24 November 2017

Dear Taskforce

Thank you for the opportunity to make a submission on Positions Paper 7: Strengthening Penalties for Corporate and Financial Sector Misconduct.

Position 4: The Peters test should apply to all dishonesty offences under the Corporations Act

I would submit that:

a) There should be a single meaning of the term, at least in each jurisdiction and ideally nationally.
b) Common law interpretations of the term continue to vary wildly, and are subject to unexpected change.
c) The Model Criminal Code Officers Committee and the Commonwealth Parliament considered the meaning in detail, and rejected the common law approach in *Peters*.
d) The Taskforce should not perpetuate variant meanings of the term contrary to existing Parliamentary definition.
e) If there are issues with the term dishonesty, alternative fault elements should be used that clearly set out the expectations of corporate officers.

The confused common law approaches

The meaning of dishonesty remains controversial. In The Meanings of Dishonesty in Theft, (2009) 38 Common Law World Review 103 I charted the various approaches to its meaning. A point I sought to make in that paper was that there was an unacceptable degree of variation, and that to a degree the variation arose because of courts failing to fully consider or understand previous judgments. I therefore would strongly argue that Parliaments should make a considered decision to fully define dishonesty.

Despite the Parliamentary enactment of the *Ghosh* test in the *Criminal Code*, the failure to place that definition in Chapter Two has led to partial application of the test. In *S A J v The Queen* (2012) 36 VR 435, the Victorian Court of Appeal held that dishonesty in s 184(2)(a) of the *Corporations Act 2001* was to be interpreted according the test that emerged from the split decision in *Peters* (1998) 192 CLR 493, based on the English approach in *Feely*. However, Nettle JA noted:

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> Logically, it is difficult to imagine that Parliament intended the *Ghosh* test to apply the offences to which those sections are directed but not also the offence for which s 184(2) provides. That sense of disquiet is heightened by the preference for the *Ghosh* test expressed in the Explanatory Memorandum to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999* (Cth).

To confuse matters further, in *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 Bathurst CJ held:

> However, it must be remembered that s 184(1) uses the expression "intentionally dishonest". It seems to me that this expression imports as an element of the offence that the accused had knowledge that what he or she was doing or omitting to do, was dishonest. In *Marchesi v Barnes* [1970] VR 434, Gowans J stated that the meaning of not acting honestly for the purpose of s 124 of the *Companies Act 1961* (Vic) was a consciousness that what was being done was not in the interests of the company and deliberate conduct in disregard of that knowledge.
>
> In those circumstances, in my opinion, for a contravention of s 184(1) to be established, it needs to be shown that the act or omission in question was not done or omitted to be done in good faith or for a proper purpose and was dishonest by ordinary community standards known to be dishonest by the accused and carried out in disregard of that fact.

Basten JA made a similar finding. The effect of these decisions is practically to have a variant of the *Ghosh* test for s184(1) and the *Peters* test for s184(2)

The idea that there are different standards of offender awareness of wrongdoing within s184 is unfortunate, and largely a part of the Act's legislative pre-history.

The common law approach to dishonesty is similarly conflicted. The High Court in *Peters* in considering the test for dishonesty distinguished the Victorian interpretation in *Salvo* [1980] VR 401 as a "special" meaning, despite the wording of the provision in *Feely* and *Salvo* being identical. It also remarkable that both the High Court's decision in *Peters* was not a majority view, and the decision in Salvo followed with misgiving by subsequent Victorian appeal benches in *Brow* [1981] VR 783 and *Bonollo* [1981] VR 633.

Recently the United Kingdom Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 held the decision in *Ghosh* to be wrongly decided. This was despite nearly 30 years of decisions following *Ghosh*, and the fact that such a conclusion was not necessary for their decision. Their Lordships held that dishonesty in civil and criminal law was identical, was a jury question characterised more by recognition than definition and measured against ordinary standards. Such an abrupt change to settled law will have significant impacts.

There also remains a strong argument by Fullager J in *Salvo* that tests based solely on a community standard of dishonesty are destabilising:

> In my respectful opinion it is contrary to the most fundamental tenets and traditions of the common law, and of the English judicial system itself, that the judges of the

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> courts of law should set themselves up, or allow themselves to be set up, as judges of morals or of moral standards. … Feelings and intuitions as to what constitutes dishonesty, and even as to what dishonesty means, must vary greatly from jury to jury and from judge to judge and from magistrate to magistrate. In National Insurance Co. of New Zealand Ltd. v Espagne (1961) 105 CLR 569, at p. 572, Dixon, J. said: "Intuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions."

