The Meanings of Dishonesty in Theft

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Abstract: This paper examines the development of the element of fraudulence in larceny and its recasting as dishonesty in modern theft offences. It examines the diverging approaches in England, Canada, New Zealand and Australia and attempts to explain the implications of the various approaches. It suggests that historical debates over the term arose because of the lack of clarity in early decisions, and that those debates continue today. Consequently, the principled basis for dishonesty as a legal term remains fundamentally unclear and discussion of the term requires further consideration.

Keywords: larceny, theft, dishonestly, fraudulently, comparative law, history of fraudulence

I. Introduction

Dishonesty is increasingly being seen as a basic fault element for a range of offences, from fraud to trade practices, from immigration law to corporate law. The modern use of dishonesty as a fault element began with its use in the Theft Act 1968 (UK), when it replaced fraudulently (described in this article as the concept of fraudulence) as an element of stealing. However, the role of fraud in larceny and its meaning is historically contentious and the lack of certainty has allowed multiple meanings to exist across common law jurisdictions. In particular there is fundamental disagreement over whether dishonesty is a morally-based concept.

II. The Development of Mens Rea in Larceny

Larceny is one of the oldest common law offences. In its earliest form, it has been argued that there was an emphasis on common-sense understandings of crime; what has been described as manifest criminality.1 The idea was that it was possible to clearly identify a thief

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from the thief’s actions without the need for recourse to further information. George Fletcher argues that the emphasis on manifest criminality meant that the mental elements of larceny were not thought of separately from the manifestation of those elements in the manifestly criminal act.

The problem was not how the judges should prove intent, but whether appearances were a reliable guide to reality. The primary inquiry was the act of larceny, and only in extraordinary cases might there have been a dispute about whether someone who acted like a thief had the ‘spirit’ or animus of a thief. Thus the law was structured so as to render intent a subsidiary issue. It was a basis for defeating the implications of the primary element of acting manifestly like a thief.2

As a result, while dishonesty or fraudulence has come to the fore in the modern forms of larceny and theft, it is not surprising that there is little case law on the element of fraudulence in the older common law decisions on larceny. This case law on the precise meaning of fraudulence really only began as a result of the codification of fraudulence in the Larceny Act 1916 (UK) and dishonesty in the Theft Act 1968 (UK).

### III. The Early Common Law Mental Elements of Larceny

The mental elements of larceny were described for centuries by the phrase *animo furandi* or felonious intent, and in 1769 Blackstone could still describe the mental elements of larceny as:

This taking, and carrying away, must also be felonious; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*. This requisite, besides excusing those who labour under incapacities of mind or will . . . indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master’s horse, without his knowledge, and brings him home again: if a neighbour takes another’s plough, that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distress another’s cattle, or seize them: all these are misdemeanours and trespasses, but no felonies. The ordinary discovery of a felonious intent is where the party doth it clandestinely, or being charged with the facts, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, of *animum furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.3

Thus, felonious intent was seen by Blackstone as an undifferentiated compound element containing requirements of legal capacity, intent to permanently deprive and lack of claim of right. In this description the clear emphasis is on the need to show an intention to permanently deprive—as demonstrated by the nature by which the goods were

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2 Fletcher, above n. 1 at 85–6.
taken or the denial of taking. An element of dishonesty or fraudulence may be implicit in the final sentence of the description, but it is clearly a residual role, not clearly articulated.

The one issue that was discussed and resolved in the eighteenth-and nineteenth-century case law was the question of whether Blackstone’s use of *lucri causa* to describe *animus furandi* meant that the accused had to in some way intend to gain as a result of the taking. This was resolved in the negative in 1815 in *R v Cabbage*. There the court found Cabbage guilty of larceny when he backed the victim’s horse down a mine shaft in order to protect a friend from being found to have previously stolen the horse. The report stated:

> [The majority judges] thought a taking fraudulently, with an intent wholly to deprive the owner of the property sufficient.

Although the decision of a bare majority of the judges it was later adopted by the courts as a definitive statement. An intention to permanently deprive was all that was required; there was no need to have any intention to profit by the action. As the examples listed by Blackstone make clear, this was a firm requirement, with a strong emphasis on the permanency of the deprivation. This emphasis was to lessen over time.

In 1834, the *First Report* of the Royal Commissioners summed up the frustration that clearly many felt over the vagueness of the mental elements:

> This branch of the law of theft is remarkable on account of the obscurity which prevails in the authorities respecting the precise meaning of the terms *felonious, animus furandi* and *lucri causa*, as expressive of a criminal intention, and the difference of opinion that is found as to the materiality of the *lucri causa*...

For it is not a little singular, that among the great number of varying definitions of theft which have been given by eminent authorities, there are none which are explicit as to the circumstances which render a taking felonious; though it is clearly established that the taking must be felonious, in order to amount to theft. In fact, nothing has been done by way of generalizing the multitude of cases that have occurred respecting the nature of a taking which is essential to the offence of theft, than the stating that it must be committed with a mind bent on committing theft (*animus furandi*), or with a purpose deserving to be punished with forfeiture of goods and chattels, &c. (*felonious*); to which some authorities add, that it must be done for the sake of lucre (*lucri causa*), which other authorities deny; whilst a third class of authorities state that *lucri causa*

4 *R v William Cabbage* (1815) Russ & Ry 292; 168 ER 809.

may mean almost any cause whatever. The distinctions between a taking without the slightest colour of right, which may nevertheless be a trespass, and that which is a felony, and between a despoiling of the owner of the chattel altogether, and depriving him of the temporary use of it, and between cases where the owner intends to part with the property, or only with the possession of the chattel taken, are not pointed out by the terms of any of the definitions. It would seem expedient to define with precision both the manner of taking and the intent of the taker which render a taking felonious. But the authorities do not enable us to define the one or the other, in a way to enable us to state the rule in the text with confidence.6

They suggested that the mental elements be defined as:

The taking and carrying away are felonious, where the goods are taken against the will of the owner either in his absence, or in a clandestine manner, or where possession is obtained by force or surprise, or by any trick, device or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends, in any such case, fraudulently to deprive the owner of his entire interest in the property against his will.7

Note that this description sees the felonious nature of the act to be the taking without consent, and introduces ‘fraudulence’ as a form of an intention to deprive. Fraudulence is, however, not defined. In light of their review of the law, it would seem that they considered felonious to refer to the manner of the taking, and fraudulence to the intent with which it was taken. It is also worth noting in their description of the authorities that they state that a taking without colour of right could be a mere trespass. This suggests that to the Commissioners, fraudulence required more than an intention to take without a colour of right.

i. R v Holloway

In this context of uncertainty in the older authorities, a significant development occurred in 1848 in R v Holloway, where Parke B was reported in Cox’s Criminal Cases to have commented:

There is no clear definition of larceny applicable to every case; but the definitions that have been given, as explained by subsequent decisions, are sufficient for this case. The definition in East’s Pleas of the Crown is on the whole the best; but it requires explanation, for what is the meaning of the phrase ‘wrongful and fraudulent’? It probably means ‘without claim of right’. All the cases, however, show that, if the intent was not at the moment of taking to usurp the entire dominion over the property, and make it the taker’s own, there was no larceny.8

7 Ibid.
8 R v Holloway (1849) 3 Cox CC 241 at 244.
This statement strongly suggested that larceny at common law contained no moral element of dishonesty, and fraudulent intent meant merely a lack of a claim of right.9 However, two other reports of the judgment were not so clear. In Carrington and Kirwan’s Report, Parke B was reported to have said:

The definitions of larceny are none of them complete. Mr. East’s is the most so, but that wants some little explanation. His definition is, ‘the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker’s) own use, and make them his own property, without the consent of the owner’. This is defective, in not stating what the meaning of ‘felonious’ in this definition is. It may be explained to mean, that there is no colour of right or excuse for the act, and the ‘intent’ must be to deprive the owner, not temporarily, but permanently, of his property. Cases also show, that a taking of goods with an intent to return them is not larceny.10

In this report, fraudulent and felonious are used in the opposite way to what appears to be the use of the terms in Cox’s Report and to that used by the Commission—and felonious applies to the intent, not the manner of the taking. In this Report, it seems that claim of right applies to felonious, and fraudulence is left undefined.

Finally, in Denman’s Report Parke B’s statement was said to be:

[East’s] definition needs some addition; the taking should be not only wrongful and fraudulent but should also be without any colour of right.11

This Report clearly sees the concepts of fraudulence and claim of right as separate, but, as the briefest Report, may well have been an incorrect summary by the reporter. The differences between the Reports also made it unclear whether Parke B intended fraudulence to refer to the intent of the accused.

