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# IS MY CLIENT'S CONDUCT DISHONEST OR MERELY EXCUSABLE SHARP PRACTICE?

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Dishonesty is fast becoming entrenched in commercial law in Australia as the defining characteristic distinguishing criminal conduct from conduct which only has civil or civil penalty consequences. Many of the serious offence provisions under the *Corporations Act 2001* (Cth) require the prosecution to prove dishonesty and dishonesty has been adopted as a key element of the new cartel offence provision which is proposed for inclusion in the *Trade Practices Act 1974* (Cth). Whilst deciding whether conduct is dishonest may be straightforward in most cases, situations can arise where a lawyer may be asked to advise a client as to whether a proposed course of conduct is dishonest and the answer may not be clear cut. Advising a client in such a situation may be difficult because current tests of dishonesty tend to reflect standards of ethics and morality generally accepted by the community which may not accord with the client's and/or the lawyer's personal standards. This article will examine the concept of dishonesty in the context of commercial crime, attempt to add some clarity to this particularly fluid concept and scrutinize the lawyers' role in ensuring clients' actions accord with community values.

## **Introduction**

As has been widely reported, it is proposed that a new criminal offence will soon be introduced into the Trade Practices Act 1974 (Cth) which will prohibit corporations and individuals from being involved in cartels. This offence will carry gaol terms for individuals and large fines for corporations.<sup>1</sup> However under the draft legislation an individual or corporation will only breach this prohibition if that individual or corporation enters into the cartel with the intention of *dishonestly* obtaining a benefit.<sup>2</sup>

The Discussion Paper which accompanied the release of the draft bill justified the use of dishonesty as an element of the cartel offence on the basis that:

The Corporations Act 2001 uses ‘dishonesty’ to distinguish between civil and criminal prohibitions for many breaches, including in relation to directors’ and other officers’ duties.<sup>3</sup>

Whilst this statement is true, the widespread use of dishonesty as an element in offences contained in the Corporations Act 2001 (Cth) is a relatively recent phenomenon. The Discussion paper also justified the use of dishonesty on the grounds that “Dishonesty is a well-established principle of comparable criminal offences in Australia.”<sup>4</sup> This statement is also true to the extent that dishonesty is often the defining criteria of many of the fraud offences contained in the various criminal acts and codes throughout Australia and

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<sup>1</sup> See Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Exposure Draft).

<sup>2</sup> Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Exposure Draft) at @44ZZRF and @44ZZRG. Relying on dishonesty as a criteria to catch serious criminal conduct has been criticised see B Fisse (2007).

<sup>3</sup> Competition and Consumer Policy Division, The Treasury (2008) p 4.

<sup>4</sup> Competition and Consumer Policy Division, The Treasury (2008) p 4.

overseas. Furthermore, any mention of an element of ‘fraud’ in an offence provision is now generally taken to mean ‘dishonest.’<sup>5</sup>

However while ostensibly the concept of dishonesty seems to be simple it is, in fact, quite complex. It embraces at least two and arguably three distinct requirements, relating on the one hand to the defendant’s actual rights (as he or she believes them to be and as they actually are) and on the other to the conformity of his or her conduct with generally accepted standards.<sup>6</sup> Adding to such complexity is the fact that courts have been loath to define exactly what is dishonest. In *R v Salvo* [1980] V R 401 McInerney J elucidated the reason courts take this position when he said:

The word “dishonesty” implies reference to a standard of morality underlying the law. The law sets standards of legality and illegality but cannot set and never has purported to set standards of morality. Standards of morality underlie the law; they derive not from the law but from the standard of ethics accepted by the community.<sup>7</sup>

This article attempts to grapple with the somewhat nebulous concept of dishonesty and aims to provide lawyers with some reference points when trying to advise clients as to whether or to not engage in certain conduct. Part I outlines the current use of dishonesty in corporate crime and how, historically, it has become a key element in many of these types of crimes in Australia. In Part II the current tests for dishonesty are discussed and

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<sup>5</sup> See: *R v Glenister* [1980] 2 NSWLR 597. In *R v Spies* 74 ALJR 1263 at 1281 the High Court confirmed that an intention to defraud involved the use of dishonest means to prejudice the rights of another. Defrauding is the use of dishonest means with the actual obtaining of property or depriving the person defrauded of something which is regarded as belonging to him or her.

<sup>6</sup> Arlidge & Parry (1985) p 3.

<sup>7</sup> *R v Salvo* [1980] VR 401 at 407.

case law is examined with a view to determining what type of conduct will be found to be dishonest. In Part III the impact of these tests are considered from the point of view of lawyers – that is how should lawyers approach advising their clients in relation to what may be unethical conduct? Part IV considers when the use of dishonesty as an element in corporate crime may be appropriate given that its inclusion may act to promote ethical and fair dealing practices by both lawyers and their clients.

