

WHEN DOES SHARP BUSINESS PRACTICE CROSS THE LINE TO BECOME DISHONEST CONDUCT?

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Dishonesty is a key element of many of the serious offence provisions under the *Corporations Act 2001* (Cth) and many of the economic crime provisions of the various state Crimes Acts and Codes. If a client is charged with such an offence the obvious question which arises is whether the client has in fact been dishonest. Similarly if a client is considering engaging in conduct which may be morally suspect the question may arise as to whether the client will be engaging in conduct that is dishonest and thereby risk prosecution. Whilst deciding whether conduct is dishonest may be straightforward in most cases, situations can arise where the answer may not be clear cut. Advising a client in such a situation may be difficult because current tests of dishonesty tend to reflect standards of ethics and morality generally accepted by the community which may not accord with the client's or even the lawyer's personal standards. This article will examine the concept of dishonesty in the context of commercial crime, attempt to add some clarity to this particularly fluid concept and scrutinize the lawyers' role in ensuring clients' actions accord with community values.

Many of the economic or 'white collar' crime provisions now specifically require the prosecution to prove dishonesty. Even if the word dishonest or dishonesty does not appear in the actual offence provision, dishonesty may be an issue if the provision refers to 'fraudulently' or 'defraud'. This is because 'fraudulently' has been construed in relation to many offence provisions to mean dishonestly.¹ An 'intent to defraud' has been construed to mean the use of *dishonest* means to prejudice the rights of another or deprive another of something which is regarded as belonging to him or her.²

However while ostensibly the concept of dishonesty may seem to be simple it is, in fact, quite complex. It embraces at least three distinct requirements, relating on the one hand to the defendant's actions or behaviour, the conformity of his or her conduct with generally accepted standards and the defendant's belief or state of mind as to his or her own conduct.³ Courts have also refrained from defining exactly what is dishonest in relation to generally acceptable standards, leaving this decision in the hands of the jury. In *R v Salvo* [1980] V R 401 McInerney J elucidated the reason courts take this position when he said:

The word 'dishonesty' implies reference to a standard of morality underlying the law. The law sets standards of legality and illegality but cannot set and never has purported to

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¹ See *Macleod v R* (2003) 214 CLR 230, 341: where the High Court stated, 'The Court of Criminal Appeal in *Glenister* reviewed the authorities construing s173 and cognate provisions and concluded that the term "fraudulently" in this context has a meaning interchangeable with "dishonestly". That construction has been adopted in relation to analogous provisions in other Australian jurisdictions.' Note however that 'fraudulently' has a specific definition under *Criminal Code Act 1899* (Qld) s391, and *Criminal Code Act 1902*(WA) s371.

² In *R v Spies* 74 ALJR 1263, 1281: the High Court confirmed that an intention to defraud involved the use of dishonest means to prejudice the rights of another.

³ AJ Arlidge and J Parry, *Fraud* (1985) 3.

set standards of morality. Standards of morality underlie the law; they derive not from the law but from the standard of ethics accepted by the community.⁴

Adding to this complexity is the fact that in relation to some offence provisions dishonesty is part of the mens rea of the offence. Yet in relation to other offence provisions dishonesty is part of the actus reus of the offence although the state of mind of the defendant remains relevant.⁵

This article attempts to grapple with the somewhat nebulous concept of dishonesty and aims to provide lawyers with some reference points when trying to advise clients as to whether their conduct has been dishonest or whether or to not engage in certain conduct. Part I outlines the current use of dishonesty in white collar and corporate crime. In Part II the current tests for dishonesty are discussed and case law is examined. Part III attempts to distil some common threads as to what type of conduct may be found to be dishonest. In Part IV dishonesty is considered from the point of view of lawyers – how should lawyers approach advising their clients in relation to what may be unethical conduct? Part V considers when the use of dishonesty as an element in corporate crime may be appropriate given that its inclusion may act to promote ethical and fair dealing practices by both lawyers and their clients.

I DISHONESTY AS AN ELEMENT IN WHITE COLLAR CRIME

While references to dishonesty as an element of many economic crimes have increased in recent years, this trend can actually be traced right back to the development of ‘white collar’ economic crimes in the United Kingdom in the middle of the nineteenth century. Around that period offences were created in English statutes to cover forms of misconduct by company directors and trustees that fell outside the scope of common law offences such as larceny.⁶ In particular the *Trustee and Directors Frauds Protection Act 1857* (UK) introduced a number of offence provisions relating to misconduct on the part of directors and trustees, such as falsifying books, appropriating funds or making false statements. These offences had as a key element that the conduct was undertaken ‘fraudulently’ or with an intent ‘to defraud’. Gradually over time ‘fraudulently’ came to mean dishonestly and ‘to defraud’ was construed as depriving a person dishonestly of something which they owned or which they otherwise would have become entitled.⁷ As a result, in the UK, the element of dishonesty has been substituted in the place of the element of fraudulent as these type of offence provisions have been revised and amended.⁸

In NSW the offence provisions in the *Trustee and Directors Frauds Protection Act 1857* (UK) were replicated and now exist, although in a somewhat modified form, in the *Crimes Act 1900* (NSW) in the part of the Act dealing with ‘Frauds by factors and other Agents’. However, unlike in the UK, the terms ‘fraudulently’ and intent ‘to defraud’ have remained. Nevertheless ‘fraudulently’ has gained a meaning such that it is now

⁴ *R v Salvo* [1980] VR 401, 407.

