Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct

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Abstract

Traditional criminal law evolved to address morally unacceptable conduct by individuals, before expanding into regulatory contexts. Classical models of corporate criminal responsibility sought to apply the individual-focused criminal law to corporate defendants. At the same time, contemporary corporations act increasingly in ways distinct from natural persons: through systems, patterns of behaviour, policies, procedure, and culture. This has led to increasing interest in the framing of offences that are better tailored to the way in which corporations act in reality. Building on the recommendations of the Australian Law Reform Commission in its *Corporate Criminal Responsibility Report*, this article considers a novel type of offence — one that criminalises systems of conduct or patterns of behaviour by corporations. We argue that system of conduct offences have the potential to enhance corporate criminal law's effectiveness, and to serve as an alternative to traditional approaches to corporate criminal liability in appropriate contexts.

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I Introduction

Current policy debates have highlighted growing appreciation of the distinctive nature of corporate, as opposed to individual, criminality. Corporate criminal responsibility has traditionally sought to adapt individual-focused models of criminal liability to corporate defendants by using attribution methods, based on the recognition that a corporation is an artificial legal construct that acts *through* individuals. While a corporation must act through individuals, contemporary corporate action is not limited to one, or a handful of individuals. Corporations can act — and fail to act — in ways that are different from individual natural persons. Collective decision-making, computer programs, systems of conduct, patterns of behaviour, policies, procedures, and culture can all represent acts and omissions by corporations.[1] Traditional approaches to corporate responsibility, which are based on the attribution of acts and mental states of natural persons to corporations, do not easily accommodate these types of corporate action.

In recent years, various law reform initiatives have been proposed to address corporate misconduct arising from deficient systems, practices, policies, and cultures. Such initiatives have been driven by public disquiet about particular examples of misconduct, ranging from financial institutions charging their clients for services never delivered, through the push for stronger laws relating to industrial manslaughter, to calls for the criminalisation of wage theft.[2] Relatedly, there is wider recognition of the need to tailor more appropriately the criminal law to contemporary corporate defendants, due to the limitations of responsibility based on traditional attribution principles. This has resulted in the enactment of an increasing number of offences tailored to the reality of corporate action. These types of offences can better reflect the characteristics of the contemporary corporate form. Examples of such offences, which eschew reliance on traditional principles of attribution, include 'duty-based' offences relating to workplace health and safety and to the regulation of heavy vehicles,[3] and the 'failure to prevent offence' that has been proposed for

1 The corporate culture provisions in pt 2.5 of the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code* (Cth)') are a recognition of the role of corporate culture in facilitating — or preventing — criminal conduct by a corporation: *Criminal Code* (Cth) s 12.3(2)(c)–(d).

2 A number of Australian jurisdictions have recently taken steps to address wage theft. In June 2020, Victoria passed the *Wage Theft Act 2020* (Vic). The Queensland Government passed reforms to the *Criminal Code Act 1899* (Qld) sch ('*Criminal Code* (Qld)') in September 2020. At the Commonwealth level, the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) proposed the introduction of an offence where an 'employer dishonestly engages in a systematic pattern of underpaying one or more employees', however the offence was omitted from the legislation that was ultimately passed.

3 See, eg, *Work Health and Safety Act 2011* (Cth) ('*WHS Act* (Cth)'); *Heavy Vehicle National Law Act 2012* (Qld). See further Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) 321–7 [7.178]–[7.196] ('*ALRC Corporate Criminal Responsibility Report*').

foreign bribery.[4] In particular contexts, offences like these have real potential to secure corporate accountability and improve corporate culture.[5]

Within the context of such law reforms, this article explores a novel type of offence for addressing systematic corporate misconduct first put forward, in a particular form, by the Australian Law Reform Commission ('ALRC') in its *Corporate Criminal Responsibility Report*.[6] The ALRC termed such offences 'system of conduct offences', as they are based on the 'system of conduct or pattern of behaviour' concept used in the statutory unconscionability civil regulatory provisions.[7] The ALRC recommended the enactment, in appropriate contexts, of a type of system of conduct offence to criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation.[8] This article builds on the work of the ALRC, and suggests that system of conduct offences might be appropriate beyond circumstances involving multiple civil penalty contraventions, as a means of overcoming the limitations of traditional models of corporate criminal responsibility. This article proposes a more broadly applicable model of criminal offence that responds to corporate systems and patterns of behaviour that result in criminal offending and that, due to these characteristics, could provide the foundation for corporate criminal liability without the application of traditional principles of attribution.

Central to both the ALRC's recommendation and the broader offence model that we explore in this article is the concept of a system of conduct or pattern of behaviour. The ALRC adopted this concept as the foundation for its proposed system of conduct offence due to the 'developing body of jurisprudence' surrounding the meaning of this concept.[9] Part IV(B) below discusses the existing case law as to what constitutes a 'system' or 'pattern'. Put shortly, however, 'a "system" connotes an internal method of working; a "pattern" connotes the external observation of events'.[10] In this article, we adopt the terminology used by the ALRC. We describe misconduct falling within the system of conduct or pattern of behaviour concept as 'systematic' misconduct and use the term 'system of conduct' as a shorthand for this concept.

Part II of this article explores the evolution of the criminal law and its application to corporations in order to explain how criminal law developed with natural persons, rather than corporations, in mind. Part III builds on that historical analysis, and considers how reliance on principles of attribution under traditional

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4 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 cl 8 (proposed s 70.5A of the *Criminal Code* (Cth) (n 1)). Such an offence was introduced in the United Kingdom in s 7 of the *Bribery Act 2010* (UK). See discussion in *ALRC Corporate Criminal Responsibility Report* (n 3) 296–321 [7.63]–[7.177].

5 For an analysis of failure to prevent offences in the context of corporate misconduct uncovered during recent Australian Royal Commissions: see Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42(4) *Sydney Law Review* 395.

6 *ALRC Corporate Criminal Responsibility Report* (n 3).

7 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 21(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB ('*ASIC Act*').

8 See *ALRC Corporate Criminal Responsibility Report* (n 3) 270–96 [7.6]–[7.62].

9 *ALRC Corporate Criminal Responsibility Report* (n 3) 275 [7.21].

10 *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631, 654 [104] (Allsop CJ, Middleton and Mortimer JJ) ('*Unique v ACCC*').

models of corporate criminal responsibility has created the need for offences tailored specifically to corporations. It outlines some of the existing models of such offences, such as duty-based offences and failure to prevent offences. Part IV discusses the system of conduct or pattern of behaviour concept adopted by the ALRC as a foundation for framing system of conduct offences. Part V considers how such an offence model might be utilised beyond the context recommended by the ALRC. Part VI concludes.

II Evolution of the Criminal Law and its Application to Corporations

To understand the contemporary need for offences tailored to corporations, an understanding of two aspects of the historical context is necessary. First, criminal law's regulatory role has developed incrementally over time in response to specific developments both in society and in the nature of commerce. Second, the law of criminal responsibility developed with natural persons, rather than corporate entities, as its focus. The law developed methods and analogies to apply the criminal law to corporations while seeking to preserve the fundamental structure of criminal offences, including the need to prove both physical acts and states of mind.

A *The Historical Development of Criminal Law as a Regulatory Tool*

Today, the use of the criminal law as a regulatory tool is ubiquitous and expanding, at least as a matter of legislative enactment.[11] The regulatory utility of criminalisation arises due to its unique expressive power — its capacity to condemn and denounce serious misconduct.[12] This means that the criminal law is a 'regulatory tool for influencing behaviour', but also 'speaks with a distinctively moral voice'.[13] This reflects the origins of the criminal law. Prior to the 19th century, criminal law was more closely confined to those criminal offences where there was a direct 'connection to … serious moral wrongdoing: broadly speaking, offences against

[11] For example, the ALRC recently identified 3,117 offences across 25 Commonwealth statutes as potentially applicable to corporations: *ALRC Corporate Criminal Responsibility Report* (n 3) 74 [3.13]. These ranged significantly in terms of seriousness and in terms of overlap with civil penalty provisions: at 73–4 [3.12]–[3.13]. Furthermore, a number of new criminal offence provisions have been created in the implementation of the recommendations of the *Australian Securities and Investments Commission* ('ASIC') Enforcement Review: for a summary of the recommendations, see Treasury (Cth), *ASIC Enforcement Review Taskforce Report* (December 2017) xiv–xviii.

[12] Samuel Walpole, 'Criminal Responsibility as a Distinctive Form of Corporate Regulation' (2020) 35(2) *Australian Journal of Corporate Law* 235, 255–61; *ALRC Corporate Criminal Responsibility Report* (n 3) 195–9 [5.78]–[5.89].

[13] AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 4.

religion, against the state, against the person, or against property'.[14] The focus was on moral wrongdoing by *individuals*.[15]

There was a 'significant expansion of regulatory criminal offences during the mid-nineteenth century' as part of the Industrial Revolution, as Horder has observed.[16] Indeed, Horder suggests the use of the criminal law to regulate behaviour occurred long before then.[17] Why did the criminal law expand into a tool of regulation? Why was regulation not left to the private law, like the regulation of trusts or contracts? The growth of the regulatory state in the 19th century remains a topic of debate among both lawyers and historians.[18] Criminal prosecutions were not initially a common 'regulatory tool' in relation to white-collar crime.[19] This was partly because prosecutions were mostly conducted privately, in contrast to 'current understandings of the role of the state in protecting citizens from harm, which defines the unique character of the criminal law, and helps to distinguish it from civil wrongs'.[20] Private prosecutions persisted due to a political philosophy of minimal state intervention in order to promote personal liberty.[21]

Although the criminal law had been used in England to regulate conduct since the Middle Ages, such use grew dramatically in the 19th century.[22] This 'administrative revolution' transformed the enforcement of regulatory norms into something done centrally by the State, using the criminal law.[23] MacDonagh 'proposed a five stage model' for how this growth in regulation occurred:

> [F]irst, public exposure of an intolerable social evil; secondly, legislation to deal with it, which due to inexperience was ineffective; thirdly, the introduction of more effective procedures of enforcement or detection, which continually revealed new problems; fourthly, recognition that occasional parliamentary legislation was inadequate and continuous regulation was required in the light of growing and changing experience; finally,

14 Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in R A Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 101, 103. Horder, however, expresses scepticism of such accounts.

