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Crown Resorts and the Im/moral Corporate Form

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This chapter aims to contribute to a substantiation of the realist intuition as essential to attributions of culpability for certain sorts of corporate harms. Realists accept the idea of corporations as agents in their own right and argue that corporations can act and be at fault in ways that are different from the ways that their members can act and be at fault. This does not exclude ascriptions of responsibility to individuals, but it does argue that corporations can and should be regarded as moral agents in and of themselves, capable of being held criminally responsible for prohibited outcomes. Difficulties arise because criminal legal doctrine primarily engages with and privileges the ideal responsible subject as an individual human being. There is, however, some engagement with group liability under doctrines of conspiracy and accessorial liability.[1] Otherwise, group liability tends not to be considered in general criminal law texts.[2] The question of whether a corporation is a genuine agent or just a collection of individual agents is important because the answer dictates how we can explain the behaviour of corporations and whether we can and should treat them as responsible and accountable agents.[3] As I argue in section I, this question is particularly salient in criminal legal doctrine, as a central function of the criminal legal system is to establish the blameworthiness of responsible legal subjects.

* This research was funded by the Australian Government through a Discovery Early Career Researcher Award ('DECRA'), project number DE180100577, 'Rethinking Institutional Culpability: Criminal Law, Philosophy and Horror'.

[1] A Dyer, 'The "Australian Position" Concerning Criminal Complicity: Principle, Policy or Politics?' (2018) 40 *Sydney Law Review* 289; KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford, Clarendon Press, 1991).

[2] See, eg, J Horder, *Ashworth's Principles of Criminal Law*, 9th edn (Oxford, Oxford University Press, 2019). Likewise Feinberg focuses on harms caused by groups but does not consider structured forms of identity like corporations but instead random collectives like swimmers on a beach. J Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ, Princeton University Press, 1970) 244.

[3] C List and P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford, Oxford University Press, 2011).

It is now relatively widely accepted that suitably organised collectives can be agents in their own right.[4] Christian List and Philip Pettit greatly enriched the debate on group agency, arguing that groups can meet the requirements of moral agency by virtue of the fact that they 'have representational states, motivational states, and a capacity to process them and act on their basis'.[5] Accordingly, groups can have obligations, entitlements and power relations that have hitherto gone unnoticed and that require our moral attention. However, List and Pettit's model is on groups generally and provides no more than a sketch of the core ingredients of any type of group agency. Corporations are a worthy study of group agency in and of themselves for multiple reasons, including because they are so dominant in everyday life, are capable of and have inflicted widespread systemic harms and, unlike many other groups, are structured and regulated by law. To this end, I draw upon the theorist Chris Chapple, who has modified List and Pettit's broader list to enunciate group agency requirements that are specific to corporations.[6] These three core requirements of moral agency are: the agent-choice requirement – the corporation as a distinct moral agent that faces normatively significant choices; the control requirement – the corporation has power over the choice between certain actions; and good judgement – the corporation can form and access judgements in its own right, and possesses a regulative capacity that governs the ways these intentions inform and motivate actions in a way that conforms to certain rational and epistemic standards. These fundamentals of what makes moral agents are a means of considering whether corporations can be moral agents and of analysing existing criminal legal doctrinal requirements as they apply to corporations. I consider the requirements of moral agency through the lens of criminal law and apply these insights to Crown Resorts in order to provide a concrete example. I have chosen Crown Resorts as a topic of analysis because recent independent inquiries have found multiple examples of ongoing breaches of criminal law. The New South Wales (NSW) Bergin Inquiry and Victorian Royal Commission into Casino Operator and Licence found that Crown Resorts was not a 'suitable person' to hold a casino licence.[7] These inquiries detail corporate structure, actions, decision making and harms, and accordingly provide a rich case study for the purposes of analysing corporate moral agency.

This chapter maps the philosophical requirements of moral agency onto criminal legal doctrinal categories through the case study of Crown to explore the moral and legal responsibility of corporations. Section I explores why it is important to establish the corporation as a legal agent. Section II articulates each of Chapple's requirements and applies them to criminal legal doctrine and Crown Resorts to argue that corporations can be regarded as moral agents (that can choose to act immorally).

[4] PA French, 'The Corporation as a Moral Person' (1979) 16 *American Philosophical Quarterly* 207; PA French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984); D Tollefsen, *Groups as Agents* (Cambridge, Polity Press, 2015); List and Pettit (n 3).

[5] List and Pettit (n 3) 21.

[6] C Chapple, *The Moral Responsibilities of Companies* (London, Palgrave MacMillan, 2014).

[7] State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1, 3 at www.rccol.vic.gov.au/overview-recommendations (accessed 4 February 2022). Henceforth the NSW Inquiry under s 143 of the Casino Control Act 1992 (NSW) will be termed the 'Bergin Inquiry', and the Victorian Royal Commission into the Casino Operator and Licence will be termed the 'Victorian Royal Commission'.

I. Why is it Important to Establish the Corporation as a Moral Agent?

Classic positivists such as HLA Hart argue that there is no requirement to establish that corporations are moral agents, only that they are legal subjects.[8] Legislation clearly constructs corporations as legal subjects,[9] with rights and responsibilities. Corporations have the ability to own property and enter into binding contracts; they can be sued, taxed and made to fulfil obligations. For example, casino legislation requires that corporations running or associated with casinos are 'suitable persons'.[10] On this account, the concept of legal personality is 'wholly formal'.[11] For positivists, an act by a legal subject that breaches the criminal law is wrongful in and of itself.[12] There is no requirement to delve into any underlying intersection of law and morality. As such, positivists would assert that corporations are subjects of the criminal law regardless of whether they are moral agents.

Yet this response is overly simplistic and superficial, and may well leave the most interesting issues outside the carefully restricted boundaries of jurisprudence claimed by positivists such as Hart. Positivists are correct in asserting that the granting of legal personality is a constitutive role of law,[13] but it belies the fact that to a large extent corporations have been slotted into pre-existing criminal legal doctrine.[14] Of the many issues this has raised, two are of primary concern for the purposes of this chapter. First, criminal legal doctrine was constructed around the primary legal subject – the individual, biological human being. (Responsible) human beings are fundamental categories of what Steven D Smith called law's 'ontological inventories'.[15] This has resulted in difficulties in applying pre-existing categories constructed around humans to corporations. For example, a central claim of criminal legal doctrine is that a person shall not be held liable for an act unless the act was done with a guilty mind (*actus non facit reum nisi mens sit rea*).[16] Given the division of labour and decision making, this requirement

[8] HLA Hart, *Law, Liberty and Morality* (Oxford, Oxford University Press, 1963) 2.

[9] See, eg, Corporations Act 2001 (Cth), s 124; Criminal Code Act 1995 (Cth) ('Criminal Code'), pt 2.5.

[10] Casino Control Act 1992 (NSW) (Casino Control Act NSW), s 12.

[11] R Tur, 'The "Person" in Law' in AR Peacocke and G Gillet (eds), *Persons and Personality: A Contemporary Inquiry* (New York, Basil Blackwell, 1987) 121.

[12] Hart (n 8). Likewise Williams states 'a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which make it criminal': G Williams, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107, 130.

[13] S Deakin et al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 *Journal of Comparative Economics* 188.

[14] Offences specific to corporations have been created, such as failure to prevent offences and industrial manslaughter, but these are regarded as tangential to criminal law proper. SF Copp and A Cronin, 'New Models of Corporate Criminality: The Development and Relative Effectiveness of "Failure to Prevent" Offences' (2018) 39 *The Company Lawyer* 104; P Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42 *Sydney Law Review* 394; V Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10 Year Review' (2018) 82 *The Journal of Criminal Law* 48.

