could, it might be considered apt for courts to subject their operation to the same normative judgments that have hitherto been reserved for human actors.

94. As against this, however, it might be suggested that there is unnecessary artificiality and complexity in seeking to use essentially human concepts such as knowledge and intention in contexts where knowledge is being attributed without human agency. In response, it may be that courts focus upon human agency where present and, where absent, seek to devise new approaches to liability having regard to the underlying rationale of the relevant liability rule. Whilst that approach might raise short terms risks to certainty, in the long term this might avoid the artificiality of seeking to assimilate

¹³⁰ Lord Sales, ‘*Algorithms, Artificial Intelligence and the Law*’ (2020) 25 *Judicial Review* 46, 48.

¹³¹ *Ibid* 60.

systems into essentially human concepts.