## **I Dishonesty as an element in corporate crime**

### **The use of Dishonesty in the Corporations Act**

As stated above, it is only relatively recently that dishonesty has become the key element in many of the offence provisions in the Corporations Act. This shift commenced with the Corporate Law Reform Act 1992 (Cth) which in 1993 introduced Part 9.4B into the Corporations Law (the predecessor of the Corporations Act). This provided the Australian Securities and Investments Commission ('ASIC') with the option, as an alternative to a bringing a criminal prosecution for a breach of the Corporations Act directors' duties provisions, to bring an action seeking a civil penalty. After these amendments a breach of the Corporations law directors' duties provisions still attracted criminal sanctions but only if the defendant contravened the provision:

- (a) knowingly, intentionally or recklessly;and
- (b) either:

- (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or
- (ii) intending to deceive or defraud someone.<sup>8</sup>

In 1999 the Corporate Law Economic Reform Program Act (Cth) 1999 (the CLERP Act) further amended the Corporations Law to extend the reach of civil penalties to a number of other provisions which were previously exclusively criminal offences. This Act also delineated conduct which would only attract a civil penalty from conduct which would attract criminal penalties by introducing dishonesty as an essential element for the criminal offence. For example s 260A of the Corporations Act is the provision which contains the prohibition against a company giving financial assistance in relation to the purchase of its own shares. After the amendments introduced by the CLERP Act a breach of this section can result in ASIC taking civil penalty action. A breach of this provision is only a criminal offence if the person is:

involved in a company's contravention of section 260A and the involvement is dishonest.<sup>9</sup>

Similarly s 208 is a provision which contains the prohibition against engaging in related party transactions, a breach of which can attract civil penalties. Again a breach of this prohibition is only a criminal offence if the involvement is dishonest.<sup>10</sup> Many other provisions of the Corporations Act were treated in a similar fashion such as s 588G(3) (insolvent trading) s 254L(3) (redemption of redeemable preference shares) s 256D(4)

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<sup>8</sup> *Corporations Act* 2001 (Cth) s 1317FA. This provision has since been repealed but dishonesty is still a central element for a criminal breach of the directors duties provisions; see s 184 of the *Corporations Act* 2001 (Cth).

<sup>9</sup> *Corporations Act* 2001 (Cth) s 260D(3).

<sup>10</sup> *Corporation Act* 2001 (Cth) s 209(3).

(reduction in share capital) s 259F(3) (acquiring own shares) and s 344 (keeping financial records and financial reports).

In 2002 further amendments to the Corporations Act introduced as a result of Financial Services Reform Act 2001 (Cth) extended the range of offences which could attract civil penalties to the market misconduct offences such as insider trading and market manipulation. While dishonesty was not introduced as an element to these offences, a ‘catch all’ dishonest conduct offence was introduced into the Corporations Act. This provides:

A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.<sup>11</sup>

### **Why did Dishonesty become such a central element in many offences in the Corporations Act?**

The introduction of the dishonesty element into the directors’ duties offence provisions of Corporations Act in 1993 was in response to the report of the Senate Standing Committee on Legal and Constitutional Affairs “The social and fiduciary duties and responsibilities of company directors” (the Cooney Committee).<sup>12</sup> As the name of the report suggests the key focus of the Committee was the directors’ duties provisions of the Companies Code (a predecessor of the Corporations Act) and the enforcement of these provisions. During

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<sup>11</sup> *Corporations Act* 2001 (Cth) s 1041G.

<sup>12</sup> Cooney Report (1989).

the course of hearings, prior to handing down its report, the Committee received a number of submissions to the effect that “people may feel disinclined to take on directorships because of the penalties to which they would potentially be subject”.<sup>13</sup> There does not, however, appear to be any empirical evidence tendered to support this assertion.<sup>14</sup> As a result, in its report, the Cooney Committee recommended the legislation be changed so that criminal liability only “applies where conduct is genuinely criminal in nature” but did not expand upon what they meant by “genuinely criminal” or elucidate what should be the decisive factor for such criminal liability to attach.<sup>15</sup>

However, by the time the draft legislation appeared the parliamentary draftsmen had adopted ‘dishonest intent’ as this decisive factor.<sup>16</sup> Presumably the parliamentary draftsmen were influenced by the submission to the Cooney Committee that criminal penalties for company directors should apply where they had “acted fraudulently or dishonestly but not otherwise”.<sup>17</sup> This submission was made Professor Robert Baxt and endorsed by a number of persons representing the interests of business.<sup>18</sup>

An alternative submission to the Cooney Committee was that by Professor Brent Fisse. In essence this was that criminal liability should attach only when there was subjective blameworthiness, generally defined in the criminal law to be when there is intention, knowledge or recklessness.<sup>19</sup> This would ensure that the Corporations Act offences were

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<sup>13</sup> Cooney Report (1989) p 187.

<sup>14</sup> Cooney Report (1989). No empirical evidence is cited in the Report.

<sup>15</sup> Cooney Report (1989) p 190.

<sup>16</sup> *Corporate Law Reform Bill 1992*.

<sup>17</sup> Cooney Report (1989) p 188.

<sup>18</sup> Cooney Report (1989) p 188.

<sup>19</sup> Cooney Report (1989) p 190

consistent with most other crimes, where the prosecution has to prove both the actus reus of the crime as well as a specific mens rea.

