

MR ADAMSON GOES TO BERRIMAH* - A TALE OF ABUSE OF POSITION AND FALSE ACCOUNTING

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Abstract

This article considers the three offences of abuse of position, false accounting and criminal deception within the context of the *Criminal Code 1983* (NT). The article uses as a vehicle for this examination the high profile case of *Adamson v O'Brien* [2008] NTSC 8 which was decided in the Supreme Court of the Northern Territory in 2008 and involved the former Lord Mayor of Darwin. The common link in this article between the three offences is the model of a general fraud offence adopted in the *Fraud Act 2006* (UK), but which was rejected by the Model Criminal Code Officers Committee in 1995. A basic building block of the general fraud offence is 'dishonesty', which in turn has its antecedents in the *Theft Act 1968* (UK). Both the Northern Territory and Victoria enacted variations on the *Theft Act* model, where the dividing line between criminality and innocence is 'dishonesty'. The Model Criminal Code Officers Committee recommendations were a modernised variation of the *Theft Act* model. This article recommends the adoption of the definition of 'dishonesty' as found in s 130.3 *Criminal Code 1995* (Cth). The article concludes that the present sections of the *Criminal Code 1983* (NT) are not sufficiently robust or clear and proposes specific statutory language for each offence based on the model of the *Fraud Act 2006* (UK).

I INTRODUCTION

In 2008, Mr Peter Adamson, the former Lord Mayor of the City of Darwin, was sentenced to seven months in the Berrimah prison in

* With apologies to 'Mr Smith goes to Washington', directed by Frank Capra, Columbia Pictures, 1939.

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Darwin for the offences of stealing and furnishing false information with intent to deceive. The case of *Adamson v O'Brien* ('the *Adamson* case')¹ involved misuse of the Lord Mayoral allowances. On appeal to the Supreme Court of the Northern Territory, Martin CJ held that on the count of stealing, for the purposes of establishing ownership, a fiduciary relationship existed between the Lord Mayor, the appellant, and the Darwin City Council ('the Council'), which resulted in a trust over the goods in favour of the Council and therefore s 209(3) of the *Criminal Code 1983* (NT) applied.² This article will argue that a new section of the *Criminal Code 1983* (NT), to be modelled upon s 4 of the *Fraud Act 2006* (UK)³ which covers fraud by abuse of position, is necessary to buttress the existing s 209(3).⁴ The proposed new section would apply specifically to situations where the defendant has been put in a privileged position (as here, with considerable Mayoral allowances) and by virtue of occupying this position is thus required to safeguard another's (here, the Council's) financial interests (or at the very least, not act against those interests).

With regards to the false⁵ accounting charge under s 233 of the *Criminal Code 1983* (NT),⁶ legal argument turned on whether the

1 [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).

2 *Criminal Code 1983* (NT) s 209(3): 'Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust and an intention to defeat the trust shall be regarded as an intention to deprive of the property any person having that right'.

3 *Fraud Act 2006* (UK) s 4: Fraud by Abuse of Position: (1) A person is in breach of this section if he - (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (b) dishonestly abuses that position, and (c) intends, by means of the abuse of that position - (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss. (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

4 *Criminal Code 1983* (NT).

5 A falsification can be made by making a false entry but also by omitting material particulars: *R v Shama* (1990) 91 Cr App R 138.

6 *Criminal Code 1983* (NT) s 233: 'Any person who, with a view to gain for himself or another or with intent to deceive or cause loss to another; (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose or any similar purpose or for any financial transaction; or (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document referred to in paragraph (a), that is or may be misleading, false or deceptive in a material particular, is guilty of a crime and is liable to imprisonment for 7 years.' The word 'account' bears its ordinary meaning and a document purporting to be an account is not excluded merely because it is fictitious: *R v Scot-Simmonds* [1994] Crim LR 933. The word 'record' has a wide meaning and includes a mechanical account such as a meter attached to a turnstile: *Edwards v Toombs* [1983] Crim LR 43.

Crown had established that the ‘acquittal document’⁷ was required for an ‘accounting purpose’. Martin CJ upheld the Magistrate’s finding that the purpose of the acquittal document was ‘verification of Council expenditure’ and that this purpose was an ‘accounting purpose’⁸ within the meaning of s 233. More specifically, Martin CJ followed *R v Jenkins*⁹ in holding that the acquittal document was ‘substantially and not incidentally connected with the accounting process of Council’.¹⁰ This article will argue that ‘accounting purpose’ should be defined in s 233 as having the wider meaning attributed to that phrase by O’Byryan AJA who dissented in *R v Jenkins*¹¹ and held that ‘accounting purpose’ should be examined in relation to three criteria: the nature of the document, the use for which the document was made, and the evidence from which a judge or jury could conclude that the document was made for an accounting purpose.¹²

The mental element for s 233¹³ is production of the relevant document ‘with a view to gain for himself or another or with intent to deceive or cause loss to another’.¹⁴ The appellant in the *Adamson* case argued that it should be a defence to claim that he did not appreciate the use to which the acquittal form would be put.¹⁵ Martin CJ upheld the Magistrate’s finding ‘that the appellant knew that the document was required for an accounting purpose and that the evidence left no room for doubt that the appellant was so aware’.¹⁶ This article will argue that s 233 should be amended to make it clear, that awareness that the document was made or required for an accounting purpose is not an element of the offence (in keeping with Martin CJ’s expressed view on

7 The ‘acquittal document’ was dated 28 November 2006 and signed by the appellant. It was the basis of the charge that, with intent to deceive, the appellant had produced a document for an accounting purpose, namely, the acquittal of the gift cards, that was false in a material particular. The document was headed: ‘Acquittal of Gift Cards’ and contained (*inter alia*) the following words: Since the purchase of the original \$100 Gift Cards I have chosen to give away the items as \$50 Gift Cards; *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [31].

8 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [133].

9 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byryan AJA, 20 December 2002).

10 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [133].

11 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byryan AJA, 20 December 2002).

12 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byryan AJA, 20 December 2002) [164-165] (O’Byryan AJA).

13 *Criminal Code 1983* (NT).

14 *Criminal Code 1983* (NT) s 233.

15 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [137]; A T H Smith, *Property Offences (The Protection of Property Through the Criminal Law)* (1994) [24-05].

16 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [142].

this point),¹⁷ thus making s 233 an offence of strict or absolute liability aside from proof of dishonesty when that offence is brought under Part IIAA of the *Criminal Code 1983* (NT), which is virtually identical to Chapter 2 of the *Criminal Code 1995* (Cth).

This article will also contend that s 233¹⁸ should be amended to mirror the opening words of the equivalent s 83 *Crimes Act 1958* (Vic) which utilises the word ‘dishonestly’.¹⁹ The word ‘dishonestly’ also appears in s 4 of the *Fraud Act 2006* (UK).²⁰ Furthermore, ‘dishonestly’ should be defined in accordance with the existing definition of dishonesty in the *Criminal Code 1995* (Cth) as: ‘dishonest, according to ordinary peoples’ standards; and known by the defendant to be dishonest according to ordinary peoples’ standards’.²¹ The High Court has also stressed that as far as possible consistency in the interpretation of the Australian criminal codes should be upheld.²² The structure of the proposed amendment to s 233 is entirely consistent with the equivalent Commonwealth offences as regards the use of dishonestly and the intention of obtaining a gain or causing a loss, with the only difference being the documents not having a Commonwealth connection (such as the document being made or held by a Commonwealth entity or a person in the capacity of a Commonwealth public official).

The final purpose of this article, through an examination of s 227 *Criminal Code 1983* (NT)²³ which relates to criminal deception, is to contend that to be consistent with the approach taken with regard to

17 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [142].

18 *Criminal Code 1983* (NT).

19 *Crimes Act 1958* (Vic) s 83: False Accounting: (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another - (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular - he is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum). (2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

20 See above n 3.

21 *Criminal Code 1995* (Cth) s 130.3.

22 *R v Barlow* (1997) 188 CLR 1, 32 (Kirby J).

23 *Criminal Code 1983* (NT) s 227: Criminal Deception: (1) Any person who by any deception: (a) obtains the property of another; or (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).

the offence of fraud by abuse of position, the better view is to adopt a section similar to s 2(1) of the *Fraud Act 2006* (UK) which relates to fraud by false representation.

II FACTUAL BACKGROUND

An examination of recent false accounting cases that have come before the Supreme Court of the Northern Territory prior to the *Adamson* case²⁴ reveals that the defendants have often pleaded guilty.²⁵ Mr Adamson's high profile case and his defence team's determined attack on the offences with which he was charged, directed a legal spotlight on otherwise untested sections of the *Criminal Code 1983* (NT).

On 30 June 2006, Mr Adamson, having established that the mayoral entertainment allowance had approximately \$2,600 remaining, used his own credit cards to purchase a new refrigerator and gift cards. On the same day he commenced the process of obtaining reimbursement, which culminated in the Council on 25 August 2006 repaying him \$2,758.

