THE UNIVERSITY OF MELBOURNE
Prof Jeremy Gans
Melbourne Law School

12th December 2019

Senate Legal and Constitutional Affairs Legislation Committee

Dear Ms Dunstone,

Submission – Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

This submission responds to the invitation published on the Committee's webpage on 6 December 2019 and your email of 11 December 2019. My submission is solely concerned with **Schedule 3—Amendments relating to dishonesty definitions in the Criminal Code.**

I am an academic at Melbourne Law School, specialising in all aspects of criminal justice. I am also the author of *Modern Criminal Law of Australia* (2nd ed, Cambridge, 2017), which focusses on statutory criminal law, including the federal *Criminal Code*.

My submission addresses Schedule 3's effect and rationale. I argue that Schedule 3's effects are sufficiently serious and uncertain, and its purported rationales sufficiently weak and wrong, that Schedule 3 should not be enacted without substantial further consideration.

Schedule 3's effect

'Technical amendments'

The Bill's Second Reading Speech says the following (and only the following) about Schedule 3:

> *Finally, the Bill also makes technical amendments to update the definitions of dishonesty under the Criminal Code to ensure these are aligned with the test endorsed by the High Court in Peters v The Queen (1998).*

The word 'technical' should not have been included in the Second Reading Speech. Schedule 3 expressly makes substantive changes to 58 federal dishonesty offences, including 56 indictable offences.

Schedule 3 removes one of two requirements for proof of dishonesty that currently apply to most federal criminal dishonesty offences:

> *(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.*

For most of those offences, Schedule 3 redefines 'dishonest' to mean 'dishonest according to the standards of ordinary people', which includes only para (a) of the above definition and leaves out para (b).

What difference does this make? Para (b)'s effect is to exempt people from criminal liability for dishonesty if they thought they were acting honestly (or where there is a reasonable doubt about that), specifically if they thought that they were acting according to the standards of ordinary people. The effect of removing para (b) is that someone who believed that he or she was acting according to ordinary people's standards will still be able to be found to be criminally dishonest so long as he or she was wrong, even reasonably, about what those standards are.

Professor Jeremy Gans, Melbourne Law School, University of Melbourne, 3010.

Schedule 3's precise impact is complicated by the different ways that current federal criminal offences define dishonesty and the fact that the schedule doesn't affect all of them. At present, out of the 93 current federal criminal offences that include an element of dishonesty:

- 73 current federal offences define 'dishonest' to require proof that the accused knew his or her conduct was dishonest according to the standards of ordinary people. These offences were introduced at various times over the past 19 years, from 24 May 2001 (*Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* to 6 April 2019 (*Treatment Benefits (Special Access) Act 2019*.) This category includes all 56 dishonesty offences in the Code (which is the principal federal criminal law statute, a schedule to the *Criminal Code Act 1995*.)
- 13 current federal offences define 'dishonest' to mean 'dishonest according to the standards of ordinary people'. The 13 offences are all in a single piece of legislation, the *Corporations Act 2001*. However, this definition of dishonesty has only applied since 13 March 2019, when it was introduced by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.
- 7 current federal offences leave the word 'dishonest' undefined. These offences were inserted (or the element of dishonesty inserted into them) between 2001 and 2006. Most are in the *Corporations (Aboriginal and Torres Strait Islanders) Act 2006*, but two are broader offences concerned with superannuation and migration.

Schedule 3 removes all seven definitions of 'dishonest' from the Code (which all match the first definition, above) and inserts a different definition of 'dishonest' in the Code's Dictionary (in the form of the second definition, above.) Its effect is to shift all 56 dishonesty offences in the Code (and two more that use the Code's definitions) from the first of the above categories to the second.

Schedule 3's effect is prospective only. That means that its changes will not apply to any conduct alleged to have been committed before the Bill receives Royal Assent. Prosecutions of pre-commencement conduct under the 56 dishonesty offences in the Code (and the two others) will use the current two-part definition of dishonesty. Prosecutions of post-commencement conduct under those 58 offences will use the replacement one-part definition of dishonesty.

Schedule 3's effect extends to all future dishonesty offences that are inserted into the Code or that use the Code's definitions, unless a statutory provision expressly provides otherwise. The only currently proposed dishonesty offence, 'dishonestly representing conferral of police awards', will not be affected by Schedule 3, as it expressly defines 'dishonest' to mean 'known by the defendant to be dishonest according to the standards of ordinary people.'[1] Instead, it will become the 16th remaining federal offence to use the two-part definition of dishonesty.