15 Nicola Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical' [2000] *SSRN Electronic Journal* 24.

16 Horder (n 14) 102–5.

17 Ibid 105.

18 See, eg, Horder (n 14); Oliver MacDonagh, 'The Nineteenth-Century Revolution in Government: A Reappraisal' (1958) 1(1) *The Historical Journal* 52; Henry Parris, 'The Nineteenth-Century Revolution in Government: A Reappraisal Reappraised' (1960) 3(1) *The Historical Journal* 17.

19 James Taylor, 'Company Fraud in Victorian Britain: The Royal British Bank Scandal of 1856' (2007) 122(497) *English Historical Review* 700, 723. See also James Taylor, 'White-Collar Crime and the Law in Nineteenth-Century Britain' (2018) 60(3) *Business History* 343, 347; Nuno Garoupa, Anthony Ogus and Andrew Sanders, 'The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?' (2011) 70(1) *Cambridge Law Journal* 229, 230–4.

20 Sarah Wilson, 'Law, Morality and Regulation' (2006) 46(6) *The British Journal of Criminology* 1073, 1079.

21 Paul Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' (2004) 4(4) *Criminal Justice* 331, 340. See also John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40(2) *British Journal of Criminology* 222, 223.

22 Garoupa, Ogus and Sanders (n 19) 237.

23 Ibid 237–8.

> discretionary initiative was given to executive officers to deal with problems as they were continually revealed.[24]

Other scholars have argued that the key driver of the growth in regulation by the State — and through the criminal law — was the influence of utilitarianism during this period, which 'led to considerable extensions both of *laissez-faire* and of State intervention simultaneously'.[25] Criminal law came to embrace dual functions as both a 'moral and … retributive system' and as an enforcement mechanism with a 'regulatory, instrumental or utilitarian aspect'.[26] The expanded range of regulatory offences

> were a product of the expanding functions of the modern administrative state, for which the criminal law became an increasingly important tool for regulating the areas of social life born of industrialisation and urbanisation from the early nineteenth century onwards.[27]

This expansion of the regulatory role of the criminal law 'underlines a more general transformation in the legal order' during this period, as criminal justice evolved into 'a matter of administration and security'.[28] As Jackson J explained in *Morisette v United States*:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.[29]

B *Application of the Criminal Law to Corporations*

Even as criminal law's regulatory function expanded, it continued to focus on crimes by natural persons. For much of the history of the common law, corporations could

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24 As summarised in Pat Thane, 'Government and Society in England and Wales, 1750–1914' in FML Thompson (ed), *The Cambridge Social History of Britain, 1750–1950* (Cambridge University Press, 1st ed, 1990) 1, 19.

25 Parris (n 18) 35.

26 Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law: Text and Materials* (Cambridge University Press, 4th ed, 2010) 6.

27 Ibid 7.

28 Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5(1) *Social & Legal Studies* 57, 65–6.

29 *Morisette v United States*, 342 US 246, 253–4 (1952).

not be guilty of a criminal offence.[30] The common law recognised the corporation as a juristic entity, but did not confer on it the capacity to be criminally responsible.[31] The common law at this time lacked any model of corporate fault, arguably due to the absence of any appropriate principles of attribution to capture such a concept.[32]

Eventually the common law recognised that a corporation could be the subject of the criminal law, but it lacked principles for constructing a corporate 'state of mind'.[33] The criminal law was extended to corporations initially for particular types of criminal offences: nuisance, breach of statutory duties, and public welfare offences.[34] This was followed by offences of misfeasance that did not require proof of a mental element.[35] By the 1930s, courts in Australia, England, New Zealand, and the United States had held that a corporation could also be guilty of an offence that required proof of a mental element.[36] Consequently, corporate criminal liability — of some form — has been an established part of the criminal law in common law jurisdictions for over a century. The approach to corporate criminal responsibility based on attribution that developed was an evolution of the criminal law's traditional focus on individuals. As a result, corporate criminal responsibility may seem to reflect 'a form of anthropomorphism'.[37]

The present position under Commonwealth criminal law in Australia is that all criminal offences apply generally to corporations.[38] Section 12.1(2) of the *Criminal Code Act 1995* (Cth) ('*Criminal Code* (Cth)') provides that a 'body corporate may be found guilty of any offence, including one punishable by imprisonment'. Section 12.1(1) states that:

> This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in [Part 2.5] and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

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30 *The Abbot of St Benet's v Mayor of Norwich* (1481) YB 21 Edw IV 7, 12, 27, 67; *Case of Sutton's Hospital* (1612) 10 Co Rep 23a; 77 ER 960, 973; *Anon* (1706) 88 ER 1518; William Blackstone, *Commentaries on the Law of England* (Clarendon Press, 1765) vol 1, 464–5.

31 Walpole (n 12) 236, 248–55.

32 Ibid 248.

33 See discussion ibid 241–8. Conversely, the development of corporate criminal liability in Civilian jurisdictions was slower and, in some jurisdictions, has not occurred: Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43(3) *International & Comparative Law Quarterly* 493.

34 LH Leigh, *The Criminal Liability of Corporations in English Law* (Weidenfeld and Nicholson, 1969) 15.

35 *R v Great North of England Railway Company* (1846) 9 QB 315.

36 See, eg, *New York Central and Hudson River Railroad Company v United States*, 212 US 481 (1909) ('*New York Central*'); *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836 ('*Mousell Bros*'); *R v Australasian Films Ltd* (1921) 29 CLR 195 ('*Australasian Films*'); *OF Nelson and Co Ltd v Police* (1931) 4 NZ Police Reports 248. The historical development in Canada was slightly more complex: see, eg, *R v Fane Robinson Ltd* [1941] 3 DLR 409; *Canadian Dredge & Dock Co v The Queen* [1985] 1 SCR 662 ('*Canadian Dredge & Dock*'). See also LH Leigh, 'The Criminal Liability of Corporations and Other Groups' (1977) 9(2) *Ottawa Law Review* 247, 249–51. For a discussion of how corporate criminal responsibility developed over the course of the first half of the 20th century in several common law jurisdictions, refer to the judgment of Estey J in *Canadian Dredge & Dock*: at 674–91.

37 Lacey (n 15) 24.

38 *Criminal Code* (Cth) (n 1) s 12.1; *Acts Interpretation Act 1901* (Cth) s 2C(1); *Crimes Act 1914* (Cth) s 4B(1).

Section 12.1 essentially renders the question whether a corporation can commit a criminal offence one of statutory interpretation, with a presumption that corporations can be guilty of the same offences as a natural person. This approach is consistent with other Commonwealth statutes. For example, s 2C(1) of the *Acts Interpretation Act 1901* (Cth) provides that '[i]n any act, expressions used to denote persons generally … include a body politic or corporate as well as an individual.' Similarly to s 12.1 of the *Criminal Code* (Cth), s 4B(1) of the *Crimes Act 1914* (Cth) provides that a 'provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as natural persons'. As Allsop P opined in *Presidential Security Services of Australia Pty Ltd v Brilley*, given the developments in principles of attribution of criminal responsibility to corporations, '[t]he identity of the offences that might be considered, from their very nature, not capable of commission by a company … must now be narrow.'[39]

The general position under such statutory provisions is that criminal offences are as capable of commission by a corporation as they are by a natural person. However, the nature of a corporate defendant and the nature of the offence itself may mean that, in practice, a corporation cannot commit certain criminal offences. Therefore, there is, in fact, a recognition by the legislature in these statutory provisions of the necessity, in relation to certain offences, to treat corporations differently. The starting position, however, is that all criminal offences are generally considered to be applicable to corporations.[40]

Despite the now well-established existence of corporate criminal responsibility, the low incidence of criminal prosecutions of corporations[41] shows that corporations are not, in reality, treated the same as individuals insofar as the criminal law is concerned. Discussions by the ALRC with regulators also evinced a greater willingness to pursue the relevant individuals criminally, rather than the corporation.[42]

C *Mens Rea and its Imperfect Fit with the Criminal Liability of Corporations*

Generally, punishment for a criminal offence is only justified where a person is morally blameworthy. Traditionally, this requires proof of both physical and mental elements,[43] with the mental element required to establish criminal responsibility being 'mens rea or guilty mind'.[44] As Brennan J observed in *He Kaw Teh v The*

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39 *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, 248 [20]–[21]. Some examples of offences that may be uniquely human include bigamy and perjury. Relevant to that appeal was s 10(1) of the *Criminal Procedure Act 1986* (NSW) which is similar in effect to the Commonwealth statutory provisions set out in the text.

40 *Criminal Code* (Cth) (n 1) s 12.1; *Acts Interpretation Act 1901* (Cth) (n 38) s 2C(1); *Crimes Act 1914* (Cth) (n 38) s 4B(1).

