An appropriate test for dishonesty?

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Introduction

“Gummow J: Look, what has been said in other courts in Australia does not bind us, that is what I trying to get at you. The question is what we are going to do about the problem. The question is: what submissions do you make?"1

The recent history of the meaning of dishonesty in property offences has been marked by differences of interpretation between courts and jurisdictions, particularly those of England and Victoria. In Peters v The Queen2 the High Court attempted to resolve these differences and uncertainties, but was unable to come up with a true majority opinion on the point.

Professor C R Williams, in “The Shifting Meaning of Dishonesty”3, reviewed the development of the English and Victorian approaches to the meaning of dishonesty and outlined the decision in Peters. He pointed out the differences between the approaches in Peters and the approach taken in the English cases. Professor Williams noted that the High Court’s judgment in Peters appeared to preserve a limited role for the Victorian approach to dishonesty (in cases where the offence refers to “dishonesty” in a special sense), but argued that there was no sound basis in principle for preserving such a dichotomy. He therefore favoured the general adoption of the High Court’s approach in Peters.

However, as discussed below, the authority of the High Court’s decision in Peters is constituted by a technical majority, and represents the view of only two members of the Court. Further, it appears that the leading judgment contains a number of inconsistencies which are explored in this article.

Finally, the Federal Parliament currently has before it the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999. This Bill rejects the Peters analysis of dishonesty. It proposes in cl 14.2 of the Schedule to the Bill to enact in legislative form the English test of dishonesty.4 This is despite the English

4 This would become section 130.3 of the Criminal Code (Criminal Code Act 1995). See also the Explanatory Memorandum at para 57. Unfortunately discussion of this Bill is beyond the scope of this article. However note should be made of the proposed new dishonesty offences to be incorporated as Division 135 of the Criminal Code. These offences will require no more than that accused acted dishonestly in a way that caused a gain to the accused or a loss to the Commonwealth. Dishonesty will therefore be the essence of the criminality and be determined,
approach being criticised in a recent Consultation Paper by the Law Reform Commission of England and Wales. In the light of this it may be appropriate to question the High Court’s approach and to suggest alternatives. This article thus seeks to examine the various approaches in some depth, and attempts to point a way forward for Australian law following the decision in Peters.

The background to Peters

Following the passing of the English Theft Act 1968 larceny was replaced with a new statutory crime of theft, and the element of “fraudulently” replaced with “dishonestly”. The new word provided a springboard for English courts to attempt to provide guidance to trial judges on how to direct juries to make findings of dishonesty. This culminated in two Court of Appeal decisions, Feely and Ghosh. Feely is seen to have proposed an objective test for dishonesty, encapsulated in the words of Lawton LJ:

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

But in Ghosh this test was refined into a two stage test, emphasising a second subjective aspect of dishonesty. The “Ghosh test” was expounded by Lord Lane CJ to be:

“[A] jury must first of all decide whether according to the ordinary 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.”

In Victoria, which enacted into its Crimes Act 1958 provisions replicating the English Theft Act, the courts have declined to follow the Ghosh approach, instead opting for a more restricted meaning based on a lack of a claim of right. This is encapsulated in the words of Fullagar J in Salvo:

“In my opinion ‘dishonestly’, in this statute, is used in that sense of ‘with disposition to defraud’ which means ‘with disposition to withhold from a person what is his right’ and in the special context [of obtaining by deception] thus imports into the offence the element that the actor must obtain ‘the property’ without any belief that he himself has any legal right to deprive the other of it.”

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7 [1982] 2 All ER 689.
8 [1982] QB 1053 at 1064.
9 [1980] VR 401 at 432; 5 A Crim R 1 at 23.
Dishonesty in Australia – *Peters v The Queen*

Peters was charged with conspiracy to defraud the Commonwealth and appealed from his conviction on the grounds that the jury had been wrongly directed in relation to dishonesty or intent to defraud. While the court agreed on the meaning of “defraud”, they split three ways in their decision on the role and meaning of dishonesty in the offence. However a majority was formed by an unusual retraction by Kirby J.

Justice Kirby was the only judge to find dishonesty to be a separate, essential element of conspiracy to defraud. The other four judges found dishonesty to be instead an aspect of the elements of the offence. However, they split on whether dishonesty was an issue to be left to the jury. Justice McHugh, with whom Gummow J agreed, held that it was for the trial judge to determine whether the alleged means used by the accused were dishonest and that it was “not for the juries by defining dishonesty to hold what is or is not a conspiracy to defraud”. They therefore found it unnecessary to discuss the appropriate test for dishonesty.

Justices Toohey and Gaudron, in a joint judgment, held that in cases where the accused’s defence denied dishonest behaviour, dishonesty was an issue for the jury to decide and was an aspect of both the agreement to use dishonest means and the intention to place another’s interests at risk. Whether both these elements were dishonest was a question for the jury and the justices formulated a test for dishonesty which rejected in some measure the *Ghosh* test, but which retained some reference to ordinary community standards.

Kirby J held that dishonesty was a separate, essential element of the offence, and in a strongly worded judgment, argued for an entirely subjective approach to determining dishonesty. However, for the purposes of a majority, he withdrew his reasons and agreed with Toohey and Gaudron JJ.

