INTRODUCTION

In Australia in recent years there has been a series of prosecutions launched against persons involved with various "tax avoidance schemes" charging them with conspiracy to defraud the Commonwealth.

Those prosecuted range from the so-called "masterminds" of particular "tax schemes", through to promoters of such schemes, through to those who may "introduce" someone to such schemes, through to other minor "participants".

An examination of those cases reveals that a great deal of confusion exists concerning the law relating to the mental element in conspiracy to defraud. There have been conflicting directions given to juries in South Australia, Queensland and Victoria and conflicting arguments advanced by counsel for the Commonwealth Director of Public Prosecutions in different parts of Australia.

The High Court of Australia has recently declined to take the opportunity to deal with what I see as the difficulties in this area.

There are other prosecutions for conspiracy to defraud under way or on the way in respect of "tax avoidance schemes" in various States and the issues raised by these types of cases involve matters of principle applicable to conspiracy to defraud generally.

In this paper I deal separately with a number of the recent cases. I have provided fairly lengthy extracts from judgements and summings-up in order to enable participants at the Bali conference to review the source material for themselves.

I then turn to a discussion of various issues concerning the mental element which emerge from those cases. Finally, I advocate a return to fundamental principles and make some suggestions towards a "model" summing-up. I invite participants to concentrate the discussion on this aspect of the paper in the hope that collectively we can produce something which will be of real use to the profession.

It will become apparent that the nature of the role of the High Court assumes importance in the future of the law in this area, and as an ancilliary matter I invite discussion of (1) what role, if any, should the profession take in a re-defining of the expression "special"; and (2) in an application for special leave ought not the emphasis be directed to the trial rather than the judgements of the Court of Criminal Appeal.

DIRECTOR OF PUBLIC PROSECUTIONS V. ASTON, BURNELL AND THOMPSON.

Aston, Burnell and Thompson were charged with having "between January 1981 and October 1982 at Adelaide conspired together with Lonnie James Streckert and with Southern Cross Commodities Pty. Ltd. to defraud the Commonwealth by arranging fictitious commodity futures trading losses through Southern Cross Commodities Pty. Ltd. such losses being capable of inclusion as to investment losses in incomes tax returns and intended to be so used whereby the Commonwealth would have been deprived of income tax properly payable to it; contrary to the provisions of section 86(1)(e) of the Commonwealth Crimes Act 1914."

The case involved a "scheme" the "bare essentials" of which were described by White J. in R. v. Streckert, 120 LSJS 198 as follows :

"Individual tax-payers were solicited by staff of this company or its associates to participate in the scheme whereby they entrusted large sums of money, preferably cash or bank cheques, to the company for a few days. During that time, the respondent, as the only computer operator and one of the future experts, would create the paper work necessary to purport to evidence a series of fictitious deals on the commodities futures market, deals based upon the previous month's trading figures, with some profits and some losses, ending with a substantial loss at the end of a trading period of weeks. The clients'

money was never at risk and never left the vaults of the company or its bank. After a few days, the participating tax-payer received back his money in cash less 10% commission for the service. The service consisted of the creation and supply of a bundle of computer print-out records of fictitious "contracts", capable of deceiving checking officers at the Taxation Department. Without the respondent, the impressive facade of deceitful and sophisticated paperwork would not have been created. ....

The tax-payer clients were not joined as co-accused in the charge of conspiracy. The charge ws- confined to those persons and the company providing the fraudulent service to the public."

The Trial - Case for the Prosecution :

Aston and Burnell were each responsible for introducing a tax-payer client to Southern Cross Commodities in terms described by White J., and that they shared in commissions paid by that company as a result of the introductions. Specific evidence was led against Burnell that he was responsible for the introduction of his brother-in-law, Trowse :

> "Trowse first paid his 'fee' of $1,206 in June 1981 and later, on 19th April 1982, the company received from Trowse, through Burnell, $12,000. Two days later, the company, through Burnell, repaid to Trowse, in cash, the same sum of $12,000: even so, the scheme purportedly justified Trowse claiming, as an income tax deduction, through losses incurred on the commodities futures market, the sum of $11,444."

Specific evidence was led against Aston that he was responsible for the introduction of Swincer. The company in the case of Swincer received $14,000 on the 16th June 1981 and on the same day Swincer received back $13,300 of which $10,000 was cash. Swincer claimed a tax deduction of $15,573.

The Crown posed three questions :

> "The first, has the Crown proved to your satisfaction beyond a reasonable doubt that the Southern Cross tax avoidance scheme had as its intended end result a fraud upon the public revenue of the Commonwealth. Second, if the Crown has proved beyond reasonable doubt that the Southern Cross scheme was a fraud in that sense has the Crown proved to your satisfaction beyond a reasonable doubt that the practical implementation of a fraudulent tax avoidance scheme involved the participation as co-conspirators of two or more persons. Was there, in other words, a conspiracy at all to set up and operate the fraudulent scheme and thirdly, if the answer to question 2 is yes, has the Crown demonstrated to your satisfaction beyond reasonable doubt that Mr. Aston is properly to be implicated as a conspirator and separately that Mr. Burnell is properly to be implicated as a conspirator and separately that Mr. Thompson is to be implicated as a conspirator."

Case for the Defence :

It was conceded that the Southern Cross scheme was in fact fraudulent, but Aston and Burnell claimed that at the time they believed that the scheme was of an entirely different type. They believed that Streckert was engaging in actual legitimate futures commodity transactions by manipulating

commodity transactions in such a way as to create a loss in Australia, and a profit overseas, which profit they believed was not required to be brought into account in Australia under international agreement; that the Australian loss was deductible, so a taxpayer could demonstrate he had made the loss honestly and that the transaction involved exploiting an available loophole in the Australian law, by making a non-taxable profit outside Australia.

They were not aware of the fictitious documentation. It was argued on their behalf that it was necessary for the Crown to prove that the accused knew the bare essentials of the scheme (in particular the fictitious documentation) as outlined by White J.

The Summing-up :

I set out certain passages from the summing-up, and I have numbered them for ease of reference.

(1) "There are three ingredients to consider. First, the agreement, arrangement, or understanding must be considered; second, you must consider the unlawful purpose or unlawful means contemplated; and thirdly, you must consider the number of persons who are alleged to be involved."

