General Fraud Offences in Australia

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Introduction

The history of fraud offences can be seen as comprising three main waves. The first occurred in England in the 18th century and centred on the offence of obtaining property by false pretences[2]. This was characterised by the legislative extension of the common law offence of larceny, and a subsequent and continued enactment of specific offences to deal with individual issues.[3]

The second wave followed the enactment of the English *Theft Act* 1968, and marked a move away from seeing property as the subject of the offence. In that Act, a deliberate attempt was made to create general fraud offences. Within the Criminal Law Review Committee which formulated the *Theft Bill*, a split developed over whether fraud should be seen as a general dishonesty offence.[4] As a compromise the Bill contained a modernised form of obtaining by false pretences, and a section prohibiting the obtaining of pecuniary advantage.[5] The pecuniary advantage offences of the Bill were however substantially amended in its passage through Parliament and limited in their scope in such a way that a further amendment in 1978 was deemed necessary to make them more workable.[6]

By contrast, the idea of a general fraud offence was taken up by a number of jurisdictions in Australia and from the mid 1970s. These offences became an additional basis on which to charge fraud.[7] Victoria, the only Australian jurisdiction to adopt the *Theft Act* re-formulations of offences,[8] included a general offence of obtaining financial advantage by deception, which was intended to be synonymous with pecuniary advantage, but significantly did not enact the English restrictions on the scope of the offence.[9] Similar financial advantage offences were enacted in Tasmania and NSW. In NSW the revolution was so successful that the vast majority of fraud charges are now pursued through this general offence. [10]

The third wave of fraud offences that emerged in the 1990's in Western Australia and Queensland represents an adoption of the CLRC minority members' suggestion of a broad

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2 The first general fraud offence was 30 Geo 2 c24 (1757) though not seen as such until the decision in *Young* (1789) 100 ER 475 (see Hall, J *Theft, Law and Society* 2nd edn The Bobbs-Merrill Company, Inc Indianapolis 1952 50ff. The 19th Century form (see eg 7 & 8 Geo IV c29 s53) remains substantially unchanged in s179 *Crimes Act (NSW)* 1900.

3 As the only jurisdiction in Australia to have not engaged in any complete reform of its fraud offences NSW still contains such particularised and rarely used offences. Examples include: s168 Fraudulent sale of property by agent; 184A Personating owner of stock or property; and 185A Inducing persons to enter into certain arrangements by misleading etc statements etc

In the Code states, a broader approach to fraud was followed, but the basic model of using obtaining property by false pretences was still the core offence used.

4 Criminal Law Revision Committee, *Eighth Report on Theft and Related Offences* Cmnd 2977 1966.

5 These became sections 15 and 16 of the *Theft Act* 1968.

6 See *Theft Act* 1978 and Criminal Law Revision Committee *Thirteenth Report: Section 16 of the Theft Act 1968* (1977)

7 See s178BA *Crimes Act* (NSW) 1900; s82 *Crimes Act* (Vic) 1958; s252A *Criminal Code* (Tas) 1932.

8 That is, without significant change. The relevant parts of the *Model Criminal Code* are a variant of the *Theft Act* and this formulation has been adopted in a number of jurisdictions.

9 For a detailed discussion of the offences and their history see Steel, "Money For Nothing, Cheques for Free? The Meaning of Financial Advantage" (2007) 31 (1) Melbourne University Law Review (forthcoming).

10 See Brown, D et al. *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales by , Federation Press, 2006* (4 edn Federation Press Sydney 2006) Chapter 10.

general dishonesty offence. The Commonwealth and ACT also have general dishonesty offences that apply if the victim is a government entity. An alternative approach of a general deception offence has been enacted in the Northern Territory. This paper looks at the caselaw to date on the scope of the offences in this third wave and questions whether offences of such breadth are appropriate for the criminal law. The paper suggests that the offences appear to extend to prohibit activities that are not clearly criminal and too are vaguely expressed to enable certain prediction as to whether activities fall inside or outside the scope of the offences.

The offences

In 1990 Western Australia introduced a broad fraud offence[11] that encompasses traditional offences of obtaining property and also includes the gaining of a benefit or causing of a detriment – in either case whether pecuniary or otherwise. Deception is one basis on which such a result may be caused, but the offence extends also to any intent to defraud by the use of "any fraudulent means". Queensland amended its *Criminal Code* in similar fashion in 1997,[12] but expressed it as a broad dishonesty offence with no requirement that the prosecution show any deception or fraudulent means.

