**Property Checklist**

**S72 - Theft Actus Reus**

* **Appropriation s73(b)**
  + In Vic – only an act exceeding authority is appropriation
* **Property – s71(1)**
  + - Interpretation of intangible property (Oxford v Moss)
    - Things in action (Pursuant to Preddy)
* **Property Belonging to Another - S71(2)**

**Mens Rea**

* **Intention to permanently deprive**
  + INCLUDE reckless component – i.e. if you are reckless about the “borrowing” then there is intention to permanently deprive
    - “Timing Period” – return within a timely period.
  + S73(12)
    - Intention to treat as ones own regardless of the owners right
    - Must treat it respectively and appropriately
    - Borrowing or lending, period or outright undertaking
* **Dishonestly**
  + Negation definition – is NOT to be regarded as dishonest
  + S73(2)
    - Bona Fide claim of right
    - Belief they would have the others consent
    - Discovery of the lost item
      * Must take reasonable steps to find the owner
      * Langham - **A belief needs to be honest, but not reasonable**
    - Salvo, Brow and Branello – *Exhaustive* definition of the circumstances which are not dishonest. English Position is slightly different – More Utilitiy – s73(2) provides 3 instances of dishonest, BUT it is NOT exhaustive. “Jury must apply the current standards of ordinary decent people”
    - Moral Claim of Right – not dishonest

**OPD**

**Actus Reus**

* Deception s81(4)
  + Any deception by words or law
  + Intent on deceiving
  + s81(4)(b) – deception by electronic function is still deception
  + *Ray Case* – shows how easily this definition can be satisfied.
    - D ordered a meal and he intend to pay but he changed his mind, and then left without paying the bill while the waiters back was turned.
    - He was charged with OFAD, because of the inextribicable mixing of the food
    - OFAD – invasion of the debt by providing the dinner, provision of services
    - Main part of Ray – waiting until the waiters back was turned.
  + Obtaining
    - Peria – demands that a casual connection exists between the deception and the obtains
    - \*\*\*\*Would V has passed with the property if they had known the true circumstances ?
* Property – 71(1)
* BTA – s71 (2)

**Mens Rea**

* IPD s81(3)
* Dishonesty

**OFAD – s82(1)**

* **Actus Reus**
  + Deception
  + Obtains:
    - F.A – Financial Advantage
    - Don’t have to prove the financial advantage belonged to another
    - Don’t have to separately prove the IPD
* **Mens Rea**
  + Dishonesty

**Property Offences**

**4.1 Theft**

***s 72:***

1. A person steals if he ***dishonestly*****appropriates** property belonging to another with the intention of ***permanently depriving***the other of it.
2. A person who steals is guilty of theft

**4.1.1 Appropriation**

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

* **Did A assume a right of ownership? (s 73(4))**
  + Don’t need to assume all rights – only need some (*Stein v Henshall*)
  + Using the car for himself is appropriating some rights of ownership
* **Did V consent to the appropriation?**
  + Adverse interference with rights approach (usurpation of owner’s rights – *Morris*, *Baruday* - VIC)
    - Consent does not adversely effect owner’s rights, so no appropriation (Lord Roscow)
    - Deception vitiates consent (Southwell J in *Baruday*)
    - No appropriation in *Lawrence* because taxi driver only consented to correct fare – A exceeded this authority
    - Effectively conflates MR with AR elements (*Gomez*)
  + Neutral approach (any right of ownership – *Lawrence*, *Gomez*)
    - Consent irrelevant – merely exercise right of ownership
    - Only need assumption of rights – consistent with s 73(4)
    - *MacLeod* (HCA): critics *Morris* approach and *Roffel* (Vic SC); adopts *Gomez* approach – but NSW
* **Did A appropriate from a company owned by them?**
  + *Roffel* (Vic SC): *Morris* approach – consent so no adverse interference caused by misuse of the cheque
  + *MacLeod* (HCA): company separate from its officers, consent is immaterial (McHugh J), *Roffel* wrong in law (Callinan J)
    - By spending the company’s money, M appropriated it – exercised a right of ownership (spending)
* **Did A find the property?**
  + s 73(4): can still appropriate by keeping or dealing with it as owner – did A deal with it as owner?
* **Was A a bona fide purchaser of property?**
  + s 73(5): A ‘acting in good faith’?
  + Stolen property ‘transferred for value’?
  + A ‘believed himself to be acquiring’ the right?
  + If so, appropriation will not amount to theft
  + Eg, sale of cars: good title passes and A cannot be charged with theft under s 73(5)