Whether the parliamentary draftsmen considered this alternative is not clear. What is clear however is that there appears to be nothing in the published material critically analysing whether the insertion of dishonesty as an element was necessary at all or whether the simpler alternative of prescribing a specific and appropriate guilty mind element (such as intention, knowledge or recklessness) for all of the actus reus elements of the offence would have been adequate.<sup>20</sup> As such dishonesty was adopted as a key element for the directors' duty offence provisions, and has thereafter spread to other offence provisions in the Corporations Act, without a rigorous analysis of whether it was needed in the first place as a mechanism for separating criminal offences from civil penalty provisions. Its introduction appears to have been largely influenced by the unsubstantiated assertion that the risk that a director would be criminally prosecuted was acting as an impediment to people accepting positions as company directors.

Interestingly many of submissions to the Cooney Committee, including those from the business community, lamented the lack of enforcement of the Companies Code.<sup>21</sup> This led to the Committee recommending an increase in funding to those charged with enforcing this legislation.<sup>22</sup> This calls into question the rationale for needing to add

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<sup>20</sup> Since the 15 December 2001 the Criminal Code 1995 (Cth) applies to the Corporations Act. As such each of the physical elements of each of the offences under the Corporations Act also attracts a fault element. Where the physical element is conduct, the fault element, if no other is specified, is intention (ss 5.6(1)). If the physical element is a circumstance, or a result, the fault element is recklessness (ss 5.6(2)).

<sup>21</sup> Cooney Report (1989) pp 144-150.

<sup>22</sup> Cooney Report (1989) pp 150.

dishonesty as the key element for corporate crime. If there were so few prosecutions it seems improbable that the criminal penalties to which a person may be subject was reason people were not accepting positions as company directors (if in fact that was ever the case in reality). If people were, in fact, not accepting such positions perhaps potential civil liability was acting more of a deterrent than possible criminal liability.

Maybe at the time it was obvious to those involved in the enquiry that there was a lack of enforcement of the Companies Code because of the low level of funding of the bodies charged with enforcing this law. It followed then that the Cooney Committee would almost certainly recommend an increase in funding, and that this would be acted upon by the Government. With the spectre of that occurring, from the point of view of groups representing the interests of business, an extra hurdle for the authorities in prosecuting company directors (the need to prove dishonestly) was perhaps an attractive proposition. This extra hurdle would assist in preserving the status quo, that is, a low level of prosecutions of company directors, notwithstanding an anticipated increase in enforcement activity.

### **The use of Dishonesty as an element in the new cartel offence**

As is referred to in the introduction to this article, the adoption of dishonesty as an element in the new cartel offence proposed for the Trade Practices Act was influenced by its inclusion as the key requirement to the major criminal offence provisions in the

Corporations Act.<sup>23</sup> In addition the inclusion of dishonesty was influenced by dishonesty being an element of the cartel offence in the Enterprise Act 2002 (UK).<sup>24</sup> Professor Brent Fisse has analysed the history of the introduction of dishonesty as an element in this UK provision, the main influence having been the Office of Fair Trading Report, *Criminalisation of Cartels in the UK*.<sup>25</sup> He is critical of the reasoning contained in this report, including the fact that dishonesty would preclude a defence that the cartel would have economic benefits or that it constituted an activity which might be exempt under UK or EC law. Fisse points out:

One telling feature of the Report is that dishonesty was seen as a way of preventing defendants from arguing in a jury trial that they had not committed a breach of United Kingdom or European Union competition laws because, for example the conduct was subject to an exemption. This approach seems misguided. First, there is little or no merit in substituting the ill-defined notion of dishonesty for the relatively precise liability rules that apply to civil per se prohibitions and the exemptions to them. ....Second, it is difficult to understand how the element of dishonesty would prevent a defendant from arguing that conduct in compliance with a civil per se prohibition was not dishonest according to the standards of ordinary people.<sup>26</sup>

He is also highly critical of the suggestion by the UK Office of Fair Trading that dishonesty would not be a concept difficult for juries to understand and states:

The Report dismisses the difficulties that may arise in jury trials by saying that “given the context in which hard core cartels take place, we believe that, in most cases, the facts will demonstrate that the

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<sup>23</sup> Competition and Consumer Policy Division, The Treasury (2008) p 4.

<sup>24</sup> Competition and Consumer Policy Division, The Treasury (2008) p 4.

<sup>25</sup> Fisse (2007) p 252.

<sup>26</sup> Fisse (2007) p 252.

parties realised what they were doing was dishonest and was contrary to law.” This proposition begs the question of how the difficulties are to be managed in less than clear-cut cases of blatantly serious cartel conduct and seems disingenuous.<sup>27</sup>

Fisse also criticises the use of dishonesty generally in the proposed new offence stating that it is an:

undefined and undefinable popularist notion, the practical application of which will create real difficulties for judges and juries, as well as for people in business and their advisers.<sup>28</sup>

The problems highlighted by Fisse stem from the tests the law has developed for determining what is dishonest. These tests, in effect, allow a jury to set the standard and to calibrate the defendant’s conduct against this standard. This can lead to different juries potentially setting different standards and thereby lead to inconsistency and uncertainty in the law and its application.

Fisse’s criticisms reflect the comments of earlier commentators on these tests for dishonesty. In 1985 Edward Griev lamented the possibility that the tests for dishonesty could give rise to inconsistent verdicts:

It is only in a minority of cases that the matter will truly admit of argument. But within this crucial marginal group different juries, as the presumptive embodiment of ordinary decent standards, may

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<sup>27</sup> Fisse (2007) p 253.

