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New fraud and identity-related crimes in New South Wales

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New fraud and identity-related crimes in New South Wales

Associate Professor Alex Steel*

The *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* commenced on 22 February 2010.¹ It represents a significant change to fraud offences in New South Wales and introduces identity-crime related offences. The Act continues to move away from offences based on common law larceny and interference with property rights toward general offences based on a statutory defined concept of dishonesty. However, larceny and related offences have been retained. Consequently, care needs to be taken to distinguish between the different ingredients that constitute the various offences.

Dishonesty defined

As part of the move towards seeing dishonesty as the core mental element of offences of this type, the Act enacts a statutory definition of dishonesty in s 4B of the *Crimes Act 1900*. The definition is identical to the definition of dishonesty under the Commonwealth *Criminal Code*² and is based on the formula contained in the English decision of *R v Ghosh*.³ *Ghosh* built on the earlier decision of *R v Feely*⁴ which had established that dishonesty was a morally based concept, with *Ghosh* clarifying that proof of dishonesty required advertence to the issue by the accused. Section 4B defines dishonesty as:

“Dishonesty

- (1) In this Act:
‘dishonest’ means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.
- (2) In a prosecution for an offence, dishonesty is a matter for the trier of fact.”

As such the definition is a rejection of the approach to dishonesty preferred by the High Court in *Peters v The Queen*,⁵ *Spies v The Queen*,⁶ and *Macleod v The Queen*⁷ which held that dishonesty was to be morally defined as per *Feely*, but it was not necessary for the Crown to prove the requirement in *Ghosh*, that is, that the accused knew the conduct was dishonest. The combination of the definition in s 4B and the repeal of nearly all offences in the *Crimes Act 1900* that used the word “fraudulently” means that it is clear that the *Peters* test is now regarded as an inappropriate basis for criminal liability in New South Wales. However, it will continue to apply to the common law offence of conspiracy to defraud for which *Peters* is direct authority.

Two significant complications arise from this legislative change. First, there remain many minor offences in other Acts which continue to use the word “fraudulently”.⁸ Until such time as the ingredients of those offences are amended to conform to the new statutory definition of dishonesty, there may be confusion as to whether the statutory test



or the *Peters* test should be applied. Any court considering these offences will need to consider whether the authority of *Peters*, *Spies* and *Macleod* should now be confined to their own facts or whether they continue to have a wide application. It is hoped that clarification through statutory amendment will be a legislative priority.

The second complication relates to larceny. Larceny remains a common law offence (compare ss 116, 117 of the *Crimes Act* 1900) and the antiquity of the offence means that there are conflicting decisions on the offence's mens rea.⁹ It is generally considered that the offence requires proof of fraudulence, and that this is equivalent to dishonesty.¹⁰ The most recent direct appellate court authority for this proposition, *R v Weatherstone*,¹¹ approved the underlying requirement of moral obloquy in *Feely*, but did not refer to the additional subjective test in *Ghosh*, even though it was decided after *Ghosh*. The decision is therefore not inconsistent with either the approach taken in *Ghosh* or *Peters*. Until the enactment of the statutory definition of dishonesty in s 4B, considerations of comity could have suggested that the test in *Peters* was the appropriate test for larceny. Although s 4B is expressly confined to dishonesty offences in the *Crimes Act*, it nevertheless evinces a Parliamentary indication that the approach in *Peters* might not be appropriate.

Claim of right is not defined in the new legislation. The discussion paper stated that “NSW will continue to rely on the common law defence of claim of right under the proposed Bill”.¹² Lack of genuine claim of right will therefore continue to be implied as an element of these offences.

A new scheme of fraud offences

General fraud offences

The Act repeals over 30 fraud offences in the *Crimes Act* 1900 and replaces those offences with a new Pt 4AA containing one general fraud offence, and three ancillary offences. Section 192E contains a general fraud offence that has three distinct forms — dishonestly obtaining property, dishonestly obtaining a financial advantage and dishonestly causing a financial advantage. All three outcomes must be caused by a deception.