**4.1.2 Property belonging to another**

***s 71:***

(1) Property includes **money** and all other property **real and personal** including **things in action** and other **intangible property**

* Theft of land? (see s 73(6))
* Things in action – pursuant to *Preedy*

***s 73:***

(6) **Land cannot be stolen**, or things forming a part of the land, unless

1. A has been **entrusted with some legal power** to dispose of the land owned by another, and deals with the land in breach of this trust
2. A appropriates anything forming a **part of the land** (eg, something growing on it) where he is not in possession of that land
3. A is in possession of land under a tenancy and appropriates any part of the **fixtures attached** to the land

* **Is X property?**
  + X can acquire property status if they acquire different attributes by rendering skill upon them (*Kelly*: corpse – dissection and preservation sufficient skill)
* Includes intangible property – broad:
  + - Bank accounts, electronic property, export quotas
    - Debts, trademarks
    - Stealing a telephone call? (*Akbulut v Grinshaw*)
    - ‘Call’ is not a thing – just energy – better suited to OBFAD

***s 72:***

(2) In this Division, property shall be regarded as belonging to any person having **possession** or **control** of it, or having in it any **proprietary right or interest**

* **Does X belong to another? (s 72(2))**
  + Need one of:
    - Ownership (a proprietary right or interest)
    - Possession (personal proximity)
    - Control (eg, physical or operational control)
  + Abandoned property is neither possessed nor controlled
* **Does X belong to the thief?**
  + Simultaneous rights can vest in both a third party (possession, control) and A (ownership)
  + If the third party has possession and/or control, it will be property belonging to another (*Turner*: A steals his car back from the garage)
    - Garage owner had a lien over the car: work performed but not paid for
  + *Meridith*: A’s car towed for parking violation, went to impound, broke lock on his car, and drove off with it

***s 73:***

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

**Can V be deemed to have ownership? (s 73(9))**

* + Is A obliged to deal with the property in a certain way? (eg, as trustee – may have legal and equitable ownership, but still obliged to deal with trust for beneficiary, so owned by third party) (see *Meech*)
  + *Hall*: travel agent accepting money from customer obliged to spend money on tickets, not the company

***s 73:***

(10) Where a person gets property by another’s mistake, and is under an **obligation to make restoration** (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as **belonging to the person entitled to restoration**, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

* **Did A accidentally receive X?**
  + **Did A know of the error at the time they were provided X but keep it anyway?**
    - Appropriation
    - *Milks*: A overpaid by bookmaker, knew at time of overpayment but kept dividends; theft
  + **Did A only learn of the mistake later?**
    - Not appropriation
    - However, if A keeps the benefit after discovering it, will be theft
    - *A-G (Ref) No 3 [1983]*: overpayment of salary, A discovers but does nothing about it; theft

**4.1.3 Intention to permanently deprive (IPD)**

***s 73:***

(12) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights

* **Did A borrow X?**
  + s 73(12): borrowing still evinces an IPD if the lending is ‘for a period and in circumstances’ making it equivalent to an ‘outright taking or disposal’
  + However, may not be equivalent to an outright taking if returned before V misses it, and not returned in a worthless state (*Lloyd*)
    - A took films to make pirate copies and returned within hours; no IPD
    - Film still has value (since can be shown for a fee) so the borrowing is not a taking – not returned in such a changed state that all its value is gone
* **Did A appropriate X with intention to return it?**
  + Even if A takes and returns X, if X has been deprived of its proprietary value, A has acted with IPD (*Parsons*)
    - Taking and cashing cheques
    - Cheques returned, but still IPD since worthless now
* **Was A’s intention conditional?**
  + Did A IPD only if a certain condition was met? (eg, purse wasn’t empty)
  + *Easom* (UK): A takes V’s handbag; nothing of value; returns it
    - A simply ‘on a scouting mission’ so no theft (though there was appropriation)
  + *Sharp v McCormick* (Vic): A takes car coil ($30) from employer; only planned to keep it if he could use it
    - A’s taking evinces intention to dispose of as he sees fit without regard for the rights of his employer (Murphy J)
    - Treated the return of the coil as an act at his choice and discretion
  + Distinguish *Easom*?
    - Crime was in progress in *Sharp*; less easy to draw an inference that D would have returned X (*Easom*: handbag already returned when arrested)
    - Greater separation between appropriation and intended return (work, transport to home, install, return to work), whereas *Easom* was in the space of minutes
    - A treated the coil as his own – *Easom*: handbag arguably treated as his own by taking it from the seat without permission
  + *Easom* may still be relevant – perhaps where A returns property prior to arrest
  + **Critical factor** will be whether IPD can be inferred from A’s conduct – did they **treat it as their own** to dispose of **as they please**? (If so, deem IPD: s 73(12))
    - **Can intention nevertheless be deemed?**
  + s 73(13): did A part with property to a third party in circumstances suggesting the return might not be possible? If so, A has an IPD
  + s 73(14)(a): did A steal a car or plane? If so, P need only prove that he used the craft without consent of the owner – that is ‘conclusive evidence’ of IPD
  + s 73(14)(b): same as (a) but applies to **attempt to steal**