(2) "It is not necessary that persons who were involved in an alleged conspiracy join together at the one time. In such a charge any one of the parties may not know all the other parties but only that others are involved. The party may not know the full extent of the scheme to which he attaches himself but he must understand that his involvement is part of a larger scheme." (3) "The overall question in conspiracies of this kind is not whether a number of persons have a common unlawful purpose, but

whether any of them either knows or has reason to believe that his activities are part of a larger design."

(4) "In order to prove the conspiracy here it is not necessary for the Crown to prove that the accused both Mr. Aston and Mr. Burnell or, indeed, Mr. Thompson, knew exactly what Streckert had said about the scheme and they do not have to prove that Aston and Burnell knew that Streckert created the paperwork necessary to deceive the checking officers at the Taxation Department. On the Crown case all the Crown needs to do is to prove either or both may not know the full extent of the scheme provided that you are satisfied that they attached themselves to the scheme and that they must understand what they are involved in is part of a larger scheme to defraud the Commonwealth and the Crown."

(After very briefly describing the defence case).

(5) "If you think it reasonably possible that this is an honest account of the state of mind of the accused at all material times and by that I mean the period under review in connection with all those matters which the Crown has laid against the accused Mr. Aston and if you accept that what he tells you is true, that is that he did have that state of mind, that he did believe in what he thought was a legitimate scheme, given his knowledge, given his researches, and given his reading, .. if you think having regard to all those matters that he is telling you the truth about the state of mind which he had then, then in those circumstances, ladies and gentlemen, I direct you that it is your duty to acquit him."

(6) "Dishonesty is an essential element of conspiracy to defraud the Commonwealth and this is required to be proved by the Crown showing that the accused believed he was not acting honestly according to

the standard of right-minded people"

It should be noted that the passages (2),(3) and (4) were repeated, either exactly or substantially on four occasions. Passages (5) and (6) were the only references in the summing-up on those subjects.

The three defendants were convicted by majority verdict (10 - 2). Aston and Burnell appealed against their conviction.

Judgement Court of Criminal Appeal (19th March, 1987)
King C.J., Cox and O'Loughlin J.J.

The appellants firstly argued that it was wrong in law to direct the jury in terms of "reason to believe." ((3) above). The Court of Criminal Appeal dealt with this argument as follows :

> "Knowledge is, of course, an essential element of the crime of conspiracy. The Crown must prove beyond reasonable doubt that each conspirator knew that there was "coming into existence, or (was) in existence a scheme .." (R. v. Griffiths (1966) 1 Q.B. 589). It seems to me that, whilst it would have been better for the learned trial judge to have refrained from using the expression "reason to believe", what he was endeavouring to do was to explain to the jury, and to emphasize to them, that knowledge was an essential ingredient in their considerations. His use of the phrase "reason to believe", following, as it did his use of the word "knows", indicates that both were used in the same context - that is, the accused "knew" or had a "reasoned belief" or had a "belief based on reason". Thus understood, it would be unreasonable to criticize the learned trial judge by suggesting that he imported an objective test by inferring that

the jury could be satisfied if they believed that the appellants "ought, as a matter of reason, to have believed".

Counsel for the appellants complained that it was insufficient for the learned trial judge to direct the jury that there must be an understanding on the part of the appellants that their involvement was part of a larger scheme; (see passages (2),(3),(4) above) he argued that there was an onus on the Crown to prove that the two appellants knew the bare essentials of the scheme; specifically, he said that the Crown should have been required to prove that the appellants knew that fictitious documents were being used as part of the scheme.

As to his argument, the court said :

"This cannot possibly be the case; a person can be a willing conspirator in a fraudulent scheme, well-knowing that the scheme is fraudulent, but having no idea of the manner in which it is implemented - not knowing any of the essential steps leading up to its implementation. If a person knows that a scheme is fraudulent and, nevertheless, participates in it, then he is as much guilty of the conspiracy to defraud as is the mastermind of the scheme. For example, if an accused person knows that a particular plan will enable a taxpayer (with apparent justification) to claim a deduction against his assessable income, and the accused knows that that deduction is or will be false - even though he does not know the details of the falsity or the means by which the falsehood was contrived - he can, if he appropriately participates in the plan, be guilty of conspiracy. In those circumstances it matters not whether the false deduction was contrived by use of false documents or by some other means: the actual method of operation is of no significance."

The Court then referred to the trial judge's direction on "dishonesty" (passage (6) above) -

> "this was not only a correct direction (Einem v. Edwards (1984) A.Crim.R. 463) but it fairly and squarely drew to the attention of the jury the importance of bearing in mind that they must be satisfied beyond reasonable doubt that each of the appellants was wholly tainted in the manner described in the passage from the summing up."

The Court held that

> "the learned trial judge made it clear to the jury that they had to be satisfied that each of the appellants, independently, entered into and were part of, the relevant agreement, that they had to be satisfied that each of the appellants well knew that the object of the agreement was to enable individual clients, in their capacity as taxpayers, to claim false income tax deductions and that they had to be satisfied that each of the appellants well knew that, in so participating, he was acting dishonestly."

The High Court :

Aston and Burnell sought special leave to appeal to the High Court. In outline the applicants argued :

In a prosecution under sec. 86(1)(e) of the Crimes Act the circumstances of this case illustrate there are a number of complex problems requiring urgent resolution.

(1) There is uncertainty as to the mental element involved.

(2) There is uncertainty as to what is the proper direction to give concerning the requirement of dishonesty.

(3) There is uncertainty as to the degree of knowledge or understanding the prosecution must prove the accused has of the particular tax scheme involved.

The applicants argued that the "reason to believe" direction (passage (3)) was wrong and that the Court of Criminal Appeal's "explanation" of this direction was untenable.

The applicants further argued that the "dishonesty" direction of the trial judge (passage (6)) approved by the Court of Criminal Appeal was wrong in that it imported an objective test, or alternatively, quite inadequate in a case of this type.

The applicants further argued that passages (2) and (4) and their approval by the Court of Criminal Appeal should not be accepted in that for an accused person to be able to assess whether or not a scheme is fraudulent, he must at least have some idea of the manner in which it is implemented. It was argued that the failure to identify the accuseds' actual degree of knowledge of the scheme as a crucial issue was an error.