Thus began a long-lived controversy over the meaning of the nature of fraudulence. On one side were supporters of Parke B’s dictum (as reported by Cox) that felonious/fraudulent/dishonest meant no more than a lack of claim of right, on the other side were those who saw a broader moral question being involved. The conflicting reports of Parke B’s judgment allowed both sides to claim Holloway as an authority.12

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9 See for example R v Hall (1848) 1 Den. 381 where Holloway is referred to and animus furandi described as intent to permanently deprive.
10 R v Holloway (1849) 2 Car. & K. 942.
In 1863 Sir James Fitzhenry Stephen published his *A General View of the Criminal Law*, and followed that with his *Digest of the Criminal Law* in 1877. In these publications Stephen expressed his view that fraudulence meant nothing more than an absence of a claim of right.\(^{13}\)

That *Digest* formed the basis of a codification Bill that was examined by a Royal Commission, which included Stephen as a Commissioner.\(^{14}\) The Commission’s report in 1897 recommended a codification of larceny that referred to the element as ‘fraudulently and without colour of right . . .’.\(^{15}\) Yet four years later, Stephen, one of the Commissioners, in his *History of the Criminal Law* could still confidently state:

As to what amounts to fraudulent intention there has never been any difficulty or doubt in English law . . . If the alleged offender thinks that he has a right to take the property, either because he believes it to be his own, or because he believes the owner to have consented to his doing so, he does not act feloniously . . .\(^{16}\)

In this passage Stephen appears to see fraudulent and felonious as interchangeable. In the 1890 second edition of *A General View* Stephen was clearer:

The words in [Bracton’s] definition ‘cum animo furandi’ are awkward, as they include the word to be defined, but the meaning, no doubt is to exclude the case of taking under a claim of right. Theft in English law has always meant taking a thing with intent to deprive its owner of it permanently and without claim of right, and no change has been introduced into this principle from the earliest times.\(^{17}\)

This article is not the place to engage in a detailed examination of what the case law and text writers considered the correct position to be. For present purposes, the main point is that a morally-based notion of dishonesty was not a generally accepted part of larceny. Further, there is a strong tradition that considers the only mental element of larceny to be an intention to permanently deprive, coupled with an exculpatory idea of a mistaken belief in a right to the property. Importantly, as Stephen’s summaries and histories of the criminal law became highly influential, so did his views on the mental elements of larceny.

\(^{13}\) See J. F. Stephen, *A General View of the Criminal Law of England* (Macmillan: London, 1853) 126, in which he stated that theft required the taking to be ‘wilfully wrongful’ and contrasted this with a taking under claim of right.


\(^{15}\) Criminal Code Commission, *Report on Draft Code* (1879). This was expressed in the Criminal Code (No 2) Bill 1880, s. 637, as ‘with intent fraudulently to deprive’. Colour of right was not mentioned, being left as a common law defence.

\(^{16}\) Stephen, above n. 1 at 142. He referred to the Commissioners’ 1879 recommendation at 163 without comment.

IV. Fraudulence in the Larceny Act 1916 (UK) and Theft Act 1968 (UK)

i. Fraudulence in the Larceny Act

The common law of larceny was finally consolidated in the English Larceny Act 1916, where stealing was defined as:

1(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof . . .

The definition of stealing was intended to be merely a compilation of the existing common law and not to alter it in any way. But having thus expressed the offence, it was inevitable that debate continued about whether the concepts of fraudulence and lack of a claim of right were separate or synonymous.18

The issue was debated in a number of cases and academic articles19 as a result of the decisions in *R v Williams*20 and *R v Cockburn*21 which raised doubts as to whether they were in fact separate. Both cases involved the ‘borrowing’ of funds from employers without permission—and thus without consent or a claim of right, but where the accused had an expectation that the money could be repaid. As the funds were fungible, an intention to permanently deprive existed and any hope of acquittal rested on the court accepting that the word fraudulently added something more to the offence.

In *Williams*, the Court of Appeal rejected Cox’s reported dictum of Parke B in *Holloway*, and held that fraudulently was intended to have a meaning beyond that of a lack of claim of right, and that this extension had the effect of exculpating mistaken takings of other people’s property where no intention to maintain a claim of right was made. The court held that as the defendants knew what they were doing in taking without consent, they were guilty of larceny. Lord Goddard CJ stated:

The court thinks that the word ‘fraudulently’ does add, and is intended to add, something to the words ‘without a claim of right,’ and that it means (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. The person who takes the property must know when he takes it that it is the

18 See e.g. Turner, above n. 12 at 996, who argued that fraudulence was superfluous, and compare to Smith and Hogan, above n. 12 at 381–2, who argued that claim of right was a sub-species of fraudulence.


20 *R v Williams* [1953] 2 WLR 937.

property of another person, and he must take it deliberately, not by
mistake, and with an intention to deprive the person from whom it is
taken of the property in it. A very simple illustration would be that of a
person who picked up a suitcase at a railway station believing that it was
his. There, the taking is under a mistake and he is not taking it fraudu-

lently. Of course, if he knows that it is not his own, as is the case with
those people who haunt the railway stations for the purpose of stealing
suitcases, then it is larceny; but if a person, although he is not setting up
a claim of right against someone else, takes away a suitcase in the
mistaken belief that it is his own, he is not acting fraudulently. We think
that the word ‘fraudulently’ in section 1 must mean that the taking is
done intentionally, under no mistake and with knowledge that the thing
taken is the property of another person.22

Practically, what this adds to the offence is unclear. It would seem very
difficult to take with intent to permanently deprive unless one took it
‘deliberately and not by mistake’. The example that is given of a per-
son who takes a suitcase believing it is his or hers presumably takes it
without any specific intention to permanently deprive any person, as
they believe it is already in their own possession. Further, at common
law a taking that was reckless as to deprivation does not amount to
larceny,23 and thus non-advertence could not be either. It was pre-
cisely this issue that led to the development of the doctrine of continu-
ing trespass.24 Consequently, the analysis in Williams appears
misplaced.

In many ways, Lord Goddard CJ’s conception of fraudulence as
intentional and without mistake is linked to the ideas underlying the
1834 Commission’s understanding of felonious. That is, the term re-
lates to the manner of the taking. From Lord Goddard’s mid-
twentieth-century point of view it is the accused’s mental attitude to
the non-consensual taking that is critical, but the locus of attention
remains fixed on the taking, not a broader intent.

Complicating matters, in the unofficial report of the decision, a
passage from Lord Goddard CJ indicated that he felt that if the taker
had easily available funds of his or her own with which to replace the
taken coinage, ‘No jury would then say there was any intent to de-

fraud or any fraudulent taking’.25 This hinted at a moral factor in the
assessment of fraudulent intent. Significantly, this passage did not
appear in the authorized report of the decision,26 thus suggesting that
on reflection the judge had changed his mind—and further confusing
the understanding of fraudulence.

22 R v Williams [1953] 1 QB 660 at 666, 668.
23 See e.g. Phillips and Strong (1801) 2 East PC 662.
24 See R v Riley (1853) Dears 149; 169 ER 674; Minigal v McCammon (1970) SASR 82.
25 R v Williams [1953] 2 WLR 937 at 942.
ii. Fraudulence in Other Offences

‘Fraudulently’ and ‘intend to defraud’ also formed part of the law in a number of other offences, and in a number of decisions on these offences, questions over the meaning of the term had also arisen. However, in 1961 the meaning of intent to defraud in the context of forgery was examined by the House of Lords in DPP v Welham. Lord Radcliffe held that the word ‘defraud’ had no clear limits to its meaning and that in general speech:

It may mean to cheat someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray’s New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our ‘angry and defrauded young.’ There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.

Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (Commentaries, 18th ed., vol. 4, at p. 247) called ‘to the prejudice of another man’s right.’ East, Pleas of the Crown (1803), vol. 2, at pp. 852, 854, makes the same point in the chapter on Forgery: ‘in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it.’

This amounted to a broad and expansive understanding of the concept of defrauding and hence fraudulence. When compared with the approach of Lord Goddard CJ in Williams, the analysis in Welham suggests that fraudulence requires more than an intention to deliberately and without mistake take property. Additionally, if this understanding of fraudulence were to be applied to larceny it would require that there be an intention to thereby prejudice the victim. This requirement being unknown in the offence of larceny, it would seem that the understanding of fraudulence in Welham was of a different nature to the meaning of fraudulence in larceny.

No reference to dishonesty being a synonym for fraudulence was made in the decision in Welham. However, in the later 1975 House of

27 The leading statement on intent to defraud was for many years seen to be the dicta of Buckley J in In re London and Globe Finance Corporation Ltd [1903] 1 Ch 728 at 732 that: ‘To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.’
29 Ibid. at 124.
30 This is not surprising given it pre-dated the Theft Act 1968 (UK)’s use of the term.
Lords’ decision in *R v Scott,*31 a case following the introduction of dishonesty as an element of theft in the Theft Act 1968, fraudulence and dishonesty were held to be the same concepts:

I have not the temerity to attempt an exhaustive definition of the meaning of ‘defraud.’ As I have said, words take colour from the context in which they are used, but the words ‘fraudulently’ and ‘defraud’ must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, ‘fraudulently’ means ‘dishonestly,’ then ‘to defraud’ ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.32

*Scott* was a case concerning the meaning of the offence of conspiracy to defraud, and although there is a suggestion in this passage that the various concepts may have contextually different meanings the emphasis is on the interchangeability of dishonesty and fraudulence generally. The lasting impact of *Scott* was thus to provide a statement of the highest court that the terms fraudulence and dishonesty were synonyms.

