

## TOPIC 3: PROPERTY OFFENCES

- State and territory level
  - Protection of private property through offences such as theft, obtaining a financial advantage by deception; fraud
- Commonwealth level
  - Aim to protect Commonwealth property as well as giving effect to Australia obligations arising from the ratification of international instruments

### PROPERTY OFFENCES – THEFT

#### **S74 – THEFT**

- Person guilty of theft is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum)
- S80A applies as if the reference in that section to sections 81-87 (both inclusive) were reference to this section

#### **S72 – BASIC DEFINITION OF THEFT**

- A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it
- A person who steals is guilty of theft; and thief shall be construed accordingly

#### **S71 – DEFINITIONS**

- In this division
  - Gain and loss are to be construed as extending only to gain or loss in money or other property but as extending to any such gain or loss whether temporary or permanent and
    - **Gain** includes a gain by keeping what one has, as well as a gain by getting what one has not
    - **Loss** includes a loss by not getting what one might get, as well as a loss by parting with what one has
  - "Goods" except in so far as the context otherwise requires, includes money and every other description of property except land and includes things severed from the land by stealing;
  - "Property" includes money and all other property real or personal including things in action and other intangible property.
- 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 (not being an equitable interest arising only from an agreement to transfer or grant an interest)

## S73 – FURTHER EXPLANATION OF THEFT

- (1) This section has effect as regards the interpretation and operation of S72 and except as otherwise provided in this Division, shall apply only for the purposes of that section and not otherwise
- (2) Person's appropriation of property belonging to another is not to be regarded as dishonest
  - 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
  - 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
  - (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
- (3) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property
- (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](#)
- (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
- (6) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say—
  - When he is a trustee or personal representative, or is authorized by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or
  - When he is not in possession of the land and appropriates any thing forming part of the land by severing it or causing it to be severed, or after it has been severed; or
  - When, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.
- For purposes of this subsection *land* does not include incorporeal hereditaments; "tenancy" means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be

treated as having possession under the tenancy, and "let" shall be construed accordingly

- (7) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcass of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession

### THEFT ELEMENTS

PHYSICAL ELEMENT ACTUS REUS	FAULT ELEMENT MENS REA
<b>PROPERTY – S72 (1)</b>	<b>DISHONESTLY – S72 (1) AND S73</b>
<p>Property includes money and all other property real or personal including things in action and other intangible property</p> <p>Special forms of property</p> <ul style="list-style-type: none"> <li>• Land and things forming part of land can only be stolen in the limited circumstances – S73 (6)</li> <li>• Wild animals are regarded as property, but may only be stolen in circumstances specified under S73 (7)</li> </ul> <p>Intangible property</p>	<p><b>S73 (2)</b></p> <ul style="list-style-type: none"> <li>• A person's appropriation of property belonging to another is <b>not to be regarded as dishonest</b> <ul style="list-style-type: none"> <li>○ (a) If he appropriates the property in the <b>belief that he has in law <u>the right</u> to deprive the other of it</b>, on behalf of himself or of a third person; or</li> <li>○ (b) If he appropriates the property in the <b>belief that he would have the other's <u>consent</u> if the other knew of the appropriation and the circumstances of it</b>; or</li> <li>○ (Except where the property came to him as trustee or personal representative) if he appropriates the property in the <b>belief that the person to whom the property belongs cannot be discovered by taking reasonable steps</b></li> </ul> </li> </ul>
<p><b>OXFORD V MOSS</b></p> <ul style="list-style-type: none"> <li>• A student dishonestly obtained the proof of an examination to be held at his university</li> <li>• Read the contents of exam paper and returned it</li> <li>• Uni charged him with theft of confidential information</li> <li>• Held <ul style="list-style-type: none"> <li>○ Confidential information obtained by D did not fall within the meaning "intangible property"</li> <li>○ D not guilty of theft</li> </ul> </li> </ul>	<p><b>S73 (3)</b></p> <ul style="list-style-type: none"> <li>• A person's appropriation of property belonging to another may be <b>dishonest notwithstanding that he is <u>willing to pay</u> for the property</b></li> </ul>
<p>Chose in action</p> <p><b>R V PREDDY</b></p> <ul style="list-style-type: none"> <li>• Number of accused was charged with</li> </ul>	

obtaining property by deception when they obtained loans on the basis of false information

