

MONEY FOR NOTHING, CHEQUES FOR FREE? THE MEANING OF ‘FINANCIAL ADVANTAGE’ IN FRAUD OFFENCES

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[This article offers a critique of the current understanding of the phrase ‘financial advantage’ in Australian fraud offences. It begins by considering the history and use of these offences, and ultimately argues that the concept embodied by the phrase is far more complex and uncertain than recent case law suggests. It examines the concept in relation to both the English pecuniary advantage offences and the additional phrase ‘any money or any valuable thing’ in the Crimes Act 1900 (NSW) s 178BA offence, and contrasts it with offences based on the causing of detriment. It is suggested that discussions of defaulting and penniless debtors in relation to the offence are misguided and that financial advantage can only occur when the accused is placed in a better position as a result of the deception, and the advantage obtained is ‘financial’ in nature.]

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I INTRODUCTION

This article considers the meaning of the term ‘financial advantage’ in a number of fraud offences in Australian jurisdictions. Part II provides an overview of

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the introduction of these offences in England¹ and Australia and the initial difficulties associated with the intended and actual interpretation of the offence. It then suggests that the offence, while initially intended to be ancillary, is now one of the key fraud offences in Australia, particularly in New South Wales. In Part III, this article examines in detail the scope of the phrase, with emphasis on the areas that have caused some difficulty for the courts. In particular, the applicability of the phrase to circumstances of defaulting debtors is examined with a critical analysis of the decision of the Victorian Court of Appeal in *R v Vasic* ('*Vasic*').² The article suggests that the approach adopted in *Vasic* is mistaken and that the approach taken in the earlier cases of *Fisher v Bennett*³ and *Coelho v Durbin* ('*Coelho*')⁴ is to be preferred. That is, that financial advantage requires evidence that the accused is in a better position than prior to the deception,⁵ and that this can be described as an advantage that is primarily financial in nature.⁶ Further legislative definition may be needed to clarify the meaning of the term.

II BACKGROUND TO AND USE OF THE OFFENCE

A *The History of Fraud Offences*

While stealing chattels has been a crime at common law since the earliest recorded times,⁷ the use of deception to obtain property or advantage is prohibited under the criminal law only as a result of legislative intervention. In earlier times, while the common law recognised crimes of cheating or defrauding the public welfare, which largely involved the use of false weights or tokens, the courts were content to leave victims of private deceptions to their civil remedies.⁸

¹ In fact, the *Theft Act 1968* (UK) c 60 and associated legislation applies to both England and Wales. At the risk of offending the Welsh, this article refers to English and Welsh legislation compendiously as English.

² (2005) 11 VR 380.

³ (1987) 85 FLR 469.

⁴ (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 29 March 1993).

⁵ See *Fisher v Bennett* (1987) 85 FLR 469, 472–3 (Miles CJ).

⁶ See *Coelho* (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 29 March 1993) 2.

⁷ See the account in Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) vol 3, 129ff.

⁸ In *R v Wheatly* (1761) 2 Burr 1125; 97 ER 746, a brewer sold 16 gallons of amber as 18 gallons. Mansfield CJ held at 1127–8; 748:

that the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.

The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this.

In 1704, Holt CJ is reported to have said: 'It is not indictable unless he came with false tokens; we are not to indict one man for making a fool of another'.⁹

However, the Industrial Revolution brought increased complexity and mobility to society, with the result that business became much more frequently conducted between strangers, which in turn, led to an increase in the need to trust statements that the victim could not be expected to verify. In order to protect the nascent economy, the British Parliament began enacting offences dealing with specific forms of deception, which over time, were replaced with broader and more general offences.¹⁰

By the consolidations of the late 19th century, the main fraud offence was that of 'obtaining property by false pretences'.¹¹ This remained the fraud offence most commonly charged throughout the 20th century¹² until the introduction of the 'obtaining pecuniary advantage by deception' offence in s 16(1) of the *Theft Act 1968* (UK) c 60.

B *The English Offence*

Initially, the Criminal Law Review Committee, on whose report the *Theft Act 1968* (UK) c 60 was based, recommended that offences of obtaining property and obtaining credit by deception be supplemented by a general fraud offence of inducing a person to do or refrain from doing an act with a view to gain.¹³ However, this offence was controversial even within the Criminal Law Review Committee¹⁴ and it was removed during debate on the Theft Bill 1968 (UK) in Parliament.¹⁵ In its place, an offence of obtaining pecuniary advantage was proposed by the government, with three indicative examples of such advantage included in the offence. During debate, the Bill was further amended by the government to restrict the offence to the three instances of advantage described. It was considered that, without such a restriction, the offence would be undesirably uncertain.¹⁶ The resulting offence was:¹⁷

⁹ *R v Jones* (1795) 1 Salk 379; 91 ER 330.

¹⁰ For historical accounts: see, eg, Jerome Hall, *Theft, Law and Society* (2nd ed, 1952) 50–2; Tom Hadden, 'The Origin and Development of Conspiracy to Defraud' (1967) 11 *American Journal of Legal History* 25. The first general fraud offence was created by the *Obtaining Money by False Pretences, etc Act 1757*, 30 Geo 2, c 24, although it was not seen as such until the decision in *Young v The King* (1789) 3 Term 98; 100 ER 475. The 19th century form (see, eg, *Larceny (England) Act 1827*, 7 & 8 Geo 4, c 29, s 53) remains substantially unchanged in the *Crimes Act 1900* (NSW) s 179.

¹¹ There were, of course, other important fraud offences, particularly that of forgery, which remains a highly prosecuted offence. For a discussion of the introduction of forgery as a serious crime: see, eg, Randall McGowen, 'From Pillory to Gallows: The Punishment of Forgery in the Age of Financial Revolution' (1999) 165 *Past and Present* 107.

¹² Over the course of the 20th century the offence was statutorily enlarged in various ways to include legal documents and false promises.

¹³ Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences*, Cmnd 2977 (1966) 44 ('*Eighth Report*').

¹⁴ See *ibid* 46–7 where the arguments against the offence by a minority of the Committee are set out.

¹⁵ It was removed by amendment at the Committee stage: United Kingdom, *Official Report*, House of Lords, 12 March 1968, vol 290, cols 157–74.

¹⁶ For a history of the offence: see Criminal Law Revision Committee, *Thirteenth Report: Section 16 of the Theft Act 1968*, Cmnd 6733 (1977) 26–34 ('*Thirteenth Report*').

16 Obtaining a Pecuniary Advantage by Deception.

- (1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
- (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where —
 - (a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced in whole or in part, evaded or deferred; or
 - (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
 - (c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.
- (3) For purposes of this section ‘deception’ has the same meaning as in section 15 of this Act.¹⁸

Difficulties with the interpretation of these specific descriptions, which were famously labelled ‘a judicial nightmare’,¹⁹ led to a review of the offence by the Criminal Law Review Committee.²⁰ The Committee recommended that s 16(2)(a) — covering the evasion or deferral of debts — be repealed and replaced with a more delineated set of offences based on the intention of the defalcating debtor.²¹ This was subsequently enacted as the *Theft Act 1978* (UK) c 31.²² By this time, however, the breadth of the new statutory theft offence had been realised by prosecutors and, with the willingness of courts to accept broad interpretations of its terms,²³ the offence of theft expanded to cover much of the territory that had previously been seen as the province of fraud.

¹⁷ The offence was recently repealed and replaced by a new regime of fraud offences contained in the *Fraud Act 2006* (UK) c 35. These offences are based on recommendations of the Law Commission of England and Wales to introduce general fraud offences based on obtaining gain or causing loss by false representation: The Law Commission, *Fraud: Report on a Reference Under Section 3(1)(e) of the Law Commissions Act 1965*, Cm 5560 (2002).

¹⁸ *Theft Act 1968* (UK) c 60, s 16. With reference to s 16(3), note that ‘deception’ was defined in s 15(4) as ‘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.’

¹⁹ *R v Royle* [1971] 3 All ER 1359, 1363 (Edmund Davies LJ). See also The Law Commission, above n 17.

²⁰ Criminal Law Revision Committee, *Thirteenth Report*, above n 16.

²¹ *Ibid* 17–18.

²² For a critical review of this history: see *R v Preddy* [1996] AC 815, 830–3 (Lord Goff).

²³ The key impetus for this development seems to have been the decision in *R v Lawrence* [1972] AC 626, which ruled that lack of consent was no longer an element of the offence.

C *The Offence in Australia*

Variants of the *Theft Act 1968* (UK) c 60, s 16 offence were introduced in Victoria in 1973,²⁴ Tasmania in 1975²⁵ and NSW in 1979.²⁶ In 1995, the offence was used as the basis for the fraud offences in s 17.3 of the *Model Criminal Code*,²⁷ and has now been adopted as part of the *Commonwealth Criminal Code*²⁸ and the Australian Capital Territory *Criminal Code*.²⁹ SA also introduced an offence with a similar effect in 2002.³⁰

The exact wording and operation of the offence varies from jurisdiction to jurisdiction. For example, in Queensland and Western Australia there is no need for the advantage to be pecuniary, and in Queensland there is also no need for a deception. This article focuses upon the approach taken by the courts in Victoria and those jurisdictions which have followed the Victorian model of obtaining financial advantage by deception — namely, NSW, Tasmania, the ACT and the Commonwealth. However, aspects of the Victorian offence inform the variants in all jurisdictions and, thus, the analysis presented may be of use in their interpretation as well.

Of course, for each jurisdiction, decisions of the respective supreme courts amount to the only binding precedents. However, given the similarity of the different versions of the offence across the five jurisdictions focused upon here, this article assumes that any relevant decision in one jurisdiction would be seen as strong persuasive precedent in the other jurisdictions. Indeed, this is borne out in the cases.³¹ Where particular jurisdictions differ from the majority form of the offence, this difference is noted.

The version of the offence that appears in the *Model Criminal Code* is indicative of the majority form. It provides that:

²⁴ *Crimes Act 1958* (Vic) s 81, amended by *Crimes (Theft) Act 1973* (Vic) s 2(1)(b).

²⁵ *Criminal Code Act 1924* (Tas) s 252A, enacted by the *Criminal Code Act 1975* (Tas) and amended by *Criminal Code Amendment (Financial Advantage) Act 1989* (Tas) s 4.

²⁶ *Crimes Act 1900* (NSW) s 178BA, enacted by the *Crimes (Amendment) Act 1979* (NSW) sch 1(4).

²⁷ See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General ('MCCOC'), *Chapter 3: Theft, Fraud, Bribery and Related Offences* (1995) 135–9.

²⁸ *Criminal Code Act 1995* (Cth) s 134.2.

²⁹ *Criminal Code 2002* (ACT) s 332. Both the Commonwealth and the ACT also have general dishonesty offences which dispense with the need to prove a deception: see *Criminal Code Act 1995* (Cth) s 135.1; *Criminal Code 2002* (ACT) s 333. For those offences, a dishonest intent to cause a gain or a loss is required. Gain and loss are defined in financial terms.

³⁰ *Criminal Law Consolidation Act 1935* (SA) s 139, amended by the *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA).

³¹ See, eg, *Vasic* (2005) 11 VR 380, 383, 386 (Nettle JA), where the Victorian Court of Appeal considered the ACT Supreme Court's decision in *Fisher v Bennett* (1987) 85 FLR 469, but ultimately, elected not to follow it. Similarly, the ACT Supreme Court in *Fisher v Bennett* (1987) 85 FLR 469, considered the Victorian Supreme Court's decision in *Mathews v Fountain* [1982] VR 1045, and distinguished it on the facts: at 472 (Miles CJ).

17.3 Obtaining financial advantage by deception

A person who by any deception dishonestly obtains for himself, herself or another any financial advantage is guilty of an offence.³²

The offence, therefore, contains three elements: (1) the use of a deception; (2) a dishonest obtaining for the defendant or another; and (3) a financial advantage.³³ In addition, the deception must be shown to have caused the obtaining.

D *Justifications for the Introduction of the Offence in Australia*

The introduction of the offence in Australia was considered first in Victoria, at a time prior to the publication of the Criminal Law Review Committee's *Thirteenth Report*³⁴ and at the height of judicial uncertainty over the meaning of s 16(2)(a) of the *Theft Act 1968* (UK) c 60. In light of these difficulties, the offence introduced in Victoria was expressed in general terms. The Chief Justice's Law Reform Committee Sub-Committee on the Law of Theft stated in its 1972 report on the draft Crimes (Theft) Bill 1972 (Vic):

the attempted definition is complex and obscure and the sub-committee considers that the concept of dishonestly obtaining a financial advantage by deception is a sufficient statement of the crime to constitute a satisfactory operative provision.³⁵

In NSW, the offence was introduced as part of a package of offences intended to deal with white-collar crime. While other offences had been recommended by a report of the Criminal Law Review Division of the NSW Attorney-General's Department,³⁶ this offence appeared in the amending Bill³⁷ without any prior indication that it was needed and with no explanation of its intended role in the Attorney-General's second reading speech.³⁸ Moreover, although the English Criminal Law Review Committee had by that time recommended amendment to the *Theft Act 1968* (UK) c 60, s 16 offence, no reference to that amendment, or the subsequent use to which the offence had been put, was made.

