

## DESCRIBING DISHONEST MEANS: THE IMPLICATIONS OF SEEING ‘DISHONESTY’ AS A COURSE OF CONDUCT OR MENTAL ELEMENT AND THE PARALLELS WITH INDECENCY

### ABSTRACT

Fundamental differences exist internationally and within Australia over the definition of ‘dishonestly’ and the associated term ‘fraudulently’. In Australia and Canada a further concept of ‘dishonest means’ exists. This article critically examines the Australian High Court’s analysis of ‘dishonest means’ in *Peters v The Queen* by comparing it with the approach taken by the Canadian Supreme Court in *R v Theroux* and *R v Zlatic*. The definition of ‘dishonest means’ in *Peters* is also compared with the exposition of actus reus and mens rea set out in *He Kaw Teh v The Queen*, and with similar issues faced by courts in defining acts of indecency. It is argued that in choosing to see ‘dishonest means’ as an element of actus reus, the High Court was mistaken in including the state of mind of the accused as a factor in the characterisation of acts as dishonest. Instead, those mental elements are best placed in the mens rea of an offence. This is because ‘dishonesty’ should be defined as based on either a moral standard or a failure to live up to community expectations. The analysis in *Peters* conflates these approaches. The complexity generated by *Peters* suggests that dishonesty is best seen as a purely mental element.

The terms ‘dishonesty’, ‘defrauding’ and ‘fraudulently’ occur frequently throughout the criminal law in Australia. Yet they defy concise or clear definition and their meanings vary between jurisdictions. While both ‘fraudulently’ and ‘defrauding’ have a long history, ‘dishonesty’ as a concept in the criminal law is a recent innovation, coming to prominence with its use in the English *Theft Act 1968* (UK) c 60. Its extensive use in recent statutory offences<sup>1</sup> has come about despite three distinctly different interpretations of its meaning in Australia.<sup>2</sup> Internationally, there are also diverging approaches. ‘Dishonesty’ does

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<sup>1</sup> The words ‘dishonest,’ ‘dishonesty’ or ‘dishonestly’ occur 138 times in the *Criminal Code Act 1995* (Cth), and numerous times in other regulatory offences, including in the *Corporations Act 2001* (Cth).

<sup>2</sup> They are the approaches in *R v Salvo* [1980] VR 401, *Peters v The Queen* (1998) 192 CLR 493 and the *Model Criminal Code* as enacted in, eg, *Criminal Code Act 1995* (Cth).

not exist as a concept in the United States.<sup>3</sup> In Canada it is seen as part of the *actus reus* of fraud and plays a minimal part of the *mens rea* in theft (as ‘fraudulently’).<sup>4</sup> In New Zealand it is now defined as merely a lack of belief in consent by the victim.<sup>5</sup> There is therefore a need to examine closely the effects of using the concepts in different ways. This article contributes to that analysis by considering the implications of seeing dishonesty as an aspect of a physical element of dishonest means. This was the approach adopted by the Australian High Court in construing the common law offence of conspiracy to defraud in *Peters v The Queen*,<sup>6</sup> and adopted as applicable to defrauding more generally in *Spies v The Queen*.<sup>7</sup>

In order to analyse the approach taken in *Peters* and *Spies*, this article begins by examining the emergence of dishonesty as a factor in defrauding offences, and the choice made by the English courts to see it as a mental element of crimes. A comparative analysis is then made of the approach in *Peters* and that in a trio of Canadian cases — *R v Olan*,<sup>8</sup> *R v Theroux*<sup>9</sup> and *R v Zlatic*<sup>10</sup> — which see dishonesty as a constituent aspect of a physical element of fraudulent (dishonest) means. The point of difference between the Australian and Canadian case law is in whether the knowledge, belief or intent of the accused forms part of the physical element (*Peters*) or is a related mental element (*Theroux* and *Zlatic*).

The article then turns to an examination of the implications of the approach in *Peters*. It suggests that if dishonest means is to be seen as a physical element it is best conceptualised as in the Canadian cases, because that concept avoids the complexities of dealing with the implications of the framework set out in *He Kaw Teh v The Queen*,<sup>11</sup> and the practical problems of requiring a mental element as part of a physical element. Parallels and contrasts are made with a similar complexity in the meaning of indecency. It suggests that in light of these complexities dishonesty is best seen as a mental element, or at the least as a compound concept that contains distinct mental and physical elements.

## I ACTUS REUS/MENS REA AND PHYSICAL/MENTAL ELEMENTS

This article concentrates on what it is appropriate to include in the scope of the physical elements of a crime. As *Peters* and the Canadian cases are based on

<sup>3</sup> There is instead a concept of ‘intent to defraud’ which is developed on a case by case basis. See Wayne La Fave, *Criminal Laws* (4<sup>th</sup> ed, 2003) 939–46, 949–70. Compare the proposal by Buell to introduce a concept similar to dishonesty into US fraud law, in Samuel W. Buell, ‘Novel Criminal Fraud’ (2006) 81 *New York University Law Review* 1971.

<sup>4</sup> *R v Skalbania* [1997] 3 SCR 995.

<sup>5</sup> See *Crimes Act 1961* (NZ) s 217.

<sup>6</sup> (1998) 192 CLR 493 (*‘Peters’*).

<sup>7</sup> (2000) 201 CLR 603 (*‘Spies’*).

<sup>8</sup> [1978] 2 SCR 1175 (*‘Olan’*).

<sup>9</sup> [1993] 2 SCR 5 (*‘Theroux’*).

<sup>10</sup> [1993] 2 SCR 29 (*‘Zlatic’*).

<sup>11</sup> (1985) 157 CLR 523 (*‘He Kaw Teh’*).

common law principles the terms ‘actus reus’ and ‘mens rea’ are the appropriate terms to use,<sup>12</sup> but the meaning of those terms is controversial in academic literature.<sup>13</sup> Consequently, in codifications of criminal law, the terms ‘physical element’ and ‘mental (or fault) element’ are preferred.<sup>14</sup> In this article, the division between physical and mental elements is seen as the key differentiator between the concepts of actus reus and mens rea. Thus, unless otherwise stated, references to mens rea or mental elements do not include broader moral issues of culpability.

Although the common law has not in the past placed much emphasis on separating mental elements from physical elements in defining crimes, this distinction underlies decisions such as *He Kaw Teh* and the element analysis adopted in the Model Criminal Code.<sup>15</sup> Consequently, I take the position that where possible, mental elements should be considered as separate elements of common law offences. I would thus define an offence such as false pretences<sup>16</sup> as containing an actus reus of the making of a false statement that causally leads to the obtaining of another’s property, and a mens rea of both an intent to defraud and knowledge that the statement is false. In so doing, I recognise that on some conceptions of actus reus the act could be a knowingly false statement, but as I hope to make clear in this article this tendency to incorporate mental aspects into physical elements causes unnecessary confusion.

## II THE MEANING OF DEFRAUDING

The phrase ‘intent to defraud’ and the adverb ‘fraudulently’ have been a part of the statutory criminal law for many years. ‘Defrauding’ received its classical definition from Buckley J in *Re London and Globe Finance Corporation Ltd* where he stated:

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.<sup>17</sup>

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<sup>12</sup> See, eg, *Iannella v French* (1968) 119 CLR 84; *He Kaw Teh* (1985) 157 CLR 523.

<sup>13</sup> See, eg, ATH Smith, ‘On Actus Reus and Mens Rea’ in Peter Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978) 95, 97; Paul Robinson, ‘Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?’ in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (1993) 187. In part this is because the terms either describe the elements of the offence or encapsulate broader issues of moral culpability.

<sup>14</sup> See, eg, Attorney-General’s Department, Commonwealth, in association with the Australian Institute of Judicial Administration (prepared by Ian Leader-Elliott), *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 13.

<sup>15</sup> *Ibid.*

<sup>16</sup> See, eg, *Crimes Act 1900* (NSW) s 179, repealed in 2010.

<sup>17</sup> (1903) 1 Ch 728, 732–3.

This definition limited defrauding to the inducement of a course of action as a result of a deceit. Thus in Buckley J's formulation, defrauding is a result-based or, more correctly, consequence-based<sup>18</sup> actus reus. It is centred on an act of deceit that causally leads to a course of action by the victim. As defrauding is seen as an act leading to a consequence, it is not surprising that the broader concept was generally described as an 'intention to defraud'. The addition of intention supplied the otherwise lacking mental element on which criminality could rest. Deceit is itself also a consequence-based concept. Deceit requires a combination of an intentionally false statement causally leading to the inducement of mistaken belief in the victim.<sup>19</sup> As a result, deceit can be seen to have an actus reus of false statement and a mens rea of knowledge of the falsity and intent to dupe. Although never a common law offence, deceit can be seen as a complete offence in itself, and defrauding as compound offence.<sup>20</sup>

As the key concern is to establish culpability, both deceit and defrauding in this definition are seen from the accused's point of view, and thus require an intention to achieve the outcomes.<sup>21</sup> If through no intention of the accused the victim<sup>22</sup> is misled into prejudicing their own interests — for example if a person relies on incorrect investment recommendations as a consequence of a typographical error in a letter of advice — the situation could be described as an unfortunate mistake and/or a situation of negligence,<sup>23</sup> but not one of deceit or defrauding. Defrauding thus implies that the accused acts with a deliberate intent and an awareness that to do so is wrongful.

If defrauding requires a deliberate act of deception, this moral element of defrauding generally assumes no importance because it is widely recognised that a person who deliberately deceives another is normally engaging in moral

<sup>18</sup> Consequence is a more appropriate term for two reasons. First, as discussed below, the current result required is merely the creation of a risk of loss, or a prejudice to the interests of the victim. Secondly, if the loss caused is capable of being reversed (such as money being refunded), the victim may in the result be in no worse a position.

<sup>19</sup> On Buckley J's formulation, 'deceit' and 'deception' are both result-based concepts, but deceit is a prerequisite of defrauding. One can deceive without defrauding but not vice versa.

<sup>20</sup> That is, in a similar way to assault with intent to cause grievous bodily harm.

<sup>21</sup> If the concern was to express the experience of the victim, it is arguable that a person may feel defrauded or deceived even if the cause of the deceit or defrauding was an entirely innocent mistake, or even the natural course of events.

<sup>22</sup> In such circumstances the actors would be wrongly described as an 'accused' and a 'victim', but the terms are here used for convenience.

<sup>23</sup> The issue of reckless conduct is problematic for this discussion of the essence of defrauding, though recklessness is an accepted part of fraud offences (see, eg, *Crimes Act 1900* (NSW) s 192B). However, in such instances the recklessness is best seen as relating to a deception, not defrauding. If recklessness is to be a part of an essence of defrauding, this would mean that defrauding is now seen as a breach of a standard of behaviour that the accused is expected to be aware of, an issue discussed below in relation to dishonesty. That is, there is a knowing breach of the degree of risk of deception acceptable in the situation.

wrongdoing.<sup>24</sup> However, if the notion of defrauding is more widely interpreted to result from actions that do not require deliberate deception, the issue of moral wrongness becomes more problematic. It may be that in some cases the means by which prejudice is occasioned are not in themselves morally wrong. This appears to underlie much of the modern difficulty in describing the appropriate scope of defrauding.

Since the 1960s the elements of defrauding<sup>25</sup> have gone through a period of expansion and further elaboration. In 1961 the House of Lords in *Welham v DPP*<sup>26</sup> held that ‘fraudulently’ as used in forgery offences was a term that was hard to fully define, but extended to an intent to cause prejudice to the victim. Again, the emphasis is on causing a consequence, and intention is seen as additional to the notion of defrauding. The decision had the effect of broadening the range of consequences that could amount to defrauding from actual loss to the more inchoate causing of a prejudice to the victim’s interests.<sup>27</sup> Having lessened the strictures of the requisite end result of the accused’s conduct, focus turned to whether the means used had to amount to a deceit.

A broader expression of the requisite means was approved in the House of Lords decision in *Scott v Metropolitan Police Commissioner (or Commissioner of Police of the Metropolis)*.<sup>28</sup> This case dealt with the broad common law offence of ‘conspiracy to defraud’, and was handed down in a period when the courts were open to a broad role for conspiracy offences.<sup>29</sup> As the offence was one of conspiracy, the inchoate nature of the offence meant that no result need be caused, and the elements of the offence could be described more broadly. Conspiracy being a common law offence, the House of Lords was not bound by any statutory form of wording. As will be discussed below, the *Theft Act 1968* (UK) c 60 had also reconceptualised the theft offence and in doing so had replaced the concept of ‘fraudulence’ with ‘dishonesty’.

