
Stealing and 'Dishonest Application': Defining the Difference in Queensland

Terry Hutchinson*

The 1st July 1997 heralded the implementation of a number of amendments to the Queensland *Criminal Code* including some intriguing changes affecting the principal property offences of stealing (section 398) and dishonest application (section 408C). This article discusses the impact of the changes. It examines the extent of the amendments and then aims to delineate the ambit of each offence drawing on some of the more recent judgments in the area. It concludes that the offences are moving closer together while retaining many of the complexities of proof experienced in the past.

Outlining the Sections under Discussion

Three separate sections are relevant to the stealing offence. Section 390 establishes what is property for the purposes of the offence:

Things capable of being stolen

- 390 Anything that is the property of any person is capable of being stolen if it is—
- (a) moveable; or
 - (b) capable of being made moveable, even if it is made moveable in order to steal it.¹

Stealing is defined in section 391:

* BALLB Dip Lib MLP, Lecturer, Faculty of Law, QUT
1 s 390 subst Act 3 of 1997 s 64, opn 1 July 1997

Definition of "stealing"

- 391(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen, is said to steal that thing.
- (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
- (a) an intent to permanently deprive the owner of the thing of it;
 - (b) an intent to permanently deprive any person who has any special property in the thing of such property;
 - (c) an intent to use the thing as a pledge or security;
 - (d) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (e) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (f) in the case of money — an intent to use it at the will of the person who takes or converts it, although the person may intend to afterwards repay the amount to the owner.
- (2AA) In this section—
 "special property" includes any charge or lien upon the thing in question, and any right arising from or dependent upon holding possession of the thing in question, whether by the person entitled to such right or by some other person for the other person's benefit.
- (2A) A person who has taken possession of anything capable of being stolen in such circumstances that the thing thereupon is not identifiable is deemed to have taken or converted the thing fraudulently notwithstanding that the property in the thing has passed to the person if, at the time the person transports the thing away, the person has not discharged or made arrangements with the owner or previous owner of the thing for discharging the person's indebtedness in respect of the thing.
- (2B) The presumption provided for by subsection (2A) is rebuttable.
- (3) The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.
- (4) In the case of conversion, it is immaterial whether the thing converted is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it.
- (4A) It is also immaterial that the person who converts the property is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of the property.
- (5) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes, on reasonable grounds, that the owner

cannot be discovered.

(6) The act of stealing is not complete until the person taking or converting the thing actually moves it or otherwise actually deals with it by some physical act.

(7) In this section—

“owner” includes the owner, any part owner, or any person having possession or control of, or a special property in, the thing in question.²

Stealing is punished under section 398 of the Code:

Punishment of stealing

398 (1) Any person who steals anything capable of being stolen is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for 5 years.³

The fraud offence is set out in section 408C. This article is mainly concerned with the first part of this offence, specifically s408C(1)(a).

Fraud⁴

408C (1) A person who dishonestly—

(a) applies to his or her own use or to the use of any person—

(i) property belonging to another; or

(ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or

(b) obtains property from any person; or

(c) induces any person to deliver property to any person; or

(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or

(e) causes a detriment, pecuniary or otherwise, to any person; or

(f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or

(g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or

(h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment; commits the crime of fraud.⁵

2 s 391 am Act 14 of 1943 s 15; Act 17 of 1989 s 37

3 s 398 am Act 11 of 1961 s 13; Act 14 of 1964 s 9; Act 88 of 1973 s 5; Act 1 of 1986 s 27; Act 88 of 1988 s 5 and Sch II; Act 17 of 1989 s 38; Act 3 of 1997 s 65, opn 1 July 1997

4 Heading am Act 3 of 1997 s 66, opn 1 July 1997

5 subs (1) subst Act 3 of 1997 s 66, opn 1 July 1997

Statistical Significance of Offences

How widespread are the offences under discussion? The statistics are difficult to analyse and often simply give an "indicative view" of the number and rates of offenders identified for certain crimes.⁶ However, stealing has been the most common crime, at times accounting for almost one third of all crimes recorded in Australia. Property crimes generally have tended to dominate the crime "scene" outnumbering violent crimes by 45:1 in 1987-88.⁷ Statistics show that stealing or theft (excluding motor vehicle theft) has been the most frequent property crime in the country, the combined statistics in Australian jurisdictions showing a rise from 526,426 to 596,060 in a five-year period. In contrast, fraud statistics had fallen from 111,029 to 86,130 by 1995-96.⁸ In Queensland, reported offences of stealing increased from 92,732 in 1992-93 to 101,923 in 1996-97, while fraud reports increased from 16,690 to 18,660 during the same period.⁹ The importance of these figures is in their pointing to a need for clarity in dealing with the bulk of charges laid for such offences.

The Position in other Australian Jurisdictions

New South Wales, South Australia, and the Commonwealth have retained the common law approach with regard to property offences, although some legislative modification has occurred.¹⁰ At common law, the offence of larceny required a trespass, that is, that the thing said to have been stolen was taken from the person in lawful possession. The corollary of this was that someone who was already in legal possession could not be guilty of stealing his or her own property.¹¹ Larceny tended to deal with the physical taking of physical objects. Intangible objects were not covered. Thus, property capable of being stolen was restricted to tangible, though not necessarily visible, items, of some value.¹² Land was not capable of larceny. The offences of simple larceny, including stealing by employees, embezzlement and larceny as a bailee were separate, and it was only within the latter offence that provision was made for a fraudulent conversion after a person had actually acquired possession. Fraudulent conversion under the common law, therefore, differs from the other forms of dishonest conduct such as larceny, and embezzlement, because with this offence the offender has obtained possession or control and ownership of

6 S.Mukherjee, C.Carcach and K.Higgins, *A Statistical Profile of Crime in Australia*. Griffith: Australian Institute of Criminology, 1997. 25, 28

7 S.Mukherjee and D.Dagger, *The Size of the Crime Problem in Australia*. Griffith: Australian Institute of Criminology, 1990. 8

8 S.Mukherjee, C.Carcach and K.Higgins, *A Statistical Profile of Crime in Australia*. Griffith: Australian Institute of Criminology, 1997. 2 Statistics relate to crimes reported to the police.

9 These figures are taken from the Queensland Police Service Annual Reports 1992-93 to 1994-95 and Department of Police Annual Reports 1995-96 to 1996-97

10 *Crimes Act 1900* ss93J-249J (NSW), *Criminal Law Consolidation Act 1935* ss130-211 (SA)

11 *Illich v R* (1987) 162 CLR 110 at 123

12 As to tangible property see *R v White* (1904) 4 SR (NSW) 379; Gas could be stolen *R v Russell* (1878) 1 SCR (NSW) (NS) 73;

the property.¹³ The property must be held on account of another.¹⁴ In *Stephens Case*, the majority pointed to a need for a fiduciary element in the relationship of the accused person to the property alleged to have been fraudulently converted under the provision. Stealing under the Queensland Code s391, encompasses not only trespass or physical interference, but also dealing with a thing in a manner inconsistent with the rights of the true owner, after possession has been acquired legitimately, that is, fraudulent conversion.

Offences against Commonwealth property in the *Crimes Act* are also common law based. The recent decision of *Director of Public Prosecutions (Cth) Reference No1 of 1996* has clarified the differences between the offences of stealing, fraudulent misappropriation and fraudulent conversion in regard to the provisions under that Act.¹⁵ Section 71 of the *Crimes Act 1914* (Cth) provides:

(1) Any person who steals or fraudulently misappropriates or fraudulently converts to his own use any property belonging to the Commonwealth, or to any public authority under the Commonwealth, shall be guilty of an offence.

