

## ***Criminal Law Guidebook* Second Edition – Chapter 8: Property Offences**

The following are suggested solutions to the problem questions on pages 208–209. They represent answers of an above average standard. The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook* Second Edition has been used in devising these solutions.

### **Scenario 1 – Charges against Karen**

#### **New South Wales – ‘Receiving stolen property’**

If this incident occurred in New South Wales, the police could consider bringing a charge of ‘receiving stolen property’<sup>1</sup> against Karen in relation to the MP3 player. It is not entirely clear how Barry obtained the MP3 players, but it can be inferred that they were obtained dishonestly through a form of larceny. This inference is supported by the fact that Karen knew Barry did not earn much money, had a young, dependent child, and by Barry’s initial response to Karen’s express concern that the gift was too expensive to accept, that is by smiling and saying ‘Don’t you worry about that’. The inference of dishonest acquisition is further supported by the phone conversation between Karen and Barry the next day, when Barry said he had about a dozen MP3 players and ‘let’s just say they fell off the back of a truck’. In these circumstances it is certainly arguable that the MP3 players were acquired by Barry through the commission of a serious indictable offence<sup>2</sup>, such as larceny<sup>3</sup> or break, enter and steal<sup>4</sup>.

To charge Karen with ‘receiving stolen property’, the police would need to gather evidence that could prove beyond reasonable doubt that Karen received the MP3 player, which had been stolen, and at the time she received it she knew that it was stolen<sup>5</sup>. As reasoned above on known facts, it is certainly arguable that Barry had acquired the MP3 player through dishonest means amounting to stealing<sup>6</sup>, and so it had the status of ‘stolen property’ at the time it was received by Karen. Karen was in possession of the MP3 player after receiving it as a gift from Barry, which is a sufficient act of receiving for the purposes of *Crimes Act 1900* s 188<sup>7</sup>. A person possesses property when they are in a position to physically control it, and they intend to exert that control to the exclusion of others<sup>8</sup>. Despite the fact that Karen twice told Barry that she could not accept it, Karen retained physical control of the MP3 player, and although she did not

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<sup>1</sup> *Crimes Act 1900* (NSW) s 188.

<sup>2</sup> That is an indictable offence that is punishable by imprisonment for a term of 5 years or more – *Crimes Act 1900* (NSW) s 4.

<sup>3</sup> *Crimes Act 1900* (NSW) s 117.

<sup>4</sup> *Crimes Act 1900* (NSW) s 112.

<sup>5</sup> *R v Raad* [1983] NSWLR 344; *R v Dykyj* (1993) 29 NSWLR 672.

<sup>6</sup> ‘Stealing’ has an extended meaning under *Crimes Act 1900* (NSW) s 187, and includes ‘the taking, extorting, obtaining, embezzling, or otherwise disposing of the property in question’.

<sup>7</sup> *Murphy v Porter* (1984) 12 A Crim R 38.

<sup>8</sup> *Hayes v Fries* (1988) 49 SASR 184.

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remove it from its packaging, it is arguable that by placing it in a drawer to which it seems only she had access, then she intended to exert that control to the exclusion of others. Further, it may be contended that Karen's possession of the MP3 player is confirmed by her later actions in removing it from the drawer and rewrapping it to give it to her niece as a birthday present.

The major issue is whether Karen knew the MP3 player was stolen at the time she received it from Barry. The prosecution has to prove that Karen actually knew or believed that the property was stolen, in the sense that she accepted the truth that it was stolen rather than merely suspecting it was stolen<sup>9</sup>. The circumstances of the receipt of the MP3 player must be such as to make Karen believe the property was stolen. Clearly, Karen was shocked when she received an expensive gift from the impecunious Barry, and the rational inference from Karen's actions in twice saying she could not accept the gift, followed by her feelings of guilt and determination to be rid of the gift by rewrapping it to give to her niece, is that Karen knew the MP3 player was stolen. It is strongly arguable that all the circumstances point to Karen believing that the MP3 player was stolen property from the time she actually received it from Barry.

The defence may argue that there is no temporal coincidence between Karen's receipt of the MP3 player and her guilty knowledge, as her suspicions were not confirmed until she spoke to Barry the following day by telephone. The prosecution would rely on the initial conversation with Barry, and Karen's knowledge of Barry's financial circumstances, to establish that temporal coincidence as the nature of the transaction is momentary, and not such as to support an argument that the receipt of the MP3 player was continuous over an interval of time<sup>10</sup>. On this basis it is strongly arguable that there is enough evidence available to charge Karen with 'receiving stolen property'. It would be prudent to also charge Karen with 'goods in custody' in the alternative, in case the evidence available does not reach proof beyond reasonable doubt.

### **New South Wales – 'Goods in custody'**

The police could charge Karen with the summary offence of 'goods in custody'<sup>11</sup> as a back-up alternative charge to 'receiving stolen property'. The prosecution is required to prove that Karen had a thing in her custody that may be reasonably suspected of being stolen or otherwise unlawfully obtained<sup>12</sup>. Karen must have custody of the thing, the MP3 player in this case, at the time of apprehension by police, and objectively, one of the suspicions that may be reasonably entertained

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<sup>9</sup> *R v White* (1859) 1 F&F 665; *R v Raad* [1983] NSWLR 344; *R v Schipanski* (1989) 17 NSWLR 618.

<sup>10</sup> *R v Curlija* [1967] SASR 1, 5.

<sup>11</sup> *Crimes Act 1900* (NSW) s 527C.

<sup>12</sup> *Crimes Act 1900* (NSW) s 527C(1); *Grant v The Queen* (1981) 147 CLR 503.