**Criticisms of the *Ghosh* test**

In their judgment the majority (Toohey and Gaudron JJ, with whom Kirby J technically agreed) criticised the *Ghosh* test for dishonesty as artificial in its reference to the standards of ordinary, honest persons in that such persons when acting as jurors (presumably, unless otherwise instructed) judge another person’s dishonesty, not by any general standard, but by that person’s actual knowledge.

“That incongruity comes about because ordinary, honest persons determine whether a person's act is dishonest by reference to that person's knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done. They do not ask whether he or she must be taken to have realised that the act was dishonest by the standards of ordinary, honest persons. Thus, for example, the ordinary person considers it dishonest to assert as true something that is known to be false. And the ordinary person does so simply because the person making the statement knows it to be false, not because he or she must be taken to have realised that it was dishonest by the current standards of ordinary, honest persons.”

10 *Peters v The Queen* (1998) 192 CLR 493 at 541; 96 A Crim R 250 at 287.

11 Ibid at 531; 278.

12 Ibid at 503; 255.
This statement highlights what is probably in practice a major inconsistency in the Ghosh idea of dishonesty. If, as suggested by the approach taken in the English case of Roberts, the Ghosh direction is not to be used unless the accused raises a defence of naïve honesty, then the lack in all other cases of direction from the bench as to how the jury should arrive at a definition of dishonesty will mean that the jury will most likely decide such cases on the evidence of the accused’s actual knowledge. In other words, the jury will blithely adopt a subjective test, not having been informed by the bench that there is authority that they should not be approaching the issue in this way. Yet if the accused raises a defence of naïve honesty that belief will be tested against a much harsher standard, based on the jury’s own conception of what they would have done in the circumstances—or more correctly, and possibly a higher standard, what they would have done if they were acting as ordinary decent people.

Consequently, it is in the accused’s interests to claim that he or she was acting in an entirely honest way throughout, but not to admit to a confused idea of public standards of honesty, as the accused did in Roberts.

Justices Toohey and Gaudron also criticised Ghosh as having practical problems. Their first point was that:

“[I]n most cases where honesty is in issue, the real question is whether an act was done with knowledge or belief of some specific thing or with some specific intent, not whether it is properly characterised as dishonest. To take a simple example: there is ordinarily no question whether the making of a false statement with intent to deprive another of his property is dishonest. Rather, the question is usually whether the statement was made with knowledge of its falsity and with intent to deprevie.”

The court’s statement may come as somewhat of a surprise to supporters of the House of Lords decision in Director of Public Prosecutions v Gomez which has, for the purposes of the English Theft Act, effectively elevated the test of dishonesty to the heady heights of almost making other elements of theft otiose, but the High Court must be correct. The vast majority of prosecutions for property offences in the lower courts only ever really consider issues of dishonesty when a lack of dishonesty is raised by the defence. While judges will mention dishonesty or fraudulence (in common law jurisdictions) in their directions to the jury, the overwhelming concentration is on the elements of the actus reus and the inferences as to the state of mind that can be drawn from them. Thus, the Ghosh test for dishonesty if applied, will have the effect of distracting the jury from the major issues in the case. However, as noted above, if there is no direction on dishonesty, then the jury is likely to apply a subjective test.

13 (1987) 84 Cr App R 117. Roberts was a case concerning the handling of stolen goods. The Court of Appeal held that the Ghosh direction was not required because the appellant had not specifically raised a defence that he believed he was acting honestly.

14 Peters v The Queen (1998) 192 CLR 493 at 503; 96 A Crim R 250 at 255.

15 [1993] AC 442. The court held that under the definition of theft in s1 of the Theft Act 1968 (UK) no proof of lack of consent was required. All that is required is a dishonest appropriation of any (it need not be all) of the rights of the owner.

16 So much so that the Law Commission could state at para 3.17:

“When a person selects a newspaper to buy at a newsagent’s, he or she has committed all the elements of theft save for dishonesty.”
Still, the majority recognised that the issue of dishonesty could, in rare cases, be of importance:

“Of course, there may be unusual cases in which there is a question whether an act done with knowledge of some matter or with some particular intention is dishonest. Thus, for example, there may be a real question whether it is dishonest, in the ordinary sense, for a person to make a false statement with intent to obtain stolen property from a thief and return it to its true owner.”17

In such cases however, they argued that there are two separate issues to determine. The first is the need to decide if the accused had the requisite state of mind alleged by the prosecution, and then secondly, if such a state of mind in fact falls within the concept of dishonesty required by the offence. Ghosh,18 they held, conflates these two different issues. Rather:

“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.”19

**General and special meanings of dishonesty**

Justices Toohey and Gaudron also felt that offences involving dishonesty were not all similar. While they accepted that there were some offences, such as conspiracy to defraud, in which dishonesty has a general, undefined meaning they held that often offences have a specialised meaning of dishonesty. Consequently, there is often a need for the trial judge to explain to the jury the specialised meaning of dishonesty:

“If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if ‘dishonest’ is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest.”20

Such a specialist meaning they found to have been the basis of the Victorian Court of Appeal’s decision in *Salvo*21 in which the accused was charged with “by deception dishonestly obtaining” a motor vehicle. Their Honours appeared to accept that the Victorian court had been correct in holding that the specialised form of dishonesty in this offence was an obtaining without any belief of a legal right to

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18 [1982] 2 All ER 689.
19 *Peters v The Queen* (1998) 192 CLR 493 at 504; 96 A Crim R 250 at 255.
20 Ibid at 504.
deprive the other of the property. On the other hand they held that Ghosh\textsuperscript{22} had been concerned with a general form of dishonesty.

