

CRIMINALISATION OF CARTELS

Submission of the National Criminal Law Liaison Committee of the Law Council of Australia

THE DISHONESTY ELEMENT

1. The current draft cartel provision is as follows (s44ZZRF):

- “(1) A person commits an offence if:
- (a) the person makes a contract or arrangement or arrives at an understanding, with the intention of dishonestly obtaining a benefit; and
 - (b) the contract arrangement or understanding contains a cartel provision.”

There is a lengthy definition of “cartel provision” (s44ZZRD).

The penalty for individuals is a maximum 5 years, 2000 penalty units or both.

2. The analogies between the proposed cartel offence and offences in the general criminal law relating to conspiracy to defraud and obtaining property or financial advantage by deception is generally apparent. The drafting of the proposed cartel offence follows the *Criminal Code Act 1995* quite closely. (See s.134.1 Obtaining Property by Deception; s.134.2 Obtaining Financial Advantage by Deception; s.135.4 Conspiracy to Defraud.) For example, conspiracy to defraud is defined under the *Criminal Code Act 1995* (Cth) in the following terms:

“Obtaining a Gain

- (1) A person is guilty of an offence if:
- (a) the person conspires with another person with the intention of dishonestly obtaining a gain from a third person; and
 - (b) the third person is a Commonwealth entity.

Penalty: Imprisonment for ten years.”

Further sub-sections deal with an intent to cause a loss intent to cause a risk of loss to a third person and dishonestly influencing a public official.

3. A recent English extradition decision of the Queens Bench in *Norris v. United States* (presently on appeal to the House of Lords) found that market rigging amounted to conspiracy to defraud under the UK common law.
4. The relevant English legislation (2001) prohibiting cartel conduct includes the element of dishonesty. The offence is to dishonestly make a cartel arrangement. It does not include the intent to make a gain/cause a loss.
5. The proposal to include the element of dishonesty in the proposed Australian cartel offence has been criticised in an article by Brent Fisse, “The cartel Offence: Dishonesty?” (2007) 35 ABLR 235. The arguments against the inclusion of dishonesty in the proposed cartel offence are very similar to the arguments against the inclusion of dishonesty generally in the theft, fraud offences under the UK *Theft Act* and discussed in subsequent decisions culminating in the *Ghosh* test of dishonesty which has been codified in the *Criminal Code Act 1995* (Cth): see s.130.3. That definition is as follows:

“For the purposes of this Chapter, dishonest means:
(a) dishonest according to the standards of ordinary people; and
(b) known by the defendant to be dishonest according to the standards of ordinary people.”
6. Attached is an extract from the Report of the Model Criminal Code Offices Committee on Theft/Fraud offences which deals with the arguments for and against the inclusion of the concept of the dishonesty element in these offences.
7. The conclusion outlined in the MCCOC Report followed the extensive national consultation on a discussion paper which proposed the element of dishonesty for these offences. The overwhelming outcome of the consultation was for the inclusion of

dishonesty. The Government accepted that recommendation and enacted it in the *Criminal Code Act 1995*.

7. The English Law Commission has recently reviewed the law on fraud and deception, including the standard arguments put for and against the *Ghosh Test*. In its final report in 2002, the Law Commission concluded as follows:

“The fact that *Ghosh* dishonesty leaves open the possibility of variance between cases with essentially similar facts is, in our judgment, a theoretical risk. Many years after its adoption, the *Ghosh Test* remains, in practice, unproblematic. We also recognise the fact that the concept of dishonesty is now required in a very large number of criminal cases, so to reject it at this stage would have far reaching effects on the criminal justice system.”

