



CDPP

Australia's Federal Prosecution Service

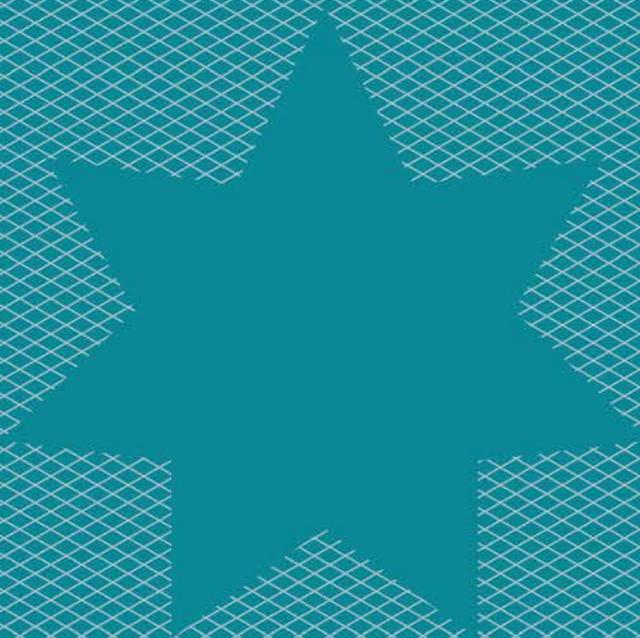
Offence Guide

General Dishonesty

Section 135.1 of the Criminal Code

Last updated October 2018

Commercial, Financial and Corruption





General Dishonesty
Section 135.1 of the Criminal Code
Last updated October 2018

Document release information

Date Released	Status	CDPP Practice Group
October 2018	Recently Updated	Commercial, Financial and Corruption

Summary of changes since the last update

- Changes to wording of offence
- Changes to element analysis
- Changes to commentary
- Other:

Increased penalty from 25 August 2018

Additional comments

If you become aware of any significant development in relation to this offence or note anything in this Offence Guide that requires amendment please notify the Practice Group Coordinator – Commercial, Financial and Corruption.

Document classification

This document is property of the Australian Government and is classified SENSITIVE - LEGAL.

This document shall be used only by those persons meeting the 'need to know' requirement.

This document cannot be printed, copied or shared with other parties without express permission of the Commonwealth Director of Public Prosecutions (CDPP).

General Dishonesty
Section 135.1 of the Criminal Code
Last updated October 2018

Contents

Important Dates.....	4
Offence.....	4
Penalty / Offence Type (Summary or Indictable)	5
Geographic Jurisdiction.....	5
Elements	6
Draft Charges	6
Other Possible Offences.....	7
Commentary / Notes	8

Important Dates

Commencement

1. Section 135.1 was inserted into the Criminal Code by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (No 137), s.3. It came into effect on **24 May 2001**.

Amendment

2. Section 135.1 was amended by the *Statute Law Revision Act (No. 1) 2016* Schedule 4 Part 1 item 91 with effect from 10 March 2016. The amendment changed the words 'is guilty of' to 'commits'. The *Explanatory Memorandum*¹ states that the purpose of the amendment is to reflect current Commonwealth drafting practice, which uses the expression 'a person commits an offence' in recognition of the fact that it is the role of the courts to find persons guilty of an offence.
3. The maximum penalty for offences against section 135.1 was increased with effect from 25 August 2018.²

Offence

Obtaining a gain

(1) A person commits an offence if:

- (a) the person does anything with the intention of dishonestly obtaining a gain from another person; and
- (b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

Causing a loss

(3) A person commits an offence if:

- (a) the person does anything with the intention of dishonestly causing a loss to another person; and
- (b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

(4) In a prosecution for an offence against subsection (3), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

(5) A person commits an offence if:

- (a) the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and
- (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
- (c) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

(6) Absolute liability applies to the paragraph (5)(c) element of the offence.

¹ Explanatory Memorandum to the *Statute Law Revision Bill (No. 3) 2015*, paragraph 48

² *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2018* Schedule 4 item 1

Influencing a Commonwealth public official

(7) A person commits an offence if:

- (a) the person does anything with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and
- (b) the public official is a Commonwealth public official; and
- (c) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

(8) In a prosecution for an offence against subsection (7), it is not necessary to prove that the defendant knew:

- (a) that the official was a Commonwealth public official; or
- (b) that the duties were duties as a Commonwealth public official.