⁵ See generally, Alex Steel ‘Describing Dishonest Means: The Implications of seeing Dishonesty as a Course of Conduct or Mental Element and the Parallels with Indecency’ (2010) 31 *Adelaide Law Review* 7.

⁶ See, *R v Glenister* [1980] 2 NSWLR 597, 603..

⁷ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 839.

⁸ See for example, *Theft Act 1968* (UK) and the *Fraud Act 2006* (UK). See also generally, Steel above n 5.

interchangeable with dishonestly⁹ and ‘intent to defraud’ has been construed to mean the use of *dishonest* means to prejudice the rights of another or deprive another of something which is regarded as belonging to him or her.¹⁰ The *Crimes Act 1900* (NSW) also contains offence provisions that were added later and modelled after UK provisions which specifically contain the element of dishonesty, for example dishonestly obtaining a benefit by deception.¹¹

In relation to other States and Territories, whilst dishonesty is peppered throughout the various Criminal Acts and Codes, there is little in the way of consistency of offence provisions. As with New South Wales, Tasmania and the Northern Territory retain some of the specific offence provisions which apply to company officers and which were derived from the *Trustee and Directors Frauds Protection Act 1857* (UK). Like NSW these require proof of an intent to defraud.¹² Queensland does not have specific offence provisions dealing with corporate directors and officers but the *Criminal Code 1899* (Qld) has a general fraud offence in s 408C requiring proof of dishonesty. This provides:

- (1) A person who dishonestly--
 - (a) applies to his or her own use or to the use of any person--
 - (i) property belonging to another; or
 - (ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
 - (b) obtains property from any person; or
 - (c) induces any person to deliver property to any person; or
 - (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
 - (e) causes a detriment, pecuniary or otherwise, to any person; or
 - (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
 - (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
 - (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

commits the crime of fraud.

It is envisaged that this offence would catch misconduct by company officers as it prescribes a higher penalty if the offender is a director and the victim is the corporation.¹³

Like Queensland, Western Australia has a general fraud offence in s 409 of the *Criminal Code Act 1913* (WA) but has retained a number of specific provisions dealing with the making of false statements and false accounting with an intent to defraud by

⁹ See, *R v Glenister* [1980] 2 NSWLR 597: in relation to of the *Crimes Act 1900 (NSW)* s173. Cited with approval by the majority of the High Court in *Macleod v R* (2003) 214 CLR 230, 314: where it said ‘The Court of Criminal Appeal in *Glenister* reviewed the authorities construing s173 and cognate provisions and concluded that the term “fraudulently” in this context has a meaning interchangeable with “dishonestly”. That construction has been adopted in relation to analogous provisions in other Australian jurisdictions’.

¹⁰ In *R v Spies* 74 ALJR 1263, 1281 the High Court confirmed that an intention to defraud involved the use of dishonest means to prejudice the rights of another.

¹¹ *Crimes Act 1900* (NSW) s178BA.

¹² *Criminal Code Act 1924* (Tas) s260-265, *Criminal Code* (NT) s232-234.

¹³ *Criminal Code 1899* (Qld) s408C(2)(a).

company officers.¹⁴ In Victoria dishonesty is an element in a number of offences such as false accounting, fraudulently inducing a person to invest and obtaining property by deception.¹⁵

The Commonwealth and the Australian Capital Territory have adopted the recommendations of the Criminal Law Officers Committee (now the Model Criminal Code Officers Committee) established by the Standing Committee of Attorneys-General. This Committee was formed with a view to introducing a Model Criminal Code which would apply throughout all of the Australian States and Territories. The Model Criminal Code does not prescribe separate offence provisions in relation to conduct of company officers on the basis that these are sufficiently covered by the Corporations Act.¹⁶ However in the Model Criminal Code, dishonesty is used extensively as an element in the Chapter dealing with Theft, Bribery and Related Offences. Similarly in South Australia the Criminal Law Consolidation Act 1935(SA) has a separate part dealing with offences of dishonesty.¹⁷ This part was introduced in 2002 and is based on the provisions of the Model Criminal Code thus also extensively uses dishonesty as an element in its offence provisions.