In discussing this section, Winneke, J came to the conclusion that "The offences of 'stealing' and 'fraudulent misappropriation' created by s71 ... are mutually exclusive offences dealing with fundamentally different transactions."¹⁶ In response to a submission that fraudulent misappropriation was limited to circumstances where the accused had obtained lawful possession of the property, Winneke, J concluded "I do not see 'possession' as being the distinguishing feature between stealing and fraudulent misappropriation."¹⁷ No decision was made in regard to the overlap between "fraudulent misappropriation" and "fraudulent conversion", although Winneke, J made the observation that "I can conceive of many transactions which might well support convictions for both fraudulent misappropriation and fraudulent conversion although the latter offence is marked out from the former by the requirement that the conversion has to be one to the accused's 'own use'."¹⁸ Cases such as these provide comparative clarification but need to be treated with caution in the context of the different wording in the Code provisions.

Modern frameworks, therefore, have led to the development of more complex property rights involving the division of interests such as ownership, possession and control. The various definition amendments have been directed to coping with these changes. In addition, there has been the increasingly dynamic creation of abstract rights by special documents like cheques, credit cards and electronic transfers.¹⁹ The

13 See *Stephens v R* (1978) 139 CLR 315 regarding s1(1) *Criminal Law Amendment Act 1902* (SA) where deposits were given to a builder who then fraudulently converted these to his own use.

14 On this point see *Halsbury's Laws of Australia* [130-5225](45) Relationship to other offences

15 (1997) 149 ALR 574 ; The term "fraudulent misappropriation" is not used in the Qld Code provisions.

16 *Director of Public Prosecutions (Cth) Reference No1 of 1996* (1997) 149 ALR 574 at 586

17 (1997) 149 ALR 574 at 580

18 (1997) 149 ALR 574 at 586

common law has developed pragmatically to provide for these developments including provision for intangible property and offences involving specific categories of property. Other offences have been specifically dependant on the status of the owner (for example an employer), the status of the person taking property (for example a public servant), or the location of the property (say a ship or mine).²⁰

The *Theft Act* 1968 (UK) provided a model for change in three Australian jurisdictions – Victoria, the Australian Capital Territory and the Northern Territory.²¹ Victoria took the initiative with The *Crimes (Theft) Act* 1973 (Vic) which inserted new provisions into the *Crimes Act* 1958 (Vic). Under this change, there were three categories of offences - theft, obtaining property by deception and obtaining financial advantage by deception. The changes replaced the common law concept of larceny with a wider offence of stealing. Theft occurs if the person “dishonestly appropriates property belonging to another with the intention of permanently depriving” the other person. The Northern Territory *Criminal Code* adopted the Victorian statute with some amendments.

More changes seem inevitable, with the UK Home Secretary announcing a comprehensive review of the dishonesty offences in April 1998. The terms of reference are to consider whether the law is comprehensible to juries, adequate for effective prosecution, fair to potential defendants, and meets the need of developing technology including electronic means of transfer. The terms of reference also included the following:

and to make recommendations to improve the law in these respects with all due expedition. In making these recommendations to consider whether a general offence of fraud would improve the criminal law.

It is expected that a consultation paper in the light of this reference will be available in the first half of 1999.²²

The Model Code

This paper is written within a broad range of contexts. Foremost of these is the Model Criminal Code investigation by the Standing Committee of Attorney-Generals (SCAG). The first substantive offence chapter dealt with fraud and theft offences. It was noted that the case law tended to identify a significant overlap between these areas. The investigating Committee decided:

The relationships between the various theft and fraud offences mean that they cannot

19 Model Criminal Code Final Report December 1995 1

20 Ibid.

21 *Crimes Act 1900* ss93-151 (ACT), *Crimes Act 1958* ss71-82 (VIC)

22 United Kingdom, The Law Commission, <http://www.gtnet.gov.uk/lawcomm/library/lur/lur40new.htm#40> (18/9/98)

sensibly be dealt with in isolation from one another²³

This was an obvious area for national reform because transactions tend not to be jurisdiction specific. State borders represent artificial barriers for such crimes and the effect of different offences and requirements can result in complexities of proof for those prosecuting the offences. A uniform Australian code seemed to be the answer. The final report on this area was published in December 1995, but there has been no general enactment of the recommendations.

The Model Code provisions for theft and fraud are as follows:

Theft: 15.1(1) A person who *dishonestly appropriates* property belonging to another, with the intention of permanently depriving the other of it, is guilty of the offence of theft.

Fraud: 17.2(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 offence.

Should there have been an amalgamation of the two sections? The Model Criminal Code canvassed the arguments for and against. On the one hand, the comment was that:

Given that the labels of theft and fraud are well understood, that the penalties for the two offences are the same, and that the practical problem in cases where the wrong offence is charged is solved by an alternative verdict provision, it would be clearer to retain the separate offence and hard to see what is achieved by merging the two offences.²⁴

The arguments against separate theft and fraud offences are strongest with the offences of stealing and obtaining property by deception, and this has been the focus of most academic discussion and caselaw in the past, especially in England.²⁵ However, in this latest change to the Queensland Code, the traditional stealing offence has been retained while dishonest application offences have been included in a section dealing with obtaining property by deception offences.

The Committee also considered another general dishonesty offence "to cover cases which fall outside the ambit of the offences of theft, obtaining property by deception, and obtaining a financial advantage by deception".²⁶ An example of such a general provision might be:

(2) A person who dishonestly obtains a financial advantage is guilty of an offence.²⁷

23 Model Criminal Code Discussion Paper - Part One ii

24 Model Criminal Code Discussion Paper 61

25 S.Shute and J.Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 July *Modern Law Review* 548; C.R.Williams "The Concept of Dishonesty" (1980) *Law Institute Journal* 567

26 Model Criminal Code Final Report December 1995 153

27 *Id* 155

However, the Committee decided that such a wide offence would lead to overcriminalisation and was too uncertain. It offended the idea that offences should be clear and knowable in advance. The Committee's ultimate decision was that the general provision should not be included. Such a broad offence was included in the Western Australian *Criminal Code* and the Commonwealth *Crimes Act*. Both have been strongly criticised. The Western Australian provision has been referred to as a "vague, sweeping and arbitrary offence".²⁸

The O'Regan Committee View

Within Queensland, a more cogent proposal was made by the O'Regan Review who suggested the abolition of the offence of stealing (including ss390-391, 393-398, 402-404, 408-408A) in favour of the offence of misappropriation under s408C. Difficulties were identified with the restricted definition of property for the stealing offence as it was then limited to tangible property. Another deficiency identified was the need to prove an intention to permanently deprive other persons of their interest in the property. It is worthwhile noting the reasoning behind the suggested changes:

The Committee is of the opinion that the criminal law should proscribe dishonest conduct which involves any assumption, permanent or otherwise, of the rights of others over property both tangible and intangible. This is now done by s408C which was incorporated into the Code in 1979 in recognition of the fact that the stealing provisions did not apply to intangible property interests such as bank credits and other choses in action which have profound importance in modern commerce. The section provides a much more adequate response to the sophisticated depredations on property rights of what is popularly called white-collar crime.²⁹

The suggested section therefore removed the element requiring proof that the offender meant to permanently deprive the owner of possession compared to the situation where property is merely borrowed. It also reduced the complexity of proof by limiting culpability to that of "dishonesty" which has gained a well-accepted meaning under the *Laurie* test.³⁰ It was also suggested that the definition of property should be expanded:

(1) For the purposes of this Chapter, the term "property" includes money; electrical or any other form of energy derived from any source; gas; water; and all other property real or personal, legal or equitable, including things in action and other intangible property.³¹

28 G. Syrota, "Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence" (1994) 24 WALR 261

29 *Final report of the Criminal Code Review Committee to the Attorney-General, June 1992*. Brisbane : Govt. Printer, 1992. 231

30 *R v Laurie* [1987] 1 Qd R 762

31 *Final report of the Criminal Code Review Committee to the Attorney-General, June 1992*. Brisbane : Govt. Printer, 1992. 102 Draft s216

These amendments would therefore have resulted in a more flexible dishonesty offence with stealing (under s390 and s391) and dishonest application (under the present s408C) being included in the one offence. In addition, it would have included a dishonest "appropriation" rather than a dishonest "application" test. This would have resulted in the other dishonesty offence being limited to the situations of obtaining property with intent to defraud and inducing persons to deliver property to another, in fact the same false pretences provisions that have been subsumed in the latest 1997 version of s408C.

