

PART VII – PROPERTY CRIMES

I Structure and History

A Australian Approaches

Australian jurisdictions take two approaches to the legal definition of property crimes:

- New South Wales and South Australia adopt the common law concept of larceny as the basis for all offences
 - Larceny is a relic of the English common law
 - A medieval offence
 - Somewhat problematic as it is unsuited to modern crime
 - NSW supplants the doctrine with a hybrid legislative scheme
 - Per Barwick CJ in *Croton v R* (1967) HCA:

Larceny is taking and carrying away the personal goods of another from any place [the actus reus of 'asportation'] with the felonious intent to convey them to the taker's own use, to make them permanently his property without the consent of the true owner [the mens rea].

- Queensland, Western Australia, and Tasmania use stealing as the basis for all offences
- Victoria, the Australian Capital Territory, the Northern Territory, and the Commonwealth use three basic offences to construct the structure of criminal liability for crimes against property: theft, obtaining property by deception, and obtaining financial advantage by deception

In contrast to common law larceny, the Victorian regime is defined by statute. The relevant offences are set out in Part I of the *Crimes Act 1958* (Vic):

- *Part I*
 - *Division 1: Offences Against the Person*
 - *Division 2: Theft and Similar or Associated Offences*
 - Theft (ss 71-4)
 - Related offences (ss 75-80)
 - Robbery (s 75) = theft + use of force
 - Armed Robbery (s 75A) = theft + use of force + weapon
 - Burglary (s 76) = theft + trespass
 - Aggravated Burglary (s 77) = theft + trespass + weapon
 - Removal of Articles from a Public Place (s 78)
 - Obtaining property by deception (s 81)
 - Obtaining financial advantage by deception (s 82)

B History of Property Crime

As Fletcher notes, the locus of property crime has, in its recent history, shifted from the nature or *modus operandi* of the act itself towards the character of the mental state under which it was committed. The subjective intention of the actual accused is now seen as the primary determinant of criminal liability for most property offences, and is reflected in the legislative structures that form the requirements for prosecution.

The law of property crime may also be viewed as an instrument of social control, maintaining the social structure and property distributions of 17th century England.

II Theft

A Statutory Definition

Theft consists of four primary elements:

- Appropriation;
- Property belonging to another;
- Intention to permanently deprive; and
- Dishonesty.

s 72:

- (1) A person steals if he *dishonestly appropriates property belonging to another* with the intention of *permanently depriving* the other of it.
- (2) A person who steals is guilty of theft.

B Appropriation

s 73:

- (4) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

1 *Extent of Rights Assumed*

Not all a property owner's rights must be assumed. It is only necessary for the accused to have exercised at least some of the owner's rights of ownership (*Stein v Henshall*).

***Stein v Henshall* [1976] (Vic SC):**

Facts:

- A drove a car that he knew to be stolen
- It was not clear whether the thief had given A the car or merely loaned it to him

Issue:

- Was there an appropriation?

Reasoning:

- Lush J:
 - "...the assumption of the rights of an owner involves the taking on one's self the right to do something which the owner has the right to do by virtue of his ownership.

I do not accept the argument that the conduct required to establish an assumption of the rights of an owner extends to establishing an intention to exclude all others."

Decision:

- Here, A assumed at least some of the rights of ownership in using the car for himself
- Therefore, there was an appropriation

2 Consent

Question: can there be an appropriation when the owner of the property has consented to the taking of the property by A?

Judicial treatments of the requirement of appropriation may be broadly categorised under two approaches. The 'adverse interference with rights' approach requires usurpation of an owner's rights (*Morris*). The 'neutral' approach involves exercising any right of ownership (*Lawrence*).

According to the narrow approach, appropriation requires an adverse interference or usurpation of the rights of the owner. Such an approach effectively conflates actus reus and mens rea elements by requiring the interference to amount to a misappropriation. Thus, if the owner consents to the conduct which is alleged to form the appropriation, then it cannot be said to have adversely affected the rights of the owner, since they voluntarily consented to assigning those rights to the accused (*Morris*). However, consent will be vitiated by dishonesty or fraud, allowing appropriation to occur where consent is obtained dishonestly.

***R v Morris* [1984] HL:**Facts:

- Morris either covered or replaced price tags on items in a supermarket with price tags removed from lower priced items
- He paid for these items (at the lower price) and was then arrested
- [Burnside, another appellant, did the same but was arrested before paying the lower price]

Issue:

- Has there been an appropriation?

Reasoning:

- The accused does not have to deprive the owner of all rights to have appropriated an item; a right is sufficient
- Lord Roscoe:
 - Taking goods from a shelf to the checkout is not an appropriation because it has been impliedly consented to by the supermarket
 - This approach has been subsequently criticised as conflating mens rea with actus reus elements
 - To set the price of the item is one of the rights of the owner; by repricing the

- item, Morris has appropriated it
- The enquiry involves an 'adverse interference with or usurpation of the rights of an owner'

Decision:

- Though taking the goods to the counter was not an appropriation because it was consented to, Morris interfered with and usurped a right of the owner by relabelling the goods at a lower price
- There has thus been an appropriation capable of constituting theft

Morris made clear that the deception involved in switching the labels vitiated the implied authority to take the goods to the cashier.

The neutral approach, by contrast, views appropriation as requiring only the exercise of any rights of ownership – regardless of whether it is adverse to the rights of the owner. Thus, consent is irrelevant: an appropriation can occur with or without the owner's authorisation, because the accused need not exercise a right of ownership in such a way as to constitute interference with the owner's rights (*Lawrence*).

- Appropriation may be honest or dishonest: mens rea elements should not be combined with actus reus
- *Morris* has been criticised as representing an undesirable conflation of actus reus and mens rea: the element of dishonesty should not go towards the question of whether property was appropriated

Lawrence v Metropolitan Police (1972) UK:Facts:

- An Italian tourist hired a taxi; the fare for the journey would be 53p
- The tourist offered the driver 1 pound, but the driver said it wasn't enough
- The tourist showed the driver his wallet and the driver took 6 pounds
- Driver charged with theft of the 6 pounds

Issue:

- Was there an appropriation?

Reasoning:

- Adopts a neutral approach: no requirement of usurpation or interference with the owner's rights – just *any* right being exercised by the accused

Decision:

-

The neutral approach is presently favoured in Australia. *Wilson* suggests that the mere act of travelling as a passenger in a stolen car is also an appropriation of the owner's rights.

R v Baruday [1984] Vic SC:

Facts:

- A charged and convicted of a number of counts of theft and false accounting in the conduct of his business as an insurance broker
- The relevant theft charges arose from Baruday sending bogus accounts the City of Knox, his client, for extra workers compensation insurance premiums
- The client paid the accounts (around a \$900 each) whereupon Baruday banked the cheques for himself
- A argues that the City of Knox consented to his banking of the cheques, so there can be no appropriation

Issue:

- Has there been an appropriation?

Reasoning:

- Southwell J:
 - Where there is an element of deception the authority or consent will be vitiated
 - If fraud obviates the consent of an owner, appropriation can still occur
 - However, true consent prevents appropriation from being said to have occurred
 - Likewise in *Lawrence*, V consented only to the correct fare being taken, so his consent was vitiated by A exceeding this authority
 - *Lawrence* is consistent with *Morris*

Decision:

- Here it was a fraud by Baruday that led his client to send him the cheques
- Thus, the consent to bank that money was vitiated
- Appropriation occurred when Baruday banked the cheques
- Appeal dismissed

Subsequent cases have criticised *Morris* as confusing dishonesty with appropriation, instead holding that relabelling goods' prices can constitute an appropriation in and of itself – regardless of the presence of consent (*R v Gomez*).

