

# *Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property*

ALEX STEEL\*

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## *Abstract*

This article questions whether misuse of intangible property should fall within the scope of theft — an issue on which Australian jurisdictions are currently divided. It provides an overview of the traditional limitation of larceny to moveable property and some of the difficult issues of interpretation of the modern theft offence that are related to the inclusion of intangible property. It then examines in detail a number of forms of intangible property to see if any of them are capable of forming the basis of a theft charge. The conclusion made is that intangible property is either unable to form the basis of a theft charge, or if it can, the coverage of activities involving such a property right is either partial or highly uncertain. The article thus suggests that nothing of practical value is gained by extending theft to include intangible property, and that misuse of intangible property is best dealt with either by fraud or *sui generis* offences.

## *1. Introduction*

Offences relating to property are some of the most complex criminal offences, in large part due to the complex forms and uses of property itself. The common law offence of larceny, which has retained its basic structure since the 1200s,<sup>1</sup> has long been considered by many to have fundamental problems of application to modern circumstances, and these problems were considered so fundamental that in 1968, England and Wales replaced the common law offence with a statutory offence of theft. This revision now forms the basis of property offences in five Australian jurisdictions: the Commonwealth, Victoria, the Australian Capital Territory, South

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\* Senior Lecturer, Faculty of Law, University of New South Wales. I would like to thank David Brown, Stuart Green and Ian Leader-Elliott for reading and commenting on drafts of this paper; Kathy Bowrey and Simone Degeling for help with aspects of the paper; and Christina Trahanas for her invaluable research assistance. The comments of the anonymous reviewers were also very helpful in focusing the argument. All the errors are of course my very own.

1 Stephen suggests that the first clear definition is to be found in Bracton (d 1268) (Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) vol 3 at 131).

Australia and the Northern Territory.<sup>2</sup> There are however significant differences between those jurisdictions in how the theft offences are formulated. The remaining jurisdictions are either based on the common law offence of larceny,<sup>3</sup> or the 1897 Griffith Code codification of larceny.<sup>4</sup> Those jurisdictions that have adopted the *Theft Act* 1968 (UK) c 60 model of theft now have an extended form of theft that covers the stealing of intangible property, as has Western Australia.<sup>5</sup> However in NSW,<sup>6</sup> Queensland,<sup>7</sup> and Tasmania<sup>8</sup> the offence of stealing is restricted to forms of moveable property.<sup>9</sup> Thus, Australian jurisdictions are divided over whether theft offences should be restricted to tangible forms of property or extend more generally.

The extension of theft to include intangible property is linked to difficulties of interpretation of the scope of the offence, outlined below. In light of the difficulties of maintaining a simple theft offence, this article examines whether the inclusion of intangible property within the scope of theft adds anything of practical benefit to the offence, and whether the criticisms of the definition of property in larceny could not have been overcome in a less drastic way.

In this paper, to enable clear distinctions to be drawn between the various forms of offence, the common law offence of larceny will be referred to as 'larceny'. Those offences modelled on the *Theft Act* or *Model Criminal Code* will be called 'theft' and when the offences are referred to generally without drawing a distinction between the forms of offences they will be described as 'stealing'.

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2 The basic definition of theft in the *Theft Act* 1968 (UK) c 60, s 1 ('*Theft Act*') is reproduced essentially unchanged in *Crimes Act* 1958 (Vic) s 72. A slightly modified version of the *Theft Act*'s theft offence is enacted in *Criminal Code Act 1995* (Cth) s 131.1 and *Criminal Code 2002* (ACT) s 308: see Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General ('MCCOC'), *Model Criminal Code—Chapter 3: Theft, Fraud, Bribery and Related Offences Report* (1995). More substantially modified forms of the *Theft Act*'s theft offence appear in *Criminal Law Consolidation Act 1935* (SA) s 134 and *Criminal Code Act* (NT) s 209.

3 The common law offence of larceny remains law in New South Wales ('NSW'), with common law precedent entirely defining the elements of the offence (*Crimes Act* 1900 (NSW) s 117). By contrast, England and Wales consolidated their larceny offence in the *Larceny Act* (1916) 6 & 7 Geo V, c 50 ('*Larceny Act*'). Tasmania has a codified offence that retains strong similarities with larceny (*Criminal Code Act 1924* (Tas) ss 226, 234).

4 *Criminal Code Act 1899* (Qld) ss 391, 398; *Criminal Code Act 1913* (WA) s 371.

5 Western Australia expanded the scope of its offence in 1954 (No. 20 of 1954). See *Sawiris v Scott* [1979] WAR 39.

6 This is the common law restriction discussed below.

7 *Criminal Code Act 1899* (Qld) s 390. See also the Queensland Supreme and District Court Benchbook <<http://www.courts.qld.gov.au/Benchbook/SD-141-Stealing.pdf>> accessed 10 July 2008.

8 *Criminal Code Act 1924* (Tas) s 227.

9 In Queensland and Tasmania there is an extension of the scope of the offence to situations where the property is already in the possession of the accused prior to the act of stealing. This allows for fraudulent conversion offences to be dealt with under the same section. It is arguable, however, that the essence of separate theft and conversion offences remains within the overall structure of the legislation. In NSW, these situations are covered in separate offences.

### A. *Larceny and Theft*

Given the longevity of the common law offence of larceny,<sup>10</sup> there are many judicial statements setting out its elements, statements that emphasise different aspects of the offence both due to the circumstances of the case before the particular court and the age of the decision. A modern Australian summary is that of Barwick CJ in *Croton v The Queen*,<sup>11</sup> a definition that also emphasises its restriction to moveable property:

[L]arceny consists in the taking and carrying away of the property of another without his consent, and without colour of right, intending at the time of the taking permanently to deprive the owner of that property. It follows that there must be what is called an asportation. Therefore, apart from any special statutory provision, larceny can only be committed of property which is capable of physical possession and removal.<sup>12</sup>

In jurisdictions that retain the offence of larceny, this core common law offence is supplemented by a range of statutory enactments that either deem certain situations to fall within larceny, or create separate offences that cover situations that fall beyond the boundaries of larceny. The most significant of these are larceny by bailees,<sup>13</sup> embezzlement,<sup>14</sup> fraudulent conversion,<sup>15</sup> and fraudulent trustee offences.<sup>16</sup> These statutory extensions have been incrementally added to larceny by parliaments since the 1700s, at times targeted at specific practices, at times more generally worded. Despite sporadic attempts at codification or simplification,<sup>17</sup> the result has been a confusing and complex web of property crimes.

While larceny appears to have begun its evolution as an offence which was defined by the general community understanding of the term,<sup>18</sup> by the 1960s it was subject to the criticism that centuries of judicial interpretation had made its scope

10 For historical accounts, see Jerome Hall, *Theft, Law and Society* (2<sup>nd</sup> ed, 1952); George Fletcher, *Rethinking Criminal Law* (1978); Michael Tigar, 'The Right of Property and the Law of Theft' (1984) 62 *Texas Law Review* 1443 at 1457–9.

11 (1967) 117 CLR 326 ('*Croton*'). Because of limitations of space, this article assumes the reader's familiarity with the elements of larceny. For accounts of this offence in an Australian context, see David Brown, David Farrier, Sandra Egger, Luke McNamara & Alex Steel, *Criminal Laws in Australia* (4<sup>th</sup> ed, 2006) at 973–1075 and C R Williams, *Property Offences* (3<sup>rd</sup> ed, 1999) at 12–53.

12 *Id* at 330.

13 *Crimes Act* 1900 (NSW) s 125. For the purposes of this article, references are made to the current provisions in the *Crimes Act* (NSW), the only Australian jurisdiction to retain larceny and related offences.

14 *Crimes Act* 1900 (NSW) ss 157, 160.

15 *Crimes Act* 1900 (NSW) ss 125, 178A.

16 *Crimes Act* 1900 (NSW) ss 164–172.

17 Such complexity has led to repeated attempts to consolidate or codify these crimes (the first attempt was the Royal Commission on Criminal Law, *Criminal Law: First Report*, House of Commons Paper No 537, Session 1834 (1834)), the final attempt being the *Larceny Act*. These consolidation and codification measures were still influenced by the centuries-old common law approach to property offences, and grounded larceny in tangible, moveable property.

18 See Fletcher, above n10.

incomprehensible to the general public, and a simpler and easier to understand offence should replace it. This was the aim of the Criminal Law Revision Committee ('CLRC')<sup>19</sup> which in 1966 recommended the abolition of the common law offence of larceny in favour of a broad, and hopefully simpler, legislative regime.<sup>20</sup> In 1968, subject to some parliamentary amendments, these recommendations became the *Theft Act 1968 (UK) c 60*<sup>21</sup> ('*Theft Act*'), which attempted to consolidate all the larceny-type offences into a single offence. Despite confident predictions that the *Theft Act* would bring a new simplicity to property crime, the provisions of the Act, particularly those relating to the theft offence,<sup>22</sup> were discovered to be uncertain and complex. Significant litigation has since centred on attempts to find boundaries to the offence; nevertheless, the English courts have consistently interpreted the offence broadly, refusing to find any real restrictions based on 'common usage'<sup>23</sup> in the elements of the offence. As a result, the description of theft in s 1(1) has produced an offence whose boundaries are now arguably even further from reflecting general community understandings of stealing than larceny ever did. Difficulty has arisen with each element of theft.

Section 1(1) *Theft Act* defines the general offence of theft:

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.

Subsequent sections provide further definition of the terms within this offence generally, broadening the terms beyond standard meanings. One key impetus behind the use of such broadly defined terms was the Committee's decision to expand stealable property to include all intangible forms of property. This was seen to be necessary because the Committee's aim was to achieve simplification by collapsing a range of larceny-related offences into one theft offence. But by including intangible property in theft, this also required a re-conceptualisation of the key elements of belonging to another and asportation.<sup>24</sup> 'Belonging to another' in the theft offence was broadened to include the victim 'having in [the subject property] any proprietary right or interest',<sup>25</sup> rather than be based on a chattel in the possession of another, or in the possession of the accused in special

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19 House of Commons, Criminal Law Revision Committee ('CLRC'), *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966).

20 *Id* at 6–10.

21 See *id* at 98–114 (Annex 1); CLRC, *Thirteenth Report: Section 16 of the Theft Act 1968* (Cmnd 6733, 1977) at 26.

22 *Theft Act* ss 1–7. See below.

23 In so choosing to describe the offence in general terms it seems that the drafters of the theft offence used words that they thought had settled and relatively narrow meanings, drawn from previous usage in relation to larceny. See J C Smith, 'The Sad Fate of the *Theft Act 1968*' in William Swadling & Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) at 97.

24 In Alex Steel, 'Taking Possession: The Defining Element of Theft?' (2008) 32(3) *Melbourne University Law Review* (forthcoming), I provide a critique of this reconceptualisation.

25 *Theft Act* s 5(1).

circumstances. Appropriation was described as ‘any assumption by a person of the rights of an owner’<sup>26</sup> rather than the taking or converting of the property.

In using the term ‘appropriates’, no mention was made in the English version of theft<sup>27</sup> that the appropriation be without consent; apparently an oversight.<sup>28</sup> Subsequent English attempts to convince courts to restrict appropriation to an appropriation without consent,<sup>29</sup> an appropriation of all or substantially all of the property rights of the victim,<sup>30</sup> or an act that ‘usurps’ the rights of the victim<sup>31</sup> were all ultimately rejected by the House of Lords.<sup>32</sup> This leaves appropriation as a very broad term, which requires only the assumption of any one property right associated with the victim. In Victoria, which has a theft offence in identical terms to the *Theft Act*, the courts have followed the English approach of adopting a minimal standard for the nature of rights that need to be appropriated, with an appropriation being held to be as minor an act as sitting in a car.<sup>33</sup>

By contrast, in those Australian jurisdictions whose theft offence is based on the Model Criminal Code, there has been an attempt to exclude liability for the most minimal of interferences by requiring that appropriation amount to an ‘assumption of rights of the owner to ownership, possession or control of property’.<sup>34</sup> Despite this attempt, it seems that the notion of control has the potential to be interpreted broadly enough to maintain a very wide scope for appropriation.<sup>35</sup>

The legislative elaboration of the meaning of the requisite ‘intention to permanently deprive’ is also problematic. Under larceny, the need to take possession led only to the question of whether the possession was a temporary borrowing or something more permanent.<sup>36</sup> Despite no indication from the CLRC that any change to the position in larceny was intended, a badly drafted and partial definition of what the term meant was inserted by Parliament in the passage of the

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26 *Theft Act* s 3(1).

27 In the Australian jurisdictions which have offences based on the *Theft Act*, appropriation is defined to require proof that the victim has not consented (*Criminal Code Act 1995* (Cth) s 131.3(1); *Criminal Code 2002* (ACT) s 304(1); *Criminal Law Consolidation Act 1935* (SA) s 134(1)(b)). Although there is no legislative reference to consent in the Victorian offence, the Victorian courts have held that appropriation must be non-consensual, adopting an English ruling rejected in later decisions (*R v Baruday* [1984] VR 685, following *R v Morris* [1984] AC 320 (*‘Morris’*). *Morris* was overruled in *DPP v Gomez* [1993] AC 442 (*‘Gomez’*) and *R v Hinks* [2001] 2 AC 241 (*‘Hinks’*)). There is also no reference to consent in the Northern Territory offence, but one case suggests that the approach taken in Victoria is to be followed (*R v Kunnick* (1992) 108 FLR 190), though that decision predated *Gomez* and *Hinks* and may no longer be good law.

28 Smith, above n23 at 100–1.

29 *Lawrence v Metropolitan Police Commissioner* [1972] AC 626.

30 *Morris* [1984] AC 320.

31 *Gomez* [1993] AC 442.

32 *Hinks* [2001] 2 AC 241.

33 *W (a child) v Woodrow* [1988] VR 358. The offence charged was car joyriding, which removed the requirement to prove an intention permanently to deprive. It was approved by the Victorian Court of Criminal Appeal in *R v Marijancevic* (1991) 54 A Crim R 431.