The affected offences

Schedule 3 broadens at least 58 current federal offences. These consist of all 56 dishonesty offences in the Code:

- 73.9(1): Providing or possessing a travel or identity document issued or altered dishonestly (10 years)
- 92A.1(1): Theft of trade secrets involving foreign government principal (15 years)

[1] Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019, schedule 1, cl 127. This Bill is presently before the Committee.

- 131.1(1): Theft (10 years)
- 132.1(1): Receiving (10 years)
- 132.6(1): Making off without payment (2 years)
- 132.7(1): Going equipped for a theft or property offence (3 years)
- 132.8(1) & (2): Dishonest taking or retention of property (2 years)
- 134.1(1): Obtaining property by deception (10 years)
- 134.2(1): Obtaining a financial advantage by deception (10 years)
- 135.1(1), (3), (5) & (7): General dishonesty (10 years)
- 135.4(1), (3), (5) & (7): Conspiracy to defraud (10 years)
- 141.1(1) & (3): Bribery of a Commonwealth public official (10 years)
- 142.1(1) & (3): Corrupting benefits given to or received by a Commonwealth public official (5 years)
- 142.2(1) & (2): Abuse of public office (5 years)
- 144.1(1), (3), (5) & (7): Forgery (10 years)
- 145.1(1), (3), (5) & (7): Using a forged document (10 years)
- 145.2(1), (3), (5) & (7): Possession of a forged document (10 years)
- 145.3(1) & (2): Possession, making or adaptation of devices etc. for making forgeries (10 years)
- 145.4(1) & (2): Falsification of documents etc. (7 years)
- 145.5(1) & (2): Giving information derived from false or misleading documents (7 years)
- 471.1(1): Theft of mail receptacles, articles or postal messages (10 years)
- 471.2(1): Receiving stolen mail receptacles, articles or postal messages (10 years)
- 471.3(1): Taking or concealing of mail-receptacles, articles or postal messages (5 years)
- 471.4: Dishonest removal of postage stamps or postmarks (12 months)
- 471.5: Dishonest use of previously used, defaced or obliterated stamps (12 months)
- 471.7(1): Tampering with mail-receptacles (5 years)
- 471.8: Dishonestly obtaining delivery of articles (5 years)
- 474.2(1), (2) & (3): General dishonesty with respect to a carriage service provider (5 years)
- 474.47(1): Using a carriage service for inciting theft on agricultural land (5 years)
- 480.4: Dishonestly obtaining or dealing in personal financial information (5 years)
- 480.5(1): Possession or control of a thing with intent to dishonestly obtain or deal in personal financial information (3 years)
- 480.6: Importation of thing with intent to dishonestly obtain or deal in personal financial information (3 years)

and the two offences of bribery of jurors or potential jurors in ss. 58AG(1) & (2) of the *Federal Court of Australia Act 1976* (10 years).

Each of these offences – and their penalties – was designed and enacted with the current *Code* definition of 'dishonest' in mind. Each of these 58 offences will be altered (and, indeed, broadened) by Schedule 3 without any specific attention to whether the change (and penalty) is appropriate for that particular offence. Schedule 3's actual practical impact depends on the particular purpose, scope, elements and penalty of each offence. What effect will the new definition of dishonesty have on the federal offence of theft of trade secrets? Forgery? Bribery of a Commonwealth public official? Abuse of public office? Dishonest removal of postage stamps? Does anyone know?

Two sets of offences that merit particular attention are the 'general dishonesty' offences in ss. 135.1 and 474.2 of the Code. As their names suggest, dishonesty is the central feature of these offences, which essentially criminalise dishonesty itself in a wide range of circumstances. These sets of offences' terms (together) criminalise most interactions anyone has with the federal government or an internet service provider if the interaction is 'dishonest'. They expose every taxpayer, social welfare recipient, user of a government service and user of the internet to hefty penalties of up to 10 years imprisonment if anything they do with respect to those things falls within the definition of dishonesty.

When they were inserted into the Code two decades ago (together with most of the other dishonesty offences), the federal Parliament's express rationale was specifically based on their use of the two-limb definition of dishonesty and not the one-limb definition. The explanatory memorandum for the Bill that introduced both the Code definition of dishonesty and the new general dishonesty offences explained that the two-limb definition:

> *is particularly important to the Criminal Code because it has additional offences which rely on 'dishonesty' even more so than the Model Criminal Code offences (see proposed sections 132.8, 135.1 and 135.2).*[2]

Schedule 3 significantly broadens a set of offences that not only go beyond the recommendations of the Model Criminal Code Officers' Committee but now carry twice their original maximum penalties.[3] Moreover, it does so in a way that reverses the express rationale that was used to justify the introduction of these significant expansions of federal criminal law.

