Corrupt benefits for trustees – Is the presumption of *mens rea* rebutted in s 249E of the *Crimes Act 1900 (NSW)*, a*nd if not, what is the* mens rea *to be implied?*

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Corrupt benefits for trustees – Is the presumption of *mens rea* rebutted in s 249E of the *Crimes Act 1900* (NSW), *and if not, what is the mens rea to be implied*?

The proper interpretation of s 249E of the Crimes Act 1900 (NSW) is presently a matter of some uncertainty. The provision is broadly worded, with no express mens rea. On a literal reading, it creates an offence to offer or give a benefit to a trustee, or for a trustee to solicit or receive a benefit, by way of inducement or reward for the appointment of another trustee, if without beneficiary or court consent. Does this offence apply strictly to any such transaction? This article considers the available constructional choices and argues that the combination of the ***legislative history*** *and the* ***presumption of mens rea*** *supports the implication into s 249E of a mens rea of dishonest intention consistent with the interpretation given to the mens rea in s 249B. Given the significant implications of the offence, legislative amendment to clarify the mens rea of s 249E is desirable.*

Introduction

In *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* ("the *BT* case"),[1] Ball J delivered the first judicial analysis of s 249E of the *Crimes Act 1900* (NSW) ("the NSW *Crimes Act*"),[2] an offence that has existed for over a century yet has never been considered or prosecuted. Relevantly, s 249E(2) provides:-

> **249E Corrupt benefits for trustees and others**
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> (2) Any person who offers or gives a benefit to a person entrusted with property, and any person entrusted with property who receives or solicits a benefit for anyone, without the consent-
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> (a) of each person beneficially entitled to the property, or
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> (b) of the Supreme Court,
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> as an inducement or reward for the appointment of any person to be a person entrusted with the property, are each liable to imprisonment for 7 years.[3]

By sub-section (1), a person is said to be "entrusted with property" if, amongst other things, it is a trustee of that property.[4]

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[1] *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* [2022] NSWSC 401 ('*BT case*').
[2] *Crimes Act 1900* (NSW) s 249E.
[3] Ibid.
[4] Ibid.

The proper construction of the offence under s 249E has been cast into the spotlight through the *BT* case.

The *BT* case did not arise from a prosecution. Rather it was an *ex parte* application by a superannuation trustee for consent of the court to the receipt by the applicant of certain payments in the course of a transaction known as a 'successor fund transfer' ("SFT"). The application was brought in light of concerns in the superannuation industry as to whether the receipt of such payments in the course of an SFT might constitute an offence under s 249E given the broad terms in which the offence is framed.

An SFT is a process by which two superannuation funds are consolidated. One superannuation fund trustee transfers its members and trust assets to another superannuation fund trustee on the basis that the receiving fund will match or better the terms of the transferring fund. An SFT is a highly regulated form of superannuation fund merger. It is the subject of Regulation 6.29 of the *Superannuation Industry (Supervision) Regulations* 1994;[5] detailed reporting guidelines by the ATO;[6] and ASIC;[7] and a detailed prudential practice guide by APRA: SPG 227 - Successor Fund Transfers and Wind-Ups.[8] By law it is not necessary to obtain members' consent to an SFT, or the consent of the court or the regulator, APRA, but it is a key requirement that the receiving fund will confer on the members 'equivalent rights',[9] and that the trustees act in the best interests of members. There are also detailed disclosure requirements pursuant to s 1017B of the *Corporations Act 2001* (Cth).[10]

In negotiating an SFT it is commonplace for certain warranties and indemnities to be negotiated between the trustees with respect to costs or losses that might be incurred in the process. Routinely, the receiving trustee will give the transferring trustee warranties and indemnities of various kinds to protect it and the members against losses and potential expenses incurred in the process.

The critical question before the court in the *BT* case was whether the giving of such warranties and indemnities falls within the scope of the offence. Ball J accepted that the transfer the subject of that transaction was undertaken in the best interests of members, and that the benefit of the particular warranties and indemnities would ultimately accrue to the beneficiaries and not to the trustee personally.[11] However, Ball J found that s 249E was framed broadly and was "not … dependent upon proof of 'corrupt' conduct'" as is the case with other provisions in Part IVA that are directed to secret commissions by agents.[12] His Honour did not otherwise identify or discuss a particular *mens rea* element. His Honour found that it "seems clear that the Provisions are broad enough to catch the payments or

[5] *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.29.
[6] See 'Successor fund transfer reporting', *Australian Taxation Office* (Web Page, 15 September 2021) <https://www.ato.gov.au/super/apra-regulated-funds/in-detail/apra-resources/protocols/successor-fund-transfer-reporting/>.
[7] See 'Notifying members about superannuation transfers without consent', Australian Securities & Investments Commission (Information Sheet 90, July 2021) <https://asic.gov.au/regulatory-resources/superannuation-funds/superannuation-guidance-relief-and-legislative-instruments/notifying-members-about-superannuation-transfers-without-consent/>.
[8] Australian Prudential Regulation Authority, *Prudential Practice Guide: SPG 227 – Successor Fund Transfers and Wind-ups* (Practice Guide No SPG 227, July 2017).
[9] See, in particular, *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.29, 1.03.
[10] *Corporations Act 2001* (Cth) s 1017B.
[11] *BT case* (n 1) [21] (Ball J).
[12] Ibid [12].

benefits in contemplation,[13] but held that the legislature chose to "ameliorate their broad effect through a mechanism of approval by the Supreme Court."[14]

Having regard to the reasoning, this decision raises significant issues for the superannuation industry in relation to both the logistics of obtaining court consent to any such proposed SFT, as now appears required, and what to do about past transfers in respect of which consent was not sought. The significance of the decision is not limited to the superannuation industry though; these questions are potentially relevant to any trustee or other person entrusted with property in dealing with the appointment of a new trustee, such as custodial and nominee services in the funds management industry.

This article considers two particular aspects of the proper construction of s 249E.

The first focusses upon the presumption of *mens rea,* the element of a "guilty mind", in the offence under s 249E. There is a well-established presumption that *mens rea* is an essential ingredient of a criminal offence, particularly a serious criminal offence, even if the legislation is silent on it, unless the presumption is rebutted.[15] If not rebutted, it is the task of the court to identify the nature of the mental component where it is not express.[16] In *He Kaw Teh v The Queen*,[17] the High Court considered in detail the principles to be applied in determining whether a statutory offence has a *mens rea* element where the legislation is otherwise silent. This article considers whether the presumption of *mens rea* ought to be rebutted in s 249E, and if not, what the mental element should be.

The second question is whether the construction of subsection 249E(2)(b) as containing a "mechanism of approval" precludes the construction of the offence as requiring corrupt or dishonest conduct.[18] It was submitted to the court that "*it might be rather odd if the Supreme Court's consent was available for something which necessarily required corruption*."[19] It is argued that it does not follow that the power of the Supreme Court to consent to a benefit that falls within the scope of the provision necessitates a construction that the offence under s 249E does not require corruption. The Supreme Court has power – whether in its inherent jurisdiction or otherwise – to give consent to the receipt of a benefit in appropriate circumstances. If *mens rea* is appropriately implied into the offence, lack of beneficiary or court consent is an element of the *actus reus* under s 249E(2) that, if accompanied by the requisite *mens rea*, is capable of constituting corrupt conduct.

The issues raised in this article are considered in five parts. Part A describes the background to the *BT* case and gives an outline of the reasons for judgment. Part B considers the context and purpose of Part IVA in which s 249E appears, particularly its legislative history. Part C addresses the question of *mens rea.* Part D considers the "consent mechanism" argument. Part E considers the application of these principles to s 249E and concludes with some thoughts on a way forward.

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[13] Ibid [13].
[14] Ibid.
[15] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528 (Gibbs CJ) ('*He Kaw Teh*').
[16] *R v Wampfler* (1987) 11 NSWLR 541, 546 (Street CJ, Hunt and McInerney JJ agreeing at 550) ('*Wampfler*').
[17] *He Kaw Teh* (n 15).
[18] *BT case* (n 1) [15] (Ball J).
[19] Transcript of Proceedings, *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* (Supreme Court of New South Wales, 2022/81776, Ball J, 22 March 2022) 1.

PART A: THE BT CASE

The applicant in the *BT* case was BT Funds Management Limited ("BTFM"), the trustee of the Retirement Wrap Superannuation Fund. On 22 March 2022, it made an *ex parte* application to the Supreme Court of New South Wales seeking the Court's consent under s 249E of the NSW *Crimes Act* (and cognate provisions in other states),[20] in relation to the possible transfer by it of all of the members and assets of the Retirement Wrap Superannuation Fund to another superannuation trustee in the course of a proposed merger of that fund with another superannuation fund. The impetus for the merger was the release by APRA of the results of its annual performance test of superannuation funds showing that two of BTFM's products did not meet minimum requirements and a third was performing poorly. APRA is actively encouraging poorly performing funds to merge.[21]

The proposed merger was by way of SFT. The relevant part of BTFM's proposal in respect of which consent was sought was the proposed receipt by it of certain warranties and indemnities from the transferee, in respect of (i) its costs of the transaction; (ii) compensation to members for any losses they suffer as a consequence of the transfer; and (iii) the indemnification of BTFM for claims against it in respect of which, as trustee, it would otherwise be entitled to be indemnified out of the assets of the Fund.[22] It is worth noting that the evidence before the Court was that the warranties and indemnities under consideration were not payments to the trustee by way of augmentation of its personal estate, for its own use or enjoyment. Its "benefit" from the indemnities was only to economically neutralise its personal liability for trust debts and liabilities incurred for the benefit of the beneficiaries. As long as the trustee had a clear account,[23] under normal trust principles it would otherwise be entitled to recoup, or exonerate itself, out of trust assets in respect of those debts and liabilities, even after the transfer.