At the time of purchasing the refrigerator, Mr Adamson instructed the retailer to arrange for delivery to his apartment, which had no refrigerator. On 23 August 2006 Mr Adamson signed a document falsely stating that the refrigerator had been donated to the St Vincent de Paul Society. On 28 October 2006, after repeated enquiries and meetings with the Chief Executive Officer ('CEO') of the Council concerning the refrigerator, Mr Adamson took the refrigerator to a charitable organisation and informed the CEO of that delivery. Mr Adamson subsequently said in evidence that he used the refrigerator after it had been delivered to his apartment.

During the period July to September 2006 Mr Adamson used 11 of the gift cards for the purchase of personal items for himself and his partner, including items subsequently found in his apartment. On 28 November 2006 he signed a document headed 'Acquittal of Gift Cards' which listed details of various parties he had purportedly distributed the gift

²⁴ [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).

²⁵ See *The Queen v Hutton* (Unreported, Supreme Court of the Northern Territory SCC 20410388, Angel J, 19 January 2005); *The Queen v Pettifer* (Unreported, Supreme Court of the Northern Territory SCC 20217882, Thomas J, 28 November 2003); *The Queen v Hayne* (Unreported, Supreme Court of the Northern Territory SCC 20507242, Thomas J, 9 November 2005); *The Queen v Philits* (Unreported, Supreme Court of the Northern Territory SCC 20207074 and SCC 20316468, Bailey J, 1 September 2003); *The Queen v Malborta* (Unreported, Supreme Court of the Northern Territory SCC 20407279, Bailey J, 20 September 2004).

cards to.²⁶ In evidence Mr Adamson said that he shared the gift cards with his partner. The Magistrate found this acquittal document to be false in its entirety and was produced with an intention to deceive.²⁷

Mr Adamson was charged with four offences. Magistrate Luppino dismissed two of the charges²⁸ which concerned obtaining the property of the Council by deception contrary to s 227 *Criminal Code 1983* (NT) and making a false statement in a statutory declaration contrary to s 27F *Oaths Act 1939* (NT). The Magistrate convicted Mr Adamson of stealing under ss 209 and 210 of the *Criminal Code 1983* (NT),²⁹ and of furnishing false information with intent to deceive under s 233 of the *Criminal Code 1983* (NT).³⁰

On appeal, Mr Adamson's argument was that the Magistrate erred in finding that the purchases were made as an agent of the Council and therefore became the Council's property.³¹ The point made on appeal was that the purchases remained Mr Adamson's property for the duration of the charge and he was therefore entitled to dispose of the purchases as he saw fit. It followed that Mr Adamson as the legal owner could not be convicted of stealing.³² As will be further discussed in the next section, Martin CJ approached the above contention by considering whether a trust with respect to the purchases existed in favour of the Council, which thereby provided the Council with a sufficient proprietary interest for the purposes of sustaining a charge of stealing.³³

On the conviction for false accounting, the point made on appeal was that the prosecution had failed to prove that the acquittal document³⁴ was made for an 'accounting purpose' and that the prosecution had failed to establish that Mr Adamson knew that the document was required for such a purpose.³⁵ As will also be discussed later in the article, s 233 of the *Criminal Code 1983* (NT) relating to false accounting is drawn in similar terms to the equivalent s 83 of the

26 See above n 7.

27 *O'Brien v Adamson and Kennedy v Adamson* [2007] NTMC 042 (Unreported, Magistrate Luppino, 13 July 2007).

28 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).

29 *Criminal Code 1983* (NT) s 209: Definition of Stealing and Interpretation; s 210: General Punishment of Stealing.

30 *Criminal Code 1983* (NT) s 233: False Accounting.

31 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [36].

32 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [36].

33 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [57].

34 See above n 7.

35 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [98].

Crimes Act 1958 (Vic), the latter section featuring in *R v Jenkins*,³⁶ the leading case on furnishing false information. Martin CJ followed the interpretation of s 83 of the *Crimes Act 1958* (Vic) as laid down in *R v Jenkins*,³⁷ that to determine whether a document is ‘required for any accounting purpose’ evidence would be expected both of the connection of the documents with the relevant accounts and also as to their requirement for that purpose.³⁸ In Mr Adamson’s case, to ascertain the purpose of the acquittal document it was necessary to consider the relevant statutory provisions governing the operation of the Council. Martin CJ upheld the Magistrate’s finding that the purpose of the acquittal document was to verify Council’s expenditure and that this purpose was an accounting purpose within the meaning of s 233(b) of the *Criminal Code 1983* (NT).³⁹ On the question of whether it was necessary to establish whether Mr Adamson knew the acquittal document was required for an accounting purpose, Martin CJ concluded that the Magistrate was correct in finding that the evidence left no doubt that Mr Adamson was so aware.⁴⁰ While not forming any concluded view because it was unnecessary to decide, Martin CJ was inclined to the view that knowledge of the document’s accounting purpose was not a requirement of s 233.⁴¹ This article respectfully supports his Honour’s view, but argues that ‘accounting purpose’ should be defined in s 233 as having the wider meaning attributed to that phrase by O’Byran AJA who dissented in *R v Jenkins*.⁴²

III ABUSE OF POSITION AND A FIDUCIARY RELATIONSHIP

His was not a high code of ethics ... indeed, in the course of a chequered career he had frequently been guilty of actions which would have caused a three-card-trick man to purse his lips and shake his head.⁴³

On appeal, the argument was run that the purchases remained the property of Mr Adamson throughout the entire period as he was not the agent of the Council.⁴⁴ Martin CJ addressed this contention by stating

36 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byran AJA, 20 December 2002).

37 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byran AJA, 20 December 2002).

38 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [113].

39 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [133].

40 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [142].

41 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [142].

42 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byran AJA, 20 December 2002) [164–165] (O’Byran AJA).

43 P G Wodehouse, *French Leave* (1st ed, 1955) quoted in Richard Osborne (ed), *Wodehouse Nuggets* (1st ed, 1983) 155.

44 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [36].

that because the Lord Mayor occupies a statutory position as head of an elected Council and is the public face of the Council, Mr Adamson occupied a position of trust.⁴⁵ Consequently, his Honour reasoned that the Council was vulnerable to abuse by Mr Adamson of that position of trust and it followed that a fiduciary relationship existed between Mr Adamson and the Council, which contained the ‘critical feature’⁴⁶ of accepted fiduciary relationships.

On the evidence, Martin CJ found that as regards the purchases Mr Adamson purported to be exercising his powers as Lord Mayor, he had represented to the Council that the purchases were to be applied for proper Council purposes, and that reimbursement was therefore appropriate. Martin CJ therefore concluded that these facts combined with the fiduciary relationship, resulted in a trust over the purchases in favour of the Council and that consequently s 209(3) of the *Criminal Code 1983* (NT)⁴⁷ applied.⁴⁸ Thus, when Mr Adamson applied for reimbursement, the existence of the trust and the operation of s 209(3) had the effect of giving the Council the necessary proprietary interest in the purchases for the purposes of s 209 and s 210 of the *Criminal Code 1983* (NT).⁴⁹ In this way, Martin CJ disposed of the defence’s appeal on the stealing charge.

This article argues that the above process of reasoning is somewhat circuitous, but necessitated by the manner in which the relevant sections of the *Criminal Code 1983* (NT) are currently drafted, and that the preferable approach would thus be to introduce a new section of the *Criminal Code 1983* (NT) to be modelled upon s 4 of the *Fraud Act 2006* (UK)⁵⁰ which covers fraud by abuse of position, so as to buttress s 209(3).

Significantly, s 209(3) *Criminal Code 1983* (NT)⁵¹ may not have prevented the outcome that occurred in England under s 5(1) of the

45 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [57].

46 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97 (Mason J): ‘The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense’.

47 See above n 2.

48 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [59].

49 See *Criminal Code 1983* (NT) s 209: Definition of Stealing and Interpretation; s 210: General Punishment of Stealing.

50 See above n 3.

51 See *Criminal Code 1983* (NT) s 209(3), which is written in identical language to s 5(2) *Theft Act 1968* (UK).

Theft Act 1968 (UK),⁵² where the defendant who had made a secret profit by abusing a position of employment was held not to come under a constructive trust. In *Attorney-General's Reference (No 1 of 1985)*⁵³ the manager of a public house was charged with theft, having sold his own beer on his employers' premises. The theft charge foundered because there was no 'property belonging to another'.⁵⁴ Lord Lane CJ said that 'if something is so abstruse and so far from the understanding of ordinary people as to what constitutes stealing, it should not amount to stealing'.⁵⁵ The court held that a constructive trust had not arisen,⁵⁶ and therefore the employers had no beneficial or proprietary interest in the proceeds of the beer sales. In the alternative, it was held that even if a trust had arisen, it was not such a trust as fell within the ambit of s 5(1) of the *Theft Act 1968* (UK).⁵⁷ But this alternative finding may not be correct as s 5(2) of the *Theft Act 1968* (UK)⁵⁸ makes it clear that trust property does 'belong' to the beneficiary of an express trust. Furthermore, a conviction for theft of property held on constructive trust was upheld in *R v Shadrokh-Cigari*.⁵⁹

While it may be contended that the 2006 United Kingdom fraud legislation is similar to two offence provisions in Australian jurisdictions, the UK provision is more robust and of wider reach. The first similar offence is of abuse of public office under s 142.2 of the *Criminal Code 1995* (Cth) which *inter alia* covers the exercise of influence and the use of information by a Commonwealth public official with the intention

52 *Theft Act 1968* (UK) s 5(1): 'Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)'.