The general principles of criminal responsibility

Or does it? The entire effect of Schedule 3 could potentially be undermined by Chapter 2 of the Code, which sets out general principles of criminal responsibility.

Chapter 2's key provision is s. 5.6:

> *(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*
>
> *(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.*

The purpose of this provision – the most important provision in federal criminal law – is to add subjective fault requirements to every physical element of an offence by default, unless Parliament expressly specifies either no fault element at all (i.e. strict or absolute liability) or a different fault element.

Section 5.6 has rightly been applied rigidly by Australian courts, reading subjective fault elements into offences despite cogent practical arguments that those elements will undermine Parliament's intention (for example, requiring proof that anyone accused of perverting justice in a federal proceeding must know that their proceeding is 'federal' and that anyone accused of people smuggling must know that the location they are sailing to (e.g. Ashmore Reef) is part of 'Australia',) In these

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[2] Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999.
[3] When these offences were originally introduced, they carried penalties of 5 years in prison. However, the penalty for s. 135.1 was lifted to 10 years on 25 August 2018.

cases, the courts have sensibly reasoned that, if Parliament does not want such fault elements to be read in, it can easily say so.

Parliament has not said so in the case of 'dishonesty' in federal criminal offences, either in the current Code or in Schedule 3. Parliament's silence is no problem under the existing Code definition, because it clearly specifies its own fault element – '(b) known by the defendant to be dishonest according to the standards of ordinary people' – and therefore renders s. 5.6 inapplicable. But it is potentially a problem with Schedule 3's definition, which refers only to the standards of ordinary people and does not expressly specify a recognisable fault element.[4] It is possible that the courts will apply s. 5.6(2) to the new definition of dishonesty, meaning that the prosecution will have to prove that the defendant as reckless (aware of a substantial risk that cannot be justified in the circumstances) about the 'circumstance' of whether or not his or her conduct was contrary to the standards of ordinary people.[5]

Or maybe not.[6] Perhaps the courts will treat 'dishonest' as a 'fault element', on the basis that ordinary people's standards define whether the accused is at fault, or because ordinary people care about what the accused knows or believes or intends when they assess honesty. Or perhaps the courts will treat the 'dishonesty' as something that is neither a physical nor fault element and therefore is unaffected by Chapter 2. Or perhaps the courts will apply the defence of mistake of fact in s. 9.1, so that an accused will avoid liability if he or she has a belief that is inconsistent with dishonesty. Or perhaps the courts will treat offences that require intentional dishonesty differently to ones that don't. Or perhaps different courts in Australia will take different approaches.

Who knows? But what is likely is that the issue of the interaction between the Schedule 3 definition of dishonesty and Chapter 2 of the Code[7] will be a source of continuing uncertainty in criminal investigations and prosecutions until a court – perhaps the High Court – resolves it conclusively, with considerable costs for prosecutors, defendants and courts in the meantime.

The unaffected offences

The day after the Bill receives Royal Assent, there will be:

- 15 or 16 federal offences that define 'dishonest' to mean:

  (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.

- 71 federal offences that define 'dishonest' to mean 'dishonest according to the standards of ordinary people'; and
- 7 federal offences that leave the word 'dishonest' undefined.

All up, there will be 35 or 36 federal offences that aren't affected by Schedule 3, because they are neither in the Code nor use the Code's definition of dishonesty. Of these, 13 – the ones in the

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[4] A non-exhaustive list of fault elements in in s. 5.1 specifies intention, knowledge, recklessness and negligence.

[5] Or, perhaps, they will apply s5.6(1), if the term 'dishonesty' is characterised as 'integral to' (rather than 'attendant upon') the conduct element of an offence. In that case, the prosecution will have to prove that the defendant meant to act contrary to the standards of ordinary people.

[6] See A Steel, 'Describing Dishonest Means: The Implications of Seeing 'Dishonesty' as a Course of Conduct or Mental Element with Parallels with Indecency', (2010) 31 *Adelaide Law Review* 7.