**4.1.3 Dishonesty**

***s 73:***

(2) A person's appropriation of property belonging to another is not to be regarded as dishonest

1. if he appropriates the property in the belief that he has **in law** the **right to deprive** the other of it, on behalf of himself or of a third person; or
2. if he appropriates the property in the belief that he would have the other's **consent** if the other **knew of the appropriation and the circumstances** of it; or
3. (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs **cannot be discovered by taking reasonable steps**.

* Did A believe he had a legal right to deprive V of it?
  + Must be legal, not moral (*Salvo*)
  + Defined by reference to actual A’s belief – doesn’t matter whether A’s means used to effect the right are objectively honest, just that A in fact believed in the right (*Salvo*)
  + *Salvo* (OPD but dishonesty the same):
    - Rejects the *Ghosh* and *Feely* approach – they ‘dangerously place’ criminal liability on the ‘shifting sands of juror’s beliefs’ (and not A’s actual intent)
    - Does **not matter that A used subterfuge** to obtain what he thought he had a legal right to
    - English Position is slightly different – More Utility – s73(2) provides 3 instances of dishonest, BUT it is NOT exhaustive. “Jury must apply the current standards of ordinary decent people”
  + P must negative the existence of A’s belief in a legal right to do X at the time of appropriation (if they can’t, there is no dishonesty)
  + *Brow* (Vic): follows *Salvo* in the context of theft: s 73(2) uses a subjective test of dishonesty; not a question of fact for the jury
* *Bonollo*: again follows *Salvo*, but with a twist:
  + - Did A believe that appropriation would not cause any ‘significant practical detriment’ to V’s interests? (McGarvie J)
    - If so, will not be dishonest
  + Note *Peters*: *Ghosh* hybrid approach in fraud offence under *CA* (Cth)
    - UK approach may apply to certain offences
    - Arguable that it applies to OBPD and OBFAD, but not to theft (as a result of s 73(2))
* **Did A believe that V would consent had she known of the appropriation and its circumstances?**
  + Must be honest, subjective belief
* **Was A not a trustee, and did A appropriate in the belief that the owner could not ‘be discovered by taking reasonable steps’?**
* Native title?
  + *Galarrwuy*: see p 98

**4.1.3 Obtaining Property by Deception (OPD & OFAD)**

Must discuss both OPD and Theft if believing OPD and draw distinction for OPD. Then defendant would be charged with Theft and OPD. If no OPD, then just Theft.

***s 81 - OPD***

(1) A person who by any **deception dishonestly obtains property belonging to another**, with the **intention of permanently depriving** the other of it, is guilty of an indictable offence (10 years maximum)

***s 82 - OFAD***

(1) A person who by any **deception dishonestly obtains** for himself **a financial advantage**, is guilty of an indictable offence (10 years maximum)

* **Did A obtain property or a financial advantage?**
* **Refer to s82 and s81(3)**
* What is a financial advantage?
  + Left undefined
  + Increasing credit
  + Obtaining services and not paying for them, where it is understood they are to be paid for
  + Avoiding a debt acquired for services/goods
* *Matthews v Fountain*:
  + Passing invalid cheques allows A to OFAD
  + A retained use of employee’s services for 2 weeks, receiving services for which they deceptively avoided paying
* *Preedy*
  + Neither cheques nor electronic transfer amounting to property belonging to another
* *Fisher v Bennett*:
* A wrote bad cheques, but did not avoid their debt
* Interest owing continued to accrue
* Did not increase credit, nothing had changed
* Monies still owing, just a temporary delay in paying
* No financial advantage

***s 81:***

(2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

* **Did A obtain X?**
  + Did A get ownership, possession, or control of it?