53 [1986] QB 491.

54 *Attorney-General's Reference (No 1 of 1985)* [1986] QB 491, 501 (Lord Lane CJ).

55 *Attorney-General's Reference (No 1 of 1985)* [1986] QB 491, 507 (Lord Lane CJ).

56 The court applied *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA) where it was held that an employee who receives a secret profit or bribe merely has to account to his employer for it and is not a constructive trustee of it. However, in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 it was held that *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA) had been wrongly decided such that an employee is also a constructive trustee of the secret profit or bribe. In *Re Holmes* [2005] 1 All ER 490 [24] the court took the provisional view that property subject to a constructive trust is to be regarded as belonging to the person entitled to the beneficial interest and it distinguished *Attorney-General's Reference (No 1 of 1985)* [1986] OB 491 on the ground that the case concerned a secret profit whereas *Re Holmes* [2005] 1 All ER 490 was concerned with a fraudulent taking of property.

57 See above n 52.

58 *Theft Act 1968* (UK) s 5(2): 'Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce that trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right'.

59 [1988] Crim LR 465.

of dishonestly obtaining a benefit or dishonestly causing a detriment to another person. The second similar offence provision is s 229(4) *Companies (Western Australia) Code* which covers the improper use of position by an officer or employee of a corporation to gain an advantage for himself/herself or another or to cause detriment to the corporation.⁶⁰

The *Fraud Act 2006* (UK) which came into force in the United Kingdom on 15 January 2007 creates a general offence of 'fraud',⁶¹ distinct from the common law offence of 'conspiracy to defraud' and various other offences which fell under the UK Theft Acts.⁶² The new offence is punishable by up to 10 years in prison and/or a fine.⁶³ There are three ways of committing fraud under the new Act: false representation (such as obtaining property by deception),⁶⁴ failing to disclose information (such as failing to disclose a financial interest in a company or unspent criminal convictions),⁶⁵ and abuse of position (such as diverting business to a competitor or abusing access to client/patient bank accounts).⁶⁶ To be found guilty of fraud in any of the three ways, the behaviour in question must be dishonest and there must be an intention either for someone to gain from the dishonest actions, or to cause loss or a risk of loss to another. Unlike previous deception offences, there is no need to prove that actual loss or gain occurred, provided the requisite intention is there. The idea of having one offence of fraud, which can be committed in three ways, seeks to sweep away the technicalities which beset the old law by capturing the base elements of fraud, but in a manner which is deliberately not attached to any specific activity. This is intended to overcome the difficulties as to charging and to also 'future proof' the law, by avoiding over-specificity and allowing it to keep pace with developing technology.

60 This was considered in *Chew v R* (1992) 173 CLR 626 where the appeal turned on the mental element for the offence. The High Court held that the accrual of an advantage or the suffering of a detriment was not an element of the offence, so that an officer who made improper use of his or her position and whose purpose was thwarted is still guilty of an offence. The improper use of position must be for the purpose prescribed.

61 *Fraud Act 2006* (UK) s 1(1) 'A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offences); s (2) 'The sections are - (a) section 2 (fraud by false representation), (b) section 3 (fraud by failing to disclose information), and (c) section 4 (fraud by abuse of position)'.

62 The new *Fraud Act 2006* (UK) repealed a variety of offences. Under the *Theft Act 1968* (UK) the repealed sections were: s 15 (obtaining money by deception); s 15A (obtaining a money transfer by deception); s 16 (obtaining a pecuniary advantage by deception); and s 20(2) (procuring the execution of a valuable security by deception). Under the *Theft Act 1978* (UK) the repealed sections were: s 1 (obtaining services by deception); and s 2 (evasion of liability by deception).

63 See *Fraud Act 2006* (UK) s 1(3).

64 *Fraud Act 2006* (UK) s 2.

65 *Fraud Act 2006* (UK) s 3.

66 *Fraud Act 2006* (UK) s 4.

The United Kingdom Law Commission ('the UK Law Commission') in a press release⁶⁷ marking the publication of its Fraud Report in 2002,⁶⁸ gave four reasons for recommending a single offence of fraud. First, a single offence of fraud will make the law more comprehensible to juries, especially in serious fraud trials. Second, a general offence of fraud will be a useful tool for the effective prosecution of fraud from investigation through to trial. Third, replacing the current patchwork of crimes with a single, properly defined crime of fraud will dramatically simplify the law of fraud.⁶⁹ Fourth, a single comprehensive offence of fraud will encompass fraud in its many unpredictable forms. The UK Law Commission said it was arguable that the law of fraud was suffering from 'an undue particularisation of closely allied crimes' and that over-particularisation is not only 'undesirable in itself, but also has undesirable consequences'.⁷⁰ The UK Law Commission identified these undesirable consequences as, allowing technical arguments to prosper⁷¹ and a defendant possibly facing the wrong charge or too many charges.⁷² The UK Law Commission was particularly conscious of criticism of the length and complexity of fraud trials (also evident in the *Adamson* case) which in part resulted from the Crown taking a 'belt and braces' approach to avoid mistakes.⁷³

The explanatory notes⁷⁴ relating to section 4 of the *Fraud Act 2006* (UK) explain that s 4 makes it an offence to commit a fraud by dishonestly abusing one's position. Section 4 applies in situations where the defendant has been put in a privileged position, and by virtue of this position is expected to safeguard another's financial interests or not act against those interests. The explanatory notes also explain the meaning of 'position'⁷⁵ in terms of the necessary relationship being present between such well known examples as trustee and beneficiary, director and company, professional person and client, agent and principal,

67 The UK Law Commission, *The Law Commission Recommends a Simpler Law of Fraud*, (Press Release, 30 July 2002) <<http://www.lawcom.gov.uk/docs/lc276sum.pdf>> at 11 May 2009.

68 The UK Law Commission *Fraud*, Report No 276, Command 5560 (2002) [7.38].

69 The UK Law Commission, above n 68, [3.10] took as its 'text' a quotation from Griew on Theft: Edward Griew, *The Theft Acts* (1995) 141: 'No one wanting to construct a rational, efficient law of fraud would choose to start from the present position. The law ... is in a very untidy and unsatisfactory condition'.

70 The UK Law Commission, above n 68, [3.11].

71 The UK Law Commission, above n 68, [3.12].

72 The UK Law Commission, above n 68, [3.20].

73 The UK Law Commission, above n 68, [3.23].

74 Queen's Printer of Acts of Parliament, *Explanatory Notes to Fraud Act 2006*, Chapter 35, page 5 section 20 <http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060035_en_1> at 10 March 2009.

75 See Queen's Printer of Acts of Parliament, above n 74, page 5 section 20.

employee and employer, or between partners. Any relationship recognised by the common law as importing fiduciary duties will suffice. The explanatory notes also explain that the term ‘abuse’ is not limited by a definition, because it is intended to cover a wide range of conduct.⁷⁶ Moreover, subsection (2) of s 4 *Fraud Act 2006* (UK) makes clear that the offence can be committed by omission as well as by positive action.⁷⁷ Thus, offences may be committed by individuals in a personal capacity and by companies and other legal entities. As a result, a corporate official may be liable for a fraud where he/she has dishonestly made a false representation, withheld information or abused the company’s position. This would certainly cover any member of an elected Council irrespective of whether the abuse related to an expense allowance, contract or planning application. The offence of fraud by abuse of position also dovetails with the law of restitution in that ‘a fiduciary who uses his position of trust to acquire a benefit for himself holds that benefit on constructive trust for his beneficiary’.⁷⁸ Goff and Jones give an example of the application of this rule, where a person in a fiduciary position derives a profit from the unauthorised use of another’s property (which is on point with the *Adamson* case).⁷⁹

The offence of ‘stealing’ under the *Criminal Code 1983* (NT) is modelled on the *Theft Act 1968* (UK).⁸⁰ Indeed, both the Northern Territory and Victoria enacted variations on the *Theft Act* model where the dividing line between criminality and innocence is ‘dishonesty’. The Model Criminal Code Officers Committee (‘MCCOC’) recommendations were a modernised variation of the *Theft Act* model.⁸¹ Interestingly, while the MCCOC recommended against a general dishonesty offence,⁸² a general dishonesty offence was inserted in s 135.1 *Criminal Code 1995* (Cth). Under the UK *Theft Act 1968*, theft is defined as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it.⁸³ The crucial concept in the definition of theft is that of ‘appropriation’, which is defined by s 3(1) of the *Theft Act 1968* (UK) as ‘any assumption ... of the rights of an owner’. The House of Lords held in *R v Gomez*⁸⁴ that even an act authorised by the owner of the property can be an appropriation, and, if dishonest, can therefore amount to theft.