Both the Commonwealth[13] and the ACT[14] also have general dishonesty offences which dispense with the need to prove a deception. In those offences a dishonest intent to cause a gain or a loss is required. Gain and loss are defined in financial terms. A significant limitation on the scope of these offences however is that the victim must be the Commonwealth or Territory. The offences thus represent less of a new broad dishonesty offence and more a reworking of the pre-existing offence of imposing on the Commonwealth.[15]

The Northern Territory *Criminal Code* was amended in 2001 to include the obtaining of advantage in the general deception offence.[16] In contrast to the approach taken in Western Australia and Queensland this offence both requires proof of deception and does *not* require proof of dishonesty.

The aim of the fraud: Benefit, advantage or detriment, pecuniary or otherwise

Any advantage

The requisite benefit, advantage or detriment[17] is described in the Western Australian[18] and Queensland[19] offences as "pecuniary or otherwise". The Northern Territory offence requires the gaining of a benefit, defined to "include[] any advantage, right or entitlement."[20] These

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11 Section 409 as inserted by *Criminal Law Amendment Act* 1990. See Appendix.

12 Section 408C *Criminal Code Act* 1899. See Appendix.

13 s 135.1 *Criminal Code* 1995 (Cth). See Appendix Section 135.2 of the *Criminal Code* 1995 (Cth) and s333 of the *Criminal Code* 2002 (ACT) also enacts an additional offence of knowingly receiving a financial benefit to which the recipient is not entitled. This does not require proof of dishonesty. Instead it requires proof that the accused knew or believed that they were not entitled to the payment.. It appears to be an specific enactment to deal with persons who continue to receive social security payments past the period to which they are entitled to receive them.

14 s333 *Criminal Code* 2002 (ACT) See Appendix.

15 Formerly s29B *Crimes Act* 1914 (Cth). See Lanham D, Weinberg M, Brown K and Ryan G, *Criminal Fraud* (Law Book Company Sydney 1987) p118ff

16 Section 252A *Criminal Code* as amended by the *Criminal Code Amendment Act* (No. 3) 2001. See Appendix.

17 Due to space limitations, the meanings of these terms are not explored.

18 Section 409(1)(c) *Criminal Code*

19 Section 408C(1)(d) *Criminal Code*

20 Section 227 *Criminal Code* (NT)

offences appear to go significantly beyond the scope of the offences in the other jurisdictions that require that the advantage be financial.[21] In fact by refraining from using either "financial" or "pecuniary" as a limiting descriptor, the legislation appears to envisage the prosecution of situations that would fall outside these limits.

"Benefit" as used in the WA *Criminal Code* has been described by the Western Australian Court of Appeal in *Mansell* as being broader than, but incorporating the obtaining of property,[22] as extending to the provision of a service[23] and to not requiring that the benefit be quantifiable in pecuniary or proprietary terms.[24]

Consequently, the offences could extend to circumstances such as where a person obtains sexual favours by pretending to have an occupation or wealth they do not have, or where a person obtains an emotional benefit in providing misinformation to another, such as in bitter family disputes.[25]

Accordingly, there appears to be no limitation of fraud offences to either property or monetary advantages, and such offences now have the potential to expand into areas of life that have traditionally been seen as being governed by morals rather than criminal law. Indeed, it is the very moral basis of dishonesty that has led to the controversies over any major reliance on it as a positive element of liability.[26]

The method of the fraud: fraudulent means, dishonesty or deception

Western Australia: Intent to defraud, deceit or any fraudulent means

The relevant elements of the WA Code offence in s408C are expressed as "Any person who, with intent to defraud, by deceit or any fraudulent means …". This wording is apparently based on the previous offence of conspiracy to defraud.[27] The mental element required is one of intending to defraud, but this must be accomplished by either deceit or "any fraudulent means".

Despite earlier High Court authority in *Balcombe v De Simoni*[28] that an intention to defraud meant an intention to deprive another of property by deceit, the High Court in *Peters*[29] held, at least in relation to the common law, that as a result of a number of English decisions the concept should be seen in a broader light. The outcome of *Peters* was described by the High Court in *Spies* as:

> In *Peters v The Queen*, however, this Court, while accepting that *Scott* was correctly decided, denied that dishonesty was an independent element of a conspiracy to defraud. All members of the Court, with the exception of Kirby J, held that *dishonest means*, but not dishonesty by itself or additionally, is what must be proved to constitute a conspiracy to defraud.