“It need hardly be said again that a statute establishing an offence may use the term "dishonestly" in its ordinary meaning (as in Ghosh) or use it in a special sense (as in Salvo).”\textsuperscript{23}

This conclusion however, is puzzling, as Ghosh and Salvo were both charged under identical sections.

Ghosh was charged under ss 20(2) and 15(1) of the English Theft Act 1968.

Section 20(2) states:

“A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years.”

Section 15(1) states:

“A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.”

The decision in Ghosh discusses the meaning of dishonesty generally, with no distinction between the two sections. Thus the conclusions of the judges apply to offences under s 15. Salvo was charged under s 81(1) of the Crimes Act 1958 (Vic).

Section 81(1) states:

“A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of felony and liable to imprisonment for a term not exceeding ten years.”

This is in identical terms to s 15(1) of the English Theft Act 1968. That Toohey and Gaudron JJ could come to their conclusion that the word “dishonestly” is used in a general sense in s 15(1) and in a specific sense in s 81(1) is puzzling. It would be explicable if they were to affirm both tests and find one test was misapplied on the facts, but their judgment instead suggests that they rejected both tests, preferring their own.

If one looks at the decision in Salvo,\textsuperscript{24} the reason Fullagar J found a specialised meaning for dishonesty was because:

“I consider that express provisions of the statute like ss 73(1), 73(2), 81(1) itself and 81(3) make it clear that the word ‘dishonestly’ in the Act is used in a special sense and not in its [general] meaning of ‘discreditably as being invariance with straightforward or honorable dealing’...s 81(1) contemplates an obtaining by deception (with intent to permanently deprive) which may be accomplished honestly. Next there are the express glosses on the word ‘dishonestly’ contained

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\textsuperscript{22} [1982] 2 All ER 689.

\textsuperscript{23} Peters v The Queen (1998) 192 CLR 493 at 510; 96 A Crim R 250 at 260. The High Court’s footnotes have been converted into parentheses.

\textsuperscript{24} [1980] VR 401; A Crim R 1.
in s 73, in the form of deeming clauses, and with the presence of these glosses must be coupled the fact that most of the glosses, including especially s 73(2)(a), are not to apply to s 81(1) at all, an intention stated by s 71(1) and intractably affirmed by s 81(3).”

What this passage, and its later elucidation, confirm is that Fullagar J’s idea of a special meaning for dishonesty is a restriction in its scope. He is pointing out that the places that the jury can look to find evidence of dishonesty are limited. They cannot look at the deception itself, and they must disregard the various forms of belief found in s 73. Thus, when Fullagar J comes to state the “specialised” meaning as a lack of claim of right, he is in fact not formulating a specialised meaning, but merely reiterating one of the traditional ideas of the meaning of fraudulently. All that is special is the need to explain the jury the precise nature of where the jury can look to find the dishonesty.

The explanation of the elements of dishonesty found in conspiracy to defraud by Toohey and Gaudron JJ in Peters also shows some confusion over the meaning of “general” and “special” meanings of dishonesty. They held:

“But when 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 imperiling existing legal rights or interests of others. That, too, is dishonest by ordinary standards.”

It seems that their Honours are suggesting conspiracy to defraud requires dishonesty according to general standards. The judgments in Peters do not outline what any “ordinary standard” of dishonesty might be. Presumably they would agree with Fullagar J’s description in Salvo of the ordinary meaning of dishonesty to be “discreditably as being in variance with straightforward or honourable dealing”. However Fullagar J himself rejected the application of such a definition and held that a more limited notion of dishonesty was meant by its use throughout the Victorian Crimes Act 1958. He held:

“In my opinion, ‘dishonestly’, in this statute, is used in that sense of ‘with disposition to defraud’ which means ‘with disposition to withhold from a person what is his right’ and in the special context [of s 81(1)] thus imports into the offence the element that the actor must obtain the ‘property’ without any belief that he himself has any legal right to deprive the other of it.”

Note that this passage emphasizes that for the purposes of the Crimes Act 1958 (Vic) dishonestly does not have any new undefined meaning but instead is synonymous with the common law idea of defrauding, and as discussed below, is linked to economic or legal interests. Secondly the “special meaning” of s 81(1) relates to the obtaining of the property and not the meaning of dishonesty.

25 Ibid at 429; 20.
27 Ibid at 509; 260.
29 Ibid at 432; 23.
Despite the justices’ statements, a close analysis of Toohey and Gaudron JJ’s definition of the elements of dishonesty for the offence of conspiracy to defraud (quoted above) reveals that two highly specific forms of dishonesty are required. In so doing they come very close to the approach adopted by Fullagar J in Salvo.30 Their “ordinary” definition of “dishonest means” in fact defines dishonesty as use of means that the accused “know they have no right to use or do not believe they have any right to use”. This is virtually identical to a lack of a claim of right.31 The second form of dishonesty is found in the intention to defraud, which they hold is to imperil another’s legal or economic interests. This is apparently also dishonest according to “ordinary standards”. However, an intention to imperil another’s rights or interests is the basis of the more expansive definitions of the so-called “special” definitions proposed by King CJ in Kastratovic32 and by McGarvie J in Bonollo33 (discussed below). In light of their definition of dishonesty in ways that they had previously labelled as special, it is unclear how they can conclude by stating that these definitions are defined according to “ordinary standards”.