Gomez reconciles the disagreement between *Morris* (adverse interference with rights; consent precludes) and *Lawrence* (neutral approach; consent irrelevant) in favour of *Lawrence*, adopting the neutral approach and confining the appropriation analysis to actus reus elements.

***R v Gomez* [1993] HL:**Facts:

- A induces shopkeeper to give him £16 000 worth of electrical good in return for invalid cheques that A knew were worthless
- Shopkeeper authorizes A to take the goods in return for the cheques

Issue:

- Was there an appropriation?

Reasoning:

- *Morris* is a problematic decision
- Merely relabelling the goods in *Morris* was an appropriation regardless of anything else being done because it was an appropriation of one of the rights of the owner

- Dishonesty by A is not relevant to the question of appropriation (but rather, mens rea)
- *Morris* is incorrect in so far as it suggests that an act that is either expressly or impliedly authorised by the owner can never be an appropriation
- The approach in *Lawrence* is to be preferred to that in *Morris*
 - *Lawrence* makes clear that an appropriation can occur even with the consent of the owner
 - It is the assumption of one or more of the rights of ownership that defines an appropriation
- Thus an appropriation may be honest or dishonest, and may occur with or without the consent of the owner.
- An honest appropriation – such as taking items from a supermarket shelf – will not be theft because the other elements of the offence must also be made out.
- In theft, don't confuse the element of 'dishonesty' with the element of 'appropriation'

Decision:

- Although the shopkeeper authorised A to take the goods there was still an appropriation

In summary:

- **Neutral approach**
 - *Lawrence* 'neutral' approach has been used in the UK since *Gomez*
 - Assumption of rights need not be adverse to those of the owner
 - Appropriation may occur with or without the consent of the owner
 - Appropriation is simply the assumption of one or more of the rights of ownership
- **'Broad' approach**
 - An appropriation will occur only if the exercise of rights of ownership by the appropriating person is adverse to the exercise of the rights of the owner
 - If the owner consents to the exercise of these rights, implicitly or explicitly, there will be no appropriation
 - *Baruday* (Vic SC):
 - No conflict between the two approaches
 - Held: if the consent of the owner is vitiated by fraud there can still be an appropriation
 - *MacLeod* (HCA):
 - Critical of the *Morris* approach as applied by the Vic SC in *Roffel*
 - Instead adopted the *Lawrence/Gomez* approach
 - Decided in the context of the *Crimes Act* (NSW), so the *Morris* approach is still relevant to Victoria

3 Appropriation from Companies

Issue: can B steal from a company owned and controlled solely by them?

A company is a legal person. It can own property, commit torts and crimes, and is separate from its owners and shareholders. Consequently, it is entirely possible to appropriate property from a company, irrespective of its owner's implied consent.

***R v Roffel* (1985) Vic SC:**

Facts:

- A husband and his wife (the Roffels) are the sole owners and shareholders of a company
- They receive an insurance payout after a fire destroys part of the company's property
- However, instead of rebuilding the property, they spend the money on themselves

Issue:

- Did the Roffels commit theft?

Reasoning:

- There cannot be theft because there has been no appropriation
- *Morris* approach applied
- The Roffels could not have appropriated their company's cheque because there was no adverse interference with rights

Decision:

- No appropriation has occurred because the company's rights were not adversely interfered with by the Roffels' misuse of the cheque

However, in light of criticism of the *Morris* approach, the High Court of Australia recently overruled *Roffel* in holding that an appropriation could occur where cheques are misused by a company director.

MacLeod v R (2003) HCA:**Facts:**

- M is the director and sole shareholder of Trainex Pty Ltd, a film production company that provides cinematic services to corporations seeking to benefit from a taxation benefit associated with movie production
- M took \$2.2m of the money assigned to invest in the making of a film and used it to purchase a beachside house and other property
- M used only \$800 000 of the invested money to actually produce the film
- M argued that no crime had been committed because the appropriation was authorised by the company

Issue:

- Did M appropriate his company's investment?

Reasoning:

- Gleeson CJ and Hayne J:
 - The company has rights and interests
 - It is separate from its officers and stakeholders
 - s 71(3): there is no requirement for the company to have not consented to the appropriation
 - It is thus possible for officers of a company to steal from it
 - A person in sole ownership is still capable of stealing from it
- McHugh J:
 - Consent is immaterial
- Callinan J:

- *Roffel* wrong in law

Decision:

- Here, Trainex was not vested with the money for the purpose of its director purchasing a Gold Coast property
- An appropriation occurred because M exercised a right of ownership by spending the company's money

4 *Finding Property*

s 73(4) states that found property can be appropriated by keeping or dealing with it as its owner. Thus, for example, if one finds and uses a wallet discovered on a footpath, one has appropriated it as property by dealing with it as owner.

5 *Bona Fide Purchaser***s 73:**

- (5) Where property or a right or interest in property is or purports to be transferred for value to a person acting in *good faith*, no later assumption by him of rights which he *believed* himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

Requirements:

- The recipient of property must be 'acting in good faith'
- The stolen property must be 'transferred for value'
- The recipient must '[believe] himself to be acquiring' the right he assumes

In these circumstances, anything that would otherwise be an appropriation cannot amount to theft.

This provision is most often applied to the sale of automobiles. If a purchaser acts in good faith, then purchasing a stolen car may not amount to theft. This may be established by, for example, the buyer attempting to verify the car's legitimacy at the point of sale.

For example:

- X steals P's bicycle and sells it to A
- P then proves to A that the bike is hers and demands its return
- A refuses to return it

a) Could A be charged with theft?

- No: s 73(5) provides that where a party acting in good faith has title transferred for value, good title passes and the property is transferred to them

b) Would it make any difference if X gave the bicycle to A?

- Yes: if the transfer did not occur for value, the property must be returned

6 Summary

- The neutral approach (*Lawrence*) is currently favoured in Australia (*MacLeod*)
- Assumption of one or more of the rights of ownership is sufficient to amount to appropriation
- Appropriation is not determined by the presence or absence of the owner's consent, which is relevant only to the mens rea of theft

C Property

1 General Definition

Not everything can be stolen. s 71(1) defines the spectrum of property able to be stolen at law.

s 71:

- (1) Property includes money and all other property real and personal including things in action and other intangible property

This broad definition is qualified by s 73(6), which limits theft of land.

s 73:

- (6) Land cannot be stolen, or things forming a part of the land, unless
- A has been entrusted with some legal power to dispose of the land owned by another, and deals with the land in breach of this trust
 - A appropriates anything forming a part of the land (eg, something growing on it) where he is not in possession of that land
 - A is in possession of land under a tenancy and appropriates any part of the fixtures attached to the land

Wild creatures form another exception to the broad definition of s 71(1) (s 73(7)). This exception is said to be justified by the fact that they belong to nobody and grace unpredictably, potentially giving rise to unintentional appropriation. However, the exception may not apply where they are tame or ordinarily kept in captivity.

2 Acquisition of Proprietary Attributes

Ordinarily, corpses cannot be stolen because there is not property in a corpse. However, where a corpse has been transformed in such a way as to render value upon it, it may be property capable of theft (*R v Kelly*).

