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Part II: The Cutting Edge of Dishonesty – *Ivey v Genting Casinos* symposium

DISHONESTY OUTSIDE OF ENGLAND AND WALES: *IVEY* IN INTERNATIONAL COMPARISON

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1 Introduction

The enactment of the Theft Act 1968 ('the TA1968' and 'the 1968 Act'), and its adoption of the adverb 'dishonestly' have had ongoing repercussions throughout the common law world. Variants of the English concept of theft have now been adopted in most of these jurisdictions. Even in those jurisdictions where there has not been a reform of theft laws that led to the introduction of dishonesty as a statutory concept, Parliaments have adopted the term as a convenient way of expressing fault in an increasing array of acquisitive and relational crimes. The one significant exception is Canada, but even there the approach taken to fraudulence, dishonesty's predecessor, is an instructive contrast.

This chapter considers the way dishonesty has been interpreted and defined in three countries: Canada, New Zealand and Australia – which has nine statutory criminal jurisdictions,[1] and an overlaying national common law.[2] In all of these jurisdictions, the English decisions of *R v Williams*[3]

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[1] Under the Australian *Constitution* (s 51), the power to legislate with respect to criminal law generally is a power that residually remains with each State (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia). The Commonwealth Government additionally has power to create criminal laws ancillary to its enumerated powers (s 51) and has also devolved criminal law powers to the Northern Territory (Northern Territory (Self-Government) Act 1978) and the Australian Capital Territory (Australian Capital Territory (Self-Government) Act 1988. Other external territories are governed using Australian Capital Territory, Northern Territory or Western Australian law: see Department of Infrastructure, Regional Development and Cities, 'Territories of Australia' (Department of Infrastructure, Regional Development and Cities, 9 January 2018) accessed 17 January 2019 <https://regional.gov.au/territories/>.

[2] *Lipohar v The Queen* [1999] HCA 65, (1999) 200 CLR 485, 505.

[3] [1953] 1 QB 660 (CA). Mr and Mrs Williams ran a store which included a sub-post office. Williams 'borrowed' money belonging to the Postmaster General to support his own business but said he believed he could pay it back.

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('*Williams*'), *R v Feely*[4] ('*Feely*') and *R v Ghosh*[5] ('*Ghosh*') have been central to the discussion. Thus, the reconsideration of those decisions by the UK Supreme Court ('the Court') in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*[6] ('*Ivey*') can be read against a range of alternative international approaches.[7]

1.1 The English cases

It may be useful to begin with a quick reprise of these leading English cases.[8] From 1916-1968 the offence of theft included the phrase 'fraudulently and without claim of right made in good faith'.[9] In *Williams*, the Court of Appeal had held that 'fraudulently' had a role separate to a claim of right, and meant 'intentional and deliberate, that is without mistake.[10] This gave fraudulence only a very minimal role in the offence. But issues with the reporting of the decision, other caselaw and academic commentary persistently suggested that fraudulence might have a broader scope.

In TA 1968, the term 'fraudulently' was replaced with 'dishonestly'. This led to uncertainty as the new term's meaning, culminating in the Court of Appeal decision in *Feely*. In a joint decision, five justices rejected the approach in *Williams* and held that dishonesty required proof of moral obloquy, was based on the defendant's state of mind, and was a question for the jury. They stated:

> Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people.[11]

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4 [1973] QB 530 (CA). Feely 'borrowed' money from his employer's till despite explicit instructions to not do so. He said he intended to repay the money.

5 [1982] EWCA Crim 2, [1982] QB 1053. Ghosh was a surgeon who made false claims for payments for having performed operations that had been performed by others or for which he was not due payment. He said the quantum was equivalent to money properly due to him for other consultations and procedures.

6 [2017] UKSC 67, [2018] AC 391. Ivey was a professional gambler. He employed a method called 'edge sorting' to win a large amount of money from a casino. He was found to have cheated at gambling: Gambling Act 2005, 42. An issue on appeal was whether dishonesty was an element of that offence.

7 Supplementing and critiquing those approaches are a wide array of academic articles. It is beyond the scope of this chapter to do all that academic work justice, but a number are referred to where relevant.

8 A more detailed analysis can be found in David Ormerod and David Williams, *Smith's Law of Theft* (19th edn, OUP 2007).

9 Larceny Act 1916, s 1(1).

10 *Williams* (n 3) 666.

11 *Feely* (n 4) 538-39.

But this judgment led to further uncertainty as to whether this statement promulgated a subjective or objective test for jurors, or was merely an observation about jury processes. In *Ghosh*, a three-member court considered the issue. They reviewed the conflicting caselaw and concluded the authorities were unreconcilable. Building on the approach in *Feely*, they then formulated a two-limb test:

> In determining whether the prosecution has proved that the defendant was acting dishonestly, 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.
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> 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.[12]

This became the accepted test for dishonesty in England and Wales.

In *Ivey*, the Supreme Court engaged in a detailed critique of the analysis of precedent and principled justifications laid out in the judgment in *Ghosh.* Overturning 35 years of settled law, the Supreme Court overruled *Ghosh* and substituted the approach to dishonesty applied in equity, which was synonymous with an objective test understanding of *Feely.* They held:

> The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes* ["Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."] When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge

[12] *Ghosh* (n 5) 1064.

> or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.[13]

1.2 Chapter structure

This chapter outlines the range of judicial and legislative approaches to dishonesty outside England and Wales since 1968.[14] Often Parliamentary intervention has been in reaction to the judicial approaches. Across the jurisdictions, the judicial and statutory interpretations overlap and at times are ignorant of each other. Thus, rather than adopt a chronological approach, this chapter places them in a rough taxonomy for analytical purposes. That taxonomy is:

(a) *mens rea* approaches to dishonesty:

  (i) minimalist approaches that define dishonesty down to a synonym of pre-existing *mens rea* concepts – namely synonyms for intent, claim of right or consent; and

  (ii) definitions that are comprised exclusively of elements which conform to ideas of 'subjective' or '*mens rea*' elements – that is, based on awareness of moral wrongdoing, with or without limitations;

(b) *actus reus* approaches to dishonesty in which definitions are comprised exclusively of elements which conform to ideas of 'objective' or '*actus reus*' elements – that is, characterisation of actions irrespective of the defendant's intention or knowledge; and

(c) hybrid approaches to dishonesty with definitions that combine subjective and objective elements or *actus reus* and *mens rea* elements.

This taxonomy highlights similarities and differences in doctrinal and philosophical perspectives, but at the cost of a coherent discussion of

[13] *Ivey* (n 6) [74] (Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed)), citing *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

[14] For the history of the legal concept of dishonesty prior to 1968, see Alex Steel, 'The Meanings of Dishonesty in Theft' (2009) 38 Common Law World Rev 103.

developments within each jurisdiction. Necessarily, then, the chapter moves forward and backward in time, and at times separates discussion of judgments in a single case into different sections.

Before considering those approaches, it is necessary to consider a fundamental preliminary issue, that of the proper role of dishonesty in criminal law. Again, this involves a comparison of approaches agnostic as to their historical moment.

2 What is the role of dishonesty?

The strongest theme that emerges from this chapter is the inability of courts and Parliaments to consistently agree on an approach to dishonesty because of competing understandings of the basis and role of the criminal law. In this sense, 'dishonesty', rather than being a difficult concept, is instead one that lays bare an unresolved controversy in the philosophy of the law itself. That is, the question of whether there are any pre-legal moral or ethical bases to criminalisation[15] and the related question of whether dishonesty should be a basis of distinguishing criminal from non-criminal behaviour.[16]

Surprisingly, there is little judicial recognition of these underlying issues post-1968, and they were not explored in *Ivey*. Implicitly, *Ivey* stands for a compromise on both issues. The Court finds that the community standard of dishonesty is based on an expectation of morality, but abiding by a personal code of morality is not a basis for exculpation.[17] The Court also postulates that the test for dishonesty should be the same in both civil and criminal contexts, despite the different consequences a finding of dishonesty has in each context,[18] and this perhaps has the effect of raising the bar in civil proceedings and lowering it in criminal ones.

The decision in *Feely* is famous for its rejection of *Williams* and for providing the statement:

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[15] See eg Richard Tur, 'Dishonesty and the Jury' in A Phillips Griffiths (ed), *Philosophy and Practice* (CUP 1985); Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006); Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard UP 2012).

[16] For a discussion of these issues, see Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 UNSWLJ 712; responding to Andrew P Simester and G Robert Sullivan, 'On the Nature and Rationale of Property Offences' (OUP, 2005); see generally AP Simester and Andrew Von Hirsch, Crimes, *Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011).

[17] Proof of dishonesty generally rests on the prosecution not on the defence. However, for ease of reading throughout this chapter, exculpation is used to describe possible beliefs or attitudes the prosecution must negative.

[18] That is, determining guilt and punishment in criminal law, but liability and compensation in civil law.

> In our judgment a taking to which no moral obloquy can reasonably attach is not within the concept of stealing either at common law or under the Theft Act 1968.[19]

This underlying moral basis to dishonesty has been accepted in most jurisdictions – with two notable exceptions, Canada and Victoria. Canadian courts have chosen to stay with the *Williams* approach and ignore *Feely*,[20] but with no real reason why other than historical precedent.