**Ordinary decent people**

Another problem with the judges’ reasoning is that although they begin by pointing out the artificiality of instructing a jury to construct a hypothetical “decent, honest person” standard they conclude that the characterisation of beliefs as dishonest, when used in an ordinary way in an offence, are still to be determined by reference to “ordinary standards”.

Exactly what this concept of an ordinary standard constitutes is also problematic. Counsel for Peters made the following comment in the hearing before the High Court:

“Kirby J: What is your answer to the ‘Robin Hood’ defence, that is to say that everybody else in society would think this was dishonest, but this particular accused has this theory of his own that he can go ahead and do something because he does not like Australia's drug laws or does not like its tax laws or - - -

Mr Priest: Yes. If the Earl of Locksley was tried by a jury of bishops whose purses he had unloaded, then I am sure he would be convicted. If, however, he was tried by a jury of serfs who had received his largesse, I am sure the result would be different, and therein lies one of the problems about leaving it to juries to determine what dishonesty is because there is a fallacy that there is some sort of community norm and there may or may not be.”34

31 The non-ordinary instances would probably fall within McGarvie J’s expanded definition of dishonesty discussed below.
As Professor Griew noted in 1985:

“[The test] implies the existence of a relevant community norm. In so doing it glosses over differences of age, class and cultural background which combine to give the character of fiction to the idea of a generally shared sense of the boundary between honesty and dishonesty. This is most obvious in a society with the range of cultural groups that ours now has; and it is the more relevant since jury service was extended to the generality of electors between 18 and 65. It is simply naive to suppose—surely no one does suppose—that there is, in respect of the dishonesty question, any such single thing as ‘the standards of ordinary decent people’.35

As Kirby J pointed out in his dissenting judgment, the reference to “ordinary decent people” by Lawton LJ in *Feely*36 may not have been intended to create any form of standard:

“In its context, it seems fairly clear to me that Lawton LJ, in the passage cited from *Feely*, was not proposing the imposition of a legal gloss on the meaning of dishonesty so that the concept was to be judged by reference to objective standards. That suggestion would have been completely inconsistent with the opening passage of his remarks where it was proposed that no judicial definition of ‘dishonesty’ should be proffered at all. All that his Lordship was saying was that, as a matter of commonsense, the community could trust juries to apply ‘current standards of ordinary decent people’. It could do so because juries, by hypothesis, were generally made up of just such people—ordinary and decent; reasonable and honest.”37

Use of the phrase as a standard in *Ghosh* was therefore a mistaken reading of Lawton LJ’s remarks.

The problems of community norms of behaviour are most obviously encountered in corporate fraud cases. One need only imagine entrepreneurial accused arguing, as a defence to dishonesty, long hours of work and a belief that as they had built the company they were entitled to disregard what they considered the unnecessary minutia of corporate regulation. Giving a jury no guidance on what the standards of conduct are in such cases is a recipe for inconsistency. It was a fear expressed by Professor Griew over ten years ago:

“The *Feely* question is in any case unsuitable where the context of the case is a specialised one, involving intricate financial activities or dealings in a specialised market. It is neither reasonable nor rational to expect ordinary people to judge as ‘dishonest’ or ‘not dishonest’ conduct of which, for want of relevant experience, they cannot appreciate the contextual flavour. Their answer to the *Feely* question ought sometimes to be that ordinary people have no standards in relation to the conduct in question.”38

37 *Peters v The Queen* (1998) 192 CLR 493 at 545; 96 A Crim R 250 at 290.
38 Griew, op cit n 35 at 345.
As an example, consider the case of *Abberton*. In that case the accused had realised that the accounts which he was required to keep were not matching up with the amount of money that was in his employer’s bank account. Worried that he might be dismissed for allowing this to occur he falsified the records for a period of time, hoping to catch the thief. But the court found that such actions nevertheless constituted false accounting, on the basis that an intent to defraud was based on the effect on the victim, not on the motives of the accused.

If the issue had been left to the jury, and they had been directed to decide guilt on the basis of a concept of dishonesty according to ordinary decent people, they conceivably could have been faced with the dilemma that Abberton’s actions were in fact a normal reaction by an ordinary decent person in a position of great stress. The test as expressed by the High Court refers to notions of ordinariness and decency, not morality and reasonableness. Thus an ordinary decent person in a period of great strain might begin to behave in unreasonable ways – to what extent then can the situation of the accused influence the ordinary decent standard?

Halpin makes the same point in relation to the Guinness trials. The Guinness trials concerned the actions of the directors of the Guinness group of companies in setting up a share support scheme during a contested takeover. The British chief executive of Guinness, Saunders, was convicted of theft of money from the company to finance the scheme in circumstances where he had made no personal gain. The court found he had acted honestly until the very end when he “had got sucked into dishonesty by the ethos of the bitterly fought contested takeover”. On the other hand, Ward, also a director of Guinness, but a United States corporate lawyer, was acquitted – even though he personally made a £5.2 million success fee. Halpin suggests this may have something to do with evidence that Ward’s actions were standard procedure in the United States, the implication being it was honest according to the ordinary standards of United States corporate lawyers.