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<sup>24</sup> An exception to this is the idea of the sting. Such situations have been recognised as requiring additional attention, and it seems that they would fall outside of defrauding because of the existence of a belief in a claim of right. See, eg, *R v Salvo* [1980] VR 401; *Peters* (1998) 192 CLR 493.

<sup>25</sup> In current terms, the nature of the act of the accused, the result of the course of the action induced and accompanying mental elements.

<sup>26</sup> [1961] AC 103.

<sup>27</sup> The creation of risks as a proof of the offence might be seen to derogate from the result-based nature of the offence and instead make the offence more one based on the creation of potentialities. It might be clearer to describe the offence as a consequence-based offence.

<sup>28</sup> [1975] AC 819 (*‘Scott’*).

<sup>29</sup> See, eg, *DPP v Shaw* [1962] AC 220; *R v Knüller* [1973] AC 435; *Kamara v DPP* [1974] AC 104; though contemporaneously to the decision in *Scott* [1975] AC 819 the House of Lords signalled an end to the creation of new heads of conspiracy in *DPP v Withers* [1975] AC 842.

In this environment, the House of Lords held that defrauding was not limited to inducing an outcome by deceit, but that instead it could be more broadly described as inducing such an outcome by dishonesty. Viscount Dilhorne described it thus:

I have not the temerity to attempt an exhaustive definition of the meaning of ‘defraud.’ As I have said, words take colour from the context in which they are used, but the words ‘fraudulently’ and ‘defraud’ must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, ‘fraudulently’ means ‘dishonestly,’ then ‘to defraud’ ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.<sup>30</sup>

Lord Diplock similarly held:

Where the intended victim of a ‘conspiracy to defraud’ is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.<sup>31</sup>

On their face, these statements remove the requirement that the prohibited consequence be caused by a deceit, and replace that requirement with a broader one of a causing of the consequence by means that are dishonest. There is nothing in the speeches which gives any further definition of how the means should be seen to be dishonest, but the reference to the Criminal Law Revision Committee suggests it meant the same as ‘dishonesty’ in the *Theft Act 1968* (UK) c 60. Although this was not referred to in the speeches, the House of Lords would have been aware that the Court of Appeal in *R v Feely*<sup>32</sup> had held that ‘dishonestly’ required proof of moral obloquy beyond an intention to do an act and that this was a separate mental element. On this basis, it was the general view that *Scott* had established that defrauding required a separate mental element of dishonesty that supplied the moral obloquy. This is the view of the Model Criminal Code Officers Committee,<sup>33</sup> various textbook writers,<sup>34</sup> and appears to be the approach taken in the Privy Council decisions of *Wai Yu-Tsang v The Queen*<sup>35</sup> and *Adams v The Queen*.<sup>36</sup>

<sup>30</sup> *Scott* [1975] AC 819, 839.

<sup>31</sup> *Ibid* 841.

<sup>32</sup> [1973] 1 QB 530 (*‘Feely’*).

<sup>33</sup> Model Criminal Code Officers Committee, Standing Committee of Attorneys-General, Commonwealth, *Model Criminal Code*, Report Chapter 3: ‘Conspiracy to Defraud’ (1997) 5.

<sup>34</sup> See, eg, ATH Smith, *Property Offences: The Protection of Property Through the Criminal Law* (1994) 588.

<sup>35</sup> [1992] 1 AC 269 (*‘Wai Yu-Tsang’*).

<sup>36</sup> [1995] 1 WLR 52 (*‘Adams’*).

In *Wai Yu-Tsang* the House of Lords held:

The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that, as in *Reg. v Allsop* and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It is however important in such a case, as the Court of Appeal stressed in *Reg. v Allsop*, to distinguish a conspirator's intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud. Of course, if the conspirators were not acting dishonestly, there will have been no conspiracy to defraud; and in any event their benign purpose (if it be such) is a matter which, if they prove to be guilty, can be taken into account at the stage of sentence.<sup>37</sup>

This passage makes clear that dishonesty is a defining characteristic or species of intention that lies behind the creation of a state of affairs that then causally leads to the defrauding. In terms of defrauding, the emphasis is strongly on the causing of prejudice. The method by which that occurs is, since *Scott*, of less importance. Instead the emphasis is on whether in intending that course of events to occur, the accused's knowledge, belief or intention (which for brevity is referred to in this article as a 'mental attitude') is dishonest. Dishonesty is assessed by means of the accused's awareness of a community-based test as set out in *R v Ghosh*<sup>38</sup> (discussed below), which predated *Wai Yu-Tsang* and *Adams*. The means by which the prejudice is caused are important merely as a focal point for the dishonest intentions of the accused.

The emphasis of the offence is thus on turning an activity that is otherwise lawful into a crime on the basis of the mental attitude of the accused. In traditional terms, it is strongly reliant on mens rea for convictions.<sup>39</sup>

The broadening of the means of defrauding from use of deceit to a general use of dishonest means led courts in later decisions to conclude that there was therefore no real difference between the concepts of 'defrauding' and 'dishonesty' and thus that the word 'fraudulently' could be used interchangeably with 'dishonestly.' However, it is worth noting that in fact the substitution in the English cases was to replace 'deceit' with the broader concept of 'dishonestly'. 'Defrauding' was a separate

<sup>37</sup> [1992] 1 AC 269, 279–80.

<sup>38</sup> [1982] QB 1053 ('*Ghosh*'). *Ghosh* held that the test of dishonesty for defrauding and theft should be the same. See also *R v Cox* [1983] Crim LR 167.

<sup>39</sup> This has been criticised. See, eg, David Ormerod, *Smith and Hogan Criminal Law* (11<sup>th</sup> ed, 2005) 382.

concept and an accused was seen to ‘dishonestly defraud’. Thus there is some difficulty in accepting that a straight substitution of ‘dishonestly’ for ‘fraudulently’ can be achieved in all cases.

### III THE TWO ROLES OF DISHONESTY

The enactment of the *Theft Act 1968* (UK) c 60 marked a significant development in the understanding of the role of dishonesty in criminal law. Prior to its enactment, the term ‘dishonestly’ had not been used in statutory offences, though case law had suggested, without analysis, that it was a synonym of ‘fraudulently’.<sup>40</sup> In an effort to free the law from complexities attached to the meaning of fraudulence, the Criminal Law Review Committee, which was responsible for the drafting of the *Theft Bill*, suggested that the term ‘dishonestly’ be used in preference to ‘fraudulently’.<sup>41</sup>

Despite an earlier decision which had held that ‘fraudulently’ added little to the meaning of larceny other than emphasising a specific intention to commit the actus reus of the offence,<sup>42</sup> the Court of Appeal in the landmark cases of *Feely* and *Ghosh* held that ‘dishonestly’ where used in the *Theft Act 1968* (UK) c 60 required proof of moral obloquy in addition to any intention or lack of claim of right.

In *Feely*, the Court of Appeal held that finders of fact could determine this moral obloquy by using the ‘standards of ordinary decent people’.<sup>43</sup> Following confusion over whether this meant that the standard was to be applied objectively<sup>44</sup> or whether it was a subjective standard of the accused,<sup>45</sup> the subsequent Court of Appeal decision in *Ghosh* held that the standard was an objective one, but that a second question of whether the accused was aware of this standard had also to be satisfied.<sup>46</sup> This became known as the ‘*Feely/Ghosh*’ or ‘*Ghosh* test for dishonesty’. It remains the test in England and has since been used as the basis for the criminalisation of behaviour in a new range of general fraud offences.<sup>47</sup>

<sup>40</sup> See, eg, *Welham v DPP* [1961] AC 103.

<sup>41</sup> Criminal Law Revision Committee, House of Commons, *Eighth Report: Theft and Related Offences*, Cmnd 2977 (1966) [39].

<sup>42</sup> *R v Williams* [1953] 1 QB 660.

<sup>43</sup> [1973] 1 QB 530, 537–8.

<sup>44</sup> *R v McIvor* [1982] 1 All ER 491.

<sup>45</sup> *R v Landy* [1981] 1 All ER 1172.

<sup>46</sup> [1982] QB 1053, 1034.

<sup>47</sup> See, eg, *Fraud Act 2006* (UK) c 35, ss 1–4, 11.

As both the judgment in *Ghosh*<sup>48</sup> and the judgment of Kirby J in *Peters*<sup>49</sup> make clear, it is a misreading of *Feely* to suggest that it aimed to set up an objective test of dishonesty. Instead, *Feely* held that dishonesty meant behaviour involving moral obloquy and that this was a question of fact for a jury applying ordinary standards. There is nothing in the decision in *Feely* that explains the basis on which this moral obloquy is determined by the jury — and it may well have been intended to be an entirely subjective concept derived from the beliefs and understanding of the accused.<sup>50</sup> However, in setting up a two stage test where the second test was overtly subjective, *Ghosh* had the effect of converting the vaguely expressed idea in *Feely* into a firmly objective test of community standards.

This is because in order for the accused to know that the act is in breach of ordinary standards of dishonesty, that standard must be sufficiently static to be knowable, and must further be derived without reference to the accused. If it were not so, the accused would be able to claim that he or she assumed their standards were those of ordinary people because he or she was an ordinary person. Logically, the accused must be excised from ordinary people.

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<sup>48</sup> Lord Lane CJ stated *Ghosh* [1982] QB 1053, 1063–4:

The case is often treated as having laid down an objective test of dishonesty for the purpose of section 1 of the Theft Act 1968. But what it actually decided was (i) that it is for the jury to determine whether the defendant acted dishonestly and not for the judge, (ii) that the word ‘dishonestly’ can only relate to the defendant’s own state of mind, and (iii) that it is unnecessary and undesirable for judges to define what is meant by ‘dishonestly’.

It is true that the court said, at pp. 537–538:

‘Jurors, when deciding whether an appropriation was dishonest, can be reasonably expected to, and should, apply the current standards of ordinary decent people.’

It is that sentence which is usually taken as laying down the objective test. But the passage goes on:

‘In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty.’

The sentence requiring the jury to apply current standards leads up to the prohibition on judges from applying *their* standards. That is the context in which the sentence appears. It seems to be reading too much into that sentence to treat it as authority for the view that ‘dishonesty can be established independently of the knowledge or belief of the defendant.’ If it could, then any reference to the state of mind of the defendant would be beside the point. ...

If we are right that dishonesty is something in the mind of the accused (what Professor Glanville Williams calls ‘a special mental state’), then if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would have regarded it as dishonest to embark on that course of conduct.

<sup>49</sup> (1998) 192 CLR 493, 545.

<sup>50</sup> That is, a jury, applying the standards of ordinary people as an initial touchstone, would assess the likely veracity of the claims of the accused as to his or her beliefs that the behaviour was not dishonest. This was the interpretation of *Feely* adopted in *R v Landy* [1981] 1 All ER 1172.

What is significant about the decisions in *Feely* and *Ghosh* is the clear identification of an issue of particular importance to the theft offence. Larceny and theft contain elements that clearly set out the nature of the acts prohibited, and also clear elements of mens rea. The choice before the courts was thus whether dishonesty related to the actus reus or the mens rea of the offence. The resolution of this issue was clearly stated by Lord Lane CJ in *Ghosh*:

Is ‘dishonestly’ in section 1 of the *Theft Act 1968* intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem.<sup>51</sup>

‘Dishonestly’ was thus conceived of as a mental element. Rather than overrule *Feely*, the court in *Ghosh* ensured that dishonesty was at least in part a subjective mental element by adding a second requirement that the accused be aware that the conduct was considered dishonest. This conflation of objective and subjective tests has been criticised.<sup>52</sup> However, the overall result is that dishonesty in England is clearly seen as an additional mental element that contains the moral wrongness of the offences in which it is used. It is thus truly a fault element rather than merely a mental element.<sup>53</sup> In many offences, and in codifications of criminal law, the wrongness of the offence is reduced to a predetermined element of intent, knowledge or recklessness and moral wrongness presumed by such mental states.<sup>54</sup> However, dishonesty in England requires in addition a case-by-case analysis of whether the prohibited act warrants criminal punishment measured against a knowing contravention of a community standard.