[15] SD Smith, *Law's Quandary* (Cambridge, MA, Harvard University Press, 2004) 8.

[16] *Fowler v Padget* (1978) 7 Term Rep 509, (1798) 101 ER 1103. As noted in the text accompanying nn 78–81, there is legal doctrine applied to human subjects supporting the stretching of the actus reus so that mens rea is required only at some point in time during the actions and omissions of the accused. S Yeo, 'Killing a Supposed Corpse: In Search of Principle' (1998) 31 *Comparative and International Law Journal of South Africa* 350.

of temporal coincidence is almost impossible to meet in large corporations.[17] As considered below, it is also difficult to identify a corporation's mind and intent,[18] and to attribute acts and omissions to the corporation. These are practical difficulties that arise as a consequence of the historical construction of criminal legal doctrine around the 'ideal legal actor',[19] the (responsible) human being, and are frequently pointed to as an explanation for the relative dearth of criminal prosecutions of corporations for wrongdoing.[20]

Second, and relatedly, the bulk of criminal law theorists accept that the criminal law is a system of blaming.[21] The prosecution must prove the *guilt* of the accused beyond a reasonable doubt.[22] It involves and requires censure or reproof for fault, wrong, badness or wickedness.[23] The structure of criminal law seeks to establish that an accused is sufficiently blameworthy to justify punishment or sanctions. Inherent to these ideas of censure is the precondition that the accused is a moral agent, that is, a 'responsible subject'.[24] Unless a person has the capacity to freely choose to do something that they understand to be wrong, they cannot be regarded as blameworthy and should not be liable to punishment in criminal proceedings.[25] Accordingly, not all humans have legal standing, that is, the legally recognised capacity to be held responsible at law for their actions, all the time.[26] In criminal law the question of moral capacity has an impact on legal standing and is interrogated in legal doctrines such as *doli incapax*, insanity and unfitness to plead.[27] There are various ways in which we express lack of responsibility for great harms. In the modern world, we tend not to regard natural disasters as wicked,

[17] P Crofts, *Evil Corporations: Criminal Law, Horror and Philosophy* (Routledge, forthcoming).

[18] The common law solution has been to identify the 'directing mind' of the corporation: *Tesco v Nattrass* [1971] UKHL 1, [1972] AC 153 (*Tesco*).

[19] N Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford, Hart Publishing, 2009) 67.

[20] J Clough and C Mulhern, *The Prosecution of Corporations* (Oxford, Oxford University Press, 2002); SW Buell, 'The Responsibility Gap in Corporate Crime' (2018) 12 *Criminal Law and Philosophy* 471.

[21] JB White, 'Making Sense of Criminal Law' (1978) 50 *University of Colorado Law Review* 1; G Fletcher, *Rethinking Criminal Law* (Boston, MA, Little Brown, 1978).

[22] *DPP v Woolmington* [1935] UKHL 1, [1935] AC 462.

[23] P Crofts, *Wickedness and Crime: Laws of Homicide and Malice* (Abingdon, Routledge, 2013).

[24] N Naffine, 'Our Legal Lives as Men, Women and Persons' (2004) 24 *Legal Studies* 621, 628.

[25] Sir M Hale, *History of the Pleas of the Crown* (London, Professional Books, 1736) 14–15; N Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' (2001) 64 *Modern Law Review* 350, 353; V Tadros, *Criminal Responsibility* (Oxford, Oxford University Press, 2005).

[26] Legal personhood has also been based on social status. In early Roman civil law, a slave was a thing owned rather than a *persona*, and therefore did not have the right to initiate legal actions or own property. Under the doctrine of coverture, married women could not own property or be parties to contracts in their own right. D Gindis, 'Legal Personhood and the Firm: Avoiding Anthropomorphism and Equivocation' (2016) 12 *Journal of Institutional Economics* 499.

[27] P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002). For example, the presumption of *doli incapax* is that children lack the moral and intellectual development to have the capacity to be guilty of crime. T Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of Doli Incapax' (2018) 40 *Sydney Law Review* 339. The rules of insanity under *R v M'Naghten* (1843) 8 ER 718, 722 apply when a person, at the time of the act, 'was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what wrong'. For a critique, see T Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 *Griffith Law Review* 434.

because there is nothing or no one to hold responsible.[28] There is also a tendency to use the (passive) language of accident, disaster or tragedy in response to harms where it is difficult to identify a responsible agent.[29] This is particularly the case for complex harms caused by corporations in the past and/or through governmental and regulatory failures.[30] As Scott Veitch has argued, in the production of large-scale harms the question of responsibility may not be raised at all.[31] Central to attribution of blameworthiness is that a subject can be regarded as a moral agent.

Models of culpability are contingent and have changed across time and place; but in recent centuries, the dominant model of culpability expressed in classic criminal legal doctrine is subjective, that is, the accused must have intention or knowledge in order to be at fault.[32] This was affirmed by the High Court of Australia in its statement that there is a common law presumption that every offence requires a guilty mind or subjective culpability.[33] There are necessarily difficulties in importing and applying the requirement of subjective culpability to corporations. The practical difficulties of establishing who the mind of the corporation is, what the mind was thinking at the time of offence are myriad. However, many of these practical difficulties pointed to by critics are not applicable or required in 'regulatory' offences, many of which were introduced to apply to corporations. This is because regulatory offences involve strict or absolute liability, and require only that the prosecution prove that the accused did the act, not that the prosecution establish subjective blameworthiness.[34] For example, both the Bergin Inquiry and the Victorian Royal Commission found that Crown Melbourne facilitated the laundering of millions of dollars.[35] Australia has wide-ranging anti-money-laundering criminal offences under part 10.2 of the Criminal Code Act 1995 (Cth), all with a strict liability option. Despite the relatively low evidentiary elements for the prosecution of money-laundering offences, there have been no federal prosecutions of corporations for money laundering in Australia.[36] This failure to prosecute is in part

[28] Theorists like Card have argued that responsibility can be ascribed for making the effects of disasters worse. C Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford, Oxford University Press, 2002); D Tracy, 'Horrors and Horror: The Response of Tragedy' (2014) 81 *Social Research* 739. See also Neiman's discussion about the historical regard of natural disasters such as earthquakes as paradigms of natural evil visited on humans who sinned. S Neiman, *Evil in Modern Thought* (Melbourne, Scribe Publications, 2002).

[29] Rader has pointed to a tendency to a language of fate and determinism in the contemporary secular world dominated by unregulated globalisation. In tragedies, the impersonal sense of necessity always wins out. 'If forces beyond our control or comprehension are influencing our lives, what happens to choice? … How are we to conceive of ethics in a world studiously indifferent to our choices?' R Rader, 'The Fate of Humanism in Greek Tragedy' (2009) 33 *Philosophy and Literature* 442, 442.

[30] Tombs has argued that corporate harms tend not to be conceptualised as 'violence' in media or by the criminal justice system, in part because of difficulties in conceptualising who or what the authors of this violence were, and how it was generated and sustained. S Tombs, 'Home as a Site of State-Corporate Violence: Grenfell Tower, Aetiologies and Aftermaths' (2020) 59 *The Howard Journal of Crime and Justice* 120.

[31] S Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon, Routledge, 2007).

[32] Fletcher (n 21).

[33] *He Kaw Teh v R* [1985] HCA 43, (1985) 157 CLR 523.