76 See the UK Law Commission, above n 68, [7.38].

77 See also Queen’s Printer of Acts of Parliament, above n 74 [21].

78 See Robert Goff and Gareth Jones, *The Law of Restitution* (4th ed, 1993) 647.

79 Goff and Jones, above n 78, 661.

80 See Stephen Gray, *Criminal Laws Northern Territory* (1st ed, 2004) 191.

81 Model Criminal Code Officers Committee, Final Report, Chapter 3, *Theft, Fraud, Bribery and Related Offences*, December 1995.

82 MCCOC, above n 81, 153-171.

83 *Theft Act 1968* (UK) s 1.

84 [1993] AC 442.

A constructive trust would give the beneficiary an equitable proprietary right in the benefit acquired, which would have the effect of bringing section 5(1)⁸⁵ of the *Theft Act 1968* (UK) into play.⁸⁶ As Simester and Sullivan⁸⁷ point out, s 5(1) means that for the purposes of theft or stealing, an item 'belongs' to all those with 'any form of proprietary interest in the item whatever the nature of that interest' which the authors state includes 'a proprietary interest existing only at equity'.⁸⁸ The definition of 'owner'⁸⁹ in s 1 of the *Criminal Code 1983* (NT) appears to serve the same purpose as s 5(1) of the *Theft Act 1968* (UK).⁹⁰

There are always potential difficulties in importing legislation into a statute. However, this article argues that given the close parallels between the offence of stealing under the *Criminal Code 1983* (NT) and the equivalent provisions in the *Theft Act 1968* (UK), there is a degree of consistency in looking to the 'sister' legislation of the *Fraud Act 2006* (UK) in adopting s 4 of that Act which covers fraud by abuse of position, to buttress s 209(3) *Criminal Code 1983* (NT) which covers property subject to a trust, and the definition of 'owner' in s 1 of the *Criminal Code 1983* (NT).

IV FALSE ACCOUNTING

A youth and middle age spent on the London stock exchange had left Lester Carmody singularly broad-minded. He had to a remarkable degree that precious charity which allows a man to look indulgently on any financial project, however fishy, provided he can see a bit in it for himself.⁹¹

A Interpretation

As was mentioned earlier, s 83 of the *Crimes Act 1958* (Vic) and s 233 of the *Criminal Code 1983* (NT) both deal with the offence of false

85 *Theft Act 1968* (UK) s 5(1) elaborates upon the meaning of 'belonging to another'; See above n 52.

86 See Andrew Simester and Robert Sullivan, *Criminal Law: Theory and Doctrine* (1st ed, 2000) 439.

87 Simester and Sullivan, above n 86.

88 Simester and Sullivan, above n 86, 426 - 427.

89 *Criminal Code 1983* (NT) s 1: 'Owner' includes any part owner and any person having possession or control of, or any special property in, the property in question; it also, as does the term 'person' and other like terms when used with reference to property, includes Her Majesty and any corporation, local authority and public body constituted by or under statute and any other association of persons capable of owning property.

90 See above n 52.

91 P G Wodehouse, *Money for Nothing*, (1st ed, 1928), quoted in Richard Osborne (ed), *Wodehouse Nuggets* (1st ed, 1983) 221.

accounting and are drawn in similar terms.⁹² The leading case on s 83 is *R v Jenkins*⁹³ whose authority was quoted extensively by Martin CJ in his Honour's interpretation of s 233 *Criminal Code 1983* (NT) in the *Adamson* case.⁹⁴

In *R v Jenkins*,⁹⁵ Ormiston JA observed that s 83 *Crimes Act 1958* (Vic) was taken from the *Theft Act 1968* (UK) in an attempt to simplify the law relating to theft.⁹⁶ His Honour, Ormiston JA, then examined the history of the section by considering the report which led to the passing of the *Theft Act 1968* (UK),⁹⁷ and concluded that the objective of the new provision was 'to confine it to books of account and documents required for accounting purposes, as such'.⁹⁸ His Honour, may however have overlooked the need to have amended the *Theft Act 1968* (UK) in 1976 and 1996 to avoid over-specificity and to keep abreast of developing technology. Ormiston JA continued by stating that the section 'means what it says'⁹⁹ when referring to documents required for any accounting purpose, and that the only remaining issue is 'how close the relationship has to be between the document and the accounting purposes of a party intended to be affected'.¹⁰⁰ His Honour then turned his attention to the meaning of an 'accounting purpose' and decided it was inappropriate to be too rigid about the extent to which a document is required, but it should 'not be a chance or barely incidental connection'¹⁰¹ as there must be some purpose to be served by relating the document to materials kept by a business as part of its accounting processes. His Honour then analysed a number

92 The key difference is that the section of the Victorian Act uses the word 'dishonestly' which had in turn been taken from False Accounting s 17(1) *Theft Act 1968* (UK) which in turn is otherwise identical to s 233 *Criminal Code 1983* (NT).

93 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

94 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).

95 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

96 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [29] (Charles JA agreed with Ormiston JA's judgment; O'Bryan AJA dissented).

97 English Criminal Law Revision Committee, Eighth Report, '*Theft and Related Offences*', May 1966, Cmnd 2977.

98 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [37] (Ormiston JA).

99 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [37] (Ormiston JA).

100 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [38] (Ormiston JA).

101 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [38] (Ormiston JA).

of relevant cases¹⁰² to ascertain whether there was any authority¹⁰³ for a wider proposition such as mere use in a business rather than a connection with the accounting processes of a business. Ormiston JA concluded that '[t]his elaborate excursus into the authorities on s 83 and its English equivalent' substantially supported the proposition that a business purpose is 'simply not sufficient to satisfy the section'.¹⁰⁴

Under the heading '*Conclusions as to interpretation of s 83*',¹⁰⁵ Ormiston JA identified two principal elements to the expression 'required for any accounting purpose', firstly, what is an 'accounting purpose' and secondly, what is 'required' for that purpose, the latter having an objective element.¹⁰⁶ Ormiston JA then said, '[a]fter all the accused is being charged with creating or passing on false information of a particular kind and in particular circumstances and, as Professor Sir John Smith has pointed out,¹⁰⁷ the accused's intent cannot fairly be taken to extend to some activity of which reasonably he could not have been aware'.¹⁰⁸ His Honour rounded off his conclusion on s 83 *Crimes Act 1958* (Vic) by approving *Attorney-General's Reference (No. 1 of 1980)*¹⁰⁹ and by stating that it was never the purpose of s 83 'to strike at the falsification, production or use of documents which only had an unintended or chance connection with a business's accounting records'.¹¹⁰ The interpretation of s 83 of the *Crimes Act 1958* (Vic) in

102 See *R v Mallett* [1978] 1 WLR 820; *Attorney-General's Reference (No 1 of 1980)* [1981] 1 All ER 366; *R v Julius Sefton Holt* (1983) 12 A Crim R 1; *R v Grabam* [1997] Crim LR 340; *R v Okanta* [1997] Crim LR, 452; *Osinuga v DPP* [1998] Crim LR 216; *R v Sundbers* [1998] Crim LR 497; *R v Sampson* (Unreported, English Court of Appeal, 3 April 1998); *R v Manning* [1999] QB 980.

103 His Honour 'found no relevant authority from other jurisdictions, where the equivalent provisions (if there are any) are different in form and in many cases closer to the earlier English (and Victorian) provisions': *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [39] footnote 33.

104 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [55] (Ormiston JA).

105 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [55] (Ormiston JA).

106 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [57] (Ormiston JA).

107 See J C Smith, *Law of Theft* (8th ed, 1997) [6-06]; David Ormerod, *Smith & Hogan Criminal Law* (10th ed) 619.

108 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [57] (Ormiston JA).

109 [1981] 1 WLR 34.

110 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [59] (Ormiston JA).