8. While the vast majority of fraud cases do not give rise to difficulty in relation to the element of dishonesty, there are some cases - like *Feeley* and *Ghosh* - which are genuinely hard cases. It seems inevitable that similarly difficult borderline cases will arise under the new cartel provisions, however drafted. The definition of a “cartel provision” runs for several pages and includes numerous exceptions. The quest for precision is nearly always over-optimistic. (The sale shares by directors of the *ABC Learning Centres’ directors* in the context of insider trading may illustrate the problem. For the sake of the argument, assume press reports that the directors are guilty of insider trading. They sold shares under compulsion from their lenders who forced the sale under margin lending provisions. It could not be thought that insider trading was intended to catch this conduct. A dishonesty element would cater for this sort of situation.)
9. In principle, there seems to be no objection to criminalising cartel conduct where people have sought to obtain gain/cause loss by cartel conduct. However, such a criminal

offence must be consistent with the dishonesty offences in the *Commonwealth Criminal Code*. Obviously, the Commonwealth has drafted the proposed cartel offence to be consistent with these provisions.

10. The proposed offence is to carry a five year gaol sentence. If it is to be a criminal offence, the prosecution ought to be required to prove the same elements as they would be required to prove for an offence of fraud generally, or in particular, conspiracy to defraud. In most cases, this will be unproblematic. However, in the marginal case, juries should determine whether the conduct is dishonest.

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The need for a fault element such as dishonesty is much greater under the *Theft Act* which is far more abstract than the old law of larceny; under the *Theft Act* there is no need to prove a physical taking and carrying away of an object or the absence of the consent of the owner. Recently, in England the case of *Gomez* has attenuated the concept of appropriation to the point that almost any dealing with the goods of another satisfies the element of appropriation¹⁰. Picking goods up from the supermarket shelf and putting them into your basket is an appropriation element under the *Theft Act*. It does not have to be shown that this was done without the owner's consent as would have been required at common law. The effect of this is to throw more weight onto the element of dishonesty as a means of distinguishing theft from innocent takings. Some of the effect of this will be offset by the MCCOC recommendation to include lack of consent in the definition of appropriation (see s15.3(1), below). However, while this is desirable and will minimise the residual area where it will be necessary to rely on the element of dishonesty, it will not remove that need. While the element of dishonesty (or an equivalent term) assumes greater importance under the *Theft Act* definition of theft, the controversy surrounding the meaning of that term under the *Theft Act* - and under the Code and common law equivalents - is sharp and the differences between the jurisdictions on the issue are considerable.

The Queensland and Western Australian Codes use the term "fraudulently" in their definitions of theft but they define it in terms of intention to permanently deprive. Tasmania has adopted the term "dishonestly", the Northern Territory uses "unlawfully". Victoria and the ACT use "dishonestly" in their adaptations of the *Theft Act* but each has a different definition and this is different again from the definition arrived at in the English cases on dishonesty.¹¹

The common law jurisdictions - New South Wales and South Australia - use "fraudulently" in its common law sense. But the common law cases on the meaning of the term fraudulently were confused. While old definitions held that takings had to be morally wrongful, and judges said that the term fraudulently had to add something to the offence of theft, some of the cases just prior to the *Theft Act* seemed to give little meaning to "fraudulently" beyond intent to permanently deprive.¹² The framers of the *Theft Act* thought that dishonesty did add a "vital element" to theft but that the term fraudulently was too technical. They substituted "dishonestly" on the basis that it "is something which laymen can easily recognise when they see it." Because of this, the *Theft Act* does not define "dishonestly", although it does specify that certain states of mind (eg where the defendant has a claim of right, believes that he or she would have the other's consent, or believes the owner cannot be found) are *not*

¹⁰ *Gomez* [1992] WLR 1067

¹¹ See the discussion of these elements in Williams and Weinberg, ch 2.