On the other hand the findings of a previous investigation by the Licensed Dealer’s Tribunal into a similar share support scheme had found:

“There is nothing intrinsically improper in the purchase and sale of shares in the market under an indemnity arrangement entered into between a dealer and a third party.”

If this report had been available at the Saunders trial he might also have been acquitted on the basis that the Report provided evidence of the concepts of dishonesty of ordinary British share traders, and that according to them Saunders had acted honestly.

Considerations such as these highlight the problem, noted by Campbell, that the jury are asked to come to a factual conclusion on a subject that is not explicitly the

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39  [1931] VLR 237.


41  Quoted in Halpin, op cit n 40 at 291.

42  Halpin, op cit n 40 at 290.


subject of evidence before the court. How does a jury come to an understanding of community norms without any evidentiary guidance, or without directions as to the permissibility of relying on evidence produced at the trial for other purposes? They are fact-finders applying community-derived commonsense, not sociologists with an intimate knowledge of societal beliefs and attitudes. If they are to be asked to make a factual finding on what the ordinary decent notion of dishonesty is, they would require evidence on which to base their finding. Otherwise we face the prospect of the return of a form of Grand Jury.

The Law Commission takes the same view of the issues. Their comments are worth quoting at length:

“5.11 The Ghosh approach requires fact-finders to set a moral standard of honesty and determine whether the defendant’s conduct falls short of that standard. The argument in Feely (which first laid down the approach developed in Ghosh) is that this is a purely semantic enquiry: ‘dishonestly’ is an ordinary English word, and, as presumably competent users of English, fact-finders can be expected to know what it means. But it is also a moral enquiry, and requires the making of a moral judgment. To say that something is dishonest is to characterise the existing facts, not add another fact. This, we believe, is an unusual kind of requirement in English criminal law. …

5.13 … Dishonesty is not quantifiable, even in theory. The relative blameworthiness of (say) minor theft from an employer and failure to disclose part of one’s income to the tax authorities is entirely a matter of opinion. The fact-finders are required not merely to place the defendant’s conduct at an appropriate point on the scale, but to construct their own scale. …

5.15 That like circumstances should be treated alike is fundamental to fairness and the rule of law. The result of our analysis of dishonesty is that the use made of the concept in the law must result in endemic inconsistency. …

5.17 The test in Ghosh provides a way for fact-finders to apply the ‘ordinary standards of reasonable and honest people’, presumably by applying their common understanding of the word. But this amounts to an appeal to a unified conception of honesty which we do not think is workable in modern society. We live in a heterodox and plural society which juries (and to a lesser extent magistrates) presumably replicate. To assume that there is a single community norm or standard of dishonesty, discernible by twelve (or even ten) randomly selected people of any age between 18 and 65, and of widely varied class, cultural, educational, racial and religious backgrounds, is unrealistic. How juries cope with these problems we cannot tell, given the prohibition on research into jury discussions. It seems inconceivable, however, that different juries do not come to different decisions on essentially similar facts. These are not perverse verdicts, because individually they are the result of the jury correctly applying the law. Such verdicts have been described as ‘anarchic’, because they are the result of the jury being asked ‘a question of moral estimation without guidelines’ …

5.20 Our provisional view is that juries and magistrates should not be asked to set a moral standard on which criminal liability essentially depends. As a general rule, the law should say what is forbidden, and that should be informed
by moral insights. A jury or magistrates should then be asked to apply the law by coming to factual conclusions, not moral ones.\footnote{45}

Further, the High Court, in appearing to revert to the \textit{Feely} formulation of “ordinary, decent people” instead of the \textit{Ghosh} idea of “the ordinary standards of reasonable and honest people” permits argument over whether there is a difference between decency and honesty—whether ordinary, decent but mildly dishonest people have standards that reflect their behaviour or whether those standards are ones they expect of other people but not themselves; and whether one can be unreasonably honest.

\section*{Is dishonesty a subjective standard?}

One of the arguments in favour of the \textit{Feely/Ghosh} test of ordinary decent people defining dishonesty is that it avoids a wholly subjective standard of dishonesty. In \textit{Peters},\footnote{46} Kirby J rejected such arguments and argued strongly for a subjective approach. He felt juries could be trusted to discern implausible claims of honesty and that:

\begin{quote}
“Fear of hordes of modern Robin Hoods, galloping into the courtrooms of the nation, in company with anti-vivisectionists, environmentalists and other people affirming minority beliefs (so often raised as a spectre in these cases) should neither be exaggerated nor overstated.”\footnote{47}
\end{quote}

He continued:

\begin{quote}
“The injection of an objective criterion as contemplated by the ruling in \textit{Ghosh} cuts across one of the basic principles of our criminal law. Without the specific authority of Parliament, the courts should not invent such an exception. To do so is to countenance the punishment of an accused on the basis of a criminal intention derived from a fiction based on objective standards rather than on the foundation of the accused’s actual intention, subjectively held at the time of the criminal act charged. Such a departure from principle could certainly be achieved by statute. No doubt it would be applauded by some. But it is out of harmony with one of the most fundamental concepts—perhaps the most fundamental idea—of the criminal law of this country. If such a principle were to be adopted it would have to be done by a Parliament and not by a court declaring the common law in Australia.”\footnote{48}
\end{quote}

Instead, he argued:

\begin{quote}
 “[In the present case] instead of telling the jury, as \textit{Ghosh} and its Australian acolytes required, that they had to ascertain whether the appellant had acted dishonestly by reference to ‘the ordinary standards of reasonable and honest people’, it would have been the judge’s duty to focus the minds of the jury on what the appellant himself in fact believed as to the means chosen to achieve the agreement found. If he believed that he had a legal right to act as he did, if he
\end{quote}

\footnote{45} The Commission’s footnotes have been omitted.