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is that the MP3 player was stolen or otherwise unlawfully obtained. When the police arrive to question Karen several days later it is apparent she still has custody of the MP3 player, as she produces it for the police saying, 'I wasn't going to keep it; look it's still gift-wrapped.' Further, on the known facts, it is strongly arguable from an objective viewpoint<sup>13</sup> that one of the suspicions that may reasonably be entertained is that the MP3 player was stolen or otherwise unlawfully obtained. It does not matter that there are other possible explanations which are inconsistent with guilt for the offence, and the court does not have to determine that the most likely suspicion which could reasonably be entertained is the suspicion required by *Crimes Act 1900 (NSW) s 527C*<sup>14</sup>.

Karen may raise the defence under *Crimes Act 1900 (NSW) s 527C(2)*, by attempting to satisfy the court on the balance of probabilities<sup>15</sup> that she had no reasonable grounds for suspecting that the property referred to in the charge was stolen, or otherwise unlawfully obtained. In raising this defence, Karen is not required to show that the goods were lawfully in her possession. The issue is whether Karen had reasonable grounds for a suspicion that the goods were stolen or unlawfully obtained<sup>16</sup>. Karen's whole approach to the receipt of the MP3 player from Barry, where she tried to get him to take it back twice and then with feelings of guilt, determined to get rid of it by giving it to her niece as a birthday present, shows that it would be difficult for Karen to satisfy the court that she had no reasonable grounds for such a suspicion.

This charge would certainly be easier to prove than 'receiving stolen property', however, both offences could be charged by the police in this instance, with 'receiving' as the principal charge and 'goods in custody' as a backup charge.

### **Victoria – 'Handling stolen goods'**

If this incident occurred in Victoria, the police could bring a charge of 'handling stolen goods'<sup>17</sup> against Karen. This is similar to the 'receiving' offence under the *Crimes Act 1900 (NSW)* discussed above, but Karen must 'dishonestly' receive the goods. The requirements that the handled goods must be stolen and that the accused must have 'knowledge or belief' that the goods are stolen at the time of handling them, closely reflect the requirements of the New South Wales 'receiving' offence, and the same reasoning applies as set out above.

There are clear arguments that the MP3 player was stolen by Barry, and that Karen knew or believed that it was stolen at the time she received it from Barry.

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<sup>13</sup> *Cleary v Hammond* [1976] 1 NSWLR 111; *Anderson v Judges of the District Court (NSW)* (1992) 27 NSWLR 701; *R v Chan* (1992) 28 NSWLR 421.

<sup>14</sup> *R v Chan* (1992) 28 NSWLR 421.

<sup>15</sup> *Tegge v Caldwell* (1988) 15 NSWLR 226.

<sup>16</sup> *Anderson v Judges of District Court of NSW* (1992) 27 NSWLR 701.

<sup>17</sup> *Crimes Act 1958 (Vic) s 88*.

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Further, it is arguable that Karen acted dishonestly when she received the stolen MP3 player, even though it initially appears it was her intention to return the goods to Barry<sup>18</sup>. The three criteria under *Crimes Act 1958* (Vic) s 73(2) that will negate dishonesty for the offence of theft do not apply to the offence of 'handling stolen goods', so whether Karen had a dishonest state of mind when she received the MP3 player will be determined objectively by the application of 'current standards of ordinary decent people'<sup>19</sup>. Arguably Karen's immediate shock at receipt of the gift from Barry, and subsequent actions in trying to return it and then get rid of it, show that she was acting dishonestly by these standards at the time of receipt. The charge of 'handling stolen goods' could be proved beyond reasonable doubt.

### **Victoria – 'Possession of stolen personal property'**

In parallel with the New South Wales offence of 'goods in custody' discussed above, an alternative summary offence of 'possession of stolen personal property' could be charged if this incident occurred in Victoria<sup>20</sup>. To prove this offence, the prosecution must establish that Karen was in possession of personal property that is reasonably suspected of being stolen or otherwise unlawfully obtained. This is similar to the New South Wales 'goods in custody' offence, however, the prosecution must prove the personal property 'is' rather than 'may be' reasonably suspected of being stolen. Clearly, the police actions in questioning Karen show that the personal property, the MP3 player, is reasonably suspected of being stolen and, as in all the circumstances discussed in relation to the New South Wales 'goods in custody' offence above, this offence could be established beyond reasonable doubt.

The defence open to Karen is to give a satisfactory account as to how she came by the property<sup>21</sup>, and she may argue that it was a gift that she did not want and endeavoured to return to Barry. However, her subsequent actions in rewrapping it to pass on as a gift to another person, would work against the court being of the opinion that this was a satisfactory account of her possession of the property.

Overall, the police could charge both offences with 'handling stolen goods' as the principal charge, and 'possession of stolen personal property' as an alternative charge.

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<sup>18</sup> *R v Matthews* [1950] 1 All ER 137.

<sup>19</sup> *R v Feely* [1973] 1 QB 530; *Peters v The Queen* (1998) 192 CLR 493.

<sup>20</sup> *Summary Offences Act 1966* (Vic) s 26(1).

<sup>21</sup> *Summary Offences Act 1966* (Vic) s 26(2).

**South Australia – ‘Theft’**

If this incident occurred in South Australia, the police could charge Karen with the theft of the MP3 player, as receiving stolen property may be described as theft and is punishable as a species of theft in this jurisdiction<sup>22</sup>. Dealing with property extends to ‘takes, obtains or receives the property’<sup>23</sup>, so that Karen’s receipt of the MP3 player from Barry amounts to dealing with the property. To prove a charge of theft against Karen the prosecution must establish that she dealt with the property, in the sense of receiving the property dishonestly without the owner’s consent, and intending to permanently deprive the owner of the property or make a serious encroachment on the owner’s proprietary rights. Karen’s dishonesty in dealing with the property is judged ‘according to the standards of ordinary people’ and she must know that she is acting dishonestly<sup>24</sup>. As discussed above in relation to the Victorian offence of ‘handling stolen goods’, Karen’s immediate shock at receipt of the gift from Barry and subsequent actions in trying to return it and then get rid of it, show that she was acting dishonestly according to the standards of ordinary people, and that she knew she was acting dishonestly in keeping possession of the MP3 player.