In relation to each of these proposed payments, the Court accepted that the intention was that these "benefits" would be passed on to members of the Plan, either through a reduction in the amount that BTFM would be entitled to recover from the Fund, or through the payment of compensation to individual members for any losses that they suffer. (The only sense in which a trustee might benefit personally beyond this would be if it did not have a clear account, or lacked entitlement to be exonerated for a particular expense, such that the scope of the indemnity offered to it would be greater than the existing right of indemnity. Such a benefit would have the effect of neutralising a liability, but could extend beyond that claimable under its indemnity).

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[20] The BT application was specifically in relation to provisions of other state criminal law being the: *Criminal Code Act 1899* (Qld) sch 1 s 442F; *Crimes Act 1958* (Vic) s 180; *Criminal Code Act Compilation Act 1913* (WA) s 535.

[21] See, eg, 'Myths and misconceptions should be no barrier to super consolidation', *Australian Prudential Regulation Authority*, (Web Page, 27 May 2020) <https://www.apra.gov.au/myths-and-misconceptions-should-be-no-barrier-to-super-consolidation>.

[22] The trustee's right of indemnity from the trust assets comprises two limbs: a right of recoupment for debts, liabilities and expenses the trustee has already paid out of its own money; and a right of exoneration for unpaid debts, liabilities and expenses. Those rights survive a trustee's retirement from office in respect of antecedent debts and liabilities, despite the fact that the trust assets are thereafter held by another trustee.

[23] This assumes that the debts, liabilities and expenses have been properly incurred and the trustee's account is clear – that is, it owes no obligation to restore or make good a loss to the fund arising from its own misconduct. If the trustee's account is not clear, then in equity, its right to claim against the fund may require it to make good any amount owed or a court may offset that amount against the amount claimed from the fund. For further discussion of the clear accounts rule, see Allison Silink, 'Trustee exoneration from trust assets – Out on a Limb? The tension between creditor expectations and the 'clear accounts rule' (2018) 12 *Journal of Equity* 58.

Reasons of the Court

In giving reasons for judgment, Ball J noted that there was no case law dealing with s 249E or its cognates in other states, and that the secondary materials shed little light on the purpose of the section.[24] His Honour observed that the provision was first enacted in s 7 of the (now repealed) *Secret Commissions Prohibition Act 1919* (NSW), a provision modelled on s 6 of the (now repealed) *Secret Commissions Prohibition Act 1905* (Vic), but considered that there was little in its legislative history that guided the exercise of what was found to be a discretion in the Court to give consent under that provision.

Citing *SZTAL v Minister for Immigration and Border Protection,*[25] and *Australia City Properties Management Pty Ltd v Owners - Strata Plan No 65111,*[26] his Honour noted that the purpose of the section had to be ascertained from its terms and the context in which they appear. His Honour found that "[t]he evident purpose of the Provisions is to prevent a trustee from being persuaded by the prospect of personal gain to exercise its power to appoint a substitute trustee,"[27] but considered that it was "unnecessary to explore the precise limits of the prohibition contained in the Provisions" and found that it "seems clear that the Provisions are broad enough to catch the payments or benefits which are in contemplation."[28] His Honour observed that:

> Taking s 249E as an example, BTFM holds the assets of the Plan as trustee for the members. It is contemplating appointing another trustee to hold those assets on trust for the members in its place. It is seeking to solicit payments and indemnities in connection with that transaction; and those payments and indemnities are sought and will be made as an inducement for the appointment, at least in the sense that BTFM intends to take into account, among other things, the extent to which a potential transferee is willing to pay or provide that indemnity in deciding whether and, if so, to whom it will transfer the business.[29]

Ball J did not address separately the question of whether the SFT constituted an "appointment of a new trustee" within the meaning of the section. It appears his Honour accepted that the proposed benefits were in contemplation of a relevant appointment for the purposes of the act. Pausing here, the cases use the expression "appointment" of a trustee to refer to both the appointment of a new trustee to an existing trust and also to the transfer of trust property from one trustee to another to hold the property "in his stead" to use the language of the provision in its earlier form in s 7 of the *Secret Commissions Prohibition Act 1919* (NSW), whether on new terms or old.[30] This would seem to cover the circumstances of a transfer to a new trustee by means of an SFT.

Ball J found that the proposal fell within the scope of s 249E. His Honour accepted that it would not be practical to obtain the consent of individual members to the conduct caught by

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[24] *BT Case* (n 1) [12] (Ball J).
[25] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ) ('*SZTAL*').
[26] *Australia City Properties Management Pty Ltd v Owners - Strata Plan No 65111* [2021] NSWCA 162 at [330] (Bathurst CJ, Payne JA agreeing at [360], McCallum JA agreeing at [361]).
[27] *BT Case* (n 1) [18] (Ball J).
[28] Ibid [13].
[29] Ibid.
[30] See, eg, *Loxton v Moir* (1914) 18 CLR 360.

the Provisions, but found that the Court has the power to make the consent orders sought and that it is "given that power directly by s 249E(2)."[31]

In relation to the circumstances in which it would be appropriate to give the Court's consent to a proposal otherwise within the scope of s 249E, Ball J identified two possible circumstances. One was "if it was satisfied that the appointment of the new trustee was in the best interests of beneficiaries."[32] Another was "if it was satisfied that the proposed conduct did not provide an inducement to the transferor to act other than in the best interests of the beneficiaries."[33] His Honour reasoned that, "[i]n either case, the object of the prohibition contained in the Provisions would not be undermined."[34] Ball J accepted that the merger as outlined was in the best interests of the members and made orders consenting to the proposal in the form of the orders sought.

PART B: LEGISLATIVE HISTORY

It is well-established that the text must always be the starting point and extrinsic materials cannot be relied on to displace the clear meaning of the text. However, it is equally uncontroversial that the ordinary meaning of the text takes into account the context and purpose of a provision, in particular, the mischief it is seeking to remedy,[35] and that these are to be considered "in the first instance."[36] In *CIC Insurance Ltd v Bankstown Football Club Ltd*,[37] Brennan CJ, Dawson, Toohey and Gummow JJ noted that:

> … the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.[38]

In *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* ("*Lake City Freighters*"),[39] Mason J (in dissent in the result, but not on principles of statutory interpretation) in discussing the aspects of relevant "context" cited Viscount Simonds in *Attorney-General v Prince Ernest Augustus of Hanover*,[40] who said:

> "... I use 'context' in its widest sense ... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

Pursuant to s 33 of the *Acts Interpretation Act 1987* (NSW), in the interpretation of a provision of a NSW Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly

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[31] *BT Case* (n 1) [15] (Ball J).
[32] Ibid [18].
[33] Ibid.
[34] Ibid.
[35] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).
[36] *SZTAL* (n 25) 368 [14] (Kiefel CJ, Nettle and Gordon JJ).
[37] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.
[38] Ibid 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
[39] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J), cited with approval in many cases, including *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548, 575-6 [107]-[108] (Spigelman CJ, Handley JA agreeing at 593 [211]).
[40] *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 461.

stated) shall be preferred to a construction that would not promote that purpose or object. Accordingly, the determination of the purpose or object of the provisions is central to the process of interpretation.[41]

These principles all point to the importance of considering the legislative history and other matters that afford relevant context and assist in determining the purpose of the section, which may influence the interpretation to be given to the ordinary words of the section.

The legislative history of the current NSW provisions

Section 249E is headed "Corrupt benefits for trustees and others" and is located in Part IVA of the NSW *Crimes Act* which is similarly entitled "Corruptly Receiving Commissions and Other Corrupt Practices."