Thus, it appears that the difficulties experienced in attempting to confine the offence in England led to the omission of any specific restrictions in the Australian variants. It would also appear that, at least in Victoria, the removal of the restrictions on scope was justified on the basis that the offence would be merely ancillary to the main fraud offences, in particular, obtaining property by decep-

³² MCCOC, above n 27.

³³ See, eg, *R v Licardy* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Loveday AJ, Badgery-Parker and Bruce JJ, 26 May 1995).

³⁴ Criminal Law Revision Committee, *Thirteenth Report*, above n 16.

³⁵ Chief Justice's Law Reform Committee, *Law of Theft* (1972) 3.

³⁶ New South Wales, *Summary Prosecution in the Supreme Court of Corporate and 'White Collar' Offences of an Economic Nature*, Paper No 13 in *Joint Volumes of Papers Presented to the Legislative Council and Legislative Assembly and Ordered to Be Printed* (1978–79).

³⁷ Crimes (Amendment) Bill 1979 (NSW).

³⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 March 1979, 3321–8 (Francis John Walker, Attorney-General and Minister for Justice).

tion.³⁹ Such an intention appears to have long since disappeared in NSW (if it ever existed). In fact, the offence has now replaced that of false pretences as the overwhelmingly preferred fraud offence for the prosecution to charge in NSW. This is clear from statistical records of the number of convictions for fraud offences, as discussed below.

E Current Use of the Offence

In NSW, if ranked in terms of the number of convictions (including attempts)⁴⁰ recorded by the Judicial Commission of NSW, the most important fraud offences under the *Crimes Act 1900* (NSW) are:⁴¹

Section	Offence	Local Court January 2002 – December 2005	Higher Courts October 1998 – September 2005
178BA	Obtaining money etc by deception	3253	178
300	Making or using false instruments	997	101
178BB	Obtaining money etc by false or misleading statements	310	51
178B	Valueless cheques	232	5
302	Custody of false instruments etc	122	8
179	False pretences etc	48	3

The obtaining of financial advantage offence (entitled 'Obtaining money etc by deception') is thus the central NSW fraud offence. It appears that the offence is used to a similar degree in Tasmania.⁴² In SA, the new deception offences relevantly require proof of a benefit or advantage of a proprietary or financial nature.⁴³ Thus, financial benefit is likely to become a core offence.

By contrast, the offence has remained an ancillary one in Victoria, although the degree to which it is used is still significant. Data collated by Court Services at the Victorian Department of Justice identifies the number of convictions (including attempts) for obtaining by deception offences:⁴⁴

³⁹ See Explanatory Memorandum, Crimes (Theft) Bill 1973 (Vic) 8, which suggested that the offence was intended to be merely ancillary to the false pretences offence and to operate where no property had passed hands.

⁴⁰ That is, the number of persons convicted where the relevant offence was the principal offence charged.

⁴¹ This data is based on a collation of convictions by offence as recorded by the Judicial Commission of New South Wales Sentencing Information Service, *Judicial Information Research System* (25 June 2007) <<http://www.judcom.nsw.gov.au/sentencing/jirs.php>>.

⁴² Kate Warner, *Sentencing in Tasmania* (2nd ed, 2002) 346–8.

⁴³ *Criminal Law Consolidation Act 1935* (SA) s 139. Section 130 defines 'benefit'.

⁴⁴ Data provided pursuant to a request made to Court Statistical Services. See also Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 983–7.

Offence Description	Magistrates' Court 2002–05 ⁴⁵	Higher Courts 2001–05 ⁴⁶
Obtain property by deception	3135	214
Obtain financial advantage by deception	1004	213

It is likely that the *Crimes Act 1900* (NSW) s 178BA offence is so widely used because it also includes within its terms the obtaining of a valuable thing, and thus is used as both an obtaining of property offence and an obtaining of financial advantage offence. In using it so, charging police may be exhibiting a preference for the more modern formulation of the deception elements in s 178BA of the *Crimes Act 1900* (NSW) over the older false pretences/false promise formulation in s 179.

However, despite this caveat, it is clear that the offence of obtaining financial advantage is significantly used by prosecutors in all jurisdictions. As the Victorian data shows, even if there is a clear preference for charging an obtaining of property offence when available, the ‘ancillary’ financial advantage offence is still very heavily used. Indeed, in Victoria, it now accounts for a quarter of fraud-related convictions in the Magistrates’ Court, and one half of all higher court convictions. There is a strong possibility that similar charging practices will develop in the Commonwealth and the ACT and, indeed, there is no other option in SA.⁴⁷

It is, therefore, appropriate to consider the offence as one of the main fraud offences in Australia and worthy of closer analysis than it has received in recent times. This article considers the key element of the offence — what amounts to a financial advantage — and suggests that the issue is more difficult than has been generally recognised by the courts. In particular, it is argued that, contrary to the finding in *Vasic*, defaulting debtors should fall outside the scope of the offence.

⁴⁵ While data for the Magistrates’ Court is available back to 1997, this table only records data from 2002 in order to allow a degree of comparability with the NSW data. Unfortunately, the NSW data could not be broken down by year.

⁴⁶ This can be more accurately described as County Court convictions, as there was only one recorded conviction in the Supreme Court in the period (an obtaining of property conviction).

⁴⁷ The Commonwealth, ACT and South Australian offences are too recently enacted to provide any meaningful data regarding their degree of use.

III THE MEANING OF FINANCIAL ADVANTAGE

The use of the term 'financial advantage'⁴⁸ as the required outcome of the prohibited conduct marks a decisive break with older fraud offences.⁴⁹ While those offences varied in their scope and degree of specificity, they all shared a 'family resemblance' with the core offence of false pretences, which in turn can be seen as an extension or elaboration of the common law offence of larceny.⁵⁰ The false pretences offence, therefore, revolves around the obtaining of property by the accused.⁵¹ While larceny restricts larcenable property to tangible, moveable property, the definition of property in statutory false pretences or obtaining property offences extends the offences' scope to include all forms of property — including land and intangible property.⁵²

By contrast, the financial advantage offence appears to be designed to complement and go beyond concepts of property. Emphasising the break with the older fraud offences, Crawford J held in *R v Howard*,⁵³ an early Tasmanian case, that financial advantage was not a 'thing' and thus could not be 'owned', nor could an accused be required to intend to permanently deprive another of it.⁵⁴

⁴⁸ The phrase 'financial advantage' is also used beyond the offences discussed in this article. Both the Western Australian and Queensland offences refer to 'pecuniary' benefit or advantage rather than 'financial' advantage. It is unlikely that any difference between the two terms exists, particularly in light of the fact that those jurisdictions using the word 'financial' intended it to be synonymous with 'pecuniary'. This was clearly the intention in Victoria and it is assumed the other jurisdictions followed Victoria's approach in this respect: Chief Justice's Law Reform Committee, above n 35, 3. In any case, the issue is unlikely to arise because both jurisdictions refer to the benefit or advantage as 'pecuniary or otherwise', thus making otiose any argument that the word acts as a limit on the meaning of advantage. The discussion in this article on the meaning of advantage may however be apposite. For an overview of these other offences: see Alex Steel, 'General Fraud Offences in Australia' (Paper presented at the 61st Australasian Law Teachers Association Conference, Victoria University, Melbourne, 4–7 July 2006) <http://www.alta.edu.au/pdf/conference/published_papers/steel_a_2006_alta_conference_paper_general_fraud_offences.pdf>.

⁴⁹ For a comparative analysis of false pretences and obtaining financial advantage offences: see David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006) 1027–35.

⁵⁰ Other than in replacing the concept of taking without consent with a deception, the key elements are the same. The need to show an intention to permanently deprive the prior possessor of the property was implied by the courts (see *R v Kilham* (1870) LR 1 CCR 261) and has been included in the modern form of the offence in *Model Criminal Code s 17.2*: see MCCOC, above n 27, 131–3; *Criminal Code 2002 (ACT)* s 326; *Criminal Code Act 1995 (Cth)* s 134.1.

⁵¹ In its more modern form, the offence is described as obtaining property by deception.

⁵² See, eg, the definition of property in s 4 of the *Crimes Act 1900* (NSW). Some writers have suggested that the definition is too broad and should be read down to apply to only tangible moveable property: see Judge Rod Howie QC and Judge Peter Johnson SC, *Annotated Criminal Legislation New South Wales* (2005) 851. Doctrinal difficulties with the use of these offences in relation to intangible property have also arisen in recent times: see *R v Preddy* [1996] AC 815; Alex Steel and Gregory J Tolhurst, 'The Characterisation of Rights and Things as Property: *Parsons v R*' (1999) 13(2) *Commercial Law Quarterly* 32; David M Fox, 'Property Rights and Electronic Funds Transfers: *R v Preddy*' [1996] *Lloyd's Maritime and Commercial Law Quarterly* 456; Jacqueline Lipton, 'Property Offences into the 21st Century' [1999] 1 *Journal of Information, Law and Technology* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_1/lipton>; cf *R v Petronius-Kuff* [1983] 3 NSWLR 178, and its approval of *R v Arnold* (1883) 4 LR (NSW) 397.

⁵³ (Unreported, Supreme Court of Tasmania, Crawford J, 21 April 1977), quoted in *Murphy v The Queen* [1987] Tas R 178, 181 (Nettlefold J) ('*Murphy*').

⁵⁴ This decision was followed in *Woodhouse* (1981) 4 A Crim R 208 and partially approved by the Court of Appeal in *Murphy* [1987] Tas R 178. Unhelpfully, the Court in *Murphy* held that the

Despite the novelty of the concept and lack of legislative definition, courts have largely resisted detailed definition of ‘financial advantage’. It has been held to be a term of clear and plain meaning which is not to be given any narrow construction.⁵⁵ In the Tasmanian case of *Murphy*, Murphy induced people to hand over money in return for cheap electrical goods which were never delivered. It was held that, despite the breadth of the term ‘financial advantage’ and the fact that it overlapped with a number of other pre-existing offences, it was impermissible to read the term down so as not to overlap with other offences. The Court held that the term was to be given a broad construction:

We are concerned with the denotation of a term. The word ‘finance’ may cover, depending on context, inter alia, payment of a debt, or of compensation; a ransom; stock of money; borrowing of money at interest; the pecuniary resources of a state and, hence, of a company or individual; to engage in financial operations; to provide oneself with capital. [*Shorter Oxford English Dictionary*] ... The word ‘advantage’, inter alia, has the meaning of having the better of another in any respect; the result of a superior position; to benefit or profit. [*Shorter Oxford English Dictionary*] ...

By refraining from any definition Parliament avoided sophistry ... and left the law to evolve case by case by an application of the ordinary meaning of the words used.

Cases where a person obtains services, money or property by means of a bogus cheque pose no difficulty. The services, money or property amount to a financial advantage ...⁵⁶

Thus, the Court held that the term ‘financial advantage’ includes the obtaining of cash as well as other forms of intangible benefit. It was also suggested that an advantage can be conferred even if its duration is only fleeting, with Wright J suggesting that retention of goods, after payment and prior to delivery, could amount to a financial advantage.⁵⁷

There seems to be universal agreement that the offence is designed to cover the activities prohibited under the older obtaining of credit offences. Thus, it is an offence to engage in deception with a dishonest intent to *gain* credit from another⁵⁸ or to obtain credit cards.⁵⁹ So, too, is the obtaining of goods or services by the passing of cheques that are subsequently dishonoured — so-called ‘dud

rulings in both earlier cases were correct but added that ‘some of their observations are too wide and should not be followed’: at 184 (Nettlefold J); cf at 185 (Wright J).

⁵⁵ See, eg, *Walsh v The Queen* (1990) 52 A Crim R 80, 81 (O’Byrne J); *Matthews v Fountain* [1982] VR 1045, 1049 (Gray J).

⁵⁶ *Murphy* [1987] Tas R 178, 183–4 (Nettlefold J) (citations omitted), 184 (Underwood J), 185 (Wright J).

⁵⁷ *Ibid* 185.