[34] Fletcher (n 21); Crofts (n 23); C Wells, 'Swatting the Subjectivist Bug' [1982] *Criminal Law Review* 209. Although there is evidence that, in many cases, even if offences do not require intention or knowledge, prosecutions will occur only if the accused had intention or knowledge. P Crofts, 'Communicating the Culpability of Illegal Dumping: Bankstown v Hanna (2014)' (2015) 2 *Australian Journal of Environmental Law* 57.

[35] Victorian Royal Commission (n 7) 2.

[36] There have been three civil penalty cases commenced by AUSTRAC against corporations – each time resulting in record-breaking penalties.

because of the perceived centrality of subjective culpability to conceptions of blameworthiness, such that regulatory offences are regarded as failing to meet the requirement of blameworthiness.[37] But this lack of prosecution may be because of a related and preceding conceptual barrier to prosecuting corporation – that is, the belief that corporations are not moral agents.

This can be seen in the governmental inquiries into Crown. Despite clear breaches of criminal law and legal duties, the inquiries have framed malfeasance at Crown Resorts as failures of corporate governance rather than criminal offences. For example, the Victorian Royal Commission notes that Crown is regulated by the Corporations Act 2001 (Cth), the ASX Listing Rules, Australian Prudential Regulation Authority (APRA) prudential standards, gambling regulation and codes, liquor controls, commercial agreements and casino control legislation in each state in which it operates (including internationally).[38] In its overview chapter on corporate governance, the Victorian Royal Commission does not include reference to criminal legislation in each state, nor does it mention anti-money-laundering and terrorism-financing legislation that should be taken into account in corporate governance. It is only in the conclusion of the chapter that it is noted that a casino operator should 'obey the law'.[39] Arguably, this reflects a tendency to conceive of corporations and corporate governance as somehow separate or aside from criminal law. Despite multiple breaches of the criminal law, the Royal Commission does not propose any criminal prosecution of Crown Resorts.[40]

II. Crown, Criminal Law and the Requirements of Moral Agency

This section maps the three requirements of moral agency onto criminal legal doctrine, and applies these requirements to Crown to argue that corporations can and should be regarded as moral agents capable of criminal legal attributions of blameworthiness.

A. Distinct Moral Agent

The first requirement, that there is a distinct moral agent that faces normatively significant choices, maps onto the criminal law requirement that an accused is a responsible

[37] Despite concerns about regulatory offences' diluting the power of the label of 'criminal', corporations expend a great deal of energy seeking to rebut or exclude it. P Crofts, 'Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services' (2020) 29 *Griffith Law Review* 21.

[38] Victorian Royal Commission (n 7) ch 4.

[39] ibid [84].

[40] At the time of writing, AUSTRAC has announced that it will be commencing civil penalty proceedings against Crown for money laundering. This failure to prosecute for criminal breaches of money-laundering legislation is in accordance with the argument of this chapter on the failure to regard and regulate corporations as criminal legal subjects. For further arguments about money laundering and the lack of criminal prosecutions of corporations, see P Crofts and H van Rijswijk, 'A Case Study of State-Corporate Crime: Crown Resorts' *Current Issues in Criminal Justice* (2022), doi:10.1080/10345329.2022.2144899.

legal subject. As argued in section I, although criminal law has been constructed around the ideal legal subject – human beings – not all human beings are accorded full legal subjecthood. Legal subjecthood is not a given but rather a legal artefact that can change across time and place. With regard to corporations, in order to satisfy the agent-choice requirement, a distinct, emergent corporate state that supervenes or has a rational agent-identity over and above its individual members must be identified.[41] This question of whether or not the corporation is a distinct moral agent remains a live question in legal circles, commonly split into nominalists and realists.

Nominalists are sceptical about the idea that corporations can be moral agents. They accept, of course, that corporations have a legal identity, but this is a legal fiction serving as a nexus for contracting among individual factors of production.[42] For nominalists, the idea that a corporation can act and be blameworthy is a fiction or legal artefact. Corporations are nothing more than collectivities of individuals,[43] and corporations cannot act or intend except through individuals.[44] In contrast, realists accept the idea of corporations as agents in their own right. They argue that corporations have an existence that is independent from their members. On this account, corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault.[45]

The idea of a corporation as an agent is supported colloquially. Media reporting of the inquiries into Crown Resorts simply referred to 'Crown' or 'Crown Resorts'. The corporation was personified in reporting. Crown was 'lucky to escape [with its licence]'[46] and 'must be desperate or think we're dumb'.[47] This is likewise reflected in how the law and legal institutions conceive of and organise corporations. The various Acts regulating casinos require that operators and associates of operators are a 'suitable person'.[48] Crown is a regulated entity – 'whose privilege to hold a casino licence is dependent upon it being, at all times, a person of good character, honest and integrity'.[49] The language here is grammatically awkward. At times, Crown is personified 'whose' at others it is objectified 'its'. Crown might be singular 'it' or plural 'they'. Despite this, linguistic complications should not be regarded as justifying the failure to regard corporations as moral agents. Historically, there have been linguistic shifts in society and at law. In the late twentieth century, feminists challenged the argument that use of the pronoun *he* referred to a generic person or *man* to humanity.[50] More recently, transgender communities have

[41] Chapple (n 6).

[42] A Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *The American Economic Review* 777.

[43] PA French, *Corporate Ethics* (San Diego, CA, Harcourt Brace College Publishers, 1995).

[44] E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1.

[45] ibid 3.

[46] D Ziffer, 'Crown lucky to escape the Victorian royal commission with its licence intact' *ABC News* (27 October 2021) at www.abc.net.au/news/2021-10-27/crown-lucky-to-survive-victorian-royal-commission-with-licence/100569696.

[47] P Martin, 'Casino operator Crown plays an old business trick – using its workers as human shields' *ABC News* (11 August 2021) at www.abc.net.au/news/2021-08-11/crown-casino-royal-commission-workers/100365220.

[48] Casino Control Act NSW (n 10), s 12.

[49] Victorian Royal Commission (n 7) [4].

[50] For example, research has shown that outcomes differ for a woman arguing a criminal defence, depending on whether juries are charged with considering her actions in relation to the reasonable man, reasonable person or reasonable woman. DA Donovan and SM Wildman, 'Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation' (1980) 14 *Loyola of Los Angeles Law Review* 435.

pursued trans language-reform efforts.[51] These incursions highlight that language is political and constitutes, rather than reflects, specific concepts and power relations. Grammatical difficulties reflect and reinforce the complexity of imagining the corporation as an emergent legal subject.

We also express reactive attitudes to corporate wrongdoing, such as indignation and anger. The Victorian Royal Commission stated that Crown's conduct was 'disgraceful … illegal, dishonest, unethical and exploitative'.[52] Crown 'bullied' and provided the regulator with false information, and 'delayed' and did what it could to 'frustrate' the regulator's investigations. The Royal Commission ascribed emotional states to Crown, labelling it 'callous' and 'appalling'.[53] Crown 'happily assisted wealthy Chinese patrons to breach the currency laws of their country'.[54] These language choices may be of convenience or may reflect the idea of an organisation as an independent agent, with a good or bad identity, and capacity to act, have intentions and even emotional states over and above those of individual members.[55]

Corporations have a stable identity due to rules, written and unwritten, that are external and internal to the corporation. Companies have specific structures, rules and hierarchies, and are regulated in specific ways.[56] There is some complexity to Crown as an agent, to the extent that the Victorian Royal Commission devoted a chapter to enunciating its structure.[57] Crown Resorts has three operating subsidiaries: Crown Melbourne (which operates Melbourne Casino); Burswood Nominees Ltd (which operates Crown Perth); and Crown Sydney Gaming Pty Ltd (which hoped to operate Crown casino at Barangaroo). This complexity of identity frequently works in the favour of large corporations, particularly due to the corporate veil.[58] Each inquiry circumvented complexity in corporate identity by focusing on whether the subsidiary for that specific jurisdiction was a 'suitable person' to have a gaming licence, and whether Crown was a suitable person to be a close associate.[59] Crown owns all the shares in all of its subsidiaries.