Part IVA was inserted into the NSW *Crimes Act* 35 years ago by the *Crimes (Secret Commissions) Amendment Act 1987* (NSW) ("the 1987 *Crimes Amendment Act*").[42] The brief description of the act described it as, "[a]n Act to amend the Crimes Act 1900 with respect to the giving or receiving of secret commissions and other corrupt practices".[43] The Explanatory Note stated that its objects were (a) to repeal the *Secret Commissions Prohibition Act 1919* (NSW) and (b) to re-enact, with modifications, the provisions of that Act as Part IVA of the *Crimes Act 1900* (NSW).[44] In the Second Reading Speech the Attorney-General explained the purpose of the bill:

> "The target of the bill to amend the Crimes Act is the corrupt activities of those agents who either accept bribes in relation to their principals' affairs, or who do not make full disclosure to their principals of matters which may affect the carrying out of the agents' duties. …
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> The main purpose of this bill is, therefore, to up-date the existing laws to enable effective prosecution of these offences and to ensure adequate penalties exist for the punishment of the worst examples of these crimes. To this end, the *Secret Commissions Prohibition Act* will be repealed, and most of its provisions brought into the Crimes Act, with appropriate amendments. ….*The offences currently existing are all to be re-enacted in a form similar to that which they presently have, although some effort has been taken to simplify and clarify them*. However, they are dealing with fairly complex areas. …The penalty of seven years is appropriate because these offences can represent substantial breaches of the fiduciary relationship that exists between principal and agent. The penalty is consistent with those prescribed for the general offences relating to theft and misleading statements, but takes into account the aggravating circumstances of a breach of trust…
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> This bill brings the offences covered by this legislation into line with other comparable offences of dishonesty".[45]

The main amendments were (i) the elimination of the time limits on the commencement of prosecutions for these offences, (ii) a substantial increase in the maximum penalties from 6

[41] See, eg, *Saraswati v The Queen* (1991) 172 CLR 1, 21 (McHugh J) ('*Saraswati*').
[42] *Crimes (Secret Commissions) Amendment Act 1987* (NSW) ('*1987 Crimes Amendment Act*').
[43] Ibid 1.
[44] Explanatory Note, Crimes (Secret Commissions) Amendment Bill 1987 (NSW).
[45] New South Wales, *Hansard*, Legislative Assembly, 26 May 1987, 12407-9 (Terence Sheahan).

months to 7 years, (iii) increases in the maximum fine and (iv) abolishing the reversal of onus of proof.[46]

These extrinsic materials afford important insights into the purpose of Part IVA. First, Part IVA was "re-enacting" existing legislation without change to its original nature or purpose. Second, a major purpose of the amendments included increasing penalties and make them indictable offences to bring them into line with "*other offences of dishonesty*." The seven-year term of imprisonment was said to be appropriate because of the nature of the offences, constituting potentially "substantial breaches of fiduciary relationship." Third, it confirms that both the new Part IVA, and the existing legislation from which it derived, were directed to "corrupt conduct" that is founded in such dishonest breaches of fiduciary duty.

In relation to s 249E itself, the Explanatory Note confirms that it "restates" the existing offence under s 7 of the *Secret Commissions Prohibition Act 1919* (NSW).[47] That section provided:

> "If any person offers or gives any valuable consideration to a trustee, or if any trustee receives or solicits any valuable consideration for himself or for any other person without the assent of the persons beneficially entitled to the estate or of a judge of the Supreme Court, as an inducement or reward for appointing or having appointed, or for joining or having joined with another in appointing, or for authorising or having authorised, or for joining or having joined with another in authorising any person to be appointed in his stead or instead of him and any other person as trustee, he shall be guilty of an offence against this Act".[48]

The side note to s 7 was "*secret commission to trustee in return for substituted appointment. Vict. Crimes Act 1915 s 174*." This section was modelled upon s 6 of the *Secret Commission Prohibition Act 1905* (Vic),[49] which was in substantially identical form.[50] Section 6 of the original legislation is discussed below.

The originating legislation and Royal Commission recommendations that led to it

The *Secret Commission Prohibition Act 1905* (Vic), upon which the NSW *Secret Commissions Prohibition Act 1919* (NSW) was modelled, had been enacted in response to recommendations of two Royal Commission reports; the Report of the Royal Commission dealing with *Secret Rebates on Ocean Freights 1904*, and the recommendations of the *Royal Commission On the Butter Industry 1905 (the "Butter Royal Commission")*. The scope of the two reports overlapped in the context of the shipping of butter by way of trade with England and other countries in the European market. These reports and their recommendations are a further source of context for understanding the scope of Part IVA.

The Terms of Reference for the Butter Royal Commission required the Commission to inquire into and report upon a range of matters including, "the alleged payments of secret commissions, rebates, discounts brokerages, refunds, or other concessions on ocean freights on butter; the allegations of bribery or allowances to or on the part of agents, merchants and

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[46] Under the earlier legislation, where a payment was proved to have been made without consent, the accused bore the onus of proving that the payment had not been made in circumstances contravening the Act. However, this was abolished in light of the significant increase in penalties and making the offences indictable.
[47] Explanatory Note, Crimes (Secret Commissions) Amendment Bill 1987 (NSW).
[48] *Secret Commissions Prohibition Act 1919* (NSW) s 7.
[49] *Secret Commission Prohibition Act 1905* (Vic) s 6.
[50] The only difference was that the word "offence" in the last line was "misdemeanour" in the 1905 legislation.

others."[51] In its first Progress Report in 1904, the Butter Royal Commission reported on these so-described "nefarious systems,"[52] including "the systematic corruption of employees and others by bribery, in order to direct trade to some particular Agent," and the "unjustifiable receiving of secret rebate commissions" which "appears to involve the necessity of some drastic legislation to eradicate existing abuses, and to render their recurrence impossible."[53]

In its Final Report, the Butter Royal Commission detailed the growth of the butter industry in Victoria and development of an export trade to allow butter to be profitably sold in London and other foreign markets in the late nineteenth century. The Report discussed at length the "interesting and sensational" evidence in relation to the "irregular and illegal" practices followed by agents to secure factories' business and the trade customs adopted by them in the sale of produce.[54] The Commission reported widespread practices in breach of fiduciary duty by butter agents, including purchasing large quantities of the butter they were consigned to sell and charging commission on it, and "induc[ing] the farmers to join with them for the purpose of obtaining control and marketing of the producer's supplies" noting that "a number of the companies and factories gradually reverted to the original promoters, or became the sole property of interested agents." There was evidence that commissions had been secretly paid by butter agents to secretaries, managers and directors of factories, or solicited from them for influence to be used on their behalf.[55] So endemic was it that the Royal Commission reported that the business of traders and agents who withstood the solicitations for commissions consequently suffered from such refusal to make secret payments."[56] Importantly, the Royal Commission observed:

> We have not discerned during the investigation an instance where gifts were bestowed or bribes given with a philanthropic motive. It has been clearly demonstrated that the object of these payments was to gain the favour of the director or official as against the interests of their principals, or to perpetuate a practice followed by competitors and insisted upon by the employees.[57]

The Royal Commission concluded that:

> Following upon the Report by this Commission dealing with Secret Rebates on Ocean Freights, the Premiers in Conference at Hobart with the representatives of the Federal Parlament (sic) have intrusted to the Premier of Victoria, the Hon. Thomas Bent, the introduction of *legislation to check the corruption arising out of secret commissions and bribes*. We have no hesitation in stating that much benefit will be derived by the dairy industry and the trade generally from the introduction of such legislation.[58] (emphasis added)

The introduction of the first Secret Commissions Prohibition legislation in 1905 in Victoria

The *Secret Commission Prohibition Act 1905* (Vic) was the legislation enacted in response to the recommendations. The bill was introduced to the lower house by Mr Mackey, Member for Gippsland West. The Second Reading speech and debate gives a detailed insight into its

[51] *Royal Commission on the Butter Industry*, (Final Report, 1905) 7.
[52] *Royal Commission on the Butter Industry*, (Progress Report, 1904) 12.
[53] Ibid.
[54] *Royal Commission on the Butter Industry*, (Final Report, 1905) 28-9.
[55] Ibid 32.
[56] Ibid.
[57] Ibid.
[58] Ibid 33.

purpose.[59] Mr Mackey observed that the bill was "almost exclusively" one of the consequences of the Butter Royal Commission.[60] He referred to the evidence in relation to corrupt practices in the form of secret commissions, and observed that "the introduction of a Bill embodying the principles contained in this Bill is justified by those findings."[61] There was also much discussion in the legislative assembly of different forms of corrupt secret commissions in other industries beyond the butter trade, including areas of business, mining, real estate agents, architects, doctors and others. He noted, "sometimes solicitors at meetings of creditors and elsewhere will recommend the creditors to employ a certain trustee under a deed of arrangement, the arrangement being that this trustee shall give the solicitor a commission."[62]

Mr Mackey addressed the object of the Bill. He said:

> The object of the Bill will be gathered from the report of the Royal Commission I have referred to, and cannot be better put than it was put when a Bill introduced in 1899 by Lord Russell of Killowen was before the House of Lords. He stated-
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> > The object of the Bill may be shortly stated as an effort to check by making them criminal, a large number of inequitable and illegal secret payments, all of which are dishonest, and tend to shake confidence between man and man, and to discourage honest trade and enterprise.
>
> In the preamble to the Bill we read –
>
> > Whereas secret commissions in various forms are prevalent to a greater extent in almost all trades and professions, and in some trades the said practice had increased and is increasing. And whereas the said practice is producing great evils, by corrupting the morals of the community, and by discouraging honest trade and enterprise, and it is expedient to check the same and other kindred malpractices, by making them criminal.[63]

Its scope was clear, "if the commissions are given without the consent of the principal, and for a corrupt purpose, the Bill will prevent it."[64]

Mr Mackey was asked repeated questions about the effect of the bill upon honest practices of giving commissions and whether they would become illegal. Mr Mackey answered (emphasis added):

> There are two factors that must be borne in mind. The mere giving of the commission, or the receipt of it, is not an offence. The jury must be satisfied of two things. *The first is that the gift was given or received, as the case may be, without the consent of the principal, and secondly, that the commission was paid or received, as the case may be, for an improper purpose, or was likely to have an improper effect*.[65]

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[59] Victoria, *Hansard*, Legislative Assembly, 25 July 1905, 507-21. See also Victoria, *Hansard*, Legislative Assembly, 9 August 1905, 869-905.
[60] Victoria, *Hansard*, Legislative Assembly, 25 July 1905, 507 (Mr Mackey).
[61] Ibid 509.
[62] Ibid.
[63] Ibid 512.
[64] Ibid 510.
[65] Ibid 514.