¹² See generally, Fletcher, "The Metamorphosis of Larceny" (1976) *Harv LR* 469. In particular, Williams [1962] *Crim LR* 111, *Cockburn* [1968] 1 *All ER* 466.

to be regarded as dishonest. The *Model Criminal Code* follows the *Theft Act*. The claim of right defence is set out in s.9.5 of the *MCC* with the other general principles of criminal responsibility. Cases of a person finding goods and believing that the owner cannot be found by taking reasonable steps are covered in s15.2(1). The Code does not follow the *Theft Act* in specifically saying that a taking is not dishonest where the taker believes that he or she *would* have the owner's consent if he or she knew of the taking and its circumstances. A submission from Mr I Leader-Elliott suggested that the section should also cover mistaken belief that the owner *had* consented. He also pointed out that this provision may be relevant in a deception case where, for example, because of some temporary situation the defendant needs to deceive the victim but believes the victim would consent if he or she knew the true situation. This situation is not provided for in the *Theft Act*. The Committee agrees with the submission but has concluded that these situations are best be covered by the general definition of dishonesty in s14.2(1) which does not have an equivalent under the *Theft Act*. The Code follows the *Theft Act* in providing that a taking may be dishonest even though the taker intended to pay (s.15.2).¹³ But beyond these situations, what *does* it mean to be dishonest?

The positive meaning of "dishonesty" has been left to the case law where the leading English authority is the Court of Appeal decision in *Feely*. In *Feely's Case*, the defendant had borrowed money from his employer's till, contrary to the employer's directions, but said he intended to repay the money a couple of days later. Because Feely did not intend to repay those particular notes, he had the intent to permanently deprive. The only question was whether he was dishonest. He knew the employer did not consent so the question was what further meaning dishonesty might have. The Court of Appeal ruled that dishonesty is an ordinary word in the language and that the jury, not the judge, should determine whether the defendant's appropriation was dishonest according "to the current standards of ordinary decent people". This should not be subject to judicial elaboration. The Court of Appeal in *Ghosh* modified this into a two step test:

...a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.¹⁴

13 Vic: s73(2) & (3); ACT: s 96 (3), (4) & (5). Subsections 73(2)(a) and (b) are not expressly applied to the deception sections (ss81 and 82) of the Victorian Act. It seems to have been assumed in the *Salvo* line of cases that these subsections do apply to the deception offences.

14 *Feely* [1973] QB 530; *Ghosh* [1982] 3 WLR 110, 118-9.

The Court of Appeal went on to explain that in most instances where the actions are obviously dishonest by ordinary standards, the jury will easily draw the inference that the defendant knew that he or she was acting dishonestly. The defendant would not escape with a "Robin Hood" defence because he or she would know the taking was dishonest by ordinary standards, even though he or she felt morally justified in doing so.

-Arguments for the Feely/Ghosh test

The *Feely/Ghosh* test has been the subject of considerable controversy. Its supporters argue that the term it replaces - fraudulently - was similarly a matter for the jury to decide. Like the concept of negligence, dishonesty has to be flexible enough to cover a myriad of situations and to reflect community standards which may vary from time to time. They say that dishonesty is a concept that all jurors employ in everyday life and that the jury is ideally placed to determine the hard cases which hover between honesty and dishonesty. Variability between similar cases is no more a concern here than it is in negligence cases, or where juries have to determine "offensiveness" in offensive behaviour, or whether menaces are "unwarranted" in blackmail, or whether a secret commission was "corruptly" received, or the meaning of the common law term "fraudulently" in larceny or conspiracy to defraud, or the standards of self-control of an "ordinary person" in the provocation defence. As McInerney J said in his dissenting judgment in the first of the 3 Victorian decisions rejecting *Feely*.

Differences of opinion in such cases - and perhaps *R v Williams*, *R v Cockburn* and *R v Feely* may be taken as illustrations - should not be allowed to obscure the truth that in the overwhelming number of cases the fact-finding tribunal - be it jury, judge, magistrate or justice of the peace - will have no difficulty deciding whether the act was done honestly or dishonestly. If or in so far as this requires the fact-finding tribunal to undertake the task of ascertaining and applying the standard of honesty, accepted in the community, it is complying with the will of Parliament which has imposed on it that very task. Nor is there any great novelty judges or fact-finding tribunals assuming to act as judges of moral standards; such task is commonly committed to them by legislation, as, in my opinion, by the provisions of the *Theft Act*.¹⁵

