



Dishonesty Offences

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Introduction

Most offences of dishonesty involve property, and the offences of stealing and fraud are the two main types of dishonesty offences. Given the vast amount of commercial and non-commercial transactions that occur daily between citizens, it is important to understand what acts constitute an offence of either stealing or fraud.

Queensland courts are prepared and desire to record criminal convictions for dishonesty offences due to the interest of employers to know about this form of criminal behaviour. It is very important that you seek legal advice if you are ever charged with an offence of dishonesty.

Main Dishonesty Offences

Most offences of dishonesty involve property. Property offences are mainly contained within the *Criminal Code Act 1899* (Qld) (Criminal Code). The major Criminal Code offences include:

- stealing (s 398)
- unlawful use of a motor vehicle (s 408A)
- fraud (s 408C)
- robbery (s 411)
- demanding property by threats (s 415)
- burglary (s 419)
- receiving tainted property (s 433)
- damage to property (ss 461, 469).

Stealing

Section 391(1) of the Criminal Code provides that a person who fraudulently takes anything capable of being stolen or fraudulently converts anything capable of being stolen to their own use (or to the use of any other person) is said to steal that property.

Fraudulence

Fraudulence is the mental element of the offence of stealing and requires a degree of intention in the act of stealing. Under s 391(2) of the Criminal Code, fraudulence is present if there is intent to:

- deprive the other person of the stolen item permanently. This is the usual case for stealing. The intention here is not satisfied if there is evidence that the defendant only had an intention to deprive the person of the item temporarily (see *R v Bailey* [1924] QWN 38)
- use it as a pledge or security
- take it on a condition about its return that the person may be unable to perform
- deal with it in a way that it cannot be returned in the same condition

- use it at the defendant's will if the property is money, even if the defendant intends to repay the other person afterwards.

Apart from satisfying one of these modes of intent, there is no additional requirement for the prosecution to prove or intend to prove that the accused acted dishonestly.

Taking or converting

The element of taking is satisfied if a defendant physically takes something and carries it away from the true owner. The slightest degree of movement can be sufficient (see *Wallis v Lane* [1964] VR 293). Section 391(6) of the Criminal Code provides that the act of stealing is not complete until the property actually moves or is otherwise actually dealt with by some physical act. In addition, taking may be a continuous act (e.g. stealing is established if someone takes an item with no intent of stealing it but then decides to keep it (see *R v Johnston* [1973] Qd R 303)).

Converting involves dealing with goods in a manner inconsistent with the right of the true owner. There must also be an intention on the part of the defendant to deny the owner's right or to assert a right that is inconsistent with the owner's right. Examples of converting include keeping something, selling it or changing its appearance.

Anything capable of being stolen

Section 390 of the Criminal Code notes that property capable of being stolen must be moveable or capable of being made moveable, even if it is made moveable in order to steal it.

The definition for property capable of being stolen is very broad. Under s 1 of the Criminal Code, property includes:

- everything animate or inanimate that is capable of being the subject of ownership
- money
- electrical or other energy, gas and water
- a plant
- an animal that is:
 - a tame animal, whether or not naturally tame
 - an untamed animal of a type that, if kept, is usually to be confined
 - an untamed animal in a person's possession or being pursued for return to possession after escape
- a thing produced by an animal mentioned above
- any other property, real or personal, legal or equitable including things in action and other intangible property (e.g. copyrights or patents).

Ownership

Demonstrating ownership is important for stealing prosecutions. Ownership has an extended meaning under s 391(7) of the Criminal Code such that possession or control of property is sufficient. Section 390 provides that the property must be owned by a person. However, if the property is owned by one or more persons, s 566(15) of the Criminal Code provides that ownership is established where evidence of such ownership is provided by one of the owners. Where ownership is unknown, a prosecution can still occur, but the Crown must prove that ownership is unknown. Ordinarily, ownership will be known, and the Crown merely needs to prove that ownership.

Lost property

Section 391(5) of the Criminal Code contains a provision for the situation where someone finds an item. In that situation, conversion will not be fraudulent if, at the time of converting it, the defendant did not know who the owner of the lost item was, and they reasonably believed the owner could not be found. However, if there were some identifying details of the owner on the property, a failure to contact the owner would constitute stealing. However, if its owner has abandoned the property, it cannot be stolen.