It is not clear who the owner of the MP3 player is, as Barry has obviously obtained the property dishonestly and sparked a police investigation. In this way, Karen has received the property without the owner’s consent. Further, Karen’s actions in rewrapping the MP3 player and deciding to give it to her niece as a birthday present, show that she intended to deprive the owner, whoever that may be, permanently of the property. At the very least, this conduct is a serious encroachment on the owner’s proprietary rights, in the sense of treating ‘the property as her own to dispose of regardless of the owner’s rights’<sup>25</sup>. Accordingly, there is a strong argument that Karen could be charged with ‘theft’ for her receipt of the MP3 player from Barry.

**South Australia – ‘Unlawful possession of personal property’**

As discussed in relation to New South Wales and Victoria, there is scope for an alternative charge of ‘unlawful possession of personal property’ if this incident occurred in South Australia<sup>26</sup>. This summary offence is very similar to the Victorian offence of ‘possession of stolen personal property’ discussed earlier and requires the prosecution to prove that Karen has possession of personal property that ‘is reasonably suspected of having been stolen or obtained by unlawful

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<sup>22</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(5).

<sup>23</sup> *Criminal Law Consolidation Act 1935* (SA) s 130.

<sup>24</sup> *Criminal Law Consolidation Act 1935* (SA) s 131(1).

<sup>25</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(2)(a).

<sup>26</sup> *Summary Offences Act 1953* (SA) s 41(1).

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means'. The same analysis used for New South Wales and Victorian offences can be used here, and it could be established beyond reasonable doubt that the MP3 player which Karen is in possession of when the police arrive to question her is reasonably suspected of having been stolen by Barry.

Karen can raise the defence that the property was obtained honestly, which she must prove on the balance of probabilities<sup>27</sup>. Given the circumstances in which Karen received the property, including her knowledge of Barry's straitened financial situation and her attempts to return the property immediately and again the next day, it would be difficult for Karen to prove she obtained the MP3 player honestly.

Overall, in South Australia the police could charge both offences with 'theft' as the principal charge, and 'unlawful possession of personal property' as a summary backup charge.

### **Scenario 2 – Harry's criminal liability**

#### **Larceny or theft**

Depending on the jurisdiction in which this incident occurred, Harry may be criminally liable for the offence of 'larceny'<sup>28</sup> or theft<sup>29</sup> of the \$100 from Max's wallet. Essentially there are similar elements to be proved for these dishonest property offences, in that the property owned by another person must be taken dishonestly with the intent to permanently deprive the owner of that property<sup>30</sup>.

The property in question here is money and it is specifically included in the definition of 'property' that can be the subject of theft in Victoria and South Australia<sup>31</sup>. At common law, as it applies in New South Wales, the property stolen must be tangible and the physical \$100 note falls into this category of property, although money in a bank account does not and must be prosecuted as stealing a valuable security<sup>32</sup>. Harry removed the \$100 from Max's wallet whilst Max was out of the room, and did not tell Max he had done this until the next day when Max noticed the money was missing and went back to ask Harry about it. This amounts to a taking and carrying away of property at common law in New South Wales<sup>33</sup>. Also, this conduct would amount to an 'appropriation' of property under *Crimes Act 1958* (Vic) s 73(4), as Harry has assumed the rights

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<sup>27</sup> *Summary Offences Act 1953* (SA) s 41(2).

<sup>28</sup> *Crimes Act 1900* (NSW) s 117.

<sup>29</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(1); *Crimes Act 1958* (Vic) s 74.

<sup>30</sup> *Criminal Law Consolidation Act 1935* (SA) ss 131, 134(1)-(2); *Crimes Act 1958* (Vic) ss 72-73; *Ilich v The Queen* (1987) 162 CLR 110, 123.

<sup>31</sup> *Criminal Law Consolidation Act 1935* (SA) s 130; *Crimes Act 1958* (Vic) s 71(1).

<sup>32</sup> *Croton v The Queen* (1967) 117 CLR 326; *Crimes Act 1900* (NSW) s 134.

<sup>33</sup> *Wallis v Lane* [1964] VR 293.

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of the owner of the \$100 by taking it and using it to bet on a horse. In South Australia, this conduct would fall within the definition of 'deal'<sup>34</sup> with property, as Harry took the money and converted it to his own use in gambling on a horse race.

It is clear that the legal owner of the \$100 note is Max and he did not give his consent to Harry to take the money. Even though Harry asserted the next day that 'it was just a loan', it is apparent that Max was originally not aware that Harry had taken the money and did not agree to loan the money to Harry. The actus reus elements of larceny or theft can be established beyond reasonable doubt.

Turning to the mens rea elements, it is certainly arguable that Harry dishonestly took the \$100 note from Max. In New South Wales, dishonesty is defined at common law for the purposes of the offence of larceny<sup>35</sup> and the fact-finder applies the 'current standards ordinary decent people'<sup>36</sup> in determining whether the accused had the knowledge, belief or intent that makes their act dishonest by those standards.<sup>37</sup> Harry's actions in surreptitiously removing the \$100 note from Max's wallet, without asking and while Max was in the toilet at his house show that Harry knew or believed when he took the money that it did not belong to him. Objectively this furtive conduct by Harry would be considered to be dishonest by the standards of ordinary decent people, thus satisfying the common law test of dishonesty.