The Victorian courts, on the other hand, wrestled with the underlying moral question at length in a series of judgments. The issue came to the Full Court of the Supreme Court of Victoria in three decisions in 1979 and 1980. Significantly, this was after the decision in *Feely* and the emergence of commentary on that decision, but before the decision in *Ghosh*. The Court was thus confronted with the *Williams* approach to 'fraudulently' and the recent assertion of a moral basis to 'dishonestly' in *Feely*. In *R v Salvo*[21] ('*Salvo*'), the Full Court split on these issues with a majority rejecting *Feely*. In *R v Brow*[22] ('*Brow*'), the majority approach in *Salvo* was applied unanimously. Ten days later, in *R v Bonollo*[23] ('*Bonollo*'), the Full Court divided again. Three different approaches to the concept were developed, but the court unanimously agreed it was bound by the decision in *Brow* and the reasoning of Fullagar J in *Salvo* emerged as the statement of the Victorian position.

Justice McInerney in both *Salvo* and *Bonollo*[24] espoused an approach to dishonesty his Honour considered in line with *Feely*. In *Salvo*, his Honour argued that dishonesty did not mean 'dishonourably', which he felt was a word that was closer to an assessment of a person's moral integrity or probity, and that community and individual self-assessments could differ. Instead, dishonesty connoted:

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[19] *Feely* (n 4) 539. cf *Ivey* (n 6) [48]. The Court of Appeal in *Feely* may not have accepted that there was a significant difference in the underlying meaning of the elements 'fraudulently' and 'dishonestly'. It is arguable that *Ivey* is incorrect in stating the law changed in *Feely*. *Williams* and *R v Cockburn* [1968] 1 All ER 466 may have been the aberrations. See Steel (n 14).

[20] See sections 3.1 and 4 below.

[21] [1980] VR 401. Salvo, a second hand car dealer, accepted a trade-in as partial payment for a vehicle. As it turned out, the trade-in vehicle was subject to repossession. To recoup his losses, Salvo re-purchased his original vehicle, but then stopped payment on the cheque. He was charged with fraud but raised a claim of right defence.

[22] [1981] VR 783 at 788. Brow sold second hand cars falsely representing they were unencumbered. He said he intended to pay off the encumbrances but had cash flow issues.

[23] [1981] VR 633, 2 A Crim R 431. Bonollo falsely represented to a financing company that she owned business furniture and fittings in order to enter into sell and lease-back arrangement. She claimed she thought this was necessary to obtain a loan.

[24] However, in *Bonollo*, his Honour felt compelled to accept that the test set out by Fullagar J in *Salvo* had become the approved approach.

> […] disregard of the dictates of the moral virtue of justice which acknowledges and gives effect to the rights of others to or in respect of material things, or of the relationship of one person to another […] The terms may in certain contexts connote respect for or disregard of the moral virtue of truth.
>
> The word "dishonestly" implies reference to a standard of morality underlying the law. The law sets standards of legality and illegality but cannot set and never has purported to set standards of morality. Standards of morality underlie the law: they derive not from the law but from the standard of ethics accepted by the community.[25]

Dishonesty thus drew on an antecedent set of morals independent of the law. Not every breach of morals would constitute a crime, but only breaches associated with actions that affected legal rights:

> [The law] is concerned with the secret dispositions of the accused's minds only in so far as they relate to overt acts or omissions which interfere with or deny legal rights or powers or privileges belonging to other people.[26]

While precision in definition was not possible, individual cases which had been seen as controversial were merely exceptions to the application of a generally easily applied concept.[27] Because dishonesty was a factual matter outside the law it was pre-eminently a jury question, and if judges were to determine if a person was dishonest, this would be usurpation of the jury. As such, McInerney J's approach is exactly in line with the statements in *Ivey* that dishonesty is 'primarily a jury concept'.[28] His Honour's conception of the moral basis to dishonesty provides one possible approach to explain what underlies the conceptions of moral obloquy in *Feely* and *Ivey*.[29]

By contrast Fullagar J, in a judgment that has since been accepted as the leading statement of the Victorian approach, emphatically rejected any moral basis for dishonesty. His Honour considered that the 'moral obloquy test' in *Feely* was flawed because average moral standards were uncertain and 'could be debated by philosophers as well as jurors from sun-up to sundown

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[25] *Salvo* (n 21) 407. His Honour thought that the defendant in *R v Gilks* [1972] 1 WLR 1341, [1972] 3 All ER 280 was clearly dishonourable.
[26] ibid 409.
[27] ibid.
[28] *Ivey* (n 6) [53], referring to [48].
[29] cf Tur (n 15).

without arriving at any satisfactory answer', and rejected the Criminal Law Review Committee's claim that 'every citizen "knows dishonesty when he sees it" or knows the meaning of the word generally, let alone in the context of a badly drawn statute.'[30] His Honour invoked both Blackstone and Dixon CJ to warn against judges deciding cases on moral rather than legal principles and continued:

> […] 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 courts of law should set themselves up, or allow themselves to be set up, as judges of morals or of moral standards. The public respect for the courts, upon which the courts' authority and existence ultimately depend, is held because they decide cases according to known legal principles. It is equally important that the principles applied be legal principles and known principles. 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.
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> […] once the courts of law, properly so called, begin to decide cases, especially criminal cases, according to the judge's own view of abstract justice or of current standards of honesty or morality, respect for the courts will be calculated to decline, with dire consequences of a most fundamental character. Justice would no longer be seen to be done, and a judge would be no better qualified than anyone else to decide the cases […] If judges cannot have the same intuitions as to what is or is not dishonest or discreditable or immoral or deserving of moral obloquy, and if they, as well as learned academical commentators, disagree (as the cases show they do) as to the meaning of "dishonestly" and as to the kind of case which comes within it, it is difficult to see how juries can be expected to have any greater capacity for uniformity. We should soon have as many different decisions upon similar facts "as there are differences of capacity and sentiment in the human mind". Further, in directing a jury as to what are the facts relevant to the element of dishonesty, the judge is always by implication defining, or at all events indicating the connotations of, the element and word and, if the concept is purely one relating to

[30] *Salvo* (n 21) 428, 431.

> moral obloquy, he necessarily does so by reference to his own view as to morals.[31]

This led his Honour to read the concept down to remove non-legal concepts from its remit. Justice Fullagar's approach is in line with a vein of English commentary[32] but is an approach that has not garnered academic approval in Australia.[33]

The debate regarding the respective approaches of McInerney J and Fullagar J highlights a key tension in use of the concept of dishonesty in criminal law. Although the Court in *Ivey* accepted the *Feely* moral basis of the concept without question, the position taken on the moral question has a significant impact on the subjective/objective debate. That is because if dishonesty is at heart a judgment about morals, it must be a fault element and thus fundamentally subjective, or negligence based. If, however, dishonesty is merely a description of a type of activity, it can be determined entirely apart from a defendant's thought processes, and can be seen as purely objective. Or if like the Fullagar J approach it remains non-moral but subjective, it can easily be mapped onto pre-existing forms of *mens rea.* In fact, all three approaches have been followed by common law courts.

3 *Mens Rea* approaches

If dishonesty is to be seen as an element of subjective *mens rea*, it can be either a synonym for a particular state of mind, or a judgment about moral positions. If it is a synonym, which form of *mens rea* is it?

3.1 Minimalist subjectivism: dishonesty is a synonym for intent

Returning to the pre-*Feely* law, in *Williams*,[34] the Court of Appeal had suggested that in the phrase 'fraudulently and without claim of right' in the Larceny Act 1916 the word 'fraudulently' added little beyond a requirement that the defendant act intentionally and without mistake. This interpretation of both 'fraudulently' in the 1916 Act and 'dishonestly' in the 1968 Act was trenchantly rejected in *Feely* but remains the position in Canada and the Solomon Islands.[35]

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[31] ibid 431.

[32] See David Ormerod QC and Karl Laird, *'Ivey v Genting Casinos* – Much Ado About Nothing?' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

[33] See eg CR Williams, 'The Shifting Meaning of Dishonesty' (1999) 23 Criminal LJ 275.

[34] *Williams* (n 3).

[35] *Toritelia v R* [1987] SILR 4.

The Canadian Criminal Code offence of theft requires a defendant to have acted 'fraudulently and without colour of right.'[36] Prior to 1968, the decisions in *R v Shymkowich*[37] and *R v Howson*[38] had accepted that 'fraudulently' was an element of *mens rea*, but also accepted that the reading down of 'fraudulently' in *Williams* was correct. While post-1968 the theft offence and dishonesty were not adopted in Canada, the *Feely* interpretation of dishonesty was raised in a few cases. When the issue arose before the Supreme Court of Canada, *Shymkowich* was affirmed and *Feely* rejected (*LaFrance v R*).[39] The Supreme Court of Canada repeated its position in *R v Skalbania*[40] when it unanimously stated:

> [...] an intentional misappropriation, without mistake, suffices to establish *mens rea* under s 332(1): see *LaFrance v. The Queen*, [1975] 2 S.C.R. 201; *R. v. Williams,* [1953] 1 Q.B. 660 (C.A.). The word 'fraudulently', as used in this section, connotes no more than this. The dishonesty inherent in the offence lies in the intentional and unmistaken application of funds to an improper purpose.[41]

Significantly, this approach means that dishonesty adds nothing to a criminal offence, and thus fails to act as a basis to differentiate criminal from civil misbehaviour. As a further result of this approach, Canadian courts have also seen the concept of dishonesty in fraud offences as an element of the *actus reus* to be determined objectively.[42]

3.2 Minimal subjectivism: dishonesty is a synonym for lack of a claim of right

In Victoria, a similar minimalist approach has been adopted, but via an alternative route. Victoria has a Crimes Act 1958 (Vic) which provides

[36] RSC 1985, c C-46, s 322.