The approach of seeing dishonesty as a mental attitude of some sort had been adopted in Australia in a number of cases prior to *Peters*. In *R v Salvo*,<sup>55</sup> the Victorian Court of Appeal, while taking a much more restricted view of the scope of dishonesty in statutory theft and fraud legislation, nonetheless held that dishonesty was a mental element and was proved by evidence of a lack of a claim of right.<sup>56</sup> A similar approach was taken by the New South Wales Court of Criminal

<sup>51</sup> [1982] QB 1053, 1063. Liability based on negligent failure to act to an acceptable standard could have been a third option here, but it was probably not considered by the courts in light of the seeming incongruity of a notion of moral negligence.

<sup>52</sup> See Toohey and Gaudron JJ in *Peters* (1998) 192 CLR 493, 503.

<sup>53</sup> This moral element has been controversial. See, eg, AP Simester and GR Sullivan, ‘On the Nature and Rationale of Property Offences’ in RA Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of Criminal Law* (2005) 168. Cf Alex Steel, ‘The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft’ (2008) 31 *University of New South Wales Law Journal* 712.

<sup>54</sup> See the discussion and critique of this in Andrew Halpin, *Definition in the Criminal Law* (2004) 132–40.

<sup>55</sup> [1980] VR 401.

<sup>56</sup> *Ibid* 435 (Fullagar J).

Appeal in *R v Love*,<sup>57</sup> and had been applied to Commonwealth offences in *R v Conlon*.<sup>58</sup>

If dishonesty constitutes a state of mind (whether determined subjectively or objectively<sup>59</sup>), this allows the element to potentially float free of the individual physical elements of the offence. It can thus be seen as a holistic determinant of criminality. This allows offences to describe a form of activity which may have a number of constituent parts, all of which individually may be legal, but to prohibit certain instances of that activity by application of the generalised evaluative tool of dishonesty. However, if dishonesty is seen to be a characterisation of a course of conduct, dishonesty must be specifically tied to particular acts because the conduct is defined by those acts. The focus is on characterisation of the acts themselves, rather than on the intent of the actor.<sup>60</sup>

There is thus a key difference between *dishonest means*, which is a physical element of an offence, where the role of 'dishonesty' is to be descriptive of those means; and *dishonesty* as a stand alone element which supplies a fault element for an offence, and is separate from any physical elements. Such a separation has been endorsed by the New Zealand Supreme Court in *Hayes v The Queen*:

It is important ... to distinguish between two concepts. The first is whether conduct of the kind in question should be characterised as dishonest. The second is whether the mind of the particular accused was dishonest. It is seldom that any issue arises at trial in respect of the first concept. But where it has arisen, the correct approach to its resolution has proved controversial. What is normally in issue at trial is whether the mind of the particular accused was dishonest. That is conventionally assessed subjectively by reference to what the accused knew or believed the circumstances to be. The principal focus of the cases cited has been on the first issue. Little, if any, difficulty has been encountered with the second.<sup>61</sup>

The Supreme Court in *Hayes* went on to characterise the decision in *Peters* thus:

The decision of the High Court in *Peters* was concerned primarily with the first of the two issues referred to above, that is, how to identify an external standard for determining what constitutes dishonest conduct.<sup>62</sup>

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<sup>57</sup> (1989) 17 NSWLR 608.

<sup>58</sup> (1993) 69 A Crim R 92.

<sup>59</sup> If it is determined objectively, this would still require evaluation of the state of mind of the accused judged against a standard.

<sup>60</sup> That is, the intent of the actor is a factor taken into account in characterising the act. Liability does not rest on proof of the intent itself.

<sup>61</sup> [2008] 2 NZLR 321, 336 (*Hayes*).

<sup>62</sup> *Ibid* 338.

It is this emphasis on conduct which it is argued causes all the complexities in *Peters*.

#### V THE APPLICATION OF DISHONESTY IN DEFRAUDING: CANADA AND PETERS

The High Court, prior to the decision in *Scott*, had similarly defined an ‘intention to defraud’ in terms of Buckley J’s definition.<sup>63</sup> The decision in *Scott* had, however, caused uncertainty as to the correct approach, and to the correct interpretation to give to the concept of ‘dishonesty’. These issues were dealt with in a trio of decisions: *Peters*, *Spies* and *Macleod v The Queen*.<sup>64</sup> In these cases the High Court adopted the broad approach to defining the means by which defrauding could be caused, that had been articulated in *Scott*, but, significantly, rejected the argument that dishonesty was a separate mental element of the offence.<sup>65</sup> Instead, it held that dishonesty was inherent in two physical elements of the offence: dishonest means, and the causing of a dishonest prejudice or detriment. The significant difference, as will be explored below, was the creation of a defining boundary around the acts that could constitute the means by which prejudice was caused. The court did this by defining those means as ‘dishonest’. In so doing, it adopted the approach, rejected by the English courts, of seeing dishonesty as a characterisation of a course of action, and not as an element of mens rea. In simple terms the High Court chose to require proof of dishonest means rather than dishonest intent.

While not explicitly acknowledged, the reasoning of the High Court in *Peters* is very similar to that used in a trio of Canadian cases which examined that country’s general fraud offence.<sup>66</sup> As will be discussed below, in Canada, dishonesty in fraud is seen to form part of the actus reus. It is thus a characterisation of a course of conduct, and is assessed objectively.

<sup>63</sup> *Balcombe v De Simoni* (1972) 126 CLR 576, 593 (Gibbs J).

<sup>64</sup> (2003) 214 CLR 230.

<sup>65</sup> In so doing they relied on the analysis in John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* (56th ed, 2008). The editors of Archbold no longer maintain this opinion:

17–62 (a) ‘To defraud’ or to act ‘fraudulently’ is dishonestly to prejudice or to take the risk of prejudicing another’s right, knowing that you have no right to do so: *Welham v. DPP [1961] A.C. 103*, HL (and see now the ambit of the offence of fraud under the *Fraud Act 2006*, ss 1–4, post, §§21–356, *et seq*). The word ‘dishonestly’ is inserted in deference to opinions, mostly obiter, expressed in several cases (e.g. *R. v. Sinclair*, 52 Cr.App.R. 618, CA; *Wai Yu Tsang v. R. [1992] 1 A.C. 269*, PC). In the leading case of *Welham*, however, there is no mention of any need to tell the jury that they must be satisfied that the accused was acting dishonestly. It is submitted that the reason for this is that their Lordships considered it beyond argument that intentionally to take the risk of prejudicing another’s right, knowing that there is no right to do so, is dishonest.

<sup>66</sup> *Olan* [1978] 2 SCR 1175; *Theroux* [1993] 2 SCR 5; *Zlatic* [1993] 2 SCR 29.

## VI THE ACTUS REUS OF DEFRAUDING

Peters was a solicitor who assisted his client to hide illicit earnings by drafting false mortgage documents. He appealed against his conviction to the Australian High Court, arguing that the jury had been incorrectly directed on the elements of conspiracy to defraud. In *Peters*, the High Court adopted the approach taken in *Welham v DPP* and *Scott* on the meanings of ‘fraudulently’ and ‘defrauding’.<sup>67</sup> This then led the court to describe the physical elements of defrauding as the use of dishonest means in a way that causes prejudice to the victim. This terminology is similar to the phrase ‘fraudulent means’ used in the Canadian fraud legislation,<sup>68</sup> the interpretation of which also draws upon the English analysis. In three decisions, *Olan*, *Theroux* and *Zlatic*, all of which predated the decision in *Peters*, the Supreme Court of Canada developed an elaborated interpretation of the meaning of ‘fraudulent means’ in the Canadian *Criminal Code*’s general fraud offence.

Section 380 of the Canadian *Criminal Code*<sup>69</sup> relevantly provides:

Every one who, by deceit, falsehood or other fraudulent means ... defrauds the public or any person ... of any property ... is guilty of an indictable offence.<sup>70</sup>

Importantly, prior to 1948 the offence was one of ‘conspiracy to defraud’, until it was amended to remove the requirement of a conspiracy.<sup>71</sup> Consequently, the offence is intended to cover the same activities as those proposed in a ‘conspiracy to defraud’ and is thus directly comparable to the offence in *Peters*.

These decisions provide an important background to the decision in *Peters*. While the Canadian cases are not discussed explicitly in the judgments in *Peters*, it seems unlikely that the High Court was not aware of these decisions.<sup>72</sup> In light of this, it is appropriate to compare the analysis in *Peters* with that undertaken in the Canadian cases.<sup>73</sup>

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<sup>67</sup> (1998) 192 CLR 493, 505–9, 524–30, 541.

<sup>68</sup> *Criminal Code*, RSC 1985, c C46.

<sup>69</sup> *Criminal Code*, RSC 1985, c C46, s 380.

<sup>70</sup> This is essentially the same wording as the *Criminal Code Act 1913* (WA) s 409(1). The Canadian caselaw has been relied upon by the WA courts in interpreting the section.

<sup>71</sup> See *Theroux* [1993] 2 SCR 5, 14 (McLachlan J).

<sup>72</sup> The decisions are footnoted in *Peters* (1998) 192 CLR 493, 507 (footnote 93) (Toohey and Gaudron JJ), 534 (footnote 217) and 548 (footnote 279) (Kirby J).

<sup>73</sup> One important difference between s 380 of the *Criminal Code* and the offence of conspiracy to defraud is that s 380 identifies a role for ‘dishonest means’ beyond deceit and falsehood. This meant that the Canadian cases concentrate on the outer reaches of ‘dishonest means’. By contrast, the High Court’s examples of ‘dishonest means’ tend to centre on issues of deceit and falsehood.

*A R v Olan*

In *Olan*, a case involving allegations of fraud in the financing of a company takeover, the Canadian Supreme Court set out what it considered to be the actus reus of this offence. Dickson J, delivering the judgment of the court, held that in the context of s 338 (now s 380):

The words ‘other fraudulent means’ in s 338(1) include means which are not in the nature of a falsehood or a deceit; they encompass all other means which can properly be stigmatized as dishonest.<sup>74</sup>

Dickson J considered the English decisions in *R v Sinclair*,<sup>75</sup> *R v Alsop*<sup>76</sup> and *Scott* which dealt with the meaning of ‘defrauding’ and concluded that:

Courts, for good reason, have been loathe to attempt anything in the nature of an exhaustive definition of ‘defraud’ but one may safely say, upon the authorities, that two elements are essential, ‘dishonesty’ and ‘deprivation’. To succeed, the Crown must establish dishonest deprivation. ... The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud.<sup>77</sup>

The effect of this interpretation was summarised by McLachlan J in *Theroux*:

Dickson J (as he then was) set out the following principles in *Olan*:

- (i) The offence has two elements: dishonest act and deprivation;
- (ii) The dishonest act is established by proof of deceit, falsehood or ‘other fraudulent means’;
- (iii) The element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

*Olan* marked a broadening of the law of fraud in two respects. First, it overruled previous authority which suggested that deceit was an essential element of the offence. Instead, it posited the general concept of dishonesty, which might manifest itself in deceit, falsehood or some other form of dishonesty. Just as what constitutes a lie or a deceitful act for the purpose of the actus reus is judged on the objective facts, so the ‘other fraudulent means’ in the third category is determined objectively, by reference to what a reasonable person would consider to be a dishonest act.<sup>78</sup>

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<sup>74</sup> [1978] 2 SCR 1175, 1180.

<sup>75</sup> [1968] 3 All ER 241.

<sup>76</sup> (1976) 64 Cr App R 29.

<sup>77</sup> *Olan* [1978] 2 SCR 1175, 1182.

<sup>78</sup> [1993] 2 SCR 5, 15.

Consequently, this meant that ‘dishonesty’, when used to describe the elements of this offence, was a term that was constitutive of the actus reus of the offence, not the mens rea. ‘Dishonesty’ was a characterisation of an act, and that characterisation was to be made objectively on the basis of a reasonable person standard. This is the approach explicitly rejected in *Ghosh*. As the decision in *Ghosh* pointed out, it allows for a more objective approach to defining ‘dishonest means’.

