

Final Exam Notes

Part A is a compulsory problem question worth 50% (20 marks).

Part B contains five questions, some problem based others essay style.

Students can choose any two questions from this part. Each question is worth 25% (10 marks each).

Due: UTS Exam period

Criteria: The formal exam will be assessed according to the following criteria:

- 1. Knowledge of substantive law, including:**
understanding key legal concepts and principles; interpreting statutory provisions and case law.

- 2. Analysis of reading materials, including:**
referencing the relevant cases, statutory provisions and commentary from the readings;
analysing the relevant cases, statutory provisions and commentary in the context of the discussion and problem questions.

- 3. Application of problem-solving skills, including:**
identifying material facts;
identifying relevant legal issues;
analysing the case law and statutory provisions;
applying the law to the facts, and distinguishing where appropriate;

- 4. Critical analysis and evaluation, including:**
applying appropriate reasoning in the interpretation of the law;
evaluating the relative strengths and weaknesses of competing legal arguments; developing reasoned arguments supported by the law.

- 5. Written Communication, including:**
expressing oneself clearly, succinctly and logically in writing;
effective use of the English language, through correct and appropriate grammar, punctuation and syntax;
presentation of clear and persuasive conclusions.

Property Offence: Fraud

- consider all three alternative if they seem relevant on the facts, in case one alternative fails

Introduction

Accused will be charged with the statutory offence of fraud contrary to s192E of the Crimes Act 1900 (NSW). The prosecution has the burden to prove the elements of this offence beyond a reasonable doubt ('BRD') (*Woolmington v DPP* [1935] AC 462). There are no defences available to Tyson.

[1.1] Voluntariness

[1.11] Rule

While the Crown will assume Tyson's action to be voluntary, (*Bratty v Attorney-General for Northern Ireland* [1963] AC 386) if Tyson raises the 'reasonable possibility' (AM Blackmore and GS Hosking, *New South Wales Criminal Law 2016* (Thomson Reuters, 2016) 339) that his words and actions were not 'conscious or willed', the Crown must prove BRD that Tyson's actions were voluntary (*Ryan v The Queen* (1967) 121 CLR 205, 216-17; *R v Falconer* (1990) 171 CLR 30 at 40-41)

[1.12] Apply the Facts to the Rule

[1.13] Conclusion

A. ACTUS REUS

[2.1] Deception: Actus Reus

[2.11] Rule

The first element that the Crown must prove is that A's actions satisfy the actus reus element of deception (s192E). Deception, as defined in 192B(1) of the Crimes Act, can be caused by words or other conduct, regarding the facts or the law. It includes deception about the intention of the accused or any other person (s192B(1)(a)) or conduct that causes an electronic device to respond in a way it is not authorised to (s192B(1)(b)).

DECEPTION BY FALSE STATEMENTS:

Deception can be caused by false statement, which may arise from lying about the facts or the law, or omitting information which creates a false impression (*M* [1980] 2 NSWLR 195). However, if the statements amount to puffery (an exaggerated or enthusiastic description or claim intended to increase interest in the property), the element of deception is not met (*Bryan* (1857) Dears B 265). However, lying about how many carats a diamond has, does amount to false pretence, as is such deception (*Patmoy* (1944) 62 WN (NSW) 1).

DECEPTION BY CONDUCT AND SILENCE

False pretence can be established by conduct without words, for example:

- a person creates a false impression of being an Oxford Student by dressing in cap and gown, to a shopkeeper (*Barnard* (1837) 7 C&P 784).