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21 Financial advantage is required in NSW, Victoria and Tasmania. For suggestions as to the limitations this imposes see *Coelho v Durbin* (unreported, NSWSC, Badgery-Parker J, 29 March 1993, BC9304122; but cf *Murphy* [1987] Tas R 187.

22 [2004] WASCA 111 at [28] per Malcolm CJ, the other judges to similar effect.

23 At [49] per Murray J

24 At [50] per Murray J

25 Compare the facts in *R v Love* (1989) 17 NSWLR 608 and other examples given by Syrota, G, 'Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence', (1994) 24 University of Western Australia Law Review 261

26 See eg Griew, E., "Dishonesty: The Objections to Feely and Ghosh" [1985] Criminal Law Review 431; Steel, A, 'An Appropriate Test for Dishonesty? ' (24) Criminal Law Journal 46 and Law Commission of England and Wales *Legislating the Criminal Code: Fraud and Deception* (CP 155 1999) but cf Tur R, Tur, "Dishonesty and the Jury: A Case Study in the Moral Content of Law", in Philosophy and Practice, CUP, 1984

27 See Syrota, n25.

28 (1972) 126 CLR 576.

29 (1998) 192 CLR 493.

The decision in *Scott* must mean that a person may also be defrauded without being deceived. It necessarily follows that, in an offence alleging "defrauding", deceit is not a necessary element of that offence, notwithstanding what was said in *Balcombe v De Simoni*. Statements to the contrary in that case can no longer be regarded as authoritative. Nevertheless, to prove a defrauding the prosecution must establish that the accused used "dishonest means" to achieve his or her object.

In *Peters*, Toohey and Gaudron JJ said:

> "Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to 'some lawful right, interest, opportunity or advantage', knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests. Thus, to take a simple example, a 'sting' involving an agreement by two or more persons to use dishonest means to obtain property which they believe they are legally entitled to take is not a conspiracy to defraud."

In the same case, McHugh J said:

> "In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's rights or interest or performance of public duty by:
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> - making or taking advantage of representations or promises which they knew were false or would not be carried out;
> - concealing facts which they had a duty to disclose; or
> - engaging in conduct which they had no right to engage in."

To prove that the appellant defrauded a "person in his or her dealings" with Sterling Nicholas, therefore, the prosecution had to prove that the appellant used dishonest means to prejudice the rights of such a person in his or her dealings with Sterling Nicholas.[30]

The main effect of the wording in s408C[31] might thus appear be to expand the older basis of the offence from one requiring proof of a fraudulent deception, to one that merely requires proof of an intent to defraud. This is because the High Court has held that the use of fraudulent means is an aspect of defrauding, and would thus add nothing to the elements of the offence. However, the Western Australian caselaw appears to hold otherwise.

"Any fraudulent means" has been held to by the Western Australian courts to have a broad scope. In *Graham-Helwig* it was held that

> … in relation to the rather similar s 338(1) of the Canadian *Criminal Code*, the Canadian Supreme Court concluded that that expression should be given the broadest possible meaning, encompassing "means which are not in the nature of a falsehood or a deceit; they encompass all other means which can properly be stigmatized as dishonest": *R v Olan, Hudson & Hartnett* (1978) 41 CCC (2d) 145 at 149. That meaning seems to be consistent with the history of s 409. It was introduced as a result of recommendations in the Murray Report (M Murray, The Criminal Code (A General Review) Perth 1983) and the recommendations in that report make it clear that it is intended to extend to those who dishonestly fail to call attention to the true state of affairs. For example, it would extend to the person who gains admission to a cinema by sneaking unnoticed through an unguarded door (page 267). In this case, the appellant is alleged to have taken a number of steps to ensure that the true state of affairs did not come to the attention of his employers. I see no reason why those should not be "fraudulent means".[32]

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30 (2000) 201 CLR 603 at [77] – [81]

31 Syrota, n25, notes that the Murray Committee which proposed the wording of the offence had expressed declined to use the word 'dishonest' which they had thought unclear, in favour of the phrase intention to defraud. However, in light of the decisions of the High Court in *Peters*, *Spies* and *Macleod* and their acceptance as applicable by the Western Australian courts there is now little difference between the terms.

