

AGGREGATION IN CORPORATE ATTRIBUTION LAW: A WINDOW INTO ORGANISATIONAL CULPABILITY

NICHOLAS COKIS*

In many large corporations, knowledge of corporate activity is diffused across numerous individual employees. Traditional models of corporate attribution struggle to attribute mental states to corporations with diffused individual knowledge. This makes it difficult to apply legal doctrines denoting serious culpability to corporations that cause significant harm to society. Although it has largely fallen into disuse, aggregation is a model of corporate attribution that has previously been applied in cases where corporations are affected by diffused knowledge. This article attempts to understand reasons for the use of aggregation by examining cases involving aggregation across the United States, United Kingdom and Australia. It suggests that a predominant reason for the use of aggregation is its ability to attribute complex mental states to corporations affected by diffused knowledge. In doing so, aggregation necessarily captures culpability derived from corporations themselves, rather than individual employees. This suggests aggregation may be better understood through organisational corporate attribution models.

I INTRODUCTION

A feature of modern corporations is the extent to which knowledge of corporate activity is diffused across a large number of individuals. Today's corporations are larger on average than they have been before.¹ Whether through deliberate corporate strategy or as a natural consequence of growth, employees of large corporations only need to know a fraction of overall corporate activity to sufficiently do their job. While diligent managers may try to accumulate more comprehensive knowledge,

* Lawyer, Corrs Chambers Westgarth. Email: nacokis@gmail.com. This article arises from research undertaken as part of the Juris Doctor at the University of Western Australia. I am deeply grateful to Elise Bant for her invaluable guidance, feedback and support throughout the development of this article. I also thank Rebecca Faugno for her comments and assistance, and the anonymous reviewers for their comments. Any errors or omissions are my own.

1 See Jan De Loecker, Jan Eeckhout and Gabriel Unger, 'The Rise of Market Power and the Macroeconomic Implications' (2020) 135(2) *Quarterly Journal of Economics* 561 <<https://doi.org/10.1093/qje/qjz041>>. While the authors focus exclusively on the United States ('US'), they note evidence of similar patterns around the world: at 567.

important knowledge often fails to move up the corporate hierarchy.² Consequently, senior managers tend to have limited knowledge of day-to-day corporate activity.³

This presents a problem for those pursuing legal action against large corporations. Whether criminal or civil, claims denoting serious culpability often require a corporation to be attributed with a specific mental state, such as knowledge or intention.⁴ In large corporations where knowledge is diffused among many individuals, it is often the case that no single individual possesses the required mental state.⁵ This makes the effectiveness of traditional models of corporate attribution, with their individualistic focus, highly limited.⁶

What can follow are situations in which corporations are not able to be attributed mental states associated with serious culpability, despite an intuitive sense that the corporation manifests the requisite mental state and its associated culpability independently of its individual employees. Factors unrelated to individual mental states may reinforce this intuitive understanding. For instance, the corporation may have failed to implement appropriate communication systems to alert it to potential harm arising from its activities. It also may have adopted sophisticated systems to ensure it obtains commercial benefit from activities that are in fact causing harm.⁷ In any event, the diffusion of corporate knowledge should not automatically insulate corporations from liability for misconduct.⁸ As Owen J pithily explained: ‘A corporation ought not, by compartmentalising its decision-making, be able to escape the consequences of causing harm to others.’⁹

This concern has encouraged the development of alternative methods of attributing mental states to corporations. These methods attempt to bypass the issues associated with focusing on individual mental states by proposing

2 See also John C Coffee Jr, ‘Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response’ (1977) 63(7) *Virginia Law Review* 1099, 1131–2 <<https://doi.org/10.2307/1072549>>.

3 In this article, the terms ‘manager’ and ‘senior manager’ are intended to refer to someone in a position of substantial power and influence within a corporation. The definition of ‘senior manager’ in section 9 of the *Corporations Act 2001* (Cth) (‘*Corporations Act*’) is consistent with this understanding.

4 This is not true for strict liability offences, such as ‘failure to prevent’ type offences: see generally Law Commission (UK), ‘Corporate Criminal Liability’ (Options Paper, 10 June 2022) ch 8 (‘Corporate Criminal Liability Options Paper’). While strict liability approaches to corporate wrongdoing are promising, they are not a panacea: see Elise Bant, ‘Catching the Corporate Conscience: A New Model of “Systems Intentionality”’ [2022] (3) *Lloyd’s Maritime and Commercial Law Quarterly* 467, 481–4 (‘Catching the Corporate Conscience’).

5 See, eg, the role diffused individual knowledge played in the destruction by Rio Tinto of the Aboriginal cultural heritage site at Juukan Gorge: Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward* (Final Report, October 2021) 23–6 [2.61]–[2.71].

6 See, eg, Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) (‘*CCR Final Report*’) chs 4, 6; ‘Corporate Criminal Liability Options Paper’ (n 4) chs 3, 7. See also discussion in Part II(A) below.

7 See, eg, the ‘fees for no service’ systems previously adopted by AMP and other financial service providers: *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 136–45.

8 Likewise, smaller corporations should not be disproportionately more likely to attract liability for misconduct.

9 *Bell Group (in liq) v Westpac Banking Corporation* [No 9] (2008) 39 WAR 1, 682 [6159] (Owen J) (‘*Bell* [No 9]’).

novel models of corporate attribution grounded in a concept of organisational culpability.¹⁰ The term organisational culpability reflects a core foundation of these models – that corporations are capable of attracting culpability in their own right, independently of specific individuals.¹¹ The concept of organisational culpability recently attracted attention in the High Court case of *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (*Productivity Partners*).¹² In *Productivity Partners*, Gordon J and Edelman J applied and endorsed reasoning consistent with ‘systems intentionality’, a novel, organisational model of corporate responsibility.¹³ Central to the model, as explained by Gordon J, is that corporations ‘think’ and act through systems. This enables corporate mental states to be revealed and instantiated through corporate systems, policies, and practices, independent of the mental states of individuals within a corporation.¹⁴

Although applied in the context of a statutory unconscionability claim, the potential scope of systems-based approaches to corporate attribution, and the ramifications for corporate responsibility more broadly, remain open for further consideration.¹⁵ As recently identified by Justice Kristina Stern (speaking extra-curially), one issue relevant to the development of systems intentionality is the degree to which it resembles a type of corporate attribution method which predates organisational models of attribution, known as aggregation.¹⁶ In recognition of the relevance of aggregation to the development of modern organisational models of corporate attribution, this article provides a timely and critical analysis of aggregation.¹⁷

10 See generally *CCR Final Report* (n 6) 147–8 [4.73]–[4.79]; Elise Bant, ‘The Culpable Corporate Mind: Taxonomy and Synthesis’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 3 <<https://doi.org/10.5040/9781509952410.ch-001>> (‘Taxonomy and Synthesis’).

11 *CCR Final Report* (n 6) 147 [4.73]–[4.79]. The Australian Law Reform Commission used the term ‘organisational blameworthiness’ instead of ‘organisational culpability’ in its report. This author considers these terms synonymous but prefers to use ‘organisational culpability’.

12 (2024) 281 CLR 338 (*Productivity Partners*).

13 See especially *ibid* 399–401 [108]–[111], 407 [134], 409–10 [143] (Gordon J), 425–6 [199]–[200], 436–8 [236]–[241] (Edelman J). For an outline of the systems intentionality model, see Elise Bant, ‘Systems Intentionality: Theory and Practice’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 183 <<https://doi.org/10.5040/9781509952410.ch-009>> (‘Systems Intentionality’), cited in *ibid* 400 [108]–[109] n 254–60 (Gordon J), 438 [243] n 355 (Edelman J); Elise Bant, ‘Modelling Corporate States of Mind through Systems Intentionality’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 231 <<https://doi.org/10.5040/9781509952410.ch-009>>. See also Elise Bant, ‘Culpable Corporate Minds’ (2021) 48(2) *University of Western Australia Law Review* 352, cited in *ibid* 437 [238] n 346 (Edelman J); Elise Bant and Jeannie Marie Paterson, ‘Systems of Misconduct: Corporate Culpability and Statutory Unconscionability’ (2021) 15(1) *Journal of Equity* 63 (‘Systems of Misconduct’), cited in *ibid* 437 [240] n 350 (Edelman J).

14 *Productivity Partners* (n 12) 399–400 [108] (Gordon J), 425–6 [198]–[200] (Edelman J).

15 See Elise Bant, ‘Rethinking Corporate Groups: Insights from Systems Intentionality’ (2025) 47 *Sydney Law Review* 20353: 1–29 <<https://doi.org/10.30722/slr.20353>>; Elise Bant and Rebecca Faugno, ‘Revolution and Evolution in Corporate Law: *Productivity Partners* and Systems Intentionality in the High Court of Australia’ (2025) 40(3) *Australian Journal of Corporate Law* 181; Justice Kristina Stern, ‘Systemic Unconscionability and Corporate Intention’ (Speech, Commercial Law Association of Australia, 8 August 2025).

16 Stern (n 15).

17 Aggregation has also been termed ‘collective knowledge’ or ‘collective scienter’ in the US: see, eg, Eli Lederman, ‘Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity’ (2000) 4(1) *Buffalo Criminal Law Review* 641, 662

Aggregation involves adding up the individual mental states of different employees and attributing this summation of mental states to a corporation. On its surface, this approach suggests any attributed mental state must reflect the culpability of individuals within a corporation. However, as this article will demonstrate, close analysis of cases applying aggregation reveals that the mental states attributed to corporations through aggregation have minimal connection to individuals' subjective states of mind. Rather, the attributed aggregated mental state reflects a distinctive corporate culpability, derived from the adoption of systems that diffuse knowledge.

Despite its use in a significant number of criminal and civil cases,¹⁸ aggregation has always been considered contentious and problematic.¹⁹ As this analysis will show, it is highly limited in its ability to explain and justify the attribution of culpable mental states. Its unprincipled approach largely prevents it from being practically workable. Nevertheless, aggregation provides a critical insight. It shows that organisational culpability may be reflected in the adoption of corporate systems that diffuse knowledge. In this respect, the use of aggregation provides a window into organisational culpability. Through it, it becomes possible to see that corporate systems that diffuse knowledge are capable of reflecting discrete forms of culpability, relevant to both civil and criminal legal frameworks, captured by mental states. This presents an opportunity for aggregation models to be better explained through approaches to corporate attribution which ground corporate responsibility in the adoption of corporate systems.

Part II of this article introduces the concept of aggregation in the context of corporate attribution law. Part III explores the reasons given by courts for the use of aggregation and analyses its criticisms. It covers the use of aggregation in the United States ('US'), United Kingdom ('UK') and Australia – jurisdictions in which aggregation has been used significantly. Part IV summarises common patterns in the reasons for the use of aggregation and its criticisms across these jurisdictions. It suggests a shared and predominant reason for the use of aggregation lies in the perceived need to attribute mental states to corporations despite the existence of corporate structures that diffuse knowledge. It also suggests that although aggregation is largely unworkable, including because it fails to particularise the discrete doctrinal requirements of culpable mental states, its use demonstrates that corporate structures that diffuse knowledge may reflect a distinct sense of organisational culpability.

While this article necessarily engages in a degree of comparative analysis, it should not be considered an attempt to outline a complete or universal account of aggregation.²⁰ Instead, it intends to identify patterns of reasoning in the use of

<<https://doi.org/10.1525/nclr.2000.4.1.641>> ('Models for Imposing Corporate Criminal Liability');

Bradley J Bondi, 'Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions' (2009) 6(1) *New York University Journal of Law and Business* 1, 7. In this article, the term 'aggregation' will be used.

18 See Part III below.

19 See, eg, Thomas A Hagemann and Joseph Grinstein, 'The Mythology of Aggregate Corporate Knowledge: A Deconstruction' (1997) 65(2) *George Washington Law Review* 210. See also Part III below.

20 More complete accounts of aggregation have been appropriately confined to their relevant jurisdiction.

For the US: see Eli Lederman, 'Corporate Criminal Liability: The Second Generation' (2016) 46(1)

aggregation by considering the perspective of different courts across different jurisdictions, responding to similar fact scenarios. As courts in each jurisdiction faced similar issues of attributing liability to diffused-knowledge corporations under their respective attribution methods (discussed below), courts across jurisdictions are likely to have common reasons for developing their aggregation models.

Part V explores the significance of understanding aggregation as a limited model for capturing organisational culpability. It suggests that the novel systems intentionality model may represent a more principled response to the issues highlighted by the use of aggregation.²¹ Part VI concludes.