⁵⁸ See, eg, *R v Rosar* (1999) 8 Tas R 344; *R v Keech* (2002) 5 VR 312; David Lanham, ‘Obtaining a Financial Advantage by Deception in Victoria — The Meaning of Financial Advantage’ (1977) 1 *Criminal Law Journal* 188, 190; C R Williams, *Property Offences* (3rd ed, 1999) 184. In relation to the meaning of advantage in corporate offences: see, eg, the obtaining of mortgages in *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 215 ALR 110.

⁵⁹ See, eg, *R v Elov* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips, Charles and Buchanan JJA, 14 May 1998).

cheques'.⁶⁰ The obtaining of money — whether by cheque,⁶¹ cash⁶² or electronic means⁶³ — is a clear financial advantage.⁶⁴

The obtaining of services is also considered a clear example of the gaining of a financial advantage.⁶⁵ In such cases, it is necessary to establish that the service is one offered for a price and that, but for the deception, the accused would have been required to pay.⁶⁶

However, while there are situations that might seem to fall clearly within the centre of an understanding of the term, the lack of guidance as to its boundaries continues to engender uncertainty. This article examines some of those situations.

A Property

The obtaining of property is generally considered to fall within the offence of obtaining a financial advantage by deception,⁶⁷ but the existence of other property-based deception offences and the need to establish a financial advantage leave open the theoretical possibility that the offence may not be completely coextensive with the obtaining of property.

In one sense, the offence of obtaining a financial advantage through a dealing with property is broader than the offence of obtaining property. As the financial advantage offence does not require an intention to permanently deprive anyone of property, borrowing property may fall within the offence — for example, when one hires equipment with dud cheques.⁶⁸

In another sense, the offence of obtaining a financial advantage may be narrower than the offence of obtaining property. This is because statutory forms of the obtaining property offences define property without any requirement that the

⁶⁰ See, eg, *Smith v The Queen* (1982) 7 A Crim R 437. Prior to the enactment of these offences, the passing of dud cheques or the use of fraud to gain credit was covered by specialist offences, many of which remain in force. For discussion of the role of these offences: see below Part III(D).

⁶¹ See, eg, *Itaoui v The Queen* [2006] NSWCCA 273 (Unreported, Spigelman CJ, Whealy and Howie JJ, 7 September 2006); *R v Mills* (Unreported, New South Wales Court of Criminal Appeal, McInerney and Abadee JJ, 22 July 1996).

⁶² See, eg, *Murphy* [1987] Tas R 178.

⁶³ See, eg, *R v Suteski [No 6]* (2002) 129 A Crim R 559.

⁶⁴ In NSW, such activities are generally charged as obtaining money by deception or obtaining a 'valuable thing', if obtained by means of a cheque. Cf *R v Finnie* [2002] NSWCCA 533 (Unreported, Spigelman CJ, Dunford and Howie JJ, 17 December 2002), where the obtaining of a cheque was particularised as obtaining a valuable thing, and the obtaining of credit balances in a bank account as obtaining a financial advantage. A similar practice occurs in Victoria: see *R v Jones* (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway JA and Ashley AJA, 3 July 1997).

⁶⁵ See, eg, *Murphy* [1987] Tas R 178, 184 (Nettlefold J).

⁶⁶ For example, obtaining a vehicle maintenance service. By contrast, gaining a service that is available only to persons of a certain status might not amount to a financial advantage. For example, obtaining entry to restricted parking spaces by use of false representations as to the accused's identity might be seen as a service that cannot be purchased and, therefore, the advantage is not one that is financial.

⁶⁷ See, eg, Lanham, above n 58, 190; C R Williams, above n 58, 185; Ian D Elliott, "'Obtaining a Financial Advantage by Deception' — A Comment" (1978) 2 *Criminal Law Journal* 18, 19.

⁶⁸ But there may remain issues as to causation: see, eg, *Clemesha v The Queen* [1978] WAR 193.

property be of value.⁶⁹ In essence, property is deemed to have value. This can be contrasted with the approach to property in the common law offence of larceny.

To establish larceny, the property taken has to be of sufficient value for the taking to be criminal, the emphasis of the law being that larceny protects economic interests, not mere sentimental attachments. The exact amount of value required was historically uncertain and, consequently, the history of larceny is littered with arcane arguments over the question of whether paper documents have any value.⁷⁰ The requirement that the property be of some value caused problems for documents evidencing property rights or contracts. While value was found to exist in the physical paper of a cancelled banknote⁷¹ and a cancelled cheque,⁷² the courts considered the physical nature of these documents to be insignificant and the real value to be in the chose in action it evidenced. Thus there could not be larceny in the theft of mere documents.⁷³ In the case of animals, those that had no economic value — that is, were not domesticated or edible — were considered to be of a ‘base nature’ and not larcenable.⁷⁴

Thus it would seem that, if an accused is charged under a statutory obtaining of property offence, no evidence as to the value of the property is required. However, if an accused is charged instead under the financial advantage offence, evidence of value might need to be established, bringing into play some of the issues confronted in the old larceny cases.⁷⁵

B *Money or Valuable Thing*

Unlike the versions of the offence in other jurisdictions, the NSW offence also contains the phrase ‘any money or any valuable thing’.⁷⁶ It is somewhat surprising that this expression re-emerged in NSW in the ‘modern’ offence, as it does not appear in either the Victorian or Tasmanian offences. As the NSW offence is based on the Victorian offence, there is an argument that financial advantage was intended to refer to forms of advantage that were not money, property or a valuable thing. Another argument is that there may be some distinction to be

⁶⁹ This is also the case for the statutory false pretences offence.

⁷⁰ See, eg, *R v Watts* (1854) Dears 326; 169 ER 747.

⁷¹ *R v Clark* (1890) 168 ER 749.

⁷² *R v Perry* (1845) 1 Car & Kir 725; 174 ER 1008.

⁷³ See, eg, *R v Greenhalgh* (1854) Dears 267; 169 ER 722 (order for payment); *R v Williams* (1852) 6 Cox CC 49 (conveyance and mortgage deeds); *R v Powell* (1852) 2 Den 403; 169 ER 557 (mortgage deeds).

⁷⁴ 1 Hale PC 512:

Larceny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, gray-hounds, bloodhounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, &c or their whelps or calves, because, tho reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c made tame, which, tho wild by nature, serve for food.

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

⁷⁵ As discussed below, there is a temptation for courts to assume value without measuring it.

⁷⁶ *Crimes Act 1900* (NSW) s 178BA.

drawn between a valuable thing and property.⁷⁷ However, it is unlikely that such arguments would find favour with the courts.⁷⁸

'Money' is defined in s 4 to include 'all coined money, ... and all bank notes or instruments ordinarily so called, if current as such, and payable to the bearer.' In interpreting the meaning of money in s 178A of the *Crimes Act 1900* (NSW), another fraud offence using the term in a similar way, the NSW Court of Criminal Appeal held in *R v Hunt*:⁷⁹ 'In general speech the sum of money entered in the books of the bank standing to the credit of a customer is described as money. Mainly, only lawyers and tax accountants speak or think of choses in action.'⁸⁰ The Court held that the term should be interpreted according to the 'ordinary meaning of money'⁸¹ and was not confined to the definition in s 4. This avoids the need to consider the detailed elaboration of the term in banking law but has the potential to create doubt as to its breadth. However, in the Tasmanian case of *Murphy*, the appellant argued that financial advantage did not include money.⁸² This argument was rejected by the Full Court of Criminal Appeal of Tasmania,⁸³ and so, it could be contended that 'financial advantage' in NSW already includes money, thus avoiding any need to rely on the interpretation of the term 'money' itself.

The second term in s 178BA — 'valuable thing' — is a somewhat vague concept. It is often used by prosecutors when charging the obtaining of cheques⁸⁴ or other tangible forms of property, such as a memorandum of transfer of land.⁸⁵ It appears to have been sourced from older offences that predate the use of a compendious definition of property.⁸⁶ Its exact meaning in its historical context is unclear, as there does not appear to be any case law that examined its meaning. It may have been a commonsense term based on the classification of property into things in possession and things in action. If 'thing' was shorthand for the primary category of things in possession, the phrase may have been intended to mirror the scope of larcenable property — that is, to those chattels that were of some value.⁸⁷

⁷⁷ Such arguments would depend upon the application of the principles of *noscitur a sociis* and *eiusdem generis*: *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629, 639 (Starke J); *R v Regos* (1947) 74 CLR 613, 622–3 (Latham CJ).

⁷⁸ Cf the approach taken in *R v Heavener* (1933) 33 SR (NSW) 101 in relation to s 178A of the *Crimes Act 1900* (NSW).

⁷⁹ (1996) 88 A Crim R 307.

⁸⁰ *Ibid* 317 (Smart J). See also at 308 (Hunt CJ at CL), 330 (Simpson J).

⁸¹ *Ibid* 317 (Smart J).

⁸² [1987] Tas R 178, 182 (Nettlefold J).

⁸³ *Ibid* 182–4 (Nettlefold J).

⁸⁴ Cf *R v Leon* [1945] KB 136.

⁸⁵ See, eg, *Kron* (1995) 78 A Crim R 474.

⁸⁶ The phrase 'money or valuable thing' appeared in the English *Gaming Act 1845*, 8 & 9 Vict, c 109, ss 17–18 and 'goods or valuable thing' was used in the English *Forgery Act 1913*, 3 & 4 Geo 5, c 27, s 18(1).

⁸⁷ In relation to the depositing of valuable things for gaming purposes, there are suggestions that a valuable thing includes items such as gold cups: see, eg, *Strachan v Universal Stock Exchange Ltd* [1895] 2 QB 329, 332 (Smith LJ). On the other hand, there are cases that accept that a 'mere form' can be a valuable thing: see, eg, *R v Governor of Brixton Prison; Ex parte Stallmann* [1912] 3 KB 424, 440 (Phillimore J).

While this is merely speculative, the only NSW decision on the meaning of the term hints at a similar analysis. In *R v Love*,⁸⁸ the Crown alleged that Love procured the transfer of land (held by his son) into the name of a person who was unaware of the transfer so that he could thereby gain ‘control over [the] property’⁸⁹ — that is, conceal his interest in it, but at the same time procure such dealings with it as he chose. The Court of Criminal Appeal held:

We cannot accept that such a state of affairs is a ‘thing’ within the meaning of s 178BA. In its widest sense the word ‘thing’ may include all matters which may be the object of thought. Thus, a state of affairs may be described as ‘a good thing’. This sense was considered and rejected, for example, in *Re Keyes* (1884) 5 LR (NSW) 359. In its present context the word is used in a narrower sense. The ‘thing’ must be capable of being ‘obtained’. Similar contextual considerations were decisive in *Grant v The Queen* (1981) 147 CLR 503 where the High Court held that the words ‘any thing’ in s 40 of the *Summary Offences Act 1970* did not include credits in bank accounts: see also *R v Bennett* [1961] NZLR 452 but compare *Hardy v The Queen* (1980) 25 BCLR 362; *R v Stewart* (1983) 149 DLR (3d) 583 and *R v Scallen* [1974] 4 WWR 345 at 377. Whether the word ‘thing’ in s 178BA is limited to tangible objects or entities, or whether it also includes rights, it does not, in our view, extend to a state of affairs of the kind referred to by the expression ‘control of the (Dapto) property’ in the present case.⁹⁰

There has been no further judicial elaboration of the meaning of the term ‘valuable thing’. Its historic use, and the possibility that it is limited to tangible objects or entities, suggests that the term is in many ways an obscure reference to tangible property. However, unlike the obtaining property offence, it would seem to require proof that the thing is in some way valuable. The concept of value here, may extend beyond simply financial value and so may amount to a broader basis upon which to found liability than the obtaining of a financial advantage. Additionally, once value is established, there is, as for the obtaining of property offence, no need to establish that the thing in any way constitutes an advantage to the accused. For example, if an accused obtains a stored-value card, such as a rechargeable mobile phone SIM card, but does not know the password to be able to use the card, the card could easily be shown to be a valuable thing but there might be significant difficulty in establishing how the accused has in any way personally obtained a financial advantage.

C *Gambling and Unenforceable Debts*

The obtaining of credit in relation to wagers is also an area of some complexity because of the role of legislative schemes controlling gambling. For example, s 56 of the *Unlawful Gambling Act 1998* (NSW) deems all contracts related to unlawful gaming to have no effect and not to give rise to legal rights. Thus, deceptions which result in the acceptance of unlawful bets for credit may not

⁸⁸ (1989) 17 NSWLR 608.

⁸⁹ *Ibid* 611 (Gleeson CJ, Newman and Loveday JJ).