"Obtaining" is defined broadly in s130.1 as including "obtaining for another person; and inducing a third person to do something that results in another person obtaining."

"Gain" is also defined broadly in s130.1 as meaning "a gain in property, whether temporary or permanent; or a gain by way of the supply of services; and includes keeping what one has."

"Loss" is defined broadly in s130.1 as meaning "a loss in property, whether temporary or permanent, and includes not getting what one might get."

"Dishonest" is considered in paragraph 8 below.

Penalty / Offence Type (Summary or Indictable)

- 4. Offences against section 135.1 are indictable offences. For offences committed on or before 24 August 2018, the maximum penalty is five years' imprisonment. For offences committed on or after 25 August 2018, the maximum penalty is 10 years' imprisonment.³
- 5. Charges under this section can also be heard summarily.⁴ For offences committed on or before 24 August 2018, the maximum penalty when heard summarily is 12 months' imprisonment and/or a fine of 60 penalty units. For offences committed on or after 25 August 2018, the maximum penalty when heard summarily is two years' imprisonment and/or a fine of 120 penalty units.
- 6. The value of a penalty unit is prescribed in [s4AA of the Crimes Act 1914](#) (Cth). See the Guidance Note entitled [Commonwealth Penalty Units: Value](#) for changes to the value of a penalty unit over time.

Geographic Jurisdiction

- 7. Section 15.4 of the *Criminal Code* (extended jurisdiction – category D) applies to this provision (see section 135.5).

15.4 Extended geographical jurisdiction—category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

³ *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2018* Schedule 4

⁴ *Crimes Act 1914* (Cth) s4J(1)

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression *offence* is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

Elements

Subsection (1)

- (i) D does anything (conduct)
Fault: With the intention of dishonestly obtaining a gain from another person (s135.1(1)(a))
- (ii) The other person is a Commonwealth entity (circumstance)
Fault: Not necessary to prove knowledge (s135.1(2))

Subsection (3)

- (i) D does anything (conduct)
Fault: With the intention of dishonestly causing a loss to another person (s135.1(3)(a))
- (ii) The other person is a Commonwealth entity (circumstance)
Fault: Not necessary to prove knowledge (135.1(4))

Subsection (5) – causing a loss

- (i) D engages in conduct (conduct)
Fault: Dishonesty (ss135.5(a) and 130.3(1))
- (ii) The conduct causes a loss to another person (result)
Fault: D knows or believes that the loss will occur or that there is a substantial risk of the loss occurring (s135.1(5)(b))
- (iii) The other person is a Commonwealth entity (circumstance)
Fault: Absolute liability (s135.1(6))

Subsection (5) – causing a risk of loss

- (i) D engages in conduct (conduct)
Fault: Dishonesty (ss135.5(a) and s130.3)
- (ii) The conduct causes a risk of loss to another person (result)
Fault: D knows or believes that there is a substantial risk of the loss occurring (s135.1(5)(b))
- (iii) The other person is a Commonwealth entity (circumstance)
Fault: Absolute liability (s135.1(6))

Subsection (7)

- (i) D does anything (conduct)
Fault: With the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official (circumstance) (s135.1(7)(a))
- (ii) The public official is a Commonwealth public official (circumstance)
Fault: Not necessary to prove knowledge (s135.1(8))
- (iii) The duties are duties as a Commonwealth public official (circumstance)
Fault: Not necessary to prove knowledge (s135.1(8))

Draft Charges

8. Subsection (1)

On [date] at [place] in [name of State], [name of defendant] [describe conduct] with the intention of dishonestly obtaining a gain from another person, namely [name of entity], which is a Commonwealth entity, contrary to s135.1(1) of the *Criminal Code* (Cth).

Subsection (3)

On [date] at [place] in [name of State], [name of defendant] [describe conduct] with the intention of dishonestly causing a loss to another person, namely [name of entity], which is a Commonwealth entity, contrary to s135.1(3) of the *Criminal Code* (Cth).

