The time has come to tighten the reach of Honest Claim of Right in Australian Criminal Codes

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Abstract

Honest claim of right operates as an exception to the general rule that ignorance of the law does not afford an excuse.[1] The defence (or more properly the excuse) is generally relevant to a situation where the defendant has 'stolen, damaged or destroyed property and the fault element is negated by the existence of an honest claim of right to do the prohibited act'.[2] The excuse of honest claim of right, which is limited to property, finds expression in all the Criminal Codes in Australia.[3] All of the relevant sections are comparatively short and rely on the common law to interpret the reach of the excuse (for example, a mistaken belief does not have to be reasonable provided it is genuinely held). This paper argues that, given

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1 Stephen Gray, *Criminal Laws Northern Territory* (1st ed, 2004) 147; Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (6th ed, 2009) 590.

2 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 198.

3 *Criminal Code 1995* (Cth) s 9.5; *Criminal Code 1983* (NT) ss 30(2), 43AZ; *Criminal Code 2002* (ACT) s 38; *Criminal Code 1899* (Qld) s 22; *Criminal Code 1902* (WA) s 22; *Criminal Code 1924* (Tas) ss 42, 44, 45, 226(1), 267(3).

Criminal Codes are intended to consolidate criminal law into one statute and should be construed according to their natural meaning, it is an appropriate drafting principle to provide as much clarification as possible within the relevant section as opposed to placing significant detail in the explanatory notes or second reading speeches.

In the case of honest claim of right, it is contended that such a drafting principle becomes more pressing when the leading High Court case, *Walden v Hensler*,[4] had differently constituted majorities on such critical matters as the interpretation of property and the availability of the defence itself. *Walden v Hensler* also overruled the previous leading authority of *Pearce v Paskov*[5] on the phrase 'an offence relating to property' holding s 22 of the *Criminal Code* (WA) should not be read down or narrowly construed.

Recent cases of honest claim of right such as *Mueller v Vigilante*[6] and *Wilkes v Johnsen*[7] have featured native title rights under s 211 of the *Native Title Act*,[8] an Act that post dates *Walden v Hensler*, which allows specified classes of activity such as hunting or fishing for the purpose of satisfying personal, domestic or non-commercial needs and which overrides under s 109 of the Constitution any State law that completely protects a particular fish or fauna. In *Yanner v Eaton*,[9] the High Court upheld the dismissal of a similar charge to *Walden v Hensler* in reliance on s 211 of the *Native Title Act*. In keeping with national concerns relating to endangered species[10] which begs

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4 *Walden v Hensler* (1987) 163 CLR 561.

5 *Pearce v Paskov* [1968] WAR 66.

6 *Mueller v Vigilante* (2007) 215 CLR 68.

7 *Wilkes v Johnsen* (1999) 21 WAR 269.

8 *Native Title Act 1993* (Cth).

9 *Yanner v Eaton* (1999) 201 CLR 351.

10 In the past 200 years about 17 different Australian mammals have become extinct. Many more mammals and other animals are in danger of dying out. Australia has more endangered species than any other continent: <http://www.kidcyber.com.au/topics/Austendangered.htm> at 26 April 2009.

the question 'what about the country?', this paper also argues that s 211 should be amended to exclude any totally protected species under any Commonwealth, State or Territory law from the operation of s 211.

To illustrate the drafting principle being contended for, s 9.5 of the *Criminal Code 1995* (Cth) is here reworded to reflect both a clearer and narrower reach of the excuse of honest claim of right. This could be achieved, for example, by placing a legal burden on the defence to prove the belief was reasonable. It is argued that not only will the reworded section provide a model section for the excuse of honest claim of right, but will also provide a template as to the manner in which sections of Criminal Codes could be drafted more explicitly and be less open to inconsistent interpretation.

I Introduction

In *R v Pollard,*[11] a case involving s 22 of the *Criminal Code 1899* (Qld),[12] Gibbs J stated it was well settled that it was sufficient that a claim of right to relieve a person of criminal responsibility 'need only be honest and need not be reasonable'.[13] His Honour went on to observe that 'the fact that it is wrongheaded does not matter'[14] and quoted from *R v Bernhard* that a person has such a claim of right 'if he is honestly asserting what he believes to be a lawful claim even though it may be unfounded in law or in fact'.[15]

It follows that a person cannot be convicted of stealing if he or she held a bona fide belief in a claim of right to the property. This is a purely subjective test and leads to the

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[11] *R v Pollard* [1962] QWN 13.

[12] *Criminal Code 1899* (Qld).