⁹⁰ *Ibid* 617 (Gleeson CJ, Newman and Loveday JJ).

breach the offence of obtaining a financial advantage by deception.⁹¹ Nevertheless, deception in gambling is prohibited under a separate regime of offences in the *Unlawful Gambling Act 1998* (NSW).⁹²

Similarly, in Tasmania, it was held in *R v Rosar*⁹³ that obtaining credit to place bets with a totalisator agency does not amount to obtaining a financial advantage because credit betting is not permitted under the *Racing and Gaming Act 1952* (Tas) and, thus, the contract is unenforceable. In that case, Slicer J referred to English decisions on whether unenforceable debts could amount to a financial advantage and held that there was a fundamental distinction between the English and Australian offences:⁹⁴

The *Theft Act*, s 16(2)(a), provided: 'any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred.'

In relation to which Megaw LJ said at 1047:

It is to be observed that, by the words of s 16(2)(a), the debt is not necessarily legally enforceable. It was, in the view of this court, clearly open to the jury to find, having been correctly directed in this respect, that there was a debt.

The *Code*, s 252A, contains no equivalent provision. No enforceable future debt or contract was created by the conduct of the accused. The dishonest conduct of the accused did not create an existing or potential enforceable benefit. Absent evidence from [the totalisator agent] that, notwithstanding the provisions of the *Racing and Gaming Act 1952*, s 57K(3), she would have paid out moneys in the event of a successful wager, there is no basis upon which a jury, properly instructed, could conclude that the accused received an advantage, either immediate or potential. An essential ingredient of the crime has not been made out.

This decision suggests that no financial advantage will accrue in any circumstance where the basis on which the advantage arises is illegal, unless further evidence is adduced showing that the victim is willing to act irrespective of the legal situation. Similar considerations would no doubt apply to circumstances where a contract has been entered into as a result of a false representation.

This, in turn, suggests that it is not correct to assume financial advantage merely from the apparent existence of a contractual agreement or undertaking of some kind.⁹⁵ Rather, further evidence of both the legal basis of the arrangement and the intention of the parties is necessary in order to determine if there is any

⁹¹ By contrast, it is possible in Queensland to be convicted of obtaining credit in order to place Keno wagers: *R v Seymour* [2004] QCA 19 (Unreported, McMurdo P, Davies JA and Mackenzie J, 13 February 2004). Credit falls within the extended definition of property in s 408C(3) of the *Criminal Code 1899* (Qld).

⁹² Credit betting by totalisator licensees is prohibited in NSW: *Totalizator Act 1997* (NSW) s 81; cf *R v Rosar* (1998) 8 Tas R 344.

⁹³ (1998) 8 Tas R 344.

⁹⁴ *Ibid* citing *R v Aston* [1970] 3 All ER 1045, 1047 (Megaw LJ).

⁹⁵ It may be the case that a voidable contract creates a financial advantage until voided, but that one which is void ab initio does not. That advantage accrues from the performance of contracts is well established in commercial contexts: see, eg, *R v Donald; Ex parte A-G (Qld)* [1993] 2 Qd R 680.

financial advantage. This is particularly the case in relation to the evasion of debts.

D *The Difficult Issue: The Evasion of Debts and the 'Penniless Man'*

The older obtaining credit offences were worded in such a way as to make it clear that they did not extend to the deceptive evasion of the payment of a debt. They were only applicable to the initial obtaining of a debt, not any subsequent evasion of payment.⁹⁶ Further, one could not in any event be found guilty of obtaining credit by fraud if one attempted to pay a debt by passing a dud cheque. In *Tilley v Official Receiver in Bankruptcy*,⁹⁷ the High Court held that passing a dud cheque was in fact a conditional payment of the debt which was later rejected by the paying bank. Consequently, no credit was asked for or obtained by such an action.⁹⁸ It was a fraud, but not one that obtained credit.

Perhaps in light of this history, there was disagreement in a series of English cases as to whether the passing of such cheques under the *Theft Act 1968* (UK) c 60, s 16 offence amounted to the obtaining of a financial advantage because it afforded the accused further time in which to make the payment.⁹⁹ This disagreement was resolved by the House of Lords in *Director of Public Prosecutions v Turner* ('*Turner*')¹⁰⁰ in favour of such representations amounting to a financial advantage. However, the decision was based on the wording of the English offence which defined 'pecuniary advantage' to include the evasion of an antecedent debt.¹⁰¹ Following this decision, the offence was amended to remove the subsection referring to evasion of debts, and later replaced with s 2(1)(b) of the *Theft Act 1978* (UK) c 31, which made it clear that the passing of dud cheques to evade payment of a debt was not criminal unless it was done with intention to permanently evade payment.

A second issue which arose during argument in *Turner* was whether the financial situation of the debtor could affect his or her criminal liability. In other words, is there a difference between a person who chooses not to pay the debt because they prefer to use their available funds for other purposes (such as accruing interest in a bank account) and a person who avoids payment because they have no funds with which to pay and are hoping to avert bankruptcy?

⁹⁶ This appears to be clear on the wording of the offences, but there are no cases on the point: see Criminal Law Revision Committee, *Eighth Report*, above n 13, 43.

⁹⁷ (1960) 103 CLR 529.

⁹⁸ See *ibid* 532, where Dixon CJ stated that: 'Prima facie when a cheque is taken for the price of goods, or for that matter in respect of any other debt contracted, it operates as conditional payment. The condition is that the cheque be paid on presentation: if it is dishonoured the debt upon the original consideration revives.'

⁹⁹ See, eg, *R v Locker* [1971] 2 QB 321 ('*Locker*'); *R v Page* [1971] 2 QB 330; *R v Fazackerley* [1973] 2 All ER 819; *R v Turner* [1973] 2 All ER 828.

¹⁰⁰ [1974] AC 357.

¹⁰¹ Section 16(2)(a) of the *Theft Act 1968* (UK) c 60 defined pecuniary advantage to include situations where 'any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred'. No such definition forms part of the Australian versions of the offence.

Indeed, it had been suggested by the Court of Appeal that the latter might not be able to obtain any financial advantage at all.¹⁰²

In Australian jurisdictions, the offence does not contain any definitional section stating that an evasion of a debt amounts to a financial advantage, or any mention of the need for an intention to permanently avoid payment. The issue has thus had to be resolved by the courts through elaboration of the meaning of the phrase 'financial advantage' itself.

1 *Parliamentary Intentions*

Recently, in the Victorian decision of *Vasic*, the Court of Appeal drew on the history of the introduction of the offence in Victoria to hold that there was a legislative intent that the offence be at least as wide as the *Theft Act 1968* (UK) c 60, s 16 offence, and thus, although the evasion of a debt was not included in the statutory wording of the offence, the Court should effectively imply all of the English definitions into the scope of the offence.¹⁰³

This approach means that any dishonest evasion of a debt by deception in Victoria falls within the offence. Nettle JA held:

Thus as I read the Committee's report and the explanatory memorandum, 'financial advantage' was thought to be a broader notion than 'pecuniary advantage', and so to cover at least all of those things embraced in the extended definition of 'pecuniary advantage' in s 16(2) of the *Theft Act*, and an exhaustive definition of the kind contained in s 16(2) was eschewed lest it be taken to limit ordinary conceptions of financial advantage. If that be so, it can scarcely be doubted that s 82 was intended to have an operation as broad as s 16 of the *Theft Act*, if indeed not broader.

At least, in as much as s 82 was enacted in the belief that 'the English reform [had] proved highly successful in practice', and with evident approval of the way in which 'the English courts [had] shown a determination to interpret the new provisions according to their letter and spirit, and to discourage attempts to introduce into the new law the technicalities that disfigured the old' and in the hope that the English decisions would 'be readily available as precedents and guidance for our own courts', I conclude it was intended that the decisions of the House of Lords in *Turner's* case and *DPP v Ray* should apply as much to s 82 as they do to s 16 of the *Theft Act*.¹⁰⁴

The difficulty with this is that the decisions in *Turner* and *Director of Public Prosecutions v Ray*¹⁰⁵ were handed down after the enactment of the Victorian offences, and therefore could not have been contemplated by those responsible for drafting the offences.¹⁰⁶ At the time of the drafting of the Victorian offences,

¹⁰² See *R v Turner* [1973] 2 All ER 828, 830 (Lord Widgery CJ): 'If a penniless man owes a debt of £100 which he has no prospect of being able to pay, how does he evade that debt by giving the creditor a worthless cheque?'

¹⁰³ (2005) 11 VR 380, 386 (Nettle JA).

¹⁰⁴ *Ibid* (citations omitted).

¹⁰⁵ [1974] AC 370 ('*Ray*').

¹⁰⁶ *Turner* and *Ray* were both handed down on 25 July 1973. The amending *Crimes (Theft) Act 1973* (Vic) was introduced into Parliament on 13 December 1972, passed both Houses on 12 April 1973 and assented to on 17 April 1973. No mention of these issues is made in the reported debates. *Locker* [1971] 2 QB 321 was at the time the leading case, and it held that passing a dud

the English authorities were grappling with the meaning of the terms ‘evasion’ and ‘deferment’, but had not made findings on the general meaning of the term ‘pecuniary advantage’.¹⁰⁷ The issue of the penniless person had not yet been ventilated.¹⁰⁸

Further, it seems that the British Parliament itself did not intend that the offence should extend to the evasion of a debt by the passing of a dud cheque. The Criminal Law Revision Committee, when asked to review the wording of the offence, discussed the debates over the Theft Bill 1968 (UK) in the British Parliament and concluded: ‘Thus Parliament appears to have assumed that section 16(2)(a) would not penalise the debtor who gave a worthless cheque unless the deception resulted in the obtaining of property or the performance of services.’¹⁰⁹

However, in *Turner*, the House of Lords held that s 16(2)(a) of the *Theft Act 1968* (UK) c 60 did in fact extend to this situation, but not because the evasion of a debt by the passing of a dud cheque was included within the term ‘pecuniary advantage’. As Lord Reid put it:

It is clear that [the offence] was intended to widen the scope of the existing law, but I cannot deduce from its terms or from anything else in the Act any clear indication of the extent of the change which was intended.

As the section creates a criminal offence it must not be loosely construed. Each word must be given its ordinary or natural meaning. It may be permissible, where necessary, to give to some word a secondary meaning of which it is reasonably capable in ordinary speech. But we must not substitute for any word some other word or phrase or write in anything which is not there. ...

On the view which I take of sub-s (2) we do not have to consider what is meant by pecuniary advantage.

But sub-s (2) requires meticulous examination and analysis. I think we must proceed by examining each important word in it. The first part is drafted in an unusual way. Does it mean that in the cases set out in heads (a), (b) and (c) a pecuniary advantage is to be deemed to have been obtained, so that it is irrelevant to consider whether in fact any such advantage was obtained, and equally irrelevant to prove that nothing in the nature of pecuniary advantage was in fact obtained by the accused? I think that that must be its meaning though I am at a loss to understand why that was not clearly stated. ‘Is to be regarded as obtained’ must, I think, mean ‘is to be deemed to have been obtained’ even if in fact there was none.¹¹⁰

cheque did not amount to obtaining a pecuniary advantage. *R v Fazackerley* [1973] 2 All ER 819, which held otherwise, was handed down on 16 March 1973 but was doubted. *Locker* was followed by the Court of Appeal in *R v Turner* [1973] 2 All ER 828, handed down on 29 March 1973.

¹⁰⁷ The relevant cases were: *R v Page* [1971] 2 QB 330; *Locker* [1971] 2 QB 321.

¹⁰⁸ It first appeared in Lord Widgery’s judgment in *R v Turner* [1973] 2 All ER 828, 830–1, on 29 March 1973.

¹⁰⁹ Criminal Law Revision Committee, *Thirteenth Report*, above n 16, 7–8. The *Thirteenth Report* points out that a proposal to insert a specific offence of a debtor passing a dud cheque was withdrawn after the Solicitor-General argued that it was not necessary to make such actions criminal: at 8.

¹¹⁰ *Turner* [1974] AC 357, 364–5.

Thus, whether the evasion of a debt was in fact a financial advantage did not need to be decided by the Court. The evasion of a debt was only held to fall within the offence in *Turner* as a result of the peculiar deeming effect of s 16(2)(a) of the *Theft Act 1968* (UK) c 60. Furthermore, the decision in *Turner* in no way suggests that the British Parliament intended that the evasion of a debt by the passing of a dud cheque should fall within the scope of the offence. In fact, the undesirability of the outcome in *Turner* can be seen by the response of the British Parliament, which was to ask the Criminal Law Revision Committee to review the offence and to follow its recommendation to repeal the offence and replace it with a narrower one.