\footnote{46} (1998) 192 CLR 493; 96 A Crim R 250.

\footnote{47} Ibid at 552; 296.

\footnote{48} Ibid.
believed that that he was not acting in breach of any legal obligations or if he had no dishonest intention to act in a way to impede the Commissioner of Taxation in the lawful collection of tax from the client, the means chosen to achieve the purposes of the agreement would lack the element of dishonesty necessary to establish its character as one of defrauding the Commissioner. The search is for the accused’s intention as well as for his actions. It was not just the intention to enter an agreement with the alleged co-conspirators but the intention to enter an agreement intended to be achieved by dishonest means which alone would warrant criminal punishment.49

The Ghosh approach asks a juror to imagine the “ordinary standards of [a] reasonable and honest” person and then apply that fiction to the beliefs of the accused. The Peters “ordinary standards” approach of testing dishonesty by the standards of “ordinary, decent people” seems to say much the same thing, but raises questions of whether ordinary people must be honest or reasonable, issues that are likely to confuse a jury. Justice Kirby’s approach does not prescribe any technique, instead emphasising solely the state of mind of the accused. But of course jurors, knowing that they are the accused’s “country” recognize that they represent society and will already be filtering their views through perceptions of societal norms.

Such filtering will be unavoidable. After all, the jurors need something to measure an accused’s claimed beliefs against. But if the jury are told to construct a model of societal norms before they can look at the accused’s behaviour they will be highly likely to spend much of their energies constructing an unreviewable and secret model against which the accused is judged. In any event such models can probably not be constructed for pluralist societies.

Thus while the end result will often be the same, Kirby J’s approach has the benefit of not emphasising the technique of evaluation over the aim of evaluation and reinforces the criminal law’s fundamental requirement for individual guilt. Its flaw is that it leaves the jury at large to construct methods of judging the accused’s dishonesty. However, it focuses the jury’s attention on evaluating the claims of dishonesty or honesty as they arise from the evidence.

Defining dishonesty

Section 1(1) of the English Larceny Act 1916 defined larceny to (relevantly) be an action done “fraudulently and without a claim of right made in good faith”. The long and confused history of the mental element of larceny50 divides along the question of whether “fraudulently’ in fact adds anything to a lack of claim of right. It seemed to be settled by 1815 that both concepts were interchangeable.51 However the words of the 1916 Act gave rise to some controversy over the issue and led to Williams52 and Cockburn53 in which different views were expressed. The 1968 Act attempted to

49 Ibid at 553; 297.
51 Holloway (1849) 3 Cox 241 at 244.
resolve the controversy by substituting the concept of dishonesty as a required element of theft–dishonesty intended to be a more understandable synonym of fraudulently—and also enacted that for most offences a claim of right would negative any dishonesty.\textsuperscript{54}

The continuing problems over this undefined concept of dishonesty however, suggests that a return to a more technical concept based on a lack of claim of right is warranted. The Law Commission has expressed a tentative view that the separate element of dishonesty in deception and theft is a mistake and that the law should instead revert to merely a defence of claim of right:

“7.52 More generally, we are not aware of any other area of criminal law which recognises an open-ended defence that the conduct in question is morally blameless. The general approach in English law is for the elements of the offence to spell out the conduct it is sought to criminalise, and similarly to provide defences by specifying excusable forms of conduct which would otherwise be caught. There is no specific requirement of morally blameworthy conduct in the law of (for example) assaults, sexual offences, corruption or criminal damage. Even in the case of forgery (an offence closely analogous to deception) a person who satisfies the statutory requirements is guilty of the offence, irrespective of moral blame. If a bank cashier says that a form needs a customer’s husband’s signature, and the customer forges that signature in order to save time, knowing that her husband would sign if he were present, it is not a defence that she meant no harm. These offences are defined in such a way that conduct which satisfies their requirements (and does not fall within a recognised general defence) will normally be blameworthy; but the element of moral blame is incorporated in the definition of the conduct prohibited, not superimposed upon it. There is always the possibility that blameless conduct may occasionally be caught, but that possibility is dealt with via prosecutorial discretion and sentencing options. It is not clear why theft and deception should be thought unique in this respect.

7.53 Our provisional conclusion, therefore, is that, while it would ideally be desirable to exclude morally blameless conduct from the scope of the law of deception, this should not be done by means of a requirement of \textit{Ghosh} dishonesty. We provisionally propose that the deception offences should cease to require proof of dishonesty as a separate element.”

Instead, the Law Commission proposed the removal of dishonesty as an element of deception offences and its replacement by a provision that:

“…it should be a defence to any of the deception offences that the defendant secures the requisite consequence in the belief that he or she is legally entitled to do so, whether by virtue of the deception or otherwise.”