Mr Mackey repeated the latter point in response to another question, saying:

> It is not declared anywhere in the Bill that a secret commission is *ipso facto* punishable. It must be given for an improper purpose. The mere proof of secret commissions is not sufficient. Proof of the improper purpose is also essential.[66]

Mr Mackey confirmed that a payment of a secret commission would not be enough. The payment "must be corrupt."[67]

The original form of clause 2 of the 1905 bill (ie the progenitor of s 249B) as it was introduced to the Victorian legislative assembly, dealing with offering or giving an agent, or an agent soliciting or receiving a benefit by way of inducement or reward to act in particular ways, did not use the word "corruptly". This was inserted by way of amendment to clause 2 the bill introduced in response to heated debate and alarm amongst members as to its scope to apply to honest behaviour if it was not limited. Mr Mackey made the amendment and noted that "[a]s he had told the House right through, the intention of the Government was only to prohibit dishonest commissions…" The amendment introduced the word "corruptly" to appear before "receives or solicits" and "gives or offers". (It is important to remember that clause 2 of the original, the equivalent of s 249B, did not require that the benefit was paid without consent, and still does not in s 249B).

Mr Mackey addressed the purpose of clause 6 of the Bill (the forerunner of s 249E):

> Clause 6 is to meet a practice which has arisen in this country. Where a person is an executor, or administrator, or entitled to take out probate or administration, a practice has arisen in one or two cases of trustee companies giving consideration to allow them to be appointed in his place. This is most improper competition, and it prevents the persons to whom the commission is given from exercising a disinterested discretion in the selection of trustees in the interests of the beneficiaries.[68]

The draft of clause 6 dealing with secret commissions to or from trustees in return for an appointment included that this conduct was engaged in without consent. It would appear clear that its purpose was to target a corrupt practice by trustee companies of payment of secret commissions in return for an appointment. There was no further debate on the clause. Unlike clause 2, there was no discussion of whether the clause might apply in its terms to honest conduct.

When the bill had its second reading in the upper house, the Attorney-General, the Hon J M Davies, also said that:

> the Bill was not intended to in any way prevent honest commissions being given or taken, but it was for the purpose of preventing a commission being given or obtained for the purpose of inducing a person to do something dishonest which otherwise he would not do."[69]

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[66] Ibid 515.
[67] Victoria, *Hansard*, Legislative Assembly, 9 August 1905, 900 (Mr Mackey).
[68] Victoria, *Hansard*, Legislative Assembly, 25 July 1905, 515 (Mr Mackey).
[69] Victoria, *Hansard*, Legislative Council, 26 September 1905, 1686 (J M Davies).

Analysis of legislative history and its role in informing legislative purpose

These second reading speeches support a construction of the purpose of the secret commissions prohibition legislation as targeting corrupt and dishonest practices, and not honest payments, consideration or commissions.

In construing legislation, courts are not bound by statements of legislative intent by ministers.[70] In *Re Bolton; Ex parte Beane,*[71] Mason CJ, Wilson and Dawson JJ said:

> The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.[72]

Therefore, the question for the court is the extent to which this legislative history is accepted as informing the statutory purpose so that in accordance with s 33 of the *Acts Interpretation Act 1987* (NSW),[73] a construction which would promote the purpose or object underlying the act is preferred.

The important point is that this legislative history to the original secret commissions legislation directly informs the purpose of Part IVA of the *NSW Crimes Act* that re-enacted it. Section 249E as the direct lineal descendant of s 6 of the *Secret Commissions Prohibition Act 1905* (Vic).[74] Accordingly, in determining the ordinary meaning of the text of s 249E, the court should take into account the context and purpose to the 1905 Act of prohibiting only dishonest conduct in construing Part IVA of the *NSW Crimes Act*.

Against this background, I now turn to the principles applied to determine whether to construe s 249E as having a *mens rea* element.

PART C: MENS REA

It is a general principle of criminal law that a prohibited act does not of itself make a person guilty of a crime without also having a guilty mind: *actus non facit reum, nisi mens sit rea,*[75] justified on the basis that it is "repugnant to basic and long-accepted notions of criminal

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[70] *Saeed v Minister of Immigration and Citizenship* (2010) 241 CLR 252, 264-5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (recs and mgrs apptd*) (2017) 93 NSWLR 765, 786 [91] (Ward JA, Bathurst CJ agreeing at 767 [1], Beazley P agreeing at 767 [2]); *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36, 56 [84] (Leeming JA, McColl JA agreeing at 39 [1]).

[71] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

[72] Ibid 518 (Mason CJ, Wilson and Dawson JJ).

[73] *Acts Interpretation Act 1987* (NSW) s 33.

[74] See *Saraswati* (n 41) 21 (McHugh J): "Moreover, the terms of s.34 of [the Interpretation Act], which provides for the use of extrinsic material, make it plain that "the ordinary meaning conveyed by the text of the provision" is the meaning conveyed by that provision after "taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule". Hence, it is always necessary in determining "the ordinary meaning" of a provision … to have regard to the purpose of the legislation and the context of the provision as well as the literal meaning of the provision. Sometimes the purpose of the legislation is expressly stated; sometimes it can be discerned only by inference after an examination of the legislation as a whole; and sometimes it can be discerned only by reference to the history of the legislation and the state of the law when it was enacted".

[75] See discussion in Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) 192-210.

responsibility to hold a person to be guilty of a crime without some element of mental fault, such as intention or knowledge."[76] As observed by Brennan J in *He Kaw Teh v The Queen,*[77] the requirement of *mens rea* "avoids what Lord Reid in *Sweet v Parsley* called "the public scandal of convicting on a serious charge persons who are in no way blameworthy."[78]

It is of course possible for the legislature to create offences of strict liability where no mental element is required, but the legislative intent needs to be clear on the face of the legislation. Accordingly, there is a rebuttable presumption that *mens rea* – an "evil intention, or knowledge of the wrongfulness of the act"[79] - is an essential ingredient of a criminal offence, even if the legislation is silent on it.[80] There is no single mental element common to all offences. The mental element of a criminal offence will ordinarily be found to be some form of intention, knowledge, recklessness, dishonesty or combination of these: an offence may have different mental elements attached to different elements of the *actus reus* and the element of intention may be found to be a form of "general" or "basic" intent which relates to the doing of the act involved in an offence, or one of "special" or "specific" intent which relates to the consequences of the act done.[81] If the presumption is not rebutted, it is the task of the court to identify the nature of the mental component to be implied.[82]

In *He Kaw Teh,*[83] the High Court considered the principles to be applied in determining whether the presumption ought to be rebutted or not where the legislation is silent. Gibbs CJ observed that in considering whether the presumption as to *mens rea* has been displaced by Parliament, the court should consider (i) the words of the statute creating the offence, (ii) the subject matter and the seriousness of the consequences (noting that "it is more likely that Parliament will have intended that full *mens rea*, in the sense of guilty intention or guilty knowledge, will be an element if an offence is one of a serious kind"),[84]`and (iii) whether strict liability would assist law enforcement.[85]

That case concerned the construction of ss 233B(1)(b) and (c) of the *Customs Act 1901* (Cth) which prohibited the importation of narcotics. In applying these principles to the construction of s 233B(1)(b), Gibbs CJ (Mason J agreeing) reasoned that it would lead to an absurdly Draconian result if the section had no mental requirement in light of the fact that the section did not allow for a defence of reasonable excuse.[86] His Honour found it was unlikely that Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so[87] and found that no good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an innocent agent to import narcotics.[88] There was no reason to think that strict liability for negligence would aid the prohibition of importation of narcotics.[89]

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[76] *Azadzoi v County Court of Victoria* (2013) 40 VR 390, 396 [21] (Bell J).
[77] *He Kaw Teh* (n 15) 565 (Brennan J).
[78] Ibid, quoting *Sweet v Parsley* [1970] AC 132, 150 (Lord Reid).
[79] *Sherras v De Rutzen* (1895) 1 QB 918, 921 (Wright J), approved in *He Kaw Teh* (n 15) 566 (Brennan J).
[80] *He Kaw Teh* (n 15) 528 (Gibbs CJ).
[81] Ibid 569 (Brennan J).
[82] *Binskin v Watson* (1990) 48 A Crim R 33, 43 (Priestley JA).
[83] *He Kaw Teh* (n 15).
[84] Ibid 535 (Gibbs CJ).
[85] Ibid 528-30 (Gibbs CJ).
[86] Ibid 529.
[87] Ibid 530.
[88] Ibid.
[89] Ibid 536 (Gibbs CJ).