41 See *ALRC Corporate Criminal Responsibility Report* (n 3) 96–117 [3.69]–[3.110].

42 Such discussions occurred in the course of consultations undertaken during the ALRC's Corporate Criminal Responsibility Inquiry.

43 Thomas Weigend, 'Subjective Elements of Criminal Liability' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 490, 490.

44 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 565 (Brennan J) ('*He Kaw Teh*').

Queen, the 'requirement of mens rea avoids … "the public scandal of convicting on a serious charge persons who are in no way blameworthy"'.[45] Consequently, there is a presumption that a statutory offence requires proof of mens rea.[46] Offences of strict and absolute liability are exceptions to this principle.[47] While many lower-level regulatory offences involve strict or absolute liability, for most serious criminal offences it remains the case that proof of a 'guilty mind' is necessary to establish the criminal offence. The need to prove mens rea has been at the core of difficulties in applying the criminal law to corporate defendants. It is why corporations remain 'penumbral subjects of criminal law'.[48]

The doctrine of mens rea can be traced back to the medieval period — even before its express recognition as an element of criminal responsibility.[49] Papp Kamali has explored medieval jurors' focus on 'intentionality' and the reception of the idea that 'culpability depends upon the presence of *mens rea*, or guilty mind' into medieval English criminal law through canonist influences.[50] The importance of 'mind' stemmed from the religious beliefs of the time.[51] These principles developed into the modern doctrine of mens rea.[52] One can observe an inherently human aspect to this conception of culpability that does not easily translate to a corporate defendant. The requirement to establish mens rea was the real sticking point for the general acceptance of corporate criminal responsibility, outside of specific categories of offences[53] — '[t]he most formidable impediment … [to corporate criminal responsibility] … was the doctrine that a corporation does not have a mind and hence is incapable of mens rea.'[54] The 1909 edition of *Halsbury's Laws of England* stated that:

> By the general principles of the criminal law, if a matter is made a criminal offence it is essential that there should be something in the nature of *mens rea*, and therefore, in ordinary cases, a corporation aggregate cannot be guilty of a criminal offence.[55]

The law was required to construct models of corporate fault through which the requirements of criminal responsibility relevant to individuals could be translated to corporations.[56] Early attempts adopted vicarious liability as the method of

45 Ibid, quoting *Sweet v Parsley* [1970] AC 132, 150 (Lord Reid).
46 *He Kaw Teh* (n 44) 565–6 (Brennan J).
47 Brennan J explained that such offences are justified where 'the purpose of the [offence] is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur': ibid 567.
48 Lacey (n 15) 18. Lacey observed: '[T]he subject of modern systems of criminal law in and beyond the common law world is generally assumed to be a human individual. The elaborated notions of conduct and responsibility … have been worked out in relation to assumptions about individual human beings': at 19.
49 Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (Cambridge University Press, 2019) 305–8.
50 Ibid 2–3.
51 Ibid 2, 10–11.
52 Ibid 4–11, 305.
53 See Lacey (n 15) 46.
54 *R v JJ Beamish Construction Co Ltd* [1966] 2 OR 867, 883–4 (Jessup J).
55 *Halsbury's Laws of England* (Butterworths, 1st ed, 1909) vol 8, 390 [858] quoted in *Canadian Dredge & Dock* (n 36) 676.
56 See Walpole (n 12).

attribution.[57] Since then, English and Australian law has developed more sophisticated mechanisms of attribution,[58] such as identification theory and, later, models of organisational liability that seek to ascribe particular conduct and mental states to the corporation itself, rather than merely holding the corporation vicariously liable for the conduct of its agents.

Identification theory, in its original form, involved a search for the 'directing mind and will' of the corporation, whose acts and mental states were to be attributed to the corporation.[59] As such, identification theory considers the mental states of the individuals who direct the corporation to determine the corporation's criminality. In *Meridian Global Funds Management Asia Ltd v Securities Commission*, which reflects the current common law approach in Australia,[60] the identification approach was refined so that the question became who was the company for the particular offence, based on statutory interpretation.[61] Statutory innovations have also sought to widen the identification doctrine. The prevailing attribution method under Commonwealth criminal law, which the ALRC termed the 'TPA Model',[62] does so by deeming the states of mind and conduct of a director, employee, or agent to be those of the company.[63] We discuss the limitations of these approaches further below. Conversely, organisational models of liability, like that in pt 2.5 of the *Criminal Code* (Cth), seek to construct a model of corporate fault unique to the corporation itself.[64]

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57 See, eg, *Mousell Bros* (n 36) 845–6 (Viscount Reading CJ, Ridley and Atkin JJ); *New York Central* (n 36) 495 (Day J); *Australasian Films Ltd* (n 36) 217 (Knox CJ, Gavan Duffy and Rich JJ). In regards to the debate about whether vicarious liability involves derivative liability for an agent's conduct or an agent's own liability, see *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136, 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ).

58 United States jurisdictions (including federal law) continue predominantly to use vicarious liability — *respondeat superior* — as their method of attribution pursuant to *New York Central* (n 36). Some state decisions have adopted an approach more in line with identification theory: see, eg, *People v Canadian Fur Trappers Corp*, 248 NY 159, 163, 169 (NY, 1928); *Idaho v Adjustment Department Credit Bureau*, 483 P 2d 687, 691 (Idaho, 1971); *St Johnsbury Trucking Co v United States*, 220 F 2d 393 (1st Cir, 1955); *Louisiana v Chapman Dodge Center Inc*, 428 So 2d 413 (La, 1983); *Commonwealth v Beneficial Finance Co*, 360 Mass 188 (Mass, 1971). See discussion in *Canadian Dredge & Dock* (n 36) 686–8; Eliezer Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle' (1985) 76(2) *The Journal of Criminal Law and Criminology* 285, 288–93.

59 See *Lennard's Carrying Co v Asiatic Petroleum* [1915] AC 705, 713–14 (Viscount Haldane LC); *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 172 (Denning LJ); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170–2 (Lord Reid) ('*Tesco*').

60 In both a criminal and civil context, see, eg: *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace* (2006) 161 A Crim R 250; *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 ('*ASIC v Westpac (No 2)*').

61 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507 (Lord Hoffmann) ('*Meridian*').

62 Due to its origin in s 84 of the then *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)). See *ALRC Corporate Criminal Responsibility Report* (n 3) 90–3 [3.57]–[3.65].

63 The defining features of the TPA Model are discussed in detail in *ALRC Corporate Criminal Responsibility Report* (n 3) 250–6 [6.123]–[6.150].

64 See *ALRC Corporate Criminal Responsibility Report* (n 3) 147–8 [4.73]–[4.79].

III Alternative Approaches to Corporate Criminal Liability

A *Overcoming Limitations of Traditional Approaches through Tailored Offences*

There is increasing interest among policymakers in models of corporate criminal liability that better reflect the nature of the corporation and the reality of corporate action than traditional approaches relying on attribution. This is because alternative models can overcome the limitations associated with establishing criminal responsibility through traditional approaches based on attribution principles. Attribution is inherently artificial. Whether the method used is the common law identification theory (as refined in *Meridian*)[65] or the TPA Model, the central limitation of attribution theory is that it seeks to locate corporate action and states of mind — themselves constructs — in a particular human individual or individuals. As Lord Hoffmann said in *Meridian*, the question is 'Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?'[66] Both *Meridian* and the TPA Model merely widen the scope of actors who may be identified with the company beyond the 'directing mind and will' model of the mid-20th century.[67]

The central limitation of all of these approaches, which are tied to particular individuals, is that they do not have regard to the complexity of a modern corporation. As Bant has explained:

> With some minor exceptions, [these attribution methods] ultimately require identification of one human repository of the requisite knowledge or state of mind. For this reason, they are routinely confounded by the dispersed lines of authority, staff turnover, knowledge silos and fragmented task responsibility that characterise many corporate business models. Indeed … it is arguable that these attribution rules actually encourage corporate structures that disperse knowledge and responsibility.[68]

The innovative attribution method enacted in pt 2.5 of the *Criminal Code* (Cth) goes some way to ameliorating these limitations, through enabling a prosecutor to prove fault through the presence or absence of a corporate culture.[69] While corporate culture looks effective in theory, particularly as it embraces notions of 'organisational liability',[70] in reality most statutory regimes exclude it.[71] As a result, there is a lack of experience and practical guidance as to how it might apply in

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65 *Meridian* (n 61).

66 Ibid 507.

67 See *Tesco* (n 59).

68 Elise Bant, Submission No 21 to ALRC, *Corporate Criminal Responsibility: Discussion Paper* (28 January 2020) 2.

69 *Criminal Code* (Cth) (n 1) s 12.3.

70 Models based on 'organisational liability' seek to construct a 'holistic model of corporate fault' that has regard to 'how the corporation operates, as a collection of systems and relationships': *ALRC Corporate Criminal Responsibility Report* (n 3) 147 [4.73]–[4.74].

71 *ALRC Corporate Criminal Responsibility Report* (n 3) 90–2 [3.57]–[3.63]. For example, s 769A of the *Corporations Act 2001* (Cth) ('*Corporations Act*') expressly excludes pt 2.5 from applying to ch 7 of the *Corporations Act* and s 12GH(6) of the *ASIC Act* (n 7) expressly excludes its application to the provisions of pt 2 div 2 of the *ASIC Act* (n 7).

practice, and an absence of concrete evidence of its efficacy at securing corporate accountability.