<sup>28</sup> Fisse (2007) p 236.

take different views of essentially indistinguishable cases. The law of the relevant offence will vary as between different defendants. This must be unacceptable.<sup>29</sup>

## **II What type of conduct is classified as dishonest?**

A number of commentators, such as Fisse and Griew, take issue with the notion that ‘dishonesty’ as a concept is a simple, untechnical term which is easily understood by all. This is because whilst some actions are clearly dishonest to all (such as stealing) other actions, such as obtaining credit where it is doubtful that it can be repaid, may be dishonest in the eyes of some people but not others. Griew gives other examples:

theft at work (“perks”), handling stolen goods being offered in the neighbourhood (“from off the back of a lorry”), inflation of expense claims, inaccuracy or concealment in the income tax return.<sup>30</sup>

Obviously what is dishonest does not necessary mean the same thing to everyone and this can gives rise to ‘grey’ areas where whether something is judged to be dishonest can depend upon a person’s background, morals and ethics. Yet the law, and the tests it prescribes, operates on the assumption that a lay jury can determine a universal objective test of what the community would regard as dishonest and calibrate a defendant’s conduct against this universal standard.

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<sup>29</sup> Griew (1985) p 344.

<sup>30</sup> Griew (1985) p 46.

The current tests of dishonesty all contain an objective test of what is dishonest. In addition there may also be subjective element which may depend upon the state of mind of the defendant.

### **The *Peters* test**

In Australia there is no one universal test for dishonesty applicable in all jurisdictions for all offences. Where dishonesty is an element of an offence provision, and there is no test for dishonesty prescribed in the relevant legislation, the current test is that laid down by the High Court in *Peters v The Queen* (1998) 192 CLR 493. In that case the majority of the High Court held that:

In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However if “dishonest” is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest.<sup>31</sup>

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<sup>31</sup> *Peters v The Queen* (1998) 192 CLR 493 at 504 per Toohey and Gaudron JJ. Kirby J had a different view but for the sake of forming a majority withdrew it and agreed with Toohey and Gaudron JJ. The reference

The test from *Peters*, is therefore generally a three-stage test with both subjective and objective elements. First the knowledge, belief or intent that is said to render that act dishonest needs to be identified. Second the defendant has to actually have that knowledge, belief or intent. Third a jury must determine whether this knowledge, belief or intent was dishonest according to the standards of “ordinary, decent people”.

In legislation that contains its own test of dishonesty the test that is generally adopted by the legislature is that derived from the UK case of *R v Ghosh* [1982] QB 1053.<sup>32</sup> This is the case with the proposed cartel offence to be inserted in the Trade Practices Act and the test for the specific offence provisions under Chapter 7 of the Criminal Code 1995 (Cth) (the ‘Code’).<sup>33</sup> In *Ghosh* the UK Court of Appeal said:

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first decide whether according to the standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.<sup>34</sup>

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to the use of dishonesty in a “special sense” appears to be a reference to whether the particular legislation qualifies what is dishonest, for example s.81(1) of the *Crimes Act 1958* (Vic) which provides that it is an offence if a person “who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it”.

<sup>32</sup> Despite the fact that the High Court specifically disapproved of that test in *Peters*, Australian parliaments have tended to adopt the *Ghosh* test when prescribing a test for dishonesty.

<sup>33</sup> See *Criminal Code 1995* (Cth) Chapter 7. See also Chapter 3 of the *Criminal Code 2002* (ACT) and the *Criminal Law Consolidation Act 1935* (SA) s 131.

<sup>34</sup> *R v Ghosh* [1982] QB 1053 at 1064.

In relation to Corporations Act offences the situation is further complicated because while some offence provisions have the *Ghosh* test as the prescribed test,<sup>35</sup> other offence provisions have dishonesty as an element but no test is prescribed.<sup>36</sup> In those latter situations as the Code applies, dishonesty is what is known as a “physical element” under the Code, being a “circumstance” in which conduct occurs.<sup>37</sup> Although the Code does not make it clear, presumably as a result of *Peters*, a jury would be directed that they would have to find that the conduct was dishonest in accordance with the standards of ordinary, decent people. In addition, as with any physical element where the Code applies, there is a prescribed “fault element”, in this case recklessness.<sup>38</sup> Accordingly, under the Code the defendant must be either know that the conduct would be dishonest in accordance with the standards of ordinary people, or at least be aware that there was a substantial risk that the conduct would be dishonest in accordance with the standards of ordinary people.<sup>39</sup>

### **Similarities and differences between the tests**

The focus in the *Peters* test is the *state of mind* of the defendant. It requires as a first step identification of the state of mind (knowledge, belief or intent) said to render the act dishonest and a determination of whether the defendant had that knowledge, belief or intent. As a second step it is necessary to determine whether this state of mind was dishonest in accordance with the standards of ordinary people. Under the *Ghosh* test as

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<sup>35</sup> For example *Corporations Act* 2001 (Cth) s 1041G(2).

<sup>36</sup> For example *Corporations Act* 2001 (Cth) s 588G(3), s 260D(3) and s 256D(4).

<sup>37</sup> *Criminal Code* (Cth) s 4.1(1).

<sup>38</sup> *Criminal Code* (Cth) s 5.6(2).