[7] A further issue is whether the new definition of dishonesty counts as a 'special liability provision' that potentially restricts the fault elements of attempt, complicity, joint commission, incitement and conspiracy. See para (b) of the definition of 'special liability provision' in the Code's Dictionary, and ss. 11.1(6A), 11.2(6), 11.2A(8), 11.4(4A) & 11.5(7A).

Corporations Act 2001 – were subject to a similar change six months ago. But the remaining 22 or 23 will, after Schedule 3 is enacted, use a different definition of dishonest to the rest.

The 15 or 16 offences that will continue to use the two-step definition of 'dishonest' are:

- *Australian Federal Police Act 1979*, proposed s. 62: Dishonestly representing conferral of police awards (6 months)
- *Australian Participants in British Nuclear Tests and British Commonwealth Occupation Force (Treatment) Act 2006*, s. 40: Bribery by medical service providers (2 years)
- *Australian Participants in British Nuclear Tests and British Commonwealth Occupation Force (Treatment) Act 2006*, s. 41: Practitioners receiving bribes etc (2 years)
- *Australian Passports Act 2005*, s. 35: Dishonestly obtaining an Australian travel document (10 years)
- *Australian Passports Act 2005*, s. 40: Abuse of public office (10 years)
- *Defence Force Discipline Act 1982*, s. 47C: Theft (5 years)
- *Defence Force Discipline Act 1982*, s. 47P: Receiving (5 years)
- *Fair Work Act 2009,* s. 536D(1) & (2): Giving and receiving corrupting benefits (10 years)
- *Future Fund Act 2006*, s. 60: Good faith – criminal offence (5 years)
- *Future Fund Act 2006*, s. 61: Use of position – criminal offence (5 years)
- *Future Fund Act 2006*, s. 62: Use of information – criminal offence (5 years)
- *Military Rehabilitation and Compensation Act 2004*, s. 309: Offence for bribery by medical service providers (2 years)
- *Military Rehabilitation and Compensation Act 2004*, s. 310: Offence for practitioners receiving bribes etc (2 years)
- *Treatment Benefits (Special Access) Act 2019*, s. 50: Bribery by medical service providers (2 years)
- *Treatment Benefits (Special Access) Act 2019*, s. 51: Practitioners receiving bribes etc (2 years)

This list notably includes:

- 12 bribery offences, which will (if Schedule 3 is enacted) define dishonesty differently to how it is defined in the main federal offence for bribing Commonwealth officials (s. 141.1 of the Code.)
- 2 theft/receiving offences under military law, which will (if Schedule 3 is enacted) define dishonesty differently to how it is defined in the civilian/general theft/receiving offences (ss. 131.1 & 132.1 of the Code.)
- The offence of dishonestly obtaining a passport, which will (if Schedule 3 is enacted) define dishonesty differently to how it is defined in the Code offence of providing or possessing a dishonestly issued or altered passport (s. 73.9(1) of the Code), both carrying 10 years in prison.

Prosecutors making charging decisions about conduct that may fall within both types of provisions will have to take account of these different requirements for dishonesty. Defendants making plea decisions will have to do the same. If both sorts of offence are charged and go to a trial on indictment, then the jurors will have to be told to use different definitions of dishonesty for each offence.

The 7 further federal dishonesty offences where dishonesty will remain undefined are:

- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ss. 265.25(1), (3) & (4): Good faith, use of position and use of information – criminal offences (5 years)
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, s. 284.5(3): Consequences of breach (5 years)
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, s. 363.1(2): sanctions (5 years)
- *Migration Regulations 1994*, Reg. 5.12: Offences in relation to Commissioners (10 penalty units)
- *Superannuation Industry (Supervision) Act 1993*, s. 202: When contravention of civil penalty provisions is an offence (5 years)

These includes 5 offences for officers of Indigenous corporations that will potentially define dishonesty differently to the equivalent offences for non-Indigenous corporations in the *Corporations Act 2001*.

The meaning of dishonesty in all 7 offences is a matter of statutory interpretation. Courts may decide that dishonesty has a 'special' meaning (or 'sense') in one or more of these offences. Or they may decide that it is defined in the same way as dishonesty is in the current Code. Or they may decide that it is defined in the same way as the *Corporations Act* offences. It is possible that courts may change their approach to this question in light of Schedule 3, either attempting to define these offences consistently with Schedule 3 or reasoning that the Schedule 3's failure to define dishonesty in these offences indicates that Parliament wasn't aiming for such consistency. Who knows?