Ultimately, this suggests that, in certain contexts, alternative approaches to corporate criminal liability may be justified as a means of overcoming the limitations of traditional approaches. As Crofts has cogently argued, the fact that '[c]riminal legal doctrine has failed to develop a coherent, persuasive and effective means of attributing responsibility for harms caused by large organisations' shows a need for novel criminal offences.[72] Consequently, '[t]he failure of the criminal justice system to respond to systemic failures of large organisations requires us to think imaginatively and broadly about organisational culpability.'[73] Such an approach is already underway. In the remainder of this Part of the article, we describe two existing types of offences tailored to corporations: duty-based offences, and failure to prevent offences. We outline these in order to situate consideration of a new type of tailored offence based on systems of conduct within the existing policy trend toward tailored offences.

B *Duty-based Offences*

Duty-based offences are not a new invention.[74] They were 'the first inroad upon the proposition … [that] … "A corporation is not indictable…"',[75] and pre-date the development of generalised principles of corporate attribution.[76] There is, however, an 'increasing preference for such offences in legislation relevant to industries involving high proportions of corporate actors'.[77] The basic principle behind a duty-based offence is that the corporation *itself* is held liable for its *own* breach of a particular duty imposed on it by statute.[78] It follows that '[t]here is no need to find someone — in the case of a company, the "brains" and not merely the "hands" — for whose acts the person with the duty can be held liable'.[79] As the Victorian Court of Appeal recently stated in relation to a particular duty-based offence: 'it is tolerably clear that the rules of attribution do not apply'.[80] The ALRC observed that the key advantage of a duty-based offence in the corporate context is that, properly framed,

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72 Crofts (n 5) 397.

73 Ibid 400.

74 In *R v Birmingham and Gloucester Railway Company* it was held that a corporation could be guilty of non-feasance in breach of a statutory duty requiring the corporation to do something: *R v Birmingham and Gloucester Railway Company* (1842) 3 QB 223. Then, in *R v Great North of England Railway Company* (n 35) it was held, following the earlier case, that the criminal liability of a corporation extended to misfeasance in the exercise of powers conferred under a statute. For a summary of these earlier cases, see CRN Winn, 'The Criminal Responsibility of Corporations' (1929) 3(3) *Cambridge Law Journal* 398.

75 Winn (n 74) 399.

76 Meaghan Wilkinson, 'Corporate Criminal Liability: The Move towards Recognising Genuine Corporate Fault' (2003) 9 *Canterbury Law Review* 142, 143–8; Stessens (n 33) 496, cited in *ALRC Corporate Criminal Responsibility Report* (n 3) 321 [7.178].

77 *ALRC Corporate Criminal Responsibility Report* (n 3) 326 [7.193].

78 Winn (n 74) 398.

79 Sir John Smith, 'Health and Safety at Work' [1995] *Criminal Law Review* 654, 655.

80 *Director of Public Prosecutions (Vic) v JCS Fabrications Pty Ltd* [2019] VSCA 50, 19 [39] (Whelan AP, Priest and McLeish JJA).

it can avoid the limitations of models of corporate liability based on principles of attribution.[81]

This type of offence is commonly used in a workplace health and safety context. Under the harmonised approach to workplace health and safety laws in Australia,[82] it is an offence[83] for 'a person conducting a business or undertaking'[84] to fail to comply with a number of broad duties of care imposed by the legislation.[85] The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) contains a duty-based offence expressly focused on a corporation. It establishes a specific offence for a corporation whose 'activities are managed or organised' in such a way as to cause a person's death and where the way in which those activities are managed or organised 'amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.[86] Outside of the workplace health and safety context, duty-based offences have been enacted in relation to the regulation of heavy vehicles and in certain environmental protection legislation.[87]

C *Failure to Prevent Offences*

Another type of offence that is increasing in prevalence is offences that adopt the 'failure to prevent' model. The failure to prevent model is based on an organisational liability framework. Offences are framed in terms of the corporation itself committing an offence due to its failure to prevent the commission of a predicate offence by one of its associates.[88] Failure to prevent offences were first enacted in respect of foreign bribery in the *Bribery Act 2010* (UK)[89] and have since been expanded to apply to tax avoidance.[90] The United Kingdom has also given consideration to expanding the model to 'economic crime' more generally, and to corporate human rights violations.[91] In Australia, an offence of failing to prevent foreign bribery is contained in the Crimes Legislation Amendment (Combatting

81 *ALRC Corporate Criminal Responsibility Report* (n 3) 322–3 [7.180]. Of course, where a particular duty-based offence requires proof of recklessness, it will be impossible to avoid the use of principles of attribution in relation to a corporate defendant: at 325 [7.190].

82 Based on the *WHS Act (Cth)* (n 3). Only Victoria and Western Australia retain their own legislative framework, although these regimes also contain duty-based offences: *ALRC Corporate Criminal Responsibility Report* (n 3) 323 [7.184].

83 *WHS Act* (Cth) (n 3) pt 2 div 5.

84 Ibid s 5. It follows that these duty-based offences are not expressly restricted to corporate defendants. However, such offences are 'often and effectively prosecuted against corporations' and '[t]his was clearly the legislative intent behind the drafting of such offences': *ALRC Corporate Criminal Responsibility Report* (n 3) [7.191]. This, coupled with their aptness for application to a corporation means they can properly be considered to be offences tailored to corporate (in)action.

85 Relevantly to a corporate defendant, see *WHS Act* (Cth) (n 3) pt 2 divs 2–3.

86 *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1.

87 See *ALRC Corporate Criminal Responsibility Report* (n 3) 326 [7.193]–[7.194], referring to the *Heavy Vehicle National Law* and the *Environmental Protection Amendment Act 2018* (Vic) s 25(1).

88 Ibid [7.63].

89 *Bribery Act 2010* (UK) s 7.

90 *Criminal Finances Act 2017* (UK) ss 45–6.

91 Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57, 61.

Corporate Crime) Bill 2019 (Cth), which remains before the Australian Parliament.[92] The ALRC also recommended '[t]he Australian Government … consider applying the failure to prevent [model] … to other Commonwealth offences that might arise in the context of transnational business'.[93]

> The failure to prevent model involves
>
> a standalone offence under which a corporation can be convicted of failing to prevent the commission of a stipulated primary offence … by one of its 'associates'. A defence of appropriate or reasonable measures (or due diligence) allows a corporation to show that it lacks organisational culpability if it can prove that targeted policies and procedures were in place to prevent the offence.[94]

This type of offence avoids the need to prove the fault of the corporation *itself* through principles of attribution.[95] Instead, the conceptualisation of corporate fault constructed under the failure to prevent model holds the corporation as an entity liable for failing to prevent the predicate offence.[96] The corporation is called on to prove an absence of corporate fault through establishing a defence of 'adequate procedures',[97] 'reasonable precautions',[98] 'reasonable measures'[99] or 'due diligence'[100] (depending on how the defence is framed in the statute). If a corporation can prove the defence on the balance of probabilities, then it cannot be said to be organisationally liable for the predicate offence committed by its associate. Campbell has argued that failure to prevent liability operates 'as a preventative device and a mechanism to influence behaviour, rather than something that operates primarily in reactive mode'.[101] The 'adequate procedures' defence gives a corporation an incentive to improve its business practices, systems, and procedures. On a more theoretical level, Crofts has argued that failure to prevent offences are justified on the basis of the 'harmful consequences' of the failure 'and the blameworthiness of the failure/s'.[102]

92 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) sch 1 cl 8 (proposed s 70.5A of the *Criminal Code* (Cth) (n 1)).

93 *ALRC Corporate Criminal Responsibility Report* (n 3) 18 recommendation 19.

94 Ibid 297 [7.67].

95 Although it remains necessary to prove the mental elements of the predicate offence committed by the associate that the corporation is alleged to have failed to prevent. There is no requirement, however, to attribute these fault elements to the corporation, which is where one of the advantages of failure to prevent offences arises.

96 Crofts has argued, based on recent systemic failures by organisations in Australia, that the requirement to prove the predicate offence should be removed and instead criminal liability should result where there has been a 'systemic failure to prevent breach of [a] legal duty of care': Crofts (n 5) 397. Such an approach would appear to blend aspects of duty-based and failure to prevent offences. See also 409–11.

97 See, eg, *ALRC Corporate Criminal Responsibility Report* (n 3) 304–6 [7.96]–[7.109]; 312–15 [7.134]–[7.147].

98 This was the formulation ultimately recommended by the ALRC in the context of amendments to the methods of attribution applicable under Commonwealth criminal law: *ALRC Corporate Criminal Responsibility Report* (n 3) 259–66 [6.161]–[6.192].

99 See, eg, *Criminal Code*, RSC 1985, c C-46, s 22.2(c).

100 See, eg, *Criminal Code* (Cth) (n 1) s 12.3(3).

101 Campbell (n 91) 59.

102 Crofts (n 5) 418–22.

IV Addressing Systematic Misconduct by Corporate Entities

In recent years, it has become apparent that there is a need to address deficient corporate systems and processes that result in corporate misconduct, whether civil or criminal. An offence targeted to respond to systematic misconduct in a corporate context could help to address this. This Part discusses the need to respond to corporate systems and processes that contravene the law, and how, as the ALRC suggested, the system of conduct or pattern of behaviour concept used in existing civil regulatory provisions could form the foundation for a system of conduct offence. It concludes by discussing the particular type of system of conduct offence recommended by the ALRC.