Those opposed to the *Feely/Ghosh* test argue that it is uncertain and may lead to inconsistent verdicts in similar cases. While not perfect, twelve minds on the jury may be expected to fairly reflect community standards on this issue as they are in other cases (eg criminal negligence, provocation, self-defence) when called on to make evaluative assessments. It is true that single judges and magistrates

¹⁵ *Salvo* [1980] VR 401, at 408-409.

cannot be said to be as representative as juries but their variability on this issue is unlikely to be greater than on other similarly evaluative criteria. In any event, a degree of uncertainty or variability is preferable to a very narrowly-drawn definition of dishonesty. Certainty is a dubious benefit when it means that the defendant will certainly be convicted of theft if he or she cannot make out a claim of right in a case where he would have a chance of acquittal on the *Feely/Ghosh* test. Opponents of the *Feely/Ghosh* test tend to paint it as though it casts the law forth into a sea of moral confusion and uncertainty. In fact the cases where dishonesty is a genuine issue are few. Where it does arise, the defendant is entitled to have that question determined on its merits. It is no answer to this to say that a defendant should have to rely on prosecutorial discretion or a lenient sentence. The law can fairly be criticised if it sweeps difficult moral judgments under the carpet with a definition which simply precludes consideration of the hard question - as the Victorian cases do (see below). Dishonesty raises very difficult questions in the borderline cases. The great virtue of the *Feely/Ghosh* test is that it provides a framework in which those questions can be asked and answered so that justice can be done in the individual case.

In response to the argument about the difficulty for lawyers in advising their clients (for example, business people getting legal advice - a rare enough happening in these sorts of cases, but note *Salvo*) - the answer is that if such people are sailing too close to the wind, the prudent course would be to avoid doing it. That is a better solution than rigidly confining the concept of dishonesty in an artificial way. Convicting the common or garden person who does not have access to legal advice would be too high a price to pay for certainty.

Finally, *Feely/Ghosh* gives the defendant an argument to put to the DPP as to why the prosecution in that the case should not proceed. It is not sufficient to argue that there is no need for a dishonesty requirement and that deserving cases will be weeded out of the system by the operation of prosecution discretion at large. The presence of the element of dishonesty supplies a basis for the exercise of the prosecutorial discretion.

-Arguments against the dishonesty approach and the Feely/Ghosh test

Critics of the dishonesty approach and the *Feely/Ghosh* test regard it as an abdication of legislative and judicial responsibility and a departure from the standards of precision and certainty which should characterise the criminal law. They argue that the parameters of dishonesty should be drawn more tightly to enable judges to assist juries and to avoid inconsistent application of the test. One of the strongest criticisms of the *Feely* approach was made by Fullager J in *Salvo*.

Long ago William Blackstone cogently warned against the notion that a judge should decide each case in the way that he thinks morally right or just, without founding his decisions on known

legal principles: "The liberty of considering all cases in an equitable light must not be indulged too far, lest we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law without equity, though hard and disagreeable, is much more desirable for the public good than equity without law which would make every judge a legislator and introduce most infinite confusion; and there would then be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind."¹⁶

Rather than attempt to tailor a provision to deal with all possible (largely hypothetical) hard cases at the expense of clarity and certainty of the law, it is preferable that such cases could be dealt with at sentence, if not earlier eliminated by prosecutorial discretion.¹⁷

In Victoria, the *Feely/Ghosh* test has been rejected in a series of decisions in the Court of Criminal Appeal, though not without some strong dissenting judgments. The Victorian authorities are not easily stated but the position appears to be that unless the defendant can point to a claim of right or one of the two sub-sections describing states of mind which are *not* to be regarded as dishonest (a belief that the owner would have consented, or that the owner cannot be found), he or she will be taken to be dishonest. In other words, beyond the exceptions stated in the statute, dishonesty adds nothing to the definition of theft.¹⁸ On the existing *Theft Act*, that means that a person who did take money from the employer's till against instructions would have to be convicted of theft even if the jury was fully satisfied that he or she did intend to return it.