32 At [14} per Wheeler JA, the other judges concurring.

Both Malcolm CJ and Pullin JA in agreeing with Wheeler JA held that "any fraudulent means" was to be seen as synonymous with dishonesty, and Malcolm CJ suggested that *Peters*[33] provided "a degree of enlightenment" on the meaning of the term. However, the Western Australian courts have made clear that the mental element of intention to defraud requires a subjective awareness on the part of the accused that they are using fraudulent means or employing deceit with such an intention.

In *Ali*, Pullin JA held:

> In *Mathews v The Queen* (2001) 24 WAR 438 the Full Court made it clear that in relation to a charge under s 409 the question of intent to defraud was to be assessed by determining the subjective intention of the accused; it is a question of what the accused intended and not what a reasonable person might have intended, and intent to defraud is not to be equated with carelessness. See also *Markarian v The Queen* [2001] WASCA 393. [34]

In *Papotto*, Murray AJA held:

> An intention to defraud is an intention to cause another to act against that person's interest or to that person's detriment: *Tan v The Queen* [1979] WAR 149 per Burt CJ, at 153. In this case, therefore, it required proof of the intention to cause the investors to provide their money so as to gain the benefit which was in fact gained for Gold Coast Holdings Pty Ltd. The means by which that had to be done to constitute the offence was by deceit or fraudulent means. If the investors were induced to part with their money by making a deliberately false statement, that would be deceitful and it would also constitute fraudulent means. As I put it in *O'Brien v The Queen* [2004] WASCA 107
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> > "The phrase 'deceit or any fraudulent means' is a composite one, not expressly defined in the *Criminal Code*. It describes conduct which is dishonest, and in that concept there are the notions that the victim is deceived by the act or acts of the offender or that a proscribed outcome is achieved dishonestly, whether or not the victim is duped. The concept involves a mental element, apart from the requirement of an intention to defraud … "
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> What is involved is that the offender must consciously or intentionally behave in a way which is dishonest according to the standards of honesty of ordinary people. Clearly it would be open to find that to portray the guarantor who is standing behind the borrowing company as a person of real financial worth when that was known not to be the case would satisfy the concepts involved.
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> What I have written above is derived from the High Court's decision in *Peters v The Queen* (1998) 192 CLR 493, *Lewis v The Queen* (1998) 20 WAR 1, *Mathews v The Queen* (2001) 24 WAR 438, and most recently, *Graham-Helwig v Western Australia* (2005) 30 WAR 221, particularly per Wheeler JA at [12] – [14]. [35]

If one interprets what Murray AJA appears to be holding in this passage in light of the analysis of what Toohey and Gaudron JJ held intent to defraud to mean in *Peters*[36] it seems that the section requires the following. The offence is proved if the rights or interests of another are prejudiced by dishonest means. To prove an intent to defraud it must be shown that the accused intentionally acted to prejudice the interests of another (ie act against or to the detriment of another's interests) and that this was done dishonestly in a general sense. In order to prove that fraudulent means were employed, it is necessary to show that the accused consciously acted in breach of the standards of ordinary people, that is that the accused was aware that the use of the means in that way would have been considered dishonest by ordinary people.

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33 (1998) 192 CLR 493

34 [2005] WASCA 90 at [35} the other judges concurring.

35 [2005] WASCA 234 per Murray J at [25] – [27] the other judges concurring.

36 (1998) 192 CLR 493

This appears to be a test that is very similar to the *Ghosh* test[37] for dishonesty. If one is to act consciously in breach of the standards of ordinary people, one would need to know what those standards are. It would therefore seem that the use of fraudulent means is to be interpreted to be acting dishonestly according to the composite test set out in *Ghosh* and legislatively in a number of jurisdictions. The decision in *Peters* appears to be relied on by Murray AJA only in relation to the understanding of what is involved in fraudulent means for the purposes of intention to defraud, not generally. Thus the statement by Murray AJA in *O'Brien* that the use of "fraudulent means" adds an additional mental element to the offence suggests that His Honour is using the incorporation of the phrase in the section in addition to the requirement of an intent to defraud as overcoming the decision in *Peters* that the dishonesty of the means is not a subjectively-based test. It does however lead to the result that determining if the means are dishonest is decided for the purposes of "intent to defraud" as merely based on the standards of ordinary decent people, but that the same concept where it appears explicitly in the section is to be interpreted as additionally requiring that the accused be aware of the attitude of ordinary people.

