REINING IN THE CONCEPT OF APPROPRIATION IN THEFT

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The concept of appropriation as a defining element in the offence of theft needs to be understood in such a manner as to draw a proper borderline between those forms of interference with property rights which ought to be the concern of the criminal law and other forms of misconduct which should be actionable only, if at all, by civil litigation. To regard an appropriation as occurring where an act is performed which amounts to an assumption of any one of the rights of an owner is to define the actus reus of theft too widely. Rather, the concept of appropriation should be regarded as incorporating an element of adverse interference with or usurpation of a right of an owner.

I INTRODUCTION

In Victoria, the theft legislation has now been in force for almost 30 years.[1] The legislation is contained in Division 2 of Part 1, ss 71-95, of the *Crimes Act 1958* (Vic). The Victorian provisions differ in only a few respects from the English *Theft Act 1968*, which Act embodied 'a fundamental reconsideration of the principles underlying' the law of property offences.[2] Overall, the legislation has been successful in providing an appropriate set of offences that is both coherent and suitable for the needs of contemporary society.[3] On any objective analysis, it provides a vastly superior method of dealing with crimes against property than does the common law which continues to apply in New South Wales. The English/Victorian model has been adopted in the Australian Capital Territory, the Northern Territory and South Australia.[4]

The theft legislation sought to replace the arcane, narrow technicality of the common law with broad concepts more readily capable of being understood by jurors. Broadly defined concepts limit the potential for ingenious or simply fortunate rogues to escape conviction by falling between the boundaries of technically complex offences. The use of such concepts, however, carries the danger that the legislation will fail to define in an acceptable fashion the borderline between those forms of interference with property rights which ought

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1 The *Crimes (Theft) Act 1973* (Vic) was enacted on 17 April 1973. It was proclaimed and came into force on 1 October 1974.

2 Criminal Law Revision Committee, Eighth Report, Theft and Related Offences, Cmnd 2977, 7.

3 For a comprehensive treatment of the legislation, see C R Williams, *Property Offences* (3rd ed, 1999).

4 *Crimes Act 1900* (ACT) pt IV; *Criminal Code Act 1983* (NT) pt VII; *Criminal Law Consolidation Act 1935* (SA) as amended by the *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA) pt V.

to be the concern of the criminal law, and other forms of conduct which should be actionable only, if at all, by civil litigation. When this occurs, it becomes the responsibility of the judges to develop principled limitations to the scope of these concepts so as to avoid undue extension of the ambit of the criminal law.

The word 'appropriates' in the definition of theft provides an example of a broad concept which should be read down if the offence of theft is not to extend beyond the legitimate boundaries of the criminal law. It will be argued that the word should be interpreted as incorporating an element of adverse interference with or usurpation of a right of an owner.

II *MENS REA* AND *ACTUS REUS*

Section 72(1) of the *Crimes Act 1958* (Vic) provides that a person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.[5] The *actus reus* of theft is the appropriation of property belonging to another. The *mens rea* is dishonesty coupled with intention permanently to deprive.

In Victoria, the need to draw clear boundaries to the *actus reus* of the offence is heightened because of the limited scope accorded to possible defences based on lack of dishonesty.[6] Section 73(2) provides a negative definition of dishonesty. A person's appropriation of property 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. It is unclear from s 73(2) whether the classes of case there listed was intended to be exhaustive, or whether there are cases not covered by the sub-section in which an accused may have a defence on the ground that her or his conduct was not dishonest. Cases in which an accused has appropriated property belonging to another with intent permanently to deprive, which do not fall within s 73(2), and yet the accused nonetheless claims that her or his conduct was not dishonest are obviously fairly rare. Such cases do however occur. One example is the unauthorised 'borrowing' of fungibles, where the accused intends to return not the original item taken but a precise equivalent. Other situations in which the conduct of the accused may be thought not to be properly regarded as criminal may readily be imagined. For example, the accused is cleaning up the papers of a friend who has recently died. The accused destroys letters he or she finds in the realisation that the contents of the letters can only cause distress and

5 For the ACT, Northern Territory and South Australia: *Crimes Act 1900* (ACT) s 94; *Criminal Code Act 1983* (NT) s 209(1); *Criminal Law Consolidation Act 1935* (SA) s 134.

6 For detailed discussion of this issue, see Williams, above n 3, 129-39; C R Williams, 'The Shifting Meaning of Dishonesty' (1999) 23 *Criminal Law Journal* 275.

humiliation to the spouse and family of the deceased. Such conduct should not, it is suggested, render the actor a thief.

In England, the courts have adopted the view that the word 'dishonestly' does have a residual meaning beyond the cases covered by s 73(2). It is for the jury, or in cases tried summarily, the magistrate, to determine whether the accused has acted dishonestly by applying the test of the 'current standards of ordinary decent people': *R v Feely*.[7] Further, the accused must be shown personally to have realised that his or her conduct was by those standards dishonest: *R v Ghosh*.[8] The *Feely/Ghosh* approach to dishonesty has been criticised.[9] It is argued that if the dishonesty of the conduct of the accused is left to the jury 'different juries may well give different answers on facts which are indistinguishable'.[10] In cases of complex fraud, the task of determining what constitutes dishonesty may involve complex value judgments and questions of policy which may be thought to be beyond the average jury.[11] Nonetheless, *Feely/Ghosh* provides a mechanism by which the scope of the offence of theft may be limited by reference to the jury's assessment of the moral culpability of the accused in the circumstances of the particular case.