<sup>39</sup> *Criminal Code* (Cth) s 5.4.

well as under the Code, the initial focus is on the *act or conduct* and whether this act or conduct is dishonest according to the standards of ordinary people. The test then moves to consider the defendant's state of mind in order to determine whether he or she realised that the act was dishonest according to the standards of ordinary people (under *Ghosh*) or whether there was a substantial risk that the conduct would be dishonest in accordance with the standards of ordinary people (under the Code).

Accordingly it is critical to determine in any transaction what is alleged to be the relevant act said to be dishonest and/or which facts point to the defendant having a dishonest state of mind. It is only once those reference points are established that the next parts of the tests can be considered. As a practical matter for a lawyer advising a defendant charged with a dishonesty offence, it is critical that they seek at the earliest possible stage from the prosecution particulars of what is the alleged act or conduct said to be dishonest, and what facts in the transaction the prosecution will use to invite the jury to draw the inference that the defendant had the requisite dishonest state of mind. From the point of view of a lawyer advising a client who is intending to undertake a transaction which may be seen as sharp practice or unethical conduct, it is essential to identify what act or conduct may be problematic and what facts may give rise to an inference of a dishonest state of mind on behalf of their client. It is only once this exercise is undertaken that the next step can be considered as to whether this act, conduct or state of mind might be seen as dishonest in accordance with the standards of ordinary people.

**What sort of facts point to dishonesty judged by the standards of ordinary people?**

The case law does suggest some types of factual scenarios which point to conduct or a state of mind which may be seen as dishonest by ordinary people. These can be categorised as follows:

1. Deception

Deception is the classic indicia of dishonesty. Deceiving another person often points to dishonesty on the part of the person practicing the deception. In *In re London Globe Finance Corporation Limited* [1903] 1 Ch 728 Buckley J defined deception as follows:

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false.<sup>40</sup>

However as was made clear in *Scott v Commissioner for Police* [1974] 3 All ER 1032 dishonesty is not limited to cases involving deception.<sup>41</sup> Furthermore although there may be deception it may not be dishonest. For example it may not be dishonest if a person deceived another to obtain property to which they had a claim of right. Alternatively, as is clear from *In re London Globe*, the person who caused

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<sup>40</sup> This passage was cited by approval by the High Court in *Spies v the Queen* (2000) 201 CLR 603 at 629.

<sup>41</sup> *Scott v Commissioner for Police of the Metropolis* [1974] 3 All ER 1032 at 1036.

the deception may not have been aware that the facts that they were conveying were false.

2. Making or relying on representations or promises which the person knows are false or would not be carried out.<sup>42</sup>

This would include making false representations to electronic machines such as Automatic Teller Machines. Although the case law is clear that machines cannot be deceived,<sup>43</sup> making a false or misleading representation to a machine or a computer would be caught by this category.

3. Concealing facts which the person knew that they had a duty to disclose.<sup>44</sup>
4. Engaging in conduct which they knew they had no right to engage in.<sup>45</sup>

In relation to this category McHugh J in *Peters* said the conduct could involve “a breach of duty, trust or confidence by which an unconscionable advantage is to be taken of another” and gave two examples. First where company directors concealed

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<sup>42</sup> McHugh J in *Peters v The Queen* (1998) 192 CLR 493 at 529 which was cited with approval by the full High Court in *Spies v The Queen* (2000) 201 CLR 603 at 631. *Peters* involved a conspiracy to defraud and the majority found that dishonesty was not a separate element of conspiracy to defraud but the defendant must have intended to prejudice another person’s rights or interests or the performance of a public duty by dishonest means. McHugh J set out these categories as examples of dishonest means. These categories were also quoted as examples of dishonest behaviour in the Competition and Consumer Policy Division, The Treasury (2008) p 4.

<sup>43</sup> *R v Fischetti* (2003) 192 FLR 119.

<sup>44</sup> McHugh J in *Peters v The Queen* (1998) 192 CLR 493 at 529. See also note 42 above.

<sup>45</sup> McHugh J in *Peters v The Queen* (1998) 192 CLR 493 at 529. See also note 42 above.

a conflict of interest and second where company directors agree to divert funds for their private purposes.<sup>46</sup>

Another example is *Scott* where an agreement with employees of a cinema to temporarily remove films without the consent of the employer, for the purpose of copying the films, was held to be dishonest. The employees were engaging in conduct which they had no right to engage in so were dishonest. The person who induced this behaviour was also held to be dishonest.

## 5. Wilful Blindness

It may be dishonest for someone to act with wilful blindness. Wilful blindness is where a person suspected the fact, realised its probability, but refrained from obtaining the final confirmation because he or she wanted to be able to deny knowledge.<sup>47</sup> However just because the person did not ask questions does not necessarily mean that a person is dishonest because their conduct may be only careless or negligent. What appears to be critical is whether they consciously knew that it was likely they may find out something adverse. In *Twinsectra Ltd v Yardley* [2002] 2 All ER 377 the House of Lords confirmed that it was dishonest to deliberately close one's eyes and ears, or deliberately not ask questions, lest the

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<sup>46</sup> *Peters v The Queen* (1998) 192 CLR 493 at 530.