Corporations codify values, goals and decision-making procedures. The rules provide a means of testing validity – are the actions those of the corporation or those of a rogue employee? The rules also mean that the behaviour of the corporation is predictable and

[51] L Zimman, 'Transgender Language Reform' (2017) 1 *Journal of Language and Discrimination* 84.
[52] Victorian Royal Commission (n 7) [10].
[53] ibid [5].
[54] ibid.
[55] See also Carroll, ch 15 of this volume, on whether corporations can feel and express remorse.
[56] P Sheehy, *The Reality of Social Groups* (Farnham, Ashgate Publishing, 2006); French (n 4).
[57] Victorian Royal Commission (n 7) ch 17.
[58] G Allan, 'To Pierce or Not to Pierce? A Doctrinal Reappraisal of Judicial Responses to Improper Exploitation of the Corporate Form' (2018) 7 *Journal of Business Law* 559; A Belcher, 'Boundaries, Corporate Decision-Making and Responsibility' (2007) 58 *Northern Ireland Legal Quarterly* 211; R Grantham, 'The Corporate Veil: An Ingenious Device' (2013) 32 *University of Queensland Law Journal* 311; S Sutherland, 'Piercing the Corporate Veil – with a Stake? Vampire Imagery in American Caselaw' in P Day (ed), *Vampires: Myths and Metaphors of Enduring Evil* (Amsterdam, Rodopi, 2006) 143.
[59] The Victorian Royal Commission (n 7) was critical of the dominance of Crown Resorts and the lack of independent management of Crown Melbourne.

regular in a way that actions of other groups may not be. It means that the corporation is independent of the specific individuals who control or work for the organisation.[60] Thus multiple employees of Crown have come and gone over the years, including the mass exodus of members of the board in the wake of the Bergin Inquiry and changing chief executive officers, yet the corporate identity of Crown continues. Corporations have a perpetual existence separate from the individual lifespans of employees or founders. Thus, although in recent times Crown has been associated strongly with the 'vision' of James Packer, Crown has assumed a life and identity of its own. With his imminent departure as dominant shareholder, Crown and its various subsidiaries endure.

Corporations are complex organisations, and members, whether as employees, managers or shareholders/owners, 'contribute to the corporate effect and are a consequence of the corporate effect'.[61] Corporations are 'an awesome social invention',[62] providing an essential means to coordinate and integrate actions of members in the right way to work towards a particular goal (usually profit) and to take advantage of market opportunities otherwise not available to individuals acting alone. Rules enable coordination and integration of individual contributions into a group judgement. Rule-based structures, whether formal or informal, shape the way that individuals think and act when on corporate business. Without these rules, different processes or outcomes might result. It is to the advantage of corporations to act as agents. There is extensive empirical evidence that there is a correlation between companies' performance in pursuit of their goals and cultural factors that support agency.[63]

One way of demonstrating how a corporation is an agent over and above its individual members is to look at when individuals working for the corporation act in ways, or support actions or omissions, with which they disagree or that they would not support or defend outside of their employment. This is in accordance with ideas about employment as a role or a 'practical identity',[64] which may exert a normative and psychologically structured influence on what features an agent is committed to displaying.[65] This idea that people may behave at work in ways that are inconsistent with beliefs they hold outside of employment is shown in relation to the way employees acted towards problem gamblers at Crown Resorts. At Crown Melbourne, hosts (employees who look after Crown loyalty programme members) acknowledged that they were 'predatory and

[60] PH Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1994) 75 *Minnesota Law Review* 1095.

[61] Singapore Government, Penal Code Review Committee, *Penal Code Review Committee Report* (Report, August 2018) 212, citing R Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1982) 2 *Mountbatten Journal of Legal Studies* 31, 40, 54. For the definitive critique of methodological individualism, in the context of corporate crime, see B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993) ch 2.

[62] MK Ramirez, 'The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty' (2005) 47 *Arizona Law Review* 933.

[63] DR Denison, *Corporate Culture and Organizational Effectiveness* (New York, John Wiley & Sons Inc, 1990); DR Denison and AO Mishra, 'Towards a Theory of Organizational Culture and Effectiveness' (1995) 6 *Organization Science* 204.

[64] M Fricker, 'Can There Be Institutional Virtues?' in T Szabo Gendler and J Hawthorne (eds), *Oxford Studies in Epistemology: Social Epistemology*, vol 3 (Oxford, Oxford University Press, 2010) 235.

[65] ibid. See also P Crofts, 'The Townspeople of Derry in Stephen King's IT: Bystanders and Responsibility For Evil' in WS May (ed), *(En)Countering Pennywise: Critical Perspectives on Stephen King's IT* (University Press of Mississippi, 2022) 135.

irresponsible' in relation to problem gamblers, in order to gain revenue for Crown.[66] They would entice clients to come to the casino, would arrange gifts, would not question whether the client could afford to gamble, would rarely ask clients to take a break from gambling, would permit customers to gamble even if they owed money to Crown Resorts and would discourage gamblers from self-excluding. Other problem-gambling research has recorded the way employees at gambling venues felt about allowing or even encouraging problem gamblers to continue.[67] This facilitation of problem gambling was an informal rule, geared towards profit, which contradicted Crown's formal policies asserting world-leading approaches against problem gambling. Bant makes a similar point in relation to anti-money laundering at Crown and practices of aggregation of individual deposits that obscured what was occurring in the bank accounts. The Victorian Royal Commission accepts Bant's argument that whilst employees at Crown may have been individually honest, they were 'nonetheless cogs in a corporate process that was inherently apt to break the law'.[68]

Accordingly, corporations are recognised as agents at law and colloquially. This group agency is facilitated by (written and unwritten) rules that govern how its members act and decide, and that determine how individuals and groups behave when acting 'in' the corporation or 'for' it. Corporations have emergent properties that arise out of the various individual members and yet are novel or irreducible with respect to them.[69]

B. Control Requirement

The second requirement of moral agency is arguably akin to criminal legal doctrine actus reus requirements, that the agent has some control or power over the choice between action/omission and has some causal effect in relation to prohibited outcomes. In terms of moral agency, the emphasis is on making or facing a choice, that is, morally significant choices must be in the 'control' of the agent. To the extent that we believe individuals control and are responsible for certain actions, corporations can be handled under a similar account. Under this account, we are responsible for what is in our control – our actions and our choices. We tend to hold individuals responsible for their choices, even as we recognise that there is a range of constraints on how agents make those choices about how to act.

i. Voluntariness

Criminal law frames the question of control over action/omission in terms of voluntariness, that is, the requirement that an action is 'conscious and willed'. Criminal law theorist Peter Rush explains that voluntariness requires that 'something internal to the person must cause the conduct – such that you can say that it is the conduct of the accused'.[70] The prosecution are entitled to presume voluntariness unless and until

[66] Victorian Royal Commission (n 7) ch 8, [43].
[67] L Hancock, *Regulatory Failure? The Case of Crown Casino* (Melbourne, Australian Scholarly Publishing, 2011).
[68] Victorian Royal Commission (n 7) ch 6, [95].
[69] Chapple (n 6) 35.
[70] P Rush, *Criminal Law* (Sydney, Butterworths, 1997) 65.

the accused has satisfied the evidentiary burden.[71] Voluntariness is frequently explained through judicial analysis of involuntariness:

> [A]n act which is done by the muscles without any control of the mind, such as a spasm, a reflex action, or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleepwalking.[72]

From this definition, a corporation might argue that its actions are 'unwilled', that it is no longer in control of its behaviour, due to the acting of various members and sections of the corporation outside of the conscious control of the 'directing mind'.