II AGGREGATION AND CORPORATE ATTRIBUTION

A Background

Aggregation is one of several different methods of corporate attribution, which is the area of law concerning how corporations can be characterised legally as possessing mental states. The challenge of applying the individualistic concept of mental states to corporations is obvious – how can a corporation, an artificial legal entity that has no natural mind, be said to have, for example, knowledge or intention? A large number of common law, equitable and statutory doctrines require proof of mental states and are equally applicable to humans and corporations.²² For example, Australia's continuous disclosure obligations for ASX-listed entities requires assessing when a particular corporation became 'aware' of market sensitive information.²³ Another example is Australia's foreign bribery offence, which requires proving a corporation acted with an intention to influence a foreign public official.²⁴ These legal doctrines, alongside many others, necessitate having methods of corporate attribution.²⁵ Moreover, as recent inquiries into corporate criminal responsibility by the Australian Law Reform Commission ('ALRC') and UK Law Commission recognise,²⁶ the essential challenges surrounding the existence and proof of corporate mental states remain broadly the same for both

Stetson Law Review 71, 82–3 ('Corporate Criminal Liability'). For the UK: see Rachel Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022) 203–22 <<https://doi.org/10.5040/9781509941384>>.

For Australia: see Claudia Oakeshott and Deniz Kayis, 'When the Left Hand Does Not [Want to] Know What the Right Hand Is Doing: The Attribution and Aggregation of Corporate Knowledge in Australia' (2022) 30(3) *Australian Journal of Competition and Consumer Law* 180; Andrew Eastwood, 'Corporations and the Aggregation of Knowledge' (2013) 87(8) *Australian Law Journal* 553.

21 And in doing so, addresses some of the areas for further development raised in Justice Stern's speech: see Stern (n 15).

22 See, eg, the different types of claims litigated in the cases in Part III below.

23 ASX, *Listing Rules* (at 5 June 2021) r 3.1. See also *Corporations Act* (n 3) s 674.

24 *Criminal Code Act 1995* (Cth) s 70.2(1) ('*Criminal Code*'). This specific offence has recently been augmented with a new 'failure to prevent' style offence, specific to corporations: at ss 70.5A, 70.5B.

25 Bant, 'Catching the Corporate Conscience' (n 4) 481–4; Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91(5) *Notre Dame Law Review* 2049, 2058 <<https://doi.org/10.2139/ssrn.2633627>>.

26 See *CCR Final Report* (n 6) 32 [1.15]; 'Corporate Criminal Liability Options Paper' (n 4) 35–8 [3.40]–[3.55].

criminal and civil law contexts.²⁷ This suggests the necessity for a holistic and consistent approach to understanding corporate attribution.²⁸

Corporate attribution law in Australia, the US and the UK draws on a complex mix of different approaches across general law and statute.²⁹ To understand aggregation, it is helpful to briefly outline some of these different approaches to corporate attribution.

One approach to corporate attribution is to use principles of vicarious liability. This is the dominant approach in US law under the *respondeat superior* model. According to *respondeat superior*, corporations can be attributed with the mental states of any employee acting within the scope of their employment and with an intent to benefit the corporation.³⁰ Another approach is identification theory, which is the default approach at general law in the UK and Australia. Identification theory attributes to corporations the mental states of those individuals considered to be the ‘directing mind and will’ of the corporation, who are said to be the legal embodiment of the corporation’s mind.³¹ The relevant individuals who make up the directing mind and will are generally the most senior decision-makers, such as directors and executives.³² The theory has been augmented by the *Meridian* approach,³³ which proposes that it is a matter of statutory interpretation as to whose mental state for the purpose of the relevant law should be attributed to the corporation.³⁴

Both vicarious liability and identification theory can be understood as ‘derivative’ in the sense that they rely on a mental state being wholly possessed by a relevant individual before it can be attributed to the corporation.³⁵ Vicarious

27 See Bant, ‘Catching the Corporate Conscience’ (n 4) 468–9. Given mental states are essentially an issue of fact, similarities across criminal and civil law should not be surprising: see *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 (Bowen LJ).

28 Elise Bant and Rebecca Faugno, ‘Corporate Culture and Systems Intentionality: Part of the Regulator’s Essential Toolkit’ (2023) 23(2) *Journal of Corporate Law Studies* 345, 347 <<https://doi.org/10.1080/14735970.2023.2292837>> (‘Corporate Culture and Systems Intentionality’).

29 Elise Bant, ‘Reforming the Laws of Corporate Attribution: “Systems Intentionality” Draft Statutory Provision’ (2022) 39(5) *Company and Securities Law Journal* 259, 260; Samuel Walpole, ‘Criminal Responsibility as a Distinctive Form of Corporate Regulation’ (2020) 35(2) *Australian Journal of Corporate Law* 235, 237. See also Eli Lederman, ‘Corporate Criminal Liability 2.0: Expansion Beyond Human Responsibility’ (2020) 43(4) *Manitoba Law Journal* 35 <<https://doi.org/10.29173/mlj1213>>.

30 Mihailis E Diamantis, ‘Functional Corporate Knowledge’ (2019) 61(2) *William and Mary Law Review* 319, 338, citing American Law Institute, *Restatement (Third) of Agency* (Thomson Reuters, rev ed, 2024) vol 1 § 2.04; ‘Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions’ (1979) 92(6) *Harvard Law Review* 1227, 1247 <<https://doi.org/10.2307/1340445>>. See also *New York Central and Hudson River Railroad Co v United States*, 212 US 481 (1909).

31 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 171 (Lord Reid).

32 *Ibid* 187 (Viscount Dilhorne), citing *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159. The same approach was subsequently adopted in Australia: see *Hamilton v Whitehead* (1988) 166 CLR 121, 127 (Mason CJ, Wilson and Toohey JJ). See also *CCR Final Report* (n 6) 143–4 [4.58]–[4.64].

33 See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

34 *Ibid* 507 (Lord Hoffmann). See also *CCR Final Report* (n 6) 145–6 [4.70]–[4.72]. This development was also adopted in Australia: see *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 372–3 (Redlich JA); *Australian Securities and Investments Commission v Westpac Banking Corporation [No 2]* (2018) 357 ALR 240, 266 [1660] (Beach J).

35 Bant, ‘Taxonomy and Synthesis’ (n 10) 8; *CCR Final Report* (n 6) 140–1 [4.51], 143 [4.60].

liability also operates as a secondary form of liability, because corporations are deemed responsible for the liability of an individual, rather than conceptualised as attracting liability in their own right.³⁶ By contrast, identification theory conceptualises corporations as entities that attract their own liability directly, with the directing mind and will operating as the corporation's proxy mind.³⁷ However, identification theory still depends on a mental state being wholly possessed by an individual belonging to the directing mind and will for it to be attributed to the corporation. Accordingly, it remains derivative.³⁸ Australia also has a range of different statutory approaches to corporate attribution, the most widely applied being the *Trade Practices Act 1974* (Cth) model ('TPA model').³⁹ Although distinct from identification theory, the TPA model is also derivative, in that a mental state must be wholly possessed by an individual human agent before it can be attributed to the corporation.⁴⁰

The problems associated with these derivative approaches to corporate attribution have been well-identified, including recently by the ALRC and the UK Law Commission.⁴¹ A significant limitation of these approaches is that they cannot attribute a mental state to a corporation which is not wholly possessed by an individual employee.⁴² In large corporations, knowledge is often diffused to the extent that no individual employee has enough knowledge (still less intention) to form a relevant mental state with respect to corporate activity.⁴³ Consequently, when these corporations cause harm, the derivative approaches to corporate attribution are of little use in proving a corporation had a particular mental state for the purpose of a legal action.

This is not to suggest that corporate structures which diffuse knowledge are inherently wrong. There are legitimate legal and ethical reasons for certain knowledge to be compartmentalised.⁴⁴ There may also be practical reasons impeding circulation of information, due to, for example, employee numbers and

36 *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165, 187–92 [55]–[65] (Edelman and Steward JJ) ('*CCIG*'); Bant, 'Taxonomy and Synthesis' (n 10) 12. Although the US *respondeat superior* approach originally adopted the principle that corporations attract liability in their own right, in practice *respondeat superior* effectively operates as a model of secondary liability: see Walpole (n 29) 242.

37 Walpole (n 29) 244.

38 Bant, 'Taxonomy and Synthesis' (n 10) 8.

39 See *CCR Final Report* (n 6) 39, [1.43], 250–6 [6.123]–[6.150].

40 Bant, 'Taxonomy and Synthesis' (n 10) 8. Cf *CCR Final Report* (n 6) 257 [6.152]–[6.153], suggesting that the TPA model possibly permits aggregation (and is accordingly not wholly derivative) in some circumstances.

41 *CCR Final Report* (n 6) chs 4, 6; 'Corporate Criminal Liability Options Paper' (n 4) chs 3, 7. See also Mihailis E Diamantis and William S Laufer, 'Prosecution and Punishment of Corporate Criminality' [2019] 15 *Annual Review of Law and Social Science* 453 <<https://doi.org/10.1146/annurev-lawsohci-101317-031212>>; Bant, 'Taxonomy and Synthesis' (n 10); Lederman, 'Corporate Criminal Liability' (n 20).

42 Bant and Faugno, 'Corporate Culture and Systems Intentionality' (n 28) 349–50.

43 *CCR Final Report* (n 6) 229 [6.38]; 'Corporate Criminal Liability Options Paper' (n 4) 6 [1.23], 38 [3.56]; Diamantis, 'Corporate Criminal Minds' (n 25) 2057; Bant, 'Taxonomy and Synthesis' (n 10) 17.

44 This includes maintaining confidentiality obligations. Systemic centralisation of knowledge may also be very expensive for large corporations: see *Re Eastern Transmission Corporation*, 870 F Supp 1293, 1307 (Vanartsdalen J for the Court) (ED Pa, 1992).

limits to available communication technologies.⁴⁵ This is also not to suggest that these structures were necessarily put in place intentionally by people. Corporate structures may not be directly traceable to the motives of one individual or group. They may have been developed by the small, interconnected actions of many people for many purposes, and been mediated by intangible organisational forces such as corporate policy and corporate culture.⁴⁶ Nonetheless, these structures may become knowledge barriers in the sense that regardless of the nature of their origins, their effect is the diffusion and compartmentalisation of knowledge within a corporation. This article adopts the term ‘knowledge barriers’ to refer to these kinds of structures.

Newer models of corporate attribution address the limitations of the derivative approaches. They attempt to ground corporate responsibility in a concept of organisational culpability, rather than individual mental states.⁴⁷ An example is the Australian statutory corporate culture model,⁴⁸ which is itself a foundation for more recent models such as systems intentionality.⁴⁹ While many of these approaches are still in development, they are a promising way forward for addressing the challenges of corporate attribution, as demonstrated by the recent endorsement of systems analysis in *Productivity Partners*.⁵⁰ We return to these in Part V below.

B Aggregation

Aggregation, on the other hand, sits somewhat in between the traditional models of *respondeat superior* and identification theory and the newer organisational approaches. While typically regarded as controversial, it has been considered and used in a significant number of cases and widely analysed by commentators. Despite this, attempts to clearly describe or define aggregation are rare.⁵¹ This is perhaps because what aggregation involves is somewhat evident from its name. It involves the aggregation, or adding up, of the knowledge (and sometimes conduct, see below) of multiple individuals, and treating this collective knowledge as the knowledge of a corporation. Put simply, if one employee knows A and another knows B, by applying aggregation the corporation knows both A and B. This article does not intend to exhaustively describe or define aggregation, so for our purposes aggregation as a process of aggregating the knowledge of multiple individuals in a corporate attribution context suffices.

45 See *Z Ltd v A-Z* [1982] QB 558, 582 (Eveleigh LJ) (*‘Z v A-Z’*). It should be noted this case took place before the existence of rapid digital communication via the internet. Large modern corporations could likely quickly and easily communicate with all its employees using text or email.

46 See Peter A French, ‘The Corporation as a Moral Person’ (1979) 16(3) *American Philosophical Quarterly* 207, 212–14.

47 See *CCR Final Report* (n 6) 147–8 [4.73]–[4.79]; Bant, ‘Taxonomy and Synthesis’ (n 10).

48 *Criminal Code* (n 24) s 12.3.

49 See Bant, ‘Systems Intentionality’ (n 13) 183.

50 See discussion of *Productivity Partners* (n 12) above. See generally Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023).