In a series of three cases, *R v Salvo*,[12] *R v Brow*[13] and *R v Bonollo*,[14] the Victorian Court of Criminal Appeal rejected the *Feely/Ghosh* approach to dishonesty. The Court held that the word 'dishonestly' possesses no meaning or scope beyond those cases referred to in s 73(2). The trilogy of Victorian cases may well be open to challenge as being in principle inconsistent with the approach adopted by Australian courts in considering other statutory offences involving crimes against property, and in particular the decision of the High Court in *Peters v The Queen*.[15] In *Peters*, the Court was concerned with the statutory offence of conspiracy to defraud the Commonwealth. Justices Gaudron and Toohey, with whom Kirby J agreed on this point, held that the requirement of fraud in conspiracy to defraud incorporates dishonesty, and that in determining dishonesty, the *Feely/Ghosh* approach should be followed.[16]

7 [1973] QB 530, 538.
8 [1982] QB 1053.
9 See J C Smith, 'Commentary on *R v Feely*' [1973] *Criminal Law Review* 192; J C Smith, *The Law of Theft* (8th ed, 1997) 39; Edward Griew, *Dishonesty and the Jury* (1974); Martin Wasik, 'Mens Rea, Motive and the Problem of "Dishonesty" in the Law of Theft' [1979] *Criminal Law Review* 543; Edward Griew, 'Dishonesty: The Objections to *Feely and Ghosh*' [1985] *Criminal Law Review* 341; Warren J Brookbanks, 'Colour of Right and Offences of Dishonesty' (1987) *Criminal Law Journal* 153; D W Elliott, 'Directors, Theft and Dishonesty' [1991] *Criminal Law Review* 232; P R Glazebrook, 'Revisiting the Theft Acts' (1993) 52 *Cambridge Law Journal* 191; Andrew Halpin, 'The Test for Dishonesty' [1996] *Criminal Law Review* 283.
10 J C Smith, 'Commentary on *R v Feely*' [1973] *Criminal Law Review* 192.
11 See, eg, *R v Greenstein* [1975] 1 WLR 1353.
12 [1980] VR 401.
13 [1981] VR 783.
14 [1981] VR 633.
15 (1998) 192 CLR 493 ('*Peters*').
16 See also *R v Glenister* [1980] 2 NSWLR 597; *R v Smart* [1983] VR 265; *R v Lawrence* (1996) 138 ALR 487; *Macleod v The Queen* (2003) 197 ALR 333.

Until expressly overruled however, *Salvo/Brow/Bonollo* must be taken as stating the law for Victoria.[17] In consequence of the limitations placed on the availability of defences based upon lack of dishonesty, it becomes particularly important that the actus reus of theft be defined in such a manner as to draw a proper boundary between that which should and that which should not be regarded as criminal.

III APPROPRIATION AND THE IMPLICATIONS OF *LAWRENCE v COMMISSIONER OF POLICE FOR THE METROPOLIS*

Section 73(4) of the *Crimes Act 1958* (Vic) defines appropriation widely as covering any assumption by a person of the rights of an owner.[18] A person who takes property belonging to another clearly assumes the rights of an owner and this is, of course, the most common instance of appropriation. A person who uses property belonging to another also assumes the rights of an owner. A person who offers the goods of another for sale assumes the rights of an owner.[19] So too does a person who destroys or damages property belonging to another. Where property is merely damaged, it may be that theft is not committed because of the absence of an intention permanently to deprive. If however, the damage is substantial, it may constitute a permanent deprivation. To sell or to pledge property belonging to another is also an assumption of the rights of an owner. So too is a lending of property belonging to another. A mere retention of property belonging to another may also amount to an assumption of the rights of an owner. Thus a person who refuses to return property to its owner appropriates it.[20] It need not be shown that the accused assumed all the rights of an owner. What is required is no more than 'the taking on one's self of the right to do something which the owner has the right to do by virtue of his ownership'.[21]

17 In the ACT, a wider definition of dishonesty, based upon the dissenting judgment of McGarvie J in *R v Brow*, is incorporated in the legislation. Section 86(4) of the *Crimes Act 1900* (ACT) provides that a person's appropriation of property shall not be regarded as dishonest if:

> ... he or she appropriates the property in the belief that the appropriation will not cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property.

In South Australia, the *Feely/Ghosh* approach is incorporated by statute. Section 131 of the *Criminal Law Consolidation Act 1935* (SA) as amended provides:

> (1) a person's conduct is dishonest if the person acts dishonestly according to the standards of ordinary people and knows that he or she is so acting.
> (2) The question whether a defendant's conduct was dishonest according to the standards of ordinary people is a question of fact to be decided according to the jury's own knowledge and experience and not on the basis of evidence of those standards.

18 Section 73(4) provides:

> Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

For general discussion of the rights of an owner, see A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107; G W Paton and D P Derham, *A Textbook of Jurisprudence* (4th ed, 1972) 516-22.

19 *R v Pitham and Hehl* (1977) 65 Cr App R 45.

20 *R v Falconer-Atlee* (1973) 58 Cr App R 348, 359-60.

21 *Stein v Henshall* [1976] VR 612, 615 (Lush J).