Another problem is that explanation of the issue of dishonesty to juries and the determination of that issue will unnecessarily occupy the time of the courts and, given the present emphasis on reducing the cost of justice, this should be avoided.

¹⁶ *Salvo* [1980] VR 401, at 429-430.

¹⁷ See Gibbs, *Fourth Report*, paras 20.25 - 20.26.

¹⁸ There are numerous academic critics of the *Feely/Ghosh* test. See for example: J C Smith, "Commentary on *R v Feely*" [1973] *Crim LR* 192; D W Elliott, *Dishonesty in Theft: A Dispensable Concept* [1982] *Crim LR* 395; Griew, "Dishonesty: The Objections to *Feely* and *Ghosh*" [1985] *Crim LR* 341. See the discussion in Williams and Weinberg, 109-120. The Victorian cases, all relating to obtaining property by deception, are: *R v Salvo* [1980] VR 401 and *R v Brow* [1981] VR 783, and *R v Bonollo* [1981] VR 633. Note that Williams and Weinberg argue that there may still be room to argue that dishonesty has some residual meaning beyond the sub-sections specifying what is not dishonest, 118.

Other proposals

Critics of the *Feely/Ghosh* test are divided about the appropriate alternative. Some favour the test stated in the Victorian decisions, namely that dishonesty should be confined to claim of right and the two statutory exceptions. The alternative canvassed by McGarvie J in *Bonollo*¹⁹ was that the person should be regarded as dishonest by the jury if he or she were conscious that the appropriation would cause a significant practical detriment to the victim. This is not the law in Victoria but has been codified in the ACT. An appropriation will not be regarded as dishonest in the ACT if the person:

appropriates the property in the belief that the appropriation will not thereby cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property.²⁰

Those attending the ACT consultation meeting could not recall a case in which this section had been relied on and favoured the *Feely/Ghosh* test.

The Mitchell Committee in South Australia made a similar proposal:

Our understanding of “fraudulent” in the present context is an intention to act in a manner known to be materially inconsistent with the wishes of the victim.²¹

The Gibbs Committee criticised such provisions on the basis of looseness and uncertainty. Merely to act contrary to the wishes of the owner is not a sufficient substitute for dishonesty in the context of theft and fraud. The third approach attempts to avoid these problems: the NT uses the word “unlawfully” instead of “dishonestly”. This is defined as meaning “without authorisation, justification or excuse.” The Gibbs Committee proposed a similar test, “without lawful justification.”²²

Conclusion

Theft does involve “moral obloquy”, as the common law cases put it, and MCCOC believes that it is necessary for the offence of theft to retain a broad concept of dishonesty in order to reflect the essential character of the offences in this chapter as involving moral wrongdoing. To define anyone who cannot rely on a legal claim of right or a belief in the owner’s consent as dishonest (“the narrow approach”) - and hence a thief - is unduly restrictive in the offence of theft, as the facts of *Feely’s* case itself show. Where - as is proposed here - dishonesty is to be used for other offences as well as theft, the narrow approach

¹⁹ *R v Bonollo* [1981] VR 633.

²⁰ Section 96(4)(b). See too Williams and Weinberg, 112-120.

²¹ South Australia, Criminal Law and Penal Methods Reform Committee, *Fourth Report: The Substantive Criminal Law*, (1977) pp161-2.

²² NT: s 209(1); Gibbs, pp132-133.

is both restrictive and irrelevant: belief in the owner's consent in a deception case will seldom be relevant. Nor will belief in the owner's consent of a claim of right (ie to a proprietary or possessory right) be relevant in deciding whether a payment to an official in order to influence his or her duty amounts to a legitimate payment or a bribe. On the other hand, general standards of honesty and integrity will be crucial in determining that question.