The *Theft Act 1978* (UK) c 31 replaced s 16(2)(a) of the *Theft Act 1968* (UK) c 60 with the following:

2 Evasion of liability by deception

- (1) Subject to subsection (2) below, where a person by any deception —
 - (a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own liability or another's; or
 - (b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment; or
 - (c) dishonestly obtains any exemption from or abatement of liability to make a payment;
 he shall be guilty of an offence.
- (2) For purposes of this section 'liability' means legally enforceable liability; and subsection (1) shall not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or admission.
- (3) For purposes of subsection (1)(b) a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is to be treated not as being paid but as being induced to wait for payment.
- (4) For purposes of subsection (1)(c) 'obtains' includes obtaining for another or enabling another to obtain.

The Criminal Law Revision Committee, in recommending reform, commented: 'Where a debtor obtains by deception further time to pay a debt, this should be an offence only if the debtor intends never to pay the debt.'¹¹¹

Committee members Sir Rupert Cross¹¹² and Professor Glanville Williams even dissented from this proposal, with the latter arguing that such actions by a debtor were stupid but not criminal.¹¹³ He pointed out that it seemed strange to

¹¹¹ Criminal Law Revision Committee, *Thirteenth Report*, above n 16, 17.

¹¹² *Ibid* 13.

¹¹³ *Ibid* 19–21.

penalise a preliminary step of engaging in a deception when the intended result of not paying the debt was of itself not criminal.¹¹⁴

The effect of this discussion is to place into some doubt the assertions as to legislative intent that Nettle JA gleans from the explanatory memorandum. In any event, one can question whether reliance on inferences from explanatory memoranda to Bills is a strong basis on which to define the meaning of terms if the meaning is not a commonsense one. Further, courts in jurisdictions other than Victoria may not be as confident that their jurisdiction's offence was introduced with the same intention.¹¹⁵

2 *The Meaning of Financial Advantage*

A majority of the Court in *Vasic* also held that, regardless of legislative intent, the evasion of a debt falls within the general meaning of financial advantage, relying on previous Victorian decisions and referring to academic commentary.¹¹⁶ It is suggested that such an approach is more sustainable than focusing upon legislative intent. Indeed, if it appears that an evasion of a debt falls outside the ordinary meaning of financial advantage, a pious hope on the part of the legislature that they were re-enacting the English offence would be insufficient to imply the subsections.¹¹⁷

(a) *Academic Discussion*

The debate in Australia over whether evasion amounts to a financial advantage was begun by Professor David Lanham and Ian Leader-Elliott. Lanham argued that the idea that a penniless debtor obtained a financial advantage by avoiding being pursued by the creditor would force the courts to determine whether there was in fact any likelihood that the creditor would bring the matter to court to enforce the debt, or at least whether the accused believed that this was the case.¹¹⁸ The reason he stated the issue in this way was because, not only must an advantage be obtained, but it must also be a financial one. Thus, the question of whether any advantage accruing from the evasion was financial could only be determined on the basis of the likely financial implications of the evasion. To limit this form of enquiry, Lanham turned to the issue of whether the evasion was 'unilateral' or 'bilateral' — an issue that was discussed in *Turner*.¹¹⁹ Bilateral evasions occur when the debtor induces the creditor to defer or forgive the debt. Unilateral evasions occur when this does not happen, such as when a dud cheque is passed. Lanham argues that the offence should only cover bilateral evasions, and not extend to unilateral ones, because it is only under the former that the debtor actually gains a financial advantage vis-a-vis the creditor.¹²⁰

¹¹⁴ *Ibid.*

¹¹⁵ Interestingly, the ACT had a specific offence of evading a debt in s 106 of the *Crimes Act 1900* (ACT) until repealed by *Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Act 2004* (ACT) sch 3 pt 3.2 amdt 3.7.

¹¹⁶ (2005) 11 VR 380, 384–5 (Nettle JA). See also at 387 (Vincent JA), 388 (Cummins AJA).

¹¹⁷ By contrast to the approach taken in *Vasic*: see *R v Lo Presti* (2005) 158 A Crim R 54.

¹¹⁸ Lanham, above n 58, 192–3.

¹¹⁹ [1974] AC 357, 366 (Lord Reid).

¹²⁰ *Ibid* 193.

Leader-Elliott argued that the distinction between unilateral and bilateral evasions is important insofar as determining advantage.¹²¹ He suggested that if the evasion is bilateral, this is in itself sufficient proof of a financial advantage to the debtor.¹²² The rights forgone by the creditor amount to the advantage gained by the debtor. However, in unilateral evasions, it is necessary to provide further evidence that the evasion caused a financial advantage to accrue.¹²³

(b) *Case Law*

In the Victorian case of *Matthews v Fountain*,¹²⁴ the accused gave a cheque he knew would be dishonoured to an employee as a putative payment of wages. When it was dishonoured, he induced the employee to continue working for another month by admitting to financial difficulties and promising to make good the payment (which he never did). On appeal, Gray J held that financial advantage was obtained by inducing the employee to continue working, but provided obiter dicta as to the broader issues:

In my opinion, however 'penniless' a person may be, he derives a financial advantage by evading an antecedent debt, for however short a period. In one sense it can be said that he obtains 'credit' or time to pay. The proffering of a valueless cheque is equivalent to proffering counterfeit bank notes. He fobs off the creditor and gains time to pay. The fact that he may, in a given case, be unable to pay is, in my opinion, irrelevant. He is relieved for the time being of being harried by the creditor by legal proceedings or otherwise. If the observations of *Widgery, LJ* are valid, they would apply equally to the case of a man who, although having the means to pay, has resolved not to do so. It could be said that such a person has not evaded the debt or obtained any financial advantage by his deception. In this connection, one may ask rhetorically — 'Why is the valueless cheque proffered?' It is clearly tended to confer some advantage upon the person practising the deception. Equally clearly, in my opinion, it is a financial advantage.

The matter can be looked at another way. By proffering a valueless cheque, the profferor is falsely representing that it is a valid cheque. If the representation had been true, the profferor would lose the amount of the cheque, upon its presentation. In the case of the false representation he loses nothing upon the presentation of the cheque. He thus obtains a financial advantage by reason of the deception.¹²⁵

Essentially, Gray J was suggesting three bases on which financial advantage could exist. It could arise by: (1) the gaining of any extension of time in which to pay; (2) the avoidance of being harried by the creditor; or (3) the avoidance of the financial detriment involved in actually paying the debt.

¹²¹ Elliott, above n 67.

¹²² *Ibid* 22.

¹²³ While agreeing with Lanham that only bilateral evasions should be within the scope of the offence, Leader-Elliott also suggested that passing dud cheques could be seen as a bilateral evasion because, under the general rules governing payment of debts, a debtor is obligated to make payment by legal tender unless the creditor agrees otherwise. Accepting payment by cheque is such an agreement and therefore the evasion is bilateral: *ibid* 24–5.

¹²⁴ [1982] VR 1045.

¹²⁵ *Ibid* 1049–50.

By contrast, in the ACT case of *Fisher v Bennett*,¹²⁶ no advantage was found to have arisen in the gaining of an extension of time in which to pay. Having borrowed money from Langridge, Fisher failed to repay it by the agreed date. After repeated demands from Langridge, Fisher handed over a cheque for the amount, which was dishonoured. The trial magistrate held that the circumstances in which the cheque was passed amounted to deception, in that Fisher acted 'recklessly, with indifference as to whether the cheque would or would not be met upon presentation'.¹²⁷ On appeal Miles CJ held:

I do not think that it is necessary to resort to dictionary definitions of the word 'financial' or the word 'advantage'. I think that it is inescapable that an advantage involves a particular situation which is more beneficial to the person concerned than another relevant situation with which it is compared. A financial advantage involves a situation which from the financial aspect is more beneficial than another situation. When one speaks of obtaining a financial advantage by deception, there is imported in my view the notion of improving a financial situation by means of that deception. I am unable to see on the facts of the present appeal how it can be said that the appellant's financial situation was improved by his holding out to Mr Langridge by means of the valueless cheque, that there were sufficient funds in the account to discharge his debt to Mr Langridge. M S Weinberg and C R Williams in *The Australian Law of Theft* (1977) observe at p 145 that forbearance to sue on the part of the cheated creditor, even if only temporary, is itself a financial advantage. There was no forbearance in the present case. There was no reducing or forgiving the debt. Interest continued to accrue.

It was submitted on behalf of the prosecution that the appellant, by passing the valueless cheque, obtained the continuing benefit of the money that Mr Langridge had previously lent him. This may be correct but I am unable to see how the retention of the continuing benefit on the facts of the case constitutes a financial advantage in any proper sense of that term.¹²⁸

Here, Miles CJ was conceptualising financial advantage as an improvement in one's financial situation, rather than its mere maintenance, as Gray J had suggested.

Recently, the Victorian Court of Appeal in *Vasic*,¹²⁹ after considering these two approaches and the arguments of Lanham, upheld the approach in *Matthews v Fountain*. However, in so doing, the Court appears to have misconceived the issues at stake by conflating the issue of the penniless person with the question of whether financial advantage is obtained. As Leader-Elliott pointed out, the issues are separate.¹³⁰ Whether a penniless person can obtain a financial advantage by delaying payment is one question. Whether delaying payment amounts to a financial advantage is another. If delaying a debt is not of itself a

¹²⁶ (1987) 85 FLR 469.

¹²⁷ Ibid 470 (Miles CJ).

¹²⁸ Ibid 472–3 (Miles CJ).

¹²⁹ (2005) 11 VR 380. In this case, Vasic had made a number of purchases on credit and had left a dud cheque for the supplier after repeated requests for payment: at 381 (Nettle JA). He had admitted that he knew the cheque would be dishonoured: at 381 (Nettle JA).

¹³⁰ Elliott, above n 67, 22.

financial advantage, the issue of whether a person is penniless is of no importance.

Having adopted the approach in *Matthews v Fountain*, Nettle JA continued:

It may also be observed in passing that the suggested 'penniless man' exception to obtaining financial advantage by deception is as flawed as a matter of economic theory as it is intractable in practice. Evidently, the idea of the exception depends upon the premise that there is no advantage to a debtor in deferring payment of a debt unless the debtor has the money or the means of obtaining the money with which to pay the debt. According to that conception of things, if a debtor has the money or the means of obtaining it, the delay affords him or her a financial advantage equal to the time value of the debt for the period of the delay; in other words, the return which the money would generate in that period or the cost of borrowing the money for that period. Conversely, if the debtor has no money and no means of obtaining it, the delay affords him nothing; for without money he has no means of obtaining a return on money and if he cannot borrow money he cannot be said to have avoided the costs of borrowing it. But as a matter of economic theory a debtor can always borrow money. In theory it is all just a matter of price, and so everyone can borrow — at a price — no matter what the level of their credit risk. As the economist would have it, the price elasticity of credit may be hyperbolically sensitive to borrower security, but the gradient of that function never reaches infinity.

And so it is too in reality. For in reality, in the society in which we live, there are no penniless men. Widespread and deep though poverty may be in some sections of our society, all men in it have some money or at least the ability to obtain some money, by work or by the realisation of assets or by borrowing, even at exorbitant rates, or perhaps even in the form of social security entitlements. To that extent, all men obtain a financial advantage by deferring the payment of a debt; no matter how poor they may be. They are relieved of a claim upon such money or ability to generate it as they may have, for the period of the deferral.¹³¹

There is a breathtaking conclusiveness to the pronouncements on poverty and finance in this passage that many may find hard to match with the reality of lived experience. However, putting that to one side, the acceptance that there are no completely penniless people does not address the reasoning in *Fisher v Bennett*.

(c) *Assessing the Decisions*

Fisher was not penniless. As Lanham noted, the question of financial advantage in a situation of unilateral evasion applies with equal force to both penniless and obdurate debtors.¹³² In both situations, the liability of the debtor is unchanged and no financial advantage accrues merely through non-payment. Miles CJ in *Fisher v Bennett* regarded this argument as having force and applied it to Fisher, finding that there was no evidence to establish beyond reasonable doubt that a financial advantage had accrued — that is, there was no evidence to

¹³¹ *Vasic* (2005) 11 VR 380, 384 (Nettle JA). See also at 388 (Cummins AJA). Vincent JA considered that the 'difficult questions' posed in relation to financial advantage did not need to be decided in this case but noted: 'I would also add that I am of the opinion that the approach adopted by him [Nettle JA] is almost certainly correct': at 388.

¹³² Lanham, above n 58, 192–3.

establish that Fisher's position had improved, despite his lack of penalty.¹³³ In other words, the lack of advantage was not dependent on Fisher's financial status.

In *Matthews v Fountain*, Gray J argued that the gaining of time in which to make payment and relief from being harried by creditors amounted to a financial advantage.¹³⁴ However, neither of these propositions is self-evident. In relation to the gaining of time, Miles CJ noted in *Fisher v Bennett* that interest had continued to accrue on the outstanding loan.¹³⁵ In such circumstances, the delay in payment would, by contrast, appear to worsen the debtor's financial position. In normal circumstances, the interest rate on a loan is greater than that which can be obtained by investing the amount owed. Consequently, unless the credit was extended without any interest component, or with one less than the market rate, no financial advantage would accrue. Either situation would require evidence as to the terms of the loan or credit and an evaluation of the relative financial implications. One could not simply assume any advantage.