Syrota has argued[38] that the use of the phrase "intent to defraud, by deceit or any fraudulent means" is unnecessarily complex. The interpretation put on the offence in *Papotto* does not appear to dispel that concern.

The offence is in essence a conspiracy to defraud by one. Conspiracy to defraud has come under sustained criticism in recent years because of the fact that there is nothing that is necessarily criminal about the outcome intended. Indeed, the outcome may be entirely lawful, and there may be no intention to cause any loss to any person. The means used may also be generally lawful means. The criminality lies merely in the fact that with intention to affect another person's rights, the accused used means in a way that is characterised as dishonest.

Rather than representing serious fraud, such circumstances may amount to well-intentioned attempts to "cut corners" or to help management,[39] or be attempts to save situations from worsening by hiding information.[40] It is arguable that such activities should be recognised as a different or lesser form of wrong-doing, and it may be the case that they could be dealt with more appropriately by civil remedies.[41]

By contrast, the alternative basis for liability under the section "with intent to defraud … by deceit" requires both an act of deception that can be seen to be prima facie wrong, and a requirement that the person engaging in the deception be aware of its deceptive nature. Deceit has been held by the Western Australian Court of Appeal to be:

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37 [1982] QB 1053.

38 Syrota, n28.

39 See for example situations such as *Pellow* (1956) 73 WN (NSW) 478 where the accused was the Superintendent of a number of state coal mines and had been allocated funds for the preparation of two Hunter Valley coal mines. While one mine had been prepared ahead of schedule, the other mine required substantially more work than had been originally anticipated. The accused submitted false expenses claims on the completed mine in order to pay contractors to continue to work on the non-completed mine. He did this because the state authority would not have approved the expenditure of extra funds on the second mine if they had known of the true situation. Pellow claimed his false entries were made in the interests of the management committed to his charge and for the purpose of benefiting the state. If no false claims had been made, and no requirement to report back had existed, this may still have been an offence under WA law.

40 See for example the facts in *Wai Yu Tsang v The Queen* [1992] 1 AC 269. The accused were the senior management of the Hang Lung Bank of Hong Kong. They were charged with conspiring to defraud the bank, its shareholders, creditors and depositors by dishonestly concealing the dishonouring of a number of cheques which had been presented by the bank. The bank was a victim of a cheque-kiting ring. The result was that the amount of money represented by the dishonoured cheques was greater than the assets of the bank at that time. In order to prevent a consumer panic the bank senior management decided to conceal the dishonouring of these cheques from more junior employees and created a series of fictional transactions in the books to balance the dishonoured cheques.

41 A failure to distinguish between those who set out to deceive or cause harm and those who act with good intentions to avoid harm may raise arguments that the signals that the criminal law sends are confused and create issues of fair labelling. See eg Clarkson, CMV, 'Theft and Fair Labelling', (1993) 56 Modern Law Review 554

> "Deceit", both in its ordinary meaning, and as understood in the criminal law, means "to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false": *Re London & Globe Finance Corporation Ltd* [1903] 1 Ch 728 at 732 per Buckley J; *Tan v The Queen* [1979] WAR 149 at 153 per Burt CJ, 156 per Wallace J.[42]

This excludes reckless deceptions from the offence, and thus sets a relatively high bar for satisfying the mental elements of the offence. As such it is appropriate that the alternative basis of liability (fraudulent means) also require a similar degree of knowledge, and thus it is submitted that although complex and possibly against the spirit of the approach taken in *Peters*, the decision in *Papotto* is the correct approach.

Queensland, the ACT and the Commonwealth: dishonesty

Section 408C of the Queensland *Criminal Code Act* 1899 includes a number of bases on which fraud can be proved, including the traditional basis of obtaining property. It also includes the obtaining of a benefit or causing of a detriment. In none of these cases however, does it require that the property or advantage be acquired by deception. All that is required is that the advantage etc be dishonestly gained, acquired, applied etc. In such circumstances there is no room to hold that dishonesty is used in any special way[43] and thus, assuming that the common law approach taken in *Peters* and *Spies* is applicable to a Code state, dishonesty is to be seen as an objective standard.