### B *Peters v The Queen*

The leading High Court judgment in *Peters* is generally seen to be that given by Toohey and Gaudron JJ. However, their Honours expressly agreed with nearly all of McHugh J’s judgment<sup>79</sup> and extracts from both judgments were quoted in *Spies*<sup>80</sup> and *Macleod v The Queen*.<sup>81</sup> It is therefore appropriate to consider the judgments as being in agreement on the characterisation of what ‘defrauding’ and ‘dishonesty’ amount to.<sup>82</sup> In *Spies*, the reasoning in *Peters* was held to apply to offences of defrauding.<sup>83</sup>

Both judgments held that dishonesty is a part of the offence, but not a separate element,<sup>84</sup> thus aligning the analysis with the Canadian cases<sup>85</sup> rather than the *Feely/Ghosh* discussion of dishonesty as a separate element of mens rea. The decision held that conspiracy to defraud is an agreement to use dishonest means to prejudice another’s interests. Because the offence that was being discussed was a conspiracy it was difficult to separate clearly the elements of actus reus and mens rea.<sup>86</sup> But what seems clear from the judgments is that if the offence was a substantive offence of defrauding itself, dishonest means would be characterised as part of the actus reus. Thus Toohey and Gaudron JJ held that dishonesty is a characteristic of the means agreed to be employed to effect the fraud,<sup>87</sup> and McHugh J held that:

[I]n most cases, a conspiracy to defraud arises when two or more persons agree to use dishonest means with the intention of obtaining, making use of or prejudicing another person’s economic right or interest or inducing another person to act or refrain from acting to his or her economic detriment.<sup>88</sup>

<sup>79</sup> (1998) 192 CLR 493,510. The disagreement amounted to whether the question of characterisation of acts as dishonest should be left to the finders of fact.

<sup>80</sup> (2000) 201 CLR 603, 630–1.

<sup>81</sup> (2003) 214 CLR 230, 241–2, 256, 264–5.

<sup>82</sup> The point of disagreement is over whether the issues were to be assessed by a judge or jury.

<sup>83</sup> (2000) 201 CLR 603, 630.

<sup>84</sup> *Peters* (1998) 192 CLR 493, 501, 526–30.

<sup>85</sup> That dishonesty was not a separate element was first made clear in *R v Doren* (1982) 36 OR (2d) 114 (CA), approved in *Theroux* [1993] 2 SCR 5, 16.

<sup>86</sup> See the discussion in the judgment of McHugh J, 515.

<sup>87</sup> *Peters* (1998) 192 CLR 493, 501.

<sup>88</sup> *Ibid* 525.

Toohy and Gaudron JJ went on to state that ‘dishonesty’ is also ‘descriptive of what is involved in fraud’,<sup>89</sup> and they thus held that:

[W]hen properly analysed, the offence of conspiracy to defraud involves dishonesty at two levels. First, it involves an agreement to use dishonest means. Ordinarily, the means will be dishonest if they assert as true something which is false and which is known to be false or not believed to be true or if they are means which the conspirators know they have no right to use or do not believe that they have any right to use the means in question. And quite apart from the use of dishonest means, the offence involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. That, too, is dishonest by ordinary standards.<sup>90</sup>

Consequently, both judgments in *Peters* decided that defrauding involves two physical elements. The first is the use of means that can be characterised as dishonest. The second is the creation of a causally resulting situation that prejudices another’s rights. The judgments require that this deprivation also be characterised as dishonest.

In light of the approach taken by the Canadian courts it is thus possible to see that the decision in *Peters* is not primarily concerned with dishonesty as a mental or moral fault element. Instead, the majority judgments focus on how it is that the finders of fact determine the actus reus elements of dishonest means and prejudice. While the Canadian approach does not appear to require characterisation of the prejudice or detriment as dishonest,<sup>91</sup> the approach in *Peters* explicitly adds this requirement. The judgments are concerned with defining a quality of the means used and result achieved, not a stand-alone moral concept.

This then raises the question of the methodology by which those acts can be characterised as dishonest. It is clear that the High Court in *Peters* held that this is to be achieved by taking into account in some way the knowledge or belief of the accused. The implications of this approach are examined through a comparison with that taken in Canada.

## VII DETERMINING WHETHER ACTIONS CAN BE CHARACTERISED AS DISHONEST

Both the Canadian and Australian approaches rely on objective tests to determine whether an act is dishonest. In Canada it is the test of ‘reasonable people’; in Australia, ‘ordinary, decent people’. The question that remains is by what

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<sup>89</sup> Ibid 501.

<sup>90</sup> Ibid 509.

<sup>91</sup> While the use of the term ‘dishonest deprivation’ by Dickson J in *Olan* [1978] 2 SCR 1175, 1182 suggests dishonesty be proved, the summary of *Olan* by McLachlan J in *Theroux* [1993] 2 SCR 5, 15 suggests it is dishonest in an automatically derivative manner when she describes the detriment as ‘caused by the dishonest act’.

methodology are the tests applied? In particular, what role if any is played by the mental knowledge, belief or intent of the accused?

*A R v Theroux*

In *Theroux*, McLachlan J held that:

It is useful initially to distinguish between the mental element or elements of a crime and the mens rea. The term mens rea, properly understood, does not encompass all of the mental elements of a crime. The actus reus has its own mental element; the act must be the voluntary act of the accused for the actus reus to exist. Mens rea, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent — those who do not understand or intend the consequences of their acts. Typically, mens rea is concerned with the consequences of the prohibited actus reus.<sup>92</sup>

This appears to suggest that the only mental element relevant to the characterisation of an act as dishonest is whether the act is voluntary.<sup>93</sup> McLachlan J reinforced this view when she stated:

[W]here it is alleged that the actus reus of a particular fraud is ‘other fraudulent means’, the existence of such means will be determined by what reasonable people consider to be dishonest dealing. In instances of fraud by deceit or falsehood, it will not be necessary to undertake such an inquiry; all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not.<sup>94</sup>

On this approach deceit and falsehood are merely statements or actions that are objectively and independently (of the attitude of the accused) false.<sup>95</sup> This means that the fraudulent means must also only be some form of activity that is capable of being judged objectively, without any need for the finder of fact to know what the accused’s knowledge, belief or intention was in choosing to do the act.

For example, in *R v Buckingham*,<sup>96</sup> the accused had entered into an agreement with the Medical Care Commission to enable him to make claims for medical services against certain categories. In breach of that agreement, he incorrectly identified the nature of the procedures claimed, and as a result had been overpaid.

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<sup>92</sup> [1993] 2 SCR 5, 17.

<sup>93</sup> This is the opinion of the Court of Appeal of British Columbia. See *R v Wolsey* [2008] BCCA 159, [17] (Huddart JA).

<sup>94</sup> [1993] 2 SCR 5, 16–7.

<sup>95</sup> Cf *Balcombe v De Simoni* (1972) 126 CLR 576. Cf the approach taken by Taggart JA in *R v Long* (1990) 51 BCLR (2d) 42, an approach overruled in *R v Theroux* [1993] 2 SCR 5.

<sup>96</sup> [2008] NLTD 55.

The Newfoundland and Labrador Supreme Court (Trial Division) held that this amounted to the actus reus of fraudulent means, without the necessity to enquire as to whether the accused knew these claims were incorrect.<sup>97</sup>

An objective test in this context could be of two kinds. It could be an assessment of the situation by a third party with knowledge of what the accused thought and what he/she did. Or it could be a more extremely objective test based on the apparent attitude<sup>98</sup> of the accused; a concept that has been described in other contexts as ‘manifest’ criminality.<sup>99</sup> This notion of objectivity is one more commonly found in civil law areas, such as contract law. In many ways this extreme reading of the notion of ‘dishonesty’ appears to be driven by an insistence on an actus reus/mens rea dichotomy in the offence, with McLachlan J firmly limiting the mental elements that can be included in actus reus to voluntariness alone. The approach taken draws on the earlier analysis of dishonesty by J Douglas Ewart.<sup>100</sup> In a passage quoted with approval in *R v Long*,<sup>101</sup> a case in turn approved by *Theroux*, Ewart stated:

It is vital to separate this objective notion of classes of forbidden conduct, from the subjective mens rea which must be proven before a conviction can be entered. In each case, insofar as the dishonesty element of the offence is concerned, the proper question is did the accused, as a matter of objective fact, obtain something to which he was not entitled, or breach a position of trust, or take advantage of a weakness. If so, his conduct can be considered dishonest. Thereafter, one must consider whether he acted deliberately with knowledge of the relevant circumstances, but this subjective consideration should take place only after the conduct has been found to be dishonest in the objective sense.<sup>102</sup>

At a general level there is good reason for this restriction. Use of the milder form of objective assessment, where the attitude of the accused is taken into account, is a characteristic of mens rea and defence elements of crime.<sup>103</sup> In such circumstances, the objective element is used to limit the scope of the exculpatory effect of the accused’s mental attitude. However, the primary locus of criminal liability is the commission of an act,<sup>104</sup> and this act needs to be defined in such a way that it

<sup>97</sup> Ibid [57]. However, the Court went on to hold that failure to adduce such evidence of knowingly false claims meant that the mens rea of fraudulent means was not proved: at [61].

<sup>98</sup> That is, what appears to the reasonable person to be the beliefs, knowledge and intentions manifested by the accused’s actions.

<sup>99</sup> George P Fletcher, *Rethinking Criminal Law* (1978) 115–8.

<sup>100</sup> J Douglas Ewart, *Criminal Fraud* (1986).

<sup>101</sup> (1990) 51 BCLR (2d) 42.

<sup>102</sup> J Douglas Ewart, above n 100, 95, cited in *R v Long* (1990) 51 BCLR (2d) 42 [23].

<sup>103</sup> See, eg, the combination of subjective and objective elements in the common law tests for provocation (*Stingel v R* (1990) 171 CLR 312) and self-defence (*Zecevic v DPP (Vic)* (1987) 162 CLR 645). Statutory formulations also contain such hybrid tests.

<sup>104</sup> That is, other than in theoretical cases of conspiracy and rare instances of pure status offences.

can be recognised<sup>105</sup> without the need to question the perpetrator as to his or her beliefs, knowledge or intentions. Such objective recognition is required to enable enforcement of laws by identifying *prima facie* breaches of the law.

While further elaboration of this approach to characterisation of the *actus reus* was not required in *Theroux*, it formed the basis of the decision in *Zlatic*, which was a judgment delivered simultaneously with *Theroux*. In fact, Sopinka J's dissent provides a clear alternative that incorporates such a mental element.

### B *R v Zlatic*

In *Zlatic*, the accused ran a wholesale business where he accepted stock from suppliers on credit. Rather than use the proceeds of the sale of this stock to pay his creditors, he exhausted it in gambling. It was accepted that the money was legally Zlatic's. However, the majority held that despite this, the creditors had a pecuniary interest in the money gambled away, in that they had a right to repayment.<sup>106</sup> In his defence he claimed that he had used a gambling scheme which he genuinely believed would increase the chances of winning. At trial he was convicted, but the trial judge failed to make specific findings that Zlatic either had no intention to pay the creditors, or showed a reckless disregard in relation to the repayment, by continuing to gamble with awareness of the risk of loss.

McLachlan J for the majority held that Zlatic's actions, despite his belief, were sufficient to satisfy the *actus reus* of 'fraudulent means'. She first set out what dishonesty amounted to in this context:

Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs. J.D. Ewart, in his *Criminal Fraud* ... defines dishonest conduct as that 'which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings' ... Negligence does not suffice. Nor does taking advantage of an opportunity to someone else's detriment, where that taking has not been occasioned by unscrupulous conduct, regardless of whether such conduct was wilful or reckless. The dishonesty of 'other fraudulent means' has, at its heart, the wrongful use of something in which another person has an interest, in such a manner that this other's interest is extinguished or put at risk. A use is 'wrongful' in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.<sup>107</sup>

This was the notion of 'dishonesty' that was to be applied in determining whether reasonable people would consider the accused's actions dishonest. She held:

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<sup>105</sup> In cases such as fraud the recognition may only occur subsequently.

<sup>106</sup> *Zlatic* [1993] 2 SCR 29, 47 (McLachlin J, L'Heureux-Dubé and Cory JJ concurring). This was strongly disputed by Sopinka J (Lamer CJC concurring) in dissent, at 34.

<sup>107</sup> *Ibid* 45. Cited J Douglas Ewart, above n 100, 99.