<sup>47</sup> Williams (1961) p 159. This passage was quoted by the High Court in *R v Crabbe* (1985) 156 CLR 464; 59 ALJR 417; 16 A Crim R 19; 58 ALR 417, the High Court at 470–471 (CLR).

person learn something that he or she would rather not know.<sup>48</sup> However on the facts in *Twinsectra* the House of Lords did not find that the conduct of the defendant was dishonest. Rather in that case the conduct of the defendant was said to be:

a blinkered approach to his professional duties as a solicitor, or buried his head in the sand (to invoke two different animal images). But neither of those would be dishonest.<sup>49</sup>

## 6. Other indicia of Dishonesty

However as is referred to above it is for the jury to determine what is dishonest and accordingly there may be other fact situations which a jury would infer that a defendant had a dishonest state of mind. The categories of dishonest behaviour are not closed and a particular set of facts could be at such variance with straightforward dealings that an ordinary person would regard it as dishonest.

For example the Canadian case of *R v Zlatic* [1993] 2 S.C.R. 29 involved a defendant who ran a clothing business. He obtained goods on credit from suppliers. He sold the goods to customers and used the proceeds to gamble. He eventually

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<sup>48</sup> *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97 at 106 as cited by Lord Hoffmann in *Twinsectra v Yardley* [2002] 2 All ER 377 at 383.

<sup>49</sup> *Twinsectra v Yardley* [2002] 2 All ER 377 at 383. In that case the House of Lords had to consider whether the conduct of a solicitor, Mr Leach was dishonest in accordance with the *Ghosh* test, i.e. according to the standards of reasonable and honest people, and whether he was aware of by those standards he was acting dishonestly. Mr Leach was a solicitor who acted for Mr Yardley in a transaction in which Mr Yardley received a loan of £1m from Twinsectra. Mr Yardley used another solicitor, Mr Sims, when dealing with Twinsectra. Twinsectra paid the loan funds to Mr Sims on the condition it only be used to purchase property on behalf of Mr Yardley. In fact Mr Sims paid the money to Mr Leach who in turn did not ensure that the funds were used solely to purchase property.

went bankrupt. He was charged with a general dishonesty offence in relation to creditors. The court held that dishonesty was defined by a reasonable person test, namely what a reasonable, decent person would consider dishonest and unscrupulous. The Canadian Supreme Court upheld the conviction.

Another example would be fixing a sporting event upon which bets are placed, for example “doping a horse”, bribing a sportsman or loading dice. However merely inducing a person to play a game by pretending to be inexperienced may not be dishonest.<sup>50</sup>

### **Fact scenarios which may result in a finding that there was no dishonesty**

In considering what matters a jury would take into account in assessing whether or not a defendant was dishonest, the case law points to a number of factors which may be influential to negate a finding of dishonesty. These types of facts include, but are not limited to,:

1. Was the company, shareholders, creditors, employees or others likely to benefit?

If a defendant acts for pure self interest this may have the effect of persuading a jury that he or she was acting dishonestly. Conversely if a defendant acted for more

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<sup>50</sup> *R v Governor of Brixton Prison ex parte Sjoland and Metzler* [1912] 3 KB 568. See generally The Law Commission of the UK (2002).

altruistic reasons this may tend to suggest that he or she did not have a dishonest state of mind.

If the transaction results in a personal benefit which can be seen to be only incidental, with the prime motivation being to assist others, then a jury may not be persuaded that a defendant was acting dishonestly. For example, in *R v Sinclair* [1968] 3 All ER 241 the UK Court of Appeal said:

If the assets are used in the honest belief that the best interests of the company are being served by that use there is no fraud and it is irrelevant that such use incidentally brings a personal benefit to the director. If on the other hand a risk is taken in using the assets which no director could honestly believe to be taken in the interests of the company and which is to the prejudice of the rights of others, that is taking a risk which there is no right and is fraudulent.<sup>51</sup>

The fact that a person could structure a transaction to emphasise the social or economic benefits of a transaction is one reason that the inclusion of dishonesty in the proposed new cartel offence has been criticised.<sup>52</sup> A defendant could perhaps avoid a finding of dishonesty by showing that he or she entered into the cartel to prevent employee job losses or to prevent the demise of a particular industry.

## 2. Is there a claim of right?

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<sup>51</sup> *R v Sinclair* [1968] 3 All ER 241 at 246.

<sup>52</sup> International Bar Association (10 March 2008) p 3.

If a person has a genuine belief that he or she has a bona fide claim to property that person may be held to be not acting dishonestly even if the belief is unreasonable and unfounded. However although the claim of right need not be reasonable, the reasonableness of the claim will nevertheless be a factor in determining whether the person actually believed he or she had such a claim.<sup>53</sup>

3. Is there a genuine belief that there would be payment or repayment?

If the matter concerns the taking of property, and there is a genuine belief on reasonable grounds that the person would be able to pay for the property or repay the loan, as the case may be, this may be an indication that the defendant was not acting dishonestly. It appears however that a mere 'pious hope' would probably not be sufficient.<sup>54</sup>

4. Was there a belief that there would be no significant practical detriment to any person?

In *R v Bonollo* [1981] VR 663, McGarvie J suggested, obiter, that if there is a belief by a defendant that there would be no significant practical detriment caused by the defendant's actions then this would not be dishonest.<sup>55</sup> He adopted the example used by Lawton LJ in *R v Feely* [1973] 1 QB 530 at 539 of an employee, in breach

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<sup>53</sup> *R v Lawrence* [1997] 1 VR 459; *R v Fuge* (2001) 123 A Crim R 310. In some jurisdictions this consists of a specific defence at least for some offences see: *Criminal Code* (Cth) s 9.5; *Crimes Act 1958* (Vic) s 73; *Criminal Code* (Qld) s 22; *Criminal Code* (WA) s 22; *Criminal Code* (NT) s 30 (2).