In outline, the Crown argued that no error of law was involved as the Court of Criminal Appeal had correctly held that knowledge that the scheme was intended to achieve a dishonest or criminal objective is an essential element of the crime of conspiracy.

The Crown argued that the total effect of directions by the learned trial judge was to convey to the jury that

the Crown was required to prove that the applicant entered an agreement or attached himself to an agreement to achieve a particular purpose, namely to dishonestly create fictitious trading losses by means of which false tax deductions could be claimed.

Finally, the Crown contended that the Court of Criminal Appeal was correct in its interpretation of the "reason to believe" direction (passage (3) above).

In the course of argument Deane J. said that the only way that a jury could have interpreted the "reason to believe" direction in the way that the Court of Criminal Appeal had said they would is if they had misheard it. However, speaking for the majority of the Court Wilson J. said that although the summing up was not without fault he could discern no error in the approach of the Court of Criminal Appeal.

R. V. ROSENTHAL, SU AND OADES

The defendants pleaded not guilty to a charge of conspiracy to defraud the Commonwealth contrary to sec. 86(1)(e) of the Crimes Act.

In its most skeletal form the tax scheme involved contriving for participating taxpayers a commodity futures trading loss, remitting that loss overseas via companies controlled by the promoters, converting losses to notional profits by mirror contracts and returning those profits to the participating taxpayers by way of bogus loans or holding them in superannuation funds off-shore. The taxpayer simply recovered his own money, less commissions and charges, but held documentation enabling him to claim a trading loss against assessable income.

It can be seen that this scheme was similar to the one that Aston and Burnell claimed they thought existed in their case.

After the trial proceeded for 25 days the defendants changed their pleas to guilty. It was submitted on behalf of the defendants that the pleas of guilty did not necessarily involve an admission of subjective dishonesty on the part of the defendants, indeed there was a specific denial on the part of the defendants that they believed at the time that what they were doing was actually dishonest.

The Victorian Court of Criminal Appeal (Kaye, Gray and Nathan JJ., Nos. 69-71 of 1987, delivered 26th June 1987)

had occasion to deal with the matter on an appeal by the D.P.P. against sentence. The Court had no doubt that the scheme was fraudulent (pp. 5-6).

The Court referred to the denial of subjective dishonesty which accompanied the pleas and said (at p. 10) :

> "The argument of the respondents on this point was said to be supported by the judgment of the English Court of Appeal in R. v. Ghosh (1982) Q.B. 1053. That case appears to hold that dishonesty is established if the accused appreciated that a reasonable onlooker would regard the accused's conduct as dishonest even if the accused himself did not so regard it. Whatever be the precise interpretation of Ghosh's case and whether or not it represents the law in Victoria, we are satisfied that, by pleading guilty, each respondent admitted that he knew that the scheme was unlawful or, at least, had no belief that it was lawful. Accordingly, in our opinion, it was not open to the learned trial judge to sentence the respondents upon any hypothesis other than the state of subjective dishonesty inherent in a plea of guilty to conspiracy to defraud."

R. V. COLLIE, EDWARDS AND GRANT.

The defendants were charged with conspiracy to defraud the Commonwealth.

The already considerable legal history of the case includes:

(i) an application to Smithers J. of the Federal Court pursuant to the Administrative Decisions (Judicial Review) Act for a review of the magistrate's decision to commit for trial : Einem v. Edwards, (1984) 12 A.Crim.R. 463;

(ii) an appeal to the Full Court of the Federal Court against Smithers J.'s decision not to grant relief : Edwards v. Einem (unreported, V.G. 191 of 1984, 12th October 1984);

(iii) trial before Gray J. in the Victorian Supreme Court at which guilty verdicts against Collie and Edwards and not guilty verdict against Grant given on 25th April 1987;

(iv) dismissal of the appeals against conviction by the Full Court of the Supreme Court of Victoria : R. v. Collie and Edwards (unreported, 6th July 1987);

(v) applications for special leave to appeal to the High Court have been lodged.

A sufficient outline of the facts appears in the judgement of Smithers J. :

> "The general situation disclosed against all the applicants is that a Mr. Baker had conceived a scheme which would operate in a situation where a wholesaler desired to sell goods by wholesale to

to a retailer. Under the scheme the ownership of those goods was to be transferred to the retailer through a series of intermediate transactions. The goods were to be sold wholesale by the wholesaler to a company called company A and dealt with in dealings between company A and two other companies, called B and C, and as between B and C, in such a way that C would ultimately be enabled to and would sell those goods to the retailer. It appears that in that series of transactions sales tax was not, according to law, payable by the wholesaler or the retailer. The wholesaler was able to sell to the retailer at a considerable discount and at the same time enjoy a reduction of his outgoings. For this he was to remunerate the author and manager of the scheme.

It appears that Baker, the author of the scheme, was secretive about the nature of the dealings between companies A, B and C. The theory was that those brought into the operation of the scheme, the promoters, could rely on the assertion of Baker that such was the nature of the dealings that the legal result was that sales tax was not payable by the wholesaler or the retailer and that no liability for sales tax attached to companies A, B or C. Baker sought and obtained learned legal advice. This advice was to the effect that under the scheme the wholesaler and the retailer incurred no liability for sales tax. Advice as to whether A, B or C might be liable was not sought or given. However, the advice by Stone James & Co., did contain a statement "It is our view that none of you, A, B, C, wholesaler and retailer is involved in a fraud".

Additionally, in the course of his summing up Gray J. said :

"You may think it is quite apparent that the Baker scheme, as we now know it to have been, had absolutely no effect in eliminating the liability for sales tax."

"It would appear that when company A sold the half interest in the goods to company B and the other half interest to company C, that that was a sale by a wholesale merchant of goods to a person who was not registered and the sales tax was payable by company A at that point. If there was any doubt about that, and if tax is not paid at that point, it is perfectly apparent that when company C sells to the ultimate retailer, company C is liable to pay sales tax if it has not already been paid. The original transaction from the participant wholesaler to company A was exempt from sales tax because company A quoted its certificate of registration, but, thereafter, there was no quotation of certificates, and as the goods passed from company A by sale to companies B and C, it would appear that sales tax was then payable but, failing that, tax was clearly payable on the sale by company C to the participant retailer."

Einem v. Edwards (Smithers J.)