In accepting these goods with no concern for payment and in diverting the funds to a non-business, notoriously risky enterprise, he put these funds to a wrongful use. I am satisfied that a reasonable person would regard as dishonest a scheme involving the acceptance of merchandise for resale without concern for repayment and the diversion of the proceeds to a reckless gambling adventure. ... Unwise business practices are not fraudulent. The wrongful use of money in which others have a pecuniary interest for purposes that have nothing to do with business, may however, in appropriate circumstances, constitute fraud.

The fact that the appellant had legal title to the moneys he gambled away does not alter the result. Fraud looks to the substance of the matter. The authorities make it clear that it is unnecessary for a defrauding party to profit from his or her fraud in order to be convicted; it is equally unnecessary that the victims of a fraud suffer actual pecuniary loss in order that the offence be made out ... What is essential is not the formalities of profit or actual pecuniary loss, but that dishonest commercial practices which subject the pecuniary interest of others to deprivation or the risk of deprivation be visited with the criminal sanction. It follows that the fact that the defrauder may have legal title to the property affords no defence; it is not his title, but how he has obtained it and what he does with it that is important.<sup>108</sup>

McLachlan J also referred to what she saw as examples of fraudulent means in the previously decided cases. These included the transfer of assets as part of a company takeover that to a reasonable person appeared to be for personal ends rather than the interests of the company;<sup>109</sup> accepting money from a purchaser for an out of stock item and spending the money on debts after only perfunctory attempts to obtain the item;<sup>110</sup> and the making of an unauthorised investment of client funds.<sup>111</sup>

It might be possible to see Her Honour's description of Zlatic's acceptance of the funds as being 'with no concern for payment,' as importing some mental perspective of the accused into the assessment of dishonesty, but subsequent cases have not interpreted the judgment in that way. The cases suggest that there is no need for the accused to be aware that the prohibited actions are unauthorised,<sup>112</sup> with one recent provincial court suggesting that any breach of a contract is a dishonest act.<sup>113</sup> Thus the 'lack of concern' would seem to be an apparent lack of concern based on the lack of evidence of attempts by Zlatic to make repayment. Sopinka J's dissent also emphasised that on McLachlan J's approach, an unknowingly wrong act may nevertheless be dishonest.

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<sup>108</sup> Ibid 48–9. Compare this broad approach to liability to that taken in *Spies* (2000) 201 CLR 603.

<sup>109</sup> *Olan* [1978] 2 SCR 1175.

<sup>110</sup> *R v Geddes* (1979) 52 CCC (2d) 230.

<sup>111</sup> *R v Currie*; *R v Bruce* (1984) 5 OAC 280.

<sup>112</sup> See, eg, *R v Buckingham* [2008] NLTD 55; cf *R v Wolsey* [2008] BCCA 159.

<sup>113</sup> *R v Buckingham* [2008] NLTD 55, [43].

*C Justice Sopinka's dissent in Zlatic*

Justice Sopinka (Lamer CJC concurring) in both *Theroux* and *Zlatic* dissented<sup>114</sup> from the majority position that dishonesty could be determined by an objective assessment of the actions and physical circumstances alone. In *Zlatic* His Honour stated:

I accept the standard of the reasonable person and agree that the accused's belief that the conduct is not dishonest will not avail. However, as I stated in *Theroux*, there is an important distinction between a belief in the honesty of one's actions, and an honest belief in facts which would make the actus reus non-culpable. This is a distinction which my colleague does not seem to make. In this regard, I would adopt the following statement by J.D. Ewart, *Criminal Fraud*:

[I]t must be remembered that while 'dishonesty' is a purely objective standard to be determined by the trier of fact, the accused's subjective knowledge of the facts found to constitute the dishonesty must be demonstrated before a conviction can be entered. The objectivity of the standard of conduct constituting dishonesty in fraud does not affect the separate and distinct issue of the subjective mental element required for a fraud conviction.

In a situation where the accused uses his own funds in a way which jeopardizes his ability to repay his creditors, the conduct can only be stigmatized as dishonest if the accused does so knowingly. I cannot believe that the ordinary person would agree that unknowingly exposing one's creditors to risk is dishonest. It might be poor financial management, but it is not dishonest. The accused must deliberately undermine his or her ability to pay. If the accused honestly believes in facts which would mean that there is no risk to the creditor, then this aspect of the offence is not established. In these circumstances, it is likely that the accused will also believe that his or her actions are not dishonest, but this is not the reason for the acquittal.

The honest belief of the accused is relevant at three stages in assessing whether the offence of fraud is established. First, even the application of the objective test for dishonesty requires the reasonable person to take into account the state of mind of the accused. It is impossible to assess whether an act is dishonest without assessing the mind of the actor. This is implicit in the term 'dishonest'.<sup>115</sup>

<sup>114</sup> Sopinka J also disputed the finding in *Zlatic* that the creditors had a pecuniary interest (*Zlatic* [1993] 2 SCR 29, 34). His Honour held that there was no interest in a proprietary sense unless the money was subject to a trust, that this was not the case, and that the court should not be involved in the evaluation of 'the social utility of the expenditure'. However, his Honour concluded that the accused knew he was subjecting the creditor's money to risk and upheld the conviction.

<sup>115</sup> [1993] 2 SCR 29, 36–7 (Cited J Douglas Ewart, above n 100, 99). The other two stages where the honest belief of the accused is relevant relates to the mens rea, discussed below.

The point of difference is the question of whether it is possible to assess an act as dishonest without knowing the perspective of the accused. McLachlan J's analysis held that a dishonest act is to be assessed without reference to the state of mind of the accused. This prohibited act is therefore an assessment of an act based on an assumption that an act can be a dishonest act, even if the accused is entirely unaware of the factors that the finder of fact relies on to characterise the act as 'dishonest'. The mental attitude of the accused is reserved for the mens rea. By contrast, for Sopinka J, dishonesty requires consideration of the knowledge of the accused. It seems that this dissenting view is the same as the approach taken by the High Court in *Peters*.

#### D *Peters v R*

It is clear that the majority of the High Court in *Peters* approached the notion of 'dishonesty' from the same position as had the Supreme Court of Canada. That is, they saw 'dishonesty' as descriptive of a characterisation of conduct, not a state of mind. However, for the majority of the High Court that characterisation involved consideration of the state of mind of the accused, and this mental state was the central fact in issue.

As Toohey and Gaudron JJ put it:

As in other contexts, the question whether the agreed means are dishonest is, at least in the first instance, a question of knowledge, belief or intent and, clearly, that is a question of fact for the jury. On the other hand, the question whether, given some particular knowledge, belief or intent, those means are dishonest is simply a question of characterisation. And as in other contexts, the question whether an act done with some particular knowledge, belief or intent is properly characterised as dishonest is usually not in issue. Thus, putting to one side the exceptional case where it is in issue, it is sufficient for a trial judge simply to instruct the jury that they must be satisfied beyond reasonable doubt as to the knowledge, belief or intent alleged by the prosecution before they can convict. Alternatively, the trial judge may instruct the jury that, if satisfied as to the knowledge, belief or intent alleged, the means in question are properly characterised as dishonest and they should so find.<sup>116</sup>

McHugh J expressed the issue thus:

In determining whether ... the alleged facts show an agreement to use dishonest means to prejudice the interests of a third party, questions of intention, knowledge and claims of right on the part of the defendants will ordinarily be crucial because the common state of mind of the defendants in relation to various acts or omissions will usually be decisive in determining

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<sup>116</sup> Ibid 508.

whether the object of the conspiracy was an unlawful act or whether its implementation involved the use of unlawful means.<sup>117</sup>

In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's right or interest or performance of public duty by: making or taking advantage of representations or promises which they knew were false or would not be carried out; concealing facts which they had a duty to disclose; or engaging in conduct which they had no right to engage in. In the latter class of case, it will often be sufficient for the Crown to prove that the defendants used dishonest means merely by the Crown showing that the defendants intended to engage in a particular form of wrongful conduct. Proof of an agreement by the defendants to engage in conduct that involves a breach of duty, trust or confidence or by which an unconscionable advantage is to be taken of another will usually be sufficient evidence of dishonest means unless the defendants raise an actual or supposed claim of right or allege that they acted innocently or negligently.

Inevitably, the question of whether those means are dishonest will ordinarily involve other questions concerning the state of mind of the defendants at the time of the agreement — the intention, knowledge or state of belief that is to accompany their acts or omissions. Thus, if the charge is conspiracy to defraud a company by investing its funds in high risk ventures, the beliefs and knowledge of the accused as to the risk involved will be critical in determining whether they used dishonest means. ... The beliefs of the accused persons as to whether they thought they were acting honestly are irrelevant.<sup>118</sup>

Thus, contrary to the majority position in Canada, in Australia dishonest means are primarily determined by the knowledge, intention or belief of the accused. It is this mental element that has the effect of turning otherwise lawful actions into prohibited actions. This is emphasised by McHugh J's mention of beliefs of claim of right, or claims of innocence or negligence, as relevant to the determination of whether an act is dishonest. This suggests that a subjective belief that the action is lawful prevents it being characterised as 'dishonest', and the reference to innocent and negligent actions suggests that non-advertence to the relevant circumstances may also prevent a finding of dishonest means. What is not relevant is a belief in a morally based notion of honest behaviour. This analysis parallels that of Sopinka J in *Zlatic*, extracted above.

While in Canada the insistence that the actus reus of defrauding contain no mental element, other than that the act be voluntary, requires, on a common law analysis, a clear role for a subjective mens rea of some description, the Australian approach in *Peters* is less clear. If the mental elements of 'awareness of the nature of the act' form part of the construing of the actus reus, there may not be much left to amount

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<sup>117</sup> (1998) 192 CLR 493, 529.

<sup>118</sup> Ibid 530.

to mens rea, absent an additional element of morally based dishonesty — which is the English approach.<sup>119</sup>

Again, the Canadian approach is instructive.

#### VIII THE MENS REA OF DEFRAUDING

Although dishonesty is held in both approaches to be merely descriptive of the actus reus of defrauding, under common law principles the offence must still contain a mens rea. Having rejected any subjective mental element in the characterisation of an act as ‘dishonest’, the majority in *Theroux* and *Zlatic* were forced to then consider whether the accused’s knowledge of the dishonest character of his or her act formed part of the mens rea. In *Theroux*, McLachlan J held that the mens rea must be subjective, but that

this inquiry has nothing to do with the accused’s system of values. A person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believed the acts or their consequences to be moral. Just as the pathological killer would not be acquitted on the mere ground that he failed to see his act as morally reprehensible, so the defrauder will not be acquitted because he believed that what he was doing was honest.<sup>120</sup>

Having rejected the notion that the beliefs of the accused could affect criminality, the consequence was that the only mens rea were the basic forms of awareness and intent:

The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another’s property at risk. The mens rea would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. ... the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). ...

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<sup>119</sup> Discussed above.

<sup>120</sup> [1993] 2 SCR 5, 18. There is a problem with this analogy in that her Honour appears to overlook the fact that killing is generally illegal irrespective of the circumstances, but the activities that amount to dishonest means are only illegal if certain circumstances exist.

Although ‘other fraudulent means’ have been broadly defined as means which are ‘dishonest’, it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The ‘dishonesty’ of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the *actus reus* of the offence can be made out of particular facts. That established, it need only be determined that an accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.<sup>121</sup>

Any belief that deprivation is unlikely to occur, or a belief that there was nothing wrong with the act, was no defence. The *mens rea* of fraud was thus:

1. Subjective knowledge of the prohibited act; and
2. Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim’s pecuniary interests are put at risk).<sup>122</sup>

This decision left unclear exactly what the subjective knowledge of the prohibited act involves. At the most minimal it could amount to merely an awareness that one was acting.<sup>123</sup> At the other extreme it may be argued that full awareness that the act will be characterised as ‘dishonest’ is required, in order to appreciate that the act is prohibited. However, that appears to be excluded by the clear statement that a belief in honesty is irrelevant. Thus it seems most likely that the degree of subjective knowledge required is an awareness of circumstances that make the act dishonest, but excludes awareness of that final characterisation.<sup>124</sup>

#### *A Mens rea in Peters*

Although Toohy and Gaudron JJ did not refer to the *actus reus/mens rea* dichotomy in their reasons, they appeared to use similar reasoning to that of Sopinka J in the Canadian cases.<sup>125</sup> They agreed in large measure with McHugh J’s judgment, in which he imported a mental element. His Honour held:

<sup>121</sup> Ibid 19. Her Honour also considered that recklessness as to consequences could suffice to establish liability, at 20.