R v Kelly:Facts:

- Kelly, an artist, borrowed body parts from a local medical college
- The college had not permanent rights to the bodies, which were on loan from the morgue for study, dissection, and preservation
- Kelly did not return the body parts, instead burying them in the yards of his house and his neighbours'

Issue:

- Is there property in a corpse?

Reasoning:

- Corpses are capable of acquiring property status by their acquisition of different attributes by rendering skill upon them
- Obiter: in future, perhaps corpses will be regarded as property even without such an acquisition of attributes

Decision:

- Dissection and preservation are here sufficient to render the corpses property capable of being stolen by Kelly

3 *Intangible Property*

Intangible property is expressly included in the definition of property under s 71(1). The provision includes: bank accounts, electronic property, and export quotas (ie, unauthorised selling of spare trade quotas may amount to theft from a company).

Stealing a telephone call poses more difficulty (*Akbulut v Grinshaw*). The 'call' is not a thing – it is the mere transmission of energy – a communication. Such an appropriation is more suited to prosecution for obtaining a financial advantage by deception.

4 *Summary*

- The proprietary nature of a stolen item is clearly evident in most cases; however, complications arise at the peripheries of the definition in s 71(1), which is broad
- The legislative definition of property is broad enough to include property without physical existence (eg, debts, trademarks, etc)
- Some property that may prove more difficult to define is provided for in subject-specific legislation (eg, electricity offences, computer hacking, information theft)
- Generally, however, information is more commonly protected by civil actions and non-legal defensive measures: bits and bytes cannot be stolen

D *Belonging to Another*

1 *General Definition*

Property consists in the interests and rights that a person has in an object. Three primary interests and rights are typically described:

- Ownership;
- Possession; and
- Control.

These rights fall into two groups:

- 1 Legal
- 2 Equitable

Property is thus said to legally belong to another where that person has:

- Possession of the property;
- Control of the property; or
 - Eg, physical control
- Any proprietary interest or right in the property.

s 72:

- (2) In this Division, property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest

For example, let us assume that X owns a book, Y borrows it from X, Z takes it into their hand, and A suddenly runs past and wrests it from Z's grasp. Here, X has ownership of the book, Y has possession of it, and Z is in control of it. A may thus be said to have stolen the property of all three, since each had a relevant proprietary right or interest in it at the time of its appropriation.

Note, however, that abandoned property is neither possessed nor controlled. It is thus not property belong to another, and may be freely appropriated without being stolen.

2 *Property Belonging to the Thief*

Where a third party has possession and control over a person's property, such property may be classified as 'belonging to another' and is thus capable of being stolen by its original owner (*R v Turner*).

R v Turner (No 2) [1971] All Er 441:

Facts:

- A took his car to a garage for repairs
- When complete, A told the garage owner that he would return the next day to collect the car and pay for the repairs
- Later, A took the car without paying for repairs; A claimed he had the right to do so because it was his car

Issue:

- Did A commit theft?

Reasoning:

- It doesn't matter that there were simultaneous rights vested in both the garage owner (possession, control) and A (ownership)
- The sole issue is whether the garage owner had possession and/or control of the car
 - It did have these rights
 - Lien, a proprietary right over work performed but not paid for, is also held by the garage owner in respect of the car

Decision:

- Because the garage had possession and control of the car when A collected it, it was property belonging to another and thus capable of constituting theft

See also:

- *Meridith v R* (accused's car was towed due to parking violation; he went to the police caryard, broke the lock on his car, and drove off in it)

3 Deemed Ownership

Even if the person from whom property is stolen has no legal or equitable interest in it (ie, they do not possess, own, or control it, or have proprietary rights in it), a thief may still be convicted of theft for appropriating it with the required mental elements – even where they are, in fact, entrusted with its possession or control:

s 73:

- (9) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

For example, a trustee has a legal right to property because they own it on behalf of the beneficiary, who has an equitable interest in it. If B, a trustee, has both legal and equitable ownership of property (as well as possession and control), but is nevertheless under a particular obligation to deal with that property in a certain way (on account of a testator, for example), then the property is ultimately owned by the person to whom that obligation is owed.

The effect of s 73(9) is thus to prevent an accused entrusted with property from appropriating it in a way that subverts their obligations under the trust.

It is difficult to satisfy this provision:

- *R v Hall* (travel agent accepted money from clients, but spent the money on his travel firm; the money was *meant* to be spent on tickets for the client, which were not provided; not theft, but can still give rise to an action on the contract)
- *R v Meech*

4 Mistaken Receipt of Property

Individuals frequently acquire property accidentally. For example:

- Overpayment by an employer;
- Accidental underpricing or excessive change dispensation;
- Favourable bank transaction errors; or
- Transactions predicated on false assumptions.

To prevent an individual from keeping the property to which they are not entitled, s 73(10) allows ownership to be deemed to belong to the mistaken (ie, accident-prone) party and thus capable of appropriation by an accused:

s 73:

- (10) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

Two classes of circumstances are identified in which mistaken receipt of property may be discovered and acted upon by a recipient:

- T1 Transfer 1: B knows of the mistake at the time they were provided the property, but does nothing to correct the error and keeps the property anyway
- T2 Transfer 2: B only learns of the mistake at a point in time subsequent to receiving the mistakenly-provided property

Generally, T1 situations are regarded as appropriation, while T2 situations are not.

- *R v Milks* (Bookmaker overpays Milks; he knew at the time of overpayment [T1] but elects to keep the dividends; convicted of theft)
- *A-G (Ref) No 3* [1983] (A received overpayment of salary; discovered after receiving the payment [T2] but did nothing about it; convicted of theft)

5 Summary

- 'Belonging to another' is defined in s 71(2):
 - 'having possession or control'; or
 - 'any proprietary right or interest' (eg, ownership, equitable rights, lien)
- Property is also deemed to belong to another:
 - where there is a particular obligation to deal with the property: s 73(9); or
 - property has been acquired mistakenly: s 73(10)

- 6 *Hypothetical*
- Actus reus
 - Appropriation – clearly satisfied (removing from shelf) regardless of whether neutral or narrow approach adopted
 - Property – yes
 - Belonging to another – clearly satisfied
 - Mens rea
 - Intention to permanently deprive – probably
 - Dishonesty – not be present where the accused holds a belief that:
 - A legal right such that the property could be permanently taken without attracting civil or criminal liability
 - The owner would have consented had they known of the circumstances
 - Guilt to be determined by referenced to the subjective intention of the accused (not imputed intention)

E *Intention to Permanently Deprive*

1 *General Definition*

s 73:

- (12) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights

2 *Borrowing Property*

Borrowing property without the owner's permission may still be deemed to import an intention to permanently deprive 'if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal': s 73(12).

However, *R v Lloyd* suggests that a borrowing will not be 'equivalent to an outright taking' if it is returned before its owner has time to miss it, and is not returned in a worthless state.

***R v Lloyd* (1985) UK Court of Appeal:**

Facts:

- D worked at a cinema
- He arranged for films due to be shown in the cinema to be taken away and copied to make pirate videos of them, then for the films to be returned a few hours later.

Issue:

- Did Lloyd appropriate the films with an intention to permanently deprive the cinema owners of them?