In Victoria, the provisions of *Crimes Act 1958* (Vic) s 73(2) must be considered, and it is clear that Harry does not have a claim of right to the \$100 note, nor does he believe the owner of the property cannot be discovered. Harry may rely on a 'belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it'<sup>38</sup>, however, it is apparent that Harry had ample opportunity to ask Max for a loan of the money and to tell him he had taken it to use for gambling. By taking it surreptitiously, it is strongly arguable that Harry believed Max would not give his consent to Harry borrowing the \$100 in circumstances where Harry intended to use it to bet on a horse race. Accordingly, the prosecution would likely be able to prove that none of the circumstances in s 73(2) applied to Harry's appropriation of the \$100, so he acted dishonestly in the circumstances.

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<sup>34</sup> *Criminal Law Consolidation Act 1935* (SA) s 130.

<sup>35</sup> There is a statutory definition of 'dishonesty' in *Crimes Act 1900* (NSW) s 4B but it is unlikely to apply to the offence of larceny as the word 'dishonesty' is not used in the description of this offence under *Crimes Act 1900* (NSW) s 117.

<sup>36</sup> *R v Feely* [1973] 1 QB 530 applied by the High Court in *Peters v The Queen* (1998) 192 CLR 493

<sup>37</sup> *Macleod v The Queen* (2003) 214 CLR 230.

<sup>38</sup> *Crimes Act 1958* (Vic) s 73(2)(b); *Carrott v The Queen* [2013] VSCA 90.

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In South Australia, under *Criminal Law Consolidation Act 1935* (SA) s 131, it is arguable that on an objective assessment of Harry's conduct, it is dishonest according to the standards of ordinary people, and that the circumstances in which he took the \$100 note show that he knew he was acting dishonestly; otherwise, why not just ask Max for a loan<sup>39</sup>. Also, even though Harry indicated a willingness to pay the money back to Max 'and then some', this 'does not necessarily preclude a finding of dishonesty'<sup>40</sup>. Further, the provisions in *Criminal Law Consolidation Act 1935* (SA) ss 131(4) – (6) do not apply to Harry's situation, as he didn't find the money, nor did he have a belief that the owner could not be discovered. Also, there is no issue of a fair entitlement to the money, as Harry did not honestly believe that he had a legal or equitable right to take the money from Max. Overall, there is sufficient evidence available to prove Harry acted dishonestly in dealing with Max's \$100 note by secretly taking it from his wallet.

Finally, in each jurisdiction there is a mens rea requirement that Harry took the money with the intention to permanently deprive Max of it. In South Australia, there is an alternative to this in that it can be proved that Harry dealt dishonestly with the money, and made 'a serious encroachment on the owner's proprietary rights'<sup>41</sup> by treating the property as his own, or dealing with it 'in a way that creates a substantial risk that the owner will not get it back'<sup>42</sup>.

Harry would argue that that he only borrowed the money to invest on a 'sure thing' that won the race, and even if it hadn't won, he still would have paid the money back to Max, so there was never an intention to permanently deprive Max of the money.

In New South Wales and Victoria, an intention to return the property or to reimburse an owner for its loss does not preclude a finding of larceny or theft<sup>43</sup>, so that 'borrowing' property with intent to return it or pay it back, can still amount to larceny or theft<sup>44</sup>. This occurs in circumstances where there is only a temporary taking and use of property, without exercising ownership over the property by acts that would diminish its value, or deprive the owner of the property for an extended duration<sup>45</sup>. In relation to money, as it is not necessary to return the actual note and the value of money is not diminished when it is paid back quickly, it may be difficult to establish Harry's intention to permanently deprive Max of the \$100 when it was paid back 'and then some' the next day.

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<sup>39</sup> *Criminal Law Consolidation Act 1935* (SA) s 131(1).

<sup>40</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(3).

<sup>41</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(1)(c)(ii).

<sup>42</sup> *Criminal Law Consolidation Act 1935* (SA) s 134(2)(b)(i).

<sup>43</sup> *Crimes Act 1900* (NSW) s 118; *Crimes Act 1958* (Vic) ss 73(3) and (12).

<sup>44</sup> *Foster v The Queen* (1967) 118 CLR 117; *Crimes Act 1958* (Vic) s 73(12).

<sup>45</sup> *Foster v The Queen* (1967) 118 CLR 117, 121.



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Equally it is arguable that Harry took the money and exercised ownership over it<sup>46</sup>, by converting it to his own use by using it to bet on a horse. There are alternative arguments available for resolution by the fact finder, but Harry could be criminally liable for larceny or theft particularly given that he did not tell Max what he had done until he was confronted by him, even though it appears the horse race had concluded and Harry had an earlier opportunity to tell Max of his win and intention to pay him back. It is possible to infer from this that had Max not confronted Harry about the money, he would not have told him about the loan, winning horse and ability to pay Max back, thus demonstrating an intention to exercise ownership over the \$100 and to permanently deprive Max of it.

In South Australia, the prosecution may rely on the alternative mental state of 'serious encroachment on an owner's proprietary rights', in that Harry's actions in secretly taking Max's money and using it to bet on a horse may more easily be characterised as treating the property as his own, regardless of Max's rights or dealing with the money in such a way that a substantial risk was created that Max would not get it back. Gambling money on horse races is a very uncertain way of 'investing', even where the person gambling is a retired horse trainer who keenly follows the form and decides the horse is a 'sure thing'. It is certainly arguable that Harry treated the money as his own and if he had lost it, he may well not have admitted that he took the money from Max. Harry only said he would still have paid Max back in circumstances where he knew the horse had won the race.