A *The use of Dishonesty in the Corporations Act*

Dishonesty is also a key element of many of the offence provisions in the *Corporations Act 2001* (Cth) ('Corporations Act'), however this occurred only relatively recently. This shift commenced with the *Corporate Law Reform Act 1992* (Cth) which in 1993 introduced Part 9.4B into the Corporations Law (the predecessor of the Corporations Act). This provided the Australian Securities and Investments Commission ('ASIC') with the option (as an alternative to bringing a criminal prosecution for a breach of the Corporations Act directors' duties provisions) to bring an action seeking a civil penalty. After these amendments a breach of the Corporations Law directors' duties provisions still attracted criminal sanctions but only if the defendant contravened the provision:

- (a) knowingly, intentionally or recklessly; and
- (b) either:
 - (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or
 - (ii) intending to deceive or defraud someone.¹⁸

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

¹⁴ *Criminal Code Act 1913* (WA) s419-420.

¹⁵ *Crimes Act 1958* (Vic) s191, s83 and s81 respectively.

¹⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 3, Theft, Fraud, Bribery and Related Offences, Report* (Final Report, December 1995) 171-173.

¹⁷ See *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA).

¹⁸ *Corporations Act 2001* (Cth) s1317FA. This provision has since been repealed but dishonesty is still a central element for a criminal breach of the directors duties provisions; see *Corporations Act 2001* (Cth) s184.

of this section can result in ASIC taking civil penalty action. A breach of this provision is only a criminal offence if the person is:

involved in a company's contravention of section 260A and the involvement is dishonest.¹⁹

Similarly s 208 is a provision which contains the prohibition against engaging in related party transactions, a breach of which can attract civil penalties. Again a breach of this prohibition is only a criminal offence if the involvement is dishonest.²⁰ Many other provisions of the Corporations Act were treated in a similar fashion such as s 588G(3) (insolvent trading) s 254L(3) (redemption of redeemable preference shares) s 256D(4) (reduction in share capital) s 259F(3) (acquiring own shares) and s 344 (keeping financial records and financial reports).

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

A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.²¹

II THE TESTS FOR DISHONESTY

There is no one test for dishonesty which prevails in Australia. As is explained below, the current tests of dishonesty all contain an objective test of what is dishonest. In addition the state of mind of the defendant is also relevant but may be relevant in different ways.

A *The 'Peters' test*

In Australia where dishonesty is an element of an offence provision, and there is no test for dishonesty prescribed in the relevant legislation, the current test is that laid down by the High Court in *Peters v The Queen* (1998) 192 CLR 493. In that case the majority of the High Court appeared to treat dishonesty as part of the actus reus yet held that the defendant's state of mind was relevant. The majority said:

In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However if 'dishonest' is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more

¹⁹ *Corporations Act 2001* (Cth) s260D(3).

²⁰ *Corporation Act 2001* (Cth) s209(3).

²¹ *Corporations Act 2001* (Cth) s1041G.

usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest.²²

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

In legislation that contains its own specific test of dishonesty the test that is generally adopted is that derived from the UK case of *R v Ghosh* [1982] QB 1053.²³ This is the case for the offence provisions introduced as a result of the recommendations of the Model Criminal Code Officers Committee such as those under Chapter 7 of the Criminal Code 1995 (Cth) (the 'Code').²⁴ In *Ghosh* the UK Court of Appeal said:

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

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.²⁵

The *Ghosh* test treats dishonesty as part of the mens rea with the defendants' state of mind determinative as to whether this element is made out.²⁶

In relation to Corporations Act offences the situation is further complicated because while some offence provisions have the *Ghosh* test as the prescribed test,²⁷ other offence provisions have dishonesty as an element but no test is prescribed.²⁸ In those latter situations as the Code applies, dishonesty is part of the actus reus (known as a 'physical element' under the Code), being a 'circumstance' in which conduct occurs.²⁹ Although the Code does not make it clear a jury would presumably be directed in accordance with the *Peters* test. In addition, as with any physical element where the Code applies, there is a prescribed 'fault element', in this case recklessness.³⁰ Accordingly, under the Code the defendant must either know that the conduct would be dishonest in accordance with the

²² *Peters v The Queen* (1998) 192 CLR 493, 504 per Toohey and Gaudron JJ. Kirby J had a different view but for the sake of forming a majority withdrew it and agreed with Toohey and Gaudron JJ. The reference to the use of dishonesty in a 'special sense' appears to be a reference to whether the particular legislation qualifies what is dishonest, for example *Crimes Act 1958* (Vic) s81(1), which provides that it is an offence if a person 'who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it'.