A *Contemporary Corporate Action and Responding to Unlawful Corporate Systems and Processes*

Corporations both large and small are more than the product of the people they engage to act on their behalf as employees, contractors and agents. The value of the corporation is tied up in the policies and procedures, the ways of working, and norms of behaviour that result in the delivery of products or services — whether for profit or other purpose — in a way that is not possible through the mere agglomeration of people. In accounting terms, the value of a corporation is not just in tangible assets but also in the intangible assets such as goodwill.[103] The success of McDonald's as a quick service restaurant is as much a story of the 'McDonald's system' as the food served.[104]

Just as a corporation's systems and procedures may serve its goals and benefit its consumers and shareholders, those very systems may result in great harm: maintenance systems may not be applied sufficiently to prevent oil being discharged from an offshore platform and polluting the marine environment; computer programs may produce insurance quotes that breach anti-discrimination laws; or, computer systems may send out invoices for financial services never delivered if human oversight is insufficient.[105] There is a need to grapple with the collective nature of the corporation that combines human endeavour with capital and technology when conceptualising what is criminal behaviour by a contemporary corporation.

In this way, the approach of looking to whether a single human within the corporation holds the requisite state of mind, whether as an employee under the TPA Model or as an individual who can be identified with the corporation at common

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[103] See, eg, Australian Accounting Standards Board ('AASB'), *AASB 138 Intangible Assets* (F2021C00883, Compilation no 4, 30 June 2021).

[104] Mary-Angie Salva-Ramirez, 'McDonalds: A Prime Example of Corporate Culture' (1995–6) 40(4) *Public Relations Quarterly* 30, 30.

[105] See, eg, US Chemical Safety and Hazard Investigation Board, *Investigation Report, Explosion and Fire at the Macondo Well* (5 June 2014); Jeannie Marie Paterson and Yvette Maker, 'Why Does Artificial Intelligence Discriminate?' *Pursuit* (Web Page, 24 October 2018) <https://pursuit.unimelb.edu.au/articles/why-does-artificial-intelligence-discriminate>; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1.

law, fundamentally misunderstands how modern, large corporations act in practice.[106] A corporation should not be absolved of liability simply because a bribe, paid to facilitate sales by a corporation in a foreign country, was made without the awareness of senior corporate officers in the company's headquarters. Those payments are the product of the systems, norms of conduct, and processes put in place (or not put in place) by the corporation. This is the same reasoning that underpins the enactment of failure to prevent offences in the context of foreign bribery.[107]

The counterargument here is that mistakes or omissions by a corporation, even if occurring through systems or patterns of behaviour, are not equivalent to the positive states of mind generally required to establish many offences.[108] As a result, there is a risk of divergence between the criminal standard applied to humans and corporations.

This argument has some superficial attraction, particularly when examined through the lens of current tests of attribution. However, it is possible to consider systems of conduct or patterns of behaviour as indicia of corporate states of mind, or at least a reasonable alternative, in particular contexts.[109] Systems and patterns are something more than one-off mistakes; they reflect the way a corporation routinely acts in practice. In reality, attribution methods are themselves merely principles for constructing an artificial corporate state of mind. As Bant has previously explained, albeit in the civil context, '[t]he legitimate objective here is to regulate behaviour that has an inherently harmful tendency'.[110] It may be appropriate 'to take seriously the original position taken by the courts, which was that as artificial entities, corporations lacked "minds," and instead focus on the objective quality of the conduct of corporations'.[111] As corporate conduct is 'unlikely to be unintentional in any relevant sense', it is more appropriate to 'focus … on the quality of conduct, not on some artificial mental state'.[112] In addition, as noted above, while the criminal law has tried to apply offences in the same way to legal persons as it does to natural persons, the relevant statutes acknowledge that this will not always be possible.[113] Similarly, Crofts has suggested that:

106 *ALRC Corporate Criminal Responsibility Report* (n 3) 230 [6.42]. See also *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, 311 [92]–[93] (Nettle and Gordon JJ).

107 See, eg, Steven Montagu-Cairns, 'Corporate Criminal Liability and the Failure to Prevent Offence: An Argument for the Adoption of an Omissions-Based Offence in AML' in Katie Benson, Colin King and Clive Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Routledge, 2020) 185.

108 See Law Council of Australia Submission No 27 to ALRC, *Corporate Criminal Responsibility: Discussion Paper* (31 January 2020) 19 [70]. See also TA Game SC and Justice David Hammerschlag, Submission No 17 to ALRC, *Corporate Criminal Responsibility: Discussion Paper* (20 December 2019) 2–5 [8]–[24].

109 See Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352. See also Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63.

110 Bant (n 68) 6.

111 Ibid.

112 Ibid 7.

113 As set out in s 12.1 of the *Criminal Code* (Cth) (n 1), the Code is to be applied 'with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals'.

> there needs to be engagement with the types of harms most likely to be caused by large organisations, and the reasons why these harms come about. Whilst there are occasions where large organisations may actively choose to breach the law, it is more likely that breaches of the law are due to systemic failings on the part of the organisation. These systemic failings are culpable.[114]

We consider that systems-based liability should nonetheless be restricted to particular contexts where it is considered appropriate by policymakers, rather than used as a replacement for traditional models of corporate criminal liability entirely. The specific contexts in which such offences might be relevant is beyond the scope of this article. Instead, this article seeks to set out a model for a new type of corporate criminal offence for consideration by policymakers.

B *The 'System of Conduct or Pattern of Behaviour' Concept*

As noted above, the conceptual foundation adopted by the ALRC for system of conduct offences is the concept of a system of conduct or pattern of behaviour that exists in the civil regulatory provisions dealing with statutory unconscionability.[115] The concept's origins in statutory unconscionability may make it appear inapposite for broader application. However, the developing jurisprudence demonstrates that it can be used as a tool for assessing evidence of conduct — in particular, conduct arising from deficient corporate systems, procedures, processes, policies, patterns of work, and cultures — to determine whether the relevant conduct amounts to a system or pattern.

1 *Development*

The provisions in the *Australian Consumer Law* and *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') prohibiting unconscionable conduct reflect the system of conduct or pattern of behaviour concept.[116] Provisions in both Acts state that 'it is the intention of the Parliament that … this section 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'.[117] The express reference to a system of conduct or pattern of behaviour is one of several 'interpretive principles'[118] that were added to those statutes by the *Competition and Consumer Legislation Amendment Act 2011* (Cth).

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[114] Penny Crofts, Submission No 61 to ALRC, *Corporate Criminal Responsibility: Discussion Paper* 9.

[115] *Australian Consumer Law* (n 7) s 21; *ASIC Act* (n 7) s 12CB. For a summary of the prohibition on statutory unconscionability and how it is established, see Michelle Sharpe, '"More Than a Feeling": Finding Statutory Unconscionable Conduct' 27(2) *Australian Journal of Competition and Consumer Law* 108. 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(1) *Journal of Equity* 81.

[116] *Australian Consumer Law* (n 7) s 21; *ASIC Act* (n 7) s 12CB. The provision in the *Australian Consumer Law* is directed to unconscionable conduct in connection with goods and services, while that in the *ASIC Act* relates to financial services.

[117] *Australian Consumer Law* (n 7) s 21(2)(b); *ASIC Act* (n 7) s 12CB(4)(b).

[118] Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010 (Cth) 19 [2.8].

In the context of statutory unconscionability, the use of the system of conduct or pattern of behaviour concept 'ensures that the focus is on the conduct in question, as opposed to the characteristics of a particular person, or the effect of the impugned conduct on that person'.[119] The introduction of this interpretive principle was designed to confirm a judicial interpretation that proof of statutory unconscionability did not require a specific victim to be identified.[120] Consequently, in its history and present usage, the concept is tied to the statutory norm of unconscionability.

The enactment of the 'interpretive principle' relating to systems of conduct or patterns of behaviour has led regulators to pursue what have been termed as 'system' cases — cases focused on how a corporation has run its business, rather than emphasising the impact on particular individuals.[121] Under the existing provisions, system cases require the court to reach an evaluative judgment, on the evidence, about whether the impugned conduct can be characterised as a system of conduct or pattern of behaviour and whether that system or pattern can be characterised as unconscionable. An increasing number of these cases have been brought since 2011.[122] Some have been successful.[123] Others have not.[124] Where proceedings have been unsuccessful, in some cases this has been due to the failure of the regulator to prove that the impugned conduct constituted a system of conduct of pattern of behaviour.[125] An example of this is *Unique International College Pty Ltd (in liq) v Australian Competition and Consumer Commission* ('*Unique v*

119 Ibid 25 [2.24].

120 *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [30], 140–1 [33], 143 [44] (Tamberlin, Finn and Conti JJ) ('*National Exchange*'); *Australian Competition and Consumer Commission v EDirect Pty Ltd* (2012) 206 FCR 160, 184 [70], 185–6 [72]–[73] (Reeves J) ('*EDirect*').

121 Explanatory Memorandum (n 118) 25 [2.24]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689, 721 [181] (Besanko and Gilmour JJ).

122 Some cases were brought before the system of conduct or pattern of behaviour concept was expressly adopted by the Parliament: see, eg, *Australian Competition and Consumer Commission v IMB Group Pty Ltd* (2002) ATPR (Digest) ¶46–221; *National Exchange* (n 120); *Australian Competition and Consumer Commission v Keshow* (2005) ATPR (Digest) 46-265; *EDirect* (n 120). Note, however, that not all of these actions were successful.