There are two related ways of considering this issue of involuntariness. First, this returns to the issue of whether a nominalist or realist conceptualisation of corporations is adopted. If a nominalist account is adopted then the actions of employees in the absence of knowledge by the directing mind might be regarded as involuntary. However, this lack of knowledge or control by the directing mind is more likely to be argued in courts as lack of mens rea rather than as involuntariness.[73] There are defined roles by which individuals can exercise certain powers,[74] which provide a means for distinguishing employees who are acting on behalf of the corporation and rogue employees. In the absence of a rogue employee, courts are dubious of corporate claims of lack of control and tend to accept that the acts or omissions of the corporation are at issue. Claims of lack of knowledge by the directing mind constitute a separate question to be dealt with under fault or mens rea requirements. For example, both inquiries established that Crown was involved in money laundering, even though the inquiries accepted the Board's claims of ignorance.

Second, the time frame in which involuntariness is considered is also significant, particularly in terms of omissions by corporations, such as the failure to comply with standards, including health and safety and protections against money laundering. The High Court has established that in cases of involuntariness, it is open to the jury to broaden the 'relevant act' under consideration.[75] For example, in the case of *Ryan*, the accused argued that he had instinctively pulled the trigger and killed the victim when the victim moved suddenly. The High Court rejected this argument and held that it was not solely the pulling of the trigger instinctively that was the 'relevant act'; rather, it was holding a loaded gun with a finger on the trigger against the head of the victim.[76] Likewise in *Jiminez*, the accused was charged with culpable driving after he fell asleep at the wheel, collided with a tree and killed one of his passengers. The High Court held:

> While he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public.[77]

[71] *R v Falconer* [1990] HCA 49, (1990) 171 CLR 30, 83.

[72] *Bratty v Attorney-General (Northern Ireland)* [1961] UKHL 3, [1963] AC 386, 409 (Lord Denning). See also *Falconer* (n 71) and *Ryan v R* [1967] HCA 2, (1967) 121 CLR 205, 214, 231.

[73] Involuntariness is very difficult for human individuals to argue in criminal law also. It is frequently argued for offences which do not require mens rea. See, eg *Jiminez v R* [1992] HCA 14, (1992) 173 CLR 572 (*Jiminez*); *Ugle v R* [2002] HCA 25, (2002) 211 CLR 171 (*Ugle*); *Ryan* (n 72).

[74] P French, 'Commentary' (1983) 2 *Business and Professional Ethics Journal* 89.

[75] This flexibility of temporality in criminal law is theorised by M Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1980) 33 *Stanford Law Review* 591.

[76] Similar reasoning was applied in *Ugle* (n 73).

[77] *Jiminez* (n 73) 577.

However, the court applied the principles from *Ryan* and held that the period of driving immediately preceding Jiminez's falling asleep could be considered:

> It follows that for a driver to be guilty of driving in a manner dangerous to the public because of his tired or drowsy condition, that condition must be such that, as a matter of objective fact, his driving in that condition is a danger to the public. Various matters will be relevant in reaching such a conclusion. The period of driving, the lighting conditions (including whether it was night or day) and the heating or ventilation of the vehicle are all relevant considerations. And, of course, it will be necessary to consider how tired the driver was. If there was a warning as to the onset of sleep, that may be some evidence of the degree of tiredness. And the period of driving before the accident, and the amount of sleep that he had earlier had, will also bear on the degree of his tiredness. But so far as 'driving in a manner dangerous' is concerned, the issue is not whether there was or was not a warning of the onset of sleep, but whether the driver was so tired that, in the circumstances, his driving was a danger to the public.[78]

This reasoning can be applied to corporate acts and omissions. That is, rather than look at money laundering in isolation, Crown's actions – including the reduction of money-laundering compliance, the ongoing failure to heed warnings by banks, changing banks when red flags were raised and choosing to reward profit rather than protection against money laundering – demonstrate decisions and choices that were made voluntarily.

It might be argued that corporations have limited choices in how they act. Corporations act within certain constraints, such as size, capacity, law and commercial commitments, and to maximise profits. But these same arguments can be made with regard to individuals – humans have multiple constraints on the choices they make. According to criminal legal doctrine, even in cases of coercion, voluntariness is not an issue – an accused is regarded as making a choice to act, albeit under coercion. The defences of duress or necessity are raised only after the elements of offences are established. For the most part, corporations are required to achieve and maximise profit.[79] However, whilst Crown is required to achieve profit, it has a range of choices about how it goes about this, for example whether it adopts short-term easy-money or more long-term sustainable choices.[80]

Corporations have a set of decision-making rules and procedures through which courses of concerted action can be, though not necessarily are, chosen on a rational basis. If a broader time frame is adopted in accordance with existing legal doctrine and theory, these actions and omissions are conscious and willed across time.[81]

ii. Causation

The second aspect of control requires that a corporation be a controlling cause of actions in a way that may ground moral responsibility. Nominalists would argue that

[78] ibid 579.

[79] M Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' *New York Times Magazine* (New York, 13 September 1970).

[80] ER Outa and S Kutubi, 'Bank Corporate Governance in Australia: Is There a Conflict between the Existing Corporate Culture and the Anglo-Saxon Model of Corporate Governance?' (2021) 32 *Journal of Corporate Accounting & Finance* 145.

[81] Kelman (n 75).

corporations can only act through individuals, and therefore it is only individuals who can be causally responsible.[82] However, realists would argue that corporations can be causally responsible in ways that transcend individual actions or omissions. Even where actions are implemented by lower-level individual members, corporations bring about actions by coordinating through processes, routines, etc to realise the goals of the company. Corporate actions feature examples where a higher-level cause, such as profit, is insensitive to the way in which it is realised. Different individuals can implement these corporation processes in different ways, provided they are working towards the relevant outcomes. If an individual did not occupy an office or a role, another would take their place and do it. For example, if an employee refused to go along with facilitating problem gambling (for which they would receive no encouragement or reward), they might lose their job or opportunities for promotion, whilst another employee would facilitate problem gambling and be rewarded. Likewise, the Royal Commission quoted Bant's argument that breaches of anti-money laundering at Crown 'were replicated over long periods, as individual employees were replaced by new employees trained in carrying out the requisite processes'.[83] On this account, a focus on individual employees fails to recognise and evaluate the corporate systems and policies that organised and systematised conduct aimed at achieving profit.