<sup>122</sup> Ibid 20.

<sup>123</sup> If so, in a situation of fraud by mistaken false statement, what appears to save an accused from conviction is the fact that the accused was unaware that the false statement would cause prejudice. The effect appears to be that criminal liability hinges heavily on awareness of the consequences of actions, rather than on the intent behind the actions themselves. A subjectively wrongful intent provides evidence of an awareness of the risk of prejudice.

<sup>124</sup> See the discussion in Brenda L Nightingale, *The Law of Fraud and Related Offences*, (at 2008–2) 10.7–10.10.

<sup>125</sup> Given that the decision pre-dates the implementation of the Criminal Code it is unlikely that their Honours were employing an element analysis, and the tenor of

In so far as it is meaningful to speak of mens rea in the crime of conspiracy to defraud, mens rea means the intention to prejudice the interests of a third person by the use of means that are dishonest.<sup>126</sup>

The mens rea is thus the intention to use dishonest means for a specific purpose. Subjective awareness of the nature of the act that allows it to be characterised as ‘dishonest means’ is formally part of the actus reus. The linking of any knowledge (or belief) of the accused that would be relevant to the characterisation of the act to the actus reus of the offence, and the linking of an intention to do the act to the mens rea, is made clear in a subsequent passage from McHugh J’s judgment:

Obtaining property by statements which are *known to be untrue* is the employment of dishonest means. If the accused agree to obtain property by such means, they are guilty of the offence of conspiracy to defraud ... That is because the accused have *the intention to do acts* which for the purposes of the crime of conspiracy are unlawful acts and have agreed to do them ...

It follows that the mental element of the crime of conspiracy to defraud is *the intention* to prejudice the interests of a third person by the use of means that are dishonest (emphasis added).<sup>127</sup>

This approach was also supported by a passage of Toohey and Gaudron JJ’s judgment in *Peters*, which was subsequently quoted in the joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Macleod*:

Toohey and Gaudron JJ said that, ordinarily, fraud involves: ‘the *intentional* creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to ‘some lawful right, interest, opportunity or advantage’, *knowing* that he or she has no right to deprive that person of that money or property or to prejudice his or her interests’ (emphasis in original).<sup>128</sup>

Thus the decision in *Peters* appears to hold that:

1. ‘Dishonest means’ and ‘dishonest prejudice’ are the actus reus elements of defrauding;
2. Both ‘dishonest means’ and ‘dishonest prejudice’ are to be assessed by taking into account not only acts themselves, but also any knowledge, belief or intent that the accused might have in relation to those acts; and

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the judgment seems to be against seeing dishonesty as a compound element, as they rejected its existence as a stand alone element of the offence.

<sup>126</sup> *Peters* (1998) 192 CLR 493, 526.

<sup>127</sup> *Ibid* 527–8, 530.

<sup>128</sup> *Macleod v the Queen* (2003) 214 CLR 230, 242.

3. The mens rea of defrauding is merely an intention to use the dishonest means and to effect the dishonest prejudice.

Any suggestion that the mens rea requires proof that the accused be aware of the nature of the acts (eg that they unauthorised, untrue representations, etc) is otiose. As Sopinka J pointed out in *Zlatic*, by taking the attitude of the accused into account in characterising an act as ‘dishonest means’, the finder of fact has already considered the subjective knowledge or belief of the accused as to the nature of the act.

Thus, for Sopinka J, proof that an act is dishonest provides proof of mens rea:

The state of mind of the accused is also examined in dealing with the requirement of mens rea for dishonesty. Although this is a subjective test, it is really a duplication of the application of the objective standard of dishonesty.<sup>129</sup>

As Huddart JA put it in *R v Wolsey*, ‘Sopinka J held that the *mens rea* with respect to the dishonesty of the conduct could be axiomatically derived from the *actus reus* itself’.<sup>130</sup> Consequently this approach leaves little effective practical role for mens rea to play in the offence. Intention to do the act is normally not denied. What is normally denied is the characterisation of the act (this is assuming that there is no claim of fact or law about ownership, consent, etc). But an effective rebuttal of prosecution claims as to the accused’s subjective mental state in relation to characterisation does not defeat the prosecution’s case. This is because such subjective states are merely factors in the objective assessment of dishonest means. Dishonest means can be proven in the absence of any evidence as to the accused’s state of mind.

### B *Dishonest prejudice*

In light of the High Court’s approach to ‘dishonest means’, the further requirement in *Peters* that the resulting deprivation or prejudice (referred to as prejudice hereafter) also be dishonest appears strained. Prejudice is clearly an objective circumstance, and the judgments of both Toohey and Gaudron JJ and McHugh J make clear that the attached mens rea is an intent to cause this prejudice.<sup>131</sup> Such an intention parallels the approach taken in the Canadian cases. Whether the consequence itself need be characterised as ‘dishonest’ is problematic.

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<sup>129</sup> [1993] 2 SCR 29, 37. His Honour went on to note that there was a role for dishonesty in the mens rea of deprivation: ‘Finally, in a case involving risk of deprivation, knowledge of the risk is a required mental element. ... If the accused honestly believes there is no risk, this aspect of mens rea is not made out’, at 37.

<sup>130</sup> [2008] BCCA 159, [20].

<sup>131</sup> See the references to *Peters* (1998) 192 CLR 493 in the section entitled ‘Mens Rea in *Peters*’, above (VIII A).

If the means used are characterised as ‘dishonest’, part of that evaluation must surely be an awareness of the potential for prejudice. To further require that the prejudice in some way also be characterised as ‘dishonest’ is difficult to understand. There is no basis for a community-based evaluation of the type of prejudice caused. Instead, prejudice would appear to be a straight forward objective fact. Importantly, while ‘dishonest means’ is a morally-based characterisation of an act, which can involve consideration of the mental attitude of the accused in doing the act, prejudice is a consequence or result which seems incapable of being construed on any moral basis. It is therefore suggested that when Toohey and Gaudron JJ held that the bringing about of a situation of prejudice was also ‘dishonest by ordinary standards’, they did not mean to require proof of dishonest prejudice but instead merely pointed out that awareness of such prejudice was an aspect of assessment of whether the means were dishonest. If this suggestion is not correct, then the judgment would appear to require the impossible task of assessing impersonal causal outcomes on a moral basis.

## IX IMPLICATIONS OF THE HIGH COURT’S NOTION OF DISHONESTY

This insertion of mental elements into the actus reus of dishonest means and the consequent minimalist concept of mens rea arising from it gives rise to a number of issues. First, does this approach conflict with the principles of implied mens rea set out in *He Kaw Teh*? Secondly, does the incorporation of mental elements into the definition of a physical element undermine the notion of the prohibited act, in the sense that it significantly diminishes the prior knowability of prohibited behaviour, and thus destabilises the deterrent effect and enforceability of the law?

### A *He Kaw Teh* and the circumstances that must be known

If dishonest means is to be considered a physical element, this raises the prospect that the approach in *Peters* might be contrary to the common law requirement that the accused be aware of the dishonesty.<sup>132</sup> In *He Kaw Teh* Brennan J held that if an element of actus reus amounted to an act in circumstances external to the act (‘attendant on’ the act), then knowledge of those circumstances would generally be implied as mens rea. Alternatively, where those circumstances were integral to the definition of the act, the common law would always require proof of an implied mental element of knowledge of those circumstances.<sup>133</sup> Whether dishonesty is an

<sup>132</sup> One alternative not canvassed in *He Kaw Teh* (1985) 157 CLR 523 was the role of negligence as a basis for liability in the common law. While there is not space to pursue this consideration in detail, I would argue that dishonesty does not constitute a form of negligence-based liability. McHugh J appears to confirm this in *Peters* when he states that certain situations are prima facie dishonest ‘unless the defendants raise an actual or supposed claim of right or allege that they acted innocently or negligently’: (1998) 192 CLR 493, 530. The relevance of exculpating beliefs and the lack of a threshold of ‘gross’ dishonesty suggest analogies with negligence are misplaced. Cf the discussion of negligent manslaughter in *R v Lavender* (2005) 222 CLR 67.

<sup>133</sup> ‘The definition of circumstances attendant upon but not an integral part of the act involved in the offence may (but does not always) imply another mental element:

integral or external element of the means is unclear, however there is an argument that it is an integral element, as discussed below.

Application of these principles is complex under the approach in *Peters*. If ‘dishonest means’ is a characterisation of an act, and the mental attitude of the accused is part of that characterisation, then the obvious attached mens rea would be an awareness that the combination of that mental attitude with the acts in the surrounding circumstances amounts to dishonesty. However, that is the second limb of the *Ghosh* test, which was rejected in *Peters*.

Consequently, in order to reconcile *Peters* with *He Kaw Teh* it is necessary to establish that the characterisation of acts as ‘dishonest’ is not something that mens rea attaches to. In *He Kaw Teh* Brennan and Gibbs JJ<sup>134</sup> quoted the judgment of Jordan CJ in *R v Turnbull*,<sup>135</sup> where he described the common law principle regarding the degree of knowledge of the accused required to establish criminal liability. In Brennan J’s judgment he italicised portions of the extract:

The principle applicable at common law was stated by Jordan CJ in *R v Turnbull*:

‘it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he *knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing*. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his knowledge of the presence of some essential factual ingredient of the crime charged.’ (Original emphasis of Brennan’s judgment.)

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knowledge or the absence of an honest and reasonable but mistaken belief as to the existence of those circumstances. The distinction between the act and the circumstances which attend its occurrence is frequently of no moment, because for all practical purposes the same mental element — knowledge — is the requisite mental element ordinarily applicable both to the act and the circumstances. But if there be a legislative intention to apply a mental element to the circumstances different from the mental element applicable to the act involved in the offence, it is necessary to decide what circumstances are defined to be an integral part of the act (to which intent and therefore knowledge will ordinarily apply) and what circumstances are defined to be merely attendant (to which no mental element may be intended to apply or to which a mental element less than knowledge may be intended to apply). One of the intractable difficulties in the process of identifying the particular category of mens rea that applies to the respective external elements of an offence is the identification of the prohibited act on the one hand and the circumstances attendant on the doing of that act on the other.’ (*He Kaw Teh* (1985) 157 CLR 523, 571).

<sup>134</sup> 157 CLR 523, 531 (Gibbs CJ), 572 (Brennan J).

<sup>135</sup> (1943) 44 SR (NSW) 108, 109.

In *O'Connor*, Stephen J defined ‘criminal intention’ by citing Jordan CJ’s statement of the requirement of knowledge. Prima facie, the requirement of knowledge relates not only to the facts which give character to the physical act involved in the commission of the offence but also to the circumstances which attend its occurrence and make it criminal.<sup>136</sup>

When quoting Jordan CJ, Brennan J italicised the passage which stated that knowledge of all the *facts* was required. Thus in *Peters* the High Court must have held that a finding that the acts amount to dishonest means, though actus reus, is not a fact. In the Canadian context, Nightingale has suggested that a distinction can be drawn between what she calls ‘factual and legal circumstances’. She argues that circumstances such as ‘dishonesty’ in ‘dishonest means’ are legal constructs rather than factual characteristics.<sup>137</sup> The doctrine of ignorance of the law being no excuse is said to apply to these legal circumstances. Examples given by Nightingale in a Canadian context include indecency, blasphemy, and narcotic goods.<sup>138</sup> The Australian approaches to these categories of offence are discussed below.

In *Ostrowski v Palmer*, McHugh J noted:

Thus, it is no defence to a criminal charge that the defendant believed that his or her actions were not regulated by law or that his or her actions satisfied the provisions of a law. Such beliefs are mistakes of law, not mistakes of fact. In *Von Lieven v Stewart* ... Clarke JA said that, once the defendant knows all the facts which constitute the elements of the offence, a mistake as to their legal effect is not a defence to a criminal charge. Handley JA (with whom Mahoney JA agreed) said:

‘[A] belief or assumption that the acts in question are lawful either because they are unregulated, or because the requirements of the law have been satisfied, cannot excuse in cases such as this ... The only excuse is the existence of an actual or positive belief, based on reasonable grounds, in the existence of some fact or facts which, if true, would make the act in question innocent.’<sup>139</sup>

Thus the facts might include the accused’s knowledge of his or her intended act, any further objective circumstances such as falsity or authority to do the act, and his or her awareness of those characteristics and intentions in relation to the act. The conclusion that this was dishonest would be the legal effect of those facts. A modification of the Canadian approach, with its clear separation of physical

<sup>136</sup> *He Kaw Teh* (1985) 157 CLR 523, 572.