At common law, the *actus reus* of larceny was a taking. The crime of larceny was limited in scope by two requirements. First, by the requirement that the taking must amount to a trespass.[22] Secondly, by the rule that larceny could not be committed if the accused obtained ownership and not merely possession of the property in question.[23] In cases in which property was obtained by deception, the test of whether the victim was induced by the deception to part with ownership or merely possession distinguished larceny by a trick from the crime of obtaining property by false pretences.[24] More generally however, the requirements that the taking amount to a trespass and that ownership in the property not pass to the accused meant that the crime of larceny was restricted to cases in which the civil law would regard the conduct of the accused as being wrongful, and would recognise the person deprived of his or her property as still being the rightful owner. The rationale to which these and other requirements of the common law of property offences gave expression was what the American scholar George Fletcher has termed 'the principle of manifest criminality'. Professor Fletcher writes:

> The principle of manifest criminality embodies a way of thinking about liability that many theorists have since identified as characteristic of legal thought. The mode of thought requires a two-stage progression in the analysis of liability. The first stage consists of objective facts; and the second, of subjective criteria related to the actor. Further, the external facts are typically incriminating; and the subjective facts, exculpatory. The case for liability moves from the objective to the subjective, the external to the internal, the act to the actor. This way of thinking is deeply embedded in the law.[25]

Modern criminal law has seen the dominance of subjective approaches to liability, taking the actor's intent as the central question in assessing liability, and minimising the preliminary requirement of an act which is objectively wrongful. Nonetheless, the idea that conduct should only amount to a crime if it embodies an act which is wrongful in itself, independently of the subjective state of the mind of the actor, remains an important value in limiting undue expansion of the criminal law.

In *Lawrence v Commissioner of Police for the Metropolis*,[26] it became clear that the limitations of the common law of larceny, and implicitly the principle of manifest criminality, were not inherent in the crime of theft. An Italian student who spoke little English had taken a taxi from Victoria Station to Ladbroke

[22] *R v Smith* (1852) 2 Den 449; 169 ER 576; *R v Middleton* (1873) LR 2 CCR 38; *R v Ashwell* (1885) 16 QBD 190; *R v Hill and Marshall* [1909] VLR 491; *Croton v The Queen* (1967) 117 CLR 326; *Ilich v The Queen* (1987) 162 CLR 110, 123 (Wilson and Dawson JJ). See also *Russell on Crime* (12th ed, 1964) vol 2, 909-10; R M Perkins, *Criminal Law* (2nd ed, 1959) 245-6.

[23] *R v Middleton* (1873) LR 2 CCR 38, 43 (Cockburn CJ, Blackburn, Mellor, Lush, Grove, Denman and Archibald JJ); *R v Ashwell* (1885) 16 QBD 190; *Lacis v Cashmarts* [1969] 2 QB 400; *Ilich v The Queen* (1987) 162 CLR 110.

[24] *East's Pleas of the Crown* (1803) vol 2, 816; *R v Ward* (1938) 38 SR (NSW) 308.

[25] George Fletcher, *Rethinking Criminal Law* (1978) 88-9. See also George Fletcher, 'The Metamorphosis of Larceny' (1976) 89 *Harvard Law Review* 469.

[26] [1972] AC 626 (*'Lawrence'*).

Grove. The accused, a taxi driver, had told him it was a long journey and very expensive, though the correct fare was only 10s 6d. The student took out his wallet and gave a pound to the driver. He held his wallet open and the driver took a further six pounds out of it. The driver was charged with the theft of six pounds. In cross-examination, the student was asked whether he had consented to the money being taken. He replied through an interpreter that he had 'permitted'. The accused was convicted and on appeal it was submitted that since the student had consented to the taking of the six pounds, the conviction for theft could not stand.

The contention that there could not be an appropriation within the meaning of the theft legislation unless the property was taken without the consent of the owner, ie that the taking must be a trespass, was expressly rejected by both the Court of Appeal and by the House of Lords. The omission from the section of any express requirement that the Crown prove absence of consent was treated as a deliberate decision by Parliament. An alternative submission, that the facts alleged against the accused might have justified a charge of obtaining property by deception but not a charge of theft, was likewise rejected. The Court of Appeal and the House of Lords held that the offences of theft and obtaining property by deception were not mutually exclusive, and that the accused was properly convicted of theft even though the victim intended to transfer ownership in the property he was induced to hand over.[27]

The effect of *Lawrence* would seem to be that, apart from cases involving land which in general may be obtained by deception but not stolen, all conduct which amounts to obtaining property by deception also constitutes theft.[28] Further, by holding that theft may be committed where the victim consents to the taking, the House of Lords extended the offence to situations in which the civil law would view the conduct of the accused as not amounting to the tort of trespass, and would regard the full proprietary interest in the property as having passed to the accused.

IV SEEKING LIMITS TO APPROPRIATION: *R v MORRIS*

In *R v Morris*,[29] the House of Lords sought to limit the concept of appropriation. Their Lordships held that an accused, however dishonest the intention, does not commit an appropriation where he or she does no more than is authorised by the owner. The concept of appropriation involves an element of adverse interference with or usurpation of the rights of the owner. Morris was followed by the Victorian Court of Criminal Appeal in *R v Baruday*[30] and affirmed in *R v Roffel*.[31] In *R v Gomez*,[32] however, the House of Lords carefully restricted this limitation

27 In Victoria, *Lawrence* was followed in *Heddich v Dike* (1981) 3 A Crim R 139.
28 In the ACT and South Australia, obtaining property by deception has been abolished as a distinct offence.
29 [1984] AC 320 ('*Morris*').
30 [1984] VR 685 ('*Baruday*').
31 [1985] VR 511 ('*Roffel*').
32 [1993] AC 442 ('*Gomez*').

on the scope of the offence. Any action beyond those the accused was strictly authorised to perform may be sufficient to constitute an appropriation. Further, any deception on the part of the accused in obtaining the consent of the owner to the actions of the accused may be sufficient to vitiate that consent.