Penalty for stealing

The head sentence for stealing is generally five years imprisonment (s 398 Criminal Code). However, this head sentence can be increased to ten years imprisonment where the following features exist:

- the property is stolen from the person by another
- the property is stolen from a dwelling and exceeds \$1000 in value, or was taken with a threat of violence
- the property is stolen from a vehicle
- there is a relationship between the stealing and the defendant's position (e.g. public servant, clerk, servant, company director, agent or tenant)
- the value of the thing exceeds \$5000 or after previous conviction
- the property stolen is a firearm.

Where the property stolen is a firearm and is being stolen for the purpose of committing an indictable offence, or the property stolen is a vehicle, the head sentence can be increased to 14 years imprisonment. Finally, where the property stolen is a testamentary instrument (a will), the head sentence can be increased to life imprisonment.

Appropriate court

These offences are indictable offences, which must be dealt with summarily in the Magistrates Court. A defendant no longer has a right to elect to have these matters determined in the District Court of Queensland. However, in certain circumstances, where the value of the property stolen is in excess of \$30 000, there is provision for the charge to be dealt with on indictment in the District Court (s 552BA Criminal Code).

Whether the defendant is pleading guilty or not is sometimes a determining factor. Where the value of the property stolen or the detriment incurred exceeds the prescribed value of \$30 000, scope may still exist to have the matter determined summarily on a plea of guilty where the magistrate believes that they may adequately deal with the matter. Should an accused person contest the charges and the value of the property stolen or the detriment incurred exceeds the prescribed value, then the matter will be committed to the District Court.

Offences alleging aggravating features carrying a period of imprisonment of 14 years must also be dealt with in the District Court.

There is also discretion for a magistrate to order that a charge be referred to the higher court, if the magistrate is of the view that the defendant will not be appropriately punished in the Magistrates Court (s 552D Criminal Code). Magistrates can only impose terms of imprisonment up to three years.

Regulatory offences for stealing

Under the *Regulatory Offences Act 1985* (Qld) (Regulatory Offences Act), there are two main stealing offences. The first is unauthorised dealing with shop goods. Section 5 of the Regulatory Offences Act provides that it is a regulatory offence for any person, with respect to shop goods valued at \$150 or less, to:

- consume them without the consent, express or implied, of the person in lawful possession of the goods
- deliberately alter, remove, deface or otherwise render indistinguishable a price shown on the goods, without the consent, express or implied, of the person in lawful possession of them
- take the items away without discharging, or attempting honestly or making proper arrangements to discharge their debt for the goods, whether or not the property in the goods has passed to the person.

The penalty is usually a fine, and the court can also order payment of costs of the investigation, costs of court and compensation (s 9 Regulatory Offences Act). It is a defence to a charge of an offence of non-payment to prove the taking away of the goods was not dishonest.

The second offence is leaving a hotel without payment. Section 6 of the Regulatory Offences Act makes it an offence for any person who, with respect to food, drink, accommodation or like goods and services, valued at \$150 or less, obtained from any restaurant or hotel, motel, boarding house or like premises:

- leaves such premises without discharging, or attempting honestly or making proper arrangements to discharge their debt
- purports to pay with a cheque that is not met on presentation, or a credit card or similar document the person is not authorised to use.

The penalty is a fine of \$300 (subject to costs or compensation being ordered under s 9 of the Regulatory Offences Act). It is a defence to a charge of an offence of giving an invalid cheque or unauthorised credit card to prove the defendant believed on reasonable grounds the cheque would be

paid in full on presentation, or the defendant was authorised to use the credit card or similar document.

Offences under ss 5 and 6 of the Regulatory Offences Act are both determined summarily. The defences to the charges are specifically provided for in the sections, and a defendant must prove a defence on the balance of probabilities.