Reasoning:

- There was no intention to permanently deprive because the films were returned very promptly, before they were missed
- There is thus no impairment of the owner's rights
- It was argued that piracy reduces their value and constitutes deprivation of property
 - Rejected: 'borrowing only amounts to a taking if the property is returned in such a changed state that it can be said that all of its value has gone'

Decision:

- Here, the film still has value (since it is able to be shown for a fee), so the borrowing is not a taking and there is no intention to permanently deprive

3 Substantial Alteration of Property

If A appropriates property with an intention to return it, but returns it in a substantially altered condition, this may amount to an 'intention to permanently deprive.'

Parsons v R (????) HCA:

Facts:

- P is accused of stealing the proceeds of cheques
- P claims that, because the paper on which the cheques are written was eventually returned after their deposit, there could be no intention to permanently deprive

Issue:

- Did P's appropriation and deposit of the cheques amount to theft despite the physical pieces of paper comprising those cheques eventually being returned?

Reasoning:

- A cheque transfer *can* be a permanent deprivation 'of the characteristics which lead or significantly contributed to their classification as property'
- However, the approach taken in *Freddy* (House of Lords) is the exact opposite – where the paper is eventually returned there can be no intention to permanently deprive
 - Rejected equivocally: such an approach is 'absurd'

Decision:

- Because the cheques returned have been entirely deprived of their proprietary value, P may be said to have acted with an intention to permanently deprive the drawer

4 Conditional Intention

An accused may appropriate property but do so with the intention to permanently deprive its owner of it only if a certain condition is met (eg, the property turning out to be valuable). Two conflicting authorities exist on the point of conditional intention.

R v Easom [1971] 2 QB 315:Facts:

- A takes V's handbag while she is watching a movie in a cinema
- He looks through it, concludes there is nothing of value, and replaces it
- He is arrested on leaving the cinema and charged with theft

Issue:

- Was there an intention to permanently deprive?

Reasoning:

- There was appropriation but not theft because Easom was simply 'on a scouting mission'

Decision:

- At the time the appropriation occurred, there was not an intention to permanently deprive

Sharp takes the opposite approach, holding that an intention to permanently deprive may exist where the accused treats property as his own to dispose of as he pleases, such that return of the property is merely an option available to him, subject to his ultimate choice and discretion.

Sharp v McCormick [1986] VR 869:Facts:

- D took a car coil (worth \$30) from his employer (Toyota)
- D said that he'd only planned to keep it if it could be installed in his car (otherwise he would return it)
- He therefore argued that, following *Easom*, it was a conditional intention only, and that there was not at the time of appropriation an intention to permanently deprive

Issue:

- Did D, at the time of appropriation, possess an intention to permanently deprive?

Reasoning:

- Trial judge: applied *Easom* (no intention to permanently deprive)
- Murphy J (on appeal):
 - Taking the coil implies that D sees it as his own, to dispose of as he sees fit without regard for the rights of his employer (eg, to use it in other cars)
 - In basing his return of the coil on whether it fits in his car's engine, D is treating the return of the property as an act of his choice and at his discretion
 - D envisaged the course of conduct as one in which he took and deprived his employer of the coil, *then* checked whether it was of use to him and subsequently *may* return it
 - He therefore treated it as his property, with the option of returning it
- Distinguishing *Easom*:
 - The crime was in progress here, so it is less easy to draw an inference that D would have returned the coil (in *Easom*, the accused had already returned the handbag when he was arrested)
 - There is a greater separation between appropriation and return (the former took

- place at work; the coil was then to be transported to his home, installed in his car, and possibly returned the next day, or even later)
- D was here treating the coil as his own and was going to dispose of it according to his rights (of course, *Easom* arguably also treated the handbag as his own in taking it from the seat without permission)

Decision:

- Because D treated the coil as his own, he may be said to have acted with an intention to permanently deprive his employer of it
- However, this decision does not expressly overrule *Easom*, which may still be a relevant approach (where, perhaps, the accused has already returned the property prior to being arrested)

Today, an intention to permanently deprive another of their property may be inferred from an accused's conduct where they treat it as their own to dispose of as they please: s 73(12).

5 Deemed Intention to Permanently Deprive

If a person passes another's property to a third party in circumstances where the condition for return may be unsatisfiable, this may be evidence of an intention to permanently deprive:

s 73:

- (13) Without prejudice to the generality of sub-section (12) where a person, having possession or control (lawfully or not) of property belonging to another, ***parts with the property under a condition as to its return which he may not be able to perform***, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

In the context of motor vehicles and aircraft, mere appropriation without consent may be sufficient to establish an intention to permanently deprive:

s 73:

- (14) Notwithstanding anything contained in sub-section (12) in any proceedings
- (a) for stealing a motor vehicle or an aircraft, proof that the person charged took or in any manner used the motor vehicle or aircraft without the consent of the owner or person in lawful possession thereof shall be *conclusive evidence* that the person charged intended to permanently deprive the owner of it; and
 - (b) for *attempting to steal* a motor vehicle or an aircraft proof that the person charged attempted to take or in any manner use the motor vehicle or aircraft without the consent of the owner or person in lawful possession thereof shall be *conclusive evidence* that the person charged intended to permanently deprive the owner of it.

These provisions appear to be directed at aiding the prosecution of 'joy riders' in situations where they an intention to possess the car for more than a few brief moments may be absent, yet they are still clearly guilty of theft.

F Dishonesty

1 General Definition

An accused must appropriate property dishonestly. Dishonesty is defined negatively

s 73:

- (2) A person's appropriation of property belonging to another is not to be regarded as dishonest
- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

2 Belief in a Right to Deprive

An accused's belief in a right to deprive another of property must be legal in nature; it cannot be moral.

What constitutes dishonesty is to be defined by reference to the actual accused's belief. Subjective belief in a legal right is sufficient to preclude dishonesty, irrespective of whether the means used by the accused to attain that right are objectively honest (*R v Salvo*).

R v Salvo (1980) Full Vic SC:

Facts:

- A was a used car salesman
- K traded in a Valiant to A in return for a Falcon
- A did not know that the Valiant was subject to a bill of sale to a company called IAC
- A meanwhile sold the Valiant to T
- IAC repossessed the car from T, and so A paid what was owing on the bill of sale and returned the car to T
- A saw that K was selling the Falcon, and bought it back from them
- Once A had the Falcon back he cancelled the cheque he used to pay for it

- A said he had no intention of honouring the cheque at the time he handed it over, but that he believed he was entitled to repossess the Falcon

Issue:

- Did A appropriate the Falcon dishonestly?

Reasoning:

- Trial Judge:
 - If A believed he had a legal right to repossession, the jury should acquit
- Majority (on appeal):
 - The trial judge failed to instruct the jury adequately
 - Considers the UK approach to dishonesty
 - Originally enunciated in *Gosh* and *Feely* (UK)
 - Posits a largely objective test; the jury applies their conception of dishonesty
 - Rejects the UK approach, which
 - *dangerously places criminal liability on the shifting sands of juror's beliefs and not the subjective intent of the actual accused*
 - Instead
 - Propose a subjective test based on the accused's actual belief
 - It does not matter that he used subterfuge to obtain what he thought he had a legal right in
 - However, the belief must be legal in nature, and not moral
- Fullagar J:
 - Also rejects UK approach, but basis his decision on the *Crimes Act 1958* (Vic) s 73(2)
- Note: the focus of *Salvo* is on the offence 'obtaining property by deception' (and not theft); however, the definition of dishonesty is shared between the two
- McKiernan J (dissenting):
 - The court should not usurp the function of the jury
 - Follows UK approach

Decision:

- [???]At the time of appropriation, A believed that he had a legal right to repossess the Falcon
- His subjective belief is therefore such as to preclude the possibility of acting dishonestly at law (or under s 73(2))

Salvo was subsequently followed in *R v Brow*, which emphasised the subjective definition of dishonesty.