<sup>54</sup> *Halstead v Patel* [1972] 2 All E.R. 147.

<sup>55</sup> *R v Bonollo* [1981] VR 663 at 659.

of instructions, taking money from the till to pay for a taxi for his wife because he had no small change but with the intention of immediately replacing it when he obtained the correct change.<sup>56</sup>

### **III How does the current test of dishonesty impact upon lawyers and their clients?**

Set out above are some matters which a jury may consider influential in whether or not it finds a particular act or conduct was dishonest and/or whether a defendant has a dishonest state of mind. However they are not determinative of the issue. As is referred to above, under the current tests of dishonesty the jury sets the standard and judges the defendant's behaviour against this standard. Furthermore, generally judges are unwilling to give detailed directions to a jury as to the meaning of dishonesty. In *Peters Toohy and Gaudron JJ* said:

If the question is whether the act was dishonest according to ordinary notions it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.<sup>57</sup>

Accordingly for lawyers advising clients they must be aware that any deviation from straightforward dealings may later be found by a jury to be indicative of dishonesty. A lawyer advising a client must steer his or her client towards conduct which will be judged

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<sup>56</sup> *R v Bonollo* [1981] VR 663 at 658.

<sup>57</sup> *Peters v The Queen* (1998) 192 CLR 493 at 504. However in *Toohy and Gaudron JJ* also said (at 510) "There may be cases where the evidence is such that, even though the issue is not specifically raised, it is necessary to instruct the jury that they must be satisfied that the accused neither had nor believed that he had a legal right to prejudice or imperil the rights or interests of the victim of the intended fraud.". See also *Clark v R; Forge v R* [2004] WASCA 217 where the Western Australian Court of Criminal Appeal, following *Peters*, rejected an argument that the trial judge should have given the jury a long and detailed direction.

by all as being ethical and straightforward regardless of the actual ethical standards of the lawyer or the client. In summary, the values and views of the lawyer and the client must be put to one side and the transaction viewed through the eyes of someone who expects the highest standards of probity.<sup>58</sup>

Nor will the context in which the transaction has occurred always assist, nor the fact that that type of transaction conducted in that particular way is or was common in the industry. The conduct will be judged by a lay jury, not a jury of experts, and whilst evidence of context may be relevant and admissible, it is not conclusive and may be rejected by a jury.<sup>59</sup>

Therefore, drawing from some of issues considered above, a lawyer should ensure that their client acts with the highest ethical standards and he or she should pay particular attention to the following matters:

1. Transparency

As is referred to above deception is one of the factors which is most often cited as the indicia of dishonesty. Accordingly a lawyer should advise their client to aim for transparency by engaging in full disclosure of all relevant information and ensure that all of the benefits and costs are clear to all those with a stake in the transaction.

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<sup>58</sup> Griew (1985) p 346 is critical of the fact that a jury may apply a standard higher than that which they, as individuals, would comply with.

<sup>59</sup> Griew (1985) p 345 is also critical of the fact that the tests of dishonesty do not take into account the “contextual flavour.”

It is prudent to take this course whether or not it is apparent that the person is under a legal duty to disclose all relevant information. Although in many cases it may be obvious that there is duty to disclose<sup>60</sup> there are other situations where a court may later decide there should have been full disclosure. Section 52 of the Trade Practices Act 1974 (Cth) may apply, a court may imply a term of a contract or declare that the relationship between the parties was such that one party was under a fiduciary duty to the other.<sup>61</sup>

2. No personal benefit or all personal benefits disclosed

A person acting with altruistic motives is less likely to be found to be dishonest. Whilst the obtaining of a personal benefit from an arrangement will not always indicate dishonesty, if personal benefits are likely to flow to a particular individual or corporation these should be fully disclosed.

3. No 'wilful blindness'

If a person (lawyer or client) is put on notice that there may be something suspicious or untoward in a transaction they should investigate this suspicion fully to satisfy themselves that there is no basis for this suspicion.

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<sup>60</sup> For example, the provisions in the *Corporations Act 2001* (Cth) which require disclosure of all relevant information in prospectuses; as a result of an express term of a contract; the person is acting as a trustee.

<sup>61</sup> See *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

4. Ensure that there is a factual basis for all promises, forecasts etc.

All promises, forecasts and representations made in the course of a transaction should have a factual basis and preferably also be documented. This would allow written evidence to be adduced at a later time to counter an allegation of dishonesty.

5. Ensure that the person complies with all of their duties, fiduciary and otherwise.

As referred to above a person may be subject to legal duties that give rise to obligations of disclosure. In addition to making full disclosure, if a person is under a legal duty they must comply with all this entails and refrain from any behaviour which is in breach of that duty or even conduct which is not consistent with the spirit of that legal duty.<sup>62</sup>

By following some of these guidelines a lawyer should be able to be more secure that their client (and perhaps also the lawyer) will not later be accused of being dishonest.