34 See, for example, *Criminal Code Act 1995* (Cth) s 131.3(1).

*Theft Bill*. This was apparently intended to largely replicate the meaning of the term in larceny.<sup>37</sup> However, because of the confused wording of the section, scope exists for various interpretations to be taken of its meaning.<sup>38</sup> The current English interpretation appears to be that ‘intention to permanently deprive’ extends to any intention to treat the thing as his or her own to dispose of regardless of the other’s rights, and that this includes any person ‘who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss.’<sup>39</sup> It remains unclear whether this will have the effect of including cases of borrowing within the theft offence and, as discussed below, there is some uncertainty as to whether it might include the assumption of rights to licence or use forms of intellectual property.

The result of the broadness of these terms, and the concomitant uncertainty of their application in novel situations, is that large weight has been placed on the mental element of dishonesty. In fact in England, whether an action amounts to theft will in practical terms depend on whether the person is dishonest. This can be exemplified in the statement of the Law Commission that:

When a person selects a newspaper to buy at a newsagent’s, he or she has committed all the elements of theft save for dishonesty.<sup>40</sup>

In this sense dishonesty ‘does all the work’.<sup>41</sup> This has been acknowledged by the House of Lords; a situation that they consider is acceptable.<sup>42</sup>

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- 35 For example, taking goods to a shop counter (see the Law Commission’s example at n40 below) could be seen to be exerting the right to control the physical disposition of the property. Whether this was consented to would depend on issues of implied licence. But compare the example of picking up fallen goods from a supermarket floor, considered by MCCOC to fall outside appropriation as defined (MCCOC, above n2 at 41). In *Pellegrino v DPP (Cth)* [2008] NSWCCA 17 at [61] it was held that “control” in theft included statutory rights of control over property, at least where such rights practically amounted to actual physical control – in that case Customs’ right to prevent movement of containers on wharves. English commentators suggest that control need only amount to custody, see David Ormerod & David Huw Williams, *Smith’s Law of Theft* (9th ed, 2007) at 80.
- 36 In larceny, the element excludes from the offence circumstances that are merely a wrongful borrowing of property, which at most leads to tortious liability. Instead, what is required is an intention ‘to take the entire dominion over the property’ (*R v Holloway* (1848) 1 Den 370 at 375; 169 ER 285 at 287). There are a number of exemptions to this requirement discussed in John Spencer, ‘The Metamorphosis of Section 6 of the *Theft Act*’ [1977] *Criminal Law Review* 653.
- 37 *Theft Act*, s6. For the legislative history, see Spencer, *ibid*, and for what the drafters may have meant, see Smith above n23.
- 38 See, for example, Alex Steel, ‘Permanent Borrowing and Lending: A New Approach to s6 *Theft Act*’ (2008) 17(1) *Nottingham Law Journal* 3; A T H Smith, *Property Offences: The Protection of Property Through the Criminal Law* (1994) at 185–235.
- 39 This is what was stated in *Fernandes* [1996] 1 Cr App R 175 at 188. Commentators have had some difficulty accepting that this is what the court intended to state (see, for example, the discussion in Ormerod & Williams, above n35 at 116–123). In another article, I argue that it may be possible to construct a more restrictive interpretation of the section, but to do so would be against the weight of judicial statements to the contrary (see Steel, above n38). See also Smith, above n23.

Dishonesty, the theft restatement of the concept of ‘felonious’ or ‘fraudulently’<sup>43</sup> in larceny, has itself been the subject of sustained debate over whether the element should be seen as a narrow test of awareness or belief or a broader moral touchstone for criminality; and if so whether that moral standard is to be objectively determined on the basis of community standards of honesty or a subjective state of mind.<sup>44</sup> Somewhat perversely, the debate over the proper scope and role of dishonesty has seen it emerge as a new key basis for criminalisation. Increasingly, conduct is being proscribed on the basis that a particular activity is done dishonestly. In most instances the activity is *prima facie* illegal, such as the use of deception for financial gain,<sup>45</sup> or the misuse of a director’s position.<sup>46</sup> More controversially, dishonesty may be the only differentiator from lawful activity — often because of the character of the identified victim.<sup>47</sup>

Such a development was not foreseen in the 1960s when the theft offence was created. At that time, it was considered that property rights were the key defining character of crimes in this area. The main issue in drafting general offences was thus the way in which various activities that were considered criminal could be brought within the scope of an infringement of a property right that was held by the victim. This is now no longer considered necessary.

Indeed, the new generation of fraud offences dispense entirely with any reference to property. Instead the focus is on whether the accused dishonestly makes a gain, or causes a loss to the victim.<sup>48</sup> Whether such broadly defined offences are appropriate, or amount to overcriminalisation are topics beyond the scope of this article.<sup>49</sup> What is clear is that the enactment of such offences, whether of general dishonesty or with more defined physical elements, significantly reduces the need to rely on expanded notions of theft to catch dishonest<sup>50</sup> conduct in this area.

In light of both the complexity of the theft offence, and the reduced need to rely on it to catch dishonest conduct, it may be that there is justification for restricting stealing offences to tangible property. If so, this might mean that the offence could

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40 Law Commission of England and Wales, *Legislating the Criminal Code: Fraud and Deception* (2005) CP 155 at [3.17].

41 *Id* at [3.15].

42 In *Hinks* [2001] 2 AC 241 at 252–253, Lord Steyn stated ‘if the law is restated by adopting a narrower definition of appropriation, the outcome is likely to place beyond the reach of the criminal law dishonest persons who should be found guilty of theft. The suggested revisions would unwarrantably restrict the scope of the law of theft and complicate the fair and effective prosecution of theft. ... 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’.

43 Dishonesty was a restatement of the element of ‘fraudulently’ in the *Larceny Act* codification (s 1). Prior to that time, both the words feloniously and fraudulently had been used in common law judgments. Whether they were separate concepts or not remains a matter of debate. See, for example, John Edwards, ‘Fraudulent Taking in Larceny’ (1953) 16 *Modern Law Review* 385–388; Stephen, above n1 at 142; J W Cecil Turner, *Russell on Crime* (12<sup>th</sup> ed, 1964) at 996; and J C Smith & Brian Hogan, *Criminal Law* (1<sup>st</sup> ed, 1965) at 381–2.

be made simpler to understand and prosecute. Importantly, it would suggest that there is no need for NSW, Queensland and Tasmania to expand the reach of their offences.

To evaluate whether such an approach is justifiable, this article examines exactly how much of an expansion to theft practically results from the inclusion of intangible property, and the degree to which uncertainty of application arises as a result of any such inclusion.

### **B. Civil Property Doctrines and Theft**

Larceny has a history of slowly and incrementally expanding the protected forms of property, from a simple idea of physical things to more complex notions of constructive possession, though it remains restricted to tangible property. This meant that it is possible for courts to continue to see property, for the purposes of stealing, as meaning a physical thing, not the bundle of rights connected to it.<sup>51</sup> This can be exemplified by the 1883 NSW Supreme Court case of *R v Arnold*<sup>52</sup> where the court held, in dealing with the offence of obtaining by false pretences:

This statute does not deal with the right to property in the abstract, which might have been affected by agreements by parol or in writing, and by dealings altogether away from the property; what is meant in this section by the word ‘property’ is the thing itself, the obtaining of which by false pretences is made an offence.<sup>53</sup>

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- 44 See, for example, Edward Griew, ‘Dishonesty: The Objections to *Feely* and *Ghosh*’ [1985] *Criminal Law Review* 341; Alex Steel, ‘An Appropriate Test for Dishonesty?’ (2000) 24 *Criminal Law Journal* 46; and Law Commission of England and Wales, above n40. Compare Richard Tur, ‘Dishonesty and the Jury: A Case Study in the Moral Content of Law’ in A Phillips Griffiths (ed), *Philosophy and Practice* (Royal Institute of Philosophy Lecture Series: 18; Supplement to *Philosophy* 1984) (1985) at 75–96. The current English position is a hybrid of both positions, defended as being practicably the most workable (see Law Commission of England and Wales, *Fraud*, Report No 276 (2002) at [5.18]). A similar approach has been taken in Australia in jurisdictions that have adopted the theft offence (see, for example, Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud and Related Offences) Bill 1999 (Cth) at [57]–[60]). In the other jurisdictions, the lack of a statutory definition of dishonesty suggests that the High Court’s adoption of an objective test in *Peters v R* (1998) 192 CLR 493 (*‘Peters’*) at 508 (Toohey & Gaudron JJ) for common law defrauding may be applicable.
- 45 See, for example, *Criminal Code Act 1995* (Cth) s 134.2; *Crimes Act 1900* (NSW) s 178BA.
- 46 *Corporations Act 2001* (Cth) s 184.
- 47 See, for example, *Criminal Code Act 1995* (Cth) s 135.1.
- 48 See, for example, *Criminal Code Act 1995* (Cth) s 134.2; *Crimes Act 1900* (NSW) s 178BA. In England all that is required is an intention to cause such a gain or loss: *Fraud Act 2006* (UK) ss 2–5.
- 49 For discussion of such offences, see, for example, Alex Steel, ‘General Fraud Offences in Australia’ [2007] *University of New South Wales Law Research Series* 55; David Ormerod, ‘The *Fraud Act 2006*—Criminalising Lying?’ [2007] *Criminal Law Review* 193.
- 50 In the moral sense used in *R v Ghosh* [1982] 1 QB 1053 and *Peters* (see above n44).
- 51 See, for example, James Penner, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 *UCLA Law Review* 711.
- 52 (1883) 4 LR (NSW) 347.

In contrast, the *Theft Act* includes, by default, all forms of property recognised by civil law, and then makes a number of limited exclusions. The *Theft Act's* reversal in approach to defining property thus means that new forms of property rights are automatically protected by the theft offence, unless excluded. This legislative adoption of an inclusive definition means that criminal courts must now accept that all forms of property may fall within the scope of theft.<sup>54</sup> While the role of the criminal and civil law is different, when Parliament chooses to define terms in criminal offences using civil law terms,<sup>55</sup> and at times uses the same definition as applies to property rights in civil legislation,<sup>56</sup> it is not possible to maintain an argument that the meaning of property in stealing is less than that of civil law — other than through express legislative restriction. Indeed, in key cases on the meaning of property in theft, English courts have relied on civil doctrines.<sup>57</sup> Consequently, the scope of theft can now only be understood by an examination of all forms of civil property.

However, not all such forms of property may be easily defined, nor may it be possible to appropriate them with an intention to permanently deprive. In fact, much of the current concern over the scope of the theft offence in England is based around the inconsistency caused by the CLRC's inclusion of the full civil scope of property rights in the theft offence without any consideration of the consequent interrelationship that the other elements of theft would have with areas of civil law.<sup>58</sup> As will be discussed later, the problem of overlapping civil and criminal property laws is particularly relevant to intellectual property and equitable rights.

## 2. *What Forms of Property Can be Stolen?*

### A. *Larcenable Property: Incremental Development*

In order to appreciate the expansion in scope of stealing the theft offence represents, it is necessary to first examine the scope of larcenable property. As already noted, a key boundary of the scope of larceny is that it is restricted to moveable, tangible property. The 'moveable' requirement operates to exclude from larceny the appropriation of land, or things attached to land. Thus it is not

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53 Id at 352. This physicalist approach has apparently been approved by the NSW Court of Criminal Appeal as recently as 1983 (*R v Petronius-Kuff* [1983] 3 NSWLR 178).

54 For discussion of this issue, see, for example, J C Smith, 'Civil Law Concepts in the Criminal Law' (1972) 31 *Cambridge Law Journal* 197.

55 '[A]ll other property, real or personal, and including things in action and other intangible property' (*Theft Act* s 4) leaves little room for a restrictive reading.

56 See, for example, the definition of property in the *Criminal Code Act 2002* (ACT) Dictionary.

57 See, for example, *R v Preddy* [1996] AC 815 ('*Preddy*') and *R v Kohn* (1979) 69 Cr App R 395 ('*Kohn*').

58 In *Hinks* [2001] 2 AC 241, it was held that a person could be convicted of theft even if the property had lawfully come into their ownership or control under civil law. For trenchant criticisms of this outcome, see, for example, Ormerod and Williams, above n35 at 29–37; A P Simester & G R Sullivan, *Criminal Law: Theory and Doctrine* (3<sup>rd</sup> ed, 2007) at 476.

possible to steal title to land,<sup>59</sup> nor fixtures,<sup>60</sup> or emblements.<sup>61</sup> Documents that evidence title to land were said to ‘savour of the realty’<sup>62</sup> and not be larcenable; an anomaly now overcome by statutory provision.<sup>63</sup>

Doctrinally, the severing of a thing from land creates a new item of personal property, and the severer is the first, and thus lawful, possessor of the property.<sup>64</sup> In an effort to overcome this, the courts created a fiction that if the severer allowed the severed property to rest on the land for a certain period of time, the courts could imply that the severed property had been abandoned, and any later taking thus amounted to larceny on the basis that the property in the severed item reverted to the possessor of the land.<sup>65</sup> If this fiction could not be relied on, criminal sanction had instead to be found through criminal damage offences.<sup>66</sup> Today, statutory provisions overcome the common law exclusion of fixtures and emblements.<sup>67</sup>

The courts also required that the property taken be tangible in nature. As early as 1584, Lord Coke had held that choses in action also were not forms of larcenable property.<sup>68</sup> While this boundary has remained firm,<sup>69</sup> courts have accepted that ephemeral or dynamic forms of property can be stolen so long as there is a minimal degree of tangibility. Thus, water can be stolen from taps<sup>70</sup> and gas from pipes.<sup>71</sup>

Notions of value also formed a key part of the development of the scope of larceny, with some forms of taking considered *de minimis*. A good example of this requirement is in the uneven protection larceny gives to owners of animals. Animals were only considered worthy of the protection of the criminal law if they could be seen to be of some economic value.<sup>72</sup> Essentially, this was a requirement that they be livestock or a means of transport: the animal had to be suitable to eat

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59 See, for example, Edward Hyde East, *Pleas of the Crown* (1803) vol 2 at 587.