In *R v Morris*,[33] the accused removed articles from shelves in a self-service store and attached in place of or on top of the correct price labels, price labels removed from lower-priced articles in the store. He then paid at the checkout point the lower price indicated on the false labels. The accused could have been convicted of obtaining the articles by deception, but was charged with theft. The accused was convicted on the basis that the act of changing the labels amounted to an appropriation.

The Court of Appeal held that it was not necessary for the prosecution to prove that possession was taken without the owner's consent or authorisation. The court concluded that the accused had appropriated the articles when he removed them from the shelves.

On appeal the House of Lords, while affirming the conviction, held that the concept of appropriation involves an element of adverse interference with or usurpation of some right of the owner. Delivering the judgment of their Lordships, Lord Roskill stated:

> If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the checkpoint there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket. In the context of s 3(1) [the English equivalent of s 73(4)], the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied authority of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the checkpoint and there to pay the correct price, at which moment the property in the goods will pass to the shopper for the first time. It is with the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts and thus obtained at least control if not actual possession of the goods preparatory, at a later stage, to obtaining the property in them on payment of the proper amount at the checkpoint. I do not think that s 3(1) envisages any such act as an 'appropriation', whatever may be the meaning of that word in other fields such as contract or sale of goods law.[34]

His Lordship held that while mere removal from the shelves did not amount to an appropriation, the combination of removal from the shelves together with the switching of labels constituted an adverse interference with or usurpation of the right of the owner and therefore amounted to an appropriation.

[33] [1983] QB 587 (Court of Appeal); [1984] AC 320 (House of Lords).
[34] [1984] AC 320, 332. See also *R v Gallasso* [1993] Crim LR 459.

Where an accused performs acts wholly within the scope of what was authorised or consented to by the owner of the property, an appropriation will nevertheless be committed if that authorisation or consent was obtained as a consequence of deception. The view that deception vitiates consent, converting what would otherwise be a taking authorised by the owner into an adverse interference with or usurpation of the right of the owner, enables the decision in *Lawrence*[35] to be reconciled with the approach developed in *Morris*. Thus in *Lawrence*, an appropriation occurred when the accused took the money from the wallet. Although there was consent to the taking, that consent was obtained as a consequence of deception.[36]

This understanding of the nature of appropriation was adopted by the Victorian Court of Criminal Appeal in *Baruday*.[37] The accused was convicted on a number of counts of theft arising out of the conduct of his business as an insurance broker. Two of the counts involved cheques paid by a client to the accused upon receipt of bogus accounts from the accused for the payment of extra premiums in respect of workers' compensation insurance policies. The Court held that the accused appropriated these premiums when he received the cheques and paid them into his account. Although the accused had obtained possession of the cheques with the consent of the owner, that consent was vitiated by his deception.

In *Gomez*,[38] the accused was employed as the assistant manager of an electrical goods shop. He entered into an arrangement with a rogue to supply the rogue with electrical goods in exchange for building society cheques, which both knew to be stolen and worthless. The accused induced the shop manager to authorise the supply of the goods against the cheques which he told the manager were 'as good as cash'. The cheques were then used for the purchase of electrical goods and were later dishonoured on presentation. The accused was convicted of theft of the goods. The Court of Appeal quashed the conviction on the ground that, as the manager had expressly authorised the goods to be removed, there had been no appropriation. The Crown appealed to the House of Lords where the decision of the Court of Appeal was reversed and the conviction of the accused restored. Counsel for the accused argued that the decision in *Lawrence* was in conflict with the requirement laid down in *Morris* that to constitute an appropriation, the acts of the accused must constitute an adverse interference with or usurpation of the right of the owner. By a majority of four to one, their Lordships affirmed the decision in *Lawrence*.[39] *Lawrence* was reconciled with *Morris* on the basis suggested above, ie that an act expressly or impliedly authorised by the owner can amount to an appropriation where the owner is induced by fraud to part with her or his goods.

What of the situation where the owner's consent is obtained as a consequence of a mistake on the part of the owner of which the accused was aware, but which

35 [1972] AC 626.
36 See also *Heddich v Dike* (1981) 3 A Crim R 139.
37 [1984] VR 685.
38 [1993] AC 442.
39 Lords Keith, Jauncey, Browne-Wilkinson and Slynn; Lord Lowry dissenting.

was not induced by any deception on the part of the accused? It is suggested that in this case also there is an adverse interference with or usurpation of the right of an owner and thus an appropriation, provided the mistake was of a sufficiently fundamental nature to prevent ownership in the property from passing to the accused. Broadly, mistake operates to prevent ownership from passing in three classes of case.[40] First, there is mistake as to the identity of the person to whom the property is given.[41] Secondly, mistake as to the identity of that which is handed over (eg where a $100 note is handed over, the owner believing it to be a $10 note).[42] Thirdly, where an excess quantity of goods is handed over, ownership in the excess does not pass.[43] A mistake as to quantity does not, however, prevent ownership from passing in the case of money.[44] It is suggested that these are the only types of mistake which have the effect of preventing property from passing. Where a person (P) delivers something to another intending to part with ownership of that thing to the person to whom P delivers it, whether it is delivered by way of gift or pursuant to an agreement, property in the thing will pass. Property is not prevented from passing because the goods have been delivered for a mistaken reason. P may be mistaken as to the attributes of the person to whom P delivers the goods, P may mistake the value of the goods, or in cases of delivery pursuant to an agreement, P may mistake the extent of P's obligation to deliver goods. Such mistakes do not prevent property in the goods from passing to the receiver.