***R v Brow* (1981) Full Vic SC:**Reasoning:

- Full Court follows *Salvo*

- s 73(2) requires that the definition of 'dishonesty' in theft offences is a question of law for the judge
- The definition of dishonesty is *not* a question of fact for the jury to determine based on their own conceptions of morality

Bonollo further reinforced the *Salvo* and *Brow* approaches.

***R v Bonollo* (1981) Vic Full SC:**

Reasoning:

- Followed *Salvo/Brow* approaches
- McGarvie J:
 - Suggested an alternative approach to the definition of dishonesty
 - An appropriation of property should not be regarded as dishonest if
 - *A appropriates the property in the belief that the appropriation will not thereby cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property*
 - However, McGarvie J felt bound to follow *Salvo*

Decision:

-

3 Other Issues

The *Salvo* approach is subjective in so far as it is concerned with the accused's actual state of belief about the circumstances of the case. However, in *Peters*, the High Court of Australia applies the hybrid objective/subjective approach from *Ghosh* to an offence involving dishonesty (fraud) under the *Crimes Act* (Cth).

***R v Peters* (1998) HCA:**

Facts:

- X is engaged in a money laundering scheme for the purposes of tax evasion
- His lawyer is aware of it

Issue:

- What is the meaning of dishonesty in the context of defrauding the Commonwealth government under the *Crimes Act* (Cth)?

Reasoning:

- The Court distinguished the offences of theft and obtaining by deception under the *Crimes Act 1958* (Vic)
 - Dishonesty is there defined by the decisions of *Salvo*, *Brow* and *Bonollo*
 - Legislation specifies the scope of dishonesty: s 73(2)

- Objective standards considered:
 - *R v Feely* (UK)
 - If conduct is dishonest according to the common (ie, objective) understanding of dishonesty then the accused will be said to be acting dishonestly
 - *Problem*: totally objective standard
 - *R v Gosh* (UK)
 - Expanded *Feely*, introducing a hybrid subjective/objective test of dishonesty
 - 1) Was what was done dishonest according to ordinary standards? (Objective)
 - 2) Must the accused have realised that what they were doing was dishonest according to these standards? (Subjective)
- Discusses problems associated with objectively defining dishonesty
- Appears that HCA is willing to follow the UK approach in relation to certain offences, and that it is at least now arguable that the UK approach to dishonesty should be adopted with respect to ss 81-2 offences (in relation to which there is no statutory definition of ‘dishonesty’)

Decision:

- A part objective, part subjective test of dishonesty is set out with respect to Commonwealth fraud offences

As a result of *Peters*, it is arguable (though not binding) that the UK approach could apply to ss 81-2 offences. However, it is unlikely to apply to theft, which already has the dishonesty requirement set out in s 73(2).

4 Summary

For an appropriation to be dishonest, the prosecution must establish beyond reasonable doubt that A appropriated property belonging to another (with an intention to permanently deprive) *in the absence of one of the three beliefs set out in s 73(2)*:

- **s 73(2)(a) – Belief in a legal right to deprive**
 - *Salvo*, *Brow* and *Bonollo* establish that section 73(2)(a) means that if A honestly (ie, subjectively) believes that he or she has a *legal* right to deprive another of property, then he or she is not, as a matter of law, dishonest and will not be guilty of theft
 - s 73(2)(a) does not apply if the claim over the property is only moral or informal; it must be a legal right to which the accused believes himself entitled
 - A’s belief does not have to be reasonable, so long as it is honestly held (ie, subjective)
 - A will still be protected by s 73(2)(a) even if he or she uses deceptive methods to acquire property that he believes he has a legal right to (*Salvo*)
- **s 73(2)(b) – Belief in the owner’s consent**
 - s 73(2)(b) applies where A appropriates property in the honest (ie subjective) belief that, had the owner known of the circumstances of the appropriation, he or she would have consented to it

- **s 73(2)(c) – Belief that the owner of the property cannot be found**
 - s 73(2)(c) operates to deem an appropriation honest where A believes that the owner cannot be discovered by taking reasonable steps

The definition of dishonesty is a question of *legal* principle and not a question of *fact* based on the personal or collective morality of the jury (as it is with the UK *Feely* or *Ghosh* approaches). The *Salvo* approach rejects the *Feely* and *Ghosh* objective/subjective approach to dishonesty.

5 Post Script: Native Title

Issue: Can native title and associated customary aboriginal law form the basis for a 'claim of legal right' defence to criminal charges?¹

Galarrwuy Yunupingu:

Facts:

- A photographer takes a picture of a member of the Yunupingu tribe
- Because photography was in contravention of tribal customs, the member confiscated the camera and took out the film
- The film was overexposed, rendering it worthless, but the camera was unharmed
- The tribe member returned the camera
- The photographer alleged that his property had been stolen

Issue:

- Could a belief in a legal right such as to exclude the possibility of dishonesty be founded on Aboriginal customary laws?

Reasoning:

- Native title creates various rights in property; they coexist to the extent that they are not repugnant to rights created under the common law
- Here, the accused believed he had the legal right (under customary law) to take control of the camera and remove the film
- However, interference with the photographer's rights can only occur to the extent necessary to protect traditional rights
 - Otherwise, an accused would be acting beyond the scope of the legal right on which they believed they were entitled to act

Decision:

- Because this belief was honestly held by the Yunupingu tribe member, there can be no dishonesty (and thus no theft, since the requisite elements of its mens rea cannot be made out)

¹ See further AM 7.10.

III **Obtaining by Deception**

A **Relevant Offences**

Crimes Act 1958 (Vic) ss 81-2 set out two offences for prosecuting persons that obtain property or financial advantage by deceptive conduct:

- Part I: Offences
 - Division 2: Theft and Similar or Associated Offences
 - s 81: *Obtaining Property by Deception*

s 81:

- (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence (10 years maximum)

- s 82: *Obtaining Financial Advantage by Deception*

s 82:

- (1) A person who by any deception dishonestly obtains for himself a financial advantage, is guilty of an indictable offence (10 years maximum)

The primary difference between s 81 and s 82 lies in what is obtained. Under s 81, property belonging to another is what the accused acquires deceptively. Under s 82, financial advantage is obtained. Where property is obtained (s 81), it must be accompanied by an intention to permanently deprive its owner of it:

s 81 – Obtaining Property by Deception	s 82 – Obtaining Financial Advantage by Deception
<ul style="list-style-type: none"> • Obtaining by deception: s 81(2), s 81(4) • Property belonging to another: s 71(1) • Dishonesty: undefined • Intention to permanently deprive: s 81(1) 	<ul style="list-style-type: none"> • Obtaining by deception: s 81(2), s 81(4) • Financial advantage: undefined • Dishonesty: undefined

Several definitional elements are shared between the offences of theft and those of obtaining by deception:

- Belonging to another
- Basic definition of property
- Basic definition of intent to permanently deprive

However, there are several differences vis-à-vis the scope of these definitions, which is generally wider in the obtaining offences:

- Scope of property is wider (no exception for land)
- Intention to permanently deprive (not deemed in relation to vehicles and aircraft)
- Dishonesty (exceptions from theft do not apply, though belief in a legal right is similar)

Additionally, some concepts are left undefined by legislation:

- Dishonesty
- Financial advantage

Careful attention thus needs to be paid to the minutiae of obtaining offences to avoid conflating different or inapplicable concepts among Division 2 offences.