<sup>137</sup> For a detailed examination of the differences between legal and factual issues in the context of mistake, see Gerald Leonard, ‘Rape, Murder and Formalism: What Happens If We Define Mistake Of Law?’ 72 (2001) *University of Colorado Law Review* 507.

<sup>138</sup> Brenda L Nightingale, above n 124, 10.17–18; interestingly, as the discussion following demonstrates, in Australia it is not clear whether any of these examples are considered to be free of the implication of mens rea.

<sup>139</sup> (2004) 218 CLR 493, 513–4.

and mental elements, appears to fit well with this interpretation, as it is possible to construct an objective notion of dishonesty from various circumstances (*actus reus*), and then separately ask if the accused is aware of those circumstances (*mens rea*). Under the approach in *Peters*, the difficulty arises of logically requiring that the mental attitude of the accused which is a constituent element of the characterisation, also be known to the accused as an aspect of *mens rea*. Sopinka J would suggest that this is axiomatic, but it may be that the whole process is logically redundant, and only exists due to the insistence upon placing the mental attitude into the *actus reus*.

On the other hand, in *He Kaw Teh* Brennan J, when applying the principles in *R v Turnbull*,<sup>140</sup> held that one could only be convicted of possession of narcotic goods if one had knowledge that the goods were so characterised. The character of the act depended on the nature of the goods imported, and the fact that the goods were narcotic could not be separated from the act to make it an attendant circumstance. Brennan J held: ‘An intention “to do the whole act that is prohibited” — the view of Dixon C.J. in *Reynhoudt* — is, in my opinion, the only view which the language of [the section] permits’.<sup>141</sup>

There is thus an argument that, following *He Kaw Teh*, any crime involving circumstances that define the nature of the act should also require awareness of those circumstances as part of the *mens rea*. In particular this argument may be applicable to offences that can be described as morals-based. This proposition appears to have been accepted by Australian state courts in interpreting offensive conduct crimes. In *Pregelj and Wurramura v Manison*,<sup>142</sup> Nader J (Kearney J concurring) considered that both at common law<sup>143</sup> and under the Northern Territory Criminal Code<sup>144</sup> offensive behaviour required the accused to be aware that the act could offend.<sup>145</sup> In *Police v Pfeifer*,<sup>146</sup> Doyle CJ applied similar reasoning to the South Australian offence,<sup>147</sup> but concluded that there was contrary Parliamentary intention to exclude the implication of requisite knowledge.<sup>148</sup> It is interesting that in both cases it is clearly acknowledged that when there is an offence that characterises certain acts according to some community standard, a starting point is that the accused should be aware of that characterisation. The issue has also arisen in relation to interpretation of ‘reasonable person’ tests under the Commonwealth Criminal Code.<sup>149</sup>

<sup>140</sup> (1943) 44 SR (NSW) 108.

<sup>141</sup> *He Kaw Teh* (1985) 157 CLR 523 584. Brennan J cited Dixon CJ in *R v Reynhoudt* (1962) 107 CLR 381 at 387.

<sup>142</sup> (1987) 51 NTR 1.

<sup>143</sup> *Ibid* 9–11.

<sup>144</sup> *Summary Offences Act* (NT) s 47.

<sup>145</sup> *Wurramura v Manison* (1987) 51 NTR 1, 16–9.

<sup>146</sup> (1997) 68 SASR 285 (*‘Pfeifer’*).

<sup>147</sup> *Summary Offences Act* 1953 (SA) s 7(1).

<sup>148</sup> *Pfeifer* (1997) 68 SASR 285, 293.

<sup>149</sup> See *Crowther v Sala* [2007] QCA 133 (Unreported, Williams JA, Muir and Philip McMurdo JJ, 20 April 2007); See also the analysis in Ian Leader-Elliott, ‘Cracking

In England, similar issues were raised in *Whitehouse v Lemon and Gay News*<sup>150</sup> as to whether blasphemy required an awareness that the material published was likely to be of a blasphemous nature. The majority judges of the House of Lords held that it did not, their reasoning based largely on historical precedent. However, the dissents by Lord Diplock and Lord Edmund-Davies paralleled the approach taken in *He Kaw Teh*.

Lord Edmund-Davies held:

The subjective intention to blaspheme or recklessness as to the blasphemous effect of the words published must be brought home in turn to each person charged. If he is the author, the all-important question is what was his state of mind in supplying the material for publication; if he is the editor or publisher of the words of another, it is as to their state of mind in playing their respective roles in the act of publishing. And it would be nihil ad rem that one or all of them were motivated by, for example, the desire to make money or to make known the blasphemous words of another. ... There are those who dislike this tendency. But to treat as irrelevant the state of mind of a person charged with blasphemy would be to take a backward step in the evolution of a humane code.<sup>151</sup>

In Australia, consideration of the elements of blasphemy has not occurred in recent years, and there has been call for repeal of the offence.<sup>152</sup> In relation to the offence of indecency the issue remains confused, as discussed below. However, it is clear that in any ambiguous situation of indecency a specific intent of sexual gratification is required, even if misconstrued as an aspect of the actus reus.

Dishonesty raises similar issues to these morally-based offences. They all rely on some community-based assessment of conduct. The limited Australian case-law suggests that in such offences, the characterisation of the act is integral, and thus knowledge of the characterisation is implied unless excluded by Parliamentary intention (as in *Pfeifer*). In individual statutory offences, there may be an argument that Parliamentary intention is to assist enforcement at the expense of full rights to the accused.<sup>153</sup> Alternatively, there may be an argument, as there was in *Whitehouse v Lemon and Gay News*<sup>154</sup>, that the activity is such that one can expect the accused to be aware of its offensive nature. The difficulty is that ‘dishonesty’ tends to be used as an inculcating element in serious offences (as opposed to summary offensive behaviour offences), and in situations where the activity itself is often quite legal (as opposed to blasphemy and inherent indecency where

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the Criminal Code: Time for some changes’ (Research Paper No 2009–003, University of Adelaide, 2009).

<sup>150</sup> [1979] AC 617.

<sup>151</sup> Ibid, 656.

<sup>152</sup> NSW Law Reform Commission, *Blasphemy*, Report No 74 (1994).

<sup>153</sup> See, eg, the analysis of Doyle CJ in *Pfeifer* (1997) 68 SASR 285.

<sup>154</sup> [1979] AC 617.

prohibited conduct could be expected to be clearly understood as such<sup>155</sup>). This makes implications of Parliamentary intention that accused be aware of community standards harder to make. Yet none of this is discussed by the High Court in *Peters* or *Spies*. Instead the judgments appear to suggest that dishonesty is really a circumstance attendant to the act, and that dishonesty is an exception to the general common law requirement that knowledge of the circumstance be implied. If this is the case, then the Canadian approach to actus reus is preferable because it separates clearly the mental elements and thus makes it obvious that further knowledge of their effect is unnecessary.

B *The undermining of knowable physical elements:  
a comparison with indecent assault*

What is special and confusing about the High Court's definition of dishonest means is that normally circumstances that characterise acts are externally defined. Thus in sexual assault, the lack of consent by the victim is something that exists objectively and externally to the accused. An accused can therefore either be required to know of these circumstances before being liable, or be expected to be aware of them if the offence contains negligence based elements of liability. However, on the *Peters* analysis, an act can only be characterised as dishonest if the circumstances that make it dishonest emanate from the accused. This has the effect of requiring the proof of mental elements that would normally be seen as part of the mens rea prior to establishment of the actus reus.<sup>156</sup>

This problem of using mental elements to define physical elements also appears in the tests for indecent assault. Australian courts have held that indecency across a range of contexts<sup>157</sup> is an objectively determined characterisation of an act made without reference to the intentions of the accused. In *Crowe v Graham, Duncan, Rogers & McKay*,<sup>158</sup> the High Court held that indecency was to be determined according to a test of whether the act would offend the modesty of the average man or woman in sexual matters.

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<sup>155</sup> The whole notion of a crime of blasphemy is controversial, but assuming a religiously oriented society, statements against the dominant faith would clearly be made with a sense that this was not acceptable behaviour.

<sup>156</sup> Some commentators, such as Andrew Halpin have argued that mental elements may act as limiting factors on the type of physical act required (above n 54, 144–5). For example, an intent to permanently deprive in theft may act to limit the forms of appropriation on which a charge of theft can be based and thus be seen as part of the actus reus of the crime. However, there is a conceptual difference here in that this requirement is in addition to other external factors which are clearly fixed. This is not the case with dishonest means. No form of activity is pre-defined as a requisite type prior to the application of the mental elements to the actus reus.

<sup>157</sup> See the discussion in the judgment of Windeyer J in *Crowe v Graham, Duncan, Rogers & McKay* (1968) 121 CLR 375.

<sup>158</sup> (1968) 121 CLR 375, 379 (Barwick CJ). The other members of the court adopted similarly expressed tests.

However, state courts have also held that in cases of indecent assault the definition of an assault as ‘indecent’ is partially dependent on an intention or purpose of the accused to achieve sexual gratification.<sup>159</sup> This derives from the decision of the House of Lords in *R v Court*.<sup>160</sup> The reasoning in this case contains a number of contradictions and complexities,<sup>161</sup> primarily because the Lords (other than Lord Goff who dissented) chose to insert the mental attitude of the accused into the test for determining what amounted to an indecent assault.

The traditional position, upheld in *Court*, was that if an act or assault could be considered in the opinion of ‘right-minded persons’<sup>162</sup> to be indecent, then the physical elements of the offence were proved, subject to a defence of satisfactory explanation of the reason for undertaking the act.<sup>163</sup> Lord Ackner held:

Whether he did so for his own personal sexual gratification or because, being a misogynist or for some other reason, he wished to embarrass or humiliate his victim, seems to me to be irrelevant. He has failed, ex-hypothesi, to show any lawful justification for his indecent conduct.<sup>164</sup>

His Lordship then accepted the logical consequence that

if the circumstances of the assault are *incapable* of being regarded as indecent, then the undisclosed intention of the accused could not make the assault an indecent one.<sup>165</sup>

In making this statement the House of Lords approved the decision in *R v George*,<sup>166</sup> which held that the act of removing a girl’s shoe was not an indecent assault even if undertaken by a foot fetishist in order to gain sexual gratification. There were no overt circumstances of indecency relating to the act.

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<sup>159</sup> See, eg, *Harkin v R* (1989) 38 A Crim R 296. See also *In R v Manson and Stamenkovic*, (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Clarke JA, Sully JJ, 17 February 1993) where Gleeson CJ held:

If ... the act in question has an unequivocally sexual connotation the Crown does not have to prove that the act was done for the purposes of providing sexual gratification. On the other hand, the purpose for which an act is done may well be regarded by right-minded people as relevant to the question whether it is decent or indecent, depending upon the circumstances of the particular case. The fact that an act was done for artistic or political purposes may lead a jury to conclude that it was not indecent. On the other hand, it would certainly not require such a conclusion.

<sup>160</sup> (1989) 1 AC 28 (*‘Court’*).

<sup>161</sup> See Glanville Williams, ‘The meaning of indecency’, (1992) 12 *Legal Studies* 20.

<sup>162</sup> *Court* (1989) 1 AC 28, 42.

<sup>163</sup> Admittedly, the decision does not view such excuses as a form of defence, but this seems the most sensible way to construe its role, as the prosecution would not be required to rebut it unless raised by the accused.

<sup>164</sup> *Court* (1989) 1 AC 28, 43.

<sup>165</sup> *Ibid.*

<sup>166</sup> [1956] CrimLR 52.