It is apparent that the passages marked (2) and (3) in the summing up in Aston and Burnell (supra p. 6-7) have been taken exactly from the reasons of the magistrate in Edwards' case which are set out by Smithers J. at p. 467.

Nothing appears to have been said about these passages. The applicant's main argument was that the magistrate took the view that the relevant mens rea was established once it appeared that the agreement was to bring about a state of affairs in which non payment of sales tax was unlawful.

Smithers J. held that on a fair reading of the magistrate's reasons as a whole that the magistrate had correctly

accepted that dishonesty was an essential element in the offence of conspiracy to defraud the Commonwealth.

Smithers J. further held that the element of dishonesty "would be established where a jury looking at the facts proved, and applying their own notions of what is honest and what is not, concluded that the accused could not have believed that he was acting honestly." (p. 470). In this regard he applied R. v. Ghosh, (1982) 3 W.L.R. 110 at 118. The passage he cites from Ghosh includes :

> "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. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realized that what he was doing was by those standards dishonest."

Passage (6) in the summing up in Aston and Burnell (supra p. 7-8) regarding "dishonesty" reproduces exactly part of the headnote of Einem v. Edwards.

Summing-up (Gray J.)

As to the elements of sec. 86(1)(e) the jury were directed in the following terms :

> "To establish the commission of that crime, the Crown must first prove that the particular accused agreed with one or more of the others to promote and implement the Baker scheme. There is no dispute about that matter in this case.

The Crown must next prove that the particular accused understood that the purpose of the Baker scheme, if and when implemented, was to cause economic loss to the Commonwealth by depriving the Commonwealth of sales tax to which it was legally entitled. In the context of this case, this means that the Crown must prove that a particular accused understood that this unlawful purpose was to be achieved by diverting the sales tax liability of wholesale merchants participating in the Baker scheme to an entity or entities which would not, and could not, pay the said sales tax and by concealing the said sales tax liability of the said entities.

Finally, the Crown must prove that the means by which the Commonwealth was to be deprived of sales tax involved dishonesty. In the present context this means that the Crown must satisfy you that the particular accused, whose case you ar considering, knew that the Baker scheme did not lawfully avoid sales tax liability or had no belief that it did. If you are so satisfied, you may think that a finding of dishonesty against that particular accused becomes inescapable, although it remains a matter for you. It is not necessary for the Crown to prove that a particular accused formed the dishonest intention at the time when he first agreed to implement the Baker scheme. What the Crown must prove is that at some time during the period alleged in the indictment, the particular accused acquired the knowledge that the scheme did not lawfully eliminate sales tax or, at least, ceased to believe that it did.

It has become perfectly clear from the way the arguments of counsel proceeded that the live issue in relation to count one is whether you are satisfied beyond reasonable doubt that the particular

accused had not belief in the legal effectiveness of the Baker scheme to altogether eliminate sales tax liability on the transactions that you have heard about. The Crown submit that it is obvious that each of the accused knew perfectly well that the Baker scheme did not and could not eliminate sales tax liability from a transaction of this kind. The defence of each accused is that he believed the Baker scheme legally avoided sales tax and that, accordingly, he was not guilty of the dishonesty which is an essential element of the conspiracy to defraud."

VEREKER, FORSYTH and SAUNDERS CASES.

Vereker, Forsyth and others were charged with conspiracy to defraud the Commonwealth.

They took proceedings under the Administrative Decisions (Judicial Review) Act against a magistrate's decision that there was sufficient evidence to put them on trial : Vereker and others v. Rodda, and Forsyth v. Rodda, (1987) 72 A.L.R. 49.

The charge related to a taxation scheme called the Norfolk Island Public Art Gallery Scheme. The scheme was designed to apply so that the owners of shares in companies with current year profits could sell their shares for a price which was such that they would effectively realise the benefit of the profits made in the current year without bearing the burden of taxation upon them. They key to the scheme was to enable the company to claim a full year deduction despite the change in ownership of shares by making a donation to a public art gallery (the Norfolk Island Art Gallery.)

Vereker was associated with a company which marketed tax schemes and Forsyth was a Queen's Counsel specializing in revenue work who had given an opinion that the scheme would be effective to attain its objects.

Saunders and another were charged with a different conspiracy to defraud the Commonwealth involving a

different tax scheme. They also applied for a review of the magistrate's decision in their case that there was sufficient evidence to put them on trial : Saunders and another v. Brown, (1987) 72 A.L.R. 66.

Saunders was an accountant who carried on business as a promoter of tax minimization schemes. The complicated scheme in that case involved four phases of "acquisition", "treatment", "stripping" and "liquidation". The "treatment" phase involved introducing the target companies acquired to a tax scheme. Two schemes were used : one scheme involved prepaid interest with each company claiming a deduction for the interest prepaid (Cf. Europa Oil N.Z. Ltd. v. Inland Revenue Commission (N.Z.), (1973) 5 A.T.R. 744) and the other involved the participation of targets in a partnership which gave rise to a loss consequent upon depreciation of plant and machinery. (Cf. Pettigrew v. Commissioner of Taxation, Taxation Board of Review No. 3, 22nd June 1984).

In both Vereker and Forsyth's case, and Saunder's case, Jackson J. of the Federal Court held that the magistrate had erred in failing to consider the question of whether the taxation avoidance schemes were efficacious to create allowable deductions. He held that if in fact the schemes operated to make allowable deductions and thus to reduce the companies taxable incomes to a level where no tax was payable, it could not be that the agreement alleged was to do an unlawful act and it could not be that the agree-

ment alleged was to deprive the Commissioner of Taxation of something to which he is or would be or might be entitled, therefore there could be no conspiracy to defraud.

Although the headnote to Vereker and Forsyth states that "an intent to defraud the Commonwealth does not exist unless the scheme is not effective to make the donations an allowable deduction", in my view Jackson J's decision is not about the necessary "intent" in conspiracy to defraud but about the terms and nature of an agreement necessary to constitute an agreement to defraud. This appears particularly in his reference (at p. 58) to D.P.P. v. Nock, (1978) A.C. 979 and the judgement of Davies J. in Edwards v. Einem (at p. 57).