The requirement of causation in criminal law seeks to establish a connection between the accused and the prohibited consequences, that is, that an accused can only be criminally liable for harms for which they are responsible. The bar is set fairly low in Australia, requiring only that the accused was 'a substantial and operating' cause.[84] Accordingly, there can be multiple causes of a prohibited consequence. Under the Casino Control Act 1992 (WA), Crown Resorts has a duty to prevent and minimise harm from gambling.[85] Casinos are recognised as a site of risk for problem gambling. There are multiple structural ways in which Crown Resorts was a substantial and operating cause of problem gambling above and beyond the actions of individual employees. The Victorian Royal Commission Report shows that in 2018–19, 25 per cent of people who gambled at Melbourne Casino in the previous year experienced some harm from gambling, and those gambling at Melbourne Casino are more likely to have experienced at least one form of harm from gambling. It was estimated that the prevalence of problem gamblers at Melbourne Casino may be three times higher than among all Victorian adults who gamble.[86] The reasons why problem gamblers are drawn to the casino are due to organisational choices rather than the actions of specific individuals. It has long been recognised that accessibility is a major cause of problem gambling – the greater the accessibility of gambling, the greater the chance of problem gambling.[87]

[82] There is increasing recognition of the possibility of corporations acting through technology. For example, Robodebt is an example of automated generation of debt notices through problematic algorithms and an absence of human intervention. P Crofts and H van Rijswijk, *Technology: New Trajectories in Law* (Abingdon, Routledge, 2021). See also Paterson and Bant, ch 12 of this volume.

[83] Victorian Royal Commission (n 7) ch 6, [96].

[84] *Royall v R* [1991] HCA 27, (1991) 172 CLR 378.

[85] Casino Control Act 1992 (WA), s 4A(c).

[86] Victorian Royal Commission (n 7) ch 8, [10].

[87] L Nower and A Blaszczynski, 'Gambling Motivations, Money-Limiting Strategies, and Precommitment Preferences of Problem versus Non-Problem Gamblers' (2010) 26 *Journal of Gambling Studies* 361.

The casino is open 24 hours a day and has more electronic gambling machines (EGMs) than any other venue.[88] Unlike other venues in Victoria, Crown Melbourne has EGMs that are permitted to operate in 'unrestricted' mode, that is, with no maximum betting limits – another organisational (and governmental) choice.[89] The Gambling Code at Crown is out of date and focuses on external signals of distress rather than contemporary research that draws upon data collected about spending patterns (data collected for loyalty programmes but not used to fulfil problem-gambling obligations).[90] The Victorian Royal Commission found that the tools to prevent problem gambling are 'not effective' and have 'serious deficiencies'.[91] In addition, despite claiming a formal gambling code that is world-leading, staff are not adequately trained to implement the (deficient) Gambling Code. Staff who work on or near the gaming floor could not accurately describe the signs of problem gambling, nor accurately explain Crown's Play Periods Policy; they did not know what RSG (Responsible Service of Gaming) meant, and could not name the Responsible Gaming Officers at Crown and had never referred anyone to the Responsible Gaming Officers or suggested to a manager that someone be referred.[92] Crown hosts receive a bonus that is based on customer visitation, and the Royal Commission assumed a relationship between turnover and visitation. These rewards lead individual hosts to work towards increasing attendance and expenditure by clients, regardless of whether those clients are problem gamblers. The failure to prevent problem gambling, or arguably the choice to facilitate and promote problem gambling, is over and above the actions of any one individual and is in conformity with the aims of Crown Resorts to obtain profit. Through structural choices, the development of rules and policies, and corporate culture's rewarding profit over compliance with problem-gambling requirements, Crown is 'a substantial and operating cause' of problem gambling on its premises.

C. Good Judgement Requirement

The third requirement of moral agency is that of good judgement, whereby intentional acts based on the beliefs and desires of the agent are attributable to the agent.[93] This is in accordance with the ideal that a person should not be punished unless they had the capacity and a fair opportunity to obey the law.[94] For corporate moral agency, this requires that a corporation must be able to form intentions that are distinct from those of its members. Additionally, when making moral judgements about an agent's behaviour, we assume that the agent can form and access judgements in its own right and possesses a regulatory capacity that governs how these intentions inform and motivate actions in a way that conforms to rational and epistemic standards. Accordingly, in

[88] Victorian Royal Commission (n 7) ch 8, [11].
[89] Nower and Blaszczynski (n 87).
[90] Hancock (n 67).
[91] Victorian Royal Commission (n 7) ch 8, [23].
[92] ibid [25].
[93] Chapple (n 6) 112.
[94] HLA Hart, *Punishment and Responsibility* (Oxford, Clarendon Press, 1968); C Crosby, 'Gross Negligence Manslaughter Revisited: Time for a Change of Direction?' (2020) 84 *The Journal of Criminal Law* 228.

order to be regarded as capable of good judgement, a corporation must first be critically reflective, that is, have the ability to reflect and pass judgement upon its actions and the thought processes leading up to them. Second, the corporation must have a sensitivity to reasons and the ability to weigh them: this requires that evidence must be available to make decisions, even if it is not drawn upon. Third, critical reflection and reasons can make a difference to how one acts – that is, can the corporation modify its actions and intentions in response to information?[95]

The good judgement requirement has some intersections with the criminal legal doctrinal requirement of mens rea or the state of mind of the accused. In criminal law, mens rea requirements are closely associated with blameworthiness, to the extent that in some codes they are termed the 'fault elements'.[96] Mens rea requirements of offences were constructed around the privileged legal subject – the (responsible) human being. The currently dominant model of culpability in criminal legal doctrine (more honoured in the breach) is that of subjective blameworthiness, that is, intention and knowledge.[97] There are common law offences that do not require that an accused has the capacity for good judgement, but these are characterised as exceptional. This can include very serious offences, such as cases of manslaughter by criminal negligence, where the accused is measured against the objective standard of the reasonable person, as opposed to whether the accused recognised, or was even capable of recognising, that their behaviour or failure was objectively dangerous.[98] These cases have led to criticisms about the fairness of holding an accused liable for a standard that they could not meet, that is, of attributing blameworthiness when arguably the accused was not a full moral agent.[99] In addition, there are regulatory offences of strict or absolute liability with minimal or no mens rea requirements – many of which were created in order to cope with corporate wrongdoing or harms.[100] These regulatory offences have also generated a great deal of criticism from some criminal law theorists for breaching fundamental requirements of criminal legal doctrine.[101] Like the requirements of moral agency, in most criminal offences there is no requirement that an accused exercised good judgement, only that they are capable of doing so. The doctrine of unfitness to plead and defences of mental impairment and intoxication provide restricted platforms for considering the moral and mental capacity of the accused. Historically, a primary obstacle for holding corporations criminally liable stems from difficulties of establishing the mens rea of corporations.[102]

How, then, are these intersecting requirements of capacity for good judgement and the mens rea of corporations to be established? List and Pettit frame the requirement

[95] Chapple (n 6) 72.
[96] Criminal Code (n 9) div 5.
[97] Wells (n 34); Fletcher (n 21).
[98] *R v Stone and Dobinson* [1977] 1 QB 354.
[99] Crosby (n 94); L Steele and S Thomas, 'Disability at the Periphery: Legal Theory, Disability and Criminal Law' (2015) 23 *Griffith Law Review* 357.
[100] S Walpole and M Corrigan, 'Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct' (2021) 43 *Sydney Law Review* 489.
[101] JD Greenberg and EC Brotman, 'Strict Vicarious Criminal Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization' (2014) 51 *American Criminal Law Review* 79.
[102] PH Bucy, 'Organizational Sentencing Guidelines: The Cart Before the Horse' (1993) 71 *Washington University Law Quarterly* 329.

of good judgement for group agency in terms of democratic, representational decision making.[103] But as Chapple points out, this does not accord with the hierarchical, rule-based decision making of corporations.[104] Corporate rules will set out specific procedures by which decisions are arrived at, and frequently one person will be authorised to act on behalf of the corporation.[105] Corporate hierarchies are precisely intended to place good judges in key decision-making positions. Individuals will have special roles to make decisions on behalf of the company.