While discussions of fraudulence generally and in other offences is beyond the scope of this paper, the linkage in *Scott* between these broader notions of defrauding and fraudulence in theft had the effect of increasing the justification of a broader meaning for the term. A mere lack of claim of right seems an inadequate way of expressing the notion of defrauding in fraud offences.

### iii. Dishonesty in the Theft Act

Probably as a result of academic concern over the judgment in *Williams* and the increasingly elaborated meaning the term was likely to receive in forgery cases post-*Welham,* the 1966 Criminal Law Revision Committee Report (‘the CLRC Report’) considered that the term fraudulently had become overly complex and opted for a change in terminology.

They stated:

The word ‘dishonestly’ in the definition in clause 1(1) is very important, as dishonesty is a vital element in the offence [of larceny]. The word replaces the requirement in 1916 section 1(1) that the offender should take the property ‘fraudulently and without a claim of right made in good faith’. The question ‘Was this dishonest?’ is easier for a jury to answer than the question ‘Was this fraudulent?’ ‘Dishonesty’ is something which laymen can easily recognize when they see it, whereas ‘fraud’ may seem to involve technicalities which have to be explained by a lawyer.33

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Although some members of the committee thought ‘dishonestly' was so obvious in meaning that no definition was required, the compromise position was to include ‘a partial definition in clause 2 in order to preserve specifically two rules of the present law’.  

Dishonestly was thus defined in the Theft Act 1968 (UK) as:

2.—(1) A person’s appropriation of property belonging to another is not to be regarded as dishonest—

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person’s appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

This partial definition of dishonesty has the effect of seeing the element of claim of right as a subset of non-dishonesty (s. 2(1)(a)). Dishonesty thus involves any subjective beliefs the accused might hold as to his or her legal rights to the property appropriated. However, s. 2(1)(b) and (c) do not involve any such beliefs. Both assume a recognition by the accused that he or she has no legal rights to the property, but instead involve beliefs that either the owner, or society more generally, will permit the appropriation without such rights. Whether this can be characterized as a morally-based approach is debatable, but both situations do move beyond the narrow claim of right basis for non-dishonesty. Importantly, all three instances are based on subjective beliefs.

The definitions in the Theft Act thus had the effect of resolving the fraudulence/claim of right debate against those who had argued that fraudulence was surplusage, but created a new debate over what dishonesty meant beyond the instances in s. 2. Was it a minor addition as had been suggested in Williams—intentional and without mistake—or was it somewhat broader?

In one final twist, the Court of Appeal in 1968 handed down a decision that post-dated the CLRC’s recommendations but pre-dated the coming into force of the Theft Act. In Cockburn the court effectively argued against a broad role for dishonesty when they considered the excised passage in Williams to have been an error and to

34 Ibid. at 20.
35 J. C. Smith, who was a member of the CLRC, had previously argued that this was the case; see Smith and Hogan, above n. 12 at 382.
36 That is, in England and Wales. Victorian courts still considered that dishonesty meant no more than lack of claim of right. See the discussion of Salvo below.
be ‘an extremely dangerous and misleading statement’. Winn LJ commented:

But the fact of the matter is this, that whereas larceny may vary very greatly indeed to the extent, one might say, of the whole heavens between grave theft and a taking which, whilst technically larcenous, reveals no moral obloquy, and does no harm at all, it is nevertheless quite essential always to remember what are the elements of larceny and what are the complete and total elements of larceny, that is to say, taking the property of another person against the will of that other person without any claim of right so to do, and with the intent at the time of taking it permanently to deprive the owner of it.37

This is an even narrower approach than Williams, in that describing the ‘complete and total elements of larceny’ the notion of fraudulence is not even acknowledged. This decision strongly backs Stephen’s argument that the only role for fraudulence is as a synonym for lack of claim of right.

V. The Emergence of Subjective Dishonesty: R v Feely and R v Ghosh

When the meaning of dishonesty under the Theft Act 1968 fell to be determined by the Court of Appeal, there was a strong dissent from the approach in Cockburn. In R v Feely, the Court of Appeal held:

We find it impossible to accept that a conviction for stealing, whether it be called larceny or theft, can reveal no moral obloquy. A man so convicted would have difficulty in persuading his friends and neighbours that his reputation had not been gravely damaged. He would be bound to be lowered in the estimation of right thinking people. Further, no reference was made by Winn L.J. to the factor of fraud which Lord Goddard C.J. in Reg. v. Williams [1953] 1 Q.B. 660 had said had to be considered. It is this factor, whether it is labelled ‘fraudulently’ or ‘dishonestly,’ which distinguishes a taking without consent from stealing.38

Consequently they considered that dishonesty was an element of theft based on moral considerations and held:

Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people.39

However, further confusion ensued about whether the element of dishonesty was to be assessed subjectively or objectively. In other words, was the test one of whether ordinary people would consider

38 R v Feely [1973] QB 530 at 541.
39 Ibid. at 537–8.
the taking morally wrong, or was the test whether the accused believed he or she were doing the wrong thing.

This uncertainty was resolved in *R v Ghosh* where it was held:

In determining whether the prosecution has proved that the defendant was acting dishonestly, 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.

In *Ghosh*, the English Court of Appeal thus accepted that dishonesty was a state of mind. However, feeling bound by the decision in *Feely* that dishonesty meant something that was morally wrong, the court could not, or did not wish to consider whether such a basis for liability was appropriate. Instead they ensured that dishonesty was a subjective state of mind by grafting onto the *Feely* test the second step of requiring that the accused was subjectively aware of the breach of community morals. Further, they endorsed the approach in *Scott* and held that dishonesty had the same meaning in both theft and conspiracy to defraud.

The *Ghosh* test was itself subject to academic criticism, and the Law Commission in a Discussion Paper strongly suggested that the test was inappropriate, and that dishonesty should be removed from the fraud offences. However, in the Commission’s final report, *Fraud*, there was a change of heart and the Commission instead pragmatically concluded that while problems with the application of the *Ghosh* test might result in a theoretical risk of error, in practice none had emerged. The test was thus a workable one and the best available.

England thus now has a strong morality-based concept of dishonesty. The change from fraudulence to dishonesty appeared to make this possible, as did the tying of the element of defrauding in fraud offences to the use of the term in larceny/theft.

41 See *R v Landy* [1981] 1 WLR 355.
VI. The Canadian Approach

In Canada, the offence of theft is based on the Draft Criminal Code of the 1878 Criminal Code Commissioners and requires the accused to have acted ‘fraudulently and without colour of right’. Again, what fraudulence amounted to was a subject that did not elicit much judicial comment, one commentator in 1968 referring to it as the ‘mystery element’ of theft. Judicial statements did, however, appear to see fraudulence as having a minimal role. The decision in Williams was thus adopted in Canadian courts. In R v Howson, Laskin JA held:

There remains for consideration the accused’s contentions that he was not shown to have removed and detained the informant’s car fraudulently and without colour of right as required by s. 269. Although it may be doubtful (as is pointed out by Williams, Criminal Law: The General Part, 2nd ed. 1961, p. 322) whether, apart from special situations, the term ‘fraudulent’ adds anything to the phrase ‘without colour of right,’ it is enough to say that it merely emphasizes the intentional character of the offence; an intention to take or keep that involves knowledge of what is being done and that the property of another is the subject of the intention and of the appropriation or detention: see Regina v. Williams, [1953] 1 Q.B. 660, 37 Cr. App. R. 71; Regina v. Shymkowich, [1954] S.C.R. 606, 19 C.R. 401, 110 C.C.C. 97.

Following the decision in Feely there was some judicial endorsement of a broader, morally-based notion of fraudulence. However, in 1975 the Canadian Supreme Court adopted the approach taken in Williams as the correct understanding of fraudulence. In LaFrance, Martland J held:

I agree with the Court of Appeal that all of the elements of theft, as defined in s269 [now s. 322(1)(a)] were established in this case. The taking was intentional, under no mistake and with knowledge that the motor vehicle was the property of another. In my opinion this made the taking fraudulent. (See R. v. Williams, [1953] 1 Q.B. 660 at p. 666.)