However, the outline of the applicant's argument in both cases dealt extensively with the question of the mental element in conspiracy to defraud. I am indebted to Mr. James Judd of the Melbourne Bar, who appeared for the applicants in both Vereker v. Rodda and Saunders v. Brown, for allowing me to reproduce those parts of the outline.

Elements of the Offence

...

2.2 If the elements of (the offence under sec. 86(1)(e)) are to be interpreted having regard to contemporary notions relating to the common law offence of conspiracy to defraud then, the essential elements are as follow :

(a) an agreement between two or more persons;

(b) by dishonest means;

(c) to deprive a person of what is his; or, of something to which he is or would or might but for the perpetration of the fraud be entitled: Scott v. Metropolitan Police Commissioners (1975) A.C. 819

2.3 Any deceit or dishonesty must be a deceit of the Commonwealth or dishonesty aimed at the Commonwealth. That is, it must be purposive. The Commonwealth must be the object of any conduct so proscribed.

2.4 Deprivation by deceit or by dishonest means, as the purposive component of the offence, embodies a concept of entitlement to something. Thus, it is necessary that the prosecution prove, as an essential ingredient of the offence :

(a) entitlement of the alleged victime to the thing allegedly deprived of; and,

(b) knowledge of or a belief in that entitlement by the person charged with the offence.

.....

Mens rea

5.1 There are primary, secondary and tertiary elements to conspiratorial mens rea;

(a) intention to agree (and agreement in fact) to do the proscribed act;

(b) the requisite knowledge of each essential fact

required to be known as a constituent element of the offence and an intention that each essential act constituting the offence be done;

(c) a purpose proscribed by the offence: He Kaw Teh v. R. (1985) 60 A.L.R. 449.

5.2 The purpose must be to achieve the end proscribed as unlawful: R. v. Thomson (1965) 50 Cr.App.R. 1.

5.3 Both offences charged against each applicant require proof of each category of mens rea :

(a) conspiracy to defraud the Commonwealth requires proof

(i) that each applicant intended to agree (and agreed in fact) with the alleged co-conspirators;

(ii) in the knowledge or belief that the Commonwealth was entitled to revenue;

(iii) with a purpose to deprive the Commonwealth of that revenue by dishonest means, i.e. with an intent to defraud the Commonwealth;

....

5.7 Thus, in order to prove the primary and secondary elements of conspiratorial mens rea the prosecution must prove knowledge or belief on the part of the applicants that revenue was payable to the Commonwealth. Unless this is so it cannot be said that

the applicants agreed to deprive the Commonwealth of anything.

5.8 The tertiary element of the required mens rea, being the proscribed purpose, is only proved upon evidence which discloses actual fraud: Hardie v. Hanson (1961) 105 C.L.R. 451; R. v. Landy (1981) 1 W.L.R. 335.

5.9 Actual fraud is only established by evidence of purposive dishonesty. That is dishonest means aimed at the Commonwealth.

5.10 Dishonesty is found by proof of absence of a claim of right.

5.11 Evidence that the applicants believed that, at the very least, on balance, the scheme was efficacious to achieve an allowable deduction:

(a) negates or is inconsistent with that element of the offence which requires that they knew or believed that the Commonwealth was or would be entitled to revenue;

(b) negates or is inconsistent with the purposive dishonesty;

(c) constitutes a positive claim of right;

(d) prescribes the standard of belief to be disproved by the prosecution in order to support a finding of dishonesty. That is, a belief held on balance."

R. V. MAHER

Brian Maher was a very high profile promoter of "tax schemes". After a very lengthy trial in the Supreme Court of Queensland he was convicted of one count of conspiring to defraud the Commonwealth and one count of conspiring to defraud a company (contrary to Sec. 430 of the Queensland Criminal Code).

His appeal against these convictions was dismissed by the Queensland Court of Criminal Appeal (Kelly A.C.J., Derrington and Moynihan JJ.) : R. v. Maher, (1987) 1 Qd.R. 171.

The Court described the scheme the subject of the charge of conspiracy to defraud the Commonwealth in these terms :

> "Stripped of the frills, the scheme involved taking a company with a current year profit and hence a potential liability for tax - the "target company". The assets of the target company were then sold at a high price to an associated company which could either make no profit at all upon those assets or even sustain a tax loss for use otherwise. The purchase price of the assets came from a round-robin arrangement involving a number of sequential steps whereby the shares of the target company were sold to the appellant's company which, in the round-robin arrangement borrowed the purchase price from the target company. When it paid the vendor shareholders, they in turn lent the money back to their associated company, which used it to pay the target company the purchase price for its assets. The amount of the fee of which the appellant had the benefit was represented by the difference between the amount his company borrowed from the target company and the smaller amount which

> the vendor shareholders were paid as the purchase price for their shares. That extraction from the funds used on the round-robin arrangement was made up by a loan provided by another associated company of the vendor shareholders to the associated company which purchased the target company's assets. There was then another round-robin in which the appellant's company, which had purchased the target company's shares, sold them to what were in the jargon of the trial referred to as straw purchasers, straw shareholders, straw directors or simply "straws".
>
> In truth, the target company came into the appellant's hands with an asset in the form of a debt owing to it of a sum exactly corresponding to the value of the assets which it had disposed of to the associated company, the debtor being the appellant's company. In that condition it was passed to the straws. There was a good deal of evidence to support a conclusion that this was designed to minimise, putting it at its most favourable to the appellant, the prospects of the Commonwealth's recovering from a target company the taxes for which that company became liable. There was moreover ample evidence upon which the jury could be satisfied that this was the point of the arrangement and of the appellant's involvement in it."

There were numerous grounds of appeal argued, but only two need be referred to here.

Complaint was made of the trial judge's treatment of what was described as the appellant's bona fide claim of right. As to this the Court said.

> "It may be doubted that a bona fide claim of right in the strict sense ever in truth arose for consideration. The argument was directed rather to considerations of the appellant's belief that what he was doing was lawful, the relevance of evidence to that issue

and "dishonesty" element of conspiracy to defraud.