- a person decides to stay in a restaurant after deciding not to pay, which creates a dishonest deception that he is an ordinary customer who is willing to pay (DPP v Ray [1974] AC 370). A continued the impression he had created at the start of his intention to pay, and continued it by staying, without any indication to waiters that his intention had changed.
- a person presents an object at a price which he, but not others know, is dishonestly excessive (Silverman (1988) 86 Cr App 213)

[2.12] Apply the Facts to the Rule

[2.13] Issue

In (DPP v Ray [1974] AC 370) A continued the impression he had created at the start of his intention to pay, and continued it by staying, without any indication to waiters that his intention had changed. Lord Reid dissented, stating that there must be a positive act. He stated that while silence can be as eloquent as an express statement, in this case, A merely sat still, which could not amount to deception since there was nothing that he did that induced the waiter to think that he was going to continue paying, even when he decided he was not. **Issue: whether there needs to be a positive act for deception. Answer: most likely no, but it is worth arguing.**

[2.14] Conclusion

[3A.1] Obtains Property Belonging To Another (**First Alternative**)

Due to the availability of far simple financial advantage limb, it is unlikely that this Alternative will be used in instances beyond simple tangible property frauds (Brown et al, pg 1003).

[3A.11] Rule

The Crown must prove that A obtained property that belonged to another (s192E(1)(a)).

DEFINING PROPERTY

Property is defined in s4b of the Crimes Act as being:

“real and **personal property**; **money**, valuable securities, debts, and legacies; and all deeds and instruments relating to, or evidencing the title or right to any **property**, or giving a right to recover or receive any **money** or **goods...**” **(edit the words based on what is needed for the FACTS).**

DEFINING ‘OBTAINS PROPERTY’

The phrase ‘obtains property’ is defined in s192C(1) of the Crimes Act as obtaining ownership, possession or control of a property, or enabling it to be retained, for A or another person or inducing a third person to do something that results in A, or another person obtaining ownership, possession or control. **(only add ‘another person’ if it seems relevant on the FACTS)**

DEFINING ‘PROPERTY BELONGS’

A property is said to belong to another person, if that person has possession or control over it, (s192C(3) (a)) or has proprietary right or interest in the property (s192C(3)(b)). **(Only include subsection(b) if relevant to the FACTS).**

[3A.12] Applying the facts to the law

[3A.13] Issue

[3A.14] Conclusion

[3B.1] Obtains Financial Advantage **(Second Alternative)**

[3B.11] Rule

The Crown must prove that A obtained financial advantage (s192E(1)(b)).

DEFINING 'OBTAIN' A FINANCIAL ADVANTAGE

The phrase 'obtain' a financial advantage is defined in s192D(1) as obtaining, retaining or inducing a third person to do something that results in, financial advantage for A or another person. The advantage does not need to be permanent (s192D).

DEFINING 'FINANCIAL ADVANTAGE'

The phrase 'financial advantage' has a broad scope (Vasic [2005] VSCA 38 Nettle JA; Walsh (1990) 52 A Crim R 80), however Nettlefold J deconstructed the phrase such "The word advantage, inter alia, has the meaning of having the better of another in any respect; the result of a superior position; to benefit or profit", and the word financial refers to "services, money or property"(Murphy [1987] Tas R 178). However, simply having an 'advantage' is not sufficient; A must obtain a benefit which can be valued in terms of money and is a financial advantage as distinct from other kinds of advantage (Coelho v Durbin (unreported, NSWSC 29 March 1993 BC9304122)).

[3B.12] Applying the facts to the law

[3B.13] Issue

[3B.14] Conclusion

[3C.1] Obtains Financial Advantage **(Third Alternative)**

There is no Causation element that has to be satisfied if this Alternative is chosen. The other two Alternatives require a separate Causation element

[3C.11] Rule

The Crown must prove that A caused a financial disadvantage (s192E(1)(b)).

DEFINING 'CAUSE' A FINANCIAL DISADVANTAGE

The phrase 'cause' a financial advantage is defined in s192D(2) as causing, or inducing a third person to do something that results in, a financial disadvantage for A or another person. The disadvantage does not need to be permanent (s192D(2)).