In 1997, the Supreme Court reasserted the approach in LaFrance. In R v Skalbania, the Supreme Court unanimously stated:

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49 Atrens, above n. 47, says the issue had not been discussed by 1968.
51 Ibid. at 364.
52 See e.g. R v DeMarco (1973) 22 CRNS 258; 13 CCC (2d) 369. There was concern that ‘prank’ cases should not be within the scope of theft.
53 LaFrance v R [1975] 2 SCR 201.
54 Ibid. at 214.
55 R v Skalbania [1997] 3 SCR 995. In the Court of Appeal decision in Skalbania, Royle JA (in dissent on this point, but seemingly upheld by the Supreme Court) held that the meaning of fraudulently was specific to the particular statutory offence. Thus fraudulently in the general theft offence (s. 322(1)), the specific
We agree with Rowles J.A. in the British Columbia Court of Appeal that an intentional misappropriation, without mistake, suffices to establish mens rea under s. 332(1): see LaFrance v. The Queen, [1975] 2 S.C.R. 201; R. v. Williams, [1953] 1 Q.B. 660 (C.A.). The word ‘fraudulently’, as used in this section, connotes no more than this. The dishonesty inherent in the offence lies in the intentional and unmistaken application of funds to an improper purpose.56

These two decisions amount to a decisive rejection of the broader, morally-based approach in Feely and Ghosh. However, as discussed above, it is unclear what the Williams analysis adds to the elements of theft, and consequently in Canada much more attention has been focused on the scope of claim of right.57

It is also important to note that in Canadian law dishonesty also plays a significant role in fraud offences and is differently defined. Under the Canadian Criminal Code, fraud can be committed by a person who ‘... by ... fraudulent means, defrauds the public or any person ....’58 It has been held by the Canadian Supreme Court that in this context, fraudulent means a dishonest act59 and that dishonesty is thus descriptive of the actus reus of the offence rather than the mens rea.60 This recognition of different roles and meanings for dishonesty is significant, and is in stark contrast to the English approach in Scott and Ghosh to harmonize the terms across offences.

VII. The New Zealand Approach

The New Zealand Crimes Act 1961 had, until 2003, also used the wording ‘fraudulently and without colour of right’.61 Again there was little judicial exegesis until recent times.62 In 1975, the New Zealand Court of Appeal was asked in R v Coombridge63 to determine the meaning of ‘fraudulently’ in an offence of fraudulent conversion.64 The court expressly relied on the approach in Feely and noted that this
overruled the approach in *Williams* and *Cockburn*. They defined fraudulently in the following terms:

We think that in order to act fraudulently an accused person must certainly, as the judge pointed out in the present case, act deliberately and with knowledge that he is acting in breach of his legal obligation. But we are of opinion that if an accused person sets up a claim that in all the circumstances he honestly believed that he was justified in departing from his strict obligations, albeit for some purpose of his own, then his defence should be left to the jury for consideration provided at least that there is evidence on which it would be open to a jury to conclude that in all the circumstances his conduct, although legally wrong, might nevertheless be regarded as honest.65

This is a strongly moral and highly subjective test. Importantly, it allows a person to be exculpated even though they are aware that their moral code is different to that of the rest of society—a defence not permitted under the *Ghosh* test. In *R v Williams*,66 the Court of Appeal considered *Coombridge* and *Ghosh* and held that the approach in *Coombridge* ‘is how the test has been applied in this country for many years, and it is the test which must be applied here unless and until a Full Court decides otherwise’.67 In so doing the court rejected the approach in *Ghosh* and referred to the alternative approaches in Australia.68

However, in a major revision of the theft offences in 2003,69 ‘fraudulently’ was replaced with ‘dishonesty’ and ‘dishonestly’ defined as follows:

**Crimes Act 1961 (NZ)**

217 Interpretation

In this Part, unless the context otherwise requires,—

dishonestly, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority . . .

There appears to be no clear Parliamentary statement as to why this particular change was needed, but it was clearly a reaction against the *Coombridge* test. The Committee appointed to review the draft Bill reported:70

The term ‘dishonestly’ remains but is confined by our proposed definition to conduct which is known or believed to be without proper authority. While the Committee does not support the use of an objective standard to assess the defendant’s belief that the act in question was authorised, at the same time the bill should remove any doubt that an

65 *Coombridge*, above n. 63 at 387.
67 Ibid. at 308.
69 The definition was inserted by the Crimes Amendment Act 2003 (NZ).
idiosyncratic moral view about what actually constitutes dishonest behaviour will excuse the defendant from liability.\textsuperscript{71}

Proof of a lack of claim of right remains as a separate element of the offence.\textsuperscript{72} When compared with the partial definition of dishonesty in the English Theft Act, the New Zealand definition appears to require that the accused believe that consent has previously been given—and so neither a belief that the owner would consent if informed, nor that the owner of lost property cannot reasonably be found, would exculpate. The new approach is thus significant in being the only jurisdiction to specify that dishonesty is restricted to a belief as to consent.\textsuperscript{73} Simester and Brookbanks have commented:

What the new law threatens to do is to convert most deliberate usurpations of property rights into theft. But remedying interferences with property rights is the job of the civil law. Criminal law requires something more: a moral wrong, sufficient to mark that interference out as deserving the attention of the criminal law—i.e. as more than a mere tort or breach of trust. It is submitted that someone who is not morally dishonest lacks the guilty mind that makes the actions criminal rather than a civil wrong. Abolishing this element is an error.\textsuperscript{74}

Again it is not entirely clear what this definition of dishonesty adds to the offence. A belief that the victim consented to the appropriation, if misplaced but reasonable, would appear to amount to a mistake of fact.\textsuperscript{75} Consequently, this section only serves to additionally protect those with unreasonable beliefs as to consent—which would seem to be the sort of idiosyncratic beliefs the Committee were concerned to remove from the Act. The amendment is also another example of a rejection of a morally-based approach to the offence in favour of a return to Stephen’s restrictive understanding of fault elements.

\textbf{VIII. The Alternative Approaches in Australia}

Australia has nine different criminal jurisdictions and there is a range of increasingly divergent approaches to the meaning of dishonesty in theft. Queensland and Western Australia have offences based on Sir Samuel Griffith’s 1897 Criminal Code (the ‘Griffith Code’) which in

\begin{itemize}
  \item \textsuperscript{71} \textit{Ibid. at 65.}
  \item \textsuperscript{72} Crimes Act 1961 (NZ) s. 219.
  \item \textsuperscript{73} In \textit{Hayes v R [2008] 2 NZLR 321} at 334 [34] the New Zealand Supreme Court confirmed that this belief need not be reasonable.
  \item \textsuperscript{74} A. P. Simester and W. J. Brookbanks, \textit{Principles of Criminal Law}, 3rd edn (Brookers: Wellington, 2007) 688.
  \item \textsuperscript{75} Cf Crimes Act 1961 (NZ) s. 2 ‘claim of right’; \textit{Proudman v Dayman} (1941) 67 CLR 536.
\end{itemize}
turn was influenced by Stephen’s writings.\(^\text{76}\) However, under the Griffith Code formulation there is no reference to dishonesty and fraudulence is defined as an intention to permanently deprive. The law is to similar effect in the Northern Territory. The English Theft Act wording has been adopted in Victoria, though that state interprets the meaning of dishonestly differently to the English approach. The Commonwealth, South Australian, and Australian Capital Territory have adopted the wording of the Australian Model Criminal Code, and that Code provides a legislative definition of dishonesty that mirrors the approach in *Ghosh*. New South Wales is the only jurisdiction to continue to rely on the common law offence of larceny, and thus fraudulence or dishonesty remains uncodified. It appears to have adopted the test for dishonesty as set out in *Feely*. However, this is complicated by the approach to dishonesty at common law adopted by the Australian High Court.

### i. The Code States and the Northern Territory

In Queensland and Western Australia theft is defined as occurring when the accused ‘fraudulently takes . . . or . . . converts . . . anything capable of being stolen’.\(^\text{77}\) Thus fraudulently is the only mental element of the offence.\(^\text{78}\) Claim of right is a general defence. Fraudulently is defined as follows:

\[
\text{(2) A person who takes anything capable of being stolen or converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:}
\]

(a) an intent to permanently deprive the owner of the thing or property of it or any part of it;
(b) an intent to permanently deprive any person who has any special property in the thing or property of such special property;
(c) an intent to use the thing or property 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;


\(^\text{77}\) *Criminal Code Act 1899* (Qld) s. 391(1); *Criminal Code Compilation Act 1913* (WA) s. 371(1).

\(^\text{78}\) A distinguishing feature of the Griffith Code is a lack of a general doctrine of *mens rea*. Instead liability arises on proof of conduct elements—subject to any explicit requirement of a mental element. Liability can be avoided by proof of the general defences of mistake, claim of right, accident, emergency, etc., for which the accused bears an evidentiary burden but if raised must be disproved by the prosecution. For discussion see R. G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, 7th edn (Butterworths: Sydney, 2008).

\(^\text{79}\) That is, *Criminal Code Act 1899* (Qld) s. 391(2); *Criminal Code Compilation Act 1913* (WA) s. 371(2).
(f) in the case of money, an intent to use it at the will of the person who takes or converts it although he may intend to afterwards repay the amount to the owner.

(3) The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.\(^80\)

It has been held that this definition is exclusive.\(^81\) Consequently, there is no need to prove any intent beyond that of an intent to permanently deprive any person of property rights, or an intent to deal with any property or thing as an owner. There is no requirement of any moral element, nor is there any requirement of a lack of a belief in consent. However, there are general defences of claim of right\(^82\) and of honest and reasonable mistake of fact.\(^83\) It would appear that a mistaken belief as to prior consent would fall within the mistake of fact defence,\(^84\) but not a belief as to whether an owner would consent if asked.\(^85\) Interestingly, the belief in a claim of right has to additionally be ‘without intent to defraud’.\(^86\)

The Northern Territory’s version of theft is free of any express reference to either dishonesty or fraudulence. Under ss 209 and 210 stealing occurs if a person unlawfully appropriates property with intent to permanently deprive. ‘Unlawfully’ is defined in s. 1 as ‘without authorisation, justification or excuse’. These terms are further defined in the following sections. Of relevance\(^87\) is s. 30(2):

(2) A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud.