> In so far as the matters complained of depended on positive evidence of the appellant's state of mind or belief, it may be further doubted that any relevant consideration arose. The appellant did not give evidence. The evidence disclosed that he, through various entities and persons with whom he was associated, conducted a business involving a number of ways of minimising or avoiding tax, the scheme or schemes the subject of the conspiracies for which he was tried being but one (or some) of them. In this context it was extracted from a number of prosecution witnesses in the course of cross-examination that the appellant had expressed himself in terms of assertions that what he was doing was lawful and that he had made reference to opinions and advices which had been obtained in support of that. Evidence as to the contents of any opinions or advices was never proffered as founding such a belief which in any event seems to have been expressed in general terms. The appellant's conduct was equivocal if not consistent with an intent to bolster the scheme irrespective of its legality or illegality."

Additionally, it was submitted that in directing the jury in terms of R. v. Ghosh the trial judge had erred and had failed to direct them that they had to apply community standards of honesty prevailing during the period dealt with by the charge. (It should be noted that the trial judge had directed the jury in terms of Ghosh at the request of counsel for the defence.)

The Court stated its approval of Ghosh in these terms :

> The learned trial judge directed the jury in terms of approaching the question of dishonesty in two stages. First to determine whether the conduct of

the accused was dishonest according to the objective standards of the community and, only if that were answered affirmatively would they approach the second stage and determine whether the accused subjectively knew that his conduct was dishonest according to the standards of the community. By reason of the convictions, the jury must have answered both questions affirmatively. It is of course open to an accused to rely upon his subjective perception of public norms of honest behaviour so that if he is in genuine error in his evaluation of that, then he is entitled to the benefit of his subjective state and is thereby innocent; but he is not entitled to impose his own subjective values which he must have known to be contrary to the current "ordinary" standards. Ghosh's case means no more than that, and it is a view which is totally consistent with all the authorities referred to .."

R. V. AHERN

Ahern was convicted of conspiracy to defraud the Commonwealth. The charge was based upon allegations that Ahern conspired with others (of whom Maher, Donnelly and Hurley were named in the indictment) to defraud the Commonwealth through the scheme already referred to in R. v. Maher.

His appeal to the Queensland Court of Criminal Appeal (Mathews, Thomas and Ambrose JJ.) was dismissed : R. v. Ahern (unreported, Qld.C.C.A., 28th May, 1987).

The brief facts taken from the judgment of Mathews J. are as follows :

> "At the trial it was formally admitted on behalf of the appellant that the Commonwealth had been defrauded by a conspiracy in which Maher, Donnelly, Hurley and others had taken part but the defence was that the appellant did not know of the relevant fraud and was not a party to the doing of anything which could have had the effect of making him a party to the relevant conspiracy. In particular but not in detail it could be said that the fraud, the subject of the conspiracy, was to evade payment of income tax which in the normal course of events would have become payable by companies (the "target" companies) on profits earned during relevant years and in respect of which the relevant companies, again in the normal course of events, would have had assets to meet their liabilities. By a series of steps the shares in the target companies were transferred to people of no substance (referred to in the jargon of the trial as "straws") and the companies were left with no assets and little, if any, by way of records. The companies were "dumped". It was not

> suggested that those originally in control of the companies were parties to the conspiracy or that they believed that there was involved anything more than legitimate tax avoidance schemes. At the relevant time, Maher, it seems, was recognised as an astute leader in the field of such schemes and the appellant himself had some sort of practice in respect of them but it was thought by many people concerned, and the appellant claimed to be one of them, that Maher was a smart but honest operator and that the target companies would be cleverly "treated" to avoid payment of tax."

The grounds of appeal were limited to questions of the way in which the acts and declarations of alleged co-conspirators could be used, and although all three judges agreed that the trial judge had erred in this area the majority saw fit to apply the proviso, whilst Mathews J. quashed the conviction.

However, there are two matters of relevance to the mental element in conspiracy to defraud.

Firstly, it is clear from the judgments that the issue of the appellant's knowledge was left to the jury in a most straight forward way - did he know that the companies would be "dumped" ? Knowledge of the "dumping" was accepted by both sides as the relevant matter by which the criminality of the action of those who took part should be tested and the trial judge directed the jury accordingly.

The second, is the following passage from the judgment of Thomas J. who referred to the fact that "the many authorities on the subject of conspiracy afford something of

a minefield" and then said :

> "One reason for this is the failure to give a constant meaning to the terms "proof of the combination" and "proof of the agreement". It might be thought that the former term directs attention to the issue of who were the parties to an agreement such as that charged, as distinct from the actual terms of the agreement; whilst the latter terms refers to proof of what the terms were without reference to the parties thereto. But that distinction does not always seems to have been observed in practice, and sometimes the terms are used interchangeably. Moreover the expressions do not on their face demand the distinction to which I have adverted and may be confusing to lawyers and juries alike in any case where a distinction needs to be drawn between proof of parties and proof of terms. The expression "proof of the agreement" could be taken to refer to either aspect or both. For this reason it is in my view desirable to forsake the use of those expressions in favour of express references to parties and terms."

COMMENT AND DISCUSSION

I begin by returning to D.P.P. v. Aston and Burnell. In my view the summing-up in that case was seriously defective and the treatment of the issues on appeal by O'Loughlin J. (with whom King C.J. and Cox J. agreed) was superficial and unsatisfactory.

The directions in the passages (2) and (4) that the defendants need not know "the full extent of the scheme" are inappropriate in the context in which they are given and are consequently very misleading.

When taking passages (2) and (3) word for word from the reasons of the magistrate in Einem v. Edwards (supra p. 17) the trial judge has failed to recognize the particular context in which they were used. That context is clear from the magistrate's words immediately proceeding those passages : "the first question that I should ask in these proceedings is - was there an agreement between each of the defendants ? In answering that question I have noted that ...". (And the magistrate later goes on to deal separately with "the next question ... whether that agreement was to do an unlawful act, that is to defraud the Commonwealth" and finally with whether "the element of dishonesty has been satisfied.")

The magistrate was, therefore, in those passages endeavouring to direct himself upon an issue relating to the actus reus of conspiracy referred to in Gillies The Law

of Criminal Conspiracy (1981) at p. 14 : "There is no requirement that each party to a given conspiracy has personally communicated to every other such party his assent to the formation of the criminal agreement ... It is quite possible indeed that a given conspirator may be unaware of the identity or event the existence of certain of his co-conspirators, provided that he and they have been enrolled in the one plot embodying the prescribed common objectives. This point was made by the English Court of Criminal Appeal in Meyrick (1929) 21 Cr.App.R. 94 ..."