²³ Despite the fact that the High Court specifically disapproved of that test in *Peters*, the Federal Parliament has tended to adopt the *Ghosh* test when prescribing a test for dishonesty. Note also that some State Crimes Acts, whilst not defining dishonestly, qualify what is not dishonest, for example, *Crimes Act 1958* (Vic) s73.

²⁴ See, *Criminal Code 1995* (Cth) ch 7. See also, *Criminal Code 2002* (ACT) ch 3 and the *Criminal Law Consolidation Act 1935* (SA) s131.

²⁵ *R v Ghosh* [1982] QB 1053, 1064.

²⁶ *R v Ghosh* [1982] QB 1053, 1063. In relation to whether dishonesty is part of the mens rea of actus reus see generally, Steel, see above n 5.

²⁷ See, for example, *Corporations Act 2001* (Cth) s1041G(2).

²⁸ See, for example, *Corporations Act 2001* (Cth) s588G(3), s260D(3) and s256D(4).

²⁹ *Criminal Code 1995* (Cth) s4.1(1).

³⁰ *Criminal Code 1995* (Cth) s5.6(2).

standards of ordinary people, or at least be aware that there was a substantial risk that the conduct would be dishonest in accordance with the standards of ordinary people.³¹

B *Similarities and differences between the tests*

1 *The Defendant's state of mind.*

Under all tests the state of mind of the defendant is relevant but it may be relevant for different reasons. In relation to the *Peters* test dishonesty is part of the actus reus however the state of mind of the defendant is relevant. It requires as a first step identification of the state of mind (knowledge, belief or intent) said to render the act dishonest and a determination of whether the defendant had that knowledge, belief or intent. Under the *Ghosh* test, dishonesty is part of the mens rea and the defendant must realise that his or her act or conduct was dishonest according to the standards of ordinary people. If dishonesty is an offence to which the Code applies and the Ghosh test is not prescribed,³² the defendant must know that there was a substantial risk that the conduct would be dishonest in accordance with the standards of ordinary people.

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

2 *The views of ordinary people - an objective standard?*

Although a defendant's state of mind is relevant, both the *Ghosh* test and the *Peters* test contain as a requirement that the act or conduct must be dishonest from the point of view of 'ordinary people'. Under the *Peters* test the knowledge, belief or intent of the defendant has to be dishonest according to the standards of 'ordinary, decent people'. Under *Ghosh* the conduct must be dishonest according to the standards of reasonable and honest people. Accordingly both require a lay jury to set the standard which applies and to calibrate the defendant's conduct against this standard.

This could possibly lead to different juries potentially setting different standards and thereby lead to inconsistency and uncertainty in the law and its application. As such some commentators have lamented that this could give rise to inconsistent verdicts:

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

³¹ *Criminal Code 1995* (Cth) s5.4.

³² See, for example, *Corporations Act 2001* (Cth) ss209(3), 260D(3), 588G(3).

of the relevant offence will vary as between different defendants. This must be unacceptable.³³

They also take issue with the notion that ‘dishonesty’ as a concept is a simple, untechnical term which is easily understood by all.³⁴ This is because whilst some actions are clearly dishonest (such as the stealing of a handbag) other actions, such as taking home an office pen or obtaining credit where it is uncertain that it can be repaid, may be dishonest in the eyes of some people but not others. Griew gives other examples:

theft at work (‘perks’), handling stolen goods being offered in the neighbourhood (‘from off the back of a lorry’), inflation of expense claims, inaccuracy or concealment in the income tax return.³⁵

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

III WHAT TYPE OF CONDUCT IS CLASSIFIED AS DISHONEST?

A *Factual Scenarios which may result in a finding that there was dishonesty*

Notwithstanding these difficulties it is possible to distil some common threads in the cases as the types of conduct and behaviour which point to conduct or a state of mind which may be seen as dishonest by ordinary people. These can be categorised as follows:

1 *Deception*

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

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false.³⁶

However as was made clear in *Scott v Commissioner for Police* [1974] 3 All ER 1032 dishonesty is not limited to cases involving deception.³⁷ Furthermore although there may be deception it may not be dishonest. For example it may not be dishonest if a person deceived another to obtain property to which they had a claim of right.

³³ E Griew, ‘Dishonesty: The objections to Feely and Ghosh’ (1985) *Criminal Law Review* 341, 344. See also generally, A Halpin, ‘The Test for Dishonesty’ [1996] *Criminal Law Review* 283 and D W Elliott ‘Dishonesty in Theft: A Dispensable Concept’ [1982] *Criminal Law Review* 395.

³⁴ Griew, *ibid* and Brent Fisse ‘The Cartel Offence; Dishonesty?’ (2007) 35 *Australian Business Law Review* 235.

³⁵ Griew, *ibid*, 46.

³⁶ This passage was cited by approval by the High Court in *Spies v the Queen* (2000) 201 CLR 603, 629.