Notwithstanding an absence of deception, the awareness by the accused of a mistake of such a nature as to prevent property from passing can, it is submitted, be viewed as amounting to fraud and therefore as vitiating the owner's consent. This was the position at common law. In the celebrated case of *R v Middleton*,[45] the accused gave notice of intention to withdraw ten shillings from his post office savings account. When he went to withdraw the money, the post office clerk mistakenly referred to a letter of advice relating to another customer and gave the accused eight pounds 16s 10d. The accused took the money realising the mistake, and was convicted of larceny of that sum. The Court for Crown Cases Reserved by a majority of 11 to four upheld the conviction.[46] Since the accused was aware of the mistake and property in the money did not vest in him, larceny

40 For more detailed consideration of what forms of mistake have the effect of preventing property from passing, see Williams, above n 3, 36-7, 91-2. See also R Goff and G Jones, *The Law of Restitution* (4th ed, 1993) 107-229; N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8th Aust ed, 2002) 594-654.

41 *R v Middleton* (1873) LR 2 CCR 38.

42 *R v Ashwell* (1885) 16 QBD 190.

43 *Russell v Smith* [1956] 1 QB 439.

44 *Ilich v The Queen* (1987) 162 CLR 110.

45 (1873) LR 2 CCR 38.

46 A joint judgment was delivered by Cockburn CJ, Blackburn, Mellor, Lush, Grove, Denman and Archibald JJ. Separate judgments upholding the conviction were delivered by Bovill CJ, with whom Keating J, Kelly CB and Pigott B agreed; Martin, Bramwell and Cleasby BB, and Brett J dissented.

was committed.[47] In *R v Gilks*,[48] the Court of Appeal held the reasoning of *R v Middleton* was applicable under the theft legislation. There is no suggestion in *Morris* that their Lordships intended to overturn *R v Gilks*.[49]

The above understanding of the nature of appropriation is incorporated in the ACT legislation.[50] Section 86(1) of the *Crimes Act 1900* (ACT) provides:

> For the purposes of this Part, a person shall be taken to have appropriated property if:
>
> (a) he or she obtains by deception the ownership, possession or control of the property for himself or herself or for any other person; or
> (b) he or she adversely interferes with or usurps any of the rights of an owner of the property.

V APPROPRIATION WIDENS: *R v HINKS*

The approach outlined in the above section involves, it is submitted, an in principle correct drawing of the boundary between those forms of conduct which should constitute the actus reus of theft and those which should be regarded as not falling within the ambit of the criminal law. In *R v Hinks*,[51] however, the House of Lords rejected such an approach in favour of returning to an unrestricted view as to what assumptions of an owner's rights may constitute an appropriation. The accused was friendly with a man of limited intelligence, describing herself as the main carer for the man. Over a six-month period, the man withdrew sums totalling about 60,000 pounds from his building society account, and those sums were deposited into the account of the accused. The accused was charged with various counts of theft. The prosecution case was that the accused had influenced and coerced the man to withdraw moneys from his account. The accused made a submission of no case to answer, contending that the moneys were a gift to her, that the title in the moneys had passed to her and that in those circumstances there could be no theft. The submission was rejected

47 *R v Middleton* was followed in *R v Ashwell* (1885) 16 QBD 190 and *R v Flowers* (1886) 16 QBD 643. The principle of *R v Middleton* was adopted in s 1(2)(i)(c) of the *Larceny Act 1916* (UK) (now repealed), which was intended to be declaratory of the common law. In *R v Potisk* (1973) 6 SASR 389, however, the Supreme Court of South Australia rejected *R v Middleton*. For discussion and criticism of *R v Potisk*, see Williams, above n 3, 31-2, 35-7.

48 [1972] 1 WLR 1341. The actual decision in *R v Gilks* has been criticised, correctly it is submitted, on the basis that the mistake was not such as to prevent property in the money obtained by the accused from passing to him: 'Commentary on *R v Gilks*' [1972] *Criminal Law Review* 586; J C Smith, *The Law of Theft* (8th ed, 1997) 56-7.

49 On the contrary, Lord Roskill's criticism of *Dip Kaur v Chief Constable for Hampshire* [1981] 1 WLR 578 suggests approval of *R v Gilks*: [1984] AC 320, 334.

50 By way of contrast, the South Australian legislation replaces the requirement of appropriation with a requirement that the accused 'deals' with property: *Criminal Law Consolidation Act 1935* (SA) (as amended) s 134(1). Section 130 defines 'deals' as covering the conduct of a person who:

> (a) takes, obtains or receives the property; or
> (b) retains the property; or
> (c) converts or disposes of the property; or
> (d) deals with the property in any other way.