Brennan J cited and discussed the principles summarised by Lord Scarman in *Gammon Ltd v Attorney-General (Hong Kong)*:[90]

> "(1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."[91]

Brennan J observes that the first three propositions "correctly emphasize the strength which contemporary authority gives to the presumption that *mens rea* is an essential element of an offence." His Honour considered the fourth was expressed in perhaps "too categorical" terms, as it will always be a matter for interpretation, but that the fifth proposition reflects the deterrent purpose of the criminal law. On the question of whether the presumption of *mens rea* was rebutted in the interpretation of s 233B(1)(b), the Court (Gibbs CJ, Mason, Brennan and Dawson JJ, Wilson J dissenting) found that the presumption of a *mens rea* requirement was not displaced. The principles discussed in *He Kaw Teh* remain relevant to offences under NSW legislation.[92]

PART D: APPLICATION OF PRINCIPLES TO THE INTERPRETATION OF S 249E

As noted, in the *BT* case, Ball J did not discuss *mens rea* directly except to note that s 249E was framed broadly and was "not … dependent upon proof of 'corrupt' conduct".[93] This part considers whether s 249E should be construed as having a *mens rea* element, and if so, what it should be.

Should s 249E be construed as having a mens rea element?

As discussed above, the fact that s 249E is silent as to *mens rea* is not of itself conclusive.[94] It is necessary for the court to consider the principles in *He Kaw Teh*.

(i) The words of the provision

Firstly, the court must consider the words of the provision and their effect with or without the implication of a *mens rea* element. As was the case in *He Kaw Teh*, the plain words of s 249E are broad. It appears clear from the legislative debates that clause 6, the forerunner of s 249E was intended to prohibit a corrupt practice of payment of secret commissions in return for an appointment. However, as found by Ball J in the *BT* case, the words of s 249E are

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[90] *Gammon Ltd v A-G (Hong Kong)* [1985] 1 AC 1.
[91] *He Kaw Teh* (n 15) 566-7 (Brennan J), quoting ibid 14 (Lord Scarman).
[92] *Wampfler* (n 16) 546 (Street CJ, Hunt and McInerney JJ agreeing at 550).
[93] *BT* case (n 1) [12] (Ball J).
[94] In *Bond v Foran* (1934) 52 CLR 364, the High Court confirmed that the presumption of *mens rea* was not rebutted in the construction of s 63 of the Lottery and Gaming Act 1917 to 1930, and it was held that upon the proper construction of the provision, the provision required a mental element of knowing that the premises were being used for gambling or other purpose forbidden by the section.

broad and capable of applying to benefits received in the best interests of beneficiaries and which would accrue to their benefit.

In light of the legislative history and purpose of the provision, it is unlikely that Parliament intended that the consequences of committing such a serious offence should be visited on a person who had no intention to do anything wrong.[95] To construe s 249E as applying strictly to any benefit received by way of inducement or reward without consent, even where the trustee was induced to accept, or solicited, a benefit not for personal gain but for the benefit of its beneficiaries, where there is no moral culpability or obloquy on the part of a trustee,[96] would arguably also be "absurdly Draconian" as found by Gibbs CJ in *He Kaw Teh.*[97] As observed by Mason and Wilson JJ in *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:

> … when the judge labels the operation of the statute as "absurd", "extraordinary", "capricious", "irrational" or "obscure" he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. *But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions*.[98] (emphasis added)

(ii) The subject matter with which the statute deals

Secondly, the court must consider the subject matter with which the statute deals, and whether is it likely that Parliament intended that the consequences of strict liability should follow. In *Bond v Foran*,[99] the High Court considered whether the presumption of *mens rea* was rebutted in construing s 63 of the *Lottery and Gaming Act 1917 to 1930*, which prohibited premises being "used" for gambling or other purpose forbidden by the section but did not expressly provide for a mental element. McTiernan J observed that:

> There is no ground for the assumption that the Legislature omitted to say in s 63(3) that mens rea on the part of the occupier was a necessary element of the offence because it intended that every person would at his peril be an occupier of a place used for any of the prohibited purposes.[100]

This analysis is apposite here: there is no indication in the legislative history of either the *Secret Commissions Prohibition Act* or its re-enactment of an intention of the legislature to punish, strictly and severely, a trustee who receives a benefit in the appointment of another to the role, where that benefit was to be passed on to the beneficiaries and was negotiated in their best interests, without objective dishonesty according to community standards. Indeed,

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[95] *He Kaw Teh* (n 15) 530 (Gibbs CJ).
[96] In *Peters v The Queen* (1998) 192 CLR 493, 544 [120], Justice Kirby observed that *R v Ghosh* [1982] QB 1053, 1063, 'represented the attempt by the English Court of Appeal to achieve a compromise which would at once prevent *"conduct to which no moral obloquy could possibly attach*" from being regarded as dishonest whilst at the same time avoiding the other extreme by which an exclusively subjective approach might permit sincere, but unacceptable, extremists imposing their own conceptions of honesty on others and escaping criminal liability for conduct wholly unacceptable to society' (emphasis added).
[97] *He Kaw Teh* (n 15) 529 (Gibbs CJ).
[98] *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).
[99] *Bond v Foran* (1934) 52 CLR 364.
[100] Ibid 381-2 (McTiernan J).

the express statements in the Second Reading Speech to the original legislation were to the contrary: as noted above, it was said in the second reading speech that the mere giving of the commission, or the receipt of it, is not an offence, and that the jury must be satisfied that in addition to lack of consent, the commission was offered or given, solicited or received for an improper or corrupt purpose, or was likely to have an improper effect.[101]

(iii) Would strict liability assist the goals of the law?

Third, does it assist the prohibition of bribes and secret commissions to construe s 249E strictly? The Australian Law Reform Commission in its Final Report*, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws,*[102] discussed the justifications for *strict* and *absolute* liability. Strict liability offences have no element of *mens rea*, but traditionally allow for a defence of honest and reasonable mistake as to the facts. *Absolute* liability allows for no defence at all. The imposition of strict liability may be justified where (i) it is difficult to prosecute fault provisions; (ii) to overcome 'knowledge of law' issues; (iii) where a physical element incorporates a reference to a legislative provision; (iv) where it is necessary to protect the general revenue; or (v) to ensure the integrity of a regulatory regime (for example, public health, the environment, financial or corporate regulation).[103]

It is difficult to see that the purpose of the secret commissions legislation would be advanced by strict liability or that these offences are of the kind ordinarily addressed by strict liability. Furthermore, without a *mens rea* element and construed broadly, the offence arguably "cure(s) the mischief the enactment was designed to remedy but at the cost of setting up a disproportionate and unforeseen counter-mischief,"[104] not least in the form of the scale of consent applications that will be required to approve routine transactions and benefits negotiated in the interests of the beneficiaries.

Mens Rea implied by the Court

If a court determines that the presumption of *mens rea* is not rebutted, the main constructional choice would seem to be between implying a *mens rea* of *intention* in the sense of engaging in the act defined in the offence voluntarily and with the intention of doing the defined act, or a *mens rea* of *dishonest intention* as discussed in the cases considering another provision under Part IVA, s 249B.

Mens rea of intention

Arguably the nature of the elements of the *actus reus* is that such acts can only be done intentionally: it is difficult to conceive of circumstances in which an inducement or reward could be offered, given, solicited or received accidentally.

Significantly however, given the broad scope of the elements of the offence as discussed in the BT case, a *mens rea* of *intention* alone would not prevent the section to applying to

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[101] Victoria, *Hansard*, Legislative Assembly, 25 July 1905, 513-14 (Mr Mackey).
[102] Australian Law Reform Commission*, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129, December 2015).
[103] Ibid 291 [10.29], citing Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284. Examples where strict liability offences tend to be found include corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright.
[104] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 [47] (White J), citing Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis Butterworths, 6th ed, 2013) 901-4.

innocent conduct. Intentional conduct by way of receiving an unauthorised benefit can constitute a breach of fiduciary obligation (which carries its own civil consequences)[105] without being dishonest: as is well-known, the equitable obligation is strict and does not require a guilty mind. In *Boardman v Phipps,*[106] the solicitor was acting to promote the interests of the trust in acquiring shares in a company (in which a shareholding was held on trust) to give the beneficiaries control of the company. Despite the finding that there was no dishonesty,[107] and that the solicitor was acting in the best interests of the beneficiaries, he was not permitted to retain the shares he had acquired on account of it amounting to a conflict of interest and an unauthorised profit. However, an allowance was made for due care and skill in acquiring the shares.

The second reading speech to the 1905 bill confirms that the legislative purpose of the secret commissions prohibition legislation was to target only *corrupt* or *dishonest* behaviour, and that the payment of a secret commission, without more, was not an offence. In relation to bribes and secret commissions in equity, it has been held that is this corrupt intention which distinguishes the indictable offence from the civil wrong: *Grimaldi v Chameleon Mining NL (No 2).*[108] Accordingly, it is difficult to see how construing s 249E as requiring a *mens rea* of intention but not dishonesty would be consistent with the statutory purpose.