³⁷ *Scott v Commissioner for Police of the Metropolis* [1974] 3 All ER 1032, 1036.

Alternatively, as is clear from *In re London Globe*, the person who caused the deception may not have been aware that the facts that they were conveying were false.

2 *Making or relying on representations or promises which the person knows are false or would not be carried out*³⁸

This was a category of conduct recognised by McHugh J in *Peters* as dishonest.³⁹ It would include making false representations to electronic machines such as Automatic Teller Machines. Although the case law is clear that machines cannot be deceived,⁴⁰ making a false or misleading representation to a machine or a computer would be caught by this category.

3 *Concealing facts which the person knew that they had a duty to disclose*

This was another category identified by McHugh in *Peters* as dishonest.⁴¹

However it appears that secrecy, without a duty to disclose, may not be enough to constitute dishonest conduct. By way of illustration, s 188 of the *Enterprise Act 2002* (UK) provides that a person will be guilty of a criminal offence if the person enters an agreement to form a cartel but only if he or she ‘dishonestly’ entered into the agreement. Two recent decisions from the House of Lords handed down on the same day held that the mere entry into a secret agreement with a competitor to fix prices, without aggravating elements such as misrepresentation, deception, violence, intimidation or inducement of breach of contracts, was not dishonest.⁴²

4 *Engaging in conduct which they knew they had no right to engage in*⁴³

In relation to this category McHugh J in *Peters* said the conduct could involve ‘a breach of duty, trust or confidence by which an unconscionable advantage is to be taken of another’ and gave two examples. The first was where company directors concealed a conflict of interest and the second was where company directors agreed to divert funds for their private purposes.⁴⁴

Another example is the factual scenario in *Scott v Commissioner for Police*⁴⁵ where an agreement with employees of a cinema to temporarily remove films without the consent of the employer, for the purpose of copying the films, was held to be dishonest. The employees were engaging in conduct which they had no right to engage in so were dishonest. The person who induced this behaviour was also held to be dishonest.

³⁸ McHugh J in *Peters v The Queen* (1998) 192 CLR 493, 529: which was cited with approval by the full High Court in *Spies v The Queen* (2000) 201 CLR 603, 631. *Peters* involved a conspiracy to defraud and the majority found that dishonesty was not a separate element of conspiracy to defraud but the defendant must have intended to prejudice another person’s rights or interests or the performance of a public duty by dishonest means. McHugh J set out these categories as examples of dishonest means.

³⁹ McHugh J in *Peters v The Queen* (1998) 192 CLR 493, 529. See also above n 38.

⁴⁰ *R v Fischetti* (2003) 192 FLR 119.

⁴¹ McHugh J in *Peters v The Queen* (1998) 192 CLR 493, 529. See also above n 38.

⁴² *Norris v The Government of the United States of America and ors* [2008] UKHL 16; *R v GG plc and ors* [2008] UKHL 17.

⁴³ McHugh J in *Peters v The Queen* (1998) 192 CLR 493, 529. See also above n 38.

⁴⁴ *Peters v The Queen* (1998) 192 CLR 493, 530.

⁴⁵ *Scott v The Commissioner for Police* [1974] 3 All ER 1032.

5 *Wilful Blindness*

It may be dishonest for someone to act with wilful blindness. Wilful blindness is where a person suspected the fact, realised its probability, but refrained from obtaining the final confirmation because he or she wanted to be able to deny knowledge.⁴⁶ However just because a person did not ask questions does not necessarily mean that the person is dishonest. Their conduct may be only careless or negligent. What appears to be critical is whether they consciously knew that it was likely they may find out something adverse. In *Twinsectra Ltd v Yardley* [2002] 2 All ER 377 the House of Lords confirmed that it was dishonest to deliberately close one's eyes and ears, or deliberately not ask questions, lest the person learn something that he or she would rather not know.⁴⁷ However on the facts in *Twinsectra* the House of Lords did not find that the conduct of the defendant was dishonest. Rather in that case the conduct of the defendant was said to be that he took:

a blinkered approach to his professional duties as a solicitor, or buried his head in the sand (to invoke two different animal images). But neither of those would be dishonest.⁴⁸

6 *Other indicia of Dishonesty*

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

For example the Canadian case of *R v Zlatic* [1993] 2 S.C.R. 29 involved a defendant who ran a clothing business. He obtained goods on credit from suppliers. He sold the goods to customers and used the proceeds to gamble. He eventually went bankrupt. He was charged with a general dishonesty offence in relation to creditors. The court held that dishonesty was defined by a reasonable person test, namely what a reasonable, decent person would consider dishonest and unscrupulous. The Canadian Supreme Court upheld the conviction.

