

Theft

Intro

“__ may be charged with theft (s 72) in relation to [action]. In order to be found guilty, the pros must prove BRD that __ dishonestly appropriated property belonging to another with the intention of permanently depriving the other of it (s 72(1))”

Actus Reus

Property

- Inc money and all other property **real or personal**, inc **choses in action** and other **intangible** property (s 71(1))

“Here the property is the __ because it is [real/personal property]” OR “__ isn’t property because [it isn’t in existence/confidential info] (cite authority)”

- Includes **cheques** (which are debts) (*Parsons*) not clear if includes EFTs (overruled UK case of *Preddy*)
 - o *Parsons v R* (HCA) – cheques not just choses in action but a mandate to pay. Special kind of intangible property capable of being owned and controlled and there for can be subject of theft.
 - o *Preddy* (UK) – Cheque not theft, EFT fraud could be theft
 - o *Parsons* overruled in relation to cheques but EFTs remain unclear
 - o EFT would be better under OFAD
- **Excludes confidential information** (*Oxford v Moss* – UK)
 - o Arguable that these types of cases are better suited to civil law
- **Excludes creation of future obligations**. Property **must** already **be in existence** (*Akbulut*)
 - o *Akbulut v Grimshaw* (VICSC) – creating future obligation in owner of phone service to pay for unauthorised phone calls wasn’t theft of property. Didn’t deprive owner
- **Exclude land** unless D is holding land in trust and sells it (s 73(6))
- **Exclude wild animals** unless tamed/ordinarily kept captive (farm) or being reduced into possession (hunted) (s 73(7))

Belonging to another

“The [property] belonged to [victim] because [they has possession/control/other reasons]”

- Property belongs to anyone who has **possession or control** of it, or who has any other proprietary right/interest in it (S 71(2))
 - o Inc legal and equitable interests BUT not equitable interests arising from agreement to transfer/grant interest in property (s 71(2))

- Not likely to come up on exam, more about property, general policy not to be charged with theft when there's dispute about contractual agreement
- **D can steal their own property** if another has lawful control/possession (*Turner*), BUT not theft if taken away from D unlawfully (*Meredith*)
 - *Turner (No 2) (UK)* – T stole car from mechanic without paying for repairs
 - *R v Meredith (UK)* – D not guilty of stealing own car back from police as police had no legal right to retain it
- EFTs can't belong to another bc they create new debts which didn't previously exist (*Preddy*)
 - *R v Preddy (UK)* – where payment between accounts EFT/cheque, no identifiable property passes, bc it's a new chose in action being created in another account
 - HCA overruled in relation to **cheques** in *Parsons*. Drawer of cheque **has possession and control** before they hand it to the wrongful payee = belongs to another
 - *R v Williams (UK)* held that EFT obtained by fraud could be theft
- If D receives a **fungible**, it is now in their possession, doesn't belong to another (*Greenberg*)
 - BUT contemporaneity – theft if D had MR while appropriating the fungible
 - Fungible = good/commodity whose individual units are interchangeable. Aren't separately identifiable or retrievable (petrol, corn, money, sugar)
 - *R v Greenberg (UK)* – D took petrol from self-service petrol station and left without paying, had intended to pay. Held that at the time of appropriation (driving away) the petrol belonged to D – was in his possession
- In some cases, property will be **automatically deemed** as belonging to another
 - Property is held on **trust**, deals with it in manner inconsistent with trust (s 73(8))
 - D received property on account of another and was under obligation to retain and deal with it/proceeds in a particular way (**fiduciary obligation**) (s 73(9))
 - Obligation must be legal not moral. Doesn't matter if not legally performable or ultimately enforceable (*Meech*)
 - Obligation **must exist at time of appropriation** (*Meech* – UK)
 - BUT won't be deemed if no specific instructions given (*Hall* – UK) or if D received money as result of private venture (*A-G's Ref No.1 of 1985*)
 - D receives property from another by **mistake** AND is under legal obligation to restore it (s 73(10))
 - BUT not deemed if D unaware of mistake when receiving (*Gilks* - UK)
 - Is deemed if realise later and then choose to keep it (e.g., *Gilks* where D knew immediately) > appropriation occurs when realise

- Obligation to restore must be legal, not merely moral or social in nature
- Overpayment of an employee is covered by this section (*A-G's Ref*)
- D steals property from corporation sole, and incumbent is dead or position is otherwise vacant (s 73(11))
- At CL where (9) and (10) aren't met, property deemed belonging to another if D induces or is aware of mistake bc V's consent is vitiated by fraud (*Gilks*)

Appropriated

“__ appropriated [property] bc [assumed rights by...]”