In relation to the relief from harassment by creditors, any such relief might well be a significant emotional advantage to the debtor, but as Lanham pointed out, it would not remove the financial liability¹³⁶ and, in fact, would be likely to increase the resolve of the creditor to commence court action to recover the money. In financial terms, such an outcome would increase the financial disadvantage by adding a liability for court costs.¹³⁷

What is really at stake in these arguments is highlighted by Gray J's third argument in *Matthews v Fountain* — that is, whether an avoidance of detriment on the part of the debtor can amount to an advantage.¹³⁸ In common parlance, an advantage is where one is better off than before, not where one is in the same position or worse. In the *Theft Act 1968* (UK) c 60, s 16 version of the offence, the evasion of a debt, irrespective of advantage, fell within the meaning of 'pecuniary advantage' because the legislation specifically defined the term to include evasion.¹³⁹ 'Pecuniary advantage' was therefore a term of art. But, in light of the Australian legislative approach of not defining financial advantage and judicial pronouncements that the term is one of 'clear and plain meaning',¹⁴⁰ there are strong arguments against any equation of avoidance of detriment with advantage to the accused. The meaning of financial advantage should be kept within clearly understood boundaries, not stretched to fit circumstances that

¹³³ Ibid 472–3.

¹³⁴ [1982] VR 1045, 1049–50.

¹³⁵ (1987) 85 FLR 469, 473.

¹³⁶ The requirement that the advantage be financial in nature is discussed in below Part III(D)(5).

¹³⁷ This is not to deny that the actions of the defaulting debtor would be a significant financial detriment to the creditor, but only that any advantage to the debtor would be illusory.

¹³⁸ The situation is reminiscent of the old joke where a person stands next to a wall hitting their head against it. When asked why this is done, the reply is 'because it feels so good when I stop'. From that person's perspective, the feeling when they stop is an advantage, but from the observer's perspective such a feeling is normal and hitting one's head against a wall is a clear detriment.

¹³⁹ See *Turner* [1974] AC 357.

¹⁴⁰ See, eg, *Walsh v The Queen* (1990) 52 A Crim R 80, 81 (O'Bryan J); *Matthews v Fountain* [1982] VR 1045, 1049 (Gray J).

might appear to be criminal but that do not easily fall within the ambit of financial advantage, as that term is commonly understood.

Such distinctions between commonsense meanings of financial advantage and use of equivalent terms of art can be seen in the *Model Criminal Code* approach to the area. While the offence discussed in this article¹⁴¹ is expressed as a gaining of a financial advantage, the *Model Criminal Code* includes other offences¹⁴² which are simply expressed in terms of causing a 'gain', with 'gain' and 'loss' specifically defined in s 14.3(1):

'gain' or **'loss'** means gain or loss in money or other property, whether temporary or permanent, and:

- (a) **'gain'** includes keeping what one has; and
- (b) **'loss'** includes not getting what one might get.¹⁴³

It is thus arguable that the explicit definition of 'gain' as 'includ[ing] keeping what one has' is a result of a legislative understanding that such a situation would not normally be considered a gain or advantage.

(d) *Advantage or Detriment?*

In large part, the difficulty arises because the corollary offence of causing a detriment by deception has not been enacted in Victoria, Tasmania or NSW. By contrast, in SA, the offence contained in s 139 of the *Criminal Law Consolidation Act 1935* (SA) is worded as follows:

139 Deception

A person who deceives another and, by doing so —

- (a) dishonestly benefits¹⁴⁴ him/herself or a third person; or
- (b) dishonestly causes a detriment¹⁴⁵ to the person subjected to the deception or a third person,

is guilty of an offence.

It is suggested that under this offence, the issue in *Vasic* need never arise because the creditor clearly suffers detriment. This detriment is not based on the fact that they do not receive repayment of the money owed, but that they are deceived into ceasing to seek to have the money repaid.¹⁴⁶ It is only when there is no

¹⁴¹ See, eg, *Model Criminal Code* s 17.3: MCCOC, above n 27, 134–9.

¹⁴² See, eg, *Model Criminal Code* s 19.7: MCCOC, above n 27, 230–1.

¹⁴³ (Emphasis in original).

¹⁴⁴ 'Benefit' is defined in *Criminal Law Consolidation Act 1935* (SA) s 130 to be a benefit of a proprietary nature, a financial advantage, or a benefit of a kind that might be conferred by the exercise of a public duty in a particular way.

¹⁴⁵ 'Detriment' is defined in *Criminal Law Consolidation Act 1935* (SA) s 130 to be a detriment of a proprietary nature, a financial disadvantage, loss of an opportunity to gain a benefit, or a detriment of a kind that might result from the exercise of a public duty in a particular way.

¹⁴⁶ The detriment is the loss of the availability of the funds in the period of time in which the institution of civil proceedings to recover the funds is delayed by the deception. If the detriment suffered was only the loss of the use of the money, then there would be no causal connection to the deception used: see below Part III(D)(4). Further, no detriment is caused by any deception of a penniless debtor: see David Lanham et al, *Criminal Laws in Australia* (2006) 374.

offence of causing detriment that courts strain to find an advantage in a situation of detriment.

Logically, there are three possible outcomes of the accused's act: advantage, continuance of the status quo and detriment. Consequently, it is also logically possible that, as a result of an action, party A may maintain their status quo, but party B may be either advantaged or disadvantaged. It may therefore be a logical fallacy to conclude that party A gains an advantage by establishing that party B has suffered a detriment. Whether it is a logical fallacy is determined by whether advantage and/or detriment are judged by reference to the broader environment or solely by reference to the other party.

In *Murphy*, the Tasmanian Court of Appeal endorsed definitions of advantage from the *Shorter Oxford English Dictionary*, namely: 'having the better of another in any respect; the result of a superior position; to benefit or profit.'¹⁴⁷

The first of these definitions could be seen to situate advantage solely in terms of a relation to the other party and permit advantage to be determined from only one perspective. It would therefore be possible to argue that as between party A and party B, if A tricks B into giving A \$100, no further evidence is required to establish that A is in a position of financial advantage. The difficulty is that this requires an assumption of a zero-sum gain and the exclusion of all other factors. If, in fact, B owes A \$500, payment of \$100 still represents a \$400 detriment to A.¹⁴⁸ Further, if the money that B hands over is not B's money, but C's, then B may not have even suffered any real detriment and the only party whose position is substantially affected, C, is outside of the frame of reference. Thus, financial advantage can only be reasonably determined by further evidence of the nature of the relationship between A, B and C, the circumstances of the loan and its repayment, and any other relevant issues.

It is, therefore, suggested that it is fallacious to assume that any detriment automatically amounts to a reciprocal advantage: advantage or detriment must be determined by taking into account the wider environment, rather than just the instant situation of the parties.

(e) Fair Labelling

Further, failing to take into account the broader context in determining advantage may offend against a number of principles which are generally seen as underlying the form that criminal law should take. Use of a term that does not accord with community understandings of its meaning offends against the principle of maximum certainty or fair warning, in the sense that individuals will be misled as to the scope of the offence. Moreover, if the offence is given a very broad meaning it may become overly vague and thus lead to problems of retroactivity (that is, conduct will only be seen as criminal after the event).¹⁴⁹ Ashworth comments:

¹⁴⁷ [1987] Tas R 178, 183 (Nettlefold J).

¹⁴⁸ To suggest that the receipt of \$100, when one expects \$500, still constitutes an advantage of \$100 on what would otherwise amount to a loss of \$500, involves a degree of sophistry unlikely to appeal to any court.

¹⁴⁹ For a discussion of these principles see, eg, Andrew Ashworth, *Principles of Criminal Law* (4th ed, 2003) 80–2.

Why should such emphasis be placed on certainty, predictability, and 'fair warning'? As with the principle of non-retroactivity, a person's ability to know of the existence and extent of a rule is fundamental: respect for the citizen as a rational, autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them. The criminal law will also achieve this respect more fully if its provisions keep close to moral distinctions that are both theoretically defensible and widely felt: this suggests a connection between fair warning and fair labelling.¹⁵⁰

Fair labelling has been described by Clarkson in the following terms:

Criminal offences should accurately describe the prohibited conduct as far as possible. ... Offences should be structured, labelled and punished to reflect the extent of wrongdoing and/or harm involved. Criminal offences are categorised for symbolic reasons. It is to communicate the differing degrees of rejection or unacceptability of different types of conduct. Such symbolic messages are not conveyed by the creation of broad morally uninformative labels ...¹⁵¹

It is suggested that the labelling of the offence as one of financial advantage places the emphasis on the changed position of the accused, not the maintenance of an existing position or the effect on the victim. It is therefore inappropriate to attempt to insert situations of detriment into the offence. The refusal of the legislature to define the term 'financial advantage', together with the reluctance of the courts to attempt to do so at a general level, means that persons attempting to avoid conduct prohibited under the offence have no basis for interpretation other than the community's understanding of that term. It is therefore appropriate for the courts to approach interpretation cautiously and not to seek to include within the scope of the offence situations that go beyond this understanding.

3 *The Need to Prove All the Elements of Offences and the Existence of Alternative Summary Offences*

Further, the alternative approach of Miles CJ demonstrates another important principle of criminal law — that, absent legislative intervention, the burden of proof is on the prosecution to prove all the elements of the offence.¹⁵² All that the prosecution alleged in *Fisher v Bennett* was that the cheque had been dishonoured. On that basis alone, Miles CJ was unwilling to assume that any financial advantage had accrued.

By contrast, in *Vasic*,¹⁵³ the Victorian Court of Appeal upheld the approach of Gray J in *Matthews v Fountain* that the proffering of a valueless cheque, *of itself*, amounted to a financial advantage.¹⁵⁴ To do so has the effect of judicially creating a special class of deceptions within the general offence that will

¹⁵⁰ Ibid 77 (citations omitted).

¹⁵¹ C M V Clarkson, 'Theft and Fair Labelling' (1993) 56 *Modern Law Review* 554, 554–5 (citations omitted).

¹⁵² *Woolmington v DPP* [1935] AC 462.

¹⁵³ (2005) 11 VR 380, 384–5 (Nettle JA).

¹⁵⁴ [1982] VR 1045, 1048.

(effectively) be deemed to be a financial advantage without the need for the prosecution to adduce any evidence of such advantage.

There seems to be no clear basis for significantly increasing the liability of those who pass cheques rather than engage in other forms of deception. The deeming of any form of activity as automatically obtaining a financial advantage is something that should be done explicitly by legislatures, not by courts.

This is particularly relevant given the existence of summary offences prohibiting the passing of dud cheques. For example, the NSW offence is as follows:

178B Valueless cheques

Whosoever obtains any chattel, money or valuable security by passing any cheque which is not paid on presentation shall, unless he or she proves:

(a) that he or she had reasonable grounds for believing that that cheque would be paid in full on presentation, and

(b) that he or she had no intent to defraud,

be liable to imprisonment for one year, notwithstanding that there may have been some funds to the credit of the account on which the cheque was drawn at the time it was passed.¹⁵⁵

Similar offences exist in Victoria¹⁵⁶ and SA.¹⁵⁷ These offences provide for automatic liability for any passing of a cheque that is not paid on presentation, and for the defence that there was no fraudulent intention or negligence in the presentation.¹⁵⁸ It is suggested that summary offences of this nature adequately deal with situations where a cheque has been passed and no advantage gained.¹⁵⁹ To invoke the more serious offence of obtaining of financial advantage, the prosecution should be required to prove some actual financial advantage.

4 Causation Issues

But even accepting the assumption in *Vasic* that deferring payment does not place a debtor in a worse financial position, it is necessary to show how it is that the deception practised leaves the debtor better off financially than before the deception. It may be true that everyone gains a financial advantage by delaying payment. The financial quantum or nature of the advantage gained, however, appears to be exactly the same whether one refuses point-blank to pay, or engages in deception to do so. In order for the passing of a dud cheque or any other form of deception to amount to a financial advantage, it must be shown that the financial situation has changed as a result of that deception. The offence requires that the financial advantage be obtained by means of the deception, not as a default outcome due to a lack of change in the situation. In other words,

¹⁵⁵ *Crimes Act 1900* (NSW) s 178BA.

¹⁵⁶ *Summary Offences Act 1966* (Vic) s 37.

¹⁵⁷ *Summary Offences Act 1953* (SA) s 39.