- Held
  - **EFT is property**
  - In this case, they did not belong to another

### PARSONS V R

- If a person by deception induces another to make out a cheque and deliver it to him, the fraudster has obtained an instrument of value at the expense of the victim...these sentiments seem to me to accord with practical reality. In my view the courts of this State have regarded cheques as instruments of inherent value which are capable of being stolen or obtained, and not simply as intangible property or choses in action
- **A cheque is a special kind of tangible property which embodies values intangible characteristics, and is capable of being 'owned', controlled or possessed by both the drawer and the payee for the purposes of the relevant property offences**

### AKBULUT V GRIMSHAW

- A allegedly stole property by entering into place of business where he made 35 phone calls
- Held
  - **Phone calls were not property** because doesn't fall within the definition as **it must exist prior to its appropriation**
  - Has not deprived the owner of the rights – merely created obligations of payment

### S73 2A – Claim of right

#### R V LANGHAM

- L convicted of armed robbery
- Went to sports store and bought a crossbow
- Crossbow didn't suit his needs and seeks refund at the store
- Told that policy of store that can only give store credit
- Goes back to the store some months later and buys a shot gun with the store credit
- Comes back later and threatens staff for cash back
- Argued that shouldn't be guilty because he had a claim to the money – legal claim to obtain the money for the refund
- Held
  - **Legal claim of right must be claimed in a legal way**
  - The essential notion is that the claim of right must be of such a nature as to **negative fraud or dishonesty in the taking of the proper**

#### Meaning of Dishonesty

#### R V FEELY

- F manager of bedding shop and said that new policy was that employers could not borrow from till
- F borrowed money by way of IOU – claiming that company owed him money so he wasn't stealing
- Held
  - Juries should define dishonesty
  - Jurors, when deciding whether an appropriation was **dishonest can be reasonably expected to and should apply the current standards of ordinary decent people**

### R V SALVO

- S was car dealer – charged with obtaining a car with deception
- Held
  - Defined dishonesty as meaning obtaining property “without any belief that the accused has any legal right to deprive the other of it”

### R V GHOSH

- Claiming compensation for procedures he wasn't carrying out
- Held
  - It is for the jury to determine whether the accused acted dishonestly and not for the judge
  - Word can only relate to accused's state of mind
  - Unnecessary and undesirable for judges to define what is meant by “dishonesty”

### R V BROW

- Dishonesty means that the accused acted without any claim of legal right

### R V BONOLLO

- 2 stage inquiry
  - Jury had to be satisfied that the accused believed that the obtaining the property would produce a particular consequence affecting the interests of the person deprived of it
  - That the particular consequence was one which would be detrimental to those interests in a significant way

### PETERS V THE QUEEN

- Dishonesty was conspiracy to defraud at 2 levels

	<ul style="list-style-type: none"> <li>○ Agreement must be to use dishonest means</li> <li>○ It must be to bring about a situation prejudicing or imperilling existing legal rights or interests of others</li> </ul> <p><b>MCLEOD V THE QUEEN</b></p> <ul style="list-style-type: none"> <li>• McHugh set out 3 stage test <ul style="list-style-type: none"> <li>○ Identify the knowledge, belief or intent which is said to render conduct dishonest</li> <li>○ Instruct the jury to decide whether the accused had that knowledge, belief of intent and to determine whether on that account the act was dishonest</li> <li>○ Direct the jury that in determining whether the conduct of the accused was dishonest, the standard is that of ordinary decent people</li> </ul> </li> </ul>
<i>BELONGING TO ANOTHER – S72 (2)</i>	<i>WITH AN INTENTION TO PERMANENTLY DEPRIVE – S72 (1)</i>
<p><b>S72 (2)</b></p> <ul style="list-style-type: none"> <li>• 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 (not being an equitable interest arising only from an agreement transfer or grant an interest)</li> </ul> <p><b>R V GREENBERG</b></p> <ul style="list-style-type: none"> <li>• Filled tank up from self serve and had intention to fill it up</li> <li>• Walks to cashier who’s busy with another client – so busy that leaves because doesn’t want to wait and drives off without paying</li> <li>• Held <ul style="list-style-type: none"> <li>○ <b>Could not be held guilty of theft of petrol.</b> At the time of filling his tank <b>he intended to pay for it</b>, and therefore not acting dishonestly. At the time of dishonestly driving off, the petrol</li> </ul> </li> </ul>	<p><b>S73 (12)</b></p> <ul style="list-style-type: none"> <li>• 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; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal</li> </ul> <p><b>R V WARNER</b></p> <ul style="list-style-type: none"> <li>• An intention to take goods for a limited period only, even though the precise length of the period has not been determined, is not equivalent to an outright disposal</li> <li>• Not theft</li> </ul>

no longer belonged to the proprietors of the petrol station. At this point in time, he **had full proprietary interest in the petrol together with possession and control of it**