*R v Jenkins*¹¹¹ was followed in *R v Heinze*,¹¹² with the leading judgment in the Victorian Court of Appeal given by Nettle JA who stated:

In R v Jenkins this court decided by majority¹¹³ that for the purposes of s 83(1) of the *Crimes Act*, a document 'required for any accounting purpose' is one which either forms part of, or is made or required in connection with the preparation of the accounts of the business, ... and that for a document to be required for an accounting purpose, there must be a substantial connection with the accounting processes of a business or other entity, not a merely incidental connection.¹¹⁴

*In R v Heinze*¹¹⁵ the court was considering whether a balance sheet and profit and loss statement were records required for an accounting purpose for purposes connected with securing a loan from the Commonwealth Bank to Mr Heinze's company. The trial judge had instructed the jury as a matter of law that 'such a document does not need to be made for an accounting purpose'.¹¹⁶ The trial judge continued as follows, '[b]eing required for the purpose of granting a loan is enough at law, to be an accounting purpose. So if you find that the document was handed over for the purpose of obtaining a loan, then it would be as a matter of law, a record required for an accounting purpose'.¹¹⁷ The court of appeal in *R v Heinze*,¹¹⁸ in following *R v Jenkins*,¹¹⁹ held that the trial judge's direction was wrong, although Nettle JA concluded there had been no miscarriage of justice.¹²⁰

It will be contended in the next section of this article that the wide

111 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

112 *R v Heinze; DPP v Heinze* [2005] VSCA 124 (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005).

113 See later discussion of the difference on the purpose of s 83(1) in *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) between the majority comprising Ormiston and Charles JJA and the minority comprising O'Bryan AJA.

114 *R v Heinze; DPP v Heinze* [2005] VSCA 124 (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005) [80] (Nettle JA).

115 [2005] VSCA 124 (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005) [80] (Nettle JA).

116 *R v Heinze; DPP v Heinze* [2005] VSCA 124 (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005) [79] (Nettle JA) citing the trial judge.

117 *R v Heinze; DPP v Heinze* [2005] VSCA 124 [80] (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005) [79] (Nettle JA) citing the trial judge.

118 [2005] VSCA 124 [80] (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005).

119 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

120 *R v Heinze; DPP v Heinze* [2005] VSCA 124 (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005) [81] (Nettle JA).

interpretation¹²¹ of ‘required for any accounting purpose’ as reflected in the minority view of O’Bryan AJA in *R v Jenkins*¹²² is, with respect, to be preferred. In addition, it is to be regretted that the Victorian Court of Appeal in *R v Heinze*¹²³ did not take the opportunity to review the difference of opinion between the judges in *R v Jenkins*.¹²⁴

B Application

In the *Adamson* case,¹²⁵ Martin CJ drew heavily on the judgment of *R v Jenkins*¹²⁶ in his analysis of the requirements of an ‘accounting purpose’ within the meaning of s 233 of the *Criminal Code 1983* (NT). Martin CJ followed the interpretation of s 83 of the *Crimes Act 1958* (Vic) given in *R v Jenkins*¹²⁷ and then turned his attention to the context of the production of the acquittal document:

As to the purpose of the acquittal document, regard must be had to the relevant statutory provisions governing the operations of the Council¹²⁸ and the duties of the CEO, together with the evidence bearing upon the context in which the document was produced and its intended purpose.¹²⁹

Martin CJ next summarized evidence given in the Magistrate’s Court as to the responsibility of the CEO to approve all such claims and the role of the Corporate and Economic Development Committee which reviewed all Council payments. The Chief Justice, following a passage where the Magistrate had found that the appellant ‘knew he had to account for his expenditure’,¹³⁰ extracted the crucial findings of the Magistrate, with which his Honour agreed, as follows:

121 Ormiston JA considered it necessary ‘to examine the history of the section and the relevant authorities to see whether they stand for such a wide interpretation as the judge put upon them and, as I understand it, O’Bryan, AJA would also put upon them’: *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Bryan AJA, 20 December 2002) [28] (Ormiston JA).

122 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Bryan AJA, 20 December 2002).

123 [2005] VSCA 124 [80] (Unreported, Callaway, Eames and Nettle JJA, 19 May 2005).

124 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Bryan AJA, 20 December 2002).

125 [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).

126 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Bryan AJA, 20 December 2002).

127 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Bryan AJA, 20 December 2002).

128 These included Division 9 of the *Local Government Act* (NT) which relates to financial administration and requires that the Council keep appropriate accounts of income and expenditure, and regulation 5(1) of the *Local Government (Accounting) Regulations* which requires a Council to prepare and maintain proper accounting records to adequately record the income, expenditure, assets and liabilities of the Council.

129 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [114].

130 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [132].

In relation to count 4 [false accounting], I find that the defendant had the intention to deceive when providing Exhibit P12 [the acquittal document] to Mr McGill [the CEO]. I find that that document was provided for an accounting purpose, specifically the verification of expenditure of the funds of the Darwin City Council.¹³¹

Martin CJ was concerned about the mental element of an offence under s 233 *Criminal Code 1983* (NT) describing it as ‘not without difficulty’.¹³² He continued by considering the need for an awareness of the document being made for an accounting purpose:

[I]t is not immediately clear from the terms of s 233 whether in producing the relevant document, the person producing the document must be aware that the document was made or required for an accounting purpose or, at the least, must realise that it might be so required.¹³³

In addressing the issue of awareness, his Honour was meeting the ‘essence of the appellant’s submission’¹³⁴ which was found in a passage from a text by A T H Smith¹³⁵ which his Honour stated as follows:

The Court [in *Attorney-General’s Reference (No 1 of 1980)*]¹³⁶ did not consider whether the section requires proof of mens rea beyond dishonesty and with a view to gain or intent to cause loss, in the form of knowledge that the document was to be used for accounting purposes ... it should be a defence for the defendant to claim that he did not appreciate the use to which the proposal form would be put.¹³⁷

Martin CJ then deemed it necessary to consider s 233 *Criminal Code 1983* (NT) ‘in its context’ having ‘regard to the various forms of conduct that will amount to an offence against s 233’¹³⁸ and then expressed the view that:

[T]he mental element is found in the intent to achieve personal gain or gain for another or in the intent to deceive or cause loss to another. The nature of the offence does not lend itself to an additional requirement that the offender know that the document amounts to an ‘account’ or a ‘record’ or a ‘document made or required for any accounting purpose’.¹³⁹

Thus, his Honour was ‘inclined to the view’ that under s 233 *Criminal Code 1983* (NT) the prosecution was not required to prove knowledge that a document was required for an accounting purpose, but in any

131 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [132].

132 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [136].

133 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [136].

134 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [137].

135 See Smith A T H, above n 15, [24-05].

136 [1981] 1 All ER 366.

137 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [137].

138 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [138].

139 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [139].

event in the circumstances of this appeal ‘the evidence left no doubt that the appellant was so aware’ and therefore ‘[t]he mental element for which the appellant contended was proved to exist’.¹⁴⁰

Whilst Martin CJ did not come to a concluded view, with respect, his Honour was correct to find that knowledge of the document being required for an accounting purpose was not an element of the offence of false accounting under s 233 of the *Criminal Code 1983* (NT). The section is not formulated so as to require that the defendant act ‘knowing’ that some circumstance exists (here, knowledge that the acquittal document was required for an accounting purpose), which demands a positive belief on the part of the defendant that the relevant circumstance does exist.¹⁴¹ In any event, even where knowledge is required this does not mean provable certainty but it is sufficient that the defendant accepts, or assumes, and has no serious doubts that the circumstance is present.¹⁴²

The *Criminal Code 1983* (NT) is in transition between sections of the Code which are covered under Part II Criminal Responsibility (the old 1983 Code) and those sections covered under Part IAA Criminal Responsibility for Schedule 1 Offences¹⁴³ (the new 2005 amendments to the Code). Part IAA mirrors Chapter 2 General Principles of Criminal Responsibility of the *Criminal Code 1995* (Cth) which states that an offence consists of physical and fault elements, although the law that creates the offence may provide that there is no fault element for one or more physical elements.¹⁴⁴ Fault elements such as intention, knowledge, recklessness and negligence are defined in Part IAA.¹⁴⁵ Section 43AJ defines or explains ‘knowledge’ as ‘[a] person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events’. So the question posed is, what fault element is appropriate for s 233 when it becomes a Schedule 1 offence and falls to be considered under Part IAA.

This article contends that the argument put by Mr Adamson’s defence counsel who relied on A T H Smith¹⁴⁶ that awareness was an element of s 233 should be met head on by making it clear in s 233 that knowledge

140 *Adamson v O’Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [142].

141 See Simester and Sullivan above n 86, 136.

142 *R v Hall* (1985) 81 Cr App R 260 (CA).

143 *Criminal Code 1983* (NT) Schedule 1 Provisions of the Code to which Part IAA applies.

144 *Criminal Code 1983* (NT) s 43AB.

145 See *Criminal Code 1983* (NT) s 43AI: Intention, s 43AJ: Knowledge, s 43AK: Recklessness, and s 43AL: Negligence.

146 See Smith A T H, above n 15, [24-05].

of the document being required for an accounting purpose is not an element of the offence of false accounting. Section 233 should also be amended to mirror the opening words of the equivalent s 83 *Crimes Act 1958* (Vic)¹⁴⁷ which utilises the word ‘dishonestly’ and that the definition of ‘dishonesty’ in s 130.3 *Criminal Code 1995* (Cth)¹⁴⁸ should be specifically adopted in s 233 *Criminal Code 1983* (NT).