Reform of these provisions was also advised in other examinations of the Code at that time. Ridgway comments on the s391 offence:

The English *Theft Act* structure of the offence, and the available defences, seem more simple and workable than ours. While observing that the replacement of "fraudulently" with "dishonestly" is certainly a recommendation, I also think a broader brush might be taken to this and related sections. I would specifically recommend amending the definition of "Things capable of being stolen" (s390) to take in all species of property including choses in action so as to move as far away as possible from notions of asportation as a prerequisite to the offence of stealing. Given this broadening of the offence, it may be that utility of the present offence of misappropriation could be questioned, at least in its present form.³²

It seems that there was some agreement therefore among commentators in regard to consolidation and change, some advocating pre-eminence be given to the s391 offence and others more inclined to a simpler test akin to s408C, but what has occurred is a half-way house with confusing overlaps between the two sections.

The Ambit of the Legislative Changes

Section 390 of the Queensland *Criminal Code* sets out the things capable of being stolen for the purposes of Chapter 36. In the past this also included specific categories of items, for example, animals and oysters. The new section streamlines the definition and specifies that things capable of being stolen include:

1. anything
2. that is the property of any person
3. if it is moveable
4. or capable of being made moveable, even if it is made moveable in order to steal it.

The definition of "property" in section 1 has been expanded to include, specifically, animate and inanimate property as well as a whole array of items including money and intangibles. The section reads:

32 P.Ridgway "Fraud and Dishonesty" (1992) 1 (1) *Queensland Criminal Law Journal* 1 at 10

“property” includes -

- (a) every thing animate or inanimate that is capable of being the subject of ownership; and
- (b) money; and
- (c) electrical or other energy, gas and water; and
- (d) a plant; and
- (e) an animal that is -
 - (i) a tame animal, whether or not naturally tame; or
 - (ii) an untamed animal of a type that, if kept, is usually kept confined; or
 - (iii) an untamed animal in a person's possession or being pursued for return to possession after escape; and
- (f) a thing produced by an animal mentioned in paragraph (e); and
- (g) any other property real or personal, legal or equitable, including things in action and other intangible property.

An “animal” means “any living creature other than mankind”, and “money” is also defined in section 1 to include “bank notes, bank drafts, cheques, and any other orders, warrants, authorities, or requests, for the payment of money”.

The principal result of the definition amendments for the stealing offence was to widen the ambit of those items that can be “fraudulently taken” or “fraudulently converted” according to the definition of “stealing” in s391 which itself remains unchanged. The definition of property limited to tangible objects has always been a point of distinction between the s391 and s408C offences. This has now disappeared with the 1997 amendments. The broader definition of property brings the section closer to the types of property included in offences under s408C.³³

Stealing is defined in section 391 and punished under section 398 of the Code. Basically there are four elements involved in proving the offence:

- There must be a thing capable of being stolen under section 390 which includes the wider definition of property from section 1
- There must be an asportation or moving in accord with section 391(6)
- There must be a fraudulent intent in regard to the taking or conversion according to section 391(2) with the proof of the intent to permanently deprive under 391(2)(a) and (b) or any of the intents specified in s391(2)(c) to (f).
- The item must be taken from the owner with ownership being defined widely according to section 391(7) and section 390.

More sweeping amendments were made to the sections of the Code dealing with Misappropriation of Property. Section 408C had been included in the Code by the *Criminal Law Amendment Act 1979* because of cases such as *The Queen v Gray*.³⁴

33 R.G.Kenny, *Introduction to Criminal Law in Qld and WA. 4th ed.*, Sydney: Butterworths, 1997. 254, [15.4]

34 Case mentioned without citation in the Queensland Parliament. *Record of the Legislative Acts*.

In Gray's case, money was transferred from a bank and Gray was the ultimate beneficiary. As Gray had misappropriated a chose in action, a credit at a bank, and because this was not included in the list of things capable of being stolen, Gray managed to escape conviction of the offence.³⁵ In 1979, in the case of *Sawiris v Scott*, the Full Court of the Supreme Court of Western Australia examined the definition of property under the Western Australian Code and concluded that the definition of "property" in s371(7) (WA) extended to include intangible items such as choses in action.³⁶ Section 371(7) (WA) states:

In this section, "property" includes any description of real and personal property, money, debts, bank credits, 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 and also includes not only such property as has been originally in the possession or in the control of any person but also any property in which or for which it has been converted or exchanged and anything acquired by the conversion or exchange, whether immediately or otherwise.

At the time of *Sawiris v Scott*³⁷, "the Queensland Code contained no equivalent provision' and in similar circumstances 'a decision would have gone the other way".³⁸

In that case, money had been received by Sawiris from other employees for a football tipping competition. The money was paid into the accused's own bank account and cheques were written which resulted in the account becoming overdrawn. It was held that the money in the bank account was a chose in action and when cheques were written "which had the effect of reducing his credit balance below the level of the competition fund, he thereby became guilty of stealing".³⁹ Smith, J commented in this case:

There can be little doubt that at common law a person in the position of the appellant in the circumstances outlined would not be guilty of simple larceny, although a charge of misappropriation might well succeed. ... The question is do the provisions of the Code alter the common law situation. The draftsman of the Code, Sir Samuel Griffith, had little doubt that a chose in action was property capable of being stolen within the equivalent of s378 of our Code.⁴⁰

Smith, J referred to the 1902 case of *Re a Solicitor* where Griffith, CJ had delivered

35 Queensland Parliament. *Record of the Legislative Acts*. Queensland Government Printer, 1979.226

36 R.G.Kenny, *Introduction to Criminal Law in Qld and WA*. 4th ed., Sydney: Butterworths, 1997. 254, [15.4] and Fn 3 - although Kenny concludes that not all intangibles are embraced by this section.

37 *Sawiris v Scott*[1979] WAR 39

38 E.Edwards, R.Harding and I.Campbell, *The Criminal Code: Commentary and Materials*. 4th ed., Sydney: Law Book Co., 1992. 594

39 C.Williams and M.Weinberg, *Property Offences*. 2nd ed., Sydney: Law Book, 1986. 62.

40 *Sawiris v Scott*[1979] WAR 39 at 42; S378 WA Code is equivalent to s398 Qld Code.

judgment in regard to a solicitor who had been given money to use for a specified purpose.⁴¹ He did not apply it to that purpose but instead refused to return it when requested to do so. According to Griffith, CJ :

I believe it is simply a case of what is now stealing under s398 of the Criminal Code. Last year it was not technically stealing, though morally just as bad: now, under the Code it is stealing; and the man who does it, solicitor or not, is liable to be dealt with criminally.