Prior to the decision in *Peters*, the Queensland courts had applied the *Ghosh* test for dishonesty, requiring that the accused be subjectively aware that the behaviour would be considered dishonest by ordinary people.[44] Despite the approach taken by the High Court in *Peters* – and reaffirmed in *Spies* and *Macleod*[45], the Queensland Court of Appeal in *White*[46] continued to apply the *Ghosh* approach. In 2005, in *Seymour*[47] the Queensland Court of Appeal explicitly applied *Peters* and *Macleod* to s408C. However in doing so they upheld a direction by a trial judge that appeared to be based on the *Ghosh* direction in that it required the jury to assess:

> "(5) Must he have realised that what he was doing was dishonest, according to those standards?"[48]

The court held that these directions "sufficiently complied" with the test in *Peters* and *Macleod* – so it is possible to interpret the finding on the grounds that the direction was overly favourable to the accused. It is regrettable that a clearer finding was not made. It must be assumed that an objective test for dishonesty is to be applied, but no clear statement to this effect has been made.

The implications of such an approach are startling. The Queensland offence does not require any use of deception or any other underhand or "illegal" means by which the benefit is obtained or the detriment caused.[49] Dishonesty, if it is an objective standard, is one based on a jury or magistrate's understanding of what community attitudes to honesty are. As such, there

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42 Graham-Helwig [2005] WASCA 127 at [13] per Wheeler JA, the other judges concurring..

43 As it is in the obtaining by financial advantage offences. See *Peters* (1998) 192 CLR 493, *Salvo* [1980] VR 401, *Love* (1989) 17 NSWLR 608

44 *Laurie* (1986) 23 A Crim R 219

45 (1998) 192 CLR 493

46 [2002] QCA 477

47 [2004] QCA 19

48 At [108]

49 To this extent it is broader than the Western Australian offence in that the WA offence requires prosecutors to establish that a particular means used was dishonest – in addition to the overall dishonesty of the activity. Further, the WA courts have resisted the objective approach in Peters and still require a subjective awareness of the dishonesty.

is limited predictability as to the scope of the offence. It is this unpredictability of the application of dishonesty in individual circumstances that has led to repeated calls for it to be only used as a negative element in offences. That is, that other external elements define the offence as prima facie criminal and then lack of dishonesty can be used to exculpate the accused. However, without such additional external elements, any activity that results in a benefit or a detriment can amount to an offence if post-fact the jury or magistrate considers that the activity is dishonest.

This has the potential to place a large amount of business activity into the scope of the offence. There are many forms of business and negotiation that might appear dubious to outsiders, and even to those within the industry. So-called smart business practices are often lauded as an entrepreneurial approach to life and the basis of much business success but now have the potential to to be prosecuted under these general offences. Without a need to establish that the person knew that the activity was wrong or dishonest, it would only take one or two adventurous uses of the offence by the Crown to cast a significant pall over entrepreneurial activity.

By contrast, in the ACT and the Commonwealth, dishonesty is defined to require that the accused be aware of the community standard, enacting the *Ghosh* test in preference to the approach taken in *Peters*. Further, the victim must be an emanation of the Crown – the Commonwealth or Territory. There is an argument that persons dealing with the State have some degree of obligation to act circumspectly, an argument that may not be that strong in light of the degree of business activity that governments now engage in.[50] But the fact that the prosecution must prove that the accused knew that what they were doing was in breach of community standards provides a degree of predictability and a respect for individuals as being responsible for their own choices – both seen as underlying principles of criminal law[51] - that is lacking in the Queensland provision.

Northern Territory: deception

Strangely, the Northern Territory offence goes in an opposite direction. Rather than rely on dishonesty as a definer of criminality, it requires an intentional deception. [52] This approach appears to put a premium on truth over motivation. There is no issue of morality in this offence. Instead what is required is proof that the accused intentionally engaged in deception. The rationale for this is somewhat puzzling. While the offence is broader than a dishonesty offence in that it does not excuse honest deceptions, it is significantly narrower in that it is not an offence to recklessly deceive

Other jurisdictions have accepted that deceptions can be reckless. The lack of a need to prove dishonesty presumably led the Northern Territory to excise from the offence situations where a person makes statements that they do not know to be true without caring whether another would be deceived by them.[53]

However this means that it may be a serious criminal offence for a fleeing woman to give a false name in obtaining accommodation in order to avoid detection by a violent spouse, but yet it may not be an offence to make dangerously false claims about products, being careless as to whether anyone would rely on them.