Subsection (5)

On [date] at [place] in [name of State], [name of defendant] dishonestly caused a loss [or risk of loss] to another person, namely [name of entity], which is a Commonwealth entity, knowing or believing that the loss would occur [or that there was a substantial risk of the loss occurring] contrary to s135.1(5) of the *Criminal Code* (Cth).

Subsection (7)

On [date] at [place] in [name of State], [name of defendant] [describe conduct] with the intention of dishonestly influencing a public official, namely [name of official], who is a Commonwealth public official, in the exercise of [his/her] duties as a public official contrary to s135.1(7) of the *Criminal Code* (Cth).

Other Possible Offences

9. A charge against s134.2(1) or s135.2 of the *Criminal Code* might also be available, and will ordinarily be preferred to a charge under section 135.1 where both are available. The Practice Group Instruction on [Dishonesty Offences under the Criminal Code](#) provides guidance on the circumstances in which it would be appropriate to lay a charge under section 135.1. It states:

4. There is a considerable overlap between the general dishonesty offences under s135.1 and the offences of obtaining either property or a financial advantage by deception under s134.1 and s134.2 in that conduct that constitutes an offence of obtaining either property or a financial advantage by deception will also constitute one or more of the offences of general dishonesty under s135.1. It is therefore appropriate that officers be provided with guidance as to whether an “obtaining” offence or an offence of general dishonesty should be charged where both offences are available on the evidence.
5. Where the alleged conduct constitutes both an offence of obtaining property or a financial advantage by deception and an offence of general dishonesty, ordinarily the appropriate course will be to charge the relevant “obtaining” offence rather than the offence of general dishonesty. This is consistent with the policy that in the ordinary course the charge laid or proceeded with will be the most serious disclosed by the evidence (refer paragraph 2.20 of the Prosecution Policy of the

Commonwealth). Since 25 August 2018, the maximum penalties for offences of general dishonesty and obtaining property or financial advantage by deception are the same: 10 years' imprisonment. Obtaining offences may nevertheless be viewed as more serious given that they include the element of deception, and are to be preferred where the evidence and circumstances render them appropriate.

6. In some cases, however, it may be appropriate to proceed on a charge of general dishonesty notwithstanding that the available evidence would support charges of obtaining property or financial advantage by deception. For example, a fraudulent scheme may consist of numerous instances of obtaining by deception each of which, when taken individually, may be relatively minor but when added together may amount to a serious fraud. In such cases it may not be possible to proceed, if the matter is to be defended, on charges which fully reflect the criminality disclosed by the evidence as to do so would overload the indictment. On the other hand, if the prosecution were to proceed on only representative charges the likely penalty in the event convictions were secured may be quite inadequate. In such cases it may be appropriate to proceed instead on a single charge of general dishonesty provided that it would provide the court with an adequate basis for sentence.
7. There may also be cases where the availability of a charge of an "obtaining" offence is problematic. Where there is any doubt as to the viability of an obtaining charge ordinarily it will be appropriate to proceed instead on a charge of general dishonesty.

Commentary / Notes

Dishonesty

10. Section 130.3 of the Code defines "dishonest" as:
 - (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.
11. This definition derives from the common law test in *R v Feely* [1973] QB 530 and *R v Ghosh* [1982] QB 1053. It applies to all the offences in Chapter 7 ('The proper administration of Government') which includes the fraud offences in Part 7.3 (s130.3). The same definition is reproduced in s470.2 of the Code for the purpose of the postal services offences in Part 10.5 of the Code.
12. Peter Hastings QC ([Opinion No 2012009](#)) has advised that the definition of dishonest in section 130.3 of the Code should be understood as a single fault element that attaches to the physical element of conduct (see, in particular, [22]-[36] and [52] of that advice):

[30] In my view there is now sufficient judicial authority to provide a basis for the current [CDPP] approach of the fault element of dishonesty under the *Code* comprising a combination of fault and physical elements, to be discredited and to establish that the element of dishonesty is in itself a single fault element.

