

Fraud: s 408C

Legislation

408C Fraud

- (1) A person who dishonestly—
 - (a) applies to his or her own use or to the use of any person—
 - (i) property belonging to another; or
 - (ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
 - (b) obtains property from any person; or
 - (c) induces any person to deliver property to any person; or
 - (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
 - (e) causes a detriment, pecuniary or otherwise, to any person; or
 - (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
 - (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
 - (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

commits the crime of fraud.

Maximum penalty—5 years imprisonment.

- (2) The offender is liable to imprisonment for 14 years if, for an offence against subsection (1)—
 - (a) the offender is a director or officer of a corporation, and the victim is the corporation; or
 - (b) the offender is an employee of the victim; or
 - (c) any property in relation to which the offence is committed came into the possession or control of the offender subject to a trust, direction or condition that it should be applied to any purpose or be paid to any

person specified in the terms of trust, direction or condition or came into the offender's possession on account of any other person; or

- (d) the property, or the yield to the offender from the dishonesty, or the detriment caused, is of a value of at least \$30,000 but less than \$100,000; or
 - (e) the offender is or was an employer of the victim.
- (2A) The offender is liable to imprisonment for 20 years, if, for an offence against subsection (1)—
- (a) the property, or the yield to the offender from the dishonesty, or the detriment caused, is of a value of at least \$100,000; or
 - (b) the offender carries on the business of committing the offence.
- (2B) The Penalties and Sentences Act 1992, section 161Q also states a circumstance of aggravation for an offence against this section.
- (2C) An indictment charging an offence against this section with the circumstance of aggravation stated in the Penalties and Sentences Act 1992, section 161Q may not be presented without the consent of a Crown Law Officer.
- (3) For the purposes of this section—
- (a) **property**, without limiting the definition of property in section 1, includes credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations; and
 - (b) a person's act or omission in relation to property may be dishonest even though—
 - (i) he or she is willing to pay for the property; or
 - (ii) he or she intends to afterwards restore the property or to make restitution for the property or to afterwards fulfil his or her obligations or to make good any detriment; or
 - (iii) an owner or other person consents to doing any act or to making any omission; or
 - (iv) a mistake is made by another person; and
 - (c) a person's act or omission in relation to property is not taken to be dishonest, if when the person does the act or makes the omission, he or she does not know to whom the property belongs and believes on reasonable grounds that the owner can not be discovered by taking reasonable steps, unless the property came into his or her possession or control as trustee or personal representative; and

- (d) persons to whom property belongs include the owner, any joint or part owner or owner in common, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, had control of it; and
- (e) **obtain** includes to get, gain, receive or acquire in any way; and
- (f) if a person obtains property from any person or induces any person to deliver property to any person it is immaterial in either case whether the owner passes or intends to pass ownership in the property or whether he or she intends to pass ownership in the property to any person.

Commentary

Meaning of 'dishonestly'

Often the difficult aspect of the direction required in s 408C cases is the explanation of 'dishonestly'.

In *R v Dillon; ex parte Attorney-General (Qld)* [2016] 1 Qd R 56 the Court of Appeal was asked whether the Crown had to prove not only that what an accused did was dishonest by the standards of ordinary honest people, but also that the accused must have realised that what they were doing was dishonest by those standards. In *Dillon*, the Court of Appeal aligned 'dishonestly' in s 408C with 'dishonesty' in the decisions of the High Court in *Peters v The Queen* (1998) 192 CLR 493, in the context of the Commonwealth offence of conspiring to defraud the Commonwealth, and in *Macleod v The Queen* (2003) 214 CLR 230, in the context of the Commonwealth offence of fraudulently taking property for a person's own use or benefit.

In *Dillon*, McMurdo P, with whom Morrison JA and Dalton J agreed, said:

As "dishonestly" in s 408C has its ordinary meaning, this Court must follow the meaning given to "dishonesty" by the High Court in *Peters* and *Macleod* ... Queensland Courts must now construe the term "dishonestly" in s 408C as requiring the prosecution to prove only that what the accused person did was dishonest by the standards of ordinary honest people. To secure a conviction, the prosecution need not prove that the accused person must have realised that what he or she was doing was dishonest by those standards. This construction works harmoniously with the defence provisions of the *Criminal Code*, particularly s 22(2), so that, where there is evidence that the accused person had an honest belief that he or she was entitled to act as he or she did, to secure a conviction the prosecution must disprove the honest belief beyond reasonable doubt.

In *R v Orchard* [2018] QCA 58, the Court of Appeal dealt with an argument that the Crown was required to prove beyond reasonable doubt that the accused acted with a subjective dishonest intent. Such an argument was based upon the following observations of Toohey and Gaudron JJ in *Peters* which were cited with apparent approval by Gleeson CJ, Gummow and Hayne JJ in *Macleod*. The observations were:

In a case in which it is necessary for the jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest ... 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.