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[50] On the other hand it may also be the case that those dealing with certain agencies of the State – such as social services – are in a more vulnerable position and the obligations may be reversed.

[51] See Ashworth, A *Principles of Criminal Law* (4 edn Oxford University Press Oxford 2003)

[52] What deception or deceit amounts to is discussed above in relation to the Western Australian offence.

[53] "Deception" in s1 Definition *Northern Territory Criminal Code*

Conclusion

It is clear that in a number of Australian jurisdictions it is now possible for a person to be convicted of fraud in circumstances where no action that they commit is, of itself, prohibited. In these states a person can be guilty of fraud if a jury or magistrate is convinced that despite the prima facie legality of the activity, the person was aware that ordinary people would think he or she was doing the wrong thing in a moral sense. Thus business practices that do not fully disclose the full circumstances of an opportunity or properties of a product, while not amounting to deception might be fraud if seen to be dishonest in this broad sense. In Queensland, the accused may be convicted even if they are not aware that others would think it wrong. But in the Northern Territory, any misleading of another is fraud – even if such deception is morally the right thing to do.

There are major philosophical debates over whether forms of deception such as lying are wrong in all situations,[54] and on policy grounds it is hard to justify criminalising conduct that the accused is not aware is unacceptable. To do otherwise may have the effect of re-constituting fraud offences as based on negligence standards.

These possibilities require that more considered examination of the appropriate boundaries of the criminal law in the area of deception and dishonesty be undertaken than has been to date. The comfortable boundary that property had a right to be protected which formed the basis of false pretences offences is no longer the actual edge of the law. The second wave of fraud offences extended the boundary to one of financial advantage. The general fraud offences discussed in this paper appear to dispense with any boundaries, potentially extending the reach of the criminal law into areas of life that have not till now been seen as within the aegis of the criminal law. This has happened without any significant public debate. In removing these requirements that in the past were ways of identifying fraud, the mental elements of offence have become more crucial as the basis on which to found liability. Yet the widely divergent approaches taken in the jurisdictions on what those mental elements should be suggest that there is a need for a more consistent approach across the jurisdictions. While the forms of fraud are complex and difficult to define, the basis of criminal liability should be one firmly rooted in individual culpability based on the accused's awareness of wrongdoing. On this basis the Western Australian approach appears to be the most appropriate – but is unnecessarily complex.

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[54] See e.g. Bok, *Lying: Moral Choices in Public and Private Life*, Vintage Books, New York, 1979; Green, *Lying, Cheating and Stealing: A Moral Theory of White Collar Crime*, Oxford University Press, Oxford, 2006

Appendix: General Fraud Offences

Northern Territory Criminal Code

227. Criminal deception

(1) Any person who by any deception - …

(b) obtains a benefit (whether for himself or herself or for another),

is guilty of a crime and is liable to the same punishment as if he or she had stolen the property or property of equivalent value to the benefit fraudulently obtained (as the case may be).

(1A) In subsection (1), "benefit" includes any advantage, right or entitlement.

Western Australian Criminal Code

409. Fraud (inserted by 101 of 1990)

(1) Any person who, with intent to defraud, by deceit or any fraudulent means —

(a) obtains property from any person;

(b) induces any person to deliver property to another person;

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

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

(e) induces any person to do any act that the person is lawfully entitled to abstain from doing*;* or

(f) induces any person to abstain from doing any act that the person is lawfully entitled to do,

is guilty of a crime and is liable —

(g) if the person deceived is of or over the age of 60 years, to imprisonment for 10 years*;* or

(h) in any other case, to imprisonment for 7 years.

Alternative offence: s. 378, 414 or 428.

Summary conviction penalty (subject to subsection (2)):

(a) in a case to which paragraph (g) applies: imprisonment for 3 years and a fine of $36 000*;* or

(b) in a case to which paragraph (h) applies: imprisonment for 2 years and a fine of $24 000.

(2) If the value of —

(a) property obtained or delivered*;* or

(b) a benefit gained or a detriment caused;

is more than $10 000 the charge is not to be dealt with summarily.