The first “dishonestly ... obtains property belonging to another” mirrors the *Criminal Code* (Cth) modernisation of the false pretences offence previously in s 179. The definition of “belonging to another” is contained in s 192C. The complexity of this section is due to its heritage as the definitional section in the *Theft Act* 1968 (UK) — on which the theft and fraud offences in the *Criminal Code* (Cth) are based. The *Theft Act* definition of “belonging to another” was designed to permit incorporation of a range of larceny-related offences into one theft offence, and the subsections in s 192C are testament to the complexities of that task. The UK form of the section, s 5 of the *Theft Act*, has generated significant case law and criticism.¹³ In particular, despite

the requirement in s 192C(2) that the accused intend the victim to be permanently deprived of the property, s 192C(4) creates a complex extension of that concept.¹⁴ It may also be of some significance that the wording of s 192C differs from that in the *Criminal Code* (Cth) in a number of respects, and decisions on the meaning of the terms under that Code may not be directly applicable. However, the breadth of the other two limbs of s 192E are such that s 192E(1)(a) is only likely to be used for relatively straightforward appropriations of physical property and the complexities of s 192C can hopefully be avoided. One further reason to expect that s 192E(1)(a) is less likely to be used is that while property must be obtained with an intention to permanently deprive (s 192C(2)), s 192D only requires that the financial advantage or disadvantage be intended to be temporary (s 192D).

The second limb, “dishonestly ... obtains financial advantage” is essentially a re-enactment of the previous s 178BA. “Obtaining” is given an expansive definition in s 192D(1) to include inducing third parties to cause advantage to accrue and the retaining of an advantage.

One problem with relying on obtaining financial advantage as a basis for a general fraud offence is that it fails to cover those situations where the fraud is intended to vindictively cause loss to another without the accused himself or herself intending to financially gain. There have also been difficulties with easily construing the delaying of debt payments as an advantage to the debtor.¹⁵ These “dud cheque” cases have caused the most difficulty in judicial definition of financial advantage.

The third limb of “causing a financial disadvantage” overcomes these issues by allowing a prosecution to establish that the accused's behaviour caused loss rather than was intended to result in a gain to the accused. This third limb should mean that it will be unnecessary for New South Wales prosecutors and courts to stretch the meaning of advantage to include non-payment or vindictive behaviour. Instead it is likely that prosecutors will determine whether to allege financial advantage or disadvantage based on the strength of the evidence for either.

All of these limbs of s 192E must be accomplished by deception. Deception is defined in s 192B in essentially similar terms to the previous definition in s 178BA(2) and the previous authorities on deception and causation should continue to apply to the new offence.¹⁶ Section 192E(3) replicates the *Criminal Code* (Cth) wording of the general deficiency provision¹⁷ previously contained in s 161.

From a theoretical perspective, fraud offences have elsewhere been based on a wrongful form of the obtaining of property,¹⁸ or the obtaining of a financial or other advantage,¹⁹ or based on the making of false representations,²⁰ or the use of dishonesty generally.²¹ Those based on the obtaining of property offences have been criticised as too narrowly based and advantage based offences as too vaguely expressed. Representation and general dishonesty based offences have also been criticised for being too broadly defined. The new New South Wales offences

base fraud in the traditional requirement of a dishonest deception. This limits the breadth of the dishonesty basis of the offence, but also avoids the limitations of the property or advantage basis by allowing for a relative change of financial position.

The fraud offence in s 192E is extended by s 192G which amounts to a partial codification of attempts to commit s 192E — where the means used are statements. It is largely similar to the previous s 178BB, but importantly includes the requirement that any statement made with intent to obtain property or a financial advantage, or to cause a financial disadvantage, must be done dishonestly. This brings the offence in line with the main fraud offence and reverses the previous approach in *R v Stolpe*.²²

Accounting offences

Previous offences dealing with criminal interference of business records²³ have now been replaced with a single accounting records offence in s 192F. This offence appears to be derived from the Model Criminal Code offence,²⁴ but is both more and less inclusive. The Model Criminal Code version of this offence requires that the subject of the behaviour be a “document made or required for accounting purposes”. Section 192F instead refers to an “accounting record”. A record may be as slight as a mark or tick, and the section does not require that the place where this record is made be either a document, nor a document that as a whole is part of an accounting purpose. The offence will thus require concentration, not on the nature or purpose of any document, but instead merely on whether the record made is an accounting record. The Victorian courts have had to grapple with the difficult nature of what an “accounting purpose” is.²⁵ The New South Wales offence instead appears to require an objective assessment of whether the record is an “accounting” record, irrespective of the reason for its creation. The Victorian case law suggests that accounting records will only be those that are prepared for the accounts of the business, and not broader business records. Thus the offence will only be applicable to financial documents and will not be a broader business documentation offence.