Would a mens rea of corrupt or dishonest intention give effect to purpose of legislation?

Alternatively, a court might find that to give proper effect to the *purpose* of the legislation, the relevant intention to be implied is a specific intention in the form of a "dishonest intention", or "improper purpose" or acting "corruptly", these expressions being used synonymously in the Second Reading Speech to the original 1905 legislation, and also in case law discussing the *mens rea* of s 249B, discussed below.

Comparison with mens rea of dishonest intention under s 249B

In construing the *mens rea* of s 249E, it is instructive to consider the manner in which the *mens rea* element of other sections of Part IVA have been analysed. Section 249B in particular has very similar elements of its *actus reus* being to "offer or give" or "solicit or receive" "a benefit" by way of "inducement or reward" to act in a particular way. It is headed "s 249B Corrupt commissions or rewards" and deals with offences committed by agents. The main difference between the two sections is that s 249B uses the word "corruptly" but does not expressly refer to the fact that the conduct is engaged in without consent, whereas s 249E does not use the word "corruptly" or any other term for *mens rea*, but provides expressly that the conduct is engaged in without consent.

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[105] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134.
[106] *Boardman v Phipps* [1967] 2 AC 46.
[107] Ibid 104 (Lord Cohen).
[108] *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 348-9 [192] (Finn, Stone and Perram JJ), where the Court observed that "[w]hile secret commissions often are given with the corrupt purpose of influencing, such is not a necessary characteristic of them in civil proceedings." The Court then cited the observations of Lawrence Collins J in *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119, 132 [53]: "In proceedings against the payer of the bribe there is no need for the principal to prove (a) that the payer of the bribe acted with a corrupt motive; (b) that the agent's mind was actually affected by the bribe; (c) that the payer knew or suspected that the agent would conceal the payment from the principal; (d) that the principal suffered any loss or that the transaction was in some way unfair; the law is intended to operate as a deterrent against the giving of bribes".

A comparison of the main elements of s 249B and 249E illustrates their fundamental similarity. Both offences refer to circumstances of offering or giving a benefit, as well as soliciting or receiving. Summarising just the latter form, the similarity in the provisions is evident:

249B Corrupt commissions or rewards	**249E Corrupt benefits for trustees and others**
(1) If any agent ***corruptly*** receives or solicits … from another person for the agent or for anyone else any benefit-- (a) as an inducement or reward for or otherwise on account of-- (i) doing or not doing something, or having done or not having done something, or in relation to the affairs or business of the agent's principal… the agent is liable to imprisonment for 7 years.	(2) Any [trustee] who receives or solicits a benefit for anyone, ***without the consent*** (a) of each person beneficially entitled to the property, or (b) of the Supreme Court, as an inducement or reward for the appointment of any person to be a [trustee], are each liable to imprisonment for 7 years.

Mehajer v R

In *Mehajer v R,*[109] the appellant gave a bank employee a $2,000 payment to process a loan application that contained falsified information. Amongst other charges, this was said to contravene s 249B(2). The New South Wales Court of Criminal Appeal (Bathurst CJ, Johnson and RA Hulme JJ agreeing) considered the *mens rea* element of s 249B in detail, including the manner in which courts in other jurisdictions had construed counterparts of that section. Bathurst CJ held that the requisite mental element was that the benefit was either offered or given by the accused *to* an agent, or solicited or received from another *by* an agent, intending it as an inducement or reward for one of the purposes referred to in the provision,[110] and further, that the impugned payment was made "in circumstances which would be regarded as being "corrupt" according to standards of conduct generally held."[111] This concept equated to a *mens rea* of "*dishonest intention*". This was for four reasons that included:

(i) giving meaning and effect to the word "corruptly" as it appears in s 249B;[112]

(ii) to address the *mischief* to which the section was directed (and avoid catching conduct to which it is not directed, such as conduct with consent of the principal);[113]

(iii) noting that care needed to be taken in relying on cases in a different context (such as election fraud) because in that context, whilst the elements of the offence might be corrupt in and of themselves, in the context of Part IVA, it might otherwise catch conduct that is not within the mischief to which the act is directed;[114] and

[109] *Mehajer v R* (2014) 244 A Crim R 15 ('*Mehajer*').
[110] Ibid 34 [64] (Bathurst CJ).
[111] Ibid 34 [63].
[112] Ibid 34 [59].
[113] Ibid 34 [60].
[114] Ibid 34 [61].

(iv) it is consistent with the Second Reading Speech to the 1987 Act,[115] and the purpose of the legislation as a whole directed to "corruption arising out of secret commissions and rebates" and bringing "the offences covered by this legislation into line with other comparable offences of dishonesty."[116] I return to the significance of this for the construction of s 249E below.

Bathurst CJ traced the lineage of two lines of authority dealing with the meaning of "corruptly". One line of authority derived from case law construing legislation dealing with election interference under which a dishonest intention had been held *not* to be required, just an intention to engage in the conduct.[117] The other arose from cases construing cognates of s 249B in various jurisdictions in which a dishonest intention has been held to be required.

The first line of authority was traced to the decision of the House of Lords in *Cooper v Slade.*[118] There the *actus reus* was corrupt in and of itself, such that the only *mens rea* required was intention to engage in that conduct. In *Mehajer,* the Chief Justice observed that this line of authority had been followed in a number of Victorian cases construing the equivalent sections to s 249B.[119] However, in other jurisdictions construing cognates of s 249B, including South Australia,[120] Western Australia,[121] and Canada,[122] a narrower view of "corruptly" has been taken, requiring a dishonest intention. For example, in South Australia, in *C v Johnson*,[123] in construing s 5(2) of the *Secret Commission Prohibition Act 1920* (SA) (the equivalent of s 249B), Bray CJ preferred a narrower construction of "corruptly" in the sense of "acting *mala fide*, or with wrongful intention,"[124] requiring "dishonesty according to normally received standards of conduct." Similarly, Chamberlain J said that:

> ..the intention of an agent to take advantage of his relationship with his principal to secure some benefit to himself or so other person without the knowledge of his principal … I think, and as I believe most people would think, involves dishonesty.[125]

As discussed above, Bathurst CJ in *Mehajer v R*, preferred this analysis of the narrower meaning of "corruptly" for the purposes of s 249B as requiring dishonesty such that "the impugned payment was made in circumstances which would be regarded as being corrupt according to standards of conduct generally held."[126] This is the same definition of dishonesty applied in s 1041G(2) of the *Corporations Act 2001* (Cth), under which "dishonest" was defined as "(a) dishonest according to the standards of ordinary people."[127]

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[115] Ibid 34 [62].
[116] Ibid 30 [44].
[117] Ibid 30 [45]. This was a line of authority traced back to English law following *Cooper v Slade* (1858) 6 HL Cas 746, construing the *Corrupt Practices Prevention Act 1854* (UK) in relation to voter fraud, followed in later English and Victorian cases.
[118] *Cooper v Slade* (1858) 6 HL Cas 746.
[119] Such as *R v Dillon* [1982] VR 434, which was approved in *Gallagher v R* [1986] VR 219 and applied in *R v Jamieson* [1988] VR 879.
[120] *C v Johnson* [1967] SASR 279 ('*Johnson*').
[121] *R v Turner* (2001) 25 WAR 258 ('*Turner*').
[122] *R v Kelly* (1992) 92 DLR (4th) 643, considering the equivalent section to s 248B in the Canadian Criminal Code (RSC, 1985, c C-46) ('*Kelly*').
[123] *Johnson* (n 120).
[124] Ibid 289 (Bray CJ).
[125] Ibid 301 (Chamberlain J).
[126] *Mehajer* (n 109) 34 [63] (Bathurst CJ).
[127] Referred to by Commissioner Hayne in *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 153-154. I note the *Corporations Act 2001*

Lack of consent of the principal is central to "the betrayal of trust or at least a debasement of the disinterestedness a principal is entitled to expect of an agent."[128] Secrecy is "the corrupting element of the offence."[129] In *R v Turner*,[130] Burchett AUJ concluded:

> In my opinion, these authorities confirm that the sections are directed at the specified conduct done with the intention (properly described as corrupt) of seducing an agent from the duty owed to their principal or of rewarding the forsaking of that duty in favour of another. Consistently with this view of the sections, they will not apply where the principal is known or believed to have assented.[131]

In *Mehajer v R*, Bathurst CJ accepted that a payment to or received by an agent without knowledge or consent of the principal for one of the purposes described in s 249B "would generally be regarded as corrupt according to such standards."[132] However, his Honour said that it would be a matter for the jury in any particular case.[133]

There are four other related aspects of the analysis of s 249B discussed in *Mehajer* that may be of relevance to construing s 249E consistently with the other provisions of the part.