Another example would be fixing a sporting event upon which bets are placed, for example 'doping a horse', bribing a sportsman or loading dice. However, merely inducing a person to play a game by pretending to be inexperienced may not be dishonest.⁴⁹

⁴⁶ Williams G, *Criminal Law: The General Part* (2nd ed, 1961) 159. This passage was quoted by the High Court in *R v Crabbe* (1985) 156 CLR 464, 470-471.

⁴⁷ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, 106: as cited by Lord Hoffmann in *Twinsectra v Yardley* [2002] 2 All ER 377, 383.

⁴⁸ *Twinsectra v Yardley* [2002] 2 All ER 377, 383. In that case the House of Lords had to consider whether the conduct of a solicitor, Mr Leach, was dishonest in accordance with the *Ghosh* test, ie according to the standards of reasonable and honest people, and whether he was aware that by those standards he was acting dishonestly. Mr Leach was a solicitor who acted for Mr Yardley in a transaction in which Mr Yardley received a loan of £1m from *Twinsectra*. Mr Yardley used another solicitor, Mr Sims, when dealing with *Twinsectra*. *Twinsectra* paid the loan funds to Mr Sims on the condition it only be used to purchase property on behalf of Mr Yardley. In fact Mr Sims paid the money to Mr Leach who in turn did not ensure that the funds were used solely to purchase property.

⁴⁹ *R v Governor of Brixton Prison ex parte Sjoland and Metzler* [1912] 3 KB 568. See generally The Law Commission of the UK *Fraud. Report on a reference under section 3(1)(e) of the Law Commissions Act 1965* (2002): available at <<http://www.lawcom.gov.uk/docs/lc276.pdf>> at 14 May 2009.

B *Factual scenarios which may result in a finding that there was no dishonesty*

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

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

If a defendant acts for pure self interest this may have the effect of persuading a jury that he or she was acting dishonestly. Conversely if a defendant acted for more altruistic reasons this may tend to suggest that he or she did not have a dishonest state of mind.

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

If the assets are used in the honest belief that the best interests of the company are being served by that use there is no fraud and it is irrelevant that such use incidentally brings a personal benefit to the director. If on the other hand a risk is taken in using the assets which no director could honestly believe to be taken in the interests of the company and which is to the prejudice of the rights of others, that is taking a risk which there is no right and is fraudulent.⁵⁰

A defendant could perhaps avoid a finding of dishonesty by showing that he or she entered into the transaction to prevent employee job losses or to prevent the demise of a particular industry.

2 *Is there a claim of right?*

If a person has a genuine belief that he or she has a bona fide claim to property that person may be held to be not acting dishonestly even if the belief is unreasonable and unfounded. However, although the claim of right need not be reasonable, the reasonableness of the claim will nevertheless be a factor in determining whether the person actually believed he or she had such a claim.⁵¹

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

If the matter concerns the taking of property, and there is a genuine belief on reasonable grounds that the person would be able to pay for the property or repay the loan, as the case may be, this may be an indication that the defendant was not acting dishonestly. It appears however that a mere 'pious hope' would probably not be sufficient.⁵² Furthermore, in the case of taking of property if the prosecution has to prove dishonesty it is generally not necessary that it has to prove an intention by an accused person to *permanently* deprive the owner of the property. Accordingly the mere fact that

⁵⁰ *R v Sinclair* [1968] 3 All ER 241, 246.

⁵¹ *R v Lawrence* [1997] 1 VR 459; *R v Fuge* (2001) 123 A Crim R 310. In some jurisdictions this consists of a specific defence at least for some offences see: *Criminal Code 1995* (Cth) s9.5; *Crimes Act 1958* (Vic) s73; *Criminal Code 1899* (Qld) s22; *Criminal Code* (WA) s 22; *Criminal Code* (NT) s30(2).

⁵² *Halstead v Patel* [1972] 2 All E.R.147.

the accused believed they were just ‘borrowing’ the property will not necessarily result in a finding that the accused did not act dishonestly.⁵³

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

In *R v Bonollo* [1981] VR 663, McGarvie J suggested, obiter dicta, that if there is a belief by a defendant that there would be no significant practical detriment caused by the defendant’s actions then this would not be dishonest.⁵⁴ He adopted the example used by Lawton LJ in *R v Feely* [1973] 1 QB 530 at 539 of an employee, in breach of instructions, taking money from the till to pay for a taxi for his wife because he had no small change but with the intention of immediately replacing it when he obtained the correct change.⁵⁵

IV HOW DO THE CURRENT TESTS FOR DISHONESTY IMPACT UPON LAWYERS AND THEIR CLIENTS?