- CHOOSE THIS METHOD FOR WHERE FACTS SHOW A DEBT EVASION CASE.
- CHOOSE THIS METHOD WHERE DEFENDANT ENGAGES IN SPITEFUL ACTIONS DESIGNED TO CAUSE HARM TO THE VICTIM, IRRESPECTIVE OF ANY GAIN TO THE DEFENDANT.
- IT IS EASIER TO PROVE MONEY WAS TAKEN OUT OF VICTIMS ACCOUNT, THEN TO PROVE THAT DEFENDANT TOOK THE MONEY

[3C.12] Applying the facts to the law

[3C.13] Issue

[3C.14] Conclusion

[4.1] Causation

[4.11] Rule

First Alternative : The Crown must prove that A's deception caused A to obtain property belonging to another. (s192E(1)(a)). If the representation is one to which the victim is indifferent, there is no false pretence or deception (Clemesha [1978] WAR 193)

Second Alternative: The Crown must prove that A's deception caused A to obtain a financial advantage (s192E(1)(b)). It is not necessary for the Crown to establish that it was the person deceived who suffered the loss, just that there is a causal connection between A's deception and his obtaining of a financial advantage (Ho and Szeto (1989) 39 A Crim R 145 NSWCCA). If the representation is one to which the victim is indifferent, there is no false pretence or deception (Clemesha [1978] WAR 193)

If the activity does not have its intended effect on the mind of the person to whom it is addressed, because that person realises that a deception is being practiced, the offence is not committed even if property is handed over. However, there will be attempted fraud (Clemesha [1978] WAR 193).

[4.12] Apply the Facts to the Rule

[4.13] Conclusion

CONCLUSION FOR ACTUS REUS

B. MENS REA

[5.1] Intentional or Reckless Deception

[5.11] Rule

The first mens rea element that the Crown must prove is that A's deception was intentional or A was reckless to the deception (s192B(2)). If the facts suggest a false pretence, only intention to defraud and a knowledge of the falsity of statements can suffice, recklessness is insufficient (Green (1949) 79 CLR 353).

Issue: No statutory definition of 'recklessness'. Stokes and Difford (1990) 51 A Crim R 25 provides a possible definition as being 'the awareness of the possibility that the behaviour is deceptive.'

[5.12] Apply the Facts to the Rule

[5.13] Issue

Defence can try to argue that the test of recklessness requires a 'probability' rather than a possibility of behaviour being deceptive, which will be according to the standard of recklessness used by courts in murder cases, as per The Queen v Crabbe (1985) 156 CLR 464; Royall v The Queen (1991) 172 CLR 378; Campbell v R [2014] NSWCCA 175 at [304].

[5.14] Conclusion

[6.1] Mens rea for [**FIRST ALTERNATIVE**]

[5.11] Rule

The Crown must prove that A intended to permanently deprive the victim of property (s192B(2)). This element is met if A does not have an intention to permanently deprive, but treats the property as their own 'to dispose of regardless of other's rights (s192C(4)). Borrowing or lending can amount to an intention to permanently deprive if the borrowing is for a period and equivalent 'to an outright taking or disposal' (s192C(4)). Examples of an intention to permanent derive arising from borrowing or lending are if the accused parts with the property with a condition that the the accused may not be able to perform and the parting is done by the accused's authorities and no one else's (s192C(5)).

[5.12] Apply the Facts to the Rule

[5.13] Issue

[5.14] Conclusion

[6.1] Mens rea for [**third ALTERNATIVE**] and [**SECOND ALTERNATIVE**].

[6.11] Rule

There is no statutory provision describing the mens rea element as so it must be implied as per He Kaw Teh (1985) 157 CLR 523 to be an intention to obtain financial advantage/ cause financial disadvantage.

Issue: unclear whether intention must be to cause permanent financial advantage/ disadvantage.

[6.12] Apply the Facts to the Rule

[6.13] Issue

Defendant may try to argue that mens rea requires a intention to permanently obtain financial advantage/ cause a financial disadvantage. However this argument will probably fail because Murphy (1987) Tas R 178 suggests that there need not be an intention to cause a permanent change.

[6.14] Conclusion

[7.1] Dishonesty

[7.11] Rule

The Crown must prove that A dishonestly obtained property belonging to another/ financial advantage/ caused financial disadvantage. (s192E). The deception does not need to be dishonest (Salvo [1980] VR 401). 'Dishonesty' is defined in s4B of the Crimes Act as meaning 'dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people'. This test resembles the test described in Ghosh [1982] 1 QB 1053. While the High Court in Peters (1998) 192 CLR 493 rejected the Ghosh test for introducing a subjective and objective element to

dishonesty, the subsequent reforms of the Crimes Act inserting the test based on Ghosh shows the legislative's intent for Courts to adopt a subjective and objective test.