The alternatives to the *Feely/Ghosh* test canvassed above are not satisfactory. The ACT/Mitchell Committee approach is not only vague, as the Gibbs Committee pointed out, but it is also too limited in relying on activity adverse to the rights of the owner.

The Northern Territory/Gibbs "without lawful justification" approach is also unsatisfactory. The effect of such a definition is itself uncertain. One possibility is that it restricts the ambit of dishonesty defences to the negative definitions of dishonesty in the Act (ie claim of right, belief that the owner would consent, etc,) and any other general justifications and excuses. But, as the Court of Appeal pointed out in *Feely*; this would lead to the unjust conviction - as a thief - of a person who intended to return the money borrowed, even though the borrowing was unauthorised. This situation might be covered by dealing with the problem of fungibles (items like sugar, petrol, etc which are interchangeable) in the way suggested in DP1 (see s302.14) but submissions rejected this approach arguing that the *Feely/Ghosh* definition of dishonesty was a more comprehensive solution to the problems of dishonesty and rendered this unnecessary. If, on the other hand, "without lawful justification or excuse" extends further to allow a more general evaluation of the Defendant's state of mind, then it merely conceals the fact that it is the same sort of test as dishonesty. MCCOC believes that dishonesty is a better term for this than "without lawful justification" or "fraudulently".

Because honest and dishonest behaviour is so variable, attempts at capturing the substance of that concept in a statutory definition would be as difficult as a statutory definition of the concept of negligence. Requiring juries to determine community standards is not a novel proposition in the law generally - negligence being the most obvious example. Although, as the arguments for and against the *Feely/Ghosh* test reveal, there are strong philosophical disagreements about how far such concepts should be used in legislation and applied by courts and juries, the Committee's view is that the best that the law can do with such general concepts is to commit them to the juries or magistrates as the arbiters of community standards in such cases. As a practical matter, dishonesty will only arise as *the* issue infrequently in the very difficult cases. Where the law can provide a test which will allow the jury to make a determination of the fundamental issue, it should do so. The prediction that the *Feely/Ghosh* test will produce uncertainty and inconsistent verdicts in a large number of cases does not seem to be borne out in England or in Australia where it is already used in a number of jurisdictions for a variety of offences. Indeed, a submission

from his Honour Judge Boyce of the Queensland District Court said that the *Feely/Ghosh* test was easy to explain to juries and worked well. The Queensland DPP also supported the *Feely/Ghosh* test.

The *Feely/Ghosh* test is the best way of dealing with an issue that has been part of the law of theft for a very long time. The *Theft Act* merely substituted the term "dishonestly" for the term "fraudulently" in the old common law definition of larceny. The argument in *Feely* and *Ghosh* only continued earlier debates about the meaning of "fraudulently". Indeed the *Feely* test has been adopted in Australia as the correct test for "fraudulently" in New South Wales and South Australia - common law jurisdictions - and for "intent to defraud" in Western Australia and "dishonesty" in Queensland - both *Griffiths Code* jurisdictions. Trial judges in Tasmania generally adopt the *Feely* approach. It is also the test in all jurisdictions for conspiracy to defraud.²³ The Queensland Code Review Committee has proposed the *Feely/Ghosh* test. The Murray review in Western Australia has proposed the term "intent to defraud" but this appears to be little different to the common law term fraudulently which has in turn been interpreted to mean the *Feely* test.²⁴

In view of the conflict in the authorities and the diversity in the various Australian jurisdictions, some common test has to be laid down in the *Model Criminal Code*. A very clear majority of submissions favoured the *Feely/Ghosh* test as proposed in DP1 (s301), although this was not without some strong contrary submissions, in particular at the Victorian consultation seminar. MCCOC concludes that not only is the *Feely/Ghosh* test the most satisfactory in principle but that it also represents the majority consensus across the jurisdictions. Because of the Victorian case law, the test ought to be codified. Section 14.2(1) does this. Section 14.2(2) makes it clear that the issue of dishonesty is a matter for the trier of fact.