51 [2001] 2 AC 241 ('*Hinks*').

by the judge. The judge directed the jury that the accused would be guilty of theft if she realised the man was so mentally incapable that ordinary and decent people would regard it as dishonest to accept that gift from him. The accused was convicted. Her appeal against conviction was dismissed by the Court of Appeal which held that there could be an appropriation even if the owner had consented to the property being taken.

The accused appealed to the House of Lords. The question certified for consideration by the House was: '[w]hether the acquisition of an indefeasible title to property is capable of amounting to an appropriation of property belonging to another for the purposes of s 1(1) of the *Theft Act 1968*'.[52] Before the House, counsel argued that there can be no appropriation unless the owner retains some proprietary interest, or the right to resume or recover some proprietary interest, in the property. Alternatively, counsel argued that 'appropriation' should be interpreted as if the word 'unlawfully' preceded it. Counsel deployed four examples to demonstrate the width of appropriation should some such limitation not be adopted.[53]

(1) S makes a handsome gift to D because S believes D has obtained a First in his examinations. D has not and knows that S is acting under that misapprehension;

(2) P offers D a large sum of money for a painting he believes is a valuable Constable. D knows it was painted by his sister and is valueless but accepts the offer;

(3) A buys a roadside garage from B. Unknown to A but known to B it has been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A's garage; and

(4) An employee agrees to retire before the end of his contract of employment, receiving a sum of money by way of compensation from the employer. Unknown to the employer, the employee has committed serious breaches of contract which would have enabled the employer to dismiss the employee without compensation.

[52] Professor J C Smith has consistently argued for this limitation to be placed upon the scope of the offence: see J C Smith, *The Law of Theft* (8th ed, 1997) 16-17; 'Commentary on *Dip Kaur v Chief Constable for Hampshire* [1981] *Criminal Law Review* 259; 'Theft and Voidable Title: A Reply' [1981] *Criminal Law Review* 677; 'Commentary on *R v Gomez*' [1993] *Criminal Law Review* 304; 'Commentary on *R v Hinks* (C of A)' [1998] *Criminal Law Review* 904. A similar argument is adopted by G Williams, 'Theft, Consent and Illegality' [1977] *Criminal Law Review* 127; *Textbook of Criminal Law* (2nd ed, 1983) 809-14. Cf P R Glazebrook, 'Revising the Theft Acts' (1993) 52 *Cambridge Law Journal* 191; S Gardner, 'Property and Theft' [1998] *Criminal Law Review* 35. A limitation along these lines would, it would seem, achieve essentially the same outcomes as a requirement that the appropriation involve an adverse interference with or usurpation of some right of the owner. It would, however, seem preferable to achieve such a result by that means, limiting the importation of technicalities from the civil law into this area to cases involving mistake: see above n 40. On this issue generally, see also S Gardner, 'Property and Theft' [1998] *Criminal Law Review* 35; A T H Smith, 'Gifts and the Law of Theft' (1999) 58 *Cambridge Law Journal* 10; J Beatson and A P Simester, 'Stealing One's Own Property' (1999) 115 *Law Quarterly Review* 372.

[53] [2001] 2 AC 241, 251-2.

By a majority of three to two, the House of Lords dismissed the appeal, and answered the certified question in the affirmative.[54] The judgment of the majority was delivered by Lord Steyn. His Lordship held that a person could appropriate property belonging to another even though that other person had made her or him an indefeasible gift of property, retaining no proprietary interest or any right to resume or recover any proprietary interest in the property. Since in cases involving deception or coercion the victim will either retain a proprietary interest or at least have a right to recover, the decision of the majority involved a rejection of the proposition that appropriation must involve an adverse interference with or usurpation of the rights of the owner. His Lordship specifically rejected Lord Roskill's statement in *Morris* that appropriation involves such a requirement, stating that Lord Roskill's 'observation (as opposed to the decision in *Morris*) cannot stand with the ratio of *Lawrence*'.[55] His Lordship considered and rejected the argument that injustice might result from such a wide interpretation of appropriation. His Lordship stated:

> My Lords, if it had been demonstrated that in practice *Lawrence* and *Gomez* were calculated to produce injustice that would have been a compelling reason to revisit the merits of the holdings in those decisions. That is however, not the case. In practice the mental requirements of theft are an adequate protection against injustice.[56]

Lord Hobhouse, with whom Lord Hutton agreed, dissented. His Lordship stated:

> An essential function of the criminal law is to define the boundary between what conduct is criminal and what merely immoral. Both are the subject of the disapprobation of ordinary right-thinking citizens and the distinction is liable to be arbitrary or at least strongly influenced by considerations subjective to the individual members of the tribunal. To treat otherwise lawful conduct as criminal merely because it is open to such disapprobation would be contrary to principle and open to the objection that it fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights.[57]

It is submitted that the approach of Lord Hobhouse is to be preferred to that of Lord Steyn. The view of a jury that conduct is contrary to the current standards of ordinary decent people and known by the accused to be so (*Feely/Ghosh*) should not, it is submitted be sufficient to turn conduct not regarded as wrongful by the civil law into a crime. In Victoria, *Salvo/Brow/Bonollo* means that not even the limitation of *Feely/Ghosh* will be available to limit the scope of theft. Acceptance of the view of the majority in *Hinks* would mean that in Victoria, all that might be required to convert an otherwise legitimate taking into theft would be a belief on the part of the accused that he or she was not legally entitled to accept the property, notwithstanding that in reality the law would recognise such