Griffith's judgment did not appear to include a statement in regard to the issue of choses in action. However, Smith, J in *Sawiris* continued:

It seems to me, applying this criteria, that the proper approach is to construe s371 and 378 as being two sections within a Code dealing with the subject of stealing. So construed, it becomes readily apparent that the Code is providing that a person who misappropriates property is deemed to steal it and if for the purposes of the Code a person is said to steal property, that property must be some thing capable of being stolen within the meaning of the words used in s378.⁴²

An interesting issue here is the absence of discussion in relation to s371(6) and asportation. The actual dealing or physical act required was paying the money into his own bank account when it was overdrawn. The accused may have had the legal interest in the chose in action but the other employees still held a special interest in the fund. In addition, it would seem that both *Re a Solicitor* and perhaps *Sawiris v Scott* could have come within the s373 (WA) or s393 (Qld) provisions relating to property received under direction, though this was not canvassed. According to these provisions, the property is deemed to be that of the person from whom it is received until the direction is complied with.

In 1979, therefore, s408C was inserted into the Queensland Code. The definition of "property" was enlarged to cover "money and all other property real or personal, legal or equitable, including things in action and other intangible property". The elements of the s408C offence include proving that a person has:

1. dishonestly
2. applied to their own use or to the use of any person
3. either property belonging to another or property in his possession or control subject to a trust direction or condition, or on account of any person

In the 1997 amendments, section 408C Misappropriation was renamed Fraud and extended to include false pretences offences previously found in sections 427, 428 and cheating in 429 of the Code. The definition of "property" was widened

41 *Re a Solicitor* [1902] St R Qd 9

42 *Sawiris v Scott*[1979] WAR 39 at 43

again to include the definition given in section 1 (that used for stealing) and also to include :

credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations.⁴³

For the purposes of section 408C(3)(d), property can “belong” to -

the owner, any joint or part owner *or owner in common*, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender’s application of the property, had control of it.⁴⁴ (italics added)

For the purposes of section 408C(3)(c),

a person’s act or omission in relation to property is not taken to be dishonest, if when the person does the act or makes the omission, he or she does not know to whom the property belongs and believes on reasonable grounds that the owner cannot be discovered by taking reasonable steps, unless the property came into his or her possession or control as trustee or personal representative.

The action may be dishonest even though the accused is willing to pay for the property, or intends to restore the property, or the owner or other person consents to the act or in fact makes the mistake. However, the act is not dishonest if the person quite reasonably does not know to whom the property belongs.

The new subsections (3)(e) and (f) define the aspect of “obtains” and deal with the vexing issue of the passing of property for those sections:

- (e) “obtain” includes to get, gain, receive or acquire in any way: and
- (f) if a person obtains property from any person or induces any person to deliver property to any person it is immaterial in either case whether the owner passes or intends to pass ownership in the property or whether he or she intends to pass ownership in the property to any person.

There has always been some lack of clarity in regard to the differences between the two offences of fraud and stealing. Is there any further scope for confusion as a result of the changes? And, if there is, does it matter? Are there practical differences in the penalties so as to make the discussion meaningful? It would appear not. The penalties for the two offences only differ in respect to circumstances of aggravation, with the punishment for stealing having been increased from 3 years to 5 years, and with punishment in cases of aggravation increasing to

43 S408C(3)(a)

44 This section was widened slightly by the addition of the words “owner in common”.

14 years, for example:⁴⁵

S391 Punishment in Special Cases

“Stealing by clerks and servants

6 If the offender is a clerk or servant, and the thing stolen is the property of the offender's employer, or came into the possession of the offender on account of the offender's employer, the offender is liable to imprisonment for 10 years.

Stealing by directors or officers of companies

7 If the offender is a director or officer of a corporation or company, and the thing stolen is the property of the corporation or company, the offender is liable to imprisonment for 10 years.

...

Stealing property of value exceeding \$5000

9 If the value of the thing stolen exceeds \$5000, the offender is liable to imprisonment for 10 years.

...

Stealing firearm for use in another indictable offence

14 If—

- (a) the thing stolen is a firearm; and
 - (b) the offender steals the firearm intending that it be used by anyone to commit an indictable offence;
- the offender is liable to imprisonment for 14 years.”

Section 408C offences carry penalties of 5 years, the same as for stealing, increasing to 10 years for aggravated offences.⁴⁶

- (2) An offender guilty of the crime of fraud is liable to imprisonment for 5 years save in any of the following cases when he is liable to imprisonment for 10 years, that is to say—
- (a) if the offender is a director or member of the governing body of a corporation, and the victim is the corporation;
 - (b) if the offender is an employee of another person, and the victim is the other person;
 - (c) if any property in relation to which the offence is committed came into the possession or control of the offender subject to a trust, direction or condition that it should be applied to any purpose or be paid to any person specified in the terms of trust, direction or condition or came into the offender's possession on account of any other person;
 - (d) if the property, or the yield to the offender from the dishonesty, is of a value of \$5000 or more.⁴⁷

45 An example might be the stealing of firearms for use in another indictable offence.

46 For example where they are committed by company directors and employees.

47 subs (2) am Act 3 of 1997 s 66, opn 1 July 1997

In addition, the alternate verdict provisions in s 581 allow for a person to be convicted of any other of such offences committed with respect to the same property if it is established by the evidence, where stealing, fraud, obtaining property by passing valueless cheques, receiving and unlawful use of a motor vehicle are charged upon an indictment. However, there is a sufficient grey area or overlap to warrant a closer look at the principal differences between the fraud and stealing offences.

Defining the Differences

There are several points of difference between s408C and s398 offences that emerge in this discussion, particularly in relation to the following:

- the definition of property for the two provisions;
- the necessity for asportation as a separate element in proof of stealing;
- the issue of whether property has passed and the identification of where lawful possession resides;
- the proof of dishonest application in section 408C compared to the fraudulent taking or conversion in section 391;
- the need for an intent to permanently deprive as compared to a “borrowing”.

Property

In the past, property in the two sections of stealing and fraud was defined differently, and this simplified some aspects of the choice of offence, for as Kenny has commented, “The most significant difference between stealing and misappropriation is the nature of the property to which s408C extends.”⁴⁸ Have the new amendments substantially removed this distinction? Property capable of being stolen under the Code, is now defined by the extended section 1 definition, whereas in 408C offences, property is defined in s 408C(3)(a) as well as section 1. The basic definition of property able to be “stolen” or “dishonestly applied” differs markedly from the original common law parameters. It includes real property (land and interests in land) as well as personal property (anything other than real property), tangible as well as intangible, and legal as well as equitable property. The O’Regan Review pointed out the need for special provision for electricity as it is “a form of energy and is probably not property, even intangible property”.⁴⁹ Both definitions now cover electricity and other fungibles, as well as money, and things in action which can only be enforced by legal or equitable action. Basically, the new definitions mean that the property concepts encompassed within the fraud provisions are still broader than in theft. The addition is the catch-all of “credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit

48 R.J.Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* 4th ed., Sydney: Butterworths, 1997. 15.17 at 263;

49 *Final report of the Criminal Code Review Committee to the Attorney-General, June 1992*. Brisbane : Govt. Printer, 1992. 238

and releases of obligations." Thus, the provisions are wider "in that the benefit derived from dishonest appropriation is not limited to financial interest".⁵⁰