51 See, eg, Leow (n 20) 203.

This definition excludes the aggregation of acts (individual conduct). While aggregation is most often associated with the aggregation of knowledge,⁵² many aggregation models aggregate both knowledge and a combination of knowledge and acts: if one employee performs conduct A, and another knows B, the corporation did A while knowing B.⁵³ This article is not concerned with the attribution of acts.⁵⁴ However, aggregation models that include acts are functionally similar to those that focus exclusively on knowledge. When an individual's act is aggregated, what is attributed to the corporation is both the act itself and the knowledge that the act occurred. It is the aggregation of knowledge that an act occurred, together with other knowledge from an individual who did not perform that act, which courts have used as a basis to attribute mental states.⁵⁵ Accordingly, to the extent they apply to the attribution of corporate mental states, these models of aggregation are included in this article. While aggregation has also been applied exclusively to conduct,⁵⁶ these models generally do not involve the attribution of mental states and will not be the focus of this article. Similarly, although the ALRC has suggested that aggregation is permissible under Australia's TPA model,⁵⁷ they did not suggest that the TPA model permits the aggregation of knowledge, so it is not relevant to this analysis.

The attribution of mental states not wholly possessed by any individual is a key feature of aggregation. The following analysis suggests that due to this feature, aggregation resembles an organisational approach to corporate attribution. This is despite the fact that, somewhat paradoxically, the model still relies on individual mental states. Through combining individual mental states, aggregation surpasses the limits of the derivative approaches to corporate attribution, and attributes mental states on the basis of organisational, rather than individual, culpability.

52 This is evident from the term 'collective knowledge doctrine' used instead of the term 'aggregation' in the US.

53 See, eg, James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 404 <<https://doi.org/10.1111/j.1748-121X.1994.tb00510.x>>; Meaghan Wilkinson, 'Corporate Criminal Liability: The Move Towards Recognising Genuine Corporate Fault' (2003) 9(1) *Canterbury Law Review* 142, 162; Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 20 <<https://doi.org/10.1007/BF01095717>>; Leow (n 20) 203. For examples of cases using these models, see Part III(B)(1) below.

54 In modern cases, it is often not difficult or controversial to determine what acts should be attributed to corporations: see Law Commission (UK), *Legislating the Criminal Code: Involuntary Manslaughter* (Report No 237, March 1996) 96–7 [7.33].

55 See discussion of early UK cases in Part III(B)(1) and *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 ('*Krakowski*') in Part III(C)(1) below.

56 See, eg, *Criminal Code* (n 24) s 12.4(2); *R v HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr App R 10, 13 (Bingham LJ). See also Jeremy Gans, 'Can Corporations be Dishonest?' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 273 <<https://doi.org/10.5040/9781509952410.ch-013>>; *CCR Final Report* (n 6) 257 [6.152].

57 *CCR Final Report* (n 6) 257 [6.152]–[6.153].

III ANALYSIS OF AGGREGATION

A United States

1 Cases

Aggregation historically attracted the most support in the US, where it is termed ‘collective knowledge’. While it has been explicitly rejected in many US courts,⁵⁸ it has generated a substantial amount of law and commentary. This includes likely the most influential aggregation case: *United States v Bank of New England NA* (‘*New England*’).⁵⁹

In *New England*, the Bank of New England sought to overturn a criminal conviction of 31 violations of wilfully failing to file reports of currency transactions exceeding \$10,000.⁶⁰ Federal legislation criminalised the failure to file these reports only if that failure was found to be ‘wilful’.⁶¹ This required proof of corporate intention.⁶² However, no one individual bank employee had knowledge of both the existence of the 31 reportable transactions and the requirement for them to be reported. Accordingly, no one employee had knowledge capable of informing a mental state of wilfulness to not report the transactions.⁶³ In turn, the bank could not be attributed with wilfulness under the traditional *respondeat superior* attribution method.

Notwithstanding this, the trial judge instructed the jury that, in addition to the *respondeat superior* approach, it could also rely on aggregation, whereby the bank’s knowledge was ‘the sum of the knowledge of all of the employees’.⁶⁴ As a result, because the bank’s tellers knew about the reportable transactions and its managers knew about the reporting requirements, the bank could be attributed with knowledge of both. The trial judge also instructed the jury that the bank could be attributed with wilfulness if it ‘consciously avoided learning about and observing [reporting] requirements’ due to ‘flagrant organizational indifference’.⁶⁵

The bank argued that these jury instructions were inconsistent with *respondeat superior* and therefore impermissible. The Court of Appeal, however, affirmed the trial judge’s instructions on both the issues of knowledge and wilfulness,⁶⁶ stating that the aggregation instruction was ‘entirely appropriate in [the] context of corporate criminal liability’.⁶⁷

58 See, eg, *Re Apple Computer Inc Securities Litigation*, 243 F Supp 2d 1012, 1023 (Wilken J for the Court) (ND Cal, 2002); *Nordstrom Inc v Chubb & Son Inc*, 54 F 3d 1424, 1435–6 (DW Nelson J for the Court) (9th Cir, 1995).

59 821 F 2d 844 (1st Cir, 1987) (‘*New England*’).

60 Ibid 846–7 (Bownes J for the Court).

61 Ibid 854–5. See 31 USC § 5322 (2021).

62 Although wilfulness has its own unique legal meaning in the US, at its core it is concerned with intention. See *New England* (n 59) 854–5 (Bownes J for the Court). See also Bant, ‘Modelling Corporate States of Mind through Systems Intentionality’ (n 13) 233–5.

63 *New England* (n 59) 856–7 (Bownes J for Bownes, Selya and Pettine JJ).

64 Ibid 855.

65 Ibid. What ‘flagrant indifference’ means in practice will be explored further below.

66 Ibid 856–7.

67 Ibid 856.

While the Court cited several cases as authority for the use of aggregation,⁶⁸ *New England*'s strong endorsement of aggregation established it as a landmark case.⁶⁹ The case is particularly significant for our purposes because of the Court's transparency in explaining the reasons for its use of aggregation. As the Court described:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation ... Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but *necessary*.⁷⁰

This comment plainly shows the predominant reason for the Court's use of aggregation. Aggregation was necessary in this case to overcome the compartmentalisation of knowledge caused by the bank's corporate structure and facilitate more significant corporate liability.

The Court also justified the bank's culpability by describing factors contributing to its 'flagrant indifference'.⁷¹ These included the abundance of information available to the bank indicating the transactions were reportable, the bank's apparent lack of interest in attempting to make good its reporting requirements after it was informed of the violations, and that the bank was benefitting from not reporting the transactions by encouraging further unlawful deposits.⁷² The Court noted that on one occasion, a suspicious head teller decided not to investigate a transaction because the individual engaging in the suspicious transactions was 'a good customer'.⁷³ It concluded that the mental state of wilfulness could be attributed to the bank on the basis of this 'flagrant indifference'. The bank accordingly had both knowledge and wilfulness, in satisfaction of the requirements to make out the criminal charge.

The Court's emphasis on 'flagrant indifference' to attribute corporate intention caused ambiguity and was problematic, as will be explored below. Its use of aggregation where diffused knowledge otherwise prevented the attribution of a culpable corporate mental state is consistent with the broader pattern of aggregation cases in the US.

For instance, in *United States v TIME-DC Inc* ('*TIME-DC*'),⁷⁴ a large trucking corporation was charged with knowingly and wilfully permitting two of their

68 Ibid, citing *Riss & Co Inc v United States*, 262 F 2d 245 (8th Cir, 1958) ('*Riss & Co*'); *Camacho v Bowling*, 562 F Supp 1012 (ND Ill, 1983); *United States v TIME-DC Inc*, 381 F Supp 730 (WD Va, 1974) ('*TIME-DC*'); *United States v Sawyer Transport Inc*, 337 F Supp 29 (D Minn, 1971) ('*Sawyer Transport*'); *Inland Freight Lines v United States*, 191 F 2d 313 (10th Cir, 1951) ('*Inland Freight*').

69 *New England* (n 59) was also significant because it was the first US case that used aggregation to attribute a felony with criminal intent. Previous cases applied aggregation to milder offences: Lederman, 'Models for Imposing Corporate Criminal Liability' (n 17) 665.

70 *New England* (n 59) 856 (Bownes J for Bownes, Selya and Pettine JJ) (emphasis added).

71 Ibid.

72 Ibid 857.

73 Ibid. As highlighted by Hagemann and Grinstein (n 19), this fact suggests that for at least some transactions, individual managers had knowledge of both the reporting requirements and the reportable transactions: at 219–20. An explanation may be that this circumstance applied to only some violations, not all 31, so prosecutors had to rely on aggregation to prosecute all 31 violations.

74 *TIME-DC* (n 68).

drivers to drive while unwell. Using aggregation,⁷⁵ the Court emphasised that the corporation's policy of requiring proof of illness for drivers to take sick leave discouraged its management from acquiring knowledge of their drivers' sickness.⁷⁶ This in effect constituted a knowledge barrier that limited the use of sick leave,⁷⁷ which to the Court was sufficient evidence to attribute to the corporation an intention to allow its drivers to drive unwell.⁷⁸ In *Inland Freight Lines v United States* ('*Inland Freight*')⁷⁹ and *United States v Sawyer Transport Inc* ('*Sawyer Transport*'),⁸⁰ trucking companies were charged with knowingly and wilfully submitting false driver logs to the relevant regulatory authority. In each case, certain company employees were responsible for and had knowledge of the filing of drivers' logs. Meanwhile, information indicating that these logs were in fact false made its way to other employees, but never to the employees responsible for the drivers' logs.⁸¹ Faced with these knowledge barriers, the Courts in both cases used aggregation to attribute full knowledge of the false driver logs to the corporations.⁸² Subsequent cases that used aggregation followed similar patterns of reasoning.⁸³

These cases demonstrate that a predominant reason for the use of aggregation in the US has been its ability to attribute culpable mental states to corporations with knowledge barriers. Reference to aggregation as a supplement, not replacement, to the existing *respondeat superior* approach supports this conclusion.⁸⁴ Courts

75 Ibid 738 (Dalton DCJ).

76 Ibid 739–40.

77 Hagemann and Grinstein (n 19) 230.

78 *TIME-DC* (n 68) 740–1 (Dalton DCJ).

79 *Inland Freight* (n 68).

80 *Sawyer Transport* (n 68).

81 *Inland Freight* (n 68) 315 (Bratton J for the Court); *Sawyer Transport* (n 68) 30 (Neville J for the Court). In *Inland Freight*, the information was separate, contradictory driver reports, apparently also prepared by the drivers. In *Sawyer Transport*, the information was traffic citations issued to drivers at times when their logs falsely indicated they were not driving.

82 *Inland Freight* (n 68) 315; *Sawyer Transport* (n 68) 30–1.

83 See *Miller v Holzmann*, 563 F Supp 2d 54, 101 [55] (Lamberth J for the Court) (DC Cir, 2008) ('*Miller v Holzmann*'), describing aggregation's ability to attribute liability to corporations with compartmentalised knowledge as a 'public policy rationale'; *Re Eastern Transmission Corporation*, 870 F Supp 1293, 1307 (Vanartsdalen J for the Court) (ED Pa, 1992) ('*Eastern Transmission*'), describing a reason for aggregation as: 'If a corporation were able to escape this imputation of knowledge, it would always be in a position to limit its liability by professing corporate ignorance'; *Re Worldcom Inc Securities Litigation*, 352 F Supp 2d 472, 499 (Cote J for the Court) (SD NY, 2005) ('*Worldcom*'), applying aggregation in circumstances where the behaviour of a corporation's auditor caused a knowledge barrier. This behaviour was described as an 'egregious refusal to see the obvious, repeated failures to investigate the doubtful, and a pattern of acquiescence in improper accounting practices'. See also *Riss & Co* (n 68) 250 (Matthes J for the Court); *United States v Phillip Morris USA Inc*, 449 F Supp 2d 1, 896–7 (Kessler J for the Court) (DC Cir, 2006) ('*Phillip Morris*').