[37] [1954] SCR 606 (SCC). Shymkowich collected and sold saw-logs which were adrift in a booming ground and to which he had no right. He said he believed he was exercising a right of beachcombing.

[38] [1966] 3 CC 348 (Ontario CA). Howson, who owned a towing service, towed away a car that was trespassing on private land and refused to return it to the owner because he believed the owner of the land could authorise his actions.

[39] [1975] 2 SCR 201. LaFrance took a car joy-riding, intending to return it. It was argued this was not theft.

[40] [1997] 3 SCR 995. Skalbania, a real estate agent, received funds for a particular investment but used it to pay his business debts. The trial judge inferred an intention to replace the funds as soon as possible.

[41] ibid [6].

[42] Discussed below.

statutory offences that continue to draw on common law principles. Its Parliament had chosen to modernise its larceny and false pretences-based property offences and in 1973[43] enacted many of the provisions of the TA 1968, largely word for word, but with some changes of punctuation. One substantial difference was in the fraud offences. The Victorian version eschewed the complexity of the 1968 Act definitions, opting instead for a general dishonest obtaining of financial advantage offence.[44] The meaning of dishonest appropriation was defined in the theft offence in the same negative way as the English offence. However, that definitional section was not explicitly applied to the fraud offence. Inevitably, questions over the meaning of 'dishonestly' in both sections arose. The debate over whether dishonesty had a moral basis has already been discussed. In the leading judgment, Fullagar J rejected that moral basis, but accepted *Feely* was correct in seeing dishonesty as a mental element. His Honour drew on the complex statutory context of both the theft offence and the fraud offence to find that dishonesty was used in a:

> somewhat special sense in its special context in the [Crimes Act 1958] and it is simply not true to say that every citizen knows what the word "dishonestly" means in the context of this statute. [45]

His Honour considered the only available meaning was the dictionary meaning of 'with disposition to take or withhold from another that which it is his right to retain', which was in substance 'without any claim of right'.[46] Thus, Fullagar J observed:

> The concept of "without any claim of right" is substantially a known legal principle, and very close in content to a legal principle which has for many years been applied on this very branch of the law.
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> 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 thus imports into the offence the element that the actor

[43] *Crimes (Theft) Act 1973* (Vic).

[44] See the discussion in *R v Vasic* [2005] VSCA 38, (2005) 11 VR 380 and in Alex Steel, 'Money for Nothing, Cheques for Free? The Meaning of "Financial Advantage" in Fraud Offences' (2007) 31 MULR 201.

[45] *Salvo* (n 21) 431.

[46] ibid 432.

> must obtain "the property" without any belief that he himself has any legal right to deprive the other of it.[47]

This approach accepts dishonesty as a state of mind, and hence a fault element. It avoids the creation of any hybrid element combining acts and thoughts. On the other hand, it effectively removes the element from the offence because claim of right is either already a statutory defence or else implied. It avoids recognising any underlying moral aspect to criminalisation. Finally, it introduces the concept that dishonesty can be used in a general or special way, and that this can affect its meaning – a distinction that became critical in the High Court of Australia's interpretation of the term.

3.3 Minimal subjectivism: dishonesty is a lack of consent

In 2003, New Zealand enacted a legislative definition of dishonesty. The Crimes Act 1961 ('the CA 1961') was amended[48] to insert in s 217 a legislative definition of dishonesty which confined it to a belief that the victim had consented:

> dishonestly, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.

This wording had derived from a reform committee report that stated:

> The term 'dishonestly' remains but is confined by our proposed definition to conduct which is known or believed to be without proper authority. While the Committee does not support the use of an objective standard to assess the defendant's belief that the act in question was authorised, at the same time the bill should remove any doubt that an idiosyncratic moral view about what actually constitutes dishonest behaviour will excuse the defendant from liability.[49]

This was a reaction against the approach taken by New Zealand courts that is discussed below. In interpreting this new statutory provision,

[47] ibid.

[48] *Crimes Amendment Act 2003*, s 15.

[49] New Zealand Crimes Consultative Committee, Crimes Bill 1989, Report of the Crimes Consultative Committee (April, 1991), 64.

the Supreme Court of New Zealand in *Hayes v R*[50] emphasised that this definition worked alongside the claim of right definition, and was not restricted to reasonable belief – any genuinely held belief as to authority was sufficient.[51] The definition has also been adopted by Samoa.[52]

Thus, in New Zealand and Samoa, dishonesty remains a subjectively based concept, but one that has been statutorily narrowed to a belief about consent. Given that a reasonably held but mistaken belief as to consent would fall within the mistake of fact doctrine, the effect of the statutory form of dishonesty seems limited to placing the onus of proof on the prosecution and permitting unreasonable beliefs.[53]

Finally, in Western Australia and Queensland, 'fraudulently' in theft is defined to mean a range of intents to deprive,[54] and in the Northern Territory dishonestly has been replaced with the term 'unlawfully' thus effectively removing it as an element of the offence.[55]

That jurisdictions can disparately define dishonesty as a synonym of either intention, belief in legal entitlement, a belief in the victim's consent, or as a synonym for intent, underscores the lack of agreement as to the core effect of dishonesty relative to other legal elements if morality is not dishonesty's core. At a level of principle this is unsettling. While some definitional differences across jurisdictions might be expected, a lack of agreement as to the core nature of a fundamental aspect of acquisitive crime undermines both local and international conceptions of the boundaries of the law in this area. This can undermine the ability of businesses and tourists to manage their behaviour and complicates international co-operation on law enforcement.

Practically, by mapping dishonesty onto a pre-existing element the practical effect is to largely make the dishonesty otiose and so which element it is mapped onto makes no difference. What is more significant is the way in which the difference between civil and criminal liability for infringements of property rights has narrowed sharply to turn only on a mistaken belief in law.

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[50] [2008] NZSC 3, [2008] 2 NZLR 321. Hayes had been a teacher but could no longer work due to an accident, for which she received ongoing government compensation. She began a farm effluent removal business but continued to receive compensation. Hayes said she believed she was entitled to the payments so long as she was unable to teach.

[51] ibid 341, [58].

[52] *Crimes Act 2013* (Samoa), s 159.

[53] See criticism in eg Peter Doone, 'Commercial Fraud in New Zealand: Contemporary Legal and Investigative Issues Essay on Criminal Law in New Zealand - Towards Reform' (1990) 20 Victoria University of Wellington L Rev 159; Andrew Simester and Warren Brookbanks, *Principles of Criminal Law* (4th edn, Thomson Reuters 2012), 688.

[54] *Criminal Code Compilation Act 1913* (WA), s 371(2); *Criminal Code Act 1899* (Qld), s 398(1)

[55] *Criminal Code Act 1983* (NT), s 209.

3.4 Morally based subjectivism: Kirby J in *Peters*

On the other hand, if morality is at the core of dishonesty, then where that moral position is situated becomes a key issue. Is it personal to the defendant or some external standard? Again, *Feely* is key.

What is particularly problematic about the judgment in *Feely* and its later interpretation is the uncertainty over whether the court meant to assert that dishonesty was a subjective concept that juries could be trusted to apply using their own understanding, or whether dishonesty was an objective test that juries knew of and could apply. This argument was explored by Kirby J in the leading Australian High Court case of *Peters v R* ('*Peters*').[56]

Although alone in his approach, Kirby J favoured a fully subjective approach to dishonesty. His Honour was particularly critical of how the decision in *Ghosh* had taken the 'ordinary, decent people' phrase in *Feely* and turned it into a community-based objective test.[57] His Honour observed:

> Because the tribunal deciding such matters [ie dishonesty], whether jury or not, can be counted on to avoid the extremes of gullibility and naivety, that tribunal can safely be expected to apply what, for want of a better expression, amounts to "the current standards of ordinary decent people". But this is an expectation based upon the nature, composition and functions of the decision-maker. It is not based upon a legal requirement that the decision-maker, jury or otherwise, must apply to the facts an objective standard, invented as a fiction and resting on a presumption that it is possible to discover the 'current standards of ordinary decent people' or the 'ordinary standards of reasonable and honest people' separately from the standards of the decision maker.[58]

His Honour considered that to create such an objective test was against the fundamental principles of criminal law:

> The injection of an objective criterion as contemplated by the ruling in *Ghosh* cuts across one of the basic principles of our criminal law. Without the specific authority of Parliament,

[56] [1998] HCA 7, (1998) 192 CLR 493. Peters, a solicitor, created sham mortgages in false names for clients, it was alleged to enable them to launder drug money and to avoid tax liability. Peters said he was unaware of the client's aims.

[57] This was despite the court in *Ghosh* (n 5) 1063-1064 recognising *Feely* had not created any objective test.

[58] *Peters* (n 56) [135].