What still might not be covered by the new definition for the purposes of s391? What about knowledge, for example, confidential information, or body parts?⁵¹ Are these covered by either definition? Knowledge has been held to be neither real nor personal property.⁵² But what of confidential information? One definition can be found in the *Judicial Review Act 1991* (Qld) s35. According to this section, information can be taken to be of a confidential nature if it falls in certain categories, for example, where it was supplied in confidence and retains its confidential nature, trade secrets, or where publication would affect the competitive commercial activities of a government authority. A common example is the situation where a public servant who has access to private information sells the information to another. This issue was discussed in the English case of *Oxford v Moss* where a student obtained the proof of an examination paper, read its contents and then returned it. He was charged with theft of confidential information contrary to the *Theft Act 1968*. It was held that the confidential information obtained by the student did not fall within the definition of "intangible property" and the appeal was dismissed.⁵³ In the recent case of *Breen v Williams*⁵⁴ Brennan CJ unequivocally rejected the proposition that information could be property. With regard to information held in electronic form, recourse may be made to the new s408D Computer Hacking and Misuse offence, although this still would not seem to cover a situation where the person using the computer had authority to do so. In 1992, the New South Wales Independent Commission Against Corruption (ICAC) tabled a report in which it commented on the inadequacy of the NSW law covering unauthorised dealings with confidential information.⁵⁵ One commentator has noted that "none of the Australian legislatures were prepared to tackle the issue that information is not generally considered to be 'property' for the purposes of the criminal law". The one exception is the Northern Territory where s222 of the Code specifically covers theft of information. Section 222 (NT) reads:

Any person who unlawfully abstracts any confidential information from any register, document, computer or other repository of information with intent to cause loss to a person or with intent to publish the same to a person who is not lawfully entitled to have or receive it, or with intent to use it to obtain a benefit or advantage for himself or another, is guilty of a crime and is liable to imprisonment for 3 years.

Another specific exception is Commonwealth *Crimes Act 1914* s70 which cov-

50 Queensland *Parliamentary Debates*. Brisbane: Goprint, 1997. 19/3/97 601

51 See *R v Rothery* [1976] Crim LR 691

52 *Federal Cmr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 535 as to knowledge

53 *Oxford v Moss* (1978) 68 Cr App R 183 and M.Jackson 'Unauthorised Release of Government Information' (1993) 1(2) *Current Commercial Law* 54 at 58

54 *Breen v Williams* (1996) 186 CLR 71 at 81

55 ICAC, Report on Unauthorised Release of Government Information, Sydney: ICAC, 1992. 104

ers disclosure of information by Commonwealth officers. This provision has been incorporated into other Commonwealth statutes by authorising the creation of a duty to which s70 applies. Confidential information would still appear not to be covered by the latest amendments to the Code.⁵⁶

What about body parts and blood or human tissue?⁵⁷ It has been held at common law that a corpse is not "property" for the purposes of larceny. However, there is recent authority for the offence of theft resulting from a case where a man was convicted for pouring a urine sample down the sink. He had given the sample in compliance with a *Road Traffic Act 1972* (UK) requirement.⁵⁸ The case seems to suggest that the old rule may not extend to the products of the living body. However, the decision was actually an appeal against sentence, rather than a discussion of the theft charge. In a subsequent decision, where Rothery gave a specimen of blood for a laboratory test but subsequently stole the sample, the court seemed to have no doubt that the defendant was guilty of theft of a capsule containing the defendant's blood.⁵⁹ Once again, though, the theft charge was not under appeal. The 1990 Californian Supreme Court decision of *Moore v Regents of the University of California and ors*⁶⁰ raised the question of whether the human body and its tissue could be considered property for the purposes of a civil law action in conversion. The Supreme Court of California thought not, their decision largely being based on the "commercial ramifications of medical research" and public policy implications.⁶¹ It would seem very unlikely that the theft and fraud provisions would be successful in relation to offences where the property is the human body or human tissue. If the legislature intended the definitions to extend this far, then it certainly would have required clear language. In cases where there is any doubt at all regarding the category of property, perhaps the better choice would be to choose the offence with a broader sweep in regard to this aspect.

Asportation

To constitute a theft, there must also be an asportation or a moving of the property, however minimal. The standard case of *Wallis v Lane*⁶² where goods were moved from one part of a truck to another is a good demonstration of the issue. In that case, the bicycle clips were not taken out of the owner's possession but were moved with the admitted intention of stealing them. Section 391(6) clearly states that the offence is not complete until there has been an actual dealing with the property by

56 M.Jackson "Unauthorised Release of Government Information" (1993) 1(2) *Current Commercial Law* 54 at 58

57 For a discussion of these issues see A.T.H.Smith "Stealing the Body and its Parts" [1976] *Crim LR* 622

58 *R v Welsh* [1974] *RTR* 478

59 See *R v Rothery* [1976] *Crim LR* 691

60 793 P 2d 479 (Supreme Court of California), 1990

61 D.Mortimer, "Proprietary Rights in Body Parts: The Relevance of Moore's Case in Australia" (1993) 19 (2) *Monash University Law Review* 217 at 234

62 *Wallis v Lane* [1964] *VR* 293

some physical act. In a stealing offence, the offender must have actually moved or physically dealt with the property. This obviously presents difficulties when dealing with intangible property.

Thus asportation is another point of distinction between the two offences. The automatic teller machine (ATM) cases such as *Mujunen*⁶³ and *Evenett*⁶⁴ can be brought under a stealing umbrella in that there is a taking of the money from the machine without the bank's consent.⁶⁵ In *Evenett*, Andrews, CJ drew the analogy of an ATM programmed to allow money to be withdrawn when the machines were "offline", and the situation where "the owner of property leaves it on a post in his front fence in which case it could be said that he has enabled an alleged thief to take it but not that he had consented to the taking or that he had intended to pass the property to the alleged thief".⁶⁶ However, the question of asportation was not directly raised by the reference.

Asportation provides a point of divergence between fraudulent conversion under the common law and under the Code. The tort of conversion was defined in *Caxton Publishing Co v Sutherland Publishing Co*⁶⁷ as constituting dealing with goods in a manner inconsistent with the true owner's right in the property. Criminal conversion requires that the accused was also acting fraudulently. Obviously, it is possible to have an intent to convert property within your possession without an overt asportation.⁶⁸ So if a person decides to sell property that does not belong to them but does not actually move the items then this may be sufficient to constitute conversion - but not stealing for the purposes of s391 because of the requirement for a physical movement under s391(6). However, it has been held that the asportation or physical moving need not occur at the time of taking possession, but may occur when the person fraudulently deals with the property in a manner inconsistent with the rights of the true owner subsequent to obtaining possession.⁶⁹

Determining whether property has passed

Another main point of difference between fraud and stealing in the Code has lain in the issue of whether title and possession of the property had passed. There are varying degrees of possession - ownership, possession, control and custody. The rule promulgated in cases such as *R v Croton*⁷⁰ was that it was impossible to steal your own property. It was therefore imperative to identify who had legal possession of the property. Sometimes the person with legal possession (the owner) may have

63 *R v Mujunen* (1993) 67 ACrimR 350

64 *R v Evenett* (1987) 24 A Crim R 330

65 Money in the bank belongs to the banker and not the customer - *R v Davenport* [1954] 1 WLR 569 at 571.

66 (1987) 24 A Crim R 330 at 335

67 *Coxton Publishing Co v Sutherland Publishing Co* [1939] AC 178 at 201-202

68 See *R v Bloxham* (1943) 29 Cr App R 37

69 See generally the discussion C. Williams and M. Weinberg, *Property Offences*. 2nd ed., Sydney: Law Book, 1986 at 28-31, 64, 65

70 *R v Croton* (1967) 117 CLR 326 at 330

given the property to another, such as an employee, who has custody but not ownership of the goods. In addition, a bailee can hold legal as well as actual possession of property for a stipulated term. Under s396, the taking can still constitute stealing even though the person taking or converting has a special property or interest, or is a lessee, joint owner, director or officer of a corporation who owns the property. An example would be the theft by the legal owner of their own property before the expiry of the bailee's term of special ownership, for example where property is being held pending payment for repairs.