123 See, eg, *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* (2015) ATPR ¶42–498, affirmed on appeal: *NRM Corporation Pty Ltd v Australian Competition and Consumer Commission* (2016) ATPR ¶42–531; *Australian Competition and Consumer Commission v Harrison* [2016] FCA 1543; *Australian Competition and Consumer Commission v Lifestyle Photographers Pty Ltd* [2016] FCA 1538; *Australian Competition and Consumer Commission v Get Qualified Pty Ltd (in liq) (No 2)* (2017) ATPR ¶42–548; *Australian Competition and Consumer Commission v Ford Motor Company of Australia Ltd* (2018) 360 ALR 124; *Australian Competition and Consumer Commission v ABG Pages Pty Ltd* [2018] FCA 764; *Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 3)* (2019) 368 ALR 441; *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408; *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 ('*Institute of Professional Education (No 3)*'); *Australian Securities and Investments Commission v One Tech Media Ltd* (2020) 275 FCR 1; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 ('*AGM Markets (No 3)*'); *Australian Competition and Consumer Commission v Quantum Housing Pty Ltd* (2021) 388 ALR 577.

124 *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 1472 ('*ACCC v Woolworths*'); *Unique v ACCC* (n 10); *ASIC v Westpac (No 2)* (n 60); *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 ('*ASIC v Kobelt (HCA)*').

125 *Unique v ACCC* (n 10); *ASIC v Westpac (No 2)* (n 60).

ACCC').[126] In that case, the regulator failed to prove that Unique's enrolment processes amounted to a system or pattern that was unconscionable, establishing only that Unique's conduct had been unconscionable in relation to the enrolment of six individual consumers. In other cases, the regulator has established that a system or pattern existed, but failed to establish that the system or pattern was unconscionable.[127] For example, in *Australian Securities and Investments Commission v Kobelt*, Mr Kobelt's provision of book-up credit to customers of the general store was a system, but a majority of the High Court of Australia found that it was not unconscionable.[128] In some unsuccessful cases, it is harder to identify the reason for the failure, because analysis of the system or pattern concept and the statutory norm of unconscionability is closely intertwined.

Although the existing uses of the system of conduct or pattern of behaviour concept can apply to both individuals and corporations, in our view a broader application of the concept has particular resonance with corporate defendants due to the nature of contemporary corporate action. Given that the role of systems may be amplified in large corporations, it may be that a system of conduct offence is particularly apt for capturing the narrative of offending in the case of a larger corporate defendant where breaches of the law result from the internal workings of the company or their manifestations.

2 *Establishing a 'System' or 'Pattern'*

What then is a 'system of conduct' or 'pattern of behaviour'? And how can these be proved? The system of conduct or pattern of behaviour concept involves a characterisation of particular impugned conduct established by the evidence: should the conduct be assessed as comprising a 'system' or amounting to a 'pattern'? That system or pattern is then assessed according to a statutory norm or standard to determine whether, by the system or pattern (that is, the combination of conduct), a contravention of the statutory provision has occurred.

As Paterson and Bant have argued, system cases 'require a different case strategy'.[129] The focus of such a case 'is not on the impact on a few individual consumers but on the way in which the business practice operates'.[130] Consequently, different evidentiary approaches are needed.

In *Unique v ACCC*, the Full Court of the Federal Court of Australia offered the following guidance regarding proof of a system or pattern:

> A 'system' connotes an internal method of working, a 'pattern' connotes the external observation of events. These words should not be glossed. How a system or a pattern is to be proved in any given case will depend on the circumstances. It can, however, be said that if one wishes to move from the particular event to some general proposition of a system it may be necessary

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126 *Unique v ACCC* (n 10).
127 *ACCC v Woolworths* (n 124); *ASIC v Kobelt (HCA)* (n 124).
128 *ASIC v Kobelt (HCA)* (n 124).
129 JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1, 8.
130 Ibid.

> for some conclusions to be drawn about the representative nature or character of the particular event.[131]

In that case, the Australian Competition and Consumer Commission ('ACCC') sought to establish a system case by reference to Unique's conduct in relation to six individual consumers. Although successful at first instance, the case was rejected on appeal — there was insufficient evidence to establish that the six consumers were representative of the class of 3600 potentially affected consumers and to conclude that there was a system or pattern.[132] In reaching this conclusion, the Court indicated that it was not stating that to prove a system or pattern the regulator had to adduce evidence about a majority of consumers, or that the use of a representative sample to prove a system case was impermissible, or that individual cases could not be used to prove a system or pattern; all of these were possible methods of proof depending on the particular context.[133] What the Court emphasised was that whether a system or pattern exists is 'highly fact-specific, and will rely to a significant extent on the forensic exercise the regulator chooses to undertake to prove the existence of the system, as well as any forensic exercise the respondent undertakes by way of answer'.[134] In *Unique v ACCC*, the ACCC's system case — based on conduct toward particular individuals — required

> evidence about either a material proportion of individual consumers; or evidence about how and why the individual consumers were chosen; or evidence about the representativeness of the individual consumers, or a combination of all three.[135]

Without some evidence of this type, the ACCC could not establish a system from the six consumers.

Conversely, in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*,[136] Bromwich J held that the ACCC had established a system of conduct or pattern of behaviour that was unconscionable. The ACCC overcame the 'conceptual flaws'[137] in other cases such as *Unique v ACCC* because of a 'key conceptual difference': 'that the vectors of reasoning went in different directions'.[138] In 'fundamental contrast' to *Unique v ACCC*, the ACCC's case in *Institute of Professional Education (No 3)*:

> was substantially based upon evidence directly going to AIPE's internal workings, as proven by AIPE's former employees, as well as business records such as enrolment records and data, enrolment forms and other documents, together with complaints and how they were handled. This evidence combined to give a reasonably pervasive sense of what was taking place, and its likely impact could thereby be ascertained on the balance of probabilities. Evidence from individual consumers was then used to demonstrate, by example, how this pattern or system played out at the enrolment coalface. The evidence of

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131 *Unique v ACCC* (n 10) 654 [104]. This description of a 'system' or 'pattern' was referred to favourably by Nettle and Gordon JJ in *ASIC v Kobelt (HCA)* (n 124) 56 [143].
132 *Unique v ACCC* (n 10) 655 [110]–[111].
133 Ibid 666 [151]–[152].
134 Ibid 666 [150].
135 Ibid 670 [162].
136 *Institute of Professional Education (No 3)* (n 123).
137 Paterson and Bant (n 129) 7.
138 *Institute of Professional Education (No 3)* (n 123) 66 [163] (Bromwich J).

> the individual consumer witnesses was thus helpful and made for a stronger case for the applicants, but was not indispensable and not used as evidence that of itself was representative of the system or pattern.[139]

Therefore, although *Unique v ACCC* in no way forecloses proof of a system case through individual cases, *Institute of Professional Education (No 3)* shows another method of proving a system or pattern: through primary reliance on internal evidence, including, in that case, the evidence of 'three former relatively senior employees'.[140]

More recently, Beach J in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* noted that it was 'important not to confuse … the concepts of "system of conduct" and "pattern of behaviour", and … the mode of proof of such concepts'.[141] His Honour explained that a 'pattern of conduct' related to the 'external manifestation of behaviour'.[142] As to proof of a pattern, Beach J said that the number of instances that must exist before a pattern is evidenced 'depends upon the context' and

> Clearly, two or more instances of identical or similar behaviour may be sufficient to infer and discern a pattern. …
>
> Numerous like instances with no counter-examples would clearly be sufficient to display a pattern. …
>
> A pattern may still exist, notwithstanding the [existence of] exceptions. …
>
> [T]he greater the individual differences of the instances, being differences that have real significance to the characterisation of unconscionability, the greater the number of instances that may be required to justify the extrapolation …
>
> Some parts of [a respondent's] conduct may manifest a pattern, other parts not. A 'pattern of behaviour' may be sufficiently found in relation to a part.[143]

As to a system of conduct, Beach J noted that a system was not simply a similar pattern of behaviour.[144] His Honour offered the following guidance:

> 'system' connotes something designed or intended in its structure …
>
> 'system' is usually saying something about the internal structure, for example, internal working, of whatever it is that has produced or reflects the conduct. …
>
> The gist is organisation and connection. …
>
> 'system of conduct' mean[s] that each element of individual conduct is directly connected in a structured and intended way one to the other [and] 'system of conduct' focus[es] on the system as being the underlying internal structure or method of procedure, organisation or administration of the respondent …[145]

The guidance provided by these decisions, together with that in the other decided cases, amounts to an increasing body of jurisprudence on establishing a

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139 Ibid.
140 Ibid 66 [164].
141 *AGM Markets (No 3)* (n 123) 122 [385].
142 Ibid 122 [386].
143 Ibid 122 [387]–[388].
144 Ibid 122 [388].
145 Ibid 123 [389]–[391].

system of conduct or pattern of behaviour. At the same time, as the Full Federal Court said in *Unique v ACCC*, the 'words should not be glossed' — '[h]ow a system or a pattern is to be proved in any given case will depend on the circumstances'.[146] The ultimate question is whether the evidence establishes conduct that can properly be characterised as a system of conduct or pattern of behaviour. Importantly, we consider that this technique of assessing and characterising conduct as a system or pattern has potential utility in the characterisation of contemporary corporate action more generally, including for the purposes of a system of conduct offence, as proposed by the ALRC.

C *A Broader Role for the Concept*

Although the system of conduct or pattern of behaviour concept is presently linked to statutory unconscionability, the case law on the concept illuminates how it might operate as a tool for characterising corporate misconduct more broadly, such that it has potential utility in corporate regulation generally.[147] If anything, the concept may be easier to apply to misconduct outside of statutory unconscionability.[148]

Specifically, the concept, as a tool for characterising a particular concatenation of conduct in context, has potential utility as the foundation for a novel type of offence directed at systematic misconduct, where the focus should be on the nature of the corporate conduct and its systematic characteristics. Existing offences do not adequately capture this narrative of offending — the criminality of systematic misconduct. At the same time, the capacity of contemporary corporations to act through systems, processes, policies, procedures, and culture, is significant, as discussed above.