> 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.[59]

Justice Kirby had no concerns over the issues that had been raised in *R v Greenstein*[60] and *Ghosh* about idiosyncratic or 'Robin Hood' defendants. He preferred to trust the common-sense of juries and magistrates:

> To the extent that an accused puts forward idiosyncratic, bizarre, eccentric or peculiar beliefs to support an assertion of a want of dishonesty, such considerations go, in my opinion, only to the plausibility of the accused's evidence. If the tribunal of fact accepts the evidence and it sustains an absence of dishonesty at the relevant time, it will sustain an acquittal where dishonesty is an essential ingredient of the offence. Fear of hordes of modern Robin Hoods, galloping into the court rooms 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.[61]

Justice Kirby's analysis is in line with the Court's insistence in *Ivey* that dishonesty is a jury concept, recognised rather than defined.[62] The analysis also highlights an issue with *Feely* that was not addressed in *Ivey*. If *Ghosh* had been wrong in its analysis of what was held in *Feely*, and *Feely* had not intended to create an objective test for dishonesty, then to decide *Ghosh* was wrongly decided revives the issue of the meaning of *Feely*. However, *Ivey* merely reinstates the objective reading of *Feely* without consideration of Fullagar J's and Kirby J's critiques of the existence of any such objective standard. The Court in *Ivey* accepts all the critiques of the second limb of *Ghosh*, but does not examine critiques of the first limb.

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[59] ibid [137].
[60] [1975] 1 WLR 1353.
[61] *Peters* (n 56) [136].
[62] *Ivey* (n 6) [53].

3.5 Morally based subjectivism: New Zealand

Prior to 2003, New Zealand had a theft offence in s 220 of the CA 1961, which included the elements of 'fraudulently and without colour of right'. However, s 222, titled, 'Theft by person required to account', only required that the actions be done fraudulently. In 1976, in *R v Coombridge*,[63] the New Zealand Court of Appeal was asked to determine the meaning of 'fraudulently' in s 222. The Court of Appeal expressly relied on the approach in *Feely* and noted that this overruled the approach in *Williams* and *Cockburn*. Thus, the Court of Appeal held:

> We think that in order to act fraudulently an accused person must certainly, as the judge pointed out in the present case, act deliberately and with knowledge that he is acting in breach of his legal obligation. But we are of opinion that if an accused person sets up a claim that in all the circumstances he honestly believed that he was justified in departing from his strict obligations, albeit for some purpose of his own, then his defence should be left to the jury for consideration provided at least that there is evidence on which it would be open to a jury to conclude that in all the circumstances his conduct, although legally wrong, might nevertheless be regarded as honest.[64]

Then, in 1984, in *R v Williams*,[65] the trial judge explained 'fraudulently' under s 222 using the recently expounded test in *Ghosh*. This approach was rejected on appeal, with the Court of Appeal reaffirming *Coombridge*:

> [The test in *Coombridge*] is how the test has been applied in this country for many years, and it is the test which must be applied here unless and until a Full Court decides otherwise.
>
> In cases under s 222 and s 224 of the Crimes Act 1961 where it is alleged that an accused acted fraudulently, it must be shown that he acted deliberately and with knowledge that he was acting in breach of his legal obligation. But if, that being established, the accused sets up a claim of honest belief

[63] [1976] 2 NZLR 381. Coombridge agreed to act as an agent for Schindler's business affairs when Schindler went overseas. Coombridge misappropriated some of Schindler's funds. He argued that it was for either legitimate expenses or compensation for unpaid wages.

[64] ibid 387 (per Richmond, Woodhouse and Cooke JJ).

[65] [1985] 1 NZLR 294. Williams, a company director, had misapplied client funds invested for specific property and cattle-breeding ventures towards general company purposes. He said he believed he was entitled to do so.

> that he was justified in departing from his strict obligations, even for some purpose of his own, then his defence must be left to the jury if there is some evidence from which the jury might conclude that his conduct, though legally wrong, might nevertheless be regarded as honest. The failure of the prosecution, in the face of that evidence, to prove that he did not have such a belief, must result in an acquittal.
>
> In deciding whether the accused was acting dishonestly at the material time, the jury are entitled to look at all the facts and statements disclosed in the evidence from which inferences as to the honesty or otherwise of his belief may be drawn. In other words, the jury in deciding on the accused's state of mind -- honest or otherwise -- (a subjective state) are entitled to ask themselves whether on the evidence it was reasonably possible that he was acting honestly, however mistakenly, (a subjective test) and if this is reasonably possible they must acquit him. This we think is entirely consistent with the view taken by the law in the many situations where the state of a person's mind is relevant in criminal proceedings.[66]

This approach[67] is, similarly to Victoria, an entirely subjective approach, but one that goes beyond a claim of right to include any exculpating belief the accused might have. It is in line with the older common law understanding of claim of right which accepts any genuine belief of right to be exculpatory. As the New South Wales Supreme Court put it in *R v Nundah*:[68]

> [I]n the case of larceny where the question is between honesty and dishonesty, the guilt or innocence of a man cannot, as I understand the principles applicable to that branch of the criminal law, be made to depend upon a consideration by the jury of whether he had reasonable grounds for his belief. The question whether he honestly believed the property to be his is that which is material. Possibly some of the strongest beliefs held by human beings might be found by other minds to be completely destitute of reasonable grounds. They may depend on nothing more than the associations of early childhood or

[66] ibid 308 (Greig J).

[67] New Zealand's approach was reformed by legislative amendments in 2003. It does, however, remain the approach taken in Samoa: *Police v Pauli* [2016] WSSC 60.

[68] (1916) 16 SR (NSW) 482. Nundah was charged with the larceny of two heifers. He said he believed they were his.

> the gossip of his neighbourhood after a man has grown up, or the customs of the community in which he lives. But the question of thief or no thief is a question of honesty or dishonesty in the act charged as theft. A man may be ever so much mistaken in his reasoning processes and yet be honest, though you would not accept his mere statement of opinion unless there was some colour in the circumstances for his entertaining the opinion he claims to have had.[69]

This is in stark contrast to the approach taken in *Ivey* – that is, that *Ghosh* was in error because it had the 'unintended effect that the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted'.[70] In fact, this recognition of quixotic and idiosyncratic belief amongst the population has a long common law history. *Ivey*, however, supports an alternative view that indulgence of mistaken belief undermines the administration of justice. In *Ivey* the court stated:

> There is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion.[71]

3.6 Subjectivism with limits: McGarvie J in *Bonollo*

The Court of Appeal in *Ghosh,* fearful of the fully subjective approach that Kirby J would have adopted, crafted an objective test out of *Feely* and then balanced that with a subjective safety net. But an alternative would have been to endorse the subjective test of dishonesty and create an objective safety net. That was in effect the test proposed by McGarvie J in *Bonollo*.

Bonollo was the third of three Victorian Court of Appeal decisions settling the meaning of dishonesty. By that stage, Fullagar J's interpretation was too entrenched to remove. Despite this,[72] McGarvie J handed down a long and detailed judgment setting out an alternative approach to dishonesty. This concept operated in addition to a claim of right. His Honour drew on what he saw as 'the purpose and normal method of the criminal law' that a crime would occur when activity would:

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[69] ibid 482.

[70] *Ivey* (n 6) [57].

[71] Ibid [59].

[72] Justice McGarvie was only a member of the bench in *Bonollo.* In *Bonollo*, McInerney J was of the view that Fullagar's J judgment in *Salvo* could have been distinguished, but because the intervening decision in *R v Brow* [1981] VR 783 had followed Fullagar J, that argument was untenable.

> bring detriment to the interests of the other person and where the detriment would be brought by a consequence which the person obtaining the property knows or believes his obtaining will produce: cf. *Sweet v. Parsley*, [1970] A.C. 132. This points to the word "dishonestly" being used to draw the outer boundary of the offence immediately beyond those obtainings.[73]

His Honour formulated his test as:

> the constant meaning of the word "dishonestly" […] is that an accused person, obtaining property by deception, obtains it 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.[74]

The first limb of this test was subjective. The defendant had to actually know or believe that his or her actions would in some way affect the interests of the victim.[75] The second limb was whether, objectively, the effect on the victim's interests was detrimental in a significant and practical way. His Honour's concept of detriment was quite broad, extending to include risks to financial interests without actual loss and to being deceived as to the purpose as to which the traded property would be put.[76] Justice McGarvie illustrated the impact of this limb via a number of examples, which he said fell outside general understandings of dishonesty. One was the deceptive taking of liquor off a farmer who was intending to use heavy machinery. While there was no legal right to do so, the detriment was not significant and potentially of great benefit. Another example was drawn directly from *Feely*. After quoting the passage where the Court discussed the store manager who borrowed money to pay for his wife's taxi, McGarvie J noted:

> The manager in that example believed that he was affecting his employer's interests because obviously his action wrongfully deprived the employer permanently of the coins. Moreover,

[73] *Bonollo* (n 23) 655.

[74] ibid 656.

[75] Presumably a defendant who gambles with another's funds in a belief that they cannot lose is still liable because of the knowledge that they are affecting the other's interests by dealing with them. cf *R v Zlatic* [1993] 2 SCR 29.

[76] *Bonollo* (n 23) 659-60.

> the employer was not to have restored to him until some time had passed, another lot of coins to the value of 40p. The Court of Appeal clearly took the view that, as the detriment to the employer's interests was not a significant practical one, the employee would not be acting dishonestly. In the circumstances, the impact of the invasion of the employer's legal rights by being permanently deprived of particular coins which he owned to the value of 40p, was in the area of legal theory rather than practical detriment. The practical detriment through being left short of 40p for a short time was not a significant one but a trivial or negligible one.[77]

The test for significant and practical detriment was objective and judged against whether an ordinary person would consider it such a detriment. This for McGarvie J avoided judging the defendant by their own standards – the 'Robin Hood' problem.[78] This approach preserves the primacy of the defendant's subjective knowledge and intent, but determines liability on the degree of risk of harm created or harm caused. If the harm is minor or overall a social good, no crime has occurred.