This is in relevantly identical terms to the defence of claim of right in the Queensland and Western Australian Codes.\(^88\) It therefore seems that in all three jurisdictions what is known as dishonesty in other jurisdictions has no separate role and is considered to be merely an alternative way of expressing the bona fide nature of a claim of right. In a judicially approved passage, the Queensland Supreme and District Courts Benchbook suggests that:

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\(^{80}\) Criminal Code Compilation Act 1913 (WA) s. 371(2) and (3). The Queensland provision is to similar effect (see Criminal Code Act 1899 (Qld) s. 391(2)–(3)).

\(^{81}\) *Ilich v R* (1986) 162 CLR 110 at 115, *per* Gibbs CJ.

\(^{82}\) S. 22 in both Western Australian and Queensland Codes.

\(^{83}\) S. 24 in both Western Australian and Queensland Codes.

\(^{84}\) See *Ilich*, above n. 81. Stealing may occur even if the property is given to the accused with consent (*per* Wilson and Dawson JJ, at 123).

\(^{85}\) This would be a belief as to a future event, hypothetical at the time of the taking.

\(^{86}\) S. 22 in both Western Australian and Queensland Codes.

\(^{87}\) Criminal Code (NT). Authorization refers to acts pursuant to a legal right or power and are questions of law, not mental elements (s. 26). Acts of justification relate to self-defence or defence of property and revolve around appropriate use of force (ss 27–9). The other forms of excuse are defences such as unwilled act, duress, emergency and mistake of fact.

\(^{88}\) S. 22(2) in both Western Australian and Queensland Codes.
‘To defraud’ in this context means to do [or omit to do] something dishonestly, so the requirement that the claim of right be honest and the requirement of the absence of an intention to defraud are really two ways of saying that the defendant must have honestly believed himself to be entitled to do what he did [or omitted to do].

It has also been suggested that the use of defraud in this context require that a person acting pursuant to a claim of right should not use improper means.

Given that Griffith was heavily influenced by Stephen’s codification, it is not surprising that the Code states do not have any explicit role for a morally-based fault element. Unlike Stephen, Griffith attempted to exhaustively define all the common law defences, and thus claim of right received a statutory formulation.

**ii. Victoria**

In 1975 Victoria adopted, unchanged, the wording of the Theft Act offence. By contrast to the English approach, in Victoria Feely was rejected as a correct reading of the Theft Act. In *R v Salvo,* the Court of Appeal was asked to determine the meaning of dishonesty in s. 81(1) of the Crimes Act 1958 (Vic), a fraud offence that required that the accused dishonestly obtain property. Dishonesty was not defined, but the court held that it should have the same meaning as in the theft offence in s. 72(1), which was worded identically to the Theft Act offence.

Fullagar J, in an extended critique of morally-based understandings of dishonesty, agreed with the decision in *Cockburn* and held that dishonesty meant nothing more than a need to prove that the accused took the property ‘without any belief that he himself has any right to deprive the other of it’. He commented:

In my opinion the legislature has set out ‘to consolidate and amend the law relating to theft and similar offences’, and by use of the adverb ‘dishonestly’ has refined the common law requirement of ‘without any claim of right’, and in doing so has ‘covered the field’ on this topic.


90 Explanatory Note, Criminal Code Bill 1995 (Qld) 13, referring to *R v Hopley* [1915] 11 Crim App R 248. The Bill proposed in cl. 48(2) to replace ‘without intent to defraud’ with ‘in an honest way’. The Criminal Code Act 1995 was never proclaimed and was repealed by 1997 No. 3, s. 121.


92 *R v Salvo* [1980] VR 401. *Salvo* was a case on the meaning of dishonesty in the offence of dishonestly obtaining financial advantage by deception. The decision was applied to theft in *R v Brow* [1981] VR 783 and reaffirmed in another fraud case, *R v Bonollo* [1981] VR 633—though the majority of the court in that decision would have applied *Feely* if not constrained by authority.

93 *Salvo*, above n. 92 at 432.

94 Ibid. at 435.
The decision represents a comprehensive rejection of the approach in Feely and Ghosh. In Brow,\textsuperscript{95} the approach in Salvo was held to represent the meaning of dishonesty in theft.\textsuperscript{96}

(a) The Salvo Approach
In Salvo, the Victorian Supreme Court resisted the implications of the development of theft as an offence that placed greater reliance on subjective wrongdoing and insisted that the understanding of *animus furandi* propounded by Stephen continue to apply in the new offence. In so doing they ignored the clear implications of the wording of the negative definition of dishonesty in the Crimes Act and the comments of the CLRC.

The CLRC in its 1966 report had appeared to see a clear distinction between dishonesty and claim of right. It saw dishonesty as an issue for laypersons to decide and something that did not lend itself to complete definition. If the CLRC had intended that dishonesty only meant a lack of belief in claim of right, it seems strange that it would include an element of dishonesty—and then go on to define a claim of right as one of three pre-defined instances where dishonesty was not made out. Further, the two additional bases for non-dishonesty in s. 2(1) (Eng) and s. 73(2) (Vic) are not based on any belief in a legal right to property. This suggests the definition of dishonesty in general must range beyond purely legal rights.

Fullagar J saw it differently:

But in my opinion the character of s. 73(2), as a matter of drafting, is of the character of a section which provides that: an appropriation is not done dishonestly if it is done—(a) honestly, or (b) in a particular belief, or (c) in another particular belief.

If only (b) and (c) were enacted, and not (a), a quite different effect might have to be given to such a section and a different meaning to the word ‘dishonestly’.\textsuperscript{97}

His Honour appears to be arguing that the definition is in fact not a partial definition, but a deeming section that for convenience takes situations that are unrelated to dishonesty and deems them to be such. Such an interpretation seems to be an unconvincing attempt to avoid the implications of Feely.

Fullagar J’s reason for rejecting the broader understanding of dishonesty was explicitly based on a fear of permitting morally-based notions of criminality to determine liability. In particular, Fullagar J was concerned that despite dishonesty being in theory an issue for the jury, in many cases magistrates would make the determination summarily and this would bring the judiciary into disrepute:

\textsuperscript{95} R v Brow [1981] VR 783.
\textsuperscript{96} Ibid. at 788.
\textsuperscript{97} Salvo, above n. 92 at 434.
In my respectful opinion it is contrary to the most fundamental tenets and traditions of the common law, and of the English judicial system itself, that the judges of the courts of law should set themselves up, or allow themselves to be set up, as judges of morals or of moral standards. The public respect for the courts, upon which the courts’ authority and existence ultimately depend, is held because they decide cases according to known legal principles. It is equally important that the principles applied be legal principles and known principles. Feelings and intuitions as to what constitutes dishonesty, and even as to what dishonesty means, must vary greatly from jury to jury and from judge to judge and from magistrate to magistrate. In *National Insurance Co. of New Zealand Ltd. v. Espagne* (1960) 105 C.L.R. 569, at p. 572, Dixon, C.J. said: ‘Intuitive feelings for justice seem a poor substitute for a rule antecedently known; more particularly where all do not have the same intuitions.’

In my opinion, once the courts of law, properly so called, begin to decide cases, especially criminal cases, according to the judge’s own view of abstract justice or of current standards of honesty or morality, respect for the courts will be calculated to decline, with dire consequences of a most fundamental character. Justice would no longer be seen to be done, and a judge would be no better qualified than anyone else to decide the cases.98

Accepting that dishonesty was a mental element of the offence, but refusing to allow belief in moral right and wrong to exculpate, Fullagar J was thus forced to state dishonesty as being merely lack of a belief in a claim of right, there being no other historically available mental element. Murphy J came to similar conclusions.99 Despite reservations by other judges in following cases,100 Fullagar’s interpretation is now universally applied to all instances of dishonesty in Victoria.

**iii. The High Court’s Reaction and Australian Common Law**

While *Salvo* was decided in 1980 and *Ghosh* in 1982, it was not until 1998 that the Australian High Court provided its approach to dishonesty. In *Peters v R*101 the High Court was asked to decide on the elements of the common law offence of conspiracy to defraud, and in so doing provided guidance on the test for dishonesty generally. By majority, the High Court rejected the *Ghosh* test for dishonesty, which they felt was artificial and confusing. They considered the test artificial because their Honours considered that judgments of dishonesty were made without reference to any awareness of the accused that the behaviour was dishonest—in this sense the test was properly objective. They also considered that the *Ghosh* test was confusing because in most instances the awareness that the accused had

98 Ibid. at 430.
99 Ibid. at 420.
100 See Mcherney J, who dissented in *Salvo* and in *Bonollo* felt bound to accept the decision of Brow as binding; and McGarvie J in *Bonollo* who dissented.
of community standards would not be an issue. Furthermore, in borderline cases, the test had the effect of conflating two critical questions of what the knowledge, belief or intention of the accused was, and secondly whether that state of mind when doing the act could be characterized as dishonest.  