The equivalent Commonwealth offences, which sit within Part 7.7: Forgery and related offences, are contained in s 145.4: Falsification of documents and s 145.5: Giving information derived from false or misleading documents.¹⁴⁹ Given its constitutional position, the Commonwealth has to restrict the ambit of these offences to documents with a Commonwealth connection. Taking s 145.4(1): Falsification of documents *Criminal Code 1995* (Cth) as an example, the elements are: ‘(1) dishonestly damages, destroys, alters, conceals or falsifies a document; (2) the document is made or held by a Commonwealth entity; and (3) with the intention of obtaining a gain from or causing a loss to another person’. For present purposes, it is significant that absolute liability¹⁵⁰ applies to the second element¹⁵¹ above, and that for s 145.4(2) it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.¹⁵² The same applies to the equivalent sections of s 145.5 *Criminal Code 1995* (Cth).¹⁵³

There will always be a number of underlying difficulties inherent in codification and uniformity, and the implementation of the *Criminal Code 1995* (Cth) was no exception given that compromise was necessary to achieve a national uniform code and the difficult balance

147 See above n 19.

148 See *Criminal Code 1995* (Cth) s 130.3: For the purposes of this Chapter dishonest means: (a) dishonest according to the standards of ordinary people; and (b) known by the defendant to be dishonest according to the standards of ordinary people. It is based on *R v Ghosh* [1982] QB 1053. The ‘*Ghosh* test’ is firstly, was the act one that the ordinary decent person would consider to be dishonest (objective) and, if so, secondly, must the accused have realised that what he or she was doing was by those standards dishonest (subjective).

149 *Criminal Code 1995* (Cth) s 145.4: Falsification of documents and s 145.5: Giving information derived from false or misleading documents replaced s 72 of the *Crimes Act 1914* (Cth) and s 61 of the *Financial Management and Accountability Act 1997* (Cth).

150 See *Criminal Code 1995* (Cth) s 6.2 which is identical to *Criminal Code 1983* (NT) s 43AO: Absolute Liability: ‘If a law that creates an offence provides that an offence is an offence of absolute liability: (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 43AX is unavailable’.

151 See *Criminal Code 1995* (Cth) s 145.4(1A).

152 See *Criminal Code 1995* (Cth) s 145.4(3).

153 See *Criminal Code 1995* (Cth) ss 145.5(1A) and (3).

between certainty and flexibility. The *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) *inter alia* inserted a new Chapter 7 dealing with property offences against the Commonwealth, of which Part 7.2: Theft and other property offences and Part 7.3: Fraudulent conduct are the most significant.¹⁵⁴ The legislation followed a modernised version of the UK *Theft Act* model as exemplified by s 130.3 *Criminal Code 1995* (Cth) which defines ‘dishonesty’ along the lines of the ‘*Ghosh* test’¹⁵⁵ and s 131.3 *Criminal Code 1995* (Cth) which defines ‘appropriation’ of property as ‘any assumption of the rights of the owner’. The adoption of a wide view in the treatment of both key definitional issues is to be commended and sets the stage so to speak to build on a general offence of fraud.

There is a danger in becoming excessively technical as to the elements of the offence of false accounting. In the earlier section of this article which considered the *Fraud Act 2006* (UK), mention was made of the UK Law Commission’s concerns in relation to fraud, of allowing technical arguments to prosper.¹⁵⁶ The same arguments apply to false accounting. False accounting is a species of fraud. The UK Law Commission approved the sentiments of Lord Hardwicke in a letter written 250 years ago:

Fraud is infinite, and were a court once to ... define strictly the species of evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man’s invention would contrive.¹⁵⁷

The UK Law Commission cited a long string of technical cases involving deception offences¹⁵⁸ where each of these defendants had argued that the particular consequences which he/she had brought about by deception fell outside the definition of the offence with which he/she was charged. The UK Law Commission concluded that ‘by relying on a range of specific fraud offences, defined with reference to different types of consequence, the law is left vulnerable to technical assaults’.¹⁵⁹ Whilst this conclusion was drawn in the context of recommending a single general offence of fraud it is pertinent to any fraud offence such as false accounting.

154 See *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth).

155 See above n 148.

156 See Queen’s Printer of Acts of Parliament, above n 74.

157 See the UK Law Commission, above n 68, [3.14] quoting a letter from Lord Hardwicke to Lord Karnes, dated 30 June 1759, cited by W A Holdsworth, *A History of English Law* (1972) Vol 12, 262.

158 See *R v Preddy* [1996] AC 815; *R v Duru* [1974] 1 WLR 2; *R v Halai* [1983] Crim LR 624; *R v King* [1992] 1 QB 20; *R v Mitchell* [1993] Crim LR 788; *R v Manjadria* [1993] Crim LR 73; and *R v Mensab Lartey and Relevy* [1996] Crim LR 203.

159 See the UK Law Commission, above n 68, [3.19].

It is of course open to approach the whole task from the perspective of a general description of the behaviour that needs prohibition, such as stealing, furnishing false information and deception, in the same manner as the UK Law Commission addressed the law on fraud. However, this article has adopted a more partial approach using the *Adamson* case as a vehicle to specifically examine abuse of position and false accounting.

On the question of allowing technical arguments to prosper, consider the following passage from Ormiston JA's judgment in *R v Jenkins*¹⁶⁰

The history and purpose of the section ... suggest to me that in a number of the English cases, especially *Osinuga*¹⁶¹ and *Sampson*,¹⁶² the Court has been too willing to accept that a jury could easily find that a document containing a few apparently relevant figures should lead to an inference on the criminal standard that the document in which they were to be found was 'required' for the business's accounting purposes.¹⁶³

Whilst it is almost self evident that 'the accused's intent cannot fairly be taken to extend to some activity of which reasonably he could not have been aware',¹⁶⁴ even the passage from A T H Smith,¹⁶⁵ relied upon by the appellant in the *Adamson* case,¹⁶⁶ recognized that '[i]n context, the defence seems highly unlikely to succeed, since the retailer must ordinarily be aware of the general use for which the document is required'.¹⁶⁷ It is sufficient to find the relevant mental element of dishonesty if, as was the situation in the *Adamson* case,¹⁶⁸ the appellant was intentionally seeking reimbursement under a false claim (with the intention of obtaining a gain or causing a loss). This would clearly apply to any claim form where the person completing the claim form knows it contains false particulars. The payment of any monies must *per se* be part of a business's accounting records.

160 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [59] (Ormiston JA); This immediately precedes a previously quoted passage relating to 'an unintended or chance connection with a business's accounting records'.

161 *Osinuga v DPP* [1998] Crim LR 216.

162 *Sampson v R* [1998] EWCA Crim 1177 (Unreported, Evans LJ, Curtis and Forbes JJ, 3 April 1998).

163 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [59] (Ormiston JA).

164 See Smith J C, above n 107, [6-06]; Ormerod, above n 107, 619; *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [57] (Ormiston JA).

165 Smith A T H, above n 15, [24-05].

166 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [137].

167 See *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008) [137]; See Smith A T H, above n 15, [24-05].

168 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).

Turning to the other element under discussion, namely whether a document is required for an accounting purpose, in *R v Jenkins*,¹⁶⁹ the majority found that, '[i]t would seem that the documents were required for prudential rather than accounting purposes, and there was no evidence that the valuations were even kept in the accounts section'.¹⁷⁰ O'Bryan AJA dissented in *R v Jenkins*¹⁷¹ and his reasons are particularly pertinent as regards this article's contention that overly technical dissections of the elements are unhelpful. As to whether the document was required for an accounting purpose he said:

In order to answer the question [whether the evidence will support a finding that the document in question was one required for an accounting purpose] regard must be had to all of the following matters:

- (i) the nature of the document;
- (ii) the use for which it was made or required by the person to whom it was produced;
- (iii) the evidence, whether direct or indirect, upon which the fact-finding tribunal, whether it be a magistrate, a judge or a jury, could conclude that the document was made or required for an accounting purpose.¹⁷²

The process by which O'Bryan AJA found the document to be within an 'accounting purpose' was to observe that the valuation report actually had three purposes. The first was to assess the current fair market value of the property. The second was to enable the Friendly Society (The Order of the Sons of Temperance Friendly Society) to determine whether to advance money in the form of a mortgage and the amount of such a mortgage. The third was to provide the important loan valuation ratio for the purposes of s 69 of the *Friendly Societies Act 1986* (Vic). Evidence provided to the jury, which was accepted by the trial judge, was that the valuation reports were capable of allowing an inference to be drawn that they were documents the Friendly Society 'required for an accounting purpose'.¹⁷³ Thus, while the majority took the view the documents were required for prudential rather than accounting purposes, O'Bryan AJA took a wider, and with respect, better view of the nature of s 83 *Crimes Act 1958* (Vic) by holding that the 'valuation was used for the purpose of calculating the Loan Valuation Ratio before

169 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

170 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [72] (Charles JA agreeing with Ormiston JA).

