

## Defrauding the Commonwealth s 29A – Crimes Act 1914 (Cth)

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The prosecution must prove that:

1. The defendant defrauded the Commonwealth, that is that he dishonestly deprived the Commonwealth of [money] which was the Commonwealth's or to which it would or might be entitled but for the dishonesty of the accused.
2. That what the defendant did was dishonest by the standards of ordinary honest people.
3. That the defendant knew that what he did was dishonest by those standards.<sup>1</sup>

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<sup>1</sup> The above form of direction is based on the judgment of the House of Lords in *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 838 per Viscount Dilhorne as to 'defrauding', and the judgment of the Court of Criminal Appeal in Queensland in *Maher* [1987] 1 Qd R 171 approving the directions of the trial Judge based on *Ghosh* [1982] QB 1053. *Maher* was a case involving conspiracy to defraud, and the Court's judgment must now be seen in the light of the High Court's judgment in *Peters* (1998) 151 ALR 517, 96 A Crim R 250. The Court split 3/2 about the appropriate directions a trial judge should be given in the relation to any offence in which the jury have to decide if a particular act was dishonest. Toohey and Gaudron JJ (with whom Kirby J agreed but not on the basis of their reasoning but for the purpose of providing "clear instruction to those who have the responsibility of conducting criminal trials"), 255 of 96 A Crim R 250:

"In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent, and, if so, to determine whether, on that account, the act was dishonest . . . . If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury is instructed that that is to be decided by the standards of ordinary, decent people".

(Their Honours then went on to vary the direction to be given in cases in which 'dishonest' has some special sense in the legislation creating the offence.)

Although centred on the notion of dishonesty as an element of the offence of conspiracy to defraud (which they decided it was not) McHugh J (and Gummow J who agreed with McHugh J) delivered a persuasive minority judgment which might suggest that the subjective element of the concept of dishonesty may be removed in the future by the High Court.