[31] To adopt the approach of Spigelman CJ in *Lee v R* (2007) 71 NSWLR 120; [\[2007\] NSWCCA 71](#) (with whom Bell, Howie and Buddin JJ agreed) at [9]], in ordinary parlance, the term "dishonestly" is used to refer to an aspect of conduct which would be understood to involve fault on the part of the perpetrator of the offence, and in my view is to be classified as a fault element, which is to be assessed by reference to the criteria specified in s130.3 and s470.2. The requirement to prove that an aspect

of the conduct was dishonest according to the standards of ordinary people is to be understood as directed to the identification of the character of the fault which attaches to the physical element of the conduct which constitutes the offence itself.

[32] It is also relevant to note that, to the best of my observation, on each occasion that dishonesty is made an ingredient of an offence in the Code, the word is used as the adverb "dishonestly" (even though the definition provided in s130.3 and s470.2 is of "dishonest"). The function of an adverb is to modify or qualify the accompanying verb and the term is used in the Code offences to specify the fault element of the physical element described in the verb identifying the conduct which constitutes the offence. The use of the word "dishonestly" attached to the physical element of the offence indicates its character in identifying the appropriate fault element, and is in conformity with the view of the plurality in [\[R v LK; R v RK \(2010\) 241 CLR 177\]](#) that no provision is made in the Code for the specification of a fault element that is not for a physical element of the offence.

13. Stephen Odgers, *Principles of Federal Criminal Law*, LBC, 2010 ('Odgers') supports that position:

There is an argument that "dishonesty" is actually a combination of a physical element of circumstance (i.e. the conduct is "dishonest according to the standards of ordinary people") and a fault element for that physical element of circumstance (i.e. knowledge). However, it is likely that the courts will hold that it is simply one fault element, with two parts. It is something of a distortion of language to say that a characterisation of conduct as "dishonest according to the standards of ordinary people" is "a circumstance in which conduct ... occurs": s 4.1(1)(c). Rather, it is a characterisation of the conduct so as to demonstrate "fault". The conduct involves fault because it is dishonest according to a prescribed standard. The requirement that the defendant knew this adds an additional fault element. A persuasive analogy may also be made with recklessness under the Code, which like "dishonesty" contains a subjective limb (awareness of a substantial risk) and an objective limb (unjustifiable to take the risk). ... This approach finds support in the language of the revised Explanatory Memorandum which speaks of the "fault element" of dishonesty.

14. In [R v Hill \[2010\] ACTSC 18](#) at [19], Gray J considered the comparable definition of "dishonesty" in the *Criminal Code 2002* (ACT) and held that it should be regarded as a fault element.

Commonwealth entity

15. The Criminal Code Dictionary defines "Commonwealth entity" to mean the Commonwealth or a Commonwealth authority. Commonwealth authority is also defined in the Dictionary as a body established by or under a law of the Commonwealth (subject to some specified exceptions).

Not necessary to prove knowledge

16. Chapter 7 of the Code uses both absolute liability and another special liability provision - 'not necessary to prove that the defendant knew or believed a particular thing' - in relation to elements of offences that give the offences their Commonwealth connection; for example, that property belongs to the Commonwealth or that an official is a Commonwealth official.