84 Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 1993) 118–20; Lederman, 'Models for Imposing Corporate Criminal Liability' (n 17) 662; Patricia S Abril and Ann Morales Olazábal, 'The Locus of Corporate Scier' [2006] (1) *Columbia Business Law Review* 81, 113–14; Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75(4) *Minnesota Law Review* 1095, 1156 <<https://doi.org/10.24926/265535.2948>>. See, eg, *New England* (n 59) 855 (Bownes J for Bownes, Selya and Pettine JJ).

used aggregation to prevent corporations from taking advantage of the limits of *respondeat superior*, which they could do by adopting knowledge barriers.⁸⁵

2 Criticism

While this premise for the use of aggregation was acknowledged largely as valid, the approach of aggregation itself has been widely and severely criticised. A significant issue, as alluded to earlier, is the ambiguous relationship between aggregation and more complex mental states like intention. This is evident in *New England*. While the Court in that case was explicit with its use of aggregation to attribute knowledge, the Court's basis for attributing wilfulness (intention) is less clear.⁸⁶

Explicitly dealing with knowledge and intent as two distinct elements,⁸⁷ as explained above, the Court relied on a conception of the bank's 'flagrant indifference' to attribute the mental state of wilfulness.⁸⁸ In doing so, the Court largely ignored the conceptual difficulty in attributing a singular, coherent intention based on aggregated knowledge. While intention may be generally thought of as connected to knowledge, each are distinct mental states in their own right.⁸⁹ Therefore, having attributed knowledge to the bank through aggregation, the Court remained faced with the issue of attributing intention. This presented a challenge, since, related to the fact that no one individual had the requisite knowledge, it was also the case that no one individual had the requisite intention.⁹⁰ The Court's solution was to conceptualise a method of attributing organisational intention, based on the bank's 'flagrant indifference'. Aggregation itself provides no framework for attributing mental states more complex than knowledge. As evident from our intuitive understanding of mental states, intention cannot be broken down into discrete

85 Hagemann and Grinstein (n 19) 245–7; Abril and Olazábal (n 84) 86; Charles J Walsh and Alissa Pyrich, 'Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save Its Soul?' (1995) 47(2) *Rutgers Law Review* 605, 625–6; Anthony Ragozino, 'Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach' (1995) 24(2) *Southwestern University Law Review* 423, 429; Martin J Weinstein and Patricia Bennett Ball, 'Criminal Law's Greatest Mystery Thriller: Corporate Guilt through Collective Knowledge' (1994) 29(1) *New England Law Review* 65, 69; Bucy (n 84) 1156–7; Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56(6) *Southern California Law Review* 1141, 1189 ('Reconstructing Corporate Criminal Law'); Diamantis, 'Functional Corporate Knowledge' (n 30) 344–5; William S Laufer, 'Culpability and the Sentencing of Corporations' (1992) 71(4) *Nebraska Law Review* 1049, 1089; Alexander Sarch, *Criminally Ignorant: Why the Law Pretends We Know What We Don't* (Oxford University Press, 2019) 249–50 <<https://doi.org/10.2139/ssrn.3598026>>.

86 Hagemann and Grinstein (n 19) 224; Lederman, 'Models for Imposing Corporate Criminal Liability' (n 17) 669; Diamantis, 'Functional Corporate Knowledge' (n 30) 347; Bucy (n 84) 1157; Michael E Tigar, 'It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law' (1990) 17(3) *American Journal of Criminal Law* 211, 225.

87 *New England* (n 59) 854 (Bownes J for Bownes, Selya and Pettine JJ).

88 *Ibid* 855.

89 See Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 13) 233–40.

90 Lederman, 'Models for Imposing Corporate Criminal Liability' (n 17) 668; Weinstein and Ball (n 85) 81.

component mental states that could be individually held by different people.⁹¹ Adding up individual mental states of intention also presents obvious difficulties. What if two intentions contradict each other? Aggregation provides no answer.⁹²

Having used aggregation to attribute knowledge, the Court in *Sawyer Transport* also approached the issue of intention through an organisational lens. It attributed intention on the basis that the company had failed to remedy its practice of filing false driver logs, and had permitted the practice to continue for an extended period of time, despite warnings that it was violating the law.⁹³ The same approach to intention was taken in *TIME-DC*,⁹⁴ and other cases subsequent to *New England*.⁹⁵ Faced with this issue and equipped with the very limited framework of aggregation, these courts were compelled to attribute complex mental states without relying on individual mental states. Implicitly, the approach they took resembles something of the more modern organisational approaches to corporate attribution,⁹⁶ as will be discussed further below.

This intuitive approach to collective intent is opaque in its application. This was evident in *Inland Freight*, where the trial judge seemed to have outright avoided any mention of collective intention, instead leaving the question for the jury to consider.⁹⁷ The Court of Appeal rejected this approach, maintaining that intention was a distinct element that had to be individually proved. Tellingly, however, the Court of Appeal did not comment on how to instruct the jury on intention where knowledge had been aggregated.⁹⁸

The lack of a principled basis to explain the attribution of corporate intention helps explain the most widespread type of criticism directed towards aggregation – that it dilutes mental state requirements such as intention into standards closer to negligence or strict liability.⁹⁹ Aggregation, therefore, dangerously widens the scope of corporate attribution to the extent that it unjustifiably punishes corporations that

91 Diamantis, 'Corporate Criminal Minds' (n 25) 2071. See also Lederman, 'Models for Imposing Corporate Criminal Liability' (n 17) 669.

92 Diamantis, 'Corporate Criminal Minds' (n 25) 2071; Lederman, 'Models for Imposing Corporate Criminal Liability' (n 17) 669; Colvin (n 53) 22.

93 *Sawyer Transport* (n 68) 31 (Neville J for the Court).

94 *TIME-DC* (n 68) 741 (Dalton DCJ). Dalton DCJ stated:

Cognizant of the situation – for, as previously noted, the Company is held responsible for the knowledge acquired by its various employees – it adopted a more or less 'hands-off' attitude towards compliance with the regulation and, in effect, left adherence almost entirely the responsibility of its drivers. Consequently, the court determines that the Government has established beyond a reasonable doubt that the Company did 'wilfully' disregard its duty.

95 See, eg, *Phillip Morris* (n 83) 896–7 (Kessler J for the Court); *Worldcom* (n 83) 497 (Cote J for the Court).

96 Bucy (n 84) 1156. The approach in *Sawyer Transport* (n 68) resembles, in particular, the model of reactive corporate fault: see Brent Fisse, 'Reactive Corporate Fault' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 139 <<https://doi.org/10.5040/9781509952410.ch-007>>.

97 *Inland Freight* (n 68) 316 (Bratton J for the Court, Murrah J disagreeing at 316).

98 Ibid. The jury asked 'whether negligence on the part of the company, or failure on their part to check documents could be defined as knowingly and wilfully'. Neither the trial judge nor the Court of Appeal were willing to address the issue.

99 Diamantis, 'Functional Corporate Knowledge' (n 30) 349; Bondi (n 17) 20; Hagemann and Grinstein (n 19) 239; Weinstein and Ball (n 85) 82; Tigar (n 86) 224–5; Donald C Langevoort, 'Agency Law Inside the Corporation: Problems of Candor and Knowledge' (2003) 71(4) *University of Cincinnati Law Review*

are not sufficiently culpable.¹⁰⁰ The bank in *New England* unsuccessfully raised the same argument. It claimed that attributing a culpable mental state through aggregation unfairly equated wilfulness with what was really its negligent failure to maintain an effective communication network, or (in other words) appropriately manage the knowledge barrier that existed at the bank.¹⁰¹

This kind of criticism is understandable given the haphazard approach of aggregation to more complex mental states. However, it falls short of fully appreciating an important reality of corporate attribution. Because corporations lack natural minds, transposing to corporations the culpability associated with the intrinsically human phenomena of mental states is necessarily an apples and oranges-type scenario. It invariably involves a value judgement – especially when there is no single individual who possesses a wholly culpable mental state that can be straightforwardly transposed to the corporation. With this in mind, the criticism that aggregation applies a standard closer to negligence or strict liability may be better understood as aggregation’s failure to explain and apply organisational culpability. Aggregation fails to explain on a principled basis how the adoption of corporate knowledge barriers may reflect organisational culpability and how this may be relevant to the specific doctrinal requirements for corporate mental states. In reality, the aggregated knowledge of all corporate employees bears itself no significant connection to organisational culpability.¹⁰² While courts seemed to sense culpability reflected in the circumstances surrounding corporate knowledge barriers, their attempt at explaining this culpability was ultimately unprincipled, and prone to cause ambiguity. Aggregation has, on that basis, been described as mechanical, desperate, and disingenuous.¹⁰³

A consequence of its opaque and unprincipled nature is that aggregation lacks the nuance to distinguish between what intuitively resembles a culpable corporate mental state and a genuine corporate mistake.¹⁰⁴ For example, corporations may have robust communication networks in place to prevent diffused individual knowledge and any associated risk of wrongdoing. However, that system may still be subject to a mistake or error reasonably outside the corporation’s control, which nevertheless causes diffused knowledge.¹⁰⁵ Aggregation has no way to distinguish between this kind of situation and a situation where the circumstances surrounding diffused knowledge support intuitively the attribution of culpable corporate mental states.¹⁰⁶ An example of this issue may be found in *Riss & Co Inc*

1187, 1223–4. See also *United States v Science Applications International Corporation* 626 F 3d 1257, 1274–5 (Tatel J for the Court) (DC Cir, 2010).

100 Diamantis, ‘Functional Corporate Knowledge’ (n 30) 349; Bondi (n 17) 20; Hagemann and Grinstein (n 19) 239; Weinstein and Ball (n 85) 82; Tigar (n 86) 224–5.

101 *New England* (n 59) 856 (Bownes J for Bownes, Selya and Pettine JJ).

102 Fisse, ‘Reconstructing Corporate Criminal Law’ (n 85) 1190; Ragozino (n 85) 439; Karen M Hansen, ‘“Knowing” Environmental Crimes’ (1990) 16(4) *William Mitchell Law Review* 987, 997.

103 Ragozino (n 85) 439; Bucy (n 84) 1157.

104 Diamantis, ‘Functional Corporate Knowledge’ (n 30) 348–9; Abril and Olazábal (n 84) 120–1.

105 For an explanation of how to identify genuine corporate mistakes: see Elise Bant, ‘Corporate Mistake’ in Jodi Gardner et al (eds), *Politics, Policy and Private Law: Volume II* (Hart Publishing, 2025) vol 2, 123 <<https://doi.org/10.5040/9781509961047.ch-006>>.

106 Hagemann and Grinstein (n 19) 239.

v United States.¹⁰⁷ In that case, aggregation was used to attribute culpable corporate intention, despite the company having an ‘elaborate and comprehensive program designed to [e]nsure compliance with all regulations’.¹⁰⁸ Besides this example, it may be that courts avoided unfair application of aggregation by only applying it in circumstances where corporate knowledge barriers reflected a clear sense of organisational culpability. Regardless, it has been argued that the potential for this kind of unfair scope could paralyse corporations by forcing them to centralise every single item of knowledge possessed by their employees.¹⁰⁹

3 Attempts at Modification

In an attempt to resolve these issues surrounding aggregation, US courts and commentators suggested different kinds of limits on its use. The most widespread attempt has been to limit aggregation to state of mind requirements that only require knowledge.¹¹⁰ Any mental state more complex than knowledge must then be attributed according to the traditional *respondeat superior* method. It has been argued that because this model does nothing more than attribute corporations with knowledge that already existed among its employees, it makes aggregation logically sound and practically workable.¹¹¹

This model effectively limits the use of aggregation to a small number of cases, where the only mental state required to be attributed to the corporation for the purpose of the applicable legal doctrine is corporate knowledge.¹¹² An example of this type of case was *Miller v Holzmann*,¹¹³ where the relevant federal law only required that the corporation had acted knowingly.¹¹⁴ In that case, the Court aggregated only knowledge, and this application was viewed as straightforward and uncontroversial.¹¹⁵

While this approach may appear to confine aggregation to a model of derivative liability, it fails to appreciate that aggregation of knowledge necessarily attributes to a corporation a collective consciousness greater than the sum of its parts. This is because aggregated knowledge includes not only the discrete items of knowledge it is composed of, but also the inferences from having all composite

107 *Riss & Co* (n 68).

108 *Ibid* 247 (Matthes J). See also Hagemann and Grinstein (n 19) 235–6.

109 *Eastern Transmission* (n 83) 1307 (Vanartsdalen J). See also Hagemann and Grinstein (n 19) 242–3; Diamantis, ‘Functional Corporate Knowledge’ (n 30) 348.

110 See, eg, *Commonwealth v Springfield Terminal Railway Co*, 951 NE 2d 696, 705–6 (Mills J for the Court) (Mass App Ct, 2011); *First Equity Corporation of Florida v Standard & Poor’s Corporation*, 690 F Supp 256, 259–60 (Mukasey J) (SD NY, 1988); *United States v LBS Bank – New York LLC*, 757 F Supp 496, 501 (Dubois J) (ED Pa, 1990); *Saba v Compagnie Nationale Air France*, 78 F 3d 664, 670 (Silberman J for the Court) (DC Cir, 1996).