B *Obtaining*

Obtaining consists in the vesting of ownership, possession, or control of property in the accused:

s 81:

- (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

C *By Deception*

1 *Basic Definition*

The deception may be deliberate or reckless, and can be constituted by positive conduct or an omission to act:

s 81:

(4) Deception

- (a) means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person;
- (b) includes an act or thing done or omitted to be done with the intention of causing
- (i) a computer system; or
 - (ii) a machine that is designed to operate by means of payment or identification

to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.

s 81(4)(b) is designed to operate where an accused 'deceives' an machine (such as an ATM or electronic system) to obtain property (eg, money).

Importantly, the victim of the deception need not have lost anything in order to have been deceived. However, the accused does need to have gained property in order to satisfy the requirements s 81.

2 *Meaning of 'deliberate or reckless'*

Conduct is deliberately deceptive if the accused knows that what they are representing is false. However, conduct can also be deceptive if the accused acts with knowledge of 'a substantial risk' that what they are representing is false (*R v Smith*). This latter class of deceptive conduct is said to be 'reckless' deception.

R v Smith (1982) Vic CCA:

Facts:

- A is in charge of an excavation procedure requiring the removal of dense rock from the ground; this is a costly procedure, and A's bank account is overdrawn
- The bank manager, growing wary of A's creditworthiness, began to dishonour some cheques written by A
- However, some cheques were also honoured – the manager's selection was seemingly random
- A uses cheques to pay suppliers, knowing some cheques are being dishonoured by the bank
- A is convicted for obtaining financial advantage by deception

Issue:

- Did A engage in deception for the purposes of s **82** [??]?

Reasoning:

- The definition of 'recklessness' for the purpose of deception offences is that proposed by Starke J, with whom Crockett J agreed:
 - 'Where A acts with knowledge that there is a "substantial risk" that what they are representing is false' A is being recklessly deceptive
 - There needs to be actual advertence to the risk by the accused
- Here, the substantial risk is that the cheque will be dishonoured
 - It was open to the jury to be satisfied that the appellant knew of the probability of the cheque being dishonoured
 - Two judges noted that 'substantial' is a lower standard than probable
 - One judge referred to 'probability', on the facts
- Stank J
 - A not embezzling funds; comparatively minor
 - The advantage obtained is small, since he will eventually have to pay the

contractors anyway (the debts are still owing after being dishonoured)

- Appeal against sentence allowed

- Crocket J
 - ‘Substantial’ risk required
 - Appeal against sentence denied; should not be mitigated
- O’Byrne J
 - Probable risk required
 - Appeal against sentence allowed

Decision:

- Because A adverted to the risk of the cheques not being honoured, which was, on the facts, ‘substantial’, he acted deceptively in the relevant, reckless sense
- Appeal against sentence allowed, however [???

3 *Identity of the Deceived Person*

For both ss 81 and 82, the deception is not required to be directed at the person who actually supplies the property or financial advantage to the accused. Thus, a third party may be deceived, such as to cause the victim to render property or an advantage to A.

However, there must be a nexus between the deception and the property or financial advantage obtained.

Nor is it necessary that a loss occur to any person. The obtaining offences are concerned with the fact that property or a financial advantage are *gained* by A, or by another due to A’s conduct – not whether the victim lost such property or advantage.

R v Kovacs (1974) UK CA:

Facts:

- A was overspending on her bank account, and the bank told her that it would no longer honour her cheques and credit card
- A bank officer went to her house to ask her to return them; A said she didn’t have them at her residence at that time
- She then went out and bought a train ticket and a dog, paying with cheques
- The bank honoured those cheques, and extended her overdraft further to cover these amounts

Issue:

- Did A obtain the property by deception?

Reasoning:

- It is irrelevant that it was not the bank, but the store holders, who were deceived
- The section does not specify that the person suffering loss must also be the person who was deceived
- Here, the person suffering loss (the bank, incurring an overdraft) was different to the people who were deceived (store owners, from whom the dog and train ticket were purchased by A), but this does not matter

Decision:

- In presenting overdrawn cheques to pay for property, A deceived the store owners and obtained property from the bank [???
- Such conduct was deceptive despite being directed at a different person to that from whom the property was ultimately obtained

- *R v Watterfall* (accused enters into a taxi, is delivered to the specified destination, but then decides not to pay the fare) [???

Where a person makes a representation truthfully, but then behaves in such a way that makes it false, silence by an accused regarding that change of mind will amount to deception because the original representation is a continuing event (*Ray v DPP*).

***DPP v Ray* [1974] UK HL:**Facts:

- A and three friends attend dinner
- They order and eat, intending to pay for the meal, and behave like normal patrons
- After eating, they decide to leave without paying
- They wait at their table until the waiter goes into the kitchen, at which time they run from the restaurant
- A was charged with the UK equivalent of obtaining a financial advantage by deception in not paying for the meal, and thereby avoiding a debt of 47p
- A was convicted by a magistrate and fined £1

Issue:

- Was there a deception?

Reasoning:

- There was clearly dishonesty (waiting until the waiter went inside before leaving) and the obtaining of a financial advantage (not having to pay for the meal); however, the presence of deception is unclear
 - At the time when Ray ordered and ate the meal, he harboured an intention to pay; consequently, this conduct cannot be deceptive
 - When leaving, after eating, the conduct was clearly dishonest, but not deceptive
- Lord McDermott:
 - Ordering the meal entails making a representation that it will be paid for
 - The whole transaction (ordering, eating, and leaving) is to be regarded in its entirety
 - Changing their minds later falsified the earlier (and *continuing*) representation that the meal would be paid for and is consequently deceptive
- Lord Reid (dissenting):
 - If the waiter had been in the room when Ray left, no offence would have been committed since the conduct would not have been deceptive
 - This is because the escape would have been brazen and committed under no false pretence; it would be straight theft
 - Dishonest evasion of an obligation to pay is not deceptive if the representation that the meal will be paid for is contradicted openly and not covertly

Decision:

- Ordering the meal constituted an implied representation that it would be paid for; by acting in such a way as to falsify that representation, Ray behaved deceptively and can thus be guilty of obtaining financial advantage by deception

4 *Other Modes of Deception*

a) Credit Cards

The use of a credit card to pay for goods or services can constitute deception where the accused knows that they are acting without the bank's credit or authority to pay for them, because an implied representation that they are able and authorised to put the goods on credit is made when presenting the card to the shopkeeper (*R v Lambie*).

R v Lambie* [1981] UK HL:*Facts:**

- A was issued with a credit card by Barclays Bank on the express condition that she not exceed the £200 credit limit, and that she return the card to the bank at their request
- The relevant events took place in 1977, at which time all credit transactions took place by means of paper vouchers of credit (and not real time EFT)
- A used her card well in excess of the agreed credit limit, and the Bank requested that she return the card
- A said she would return it the next day, but didn't; instead, she used it for a few more weeks in various locations, including the 'Mothercare' shop
- After purchasing goods at the store on credit, A was convicted of obtaining financial advantage by deception

Issue:

- Did A act deceptively in purchasing the goods on credit that she knew would not be provided?