Conclusion

There is nothing 'technical' about the amendments in Schedule 3. The Schedule consists entirely of substantive changes that broaden the reach of two-thirds of the federal dishonesty offences, including offences of general dishonesty, of already broad scope, that were expressly justified by reference to the existing definition of dishonesty.

However, the precise nature of these substantive changes is a matter of considerable technical complexity, because Schedule 3:

- affects nearly 60 quite different offences, including some where dishonesty plays a central role;
- contains no provisions governing the interaction with the new definition of dishonesty with the general principles of criminal responsibility; and
- creates new inconsistencies between the affected offences and nearly 20 other unaffected offences (including multiple bribery offences.)

Such significant, complex and uncertain changes should not be introduced without a clear and compelling rationale.

Schedule 3's rationale

Combatting corporate crime

Why are 58 federal dishonesty offences being broadened by this Bill? It is clear that Schedule 3 has nothing to do with the Bill's title, 'combating corporate crime'.

None of the offences being changed are specific to, or even commonly used against, corporations. They are offences that primarily affect individuals, indeed ordinary individuals who have not opted

to be part of any regulatory scheme. The offences govern any dealings with federal property and money (notably taxation offences), as well as uses of postal services, identity theft and the new offence of inciting agricultural trespass. Many, but certainly not all, could be loosely classified as white collar crime offences (in that they are not primarily about violence or vice), and some could affect some corporate officers.

Nor is the definition of dishonesty especially relevant to principles of corporate criminal responsibility. No-one has ever sorted out – or even felt the need to sort out – how the definition of dishonesty interacts with the Code's little-used provisions on corporate criminal responsibility in Part 2.5 of Chapter 2.[8] None of the cases where the definition of dishonesty has been developed or debated involves corporate defendants. Rather, the key precedents on dishonesty concern a taxi driver, a person betting on the races, several doctors, a used car salesman, a carer, a company director, a leading poker player, etc.

What is Schedule 3 even doing in this Bill? As near as I can tell – the second reading speech and explanatory memorandum don't mention it – Schedule 3's origin is in 2017's consultation on revisions to foreign bribery offences, which led to what is now Schedule 1. As part of that consultation – and under the heading of 'possible alternative approaches' – the Attorney-General's Department floated the option of redefining foreign bribery in terms of dishonesty. It explained:

> *Introducing 'dishonesty' to the foreign bribery offence has two main advantages.*
>
> *The first advantage is that the concept is known and understood in Australian law. In this sense it may provide some certainty as to the conduct captured by the offence. The definition of 'dishonesty' in relation to Commonwealth offences in Chapter 7 of the Criminal Code involves both an objective and a subjective test. That is, the conduct must be found to be both objectively dishonest, according to the standards of ordinary people, and known by the defendant to be dishonest according to the standards of ordinary people (the Ghosh test).*
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> *Should 'dishonesty' be introduced into the foreign bribery offences, the provision could specify that the 'dishonesty' is to be judged according to the standards of ordinary people in Australia. A similar approach has been taken by the United Kingdom (UK), with an exception for conduct permitted or required by the written law of the jurisdiction in which the conduct occurs.*
>
> *It is also possible that an alternative test of 'dishonesty'—one that removes the subjective limb of the two-limb test—could be used in the foreign bribery provisions. This would bring the definition in line with the test adopted by the High Court in Peters. Further, specifying that a purely objective test applies would ensure that 'dishonesty' would be judged solely by Australian standards.*
>
> *The second advantage is that this approach would align the foreign bribery provisions with the domestic bribery provisions set out at Division 141 of the Criminal Code. The domestic offences apply where a person 'dishonestly' provides, offers or promises a benefit to a Commonwealth public official, or where a Commonwealth public official dishonestly asks for, receives or obtains a benefit. Such an approach would simplify the language of the offence.*
>
> *A potential concern with any 'dishonesty' approach is whether an accused could be found to be simultaneously 'reckless' and 'dishonest'. In order to establish 'dishonesty' under the Ghosh test,*

[8] The express fault element provisions of Part 2.5 are divided between 'fault elements other than negligence' (whose terms only expressly cover intent, knowledge and recklessness) (s. 12.3) and 'negligence' (s. 12.4), suggesting that dishonesty will have to be proved without reference to either attribution, corporate culture or aggregate liability.