The new offence in s 192F also only applies to the actions of destruction or concealment of accounting records. Conspicuously absent from this offence are the actions of falsifying or knowingly providing misleading records that are part of the Model Criminal Code offence. It therefore seems that the offence is intended to be an ancillary offence that is only applicable in circumstances where the accused is not attempting to create deceptive records, but instead engage in a form of criminal damage for financial reasons.

Intending to deceive members or creditors of organisations

This offence (s 192H) replaces the former s 176 offence with the Model Criminal Code wording. The offence is now more broadly expressed, but requires that the intended deception relates to the “affairs” of the organisation. This is a

broad term, and though not defined, some guidance may be derived from the non-exhaustive definition of the term in s 53 of the *Corporations Act 2001* (Cth).

The ellipsis concerning defalcating trustees and fiduciaries

The repeal of all previous fraud offences and replacement with a small number of broader offences raises the question of whether any gaps in the law result. It appears that there may be one in relation to fiduciaries and trustees. These relate to those situations where a person has been entrusted with property or money which they then misappropriate. This was the basis of the previous offences in s 178A and ss 164–173. These situations clearly fall outside of the scope of larceny-related offences.²⁶ Assuming no deception was intended at the time the property was transferred and dishonest intent only arose later, there may be no deception of the victim on which to base a fraud charge. A solicitor who pays gambling debts from a trust account may have not committed either theft or fraud.

Forgery

With the repeal of the long list of antiquated forgery offences, the false instrument offences are now known as forgery. Within the offences, the subject matter of the offence is now described as a false document rather than instrument. “Document” is not defined in the *Crimes Act 1900*, but an expansive definition is found in s 21 of the *Interpretation Act 1987*.

The circumstances in which a document is seen to be false have not been materially altered, despite difficulties of interpretation in the United Kingdom.²⁷ In particular, the new offences continue to not explicitly require proof that the document tell a lie about itself rather than merely make a false statement. They now say that a document is false “if, and only if” listed criteria are met. Despite this, it is suggested that there is no legislative intention to alter the well-settled requirement that the document tell a lie about itself.²⁸

Whereas the false instrument offences required the Crown to prove that the accused intended the forgery to be to the victim’s “prejudice” (defined in economic and public duty terms in the former s 305), the new offences replicate the obtaining property, financial advantage/disadvantage tests of the fraud offences while retaining the additional intention of influencing public duty. While there may be some minor changes to the scope of the requisite intent, overall the status quo is preserved. The offences continue the approach of the United Kingdom and Model Criminal Code legislation in not additionally requiring proof of dishonesty. This sets the offences apart from the other fraud offences. Despite contrary Victorian precedent,²⁹ New South Wales authority that a claim of right nevertheless extends to forgery would appear to continue to apply.³⁰

Making and using false documents are now in separate sections (ss 253 and 254). Using a copy of a false instrument has not been replicated.³¹ The previous offence of custody

of a false instrument is now recast as possession of a false document, but the definition of possession in s 7 has the effect of preserving a custody basis to the offence.³²

There are also changes to the scope of offences dealing with possession of equipment, etc, for creation of forgeries. Section 256(1) reproduces largely unchanged the previous offence in s 302A.³³ However, the following subsections create new expansive possession offences.

First, s 256(2) creates an offence for the possession of equipment, etc, “designed or adapted” for making false documents. This offence does not require proof that a false document be made or forgery committed, and there is a reversal of the onus of proof.

Secondly, s 256(3) creates an offence of possession of any equipment, etc, “capable” of making a false document. This further requires proof of intention to commit forgery and does not have a reversal of the onus of proof. The offence appears to be able to incriminate the possession of paper, ink and pens and consequently much will turn on the ability to prove the mental element of intention to commit forgery.

Subsections 256(4) and (5) underscore the breadth of the previous subsections. Section 256(4) enacts that the design or adaptation of the equipment need only be one of a number of purposes of the equipment. Presumably, the distinction drawn between “designed or adapted” and “capable” means that if the equipment, etc, is useful for purposes other than forgery, any standard features would make the equipment, etc, “capable” of creating a false document. There would need to be something non-standard or bespoke about a feature before the equipment, etc, would be seen to be “designed or adapted” to make a false document. Section 256(5) removes the impossibility defence and any requirement that the intended forgery be imminent.