More fundamentally, and as noted above, Paterson and Bant have argued that the system of conduct or pattern of behaviour concept represents a different type of approach to regulation.[149] Paterson, Bant, and Clare have also opined, with reference to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, that the system of conduct or pattern of behaviour concept 'has the potential to provide a powerful regulatory weapon against … sophisticated corporate wrongdoers'.[150] They further observed that:

> Given the significant difficulties in attributing dishonest or predatory intentions in the corporate context, the statutory provisions relating to systems provide a potentially important route to holding large and complex corporate wrongdoers responsible for unconscionable conduct.[151]

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146 *Unique v ACCC* (n 10) 654 [104].

147 This broader use of the concept, beyond statutory unconscionability, may also remove some of the difficulties in its use, as the underlying norm that the system or pattern is alleged to contravene may be simpler in its content and application.

148 As illustrated by the practical examples in *ALRC Corporate Criminal Responsibility Report* (n 3) 283–93 [7.46]–[7.52].

149 Paterson and Bant (n 129) 15–16.

150 Paterson, Bant and Clare (n 115) 104.

151 Ibid.

As the remarks of Paterson, Bant and Clare make clear, given the characteristics of contemporary corporate misconduct and the difficulties of traditional approaches to corporate criminal responsibility based on principles of attribution, there is potential for use of the concept of system of conduct or pattern of behaviour as the foundation for a novel type of offence tailored to a corporation. The ALRC has already adopted the concept as the foundation for such a type of offence.

D *The ALRC's Draft Model Offence for Systematic Misconduct*

The ALRC's eighth recommendation in its *Corporate Criminal Responsibility Report* was that 'the Australian Government should introduce offences that criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation'.[152]

The ALRC explained that the recommended offence would provide a means of capturing 'systematic misconduct that would otherwise have to be dealt with through civil enforcement'.[153] The ALRC recommended the enactment of this system of conduct offence in specific regulatory contexts as an adjunct to ordinary criminal offences (such offences being applied to corporations through methods of attribution).[154] The ALRC did not recommend replacing responsibility based on attribution for ordinary criminal offences.[155] Consistent with its analysis that existing offences tailored to corporations, such as duty-based offences and failure to prevent offences, have been more effective in practice in addressing corporate misconduct, the ALRC described the recommended offence as an additional option for legislators. It would be used where there is a policy objective that involves addressing systematic corporate misconduct.[156]

The offence contemplated by the ALRC has the following features:

- the use of a 'system of conduct or pattern of behaviour' concept;
- the requirement that at least two … contraventions [of prescribed civil penalty provisions] have resulted; and
- the need to prove the particular fault elements.[157]

Part of the ALRC's rationale for the recommendation was that 'there is a need to effectively design regulatory provisions that address contravening business systems and practices'.[158] Such provisions recognise that corporations act collectively. The recommended offence formed part of a suite of recommendations that, taken together, would see a decriminalisation of many of the low-level offences currently applicable to corporate misconduct, with a renewed focus on civil penalties. In the

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152 *ALRC Corporate Criminal Responsibility Report* (n 3) 15 recommendation 8.
153 Ibid 271 [7.9].
154 Ibid 283 [7.46]–[7.47].
155 Ibid.
156 Ibid.
157 Ibid 270 [7.7].
158 Ibid 271 [7.9], citing Jeannie Marie Paterson and Elise Bant, 'Unfair, Unjust and Unconscionable Conduct in Consumer Contracting: Designing Effective Law Reform in Australia' (Conference Paper, Melbourne Law School Obligations Group Annual Conference, 5–6 December 2019).

context of this package of recommendations, the system of conduct offence would address the ALRC's concern that civil penalties may be seen as a 'cost of doing business'.[159] Historically, the response to this risk has been to ratchet up the applicable penalty.[160] A large civil penalty may not be sufficient to reflect the moral opprobrium that should attach to systematic contraventions of civil prohibitions, and, given the unique expressive power of the criminal law, it was considered appropriate that such breaches of the law could result in potential criminal liability.

V Framing System of Conduct Offences to Enhance Corporate Criminal Law

The final part of this article considers how the system of conduct or pattern of behaviour concept might be utilised in contexts beyond the draft model offence recommended by the ALRC: first, as the foundation of a broader model of system of conduct offence tailored to the reality of corporate action; and, second, as an evidentiary framework of analysis.

As noted above, the ALRC's recommended offence would apply to systems of conduct or patterns of behaviour engaged in by corporations that result in breaches of two or more civil penalty provisions. The context for this recommendation was that the ALRC was recommending a significant winding back of the criminal law as it applies to corporations, recognising the pre-eminence of civil penalties as a tool of corporate regulation in Australia. As we have noted, the recommended offence was designed to ensure that corporations did not treat civil penalty provisions as merely a cost of doing business and to enable an escalation of enforcement responses where systematic misconduct was observed, as evidenced by multiple civil penalty breaches.[161]

There are arguably two further potential uses of the system of conduct or pattern of behaviour concept beyond that recommended by the ALRC.[162]

A *Uncoupling the Offence from Civil Penalty Contraventions*

The first further application involves uncoupling the recommended offence from the need to prove multiple breaches of civil penalty provisions. In this way, the system of conduct offence would sit alongside the civil penalty provision in a form of 'dual-track' regulation. As the ALRC noted, dual-track regulation is common in many

[159] *ALRC Corporate Criminal Responsibility Report* (n 3) 271 [7.11].

[160] See, eg, *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243, 300 [259] (Allsop CJ, Middleton and Robertson JJ); *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, 266 [68] (Keane CJ, Finn and Gilmour JJ). It was also a justification for the increase in maximum penalties in relation to a number of civil penalty provisions as a consequence of the ASIC Enforcement Review: Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) 22 [1.32]–[1.33], 23–4 [1.40]–[1.41], 39 [1.108], 47–8 [1.144], 53 [1.154], 64 [1.214].

[161] *ALRC Corporate Criminal Responsibility Report* (n 3) 271 [7.11].

[162] The ALRC referred to such a possibility in its Final Report, but did not make any recommendations: ibid 283 [7.45].

areas of Commonwealth regulation, where particular conduct is subject to both a civil penalty provision and a criminal offence.[163] Currently, where there is any distinction between the civil penalty provision and the criminal offence, it is that the criminal offence has additional fault elements such as intention and recklessness.[164] As outlined above, what constitutes criminal intent on the part of a corporation is particularly problematic in terms of securing accountability, arguably more so where the associated civil wrong has no fault element and a higher penalty.

Dual-track regulation provides the regulator with flexibility and 'in accordance with responsive regulation theory, it enables selection by the regulator of the pathway considered most appropriate for achieving compliance by a particular corporation or industry'.[165] Thus, the regulator could pursue a corporation under the criminal law if there was evidence of a system of conduct or pattern of behaviour leading to the corporate misconduct. It would be the evidence of systems or patterns within the corporation's operations that would justify the imposition of a criminal sanction as opposed to a civil penalty, which would be more appropriate in circumstances of more ad hoc non-compliance.

Under the approach we propose, charging fees for no service in the financial services industry could be a criminal offence if undertaken by a corporation in a manner that can be characterised as amounting to a system of conduct or pattern of behaviour. Similarly, the underpayment of wages could amount to a criminal offence if there is evidence of systems of conduct or patterns of behaviour that demonstrate that such underpayments are not simply the result of isolated errors. This example connects with recent debates about the criminalisation of wage theft as an effective regulatory response.[166] It could be argued that it is the systematic nature of the wrongdoing that makes the conduct sufficiently wrongful so as to warrant criminalisation.

Interestingly, in Queensland wage theft was recently criminalised through amendments to the definitions of the offences of stealing and fraud under the *Criminal Code Act 1899* (Qld) ('*Criminal Code* (Qld)').[167] Arguably, this does not acknowledge that, in reality, the underpayment (or non-payment of wages) may be due to a range of circumstances including clerical error(s), pay system design and payment of wages below the minimum legal entitlements. Moreover, it makes the criminal offence of wage theft difficult to prove, particularly in a corporate context, as it is necessary to prove a fraudulent intention. Given the range of explanations for

163 Ibid 87–8 [3.48]–[3.49], 172–6 [5.17]–[5.26].

164 Ibid 175–6 [5.24].

165 Ibid 176 [5.25]. Examples include *Corporations Act* (n 71) ss 601ED(5), 670A, 728, 792B, 853F, 904C, 905A, 911A, 911B, 920C, 922M, 952E, 952H, 993D, 1020A, 1021E, 1021G, 1309; *National Consumer Credit Protection Act 2009* (Cth) sch 1, ss 24, 154, 155–156, 174, 179U, 179V; *Insurance Contracts Act 1984* (Cth) s 33.

166 See, eg, Melissa Kennedy, Submission to Attorney-General's Department (Cth), *Discussion Paper on Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (2019).

167 Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 amended s 391 of the *Criminal Code* (Qld) (n 2) with respect to stealing and s 408C with respect to fraud. For analysis, see Joachim Dietrich and Matthew Raj, 'Criminalising "Wage Theft" in Australia: Property, Stealing, and Other Concepts' (2021) 45(4) *Criminal Law Journal* 218.

incorrect wages, coupled with the attribution issues highlighted in this article, the Queensland offence may be little more than a symbolic enactment.