Gotterson JA, with whom Sofronoff P and Henry J agreed, said, in *Orchard* that:

To extract from these observations a proposition that subjective dishonest intent is an element of dishonesty is to misunderstand them. Their Honours were making the point that where knowledge, belief or intent is alleged to be a circumstance in an accused's dishonesty, then the fact of the knowledge, belief or intent must be identified for the jury. That fact was one which they must consider with others in determining whether or not the accused's conduct was dishonest according to the standards of ordinary, decent people.

In *Orchard*, the relevant knowledge included that the defendant knew that the complainant was handing over a \$100,000 bank cheque to be used in accordance with a Heads of Agreement (HOA). For the defendant to have *known* that the money was in fact to be used *otherwise* than in accordance with the HOA when she obtained the bank cheque rendered the obtaining of it a pretence: to have obtained the bank cheque with that knowledge was dishonest by the standards of an ordinary person.

In *R v Lyons* [2021] QCA 136, McMurdo JA noted at [6] that, in *Peters*, Toohey and Gaudron JJ explained that an objective assessment, by the standard of ordinary honest people, of whether a person's act was dishonest must be made 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. His Honour continued:

... in most cases where honesty of an accused is in issue, the real question is whether an act was done with a certain knowledge, belief or intent, rather than whether an act done with that state of mind is properly characterised as dishonest. Nevertheless, in all cases the issue of dishonesty must be determined by reference to what is proved to have been the accused's state of mind as to some fact relevant to the accused's act in question.

In *Lyons*, Mullins JA said at [20]:

... the purpose of the suggested direction ... as to the knowledge, belief or intent with which the accused person did the dishonest act is to assist the jury in applying the test of whether the act was dishonest by the standards of ordinary honest people. It ensures the issue of dishonesty is not left at large, but focuses the jury's assessment on the evidence to decide whether the element of dishonesty has been proved beyond reasonable doubt by considering the knowledge, belief or intent with which the relevant act was committed. To enable the trial judge to give such a direction, the prosecution case must articulate clearly the knowledge, belief or intent with which the accused person is alleged to have done the dishonest act which is the subject of the particular charge of fraud.

In *Lyons*, it was held (by majority) that the trial judge's direction in relation to counts 1 and 2 (*inter alia*) was inadequate. The trial judge instructed the jury that if they concluded, beyond a reasonable doubt, that a complainant did not authorise the appellant to use their moneys in the way she did, they could convict but did not link that lack of authority with the need for the prosecution to show that the appellant knew that she was using the money for a purpose that was different from that which she was authorised to use it. Mullins JA said at [21] –

That was, in fact, the prosecution case for each of counts 1 and 2, but it was not given the imprimatur of a direction from the trial judge, as suggested in *Peters* at [18], that in order to find dishonestly, they had to apply the standards of an ordinary, honest person to the payment of the money the subject of each of counts 1 and 2, if they were satisfied beyond reasonable doubt that it was paid for a purpose by the appellant for which she was not authorised and she knew she was not authorised ...

In *R v Jayaweera* [2022] QCA 103, Fraser and Bond JA said at [11] – [13]:

[11] It does not follow from the fact that someone makes a misrepresentation to another person which causes them to suffer a pecuniary detriment that the person making the misrepresentation has been dishonest. It is a truism that misrepresentations can be made innocently or negligently, but not necessarily dishonestly. Nor does it follow from the fact that an agent has made an unauthorised transfer from a principal's account, that the agent has done so dishonestly. It is also a truism that agents may honestly exceed the bounds of their authority. An additional ingredient is required to show that conduct which might have been done honestly was in fact done dishonestly. In a case of the present nature, that which could make the conduct dishonest is that when the accused did the acts which were said to be causative of the pecuniary detriment (namely when he made the misrepresentations or made the unauthorised transfers):

- (a) he had a particular state of knowledge, belief or intent (for example, that he knew of the falsity of a fact that he had represented or that he knew that he was not authorised to invest monies in a particular way);

and

- (b) because he conducted himself with that state of knowledge, belief or intent, his conduct was dishonest by the standards of ordinary honest people.

[12] It is not uncommon in cases of this nature, and it was the case here, that there was no direct evidence of the relevant state of the accused's knowledge, belief or intent, and the Crown had to invite the jury to reach the requisite conclusion by an inference from all the circumstances that it proved, that inference being reached according to the criminal standard. But it is critical that the Crown states clearly what its case is in that respect so that the trial judge may direct the jury according to the law, and not leave the jury in the position of making some sort of inquiry at large as to what it was that made conduct dishonest.