111 Lederman, ‘Models for Imposing Corporate Criminal Liability’ (n 17) 668; Diamantis, ‘Corporate Criminal Minds’ (n 25) 2070. See also *Hills McGee v Sentinel Offender Services LLC* 719 F 3d 1236, 1244 (per curiam) (11th Cir, 2013). Cf James Gobert and Maurice Punch, *Rethinking Corporate Crime* (LexisNexis Butterworths, 2003) 85.

112 Lederman, ‘Models for Imposing Corporate Criminal Liability’ (n 17) 669.

113 *Miller v Holzmann* (n 83).

114 *Ibid* 97 (Lamberth J).

115 *Ibid* 101. See Lederman, ‘Corporate Criminal Liability’ (n 20) 83.

pieces of knowledge.¹¹⁶ For example, in *New England*, the Court attributed to the bank through aggregation two items of knowledge: that the reportable transactions occurred (all being above \$10,000) and that transactions of that kind (above \$10,000) were reportable.¹¹⁷ Having these two items of knowledge is not in itself culpable. What is culpable is the (obvious) inference that, being over \$10,000, all these transactions were in fact reportable. Yet, this is not an inference that was made by any employee: it was attributed to the corporation through aggregation.¹¹⁸ Accordingly, aggregation attributes more than just the totality of all composite knowledge – it also attributes the inferences available from possessing all composite knowledge. While for some forms of knowledge the attribution of any inferences from its composite items of knowledge might be considered relatively trivial,¹¹⁹ in the context of corporate attribution this is significant, because those inferences do not derive from any individual mental states.¹²⁰ Thus even in this more limited model, aggregation remains a model that necessarily captures organisational culpability but lacks a principled framework to explain it.¹²¹

Another attempt at limiting aggregation was an argument made by some commentators that aggregation should be reconceptualised as a novel application of the doctrine of wilful blindness.¹²² Wilful blindness refers to the legal concept that a conscious effort to avoid knowledge is as equally culpable as possessing knowledge. Accordingly, either may satisfy any legal requirement for knowledge.¹²³ Concerned by the ambiguity and large potential scope of aggregation, it was argued that every instance of aggregation could more accurately and cohesively be described as an application of wilful blindness.¹²⁴

While largely critical of aggregation,¹²⁵ this proposed limitation is entirely consistent with the predominant reason for the use of aggregation identified above. Both aggregation and wilful ignorance are applications of the principle that interference with the flow of information can be culpable in ways that justify the imputation of knowledge.¹²⁶ However, while wilful ignorance may more explicitly capture the reasons for organisational culpability in a limited set of circumstances, it fails to account for situations where there is a clear interference with the flow of

116 Diamantis, 'Functional Corporate Knowledge' (n 30) 346–7.

117 *New England* (n 59) 849.

118 Ibid. See also Sarch (n 85) 254–5.

119 As Mihailis E Diamantis describes, 'if someone knows she is holding a square, we assume she knows that what she is holding is not a circle': Diamantis, 'Functional Corporate Knowledge' (n 30) 348.

120 See also Wells (n 84) 144.

121 Fisse, 'Reconstructing Corporate Criminal Law' (n 85) 1189–90.

122 See Hagemann and Grinstein (n 19) 211; Abril and Olazábal (n 84) 120–1.

123 Hagemann and Grinstein (n 19) 223–4, citing *United States v Jewell*, 532 F 2d 697 (9th Cir, 1976). See generally Sarch (n 85).

124 See Hagemann and Grinstein (n 19).

125 Hagemann and Grinstein (n 19) described aggregation as a 'frightening bedtime story': at 237. The analogy demonstrates the scale of the perceived threat that aggregation posed to traditional ideas of corporate responsibility.

126 Sarch (n 85) 232. See also *ibid* 224.

corporate information, but no one employee can be identified as wilfully ignorant.¹²⁷ As evident from the analysis above, the lack of any individual culpable mental state is what motivated courts to use aggregation in the first place.

Thus, the application of wilful ignorance to cases like *New England* is inherently circular. It leads to the same issue of how to attribute mental states to corporations where the circumstances of corporate knowledge barriers reflect a kind of organisational culpability.¹²⁸ While wilful blindness acknowledges that knowledge barriers may reflect culpability, it fails to account for knowledge barriers which cannot be directly traced to the intention of any one individual or group. As this is the reality of many corporate knowledge barriers, wilful ignorance provides little additional value. What is needed is a model that can explain how the adoption of corporate knowledge barriers, independently of individuals, may logically support the attribution of corporate mental states.¹²⁹ This issue will be further discussed in Part V below.

B United Kingdom

1 Cases

Aggregation in the UK originated from a series of decisions concerning a particular type of factual scenario. The first case to offer this factual pattern was *Cornfoot v Fowke* ('*Cornfoot*').¹³⁰ In that case, a property owner (Cornfoot) employed an agent (Clarke) to manage the leasing of a certain property. A prospective lessee met with Clarke and asked whether there was anything objectionable about the house. Clarke honestly believed there was nothing objectionable and responded accordingly. In fact, the house was adjacent to a brothel. The principal (Cornfoot) knew about the brothel, but the agent (Clarke) did not. After learning this fact, the now-lessee claimed they had been fraudulently misled by Cornfoot through his agent.¹³¹

While this case did not involve a corporation, the lessee argued that the mental elements of fraud should be attributed to Cornfoot using a process of aggregation. They argued the conduct of Clarke in making the representation and the knowledge of Cornfoot that the representation was false should be aggregated.¹³² Effectively, the lessee was claiming two things. First, the knowledge that the representation was false and the knowledge that it had been made should be aggregated. Second, this aggregated knowledge was a sufficient basis for attributing a mental state that satisfied the legal requirements of fraudulent misrepresentation.¹³³ Although the mental state

127 Sarch (n 85) 250. Sarch also points out that wilful ignorance would fail to capture situations where one employee deliberately prevents another employee from gaining knowledge, as opposed to preventing themselves from gaining knowledge: at 252–4.

128 Diamantis, 'Corporate Criminal Minds' (n 25) 2070 n 157.

129 See also Beatrice Krebs, 'Wilful Ignorance and Corporate Criminal Liability: Some Thoughts on Chapter 9 "Corporations Keeping Themselves in the Dark" of Alexander Sarch's *Criminally Ignorant* (OUP 2019)' (2021) 12(2) *Jurisprudence* 282, 287 <<https://doi.org/10.1080/20403313.2021.1930375>>.

130 (1840) 6 M & W 358; 151 ER 450 ('*Cornfoot*').

131 Ibid 454–5 (Rolfe B).

132 Leow (n 20) 204–5.

133 The focus here is on the attribution of mental states rather than conduct: see Part III(B) above.

requirements for fraudulent misrepresentation in the UK are unique (and at the time of this case were still developing), at its core it involved dishonesty.¹³⁴

The majority of the Court rejected this reasoning.¹³⁵ However, some comments potentially supported the use of aggregation in certain circumstances. They emphasised that there could be a basis for fraudulent misrepresentation if there was evidence Cornfoot had deliberately manufactured Clarke's ignorance to avoid responsibility for any misleading statements by Clarke.¹³⁶ In dissent, Lord Abinger CB argued that dishonesty should be attributed to Cornfoot because Cornfoot had responsibility over Clarke's knowledge about the property and was benefitting from the false representation.¹³⁷ As he described: 'the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, *combine* to constitute a sufficient degree of fraud, even morally speaking, to sustain the defendant's plea'.¹³⁸

Although removed from a corporate context, *Cornfoot* demonstrates that the adoption of knowledge barriers may support the attribution of culpable mental states if the knowledge barriers were put in place for the purpose of avoiding liability. Furthermore, Lord Abinger CB's dissent supports the idea that the existence of knowledge barriers in circumstances that otherwise evidence culpability may also support the attribution of dishonesty, regardless of whether any one individual put that knowledge barrier in place for the specific purpose of preventing liability.

These ideas were later echoed and built upon in *S Pearson & Son Ltd v Lord Mayor of Dublin* ('*Pearson*').¹³⁹ Although the Court in *Pearson* did not use aggregation, its discussion of corporate liability derived from the acts of corporate agents appeared to support a broader basis for aggregation than the limits imposed in *Cornfoot*.¹⁴⁰ Lord Loreburn LC stated: 'The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.'¹⁴¹ Adopting the same approach,¹⁴² the Earl of Halsbury added:

[I]f [*Cornfoot*] was supposed to decide that the principals and agent could be so divided in responsibility that – like the schoolboy's game of 'I did not take it, I have not got it' – the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence.¹⁴³

This apparent support for aggregation was applied in practice in *London County Freehold & Leasehold Properties Ltd v Berkeley Property and Investment*

134 See generally *Cornfoot* (n 130), where the Court equated the requisite mental state with deceit, and *London County Freehold & Leasehold Properties Ltd v Berkeley Property and Investment Co Ltd* [1936] 2 All ER 1039 ('*London County*'), where the requisite mental state for fraud was described as dishonesty.

135 *Cornfoot* (n 130) 455 (Rolfé B), 455 (Alderson B), 456–7 (Parke B).

136 Ibid 455 (Rolfé B), 456–7 (Parke B).

137 Ibid 457–62 (Lord Abinger).

138 Ibid 459 (emphasis added).

139 [1907] AC 351 ('*Pearson*').

140 Note that some descriptions of corporate liability in this case blur the distinction between vicarious liability and vicarious acts: see *CCIG* (n 36) 185–94 [48]–[69] (Edelman and Steward JJ).

141 *Pearson* (n 139) 354.

142 Ibid 359.

143 Ibid 357.

Co Ltd ('*London County*').¹⁴⁴ In that case, prospective purchasers of a block of flats inquired with the seller company as to whether the rents on the flats were paid punctually. The seller company, through a junior solicitor and without the knowledge of other employees, replied that the rents were paid punctually, a representation that although honestly believed, was not in fact true.¹⁴⁵ The company's property manager, and potentially its head solicitor, knew the basis of the representation was false, but did not know it had been made.¹⁴⁶ Relying on *Pearson*, the Court aggregated the junior solicitor's representation (both the act itself and the knowledge of the act) with the property manager's knowledge of its falsity, and attributed a mental state of dishonesty to the company, in satisfaction of the requirements of fraudulent misrepresentation.¹⁴⁷ Eve J, noting that the representation had the benefit of inducing the purchasers to buy the property,¹⁴⁸ further stated:

The defendants are a joint stock company acting and conducting business by a staff of officers and other agents whose duty it is in many departments to manage the company's business and to look after its affairs. What is the result of this state of affairs? The company and its agents must be regarded as one, and the former be deemed to have the knowledge of its agents in relation to the business.¹⁴⁹

This shows that the Court's foundation for the use of aggregation was the idea that a corporation should be responsible for its own structure. Consistent with *Cornfoot* and *Pearson*, *London County* emphasised that corporations should not benefit from the adoption of knowledge barriers without being held responsible for the harm they cause.¹⁵⁰ Otherwise, a large organisation would be able to arm itself with a coordinated system of ignorant agents and as Lord Halsbury warned in *Pearson*, 'commit fraud with impunity'.¹⁵¹ Together these cases show that aggregation was used to attribute culpable mental states to corporations on the basis that knowledge barriers can be a reflection of corporate culpability and may support intuitively the attribution of mental states.

2 Criticism

Soon after *London County* was decided, the use of aggregation was firmly rejected in *Anglo-Scottish Beet Sugar Corporation v Spalding UDC* ('*Beet Sugar*')¹⁵² and *Armstrong v Strain* ('*Armstrong*').¹⁵³ The swift and unequivocal reversal was motivated by strong criticism that aggregation attributed dishonesty in cases where

¹⁴⁴ *London County* (n 134).

¹⁴⁵ Ibid 1042–3 (Slessor LJ).

¹⁴⁶ Ibid 1046 (Slessor LJ), 1050 (Romer LJ).

¹⁴⁷ Ibid 1047 (Slessor LJ), 1050 (Romer LJ), 1051 (Eve J). Cf Leow (n 20) 207–8, who suggests Slessor LJ found that the property manager knew the representation was false and that it was being made. If that was the case, aggregation was not necessary to find fraudulent misrepresentation. See also *Anglo Scottish Beet Sugar Corporation Ltd v Spalding Urban District Council* [1937] 2 KB 607, 621–7 (Atkinson J).

¹⁴⁸ *London County* (n 134) 1051.

¹⁴⁹ Ibid.