Likewise, under sections 393 and 395, stealing can occur where property is received under a direction that it shall be applied in a certain way. In the recent High Court case of *Parker v The Queen*, argued in relation to the Western Australian Code, funds were received for election campaign purposes, mixed with other money in a bank account and then amounts were withdrawn for personal purposes. There it was held that the money remains the property of the person from whom it was received until the direction is complied with.⁷¹ However, even there, inadequacies within the section became apparent:

Section 373 of the Code is silent as to how directed funds from several sources (subject possibly to differing and even inconsistent directions) are to be treated once mixed by the recipient with funds from other sources, directed, undirected and private. It would, in my view, be desirable that the Code be amended to cover, in clear terms, the problem now drawn to notice. If commercial crime is increasing, it is undesirable that the Code should be unclear in this matter for it is inevitable that cases presenting the same problems will recur.⁷²

Therefore, "under the Codes stealing is effectively an offence against possession or control".⁷³

But what if the owner transfers possession mistakenly and without any real intention to pass property? The High Court discussed this type of situation in *R v Illich*.⁷⁴ The court identified the fundamental mistakes that might be made by the true owner which would suffice to negate or prevent the passing of property, that is, mistakes as to the identity of the transferee, the identity of the thing delivered, or the quality of the thing delivered. In *Illich*, possession and ownership in the cash did pass, and in addition the High Court considered that with currency, property passes with possession in any case where the person given the money is unaware of the mistake at the time.

In *Mujunen* there were two different types of bank transactions, that is, over the counter, and automatic teller machines (the ATM cases). *Mujunen* deposited a forged cheque and then withdrew the money before the cheque was cleared. It was

71 *Parker v The Queen* (1997)71 ALJR 598 per Dawson, Toohey and McHugh JJ at 611

72 (1997)71 ALJR 598 per Kirby J at 623; s373 WA Code is equivalent to s393 Qld Code

73 R.G.Kenny *An Introduction to Criminal Law in Queensland and Western Australia* 4th ed., Sydney: Butterworths, 1997. [15.9] at 258

74 (1987) 162 CLR 110 at 126,139-144

held that the over the counter transactions could not constitute stealing because the owner (the bank) had consented to the transfer of possession of the money. The teller intended to give the money to *Mujunen* and thus the situation came under the principle in *Illich*. This issue of whether property has passed is still the main point of difference between the offences, but its application involves increasingly technical distinctions in relation to differing rules where money or currency is involved, and where fundamental mistake comes into play such as in the examples in *Illich*. In *Croton*, where the charge was larceny as a joint owner of a bank account, the conviction was quashed on appeal. The money was held to be a chose in action and the property of the bank. Thus, when the bank delivered the money to Croton, property and possession passed. Therefore, Croton could not have stolen the joint account holder's money. Croton only had a civil legal liability to account to the joint owner of the account when he withdrew money from the account. After all, money in the bank belongs to the banker and the relationship between the banker and the customer is one of debtor and creditor.⁷⁵

Are there any situations when property has passed and a stealing offence is still available? Where the property is not identifiable. Provision has been made in s391(2A) for situations in which the thing taken is not identifiable, for example petrol already mixed with that in a vehicle. In this case, the person taking it is deemed to do so fraudulently unless certain conditions as to payment have been met.

However, under section 408C, it is possible to dishonestly use the property of others which is in your possession and being held under a trust or direction. Dishonest application is an offence, not against the person having actual possession, but against the legal owner. In *R v Saba*,⁷⁶ cheques drawn against the partnership joint account, were delivered to Saba's personal creditors. The Court decided that "by doing so he converted cheques which belonged to him and Ms Lu as co-owners. ... Cheques are simply pieces of paper which have little if any intrinsic worth as such. However, in law the value of a converted cheque is the amount of money received under it." Thus, in this situation, it was found that Saba had dishonestly applied money from the account to his own use under s408C. Similarly, in *R v Harvey*,⁷⁷ a Minister used government money to pay personal debts. The Minister used credit cards to pay personal liabilities and then subsequently caused cheques to be drawn against a government account to discharge the debt. Thus, the property involved was a chose in action belonging to the Crown, that is, "the Crown's right to moneys standing to the credit of a bank account or the Crown's right to draw upon moneys up to an agreed overdraft limit in any such account".⁷⁸ However, there was no real argument regarding ownership here. The case really turned on

75 Refer to Barwick, CJ in *R v Croton* (1967) 117 CLR 326 at 332

76 *R v Saba* (Unreported decision of the Court of Appeal Supreme Court of Queensland delivered on 2/9/94 at Brisbane) at 5

77 [1993] 2 Qd R 389

78 *R v Harvey* [1993] 2 QdR 389 at 436

the issue of dishonesty and the test to be applied under 408C.

What about where the owner consents to the dishonest application? In *Capewell*, it was held that where the mother, with her 13 year old daughter's consent, withdrew money wrongly credited to her daughter's account through clerical error, and transferred this to her own account, there was a dishonest application of a chose in action to her own use under the section. The situation was that, as a result of a mistake on the bank's part, there existed a chose in action vested in Fleur. Fleur's account was deliberately credited with the extra \$4000 and the bank officer deliberately notified Fleur of the credit amount in the account. Mrs Capewell caused the money to be transferred to her own account and then proceeded to use ATMs to withdraw the money. Therefore, it is possible to have a dishonest application under s 408C irrespective of the owner's consent. This case follows the line of authority emanating from *Lawrence v Metropolitan Police Commissioner*⁷⁹ where it was held that there could be a dishonest appropriation of property even though the appropriation took place with the consent of the owner. In that case, the tourist had handed his wallet to a taxi driver who proceeded to remove a greater amount than required and so overcharge for the fare.⁸⁰ According to McPherson, J, this case provides "indirect" authority for the Queensland section: If the owner's consent is not a requisite for an appropriation under the *Theft Act*, there is even less reason for saying it is needed under s408C'.⁸¹ Pincus JA, in dissent, thought that the indictment was wrongly framed and that the appellant could have been charged with stealing from the bank as per *Evenett's Case*⁸² where money was withdrawn from an ATM when the machines were "offline" and when there were no funds in the account. This argument was based on an opinion that the \$3500 in issue did not belong to Fleur, and at the trial the jury had not been required to consider any alternative verdicts open on the charge (under s581 of the Code).

Difficulties with the framing of the indictment were also encountered in *Jell's Case*.⁸³ This was an Attorney-General's reference from an acquittal pursuant to s669A(2). Jell was charged with dishonest application of money belonging to the company for which she worked. It was contended that Jell altered the amounts on cheques that had already been signed by an authorised officer of the company. She then presented the cheques and the bank paid the full amount. Jell retained the extra amounts. Title in money passes with possession, and although Jell received some money on behalf of her employer, "legal title in the amounts representing the increases on the face of the cheques could not be regarded as passing to the company".⁸⁴ The indictment was brought under s 408C (1)(a), that is, dishonest application of "property belonging to another". With hindsight, then, the indictment could

79 *Lawrence v Metropolitan Police Commissioner* [1972] AC 626

80 *R v Capewell* [1995] 2 QdR 64 at 70

81 [1995] 2 QdR 64 at 70

82 [1995] 2 QdR 64 at 75

83 *R v Jell* (1990) 46 A Crim R 261

84 (1990) 46 A Crim R 261 at 263

more successfully have been argued under s 408C(1)(b) – “property belonging to him, which is in his possession or control (either solely or conjointly with any other person) subject to a trust, direction or condition or on account of any other person.” There was no evidence on the issue of ownership at trial, and as it was a question of fact for the jury, the academic appeal was not able to resolve this question. Thomas, J noted, however, that ownership affected the penalties in this instance, because “her status as a servant of the alleged owner was a specific aggravating circumstance which rendered her liable to imprisonment for 10 years”, whereas if the bank were the owner, the maximum penalty would have been five years.⁸⁵ For 408C then, the property must belong to another although it can be an accused’s property subject to a trust, direction, condition or on account of another. This last phrase was explained in *Allard* by Thomas, J – “if a man comes into possession of money in respect of which he has to account to another, he possesses that money on account of that other person”.⁸⁶

To summarise, then, s408C has been successfully applied where cheques are drawn against joint bank accounts, or bank accounts owned by another, such as government accounts. It is also possible to use s408C where the owner has consented to the transfer of funds as in a *Capewell* situation. With the stealing offences, however, once the owner has voluntarily transferred money then a stealing offence cannot be made out. The exceptions to this rule are laid down in *Illich*.