(3) It is immaterial that the accused person intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused.

[Section 409 inserted by No. 101 of 1990 s. 24; amended by No. 36 of 1996 s. 23; No. 23 of 2001 s. 11; No. 70 of 2004 s. 35(4) and 36(3).]

Queensland Criminal Code Act 1899

408C Fraud

(1) A person who dishonestly—

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

(i) property belonging to another; or

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

(b) obtains property from any person; or

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

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

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

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

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

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

(2) An offender guilty of the crime of fraud is liable to imprisonment for 5 years save in any of the following cases when the offender is liable to imprisonment for 10 years, that

is to say—

(a) if the offender is a director or member of the governing body of a corporation, and the victim is the corporation;

(b) if the offender is an employee of another person, and the victim is the other person;

(c) if any property in relation to which the offence is committed came into the possession or control of the offender subject to a trust, direction or condition that it should be applied to any purpose or be paid to any person specified in the terms of trust, direction or condition or came into the offender's possession on account of any other person;

(d) if the property, or the yield to the offender from the dishonesty, is of a value of $5000 or more.

(3) For the purposes of this section—

(a) ***property***, without limiting the definition of property in section 1,29 includes credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations; and

(b) a person's act or omission in relation to property may be dishonest even though—

(i) he or she is willing to pay for the property; or

(ii) he or she intends to afterwards restore the property or to make restitution for the property or to afterwards fulfil his or her obligations or to make good any detriment; or

(iii) an owner or other person consents to doing any act or to making any omission; or

(iv) a mistake is made by another person; and

(c) a person's act or omission in relation to property is not taken to be dishonest, if when the person does the act or makes the omission, he or she does not know to whom the property belongs and believes on reasonable grounds that the owner cannot be discovered by taking

reasonable steps, unless the property came into his or her possession or control as trustee or personal representative; and

(d) persons to whom property belongs include the owner, any joint or part owner or owner in common, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, had control of it; and

(e) ***obtain*** includes to get, gain, receive or acquire in anyway; and

(f) if a person obtains property from any person or induces any person to deliver property to any person it is immaterial in either case whether the owner passes or intends to pass ownership in the property or whether he or she intends to pass ownership in the property to any person.

ACT Criminal Code

333 General dishonesty

(1) A person commits an offence if—

(a) the person does something with the intention of dishonestly obtaining a gain from someone else; and

(b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2) Absolute liability applies to subsection (1) (b).

(3) A person commits an offence if—

(a) the person does something with the intention of dishonestly causing a loss to someone else; and

(b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(4) Absolute liability applies to subsection (3) (b).

(5) A person commits an offence if—

(a) the person—

(i) dishonestly causes a loss, or a risk of loss, to someone else; and

(ii) knows or believes that the loss will happen or that there is a substantial risk of the loss happening; and

(b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(6) Absolute liability applies to subsection (5) (b) .

(7) A person commits an offence if—

(a) the person does something with the intention of dishonestly influencing a public official in the exercise of the official's duty as a public official; and

(b) the public official is a territory public official; and

(c) the duty is a duty as a territory public official.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(8) Absolute liability applies to subsection (7) (b) and (c).

(9) In this section:

Territory—see section 319.

Commonwealth Criminal Code

135.1 General dishonesty

Obtaining a gain

(1) A person is guilty of an offence if:

(a) the person does anything with the intention of dishonestly obtaining a gain[55] from another person; and

(b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years. …

Causing a loss

(3) A person is guilty of an offence if:

(a) the person does anything with the intention of dishonestly causing a loss[56] to another person; and

(b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years. …

(5) A person is guilty of an offence if:

(a) the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and

(b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and

(c) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

ACT

333 General dishonesty

(1) A person commits an offence if—

(a) the person does something with the intention of dishonestly obtaining a gain from someone else; and

(b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2) Absolute liability applies to subsection (1) (b).

(3) A person commits an offence if—

(a) the person does something with the intention of dishonestly causing a loss to someone else; and

(b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both. …

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[55] Gain is defined in s130.1 to mean:

(a) a gain in property, whether temporary or permanent; or

(b) a gain by way of the supply of services;

and includes keeping what one has.

[56] Loss is defined in s130.1 to mean:

a loss in property, whether temporary or permanent, and includes not getting what one might get.