Because of these concerns they reinstated the Feely test as the general common law test for dishonesty. In what was later adopted as the leading statement, Toohey and Gaudron JJ held:

In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.

This approach was inconsistent with the approach taken in Salvo. However, rather than overrule Salvo, their Honours saw that test as an example of where dishonesty was used in a ‘special’ way:

[I]f ‘dishonest’ is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest (as in Salvo) . . .

To date no Australian courts have found other instances of such special meanings. What is particularly puzzling about this finding is that the statutory definition of dishonesty considered in Salvo was the same as that considered in Feely. If the High Court had been seeking to apply Feely, there was no need to preserve the approach in Salvo. Despite academic encouragement to do so following the decision in Peters, the Victorian Supreme Court has not yet overruled

102 Ibid. at 504. What their Honours overlooked in this criticism was the fact that the Ghosh test was to be only put to juries if the accused raised a ‘defence’ that he or she considered that ordinary people would not consider their actions dishonest. See Roberts (1987) 84 Cr App R 117.

103 Peters, above n. 101 at 504.

104 The offence in Salvo concerned obtaining financial advantage or property by deception. Because of a lack of definition of dishonesty in that offence, as in the Theft Act, the Victorian Supreme Court adopted the definition of dishonesty that formed part of the theft offence. The definition in question was thus the meaning of dishonesty in theft. This was then applied to theft in R v Brow.

Salvo/Brow, and in recent years appears to have reaffirmed it. However, in order for Victoria to continue to apply Salvo to the theft offence, it would apparently require an argument that all uses of dishonesty in the Crimes Act 1958 are special uses of the term. The continued use of the Salvo test by the Victorian courts thus provides a basis for considering that the High Court in Peters did not purport to provide any guidance on the meaning of dishonesty in theft. Instead it suggests that dishonesty has a special meaning in theft.

The decision in Peters represents a significantly different approach to dishonesty. The judgment describes Salvo as a ‘subjective’ test for dishonesty, a test it then restricts to ‘special’ cases. But in adopting the Feely test, the judgment does not at any point explain why the Salvo approach or the subjective approach is inappropriate for dishonesty generally. Further, the judgment in rejecting the Ghosh test as unworkable in practice does not at any point explain why the Feely test is an appropriate test. Thus the judgment presents an unfortunate vacuum of policy or reasoning as to what dishonesty means and what its role is in criminal law.

What is also puzzling is the lack of consideration of Fullagar J’s concerns over the judiciary being asked to decide moral concepts. Two members of the court in Peters, McHugh and Gummow JJ, were happy for the entire question of dishonesty to be a legal one determined by the judiciary, and the entire court found no difficulty with a morally-based community standards approach. This suggests that there is now strong endorsement of the moral basis for dishonesty as a concept. How it is determined by finders of fact was the only point in issue.

By isolating the test in Salvo as a special case rather than rejecting it as an outmoded approach to dishonesty, the High Court has avoided providing any guidance on the correct test for dishonesty in theft. If the issue directly came before the court it is unclear whether the test in Salvo would be upheld. Salvo is subjective in the sense that exculpation is based on the accused’s own belief as to his or her right to appropriation of the property, but it is a purely legal test and mirrors exactly the common law element of claim of right. In this sense it is an extremely minimalist understanding of the role of dishonesty. The reasoning in Peters suggests that the High Court’s understanding of dishonesty is that it is not ultimately subjective, but at the same time that it is a much broader morally-based concept.

iv. Tasmania

The Tasmanian Criminal Code Act defines stealing to be:

226. Interpretation

107 It is subjective in that the knowledge, belief or intent of the accused must be taken into account in determining if the standard has been breached.
(1) A person who, without the consent of the owner thereof, dishonestly

(a) takes; or
(b) being lawfully in the possession thereof, either as a servant of the
owner or as a bailee or part owner thereof, converts to his own use
or to the use of any person other than the owner—

anything capable of being stolen, with intent permanently to deprive the
owner thereof, steals such thing.

Until 1975, Tasmania had used the Griffith Code phrase ‘fraudulently
and without claim of right’, but amended it to ‘dishonestly’ at the
same time that Victoria had adopted the Theft Act offences. There was
thus a strong argument that the interpretation given to dishonesty in
Victoria should apply in Tasmania. However, the Tasmanian Code
does not define dishonesty in any way. In 1980 in R v Fitzgerald\(^{108}\) the
Tasmanian Supreme Court chose to adopt the morally-based under-
standing of dishonesty in \(\text{Feely}\). That decision pre-dated both the
decisions in \(\text{Salvo}\) and \(\text{Ghosh}\), but was in line with the later decision in
\(\text{Peters}\). In \(\text{Jovanovich v R}^{109}\), the Tasmanian Supreme Court rejected an
argument that dishonesty was to be defined as in \(\text{Salvo}\):

The instructions of the learned judge were in accordance with settled
practice in this State and in particular, with \(\text{R v Fitzgerald}^{[1980]}\) Tas R
In \(\text{Fitzgerald at 262 and 264, Crawford J held that for the purposes of the}
crime of stealing under the \(\text{Criminal Code}\), a jury should be instructed
that the question of dishonesty goes to the state of mind of the accused
person, that the jury should apply the current standards of ordinary
decent people and that it was not a question of whether or not the
accused person believed that he was being honest or dishonest. . . .
Legislation may use the word in a special sense, one that is different
than the usually preferred one. There is no justification for thinking that
the word is used in a special sense in the Code. This Court should affirm
the direction settled for this State by \(\text{Fitzgerald}\) and which is in accord-
ance with \(\text{Peters\, and Macleod}\).\(^{110}\)

The court considered that this was in line with the approach to dis-
honesty set out by the High Court in \(\text{Peters}\).\(^{111}\)

As such the interpretation in Tasmania follows the modern ap-
proach of seeing the replacement of fraudulence with dishonesty as
endorsing a broader morally-based form of the concept. Tasmania has
also resisted the English and Australian Model Criminal Code ap-
proach of additionally requiring that the accused be aware of this
standard.

\(108\) \(\text{R v Fitzgerald}[1980]\) Tas R 257.
\(109\) \(\text{Jovanovich v R\, (2007) TASSC 56.}\)
\(110\) \(\text{Ibid.\, at [38]–[39].}\)
\(111\) \(\text{Ibid.}\)
v. The Model Code Jurisdictions

While Peters was a decision on the common law meaning of dishonesty, in many Australian jurisdictions the test for dishonesty is now codified. The Model Criminal Code, drafted as a guide to criminal law reform, adopts the Ghosh approach.\textsuperscript{112} In the Commonwealth, Australian Capital Territory and South Australian jurisdictions the Peters/Feely approach was specifically rejected as an appropriate test and instead the meaning of dishonesty is defined according to the Ghosh test—though there are variations between the jurisdictions on the other elements of theft.

Thus in these jurisdictions a moral approach to the concept is adopted, but with the additional requirement of subjective awareness of that breach of standards.

The Commonwealth Criminal Code version is:

130.3 Dishonesty.
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.

130.4 Determination of dishonesty to be a matter for the trier of fact
In a prosecution for an offence against this Chapter, the determination of dishonesty is a matter for the trier of fact.

In the Explanatory Memorandum to the Commonwealth legislation it was stated:

The approach in Peters is not favoured because it is necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing . . .

Paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the Criminal Code is to be true to the principle that for serious offences a person should not be convicted without a guilty mind. It reflects a preference for the law which existed prior to the 1998 decision of the High Court in Peters and is particularly important to the Criminal Code because it has additional offences which rely on dishonesty even more so than the Model Criminal Code offences (see proposed sections 132.8, 135.1 and 135.2). The proposed definition was preferred over the Peters approach by the Standing Committee of Attorneys-General at its April 1998 meeting.\textsuperscript{113}

There is thus clear legislative acceptance of a morally-based test, but rejection of the adequacy of the Feely test in a number of Australian


\textsuperscript{113} Revised Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 [62]–[65] (Cth).
jurisdictions. One reason for this is the use of dishonesty as a mental element in a range of offences.\textsuperscript{114} From this perspective dishonesty emerges as a new general core element of criminal offences. If so, different meanings of the term in larceny or theft cannot be sustained.

\textbf{vi. New South Wales}

Finally, in New South Wales (NSW), the common law offence of larceny remains in force, the only Australian jurisdiction to continue to rely on larceny. Although \textit{Feely} was not directly applicable, in 1987 the Court of Criminal Appeal in \textit{R v Weatherstone}\textsuperscript{115} accepted \textit{Feely} as encapsulating the element of fraudulence in larceny. In so doing, they saw the terms as synonymous and considered that fraudulence had a broad, morally-based role to play in larceny. This decision pre-dated the decision in \textit{Ghosh}.

Weatherstone was a Council employee who had taken welding rods owned by the Council, without authorization, to repair a council tennis court fence. The facts of the case were compared to an earlier case of \textit{R v Smails}\textsuperscript{116} where a railway worker had cut up sleepers to use with his tent:

Fraudulent intent, or moral obloquy as it has been described in a more recent English case, plainly was present in \textit{Regina v Smails}. In the present case, however, there is no finding of fact of the presence of moral obloquy or dishonesty. The question accordingly arises whether, without such a finding, the appellant can be held guilty of stealing.