Overall, it can be strongly contended that Harry would be criminally liable for the larceny or theft of the \$100 from Max's wallet, although there is certainly scope to argue that he did not intend to permanently deprive Max of the money. If this argument succeeds in raising a reasonable doubt about this element, Harry could be acquitted of larceny or theft in New South Wales and Victoria, but remains likely to be convicted of theft in South Australia because of the availability of the alternative mens rea under *Criminal Law Consolidation Act 1935 (SA)* s 134(2).

### **Scenario 3 – Likely charges against Ronaldo**

#### **Discussion with Luigi at the hospital**

An issue arises from the conversation between Luigi and Ronaldo at the hospital as to whether they have formed a 'conspiracy to defraud' the insurance company, by Luigi arranging the theft of Ronaldo's Commodore and then Ronaldo subsequently making an insurance claim. For a conspiracy to exist at

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<sup>46</sup> *R v Smalls* (1957) 74 WN (NSW) 150.

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common law<sup>47</sup> there must be an agreement between two or more people to do an unlawful act or to do a lawful act by unlawful means<sup>48</sup>. There must be an intent to enter the agreement, which can be reached by words or conduct and does not have to be reached by formal means<sup>49</sup>. A 'conspiracy to defraud' at common law is an agreement to practice a fraud on somebody, and it requires an agreement to inflict economic loss or financial prejudice by dishonest means<sup>50</sup>. In *Peters v The Queen*, the High Court observed that 'the offence of conspiracy to defraud requires an agreement to bring about a result by dishonest means, which means do not necessarily involve deception ... The fraud in the offence is in depriving others of their property or of the opportunity to protect their interests.'<sup>51</sup>

Arguably the conversation between Ronaldo and Luigi at the hospital would amount to an 'agreement', particularly when Luigi says, 'Pity if it got stolen and you had to make a claim on your insurance' after finding out that Ronaldo's Commodore was insured for \$18,000, and Ronaldo smiled in response to this statement. It can be inferred from this conversation, Luigi's immediate departure from the hospital ward, and Ronaldo later finding his Commodore was missing, that the nature of the agreement in which they both participated<sup>52</sup> was to arrange for Ronaldo's car to be stolen, and for him to claim on his insurance and obtain \$18,000 from the insurance company. This agreement involves the commission of an unlawful act in the nature of a fraud offence<sup>53</sup>. It involves dishonesty in setting out to deprive the insurance company of money to which Ronaldo is not entitled, due to his concurrence in the theft of his Commodore, thus amounting to 'financial prejudice by dishonest means'<sup>54</sup>.

In all the circumstances, the general 'conspiracy to defraud' offence seems to be the appropriate offence with which to charge Ronaldo. However, if this incident occurred in Victoria, where the common law no longer applies, it is possible to argue that Ronaldo is part of a 'conspiracy to obtain a financial advantage by deception'<sup>55</sup>. In this jurisdiction, it must be proved that Ronaldo and Luigi agreed 'that a course of conduct shall be pursued which will involve the commission of an offence'<sup>56</sup>. Again this agreement can be inferred from the conversation

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<sup>47</sup> The common law applies in New South Wales and South Australia. In Victoria, 'conspiracy to commit an offence' is proscribed under *Crimes Act 1958* (Vic) s 321, the elements of which are substantially similar to the common law offence of 'conspiracy'.

<sup>48</sup> *R v Rogerson* (1992) 174 CLR 268, 280-281.

<sup>49</sup> *Kamara v DPP* [1974] AC 104, per Lord Hailsham LC at 119.

<sup>50</sup> *DPP v Withers* [1975] AC 842.

<sup>51</sup> (1998) 192 CLR 493, 505-507 per Toohey and Gaudron JJ.

<sup>52</sup> *R v O'Brien* (1974) 59 Cr App R 22.

<sup>53</sup> Such as 'Fraud' under *Crimes Act 1900* (NSW) s 192E or 'Deception' under *Criminal Law Consolidation Act 1935* (SA) s 139.

<sup>54</sup> See above n 50.

<sup>55</sup> *Crimes Act 1958* (Vic) ss 82, 321.

<sup>56</sup> *Crimes Act 1958* (Vic) s 321(1).

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between them involving words and conduct, and the subsequent overt acts of the taking and burning of Ronaldo's Commodore, and Ronaldo making an insurance claim. There is clear evidence of intention to commit the offence, the subject of the agreement<sup>57</sup> involving deceiving the insurance company that Ronaldo has a valid claim for the theft and destruction of his car.

### **Completion and lodging of the insurance claim**

When Ronaldo's car is found burnt out the following day, he then takes steps in furtherance of the conspiracy when he completes and lodges an insurance claim in relation to the theft and destruction of his car. These acts may be used as further evidence of the 'conspiracy' between Ronaldo and Luigi, but it is arguable that Ronaldo commits another fraud-type offence at this time.

In New South Wales, it is likely that Ronaldo would be charged with an offence of 'intention to obtain a financial advantage by [making a] false or misleading statement'<sup>58</sup>. Further details of the statement made by Ronaldo in the insurance claim document would be useful, as Ronaldo must dishonestly make a statement that is false or misleading in a material particular with the intention of obtaining a financial advantage. Dishonesty is defined to mean 'dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people'<sup>59</sup>. Arguably, on the known facts, it can be inferred that Ronaldo acted dishonestly and made one or more false or misleading statements in the claim document when regard is had to the nature of his 'agreement' with Luigi. Applying the standards of ordinary people, it is dishonest to make an insurance claim knowing that you were part of the arrangement to have your car stolen and destroyed. It is clear that Ronaldo knew that such an act on his part was dishonest according to those standards. The further mental element to be proved for this offence is an intent to obtain property belonging to another, gain a financial advantage, or to cause a financial disadvantage. As Ronaldo specifically enquired about obtaining the 'cheque for the eighteen grand today', it is strongly arguable that his intent was to obtain a financial advantage for himself, or to cause a financial disadvantage to the insurance company by lodging the claim for his burnt out Commodore. This offence is available whether or not the money is paid to Ronaldo.