(i) Detriment not required

The first is that actual detriment to the principal is not required. The objective of the provision is to address the risk to the principal that inheres in the fiduciary being tempted by personal gain away from focus on the best interests of the principal.[134]

(ii) Dishonesty is assessed objectively

"Dishonesty" according to normally received standards of conduct is assessed *objectively*. As Bray CJ observed in *C v Johnson* (cited with approval by Bathurst CJ):[135]

> … If a defendant charged with an offence against this section believed that to be honest which, according to standards of conduct generally held, was dishonest, that fact would not, in my view, prevent him from acting corruptly, or prevent his offence being described as one involving dishonesty.[136]

The consequence is that conduct that is *not* dishonest according to ordinary standards will not constitute an offence. However, conduct that *is* dishonest according to ordinary

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(Cth) s 1041G was amended by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 1 item 105, repealing sub-s (2).

[128] *Turner* (n 121) 263 [10] (Burchett AUJ, Malcolm CJ agreeing at 260 [3], Wheeler J agreeing at 260 [4]).

[129] *Kelly* (n 122) 660 (Cory J).

[130] *Turner* (n 121).

[131] Ibid [13] (Burchett AUJ, Malcolm CJ agreeing at 260 [3], Wheeler J agreeing at 260 [4]).

[132] *Mehajer* (n 109) 34 [63] (Bathurst CJ).

[133] Ibid.

[134] Ibid 41 [110]-[111]: "As was stated by Burchett AUJ in *R v Turner* (at [10] and [13]) and by Cory J in R v Kelly (at 658) the purpose of the section is to avoid an agent being placed in a position of conflict or being induced to breach the trust shown in him or her by the principal. The position was succinctly stated by the Court of Appeal of England and Wales in *R v Wellburn* (at 265): "The mischief aimed at by the modern statutes dealing with corruption is to prevent agents and public servants being put in positions of temptation." A construction which required proof beyond reasonable doubt that the principal was in fact imperilled would significantly undermine this objective".

[135] Ibid 30-1 [46]-[47].

[136] *Johnson* (n 120) 289 (Bray CJ).

standards, will not be spared simply because the accused did not believe that they were acting dishonestly, or were acting in accordance with common practice.

It is noteworthy that Part IVA expressly provides in s 249J that it is no defence in proceedings under the Part that the receiving, soliciting, giving or offering or any benefit is customary in any trade, business, profession or calling.[137]

(iii) The benefit is corrupt - one for personal gain or payment at the direction of the recipient

A benefit for the purposes of Part IVA can be of any nature under s 249A.[138] However, for the purposes of s 249B Bathurst CJ described it as needing to be a "corrupt benefit."[139] His Honour said that, "it is an element of the offence that the payment is corrupt."[140] A corrupt benefit occurs where the accused "takes advantage of the relationship with the principal to secure some benefit to himself or some other person." The nature of the benefit will be such that by its receipt, the accused is "knowingly putting himself in a position of temptation as regards the impartial discharge of his duties in consequence of the acceptance of a benefit."[141] The relevance of the personal gain or control over the payment to another (other than the principal) is that this constitutes the relevant temptation to act *other than* in service of the principal.

(iv) Corruption a question for the jury

As mentioned above, Bathurst CJ also observed that in all cases it would be a question for the jury as to whether a payment to or receipt by an agent without knowledge or consent of a principal would be corrupt according to ordinary standards.[142] This allows for the possibility that conduct that might technically fulfil the elements of the *actus reus* will not necessarily constitute an offence if the requisite dishonesty according to ordinary standards is not established. Although the Second Reading Speech to the Victorian legislation in 1905 was not referred to in the reasons for judgment, it is clear that this is consistent with the explanation there of the requirement for proof of a dishonest purpose in addition to payment without consent.

Should the mens rea of s 249E be different to that of s 249B?

Section 249B uses the word "corruptly" expressly. Section 249E does not. This might suggest a legislative intention to distinguish the *mens rea* of the sections. However, this does not automatically follow. In *He Kaw Teh*, the sub-section there under consideration also differed from the three other offences set out in the section in a significant respect. Section 233B(1)(b) of the *Customs Act 1901* (Cth) was wholly silent as to *mens rea* and differed from the three other offences as set out in paragraphs (a), (c) and (ca) of the sub-section that contained the words "without reasonable excuse". However, this was held not to be conclusive of either a lack of *mens rea* or a *different mens rea*. The provision had to be construed in light of the legislative purpose. Accordingly, it cannot be assumed from the

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[137] *Crimes Act 1900* (NSW) s 249J derives directly from the *Secret Commissions Prohibition Act 1919* (NSW), and the original 1905 legislation, addressing specifically the evidence before the Butter Royal Commission that secret commissions were endemic in the butter trade at the time.
[138] *Crimes Act 1900* (NSW) s 249A defines "benefit" as including "money and any contingent benefit".
[139] *Mehajer* (n 109) 34 [64] (Bathurst CJ).
[140] Ibid 34 [59].
[141] Ibid 31-2 [50], quoting *R v Dillon* [1982] VR 434, 436 (Brooking J).
[142] *Mehajer* (n 109) 34 [63] (Bathurst CJ).

difference in form between ss 249B and 249E and the presence or absence of the word "corruptly" that the legislative intent as to *mens rea* necessarily differs, even if the drafting style does.

Lack of consent indicative of but not entirely co-extensive with corruption

In the context of analysing s 249B, the in *Mehajer v R*, Bathurst CJ noted that it would nonetheless always be a question for the jury as to whether any conduct without consent was dishonest according to ordinary standards.[143] This is consistent with the explanation in the Second Reading Speech to the effect that it will always be a question for the jury as to whether the payment was made for an improper purpose as well as having been made without consent. The Second Reading Speech to the 1905 Act drew no distinctions between any of the offences in the requirement for dishonesty. Arguably this is also important to the proper construction of s 249E.

If a court were to construe s 249E such that engaging in any conduct within the broad terms of the section amounted to a corrupt conduct – even if engaged in for the benefit of the beneficiaries, and where the benefit accrues to the beneficiaries, and without an improper purpose - this would give "corrupt" a different and broader meaning in s 249E to that given to it in s 249B.

Even though s 249E does not use the word corruptly, and accepting that in New South Wales, its heading "Corrupt benefits for trustees and others" is not treated as part of the section to be construed,[144] it is relevant to note that pursuant to s 35(1) of the Interpretation Act 1987 (NSW), the heading to a *Part* of the Act *is* taken to be part of the Act. Accordingly, the heading *"Part 4A: Corruptly receiving commissions and other corrupt practices*" is relevant context to determining whether the meaning of corruptly is applied in a harmonious manner to all sections in the part.

Conclusion on mens rea in s 249E

The construction of the *mens rea* of s 249E is not straightforward and as Gibb CJ observed in *He Kaw Teh*, the "indications do not all point in the same direction".[145] The section does not expressly require that conduct is engaged in "corruptly" like s 249B. The elements of the offence can extend to the receipt of a benefit for the benefit of the beneficiaries, as found by Ball J. It is argued here that considerations of its statutory purpose and legislative history, and arguably "absurd" consequences of either strict liability or a limited general intent to engage in conduct within the scope of the provision, support finding is that an element of *mens rea* of dishonest intention is to be presumed in s 249E. If that is correct, then, consistently with the construction given to s 249B, conduct that is not accompanied by proof of the required *mens rea* will not constitute an offence. On the other hand, where conduct *is* found to be dishonest according to ordinary standards, it will be no defence that the accused did not believe or intend that they were acting dishonestly, or were acting in accordance with common practice.[146]

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[143] Ibid.
[144] Pursuant to s 35(2) of the *Interpretation Act 1987* (NSW), a heading to a provision of an act is not taken to be part of an Act.
[145] *He Kaw Teh* (n 15) 530 (Gibbs CJ).
[146] *Johnson* (n 120) 301 (Bray CJ).

PART E: DOES S 249E CONTAIN A "MECHANISM FOR APPROVAL" THAT PRECLUDES CONSTRUING THE OFFENCE AS REQUIRING CORRUPT CONDUCT?

As noted above, the proceedings before Ball J were brought as an application for consent orders from the court under s 249E. This Part considers whether s 249E contains a "mechanism of approval" by the court in subsection 249E(2)(b) and secondly, even if it does, whether its presence precludes a construction of s 249E as requiring corruption. The reason it matters is that the presence of this "mechanism for approval" in the offence itself appears to have had a bearing upon the construction given to the section in the *BT* case.

Ball J found that the court has the power to give consent to the orders sought and that "*it is given that power directly by s 249E(2)(b)*."[147] This interpretation was submitted to the court on the application as a reason for construing the offence as *not* requiring corruption, as "it might be rather odd if the Supreme Court's consent was available for something which necessarily required corruption."[148] In other words, if the offence was construed requiring corrupt intention, an application for consent to conduct that falls within the scope of the elements under s 249E might amount to the Court consenting to corrupt conduct that, but for the consent, would be an offence.

The question is whether it is correct to construe s 249E(2)(b) as limited by the power of the court to give consent to a benefit received by way of inducement or reward in the appointment of a trustee. Alternatively, the reference to conduct engaged in without consent may be construed as simply setting out one of the elements of the *actus reus*. On one interpretation, s 249E is not necessarily the *source* of the power to provide consent, rather, it assumes that the court has the power to give such consent, but that one of the elements of the *actus reus* is the failure to have obtained consent. But whether or not s 249E is construed as a source of power to consent or not, the more important question is whether the power of the court to consent – whatever the source of it – constrains the scope of s 249E to be interpreted as requiring corrupt conduct.