- Any **assumption** by D of the rights of an owner amounts to an appropriation (s 73(4))
 - Inc where D has come by the property (innocently or not) without stealing it and any later assumption of a right to it by **keeping/dealing with it as owner**
 - Where come by property but doesn't steal it, later assumes the rights of owner = theft
- Interfering with rights of the owner amounts to appropriation (*Stein v Henshall - VIC*)
 - **Doesn't have to be all the rights** of an owner (*Morris – UK*)
 - **Doesn't require intention to exclude all** others (*Stein v Henshall*)
 - **Adverse interference** with rights of owner (*Roffell; Morris*)
 - Passenger in stolen car also appropriating (*W v Woodrow – VIC*)
- Appropriation of a bona fide purchaser for value without notice won't amount to theft (s 73(5))
- **VIC**: only **actions beyond authorisation (consent)** amount to appropriation (*Roffell; Baruday*)
 - Consent is a defence to appropriation (*Roffell*)
 - A **deception** which **precludes full knowledge** of the relevant facts will **vitate owner's consent** (*Baruday*)
 - Where D appropriates company property and they're sole shareholder who consents to giving property to themselves, consent can't cure the appropriation, not lawful (*Macleod v R – HCA*) **not binding in VIC** bc relate to NSW legislation
- BUT in **UK** an appropriation can take place despite the consent of the owner (*Lawrence; Gomez – UK*)
 - C.f. *Morris (UK)* – act beyond the scope of express/implied consent is appropriation
 - Can be theft even where given as a **gift** (acquisition of an indefeasible title to property is capable of amounting to an appropriation) (*R v Hinks – UK*)

>> Black letter question, use VIC view but if have time mention that HCA might decide differently

Conclusion for AR – state any grey areas

Mens Rea

Intention to permanently deprive

- D must have intended to permanently deprive owner of property when D appropriated it (s 72(1))
- Won't be met if D only had intention to temporarily deprive the owner (*Lloyd; Warner*)
- D must have already formed the IPD at time of appropriation (*Easom; Sharp v McCormick*)
- Not IPD where items are returned and value not lost (*Dardovska*)

OR

- Intention **deemed** where D intended to treat property as their own to dispose of regardless of the owner's rights (s 73(12))
- Inc **borrowing or lending** property for a period and in circumstances that make it an outright taking or disposal (s 73(12))
- Consider duration of borrowing, owner's interest in property, has property been substantially altered?
 - o Intention to take for limited period only isn't equivalent to outright taking or disposal (*Warner*)
- If intention to return is **conditional**, there will be IPD
 - o Taking something subject to satisfaction of future condition, ransom principle (*Sharp*)
 - o Merely looking for something isn't sufficient intention (*Easom*)
- If D takes property, intending to return it only after fundamentally altering its nature = IPD (*Lloyd*)
 - o Unless property **loses all practical value**, borrowing isn't IPD (*Lloyd; Dardovska*)
 - o All goodness and virtue gone (*Warner*)
 - o E.g. Taking payment but returning physical cheque (*Duru*); Returning theatre ticket after performance; Used batteries

OR

- Intention deemed where D **parts** with another's property without authority, under conditions where D may be unable to return it (s 73(13))

OR

- If there's proof D is using or attempting to use a motor vehicle or aircraft IPD deemed (s 73(14)) => Motor vehicle includes vessel (s 73(15))

OR

- D intends to defeat a **trust** – IPD any person having a right to enforce trust of the trust property (s 73(8))

OR

- Receive property by **mistake**, intention to not restore property is IPD person of property or its proceeds (s 73(10))

Dishonesty

D's appropriation of property belonging to another only theft if **dishonest** (s 72(1))

"In Vic, dishonesty has no residual meaning beyond the statutory definition (*Salvo; Brow; Bonollo*).

Unlike the UK, it isn't given its ordinary meaning (*see Freely; Gosh*)"

- D's appropriation **isn't dishonest if**
 - o D believes they have a legal right to deprive the other of the property (bona fide claim of right) (s 73(2)(a)); or
 - Don't need to show belief of right to take property in the manner D did (*Langham*)
 - Belief **must be honest, but needn't be reasonable**. As long as it's legal and not moral. Can be based on mistake of fact or law (*Langham*)
 - Claim must extend to all of property taken, not just part (*Bedford; Salvo*)
 - o D believed they would have the other's consent (s 73(2)(b)); or
 - o D believes the owner can't be discovered by taking reasonable steps, except where property came to D as trustee or personal representative (s 73(2)(c))
- Appropriation **may be dishonest** notwithstanding that D is willing to pay for it (s 73(3))

Meaning of dishonesty

- **VIC**: any situations that fall outside s 73(2) must be dishonest. '**Dishonesty**' has no residual meaning beyond the statutory definition (*Salvo; Brow; Bonollo*)
 - o Judge sets out law and jury determine facts, will be told that they must consider whether s 73(2) applies not whether dishonest by ordinary standards
- **UK**: dishonest state of mind is a question for the jury (*Feely* (UK)), and per *Gosh* (UK), this question must be answered by 'the ordinary standard of the reasonable honest person'
 - o Criticised for leaving a legal question – what is dishonesty – to the jury
- **CTH**: dishonesty judged by applying the standards of 'ordinary decent people' – objective test (*Peters v R; Macleod v R* – HCA). In *Peters* HCA said that UK approach of leaving it to jury was preferable. Distinguished Vic cases, holding that they should be confined to Vic legislation

Conclusion

"Likely that ___ will/will not be found guilty of theft because [elements are made out/grey areas] and liable to **10 years max imprisonment** (s 74(1))"