Justice McGarvie's approach is also interesting in that it resisted the lure of the dictum in *Brutus v Cozens*[79] that ordinary words should not be interpreted, and which had influenced the approach in *Feely*. For McGarvie J, dishonesty was a concept that had an unchanging core meaning, but the effect of which changed from case to case and required specific jury direction. His Honour suggested that specific directions would be appropriate when for example the dishonesty had led to the victim suffering a greater risk than expected, the property being used for a different purpose than expected, or in the absence of any countervailing benefit. His Honour summarised his position:

> I consider that in using the word "dishonestly" in s 81(1) the legislature intended to introduce a law which would operate so that a citizen who reasonably regarded himself as acting honestly would know that he was committing no crime.[80]

Justice McGarvie's approach represents an alternative history of dishonesty, and an approach still open to legislatures. It preserves the fully subjective

[77] ibid 659.
[78] ibid 657.
[79] [1973] AC 854 (HL).
[80] *Bonollo* (n 23) 652.

approach of a traditional *mens rea*, but limits a defendant's quixotic or 'warped' beliefs to the rare cases where the belief is so warped that the defendant can be seen as the naive innocent in *Nundah* – entirely unaware of the risk of harm, or one where despite a realisation of the risk of harm, objectively no real harm could occur – thus decriminalising trivial interferences with rights. Situations where it will act to exculpate are likely to be rare, but it does have the virtue of achieving the policy aim in *Ivey* of limiting unmeritorious acquittals without removing the primacy of subjective *mens rea*.

3.7 Justice McGarvie add-on: ACT definition

Justice McGarvie's approach was the basis of a statutory definition in the Australian Capital Territory ('ACT'). The ACT adopted the version of property offences from the TA 1968 in 1985,[81] and included a partial negative definition of dishonest appropriation to the same effect as s 2 of the 1968 Act. This meant that the *Feely* approach of a residual general meaning of dishonesty applied.[82] An additional subsection was also included:

> 96 (4) […] the appropriation by a person of property belonging to another person shall not be regarded as dishonest if— […]
>
> (b) he or she appropriates the property in the belief that the appropriation will not thereby cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property;[83]

While exculpation under McGarvie J's test was based on either a subjective belief of no risk of harm existing, or if recognised the resulting harm being trivial, this subsection instead adopted the ultimately objective community based moral concept of dishonesty in *Feely/Peters* and then provided a partial exculpation based on a subjective belief.[84] It was significantly wider than McGarvie J's approach in extending exculpation to an unreasonable belief that no real harm would be caused. Justice McGarvie's test, by contrast, would incriminate if there was any awareness of the risk of harm – even if the belief was that the risk was trivial. Under the ACT approach, a 'warped' belief could exculpate even if severe harm was caused. The subsection was repealed when the ACT adopted the Model Code version of the offences (discussed below).

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[81] *Crimes (Amendment) Ordinance No 4 1985* (ACT).
[82] *R v Delly* [2003] ACTSC 113.
[83] *Crimes Act 1900* (ACT), s 96(4)(b).
[84] See *The Queen v Delly* [2003] ACTSC 113.

4 *Actus Reus*: objective characterisation

Alternatively, dishonesty can also be seen as merely *actus reus*. At this other end of the spectrum lies the approach in Canada.[85] As noted earlier, Canada has followed the *Williams* narrow reading of 'fraudulently' as merely an intentional act without mistake. However, the issue of dishonesty did fall to be discussed by its highest court as a result of uncertainty of the scope of a defrauding offence. That offence prohibits a person, *inter alia*, from using 'fraudulent means' to 'defraud' others. [86] In two decisions handed down simultaneously – *R v Théroux*[87] ('*Théroux*') and *R v Zlatic*[88] ('*Zlatic*') – the Supreme Court of Canada confirmed that dishonesty is a characteristic of the *actus reus* of defrauding, is wholly objective, and judged by the standards of reasonable people.

In *Zlatic*, McLachlin J described the question thus:

> The fundamental question in determining the *actus reus* of fraud within the third head of the offence of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest. In determining this, one applies a standard of the reasonable person. Would the reasonable person stigmatize what was done as dishonest? Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs. J. D. Ewart, in his Criminal Fraud (1986), defines dishonest conduct as that "which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings" (p. 99). Negligence does not suffice. Nor does taking advantage of an opportunity to someone else's detriment, where that taking has not been occasioned by unscrupulous conduct, regardless of whether such conduct was wilful or reckless. The dishonesty of "other fraudulent means" has, at its heart, the wrongful use of something in which another person has an interest, in such a manner that this other's interest is

[85] For a detailed history and analysis see Brenda L Nightingale, The Law of Fraud and Related Offences (1st edn, Carswell Legal Publications 2000) 3.1.

[86] *Criminal Code*, RSC 1985, c. C-46, s 380.

[87] [1993] 2 SCR 5. Théroux operated a residential construction company which failed. Clients were falsely told that deposits towards the building of houses were secured. Théroux believed the houses would be built and clients would not lose their money.

[88] *Zlatic* (n 75). Zlatic ran a clothing wholesaling business. He accepted a large amount of clothing on credit. Rather than pay his creditors with the proceeds of the sale of the clothing he lost it gambling. He said he believed gambling system he was using meant could not lose.

> extinguished or put at risk. A use is "wrongful" in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.[89]

It thus appears that there is an undefined morality implicit in how the reasonable person assesses the conduct, but this seems outside of the concern of the court. Dishonesty is whatever reasonable people say it is. As dishonesty was part of the *actus reus*, the accompanying *mens rea* was merely knowingly undertaking the act, and as McLachlin J noted in *Théroux*:

> it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The "dishonesty" of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the *actus reus* of the offence can be made out of particular facts. That established, it need only be determined that an accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.[90]

This is based on an understanding of *mens rea* which rejects any moral basis to criminality. While accepting that *mens rea* was generally a subjective element, McLachlin J commented:

> […] this inquiry has nothing to do with the accused's system of values. A person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believed the acts or their consequences to be moral. Just as the pathological killer would not be acquitted on the mere ground that he failed to see his act as morally reprehensible, so the defrauder will not be acquitted because he believed that what he was doing was honest.[91]

Her Honour in this judgment was considering the *mens rea* for the statutory offence of defrauding. That requires both a dishonest act and detrimental

[89] ibid [45] (citations omitted).
[90] *Théroux* (n 87) [22].
[91] ibid [19].

consequences. Much of the discussion of awareness of dishonesty is thus bound up with the question of awareness of the consequences, rather than merely of dishonesty *per se*. Thus, her Honour's comments, which echo those of *Ivey*:

> A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons.[92]

Mr Justice Sopinka (with whom Lamer CJ concurred) agreed that 'the objective dishonesty test should be applied rather than the subjective approach adopted in the English cases.'[93] However, his Honour considered that while a mistaken belief as to the honesty of the actions was to no avail, a mistaken belief as to relevant facts should be a basis for acquittal. The accused in *Zlatic* had spent company funds on a gambling scheme he was convinced could not fail, rather than keeping the funds to pay creditors with. In applying the reasonable person test, McLachlin J held:

> I am satisfied that a reasonable person would regard as dishonest a scheme involving the acceptance of merchandise for resale without concern for repayment and the diversion of the proceeds to a reckless gambling adventure. […] there is nothing in the evidence which negates the natural inference that when a person gambles with funds in which others have a pecuniary interest he knows that he puts that interest at risk […] On the contrary, the accused expressly acknowledged that he was aware of the risk.[94]

Mr Justice Sopinka disagreed, noting that there was evidence from *Zlatic* that he was convinced his scheme could not fail. His Honour argued that this should be an available basis for an acquittal. [95] Mr Justice Sopinka's

[92] ibid [33].
[93] *Zlatic* (n 75) [42].
[94] ibid [24], [29].
[95] ibid [44]-[45].

failure to convince the other members of the Court has led to the peculiar position that in Canada a person who undertakes a sting to obtain property that they believe is their own is simultaneously not guilty of theft (due to a colour of right defence in the offence) but guilty of fraud.[96]

The Canadian approach has a number of significant implications. First, it to some extent repels the criticisms of the approach in *Ghosh*. While the test in *Ghosh* as formulated seems artificial, the two limbs can instead be seen as a limb determining an element of *actus reus*, and then a separate limb determining an associated *mens rea* element. In this light, there then are two distinct questions to examine. What is the appropriate way to determine whether an act is a dishonest act for the purposes of *actus reus*? What does a defendant have to know about this element of *actus reus* in order to have a requisite *mens rea*? On this analysis, the decision in *Ivey* finds that the test for the *actus reus* of a dishonest act is the same as the civil test, but it fails to articulate the necessary *mens rea*. In Canada, the answers are that dishonest acts are what reasonable people consider them to be – perhaps seen as wrongful and unscrupulous, and the defendant merely needs to intend to do those acts.