171 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

172 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [164–165] (O'Bryan AJA).

173 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002) [165] (O'Bryan AJA).

money was lent and it was required for audit requirements as evidence that there had been compliance with the *Friendly Societies Act*.¹⁷⁴

Support of legislative intent for the wider view when it applies to the breadth of sections dealing with falsification, albeit in construing a different section in another jurisdiction,¹⁷⁵ can be found in *R v Webber*¹⁷⁶ where the New South Wales Court of Criminal Appeal was considering the meaning of ‘falsifies’ in s 158 of the *Crimes Act 1900* (NSW).¹⁷⁷ The appellant argued that s 158 refers, in its use of ‘falsifies’, to physical alterations to (manual interference with) documents, and this alone. The court dismissed the appeal holding that the meaning of ‘falsifies’ was not so confined, and that the trial judge was correct in taking the view that the word comprehended, *inter alia*, the filling in of a cheque requisition with particulars which were demonstrably false.¹⁷⁸ The NSW Court of Criminal Appeal was concerned to give ‘falsifies’ a wide interpretation given the infinite scope for fraud, in a similar vein to the UK Law Commission, rather than focus on the misleading and deceptive aspect of the offence. Nevertheless, in order to reinforce the point, ‘false’ can be further defined in a statutory provision as meaning untrue or misleading in keeping with language of the *Fraud Act 2006* (UK) and the suggested redraft of s 233(3) *Criminal Code 1983* (NT) as set out below. The leading judgment in *R v Webber*¹⁷⁹ was given by Lee CJ who made a pertinent observation as regards the intention of the legislature:

[T]here is no reason why the word “falsifies” in s 158 should not be given its entire meaning of making false in any way. The dictionary definition in the *Shorter Oxford English Dictionary* includes both making false or incorrect, and declaring or proving to be false, and there is no reason why that total meaning should not be given to the word “falsifies” in s 158.¹⁸⁰

174 *R v Jenkins* [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byran AJA, 20 December 2002) [166] (O’Byran AJA).

175 Under the *Crimes Act 1900* (NSW) s 158 the constraining factor is that the document belongs to or is in the possession of the clerk or servant’s employer. Under the *Crimes Act 1958* (Vic) s 83 and the *Criminal Code 1983* (NT) s 233 the employer’s ownership of the document is replaced with an accounting purpose.

176 *R v Webber* (1988) 15 NSWLR 49.

177 *Crimes Act 1900* (NSW) s 158: Destruction, falsification of accounts, etc by clerk or servant of the following terms: ‘Whosoever, being a clerk, or servant, or person acting in the capacity of a clerk, or servant, destroys, alters, mutilates, or falsifies, any book, paper, writing, valuable security, or account, belonging to, or in the possession of, or received for his employer, or makes, or concurs or concurs in making, any false entry in, or omits, or alters, or concurs in omitting or altering, any material particular from, or in, any such book, or writing, or account, with intent in any such case to defraud, shall be liable to imprisonment for five years’.

178 *R v Webber* (1988) 15 NSWLR 49, 49, 151-152 (Lee CJ).

179 (1988) 15 NSWLR 49.

180 *R v Webber* (1988) 15 NSWLR 49, 51 (Lee CJ).

Carruthers J agreed with Lee CJ adding that ‘the phrase “falsifies ... any paper ... with intent to defraud” in s 158 was intended by the legislature to be of wide import, bearing in mind the diverse methods of fraudulent conduct presently available to employees of commercial organisations’.¹⁸¹ One could further extend this comment which is arguably equally applicable to the diverse methods of fraudulent conduct available to any person seeking to knowingly deceive any private or public body by submitting false material for any purpose.

In drawing together all of the foregoing contentions for the appropriate amendment of s 233 *Criminal Code 1983* (NT), a new proposed section is given below which is intended to reduce the present undue complexity and vagueness of the law. It takes the present s 233 and imports the language of s 83(1) *Crimes Act 1958* (Vic) as regards ‘dishonestly’ which is defined in accordance with s 130.3 *Criminal Code 1995* (Cth), and dispenses in subsection (1) with the previous words ‘with intent to deceive’. There is no need to prove that actual loss or gain occurred, provided the requisite intention is there. Absolute liability applies to the paragraph (1)(a) or (1)(b) element of the offence, which is consistent with the equivalent Commonwealth provision under s 145.4 and s 145.5 *Criminal Code 1995* (Cth) where absolute liability applies to a document that is kept, made or held by a Commonwealth entity. Furthermore, in the newly proposed s 233 it is not necessary to prove that the defendant knew that the account, record or document was required for an accounting purpose, to meet the argument in reliance on A T H Smith,¹⁸² that awareness was an element of s 233. The structure of the newly proposed s 233 is entirely consistent with the Commonwealth offences as regards the use of dishonestly and the intention of obtaining a gain or causing a loss, with the only difference being the documents not having a Commonwealth connection. Falsifies is given its entire meaning of making false in any way in accordance with *R v Webber*,¹⁸³ and ‘false’ is defined as meaning untrue or misleading in keeping with language of the *Fraud Act 2006* (UK). The term ‘required for any accounting purpose’ follows the wider view adopted by O’Byrne AJA in *R v Jenkins*¹⁸⁴ and preferred in this article. The purpose of such detail in a single section of the *Criminal Code* is both to overcome overly technical defences and to place within the *Criminal Code* itself meanings that are often derived from the common law, explanatory notes or second reading speeches. The newly proposed s 233 should read as follows:

181 *R v Webber* (1988) 15 NSWLR 49, 52 (Carruthers J).

182 Smith A T H, above n 15.

183 (1988) 15 NSWLR 49.

184 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O’Byrne AJA, 20 December 2002) [166] (O’Byrne AJA).

S 233 False accounting

- (1) Where a person dishonestly, with the intention of obtaining a gain or causing a loss:
 - (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose or any similar purpose or for any financial transaction; or
 - (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document referred to in paragraph (a), that is or may be misleading, false or deceptive in a material particular.the person is guilty of a crime and is liable to imprisonment for 7 years.
- (2) Dishonestly means
 - (a) dishonest according to the standards of ordinary people; and
 - (b) known by the person/defendant to be dishonest according to the standards of ordinary people.
- (3) Falsifies should be given its entire meaning of making false in any way and includes both making false or incorrect and declaring or proving to be false. 'False' means untrue or misleading, and the person falsifying the account knows that it is untrue or misleading, or is aware that it might be.
- (4) In considering the meaning of the term 'required for any accounting purpose' regard must be had to all of the following matters:
 - (i) the nature of the document;
 - (ii) the use for which it was made or required by the person to whom it was produced; and
 - (iii) the evidence, whether direct or indirect, upon which the fact-finding tribunal, whether it be a magistrate, a judge or a jury, could conclude that the document was made or required for an accounting purpose.
- (5) Absolute liability applies to the paragraph (1)(a) or (1)(b) element of the offence.
- (6) It is not necessary to prove that the defendant knew that the account, record or document was required for an accounting purpose.

V *CRIMINAL CODE 1983 (NT)* s 227: CRIMINAL DECEPTION

'Chimpie', said Mr Molloy, I wouldn't trust you as far as a snail could make in three jumps. I wouldn't believe you not even if I knew you were speaking the truth.¹⁸⁵

As regards more general fraud offences, it is worth noting that Magistrate Luppino ruled that Mr Adamson had no case to answer on the count of obtaining the property of the Council by deception contrary to s 227 of the *Criminal Code 1983 (NT)*.¹⁸⁶ In relation to s 227(1)(a), obtaining the property of another, Magistrate Luppino held 'that it is not possible to transfer a chose in action by a funds transfer'¹⁸⁷ because whilst a transfer of funds occurs 'it is the creation of a new chose in

185 Wodehouse, above n 91, quoted in Richard Osborne (ed), *Wodehouse Nuggets* (1st ed, 1983) 155.

186 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [62]; See above n 23.