The power of the court to consent to the offer or receipt of a benefit in appropriate circumstances does not need to limit the construction of the elements of the offence. In an application for consent, a court would not be consenting to *corrupt* conduct, but to receipt of a benefit that might, but for consent, amount to an unauthorised profit. An unauthorised benefit is not in and of itself corrupt. As in *Boardman v Phipps*, for example, an unauthorised profit was made in circumstances where the solicitor (assuming for present purposes that he was in fact acting as a fiduciary) was not found to be acting dishonestly at all, but had not (because he could not) obtained consent of all trustees.

On another argument, the guiding legislative purpose, traceable to the second reading speeches in particular, is that the purpose of the secret commissions prohibition legislation *as a whole* is only to target dishonest conduct. Lack of consent is clearly an essential element of these offences. In *Mehajer v R*,[149] the presence or absence of consent was important to the

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[147] *BT case* (n 1) [15] (Ball J).

[148] Transcript of Proceedings, *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* (Supreme Court of New South Wales, 2022/81776, Ball J, 22 March 2022) 1.

[149] *Mehajer* (n 109) (Bathurst CJ) observed that: "the mischief to which the section is directed, as was pointed out in *R v Turner* and *R v Kelly*, is to prevent agents from being encouraged to act to the detriment or against the interests of their principals. A construction which gives no meaning to the word "corruptly" could in theory catch a payment which was made by a person to another's agent with the consent of the principal. For

concept of corruption given that the section did not expressly require a lack of consent. Lack of consent or approval by the principal or beneficiaries was construed as an element of, or indicative of, the dishonesty that was implicit in the offences. But it was not corrupt in and of itself: it was still necessary to prove that the payment was dishonest. Accordingly, the power of the court to consent to a payment in appropriate circumstances does not assume that the court is being asked to give consent to corrupt conduct.

The source of the power to provide consent

Is s 249E(2)(b) the *source* of the power to provide "consent"? It does not expressly provide for consent to be sought under it. By way of comparison, an example of an express statutory power of the Court to provide consent and accompanying procedure for it is found in ss 14 and 15 of the *Trustee Companies Act 1947* (ACT).[150] Section 14 of that act provides for a trustee, receiver or guardian, with consent of the court, to appoint a trustee company to perform the trustee's role,[151] and s 15 provides the process to apply for the court's consent.[152] A criminal offence with an implied consent "mechanism for approval" embedded in it has no other precedent in the NSW *Crimes Act* or, as far as I am aware, any other criminal statute. Section 249E does not provide any comparable process to the *Trustee Companies Act 1947* (ACT) process for giving such consent.

At the time of the original enactment of the 1905 legislation in Victoria, and then the 1919 NSW legislation, an element of the offence was the relevant conduct engaged in without the "*assent*" of the persons beneficially entitled "*or of a judge of the Supreme Court*." The change in language from "assent" to "consent" occurred in 1987 with the restatement of the provisions of the *Secret Commissions Prohibition Act 1919* (NSW) into the NSW Crimes Act. In light of the extrinsic materials confirming that most of the changes in language were only to "simplify and clarify" the text, it is arguable that nothing turns on the distinction. Furthermore, in the course of the Second Reading Speech to the 1905 Victorian Act, Mr Mackey was asked directly:

> Mr Gaunson: What is the meaning of "without assent"?

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example where it was agreed between the third party and the principal that the third party would pay the principal's agent for carrying out certain work which would be to the benefit of both the principal and third party".

[150] *Trustee Companies Act 1947* (ACT).

[151] Ibid s 14 provides: "Executor or administrator may appoint company to discharge duties

(1) An executor or administrator acting under any probate or letters of administration, whether granted before or after the date when this Act comes into operation, or a trustee, receiver or guardian of a child may, with the consent of the Supreme Court, appoint a trustee company to exercise and discharge all the acts and duties of that executor, administrator, trustee, receiver or guardian".

[152] Ibid s 15 provides: "Application for consent under s 14

(1) A person who intends to apply for consent under section 14 must give public notice, at least 7 days before the day the application is made, of—

(a) the intention to apply; and

(b) the intended date of the application.

Note Public notice means notice on an ACT government website or in a daily newspaper circulating in the ACT (see Legislation Act, dict, pt 1).

(2) The Supreme Court may require any person entitled to the immediate receipt of any of the income or corpus of the estate in relation to which the application is made to be served with notice of the application.

(3) The costs of the application shall be in the discretion of the Supreme Court and may be ordered to be paid out of the estate.

(4) The Supreme Court shall not give consent in the case of any will in which the testator has expressed his or her wish that the trusts of the will should not be delegated or that a trustee company or the particular trustee company in relation to which the application is made should not act in the trusts of the will".

> Mr Mackey: He must consent.[153]

The 1905 legislation predated any contemporary trustee legislation in the states.[154] Accordingly, there is an argument that if not under then existing trustee legislation, Parliament's reference in the original legislation in 1905 to "the assent of the persons beneficially entitled to the estate or of a judge of the Supreme Court" may be construed as a reference to the inherent jurisdiction of the Supreme Court. UK and Australian equity courts have long acknowledged an inherent supervisory jurisdiction over trusts and trustees. It has been noted that it is generally exercised cautiously and in specific ways.[155] However, it has also been expressed by the court in wide terms as an "inherent jurisdiction to supervise the administration of trusts, primarily to protect the interests of beneficiaries…"[156]

Aside from the inherent jurisdiction of the court, s 63 of the *Trustee Act 1925* (NSW) (and cognates elsewhere) may be used to seek directions from the court in relation to a proposal that may otherwise involve breach of trust, say by way of receipt of unauthorised profit, and s 85 (and cognates) may be used to excuse a trustee from a breach of trust as long it appears to the court that the trustee has acted honestly and reasonably. It is beyond the scope of this paper to explore, but these may be avenues for a trustee to seek consent of the Supreme Court to receipt of a payment that might constitute an unauthorised profit where the payment is not dishonest and is in the best interests of the beneficiaries.

If the presumption of *mens rea* in s 249E is not rebutted, then, in a prosecution, the Crown still would need to prove both that the payment was offered or made without consent of either beneficiaries or the court, and the mental element, that it was offered or accepted in circumstances that were corrupt according to ordinary community standards. In *Mehajer* v R, it was not assumed that payment offered or made without consent was necessarily corrupt.

If this is correct then the construction of the offence is not required to be constrained by the power of the court to consent to a receipt of a benefit in appropriate circumstances.

Conclusion

As this articles discloses, the proper construction of s 249E is not straightforward. The words of the section are wide and capable of applying to innocent (and even fully disclosed) conduct. In the *BT* case the court found that s 249E was framed broadly and was "not … dependent upon proof of 'corrupt' conduct".[157] Given the importance of the issues to the superannuation industry, it is likely that another court will soon be called upon to consider the construction of the section or one of its cognates, and the correctness of this decision.

The part of the *NSW Crimes Act* in which s 249E is found, Part IVA, has a long history, re-enacting some of the earliest post-Federation efforts to address corrupt conduct. That legislative path is clear, as was the purpose of restating the provisions and increasing the penalties for its offences. Parliament was charged by the Butter Royal Commission to enact

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[153] Victoria, *Hansard*, Legislative Assembly, 25 July 1905, 514.
[154] At the time, *Trustee Act 1898* (NSW) s 20 provided the forerunner of the current *Trustee Act 1925* (NSW) s 63.
[155] See David Russell and Toby Graham, 'The origins and scope of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts' (2018) 24(8) *Trusts & Trustees* 727-8.
[156] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 729 [51] (Lords Nicholls, Hope, Hutton, Hobhouse and Walker). See generally Daniel Clarry, *The Supervisory Jurisdiction Over Trust Administration* (Oxford University Press, 2018).
[157] *BT case* (n 1) [12] (Ball J).

"some drastic legislation" to "eradicate" the so-described "nefarious systems,"[158] including "the systematic corruption of employees and others by bribery, in order to direct trade to some particular Agent," and the "unjustifiable receiving of secret rebate commissions", so as to "render their recurrence impossible."[159] As noted above, upon the introduction of the original legislation in 1905, the secret commission prohibition legislation was not intended to prevent honest payments being given or taken, but was for the purpose of preventing corrupt and dishonest practices. This legislative purpose remains relevant in guiding the proper construction of the offence in accordance with s 33 of the *Acts Interpretation Act 1987* (NSW). There is an argument that this purpose, together with the principle of presumption of *mens rea*, supports the implication of a *mens rea* of dishonest intention into s 249E.

In addition to these questions of statutory construction, there is also a question whether this is now a matter for legislative reform. The lack of clarity in the legislation and uncertainty as to its scope that led to the application in the *BT* case is likely to lead to further court applications. The expense, commercial uncertainty and inevitable delays whilst waiting for further judicial consideration – which might require appellate review – could be avoided by appropriate and timely reform to the section to expressly provide the *mens rea* of the offence.

[158] *Royal Commission on the Butter Industry*, (Progress Report, 1904) 12.
[159] Ibid.