¹⁵⁰ See generally Leow (n 20) 221.

¹⁵¹ *Pearson* (n 139) 357.

¹⁵² [1937] 2 KB 607 ('*Beet Sugar*').

¹⁵³ [1952] 1 KB 232 ('*Armstrong*').

there was no legitimate basis for attributing any culpable mental state.¹⁵⁴ The Courts in *Beet Sugar* and *Armstrong* emphasised that culpable mental states should not be attributed to corporations where all its individuals ‘have fallen short in no way of the highest standard of honour and rectitude’.¹⁵⁵ The position established in these cases fits appropriately with the later development of identification theory and its derivative nature. *Beet Sugar* and *Armstrong* still stand as authority against the use or development of aggregation. More recent cases such as *Greenridge Luton One Ltd v Kempton Investments Ltd*¹⁵⁶ and *Stanford International Bank Ltd v HSBC Bank plc*¹⁵⁷ indicate the individualistic bias that continues to underpin corporate attribution inquiries and militate against the use of aggregation.¹⁵⁸

The criticism in *Beet Sugar* and *Armstrong* reflects aggregation’s opaque approach to attributing complex mental states to corporations. Culpable mental states are not self-evidently established by the combination of knowledge that a misrepresentation occurred and, separately, knowledge that a representation is in fact misleading. As described in *Beet Sugar*: ‘One cannot know that a representation is untrue unless one knows of the representation and knows that it is to be made or is being made.’¹⁵⁹ Aggregation attributes to the corporation knowledge that a false representation is being made without any further explanation or justification. As observed above, courts have appeared to sense this explanatory gap, and attempted to fill it by emphasising that organisational culpability is implicit in the existence of knowledge barriers. The lack of any explicit or transparent connection in this approach to the model of aggregation itself explains its lack of judicial support.

These problems with aggregation have been criticised by commentators,¹⁶⁰ some of whom have dismissed it as a ‘theory of exacerbation’,¹⁶¹ or ‘do[ing] violence to ordinary language’.¹⁶² Similarly, it has been criticised as conflating culpable mental states with corporate negligence.¹⁶³ That being said, commentators have also recognised that large, complex corporations are replete with knowledge barriers, and the derivative approach of identification theory fails to associate knowledge

154 *Beet Sugar* (n 152) 624–7 (Atkinson J); *ibid* 243–4 (Singleton LJ), 245–7 (Birkett LJ), 248 (Romer LJ).

155 *Beet Sugar* (n 152) 617–18 (Atkinson J).

156 [2016] EWHC 91 (Ch) (*‘Greenridge’*).

157 [2020] EWHC 2232 (Ch).

158 *Greenridge* (n 156) [77]–[79] (Newey J), [47]–[48] (Nugee J). See also *2 Travel Group plc (in liq) v Cardiff City Transport Services Ltd* [2012] CAT 19, [562]–[564]; *Z v A-Z* (n 45) 581–2 (Eveleigh LJ). See also ‘Corporate Criminal Liability Options Paper’ (n 4) 81 [6.45]; Wells (n 84) 112–13.

159 *Beet Sugar* (n 152) 626 (Atkinson J).

160 Gobert (n 53) 406–7; GR Sullivan, ‘The Attribution of Culpability to Limited Companies’ (1996) 55(3) *Cambridge Law Journal* 515, 528 <<https://doi.org/10.1017/S0008197300100492>>; Wells (n 84) 144; Colvin (n 53) 22–3; Wilkinson (n 53) 164; Aidan Ricketts and Heidi Avolio, ‘Corporate Liability for Manslaughter: The Need for Further Reform’ (2009–10) 13 *Southern Cross University Law Review* 57, 70; Sir John Smith, *Smith and Hogan: Criminal Law* (Butterworths, 8th ed, 1996) 189.

161 Sullivan (n 160) 528.

162 Colvin (n 53) 22.

163 Rachel Leow, ‘Meridian, Allocated Powers and Systems Intentionality Compared’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 119, 129 <<https://doi.org/10.5040/9781509952410.ch-006>>.

barriers with any form of culpability.¹⁶⁴ In this context, it has been acknowledged that aggregation captured a kind of organisational culpability, though in an inelegant way.¹⁶⁵ Ultimately, aggregation is viewed as being limited by its focus on individual knowledge, and so sharing the same issues as identification theory.¹⁶⁶ The focus of reform, therefore, has generally shifted to alternative approaches that place less emphasis on individual mental states and attempt to describe more comprehensively organisational culpability.¹⁶⁷

C Australia

1 Cases

In contrast to the UK, aggregation in Australian law has been applied in a range of cases,¹⁶⁸ and was only rejected in the relatively recent case of *Commonwealth Bank of Australia v Kojic* ('*Kojic*').¹⁶⁹

The High Court foreshadowed many of the issues concerning aggregation in the early case of *R v Australasian Films Ltd*.¹⁷⁰ In that case, a company obtained government drawback payments from exported films because one of its employees claimed, believing it to be true, that each film had not been exhibited in Australia. In fact, the employee had misread company records: each film had been exhibited in Australia and the company was not actually entitled to any drawbacks.¹⁷¹ Despite no employee having a fraudulent mental state, prosecutors alleged on the basis of aggregation that the company fraudulently obtained the drawback payments.¹⁷² The High Court rejected this argument, deciding that the relevant mental state had to be found in one individual.¹⁷³ However, Knox CJ described the employee errors as caused by the 'slipshod and unbusinesslike method' of the corporation's bookkeeping,¹⁷⁴ hinting at the idea of a knowledge barrier that allowed the company to obtain these payments illegally without consequence (for some time at least).

164 Wells (n 84) 130–1; Gobert (n 53) 401; Stewart Field and Nico Jorg, 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' [1991] (March) *Criminal Law Review* 156, 158. See also 'Corporate Criminal Liability Options Paper' (n 4) 6 [1.23].

165 Wells (n 84) 132–3; Gobert (n 53) 406–7; Field and Jorg (n 164) 160–1; Wilkinson (n 53) 161–2; Ricketts and Avolio (n 160) 69; Gobert and Punch (n 111) 85; 'Corporate Criminal Liability Options Paper' (n 4) 81 [6.44]–[6.45].

166 Wells (n 84) 144; Gobert (n 53) 407; Wilkinson (n 53) 164; Ricketts and Avolio (n 160) 70.

167 Wells (n 84) 133–5, 143–6; Gobert (n 53) 407; Wilkinson (n 53) 164; Ricketts and Avolio (n 160) 70; Colvin (n 53) 23. See generally 'Corporate Criminal Liability Options Paper' (n 4).

168 See, eg, *Westpac Banking Corporation v Bell Group Ltd (in liq)* [No 3] (2012) 44 WAR 1, 394–401 [2178]–[2200] (Drummond AJA, Lee AJA agreeing at 192 [1100]) ('*Bell* [No 3]'); *Kojic v Commonwealth Bank of Australia* [2016] FCA 368, [174]–[182] (Mansfield J) ('*Kojic* (first instance)'), revd (2016) 249 FCR 421 ('*Kojic*').

169 *Kojic* (n 168).

170 (1921) 29 CLR 195.

171 Ibid 196–9 (Knox CJ, Gavan Duffy and Rich JJ).

172 Ibid 200.

173 Ibid 217.

174 Ibid 199.

This shows that as early as 1921, aggregation had already been associated with a sense of organisational culpability reflected in knowledge barriers.¹⁷⁵

Comments in a number of subsequent cases built up support for aggregation and continued to associate it as a response to corporate knowledge barriers. In *Dunlop v Woollahra Municipal Council* ('*Dunlop*'),¹⁷⁶ Wootten J stated:

Corporations must be held responsible through those who act on their behalf, whether an act is performed by one person or by a number ... It is better for the courts to grapple with the true facts, however difficult this may be, than to shut out the realities of corporate action ...¹⁷⁷

In the context of a defamation action where a publisher was claiming not to know it had published a defamatory matter, Callinan J in *Rogers v Nationwide News Pty Ltd*¹⁷⁸ warned that if it was never possible to aggregate a corporation's knowledge:

The more geographically separated its officers or employees were, the more employees it had, the more forgetful they were, or the less assiduous it was in seeking, keeping and retrieving information, the greater would be its chances of escaping liability ...¹⁷⁹

In *Brambles Holdings Ltd v Carey* ('*Brambles*')¹⁸⁰ a company claimed a defence of honest and reasonable mistake to a statutory offence under the *Road Traffic Act 1961* (SA). In rejecting the defence, the Court emphasised that the corporation's knowledge was the knowledge of its employees combined.¹⁸¹ It followed that the company could not be said to have honestly made a mistake when appropriate communication within the corporation would have prevented the offence.¹⁸² Although these cases did not formally adopt a model of aggregation,¹⁸³ it is clear that courts were concerned with ensuring that corporate knowledge barriers appropriately attracted corporate liability.

These cases provided a foundation for the High Court decision in *Krakovski v Eurolynx Properties Ltd* ('*Krakovski*').¹⁸⁴ In *Krakovski*, the Krakowskis were intending to purchase an investment property from Eurolynx. They made it clear to Eurolynx's representatives, an agent Mr Cini and director Mr Ryan, that they would only purchase if the rate of return was at least 10%. Eurolynx found a property with a 10% return, but unknown to the Krakowskis, a side agreement concluded between Eurolynx and the tenant effectively made the ultimate return on the property to the Krakowskis less than 10%.¹⁸⁵ The purchase documents signed by the Krakowskis made no mention of the side agreement, and implied falsely the

175 Colvin (n 53) 20.

176 (1975) 2 NSWLR 446 ('*Dunlop*').

177 Ibid 485.

178 (2003) 216 CLR 327.

179 Ibid 363 [114].

180 (1976) 15 SASR 270 ('*Brambles*').

181 Ibid 276 (Bray CJ), 281 (Mitchell J). Bright J heavily implied this: at 280.

182 Ibid 275–6 (Bray CJ), 280 (Bright J), 281–2 (Mitchell J).

183 It has been debated whether *Brambles* (n 180) involved the use of aggregation: see *Kojic* (n 168) 440 [78] (Besanko J), 454 [133] (Edelman J). See also Eastwood (n 20) 556.

184 *Krakovski* (n 55).

185 Ibid 567–9 (Brennan, Deane, Gaudron and McHugh JJ).

property would provide a 10% return.¹⁸⁶ The Krakowskis subsequently claimed that they had been fraudulently misled by Eurolynx.

The Eurolynx employee who organised the documents for execution, Mr Gilbert, honestly believed that the purchase documents were not misleading. He trusted that Eurolynx's solicitor had drafted the documents honestly and accurately.¹⁸⁷ Cini, Ryan and Eurolynx's solicitors were not called as witnesses, so their mental states were largely unknown.¹⁸⁸ On the basis of Gilbert's innocent state of mind, Eurolynx argued that it could not be attributed with a dishonest mental state for the purpose of claiming fraudulent misrepresentation.¹⁸⁹

The High Court found that dishonesty could be attributed to Eurolynx, although the Court's reasoning was somewhat ambiguous. It stated that the knowledge of Eurolynx was not limited to Gilbert's knowledge, and it included the knowledge of Cini and Ryan, who knew the Krakowskis would only agree to invest if the return was at least 10%.¹⁹⁰ In support of this reasoning, the Court noted: 'A division of function among officers of a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by *each* of them.'¹⁹¹ Whether this approach in fact adopted a model of aggregation has been contested. It has been argued that because Ryan appeared to have knowledge of both the Krakowskis' investment conditions and the side agreement, his mental state alone was a sufficient basis to prove fraud.¹⁹² Other interpretations have claimed the High Court aggregated the knowledge of Gilbert, Cini and Ryan, and only on this basis was fraud attributed to Eurolynx.¹⁹³

In this author's view, whether or not aggregation was required in *Krakowski* turned on Ryan's mental state. If Ryan was aware of, or from the beginning always knew the exact representations that were being made to the Krakowskis in the final purchase documents, he would have very likely had a dishonest mental state that could be straightforwardly attributed to Eurolynx. However, if Ryan knew nothing about the final representations being made to the Krakowskis, he would never have had the full knowledge to form a dishonest mental state. In this circumstance, Ryan's knowledge would need to have been aggregated with Gilbert's in order to have a sufficient basis to attribute fraudulent misrepresentation to Eurolynx.

There is nonetheless evidence in this case of a knowledge barrier within Eurolynx that in the circumstances, reflected some greater level of culpability and supported intuitively the attribution of corporate dishonesty. Contemporary

186 Ibid 568–9.

187 Ibid 579.

188 The only available insight is that because Ryan signed the side agreement, he must have had knowledge of it: *ibid* 568.