In \textit{Peters}\textsuperscript{55} Kirby J, noting that he did not have the “temerity to attempt an exhaustive definition of the meaning of ‘defraud’, or dishonesty”, nevertheless accepted the \textit{Salvo}\textsuperscript{56} approach of lack of claim of right as applying to the concept of dishonesty more broadly, though he argued that this definition might be better

\textsuperscript{54} \textit{Theft Act} 1968, s 2(1)(a)

\textsuperscript{55} (1998) 192 CLR 493; 96 A Crim R 250.

\textsuperscript{56} [1980] VR 401; 5 A Crim R 1.

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expressed using the words of King CJ in *Kastratovic* to define the synonymous notion of “intent to defraud”:

“The broader statement expressed by King CJ in *Kastratovic* [(1985) 42 SASR 59 at 62-63] would, in my view, have application to a wider range of cases:

‘In all cases, the element of intent to defraud connotes the intention to produce a consequence which is in some sense detrimental to a lawful right, interest, opportunity or advantage of the person to be defrauded, and is an intention distinct from and additional to the intention to use the forbidden means.’

Whilst the notion of defrauding will commonly address attention to the use of forbidden means, it is not confined to a consideration of the means. In certain cases some, at least, of the means used may have been perfectly legal. The stain of fraud may arise from the object which the perpetrator dishonestly set out to achieve.”

However, this formulation does not take into account situations in which an intention, though technically detrimental to the victim’s rights, is of no real detriment and may in fact be to the advantage of the victim. An example of such a situation was given by McGarvie J in *Bonollo*:

“For example, a farmer working with dangerous machinery on a hot day may have drunk as much intoxicating liquor as is consistent with his own safety. His brother sees him take another bottle and is concerned for the farmer’s safety. By deception he obtains the bottle from him and empties it on the ground.”

This led the judge to a formulation of dishonesty in the following words:

“[An accused obtains property] dishonestly if he is then conscious that by obtaining it he will produce a consequence affecting the interests of the person deprived of it; and if that consequence is one which would be detrimental to those interests in a significant practical way.”

This would appear to be a broader and more useful definition of dishonesty and fraudulently, as it emphasises not only that there must be something affecting another’s interests, but also that such an interference must result in some more holistic loss. This second emphasis enables broader societal considerations are [sic] to be taken into account, thus contextualising the behaviour of the accused.

As Elliott has pointed out:

“It can be a significant detriment, (not is), depending on the circumstances…It is for the jury to categorise this effect as detrimental in a significant or insignificant way. This is a familiar approach in the criminal law; the jury asks what the accused himself intended or foresaw, and then finds the category of gravity of that…A question of degree such as this is not the same as a question of moral estimation without guidelines. A jury can, indeed must, be left to decide the former, and can be safely left to do so. If it is objected that a jury could still hold that, for example, robbing the rich to feed the poor was not theft,
the answer is that they could only do so if they disregarded the judge’s direction as to what was capable of being an insignificant practical detriment.”

Another approach is that of Glazebrook and Halpin which Halpin has formulated as:

1. The treatment by a person of the property of another is to be regarded as dishonest where it is done without any belief that the other would consent to that treatment if he knew of all the circumstances, unless the person believes that the law permits that treatment of the property.
2. The treatment by that person of the property of another is not to be regarded as dishonest if done (otherwise than by a trustee or personal representative) in the belief that the person to whom the property belongs is unlikely to be discovered by taking reasonable steps.”

However, the Glazebrook/Halpin definition is flawed because their definition does not take into account the well-meaning but lawbreaking brother of the farmer, assuming that the farmer, if he knew of all the circumstances would nevertheless have claimed to have been still safe to drink. Another interesting aspect of the Glazebrook/Halpin definition is the move to define dishonesty on the basis of lack of consent. This appears to be a sleight of hand way of re-introducing consent issues back into theft in England, post Gomez. While there is much to be aid for retaining consent issues as part of theft, including consent as an element of dishonesty is inappropriate. Lack of consent is one of the “external” elements of the crime, while dishonesty is the distinct mental element that changes the nature of a conversion or a trespass into a crime. The Glazebrook/Halpin approach dangerously blurs the distinctions between civil and criminal uses of another’s property.

While s 2(1)(b) of the English Theft Act 1968 enacts that is not dishonest if the appropriation is made with a belief that the owner would consent, the Glazebrook/Halpin approach does more than effect a change of style from passive to active. To state one cannot be dishonest if one has a belief relating to consent is to admit such a belief as an example of a claim of right. To say one is dishonest if one does not have that belief is to drastically increase the circumstances in which civil trespass becomes a crime.

Conclusion

The result of Peters is that the full Ghosh test is not to be applied in Australia. Instead the judgment of Toohey and Gaudron JJ posits a test of “the standards of ordinary, decent people” for offences referring to dishonesty in a general sense, and an offence by offence definition of the concept for offences using the word in a special sense.

However, their analysis appears to be flawed in that they seem to apply specialist meanings of dishonesty to an offence they characterise as an offence involving dishonesty in a general sense. Further, a close analysis of Fullagar’s judgment in Salvo which forms the basis of the majority’s idea of a specialist

62 Halpin, op cit n 40, at 294.
63 As dos [sic] the ACT Crimes Act 1900 and the Victorian Crimes Act 1958
meaning for dishonesty, does not reveal any special meaning but rather an affirmation of the traditional idea of fraudulence as lying in a lack of claim of right, but tempered in its scope by restrictions in the words of individual sections as to which particular states of mind can be relied on to make a finding of dishonesty.