The trial judge in Aston and Burnell has applied those passages to a different issue entirely, namely the issue of the degree of the defendant's knowledge of the details and terms of the Southern Cross tax scheme, which relates to mens rea.

That he applied them to that issue is evident from passage (4) itself and from the fact that passages (2) and (3) were directions given expressly in answer to the argument of counsel for Aston and Burnell in addressing the jury that they could not be guilty if what was done by Streckert (the creation of bogus documents as opposed to actually trading) was done without their knowledge.

The cause of the confusion is the imprecise terminology : "the scheme" can mean (in these types of cases) the particular "tax avoidance scheme", and it can also mean the wider "scheme" in which various parties have some

involvement in the promotion or implementation or utilization of the "tax avoidance scheme." The former meaning directs attention to the issue of the details and terms of the "tax avoidance scheme", whilst the latter meaning directs attention to the issue of the parties and their roles. A very similar difficulty is identified by Thomas J. in the passage quoted from R. v. Ahern (supra p. 33).

The error of misapplying those passages to the mental element is further compounded by reason of the errors in passage (3) which exist even when it is placed in its proper context: a common unlawful purpose is an essential feature of conspiracy; and, the concept of "reason to believe" is an objective one (and would be understood as such) and has no place in the crime of conspiracy.

Passages (2), (3) and (4) told the jury much (incorrectly) about what the Crown did not have to prove but practically nothing about what the Crown did have to prove. In my view their combined effect was to direct -

(a) that it was not necessary that any defendant possess a common unlawful purpose with the alleged co-conspirators;

(b) that the Crown did not have to prove that the defendants knew that the "tax scheme" involved bogus documents rather than actual trading in commodities futures;

(c) that the defendants could be convicted regardless of how little knowledge they had of the details of the "tax scheme" provided merely that they ought to have appreciated that there were other details of the "tax scheme" about which they had no knowledge.

Each of those propositions is, in my view, wrong in law. There is no direction as to the necessity for the Crown to prove what has been termed the "secondary element of mens rea" in conspiracy, and propositions (b) and (c) are actually inconsistent with that element.

It is noteworthy that the "three questions" posed by the Crown (supra p. 5) also make no reference to this secondary element of mens rea.

Gillies, Law of Criminal Conspiracy (1981) at p. 16 states :

> "Conspiracy, being an offence at common law, requires that the defendant must act with criminal mens rea. This involves that not only must he have agreed upon the effectuation of the criminal or other unlawful purpose, but he and at least one other of his confederates must also appreciate that this purpose is a criminal or unlawful one, i.e., that it is of the factual character required by the definition of the substantive crime or by the definition of the other unlawful purpose. This means in effect that the parties must contemplace that the act will be done in the circumstances disclosing its criminal (or otherwise unlawful) nature. In these terms two elements of conspiratorial mens rea are clearly discernible, which might be called (1) the primary element, i.e., the intention

> to agree upon the commission of the physical act constituting the criminal or other unlawful object of the crime, and (2) the secondary element of mens rea which is concerned with the degree of knowledge the conspirators must have as to the precise nature of this contemplated act, which knowledge will generally be concerned with the material circumstances surrounding the prospective commission of this act and from which its criminal or other unlawful nature may be inferred."

For a similar analysis see that of Mr. James Judd at p.24-25(supra.)

Gillies at p. 18 further states :

> "... where two persons agree to commit an act which is actually unlawful, but only one of their number contemplates that this act will be done in the circumstances disclosing that it is of this character, there will be no conspiracy. This is because there is not in this circumstance an agreement between two or more persons possessing the comprehensive guilty mind required for conspiracy. .... both of them possess primary mens rea, but only one of them possesses the secondary element of mens rea which is unique to the particular prohibited purpose."

It was necessary for the trial judge to direct the jury that it must be proved that the defendant knew of all the details of the "tax scheme" which were essential in giving it its character of a "tax scheme" to defraud the Commonwealth.

The passages in the judgement of O'Loughlin J. (supra p.) on this point avoid the reality of the position of many

defendants in cases involving "tax avoidance schemes" including Aston and Burnell themselves. The mere fact that a defendant knows that the object of the "tax scheme" is to enable a taxpayer to claim a loss as a deduction when there "really" has been no loss will not mean that he knows that the scheme is fraudulent, because contrived and artificial schemes can still be effective as a matter of law in creating a claimable deduction. Unless he knows of the particular features of the "tax scheme" which make it fraudulent he will not be in a position to know that that scheme is a fraudulent one.

The issue in Aston and Burnell should have been presented in clear and specific terms related to the actual facts. This was done in R. v. Ahern (supra p. 32) by telling the jury that the question was whether the accused knew that the companies had been "dumped" and not treated. In Aston and Burnell the jury ought to have been told that the question was whether the accused knew that the documents were bogus and that no actual trading of commodities futures had taken place.

I next turn to the direction as to the element of dishonesty.

The South Australian Court of Criminal Appeal in Aston and Burnell have in effect approved of R. v. Ghosh by its approval of Smithers J's decision in Einem v. Edwards. The Queensland Court of Criminal Appeal have also approved of R. v. Ghosh in R. v. Maher.

However, significantly, the Victorian Court of Criminal Appeal in R. v. Rosenthal, Su and Oades expressly refrained from holding that Ghosh represented the law in Victoria. (supra p. 14) It is also noteworthy that the trial judge in R. v. Collie Edwards and Grant chose not to direct the jury in terms of Ghosh's case. (supra p. 18-20)

The approach of the Victorian Court of Criminal Appeal in R. v. Rosenthal, Su and Oades stems from an important line of Victorian cases, commencing with R. v. Salvo, (1980) V.R. 401, followed in R. v. Brow, (1981) V.R. 783 and R. v. Bonello, (1981) V.R. 633, and referred to in R. v. Walsh and Harney, (1984) V.R. 474.

Salvo's case was concerned with the meaning of "dishonestly" in Sec. 81 of the Victorian Crimes Act. The majority of the Court held that it is the duty of the trial judge to tell the jury what is the constituent element of the offence created by the adverb "dishonestly". They further held that the Crown must prove that the accused obtained "the property" without any belief that he had in the circumstances a legal right to deprive the other person of that property.

