

CRIME IN THE OFFICE

'*Putting your hand in the till*' is a temptation many yield to and can lead to a wide variety of sometime serious criminal consequences. As business and financial arrangements become more complex there is also greater scope for malfeasance and misbehaviour.

A privatised approach to malfeasance in the work place has long been commonplace. Increasingly forensic accountants and investigators are being used by businesses when things go wrong. It is important to remember that while defalcations will have a management and economic dimension, the behaviour will also frequently be criminal.

The common law concept of fraud

There is an established common law associated with fraud. Most offences that involve misbehaviour with money or property will involve what the common law terms 'fraud'. Accordingly, the general law in relation to fraud is the useful guide to what is criminal conduct.

To '*defraud*' is to intentionally use dishonest means to deprive another person of their property, or to imperil their rights or interests. It involves the intentional creation of a situation by one person to use dishonest means to deprive another person of money or property, or to imperil another person's rights or interests.

The leading High Court case on fraud is *Peters* (1998) 192 CLR 493 at 508. The concept of fraud was also considered by the High Court in *Spies* (2000) 201 CLR 603, where the High Court emphasised that in all offences alleging '*defrauding*', the prosecution must establish that the accused used '*dishonest means*' to achieve his or her object.

'*Dishonest means*' was explained in *Peters* (1998) 192 CLR 493 at 508 and 529. To prove dishonest means the Crown will have to establish that the accused intended to prejudice another person's right or interest or performance of their public duty by:

- making or taking advantage of representations or promises which they knew were false or would not be carried out;
- concealing facts which they had a duty to disclose; or
- engaging in conduct which they had no right to engage in.

In determining whether the conduct of an accused is dishonest, the standard, which is applied, is that of ordinary decent people. Accordingly taking money, telling lies, concealing facts, relying on representations or promises that are false will constitute dishonest means.

The concept has some flexibility and covers a wide variety of dishonest conduct.

The other main element is economic imperilment. There is a need for some potentiality of loss. An actual loss is not required. Generally economic imperilment is easily established. The doctrine of economic imperilment has more application to frauds on public authorities.

Some common 'office' crimes.

There is a long history of differentiating between crimes between strangers and crimes between individuals where there is an economic relationship. This differentiation is made principally because an offence committed by a servant or clerk is aggravated by the breach of trusts.

Larceny by a servant

Larceny covers theft. A servant or clerk is every person employed for any purpose. One test is whether the individual is bound to obey the orders of the employer so that he or she is under the employer's control.

Larceny has the following elements:

1. the taking and carrying away of (asportation)
2. the property of another
3. with the intent to permanently deprive the owner of the property
4. and the taking is without the owner's consent

Dishonesty can also be added as an element of the offence. The property also needs to be in the possession of the owner at the time of the taking away

The property must be a specific moveable item and must have some value, no matter how slight: *Daley* (1879) 12 SCR (NSW) 151. This includes illegal drugs: *Anic* (1993) 68 A Crim R 313. It appears not to include confidential information: (*Stewart* (1988) 41 CCC (3d) 481).

Larceny by a clerk or servant is punishable by up to 10 years imprisonment (section 156, *Crimes Act* 1900).

Embezzlement

Another common law favourite is embezzlement. This offence concerns the misappropriation of property or any thing that comes in to the possession of a servant or clerk. It is larceny when the property is in the possession of the employer and is taken by the employee, embezzlement when the property is taken before the employer obtains possession of the property. The property must have been received by the employee on behalf of the employer. A typical example of embezzlement is an employee taking delivery of some property and keeping it.

Embezzlement by a clerk or servant is punishable by up to 10 years imprisonment (section 157, *Crimes Act* 1900)

General deficiency

In the NSW Crimes Act and the Commonwealth Criminal Code Act, there are provisions in relation to general deficiencies. When the charge is about money it is not necessary to prove the larceny or the embezzlement of the specific amount if there is proof of a general deficiency on examination of accounts kept or made by the employer. It will still be necessary to prove the theft or embezzlement.

Other offences

There are also a number of specific and general offences that cover taking certain types of property, impositions, fraudulent misappropriations and obtaining benefits by deceptions. The NSW Crimes Act contains offences of fraudulent misappropriation of moneys (section 178A), passing valueless cheques (section 178B), obtaining money by deception (section 178BA) and false pretences (section 179). It is, for example, still a serious offence to forge or utter the bonds of the East India Company (section 260, Crimes Act 1900).

Forgery means making or altering a document so it tells a lie about itself. The related concept of uttering means offering, disposing of, or putting off the forged document with intention to defraud, knowing it be forged. Generally the criminal offence is uttering the forgery.

The obligation to report crime

Businesses frequently want to deal with fraud in as discrete a manner as possible. The main imperative is to recover the defalcation and get the misbehaving employee out of the business.

There is an obligation to report serious crime. This fact sits rather awkwardly with the right to silence and privilege against self-incrimination. Curiously an offender is in a better position than an observer of crime. Having knowledge that a serious criminal offence has been committed and doing nothing can be an offence. The issue takes on some significance in the context of audits and investigations where it can be assumed that there will be evidence to demonstrate an individual's knowledge in relation to malfeasance.