60 A fixture is anything affixed to land with the intention that it remain there permanently. See, for example, *Holland v Hodgson* (1872) LR 7 CP 328.

61 *R v Foley* (1889) 17 Cox CC 142 (‘Foley’).

62 William Blackstone, *Commentaries on the Laws of England* (1769) vol 4 at 234.

63 *Crimes Act* 1900 (NSW) s 134.

64 For a discussion of the common law position, see *Billing v Pill* [1954] 1 QB 70 at 74.

65 See, for example, *Foley* (1889) 17 Cox CC 142.

66 See, for example, *Crimes Act* 1900 (NSW) s 195.

67 *Crimes Act* 1900 (NSW) ss 139, 140.

68 *Cayle’s Case* (1584) 8 Co Rep 32a; 77 ER 520.

69 See, for example, *R v Kidd and Walsh* (1908) 72 JP 104 holding that copyright was not larcenable.

70 See, for example, *Ferens v O’Brien* (1883) 11 QBD 21.

71 See, for example, *R v White* (1853) Dears 203; 169 ER 696. See also *R v Russell* (1878) 1 SCR (NS) (NSW) 73. In contrast, electricity does not appear to amount to property for the purposes of larceny or theft (*Low v Bleas* [1975] *Criminal Law Review* 513). A specific offence exists in s 13 of the *Theft Act*, which covers the abstraction of electricity. The recent Australian approach has been to include electricity in the definition of property. See, for example, *Criminal Code Act 1995* (Cth) s 130.1. While the inclusion of electricity appears to be a one-off extension, it does represent an unprincipled addition to property made for the purposes of convenience.

72 *The Case of Swans* (1572–1616) 7 Co Rep 15b; 77 ER 435; *Blades v Higgs* (1865) 11 HLC 621; 11 ER 1474.

or be of significant economic value.<sup>73</sup> Horses in particular, being the primary means of transportation prior to the invention of the motor car, were highly valuable and the cases are replete with horse stealing. Domesticated farm animals have therefore always been seen as forms of property capable of being stolen.<sup>74</sup> The produce of such animals is also larcenable, so it can amount to larceny to take eggs,<sup>75</sup> milk<sup>76</sup> or wool.<sup>77</sup> In fact in NSW, farm animals<sup>78</sup> were considered so valuable that the penalty for stealing them was and remains almost three times the maximum for larceny *simpliciter*.<sup>79</sup> One major exclusion of this requirement were dogs, cats, birds and other pets kept merely for ‘whim and pleasure’,<sup>80</sup> which required later statutory protection.<sup>81</sup>

The situation is more complicated with wild animals, described as ‘*ferae naturae*’. This is largely because wild animals do not belong to any person, a requirement of larceny. Once killed however, the common law adopted a Lockean understanding of ownership and held that the act of killing reduced the animal to the possession of the killer. The key exception was for game enclosed on private lands. Such animals once killed were the property of the land owner.<sup>82</sup>

Another area of difficulty in relation to value concerned documents. While in itself a document was considered not to be of sufficient value to attract the protection of the courts,<sup>83</sup> the increasing commercial value of documentation led to a weakening of these restrictions. Thus, value was found to exist in the physical paper of a cancelled banknote<sup>84</sup> and a cancelled cheque.<sup>85</sup> Historically, the exact amount of value required was uncertain and consequently the history of larceny is littered with arcane arguments over the question of whether paper documents have

73 For an amusing NSW case debating whether emus can be stolen, see *R v Lee* (Unreported, Supreme Court of NSW, Dowling J, 26 February 1830) Macquarie University Division of Law, *Decisions of the Superior Courts of New South Wales, 1788–1899* <[http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r\\_v\\_lee\\_\\_1830.htm](http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_lee__1830.htm)> accessed 14 October 2008.

74 See, for example, 1 Hale PC 511; 1 Hawk c33, s28. See generally Hall, above n10 at 81–2

75 1 Hale PC 511; 1 Hawk c33, s28; 2 East PC 614.

76 Anon (1769) 2 East PC 617.

77 *R v Martin* (1777) 1 Leach 171; 168 ER 188.

78 ‘Animals’ are jointly described as cattle, which is defined to include: ‘any horse, mare, gelding, colt, foal, filly, ass, mule, bull, cow, ox, steer, heifer, calf, ram, ewe, sheep, lamb, pig, goat, deer, alpaca, llama, vicuna, camel, or dromedary, and every hybrid or cross thereof’: *Crimes Act 1900* (NSW) s 4.

79 *Crimes Act 1900* (NSW) ss 126, 131.

80 Blackstone, above n62 at 236.

81 See, for example, *Crimes Act 1900* (NSW) ss 132, 133, 503, 504, 505, 506, 507, 508, 509, 512. Section 511 (Killing pigeons) has recently been repealed. (*Crimes Amendment Act 2007* (NSW)).

82 See, for example, the discussion in Turner, above n43 at 903.

83 At common law, the requirement that the property be of some value caused problems for documents evidencing property rights or contracts. The courts considered the physical nature of these documents to be insignificant and the real value to be in the chose in action it evidenced. Thus, there could not be larceny in the theft of the documents. See, for example, *R v Greenhalgh* (1854) Dears 267; 169 ER 722 (order for payment); *R v Williams* (1852) 6 Cox CC 49 (conveyance and mortgage deeds); *R v Powell* (1852) 2 Den 403; 169 ER 557 (mortgage deeds).

84 *R v Clark* (1810) Russ & Ry 181; 168 ER 749.

85 *R v Perry* (1845) 1 C & K 725; 174 ER 1008.

any value.<sup>86</sup> Such judicial concerns and expositions were overtaken by legislative interventions into the definition of larcenable property and a range of offences was enacted prohibiting the stealing of public documents and valuable securities.<sup>87</sup>

This expansion of the scope of larcenable property to include valuable securities had the practical effect of overcoming the common law insistence that the property be tangible in that a large range of documents that evidenced choses in action could now be stolen — and the value of those choses in action was thus protected. However, in principle, the essence of larceny as being based on tangible property remained unaffected. This was because all the negotiable instrument offences based liability on the misuse of a paper form that was the basis of its negotiability: money, cheques, bills of exchange, etc.<sup>88</sup> Consequently there remained a residual tangible aspect to the larcenable property. What had changed was that the common law restrictions on the value of the item had been largely removed, in recognition of the fact that the paper forms were, in reality, of great value.

Apart from those instances of a taking of a fully negotiable document — where for legal purposes the paper form is the property — such legislative extension is probably best seen as an example of what George Fletcher has described as the lack of imagination of the English law.<sup>89</sup> By that he suggests that many activities that could have been better conceptualised as forms of fraud were added to an increasingly stretched notion of larceny. In the current climate of increasingly electronic forms of documentation, and a much expanded regime of fraud offences, most, if not all, situations of misuse of valuable securities will be prosecuted as instances of fraud rather than stealing, and such expansions are no longer essential.

Similar legislative intervention occurred in relation to a range of other forms of property originally outside of larceny. However, the gradual nature of these enactments led to a confusing patchwork of provisions, many of which were highly specific. Even today, the NSW *Crimes Act* 1900 reflects that incremental approach with a large number of specific forms of larceny that define various forms of property as larcenable, and provide for greater or lesser maximum penalties than that of simple larceny. Thus, there are a range of enactments that extend larceny to include the stealing of animals, including pets;<sup>90</sup> and of items connected to land, such as fixtures, emblements, dead wood and minerals.<sup>91</sup>

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86 See, for example, *R v Watts* (1854) Dears 327; 169 ER 747.

87 See, for example, *Crimes Act* 1900 (NSW) ss 135 (Stealing, destroying etc wills or codicils); 138 (Stealing, destroying etc records etc of any court or public office) and 134 (Stealing, destroying etc valuable security). *Crimes Act* 1900 (NSW) s 4(1) defines valuable security as including: 'every order or other security whatsoever entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of any part of the British dominions or of any Foreign State, or in any fund of any body corporate, company, or society, whether within or without the British dominions, or to any deposit in any bank; and every debenture, deed, bond, bill, note, cheque, warrant, order, or security whatsoever for money, or for payment of money, whether current in any part of the British dominions or in any Foreign State, and every document of title to land or goods, as herein defined'.

88 See, for example, *Larceny Act* s 46.

89 Fletcher, above n10 at 13.

While NSW retains a complex set of provisions expanding what property can be stolen, it is possible to rephrase the definition of property in such a way as to overcome all of the historic difficulties with animals, documents and fixtures. For example, s 390 of the *Criminal Code Act 1899* (Qld)<sup>92</sup> states:

**390 Things capable of being stolen**

Anything that is the property of any person is capable of being stolen if it is—

- (a) moveable; or
- (b) capable of being made moveable, even if it is made moveable in order to steal it.

Provided common law larceny restrictions are not read back into the definition of ‘things capable of being stolen’, there is thus no practical difficulty in providing a clear statutory definition of tangible property for stealing that overcomes the complexities of the mix of common law and statutory provisions in larceny. What remains unclear is whether, in addition, intangible forms of property should be included, and, if so, whether all forms of such property should be included.

**B. The Theft Act: Modern Property**

Under the *Theft Act* (and Australian jurisdictions adopting the theft model) property has the broadest possible meaning:

- 4 (1) Property means money and all other property, real or personal, including things in action and other intangible property.<sup>93</sup>

A limited but detailed list of exclusions from this general definition is made for the theft offence. Section 4 goes on to exclude from the scope of theft: land (other than when appropriated by trustees), things severed from land by persons in possession of that land (other than tenants), wild mushrooms, flowers, fruit or foliage (other than when picked for commercial purposes) and uncaptured wild animals.<sup>94</sup> In recommending this definition, the 1966 CLRC Report appeared to see nothing of major consequence in this expansion.

90 *Crimes Act 1900* (NSW) ss 505 (Stealing animals etc ordinarily kept in confinement); (506 Stealing animals etc ordinarily kept in confinement—second offence); 507 (Possession of stolen animals etc); 508 (Possession of stolen animals etc—second offence); 509 (Restoration of such stolen animals etc); 510 (Setting engine for deer etc); 512 (Taking fish in waters on private property).

91 *Crimes Act 1900* (NSW) ss 139 (Stealing etc metal, glass, wood etc fixed to house or land); 140 (Stealing etc trees etc in pleasure-grounds etc); 513 (Stealing shrubs etc); 515 (Stealing etc live or dead fence etc); 517 (Unlawful possession of trees, fences etc); 518 (Stealing dead wood); 520 (Stealing plants etc in gardens); 521 (Stealing plants etc not growing in gardens); 521A (Stealing of rock, stone etc).

92 A similar provision appears in the Tasmanian Criminal Code (*Criminal Code Act 1924* (Tas) s 227).

93 Note that this definition extends beyond choses in action to include the enigmatic ‘other intangible property’.

94 *Theft Act* s 4(2).

The report blandly stated:

40. In general the offence will apply to theft of any kind of property.<sup>95</sup>

This may have been because the intention of the Committee in recommending the expansion was only to allow the removal of the list of negotiable instruments in the expanded definition. One might see this in the specific reference to money in the definition in section 4(1) — on the basis that money fell outside of the existing valuable securities offences.<sup>96</sup>

In stark contrast to the glib expansion to cover all property, the CLRC provided complex justifications for why further subsections were added to exclude certain forms of property from the definition: two pages for land; one page for the picking of wild flowers and mushrooms; and four pages for poaching wild animals.<sup>97</sup> However, there is no mention of the inclusion of specific forms of intangible property within the definition of property. The notion that theft might expand to cover all forms of intellectual property simply did not appear to concern them. The concept of electronic databases of information and international flows of digital money was, of course, something they could not have imagined in 1966. Consequently, the CLRC suggested a description of stealable property that was so broadly expressed that it has been impossible to restrain it from including all the recent expansion of intangible forms of property based rights and wealth.

The breadth of description of ‘property’ does not, however, provide any real certainty as to the applicability of theft to all forms of intangible property. The most obvious form of intangible property that might be stolen, electronic funds, faces significant doctrinal difficulties. There is also uncertainty as to whether theft now covers all forms of choses -including breaches of contract; the extent to which it overrides statutory schemes for intellectual property rights; the impact that the expanding recognition of equitable forms of property rights might have on the offence; and the unexplored potential of the phrase ‘other intangible property’.

The following part examines some of the difficulties of applying theft to these newer types of property and describes how various Australian jurisdictions have responded to these problems.

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95 CLRC, above n19 at 21.

96 Reliance had to be placed on the stealing of the paper or metal, rather than the chose in action they represented. See, for example, *Croton* (1967) 117 CLR 326 at 330–331. In NSW, valuable security is defined in *Crimes Act 1900* (NSW) s 4(1) to include any ‘order or security’ that entitles or evidences title to money, but not money itself.

97 The complexity of the discussion on these topics emphasises that the CLRC were concerned to not have theft override traditional community rights, and so it would seem that the lack of discussion of intangible forms of property such as intellectual property, which are themselves a balancing of rights between copyright holders and the community, suggests the committee did not turn its mind to the issue.

### 3. *The Impact of Business and Technology on the Scope of 'Property' in Theft*

#### A. *Money and Debts*

Stealing the physical forms of money — notes and coins — is clearly possible under both larceny and theft.<sup>98</sup> However, under larceny, money cannot be stolen from a bank account. This is because any credit in a bank account amounts to a debt owed to the customer, and is thus a chose in action and not larcenable property. Further, any payment of funds out of the account amounts to a consensual passing of property by the bank and thus not a taking without consent. If the payment is an electronic transfer of funds, there is neither any tangible property which can be the subject of larceny, nor any taking without consent.<sup>99</sup>

Despite the extension of theft to cover all choses in action, complexities in the applicability of the offence remain. As will be discussed, theft cannot easily be applied to money transfers. Its application is uneven and artificial. Consequently, offences that do not rely on a property basis may be more appropriate.