> *the prosecution must establish knowledge on the part of the accused, whereas 'recklessness' requires the prosecution to establish an awareness of the existence of a substantial risk.*
>
> *A further issue is that there is some uncertainty as to how 'dishonesty' will interact with the corporate criminal liability provisions set out in Division 12 of the Criminal Code. The OECD Convention requires that State parties' foreign bribery offences are capable of applying to companies.*[9]

All of this discussion was about – and specific to – foreign bribery. It briefly draws a comparison with domestic bribery, but makes no reference to any other dishonesty offences in the Code or elsewhere.

Two submissions in response to the consultation – from the Law Council of Australia and the International Bar Association – responded positively to adopting the two-step Code definition of dishonesty for foreign bribery, to 'to harmonise the language of the bribery offences in the Criminal Code and provide greater certainty as to the operation of the provisions.' By contrast, one submission – from the Australian Institute of Company Directors – recommended adopting the one-step dishonesty test because it is 'simpler to understand and wholly objective', and then added that the same test should be used in Chapter 7 of the Code (which includes the domestic bribery offence.) None of this mattered because, in the end, the federal government opted against defining foreign bribery in terms of dishonesty, preferring instead the concept of 'improper influence' and reducing dishonesty to merely one of 13 factors that must be considered when deciding whether an influence is improper. Indeed, when the present Bill was first introduced in 2017, it did not contain a third schedule.

So, the proposed schedule 3 seems to have little or nothing to do with the revision of the foreign bribery offence in schedule 1. It obviously has nothing to do with the provisions for deferred prosecution agreements in schedule 2. All up, there is no apparent reason for it to be in this Bill.

'Updating' the law

The Second-Reading Speech and Explanatory Memorandum instead provide a reason for Schedule 3 that has nothing to do with the consultation, foreign bribery or deferred prosecution agreements:

> *Finally, the Bill also makes technical amendments to update the definitions of dishonesty under the Criminal Code to ensure these are aligned with the test endorsed by the High Court in Peters v The Queen (1998).* [Second Reading Speech]
>
> *This will align the Criminal Code's definition of 'dishonest' with the single-limb objective test for dishonesty endorsed by Australia's High Court in Peters v The Queen (1998) 192 CLR 493 (Peters). In Peters, the High Court adopted a new test to determine dishonesty. The new test requires the defendant's knowledge, belief or intent to have been dishonest according to the standards of ordinary, decent people. Under the test adopted in Peters, there is no requirement to also prove that the defendant was aware that their knowledge, belief or intent was dishonest in this sense. The new definition in item 6 reflects this jurisprudence.* [Explanatory Memorandum]

Characterising Schedule 3 as an 'update' in light of a 'new test' is quite misleading. The 'test'[10] in *Peters* is 21 years old and was not especially new even then, effectively adopting an English judgment

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[9] Attorney-General's Department, Combatting bribery of foreign public officials, Public consultation paper, April 2017, pp. 6-7.

[10] Actually only fully supported by two judges (Toohey & Gaudron JJ0 with two more (McHugh & Gummow J) preferring a still broader test and the fifth (Kirby J) preferring a much narrower approach and reluctantly acquiescing to the narrow of the two other options.

from 25 years earlier. Moreover, the *Peters* test has been expressly and unequivocally rejected multiple times in Australia, most notably by the Model Criminal Code Officers' Committee (several years before *Peters*), the Standing Committee of Attorneys-General (months after *Peters*), the federal Parliament (in 2000),the South Australian parliament (in 2002), the ACT Legislative Assembly (in 2003) and the New South Wales Parliament (in 2009.) Schedule 3 is no 'update'. It is rather a reversal of multiple decisions made federally and a rejection of later decisions made in the ACT, NSW and South Australia.

The Explanatory Memorandum to the Bill that inserted most of the current dishonesty offences into the Code accurately describes the chronology up to 2000 (when the Code definition was adopted federally):

> *57. An important concept in the Model Criminal Code offences is the fault element of 'dishonesty'. Subsection 14.2(1) contains a straight-forward definition which was developed by the courts and is known as the Ghosh test. The Ghosh test is a familiar concept in Australia because until February 1998, it had been used in all jurisdictions, both common law and Code, in relation to conspiracy to defraud and in most jurisdictions, including the Commonwealth, in relation to the main fraud offences (s.29D and s71(1) of the Crimes Act 1914 which use the fault elements of 'defraud' and 'fraudulent'). In Peters v R (1998) 151 ALR 51 the High Court held that the Ghosh test was no longer appropriate and developed a new test which does not include a subjective component.*
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> *58. The approach in Peters is not favoured because it is necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing.*
>
> *59. Paragraph (a) of the definition of 'dishonest' seeks to achieve this by linking the definition of dishonesty to community standards (this is not novel, whether a person is negligent is assessed by a jury on the basis of what the reasonable person would have done in the circumstances).*
>
> *60. Paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the Criminal Code is to be true to the principle that for serious offences a person should not be convicted without a guilty mind. It reflects a preference for the law which existed prior to the 1998 decision of the High Court in Peters and is particularly important to the Criminal Code because it has additional offences which rely on 'dishonesty' even more so than the Model Criminal Code offences (see proposed sections 132.8, 135.1 and 135.2). The proposed definition was preferred over the Peters approach by the Standing Committee of Attorneys-General at its April 1998 meeting.*[11]