The following relevant principles can be extracted from Salvo :

(a) The concept of "dishonestly" applicable to the Crimes Act is very close to the common law requirement of "intent to defraud" or absence of a claim of right. (p. 433.)

(b) A sincere belief that the law of the land permits a certain course of conduct is inconsistent with dishonesty. (p. 420)

(c) There is a distinction between a legal and moral right.

(d) An accused charged with an offence of dishonesty can only be convicted if the Crown proved that the accused did not in fact believe that he had in the circumstances a legal right to obtain the property in question. (p. 423.)

(e) To equate dishonesty with "moral obloquy" is to construe the word so as to base criminal liability on shifting sands. (p. 428.)

(f) Feelings and intuitions as to what constitutes dishonesty, and event as to what dishonesty means, must vary greatly from jury to jury and from judge to judge and from magistrate to magistrate. (p. 430.)

(g) It is simply untrue to say that every citizen "knows dishonesty when he sees it" or knows the meaning of the word generally. (p. 431.)

(h) It is not necessary for an accused to prove reasonable grounds for a belief in a claim of right. (p. 438.

(i) It will always be for the jury to decide whether or not the Crown has excluded that there was in actual fact any belief in lawful right. (p. 438.)

(j) The fact that there are no reasonable grounds for a belief might be strong evidence against the conclusion that the belief was held but it could not conclude the matter. (p. 439.)

(k) The "morality test" of dishonesty is dangerous as well as unworkable. (p. 439.)

As the Court in Salvo equated the meaning of dishonesty with "intent to defraud" there are good grounds for arguing that the decision applies with equal force to the offence of conspiracy to defraud.

That the principles in Salvo apply to the offence of conspiracy to defraud is supported by the obiter observations of Young C.J. (with whom Murray J. agreed) in R. v. Walsh and Harney, a case on the elements of conspiracy to defraud. Young C.J. said at p. 478 :

> In R. v. Ghosh (1982) Q.B. 1053 Lord Lane C.J. said, at p. 1059; (1982) 2 All E.R. 689, that there was nothing in Scott's Case to support the view that so far as the element of dishonesty is concerned theft was in a different category from conspiracy to defraud. In R. v. Salvo (1980) V.R. 401 and in the cases which followed it, namely R. v. Brow (1981) V.R. 783 and R. v. Bonollo (1981) V.R. 633, this Court declined to follow R. v. Feely (1973) Q.B. 530; (1973) 1 All E.R. 341 in so far as it held that the jury could be left to decide for themselves what meaning should be attached to the word "dishonestly". The Court held that the meaning to be given to that word, as used in the statute, was a question of law for the Court and that it was the trial Judge's function to explain it to the jury. The High Court has not since said that this Court was wrong although special leave to appeal was sought in at least one of the cases referred to.
>
> There might be much to be said for the view that

> in cases of conspiracy to defraud as in cases of theft the jury should not be left entirely at large as to what conduct they are prepared to classify as dishonest. To allow juries to determine such a question unaided is to introduce uncertainty and arbitrariness into the criminal law. But in the case of conspiracy to defraud, the word "dishonesty" does not appear in a statute, as the corresponding adverb does in the case of theft, and the question raised in this case is not so much the meaning of that word as the proper ingredients of the offence charged. The latter question has been authoritatively answered by the House of Lords and I do not think it is for this Court to question that decision. If that decision does not represent the law for Australia, it is for the High Court to say so."

If Salvo is applicable to conspiracy to defraud, there would appear to be a direct conflict with the House of Lords in Churchill v. Walton (1967) 2 A.C. 224 upon an important matter.

In Salvo Fullager J. at p. 434 in referring to and relying upon R. v. Bernhard (1938) 2 K.B. 264 cited a passage from Stephen's History of the Criminal Law as follows :

> "Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the one case in which ignorance of the law affects the legal character of the act done under its influence".

In Churchill v. Walton the House of Lords said :

> If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realize such an act was a crime".

In my view Salvo should be followed in Australia, in preference to Churchill v. Walton.

It is to be regretted that the Victorian Court of Criminal Appeal in Rosenthal, Su and Oades did not take the opportunity there presented to determine whether the principles in Salvo applied, or whether the test in Ghosh's case applied, to conspiracy to defraud.

I add, in passing, that I consider that the Court was wrong to deal with the question of penalty upon the basis that it did. The plea of guilty, in the circumstances, either should not have been accepted or should not have been interpreted to mean something which was clearly not admitted.

I believe that it is very important that the High Court resolve the conflict between Salvo and Ghosh and Churchill v. Walton. The resolution of that conflict would have a particularly significant impact upon charges of conspiracy to defraud which involve "tax avoidance schemes".

In the meantime, juries in South Australia and Queensland at least, will probably be directed in terms of Ghosh's

case. There is also reason to think that the New South Wales Courts would take a similar position : Cf. R. v. Glenister, (1980) 2 N.S.W.L.R. 597 at 607-608; and Gyles, "Conspiracy to Defraud the Revenue", (1984) 58 A.L.J. 567 at 571. I apprehend a real danger that juries so directed in cases involving inefficacious "tax avoidance schemes" will simply convict those involved (whether in a major or minor role) on the basis that to be involved in any "tax avoidance scheme" is not, in the juries view, a decent or right-minded or moral or ethical thing to do.

I sense that the approach of the Crown may sometimes serve to encourage or contribute to this. I have particularly in mind the "three questions" posed by the Crown in Aston and Burnell (supra p. 5) and the argument advanced by the Crown in Vereker and Forsyth and Saunder's case. That argument is being persisted with as appeals have been lodged against the decisions of Jackson J. to the Full Court of the Federal Court.

In a memorandum made available to me by Mr. James Judd, he describes the Crown's argument in Saunders as involving a misinterpretation of Scott v. Metropolitan Police Commissioner (1975) A.C. 819.

What Viscount Dilhorne actually said in Scott at p. 839 is :

> "one must not confuse the object of the conspiracy with the means by which it is intended to be carried out ... 'to defraud' ordinarily means, in

> my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."

Mr. Judd says in the Crown argument "a subtle juxtaposition of words takes place but with profound and unsubtle consequences." The Crown, he says, would have the formulation of Viscount Dilhorne read :

> "To agree with another to deprive a person of something which is his or of something to which he is or would or might but for the agreement be entitled is dishonest."