One of the problems with this area is that it has traditionally been a mess. There used to be a common law misdemeanor offence of misprision of a felony and a more serious offence of compounding a felony. Misprision of felony consisted of knowing that a felony had been committed, and failing to disclose that knowledge to those responsible for the preservation of the peace within a reasonable time, and having had a reasonable opportunity to do so. Compounding a felony was constituted by agreement for consideration not to prosecute or to impede prosecution for a felony. The problem for some time in NSW was that there was real doubt as to the existence of these offences and there was no statutory equivalent. The distinct between felonies and misdemeanors also has had no real practical effect for some time and was statutorily abolished in NSW in 1999 (section 580E, *Crimes Act 1900*).

There was significant amendment to the Crimes Act 1900 due to what the then Attorney General described as the *'fragmented and confusing'* state of the law (NSW

Parliamentary Debates (Hansard, 17 May 1990, the Hon John Dowd at 3692). Section 316 was inserted as part of a package of public justice offences designed to overcome these 'gaps, anomalies and uncertainties' (above).

Section 316 provides:

(1) If a person has committed a serious offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making or reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The Governor may make regulations, not inconsistent with this Act, prescribing a profession, calling or vocation as referred to in subsection (4).

'Serious offence' means any offence that is punishable by imprisonment for five years or more. Most fraud offences will be serious indictable offences. This covers most fraud offences. The prosecution does not have to prove that the accused knew that the offence was a serious offence. The accused must have subjective knowledge of the commission of the offence, not mere suspicion: *Wozniak* (1989) 40 A Crim R 290. Material facts are not facts already known to the police: *Stone* [1981] VR 737. Silence of a person after a caution and when an answer would tend to incriminate does not constitute an offence: *King* (1965) 49 Cr App R 140, *Lucraft* (1966) Cr App R 296.

The following professions and vocations have been prescribed under s 316(5):

1. legal practitioners;
2. medical practitioners;
3. psychologists;
4. nurses;

5. social workers, including victim support workers and counsellors;
6. clergy; and
7. academic and professional researchers.

Accountants, forensic or otherwise, and investigators are not prescribed under the section.

Section 316 isn't '*dormant*' and will be used by the police in the context of serious criminal offences. Between September 1994 and August 1999, there were 112 prosecutions under the section in the NSW Local Court, 14 of these prosecutions resulted in sentences of imprisonments (See: NSW Judicial Commission, *Judicial Information Research Information Sentencing Statistics Database*).

There are also offences in relation to hindering a police officer in the execution of his or her duty and perverting the course of justice.

Lastly, it should be remembered that there is a doctrine of complicity that will make an individual in some circumstances a principal in criminal activity even if that person is not the doer of the deed. A principal is treated as if he or she has committed the offence.

There are the following degrees of participation in crime:

1. the principal in the first degree-commits the act- there may be more than one
2. principal in the second degree- present at the commission of the crime, encouraging but not participating physically
3. accessory before the fact- takes part in the preliminary stages of the crime but not present when it is committed
4. accessory after the fact- takes part in subsequent stages of the crime- eg. preparing a hiding place, assist the escape, conceals the offence or disposes of the proceeds of the offence.

An accessory after the fact must have knowledge of all the facts constituting the particular offence at the time he or she renders assistance to the principal: *Stone* [1981] VR 737. The act must be done with the intention of helping the principal avoid detection: *Young and Phipps* (1995) PD [389]. Thus sharing in the proceeds with nothing more will not be enough: *Barlow* (1962) 79 WN (NSW) 756. At common law a wife could not be convicted of being an accessory after the fact to a crime committed by her husband: CAL (NSW CCA 24/10/96). However this immunity has been abolished: s. 347A Crimes Act.

Delaying reporting conduct to the authorities with knowledge that an offender is absconding could quite constitute being an accessory after the fact.

For persons confronted with defalcations of funds, the issue is avoiding committing the offence of concealing a serious indictable offence or becoming an accessory after the fact. The main way to avoid this is to ensure that the misconduct is reported promptly.

For example section 6 of the Commonwealth *Crimes Act* 1914 notes that

'Any person who receives or assists another person, who is, to his

knowledge, guilty of any offence against a law of the Commonwealth, in order to enable him to escape punishment or to dispose of the proceeds of the offence shall be guilty of an offence.'

Penalty: Imprisonment for 2 years.

Working with the police and the court.

Against this background it is surprising that much fraud in the work place is often not reported. The police traditionally have a poor reputation in prosecuting fraud and there is a wide spread belief that the police are disinterested in prosecuting fraud. The NSW police are not the same organisation they were 20 years ago. There is now an Independent Commission Against Corruption and a Police Integrity Commission. Police do respond to genuine complaints and will investigate and prosecute frauds in the work place. It doesn't hurt to pick up the phone and make the call.

There are a number of things that police can do that no forensic accountant or investigator can do lawfully.

Lastly, as a criminal defence lawyer, the first thing I tell any client who comes to me charged with defrauding his or her employer and who intends to plead guilty is to make arrangements to make full restitution to the victim. When faced with the real prospect of imprisonment, taking out a loan and repaying stolen money becomes an attractive option.