At a fundamental level, it has been held that electronic funds do not pass from one person to another. This point was considered in *Preddy*,<sup>100</sup> an appeal against convictions for fraud under s 15(1) of the *Theft Act*.<sup>101</sup> Preddy dishonestly obtained mortgage funds from lending institutions. Some of the funds from those institutions were paid into Preddy's bank account via an electronic transfer system.<sup>102</sup> The House of Lords held that the money advanced to Preddy represented debts which Preddy owed to the lending institutions; therefore, they were choses in action and fell within the definition of 'property' in s 4(1) of the *Theft Act*.<sup>103</sup> Nevertheless, this property did not meet the 'property *belonging to another*' requirement in s 15(1). The House of Lords ruled that, in any such transfer of intangible property from one person to another, the chose in action held by the transferor is destroyed, and an identical but separate and new chose in action is created in favour of the transferee.<sup>104</sup> It is worth pointing out that while with tangible property, any taking by an accused does not affect the ownership of the property remaining in the victim, the approach in *Preddy* means that any

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98 The main complication is that of consent, mixed with the doctrine of mistake. For examples in larceny, see *Croton* (1967) 117 CLR 326 and *R v Potisk* (1973) 6 SASR 389 (but compare *Ilich v The Queen* (1987) 162 CLR 110). Such situations might now be seen as theft in England if the approach in *Hinks* [2001] 2 AC 241 applies.

99 In NSW, this limitation is overcome by focusing on the fraud involved in inducing the payment, and charging an offence under *Crimes Act 1900* (NSW) s 178BA (Obtaining money etc by deception).

100 *Preddy* [1996] AC 815.

101 Preddy and others were charged with, by deception, dishonestly obtaining property belonging to another, with the intention of permanently depriving the other of it under s 15(1) of the *Theft Act*. That offence shares the same definition of property as the theft offence.

102 *Preddy* [1996] AC 815 at 833.

103 *Id* at 834.

104 *Id* at 834, 835–7.

temporarily effective transfer of intangible property has the effect of permanently destroying that instance of the chose in action.

While this means that it may not be possible to obtain a chose in action that ‘belongs to another’<sup>105</sup> as was necessary for the fraud conviction in *Preddy*, in theft the emphasis is on the loss to the victim, not the gain of the accused. Thus destruction of the instance of the chose in action held by the victim might amount to an appropriation of it. Concerns over whether this was sufficient<sup>106</sup> were dismissed by the English Court of Appeal in *R v Graham and others*<sup>107</sup> which held:

We wish to make it clear that ... theft of a chose in action may be committed when a chose in action belonging to another is destroyed by the defendant's act of appropriation as defined by section 3(1) of the Act.<sup>108</sup>

Such a finding is only possible because the English courts have held that appropriation need only amount to the assumption of any one of the rights of the victim, in this instance the right to destruction of the property.<sup>109</sup> Thus, the decision in *Preddy* has the effect for theft of seeing intangible property as a fungible. Even if an accused intends merely to ‘borrow’ a sum of money, (for example a temporary transfer of funds from one bank account to another with the intention to return it the next day) that intention is incapable of amounting to a defence to theft because the original chose in action the sum of money represents has been destroyed, notwithstanding its later replacement with an identical copy.<sup>110</sup>

The approach in *Graham* also creates the unfortunate theoretical position that a situation which might be described in common sense terms as a taking of money out of another's account, and thus theft, is in doctrinal terms in fact an act of criminal damage (by destruction). Criminal damage is seen to be a different form of wrongdoing and remains a separate category of offence.<sup>111</sup> However,

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105 See the discussion in Gregory Tolhurst, *The Assignment of Contractual Rights* (2006) at 36–7.

106 The Law Commission of England and Wales, *Offences of Dishonesty: Money Transfers* (LC 243 1996) at [3.14]. See also *Kohn* (1979) 69 Cr App R 395 where it was held that an unauthorised overdraft could not amount to theft. This was because the bank would have no obligation to the victim to make such funds available and thus there would be no chose in action being destroyed.

107 [1997] 1 Cr App R 302.

108 Id at 334, affirming *Kohn* (1979) 69 Cr App R 395. See also *R v Hilton* [1997] 2 Cr App R 445. But see Law Commission 1996, above n106 at [3.14]. See also *Kohn* (1979) 69 Cr App R 395 at 405.

109 *Gomez* [1993] AC 442. See also *R v Hilton* [1997] 2 Cr App R 445. If such an expansive understanding of appropriation was not accepted, it might have been arguable there was no theft as the accused had not ‘got’ anything (see Law Commission 1996, above n106 at [3.14]. Under larceny, destruction of any tangible property meant an assumption of all of the rights of the possessor and this was thus automatically a permanent deprivation (see *R v Cabbage* (1815) Russ & Ry 292; 168 ER 809).

110 This is different to the issue of fungibility in relation to physical banknotes and coins (see *R v Williams* [1953] 1 QB 660)—as banknotes and coins are not destroyed, but instead transferred to third parties and replaced with equivalents. Temporary movement of credit from one account to another for accounting purposes seem to be conceptually different in that the credit is not used or exchanged as part of a further transaction or activity.

prohibiting such activities as forms of criminal damage seems just as artificial<sup>112</sup> as does relying on destruction of an instance of a chose in action to constitute an act of appropriation. Further, although stealing and criminal damage overlap significantly when the subject property is tangible property, criminal damage remains restricted to tangible property,<sup>113</sup> and any use of theft to cover an activity that has been deliberately excluded from the scope of criminal damage<sup>114</sup> is a questionable ‘work around’.

The artificial emphasis on destruction of a chose in action also means that theft provides an uneven coverage of the various ways in which funds can be dishonestly transferred to the accused’s account. The fraudulent creation of false credits in a bank account which is later paid out by the defrauded bank cannot amount to theft, as there is no original account from which actual credit was removed (or more technically, destroyed).<sup>115</sup> On the other hand, it is possible under the theft offence to steal not only the credit in an account, but also an amount equivalent to the amount of any pre-agreed overdraft limit. In *Kohn*,<sup>116</sup> the English Court of Appeal held:

If the account is within the agreed limits of the overdraft facilities, there is an obligation to meet the cheque. In either case it is an obligation which can only be enforced by action. For purposes of this case it seems to us that that sufficiently constitutes a debt within the meaning of the word as explained by Lord Reid [in *DPP v Turner*<sup>117</sup> where he held it meant ‘an obligation to pay money’].<sup>118</sup> It is a right of property which can properly be described as a thing in action and therefore potentially a subject of theft under the provisions of the 1968 Act.<sup>119</sup>

This goes beyond the notion of stealing money from a bank account and includes the notion of stealing credit from another. However, it was also held in *Kohn* that any payments by the victim bank beyond a pre-arranged overdraft do not amount to the appropriation of any chose in action belonging to the account holder:

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111 Compare the analysis in MCCOC Report, *Chapter 4: Damage and Computer Offences* (2001); AP Simester & G R Sullivan, ‘On the Nature and Rationale of Property Offences’ in Antony Duff & Stuart Green (eds), *Defining Crimes: Essays on the Special Part of Criminal Law* (2005) at 168–195.

112 Such a reductionist approach to intangible property was explored and rejected in relation to computer data offences. In an early English case (*Whiteley* (1991) 93 Cr App R 25) the wiping of data off a computer tape was seen as a form of criminal damage (a rearrangement of the magnetised particles on the computer tape). But this was rejected by law reform bodies. See, for example, MCCOC, above n111 at 157–9, which suggests that adoption of the approach ‘would require courts to subscribe to a faintly embarrassing fiction’ as offending commonsense understandings of what property and property damage meant. Similar considerations suggest that criminal damage is misplaced as the basis for prosecuting money transfer offences.

113 See, for example, *Criminal Code* 2002 (ACT) s 400; *Crimes Act* 1900 (NSW) s 194.

114 See, for example, MCCOC, above n111 at 9.

115 See, for example, *R v Thompson* [1984] 3 All ER 565. Such circumstances must instead be seen as either false accounting or the obtaining of money from the bank by means of fraud.

116 *Kohn* (1979) 69 Cr App R 395.

117 [1974] AC 357.

118 *Id* at 365.

119 *Kohn* (1979) 69 Cr App R 395 at 407.

The situation here is that there is no relationship of debtor and creditor, even notionally. The bank has no duty to the customer to meet the cheque. It can simply mark the cheque “Refer to drawer.” It can decline to honour the cheque. The reasons for that are obvious. If then a bank declines to honour a cheque, there is no right of action in the customer. If they do as a matter of grace — that is all it can be — honour the cheque then that is a course which does not retrospectively create any personal right of property in the customer and does not create any duty retrospectively in the bank. It seems, therefore, on that bald statement of principle, that this count which alleges a theft of a thing in action when the account was over the agreed limit must be quashed, unless some external reason can be found for saving it.<sup>120</sup>

Similar comments were made by Lord Goff in *Preddy* where he noted:

[I]n that event further problems would be created, since it is difficult to see how an increase in borrowing can constitute an extinction of a chose in action owned by the lending institution, or a reduction in borrowing can constitute the creation of a chose in action owned by the defendant.<sup>121</sup>

Consequently, it seems that theft does not provide for a complete coverage of the ways in which funds can be appropriated electronically. In reality, most of these situations amount to forms of fraud, either by misrepresentation<sup>122</sup> or by conduct.<sup>123</sup> In addition, most instances of unauthorised electronic funds transfers that are not based on deception of an employee of a financial institution will amount to so-called cybercrime offences — the unauthorised accessing or alteration of computer records.<sup>124</sup> This suggests that theft is an awkward and partial way of dealing with such activities.

The initial reaction to the decision in *Preddy* was to craft specific fraud offences for unlawful electronic funds transfers. The Law Commission Report, *Offences of Dishonesty: Money Transfers*,<sup>125</sup> concluded that as the primary issue was one of fraud, not only was reliance on theft a partial solution to deception cases, but also that it did not properly reflect the underlying criminality. As a result they recommended a new offence of obtaining a money transfer by deception that was specifically drafted to describe the nature of such frauds, and to avoid the doctrinal issues raised by *Preddy*. A similar approach has been included in the Commonwealth<sup>126</sup> and Australian Capital Territory offences; however, rather than enacting a separate offence, the legislation in both jurisdictions deems certain circumstances to constitute fraud offences. For example, subsections of s 330 of

120 *Kohn* (1979) 69 Cr App R 395 at 408.

121 [1996] AC 815 at 834–835.

122 Often such ‘misrepresentations’ would be made to a computer, and deemed to be such by legislation. See, for example, *R v Hawker* [2001] NSWCCA 148.

123 See, for example, *R v Todorovic* [2008] NSWCCA 49.

124 See, for example, *Crimes Act 1900* (NSW) Part 6 (Computer Offences). *Criminal Code Act 1995* (Cth) Part 10.7 (Computer Offences). For discussion see Alex Steel, “Vaguely Going Where No-one has Gone: the Expansive New Computer Access Offences” (2002) 26 *Criminal Law Journal* 72.

125 Law Commission, above n106.

126 *Criminal Code Act 1995* (Cth) ss 134.1(9)–134.1(12).

the *Criminal Code 2001* (ACT) provide that for the purposes of the offences of obtaining property by deception and receiving:

- (2) If a person (A) causes an amount to be transferred from an account held by someone else (B) to an account held by A
  - (a) the amount is taken to have been property that belonged to B; and
  - (b) A is taken to have obtained the property for A with the intention of permanently depriving B of the property.
- (3) If a person (A) causes an amount to be transferred from an account held by someone else (B) to an account held by a third person (C) —
  - (a) the amount is taken to have been property that belonged to B; and
  - (b) A is taken to have obtained the property for C with the intention of permanently depriving B of the property.
- (4) An amount is transferred from an account (account 1) to another account (account 2) if —
  - (a) a credit is made to account 2; and
  - (b) a debit is made to account 1; and
  - (c) the credit results from the debit or the debit results from the credit.
- (5) A person causes an amount to be transferred from an account if the person induces someone else to transfer the amount from the account (whether or not the other person is the account holder).

However, such enactments are only necessary if these situations continue to be conceptualised as property rather than fraud offences. If fraud is seen as a breach of trust offence, not based on property,<sup>127</sup> the specialist offences would not appear to be necessary. This appears to be the approach taken in NSW. Despite larceny being restricted to tangible property, NSW has not seen the need to enact any specific money transfer offences or deeming provisions. Instead, all forms of dishonest appropriation of electronic funds appear to be prosecuted using the broad fraud offence of obtaining financial advantage by deception,<sup>128</sup> or by reliance on the false document offences.<sup>129</sup> Further confirmation that such an approach is viable comes from the English experience. While initially enacting specific money transfer offences, these have now been repealed with the enactment of the *Fraud Act 2006*, which covers all such activities through general fraud offences.

Consequently, it is suggested that theft is not likely to be a generally appropriate offence to charge in funds transfer cases, as fraud offences are probably sufficient. If it is felt that there is a need for a theft-like offence to extend to such situations, it is probably more convenient to enact a specific money transfer offence to include transfers without consent as well as by deception. Doctrinally, this would also more appropriately reflect the fact that proof of an intention to

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127 This suggestion is explored in Alex Steel, 'Taking Possession: The Defining Element of Theft?' (2008) 32(3) *Melbourne University Law Review* (forthcoming).

128 *Crimes Act 1900* (NSW) ss 178BA, 178BB.

129 *Crimes Act 1900* (NSW) Part 5 Forgery and False Instrument Offences.

permanently deprive is an artificial requirement in light of the speed at which electronic funds can be transferred and replaced, and avoid the need to conform to a strict analysis of the transfer of property rights and issues of fungibility. In this way the offence would be *sui generis*. Building on the deeming approach taken in the *Model Criminal Code*, in essence such an offence would reflect a situation that money in bank accounts is something that no person should dishonestly interfere with irrespective of any intention to permanently deprive or whether the appropriation amounts to a form of theft or fraud. A simplistic reliance on theft of choses in action is not sufficient, nor necessary. Instead, the complexity of the underlying debt and property rights that are involved in electronic funds transfers may justify an overarching approach that concentrates on whether, at the end of the process, unauthorised credits or debits result.