Secondly, seeing dishonesty as *actus reus* also highlights the issue of how a court approaches the task of determining which circumstances surrounding an act are relevant to the characterisation of it as dishonest, particularly if the defendant's beliefs are not relevant. While, axiomatically, each case is different, there is likely to often be a significant difference in moral culpability for a person who spends money that is not theirs to spend if, on the one hand, they are an elderly family member who has access to joint family funds, and, on the other hand, a company director spending company funds. Assuming both lack awareness that what they are doing is unauthorised, a finding of dishonesty may well turn on the additional fact that one has additional fiduciary duties and higher social expectations for probity. But it is unclear how courts consistently decide what facts can go to a jury, and which cannot. Despite *Ivey's* insistence that dishonesty should be the same in theft as in equity, there are likely to be quite divergent implications from the surrounding circumstances.

Thirdly, if a circumstance is part of the definition of the act itself – what Brennan J in *He Kaw Teh v R* called 'integral' rather than 'attendant' circumstances[97] – the common law implies an accompanying *mens rea* by default. On this basis a defendant should be able to avoid liability if they are unaware of those circumstances even if the overall characterisation of the

[96] See *R v Kingsbury* [2012] BCCA 462.
[97] [1985] HCA 43, (1985) 157 CLR 523, 571.

act as dishonest is not something they need know.[98] Determining which circumstances are integral or attendant is, as Brennan J put it, one of the 'intractable difficulties'[99] in the process of identifying the appropriate *mens rea*. Whether liability for generally expressed dishonesty offences should rest on this difficult analysis is problematic.

5 Hybrid approaches

Thus far we have reviewed approaches that see dishonesty as purely subjective *mens rea* or objective *actus reus*. But the decision in *Ivey* in upholding the first limb of *Ghosh* held that it contained both subjective and objective aspects, and that those subjective aspects revolved around the defendant's knowledge and belief as to the facts.[100] This approach can be seen as a hybrid approach placing dishonesty somewhere between traditional concepts of *actus reus* and *mens rea*. It is similar to the approach taken by the Australian High Court.

5.1 Hybrid characterisation – *Peters* and Australian common law

The issue of dishonesty came to the Australian High Court in *Peters*.[101] *Peters* involved the interpretation of a statutory form of the common law offence of conspiracy to defraud.[102] The High Court found itself divided. As discussed above, Kirby J preferred a subjective approach, but he concurred in the reasoning of Toohey and Gaudron JJ to form a majority. McHugh J (Gummow J agreeing) was in dissent in seeing dishonesty as a purely legal question to be resolved by a judge rather than jury, but Toohey and Gaudron JJ stated their agreement with McHugh J on other issues. The decision constituted a break from English approaches, first in holding that dishonesty was not a separate element of conspiracy to defraud,[103] and secondly in its rejection of *Ghosh*.

Other than Kirby J, all members of the Court saw dishonesty as a characterisation of a defendant's acts and accompanying state of mind, a characterisation that was objectively determined. As McHugh J put it:

[98] For an extended discussion of this issue see 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 L Rev 7; and see also Kevin Davis and Julian Roy, 'Fraud in the Canadian Courts: An Unwarranted Expansion of the Scope of the Criminal Sanction' (1998) 30 Canadian Business LJ 210.

[99] *He Kaw Teh* (n 97) 571.

[100] *Ivey* (n 6) [74].

[101] *Peters* (n 56).

[102] *Crimes Act 1914* (Cth), ss 86, 86(1)(e).

[103] The Court held it was merely a component of the two elements of intention to use dishonest means, and intention to cause a detriment or deflect from public duty.

> A successful prosecution for conspiracy to defraud does not require proof that the accused knew that he or she was acting dishonestly either in a *Ghosh* sense or a wholly subjective sense.[104]

Justices Toohey and Gaudron had significant problems with the use of the standards of ordinary and decent people as a primary referent:

> […] 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.
>
> […] in 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 deprive. 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. [105]

Their Honours held that in the usual case all that a jury need be told was that they had to be satisfied that an act had been done with an identified knowledge or belief. This is similar in effect to the approach taken in

[104] *Peters* (n 56) [78].
[105] ibid [15], [17].

England in *R v Roberts (William)*[106] and *R v Price*.[107] It was only in unusual cases where the defence raised the question as to whether a particular activity was dishonest that the jury need be asked to apply a test. In that situation they held the *Ghosh* test was confusing because it

> […] conflates what really are two separate questions, namely, whether they are satisfied beyond reasonable doubt that the accused had the knowledge, belief or intention which the prosecution alleges and, if so, whether, on that account, the act is to be characterised as dishonest.[108]

Trial judges were to identify what the prosecution alleged were the act and the accompanying state of mind of the defendant and then to determine if together they could be characterised as dishonest:

> 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.[109]

By footnote the approach taken in *Salvo* was identified as a use of dishonesty in a 'special sense'.[110] This preserved the Victorian approach, but was odd given that the definitions considered in *Feely* and *Salvo* were identical.

At common law, Australia thus has a *Feely* test if characterisation of an activity as dishonest is put in issue. It is a question of characterisation that is factual in nature and to be decided by juries.[111] The decision thus amounts to a strong rejection of the two-step approach in *Ghosh* in favour of an objective characterisation of the defendant's acts and thoughts. But in stark contrast to the Canadian approach, the beliefs of the defendant as to

[106] (1987) 84 Cr App R 117.
[107] (1990) 90 Cr App R 409.
[108] *Peters* (n 56) [17].
[109] ibid [18].
[110] ibid n 34.
[111] ibid [86]. McHugh J (Gummow JJ agreeing) agreed that if dishonesty was an element in a statutory offence, it was a factual question for a jury to determine. However as dishonesty was not a distinct element of conspiracy to defraud, he considered it what constituted defrauding (and its constituent dishonest aspects) was a question of law for a judge to decide.

their legal rights or lack of knowledge of the unlawfulness of their actions are a critical part of the characterisation of dishonesty.

Justice McHugh held that the belief of a defendant that they were acting honestly was irrelevant but also noted in the context of defrauding:

> […] *questions of intention, knowledge and claims of right on the part of the defendants* will ordinarily be crucial because the common state of mind of the defendants in relation to various acts or omissions will usually be decisive in determining whether the object of the conspiracy was an unlawful act or whether its implementation involved the use of unlawful means. […] Proof of an agreement by the defendants to engage in conduct that involves a breach of duty, trust or confidence or by which an unconscionable advantage is to be taken of another will usually be sufficient evidence of dishonest means *unless the defendants raise an actual or supposed claim of right or allege that they acted innocently or negligently.*[112]

This goes substantially beyond Sopinka J's approach in *Zlatic* in including innocent or negligent lack of knowledge or wrong belief.

In three subsequent decisions, *Spies v R*,[113] *Macleod v R*[114] ('*Macleod*') and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [115] the High Court of Australia has referred to the decision in *Peters*. These decisions have affirmed that the approach of Toohey and Gaudron JJ is the correct approach. They have held it applies to statutory offences which use 'fraudulently' as a discrete element, and they have confirmed it is an objective test in the sense that the defendant can be found to be dishonest 'judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards.'[116]

In *Macleod*, the defendant had misapplied investors funds but had argued that he had believed he had a legal right to so apply them. Part of his appeal

[112] ibid [84] (emphasis added).

[113] [2000] HCA 43, (2000) 201 CLR 603. Spies was a director and shareholder in two companies, one trading in duty free goods and trading at a loss. He was a debtor to the trading company. Through a series of transactions, Spies moved much of the monetary assets of the trading company to his own name and became its main creditor. It was alleged this was to defraud the other creditors. He claimed the transactions were legal.

[114] [2003] HCA 24, (2003) 214 CLR 230. Macleod controlled companies that offered investments in film production as tax minimisation. He misappropriated investors funds to his own purposes, but said he believed he had a right to do so as a previously unpaid salary.

[115] [2007] HCA 22, (2007) 203 CLR 89. This was a civil case involving fiduciary duties in a joint venture.

[116] ibid [173].

to the High Court was to argue that the trial judge was in error in not separately directing on his subjective belief in a claim of right. The majority (comprising Gleeson CJ, Gummow and Hayne JJ) was unimpressed:

> Adopting the reasoning in *Peters*, as we do, and applying it to the offences now under consideration, there is no requirement that the appellant must have realised that the acts in question were dishonest by current standards of ordinary, decent people. To require reference to a "subjective" criterion of that nature when dealing with a claim of right would have deleterious consequences. It would distract jurors from applying the *Peters* direction about dishonesty, and it would limit the flexibility inherent in that direction. A direction about the "subjective" element of a claim of right was neither necessary nor appropriate in this case.[117]

This statement was limited to the actual case, but the underlying logic does seem to be that objective dishonesty trumps subjective claim of right. Drawing on McHugh J's statements in *Peters*, a belief in a claim of right is a key element of the characterisation of an act as dishonest. If a jury concludes the defendant quixotically believed in a right to take another's property but did so in what are found to be objectively unconscionable circumstances the subjective belief fails to be a basis for acquittal.

Yet at the same time the High Court has repeatedly reaffirmed that *Salvo* was correct in seeing the meaning of dishonesty in the Victorian/TA 1968 form of theft and fraud offences as the equivalent of a subjective claim of right. A complex situation might well apply in England. The test of dishonesty in *Ivey* would appear to remain secondary to a claim of right if the offence charged is theft and a claim of right made pursuant to s 2(1)(a) of the 1968 Act. But the Australian High Court's approach, if adopted in offences without a similar statutory defence, could well mean defendants lose the ability to raise a claim of right.