CLAIM OF RIGHT

The common law defence of claim of right is available to the defendant, despite his actions being dishonest. (Love (1989) 17 NSWLR 608). **(STOP HERE if Claim of right does not seem existent on the Facts)**

The defendant must show that there was no dishonest intent in the actual obtaining of the property/ advantage, and dishonest use of deception to achieve that result does not create liability under s192E (Brown et al, pg 1012) **(This arises in cases where a person takes property or obtains advantage)**. The Court in Love stated that the issue is whether there was a belief in a legal right to obtain property, not whether there was a belief in the legal right to practice deception.

[7.12] Apply the Facts to the Rule

[7.13] Issue

[7.14] Conclusion

C. TEMPORAL COINCIDENCE

In Meyers (1997) 147 ALR 440, the High Court reaffirmed the 'general principle' that for the commission of an offence (Brown et al, above n 11, 156), the 'act and intent must coincide'. Thabo Meli (1954) established the importance of viewing the facts as a series of acts, and if they did not have the mens rea for a small act, they cannot escape liability because of a little misapprehension. Gap in time does not exonerate the defendant, if the acts and mens rea were part of the 'same interaction', especially if subsequent acts were designed to hide previous acts. (Church (1966); Le Brun (1972)). In Fagan, it was established that where there is a continuing, the mens rea can be superimposed on the act.

D. CONCLUSION

NOTES

- This approach was affirmed in *Kennison v Daire*,^[24] where it was held that an ATM could produce money without the consent of the bank.
- 'deceit' and 'deception' have essentially the same meaning" in the criminal law: *Director of Public Prosecutions v Ray* [1974] AC 370 at 374.
- R v Vasic [2005] VSCA 38: We are concerned only with the question of whether it is an offence under [s. 82](#) of the [Crimes Act 1958](#) for a debtor to defer the payment of a debt by giving his creditor a cheque, which the debtor knows to be worthless, in pretended payment of the debt. In my opinion that question should be answered affirmatively, just as it was by Gray, J. in *Matthews v Fountain*. ...all men obtain a financial advantage by deferring the payment of a debt; no matter how poor they may be. They are relieved of a claim upon such money or ability to generate it as they may have, for the period of the deferral.
- Moore v R [2016] NSWCCA 260: It is plain that Mr Moore behaved not only extremely foolishly but also dishonestly. He continued to borrow and consume funds, knowing that he had no realistic prospect of

repaying them, and appreciating that there was a mistake in the Bank's systems. No other inference is available by the time the end of the period in question was reached. But whether his conduct amounted to the crime with which he was charged is quite different from Mr Moore's undoubted civil liability.

- The making of a loan is a financial advantage. Thus a person who tells a lie to a lender in order to obtain a loan commits a crime. But an element of the offence with which Mr Moore was charged is deception. The unusual aspect of Mr Moore's conduct was that there was nothing covert about it. The statements issued by St George recorded each debit, and charged a fee and interest, and stated with complete accuracy Mr Moore's growing indebtedness.
- The Crown relied on *R v Evenett* (1987) 24 A Crim R 330, which was a reference by the Attorney-General following a directed acquittal. Mr Evenett was charged with theft, following withdrawals from ATM machines at times when the machine was "off-line" and would issue up to \$500 even if that exceeded the funds in the account. The Queensland Court of Criminal Appeal found that the judge was wrong to direct an acquittal. The Court was critical of the failure to tender the terms and conditions on the account. Williams J said at 335 that: "The conditions of use at the time of the transaction are, in my view, of critical importance. They will determine whether or not there has been any breach of the relevant banker-customer relationship, and also will be critical to the termination whether or not the customer has acted fraudulently when using the card." I respectfully agree. *Evenett* confirms the conclusion I have reached. In *Evenett* it appears that the terms of the contract did not permit an ATM withdrawal which exceeded the funds in the account. In the present case, the terms of the contract gave the Bank power to approve a debit which left the account overdrawn.