Separate dishonesty tests

Thus, the two sections have distinct elements and are using different tests of dishonesty. Under s408C, the action must be “dishonest”, and there must be a “dishonest application”, whereas under s391, there must be a “fraudulent taking or conversion”. As discussed, there had been a suggestion that the 408C test be changed to “dishonest appropriation” but this was not included in the latest amendments. For a test of dishonesty under the Queensland Code, reference is made to the *Laurie* test where Connolly J stated that the jury should ask whether:

- a) what an accused has done was dishonest by the standard of ordinary honest people; and
- b) if they find it was, they then have to consider whether the accused himself must have realised that what he was doing was by those standards, dishonest.⁸⁷

This test has been more recently applied in *R v Harvey*,⁸⁸ and accepted by the committee developing the model criminal code.⁸⁹

Application’ was discussed in *Easton*⁹⁰, where Macrossan, CJ pointed to the

86 *R v Allard* [1988] 2 Qd R 269 at 271

87 *R v Laurie* [1987] 2 Qd R 762 at 763

88 *R v Harvey* [1993] 2 Qd R 389.

89 *R v Peters* (1998) 96 A Crim R 250 at 292 [128].

90 *R v Easton* [1994] 1 Qd R 531

need for some mental element, an intention in relation to the thing, and some implementation of that intention - an act or acts which constitute some dealing with the thing. Pincus and Demack, JJ thought that a claim or assertion of ownership was not sufficient. In this case, the accused had simply claimed ownership of a cheque. This suggests that the "application" required will be closer to "asportation", with the difference being that the "dealing" under s408C need not be a physical act.

What is an "appropriation" and how does it differ from "application"? Kenny's commentary appears to use the terms interchangeably, and in fact s408C was originally titled "Misappropriation" being changed to "Fraud" in the latest amendments.⁹¹ The Connolly Review in 1996 suggested the replacement of the word "applies" by the term "appropriates" throughout the section, and that report adopted the definition set out in the O'Regan Review. "Appropriates" was defined as meaning "to take, use, convert or otherwise assume any of the rights of the owner".⁹² As mentioned, this test had also been included by the O'Regan Review as a definition within its general stealing offence in Draft s202(3)(a).⁹³ Broadly speaking, this is the "taking on one's self of the right to do something which the owner has the right to do by virtue of his ownership".⁹⁴ So both the recent reports had suggested the same wording in this regard but the change was not included in the 1997 revisions. As a result, the principal dishonest application offences in s408C (408C(1)(a)(i) and (ii)) remain virtually unchanged. The issue is not canvassed at length in the debates:

Therefore it is appropriate to retain the distinction between stealing and the offence in section 408C, as opposed to fully adopting the recommendation of the advisory working group to substitute "appropriation" for "application", because there would have been no difference between the two offences.⁹⁵

Would the mere substitution of the word "appropriation" for "application" have had this effect? More importantly, what is the reason for keeping this aspect, that is dishonest application separate from stealing? Is this simply an artificial categorisation that produces confusion, or is there an added point of intentionally allowing overlap in an effort to "cover the field".⁹⁶

Some consideration of the distinction between larceny, fraudulent conversion

91 R.G.Kenny *An Introduction to Criminal Law in Queensland and Western Australia* 4th ed., Sydney: Butterworths, 1997. See discussion at beginning of 15.18 at 263

92 Queensland, Criminal Code Advisory Working Group. Report of the Criminal Code Advisory Working Group to the Attorney-General, July 1996. 73, 74

93 *Final report of the Criminal Code Review Committee to the Attorney-General, June 1992*. Brisbane : Govt. Printer, 1992. 99 Draft s202

94 C.Williams and M.Weinberg, *Property Offences*. 2nd ed., Sydney: Law Book Co., 1986. 73

95 Queensland Parliament. Official Record of the Debates of the Legislative Assembly. First Session of the 42nd Parliament 27 and 28 Vol 277, 4 Dec 1996 *Criminal Law Amendment Bill 4873*

96 On this point refer to the 1983 Murray Report's discussion of the Western Australian fraud offences - "Certainly there will be some overlap between the various paragraphs as it is recommended to be enacted. But it is much more desirable clearly to have some overlap than to have gaps in the coverage of the Section." 270 Quoted in the 1992 O'Regan Review 234

and fraudulent misappropriation under common law based provisions took place in the *Director of Public Prosecutions (Commonwealth) Reference No1 of 1996*.⁹⁷ Three matters were referred for consideration by the Director of Public Prosecutions for the Commonwealth pursuant to s405A of the *Crimes Act 1958* (Cth). The respondent, a postal services officer at a suburban post office, was authorised to issue money orders in exchange for value. However, on a number of occasions, he sold the orders on credit. He was charged with fraudulent misappropriation under s71(1) *Crimes Act 1914* (Cth), but the trial judge ruled that the evidence led by the Crown did not support the charge laid and in consequence verdicts of not guilty were returned by direction. Winneke, J stated that "larceny, ... involved a felonious taking and carrying away of property without the consent of the owner with an intention to permanently deprive, whereas fraudulent misappropriation involved the dishonest misapplication of property entrusted to an accused and/or for which he was obliged to account in circumstances which did not amount to stealing." Under that legislation, the distinction was drawn between the limited common law provision of larceny, fraudulent conversion, and fraudulent misappropriation. The latter would be most akin to the Queensland s408C offence.

An intention to permanently deprive

There are differences in the offences as to the intention to permanently deprive. The stealing offence has more complex requirements and tests. Section 391 requires proof of a fraudulent taking or conversion, evidenced by an intention to permanently deprive the owner of possession or deal with it in such a way that it cannot be returned in the condition it was in when taken s391(2) (a)-(e). In the case of money, under s391(2)(f), an intent to repay the owner is not sufficient to exculpate the offender. There is a rebuttable presumption of an intent to permanently deprive a person of a fungible, that is, items which are in some way interchangeable, such as money or petrol under s391(2A) and (2B). Borrowing or taking with an intention to return is also covered by s408C, but unlike with the stealing offence it is not simply limited to borrowing "money". Section 408C(3)(b) provides that:

- (b) a person's act or omission in relation to property may be dishonest even though -
 - (i) he or she is willing to pay for the property; or
 - (ii) he or she intends to afterwards restore the property or to make restitution for the property or to afterwards fulfil his or her obligations or to make good any detriment; or
 - (iii) an owner or other person consents to doing any act or to making any omission; or
 - (iv) a mistake is made by another person;

⁹⁷ *Director of Public Prosecutions (Commonwealth) Reference No1 of 1996*. (1997) 149 ALR 574 at 586

Of course, in modern transactions it is not always necessary to permanently deprive a person of property in order to gain a benefit, for example, interest on funds in an account. This aspect of the difference in the offences may assume less importance than others.