54 Lords Slynn, Jauncey and Steyn; Lords Hutton and Hobhouse dissenting.
55 [2001] 2 AC 241, 250.
56 Ibid 253.
57 Ibid 262.

an entitlement. In the cases put by counsel in *Hinks*, in example (1), D would be guilty of theft unless D believed he or she was legally entitled to accept the gift without divulging the truth. In examples (2) and (3), D and B would be guilty of theft unless they believed they were legally entitled to accept the money paid for the painting and the garage respectively notwithstanding the mistake on the part of the other party to the contract. In example (4), the employee would be guilty of theft unless the employee believed he or she was legally entitled to compensation on termination of employment notwithstanding the employee's own breach of contract. It is submitted that in each case, theft should not be committed on the basis that no appropriation has taken place, irrespective of the belief of the accused as to her or his legal entitlement to the money received. In each case, the money has been received with the consent of the owner, neither coercion nor deception has been employed by the accused and the various mistakes made by the owner are not of a sort that will operate to prevent property from passing.

While the facts of *Hinks* itself demonstrate highly improper conduct on the part of the accused, it does not follow necessarily that the accused should be guilty of theft. A case such as *Hinks* should, it is suggested, be approached as follows. It is assumed, as was the case in *Hinks* that the giver of the property is of sufficient mental capacity to make a gift. First, if the accused is given the property in consequence of coercion or deception, there is an appropriation and theft is committed. Second, if the accused is given the property in consequence of undue influence not involving coercion or deception, the giver should be left to her or his civil remedies in accordance with the normal principles of unjust enrichment. Third, if the accused is simply the recipient of unsolicited generosity, then notwithstanding that an honourable person would be expected to refuse such a gift, the accused will be entitled to retain the property. In neither the second nor the third case however, should the fact that the accused has behaved in a discreditable manner, and realises this be sufficient to turn what is otherwise not criminal into theft.

VI APPROPRIATION FROM ONESELF

If appropriation is regarded as requiring an adverse interference with or usurpation of some right of the owner, it follows that an accused cannot appropriate property which he or she fully owns or controls. In *Roffel*,[58] the accused was convicted on a number of counts of stealing property belonging to a company of which he and his wife were the sole shareholders and directors. The accused alone conducted the day to day management of the company. The accused, with intent to defraud creditors of the company, had drawn cheques on the company's account and had used the proceeds of these cheques for his own purposes. On appeal to the Court of Criminal Appeal, the convictions of the accused were quashed by a majority of two to one.[59] The Court held that although

[58] [1985] VR 511.
[59] Young CJ and Crockett J; Brooking J dissenting.

the company was a separate legal entity from the accused, his consent to the drawing and cashing of the cheques was the company's consent and that there was, therefore, no appropriation. Chief Justice Young stated:

> [W]here is the element of usurpation of the company's rights in the act of receiving the money? The cheque was the company's cheque, made payable to cash and in the possession of the applicant who was the de facto controller of the company. There was no evidence to suggest that the company did not intend the applicant to have the money and to use it for his own purposes. If the company decided to give the money to the applicant in order to defeat its creditors, that would be quite irrelevant. The motive of the company in making the gift could not convert the applicant's act in receiving the money into a usurpation of the company's rights.[60]

Justice Crockett stated:

> The applicant appears to me clearly to have been identified with the company at the relevant time. Whether what the company did through the agency of the applicant was dishonest vis-á-vis the trade creditors or was ultra vires the company is not to the point. By the instrumentality of the only person through which it could effectively act it consented to entry into the impugned transactions. They were thus not unilateral. Or, to describe it in the terms of *Morris*, by reason of its very acquiescence in the drawing of the cheque on its funds the company was not acting so that it could be said the applicant was adversely interfering with or usurping some right of ownership possessed by it.[61]

Justice Brooking dissented. His Honour stated:

> I see no sufficient warrant for holding that there is no assumption of the rights of an owner within the meaning of s 73(4) if the act in question is authorised by the person to whom the property belongs. The clear words of s 73(4) are not to be cut down by reference to some notion said to be contained in the ordinary meaning of 'appropriates'. The suggestion that the word 'assumption' in s 73(4) connotes something like want of authority I find unpersuasive.[62]

Roffel was considered and distinguished in *R v Clarkson and Lyon*.[63] The accused were convicted of a number of offences including theft from a building society of which the first accused was the chairperson of directors. In the course of the trial, the judge ruled that it was possible for the chairperson of directors of a building society to appropriate the property of the building society. On appeal, the

60 [1958] VR 511, 514.

61 Ibid 522. See also *R v McHugh and Tringham* (1988) 88 Cr App R 385; cf *R v Philippou* (1989) 89 Cr App R 290. See generally G R Sullivan, 'Company Controllers, Company Cheques and Theft' [1983] *Criminal Law Review* 512; Janet Dine, 'Company Controllers, Company Cheques and Theft - Another View' [1984] *Criminal Law Review* 397; Paul von Nessen, 'Company Controllers, Company Cheques and Theft - An Australian Perspective' [1986] *Criminal Law Review* 154; Robert Baxt, 'Commercial Law' (1993) 67 *Australian Law Journal* 694.

62 [1958] VR 511, 530.

63 (1986) 24 A Crim R 54.