23 NSW: *R v Glenister* [1980] 2 NSWLR 597; SA: *Kastratovic (1985)* 42 SASR 59; Queensland: *Allard [1988]* 2 Qd R 267, 270-1, 276; *Sitek [1988]* 2 Qd R 284; and *Harvey [1993]* 2 Qd R 389. WA: *Cornelius and Briggs* (1988) 34 A Crim R 49; *Clark and Bodlavich* (1991) 52 A Crim R 180, at 193-4. Tas: *R v Fitzgerald* (1981) 4 A Crim R 233. Conspiracy to defraud cases employing the *Feely/Ghosh* test of honesty as the essential component: *Walsh* [1984] VR 474, *Horsington* [1983] 2 NSWLR, *Eade* (1984) 14 A Crim R 186. *Einem v Edwards* (1984) 12 A Crim R 463, *Maher* [1987] 1 Qd R 171, *Brott v Reidel, & Castles* (1989) 44 A Crim R 29 and *Curry v Saunders* (1987) 30 A Crim R 186.

24 O'Regan, proposed new sections 202 and 232. Murray, 268.

PART 3.2 THEFT

The core offence in the first half of this chapter is theft. It has six elements:²⁵

- (1) dishonesty;
- (2) appropriation;
- (3) property;
- (4) belonging to another;
- (5) intention to deprive permanently; and
- (6) the requirement that all the elements exist at the same time.²⁶

The drafting of section 15.1(1) differs slightly in form - but not in substance - from the definition in s302 of DP1 and the *Theft Act* model by deleting the references to "stealing" and "thief". The reference to "stealing" is unnecessary. The relationship between theft and receiving (s15.8) should be noted here. There is a very substantial overlap between theft and receiving stolen goods under the *Theft Act* model. This is because most acts of receiving (and other actions dealing with stolen goods) will amount to appropriations: by receiving stolen goods, the defendant also appropriates those goods (ie the defendant assumes the rights of the owner to ownership possession or control without the consent of the person to whom they belong). Section 16.8(5) provides that the defendant cannot be convicted of *both* theft and receiving in respect of the same transaction. As a practical matter, where the offence involves goods that have not already been stolen, the defendant will be charged with theft. Where the offence involves goods which have already been stolen, the defendant will be charged with receiving. The commentary to s16.8 gives fuller reasons for this approach.

²⁵ Vic: s 72(1); ACT: s 94; cf NT: s 209(1).

²⁶ See Fisse, 285.

14.2 and 15.2 - Dishonesty

The common law has two key fault elements for theft: the taking must be done fraudulently and with intention to permanently deprive. Intention to permanently deprive - which distinguishes the dishonest borrower from the thief - is dealt with below.

Two particular qualifications apply to the s15.1 offence. Section 15.2(1) modifies the general definition of dishonesty in s14.2 by specifying that a person who finds property and decides to keep it will not be dishonest if he or she believes that the owner cannot be found by taking reasonable steps. Section 15.2(2) provides that preparedness to pay does not necessarily absolve a person of dishonesty: the defendant may know, for example, that the owner would not part with his or her favourite car no matter that the full market price of the car was paid. Section 15.2(2) makes it clear that this could still be found to be dishonest.

For the reasons outlined in the commentary on s14.2, two of the *Theft Act* paragraphs specifying states of mind which are not to be regarded as dishonest are not included here: claim of right is dealt with in s9.5 of the *MCC* and belief in consent is subsumed within the general definition of dishonesty.

All the physical and fault elements of the offence must be present at the same time for the offence to be committed. This is a general principle of criminal responsibility and is codified by s3.2 of the *MCC*. Take the example of a person who becomes the owner of goods innocently but subsequently discovers a mistake has been made and dishonestly decides to keep the goods. In the absence of any special provision, there will be no theft because at that later time the goods no longer "belong to another". (But note s15.3(2) and s15.5(3) in relation to this sort of situation.)