### **B. Cheques and Tickets**

As the definition of property in the *Theft Act* applies beyond debts and is stated to apply to all ‘things in action’, the analysis in *Predgy* may be generally applicable to all choses in action. While the destruction of a pre-existing chose in action can be seen to be theft, difficulties arise if the result of the accused’s actions is to create a chose in action which has no counterpart belonging to the victim. In *Predgy*, that difficulty related to cheques. It was held by the House of Lords that, in England, the chose in action that a cheque represents is created as property belonging to the accused; it never is a right of the victim. Thus, it is not possible to convict a person of the theft of the chose in action that a cheque represents. In Australia, the High Court has confirmed that such difficulties do not arise because the *Cheques Act* 1986 (Cth) creates a negotiable instrument, which comes into existence prior to its delivery to the accused.<sup>130</sup>

While cheques may well be seen as statutory forms of a pre-existing chose in action, this is not the case for forms of documentary value such as tickets. In cases where misuse of a ticket is at issue, the *Predgy* analysis suggests that no chose in action represented by the ticket can be stolen. This is because the right to use that the ticket represents (no matter how limited) is created in favour of the ticket holder and never belongs to the issuer. In such cases, if anything is stolen, it must be the physical paper form of the ticket.<sup>131</sup> Even then, it would have to be established that the purchaser is bound by an implied notice of a reservation of property rights by the ticket issuer. If what is issued is an e-ticket, fraud may be the only form of prosecution available, as any printed form of the ticket would have been produced by the ticketholder and thus be his or her property.

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130 *Parsons v R* (1999) 195 CLR 619 at 632–4.

131 For further discussion of the issue see David Ormerod, *Smith and Hogan Criminal Law* (11<sup>th</sup> ed, 2005) at 674; J C Smith, ‘Stealing Tickets’ [1998] *Criminal Law Review* 723; Kiron Reid & John Macleod, ‘Ticket Touts [or Theft of Tickets and Related Offences]’ (1999) 63 *Journal of Criminal Law* 593.

**C. *How Broad is the Scope of Choses in Action in Theft: Can Theft Extend to Contractual Rights?***

Standard definitions of ‘choses in action’ emphasise the breadth of the concept, and its proprietary basis. For example, in *Torkington v Magee*,<sup>132</sup> Channell J stated that a “‘choses in action’ is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession’. This definition has been accepted in England as the basis for the meaning of ‘thing in action’ in the *Theft Act* 1968.<sup>133</sup> The scope of rights that may fall within the concept is thus large.<sup>134</sup>

One key area of concern is whether theft extends to appropriation of contractual rights. While contractual rights are considered choses in action,<sup>135</sup> and thus doctrinally property rights, contract law and property law are generally considered to be separate areas of law. For a property-based offence to impact on general contractual remedies would amount to a substantial expansion of the role of the criminal law.

Some of these issues arose in the English Court of Appeal decision of *R v Marshall*.<sup>136</sup> The accused had been charged with reselling railway tickets obtained from persons who had completed their rail journey but whose tickets remained valid. The issue before the court was whether the accused had committed theft of the tickets. The court held that the accused’s activities constituted theft of the *actual*, physical tickets from London Underground Limited. Although the prosecution framed their arguments around the physical stealing of the tickets, in *obiter* the court also discussed the possibility that the tickets represented a chose in action:

On the issuing of an underground ticket a contract is created between London Underground Limited and the purchaser. Under that contract each party has rights and obligations. Theoretically those rights are enforceable by action. Therefore, it is arguable, we suppose, that by the transaction each party has acquired a *chose in action*. On the side of the purchaser it is represented by a right to use the ticket to the extent which it allows travel on the underground system. On the side of London Underground Limited it encompasses the right to insist that the ticket is used by no one other than the purchaser. It is that right which is disregarded when the ticket is acquired by the appellant and sold on.<sup>137</sup>

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132 [1902] 2 KB 427 at 430. It is generally accepted to be a leading statement of the meaning of the concept. See, for example, Roderick Meagher, J Dyson Heydon & Mark Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) at 221.

133 See *Kohn* (1979) 69 Cr App R 395.

134 Despite that property-based description, the antiquity of the concept means that there are also examples of choses in action that are both equitable and also non-assignable. Such things in action may not constitute forms of property. See *Wilson v Commissioner of Probate Duties (Vic)* (1978) 8 ATR 799 at 805.

135 See, for example, *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

136 [1998] 2 Cr App R 282. See also Smith, above n131; Reid & Macleod, above n131.

137 *R v Marshall* [1998] 2 Cr App Rep 282 at 288.

This passage suggests that contractual duties could constitute property for the purposes of theft. On its terms, the *Marshall* suggestion seems wrong as there is difficulty accepting that the contractual terms might bind a third party, not privy to the contract. But if the suggestion were limited to the actions of contracting parties, it seems that theft could have the extraordinary scope of including all breaches of contract, something clearly beyond the appropriate reach of the criminal law. Indeed, in the ACT, it seems that the legislative definition of property expressly includes contractual rights. The definition of property in the *Criminal Code 2002* includes the meaning of property in the *Legislation Act 2001*. That definition is:

**property** means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes a thing in action.

*Note* A thing in action is an intangible personal property right recognised and protected by the law. Examples include debts, money held in a bank, shares, rights under a trust, copyright and *right to sue for breach of contract*.<sup>138</sup> [Emphasis added].

To avoid the implications of such a broad notion of stealable property rights, commentators have argued that contractual choses in action cannot be appropriated. The argument is that a disregarding of the obligation is not an appropriation of it and thus cannot amount to theft.<sup>139</sup> The problem with such an analysis is that it seems overly semantic, and such attempts to find restrictions in the scope of theft in the past have been rejected by the courts. One of the key rights of property holders are use-rights. One aspect of those rights is the ability to deny another person's use of the property. The disregarding of a right to exclude may be merely the other side of the coin to the assumption of the right to use. It would thus seem better in principle to ensure that such choses in action cannot constitute property for the purposes of theft, by a limitation within the legislative definition of stealable property.

*Marshall* also provides a further example of the dangers of an overly broad basis for theft. What was really being appropriated was a service being offered by London Underground, not theft of any thing. With difficulties in prosecuting under the then existing fraud and obtaining services offences, it seems the prosecution sought to take advantage of the broad basis of the theft offence.<sup>140</sup> The result was a prosecution that achieved a conviction in a largely artificial way. Instead, it would seem preferable to have a robust offence of dishonestly obtaining services on which to rely.

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138 *Legislation Act 2001* (ACT), Dictionary.

139 See, for example, Smith, above n 131 at 726: '[i]t is like a breach of copyright which is unlawful but not theft of the copyright. The contrary view would turn all deliberate breaches of contract into theft which would be an unacceptable extension of the criminal law'. This analysis of copyright is questioned below.

140 For a detailed analysis of the entanglements such situations could cause, see Reid & Macleod, above n 131.

#### D. *Are There Property Rights in Services?*

The problem of prosecutions relying on a broad understanding of property in order to bring theft charges in situations that are really one of unlawful use of a service have arisen in other cases. In a Victorian case, *Akbulut v Grimshaw*,<sup>141</sup> the appellant made unauthorised telephone calls. The prosecution argued that, in so doing, the accused had appropriated a right of the subscription holder. Hampel J rejected this argument holding:

In the present case, there is no “property” vested in the owner which is capable of being appropriated before the acts which were the telephone calls. By making unauthorised telephone calls, the appellant created an obligation in the owner of the service to pay for the phone calls made but he did not deprive the owner of anything that could be said to be “property”, even intangible property. He did not deprive the owner of use of the service or any rights the owner may have to make phone calls pursuant to the agreement with the telephone service.

What the appellant undoubtedly did was to engage in dishonest conduct to the detriment of the subscriber because the subscriber was obliged to pay for the telephone calls made without his authority. Such conduct gave the appellant an advantage because he was able to make the phone calls for which he would not have to pay. Such conduct may well have constituted fraudulent acts such as obtaining a financial advantage by deception in breach of s. 82 of the Crimes Act. However, in my opinion, those acts could not, in law, amount to thefts which must involve a dishonest appropriation of “property”, intangible or otherwise, belonging to its owner.<sup>142</sup>

However, such an argument was accepted by the New Zealand<sup>143</sup> District Court in the 2007 decision of *Police v Davies*.<sup>144</sup> The accused had downloaded digital files using a work computer which was connected to the internet via his employer’s broadband account. Such activity had been done without the consent of his employers and he was charged with theft. The evidence suggested that the extent of the downloading had been such as to lead to his employer incurring fees in addition to the default amount payable each month. The District Court held:

But even if the estimate or cap had not been exceeded, that would provide no defence. “Property” was still being used albeit in the form of prepaid rights rather than rights exercisable against a need to make subsequent additional payment.

Arguments that if the employer did not fully utilise its entitlement there was no offence ie if dishonest using had not resulted in the cap or prepaid estimate being exceeded, cannot be correct. That is simply the equivalent of arguments that if the owner of property chooses to leave it idle there is nothing criminal about someone else using it, dishonestly.<sup>145</sup>

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141 [1998] 3 VR 756 (*Akbulut*).

142 *Id* at 758.

143 There are differences between the New Zealand offence and the approach under the *Theft Act*, but both rely on a similar definition of property. See *Crimes Act* 1961 (NZ) ss 2, 219.

144 [2007] DCR 147.

145 *Id* at [30]-[31].

The court appeared to be satisfied that such property rights had been appropriated with an intention to permanently deprive the employer of such rights, though it is unclear on what basis this was made. The decision appears to be in direct contradiction to *Akbulut*. Together, these cases suggest that there is deep confusion over the differences between property rights and services, and provide examples of the almost intuitive approaches that courts might take to construct property rights if an offence of theft is charged in relation to situations that involve the use of services.

It seems that such situations require a specially worded offence prohibiting the unauthorised use of services.<sup>146</sup> To conceptualise these situations as infringements of property rights seems to be an unnecessary and artificial exercise.

### *E. Intellectual Property*

A further issue of concern arises in relation to intellectual property. Statutory forms of intellectual property enact that such rights amount to a species of personal property,<sup>147</sup> and so on that basis it should be *prima facie*<sup>148</sup> possible to steal copyrights, patents, trade marks, etc.<sup>149</sup>

However, the nature of the protection afforded to intellectual property rights by the civil law is partial. Such rights are seen as relative, conditional on registration and statutorily limited. As Jessica Litman<sup>150</sup> has noted in relation to copyright, traditionally, ‘copyright protection afforded only shallow and exception-ridden control over protected works .... Copyright was seen as designed to be full of holes’.<sup>151</sup> The balancing of property rights and sanctions in the area of intellectual property can thus be described as a ‘transactional approach’ to property rights. The legal restrictions and the availability and nature of sanctions are determined by the way in which the right is dealt with, rather than by a blanket protection of the right — what can be described as a ‘categorical approach’ to defining a property

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146 It should be acknowledged that such an offence contains its own areas of difficulty, particularly in robustly defining a notion of ‘services’.

147 *Copyright Act* 1968 (Cth) s 196(1), (*‘Copyright Act’*); *Designs Act* 2003 (Cth) s 10(2); *Patents Act* 1990 (Cth) s 13(2); *Plant Breeder’s Rights Act* 1994 (Cth) s 20, (*‘Plant Breeder’s Rights Act’*); *Trade Marks Act* 1995 (Cth) s 21(1), (*‘Trade Marks Act’*); *Circuit Layouts Act* 1989 (Cth) s 45(1).

148 As will be discussed below, there are difficulties with satisfying the other elements of theft if the property in question is a form of intellectual property. This article, however, argues that principles of maximum certainty and fair labelling require that one element of an offence should not create the impression that a form of property falls within the offence and then remove that form of property by means of another element. (See generally, Andrew Ashworth, *Principles of Criminal Law* (5<sup>th</sup> ed, 2006) at 74–77; 88–90).

149 Ormerod & Williams, above n35 at 67, argue that in deeming such property to be ‘personal property’ they are not choses in action but are instead ‘other intangible property’. But personal property is generally considered to include chattels personal, which include both tangible and intangibles, and copyright has been described as a chose in action. See, for example, *Taypar Pty Ltd v Santic* (1989) 21 FCR 485; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] 1 Ch 71 at 93 (Lord Danckwerts). One way or the other, little seems to turn on the classification..

150 Jessica Litman, *Digital Copyright* (2001).

151 *Id* at 78–79.

right.<sup>152</sup> By contrast, the criminal law of theft adopts such a categorical right. Irrespective of the effect of the interference with a right or the environment in which it occurs, a theft is seen to have been committed.<sup>153</sup> Thus, there are dangers of overcriminalisation if theft can override such nuanced civil intellectual property regimes.

Intellectual property rights share many common characteristics, but being largely creatures of statute, they also are significantly different in important respects. It is therefore difficult to discuss intellectual property generally. Instead, this article concentrates on the possible interrelationship between theft and copyright, as it is the form of intellectual property that has received the most extension and elaboration in order to allow the incorporation of digital rights. Some reference is also made to other forms of intellectual property rights.

Copyright is also important to examine because there has been a clear trend by legislators in recent years to move away from the traditionally limited and contingent nature of copyright towards broader, less definable, rights. This is largely as a result of the development of digital forms of copyrightable material. Thus, the *Copyright Act* now grants protection to such rights as ‘the right to communicate the work to the public’.<sup>154</sup> This increasingly broad form of protection is exacerbated by the increasing ability of such property rights holders to track all uses and access to digital forms of property and the development of contractual and technological methods to restrict the nature of access. This is bolstered by the willingness of legislators to consider the circumvention of such technological methods as amounting to a criminal act.<sup>155</sup> Allied to this appears to be an increased willingness by industry players internationally to launch private prosecutions in the criminal courts in order to pursue relatively minor breaches of licensing agreements.<sup>156</sup> This suggests that there may also be pressure on authorities to complement this private enforcement with an aggressive use of theft laws to enhance and protect new forms of wealth.