Although criticised on theoretical and practical grounds in *Peters*, the second limb of the *Ghosh* test ensures that imagined community standards of honesty must be sufficiently well-known for a defendant to have been aware of them. It operates as a brake on idiosyncratic views of community standards.

Parliament's approach to the test

The Explanatory Memorandum to the enacting legislation (*Criminal Code Amendment (Theft, Fraud, Bribery And Related Offences) Bill* 1999) stated:

> 57. An important concept in the Model Criminal Code offences is the fault element of 'dishonesty'. Subsection 14.2(1) contains a straight-forward definition which was developed by the courts and is known as the *Ghosh* test. The *Ghosh* test is a familiar concept in Australia because until February 1998, it had been used in all jurisdictions, both common law and Code, in relation to conspiracy to defraud and in most jurisdictions, including the Commonwealth, in relation to the main fraud offences (s.29D and s71(1) of the *Crimes Act* 1914 which use the fault elements of 'defraud' and 'fraudulent'). In *Peters v R* (1998) 151 ALR 51 the High Court held that the *Ghosh* test was no longer appropriate and developed a new test which does not include a subjective component.
>
> 58. The approach in *Peters* is not favoured because it is necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing.
>
> 59. Paragraph (a) of the definition of 'dishonest' seeks to achieve this by linking the definition of dishonesty to community standards (this is not novel, whether a person is negligent is assessed by a jury on the basis of what the reasonable person would have done in the circumstances).
>
> 60. Paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the *Criminal Code* is to be true to the principle that for serious offences a person should not be convicted without a guilty mind. It reflects a preference for the law which existed prior to the 1998 decision of the High Court in *Peters* and is particularly important to the *Criminal Code* because it has additional offences which rely on 'dishonesty' even more so than the *Model Criminal Code* offences (see

> proposed sections 132.8, 135.1 and 135.2). The proposed definition was preferred over the *Peters* approach by the Standing Committee of Attorneys-General at its April 1998 meeting.

This clear and considered statement by the Parliament, and subsequent adoption by the NSW Parliament. The Second Reading speech noted:

> The Model Criminal Code definition of dishonesty has been adopted, so that the mental element of dishonesty means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to those standards. This definition will apply to offences in the Crimes Act that involve dishonesty, and was recommended by the Model Criminal Law Officers Committee. It was supported [sic] by the High Court in the case of Peters v the Queen and has been adopted in the Commonwealth Crimes Act. Its adoption will particularly assist juries in hearings containing charges for both Commonwealth and New South Wales offences.

Proposal

I have argued at length in 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* that the *Peters* test creates an unfortunate hybrid test that is unstable. Despite the High Court's adoption of it, the test is no more defensible than other tests. A choice needs to be made between dishonesty being an objective characterisation of an act - ideally by some clear external standard such as the way drugs are the identified as illegal by a list of substances – or as a mental fault element based on a defendant's awareness of their wrongdoing.

In light of the above I would submit that the Taskforce either adopt the Criminal Code definition throughout the Corporations Act, or seek to have an alternative test adopted throughout all Commonwealth legislation.

If there is a concern that the Criminal Code test makes conviction difficult, the Taskforce should consider the removal of dishonesty as a fault element and its replacement with another clearer element. If the Taskforce wishes serious criminal offences committed by corporate officers to be offences that are capable of being committed without knowledge that the acts undertaken are unlawful, the Taskforce should recommend that liability be on a recklessness or negligence basis.

By way of example, if the Taskforce were to continue to support a *Peters* style form of dishonesty, it would be clearer to reword s184(2)(a) in the following terms:

> (2) A director, other officer or employee of a corporation commits an offence if they use their position with the intention of directly or indirectly gaining an advantage for themselves or the corporation, and are:
>
> (a) reckless as to whether their actions fall below the levels of probity that can be reasonably expected of corporate officers

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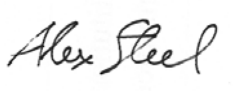
Probity may not be the best word here, but my suggestion is that framing offences in this way unpacks the vagueness of dishonesty into clearer mental elements and expected standards.

I would however argue that in the calendar of offences, a suite of the most serious offences should remain with a full requirement of advertent morally-based dishonesty. These offences would then capture the deliberately and egregiously criminal. If there are issues of enforcement for situations that are not as clear cut, it may well be that reckless or negligent behaviour is an appropriate second tier of criminality.

Yours sincerely



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