189 Ibid 566 (Merkel QC) (during argument).

190 Ibid 582–3 (Brennan, Deane, Gaudron and McHugh JJ).

191 Ibid 583 (emphasis added), citing *Dunlop* (n 176).

192 Eastwood (n 20) 558–9; Oakeshott and Kayis (n 20) 187–8; *Kojic* (n 168) 452 [124]–[125] (Edelman J).

193 *Bell [No 3]* (n 168) 398–9 [2189]–[2190], 399–400 [2193]–[2194] (Drummond AJA, Lee AJA agreeing at 192 [1100]); *Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 135 LGERA 98, 109 [23], 185 [315]–[316] (Santow JA) ('*Port Stephens*'); *Kojic (first instance)* (n 168) [174]–[180] (Mansfield J).

commentary suggested that Eurolynx's overall business model was dishonest.¹⁹⁴ Using salespeople like Ryan and Cini, Eurolynx may have enticed purchasers into negotiation with promises of favourable returns. Knowledge barriers may have then had the effect of ensuring the salespeople's ignorance of the final, less favourable terms, that were in reality offered to the purchasers.¹⁹⁵ This is consistent with comments made by the Court describing Gilbert's ignorance as 'productive of sharp practice',¹⁹⁶ and suggesting that communications from Eurolynx to the Krakowskis after the purchase agreement was settled were intended to conceal the existence of the side agreement.¹⁹⁷ If the Court did in fact rely on aggregation, the convenient diffusion of knowledge within Eurolynx may have intuitively supported the attribution of the requisite mental state of dishonesty.

Culpability associated with the adoption of knowledge barriers was emphasised by courts that later used *Krakowski* as authority for aggregation.¹⁹⁸ However, many courts also strongly rejected this interpretation,¹⁹⁹ culminating ultimately in the Federal Court decision of *Kojic*. *Kojic* was an appeal decision where for the purposes of a claim of statutory unconscionability, the trial judge had used aggregation to attribute knowledge to the Commonwealth Bank of Australia.²⁰⁰ Edelman J thoroughly analysed the development and merits of aggregation and concluded that interpretations of *Krakowski* as authority for aggregation were plainly wrong.²⁰¹ The remainder of the Court agreed with Edelman J²⁰² and cases subsequent to *Kojic* have affirmed and followed that decision.²⁰³

194 Norman Mermelstein, 'Insidious Incentives Solution' (1995) 33(8) *Valuer and Land Economist* 635. This article was written by Mr Krakowski's nephew. While it perhaps contains some bias, it provides insight into dishonest practice in the property industry. Mermelstein writes: '[*Krakowski*] clearly impacts on property developers who induce tenants by offering incentives that remain undisclosed to prospective purchasers': at 635.

195 *Ibid*.

196 *Krakowski* (n 55) 582 (Brennan, Deane, Gaudron and McHugh JJ).

197 *Ibid* 584.

198 *Bell [No 3]* (n 168) 399 [2192] (Drummond AJA, Lee AJA agreeing at 192 [1100]); *Bell [No 9]* (n 9) 682 [6159] (Owen J); *Port Stephens* (n 193) 185 [315]–[316] (Santow JA).

199 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 144–5 (Tadgell JA), 160–1 (Ashley AJA) ('*Macquarie*'); *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 325–7 [176]–[183] (Finn J) ('*Radio Rentals*'); *K & S Corporation Ltd v Sportingbet Australia Pty Ltd* (2003) 86 SASR 312, 339 [107]–[110] (Besanko J) ('*K & S*'); *J McPhee & Son (Aust) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532, 569–70 [128] (Black CJ, Lee and Goldberg JJ); *Emhill Pty Ltd v Bonsoc Pty Ltd [No 2]* [2007] VSCA 108, [31] (Warren CJ); *Choundary v Capital Airport Group Pty Ltd* [2006] FCA 1755, [25] (Gyles J).

200 *Kojic* (n 168) 424–9 [1]–[31] (Allsop CJ).

201 *Ibid* 446–7 [101]–[105], 449–57 [112]–[149] (Edelman J).

202 *Ibid* 438 [65] (Allsop CJ), 440 [78] (Besanko J).

203 *Global Risk Alliance Group Services Pty Ltd v Harmer* (2024) 330 IR 208, 327–8 [624] (Nixon J); *Cargill Australia Ltd v Viterro Malt Pty Ltd [No 28]* [2022] VSC 13, [2622] (Elliott J) ('*Cargill*'); *North Adelaide Service Partnership v Retail Employees Superannuation Pty Ltd* (2019) 132 SASR 398, [116] (Blue J); *GM Global Technology Operations LLC v SSS Auto Parts Pty Ltd* (2019) 371 ALR 1, 31–2 [95]–[101] (Burley J) ('*GM Global*'). Cf *Sydney Trains v Annovazzi* (2024) 425 ALR 272, 304–6 [110]–[116] (Bromwich, Raper and Shariff JJ), in which it was implied that aggregation may take place in the context of 'one transaction', referring to *Krakowski* (n 55) at 582–3; *ASIC v Diversa Trustees Ltd* [2023] FCA 1267, [268] (Button J) in which it was suggested that *Kojic* (n 168) has not in all contexts shut the door on aggregation.

2 Criticism

Reasons for the rejection of aggregation in Australia resemble those made in the US and UK. The most common is that aggregation creates and attributes a culpable mental state that, when not possessed by any corporate employee, appears artificial,²⁰⁴ or is otherwise unprincipled and unjustified.²⁰⁵ This reflects the core of Edelman J's reasons for rejecting aggregation in *Kojic*. As he stated: 'it is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably'.²⁰⁶ Similarly, it was suggested that without limits, aggregation would dangerously enlarge the scope for corporate liability. This excessive scope would place unnecessary pressure on corporations to disseminate information, in potential conflict with other legal obligations such as confidentiality.²⁰⁷

This criticism reflects aggregation's lack of connection or proportionality to the specific doctrinal elements of organisational culpability, such as knowledge, intention or dishonesty. Although it has been used in cases where the adoption of corporate knowledge barriers has intuitively supported the existence of organisational culpability, it provides minimal explanatory power for why organisational culpability is reflected in those knowledge barriers, or if it is at all.²⁰⁸ However, this limitation should not be characterised as a problem of artificiality. Because corporations lack natural minds, the reality of corporate attribution is that all methods are to some degree artificial.²⁰⁹ The better view is that aggregation's limitation is its lack of any inherent and principled connection to organisational culpability. However, despite this limitation, it has been acknowledged that aggregation stems from the legitimate premise of managing the problem of corporate knowledge barriers.²¹⁰ This is evident in Edelman J's conclusion on aggregation in *Kojic*. Although dismissive of the model overall, he maintained that corporations should be attributed with culpable mental states if they '[put] into place procedures intended to ensure that no particular individual could have the requisite knowledge'.²¹¹ This raises again the issue of circularity, addressed above with respect to the US concept of wilful blindness.²¹² How can a knowledge barrier be logically connected to corporate culpability when no one individual or group

204 *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641, 650 (Wootten J) ('*Re Chisum*'); *Radio Rentals* (n 199) 330 [199] (Finn J); Colvin (n 53) 23.

205 Eastwood (n 20) 554; Daniel Reynolds, 'Corporate Knowledge: The Search for the Relevant Mind(s)' (2018) 92(12) *Australian Law Journal* 991, 1003; Oakeshott and Kayis (n 20) 189–90; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 108; Colvin (n 53) 22; *CCR Final Report* (n 6) 149–50 [4.83]–[4.86].

206 *Kojic* (n 168) 449 [112].

207 *Radio Rentals* (n 199) 327 [181] (Finn J); *Kojic* (n 168) 450 [117] (Edelman J), citing Paul Davies, *Introduction to Company Law* (Oxford University Press, 2nd ed, 2010) 35; Oakeshott and Kayis (n 20) 190–1; Eastwood (n 20) 565.

208 Clough and Mulhern (n 205) 108; Gobert (n 53) 405.

209 Reynolds (n 205) 1003; Oakeshott and Kayis (n 20) 190.

210 Reynolds (n 205) 1005; Eastwood (n 20) 554; Oakeshott and Kayis (n 20) 196. See also the comments of Callinan J in *Rogers v Nationwide News* (2003) 216 CLR 327, 363 [114], extracted above.

211 *Kojic* (n 168) 457 [153].

212 See Part III(A)(3) above.

brought it about? The potential for an organisational model of corporate attribution to resolve this issue is addressed in Part V below.

3 Attempts at Modification

Similar to the US, attempts have been made in Australia to narrow the scope of aggregation and develop a principled basis for its use. In the relatively early case of *Re Chisum Services Pty Ltd* ('*Re Chisum*'),²¹³ it was suggested that aggregation should only be permitted if two corporate employees had a duty and opportunity to communicate the relevant items of knowledge.²¹⁴ Some courts appeared to accept this modification,²¹⁵ and Allsop CJ and Besanko J in *Kojic* left open the possibility for it to be developed in other cases.²¹⁶

While this attempt at refinement further demonstrates support for the overall premise of aggregation, the operation of this additional 'duty to communicate' requirement is ambiguous.²¹⁷ Minimal judicial guidance exists as to when an appropriate duty to communicate might occur.²¹⁸ If a duty is to be determined by reference to whether a duty already existed within a corporation, the model would ignore the reality that (clear from this article) corporations avoid establishing duties to communicate for their own commercial benefit. Alternatively, if the model gives courts the role of determining duties to communicate, that determination would likely be based on an intuitive sense of whether culpability is reflected in the relevant knowledge barrier. While it may provide some transparency, this process largely resembles the approach courts have already taken to aggregation. What is needed is a principled method of explaining why knowledge barriers should or should not justify the attribution of mental states. Edelman J in *Kojic* accordingly suggested that the duty to communicate requirement would be better understood as a culpable failure to disperse information.²¹⁹

Another proposed change to aggregation has been to limit it to circumstances where knowledge is said to be inherently cumulative. It has been suggested that aggregating inherently cumulative knowledge would not '[alter] the character'

213 *Re Chisum* (n 204).

214 Ibid 650 (Wooten J).

215 *Radio Rentals* (n 199) 327 [182] (Finn J); *Macquarie* (n 199) 161 (Ashley AJA); *Bell [No 9]* (n 9) 683 [6159]–[6161] (Owen J); *Cargill* (n 203) [2622] (Elliott J); *GM Global* (n 203) 33 [102] (Burley J); *K & S* (n 199) 339 [110] (Besanko J).

216 *Kojic* (n 168) 438 [66] (Allsop CJ), 441 [80], [83] (Besanko J).

217 See Eastwood (n 20) 567; Reynolds (n 205) 1004. See also *Kojic* (n 168) [83], in which Besanko J said that should the issue of a duty to communicate arise, it would 'raise a number of other questions concerning the type of duty in terms of source, nature and extent of the duty'.

218 Wooten J in *Re Chisum* suggested in obiter that a bank manager had a duty to communicate the contents of a gazette to other employees, as was ordinarily practiced in their bank: *Re Chisum* (n 204) 651. See also *ASIC v Diversa Trustees Ltd* [2023] FCA 1267, in which ASIC sought to establish that individuals within a particular corporation had a duty to communicate on the basis of an internal risk management policy which required employees to escalate knowledge of particular kinds of incidents. Button J rejected that approach, stating that the policy did not establish any generalised duty to communicate, and that 'close attention' must be paid to the 'source, nature and extent' of any alleged duty to communicate: at [264]–[270].

219 *Kojic* (n 168) 457 [153].

of that knowledge into a mental state not reflected in any individual employee.²²⁰ For example, in *Elliott v Nanda*,²²¹ an individual was sexually harassed at a workplace procured for her by the Commonwealth Employment Service ('CES'). They brought an action under the *Sex Discrimination Act 1984* (Cth), alleging the CES procured their employment in circumstances where it was aware of previous complaints of sexual harassment made at the chosen workplace. Despite the fact that the caseworker who facilitated the applicant's employment did not know the full history of sexual harassment complaints at this workplace, the Court aggregated all the complaints known by CES officers. It did so on the basis that aggregating each discrete complaint did not alter the character of the knowledge.²²² Knowledge of each complaint contributed to a view that there was a history of sexual harassment at this workplace, and knowledge of each additional complaint only strengthened that existing view.