The intellectual property right of copyright is seen as a separate right to the bundle of rights attached to the physical form<sup>157</sup> — which comprises the reproduction or substantial copy of the intellectual property right; and it is accepted that the property rights to the physical form and the exclusive rights pertaining to the copyright can be held by different persons.<sup>158</sup> Further, in

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152 See, for example, Raymond Nimmer & Patricia Krauthaus, ‘Information as Property Databases and Commercial Property’ (1993) 1 *International Journal of Law and Information Technology* 3 at 12.

153 That is, of course, assuming the other elements of theft are present. However, it matters not if the property is being appropriated for an educational or a business use.

154 *Copyright Act* 1968 (Cth) s 31(1)(iv).

155 See *Copyright Act* 1968 (Cth) Pt V Div 2A.

156 See, for example, Jacqueline Lipton, ‘Information Property: Rights and Responsibilities’ (2004) 56 *Florida Law Review* 135, which discusses many of the key issues. For some of the unsettling implications of the rhetoric that is employed by industry, see Patricia Loughlan, ‘“You Wouldn’t Steal A Car”: Intellectual Property And The Language Of Theft’ (2007) 29 *European Intellectual Property Review* 401.

157 Broadcasting and performance rights are referred to below.

copyright, different exclusive rights are commonly assigned to different parties. For example, items such as films may well represent a very large collection of separate rights held by different persons. Such a separation of the exclusive rights comprising the copyright and the physical form property rights present further complications for the appropriate application of theft. It may be the case that an infringing work (physical form) is transferred to a third party with the full consent of the previous possessor of the work,<sup>159</sup> but that appropriation might constitute a basis for a charge of theft<sup>160</sup> of the attached intellectual property rights.

Defining exactly what the property right is that could be stolen is itself a matter of potential uncertainty. A copyright allows the right holder to prevent copying of a 'substantial part' of the work. Copyright thus grants a property interest over the entire work, but only provides a remedy for a substantial infringement of it.<sup>161</sup> Under theft, no such minimum degree of infringement would be required. Any interference with the copyright might well amount to an appropriation, as appropriation requires no more than an assumption of any of the rights of the victim.<sup>162</sup> The situation is further complicated by the statutory protection in the *Copyright Act* of digital rights management measures.<sup>163</sup>

Copyright has been also extended to performance and broadcasting rights, and the definition of exactly what the intellectual property right is in this context is contested. In recent litigation,<sup>164</sup> courts were divided over whether copyright in a broadcast related to each single image or to a loosely defined period of time that amounted to a programme. Whilst the latter approach prevailed, the court failed to define a programme for copyright purposes, with it unclear, for example, if a current affairs programme is one programme or involves a package of individual 'broadcasts' thematically defined, or if advertisements were in themselves separate protected programmes.<sup>165</sup> How such ephemeral forms of property could be the subject of theft seems difficult to imagine, but equally it would have seemed difficult to imagine that a television broadcast could be protected by copyright not so many years ago.

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158 *In re Dickens; Dickens v Hawksley* [1935] 1 Ch 267; *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154 at 163. ('*Pacific Film Laboratories Pty Ltd*').

159 The owner of copyright has a right to seek the return of any infringing copies. See *Copyright Act* 1968 s 116 (compare *Pacific Film Laboratories Pty Ltd* (1970) 121 CLR 154).

160 This is assuming the mental elements could be satisfied. Further complicating the issue is the analysis in *Predgy* discussed below.

161 *Copyright Act* 1968 s 14.

162 That is, under the *Theft Act* and Victorian interpretations. Under the Australian *Model Criminal Code* approach, that appropriation must be the appropriation of the rights of the owner to control. This creates further uncertainty in this area because it is unclear what would be necessary to amount to control. Presumably, a right of control would amount to the ability to prevent the making of infringing copies.

163 *Copyright Act* 1968 (Cth) Pt V Div 2.

164 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* litigation: (2005) 145 FCR 35; (2004) 218 CLR 273; (2002) 118 FCR 417; (2001) 108 FCR 235; [2001] FCA 841.

165 See, for example, Kathy Bowrey, 'What Are You Missing Out On? Big Media, Broadcasting, Copyright and Access to Innovation' in Andrew Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (2007).

In creating such forms of intellectual property rights, the Parliament attempts to provide a sophisticated compromise between different interests. The legislative schemes provide for a complex system of recognition of the rights of owners and users, and generally provide for a civilly based set of remedies for infringement. The significant exceptions to this approach are the *Trade Marks Act* and the *Copyright Act*. Both Acts weave a web of civil and criminal penalties for infringement.<sup>166</sup> For example, the *Copyright Act* sets out a complex set of uses of copyright works that do not amount to an infringement of the copyright interest, including fair dealing provisions, the making of backup copies, and the making of copies by libraries and manufacturers.<sup>167</sup> Infringements of copyright can be civilly litigated by interest holders but criminal sanctions for making unauthorised copies are only available if the actions relate to copying for commercial gain.<sup>168</sup> Private copying is thus outside of the scope of the criminal law.<sup>169</sup>

The increasing use of criminal sanction to protect copyright is controversial. In 2006, as part of Australia's entry into a trade agreement with the United States of America, the *Copyright Amendment Act 2006* increased the range of criminal sanctions for breach of copyright.<sup>170</sup> Included in this expansion were a range of strict liability offences for minor breaches and a range of seizure powers granted to law enforcement.<sup>171</sup> While the Government maintained that a balance between the rights of copyright holders and users was preserved by these amendments,<sup>172</sup> there is a clear move towards greater use of the criminal law. For the purposes of this article such developments demonstrate that despite a parliamentary intention to increase the use of criminal law in protecting copyright, there is a clear choice to do so with specific offences that are said to take account of competing interests, and that resort to general theft laws is not intended to be a part of this legislative scheme.

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166 The *Trade Marks Act* 1990 (Cth) Pt 14 offences are more analogous to fraud offences and are not discussed in this article.

167 See *Copyright Act* 1968 (Cth) Pt III, Divs 4-7; Pt IV Div 6.

168 *Copyright Act* 1968 (Cth) Pt V, Div 5.

169 In this sense, a public/private distinction is still maintained, which was historically a defining element in property offences (see Steel, above n24). There is however a clear trend to broaden the part played by criminal law in intellectual property. See, for example, Melissa de Zwart, 'Technological enclosure of copyright: The end of fair dealing?' (2007) 18 *Australian Intellectual Property Journal* 7; Catherine Bond, 'More Convenient Copyright? The *Copyright Amendment Act 2006*' (2006) 66 *Computers and Law: Journal for the Australian and NZ Societies for Computers and the Law* 1. Interesting comparisons can be drawn with the similar expansion of larceny. Compare Tigar, above n10.

170 For discussion of the process by which these amendments occurred and some of the controversial aspects of it, see Catherine Bond, Abi Paramaguru & Graham Greenleaf, 'Advance Australia Fair? The Copyright Reform Process' (2007) 10 *Journal of World Intellectual Property* 284.

171 See *Copyright Amendment Regulations 2006* (Cth).

172 Hon Philip Ruddock, Attorney-General, 'Major Copyright Reforms Strike Balance' (Media Release 088/2006, 14 May 2006) <[http://web.archive.org/web/20060912192559/ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2006\\_Second\\_Quarter\\_14\\_May\\_2006\\_-\\_Major\\_Copyright\\_Reforms\\_Strike\\_Balace\\_-\\_0882006](http://web.archive.org/web/20060912192559/ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006)> accessed 14 October 2008.

Given the expansion of the scope of the forms of copyright in the 20<sup>th</sup> century, the approach taken in the *Trade Marks Act* and *Copyright Act* is significant and it can be assumed that all the other statutory forms of intellectual property have been drafted or amended with these Acts in mind. It is thus appropriate to conclude that Parliament, in enacting only civil remedies for breach of patents, registered designs and circuit layouts,<sup>173</sup> intended that such breaches not be subject to criminal sanction. Thus, any application of theft to infringement of these rights would most likely be against the intent of the legislators.

The approach taken to criminal penalties also is significantly different under theft and the intellectual property offences. Theft now has a maximum 10 years' imprisonment in a number of Australian jurisdictions.<sup>174</sup> By contrast, the intellectual property law enforcement regime has a graduated civil and then criminal range of sanctions linked to the seriousness of the breach. Under the *Copyright Act*, maximum penalties for offences range from fines of \$6,600 for selling of infringing copies<sup>175</sup> to five years' imprisonment for large-scale commercial infringement.<sup>176</sup> Significantly, although the economic impact of large scale infringement of copyright may be immense, the maximum penalty is only half that for theft. Under the *Plant Breeder's Rights Act*, personal property rights are granted to registered breeders of new plant varieties. The Act confers, *inter alia*, exclusive rights to the production and sale of plant material related to the registered variety. If any person infringes those rights, the Act provides for a strict liability offence of a maximum fine of \$55,000.<sup>177</sup> Applying theft to such situations would amount to a massive increase in criminalisation.

These graduated penalties represent examples of how new forms of property may be protected though a process of detailed consideration of competing interests. Theft does not take account of these competing interests, and punishes all interference with another's property rights, no matter how minor. Such a blunt approach to regulation of emerging areas of law is inappropriate in that it fails to consider what the appropriate role of criminal and civil law is in each case. Blanket criminalisation of misuse of uncertain forms of property may well have unintended effects, and can be quite stifling of innovation. This suggests that the expansion of theft into new areas of property protection may well amount to unintentional over-criminalisation.<sup>178</sup>

Again,<sup>179</sup> arguments have been made that the theft cannot apply to intellectual property. In relation to copyright, the reliance is on the element of an intention to

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173 *Circuit Layouts Act* 1989 (Cth); *Designs Act* 2003 (Cth); *Patents Act* 1990 (Cth).

174 See, for example, *Criminal Code* 1995 (Cth) s 131.1.

175 *Copyright Act* 1968 (Cth) s 132AE. This is a strict liability offence that prosecutors may choose to charge in lieu of more serious distribution offences.

176 *Copyright Act* 1968 (Cth) s 132AC.

177 *Plant Breeder's Rights Act* 1994 (Cth) s 74(1).

178 This discussion is also applicable in varying degrees to other forms of statutory intellectual property, such as patents, trademarks and registered designs. For discussion of the criminalisation of trade secrets, see for example, Law Commission of England and Wales, *Legislating the Criminal Code: Misuse of Trade Secrets* (LCCP150 1997).

179 Arguments as to why theft may not apply to contractual rights are discussed above.

permanently deprive. It has been suggested while a breach of copyright is an appropriation, such an action does not amount to treating the thing as ‘his or her own to dispose of’ within the meaning of s 6(1) of the *Theft Act*.<sup>180</sup> The issue is debatable, depending on the meaning given to ‘dispose of’, and whether the property right appropriated is the copy of the material or the right to licence such copying.<sup>181</sup> Further complications arise because of the implications of the decision in *Preddy*. It may well be that, in transferring physical property to which intellectual property attaches, or in distributing infringing digital copies, that instance of the chose in action that the intellectual property represents is destroyed and a copy recreated in favour of the transferee.<sup>182</sup> If so, permanent deprivation of that original instance of the right would occur.

Irrespective of the outcome of such a debate, it is unsatisfactory that theft is defined in such a way that breaches of copyright can amount to all of the *actus reus* elements of theft, and liability is only avoided on the technical ground that the nature of the property right means that the intention of the accused cannot be defined as an intent of permanent deprivation. Similar arguments might also apply to breaches of the *Trade Marks Act*, but are unlikely to apply to the *Plant Breeder’s Rights Act*, in that the infringing plant varieties would be in physical form. It is thus unclear whether theft applies to all or some forms of statutory intellectual property. In light of this uncertainty of coverage by theft, the comprehensive coverage of the area by other laws, and the lack of any real attempts to prosecute infringements as theft to date, a strong case can be made for excluding intellectual property from theft.

### ***F. The Impact of Equity: The Role of Trusts and Liens***

Nowhere is the state of evolution of property interests more uncertain than in the recognition of equitable interests. One of the most potentially expansive aspects of the modern approach to theft is the increased acceptance of equitable doctrines as a basis for finding property rights belonging to another. The equitable rights of beneficiaries in express trusts are a well-established and certain area of property

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180 Ormerod & Williams, above n35 at 72. There is also *dicta* asserting copyright cannot be stolen. See *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 445 (Lord Fraser), a statement described as ‘surprising’ in J C Smith’s commentary on *R v Storrow and Poole* [1983] *Criminal Law Review* 332 at 334). The equivalent Australian sections are: *Criminal Code Act 1995* (Cth) s 131.10; *Criminal Code Act 2002* (ACT) s 306; *Crimes Act 1958* (Vic) s 73(12). *Criminal Law Consolidation Act 1935* (SA) s 134(2) is an alternative wording.

181 For an outline of an argument as to how copyright could be stolen, see Alex Steel, ‘Submission on applicability of theft offence in s131.1 Criminal Code and State Fraud offences to *Copyright Act*’ Inquiry into the Provisions of the Copyright Amendment Bill 2006, Submission 72, Senate Standing Committee on Legal and Constitutional Affairs, <[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/copyright06/submissions/sub72.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sub72.pdf)> (accessed 14 October 2008).. Some of the issues discussed need further elaboration.

182 Tolhurst (above n106 at 36–7), for example, considers this a general principle of transfers of choses in action. Even if this is not the case, it may be that the personal nature of licences and assignments of copyright are analogous to transfer of bank account credits and the reasoning in *Preddy* may apply. Copyright is described as “personal property ... transmissible by assignment” in *Copyright Act 1968* (Cth) s196.

rights. There are, however, significant questions as to whether circumstances where a trustee misappropriates the property of beneficiaries should be seen as theft. In NSW, the misdeeds of trustees are prohibited under a separate offence described as ‘Trustees fraudulently disposing of property’.<sup>183</sup> Even under the *Theft Act* approach, specific provisions are deemed necessary to ensure that the definition of theft includes trustees.<sup>184</sup> It thus seems relatively simple to maintain a separate offence or offences dealing with trustees. In NSW, this also allows for the maximum penalty for breach of these offences to be higher than that of larceny *simpliciter*,<sup>185</sup> reflecting the greater culpability of any misappropriation by those entrusted with the property of others.