***s 81:***

(4) Deception

1. means any deception (whether **deliberate or reckless**) by **words or conduct** as to **fact or as to law**, including a deception as to the **present intentions** of the person using the deception or **any other person**;
2. includes an act or thing done or omitted to be done **with the intention** of causing
   1. a computer system; or
   2. a machine that is designed to operate by means of payment or identification

**to make a response** that the person doing or omitting to do the act or thing **is not authorised** to cause the computer system or machine to make.

* **Was there a deception?**
  + Did A ‘deceive’ a machine (ATM/computer) to get money?
    - Use s 81(4)(b)
  + V need not have lost anything in order to have been deceived
    - Though A does need to gain property/FA
  + **‘Deliberate or reckless’**
    - Deliberately deceptive if A knows their representation is false
    - Can also be deceptive where A has knowledge of a ‘substantial risk’ that what they are representing is false (R v Smith)
  + *Smith*:
    - Cheques selectively dishonoured – randomly
    - A uses cheques to pay suppliers knowing some will be dishonoured
    - Starke J (Crockett J agreeing): **‘substantial risk’** is sufficient to be recklessly deceptive
    - Must be **actual advertence** to risk
    - Lower standard than probability (2 JJs)
  + If there is no deception and A obtains property, and assumes one or more rights of the owner, s 72 may apply
* **Who was deceived?**
  + Doesn’t matter if it was not V (*Kovacs)*
    - A third party can be deceived, causing V to render the property/FA to A
    - *Kovacs*: overspending on bank account; supposed to return chequebook; bought property, paying with cheques; bank honoured cheques and extended overdraft to cover these amounts
    - Irrelevant that bank was deceived and not storeholders
    - Bank suffered loss (overdraft) and not owners (A purchased property from them with bank’s money), but this is still deceptive
* **Did A truthfully make a representation but then falsify it through conduct? (*Ray v DPP*)**
  + **Silence** regarding A’s change of mind will amount to deception because the original representation is a continuing event
  + ***Ray:* ordering, eating, leaving without paying**
    - Dishonesty: waiting until waiter went inside before leaving
    - FA: not having to pay for the meal
    - Deception: intention to pay when eating so not deceptive; leaving after eating clearly dishonest but not deceptive
    - Lord McDermott: ordering entails representation that it will be paid for
  + The earlier representation is **continuing**, but false – so deceptive
* **Did A use a credit card?**
  + Using a CC can be deceptively where A knows they are acting without the bank’s credit or authority to pay
  + Implied representation that they are **able and authorised** to put the goods on credit (*Lambie*)
  + *Lambie*: A substantially exceeded credit limit and bank requested she return her CC
    - A continued using to purchase goods
    - Lord Roskill: OPBD more appropriate here, since A was dishonest and obtained the goods by deception
    - FA: **evasion of an expense** for which she would otherwise be immediately liable
    - Use of card entails representation that she had credit and authority to use it
    - Infer that fraud means store owner would not have allowed transaction had they known (avoid evidentiary problems – may not be able to remember)
* **Did A use a cheque?**
  + If there’s a **substantial risk** of being dishonoured, it will be deceptive (*Smith*)
  + Cheques are “things in action belonging to the victim and capable of being stolen (Parsons)
* **Was A silent?**
  + A may deceive by **being silent** about a fact
  + Where representation **falsified** by change of mind (*Ray*) or conduct (*Lambie*)
* **If s 81, is it property?**
  + s 71(1): all real and personal property including intangibles
  + s 73 exclusions **do not apply** to s 81
    - Land can be stolen, eg
* **If s 81, did property belong to another?**
  + s 71(2): ownership (proprietary or equitable interest), possession or control
* **If s 81, did A do so with IPD?**
  + Only an element of s 81 (not s 82) – same meaning as theft, and subject to ss 73(12) and 73(13)
  + However, s 73(14) does not apply – no automatic presumption IPD for cars and planes
* **Was A dishonest?**
  + Not defined; s 73(2) does **not** apply to deception offences (*Salvo*)
  + **Defence**: did A believe in a claim of right to engage in the nrelevant conduct?
    - If so, precludes dishonesty
    - Applies to both ss 81 and 82 (*Salvo*)
    - *Grout*: follows *Salvo* – need legal right (not moral)
  + *Peters*:
    - Leave dishonesty to juries, standards of ordinary decent people – objective test (applying *Ghosh*)
    - ‘The search is for A’s intent as well as actions’ (Kirby J)
    - ‘Dishonesty’ an ordinary word to be given ordinary meaning unless statute provides otherwise (McHugh J)
  + Was what was done dishonest according to **ordinary standards** of **reasonable and honest people**?
  + Must A have **realised** that his conduct was dishonest according to those standards?