Various approaches have been proposed to identify corporate intention and judgements. The dominant common law approach for ascribing corporate liability in Australia and the United Kingdom is that of identification theory, which requires proof that the 'directing mind' of the corporation has acted with the requisite fault, as set out in *Tesco v Nattrass*.[106] This approach is based on an anthropomorphic conception of the company, where only those persons invested by proper authority with managerial powers and responsibility are regarded as the head or brains of the company. The 'state of mind' of this 'directing mind' is treated by law as the state of mind of the organisation, which enables criminal liability to be imposed on a corporation for offences that require mens rea. Whilst identification theory raises problems in terms of identifying who the directing mind is, for the purposes of argument and in accordance with the bulk of doctrine I will identify the directing mind as the Board of Crown. Although not exercising good judgement, the Board meets the requirements of moral agency of the capacity to make judgements. The inquiries demonstrate evidence of the Board's capacity to be critically reflective, with the members of the Board explaining why, despite media claims of money laundering, they believed that they were the victims of a witch hunt. Evidence was available to make decisions, even if they did not draw upon that evidence. In light of media reports, directors could have asked questions and done further research, but they did not. There is also evidence that the Board members exercised (some) critical reflection and modified their actions in response to information. For example, in response to revelations of money laundering in the Riverbank and Southbank accounts, Crown introduced new policies and controls over its patron accounts.[107]

Although this satisfies the requirements of moral agency, it fails to establish any mens rea of Crown. This is because identification theory requires that the prosecution prove that the directing mind of a corporation knew of the criminal actions and possessed the necessary mens rea.[108] The problem is that in complex organisations like

[103] List and Pettit (n 3).
[104] Chapple (n 6) 77.
[105] ibid 64.
[106] *Tesco* (n 18); *Hamilton v Whitehead* [1988] HCA 65, (1998) 166 CLR 121, 127. The UK has largely reaffirmed the directing-mind approach in *Attorney-General's Reference (No 2 of 1999)* [2000] EWCA Crim 91, [2000] 3 All ER 182. The test was tempered somewhat by the Privy Council's expanding the range of people whose actions and state of mind are attributed to the company in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5, [1995] 3 All ER 918.
[107] Victorian Royal Commission (n 7) ch 6.
[108] The directing mind can be more than one person acting collectively, such as a board of directors. See J Chalmers, 'Corporate Culpable Homicide: Transco Plc v HM Advocate' (2004) 8 *Edinburgh Law Review* 262. For an analysis of the common law position, see O Dixon, 'Corporate Criminal Liability: The Influence

Crown Resorts, where responsibility is diffuse and distributed, the higher up a person is, the less likely that they will have the necessary mens rea.[109] Ignorance by individual directors and Boards as a whole is a theme. In the bulk of wrongdoing at Crown, it was claimed that concerns and issues were not elevated to directors and/or the Board level by staff. The Board claimed ignorance about money laundering, problem gambling and legal issues in China. These claims are dubious, but they were accepted by the Bergin Inquiry. Accordingly, even though the Board meets the requirements of moral agency, the restrictive nature of common law identification liability effectively limits the corporation's liability for offences committed by its senior officers. This demonstrates the way in which the common law creates 'a perverse incentive for the senior management to insulate itself from the criminal activities of lower-level employees'.[110]

However, it is arguable that the courts are over-complicating the requirement of mens rea of corporations. Existing legal doctrine applied to human legal subjects points to a broader approach to establishing mens rea that could be applied to corporations. For individuals, in the absence of confession, intention is not transparent:

> As I said I think when I was directing you originally you cannot take the top of a man's head off and look into his mind and actually see what his intent was at any given moment.[111]

Why, then, do we expect intention to be transparent for corporations? Identification theory is an attempt to take the top off the corporation's head to ascertain intent at any given moment, but it relies upon records of decisions and knowledge whilst simultaneously discouraging recording and encouraging ignorance. Identification theory does not encourage directors to gain knowledge, ask questions or challenge. The classic response to allegations of wrongdoing is denial by the corporation.[112] For example, Crown continued to deny money laundering until the final days of the Bergin Inquiry, made some admissions, then withdrew these admissions for the Victorian Royal Commission.[113] In the absence of confession, criminal legal doctrine relies upon external conduct or results to ascertain the internal contents of an accused's mind.[114] This focus on manifest behaviour has strict parameters around it,[115] but, for example, in the absence of a confession or an explanation, if a person shoots into a crowd causing the deaths of multiple people, juries would be entitled to find an intention to kill or inflict grievous bodily harm. Likewise, if a person blew up a plane and confessed that they did so for the purposes of insurance, without making any mention of their intentions

of Corporate Culture' in J O'Brien and G Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Oxford, Hart Publishing, 2013) 251.

[109] L Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 *Law and Financial Markets Review* 57, 58.

[110] R Cheung, 'Money Laundering – a New Era for Sentencing Organisations' (2017) 1 *Journal of Business Law* 23, 28.

[111] *R v Moloney* [1985] AC 905, [1985] 1 All ER 1025, 1031.

[112] Crofts (n 37).

[113] Victorian Royal Commission (n 7) ch 6.

[114] There is also recognition that intention does not necessarily equate with an outcome. For example, a golfer might always intend to get a hole in one, but the chances of this happening are minimal. This emphasis upon unsuccessful intentions is significant in the doctrine of criminal intent.

[115] See *R v Schonewille* [1998] 2 VR 625.

with regard to the passengers who died as a consequence, juries could find an intention to kill.[116] This is a complex area of law and philosophy, and would require certainty of outcome, but the latter is a form of instrumental evil, where the collateral damage was not necessarily articulated by the accused as an intended outcome but, because it was a likely certainty, the law would regard it as intentional.[117]

The Bergin Inquiry framed Crown's compliance breaches, or to put it more bluntly and accurately, Crown's crimes, as due to failure, and specifically failure of corporate governance. There are various ways to respond to this explanation for corporate wrongdoing. One approach is to emphasise and accept this narrative of 'failure' and to argue that it is in and of itself blameworthy.[118] This is in accordance with a classic negative model of wickedness and is consistent with the offence of criminal negligence.[119] This approach is reflected in crimes that have been created that are specific to corporations, such as anti-money laundering, breach of work and safety legislation, and failure to prevent offences.[120] On this approach, it is the failure to set up anti-money laundering regimes or create a safe workplace that is in itself wrongful. This approach contributes to a critique of the emphasis on subjective culpability in criminal legal doctrine, particularly as it applies to corporations. This is because it is arguable that many of the harms caused by corporations are due to failure. Accordingly, law reform in this area to criminalise corporate failure is appropriate and justified by classic theories of wickedness.

Alternatively, theoretical and legal approaches have been proposed that aim at capturing the mens rea of corporations in the absence of confessions. For example, the Model Criminal Code Officers Committee considered that corporate culture is analogous to intention.[121] Peter French argued that the Corporate Internal Decision Structure provided a means of identifying decisions and choices of the corporation:[122]

> When the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.[123]

Elise Bant's theory of system of intentionality argues that a corporation's systems, policies and processes manifest its intentions.[124] The Victorian Royal Commission devoted

[116] Juries may simply not believe that an accused had not thought that blowing up a plane would cause the deaths of anyone on the plane.

[117] M Moore, 'Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Restrictions' (2007) 27 *Law and Philosophy* 35; RA Duff, 'Two Models of Criminal Fault' (2019) 13 *Criminal Law and Philosophy* 643.