Identity-crime related offences

The Act creates three new offences described as identity offences. However the offences range more broadly and are perhaps more clearly expressed as offences prohibiting the misuse of identification information generally. “Identification information” is any information that could be used to identify or purport to identify any person, real or fictitious. Persons include corporations. There need not be anything confidential or private about the information, nor need it be identity-specific information. A non-exclusive list of information in s 192I includes street addresses and places of birth as examples of identification information as well as bank account details, ABNs and driver’s licences. Clearly a large swathe of public information associated with individuals and companies will fall within the definition.

The behaviour prohibited is similarly broad. Liability is based on dealing with this information (s 192J), possessing the information (s 192K) and possessing equipment capable of making identification documents (s 192L). One is excused from dealing in one’s own information (s 192M), but strangely not from possessing it.

The key limitations to the scope of the offences thus lie in the mental elements. All three offences require proof that the accused intended to facilitate or commit an indictable offence. In what appears to be an ellipsis in the drafting, there is no explicit requirement that the identification information be used in the facilitation or commission of the indictable offence. It is suggested that proof of such a link is however the clear intention of Parliament.

While the offence requires proof of an intention to commit, etc, an indictable offence, the legislation imposes no requirement that the indictable offence be a fraud or false identity related offence. Nor, it would seem, is there any requirement that the identification information be used in any misleading or unauthorised manner. The offence could extend to possessing the street address of a bank to be robbed.

Similarly, the possession of equipment, etc, offence (s 192L) does not require that the document capable of being produced by the equipment be in any way misleading or unlawful. It need only be a document, etc, containing identification information. Thus a piece of paper with an address written on it could fall within the intended uses of the prohibited equipment — a pen. However, unlike the offences in ss 192I and 192K, s 192L requires proof that the person intended to both create the document, etc, and use it to commit, etc, the indictable offence. There will consequently be an issue of causation that arises, and courts will need to determine the degree to which the use of the document needs to be central to the crime so as to be able to say it was “used” in the offence.

Victim’s certificates

The Act also creates a power for the Local Court³⁴ to issue a victim of identity crime certificate.³⁵ The certificate is to identify the victim and describe the manner in which identification information was used to commit an offence, but not the identity of any perpetrator. Its purpose has been described as, “assist[ing] victims of identity crime in repairing the damage done to their financial affairs and personal details.”³⁶ The certificate is to be issued if a court is satisfied on the balance of probabilities that an offence under Pt 4AB has been committed, and can be issued irrespective of whether any proceedings have been or can be commenced for such an offence, or whether the perpetrator can be identified. Any certificate is not admissible in any criminal proceedings. The certificate can be issued by the court on its own initiative or on application from the victim of the offence.

It is likely that in many instances where the court is asked to issue a certificate no evidence will be proffered of the identity or intention of the perpetrator. Courts will need to grapple with the question of how to establish on the balance of probabilities that the victim’s loss of funds, etc, can be said to be caused by an unknown person who dealt with personal information with an intention to commit, etc, an indictable offence.

Increased penalties

There is a general increase of maximum penalties for fraud to more closely align them with Commonwealth fraud offences. The maximum penalty for fraud doubles from five to 10 years' imprisonment, and forgery offences remain at 10 years' imprisonment. The ancillary offences of false accounting and misleading statements remain at a maximum of five years' imprisonment, emphasising their status as inchoate forms of the fraud offence. The corporate member offence has a maximum of seven years, perhaps in recognition of the greater trust put in such persons.

Identity crime is identified as a serious and growing problem and dealing with identification information has a maximum penalty of 10 years, with lesser penalties for the other offences. All the new indictable offences can be dealt with summarily.