However, it is in the areas of resulting trusts, constructive trusts and equitable liens that potentially great uncertainty lies. Whereas express trusts arise as a result of the expressed intentions of the parties, resulting and constructive trusts and equitable liens arise in the absence of any such expressed intentions. Under the expansive definition of property in the theft offence, a conclusion by a court that a defendant holds property subject to such trusts or liens might provide the basis for a charge of theft if the property is dealt with in breach of the conditions of that trust or lien. Liability might then depend on the degree to which an accused was aware of the trust or lien.

(i) *Resulting Trusts*

Resulting trusts arise where a person (the settlor) transfers legal title in property to another person, but the law presumes that the settlor intends to retain, wholly or partly, the beneficial interest in the property.<sup>186</sup> Resulting trusts arise in two circumstances. First, where the settlor transfers property to the transferee, but fails to dispose of the beneficial interest in the property, the undisposed beneficial interest reverts to the settlor.<sup>187</sup> Circumstances which may lead to this instance of resulting trusts include: failure to create an express trust; where the settlor conveys land to the transferee ‘upon trust’ without stating the beneficiary; and where property is conveyed on trust for a specific purpose that fails.<sup>188</sup> Secondly, where someone uses the settlor’s money to purchase property and, therefore, gains legal title for themselves, the settlor retains the beneficial interest in the property.<sup>189</sup> The presumption giving rise to resulting trusts is rebuttable.<sup>190</sup>

183 *Crimes Act 1900* (NSW) s 172.

184 See, for example, *Criminal Code Act 1995* (Cth) ss 131.2(2), 131.4(1)(b)(i).

185 The maximum penalty is 10 years’ imprisonment, the maximum penalty for larceny is five years (*Crimes Act 1900* (NSW) s 117).

186 Gino Dal Pont, Donald Chalmers & Julie Maxton, *Equity and Trusts: Commentary and Materials* (4<sup>th</sup> ed, 2007) at 713; Meagher, Heydon & Leeming, above n 132 at 42.

187 Dal Pont, Chalmers and Maxton, above n182 at 715; Meagher, Heydon & Leeming, above n132 at 235.

188 Dal Pont, Chalmers and Maxton, above n182 at 715–19; Meagher, Heydon & Leeming, above n132 at 235–40.

189 Dal Pont, Chalmers and Maxton, above n182 at 719–26; Meagher, Heydon & Leeming, above n132 at 240–3.

190 Dal Pont, Chalmers and Maxton, above n182 at 726–30; Meagher, Heydon & Leeming, above n132 at 246–52.

Resulting trusts are thus based on the law's assumption that no one intends to transfer title to property unless such an intention is expressly stated. As such, resulting trusts operate on a legal presumption as to what the transferor would have intended, and in some circumstances have been said to arise automatically. The basis on which this presumption arises remains a point of debate.<sup>191</sup> To date, no theft prosecutions have been based on interests arising from breaches of resulting trusts.

Doctrinally, property interests created under resulting trusts sit uncomfortably with traditional notions of theft. There is nothing manifestly criminal<sup>192</sup> about a legal owner of property exercising those rights. While in an express trust, the legal owner intends to divest himself or herself of the beneficial interest in property in favour of the beneficiaries, in a resulting trust situation the trust arises because of the very lack of express indication by the transferor as to what his or her intentions were. This then provides the likelihood that the trustee may not be aware of the trust obligations, and any successful prosecution for theft will need to rely on evidence as to the degree of knowledge of the trustee that such a trust may have been created.

(ii) *Constructive Trusts*

Constructive trusts are imposed by courts on a person where equity considers the 'retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle'.<sup>193</sup> As such, constructive trusts arise by order of the courts 'regardless of actual or presumed agreement or intention' of the legal owner.<sup>194</sup> The usual position is that constructive trust interests are considered to be operable from the time of the impugned action,<sup>195</sup> unless there are compelling reasons to delay its creation to a later date — something that is only likely to occur if the trust is a remedial one.<sup>196</sup> However, as the trust is one imposed by the court, such interests do not in fact exist until so determined by the court.

In many instances, a constructive trust gives rise to an equitable property right in the beneficiary. Since constructive trusts come into existence only by court

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191 *In re Vandervell's Trusts (No 2)*; *White v Vandervell Trustees Ltd* [1974] 1 Ch 269; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. ('*Westdeutsche*').

192 That is, nothing that an observer could identify as criminal behaviour without further information. Manifest criminality was traditionally at the core of theft. This point was most famously made by George Fletcher in *Rethinking Criminal Law* (1978) and is also discussed in detail in Steel above n24.

193 *Muschinski v Dodds* (1985) 160 CLR 583 at 614 (Deane J).

194 *Ibid.*

195 In *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 ('*Reid*'), the Court held that a constructive trust over moneys held by a person taking a bribe came into existence at the moment the money was paid. See also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. There is, however, contrary *dicta* from Lord Browne-Wilkinson, in *Westdeutsche* [1996] AC 669 at 716, suggesting that the trust should arise only when the recipient becomes aware of the basis on which the trust arises (in that case a mistaken payment).

order, they arise where actions, including actions which may interfere with property rights, have already occurred; therefore, constructive trusts have an element of retrospectivity. In such circumstances, there may not have been any property interests of another that were interfered with by the accused at the time of the act, but rather a later imposition of a trust by the court that deems an interest to have existed at the earlier time and further deems that interest to have been interfered with by a refusal to return the property. Such creation of rights in beneficiaries may well provide for appropriate and just civil relief, but it is questionable whether such property rights should form the basis of additional criminal charges.

Whether a charge of theft would be available is made even more uncertain by the fact that despite a declaration that a constructive trust exists, this may not lead to the creation of any proprietary rights. Constructive trusts are a flexible instrument that may not provide for equitable property rights. It has been stated by the High Court that the imposition of a proprietary constructive trust is a remedy of last resort, and that in many instances, it may be appropriate to create a trust that provides only for creation of personal rights.<sup>197</sup>

Generally, constructive trusts tend to occur as a result of a breach of a pre-existing fiduciary relationship, or where a person takes property with knowledge of the equitable interests of others. This might suggest that despite the issues of retrospectivity, a case could be made that the accused was in essence 'skating on thin ice'<sup>198</sup> and the additional criminal liability might have been predicted. But there is one case that holds that constructive trusts can arise even without any pre-existing relationship. In *Chase Manhattan Bank N A v Israel-British Bank (London) Ltd*,<sup>199</sup> it was held that no such pre-existing relationship was necessary. *Chase Manhattan* concerned the payment of money by mistake in circumstances where there was no pre-existing fiduciary relationship, and where it was accepted that no legal interests were retained by the transferor. Goulding J nevertheless held that an equitable property interest arose in favour of the transferor. While the same

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196 A distinction has been drawn between its role as an institutional and a remedial trust. Put simply, institutional constructive trusts only arise in traditionally predictable situations—where a fiduciary acts in breach of obligations or where a stranger takes property aware of the equitable rights of others; whereas remedial constructive trusts can be created by courts whenever the situation demands a trust should be imposed. In Australia, constructive trusts are seen as both institutional and remedial (see, for example, *Muschinski v Dodds* (1985) 160 CLR 583) whereas in England, constructive trusts remain largely institutional in nature (see, for example, the discussion in Meagher, Heydon & Leeming, above n132 at 262). The distinction is, however, greater in theory than in practice, other than to emphasise perspectives on constructive trusts (Pamela O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Institutional and Remedial Features in the Evolving Constructive Trust' (1996) 20 *Melbourne University Law Review* 735).

197 *Giumelli v Giumelli* (1999) 196 CLR 101; *Bathurst City Council v PWC Properties* (1998) 195 CLR 566.

198 This was suggested as a general justification for imposing criminal liability by Lord Morris in *Kneller v DPP* [1973] AC 435 at 463, but it has been doubted in academic commentary (see Ashworth, above n148, at 73).

199 [1981] 1 Ch 105 ('*Chase Manhattan*').

outcome could have been achieved by application of the rules of tracing, Goulding J chose to impose a trust. This decision, though much doubted, has been relied on in an English case to found a conviction for theft,<sup>200</sup> and is therefore available to prosecutors as a basis for a theft charge. Whether *Chase Manhattan* is good law in Australia remains unclear, with both positive and negative judicial comment.<sup>201</sup>

(iii) *Constructive Trusts and Theft in England*

There is nothing in the *Theft Act* that explicitly prevents constructive trusts from constituting a form of stealable property. However, in *Attorney-General's Reference (No 1 of 1985)* the Court of Appeal held that the making of secret profits by an employee in breach of his fiduciary duty to his employer could not be theft of profits from the employer. The prosecution had argued that the profits were held by the accused on the basis of a constructive trust, and thus belonged to the employer.<sup>202</sup> The court held that property interests arising by way of constructive trusts did not form part of the scope of the *Theft Act*. The Court stated:

Had they intended to bring within the ambit of the *Theft Act* 1968 a whole new area of behaviour which had previously not been considered to be criminal, they would, in our judgment, have used much more explicit words than those which are to be found in section 5. ... There are topics of conversation more popular in public houses than the finer points of the equitable doctrine of the constructive trust. ... [This is] a good illustration of the objectionability of the whole proposition. 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.<sup>203</sup>

But this apparent exclusion has been substantially whittled away by subsequent English cases, and a different approach taken by the Privy Council. In *R v Clowes (No 2)*<sup>204</sup> an equitable interest was held to exist over the total amount of a mixed fund of investors' and the defendant's money and thus any appropriation of the money could form the basis for a theft charge. The court held:

Where a trustee mixes trust money with his own, as was the case with the money in account JER 54, the beneficiaries are entitled to a first charge on the mixed fund: see *Snell's Principles of Equity* (29th edn, 1990) p 303 and the passage from

200 *R v Shadrokh-Cigari* [1988] Crim LR 465 ('*Shadrokh-Cigari*').

201 *Chase Manhattan* [1981] 1 Ch 105 has been the subject of sustained academic criticism. See, for example, Meagher, Heydon & Leeming, above n72 at 483–84. Further, the case was considered to be wrong in principle in the *dicta* of Lord Browne-Wilkinson in *Westdeutsche* [1996] AC 669 at 714–715. This *dicta* has been relied on in a number of subsequent Australian cases to indicate that the reasoning should not be followed. See, for example, *Cashflow Finance Pty Ltd (in liq) v Westpac Banking Corporation* [1999] NSWSC 671; *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589; *Jones (as trustee of the property of Heather Macneil-Brown, a bankrupt) v Southall & Bourke Pty Ltd* [2004] FCA 539. *Chase Manhattan* was referred to with approval by Wilson and Dawson JJ in *Ilich* (1986) 162 CLR 110 at 129, and has not been overruled by any intermediate courts.

202 Compare *Reid* [1994] 1 AC 324.

203 [1986] 1 QB 491 at 504–507.

204 [1994] 2 All ER 316.

*Chitty on Contracts* that was cited by the judge in his ruling. Thus at the moment Naylor removed the £19,000 he was taking something in which the investors had an equitable interest. What was taken falls in our view four square within the definition of property belonging to another under s 5(1) of the 1968 Act.<sup>205</sup>

In *Reid*, the earlier decision that secret profits did not create a constructive trust was overruled by the Privy Council when considering an appeal from Hong Kong,<sup>206</sup> and in *Re Holmes*,<sup>207</sup> the Queens Bench held constructive trusts over money held in a bank account fell within the definition of property under the *Theft Act*, even if constructive trusts arising from secret profits did not.

Further, the reasoning in *Chase Manhattan* was applied by the English Court of Appeal in *Shadrokh-Cigari*<sup>208</sup> to a prosecution for theft of monies disbursed subsequent to a mistaken payment.<sup>209</sup> The court also suggested that there was no requirement that the transferee be aware of the equitable interest in order for civil liability to arise.<sup>210</sup> As a combination of the two decisions, unless *Shadrokh-Cigari* is overruled, it appears that the current English position is that in any circumstance where property is obtained by innocent mistake, the transferor retains an equitable interest.<sup>211</sup>

The decision in *Re Holmes* provides another example of the undesirable vagueness and uncertainty caused by reliance on equitable doctrines. It was alleged that money had been fraudulently placed into an account and then disbursed. The account was in Germany and the German authorities were seeking extradition of the accused. The court noted that constructive trusts form no part of German law. Nevertheless, despite acknowledging this, the court relied on the fiction that foreign law is assumed to be the same as English law (unless the contrary is proved) and held that the money had been stolen, as the rights of the beneficiaries to the (fictional) constructive trust had been appropriated. The court considered it 'inconceivable'<sup>212</sup> that a similar conclusion would not be reached by

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205 Ibid at 336.

206 [1994] 1 AC 324. In so doing, the Privy Council overruled *Lister & Co v Stubbs* (1890) 45 Ch D 1 at 336: '[t]he decision in *Lister & Co v Stubbs* is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured'.

207 [2005] 1 Cr App R 229 ('*Re Holmes*').

208 [1988] Crim LR 465.

209 The court also held that the accused could have been convicted under the mistake provisions in *Theft Act* 1968 s 5(4), so the outcome of the decision is not itself controversial.

210 'We remain unpersuaded that knowledge on the part of the recipient is a necessary pre-condition to a civil obligation on his part to restore the property, its proceeds or value, but, for the purposes of this appeal, we are prepared to make the opposite assumption in favour of the Appellant. Having done so, we take the view that the point is an academic one, for, in fact, the judge did leave this very question to the jury'. (Transcript: Marten Walsh Cherer, LexisNexis)

211 Knowledge that the property is 'not his' however appears necessary to establish that the accused acted dishonestly.

212 [2005] 1 Cr App R 229 at 239.