As the claim was not paid and Ronaldo is informed that further investigation is necessary, then a likely alternative charge would be 'attempt fraud'<sup>60</sup>, by proof that Ronaldo attempted to dishonestly obtain a financial advantage or to cause a

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<sup>57</sup> *Crimes Act 1958* (Vic) s 321(2).

<sup>58</sup> *Crimes Act 1900* (NSW) s 192G.

<sup>59</sup> *Crimes Act 1900* (NSW) s 4B.

<sup>60</sup> *Crimes Act 1900* (NSW) ss 192E, 344A.

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financial disadvantage by deception. Clearly the acts of Ronaldo in completing and lodging the claim, and requesting the cheque that day, would be sufficiently proximate to the completed offence and going beyond mere preparation such as to constitute an 'attempt' to obtain a financial advantage for himself or cause a financial disadvantage to the insurance company<sup>61</sup>. 'Deception' is defined in *Crimes Act 1900* (NSW) s 192B, and the lodging of the insurance claim in the given circumstances could be characterised as a 'deception' by conduct, in order to dishonestly obtain a financial advantage or cause financial disadvantage.

In Victoria, it is likely that Ronaldo would be charged with 'attempt to obtain property by deception'<sup>62</sup>. Although 'attempt' offences have a statutory formulation in Victoria, they comprise essentially the same elements as at common law. Ronaldo's actions in completing and lodging the insurance claim are 'more than merely preparatory and immediately connected with the commission of the offence'<sup>63</sup>. Also, it is clear that Ronaldo intends<sup>64</sup> to obtain the money from the insurance company through a form a deception, as he does not disclose his involvement with Luigi in arranging the theft and destruction of the Commodore. The money that Ronaldo seeks to obtain is 'property' for the purposes of a s 81 offence, and 'deception' has the same meaning as the NSW provision considered above<sup>65</sup>. Further, Ronaldo must act dishonestly and with the intention to permanently deprive the insurance company of the money he is attempting to obtain. These mens rea elements can be proved through Ronaldo's 'agreement' with Luigi about the theft of the car, his immediate lodging of the insurance claim, and his request to be paid the 'eighteen grand' that day.

In South Australia, the comparable offence is 'attempt deception'<sup>66</sup>. An 'attempt' is defined at common law in this jurisdiction, and so the same reasoning applies as was used in relation to the New South Wales 'attempt' offence discussed above<sup>67</sup>. As to the nature of the substantive offence attempted by Ronaldo, it is arguable that his conduct was deceptive, in that he attempted to dishonestly obtain a benefit from the insurance company in the form of a financial benefit to which he was not entitled because of his conspiratorial arrangement with Luigi for the theft and destruction of the Commodore. Ronaldo is likely to be charged with this dishonesty offence.

### **The incident in the insurance office**

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<sup>61</sup> *R v Mai and Tran* (1992) 26 NSWLR 371; *Inegbedion v R* [2013] NSWCCA 291.

<sup>62</sup> *Crimes Act 1958* (Vic) ss 81, s 321N.

<sup>63</sup> *Crimes Act 1958* (Vic) s 321N(1)(a) & (b).

<sup>64</sup> *Crimes Act 1958* (Vic) s 321N(2).

<sup>65</sup> *Crimes Act 1958* (Vic) s 81(4).

<sup>66</sup> *Criminal Law Consolidation Act 1935* (SA) ss 139, 270A(1).

<sup>67</sup> See above n 61 and also *R v Collingridge* (1976) 16 SASR 117; *R v Kristo* (1989) 39 A Crim R 86; and *R v Irwin* (2006) 94 SASR 480.

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Ronaldo's final act before he is apprehended by police at a city railway station raises consideration of a charge of 'armed robbery' in all three jurisdictions<sup>68</sup>. The elements of robbery are similar across all jurisdictions and essentially there must be a larceny or theft of property, accompanied by intentional use of force or violence to overcome any resistance of the victim, or to enable commission of the theft<sup>69</sup>. The aggravating feature to be proved is the use of an offensive weapon.

All the physical elements of larceny and theft (depending on the particular jurisdiction) can be established, as Ronaldo takes the cash thrown on the counter and runs out of the office. It is also clear that by pointing a pistol at the clerk and demanding the money, Ronaldo has used force to commit the theft or larceny. This at least amounted to a putting in fear, which occurs before or at the time of the taking<sup>70</sup>. The pistol falls within the definition of an offensive weapon<sup>71</sup>, as it is both a firearm and made for 'use for causing injury to or incapacitating a person.' In the New South Wales context it is also arguable that the pistol is a 'dangerous weapon' as it is a firearm within the meaning of that term in the *Firearms Act 1996* (NSW)<sup>72</sup>, and the appropriate charge would be 'aggravated armed robbery'<sup>73</sup>.