187 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [73]; See above n 23.

action, not a transfer of the Darwin City Council's chose in action'.¹⁸⁸ Importantly, given earlier expressed concerns in relation to fraud, of allowing technical arguments to prosper, the Magistrate acknowledged 'this is a very technical argument'.¹⁸⁹ Magistrate Luppino chose to follow the English case of *R v Preddy*¹⁹⁰ which involved a charge of obtaining money by deception, being money in the form of a chose in action, via an electronic funds transfer. In so doing, Magistrate Luppino recognised that the High Court of Australia in *R v Parsons*¹⁹¹ had rejected *R v Preddy*¹⁹² in so far as it applied to cheques.¹⁹³ In *R v Parsons*¹⁹⁴ the relevant section under consideration was s 81 *Crimes Act 1958* (Vic) which is drafted in similar terms to s 227 of the *Criminal Code 1983* (NT). Magistrate Luppino also chose not to follow persuasive Queensland Court of Appeal authority in *R v Capewell*¹⁹⁵ which involved the withdrawal of funds by electronic transfer that had been credited as a result of a bank error.¹⁹⁶

It was also unfortunate that Magistrate Luppino overlooked both the enactment of s 15A to the *Theft Act 1968* (UK) by the *Theft (Amendment) Act 1996* (UK) which was intended to close the *Preddy*¹⁹⁷ loophole, and the enactment of the *Fraud Act 2006* (UK) a year before his decision which introduced a single general offence of fraud on the recommendation of the UK Law Commission to specifically overcome a long string of technical cases involving deception offences starting with *R v Preddy*¹⁹⁸ at the head of the list. However, Magistrate Luppino was of the view that a charge under s 227(1)(b) obtaining a benefit by deception 'could have been maintained given the definition of "benefit" includes any advantage, right or entitlement in the Code'.¹⁹⁹ One academic author, Alex Steel, has suggested that:

188 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [73].

189 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [71].

190 [1996] AC 815. This case concerned mortgage fraud in which the defendant had obtained mortgages from lenders on the basis of false representations. The Court of Appeal held that where the defendant dishonestly, and by deception, procured a transaction whereby vendor's bank account was debited and consequently there was credit to the defendant's account, the defendant had not obtained property belonging to another by deception. The debt owed by vendor's bank to the vendor had been extinguished, and what the defendant obtained was a newly created debt owed by his bank to him, not property belonging to another.

191 (1999) 195 CLR 619.

192 (1996) AC 115.

193 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [72].

194 (1999) 195 CLR 619.

195 (1994) 74 A Crim R 228.

196 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [72 - 73].

197 *R v Preddy* [1996] AC 815.

198 [1996] AC 815.

199 *O'Brien v Adamson* [2007] (Unreported, Magistrate Luppino, 13 July 2007) [74]. The prosecution chose not to make a further application for leave to amend the charge.

These offences [under s 227 *Criminal Code 1983* (NT)] appear to go significantly beyond the scope of offences in the other jurisdictions that require that the advantage be financial. [Financial advantage is required in NSW, Victoria and Tasmania] 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.²⁰⁰

Steel has pointed out that the mental element under s 227 relating to Criminal deception is not dishonesty (which it will become under the newly proposed s 227) but 'proof that the accused intentionally²⁰¹ engaged in deception'.²⁰² Steel found 'the rationale for this somewhat puzzling' concluding that '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'.²⁰³ Nevertheless, Steel went on to observe that the lack of the need to prove dishonesty meant it was unnecessary for the definition of deception in s 1 of the *Criminal Code 1983* (NT) to include situations 'where a person makes statements that they do not know to be true without caring whether another would be deceived by them'.²⁰⁴

This analysis would tend to lead to the conclusion that when s 227 *Criminal Code 1983* (NT) comes under Part IIAA the appropriate fault element should be recklessness.²⁰⁵ Recklessness involves an awareness of a substantial risk which it is unjustifiable to take and is to be determined on the facts. The requisite fault element in a descending

200 Alex Steel, 'General Fraud Offences in Australia', Australian Law Teachers Association 2006 Conference Papers, Annual Conference, Victoria, Melbourne, July 2006, 7. The paper identified the history of fraud offences as comprising three main waves. Firstly, in England in the eighteenth century centered on the offence of obtaining property by false pretences. Secondly, following the enactment of the *Theft Act 1968* (UK) marking a move away from property being seen as the subject of the offence. Thirdly, broad general dishonesty offences that emerged in the 1990s in Western Australia and Queensland. An alternative approach of a general deception offence has been enacted in the Northern Territory. The paper focused on the third wave and suggested the offences appeared to 'extend to the prohibition of activities that are not clearly criminal and are too vaguely expressed to enable certain prediction as to whether activities fall inside or outside the scope of the offences'.

201 *Criminal Code 1983* (NT) s 1 defines deception as meaning intentional deception.

202 Steel, above n 200, 17.

203 Steel, above n 200, 17.

204 Steel, above n 200, 18.

205 *Criminal Code 1983* (NT) s 43AK: Recklessness: (1) A person is reckless in relation to a result if: (a) the person is aware of a substantial risk that the result will happen; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk. (2) A person is reckless in relation to a circumstance if: (a) the person is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk. (3) The question whether taking a risk is unjustifiable is one of fact. (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

staircase of criminal responsibility can either be intention, knowledge or recklessness, but either satisfies the fault element. Steel appears to suggest that s 227 is widely drawn²⁰⁶ which is consistent with the arguments advanced in this article on the related offence of false accounting under s 233 of the *Criminal Code 1983* (NT).

To be consistent with the approach taken with regards to the offence of fraud by abuse of position, the better view is to adopt a section similar to s 2 (False representation) of the *Fraud Act 2006* (UK). This section replaces the offence of obtaining property by a lie, a trick or a deception. Under s 2 (False representation) of the *Fraud Act 2006* (UK), the offence has two limbs: firstly, dishonestly making a false representation, and secondly, intending by making the representation to make a gain for himself or another or to cause loss to another or to expose another to a risk of a loss. As was stated earlier, unlike previous deception offences, there is no need to prove that actual loss or gain occurred, provided the requisite intention is there.

Both of the words ‘false’ and ‘representation’ are broadly defined. ‘False’ means untrue or misleading, and the person making the representation knows that it is untrue or misleading, or is aware that it might be. Awareness is consistent with recklessness,²⁰⁷ in so far as it is taken to mean not caring whether the representation is true or false, and awareness could also encompass negligence if the legislature wanted to widen the reach of the offence by going one-step further down the staircase of criminal responsibility. ‘Representation’ means any representation by words or conduct as to fact or law, and includes representations going to the state of mind of the person making the representation or any other person. Such drafting is the hallmark of a report on fraud whose aim was to make the law of fraud clearer and simpler and whose claim was a resulting ‘reduction in the amount of time and money wasted in coping with the present undue complexity and vagueness of the law’.²⁰⁸

VI CONCLUSION

This article has utilised the *Adamson* case to review fraud offences under the *Criminal Code 1983* (NT). The facts in the *Adamson* case were straightforward and readily established. The case hinged on technical

206 Steel, above n 200.

207 See the UK Law Commission, above n 68, [7.15] where the Law Commission suggested that the legislation make it clear that there is deception where the defendant deliberately or recklessly induces another to believe something that is not true. This was also consistent with now repealed s 15(4) of the *Theft Act 1968* (UK).

208 See Queen’s Printer of Acts of Parliament, above n 74.

legal argument relating to the Council's ownership of the purchases and the meaning and scope of the relatively untested s 233 *Criminal Code 1983* (NT) covering false accounting. It has been argued that the current fraud offences in the *Criminal Code 1983* (NT) are not sufficiently robust to be left to stand as they are currently drawn up.²⁰⁹ These offences are in need of both supplementation through a new offence of fraud by abuse of position modelled on s 4 of the *Fraud Act 2006* (UK), and clarification of certain words in relation to s 233 and s 227 *Criminal Code 1983* (NT). A new draft of s 233 *Criminal Code 1983* (NT) has been suggested above which includes a definition of 'dishonesty' drawn from the *Criminal Code 1995* (Cth), a definition of 'falsifies' drawn from the case of *R v Webber*,²¹⁰ a definition of the word 'false' to mean untrue or misleading, a definition of the term 'required for any accounting purpose' drawn from the dissenting judgment of O'Bryan AJA in *R v Jenkins*,²¹¹ and the imposition of strict liability, to meet the argument rejected in the *Adamson* case²¹² that knowledge that the document was to be used for accounting purposes was an element of the offence. Finally, for s 227 *Criminal Code 1983* (NT) to be consistent with the approach taken with regards to the offence of fraud by abuse of position, the better view is to adopt a section similar to s 2 of the *Fraud Act 2006* (UK) which relates to false representation.

It is to be hoped that such proposed draft sections on abuse of position, false accounting, and criminal deception may also prove to be useful as a template for other jurisdictions.

209 See, eg, the Commonwealth Fraud Control Guidelines, where fraud against the Commonwealth is defined as 'dishonestly obtaining a benefit by deception or other means'. It encompasses, for example, obtaining benefits by deceit, charging the Commonwealth for non-delivery or incomplete delivery of services, abusing Commonwealth facilities, bribing or corrupting Commonwealth employees, and evading payments owed to the Commonwealth <http://www.ag.gov.au/www/agd/agd.nsf/Page/Fraudcontrol_CommonwealthFraudControlGuidelines-May2002#statement> at 17 May 2009.

210 (1998) 15 NSWLR 49.

211 [2002] VSCA 224 (Unreported, Ormiston, Charles JJA and O'Bryan AJA, 20 December 2002).

212 *Adamson v O'Brien* [2008] NTSC 8 (Unreported, Martin CJ, 15 February 2008).