Fraud

Section 408C of the Criminal Code deals with the offence of fraud. Subsection 1 of this section provides that a person commits fraud if they dishonestly:

- apply to their own use or to the use of any person:
 - property belonging to another person
 - property belonging to another person, or which is in that person's possession, either solely or jointly with another person, subject to a trust, direction, condition or on account of any other person
- obtain property from any person
- induce any person to deliver property to any person
- gain a benefit or advantage, pecuniary or otherwise, for any person
- cause a detriment, pecuniary or otherwise, to any person
- induce any person to do any act which the person is lawfully entitled to abstain from doing
- induce any person to abstain from doing any act which that person is lawfully entitled to do
- make off without having paid and with intent to avoid payment, knowing that payment on the spot is required or expected for any property lawfully supplied or returned, or for any service lawfully provided.

This subsection effectively conveys the types of situations that can constitute fraud. In proving fraud, dishonesty must be established. In fact, the courts have indicated that fraudulence has been given a meaning that is interchangeable with dishonesty. To prove fraud, the defendant must have acted dishonestly by the standards of an ordinary, honest and reasonable person, and the defendant must have known that their actions were dishonest by these ordinary standards (see *Peters* (1998) 192 CLR 493).

Penalty for fraud

The sentence for fraud is five years imprisonment, but in certain circumstances it can be increased to 12 years. The increased sentence is imposed where the amount defrauded is greater than \$30 000 and if the fraud was committed by an employee or company director in the course of employment, or where the defendant had possession or control of the property in accordance with a particular obligation (e.g. a trustee).

Appropriate court

Offences of fraud will generally be determined in the District Court, but where the value of the property stolen is less than \$30 000, there is provision for the charge to be dealt with summarily in the Magistrates Court.

Specific fraud offences

In addition to the general offence of fraud, there are a number of other fraud-related offences contained within the Criminal Code. The most common offences include:

- concealing registers or records (s 399)
- fraudulently obtaining or dealing with identification material (s 408D)
- obtaining property by passing valueless cheques (s 427A)
- forgery and like offences (ss 488–502)
- personation (ss 514–515).

All of these offences attract various penalties, and the maximum penalty for each offence is contained within the relevant section of the Criminal Code.

Centrelink fraud

Centrelink is the key government agency that assists people financially. Whether you are receiving a pension, benefit or allowance, there are important obligations imposed on receivers of government money. In terms of criminal liability, the most important obligation is the duty to be honest with Centrelink and to advise them of any changes to your income. Being overpaid by Centrelink due to a failure to disclose your change in circumstances can very easily lead to criminal charges.

Centrelink fraud is committed when a person:

- knowingly gives false and misleading information to get payment(s) they should not be getting
- does not tell Centrelink information they are obliged to provide.

Fraud can be committed in a number of ways such as providing Centrelink with incorrect information on forms completed, making false statements, giving false identification or deliberately telling Centrelink the wrong information.

Given the large amount of government money that is allocated to the Centrelink system each year, Centrelink has demonstrated a strong commitment to investigating fraud. Centrelink officers investigate fraud in a similar way to police investigating crimes, for example:

- sending letters to financial institutions, employers, real estate agents and local governments to confirm current customer details. Centrelink may also contact family, friends or neighbours to confirm information the customer provides to Centrelink
- interviewing customers at a Centrelink Customer Service Centre, at home or at another suitable place

- checking income details with a customer's last or current employer, by either sending a letter directly to the employer or through the Australian Taxation Office
- using many external information sources that are available to Centrelink to check whether customers are getting the right type and amount of payment. This includes checking names, addresses, redirection information and post office box information through Australia Post, as well as contacting local councils to verify who owns property, dates of purchase and locations of properties.

Obligations

If Centrelink believes you have been overpaid, they will contact you and request an interview. It is important to get legal advice immediately. Tell Centrelink that you are not avoiding their request for an interview and you are not being uncooperative, but that you would like to get legal advice before speaking to them.

Legal advice is strongly recommended as the applicable legislation (the *Social Security Act 1991* (Cth)) is a very large and complex piece of legislation, and an allegation of fraud is very serious, which, upon conviction, can result in severe penalties including fines, probation orders or even imprisonment where large amounts of money are owed.

Upon request, Centrelink will provide you with a statement outlining the basis for their belief that you have been overpaid. This document will take the form of an account showing the amounts you have been paid by Centrelink and the amount that you should have been paid based on your income.

After receiving legal advice, a decision needs to be made about whether to participate in an interview. If you do, this interview will be recorded and can later be used in evidence against you. It is not recommended to participate in an interview unless you have a solicitor present.