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

If the question is whether the act was dishonest according to ordinary notions it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.⁵⁶

Accordingly, for lawyers advising clients they must be aware that any deviation from straightforward dealings may later be found by a jury to be indicative of dishonesty. A lawyer advising a client must steer his or her client towards conduct which will be judged by all as being ethical and straightforward regardless of the actual ethical standards of the lawyer or the client. In summary, the values and views of the lawyer and the client must be put to one side and the transaction viewed through the eyes of someone who expects the highest standards of probity.⁵⁷

Nor will the context in which the transaction has occurred always assist, nor the fact that that type of transaction conducted in that particular way is or was common in the

⁵³ See, *R v Glenister* [1980] 2 NSWLR 597. The rationale being that in introducing economic offence provisions the legislature was moving away from the restrictions of common law larceny which requires proof of an intention to permanently deprive the owner of the property.

⁵⁴ *R v Bonollo* [1981] VR 663, 659.

⁵⁵ *R v Bonollo* [1981] VR 663, 658.

⁵⁶ *Peters v The Queen* (1998) 192 CLR 493, 504. However Toohey and Gaudron JJ also said (at 510) ‘There may be cases where the evidence is such that, even though the issue is not specifically raised, it is necessary to instruct the jury that they must be satisfied that the accused neither had nor believed that he had a legal right to prejudice or imperil the rights or interests of the victim of the intended fraud’. See also, *Clark v R; Forge v R* [2004] WASCA 217 where the Western Australian Court of Criminal Appeal, following *Peters*, rejected an argument that the trial judge should have given the jury a long and detailed direction.

⁵⁷ Griew, see above n 33, 346, is critical of the fact that a jury may apply a standard higher than that which they, as individuals, would comply with.

industry. The conduct will be judged by a lay jury, not a jury of experts, and whilst evidence of context may be relevant and admissible, it is not conclusive and may be rejected by a jury.⁵⁸

A *Issues for a lawyer to consider*

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

1 *Transparency*

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

It is prudent to take this course whether or not it is apparent that the person is under a legal duty to disclose all relevant information. Although in many cases it may be obvious that there is a duty to disclose⁵⁹ there are other situations where a court may later decide there should have been full disclosure. For example, section 52 of the *Trade Practices Act 1974* (Cth) may apply or a court may imply a term in the contract or a court may declare that the relationship between the parties was such that one party was under a fiduciary duty to the other.⁶⁰

2 *No personal benefit or all personal benefits disclosed*

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

3 *No 'wilful blindness'*

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

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

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

⁵⁸ Griew, see above n 33, 45 is also critical of the fact that the tests of dishonesty do not take into account the 'contextual flavour'.

⁵⁹ For example, the provisions in the *Corporations Act 2001* (Cth) which require disclosure of all relevant information in prospectuses; as a result of an express term of a contract; the person is acting as a trustee.

⁶⁰ The categories where a fiduciary duty may arise are not closed; see, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

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

As referred to above a person may be subject to legal duties that give rise to obligations of disclosure. In addition to making full disclosure, if a person is under a legal duty they must comply with all this entails and refrain from any behaviour which is in breach of that duty or even conduct which is not consistent with the spirit of that legal duty.⁶¹

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

V THE USE OF DISHONESTY AS AN ELEMENT IN OFFENCES TO PROMOTE ETHICAL CONDUCT

As the above analysis shows, the addition of dishonesty as an element to an offence provision does add a degree of uncertainty to the law in that it can cause difficulties for lawyers in advising their clients as to whether their conduct may breach the law. Furthermore it can cause difficulties for prosecutors who cannot be entirely confident that if they proceed with a criminal prosecution what they allege is dishonest will, in fact, be accepted by the jury as being dishonest.

Accordingly, dishonesty as an element in commercial crime can be criticised and this criticism is not without merit if certainty in the law is the criteria by which the law is judged.⁶² Nevertheless the reality is that dishonesty remains as one of the key components of corporate crime and there seems to be a trend towards the enacting of dishonesty offences generally both within and beyond the corporate crime context.⁶³ A similar trend towards the introduction of general dishonesty offences is also occurring in the United Kingdom.⁶⁴ These types of 'fuzzy' offence provisions have the attraction of adding flexibility to the law by more effectively being able to address rapid changes in business practices, which may leave specific offence provisions behind. It is perhaps hoped that these offences can catch types of behaviours which fall outside of the boundaries of more specific offence provisions. These types of provisions may also provide less room for lawyers to engage in 'creative compliance' – where transactions are structured to comply with the letter of the law but the transaction itself goes against the spirit of what the law was trying to achieve.⁶⁵ Such offence provisions can also respond to calls for the volume of offence provisions to be reduced as they may allow a

⁶¹ For example a company director using their position to benefit someone other than the company.

⁶² Certainty is said to be one of the central tenets of the rule of law. For a discussion in relation to this issue see, J R Maxeiner 'Some Realism about Legal Certainty in the Globalization of the Rule of Law' (2008) 31(1) *Houston Journal of International Law* 21.