As this discussion makes clear, the two-limb test was expressly adopted despite the High Court's *Peters* ruling, specifically because the High Court's test was regarded as inadequate to reflect the wrongdoing of the Code offences, such as theft, and because the two-limb test was 'crucial' to the principles of liability that underlie the entire federal Code.

None of this is to say that previous executive and parliamentary decisions should never be reversed. Governments and parliaments get things wrong all the time, and the correct test for dishonesty is much discussed and debated (including very recently in England.) It is simply to say that the change needs a more compelling explanation than a short reference to two-decade old High Court decision

[11] Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999.

that has been repeatedly and expressly rejected by the other two branches of the federal government, and by legislatures in two states and one territory.

'Aligning' the law

Are there more compelling rationales? Here's the rationale given by the explanatory memorandum to the Bill that inserted the same test for dishonesty as Schedule 3 proposes into 13 dishonesty offences in the *Corporations Act 2001*:

> *1.171. There is no consistent definition of dishonesty in the Corporations Act. Dishonesty takes its ordinary meaning for the purposes of many provisions in the Corporations Act, while it has been defined as a two limbed test for the purposes of sections 1041F and 1041G.*
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> *1.172. More recent jurisprudence has suggested that a single limbed test is the preferred test for dishonesty in Australia. The High Court of Australia in Peters v R (1998) 192 CLR 493 (Peters) preferred an objective only test where whether an act was 'dishonest' should be decided by the standards of ordinary, decent people.*
>
> *1.173. The amendments in this Bill address the lack of a consistent definition of 'dishonest' in the Corporations Act by introducing a specific definition that applies across the Act.*
>
> *1.174. The amendments insert a definition of 'dishonest' into section 9 of the Corporations Act. 'Dishonest' means "dishonest according to the standards of ordinary people". This definition adopts, and is consistent with, the single limb test from Peters.*[12]

This explanation makes sense for the *Corporations Act 2001*, a dog's breakfast of a statute that had multiple definitions (or non-definitions) of dishonesty across its thirteen dishonesty offences and where courts had recently adopted the *Peters* test for some of those. But it makes no sense for the *Criminal Code Act 1995*, a planned statute developed after a national consultation and published model, which uses – and has always used – the exact same definition of dishonesty throughout its 56 dishonesty offences, the two-limb one that has been in place for nearly twenty years.

Should Parliament (to use the Explanatory Memorandum's phrase) now 'align the Criminal Code's definition of 'dishonest' with the single-limb objective test' used in the 13 dishonesty offences in the *Corporations Act*? That is surely a strange step, given that the *Corporations Act* only changed six or so months ago and of course 58 is a much bigger number than 13. Indeed, the real question is why the *Corporations Act* didn't align with the Code's definitions to solve the problems in that statute; however, that mystery is not presently before the Committee.[13]

Should Parliament now 'align the Criminal Code's definition of 'dishonest' with' a majority High Court judgment from 21 years ago? The High Court's decision involved a federal offence (conspiracy to defraud, defined identically to a common law offence) that was repealed and replaced by a new federal offence in 20001. So, that's obviously no reason for the law to shift now (especially as the shift is – and has to be – prospective only.)

But *Peters* does reflect the current definition of dishonesty in four Australian jurisdictions: the Northern Territory, Queensland, Tasmania and Western Australia. All of these apply *Peters* to define

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[12] Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018.

[13] Alas, it wasn't before the Committee previously, because the Senate Standing Committee on the Selection of Bills decided not to refer the previous Bill for inquiry: Senate Standing Committee on the Selection of Bills, *Report No. 15 of 2018*, p. 4.