Reasoning:

- Lord Roskill notes that obtaining property by deception would have been a more appropriate offence with which to prosecute her:
 - Dishonesty was present, since A knew she could no longer use the credit card
 - Obtaining the goods without paying for them constitutes an evasion of an expense for which she would otherwise be immediately liable
- The accused's arguments:
 - She made no representation when she used the card
 - The store owner was not induced by any claim about her credit to hand over the goods
- Lord Roskill:
 - No, the use of the card entails a representation that she had credit and was acting with the authority of the bank to put the goods on credit
 - Courts are prepared to infer that fraudulent use entails that the store owner

- would not have allowed the transaction had they known of the fraud
- This is to avoid the problem of the prosecution having to adduce evidence of the shopkeeper's counterfactual intention
 - This would be problematic since they would need to remember the particular transaction and its circumstances (which may be quite unremarkable)

Decision:

- In placing the goods on credit, A made an implied representation that the goods would be paid for
- In lacking that credit, such a representation is deceptive

Deceptions must be as to *facts* (and not opinion). Thus, a representation that 'I have sufficient credit with which to pay for provided goods' relates to facts (the presence of credit), whereas the representations that 'this product is the best' or 'my bank balance is excellent' would merely be representations as to opinion (subjective appraisals of quality or scale) and not capable of constituting deceptive conduct. The justification for this distinction between fact and opinion originates in the common law doctrine of puffery (eg, in advertising).

b) Cheques

If the accused knows or thinks that there is a substantial risk that their cheque will be dishonoured by the bank, then paying for goods using a cheque will be deceptive conduct (*R v Smith*).

c) Silence

An accused may also deceive another by failing to disclose and remaining silent about a fact. For example:

- Where a previous representation is made false by changed circumstances (*DPP v Ray*); or
- Where an implied representation embodied by conduct is incorrect (*R v Lambie*).

D *Property*

In relation to s 81 (s 82 has no requirement of property belonging to another, being concerned with the accused obtaining a financial advantage), property shares its definition with the theft provisions previously encountered.

The primary definition of property is thus contained in s 71(1), and this applies to the entirety of Division 2 of the *Crimes Act*. Because both s 81 and s 72-4 offences are within Division 2, they share a common conception of property:

s 71:

- (1) Property includes money and all other property real and personal including things in action and other intangible property.

However, s 73 contains several exceptions to the definition of property. These apply in relation to theft, but *do not apply* to s 81 offences. Thus, for example, while s73(6) precludes the possibility of land being stolen (except in certain circumstances), this does *not* extend to s 81 offences. The effect is that an accused *can* obtain land by deception.

E *Belonging to Another*

The primary definition of when property belongs to another is contained in s 71(2). This also applies to s 81 offences in the same way that it applies to theft offences under s 72.

s 72:

(3) *In this Division*, property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest

'Belonging to another' thus refers to property over which another has ownership (ie, a proprietary interest or certain equitable interests), possession, or control.

F *Financial Advantage*

The term 'financial advantage' was deliberately left undefined by the Victorian Law Reform Commission.

'Financial advantage' includes:

- A increasing his/her credit;
- A obtaining services and not paying for them;
 - Where it is understood that the services are to be paid for
- Conversely, A avoiding a debt acquired for those services.

The meaning of financial advantage is illustrated in the following cases:

Matthews v Fountain:

Facts:

- Accused was supposed to pay wages to another
- They did so by writing a cheque, which bounced
- The wages remained unpaid for a period of 2 weeks, during which the accused obtained unpaid services from the other and avoided payment

Issue:

- Was a financial advantage obtained?

Reasoning:

- Here, passing invalid cheques has allowed the accused to obtain a financial advantage by deception
- They retained use of their employee's services for the period of non-payment, thus receiving services the payment of which they took measures to avoid

Decision:

- An advantage has been obtained

Fisher v Bennett:Facts:

- Another bouncing cheque case
- Accused charged with obtaining financial advantage by deception under the *Crimes Act* (ACT)

Issue:

- Was a financial advantage obtained?

Reasoning:

- In making out bad cheques, the accused did not avoid their debt
 - Interest owing continued to accrue
- Cf credit card cases, where the accused illegitimately increases their credit to pay for services
 - Here, nothing has changed
 - Moneys still owing, no additional credit, just a temporary delay in rendering payment

Decision:

- Conviction quashed because no financial advantage was obtained

G *Intent to Permanently Deprive*

An intention to permanently deprive is only an element of s 81 (not s 82).

It has the same meaning as for theft, and is subject to the same statutory modifications under ss 73(12) and 73(13).

However, the situations of deemed intention in respect of vehicles and aircraft (s 73(14)) are not applicable to obtaining property by deception. There is thus no automatic presumption of an intention to permanently deprive in these circumstances, in which the normal onus is placed upon the prosecution to establish the requisite intent.

H *Dishonesty*

Dishonesty is not defined in the *Crimes Act 1958* (Vic). The partial definition of dishonesty in ss 73(2) and 73(3) of the Act are relevant to theft, but do *not* apply to obtaining by deception offences (*Salvo*).

However, the common law definition of dishonesty bears similarities to the ‘belief in a claim of legal right’ exception as set out in s 73(2)(a). Belief of a right to engage in conduct of the type in fact engaged in by the accused may mean that deceptive conduct is not, in fact, dishonest. This is because a genuine belief in a right to act in that way necessarily precludes any possibility of a subjective intention that is dishonest (*Salvo*).

***R v Salvo* (1980) Vic Full SC:**

Facts:

- [See above §II, s F, ss 2]
- A charged with obtaining property by deception
- D said that he did not act dishonestly because he believed that he had a *legal right* to repossess the car

Issue:

- Three elements of obtaining property by deception were clearly established:
 - A obtained by deception
 - Property belonging to another
 - With an intention to permanently deprive
- The final element, dishonesty, was unclear
- The case turned on whether Salvo had obtained the property *dishonestly*

Reasoning:

- Majority: reject the UK approach, instead importing common law principles
 - Belief in a claim of right precludes the possibility of dishonesty
 - This principle applies to both ss 81 and 82

Decision:

- The conduct cannot be dishonest because the accused believed he was entitled to engage in it

Grout and *Benallo* have since followed *Salvo*. Note, however, that belief in a mere moral right is insufficient to preclude dishonesty. Belief in a right at *law* is necessary.

***R v Peters* (1998) HCA:**

Facts:

- [See above §II, s F, ss 3]

Issue:

- What is the nature of dishonesty?

Reasoning:

- *R v Feeley* (1973) (UK CA) per Lawton LJ:
 - Judges should not try to define ‘dishonesty’
 - Instead, the matter should be left entirely to juries to determine, applying the current standards of *ordinary decent people*
 - Thus an *objective* test of dishonesty

- This approach was refined in *R v Ghosh* (1982) (UK CA):
 - Proposed a two-stage approach that embodied a compromise between the objective and subjective tests
 - Was what was done dishonest according to the ordinary standards of reasonable and honest people?
 - Must the Accused have realised that what he or she was doing was dishonest according to those standards?
- The UK approach as set out in *Feely* and *Ghosh* should still be examined, but it has not been applied in relation to property offences in Victoria
- If it is relevant in Victoria, then it is to ss 81 and 82 offences, which – unlike theft – do not import a statutory definition of ‘dishonesty’

Decision:

- [???