In \textit{Regina v Feely}, [1973] QB 530 the Court of Appeal was considering the application of the Theft Act 1968 to a particular set of facts that threw into focus the statutory requirement of proving that the act had been done dishonestly. Insofar as \textit{Regina v Feely} is a decision on the significance of the word ‘dishonestly’ it is, of course, to be recognised that it is a decision based on the recent English legislation. In the course of that judgment however their Lordships in that case stated at p 539: ‘In our judgment a taking to which no moral obloquy can reasonably attach is not within the concept of stealing either at common law or under the Theft Act 1968.’

It will be noted that in the passage cited from the judgment of the Chief Justice in \textit{Regina v Smails} it was recognised that an element of the offence of larceny was that the taking was wrongful. That this concept underlies the offence of larceny has long been recognised at common law. The element of dishonesty might be met by proving in a particular case that the intention was one to advantage the taker in a personal sense. At the same time it must be recognised that the element of personal advancement is not in itself an essential ingredient in larceny. It may, I repeat, be a factor or indeed the only factor which in a given case

\textsuperscript{114} See e.g. the offences discussed in J. Austin, ‘When Does Sharp Business Practice Cross the Line to Become Dishonest Conduct?’ [2009] \textit{University of Queensland Law Journal} (forthcoming).

\textsuperscript{115} \textit{R v Weatherstone} (1987) \textit{8 Petty Sessions Review} 3729.

\textsuperscript{116} \textit{R v Smails} (1957) \textit{WN (NSW)} 150.
establis hes the wrongfulness, the moral obloquy, the dishonesty or the relevant guilty intent, however it be expressed, which is the ingredient of larceny.\textsuperscript{117}

The court discussed the issue of whether \textit{lucri causa} had any part in defining dishonesty and concluded:

The element of dishonesty might be met by proving in a particular case that the intention was one to advantage the taker in a personal sense. . . . But this is not to be understood as establishing that personal profit is always an essential ingredient. Rather it establishes that the element of personal profit meets the dishonesty which is the true prerequisite amongst the elements going to make up larceny. Personal profit is but a species of the genus dishonesty.\textsuperscript{118}

Thus in NSW larceny requires more than merely a lack of claim of right, or intention to permanently deprive. It also requires dishonesty, described as ‘wrongfulness’ or ‘moral obloquy’.\textsuperscript{119} What is important in this judgment is that while the reasons in \textit{Feely} are quoted, the test of ‘ordinary people’ is not.

This is important, because the High Court has not yet ruled on the meaning of dishonesty in larceny. As mentioned above, in a series of cases on the meaning of defrauding beginning with \textit{Peters}, the High Court has ruled that dishonesty is a core aspect of defrauding and that it is to be assessed according to an ‘ordinary person’ community standard—but without the \textit{Ghosh} second stage. Whether this approach applies to larceny in NSW is dependent on whether dishonesty and fraudulence are synonyms and whether the concept has the same meaning across a range of offences.\textsuperscript{120} The NSW Criminal

\textsuperscript{117} \textit{Weatherstone}, above n. 116 at 3731.
\textsuperscript{118} \textit{Ibid.} at 3732.
\textsuperscript{119} \textit{Weatherstone} has been applied in \textit{R v Baartman} [1998] NSWSC 653, where the taking of a pistol off an ill person by ambulance officers and subsequent handing to the police was not larcenous.
\textsuperscript{120} There are Australian judicial statements to this effect in \textit{Macleod v R} [2003] 214 CLR 230 at 241 [34]; 256 [96] adopting an earlier statement in \textit{Glenister v R} [1980] 2 NSWLR 597. However, the situation is more complex than these statements suggest. In \textit{Glenister} the NSWCCA held (at 607) that fraudulently meant dishonestly. However, in their reasoning prior to this conclusion they also held (at 601) that the element of ‘fraudulently takes’: ‘represents the \textit{mens rea}, and is wholly subjective’, and (at 605) that ‘the word “fraudulently” is intended to apply to the accused’s state of mind, and has a meaning usually equivalent to “dishonestly” in relation to the particular thing done by the accused so far as it affects or may affect the person who is the “victim” of the “fraud”’. In terms of assessing such dishonesty, the court held (at 607): ‘It is enough if [the judge] informs the jury that, in deciding whether an application was or was not dishonest, they should apply the current standards of ordinary decent people: \textit{R v Feely}.’

This reference to \textit{Feely} pre-dated the decision in \textit{Ghosh}, and some English cases that were decided after \textit{Glenister} interpreted \textit{Feely} to amount to an entirely subjective test. In those circumstances, and in light of the clear statement at the beginning of the judgment that fraudulently was a ‘wholly subjective’ element, it may not be permissible to interpret the reference to \textit{Feely} as a reference to an objective test (as the High Court appears to have done in both \textit{Macleod} and \textit{Spies v R} [2000] 201 CLR 203).
Courts Benchbook suggests that this is the case and that the test now applicable to larceny is that of Peters. However, this is open to question, in light of the High Court’s preservation of Salvo as a special case and the legislative preference for the Ghosh test in other jurisdictions.¹²¹

(a) Further Complications with Dishonesty as a Physical Element

One argument that is given for applying Peters to larceny is that dishonesty and fraudulence are synonymous, and there are repeated statements by courts in a number of jurisdictions that assert this. However, dishonesty and fraudulence occur in a range of different offences, and in differing contexts. As we have already seen, across time and different jurisdictions the terms have been given different meanings, and in Canada, fraudulence/dishonesty is used both as a form of mens rea in theft, and as actus reus in fraud.

One key difference, recognized by the New Zealand courts, is between dishonesty as a descriptor of a physical element of an offence, such as dishonest means; and dishonesty as a stand-alone element which supplies a fault element for an offence and is separate from any physical elements. In Hayes v R¹²² the New Zealand Court of Appeal noted:

It is important . . . to distinguish between two concepts. The first is whether conduct of the kind in question should be characterised as dishonest. The second is whether the mind of the particular accused was dishonest. It is seldom that any issue arises at trial in respect of the first concept. But where it has arisen, the correct approach to its resolution has proved controversial. What is normally in issue at trial is whether the mind of the particular accused was dishonest. That is conventionally assessed subjectively by reference to what the accused knew or believed the circumstances to be. The principal focus of the cases cited has been on the first issue. Little, if any, difficulty has been encountered with the second . . .¹²³

The decision of the Australian High Court in Peters, and the Canadian approach to ‘fraudulent means’ in their fraud offence, can be seen as examples of dishonesty as an external standard of conduct, and the approaches in Ghosh, Salvo and Weatherstone as examples of the second category of defining the mental state of the accused. Elsewhere I discuss this difference in detail.¹²⁴ For present purposes the distinction is important in highlighting that with such structurally different uses of the concept, there are likely to be different emphases

¹²¹ That is, there are significant enough differences between larceny and conspiracy to defraud to see the Peters decision as not a direct precedent, and the advantages of comity between jurisdictions might incline NSW courts to avoid commitment to the Peters approach.
¹²³ Ibid. at 336 [42].
¹²⁴ See Steel, above n. 60.
in definition. Indeed in Peters, the High Court noted that different issues would apply if dishonesty were an explicit element of an offence,\textsuperscript{125} and preserved a role for ‘special’ meanings of dishonesty.

While this was done in Peters, in the two subsequent cases of Spies and Macleod, the Australian High Court applied the Peters/Feely test for dishonesty to two statutory fraud offences, in both cases rejecting arguments that there was anything special about the meaning of fraudulently in those legislative contexts. Interestingly, in both cases the High Court has felt it necessary to continue to caution against the assumption that there is an automatic synonymity between fraudulence and dishonesty.\textsuperscript{126}

Despite these cautions, the practical effect of the High Court’s approach has been to undermine this particularization of meanings of fraudulence and dishonesty in favour of a general understanding of the terms. Peters was a case on the common law offence of conspiracy to defraud. In their decision the High Court rejected dishonesty as a separate element of the offence, but found dishonesty to be an aspect of the use of dishonest means. This was reiterated in Spies v R where the court was asked to provide guidance on the meaning of ‘cheats or defrauds . . . the company . . .’.\textsuperscript{127} The court held that defrauding in this statutory context had the same meaning as in Peters.\textsuperscript{128} In light of the Canadian case law it is possible to see this decision as another example of the use of dishonesty as a descriptor of a physical element of the offence, the means used.

However, in Macleod v R the offence required proof that a corporate officer ‘fraudulently takes . . . the property of . . . such company . . .’.\textsuperscript{129} In this context it might have been possible to see fraudulently as either describing the means, or as the mental state of the accused.