Supreme Court of Victoria affirmed the convictions of the accused. The Court held that the situation of a building society is wholly different from that of a company. The legislation governing the incorporation of building societies is designed to protect the depositors. Not only did the accused not have the consent of the society, but the society could not have given its consent to his taking of its property. Even if a general meeting of the members of the society had resolved that he could take the society's property, such a resolution would have been illegal and a 'consent' which is prohibited by law could not amount to a sufficient consent to negative an appropriation for the purposes of the law of theft, particularly where the beneficiary of the taking formed the majority of those who purported to authorise it.

In *Macleod v The Queen*,[64] McHugh and Gummow JJ disapproved *Roffel*. The accused was director and sole beneficial shareholder of companies which purported to make videos. Money was raised from investors and held in separate accounts referred to as 'trust accounts' with Chase AMP bank to be applied for the purposes of the company. Of the $6 million invested, more than $2 million was applied by the accused for his own purposes. The accused was charged with being a director of a company fraudulently taking or applying property of the company contrary to s 173 of the *Crimes Act 1900* (NSW). The accused was convicted and appealed unsuccessfully to the High Court. In a joint judgment, Gleeson CJ, Gummow and Hayne JJ stated:

> The submission that the 'consent' of a single shareholder company cures what otherwise would be a breach of s 173 should not be accepted. The self-interested 'consent' of the shareholder, given in furtherance of a crime committed against the company, cannot be said to represent the consent of the company.[65]

The offence contained in s 173 of the *Crimes Act 1900* (NSW) is, of course, quite different to the crime of theft. Section 173 is specifically targeted at the activities of dishonest directors, and requires that the accused 'fraudulently takes, or applies' rather than appropriates. Their Honours stated that their decision was limited to the construction of s 173 by reference to its terms, scope and purpose, and that the correctness of *Roffel* was not a matter falling for determination.[66] Justice McHugh however considered *Roffel*, and stated that it 'was wrongly decided for the reasons given by Brooking J who dissented.'[67] Justice Callinan likewise preferred the dissenting reasoning of Brooking J, and stated that the reasoning of the majority should be rejected.

It would seem that the view of McHugh and Callinan JJ may have, in part at least, been based upon a concern that had the accused in *Macleod* been charged with theft, the decision in *Roffel* would have led to his acquittal. This would not however be the case. In *Macleod*, unlike *Roffel*, the accused was obliged to place

64 (2003) 197 ALR 333 ('*Macleod*').
65 Ibid 340.
66 Ibid 341, note 30.
67 Ibid 351.

money received from investors in a separate account to be used for the purposes specified. In Victoria, s 73(9) of the *Crimes Act 1958* (Vic) would have operated to deem the money, for the purposes of the offence of theft, to continue to belong to the investors.[68] Thus when Macleod used the money for his own purposes, he would have been guilty of theft from the investors who had not consented to his appropriation. Nor, were a case such as *Roffel* itself to re-occur need the accused escape conviction. The accused could be charged under s 596 of the *Corporations Act 2001* (Cth) with making a transfer with intent to defraud creditors of the company.[69] While the escape from conviction of someone such as Roffel may be unsatisfactory, the reason for that outcome was that he was charged with an incorrect offence. The essence of Roffel's wrongdoing was removal of the assets from the company with intent to defraud creditors. Roffel should have been charged with an offence directed toward that form of wrongdoing rather than with theft from what was in reality his company.

VII CONCLUSION

The concept of appropriation should be understood in such a manner as to draw a proper borderline between those forms of interference with property rights which ought to be the concern of the criminal law and other forms of misconduct which should be actionable only by civil litigation. Such a boundary is particularly important in the context of Victoria, where the courts have narrowly restricted the availability of a defence of lack of dishonesty.

To regard an appropriation as occurring where any act is performed which amounts to an assumption of any one of the rights of an owner is to define the *actus reus* of theft too widely. A preferable approach is that adopted by the House of Lords in *Morris*, and followed by the Supreme Court of Victoria in *Baruday* and *Roffel*. The concept of appropriation should be regarded as incorporating an element of adverse interference with or usurpation of a right of an owner. Where the owner of property gives a valid and effective consent to the accused taking possession of the property, there is no such adverse interference with the right of the owner. Such adverse interference occurs however, where the accused acts in relation to the property beyond the scope of any consent given, or where the

68 Section 73(9) provides:

> Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

69 In H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Company Law* (looseleaf edition, 2003) the decision in *Roffel* is criticised at [4.090] on the following basis:

> The majority in Roffel's case treated the criminal law as not being controlled by concepts of company law. The majority view means that creditors of a company are not fully protected by the criminal law but must rely on doctrines of company law.

It is however, by no means clear why doctrines of criminal law should be controlled by concepts of company law. The problem raised by *Roffel* is peculiar to corporations law, and it is suggested that it is appropriate that the criminal liability of the accused in such cases should rest with s 596 of the *Corporations Act 2001* (Cth).

consent is obtained in consequence of any coercion or deception. An adverse interference takes place also, it is submitted, where the accused receives property in consequence of a mistake on the part of the owner of which the accused was aware at the time of receipt but did not induce, provided that mistake is of sufficient seriousness to prevent ownership in the property from passing. In other cases, the consent of the owner should be regarded as effective with the consequence the accused should not be guilty of theft. It is suggested that in *Hinks*, the House of Lords adopted an approach to understanding the concept of appropriation which was in principle incorrect. It is suggested also that the obiter statements of McHugh and Gummow JJ in *Macleod*, rejecting the approach taken by the Supreme Court of Victoria in *Roffel*, have the potential to lead in a similar direction in Australia and should not be followed.