As to mens rea elements, it is apparent through the demand made and his running off with the cash, that Ronaldo intended to permanently deprive the insurance company of the money, and that his use of force with the pistol was intended by him to overcome any resistance from the clerk and to enable Ronaldo to commit the theft. An issue that arises is whether Ronaldo acted dishonestly in the sense of whether he honestly believed he had a 'claim of right'<sup>74</sup> to the money, as he says, 'I need money, you've got my money, so hand it over!' Ronaldo may argue that he believed he was entitled to the money as part of his insurance claim for the theft and destruction of his Commodore, and he can use force to assert such a claim of right<sup>75</sup>. The counter argument by the prosecution would be that in the circumstances of the 'conspiracy' with Luigi, Ronaldo could not have honestly believed that he had a claim of right to the money. His actions rather, show extreme frustration in not being able to access

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<sup>68</sup> *Crimes Act 1958* (Vic) s 75A, *Crimes Act 1900* (NSW) s 97, *Criminal Law Consolidation Act 1935* (SA) ss 137, 5AA(1)(b).

<sup>69</sup> *Crimes Act 1958* (Vic) s 75, *Criminal Law Consolidation Act 1935* (SA) s 137; *Smith v Desmond* [1965] AC 960 as the common law applies in New South Wales.

<sup>70</sup> *R v Foster* (1995) 78 A Crim R 517.

<sup>71</sup> *Crimes Act 1900* (NSW) ss 4, 97(1); *Criminal Law Consolidation Act 1935* (SA) ss 5, 5AA(1)(b); *Crimes Act 1958* (Vic) ss 75A(1), 77(1A).

<sup>72</sup> *Crimes Act 1900* (NSW) s 4; *Firearms Act 1996* (NSW) s 4.

<sup>73</sup> *Crimes Act 1900* (NSW) s 97(2).

<sup>74</sup> *Crimes Act 1958* (Vic) s 73(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 131(6); *R v Bedford* (2007) 98 SASR 514; *R v Fuge* (2001) 123 A Crim R 310.

<sup>75</sup> *R v Langham* (1984) 36 SASR 48.

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his redundancy payment in circumstances of financial stress. On all the information available, it would be unlikely for a fact finder to accept that Ronaldo honestly believed at the time of the taking that he was legally or otherwise entitled to the insurance money. Accordingly, his actions in taking the money by force would be objectively dishonest when judged against the standards of ordinary people<sup>76</sup>, and it is likely that Ronaldo would be charged with an 'armed robbery' offence.

### **Scenario 4 – Offences with which Luke is likely to be charged**

If these events occurred in New South Wales, Luke is most likely to be charged with 'being in a dwelling-house, committing a serious indictable offence therein and breaks out of the dwelling-house'.<sup>77</sup> The definition of dwelling-house is inclusive<sup>78</sup> so that the term retains its ordinary meaning of a residential building in which people live. The house belonging to the Longgone family fits within the meaning of dwelling-house even though it was temporarily unoccupied<sup>79</sup> when entered by Luke.

While Luke was in the dwelling-house, the prosecution must prove that he committed a 'serious indictable offence', which is any indictable offence punishable by imprisonment for 5 years or more or for life.<sup>80</sup> The relevant offence committed by Luke is 'larceny'<sup>81</sup> as Luke grabbed several important looking documents from the study and then escaped with them from the house via a window. Although the nature and value of the documents is not clear on known facts it is certainly arguable that as pieces of paper they are personal property or chattels of some value,<sup>82</sup> which were in the possession of the owner of the house from which they were taken even though members of the Longgone family were not physically in the house at the time.<sup>83</sup> In surreptitiously removing the documents, Luke has taken and carried away the documents without the consent of the owner or person in possession.

These actions, which have been visually recorded by the Longgone family's security system, demonstrate that Luke intended to permanently deprive the owner/possessor of the documents, as there is no evidence of them being

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<sup>76</sup> *Criminal Law Consolidation Act 1935* (SA) s 131(1); *Crimes Act 1900* (NSW) s 4B.

<sup>77</sup> *Crimes Act 1900* (NSW) s 112(1)(b); s 109(1). These provisions overlap in relation to the conduct which is the focus of this problem question even though the two provisions otherwise cover a range of substantially different behaviours. Therefore, on these facts the prosecution could proceed with a charge under either provision.

<sup>78</sup> *Crimes Act 1900* (NSW) s 4(1).

<sup>79</sup> *Crimes Act 1900* (NSW) s 4(2).

<sup>80</sup> *Crimes Act 1900* (NSW) s 4(1).

<sup>81</sup> *Crimes Act 1900* (NSW) s 117.

<sup>82</sup> *Crimes Act 1900* (NSW) s 4(1) – definition of 'property'.

<sup>83</sup> *Illich v The Queen* (1987) 162 CLR 110.

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dropped by Luke or subsequently returned to the owner.<sup>84</sup> Even if Luke has taken no positive action to dispose of the documents by selling them to raise funds to repay money he owes to a local moneylender it is apparent that he took them because they looked important, removed them some distance from their original location with the intention to appropriate the property for his own use or benefit. In addition, the taking must be fraudulent or dishonest, which is defined at common law to involve some moral obloquy and would be regarded as dishonest by ordinary decent people.<sup>85</sup> The prosecution would contend that the actions of Luke in having monitored the local area, entering the Longgone house knowing it was vacant, moving through the house noting items he thought were valuable and worth taking, and ultimately grabbing the important looking documents when he was disturbed by noises coming from the front door are dishonest by the standards of ordinary decent people. The planning, surveillance, entering of a stranger's house, and taking of the documents, even though other valuable items were left behind, combine to strongly support the inference that Luke acted dishonestly in relation to this property. There is no evidence as to a belief by Luke that he had a claim of right to the property.<sup>86</sup> Rather, the inference is that Luke wanted to raise funds to pay off his gambling debts through selling the property of others. Overall, it seems the prosecution has a strong case to prove all the elements of the serious indictable offence of 'larceny' against Luke beyond reasonable doubt.