\textsuperscript{125} McHugh J noted in Peters v R at 531 [86]: ‘Cases involving statutes which make dishonesty an element of an offence are in a different category. “Dishonesty” is an ordinary English word. The meaning and application of ordinary English words in a statute are questions of fact. In a criminal trial involving a statute that makes “dishonesty” an element of an offence, it is for the jury to determine whether the conduct of the accused was dishonest, although in some cases the statutory context may make it imperative for the judge to direct the jury on the meaning of the term.’ Toohey and Gaudron JJ made similar comments at 504 [17]. What their Honours meant by this is somewhat unclear given their adoption of the test in Feely, which was such a situation.

\textsuperscript{126} In Spies v R (2000) 201 CLR 603 the majority stated at 635: ‘It is not enough to constitute “defrauding” that an accused has acted dishonestly or that his or her dishonest conduct has had an effect on creditors. As Lee J pointed out in Re Hyams & Public Accountants Registration Act (1 l9), a “vast number of offences involve dishonesty, but are not offences involving fraud”.’ In Macleod v R (2003) 214 CLR 230 the plurality judgment of Gleeson CJ, Gummow and Hayne JJ cautioned at 241 that ‘to apply statements in authorities respecting other statutory or common law offences is to invite error’.

\textsuperscript{127} Crimes Act 1900 (NSW) s. 176A.

\textsuperscript{128} Peters, above n. 101 at 631.

\textsuperscript{129} Crimes Act 1900 (NSW) s. 173.
In describing the offence, their Honours clearly saw fraudulence as a separate element, rather than as an aspect of a fraudulent taking. They considered this dishonest according to ordinary notions, and thus applied the test in *Peters*. They went on to apply the approach to determining dishonesty set out in *Peters*, but did so in terms of dishonesty amounting to an element of *mens rea*. Thus they held that the evaluation of the constituent mental attitude of the accused in establishing the *mens rea* of dishonesty was such that there was no need to separately direct the jury on a claim of right argument, as the claim of right was to be taken into account by the jury in assessing whether the accused knew he had no entitlement to apply the funds for his own purposes, and was thus acting dishonestly.

However, Gleeson CJ, Gummow and Hayne JJ, in the leading plurality judgment, failed to provide any clear indication of why the reasoning in *Peters* should apply to this offence. They stated only that dishonesty was synonymous with fraudulently and that the methodology of determining whether an act was dishonest in *Peters* was ‘the preferred approach to the meaning of the term “fraudulently” in s. 173’. Despite this lack of clarity, the decision in *Macleod* is considered by the High Court to have established the *Peters* test as defining the ‘general principle’ of fraudulence.

The result is that the methodology that had been employed in *Peters* to characterize a course of conduct has now been applied to determining a mental state—and has been endorsed as applicable to dishonesty in theft in Tasmania. This is in stark contrast to the

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130 ‘The text of s. 173 indicates that the offence which it creates relevantly comprises three elements: (i) the taking or application of company property by a company director, officer or member; (ii) for his own use or benefit, or any use or purpose other than the use or purpose of the company; and (iii) that the taking or application was fraudulently made’ (at *Macleod*, above n. 121 at 240 [31]).

131 *Macleod*, above n. 121 at 242 [38].

132 *Ibid*. at 252 [83]. McHugh J held that the offence had similar elements: ‘In s. 173, “fraudulently” is an adverb that characterises the taking of property for the officer’s own benefit or for purposes other than that of the company. The focus of the provision must be on whether the use of the company’s property was for the use or purpose of the company. If it was not, it may—is very likely to—be fraudulent or dishonest.’ In this passage His Honour saw ‘fraudulently’ as applying holistically to the entire *actus reus* of the offence, and that the dishonesty lay in the characterization of the purpose for which the funds are used. Thus, His Honour was also seeing dishonesty in this offence as a form of *mens rea*.

133 *Ibid*. at 242 [38].


135 *Macleod*, above n. 121. Both the plurality judgment (at 247 [55]) and McHugh J (at 256 [100]) held that the proper course in offences like s. 173 where dishonesty was in issue was:

Thus, in accordance with *Peters*, the trial judge in a case like the present must:

(a) identify the knowledge, belief or intent which is said to render the relevant conduct dishonest; and

(b) instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest; and

(c) direct the jury that, in determining whether the conduct of the accused was dishonest, the standard is that of ordinary, decent people.
approach taken in Canada where fraudulence in theft, as a mental element, is read down to a minimum, and a morally-based approach is only applicable to defining physical elements.

(b) Complicating the Relationship Between Dishonest and Claim of Right

Macleod has also undermined the distinction between dishonesty and claim of right. In holding that the trial judge had not been in error in refusing to allow an argument of claim of right to be put to the jury in addition to a denial of dishonesty, the plurality judgment referred to Stephen:

... fraud being inconsistent with a claim of right made in good faith to do the act complained of, that act has, as a necessary element of criminal liability, the quality of dishonesty according to ordinary notions.136

This appears to misquote Stephen, in that Stephen was suggesting that no one who genuinely asserted a claim of right could be considered to be fraudulent137, and the High Court was instead holding that a finding of dishonesty precluded a claim of right. But more fundamentally, the reference overlooks Stephen’s belief that fraudulence had no role in the criminal law beyond lack of claim of right. Thus although the High Court had accepted that dishonesty had a moral basis, Stephen’s influential writings still influenced the court’s understanding of the concept. Perversely, the result is to diminish the claim of right defence that Stephen considered fundamental.

The position in Australia is thus somewhat confused. Dishonesty is seen to be a moral concept, but one that the High Court considers is ultimately objectively defined. An accused’s genuinely subjective claim of right is to be taken into account in characterizing behaviour as dishonest but a jury can still none the less find an accused to be dishonest. To allow claim of right to be put separately to a jury would, in the words of the High Court, ‘limit the flexibility inherent in [the Peters] direction’.138

In all other jurisdictions, a claim of right trumps the prosecution case in a theft trial. Whether the High Court was unconsciously establishing another special form of dishonesty for claim of right in defrauding offences is unclear but, if not, then the result for NSW will be the ultimate resolution of fraudulence over claim of right, but perversely with an objective rather than subjective determinant of the mental element.

136 Stephen, above n. 1 at 124.
137 Stephen in fact stated: ‘Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence’ (Stephen, above n. 1 at 124).
138 Macleod, above n. 121 at 245.
IX. Conclusion

This survey and analysis of the interpretation of dishonesty and fraudulence in a number of common law jurisdictions makes clear that there are fundamental differences over the meaning of the terms. Given that in 1966 the CLRC saw dishonesty as not needing definition this degree of variety is extraordinary. In many ways the difficulties are based on the historical development of larceny. Currently, the following alternative definitions of fraudulence/dishonesty exist:

1. The term has no real meaning. Stephen’s influence remains strong in a large number of jurisdictions where fraudulence/dishonesty is defined away to be merely an alternative expression of lack of claim of right. This is the case in Queensland, Western Australia, the Northern Territory and Victoria.

2. The term has a residual meaning, but one of no general importance in limiting the scope of the offence. In Canada this is seen as some sort of deliberateness, in New Zealand as an unreasonable belief in consent.

3. The term is a morally-based standard of behaviour, and liability is dependent on the accused’s awareness of that standard. This is the test developed in England and applied there and also in South Australia, the Australian Capital Territory and the Australian Commonwealth jurisdictions.

4. The term is a morally-based standard of behaviour, but there is no requirement that the accused be aware of its breach. The objective nature of this test is such that it removes the basis for a claim of right defence. This approach has been adopted by the Australian High Court in relation to common law defrauding and applied to theft in Tasmania. It is also assumed to apply to New South Wales.

An entirely subjective approach to dishonesty has been rejected by all courts that have considered it, other than the New Zealand courts. There the subjective approach was statutorily rejected.

A further complication involves situations where fraudulence/dishonesty is used in a way that might amount to a description of the physical elements of the offence. Although this is arguably required in some statutory offences, it is suggested that it is best to avoid such approaches and to see dishonesty as solely a fault element. In so doing, a morally-based approach to the concept appears to be the most logical.

It is beyond this paper to engage in the debate over whether such morally-based approaches are appropriate in the criminal law. The aim of this paper is instead to make clear the unacceptable confusion.

between jurisdictions and emphasize the need for a considered debate over use of the terms. In particular, jurisdictions which have instances on their statute books of offences using ‘fraudulently’ that are many years old might need to consider what the modern meaning of the term should be, and amend the legislation accordingly.

To see dishonesty as not involving a moral basis requires recourse to debates from the end of the nineteenth century. Since then there has been recognition of a much greater role played by mental elements in offences, and if dishonesty is to be used in offences this should be fully acknowledged. This may require the use of alternative words or definitional subsections to express the mental state required in an offence, but this is to be preferred over the deeming approach adopted in Salvo and in the New Zealand definition.

However, in accepting a morally-based approach, fresh questions arise over the role of other mental elements such as claim of right. In some jurisdictions claim of right is legislated as an automatic proof of the honest conduct, in some a general defence. It may be that with a fully articulated form of dishonesty, a separate claim of right defence is no longer necessary.140

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140 This argument has been made by Ian Leader-Elliott, ‘Cracking the Criminal Code: Time for Some Changes’, University of Adelaide Law Research Paper No. 2009-003.