Kennedy has argued that criminal sanctions for wage theft 'should be reserved for the most serious cases … and be used as part of a multi-faceted regulatory response'.[168] In our view, this is where a system of conduct offence could play a role in addressing wage theft by corporate employers. Arguably, what legitimately turns the civil wrong of underpaying wages into criminal conduct is the systematic nature of the misconduct — the development of a business model that routinely underpays employees. If that conception of criminality is accepted, then the system of conduct offence could be an apt solution and there is no need to link that offence to the breach of a civil penalty provision or look to a corporate state of mind. It is the nature of the misconduct that renders it deserving of the expressive force of the criminal law, over and above a finding of a civil penalty contravention.

This is the approach that was taken in the wage theft offence that was proposed in the Fair Work (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth), which provided that '[a]n employer commits an offence if the employer dishonestly engages in a *systematic pattern* of underpaying one or more employees'.[169] In contrast to the approach proposed by the ALRC and this article, however, the Bill provided a series of matters to which a court may have regard in determining whether the employer engaged in a systematic pattern of underpaying employees. These included

> the number of underpayments; the period over which the underpayments occurred; the number of employees affected by the underpayments; the employer's response, or failure to respond, to any complaints made about the underpayments; whether the employer failed to comply with a requirement … in relation to an employee record relating to the underpayments; and whether the employer failed to comply with a requirement … in relation to a pay slip relating to the underpayments.[170]

The proposed offence did not use the system of conduct or pattern of behaviour concept discussed above, but it did demonstrate a recognition by policymakers that systematic misconduct may be considered capable of shifting civil contraventions into the criminal sphere.

On another note, where achieving compliance is sufficiently important so as to justify the existence of strict or absolute liability offences, rather than merely civil penalty provisions, there would also be scope for the legislature to enact an applicable system of conduct offence to cover the proscribed conduct, if policymakers took the view that the systematicity of misconduct was also of particular concern in the relevant context. This would enable an effective response to misconduct that is aggravated due to its systematic nature.

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168 Kennedy (n 166) 8.

169 Fair Work (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) sch 5 cl 46, proposing to introduce s 324B of the *Fair Work Act 2009* (Cth) (emphasis added). Note that, ultimately, the proposed offence was omitted from the legislation that was actually enacted by the Australian Parliament.

170 Ibid, proposed s 324B(5).

In our view, and consistently with the ALRC's recommendation, any broader use of the system of conduct model should only be applied in specific contexts, where concern about the potential for systematic misconduct means that it is an appropriate regulatory response. However, if this option was taken to its extreme and system of conduct offences were enacted in a wide range of contexts, together with other offences tailored to corporations and also strict liability offences, then they could effectively replace traditional approaches based on attribution, as was proposed to the ALRC by Bant:

> given the difficulties around corporate attribution, one direction for future reform might be to take seriously the original position taken by the courts, which was that as artificial entities, corporations lacked 'minds,' and instead focus on the objective quality of the conduct of corporations.[171]

Under the model put forward by Bant, rather than proving fault elements through principles of attribution, it would be necessary to instead examine the corporation's conduct objectively. This would require an examination of what happened routinely within the corporation, rather than the aspirations described in mission statements and compliance manuals.

The ALRC did not go this far in the *Corporate Criminal Responsibility Report*. Looking at the enforcement data together with the theoretical concepts relating to corporate fault, the ALRC's central argument was that improved principles of attribution should be augmented by specific offences that go to the nature of corporate misconduct in particular instances and industries.[172] These offences would not negate entirely the need for a model of corporate attribution. The ALRC's recommended system of conduct or pattern of behaviour model offence would not replace attribution principles and, in addition, it would still require proof of fault elements through traditional methods.[173] Furthermore, corporate misconduct sometimes involves one-off instances — particularly with regard to fraud or dishonesty offences — that would not reach the threshold of systematic misconduct. What a system of conduct offence may do, like all offences tailored to corporations, is provide regulators and prosecutors with another tool for addressing corporate misconduct and for appropriately capturing the particular nature of offending. The evidence obtained by the ALRC as to the frequency of corporate prosecutions in relation to duty-based offences, another type of specific offence discussed earlier in this article, suggests that this tailoring of offences is more effective than traditional approaches to corporate criminal liability based on attribution.[174]

That tailoring is urgently needed. With just 13 prosecutions over 10 years under the *Criminal Code* (Cth),[175] the lack of prosecutions is an indictment of a

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171 Bant (n 68) 6.

172 *ALRC Corporate Criminal Responsibility Report* (n 3) 283 [7.46]–[7.47].

173 Ibid 272–3 [7.12]–[7.13]. As to the possibility of reforming approaches to conceptualising corporate states of mind, Bant has recently posited a new approach to corporate culpability in the form of '"systems intentionality", in which the corporate mind is manifested through its corporate systems, policies and patterns of behaviour': Bant (n 109) 354–5. Such a 'model would stand alongside and supplement existing general law and statutory attribution rules': at 355. See also Bant and Paterson (n 109).

174 *ALRC Corporate Criminal Responsibility Report* (n 3) 218–19 [6.5].

175 Ibid 105 [3.91].

collective failure to address corporate misconduct. While offences tailored to corporations, including the system of conduct offence recommended by the ALRC, can be an important part of the mix, they are not a panacea for other limitations relevant to holding errant corporate entities responsible — notably, our existing methods of attribution, limited sentencing options, and investigative limitations. The ALRC's *Corporate Criminal Responsibility Report* makes recommendations for improving these parts of the regulatory mix as well.

B *Use as an Evidentiary Framework of Analysis*

The second wider application of the system of conduct or pattern of behaviour concept beyond that recommended by the ALRC, is as an evidentiary tool that could improve methods of corporate criminal liability based on attribution, through providing guidance as to how to establish authorisation or permission through corporate culture. Much of the criticism of pt 2.5 of the *Criminal Code* (Cth), and its corporate culture provisions in particular,[176] is that it is not clear how those provisions should be interpreted or how a corporate culture may, by analogy, be said to authorise or permit the commission of the physical elements of the offence.[177] Dixon has argued that the corporate culture provisions involve 'evidentiary burdens too high to meet with any practical certainty,'[178] and Justice French described the provisions as 'extraordinarily wide and vague'.[179] There is also a paucity of practical guidance as to how to prove a case reliant on corporate culture. The Commonwealth Director of Public Prosecutions has noted the 'little available judicial authority' and observed that the provisions are 'largely untested', although there are active cases relying on the corporate culture provisions.[180] We now have, as outlined above, a significant and growing body of jurisprudence as to what can constitute a system of conduct or pattern of behaviour and what evidence is necessary to establish that they exist. What is the culture of a corporation and how is it manifested? Arguably, it is manifested in the ways of working, the patterns of behaviour, and systems of conduct of the corporation. Thus, the burgeoning jurisprudence on systems of conduct and patterns of behaviour could be used to provide guidance as to how to establish a corporate culture for the purposes of pt 2.5 of the *Criminal Code* (Cth). There is significant support for the corporate culture provisions and the model of corporate fault that they embody.[181] The system or pattern concept could provide an evidentiary framework of analysis for operationalising the more nebulous concept

176 *Criminal Code* (Cth) (n 1) ss 12.3(2)(d), 12.3(6).

177 Corporate culture is a mechanism for proving this authorisation or permission: *ALRC Corporate Criminal Responsibility Report* (n 3) 59–60 [2.45]–[2.46].

178 Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Sydney Law School Legal Studies Research Paper No 17/14, The University of Sydney, February 2017) 16.

179 The Hon Justice RS French, 'The Culture of Compliance — A Judicial Perspective' (Conference Paper, Australian Compliance Institute National Conference, 3–5 September 2003).

180 *ALRC Corporate Criminal Responsibility Report* (n 3) 247–8 [6.115], quoting the Commonwealth Director of Public Prosecutions ('CDPP'), Submission No 56 to ALRC, *Corporate Criminal Responsibility: Discussion Paper* (7 February 2020). The ALRC was made aware of one finalised case involving the corporate culture provisions: *R v Potter* (2015) 25 Tas R 213.

181 *ALRC Corporate Criminal Responsibility Report* (n 3) 246–50 [6.109]–[6.120], citing the views of Bant, Crofts, and Clough and Mulhern, together with Allens, the CDPP, and ASIC.

of corporate culture in the concrete circumstances of an appropriate individual prosecution.[182]

VI Conclusion

Thirty years ago, Fisse described the 'attribution of criminal liability to corporations' as 'one of the blackest holes in criminal law'.[183] As Parts I and II of this article sought to demonstrate, much of the problem with traditional approaches to corporate criminal liability arises from the historical evolution of corporate criminal liability, and the inherent difficulty of adapting the criminal law for application to corporations. One avenue that policymakers have increasingly taken in order to overcome the limitations of traditional approaches and effectively address corporate misconduct has been to develop offences that better reflect the nature of corporate action. Building on the work of the ALRC's *Corporate Criminal Responsibility Report*, this article has argued that the enactment of a novel type of offence tailored to corporations, and targeting corporate systems of conduct and patterns of behaviour, would enhance the law's ability to respond to contemporary corporate misconduct. Much misconduct is often systematic in nature due to the complexity of modern corporations. Enactment of system of conduct offences would enhance corporate accountability, and also level the playing field for all corporations, by ensuring that those that adopt systems and processes in breach of the law do not derive an unjust advantage over those that comply with the law.

[182] See also the model of 'systems intentionality' developed in Bant (n 109) 381–8.

[183] Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13(3) *Sydney Law Review* 277, 277.