

## Case law update for prosecuting agencies

### Dishonesty offences

*Recent Court of Appeal decision changes the Queensland test of 'dishonesty'*

8 September 2015

*For decades now, Queensland courts have seen 'dishonesty' as involving both subjective and objective elements (the "Ghosh test"). In a decision handed down a fortnight ago, the Queensland Court of Appeal ruled that the default position in Queensland now sees dishonesty in purely objective terms.*

#### Previous approach

In matters for which 'dishonesty' was an element, it has previously been the position in Queensland that in order to satisfy that element, the prosecution had to prove that:

- a) What the accused person did was dishonest by the standards of ordinary people; and
- b) The accused person must have realised that what he or she was doing was dishonest by those standards.

This position reflects what is commonly referred to as the "Ghosh test"<sup>1</sup>, and in the absence of a definition of 'dishonesty' in the Queensland *Criminal Code*, was applied by Queensland courts for many years: *R v Laurie*.<sup>2</sup> Whilst the High Court had adopted a purely objective test<sup>3</sup> in *Peters v The Queen* (1998) 192 CLR 493 in interpreting the Commonwealth *Crimes Act* 1914, the Queensland courts continued to follow *Laurie* in applying the two-part Ghosh test.

<sup>1</sup> From *R v Ghosh* [1982] QB 1053

<sup>2</sup> [1987] 2 Qd R 762, a case which applied Ghosh and which in turn has been followed in Queensland ever since. See for example *R v Alwis* [2012] QCA 308.

<sup>3</sup> Essentially, only the first limb of the Ghosh test

## New approach: *R v Dillon; Ex parte Attorney – General (Qld)* [2015] QCA 155<sup>4</sup>

The respondent Dillon faced 11 counts of fraud pursuant to s408C of the *Criminal Code*. The prosecution applied to the District Court for a pre-trial ruling as to what it must prove to satisfy the element of 'dishonesty' in s408C. The District Court judge found that he was bound by *R v Laurie*, and therefore applied the two-part Ghosh test. The prosecution referred the matter to the Court of Appeal for a ruling on this point of law.

**The Court of Appeal held that the term 'dishonestly' in s408C has its ordinary meaning, requiring the prosecution to prove only that what the accused person did was dishonest by the standards of ordinary honest people. Unlike the Ghosh test, there is no requirement to also prove that the accused person must have realised that what he or she was doing was dishonest by those standards.<sup>5</sup>**

Whilst the judgement concerns s408C in particular, it is expected that this interpretation will be applied widely to other provisions involving dishonesty. The judgment does make clear though that consideration needs to be given to the meaning of 'dishonesty' in each particular (legislative) context in which it appears, as in some cases, it may have a "special meaning" such that a subjective element may also need to be proved.

The Court noted too that where there is evidence that the accused had an honest belief that he or she was entitled to act as they did, the prosecution will need to disprove the honest belief beyond reasonable doubt.<sup>6</sup>

### What *Dillon* Means for Prosecuting Agencies

1. Prosecutorial agencies need to consider current and proposed prosecutions in light of *Dillon*. All matters involving elements of fraud, deceit or dishonesty should be reviewed.
2. Consideration must be given to whether the dishonesty elements (however expressed) in the relevant legislation are to be construed in their ordinary way (in which case an objective test only applies), or in a "special" way (which might introduce subjective elements to the test). One can imagine pre-trial applications (and appeals) being brought to clarify the position under different Acts.
3. Where dishonesty is given its ordinary meaning such that it is only to be assessed objectively, the prosecution may still have to negative a defence under s22 Criminal Code if there is evidence the accused honestly believed they were entitled to act as they did.

**For further inquiries or assistance, please contact Glen Cranny, Principal, Gilshenan & Luton Legal Practice on 3361 0240 or [gcranny@gnl.com.au](mailto:gcranny@gnl.com.au)**

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<sup>4</sup> Delivered on 25 August 2015

<sup>5</sup> *Dillon* at [48].

<sup>6</sup> In accordance with section 22 Criminal Code.