Endnotes

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- 1 LW 19 February 2010.
 - 2 *Criminal Code* (Cth), s 130.3.
 - 3 [1982] QB 1053 at 1064.
 - 4 [1973] QB 530 at 541.
 - 5 (1998) 192 CLR 493 at 504.
 - 6 (2000) 201 CLR 603.
 - 7 (2003) 214 CLR 230.
 - 8 Examples include *Criminal Assets Recovery Act* 1990 ("fraudulently acquired property": s 9A); *Firearms Act* 1996 ("fraudulently altered ... licence": s 71); *Road Transport (Driver Licensing) Act* 1998 ("fraudulently ... lends ... a drivers licence": s 23); *Water Act* 1912 ("fraudulently ... damages a water meter": s 20AC(2)).
 - 9 See the discussion in A Steel, "The meanings of dishonesty in theft" (2009) 38 *Common Law World Review* 103.
 - 10 However, this is by no means clear from a historical perspective. See Steel, *ibid*.
 - 11 (Unrep, 20/8/87, NSWCCA).
 - 12 Legislation, Policy and Criminal Law Review Division, Department of Justice and Attorney General NSW, "Discussion Paper on Crimes Amendment (Fraud and Forgery) Bill 2009", p 2, at <www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_reports>, accessed 29 March 2010. Claim of right is however not a defence in that the onus of disproving the claim is on the prosecution.
 - 13 See D Ormerod and D Williams, *Smith's Law of Theft*, 9th edn, Oxford University Press, Oxford, 2007, pp 76–103.
 - 14 The Victorian equivalent of the provision has been examined in *Sharp v McCormack* [1986] VR 869 and *R v Dardovska* (2003) 6 VR 628. For criticism of the United Kingdom case law and suggestions for a new approach which differs from the Victorian interpretation see A Steel, "Permanent borrowing and lending: A new view of section 6 *Theft Act* 1968" (2008) 17 *Nottingham Law Journal* 3.
 - 15 See A Steel, "Money for nothing, cheques for free? The meaning of 'financial advantage' in fraud offences" (2007) 31(1) *Melbourne University Law Review* 201 at 216ff.
 - 16 See for example *Ho v R* (1989) 39 A Crim R 145.
 - 17 *Criminal Code* (Cth), s 134.1(13), (14).
 - 18 This is the basis of the false pretences offences which built on the foundations of larceny by altering the nature of the taking from "without consent" to obtaining via a consent marred by a "false pretence". For criticism see for example, Criminal Law Revision Committee, *Eighth Report*, "Theft and Related Offences", Cmnd 2977, 1966, p 36ff.
 - 19 Such as the financial advantage offence in Victoria (*Crimes Act* 1958 (Vic), s 81) and the general advantage offences of Queensland (*Criminal Code* (Qld), s 408C) and Western Australia (*Criminal Code* (WA), s 409). For criticism see G Syrota, "Criminal fraud in Western Australia: A vague, sweeping and arbitrary offence" (1994) 24(2) *UWAL Rev* 261, R Evans, "Case and comment: *R v Vasic*" (2006) 30 *Crim LJ* 47 and A Steel, "General fraud offences in Australia" [2007] *UNSWLRS* 55.
 - 20 This is the basis of the *Fraud Act* 2006 (UK). For criticism see D Ormerod, "The Fraud Act 2006 — Criminalising lying?" (2007) *Crim LR* 193.
 - 21 See *Criminal Code* (Cth), s 135.1.
 - 22 (Unrep, 30/10/96, NSWCCA), but compare *DPP v Pollard* (1992) 28 NSWLR 659.
 - 23 *Crimes Act* 1900, ss 158, 174, 175, 527B, 547A.
 - 24 Model Criminal Code Officers Committee, "Theft, fraud, bribery and related offences" in *Model Criminal Code, Final Report*, Ch 3, 1995, p 230.
 - 25 See *R v Jenkins* (2002) 6 VR 81 and *R v Heinze* (2005) 153 A Crim R 380; compare *Adams v O'Brien* (2008) 22 NTLR 84.
 - 26 *R v Slattery* (1905) 2 CLR 546.
 - 27 See *Attorney General's Reference (No 1 of 2000)* [2001] 1 WLR 331 and the discussion in J Parry et al, *Arlidge and Parry on fraud*, 3rd edn, Sweet & Maxwell, London, 2007, pp 288–291.
 - 28 *R v More* [1987] 3 All ER 825, applied in *DPP v Logan-Pye* (2007) 182 A Crim R 452.
 - 29 *R v Gatzka* (2004) 9 VR 459.
 - 30 *R v Sewell* [1999] NSWCCA 307.
 - 31 While in most cases not an issue, any copy of a false document made and used by a person other than the maker of the false document itself might now not be captured (compare *R v Ondbia* [1998] 2 Cr App R 150).
 - 32 In fact, it is arguably wider given the definition in s 7 appears to go beyond common law concepts of custody.
 - 33 That is, other than the deletion of the previous requirement that the equipment, etc, be "specially" adapted. Nothing would seem to turn on this.
 - 34 *Crimes Act* 1900, s 192M(4). This power can also be exercised by Supreme and District Courts if considering identity offences: *Criminal Procedure Act* 1986, s 309A(9).
 - 35 *Criminal Procedure Act* 1986, s 309A.
 - 36 Second Reading Speech, Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009, NSW, Legislative Council, *Debates*, 12 November 2009, p 19,508.