#### S73 (8)

- Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right

#### S73 (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

#### S73 (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

#### R V PREDDY

- Property belonging to the lenders was a debt owed by the bank to them
- Property ultimately received by the accused was a new chose in

#### R V LLOYD

- L worked at cinema and projected movies
- Charged with theft because him and co-worker would take the film and copy the film to reproduce and to sell to friends and customers
- Films removed for a few hours, copied and then returned before anyone noticed they were gone
- Held
  - Intention to borrow is not enough to amount to theft unless the property is returned in such a way that it is changed
  - Film could still be shown and was not diminished in any way
  - Issue dealt with under copyright

#### R V DARDOVSKA

- D convicted of theft – she lured victim into house and assault person – stolen documents and tape recorder
- Takes them to the police and explains what happened claiming that documents had incriminating information
- Held
  - 3 situations in which courts had found an intention to permanently deprive in such circumstances
    - 1. Where a person took property from the owner intending to return the property only if the owner paid for it **“RANSOM PRINCIPLE”**
    - 2. Where the intention was to return the property only after it had undergone some

action, a debt owed by their bank to them

- Although they were of the same value they were in fact distinct and separate items of property

#### PARSONS V R

- That a cheque is a special kind of tangible property which embodies valuable characteristics and is capable of being owned, controlled or possessed by both the drawer and the payee for the purposes of the relevant property offences

Scope of possession, control and other proprietary rights or interests

#### R V TURNER (NO 2)

- Held that the words "possession and control" required no qualification in this case
- Sufficient if the person from whom the property was taken had, at the time of the appropriation possession or control of the property

#### R V MEREDITH

- Held that accused not guilty of theft of car as the police had, as against him, no right to retain it

Property received on account of another

#### R V HALL

- Accused was a partner in a firm of travel agents in Manchester
- Received money from his client for trips to America and deposited the money into the firm's general trading accounts
- Held
  - Belonging to another is not automatically deemed if no specific instructions are given

#### R V MEECH; PARSLOW AND JOLIFFE

- M plainly assumed an obligation to McCord which on the facts then known

fundamental change of character

**"ESSENTIAL QUALITY PRINCIPLE"**

- 3. Where a person pawned another's property without his consent, hoping to be able to redeem the pledge but without being certain of his ability to do so  
**"PAWNING PRINCIPLE"**

- Present case didn't fall within these categories
- **Not guilty of theft** – no intention to permanently deprive

#### SHARP V MCCORMICK

- Conditional deprivation
- M takes starter coil with intention to fit into car – taken from employer
- Argued that if didn't fit, he would return it
- Held
  - The accused as the necessary intent for theft, if, at the time of appropriation he intended to keep the coil unless he later decided to return it. If the mental state is posed the other way as an intention to return the coil unless he later decided to keep it, this could fall within the expanded definition of s 73(12)
  - If at the time of taking – his inclination is to keep it – theft

#### S73 (13)

- Without prejudice to the generality of subsection (12) **where a person**, having possession or control (lawfully



to him, remained obliged to fulfil, and on the facts, must have been taken to be said to have honestly intended to fulfil them

- Fact that in insolation that McCord would have been unsuccessful in attempting to enforce the obligation does not prevent it from existing vis-à-vis M
- Operation of the provision is focussed at the time that the parties agree to the obligation rather than sue future time at which facts may become known
- The proceeds of the cheque continued as between him and McCord to be deemed to be McCord's property so that if M dishonestly misappropriated those proceeds he was, guilty of theft even if McCord would not enforce his obligation in civil law

#### R V GILKS

- Debates about the operation of the theft provisions particularly surrounding the concept of when the money passed from one party to the other
- Court not prepared that the word obligation extends to meaning a moral or social obligation. **Obligation we are speaking of in the context of the provision is a legal one**
- Had the accused not become aware of the mistaken **overpayment** until subsequently, a dishonest intention not to pay the bookmaker would not have rendered him guilty

#### AG'S REFERENCE (NO 1 OF 1985)

- Although the money that A first receives may appear to belong to him the effect of the provision of 73 (9) is that the money is effectively the employers
- Dependent on whether or not A can properly be said to have received the property on account of the employers
- Court not prepared to hold that to be the case. A received the money on his own

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**

#### S73 (14)

- Notwithstanding anything contained in subsection (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

account as a result of the private venture

- Held
  - Difference between on the one hand a person misappropriating specific property with which he has been entrusted and a person who is in a fiduciary position who uses that position to make a secret profit for which he will be held accountable