17. In general, absolute liability is used in relation to physical elements and not necessary to prove knowledge is used where the Commonwealth connector is part of a fault element.⁵ That is because section 6.2(2) of the Code only provides for absolute liability to apply to physical elements. Whilst there is an apparent logic to the use of absolute liability in some instances and not necessary to prove knowledge in others, it is not immediately obvious to those not versed in the subtleties of the *Criminal Code*. There is scope for argument that the two types of provision must have different effect. This is magnified in provisions such as section 135.1 where the two types of provision apply to different offences within the one section.
18. The effect of an absolute liability provision is set out in section 6.2. Subsection (2) provides:
If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
(a) there are no fault elements for that physical element;
19. However there is no explanation of the effect of a provision that it is not necessary to prove knowledge. The absence of a definition raises the question of what (if any) fault element the prosecution is required to prove where an offence specifies that it is not necessary to prove knowledge in relation to a particular Commonwealth connection. Clearly it is not knowledge. The Office position is that the expression 'not necessary to prove that the defendant knew' is akin to absolute liability, and that it is not necessary to prove a fault element such as recklessness.
20. There are indications that the legislature intended not necessary to prove knowledge to have a similar effect to absolute liability. The offences that use the formulation 'not necessary to prove that the defendant knew' were introduced by the *Criminal Code Amendment (Fraud, Bribery and Related Offences) Act 2000*. The *Revised Explanatory Memorandum (EM)* to the 2000 Bill conflates absolute liability and not necessary to prove knowledge. For example, in relation to section 132.4, the Revised EM states:
In this case subsection 132.4(7) provides it is not necessary to prove the person knew the offence was punishable by imprisonment for 5 or more years or due to subsection 132.4(8) that the building is owned or occupied by the Commonwealth. Many people do not have an appreciation of the differences between Commonwealth, State and Territory functions and legislative responsibilities.⁶
Subsection (7) is a not necessary to prove knowledge provision whereas subsection (8) provides that absolute applies to the relevant element of the offence. Similarly, in relation to section 135.1, the *Revised EM* states that 'proposed subsection 135.1(4) and (6) remove the requirement to prove the person knew it was a Commonwealth entity'.⁷ Subsection (4) is a not necessary to prove knowledge provision whereas subsection (6) is an absolute liability provision.
21. Both absolute liability and not necessary to prove knowledge are special liability provisions as defined in the Code Dictionary. The definition of special liability provision was also introduced by the *Criminal Code Amendment (Fraud, Bribery and Related Offences) Act 2000*. The paragraphs of the *Revised EM* dealing with the definition indicate that absolute liability and not necessary to prove knowledge serve similar purposes.⁸

⁵ There are exceptions; for example section 135.4(6) uses the not necessary to prove knowledge formulation in relation to the physical element of conspiring to cause a loss to a third person in the circumstance where the third person is a Commonwealth entity. See also sections 132.1(2A), 132.2(3), 132.5(3), 132.7(2), 142.1(1), 144.1(5), 144.1(7) and 149.1(1)(b) and (2)(b)

⁶ Paragraph 142

⁷ Paragraph 194

⁸ Paragraphs 384-385

22. There is good reason why the prosecution should not be required to prove fault (either knowledge or recklessness) in relation to a Commonwealth connector element of an offence. Paragraph 233 of the original EM to the *Criminal Code Amendment (Fraud, Bribery and Related Offences) Bill* states:

Proposed subsection 141.1(2) also requires that the person providing the benefit does so with the intention of influencing a public official in the exercise of the public official's duties as a public official. 'Public official' is to be defined in the dictionary to the *Criminal Code* (see item 36 of this Bill) to be a Commonwealth, State or Territory official. This is in recognition that some in the community cannot distinguish between the functions of the Commonwealth and State Governments. It would therefore be too onerous to require the prosecution to prove the defendant knew the person they were bribing was a Commonwealth public official and that it was with the intention of influencing the person in relation to Commonwealth duties. Subsection 141.1(2) makes it clear that it is not necessary to prove that the defendant knew these things.

23. The justification that it would be too onerous to require the prosecution to prove that a defendant knew a person was a Commonwealth public official applies equally to proving recklessness. If one accepts (as the EM does) that some in the community cannot distinguish between the functions of the Commonwealth and State governments, it is likely to be just as difficult to prove awareness of a substantial risk (the essence of recklessness – see section 5.4 of the Code) that a person was a Commonwealth public official as it would be to prove knowledge of that fact. The existence of a Commonwealth connection usually has no bearing on the blameworthiness of a defendant's conduct; culpability is unlikely to differ where a person commits an offence against government without necessarily knowing which level of government s/he is offending against.

The risk of loss

24. Section 135.1(5) creates liability for conduct causing a *risk* of a loss. This is obviously a lower threshold than a requirement to prove actual loss.
25. The prosecution will need to isolate the relevant conduct so as to establish a causal connection between that conduct and the resulting loss or risk of loss.