German courts. While the court ordered the extradition on the basis of another charge, the reasoning of the court in relation to the imposition of constructive trusts is illustrative of the potential breadth of the use of the concept.

Davies<sup>213</sup> also points out that the complexity of constructive trusts has led to a position where the courts appear relaxed with the proposition that any decision on whether such an equitable property right exists is a matter of law for the courts. If, as in *Clowes*, the money has been removed from the account and the court decides that there was a constructive trust over the money, all the jury is left with is a question of dishonesty. Thus, in essence the court determines by definition that the actus reus has been committed.

(iv) *Constructive Trusts and Theft in Australia*

This uncertainty as to the circumstances in which a constructive trust may arise, and the very post-facto method of creation of any such property right render it unsuitable for determining criminal liability. Consequently, in some Australian jurisdictions a specific legislative exemption has been made for constructive trusts. The *Model Criminal Code* and the *Criminal Code Act 1995 (Cth)*<sup>214</sup> specifically exclude such trusts from the scope of theft<sup>215</sup> on the recommendation of MCCOC which stated:

Constructive trusts — based on equitable notions of unconscionability - may be appropriate for recovery in civil actions, but they stray too far from the common conception of theft and the much more culpable sort of dishonesty involved in theft to form part of the definition of the offence of theft. Their ambit is uncertain and likely to expand. To attach the boundaries of theft to such an uncertain concept would offend the important principle that the criminal law should be knowable in advance. No doubt that principle calls for judgements of degree on occasion. On this occasion in relation to constructive trusts and the law of theft, the Committee's judgement is to agree with what the Court of Appeal [in *AG's Ref (No 1 of 1985)*] said:

... the court should not be astute to find that a theft has taken place where it would be straining the language so to hold, or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft.<sup>216</sup>

However, no such exclusion of constructive trusts exists in Victoria which adopted the *Theft Act* in this area without modification. The English case law may be applicable.

213 Mitchell Davies, 'After *R v Clowes (No 2)*: An Act of Theft Empowered—A Jury Impoverished?' (1997) 61 *Journal of Criminal Law* 99.

214 See MCCOC, above n2 and Criminal Code Act 1995 (Cth) s130.2(1)(b)(iii).

215 However, the scope of the decision in *Chase Manhattan*, if not overruled in Australia, may range beyond constructive trusts in that the decision holds that mistaken transfers of property create independent equitable property interests that could be seen to be appropriated separately from any reliance on breach of trust duties. The position thus remains unsatisfactorily uncertain.

216 See MCCOC, above n2 at 53.

(v) *Equitable Liens*

Another equitable interest not yet considered by the criminal courts is the proprietary remedy afforded by the equitable lien. This is a charge that is imposed by implication of law on the assets of a person until the satisfaction of an unpaid debt. Unlike a common law lien that merely grants a right to detain the property until the debt is satisfied, and can only arise if the lienor already has possession of the property, the equitable lien can apply to property in the possession of another, and being non-possessory in nature can be granted over intangible forms of property. It also provides a right to seek a judicial sale of the property, rather than a mere right of retention.

The role and scope of equitable liens are even more uncertain than that of constructive trusts. Equitable liens are in the process of reinvigoration by lawyers and the courts, and are being seen as more broadly applicable than constructive trusts. Fiona Burns,<sup>217</sup> in a review of the new potential of equitable liens, notes that they are now seen as alternatives to constructive trusts both in situations where a trust could be imposed and also in situations where a trust would not be available. This includes situations of breach of fiduciary duty, proprietary estoppel, and in situations where an imposition of a full trust might negatively affect third parties. There is also the possibility that equitable liens might be used to secure a charge over all the assets of a person rather than be tied to one specified item of property.

In these circumstances, the reasoning underlying the decision by MCCOC to exclude constructive trusts from the scope of theft applies with equal force to equitable liens. Indeed, if equitable liens are not excluded, the exclusion of constructive trusts is likely to become largely irrelevant as the courts appear to be now seeing the use of the full constructive trust as a remedy of last resort.

It is clear that equitable remedies are in a process of elaboration by the courts. As an area of law that is not yet clearly settled, it becomes very difficult to predict the scope of such rights.

**G** *Other Intangible Property*

Finally, uncertainty also abounds in relation to the meaning of ‘other intangible property’ in the statutory definition. Specifically, the extent to which this phrase extends the scope of theft to property beyond choses in action is unclear.<sup>218</sup> On one influential view, choses in action are seen to be a residual form of personal property encompassing all forms of personal property that are not a chose in possession.<sup>219</sup> This might mean that the phrase has no work to do. However, there is one decision that draws a distinction between the two concepts. *R v Attorney General of Hong Kong v Nai-Keung*<sup>220</sup> concerned a transferable export quota, the

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217 Fiona Burns, ‘The Equitable Lien Rediscovered: A Remedy for the 21st Century’ (2002) 25 *University of New South Wales Law Journal* 1.

218 It has been held in England that electricity is not ‘other intangible property’ (*Low v Bleasdale* [1975] Crim LR 513).

219 *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285.

220 (1988) 86 Cr App R 174.

holder of which was entitled to apply for an export licence up to the amount in the quota. The quota itself however conferred no rights to export. This was found not to be a thing in action, but was ‘other intangible property’. Why the offence of theft needs to extend to such quasi-property rights is unclear. Presumably, any legislation creating such quotas would contain its own administrative penalties for misuse of the quotas. More importantly, misuse of such a quota is a clear case of fraud — passing oneself off as entitled to use the quota.

Whether there is a need for the additional phrase is thus unclear. In circumstances where such quotas are created by legislation, it is a simple matter to enact a concomitant set of offences relating to misuse of the quotas.<sup>221</sup> The existence of the phrase ‘other intangible property’ in the definition of theft appears only to serve one real purpose. That is to emphasise that there is no distinction to be drawn between forms of property right and that if it is possible to constitute any right as a property right it will fall within the purview of the theft offence.

The phrase also creates the unsettling possibility that the scope of theft could be expanded in line with judicial recognition of new forms of property in that it permits any recognition of new forms of property in civil law to fall automatically within theft without any consideration as to whether such expansion is desirable. For example, while Anglo-Australian courts have rejected the characterisation of confidential information<sup>222</sup> as a form of property, such reluctance has not occurred in the US.<sup>223</sup> A judicial change of heart could have startling repercussions on the scope of theft.

#### 4. Conclusion

It is clear that the doctrines of property and the value of certain forms of property change over time. The idea of property and the scope of the protection of the criminal law in the early cases were highly restrictive. There is no argument that expansion was necessary, and that the most convenient way to do this was via legislative expansion. Expanding the forms of larcenable property in an incremental way had the significant advantage that it focussed attention on each addition and the impact of such expansion was well understood.<sup>224</sup> Of course, such incremental expansion requires periodic consolidation of the new provisions. In

221 See, for example, offences in the *Crimes Act 1900* (NSW) that prohibit the making of false statements or provision of false documents to government departments and officers: *Crimes Act 1900* (NSW) ss 307A–307C.

222 See, for example, *Breen v Williams* (1996) 186 CLR 71. In a theft context, see *Oxford v Moss* (1978) 68 Cr App R 183. But see *R v Stewart* (1983) 149 DLR (3d) 583. For a detailed discussion of the issues involved in criminalising confidential information, see Law Commission of England and Wales, *Legislating the Criminal Code: Misuse of Trade Secrets*, Report No 150 (1997).

223 *Carpenter v US* 484 US 19 (1987).

224 That is not to say that the motivations behind each expansion were necessarily based on a balanced view of the rights of all members of the community. See, for example, Craig Becker, ‘Property in the Workplace: Labor, Capital, and Crime in Eighteenth-Century British Woolen (sic) and Worsted Industry’ (1983) 69 *Virginia Law Review* 1487. However, there could have been little doubt as to what the impact of such expansion would be.

many ways the frustration with the legislative forest of larceny-related offences is due to a lack of such consolidation. But consolidation of such provisions can be achieved without the need to resort to a general, all-encompassing definition of property. A good example of this occurs in the Queensland Code.<sup>225</sup>

However, the expansion of the scope of stealable property under the *Theft Act* has meant that what is potentially protected by the criminal law now extends to all forms of property recognised by the civil law, including those not connected to material things. This has been achieved by the broad legislative definition of property and its explicit linking in the legislation to general civil notions of property. Such forms of property, while often extremely valuable, can be quite esoteric in conception and far removed from any commonsense notions of property. While the increasing sophistication of the community's understanding of equitable and digital forms of property may well mean that there may be social understanding of these more elaborate forms of property, it remains the case that whether such instances of property both exist or have been interfered with requires resort to legal analysis. In many cases, the issues require complex legal argument, and in the extreme cases of remedial constructive trusts or equitable liens, no property right may confidently said to exist until a court determines its existence.

In larceny, the very physical nature of the property and its taking are such that courts and juries can assume the accused was aware of the fact that property was being interfered with, and the relevant property right of possession is an overwhelmingly factual rather than legal issue.<sup>226</sup> The focus is thus on the circumstances in which the property has been taken. However, if theft extends to intangible property, the accused may very well argue firstly that no such property right existed, or that if it did that he or she was unaware of its existence, and thus could not intend to deprive anyone of it. Consequently, what was a crime that had a simple and easily observable *actus reus* connected to an obvious form of property is now a broad and uncertain offence — where the key right around which the offence revolves is potentially non-existent at the time of the accused's act. Even if the property right exists, theft may or may not have occurred depending on whether the form of property right is capable of being appropriated or the owner permanently deprived of it. It is undesirable to maintain an offence that includes forms of property within the offence and then removes them by reliance on another element.

It also seems inappropriate to create offences where the scope of the offence is not determined by Parliament, but by reliance on another area of law that is in a state of continued evolution. Civil courts, in determining whether interests should be recognised — and recognised as property rights, have not previously considered that the impact of their decision on the criminal law should be taken into account, and this is unlikely to change. The result is that expansion of criminal law may well occur without a court giving any consideration as to whether such an expansion is necessary, desirable, or in accordance with the intentions of Parliament, if indeed Parliament could be said to have ever considered the issue.

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225 *Criminal Code Act 1899* (Qld) s 390.

226 This is discussed at length in Steel, above n24.

In such circumstances, it is necessary to ask whether there need be a crime of stealing intangible property. In most instances, the appropriation of choses in action amounts to a form of fraud not theft. If any property-based offence is needed in this area, the complexity of the doctrinal question of whether or when choses in action can be transferred point to the need for specifically crafted offences dealing with the misappropriation or destruction of choses in action. Such offences have already been created for deceptive appropriation of electronic money transfers and could be easily extended to cover non-consensual appropriations. Further, a complex range of criminal sanctions exist to protect holders of the various forms of intellectual property thus making the extension of theft to cover such forms of property both unnecessary and undesirable.

Practically, there are few instances where any appropriation of a chose in action amounts to an activity that is more characterised by theft than by fraud. While tangible property can be left 'lying around' and can therefore be taken opportunistically by complete strangers who happen upon it, it is far less likely that choses in action are stolen.<sup>227</sup> In most cases, a misuse of a chose in action can only be accomplished by either a deception of the controller of the interest,<sup>228</sup> or a fraudulent misappropriation by those in control of it. As such, the modern fraud offences adequately cover such behaviours.

More fundamentally, the whole basis of criminalising such activities around property rights may well be misplaced, and a product of outmoded thinking. The clear tendency in modern fraud offences is to prohibit the gaining of financial advantage or causing of financial loss. These offences dispense entirely with any requirement that property rights exist or pass from one person to another. There is also a tendency to enact fraud offences that move away from traditional understandings of deception. While often seen as an offence of misrepresentation, deception can be a result of objectively misleading conduct,<sup>229</sup> and this is now legislatively recognised, suggesting an encouragement to prosecutors to charge on this basis.<sup>230</sup> In some jurisdictions, deception itself is being replaced by a reliance on broader concepts of defrauding.<sup>231</sup> Use of appropriately framed fraud offences also avoids the difficult question of whether it is appropriate to include non-proprietary choses in action in the scope of theft. It would seem that theft is too strongly tied to property interests *to appropriately include* contractual rights, but a

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227 That is, other than forms of intellectual property. These, however, are adequately protected under their own *sui generis* legislation.

228 If the situation involves affecting a computerised transfer, the unauthorised use of the computer is deemed to be a fraud in some jurisdictions (see, for example, *Crimes Act 1900* (NSW) s 178BA(2); *Criminal Code Act 1995* (Cth) s 133.1), and is prohibited under specialist legislation in others (see, for example, *Criminal Code Act 1924* (Tas) s 257C).

229 See, for example, *R v Barnard* (1837) 7 C&P 784; 173 ER 342; compare *R v Nelson* (1986) 19 A Crim R 200 and *DPP v Ray* [1974] AC 370.

230 See, for example, *Crimes Act 1900* (NSW) s 178BA. In the new *Fraud Act 2006* (UK), all that is required is a false representation (that is, no deception need be proved), and this representation can be one implied through conduct (s 2). There have been concerns raised over the breadth of aspects of the new regime. See Ormerod, above n49.

231 See, for example, the discussion in Steel, above n49.

dishonest exploitation of contractual choses in action can quite comfortably fall inside an offence of making false representations to obtain a financial gain. All of this makes it far less likely that any appropriation of a chose in action can only be prosecuted as a theft.

It thus seems that there are no compelling reasons for jurisdictions such as NSW, Queensland and Tasmania to extend their stealing offences to include intangible property; and indeed it might be practical to reduce the scope of theft in other jurisdictions to only tangible forms of property. While there is clearly a place for specialised criminal offences that deal with forms of intangible property, the degree of uncertainty that results from an unrestricted expansion of theft to cover all forms of property provides a strong argument for retaining a core theft offence that is restricted to tangible property. If this is done, theft remains a simple core offence in the criminal calendar that can relatively easily be prosecuted and intuitively understood by the community.