If it is clear that you have been overpaid, and there is no legitimate excuse, then you are likely to be charged with Centrelink fraud. It is important to remember that forgetting to advise Centrelink about any personal changes is not a defence. Centrelink are likely to issue you with a summons to appear in court. Imprisonment can be imposed as a penalty for Centrelink fraud, so it is important to seek legal advice immediately if you are charged. Whether a custodial sentence is imposed will depend on a range of factors including how much is owed, whether you told Centrelink about being overpaid or they found out themselves and whether you have previous convictions for similar offences.

Paying Centrelink back

If you have been overpaid, it is important to make attempts to pay Centrelink back. However, paying back Centrelink will not stop you being charged criminally. Given the large amounts of people who receive Centrelink benefits, there is a strong deterrence argument to charge people who have broken the law. If you are charged and face a sentence, any restitution paid will be a strong mitigating factor on the sentence.

Robbery

Section 409 of the Criminal Code provides that the offence of robbery is created where violence is used or threatened to be used either immediately before or after the stealing of property. The actual or threatened violence may also be used to prevent or overcome resistance to the stealing of the property.

To establish the offence of robbery, the prosecution is required to prove stealing of property, and, at or immediately before or immediately after the time of the stealing, prove the use or threat to use violence to any person or property in order to obtain the thing intended to be stolen or to prevent or overcome resistance to it being stolen (s 409 Criminal Code).

To fulfil the requirements of this section, the violence or the threat of violence must be proffered for the purposes of obtaining the property sought or allowing a person to overcome resistance.

In considering the degree or amount of violence required, the courts have determined that the smallest amount of violence will be sufficient to substantiate this charge.

Penalty for robbery

Section 411 of the Criminal Code provides that a person who commits robbery is liable for imprisonment for 14 years.

There are three circumstances of aggravation that provide for a greater penalty of life imprisonment. These circumstances are:

- where the offender is armed or pretends to be armed with a dangerous or offensive weapon
- where the offender is in company of other persons
- if, at the time or alternatively immediately before or after the robbery, the offender wounds or uses any other personal violence to any person (s 411 Criminal Code).

A dangerous or offensive weapon is given a broad definition. An offensive weapon can be something that is not in common use for any other purpose than a weapon, such as a gun or sword. It may also be ordinary items which can be weapons depending on the circumstances, such as a knife, wood palings, screw drivers or hypodermic needles and syringes. Whether an item is a weapon depends on the manner in which it is used.

Appropriate court

The offence of robbery, either with or without a circumstance of aggravation, must be dealt with on indictment in the District Court of Queensland.

Unlawful Use or Possession of a Motor Vehicle

Section 408A of the Criminal Code provides an offence for unlawfully using or possessing a motor vehicle, aircraft or vessel. It is a requirement that such acts occur without the consent of the person in lawful possession thereof, and that there was an intention to deprive the owner of the use and possession either temporarily or permanently.

The person in lawful possession may not be the owner of the vehicle. It may refer to a person who has had a vehicle lent to them by an owner. It includes persons who hire vehicles or persons who are minding a vehicle on behalf of another.

‘Motor vehicle’ and ‘aircraft’ are defined in s 1 of the Criminal Code. ‘Vessel’ is defined in s 408A(3).

Penalty for unlawful possession of a motor vehicle

The offence of the unlawful use or possession of a motor vehicle carries a maximum penalty of seven years imprisonment. There are a number of circumstances of aggravation contained within the legislation. If the vehicle is used or intended to be used in the commission of an indictable offence, the maximum penalty is increased to 10 years imprisonment. However, if the vehicle or the mechanism of the vehicle is destroyed or intended to be destroyed, the maximum penalty is increased to 12 years imprisonment (s 408A Criminal Code).

Appropriate court

An offence against this section is an indictable offence that ordinarily must be dealt with summarily in the Magistrates Court. In certain circumstances, it will have to be committed for finalisation to the District Court of Queensland (ss 552BA, 552BB Criminal Code). This usually occurs where a magistrate is of the view that they cannot adequately deal with the matter (s 552D Criminal Code) or where the restitution or detriment incurred exceeds \$30 000.

Legal Notices

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