¹⁵⁸ Concerns may be expressed about the effective reversal of the onus of proof that this offence entails and whether an offence leading to the possibility of imprisonment is appropriate for what is, in effect, merely negligence as to one's financial affairs. It should be noted that lack of an intent to defraud is insufficient to exculpate the accused. Additionally, the accused must demonstrate that his or her acts were reasonable: see *R v Hart* [1984] 3 NSWLR 641.

¹⁵⁹ See also Robert C Evans, 'Case and Comment: *R v Vasic*' (2006) 30 *Criminal Law Journal* 47.

even if the evasion of a debt amounts to a financial advantage, the issue of causation remains and it is difficult to see how the deceptive evasion of that payment, rather than the mere fact of non-payment, is the operating cause¹⁶⁰ of the advantage. This point was also made by Lanham in his most recent co-authored textbook.¹⁶¹

The situation can be compared with that of *Ho v The Queen*.¹⁶² In that case, the defendant employees were employed to instruct a broker to buy and sell futures contracts on the Sydney Futures Exchange on behalf of clients. Instead, they engaged in bucketing — that is, they took the opposite side of a client's order on either their own or their employer's account. Payment of profit was by way of cheque drawn on the employer and issued by one of the principals of the business. Szeto, the second appellant, also had a private arrangement with his clients to receive a percentage of any profits.¹⁶³ On one alternative of the prosecution's case, the allegation was that the clients were deceived by the accused as to the nature of the money that was paid out to them. The NSW Court of Criminal Appeal examined the requirement that the obtaining be causally linked to the deception and held that:

What ... must be established ... is a causal connection between the deception used and the obtaining of the money: *Kovacs* at 416; *Charles* [1977] AC 177 at 192; *Clarkson* [1987] VR 962 at 980; 25 A Crim R 277 at 296–297. The deception must have been the means whereby the money was obtained, or the effective cause of the money having been obtained: *Royle* (1971) 56 Cr App R 131 at 141–142. In *Stanhope* (unreported, Court of Criminal Appeal, NSW, 10 September 1987), this Court said in relation to s 178BA that it is an essential ingredient of the offence created by that section that the cause of the payment of the money (or the handing over of the valuable thing or the giving of the financial advantage) was the deception used by the accused. ...

Szeto had obtained the money for himself from the member (as his share of the profits paid out) by representing to that member that the payment to the member from the association, which he had obtained for him, represented that member's profits made from trading completely and for a profit on the Sydney Futures Exchange. ...

But ... this deception has not been shown to be the effective cause of the payment. The money was given to the appellant Szeto by the particular member pursuant to the private arrangement which he had made with that member to share the amount paid out by the association to that member as his profit. The money had in fact been paid out by the association to that member as his profit. Whether the money did or did not in fact represent his profit from trading on the Exchange does not alter the character in which it had been paid out to him by the association. Nor did the deception by Szeto upon the member as to the true character of the money paid out to him by the association alter the character in which the money had been paid out by the association. It was that charac-

¹⁶⁰ *R v King* [1987] QB 547, 553 (Neill LJ, reading the judgment of Neill LJ, Waterhouse and Saville JJ).

¹⁶¹ Lanham et al, above n 146, 374.

¹⁶² (1989) 39 A Crim R 145.

¹⁶³ Ho did not, and the prosecution thus alleged that the financial advantage was obtained for the client, leading to the absurd position that the clients were alleged to have been deceived into financially advantaging themselves.

ter in which the money had been paid out by the association which triggered off the private sharing agreement. Again, there was no nexus between the deception by Szeto upon the member and obtaining that money from the member pursuant to that arrangement.¹⁶⁴

Similarly, on the facts of *Vasic*, although the creditor was deceived into believing payment would be effected by the cheque, the assumed financial advantage based on gaining time to pay accrued to Vasic as a result of the lack of payment, not as a result of the deception. The only causal effect of the deception — as distinct from the failure to pay — is to relieve the debtor from being harried by the creditor. However, it is argued that this is not a financial advantage.¹⁶⁵

5 *The Requirement That the Advantage Be Financial*

Not only must there be proof of an advantage, but that advantage must also be 'financial'. This was emphasised in the unreported case of *Coelho*,¹⁶⁶ in which the NSW Supreme Court held that the requirement in s 178BA of the *Crimes Act 1900* (NSW) that the advantage be financial had a limiting effect on the scope of the concept. In that case, compliance plates from two unregistered cars had been swapped and one of the cars had been presented for registration, with the swapped plates creating the deceptive impression that the car presented was in fact the other car. The Court was asked to determine whether such a deception could amount to a financial advantage. Badgery-Parker J held:

Other judges have declined to attempt to define the concept of 'financial advantage' (see for example *Matthews v Fountain* ... wherein the judge was bold enough to describe the concept as a very simple one). I am not altogether sure that I agree with that, nevertheless it does seem to me to be the essence of the concept of financial advantage that the person alleged to have obtained such has obtained a benefit which can be valued in terms of money and a benefit which can be seen to be financial as distinct from benefits of another kind.

I have no doubt that to obtain the registration of a motor vehicle is an advantage in a practical sense to the person by whom that step is achieved, but it does not appear to me to be an apt use of English to describe the benefit as a financial benefit, except (perhaps) in circumstances where the evidence showed an intention on the part of the person involved to utilize the vehicle thus registered in some way which could confer upon him benefits which could be described as financial benefits.

I do not say, for example, what I think was ventilated in argument before the magistrate, that the offence would necessarily have been proved had it been shown that the plaintiff, having secured registration of the vehicle was in a position to sell it and achieve a profit which exceeded the cost of registration. It may be that proof of some such prospect and intention might make out the offence, but I do not so hold. I am content to rest my decision on a finding that

¹⁶⁴ *Ho v The Queen* (1989) 39 A Crim R 145, 147–8 (Maxwell, Hunt and McInerney JJ).

¹⁶⁵ To argue that it was a financial advantage is impermissibly reductionist: see below Part III(D)(5)(a).

¹⁶⁶ (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 29 March 1993).

the obtaining of registration of the vehicle is not the obtaining of a financial advantage.¹⁶⁷

Although it would not seem controversial, the reasoning in *Coelho* has not been assessed by an appellate court, perhaps in part because the decision has not been widely reported and has not been drawn to the attention of courts in later cases considering the scope of financial advantage. It is suggested that Badgery-Parker J's two requirements — that the benefit be capable of valuation in monetary terms, and that it be financial as distinct from benefits of other kinds — are important guides to the interpretation of the concept. They also highlight two areas of uncertainty: (1) how remote from the deception the monetary benefit can be;¹⁶⁸ and (2) whether it is possible to value a benefit in terms of money but yet characterise it as not being financial.¹⁶⁹

(a) *The Need to Be Able to Quantify the Advantage in Terms of Money*

The first limb of the test is that any advantage must be able to be quantified in terms of money. Practically, this is necessary at a preliminary stage in any event because the value of the advantage affects the decision to proceed summarily or by indictment.

In Victoria, s 53 of the *Magistrates' Court Act 1989* (Vic) permits summary prosecution of offences where the value of the advantage is less than \$25 000 and where it is appropriate for it to be dealt with summarily.¹⁷⁰ Consequently, summary prosecution of the offence requires both a desire on the part of the prosecution to proceed summarily and the magistrate's approval. However, if the advantage involved is valued at over \$25 000 the matter must be proceeded with on indictment. Tasmania has a similar approach to that of Victoria. If the offence is charged in relation to property valued at under \$20 000,¹⁷¹ the offence may be proceeded with summarily if the defendant does not object.¹⁷² If the value of the property is less than \$5000, the offence is dealt with summarily unless the magistrate decides otherwise.¹⁷³ Consequently, in both jurisdictions, if the financial advantage is valued at over a certain amount the offence *must* be proceeded with on indictment.

In NSW, the reverse is true. Section 260 of the *Criminal Procedure Act 1986* (NSW) provides that, by default, all proceedings are assumed to be summary, no matter what the value of the advantage might be, unless there is an election by the prosecution (or the defendant, if the value is over \$5000) to proceed on indictment. If the advantage is valued at \$5000 or greater, the maximum penalty

¹⁶⁷ *Ibid* 2–3.

¹⁶⁸ See below Part III(D)(5)(a).

¹⁶⁹ See below Part III(D)(5)(b).

¹⁷⁰ *Magistrates' Court Act 1989* (Vic) sch 4 item 22.

¹⁷¹ The use of 'property' in the Tasmanian legislation might have the effect of requiring that all offences under *Criminal Code Act 1924* (Tas) sch 1 s 252A be proceeded with on indictment. However, the inclusion of s 252A in sch 1 suggests that it is intended that property in this section be read to include financial advantage as well. There do not appear to be any reported cases on the point.

¹⁷² *Justices Act 1959* (Tas) s 72(1)(b), sch 3 pt 2.

¹⁷³ *Justices Act 1959* (Tas) s 71, sch 2.

is two years' imprisonment or a fine of \$11 000.¹⁷⁴ Where the value of the property is less than \$5000, the maximum penalty is 12 months' imprisonment and/or a fine of \$5500, unless the property concerned is valued at less than \$2000, in which case the maximum fine is \$2200.¹⁷⁵ Despite the right to proceed on indictment, this discretion is rarely exercised by the police other than for very serious frauds. Importantly, defendants may be tried summarily for any value of financial advantage. This leaves discretion with the parties and obviates the need for a precise valuation.

The difficulties associated with the need to establish the monetary value of the advantage in Victoria and Tasmania are evident in *Otte v Magistrates' Court of Victoria*,¹⁷⁶ a case involving a charge of attempting to obtain a financial advantage by deception. Otte had attempted to secure a deposit on a house by passing dud cheques. Each cheque was for an amount of \$26 500.¹⁷⁷ The prosecution argued that the financial advantage he attempted to obtain was the avoidance of the payment of the full \$26 500. Otte's defence argued that the only value that he had attempted to obtain was the avoidance of interest for late payment of the deposit money. The magistrate would have heard the case summarily, but, because the face value of the cheques was over \$25 000, his Honour felt constrained to commit Otte to an indictable trial. This approach was upheld by Balmford J in the Supreme Court of Victoria, who held that it was 'necessary to assess, as a matter of fact, the value of the financial advantage which the plaintiff is alleged to have attempted to obtain.'¹⁷⁸ His Honour held on the basis of the hand-up brief that Otte had attempted to obtain credit for the full value and, therefore, that the offence should be proceeded with on indictment.¹⁷⁹

A similar result is likely in Tasmania, but in NSW, the magistrate would have been able to proceed summarily irrespective of the value of the financial advantage alleged. Such an approach might usefully be adopted in other jurisdictions as a way of dealing with the very real issue of over-criminalisation of matters that might be more appropriately dealt with through contractual channels.¹⁸⁰

But the need to be able to quantify the advantage in monetary terms also raises an important issue of principle in construing the offence — that is, the principle of fair warning. As outlined above,¹⁸¹ the lack of definition of the term implies

¹⁷⁴ *Criminal Procedure Act 1986* (NSW) s 267, table 1.

¹⁷⁵ *Criminal Procedure Act 1986* (NSW) s 268, table 2.

¹⁷⁶ (1996) 89 A Crim R 223.

¹⁷⁷ When interviewed by police, Otte said that he had passed the cheques to gain time in which to win the amount on Tattsлото. There was a clear implication that Otte was deluded rather than engaging in serious fraud.

¹⁷⁸ *Otte v Magistrates' Court of Victoria* (1996) 89 A Crim R 223, 227.

¹⁷⁹ His Honour did not provide any reasons for this decision. There are some difficulties with this decision being applied more generally. As this was a case of attempt, the accused would have to have intended to obtain the financial advantage. Consequently, it is arguable that the outcome of the passing of the cheque constitutes the relevant advantage, not the amount on the face of the cheque. By contrast, if the charge is one of the substantive offence of obtaining, the fact that the victim is deceived into thinking that the cheque will be paid on presentation means that the face value of the cheque is the value of any financial advantage obtained, if only fleetingly.

¹⁸⁰ See Evans, above n 159, for an overview of some of these issues.

¹⁸¹ See above Part III(D)(2)(c).

that its meaning must not depart significantly from its ordinary meaning into a term of art. It is suggested that the reasoning in *Vasic* in relation to the penniless person is a classic example of such a departure. The argument is highly reductionist and uses the fact that, in theory, everything can be bought and sold to prove that, in practice, there are no *literally* penniless people. The argument in *Vasic* ignores many highly significant contributors to poverty, such as the practical barriers of geography, age, gender, education and the laws regulating the provision of credit.