Finally, 'breaking' involves interference with the physical security of a building<sup>87</sup> and extends to opening a closed but unlocked door or window.<sup>88</sup> Luke escaped from the Longgone house by unlocking and jumping out of a window and as his interference with the physical security of the building involves unlocking a window then this final element of 'breaking out of the dwelling-house' can be proved beyond reasonable doubt. It is apparent that the 'breaking out' can be much more easily established than 'breaking in' as when Luke entered through the marginally open 'doggie door' he only moved it slightly in order to squeeze through the gap. The further opening of a door that is already ajar does not constitute a breaking<sup>89</sup> so Luke did not break and enter the house on the given facts.

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<sup>84</sup> Although note *Crimes Act 1900* (NSW) s 118, which provides that intent to return property is no defence to a charge of larceny.

<sup>85</sup> *R v Feely* [1973] 1 QB 530; *Peters v The Queen* (1998) 192 CLR 493; *Weatherstone* (1987) 8 *Petty Sessions Review* 3729 (Street CJ).

<sup>86</sup> *Fuge* (2001) 123 A Crim R 310.

<sup>87</sup> *R v Stanford* (2007) 70 NSWLR 474.

<sup>88</sup> *R v Hyams* (1836) 173 ER 196.

<sup>89</sup> *R v Smith* (1827) 1 Mood CC 178; *R v Walker* (1978) 19 SASR 532; *R v Stanford* (2007) 70 NSWLR 474.

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It is arguable that Luke could be additionally charged with the lesser offence of 'entering or remaining on any land used in connection with a building with intent to commit an indictable offence in the building'.<sup>90</sup> The focus for this offence is on Luke's conduct in approaching the rear of the Longgone house and testing several windows and doors to see if they were unlocked so that he could enter the house. It is likely that this preparatory conduct would be subsumed as part of the facts of the more serious offence analysed above but it could technically be separated. In approaching the rear of the dwelling-house and trying to open windows and doors, it is evident that Luke entered on the land behind the dwelling-house by placing his body over the boundary of the land on which the building sits.<sup>91</sup> This land would clearly be regarded as being occupied or used in connection with that residential dwelling. The indictable offence that Luke intended commit in the building would be 'larceny' given his subsequent actions within the dwelling-house of noting items he thought were valuable and worth taking before grabbing and leaving with the important looking documents. This together with the fact that Luke had to raise funds immediately to repay money he owed because of a gambling addiction would provide strong evidence of this intent. There is no evidence of any intention to commit any other indictable offence, which raises an overlap with the more serious offence under s 112(1)(b) *Crimes Act 1900* (NSW) such that the prosecution may not proceed with the lesser s 114(1)(d) charge as any conviction for that offence is unlikely to have a substantial impact upon the penalty Luke would receive when both offences relate to substantially the same course of conduct and intention.

If these events occurred in South Australia, the offence with which Luke is likely to be charged is 'serious criminal trespass in a place of residence'.<sup>92</sup> Luke committed a trespass by entering the Longgone house without the consent of the owner/possessor of the building used as a place of residence<sup>93</sup> knowing that he did not have permission to enter the property.<sup>94</sup> On the given facts it is apparent that Luke had been scoping out the local area for targets so that he could immediately raise funds to repay his gambling debts. In these circumstances it can be strongly inferred that he knew he did not have permission to enter the Longgone house particularly when his objective was take to their property and convert it to his own use. Finally it is apparent that Luke entered as a trespasser with the intention of committing a theft<sup>95</sup> on the basis of reasoning similar to that used above in relation to the intention required for the offence of 'larceny' in New South Wales.<sup>96</sup> As Luke entered the house after

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<sup>90</sup> *Crimes Act 1900* (NSW) s 114(1)(d)

<sup>91</sup> *R v Welker* [1962] VR 244.

<sup>92</sup> *Criminal Law Consolidation Act 1935* (SA) ss 168, 170.

<sup>93</sup> *Criminal Law Consolidation Act 1935* (SA) s 170(3).

<sup>94</sup> *Barker v The Queen* (1983) 153 CLR 338.

<sup>95</sup> *Criminal Law Consolidation Act 1935* (SA) s 168(1).

<sup>96</sup> See the analysis above in the two paragraphs containing notes 81 to 86.



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noticing it was vacant, there are no relevant circumstances to be considered for constituting an aggravated form of this offence.<sup>97</sup>

If these events occurred in Victoria, Luke is likely to be charged with the offence of 'burglary'.<sup>98</sup> There are no relevant circumstances of aggravation to make it likely that a charge of 'aggravated burglary' would be preferred.<sup>99</sup> Proof of the offence of 'burglary' involves the prosecution establishing beyond reasonable doubt that Luke entered a building as a trespasser with intent to steal anything in the building in question.<sup>100</sup> The Longgone house is a building within its ordinary meaning, as the word is not exhaustively defined in the legislation.<sup>101</sup> Further, based on the above analysis of the similar South Australian offence, it is apparent that the prosecution could prove that Luke entered the Longgone house as a trespasser<sup>102</sup> and that he did so with the intention to steal anything in that house, which he ultimately did by removing the important looking documents from the study.

Overall, there is a strong prosecution case in each common law jurisdiction for Luke to be charged with a burglary/housebreaking type of offence as detailed in the above analyses, particularly given that the events were all video recorded by the Longgone's security system.

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<sup>97</sup> *Criminal Law Consolidation Act 1935* (SA) ss 5AA, 170(2).

<sup>98</sup> *Crimes Act 1958* (Vic) s 76.

<sup>99</sup> *Crimes Act 1958* (Vic) s 77.

<sup>100</sup> *Crimes Act 1958* (Vic) s 76(1)(a).

<sup>101</sup> *Crimes Act 1958* (Vic) s 76(2).

<sup>102</sup> See analysis above in the immediately preceding paragraph.