The Australian approach also highlights an issue with *Ivey's* re-evaluation of the bus passenger example in *Ghosh*. The passenger's mistaken belief may be reasonable or negligent but that belief alone cannot exculpate. Under the *Peters/Feely* test that belief must be evaluated against a community standard. The Court in *Ivey* states:

[117] *Macleod* (n 114) [46].

> Because he genuinely believes that public transport is free, there is nothing objectively dishonest about his not paying on the bus.[118]

However. it is probably more correct to say that his genuine belief is likely to be a significant factor in a jury's determination of whether the behaviour is honest. It would be open to a jury to decide that honest people never trust their own beliefs in a foreign country.

5.2 Application of *Peters* across Australian jurisdictions

Other than Victoria, a number of Australian jurisdictions also have statutory definitions of dishonesty, discussed below. Where offences exist that use dishonesty without such definition, the courts have over time come to accept that the *Peters* test is binding on them as a result of the national common law. Interestingly, the question of whether such offences are used in the general or special sense has not led to significant divergence. In almost all cases, the courts have failed to find any special meaning for the term.[119]

But there are exceptions. In *Duncan v ICAC*,[120] the New South Wales Court of Appeal considered the meaning of s 184(1) of the Corporations Act 2001 (Cth). That provision enacts that an offence is committed if a director is 'intentionally dishonest' and fails to exercise their powers and discharge their duty in good faith or for a proper purpose. Accepting that the general test for dishonesty was the *Peters/Feely* test, the Court held that the addition of 'intentionally' resulted in a test that: 'the defendant was dishonest by ordinary community standards known to be dishonest by the accused and carried out in disregard of that fact'.[121]

In *Commonwealth Director of Public Prosecutions v Gerathy*,[122] Bell J held that the definition of dishonestly in the false accounting offence in s 83 of the

[118] *Ivey* (n 6) [60].

[119] Tasmania: *R v Fitzgerald* [1980] TasR 257 affirmed in *Jovanovich* [2007] TASSC 56; Queensland*: R v Laurie* [1987] 2 QdR 762 overruled in *R v Dillion; ex parte Attorney-General (Qld)* [2015] QCA 155; NSW: larceny remains a common law offence but moral obloquy is seen to underlie fraudulence *R v Weatherstone* (NSWCCA, 20 August 1987).

[120] [2016] NSWCA 143. This case reviewed findings that there was evidence of fraud by the NSW Independent Commission Against Corruption in relation to the issuing of particular coal mining exploration licences.

[121] ibid [378] (Bathurst CJ (Beazley JA agreeing)). Justice Basten (at [636]) stated 'the result is a standard reflected in *R v Ghosh*'.

[122] [2018] VSC 255. This judgment was a ruling on the test for dishonesty in a false accounting charge. The Reserve Bank of Australia, through subsidiaries, had entered into contracts to print currency for Malaysia. A Malaysian agent wished to be paid a commission for making these arrangements. Gerathy's superiors instructed him to falsely record the payment as business expenses. Gerathy complied. He believed the commission was lawful. He was subsequently found guilty: *CDPP v Gerathy (Sentence)* [2018] VSC 289.

Crimes Act 1958 (Vic) – which is similarly worded to s 17 of the TA 1968 – was neither the general *Peters* test, nor the *Salvo* test for theft and fraud. Instead, his Honour relied on English authorities[123] to find that 'the dishonesty involved is deliberately and intentionally falsifying such a document, knowing it to be false.'[124] His Honour adopted this wording from the English Court of Appeal decision in *Atkinson v The Queen*.[125] Such a test is most likely seen as a situation where the characterisation of act and thought are not in dispute and so a *Peters* or *Ghosh* test is not needed. But in the Victorian context of *Salvo*, as a default test, the approach in *Gerathy* is a 'special meaning'.

6 *Ghosh* redux – the statutory rejection of *Peters*

Outside of England, *Ghosh* has been followed in Papua New Guinea[126] and Barbados.[127] It has also been revived in Australia by legislative intervention – resulting in four of nine jurisdictions having *Ghosh* as the main test for dishonesty. It has also been statutorily enacted in Fiji[128] and Nauru.[129]

Prior to the decision in *Peters*, the Model Criminal Code Officers Committee ('MCCOC'),[130] a group formed to develop a national approach to criminal law (the Model Criminal "Code") had recommended adoption of a variant of the TA 1968 and with a statutory definition of dishonesty that replicated the *Ghosh* test. They argued:

> Opponents of the *Feely/Ghosh* test tend to paint it as though it casts the law forth into a sea of moral confusion and uncertainty. In fact the cases where dishonesty is a genuine issue are few. Where it does arise, the defendant is entitled to have that question determined on its merits. It is no answer to this to say that a defendant should have to rely

[123] *Attorney-General's Reference (G and S)* [2003] 1 Cr App R 8; *Atkinson v The Queen* [2003] EWCA Crim 3031 and *R v Paul White (AKA Lord Hanningfield)* [2011] EWCA Crim 1927.
[124] *Gerathy* (n 122) [45].
[125] [2003] EWCA Crim 3031. Atkinson, a pharmacist, made claims with false particulars to the Prescription Pricing Authority. She claimed all errors in the forms were inadvertent. The decision in *Atkinson* might suggest that special meanings of dishonesty apply in England. However, when the judgment is read as a whole, the Court of Appeal appears to have been merely holding that the trial judge was correct to direct in terms of the effect of characterisation of thought and act and that an overall *Ghosh* direction was unnecessary.
[126] *Lawi v The State* [1987] PNGLR 183 (Court of National Justice).
[127] *McCollin v R* [2008] BBCA 2 (CA).
[128] Crimes Decree 2009 (Fiji), s 290.
[129] Crimes Act 2016 (Nauru), s 180.
[130] See generally Matthew R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26(3) Crim LJ 152.

> on prosecutorial discretion or a lenient sentence. The law can fairly be criticised if it sweeps difficult moral judgments under the carpet with a definition which simply precludes consideration of the hard question – as the Victorian cases do (see below). Dishonesty raises very difficult questions in the borderline cases. The great virtue of the *Feely/Ghosh* test is that it provides a framework in which those questions can be asked and answered so that justice can be done in the individual case. […] Requiring juries to determine community standards is not a novel proposition in the law generally – negligence being the most obvious example. Although, as the arguments for and against the *Feely/Ghosh* test reveal, there are strong philosophical disagreements about how far such concepts should be used in legislation and applied by courts and juries, the Committee's view is that the best that the law can do with such general concepts is to commit them to the juries or magistrates as the arbiters of community standards in such cases. […] Where the law can provide a test which will allow the jury to make a determination of the fundamental issue, it should do so.[131]

In what, in hindsight, was a significant oversight, the Report did not see dishonesty as a 'general fault element'. General fault elements such as intention, recklessness and negligence were placed in the Code's Chapter 2, titled 'General Principles of Criminal Responsibility'[132] and were to be routinely applied across legislation. Dishonesty by contrast was placed in Chapter 3, titled 'Theft, Fraud and Related Offences' and only seen as applicable to offences in that chapter.

Following the decision in *Peters*, the Commonwealth Government moved to enact the property offences in the Model Criminal Code; choosing to follow MCCOC's recommendations and reinstate *Ghosh*. The Explanatory Memorandum to the amending Bill[133] stated:

> 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 *Peters v R* (1998) 151 ALR 51 the High Court held that the *Ghosh* test was no longer appropriate

[131] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Chapter 3: Theft, Fraud, Bribery and Related Offences Final Report (Australian Government Printing Service, December 1995) 17,23.
[132] See eg *Criminal Code Act 1995* (Cth), ss 2.1 – 16.4.
[133] *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000* (Cth).

> and developed a new test which does not include a subjective component.
>
> 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.[134]

Consequently, the *Commonwealth Criminal Code 1995* (Cth) states:

> 130.3 Dishonesty
>
> For the purposes of this Chapter, dishonest means:
>
> (a) dishonest according to the standards of ordinary people; and
>
> (b) known by the defendant to be dishonest according to the standards of ordinary people.

That definition[135] has now been adopted as the definition of dishonesty in a majority of Commonwealth, ACT,[136] NSW[137] and SA[138] statutory uses of the term.[139]

However, the decision in *Peters* means that if 'dishonestly' is not explicitly defined by statute it remains subject to the *Feely* test.[140] This has led to unfortunate anomalies, none worse than that in the Corporations Act 2001 (Cth) ('CA 2001' and 'the 2001 Act') which has three separately derived tests

[134] Explanatory Notes to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill* 2000 (Cth), para 62-63.

[135] See generally Ian Leader-Elliott, The Commonwealth Criminal Code: A Guide for Practitioners (Commonwealth Attorney-General's Department 2002).

[136] *Criminal Code 2002* (ACT), ss 300, 302.

[137] *Crimes Act 1900* (NSW), s 4B.

[138] *Criminal Law Consolidation Act 1935* (SA), s 131. The South Australian version adds the additional twist that:

> 131(2) The question whether a defendant's conduct was dishonest according to the standards of ordinary people is a question of fact to be decided according to the jury's own knowledge and experience and not on the basis of evidence of those standards.

This provision represents the status quo on how community standards of dishonesty are determined, but raises the intriguing question of how other jurisdictions might respond if robust evidence of community attitudes did emerge.