⁶³ For example of the *Corporation Act* 2001 (Cth) s1041G and of the *Criminal Code* 1995 (Cth) s135.1-135.4.

⁶⁴ See, *Fraud Act* 2006 (UK).

⁶⁵ In relation to 'creative compliance' see, D McBarnet and C Whelan, *Creative Accounting and the Cross-Eyed Javelin Thrower* (1999); John Wiley and D McBarnet 'After Enron will "Whiter than White Collar Crime" Still Wash?' (2006) 46 *British Journal of Criminology* 1091.

number of other more specific provisions to be repealed.⁶⁶ This, in turn, may lead to legislation becoming more concise and therefore more readily accessible.⁶⁷

Furthermore in corporate crime there is often a gap between what the public sees as morally wrong and what existing laws proscribe as unlawful.⁶⁸ For example in 1990 the legal firm Clayton Utz advised its client British American Tobacco Australia Service that, in effect, it could destroy documents which showed that company's knowledge of the dangers of smoking. This occurred in circumstances where there was no pending litigation and this destruction of the documents was eventually found to be lawful.⁶⁹ However it is likely that most people would regard the behaviour of the type undertaken by Clayton Utz as morally reprehensible.⁷⁰ Another example is the transfer of the business of the Australian publicly listed company James Hardie Industries Ltd from Australia to the Netherlands. This transfer was undertaken purportedly to move the company to a more favourable taxation environment. However the reality was far more sinister. The motivation was to separate the company from its asbestos related liabilities to the detriment of the public and, in particular, so that the company's assets were beyond the reach of existing and potential tort claimants.⁷¹ If dishonesty is included as an element in offences this may prevent or capture these types of reprehensible behaviours and bridge this gap between standards of morality and the 'black letter' of the law.

Another advantage of dishonesty as an element in corporate crime is that, as has been demonstrated by the analysis set out above, it should act to ensure that lawyers advise their clients to adopt the highest standards of ethical conduct to be certain that their client's conduct will not be seen as dishonest by anyone. Lawyers and their clients have to put to one side what they may regard as acceptable behaviour in the circumstances and ensure that their conduct cannot be seen on any view as dishonest. By adopting dishonesty as the key element in corporate crime this may operate to persuade or coerce lawyers and their clients to adopt high standards of probity in commercial transactions. It may also encourage lawyers to act 'responsibly' – to pursue a course of

⁶⁶ Regulation Taskforce *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006: available at <http://www.regulationtaskforce.gov.au/_data/assets/pdf_file/0007/69721/regulationtaskforce.pdf> at 15th May 2009.

⁶⁷ As the advantages of 'fuzzy' law see, Lisbeth Campbell, 'Legal Drafting Styles: Fuzzy or Fussy?' (1996) 3(2) *Murdoch University Electronic Journal of Law* and Justice Keith Mason 'The View From the Other Side – Judicial Experiences of Legislation' (paper delivered at the Fourth Australasian Drafting Conference, 2005): available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason_030805> at 15th May 2009.

⁶⁸ See, S P Green *Lying, Cheating, and Stealing, A Moral Theory of White-Collar Crime*, (2006).

⁶⁹ *British American Tobacco Australia Services Pty Limited v Cowell* (2002) 7 VR 524. Note however that new proceedings are pending: *British American Tobacco Australia Limited v Gordon & ors* (No2) [2009] VSC 77 and R Ackland, 'Rolah McCabe strikes back from the grave', *Sydney Morning Herald* (Sydney), 24 April 2009.

⁷⁰ For a discussion of this case see, J T Rush QC 'Documents, Defendants, Destruction: Lawyers' Ethics and Corporate Clients' (2006) 136 *Victorian Bar News* 28 and C Cameron and J Liberman 'Destruction of Documents Before Proceedings Commerce: What is a Court To Do?' (2003) 27 *Melbourne University Law Review* 273.

⁷¹ D.F Jackson Q.C *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation*, (September 2004): available at <http://www.dpc.nsw.gov.au/publications/publications/publication_list_-_new#11330> at 15th May 2009.

conduct which promotes the integrity of the legal system and one which complies with the spirit of the law.⁷²

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

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

VI CONCLUSION

It appears that lawyers and their clients will have to adapt to the fact that dishonesty has become a key factor in commercial crime and that with this comes an element of uncertainty. For lawyers advising their clients the only proper course is to advise their clients to adopt the highest ethical standards and behaviour so as to ensure that they will not subsequently be found to be dishonest.

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

⁷² For a discussion of the role of the lawyer to act as a 'responsible lawyer' see, C Parker 'A Critical Morality for Lawyers: Four Approaches to Lawyers Ethics' (2004) 30 *Monash University Law Review* 49 and W H Simon *The Practice of Justice: A Theory of Lawyers' Ethics* (1998) 138-169.