#### **Part IV The use of dishonesty as an element in offences to promote ethical conduct**

As the above analysis shows, the addition of dishonesty as an element to an offence provision does add a degree of uncertainty to the law in that it can cause difficulties for lawyers in advising their clients as to whether their conduct may breach the law.

Furthermore it can cause difficulties for prosecutors who cannot be entirely confident that

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<sup>62</sup> For example a company director using their position to benefit someone other than the company.

if they proceed with a criminal prosecution a jury will agree with what they allege is dishonest will, in fact, be accepted by the jury as being dishonest.

It is therefore perhaps somewhat ironic that dishonesty was introduced as an element into the Corporations legislation in 1993 on the premise that it would lead to persons being more inclined to take on the position of a company director. It was probably hoped that this would add certainty to the law and reduce the risk of directors falling foul of the law. In fact dishonesty adds little in the way of certainty and, given that standards of ordinary people are the benchmark, not the standards of others businesspeople, may in fact increase the probity expectations on company directors.

Accordingly dishonesty as an element in commercial crime can be criticised and this criticism is not without merit if certainty is the criteria by which an appropriate law is judged. However despite these criticisms, the Australian legislature is increasingly turning to dishonesty as one of the key components of corporate crime and there also seems to be a trend towards the enacting of very general dishonesty offences.<sup>63</sup> A similar trend towards the introduction of general dishonesty offences is also occurring in the United Kingdom.<sup>64</sup> These types of ‘fuzzy’ offence provisions have the attraction of more effectively being able to address rapid changes in business practices, which may leave specific offence provisions behind. It is perhaps hoped that these offences can catch types of behaviours which fall outside of the boundaries of more specific offence provisions. These general type of offence provisions can also respond to calls for the volume of

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<sup>63</sup> For example s.1041G of the *Corporation Act 2001* (Cth) and s 135.1 – 135.4 of the *Criminal Code* (Cth).

<sup>64</sup> See the *Fraud Act 2006* (UK).

offence provisions to be reduced as they may allow a number of other more specific provisions to be repealed.<sup>65</sup> This, in turn, may lead to legislation becoming more concise and therefore more readily accessible.<sup>66</sup>

Furthermore in corporate crime there is often a gap between what the public sees as morally wrong and what existing laws proscribe as unlawful.<sup>67</sup> For example in 1990 the legal firm Clayton Utz advised its client British American Tobacco Australia Service that, in effect, it could destroy documents which showed that company's knowledge of the dangers of smoking. This occurred in circumstances where there was no pending litigation and was found to be lawful.<sup>68</sup> However it is likely that most people would regard the behaviour of Clayton Utz as morally reprehensible.<sup>69</sup> Dishonesty, by adopting the standards of ordinary persons, may help to bridge this gap between standards of morality and the 'black letter' of the law.

Another advantage of dishonesty as an element in corporate crime is that, as has been demonstrated by the analysis set out above, it should act to ensure that lawyers advise their clients to adopt the highest standards of ethical conduct to be certain that their client's conduct will not be seen as dishonest by anyone. Lawyers and their clients have to put to one side what they think is acceptable behaviour and ensure that their conduct cannot be seen on any view as dishonest. By adopting dishonesty as the key element in

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<sup>65</sup> Regulation Taskforce (2006).

<sup>66</sup> As the advantages of 'fuzzy' law see L Campbell (1996) and Justice Keith Mason (2005).

<sup>67</sup> See Green (2006).

<sup>68</sup> *British American Tobacco Australia Services Pty Limited v Cowell* (2002) 7 VR 524

<sup>69</sup> For a discussion of this case see Rush (2006).

corporate crime this may operate to persuade or coerce lawyers and business to adopt high standards of ethical behaviour in commercial transactions.

Therefore dishonesty can be an appropriate element in corporate crime, at least in relation to those areas where the highest standards of ethical behaviour should be the norm or where it is difficult for the draftsman to envisage every eventuality of unethical conduct. For example the community expects that financial advisers advising the public on appropriate investments should be subject to the highest standards of ethical behaviour. Accordingly the general dishonesty offence in the Corporations Act relation to the provision of financial services seems appropriate.

However where there is a specific problem area which the legislature wishes to stamp out by obtaining convictions and the general deterrence effect of those convictions, the uncertainty that accompanies dishonesty as an element may not be as desirable. By having dishonesty as an element prosecutors may be hesitant in launching prosecutions. In such situations specific offence provisions which can be prosecuted without the uncertainty of whether or not a jury will accept the prosecution's view that the defendant was dishonest may lead to a more satisfactory outcome.

## **Conclusion**

It appears that lawyers and their clients will have to adapt to the fact that dishonesty has become a key factor in corporate crime and that with this comes an element of

uncertainty. For lawyers advising their clients the only proper course is to advise their clients to adopt the highest ethical standards and behaviour so as to ensure that they will not subsequently be found to be dishonest.

Paradoxically the very uncertainty inherent in the concept of dishonesty may be beneficial for the community at large in that it may act to foster ethical behaviour. As such, the use of dishonesty as an element of criminal offences in areas of commerce where the community expects the highest standards of ethical conduct, such as dealings between financial advisers and the public, should probably be encouraged.

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