This idea is similar to the US model of aggregation which suggested aggregation could be practically workable if applied only to knowledge. As with that model, however, while it may appear that aggregated knowledge in this circumstance is more intuitively cumulative, aggregation still alters the 'character' of corporate knowledge. Through aggregation, corporations are attributed with both the total of each composite item of knowledge, and the inferences associated with knowing each item – inferences that no individual ever made.²²³ Without a principled justification for why a corporation should be attributed with the culpability that flows from these inferences, aggregation still provides no explanation for corporate culpability.

IV OVERALL PATTERNS IN THE USE OF AGGREGATION

Keeping in mind the important caveats about comparative law analysis, there are nonetheless clear patterns in the use of aggregation across these three jurisdictions. A predominant reason for the use of aggregation is to overcome barriers to liability posed by corporate structures that restrict the flow of information, or knowledge barriers. This is not to suggest that aggregation operates the same way across these jurisdictions, or that this reason is the only reason for the use of aggregation. For instance, aggregation also seemed to appeal to some courts because of a persuasive theoretical principle or understanding that a corporation is in some sense the sum of its employees.²²⁴ However, while this might have some intellectual appeal, this analysis has revealed that this concept does not smoothly translate into a workable corporate attribution method.

220 *Elliott v Nanda* (2001) 111 FCR 240, 295 [170] (Moore J) ('*Elliott*'); *Re Chisum* (n 204) 649–60 (Wooten J). See also Eastwood (n 20) 561.

221 *Elliott* (n 220).

222 *Ibid* 295 [170] (Moore J).

223 See Part III(A)(3) above.

224 *Gobert* (n 53) 405. See, eg, the Court in *New England* (n 59), quoting the trial judge at 855: 'you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all the employees.'

As a corporate attribution method, aggregation creates and attributes corporate mental states more complex than the mental states possessed by a corporation's individuals. Limiting aggregation to only knowledge does not eliminate this effect. Aggregation attributes both the component knowledge of individuals and the available inferences from possessing all items of component knowledge. Consistently, many courts have justified the attribution of more complex mental states through aggregation based on a corporation's adoption of knowledge barriers. The circumstances of those knowledge barriers reflected a level of organisational culpability that intuitively supported the attribution of the required culpable mental state.

An important takeaway from this is that aggregation fundamentally reflects a realist view of corporate identity – that corporate identity exists to some extent independently of its individual employees.²²⁵ By attributing culpability which transcends the limits of individual mental states and is proportional to some kind of organisational culpability, aggregation (ironically) conceptualises corporations as more than a mere sum of individual minds. However, while aggregation has been used as a method of capturing organisational culpability, it bears minimal connection to the discrete doctrinal elements of culpable corporate mental states. On this basis, it has limited explanatory power, and has accordingly been described as a 'desperate, but disingenuous' method of attributing corporate responsibility.²²⁶

Aggregation also has significant practical limitations. Its lack of connection to discrete culpable corporate mental states contributes to its wide and potentially unfair scope of application. As a result, it risks conflating mental states with strict liability concepts or negligence. It also fails to consider legitimate reasons as to why knowledge should be compartmentalised, or the possibility that robust and ethical corporate communication systems may have failed by mistake. Efforts to improve aggregation have largely failed to address these issues. However, these attempts demonstrate the importance of aggregation's premise – capturing corporate culpability implicit in the adoption of knowledge barriers.

V SIGNIFICANCE OF AGGREGATION AS AN ORGANISATIONAL APPROACH TO CORPORATE CULPABILITY

Although aggregation provides a promising insight into culpability reflected in the adoption of corporate knowledge barriers, it is ultimately limited by its focus on individual mental states. This suggests that a better approach to capturing potential culpability deriving from corporate knowledge barriers is a model that

225 Colvin (n 53) 19; Sullivan (n 160) 528–9; Bucy (n 84) 1156; Weinstein and Ball (n 85) 78. See also Gobert (n 53) 407; Bant, 'Taxonomy and Synthesis' (n 10) 18. A realist view of corporate identity has been contrasted with a nominalist view, which views corporate identity as resembling nothing more than a collection of individuals.

226 Bucy (n 84) 1157.

shifts attention away from individual mental states, and towards the systems that cause knowledge barriers to materialise.²²⁷

Australia's existing corporate culture provisions in the *Criminal Code Act 1995* (Cth) provide a model of corporate attribution that focuses distinctly on organisational culpability. Under this model, a corporation can be attributed with a culpable mental state if it can be proved that its corporate culture directed, encouraged, tolerated or led to wrongdoing, or if the corporation failed to maintain a corporate culture that required compliance with the relevant law.²²⁸ The utility of corporate culture as a governance concept and regulatory tool has been widely recognised.²²⁹ However, as a method of corporate attribution, the model suffers from a lack of clarity surrounding the concept of corporate culture,²³⁰ including the relationship between corporate culture and the specific doctrinal elements of culpable mental states.²³¹ Accordingly, corporate culture may be unable to provide a robust and practical framework to adequately link the culpability implicit in the adoption of corporate knowledge barriers with culpable mental states.

A more effective approach may be found in the novel model of corporate attribution known as systems intentionality, recently endorsed by some members of the High Court, some of whom applied reasoning consistent with the model.²³² Systems intentionality shares the same concern as aggregation regarding the problems corporate knowledge barriers present for the traditional derivative methods of corporate attribution law.²³³ Building on the insights provided by Australia's corporate culture model, it also conceptualises corporate responsibility through a distinctly organisational, rather than individualistic, lens. It proposes that corporations manifest mental states through their embedded systems of conduct, policies and practices. Systems of conduct are inherently purposive – they are objectively designed or calculated to achieve certain outcomes.²³⁴ From this starting point, the model proposes that complex mental states can be logically and meaningfully attributed to corporations, without necessarily focusing on individual mental states.²³⁵ The full scope of the model is not outlined in this article,²³⁶ nor does this article attempt to comprehensively reconcile aggregation through the lens of systems intentionality. However, by focusing on systems rather than individuals, it is possible that systems intentionality addresses the underlying concern of aggregation on a more principled basis.

227 See Colvin (n 53) 23; *CCR Final Report* (n 6) 150 [4.87].

228 See *Criminal Code* (n 24) s 12.3(2)(c)–(d).

229 See *CCR Final Report* (n 6) 247–8 [6.112]–[6.115]; Bant and Faugno, 'Corporate Culture and Systems Intentionality' (n 28) 353–8.

230 *CCR Final Report* (n 6) 245–6 [6.105]–[6.108]; 'Corporate Criminal Liability Options Paper' (n 4) 75–6 [6.14]–[6.19].

231 Bant and Faugno, 'Corporate Culture and Systems Intentionality' (n 28) 352.

232 *Productivity Partners* (n 12) 399–401 [108]–[111], 407 [134], 409–10 [143] (Gordon J), 425–6 [199]–[200], 436–8 [236]–[241] (Edelman J). Gordon J's analysis appeared to be relevantly endorsed by Steward J (at 453 [282], 462 [307]) and Beech-Jones J (at 473 [340]).

233 See Bant, 'Systems Intentionality' (n 13) 185–6.

234 Ibid 187.

235 See Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 13).

236 For a detailed account of systems intentionality: see Bant, 'Systems Intentionality' (n 13); *ibid*.

A brief consideration of the landmark US case of *New England* (explored previously above)²³⁷ through the lens of systems intentionality, demonstrates the value of this alternate approach. Recall that in *New England*, the Court held that a bank had wilfully committed 31 violations of failing to report transactions greater than \$10,000. Despite the fact that no one individual employee possessed knowledge of both the reporting requirements and the reportable transactions, the Court attributed corporate intention by aggregating the knowledge of the bank's employees and applying a concept of 'flagrant indifference'.

Taking care to distinguish between the discrete doctrinal requirements of both knowledge and intention, systems intentionality first proposes that corporations manifest knowledge required for their key systems to function.²³⁸ Accordingly, the bank can be attributed with knowledge of its reporting requirements – such knowledge is implicit from operating a system of large commercial banking. Knowledge of the reportable transactions can also be attributed to the bank. In order for the bank to hold and lend its money, it must know the existence and value of the discrete transactions in which it engages.

The issue then becomes whether the bank wilfully violated its reporting requirements: meaning, did it intentionally, not mistakenly, violate the requirements?²³⁹ Systems intentionality proposes that if a system is objectively coordinated or calculated to always achieve a specific outcome, it manifests a specific intention to achieve that outcome.²⁴⁰ Looking at the evidence of the bank's systems, it is clear there was a practice at the bank of reporting requirements not being communicated to the junior tellers responsible for the bank's day to day transactions. An internal bank memo concluded that it would have been clear to managers 'something strange was going on', but nonetheless information failed to reach the critical employees.²⁴¹ The persistence of this practice for more than a year, and the bank's resistance in modifying this practice even after its existence became clear,²⁴² is a strong basis for demonstrating this practice was in reality the bank's de facto system of conduct. That system was virtually certain, or calculated, to cause transactions that should have been reported to in fact go unreported. As such, it may have manifested an intention to violate the bank's reporting requirements (knowledge of which has already been attributed to the bank), or recklessness as to whether or not the requirements were violated.²⁴³ Through this lens, any claim by the bank that the violations occurred by mistake or accident on behalf of its tellers (as it did in fact argue)²⁴⁴ is refuted. In circumstances where the bank's system of diffusing knowledge operated exactly as it

237 See Part III(A)(1) above.

238 Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 13) 249–50.

239 *New England* (n 59) 854–5 (Bownes J for Bownes, Selya and Pettine JJ).

240 Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 13) 246–7.

241 *New England* (n 59) 857 (Bownes J for Bownes, Selya and Pettine JJ).

242 Ibid 857–8.

243 See Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 13) 235–9.

244 *New England* (n 59) 859 (Bownes J for Bownes, Selya and Pettine JJ).

was designed, the mental state of individual tellers is not relevant – they were merely conforming to their specified role.²⁴⁵

Even this brief analysis demonstrates that systems intentionality has clear advantages over aggregation. Systems intentionality appropriately directs analysis to the systems causing diffused individual knowledge, avoiding a convoluted analysis of who knew what and whose knowledge matters. Culpability is manifested in corporate systems that act as knowledge barriers, and systems intentionality is able to describe these systems and explain why they manifest culpable mental states. As a result, systems intentionality has a more refined and precise scope than aggregation. Implementation of this model would also incentivise corporations more appropriately. Corporations are encouraged to maintain ethical information management systems designed to prevent wrongdoing, rather than being pressured to centralise knowledge for the sake of it.²⁴⁶

Importantly, describing corporate knowledge barriers using systems intentionality does not encounter a problem of circularity. There is not necessarily a need to look for an individual or group that intentionally put a certain corporate structure into place. Corporations are held responsible for systems of conduct that can meaningfully be described as their own.²⁴⁷ This is more consistent with the reality of corporate structures in large corporations. They are not necessarily put into place ‘intentionally’ by individuals. They can develop and evolve as a matter of practice, settling in a state that benefits the corporation commercially.²⁴⁸ Although more detailed analysis is required, systems intentionality is a promising development in light of the flaws of aggregation models.

VI CONCLUSION

This article set out to contribute to evolving approaches to corporate responsibility by exploring the basis, challenges and limitations of aggregation as an attribution model. The analysis has shown that a predominant reason for the use of aggregation is its ability to attribute mental states to corporations despite the existence of corporate structures that diffuse individual knowledge. This can be seen from common patterns across case law in the US, UK and Australia. This article also reveals that despite its apparent concern with individuals, aggregation inevitably captures a sense of organisational, rather than individual, culpability. Although aggregation has substantial limitations, it demonstrates corporate responsibility may be implicit in the adoption of knowledge barriers.

This leaves open the possibility that reasons for the use of aggregation may be better addressed by organisational models of corporate attribution.

245 For a detailed account of how to identify a genuine corporate mistake using systems intentionality: see Bant, ‘Corporate Mistake’ (n 105).

246 See Gobert (n 53) 406.

247 Cf Mihailis E Diamantis, ‘How to Read a Corporation’s Mind’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 209, 221–2 <<https://doi.org/10.5040/9781509952410.ch-010>>.

248 See Hansen (n 102) 997; Ragozino (n 85) 441, citing Laufer (n 85) 1089.

Systems intentionality, in particular, appears to have advantages over models of aggregation. From the brief analysis presented in this article, it is suggested systems intentionality may be able to capture the culpability implicit in corporate knowledge barriers with a more principled framework and precise scope. Future research into the application of systems intentionality to corporate systems that diffuse knowledge may accordingly yield valuable insights.