IV Summary

A Theft

1 Appropriation

- Appropriation requires the assumption of one or more, but not necessarily all, of the rights of ownership (*Stein v Henshall* (1971))
- *Identify the specific acts* that comprise the appropriation, and be aware of the *point in time* this occurs
 - Need temporal coincidence with mens rea
- ‘Adverse interference with rights’ approach (*Morris*)
- ‘Neutral’ approach (*Lawrence/Gomez*)
 - Cover both approaches in problem answers
 - The ‘neutral’ approach to appropriation is clearly favoured by the HCA in *MacLeod*
 - Note: *MacLeod* binding on NSW courts only, and not Victorian
 - The narrower ‘adverse interference with rights approach’ was applied by the Vic SC in *Roffel* and in *Baruday*
 - Should also be covered in any answer
 - *Roffel* and *Baruday* not overruled by HCA in respect of Victorian law
 - The different *outcome* of each approach when applied to the facts of the problem should be noted

2 Property belonging to another

- ‘Property’ is broadly defined in s 71(1)
- This definition is qualified with respect to land (s 73(6)) and wild creatures (s 73(7)) in relation to theft offences
- s 71(2): Property ‘belongs to another’ when that other has
 - Possession of the property;
 - Control of the property; or

- A proprietary interest or right in the property (ownership)
- Ownership by the other may be deemed where there is an obligation to deal with property in a particular way (s 73(9))
- Ownership by the other may be deemed where there is a mistake as to the receipt of the property (s 73(10))

3 *Intention to permanently deprive*

- s 73(12): evident where the accused has an intention is to treat the thing as his own to dispose of regardless of the other's rights
- Borrowing property
 - May import an intention to permanently deprive if it is for 'a period and in circumstances' that make it equivalent to 'an outright taking or disposal' (s 73(12))
- Altering of property
 - Temporarily acquiring property may be borrowing only if the property is not deprived of all its value when returned (*R v Lloyd*)
- Conditional intention
 - Where the accused is simply 'on a scouting mission' and does not treat the property as their own at the time of appropriation, there may not be an intention to permanently deprive (*Easom*)
 - Where the accused treats the property conditionally taken as their own to dispose of as they please (with the mere option or discretion of returning it), an intention to permanently deprive may be inferred (*Sharp v McCormick*)
 - May also be inferred under s 73(12)
- Deemed intention to permanently deprive
 - s 73(13): where the condition of return is unsatisfiable
 - s 74(14): in relation to cars and aircraft

4 *Dishonesty*

- s 73(2): appropriation of property belonging to another will not be dishonest in three circumstances:
 - belief of a right in law to deprive the other of it, on behalf of himself or of a third person
 - belief in the other's consent if they had knowledge of the appropriation and its circumstances
 - (except where accused is a trustee or personal representative) belief that owner cannot be discovered by taking reasonable steps
- *Salvo, Brow* and *Bonollo* establish that section 73(2) and (3) define dishonesty for theft offences
- Impact of HCA decision in *Peters*:
 - UK approach (as set out in *Feely* and *Ghosh*) should be noted, but has not been applied in relation to dishonesty offences in Victoria
 - If the UK approach does have application in Victoria following *Peters*, it is probably in relation to ss 81 and 82 offences, which unlike theft, import no statutory definition of dishonesty
 - *R v Feely* (1973) Lawton LJ (UK C of A):
 - Judges should not try to define 'dishonesty', and that the matter should be left entirely to juries to determine, applying the current standards of *ordinary decent people*.
 - *Objective* test of dishonesty
 - *R v Ghosh* (1982):

- Refined the *Feely* approach
- UK Court of Appeal proposed a two-stage approach that embodied a compromise between the objective and subjective tests:
 - Was what was done dishonest according to the ordinary standards of reasonable and honest people?
 - Must the Accused have realised that what he or she was doing was dishonest according to those standards?
- See further *Rush*, 'Supplementary Handout'

5 Temporal Coincidence

- Not a part of the statutory definition of theft, but as for other offences, the mens rea and the actus reus must usually coincide in time
- There are statutory exceptions to this, where the original appropriation may have been innocent but a later dishonest intention to retain property is then effectively superimposed on what the law treats as an ongoing appropriation
 - See, eg, s 73(4) (assumption of rights will be appropriation where this assumption takes place after finding the property innocently)

B Obtaining Property by Deception

- Consists of the following elements:
 - Obtaining by deception
 - Can be reckless or deliberate
 - Can induce a voluntary act by another person or a computer system or payment machine
 - Can be a deception about the intention of the accused
 - Must be as to fact or law (not opinion)
 - Can be expressed by words or implied by conduct
 - Deceptive conduct: silence, passing invalid cheques, using a credit card without authorisation
 - Property belonging to another
 - Dishonesty
 - Intention to permanently deprive

C Obtaining Financial Advantage by Deception

- Consists of the following elements:
 - Obtaining by deception
 - Financial advantage
 - Not defined in the *Crimes Act*
 - A question of fact for each case
 - Includes:
 - Extending one's credit
 - Obtaining services without paying for them
 - Avoiding payment for services already obtained
 - Dishonesty
 - The *Salvo* decision applies to both ss 81 and 82 offences
 - *Salvo* followed in *Brow* and *Bonollo*
 - The 'claim of right' defence

- Originally came from the common law
- Applies to ss 81 and 82 defences as a matter of common law
- Statutory definitions of dishonesty from the theft offence (s 73(2)(b) and (c)) do *not* apply to the deception offences (belief in consent, lost property)
- Note potential impact of *Peters* decision
 - Unlike theft, there is no statutory definition of dishonesty in relation to obtaining by deception offences
 - There is thus scope for the UK *Feely/Ghosh* approach to apply to dishonesty offences in the future

D Offence Summary

Offence Elements	Theft	Obtaining Property by Deception	Obtaining Financial Advantage by Deception
<i>Appropriation</i>	Yes* ss 72, 73(4), 73(5)	No See obtaining	No See obtaining
<i>Obtaining</i>	No See appropriation	Yes	Yes
<i>Property belonging to another</i>	Yes ss 71, 72, 73(6)-(11)	Yes, but s 73(6)-(9) do not apply	No See financial advantage
<i>Financial advantage</i>	No See property	No See property	Yes
<i>Deception</i>	No, but appropriation may (though doesn't have to) be deceptive		
<i>Dishonesty</i>	Yes; three exceptions apply: s 73(2)(a), (b), and (c)	Yes, but only the common law 'claim of right' exception applies	Yes, but only the common law 'claim of right' exception applies
<i>Intention to permanently deprive</i>	Yes; general intent and deeming provisions: s 72, 73(8), 73(10), and 73(12)-(14)	Yes, but s 73(14) does not apply	No

These differences suggest the following approach to hypothetical problems:

- First, look at what is obtained
 - Financial advantage? s 82 applies
 - Property? Continue...
- Second, look for deception: if the way the property was obtained
 - Is deceptive? s 81 may apply as well as s 72
 - Assumes one or more of the rights of the owner? s 72 may apply
- Third, go through the remaining elements of all applicable offences

*Note: the neutral approach to appropriation in theft is more similar to ss 81-2 than the adverse interference approach. Under ss 81-2, property can be willingly handed over under a deception, but still constitute the accused obtaining property. Similarly, appropriation can occur under the neutral approach with or without the property owner's consent. (Of course, the narrow approach would also allow such deception to vitiate the property owner's consent. However, the neutral approach still bears the most similarity to the obtaining offences' treatment of obtaining property.)