[118] M Midgley, *Wickedness: A Philosophical Essay* (Abingdon, Routledge, 2001).

[119] Augustine, *The Confessions of St Augustine*, tr Edward Pusey (Springfield, CO, Collier Books, 1961); Thomas Aquinas, *On Evil*, ed R Regan (Oxford, Oxford University Press, 2003); Aristotle, *The Nicomachean Ethics*, tr J Thomson (London, Penguin Books, 2004).

[120] Criminal Code (n 9), pt 10.2; Safe Work Australia, 'Law and Regulation' (2022) at www.safeworkaustralia.gov.au/law-and-regulation; Copp and Cronin (n 14); Crofts (n 14).

[121] Parliament of the Commonwealth of Australia, Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (Final Report, December 1992) chs 1 and 2, 21, 107. See also Dixon (n 108). Bucy talks about the 'ethos' of an organisation – corporate identity or ethos results from the dynamic of many individuals working together toward corporate goals: Bucy (n 60).

[122] French (n 4); French (n 43).

[123] French (n 4) 214.

[124] Bant, ch 9 of this volume.

a section of its Final Report to system intentionality, labelling it a 'compelling challenge' to Crown's claims of inadvertent money laundering, quoting Bant:[125]

> Crown must be taken to understand the inherent incidents of the systems it adopts and carries out. In this case, the unchecked, intentional and longstanding aggregation process, on which the AML system depended, actively and necessarily facilitated money laundering.[126]

Bant's theory is that corporations adopt systems to enable them to make and implement decisions, and these systems constitute and reveal the corporate intention.[127]

These theories propose a more pragmatic or realistic approach to corporations that has the potential to more neatly slot corporations within pre-existing criminal legal requirements that have been modelled on the ideal responsible legal subject. This approach is consistent with the insights of Chapple about why corporations are worthy of analysis as a specific genre of group agents. Unlike many groups, corporations are legally structured, they adopt rules and policies and practices. Authority structures and the division of labour are put in place to reduce decision costs and enable the corporation to react competitively in the market.[128] The corporation programmes and prompts judgement formation; and when a person forms a judgement on behalf of the company they will be representing the company in the technical sense. The company therefore owns this intention and is committed to its consequences, as if it had been an intention of the company.

Accordingly, it is appropriate to analyse Crown's intentions in a broader time frame. Corporate governance failings should not be considered in isolation but as part of a decision-making strategy expressed in official and unofficial, formal and informal rules. The clear intention of Crown Resorts, like the majority of public corporations, is the pursuit of profit. Whilst there is some choice about how this is to be achieved, or how avidly pursued, employees are coordinated to work towards the profit of Crown even if they do not personally want Crown to profit; they may just wish to keep their jobs, or may even disagree with the decisions of the corporation. The 'failings' of corporate governance could be reshaped and rethought of instead as structural choices in the pursuit of the primary aim – that of profit. Provided profits were sustained, the Crown Board was seduced and reluctant to ask questions about any of the dubious approaches adopted. Choices were made in terms of the kind of person put in position. This extended even to choices of Board members, installing non-executive directors who were ignorant of legal requirements and the duties of casinos, and beholden in various ways to Packer. Executives were installed and rewarded who acted according to concern for short-term profitability rather than legality. Decisions were made to organise Crown to act towards the specific goal of profit, and those structures and policies that were put in place can be analysed to determine what is valued and what is not. It is absolutely clear, and accepted by the Inquiries, that Crown avidly pursued profit at the expense of legal obligations. Crown systematically and intentionally breached the

[125] Victorian Royal Commission (n 7) 174–78.
[126] ibid 177.
[127] E Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) 39 *Companies and Securities Law Journal* 259.
[128] Chapple (n 6) 96.

law, including tax law, anti-money-laundering law, the Casino Act and legal duties of responsible gambling, Chinese laws against gambling and border controls.

Although both Inquiries accepted that Crown did not turn a blind eye to money laundering based on the principles of identification theory,[129] in the recent case of *ASIC v Westpac* the Federal Court adopted a more practical and realist approach that is in accordance with the arguments of this chapter.[130] In that case, the Federal Court refused to accept that breaches by Westpac were not deliberate, pointing to structural decisions to under-fund and under-train the one and only compliance officer, and stated:

> The conduct was deliberate, in the sense that it was the result of a planned campaign, and was not the result of unexpected or rogue behaviour by Westpac's representatives. The compliance framework for the campaign was shown to be wholly inadequate and the individual seemingly charged with the 'front line' compliance role was not qualified to perform that role. Subsequent to the commencement of these proceedings, and even after their finalisation in the High Court, Westpac has not expressed regret for the conduct, does not appear to have taken steps to remedy the compliance deficiencies and has been tardy in progressing a remediation plan.[131]

The same arguments can be made in relation to Crown. Crown's primary intention was to achieve profit at all costs, including through breaches of the law. Despite multiple red flags, including media reporting, reports in parliament, independent research and being forewarned that casinos are sites of risk for these specific crimes, Crown demonstrated a willingness with formal and informal rules and policies to break the law to make money. These decisions were arguably rational given the relative absence and soft touch of regulators. This culture of non-compliance and criminality was reinforced by a refusal to cooperate with regulatory investigations:

> It bullied the regulator. It provided it with false or misleading information. It delayed the investigatory process. All in all, it took what steps it could to frustrate the regulator's investigations.[132]

Crown consistently refused to admit responsibility for these criminal breaches or seek to minimise harm once the breaches became apparent. As noted, Crown denied that money laundering was taking place at its premises until the final hours of the Bergin Inquiry, it then withdrew these admissions prior to the Victorian Royal Commission. Overall, Crown made clear choices to breach the law in the pursuit of profit over long periods of time.

III. Conclusion

This chapter argues that corporations can and should be conceived of as moral agents in a way that is broadly consistent with our typical accounts of moral responsibility.

[129] This was likewise mirrored in AUSTRAC civil penalty cases against corporations, where the agreed facts were that breaches that occurred over many years were 'not deliberate'.

[130] *Australian Securities and Investments Commission v Westpac Securities Administration Limited* [2021] FCA 1008, (2021) 156 ACSR 614.

[131] ibid [95] (O'Bryan J).

[132] Victorian Royal Commission (n 7) [10].

Throughout I have woven criminal legal doctrinal requirements with typical accounts of moral responsibility. If corporations are broadly consistent with our existing ideas of moral and criminal agency, this suggests that there is no need to introduce new or complex theories to explain or justify corporate responsibility. I have argued that there is a tendency to over-complicate the third requirement of moral responsibility – that of good judgement. The problem with buying into the complication of large organisations is that the larger they are, the less likely anyone or anything is to be held responsible. Instead, crimes are framed as tragic accidents or mistakes. One way of attributing culpability to Crown is to argue that failure, or lack of goodness, is blameworthy.[133] An alternative is to adopt a pragmatic, realist approach. It is clear that Crown's intention has been to pursue profit at all costs – demonstrating a willingness to undermine, override, ignore and breach criminal laws in the process of achieving this, even whilst having the capacity to draw upon legal resources that are not available to individual accused. Patterns of rule-based behaviour or corporate culture – which include written and unwritten rules – were all geared to coordinate and work towards profit. Corporations like Crown can and should be regarded as moral agents capable of making moral choices for which they can be held responsible. Although immoral in its choices and actions, these were the choices of a moral agent and, as such, blameworthiness can be attributed to Crown for its criminal actions.

[133] Midgley (n 118).