

Elise Bant and Jeannie Marie Paterson, ‘Systems of misconduct: Corporate culpability and statutory unconscionability’ (2021) 15 *Journal of Equity* 63

This article focuses on the role of corporate defendant culpability, particularly when dealing with complex business systems, and argues that seeking to attribute mental blameworthiness to corporations is inadequate for complex and devolved corporate structures.

This article uses a systems analysis to argue that it is possible to understand corporate intentionality as being manifested through a corporation’s systems, policies, and processes, rather than via individual human states of mind. Given that much of the modern commercial world is now governed by automated processes, systems analysis enables a principled approach to unconscionable conduct.

The article traces the influence of equitable ideas of culpable mental states in the context of statutory unconscionability (an objective standard of conduct underpinned by community values and norms of fair-trading practices, and an assessment of the state of mind of the defendant engaged in that conduct) and identifies the challenges posed by those ideas when addressing the behaviour of corporate defendants – namely, ‘diffused responsibility’. Directors are generally concerned with high-level, strategic direction, not day-to-day management, thus knowledge – and culpability – is often fragmented across a range of employees, managers and automated systems and processes. Continuing to focus on more nuanced means of identifying the relevant human whose state of mind may be attributed to the corporation (see, eg, *Competition and Consumer Act 2010* (Cth) s 84 or US case law which allows for the ‘aggregating’ of acts and knowledge) does not address the problem of diffuse responsibility.

The article proposes a model of corporate ‘systems intentionality’ which seeks to address these challenges by perceiving the corporate state of mind manifested in its systems, policies and patterns of behaviour. This theory draws on:

- a. Philosopher Peter French’s work – X does Y “intentionally” where X’s having had a reason for doing Y was the cause of X doing it and, in the corporate context, those reasons will include corporate lines of responsibility and corporate policy.
- b. The “ground-breaking” conception of organisational fault in Part 2.5 of the *Criminal Code Act 1995* (Cth).
- c. Mihailis E Diamantis’ analysis of the “extended” corporate mind and artificial intelligence – a corporation must be said to know and intend the systems it generates or adopts and applies. It should, then, be unremarkable to find that corporations manifest their intentionality through the systems they adopt and implement.
- d. The courts’ broadening focus on defendant intention manifested through the defendant’s very systems of conduct and patterns of behaviour.

The latter part of the article speaks to that broadening focus, finding support for a model of corporate intentionality in recent Australian authorities concerning statutory unconscionability in claims of predatory or exploitative business models and practices.

The required character of unconscionability was in the defendant’s business model in *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, where the defendant made unsolicited offers to buy shares at a substantial undervalue of their true worth to members as a whole, on the basis that the class would likely contain inexperienced and vulnerable persons lacking in commercial share trading experience.

While the alleged ‘system of high-pressure sales tactics’ was not established on the facts in *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [72] – [73], evidence that telemarketing scripts were issued to salespersons was relevant to establishing that there was a telemarketing system without need to establish approval of these scripts by the Board.

Several predatory features of the sales process were identified in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCA 47, including the ‘deceptive ruse’ (a ‘free service’ of the customer’s existing

machine – part of the overall sales strategy) which tricked consumers into allowing the sales person into their home; the failure of 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. It was not required that the individual salespeople appreciate the nature of the sales practices in which they participated.

A series of cases involving alleged vocational education and training (VET) scams, which sought improperly to profit from the Commonwealth Government's VET-FEE-HELP scheme by explicitly targeting consumers from underrepresented and underprivileged backgrounds, encouraging them to enrol into VET programs through incentives such as "free" laptops and cash payments, thereby maximising enrolments in order to maximise the financial benefit obtainable under the government scheme. Some systems were found to have been designed so that the conduct they produced could only be treated as intentional. Other systems were of a nature or patently likely ("predictable") to produce certain conduct, or has happened previously (and so is "recurrent"), and no positive ("overt") steps were taken to avoid that result, so that the systems manifest recklessness. Both systemic mental states are sufficient for statutory unconscionability.

Where the system is designed to produce a specific harm to specific victims, such as the conduct in *National Exchange* and *Lux* which had no explanation other than to take advantage of the vulnerabilities of the target audience or to trick consumers respectively, this may be understood to manifest a predatory state of mind. In both cases, the defendants' knowledge of critical factors may be implicit in their adopted business model. The article concludes by noting that this subtlety suggests that the 'systems intentionality' model proposed can respond to and reflect the law's fine-grained distinctions between different degrees of culpability.