The decision in *Court* was novel because it accepted a third possibility.<sup>167</sup> This was that if the act was one that was ‘capable’ of being seen by ‘right-minded persons’ to be indecent, and the accused had undertaken it for a sexual purpose, then the act could fall within the offence. In *Court*, the act was smacking a child. This was considered to be an equivocal act, not incapable of being indecent.<sup>168</sup> Consequently, evidence concerning the purpose of the accused was admissible. As the accused had admitted to a ‘buttock fetish’, this made the intent sexual and thus the act constituted an indecent assault.<sup>169</sup>

In dissent, Lord Goff held that the purpose of the accused was irrelevant. Instead, he held that authority and principle made clear that the physical element of the offence was one of an assault undertaken in circumstances of indecency. His Lordship argued that the gravamen of the offence was an objective affront to modesty, and that the accused’s intentions were irrelevant to this consideration. The mental elements were as follows:

There are, I consider, two matters to be borne in mind. First, the requisite intention on the part of the defendant to commit the relevant act involves, in the case of an indecent assault, that the defendant should have intended to commit any part of that act which rendered the assault indecent. Second, especially since, in considering whether an assault is indecent, it may be appropriate to have regard to the surrounding circumstances, it is

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<sup>167</sup> While the effect of the decision was to ensure the conviction of the accused, their Lordships seemed motivated by wrongly assuming convictions rather than acquittals would result from ambiguous situations. The principle of reasonable doubt would suggest that any equivocal act should result in acquittal. However, Lord Ackner stated:

For the defendant to be liable to be convicted of the offence of indecent assault, where the circumstances of the alleged offence can be given an innocent as well as an indecent interpretation, without the prosecution being obliged to establish that the defendant intended to commit both an assault and an indecent one, seems to me quite unacceptable and not what Parliament intended. (*Court* (1989) 1 AC 28, 43).

<sup>168</sup> As Williams (above n 161) points out, this appears to be in conflict with the earlier acceptance of the decision in *R v George* [1956] CrimLR 52 that foot fetishism is not an indecent act. It seems impossible to avoid the conclusion that juries will find that all acts where evidence of the purpose of the accused is known are ‘equivocal’.

Because the question of whether an equivocal act is indecent is a factual question for the jury, evidence of purpose would seem to be admissible to determine that question. This would mean that juries would be first asked to assess the nature of the act without taking into account purpose. Then, if they determined that the act was in fact ‘equivocal’, purpose could be taken into account to determine indecency. Despite instructions to disregard evidence of purpose in determining the initial nature of the act, it would appear to taint any jury consideration of the issue.

<sup>169</sup> How it is possible to decide that a removal of a shoe is never indecent but smacking might sometimes be was not explained, but possibly the Lords considered that ‘right-minded’ persons are more modest about their bottoms than their feet. Williams (*ibid*) considers that there is no material difference.

necessary that the defendant should have been aware of the existence of any circumstances which are relied upon as rendering the assault indecent.<sup>170</sup>

His Lordship did accept that evidence of purpose might at times be admissible, but not because it was an element of the offence:

First, if the prosecution cannot establish that an assault is objectively indecent, they are not allowed to fortify their case by calling evidence of a secret indecent intention on the part of the defendant. Second, if an assault is prima facie indecent, the defendant may seek to show that the circumstances of the assault were not in fact indecent, and for that purpose evidence of his intention would be relevant and admissible.<sup>171</sup>

The approach taken by the majority is very similar to that adopted by the High Court in *Peters*. The physical element of indecent assault is an assault undertaken in circumstances of indecency.<sup>172</sup> However, one of those circumstances is the motive or purpose of the accused — to obtain sexual gratification. The approach is more defined than dishonest means because the required form of intent is specified to be sexual gratification alone, rather than intentions generally, and because the court accepts, at least in theory, that the intentions of the accused alone cannot create indecency from an otherwise decent act.

By contrast, Lord Goff's approach parallels the approach taken by the Canadian Supreme Court. His Lordship emphasised the objective nature of the offence and saw the indecency as determined by evaluation of the act in its circumstances. Mens rea is established by proof of the accused's awareness of those circumstances as well as intent to do the act.<sup>173</sup>

Similarly, Glanville Williams, in commenting on the offence, suggested that the proper approach was

for the law to establish that indecent assault is primarily in the eye of the beholder, not the mind of the offender. When the defendant has done something that does not appear to be indecent on its face, the case should be left as one of ordinary assault; it should not be regarded as indecent, sexual motive or not. The rule in *Court* should be abandoned. When the defendant has committed what is prima facie an indecent assault, his non-sexual motive can be relevant to liability only when it affords a justification or lawful excuse.<sup>174</sup>

<sup>170</sup> *Court* (1989) 1 AC 28, 48–9.

<sup>171</sup> *Ibid.*

<sup>172</sup> This was the description of the offence adopted by Lord Goddard CJ in *Beal v Kelley* [1951] 2 All ER 763.

<sup>173</sup> On neither approach is awareness that the act can be characterised as indecent relevant.

<sup>174</sup> Glanville Williams, above n 161, 32–3. His primary preference was for abolition of the offence.

The problem with the approach in *Court* is that the factors on which a finding of indecency is based is constructed by investigators separately to the commission of the offence. If the act is not ‘inherently indecent’ (whatever that might be), whether the actus reus of a crime has been committed can only be established following police questioning. A suspect could be arrested for committing a common assault only, but could subsequently be charged with indecent assault, based on an admission of a motivation that is essentially unrelated to any evidence necessary to sustain the initial charge. There may be nothing in the behaviour alone of the accused that would offend the morality of any person, so the charge is essentially one of a thought crime.

Community-based standards must logically be based on what the community sees, not on what an accused thinks. The approach of Glanville Williams and Lord Goff therefore seems to be the correct approach. As Lord Goff noted in his speech, if an indecent intent is to be relevant it should be a mental element required to be proved in all instances of the offence.<sup>175</sup> In other words, its proper role is as a fully fledged mental element.

Lord Goff and Glanville Williams thus make the point that indecent acts are externally defined. Whether the accused is aware of this characterisation or has an intent to obtain a particular emotional result from performing the act are conceptually separate questions to the initial characterisation of the act. Relevance of the knowledge and intention of the accused go to the question of whether the offence is one of strict liability, not whether the physical elements have been established.

By analogy, if ‘dishonesty’ is to be seen as a constituent element of a physical act, that is ‘dishonest means’, then it should not take into account the mental attitude of the accused. To the extent that it does so, it falls into the same trap as the approach in *Court* of constructing an offence after the event — an offence which is not externally recognisable or definable.

On the other hand, it is possible to see a distinction between concepts of indecency and dishonesty. Whereas indecency is essentially a concept based on the reaction of a bystander, dishonesty by contrast is primarily concerned with the internal motivations of the actor. This distinction, and the consequent mismatch between the analysis of the definition of an indecent act and a dishonest means suggests that dishonesty is a mental element, and one that should be a separate element of a crime, considered subsequently to that of the establishment of any physical element.

Other interesting contrasts can be drawn with inchoate offences. In the offence of ‘attempt’, the act is only prohibited if done with the mens rea of an intention to commit the substantive offence.<sup>176</sup> The characterisation of the act as ‘an act of attempt’ is however determined, not from an analysis of the intentions of the

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<sup>175</sup> Ibid.

<sup>176</sup> See, eg, *Giorgianni v R* (1985) 156 CLR 473.

accused, but from an external objective assessment of proximity to the intended offence, and a ‘reasonable person’ assessment of why the act must have been undertaken.<sup>177</sup> Further, although there might at times be controversy over whether the inchoateness of the behaviour of the accused is an over-reach of criminal law, the intended result must be, of itself, a substantial offence. By contrast, with dishonesty offences, often the substantive result intended is not, of itself, an offence. The dishonest intent thus ‘bootstraps’ the result up into an offence. Under the approach to dishonest means adopted by the High Court, a further ‘bootstrapping’ of the means used into a prohibited act is accomplished by reliance on the actor’s mental attitude to establish the nature of the act.

## X CONCLUSION

As has been outlined above, ‘dishonesty’ can be conceived of either as a mental element or as a description or characteristic of a physical act. While in England it has been interpreted to be a mental element, in Canada and Australia the highest courts have adopted an approach to common law dishonesty which sees it, at least in some offences, as descriptive of a physical act.<sup>178</sup> However, Australian and Canadian jurisprudence differs over the role that the knowledge, belief and intent of the accused plays in determining whether an act is dishonest.

The Canadian Supreme Court views the characterisation of ‘dishonesty’ as an entirely objective assessment, and the knowledge, belief or intent of the accused, in relation to the act, constitutes the attached mens rea. By contrast, the Australian High Court combines both the act and mental attitude into the actus reus of the offence. In so doing, the High Court appears to have created an unfortunate hybrid concept of dishonesty.

If one approaches dishonesty as a fundamentally moral concept, it seems inescapable that the knowledge, beliefs and intentions of the accused are fundamental to the concept. It seems implausible that one can be unknowingly immoral. This is the approach that underlies the English version of dishonesty. The moral standard is set by the community, but one can only be immoral if one is aware that one is acting in breach of that standard.

By contrast, if one describes dishonesty as failure to follow rules of behaviour, then it is possible to see dishonesty as an observable behaviour, and an accused can

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<sup>177</sup> See, eg, *R v Mai and Tran* (1992) 26 NSWLR 371; *DPP v Stonehouse* [1977] 2 All ER 909.

<sup>178</sup> That is not to say that in Australia, dishonesty might also be a mental state. Cf the approach taken in *Macleod v The Queen* (2003) 214 CLR 230 where the High Court without overtly recognising the distinction used the test for dishonesty in characterising a course of action, to satisfy the requirements of dishonesty when used as a mental element. Further, without clearly explaining why, the High Court appeared to preserve a more subjective mental approach for theft and deception offences, by holding that the approach taken in *R v Salvo* [1980] VR 401 and *R v Love* (1989) 17 NSWLR 608 was a special case.

unknowingly act dishonestly. This seems to be the Canadian approach. An accused acts dishonestly when he or she fails to follow the community-generated rules of appropriate behaviour. On this conception, dishonesty is similar to other morally-based standards such as offensiveness and indecency.

Under the High Court's approach to dishonesty in *Peters*, there is a failure to choose between these two conceptions. Instead, like the approach taken to define indecency in ambiguous circumstances, the *Peters* test for dishonest means combines both. In so doing, it creates an offence, the physical elements of which are only determined after the event, and which, in order to constitute the external physical elements of the crime, rely on inferences as to the offender's state of mind. At the very least, this suggests that 'dishonest means' is an insufficiently inchoate concept on which to base the actus reus of an offence. It probably also indicates that the High Court was in error in combining the physical and mental elements.

Even if these difficulties can be resolved, there remains the need to address the question of whether the circumstance of the characterisation of acts as 'dishonest' is integral to the act, and thus whether *He Kaw Teh* should require awareness of the characterisation. Australian case-law seems to point in this direction. This also seems to be the position under the *Commonwealth Criminal Code*, both in terms of implied mental elements,<sup>179</sup> and as a result of the statutory adoption of the *Ghosh* test for dishonesty in some offences.<sup>180</sup> Avoiding this implication seems strained if the mental attitude of the accused is to form part of the assessment of the act as dishonest.

It therefore seems that the Australian form of dishonest means is inherently unstable and a choice — probably legislative — needs to be made between seeing dishonesty as a moral standard or an objective rule-based breach. If it is a moral standard, then it is best reconceived as a mental element, or alternatively as a compound concept that contains both a physical act and a related mental attitude to the act — but which requires some awareness of the community's judgment on the act. If it is seen as an objective rule-based breach, the tendency to incorporate moral judgments should be avoided by renaming the element as 'unauthorised act', or some other more clearly rule-based description.

In relation to defrauding offences, given the increasing legislative use of dishonesty as a state of mind element in offences, it is probably appropriate, and much simpler, to adopt the English approach to defrauding. That is, to concentrate on requiring the causing of a prejudice as the physical element, and a requirement of dishonesty as the mental element in so causing such a result. The means by which the result is caused are then reduced to evidentiary aspects of proving the causing of the result. Legislative reform of conspiracy to defraud remains a priority.

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<sup>179</sup> See *Crowther v Sala* [2007] QCA 133 (Unreported, Williams JA, Muir and Philip McMurdo JJ, 20 April 2007); See also the analysis in Ian Leader-Elliott, 'Cracking the Criminal Code: Time for some changes' (Research Paper No 2009-003, University of Adelaide, 2009).

<sup>180</sup> See, eg, *Criminal Code Act 1995* (Cth), s 130.3.