Conclusion

The starting point for this discussion resides in the differences between occasions when the offences of stealing or "fraudulent taking or conversion", and fraud or "dishonest application", can be used now that the property definitions for the stealing offence has widened. The discussion has also noted that the amendments to the ambit of the definition of property is still incomplete - particularly as regards confidential information. Another issue is the separation of custody, possession and ownership in regard to the property in question, and the effect this may have on the choice of offence. In regard to stealing, there is still the paramount issue of asportation as a "stumbling block" in proof of the offence. And finally, more difficult questions exist in regard to whether there is any real difference between fraudulent conversion, including asportation, and dishonest application.

Therefore, we may ask whether the latest amendments are the most efficient resolution for regulation in this area, and indeed why the legislature did not simply expand the definition of property in s390 in 1979 and amend the asportation provisions rather than introducing s408C as a whole new section with a separate test. The collapsing of the offences relating to deceiving others into agreeing to part with possession or ownership has only compounded the complexity of s408C. The latest amendments seem to represent a "half-way house" solution to the current property offence issues. Perhaps the 1992 Review Committee's suggestions might have resulted in a clearer statement of the law. From the preceding discussion of the amended sections, it is apparent that there are remaining differences in elements and proof, but it is also evident that an opportunity to streamline the offences along the lines suggested by the O'Regan or Connolly Reports or even according to the Model Code provisions has been lost.

Assuming these differences in the tests, what purpose do the different sections achieve? Are they simply directed to different types of behaviour so as to "cover the field" and allow for the unusual fact situations that can occur? The cases coming before the appeal courts tend to have originated in errors in the indictment pointing to uncertainty in dealing with the intricacies and technicalities presented by the provisions. Perhaps some degree of technicality will always need to be associated with this area of the law because of the complexity of financial transactions available in the modern context and the necessity to ensure proof of an offence having been committed. It may be useful to identify the types of situations where a stealing offence would not succeed but a "dishonest application" offence will, but the variety and intricacy of fact situations arising from modern commercial transactions are virtually impossible to predict or categorise. Perhaps this is the best argument for retaining the two different approaches reflected in the sections.

There is a third issue here and that concerns the public "psyche", and perceptions of difference made relevant because of the jury process which determines guilt and the subsequent public perception of the character of a person arising from the offence stated on the criminal record. Would it be counterproductive to abolish the old stealing offence? After all, the point has been made that:

Artificial collapsing of categories is as bad as artificial distinctions. It undermines public acceptance of the law and confuses juries by lumping disparate forms of behaviour together.⁹⁸

Perhaps the differences therefore perform a "labelling" function.⁹⁹ The practicalities are that "the criminal law seeks to find appropriate labels for different kinds of wrongdoers, as part of its 'representative labelling' function". So it has been suggested that the label "thief", for example, does not carry the same moral import as the label "conman".¹⁰⁰ So perhaps the public outrage and qualities or moral failure inherent in one who would intentionally take another's property differs significantly from that of another who might simply use property that has come under their control for their own purposes rather than for the legal owner's. Or are we dealing in semantics - "morally trivial distinctions"?¹⁰¹ In relation to labelling, it would seem that s391 is focussed on a conservative nineteenth century view of stealing of physical property requiring physical movement of "goods", whereas s408C is directed at dishonesty arising in commercial settings and the "abuse of special relationships such as those involving directors and officers of corporations and trustees", that is, "white-collar crime"¹⁰² But is it really necessary to have totally different sections of the Code to cover the two categories? Is this simply an example of the modern criminal law treating the more educated thief differently?¹⁰³

98 Model Criminal Code *Chapter 3 Discussion Paper - Part One* December 1993. 59

99 A.Ashworth, "The Elasticity of Mens Rea" in C.Tapper *Crime, Proof and Punishment*. London: Butterworths, 1981 53

100 S.Shute and J.Horder, "Thieving and Deceiving: What is the Difference?" (1993) 56 July *Modern Law Review* 548 at 550

101 P.R.Glazebrook, "Thief or Swindler: Who Cares?" [1991] CLJ 389

102 R.G.Kenny *An Introduction to Criminal Law in Queensland and Western Australia* 4th ed., Sydney: Butterworths, 1997. 15.16 at 262

103 I am indebted to Geraldine Mackenzie and Carmel MacDonald who gave me the benefit of their views on an earlier draft of this article. The final responsibility for the article and any errors in it is my own.

Bibliography

- Australia. Standing Committee of Attorney-Generals, *Model Criminal Code : Chapter 3 Theft Fraud and Related Offences Discussion Paper - Part One*, Canberra: Government Printer, December 1993
- Australia. Standing Committee of Attorney-Generals, *Model Criminal Code : Chapter 3 Theft, Fraud, Bribery and Related Offences Discussion Paper - Part One*, Canberra: Government Printer, Final Report December 1995
- Colvin, E., Linden, S. and L.Bunney *Criminal Law in Queensland and Western Australia*. 2nd ed., Sydney: Butterworths, 1998
- Edwards, E., Harding, R. and I. Campbell. *The Criminal Codes : Commentary and Materials*. 4th ed., Sydney: LBC Casebooks, 1992
- Final report of the Criminal Code Review Committee to the Attorney-General, June 1992*. Brisbane : Govt. Printer, 1992.
- Gardner, S. 'Is Theft a Rip-Off?' (1990) 10 (3) *Oxford Journal of Legal Studies* 441
- Glazebrook, P.R. 'Thief or Swindler: Who Cares?' [1991] CLJ 389
- Jackson, M. 'Unauthorised Release of Government Information' (1993) 1(2) *Current Commercial Law* 54
- Jerrard, J., B.Butler and M.Shanahan, *Carter's Criminal Law of Queensland* 10th ed., Sydney: Butterworths, 1997
- Kenny, R.G. *An Introduction to the Criminal Law in Queensland and Western Australia*. 4th ed., Sydney: Butterworths, 1997
- Lanham, D., M.Weinberg, K.Brown, G.Ryan *Criminal Fraud*. Sydney: Law Book, 1987
- Mukherjee, S and D.Dagger, *The Size of the Crime Problem in Australia* Griffith: Australian Institute of Criminology, 1990.
- S.Mukherjee, C.Carcach and K.Higgins, *A Statistical Profile of Crime in Australia*. Griffith: Australian Institute of Criminology, 1997.
- Queensland Criminal Code Advisory Working Group. *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996
- Queensland *Parliamentary Debates*. Brisbane: Queensland Government Printer, 1979
- Queensland *Parliamentary Debates*. Brisbane: Goprint, 1996
- Queensland Parliament. *Record of the Legislative Acts*. Queensland Government Printer, 1979
- P.Ridgway 'Fraud and Dishonesty' (1992) 1 (1) *Queensland Criminal Law Journal* 1
- Shute, S. and J.Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 July *Modern Law Review* 548
- Smith, A.T.H. *Property Offences: The Protection of Property through the Criminal Law*. London: Sweet and Maxwell, 1994
- Syrota, G. 'Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence' (1994) 24 *Western Australian Law Review* 261
- Williams, C.R. 'The Concept of Dishonesty' (1980) Sept *Law Institute Journal* 567
- Williams, C. and M.Weinberg. *Property Offences* 2nd ed., Sydney: Law Book, 1986
- Williams, G. 'Appropriation: A Single or Continuous Act?' [1978] *CrimLR* 69