'dishonestly' (or a similar term, 'fraudulently') in various property offences. Measured by area, those jurisdictions cover the majority of the Australian continent by area (74%.) By population, not quite so much (33.5%). However, these jurisdictions eschew the modern 'Theft Act' definitions of property offences used in the Code, so any alignment between the Code (if Schedule 3 is enacted) and these jurisdictions will be only partial.

On the other hand, Schedule 3 will move federal law away from three other Australian jurisdictions, the ACT, New South Wales and South Australia. It's true that these are just three jurisdictions (as opposed to four) and cover much less of the continent by area (23.3%.) However, they cover more of the population (40.5%). More importantly, these three jurisdictions follow the modern 'Theft Act' model for fraud and (except in NSW) theft offences, the same model that the Code follows. So, the Code's present alignment with these jurisdictions is much stronger than the only partial alignment with four other jurisdictions that Schedule 3 will advance. (In addition, the federal Code's definition of 'dishonest' was adopted by Fiji in 2009 and by Nauru in 2016.[14])

Importantly, all three state and territory legislatures opted to adopt the two-limb test for dishonesty because it is used in the federal Code. South Australia, while opting for different drafting, expressly opted to follow the model code approach, which is the basis for the federal Code.[15] In the upper house, the relevant Minister expressly rejected the *Peters* test, noting that 'the High Court was unable to come to a principled and rational conclusion on the subject. '[16] The ACT's adoption the next year expressly relied on the explanatory memorandum to the federal Bill that adopted the two-limb test for dishonesty.[17] Most dramatically, Australia's largest criminal jurisdiction, NSW, expressly drew on both the Model Criminal Code Officers' Committee work and 'on the Commonwealth Criminal Code to the extent that it picks up on those reports', in order to 'bring New South Wales closer to the national approach.'[18] The Second Reading Speech of the NSW Bill said that the federal definition of dishonesty was adopted because 'it has been adopted in the Commonwealth Crimes Act' and 'its adoption will particularly assist juries in hearings containing charges for both Commonwealth and New South Wales offences.'

(I should briefly mention my home state of Victoria, home to 26% of the population, but also growing faster than any other state. Victoria, the first in Australia to adopt England's Theft Act reforms in the 1970s, doesn't follow either the High Court or the federal Code on its definition of dishonesty, so there's no aligning with it. New Zealand follows a similar approach to Victoria.)

Conclusion

None of the three rationales for Schedule 3 presented or even alluded to in the Bill's explanatory material is cogent. The change to the definition of dishonesty has nothing to do with corporate crime or the other parts of the bill; rather than 'updating' the law, Schedule 3 reverses subsequent decisions by national and federal bodies and the federal parliament, and rejects subsequent decisions by three other Australian parliaments; and it removes the current close alignment between the Code and three Australian jurisdictions (comprising 40% of the population), replacing it instead with an only partial alignment with four Australian jurisdictions (comprising 33% of the population.)

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[14] *Crimes Decree 2009* (Fiji), s. 290 (and see also *Companies Act 2015* (Fij); *Crimes Act 2016* (Nauru), s. 150.
[15] Second Reading Speech, Criminal Law Consolidation (Offences of Dishonesty) Amendment Bill 2002 (SA).
[16] South Australia Legislative Council, 22 October 2002, T G Roberts.
[17] Explanatory Statement, Criminal Code (Theft, Fraud, Bribery and Related Offences) Bill 2003 (ACT).
[18] Explanatory Memorandum, Crimes Amendment (Fraud, Forgery and Identity Offences) Bill 2009 (NSW).

This doesn't mean that there is no plausible rationale for Schedule 3. The definition of dishonesty is much debated, including in recent years. It just means that the case hasn't been made in the material accompanying the Bill. Any such case should engage both with the long-running debate about the meaning of dishonesty and the question of how best to align with other Australian jurisdictions.

Concluding remark

The federal Criminal Code is one of the best pieces of legislation in Australia, indeed globally, developed over decades and the product of extensive consultation and a concerted attempt to ensure that its content reflects a coherent principled approach. That doesn't mean that it should never change. Indeed, it has clear flaws and ought to be regularly reviewed in a detailed, comprehensive way.

But what should never happen is that a blanket change is made to the Code without cogent explanation, Much less should such a change be made that cuts across multiple past decisions and the express rationale for key offences, in a way leaves uncertain the interaction between those offences and both the Code's general principles and several dozen other federal offences. It is especially wrong to make these changes via an unrelated omnibus bill that is accompanied by incorrect claims they are 'technical' or an 'update.'

Yours Sincerely,

Jeremy Gans