Another concern about the reasoning in *Vasic* is that it suggests a corollary argument — that it is possible to value everything in monetary terms, because in economic theory everything has a price and can be bought and sold. This raises issues of both remoteness and legal policy. As Lanham noted recently, such reasoning may lead to results that seem ‘too tenuous to amount to a real financial advantage’.¹⁸²

For example, a man who by deception induces a woman to have sex with him (presumably) gains an advantage of some sort.¹⁸³ But it would clearly be against public policy for a prosecutor to engage in an exercise of attempting to ascertain the going rate for a prostitute in some way similar to the victim and thereby quantify the advantage gained in monetary terms. If a disgruntled employee by deception obtains confidential information, that information may be of use to a competitor and thus the competitor might be either willing to pay for it, or be able to quantify the financial advantage that knowledge of the information might lead to. But absent the actual sale of the information, there may be significant issues of remoteness in establishing the point at which any financial advantage accrues.

In fact, Gray J’s argument that there is a financial advantage in fobbing off a creditor or in buying time is also an economic argument. It implies that one can apply opportunity cost analyses to the idea of financial advantage or, more simply, that ‘time is money’. Any deceptive act that delays the victim in doing an action could be reduced to an opportunity cost equation.

What this shows is that the demonstration of the ability to reduce an advantage to monetary terms provides a necessary, but not sufficient basis for liability. In fact, if one adopts economic theory, as Nettle JA does in *Vasic*, then any advantage is capable of reduction to monetary terms. What is needed is a further test — one that limits the theoretical calculations to a practical understanding of financial advantage which accords with community perceptions. Any such limit would have to be found in what Badgery-Parker J was describing when his Honour suggested that a second limb was necessary — that the advantage be of a financial kind.

¹⁸² Lanham et al, above n 146, 375.

¹⁸³ Of course, if one follows Badgery-Parker J’s approach in *Coelho* (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 29 March 1993), the simple answer as to why this is not a financial advantage is that the advantage is not of a financial kind.

(b) *Non-Financial Advantages*

The second limb of Badgery-Parker J's test is to distinguish between financial advantages, and advantages of other kinds. On the facts in *Coelho*, it would have been possible to determine the market price for the vehicle with no registration, and with a full year's registration, and to hold that by registering the vehicle the increase in its value amounted to the financial advantage gained. However, in declining to sanction that analysis, Badgery-Parker J implied that a distinction could be drawn between the financial advantage of selling a car and the advantage gained from registration of the car. The advantage of registration was presumably that it allowed the car to be driven on the state's roads. This would cause a number of advantages to accrue, such as those of available transportation and personal independence. But it could not be primarily described as a financial advantage.¹⁸⁴

It would seem, then, that while almost every activity can at some level be reduced to a financial advantage, the approach taken by Badgery-Parker J would require that the advantage be primarily or significantly one that is financial in nature.

The difficulty with such a test is that it fails to bring any further clarity to the issue.¹⁸⁵ At the end of the day, it may not be possible to go beyond the magistrate or the jury having to determine for themselves whether the advantage acquired is one that can be classed as being of a substantially financial nature.

A further issue in so characterising the advantage is whether the intentions of the accused are to be taken into account. For example, the deceptive obtaining of a valuable work of art from a victim might be motivated by greed or other financial aims, or it might be motivated by vindictiveness (as in a marriage break-up). Whether intent is an appropriate factor to consider depends largely on whether the essence of the crime is an unjust enrichment, or the causing of loss to the victim. If the focus is on the latter, then the aim of the defendant is not as relevant. However, as noted above,¹⁸⁶ the symbolic labelling of the offence is aimed at prevention of gain, not loss.

The answer in such a case may be that, although financial advantage is to be determined objectively, an accused may be incapable of obtaining such an advantage if they are unaware of its existence, or at least, incapable of doing so dishonestly. In *Fisher v Raven*¹⁸⁷ and *Attorney-General's Reference [No 1 of 1988]*¹⁸⁸ it was held that fraud offences of this kind require a positive act on the part of the accused. By implication, it is impossible to do a positive act of obtaining unless one is aware of, or least reckless as to, the nature of what is being obtained. Similarly, it would seem that in order to obtain an advantage

¹⁸⁴ Unless, of course, one took the approach in *Vasic* (2005) 11 VR 380 and reduced all of the increased opportunities of the accused to financial terms.

¹⁸⁵ In *Murphy* [1987] Tas R 178, 183–4 (Nettlefold J), 184 (Underwood J), 185 (Wright J), the Full Court of Criminal Appeal of Tasmania listed a number of possible meanings of 'financial', noting that their applicability would depend on the context in which the term was used: see above Part III.

¹⁸⁶ See above Part III(D)(2)(e).

¹⁸⁷ [1964] AC 210.

¹⁸⁸ [1989] AC 971.

dishonestly, it is necessary for the accused to have a belief in relation to the act causing the advantage that could be characterised as dishonest.¹⁸⁹ A belief that the act resulted in no advantage would seem to not satisfy this requirement.

Consider, for example, an accused who disbelieves an eccentric art collector's claims that a work he owns is an early Lloyd Rees drawing, and passes a dud cheque to get possession of the work purely to cause distress to the collector. If the drawing is in fact worthless, no financial advantage may have been obtained. If it is indeed a Rees drawing, while both property and a valuable thing may have accrued to the accused, the lack of intention to obtain anything of financial value may mean that the accused has either not obtained what he intended to obtain or has acted in a way that cannot be described as a dishonest obtaining.¹⁹⁰

E Is There Utility in the Unilateral–Bilateral Distinction?

With such difficulties, the attempt to limit the nature of financial advantage to situations in which the victim is induced to positively assent to an outcome, as suggested by Lanham, is worth revisiting. His argument was that it was only in these situations that a debtor gained an advantage that was not gained by a mere refusal to pay.¹⁹¹ However, the flaw in Lanham's argument is that in no situation does the debtor ever actually gain a real, lasting financial advantage. Even if the creditor is induced by deception to forgive the debt, such forgiveness will disappear once the deception is exposed. Further, if the evasion is unilateral, the financial advantage to the debtor may in fact be more real while the deception continues.¹⁹² This is even more so when one considers circumstances beyond those of the defaulting debtor. The principle would only seem to be workable in a debt repayment situation, not a situation where there is no pre-existing relationship between the parties. For example, in a straight-out fraud, the victim is induced into acts without any belief that they are owed anything by the accused. The induced act is not arrived at via negotiations relating to any existing obligations of the accused.

More fundamentally, there is an air of artificiality about the supposed distinction between unilateral and bilateral evasions. To require a positive act on the part of the person deceived invites semantic debates over whether circumstances are an act or an omission, an example of which is the discussion by Leader-Elliott as to whether payment by cheque is unilateral or bilateral.¹⁹³ Such

¹⁸⁹ *R v Peters* (1998) 192 CLR 493.

¹⁹⁰ The dishonesty attaches to the obtaining, not the deception: *R v Salvo* [1980] VR 401; *R v Love* (1989) 17 NSWLR 608.

¹⁹¹ Lanham, above n 58, 193.

¹⁹² Elliott, above n 67, 21, gives the example of a person who creates the impression that they have permanently left the country and suggests that the advantage is greater than an agreed deferment of the debt.

¹⁹³ Elliott, above n 67, 24–5. Leader-Elliott's policy-based attempt to include the passing of dud cheques within the notion of a bilateral evasion is a further example of the artificiality of the distinction. It is not certain that any acceptance of a cheque is as a result of the deception. It may be a previous term of the loan or a common understanding that any payments be by cheque. In such cases, if the creditor feels bound to accept the cheque, the deception may be unilateral. Note that Leader-Elliott's attempt to construe the passing of dud cheques as bilateral was in the

approaches are unlikely to bring clarity to the law, nor are they reliable predictors as to the scope of an offence, because their very abstract nature provides fertile ground for imaginative deployments of the concept.¹⁹⁴

Having said that, the uncertainty would be lessened if, rather than basing liability on whether a deception was bilateral or not, the offence specifically set out the circumstances in which liability would arise. Such a legislative enactment could draw on the idea of a bilateral evasion. This appears to be what occurred in England. The *Theft Act 1978* (UK) c 31, s 2 offence prohibited the securing of the remission of a debt and the obtaining of any exemption from or abatement of liability, both of which require assent from the creditor. In any event, this would necessitate legislative intervention.

IV CONCLUSION

The foregoing has attempted to demonstrate that the concept of a financial advantage is not one of clear meaning, particularly when one attempts to determine what amounts to an advantage in attempts to avoid the payment of debts. It has been argued that the approach taken in *Vasic* and *Matthews v Fountain* misconceives the notion of what an advantage is, and instead substitutes a test of whether the creditor suffers a detriment.

Instead, it is necessary to take a more critical view of advantage. Following the analysis in *Fisher v Bennett*, it is suggested that a defendant may only be held to have gained an advantage if the prosecution can prove that the defendant is in a better position than they were in prior to the practising of the deception, and that the deception caused the improvement in their position. Such an advantage cannot be proved merely by evidence of a detriment to the victim.

The defendant's improved position must also not only be capable of valuation in monetary terms, but also be an advantage that is financial in nature. It has also been suggested that defining the requisite advantage solely in monetary terms is problematic, as it draws the courts into a theoretical economic attempt to value actions in monetary terms. Although one possible limitation may be to require that any advantage be primarily a financial one, it is difficult to see how this could work as a clear and predictable measure of criminal liability.

However, this is a broad criminal offence and the principle of strict construction should apply. The issues of whether any positive change to the defendant's position resulted (or would have resulted if the ruse was successful), whether that change can be quantified in monetary terms and whether the overall result can be characterised as primarily 'financial' in nature, all need to be established beyond reasonable doubt. As liability may well turn on whether the advantage gained is a financial one, the issue ought to be left to the determination of the finder of fact applying community understandings of what is and is not financial. This is

context of a discussion of Lanham's argument that the offence is restricted to bilateral evasions, a restriction he felt was in fact still too broad: at 25.

¹⁹⁴ See the discussion of the act-omission dichotomy in *R v Phillips* (1971) 45 ALJR 467, 477 (Windeyer J).

likely to lead to a more limited scope for the term, but, absent explicit definition by Parliaments, this is appropriate.

The English experience does, however, suggest that there may be room for further useful legislative reform in this area. The initial English attempt to *exhaustively* define what activities amounted to a pecuniary advantage was itself problematic and led to reform, the primary aim of which was to excise certain activities from the scope of the offence, in particular, persons who passed dud cheques to buy more time to pay debts.

Similarly, in Australia, it may be opportune to excise some forms of conduct from the scope of the offence, and to insert some activities that should be deemed to be a financial advantage without the need for further proof. However, in doing so, such provisions should not attempt to exhaustively define the concept of financial advantage.

In light of the coexistence of obtaining property and obtaining financial advantage offences, it is suggested that the obtaining of property offences should now be seen as an example of a deemed financial advantage. That is, the legislature considers that if any property is obtained, then evidence in relation to the identification of the property is all that is required. There is no further requirement that the property be valued in order to show the existence of a financial advantage. As noted above,¹⁹⁵ this resonates with the history of larcenable property.

Other situations where financial advantage is clear might also usefully be set out in legislation. This could include such matters as the obtaining of a service without the usual payment or the obtaining of credit.

A concomitant offence of causing detriment, such as that already in force in SA, is also a necessary enactment in other jurisdictions. Much of the complexity of the issue would dissipate with the enactment of such an offence. Indeed, it is arguable that an offence of causing detriment to a victim is in fact a more justifiable offence than that of obtaining a financial advantage. It is not clear why it should be criminal for a person to make a windfall gain if no other person suffers loss as a result. The harm principle of criminal law is clearly a justification for a causing detriment offence, but in order to apply such a principle to an obtaining financial advantage offence, a broader, less direct and less easily justified use of the principle is needed.¹⁹⁶

It is also suggested that the existence of specific offences for the passing of dud cheques means that no gap in the law is created if a person passes such a cheque without any intention to avoid payment. Glanville Williams' criticism¹⁹⁷ of attempts to draw distinctions between criminal and civil liability based on whether there was an intention to permanently evade payment is compelling and any attempts at evasion by passing dud cheques should be dealt with under

¹⁹⁵ See above Part III(A).

¹⁹⁶ See, eg, an attempt to do this in Andrew Simester and G Sullivan, 'On the Nature and Rationale of Property Offences' in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 168. For criticism of the extended use to which the harm principle is being put: see Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109.

¹⁹⁷ Criminal Law Revision Committee, *Thirteenth Report*, above n 16, 20–1.

specific cheque offences, as is currently possible in NSW and SA. The fact that the pre-existing debt continues to accrue reinforces Glanville Williams' point that people who pass cheques in such circumstances are simply stupid,¹⁹⁸ not engaging in serious crime.

¹⁹⁸ Or more charitably, operating under a significant amount of stress.