There are strong and influential arguments in favour of the rejection of any attempts to create a community based standard of dishonesty and the subjective approach, absent a definition of dishonesty, while less explicit still requires some sort of hypothetical standard to be applied.

The potential fears of easy acquittals for the famous Robin Hoods and anti-vivisectionists of Lord Lane CJ’s judicial nightmare in Ghosh can be removed by directions to the jury as to what dishonesty means based on McGarvie J’s definition. Even these accused would be aware that their actions would have significant practical detriments to the victim’s property interests—in fact this is their aim. A subjective approach would only operate to exculpate any Patty Hearst-type followers of these groups, who are arguably innocent anyway. While the same result could be achieved by the Ghosh test, it does so only at the cost of creating a fiction of a community norm and by undercutting the concept of mens rea in the criminal law.

The High Court’s argument for different meanings of dishonesty is also unsatisfactory. The reality is that dishonesty does not have a number of different meanings in different offences. It is a fundamental axiom of law that words in statutes and in the common law should have consistent meaning, unless a mistake of drafting or a quirk of history results in a forced difference of meaning. This must be true for dishonesty, particularly in light of its increasingly significant role in the Theft Acts.

Indeed the over emphasis on different meanings of dishonesty in current judicial interpretation has created a situation where the word will need to be carefully defined in order for the law to regain certainty, most likely along the lines suggested by McGarvie J in Bonollo. While general prohibitions on conduct may be permissible in civil law contexts, the criminal law, which deals with people’s liberty and has historically required stringent safeguards in procedure to protect the accused, should not be countenancing the creation of wide ranging offences where the entire definition of criminality is left to some vague notion of community standards as defined by random citizens in a jury panel.

The result of all of this judicial uncertainty has led to a point where a basic definition of dishonesty is required, and the judgments in Peters show that members of the High Court to some extent recognise this with their references to “ordinary” ways of proving dishonesty. It is submitted that McGarvie J’s definition is the definition the courts should adopt. This would also be a more appropriate statutory definition of dishonesty than the current Commonwealth Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 which contains a statutory form of the Ghosh test.

**Postscript: applying Peters**

In its Consultation Paper, the Law Commission proposed a categorisation of dishonesty adopted by the Commission; namely that dishonesty is used in the criminal law in two different ways, in what they labelled a positive and a negative way:

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“3.15 …[W]here dishonesty is the main determinant of liability, it acts as a positive element in the offence. The conduct requirements of such an offence are very general, and occur frequently in commerce or indeed in everyday life. Thus dishonesty ‘does all the work’ in such offences. It turns what would otherwise not be even prima facie unlawful (say, making a gain or causing prejudice) into a crime. Dishonesty may also feature, as an ‘element’, in offences in which the conduct requirements are much more substantial. In such offences, the conduct requirements describe conduct which may be considered prima facie criminal (subject, of course, to the proof of mental elements). The requirement of dishonesty, though in form an element of the offence which must be proved like any other, in effect provides the defendant with a defence. It operates primarily to exempt from criminal liability conduct which one would prima facie expect to be criminal—for example, obtaining property by deception with the intention of permanently depriving the owner of it. In these cases we refer to it as a negative element.”

Thus for example in conspiracy to defraud, the elements of the offence involve an agreement, and an intention to do something that prejudices or places at risk another’s legal or economic interests by means that are dishonest.66 The only thing that makes these elements amount to a crime is if they are infused with dishonesty. Absent that, it is perfectly legal to agree to intend to adversely affect another’s interests. It is the stuff of competition and commerce. In such a crime dishonesty is a positive element and “does all the work”.

On the other hand most offences involve a large number of elements which in themselves suggest criminality. As the Commission notes, obtaining by deception is a clear example of this. Having proved deception the practical reality is that, although the onus remains on the prosecution to prove dishonesty, the accused will be found guilty unless they can successfully maintain a defence argument of honest belief or intention.

In the interim, the impact of Peters is likely to be less important than it might appear if the positive/negative analysis of the Law Commission is applied to the Toohey/Gaudron test. It is arguable that offences can only use dishonesty in a “general” sense when there are not other elements of the offence that constrain the scope of dishonesty in an offence.

Conspiracy to defraud would appear to be the most obvious example of an offence of dishonesty at large, where dishonesty is the only factor that makes the actions and intentions criminal.

If on the other hand the external elements of the offence create what the Law Commission describe as a “prima facie” offence, such that dishonesty operates a negative element it will be important for the judge to explain to the jury what states of mind are relevant, and what are not (such as intention to deceive).

Another way of characterising the Law Commission’s approach would be to say that dishonesty is a general undefined concept when the other elements do not amount to a civil wrong, but that dishonesty has a “special meaning” when those elements do. Thus all crimes involving trespass, deceit and misleading conduct would all require special directions by the trial judge.

However, it to be hoped [sic] that the High Court has the opportunity to revisit the issue shortly and thus avoid a protracted period of attempts to enlarge or diminish

66 The High Court in Peters were unanimous in agreeing on these aspects of conspiracy to defraud.
the number of crimes requiring a general direction according to the standards of “ordinary, decent people”.