[13] Thus, in *R v Mirotsos* [2022] QCA 76, the Court of Appeal recently observed (citing *Peters v The Queen* (1998) 192 CLR 493 at [15]–[18]; *R v Dillon*; *Ex parte*

Attorney-General (Qld) [2016] 1 Qd R 56 at [48]; *R v Lyons* [2021] QCA 136 at [5]–[6], [19] and [136]; and *R v Davidson* [2022] QCA 22 at [11]–[14]:

“Yet the law is clear that in a case of this nature, the Crown must articulate clearly the relevant aspect of the accused’s knowledge, belief or intent which, on the Crown case, rendered the accused’s conduct dishonest and the trial judge must:

(a) identify for the jury the knowledge, belief or intent of the accused which was said to render the impugned conduct by the accused dishonest; and

(b) instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the conduct was dishonest by the standards of ordinary honest people.” (underlining added)

Suggested Direction

The elements of the offence of fraud that the prosecution must prove beyond reasonable doubt are:

First, the defendant did the act or omission relied on to constitute the offence [i.e., the act or omission].

Secondly, that at the time the defendant did the act or omission, he/she had a particular state of [knowledge, belief, or intention].

The element of knowledge requires proof of actual knowledge. A person has knowledge of a circumstance or a result if he or she is aware that it exists or that it will exist in the ordinary course of events.

‘Intent’ and ‘intention’ are familiar words. In this legal context, they carry their ordinary meaning.

Knowing, believing, or intending something is a state of mind. It is not uncommon in cases like this for there to be no direct evidence about the relevant state of the defendant’s mind.

In ascertaining the defendant’s state of mind at the time when he/she did the act or omission, you are drawing an inference from facts which you find established by the evidence concerning his/her state of mind. I [have already or will] explain how you may draw inferences generally.

The requisite state of mind may be inferred or deduced from the circumstances in which the act or omission happened, and from the conduct of the defendant before, at the time of, or after the defendant did the specific act or omission. And, of course, whatever a person has said about their state of mind may be looked at for the purpose of deciding what that the state of mind was at the relevant time.

The Crown asks you to infer that the defendant had that [knowledge, belief, or intent] based on the proven circumstances, which I will identify later.

Thirdly, at the time when the defendant did the act or omission with that [knowledge, belief, or intent] he/she acted dishonestly.

The element of dishonesty is to be determined objectively – not by the defendant’s standards, but by the standards of ordinary, honest people.

To prove that the defendant acted dishonestly, the prosecution must satisfy you, beyond a reasonable doubt, that by acting with the [knowledge, belief or intent] what the defendant did was dishonest by the standards of ordinary honest people.

Fourthly, by [the act or omission] the defendant [select as necessary]–

(a) applied to his or her own use [or to the use of any person] –

(i) property belonging to another; or

(ii) property belonging to the defendant, or which is in the defendant’s possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person.

‘Applied’ means taking or using another’s property for the defendant’s own purposes.

(b) The defendant obtained property from any person.

‘Obtain’ includes to get, gain, receive or acquire in any way (section 408C(3)(e)).

(c) The defendant induced any person to deliver property to any person.

(d) The defendant gained a benefit or advantage, pecuniary or otherwise, for any person.

(e) The defendant caused a detriment, pecuniary or otherwise, to any person.

The question of causation is to be determined by applying your common sense.

The defendant's act or omission must be a substantial or significant cause of the pecuniary detriment.

A 'detriment' includes a loss or damage.

A 'pecuniary' detriment includes one relating to money.

(f) The defendant induced any person to do an act which the person was lawfully entitled to abstain from doing.

To 'induce' would include to bring about, produce or cause something or some act.

(g) The defendant induced any person to abstain from doing an act which the person was lawfully entitled to do.

(h) The defendant made off –

(i) knowing that payment on the spot was required or expected for property lawfully supplied or returned or any service lawfully provided;

(ii) without having paid; and

(iii) with intent to avoid payment.

Fifthly, [direct on any circumstance of aggravation for example:

- the defendant was at the time of the act or omission an employee.
- the yield to the defendant was of the value of at least \$30,000/\$100,000.]

You must look at each charge and the evidence relating to it separately and decide whether the prosecution has proved each element of the offence beyond a reasonable doubt.

Taking each count on the charge sheet in turn.

Count X.

The [act/s or omission/s] relied on by the prosecution is/are that [on or between dates], the defendant did or omitted to [here state the act/s or omission/s relied on].

The prosecution alleges that the defendants state of [knowledge, intention, or belief] at the time he/she [did the act/s or made the omission/s] is that the defendant [here state the knowledge, intention or belief relied on].

The prosecution alleges that doing the [act/s or omission/s] with that state of mind was dishonest.

The [property applied, obtained or delivered, the benefit or advantaged gained, the detriment caused etc] is [here state the relevant transaction].

The value of the [property, benefit or detriment etc] is [\$XX].

The primary circumstances which the prosecution relies on, alone or in combination, to prove the [knowledge, intention, or belief] are [here state the circumstances]

The prosecution does not need to prove each circumstance beyond a reasonable doubt. It is only the state of mind that must be proved beyond a reasonable doubt.