[139] For a critique of the legislative approach see David Lusty, 'The Meaning of Dishonesty in Australia: Rejection and Resurrection of the Discredited Ghosh Test' (2012) 36 Criminal J 282.

[140] See the extended discussion of this in *SAJ v R* [2012] VSCA 243; (2012) 36 VR 435.

for dishonesty. In the CA 2001, a statutory *Ghosh* test for dishonesty is included in offences by financial advisors inserted in s 1041G. However, the Part of the 2001 Act dealing with directors duties has no statutory definition. Consequently, the courts have held that the offences of 'use their position dishonestly' (s 184(2)) or 'use information dishonestly' (s 184(3)) are interpreted using the *Peters/Feely* test;[141] whereas, as discussed above in s 184(1), the use of the phrase 'intentionally dishonest' means a common law *Ghosh* test applies.[142] As Nettle J put it in *SAJ v R*:[143]

> Logically, it is difficult to imagine that Parliament intended the *Ghosh* test to apply to 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).
>
> In the end, however, as Weinberg JA and Davies AJA explain, although Ch 2 of the Criminal Code applies to s 184 of the Corporations Act, Ch 2 does not provide in terms for the application to s 184(2) of the Corporations Act of any of the definitions of "dishonest" found in Ch 4, 7 or 10 of the Criminal Code, and the express inclusion of similar *Ghosh*-type definitions of "dishonest" in ss 1041F(2) and 1041G(2) of the Corporations Act positively implies, expression *unius est exclusio alterius*, that such a definition is not intended to apply to s 184(2).[144]

A complex commercial trial can then potentially have more than one test for dishonesty.[145]

7 General use of dishonesty

The use of the term in Australian legislation is also extremely widespread. Currently, 'dishonesty' or 'dishonestly' appears in nearly 700 legislative

[141] ibid.

[142] *Duncan* (n 120).

[143] *SAJ* (n 140). This was an interlocutory judgment on the test for dishonesty. The prosecution involved the collapse of a securities financing and stockbroking firm, and the role of directors in transactions between companies in the group prior to the collapse.

[144] ibid [4]-[5] (citations omitted).

[145] For a history of the provisions see Kane Loxley, '"Unashamedly More Interventionist" Courts and the Fading Significance of a Director's State of Mind' (2014) 32 Company and Securities LJ 486; See generally Janet Austin, 'When Does Sharp Business Practice Cross the Line to Become Dishonest Conduct?' [2010] University of Queensland LJ 16.

provisions.[146] A search of New Zealand legislation[147] indicates dishonesty or dishonestly appears in 51 separate pieces of legislation. Many more instances are likely in regulations.

These Parliaments have embraced the term with alacrity, [148] and dishonesty is now used to separate criminal from non-criminal behaviour in areas far beyond theft. Offences now use 'dishonestly' as a key element in offences as disparate as bribery of jurors,[149] corrupt workplace benefits,[150] defining spam emails,[151] eligibility to hold a power of attorney,[152] grounds for disciplining motor traders,[153] and when audits may be imposed on estate agents.[154]

Further, Parliaments in Australia have increasingly created offences where liability entirely rests on dishonesty. The following are three examples and their maximum penalties:

> 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. (10 years imprisonment)[155]
>
> A person commits an offence if …the person does anything with the intention of dishonestly obtaining a gain from […] a Commonwealth entity. (10 years imprisonment)[156]
>
> A person who dishonestly […] gains a benefit or advantage, pecuniary or otherwise, for any person […] commits the crime of fraud. (5 years imprisonment)[157]

[146] Australian Capital Territory 91; South Australia 64; Commonwealth 114; Tasmania 49; New South Wales 96; Victoria 110; Northern Territory 41; Western Australia 43; Queensland 75 <www.austlii.edu.au> accessed 14 May 2018 (for 'dishonest*' in the Consolidated Legislation database for each jurisdiction).

[147] Parliamentary Counsel Office, 'New Zealand Legislation' (15 May 2018, Parliamentary Counsel Office) <http://www.legislation.govt.nz> accessed 15 May 2018.

[148] By sharp contrast, it appears that the term only appears 3 times in Canadian legislation: Government of Canada, 'Justice Laws Website' (Government of Canada, 15 May 2018) <http://laws-lois.justice.gc.ca> accessed 15 May 2018.

[149] *Federal Court of Australia Act 1976* (Cth), s 58AG..

[150] *Fair Work Act 2009* (Cth), s 536D.

[151] *Spam Act 2003* (Cth), s 6.

[152] *Powers of Attorney Act 2014* (Vic), s 28.

[153] *Motor Car Traders Act 1986* (Vic), s 30.

[154] *Estate Agents Act 1980* (Vic), s 64A.

[155] *Corporations Act 2001* (Cth), 1041G.

[156] *Criminal Code 1995* (Cth), s 135.1.

[157] *Criminal Code 1899* (Qld), s 408E.

What is significant about these offences is the complete lack of any indication in the offence as to specific acts that are prohibited. All three offences fall across a range of lawful and everyday activities. In fact, it is impossible to engage in any transaction at all without falling within the *actus reus*. Practically no one can arrange their affairs to prevent themselves from committing the *actus reus*. In the words of the Law Commission 'dishonesty does all the work'.[158] Thus, the only basis for criminalisation is a test of dishonesty. These offences are therefore in essence a requirement to act honestly in all dealings. As *Ivey* and *Peters* have pointed out, a belief at the time of acting that one is acting honestly is no basis for exculpation. Because dishonesty is a characterisation defined by a judge or jury after the event there is no way a defendant can ever know whether their behaviour is lawful – even if that characterisation of dishonesty includes the state of mind of the defendant at the time.[159]

Determining a stable and predictable test for dishonesty is thus vital. While the issue of dishonesty in highly structured offences like theft or as a standard of wrongdoing in classically fiduciary relationships such as trustee and beneficiary may well be complicated by introducing requirements that defendants realise they are acting unlawfully, dishonesty increasingly does all the work in general dishonesty offences. It seems unjust and unprincipled to create serious criminal liability for acts otherwise lawful, and statutorily described in abstract. Yet these issues have not been canvassed by the courts.

8 Options for England and Wales

This review of interpretations of dishonesty outside of England and Wales presents a range of options and cautionary tales for any domestic reaction to *Ivey*. In returning to a reified form of the *Feely* test, England and Wales courts are now aligned with the High Court of Australia, but this is not a dominant position across the common law world. Judicially, *Ivey* faces significant criticism from proponents of both the Canadian and Victorian approaches, and a range of legislative interventions to avoid it.

The hybrid approach in *Ivey* opens up a new discussion over what circumstances and what beliefs of the defendant are relevant to the characterisation of an activity as dishonest. It re-focuses attention on the approach that the Criminal Law Reform Commission took in relation to s 2 of the TA 1968 when they sought to protect particular mistaken beliefs as exculpatory in

[158] The Law Commission, *Legislating the Criminal Code: Fraud and Deception* (CP No 155, 1999) para 3.15.

[159] For an extended discussion of this issue and its similarity to indecency, see Steel (n 98).

theft, and whether such an approach should be broadened across all forms of dishonesty. The subsuming of claim of right within an ultimately objective dishonesty test under the *Peters* approach demonstrates that there are significant issues of policy that need to be considered. At the core of this is whether modern mass society has the patience and forbearance for individuals who hold eccentric or subversive views about the property rights of others.

The intervention of Parliaments to correct perceived issues with common law notions of dishonesty also gives pause for thought. Parliamentary intervention appears to be largely on the back of expert reports, and the attitude of those experts appears key. Little debate ensues in Parliament.[160] There is again no uniformity in the legislative approaches however all seem to be insistent that a subjective *mens rea* acts as an exculpatory aspect to offences, but that this be within bounds.

The parliamentary interventions also suggest two cautionary notes. The first is that irrespective of courts' notions of the role of dishonesty in criminal and civil law, new offences are being enacted where the whole weight of liability rests on whether behaviour is dishonest. In light of this approach, it seems unprincipled to expose individuals to significant imprisonment terms for behaviour that they were entirely unaware was illegal. This suggests that Parliaments should intervene to ensure that a test for dishonesty exists that fairly balances the need for flexible offences preventing complex wrongdoing with principles of fair warning and the educative and preventative value of criminal law.

The second cautionary note is that if Parliament does intervene with a statutory definition it should do so in the most wide-ranging way possible. Australia's approach of placing definitions within Divisions of Acts to avoid upsetting previous precedent has created a hodgepodge of approaches which to quote *Ivey* is 'an affront to the law'.

In *Ivey*, the Supreme Court stated that:

> dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition.[161]

Outside of England and Wales perhaps the opposite is true. Dishonesty is a heavily and variously defined concept. Courts and parliaments have not hesitated to define it – perhaps at times without recognition of the impact

[160] See Lusty (n 139).
[161] *Ivey* (n 6) [48].

of what they were doing. To re-use the elephant analogy, the elephant is in the room. Courts and legislatures in focussing on the tests for dishonesty and fears of imagined unjust acquittals may be ignoring the core issues: how can a citizen recognise when their proposed behaviour is illegal and so avoid it, and when is that behaviour a criminal rather than a civil wrong? The various approaches taken across the common law world suggest that dishonesty is not a stable enough concept to be the sole answer to either question.