“Substantial risk” of loss

26. It has been said that the word “substantial” is not only susceptible to ambiguity, it is a word “calculated to conceal a lack of precision” (see Hay, D., (ed.) *Words and Phrases Legally Defined* – 4th edition (UK) at p1078). A review of the case law illustrates that the meaning of “substantial” will depend on the legislative context and facts of each case.
27. Odgers, *supra*, at [5.4.140] notes that a “substantial risk” of something may exist even if that thing is not more probable than not (i.e. the probability of that thing happening is less than 50 per cent) but a remote possibility will not suffice. Odgers suggests that a “substantial risk” will arise where something “may well happen”.
28. Perhaps the most relevant statement, for present purposes, is that of Gray J in *Hann v DPP (Cth)* (2004) 144 A Crim R 534; [\[2004\] SASC 86](#) at [24]:

The term “substantial risk” does not appear to be defined in Australian legal dictionaries. However Carswell's Words and Phrases, an American legal dictionary, describes the phrase as meaning “real and apparent on the evidence presented ... not a risk that is without substance or which is fanciful or speculative”. The word “substantial” has been described in Australian legal dictionaries as “real or of

substance, as distinct from ephemeral or nominal” [refer *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367; 42 FLR 331 at 348 per Deane J, which considered the phrase ‘substantial loss or damage’]. “Risk” has been described as “a possibility, chance or likelihood”.

Note that the phrase “substantial risk” also forms part of the definition of “recklessness” in s5.4(1) of the Criminal Code.

Knows or believes

29. Section 135.1(5)(b) is a hybrid fault element which requires that D either “knows or believes” that the loss will occur or that there is a substantial risk that the loss will occur. The word “know” is construed as “knowledge” as that word is defined pursuant to s5.3 of the Criminal Code. There is no definition of “belief” in the Criminal Code but Odgers, *supra*, at [5.1.130] suggests that “belief” may be contrasted with “knowledge” and “conviction”. The *Macquarie Dictionary* defines “belief” to mean “an accepted opinion”. A person may “believe” that something exists or will exist while still harbouring a doubt about it, or without being consciously aware of his or her belief at any particular time. “Belief” can also incorporate both correct and incorrect belief.

30. This distinction impacts on the way in which the result element of causing a risk of loss is construed. In previous commentary, it was suggested that if D knows or believes that there is a substantial risk of a loss occurring to another person by engaging in certain conduct then that conduct must thereby result in a substantial risk of loss. This notion is summarised succinctly by JC Smith *The Law of Theft*, 1997, at 13-41, who explains that to say that a person knows something implies that it is so. Justin McCarthy commented that:

While belief that there is a substantial risk of the loss occurring can accommodate both correct and incorrect belief, D can only know that there is a substantial risk of his conduct causing a substantial risk of a loss occurring if his conduct does in fact cause a substantial risk of a loss occurring... it is submitted that the only way that paragraphs 135.1(5)(a) and 135.1(5)(b) can be reconciled is on the basis that the result element is that D’s conduct causes a substantial risk of loss.

31. On this interpretation, the physical element of result in the breakdown of 135.1(5)(b) is made out where D’s conduct causes a *substantial* risk of loss to another person. However, it is submitted that this analysis is too demanding. As noted by Smith (cited above) at 13-41, it was to overcome the often insurmountable requirement that the Crown demonstrate that a person knew goods were stolen that the words “or believing” were added to equivalent UK property offences. The Office position is that the prosecution will be able to make out its case where D’s conduct results in any risk of loss, however insignificant in fact, provided that D *believed* that the conduct would result in a substantial risk of loss.

Judicial consideration

32. The elements for an offence against section 135.1 have received limited consideration. Section 135.1(5) was considered by the Victorian Court of Appeal in [R v Mackrae-Bathory \[2006\] VSCA 179](#) at [29] where it was put as a ground of appeal to the Court that the trial judge should have quoted the provisions of s130.3 of the Criminal Code to the jury in directing them concerning the notion of dishonesty. The Court of Appeal rejected this, holding that it was sufficient for the trial judge to have summarised the relevant provisions.

33. In *R v Phan and Ton* [2010] 108 SASR 260; [\[2010\] SASFC 53](#) the Court emphasised the need for the elements to correspond in time, at least with respect to the knowledge of the dishonesty of the scheme involved which, in that case, that had to exist at the time of the conduct element.

Further Material

Hastings, P. (QC) 'The interpretation of dishonesty under the <i>Criminal Code</i> ' (16 March 2012)	Opinion No 2012009
Neil, P. (SC) and Williams, A. 'Joint advice on National Offence Guides in relation to specified offences' (20 June 2016)	Opinion No 2016004