[13] *R v Pollard* [1962] QWN 13, 29 quoting *Clarkson v Aspinall: Ex parte Aspinall* [1950] St R Qd 79, 89 as authority.

[14] *R v Pollard* [1962] QWN 13, 29 quoting *R v Gilson and Cohen* [1944] 29 Cr App R 174, 180 as authority.

[15] *R v Pollard* [1962] QWN 13, 29 quoting *R v Bernhard* [1938] 2 KB 264, 270.

obvious question as to the boundaries of such an excuse. The person on the proverbial Clapham omnibus or Bondi tram[16] may well be surprised to discover that an honest claim of right is both a defence to robbery and to unlawful damage to property.

In *R v Skivington*[17] the defendant demanded his wife's pay-packet at knife-point and was charged with aggravated robbery. As theft is a necessary element of robbery, a successful excuse of honest claim of right will negative one of the essential elements of the offence of robbery. Provided the defendant can satisfy the evidentiary burden that he or she honestly believed in a right to take the property, there is no need for the defendant to satisfy a further belief in a right to take the property in the way that he or she did so.[18] However, an honest claim of right only applies to property and therefore the defendant in *R v Skivington* was still sentenced in relation to common assault.

As far back as 1844 it has been held that a claim of right can be a defence to unlawful damage of property. In *R v Day*[19] the accused was charged with maiming sheep belonging to another which had wandered onto his property. The matter was left to the jury as to whether the accused had acted maliciously or whether he acted under a mistaken claim of right. The case was referred to by Brennan J in *Walden v Hensler* as authority for the proposition that '[t]he defence is available when the offence relates to the damaging or destroying of property, and contains a mental element which would be negated by the existence of an honest claim of right'.[20]

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16 A reasonable hypothetical person against whom the conduct of the defendant may be judged.

17 *R v Skivington* [1968] 1 QB 166.

18 *R v Langham* (1984) 36 SASR 48.

19 *R v Day* (1844) 8 JP 186; Lord Abinger CB directed the jury that it was no offence 'for a man to do an act which he conceived himself, however erroneously, to be justified by his rights in carrying into execution'.

20 *Walden v Hensler* (1987) 163 CLR 561, 577.

The authorities as to the principles relating to an honest claim of right have been usefully collected together in *R v Fuge*[21] by Wood CJ at CL, albeit in a common law rather than a Criminal Code jurisdiction.[22]

> A review of the authorities shows that:
> a) the claim of right must be one that involves a belief as to the right to property or money in the hands of another;[23]
> b) the claim must be genuinely, ie honestly held, it not being to the point whether it was well founded in fact or law or not;[24]
> c) while the belief does not have to be reasonable,[25] a colourable pretence is insufficient;[26]
> d) the belief must be one of a legal entitlement to the property and not simply a moral entitlement;[27]
> e) the existence of such a claim when genuinely held, may constitute an answer to a crime in which the means used to take the property involved an assault, or the use of arms; the relevant issue being whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it;[28]
> f) the claim of right is not confined to the specific property or banknotes which were once held by the claimant, but can also extend to cases where what is taken is their equivalent in value, of which *Langham*[29] and *Lopatta*[30] provide examples; although that may be qualified when, for example, the property is taken ostensibly under a claim

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21 *R v Fuge* (2001) 123 A Crim R 310.

22 Ibid [24].

23 *R v Langham* (1984) 36 SASR 48.

24 *R v Nundah* (1916) 16 SR (NSW) 482; *R v Bernhard* (1938) 2 QB 264; *R v Lopatta* (1983) 35 SASR 101, 107; *Walden v Hensler* (1987) 163 CLR 561; *R v Langham* (1984) 36 SASR 48, 52-53.

25 *R v Nundah* (1916) 16 SR (NSW) 482, 485-490; *R v Langham* (1984) 36 SASR 48, 49; *R v Kastratovic* (1985) 19 A Crim R 28.

26 *R v Dillon* (1878) 1 SCR NS (NSW) 159; *R v Wade* (1869) 11 Cox CC 549.

27 *R v Bernhard* (1938) 2 QB 264; *Harris v Harrison* (1963) Crim LR 497.

28 *R v Love* (1989) 17 NSWLR 608, 615-616; *R v Salvo* (1980) VR 401; *R v Langham* (1984) 36 SASR 48, 58; *R v Kastratovic* (1985) 19 A Crim R 28, 66; *R v Barker* (1983) 153 CLR 338; *R v Williams* (1986) 21 A Crim R 460; see also *R v Boden* (1844) 1 C & K 395.

29 *R v Langham* (1984) 36 SASR 48.

30 *R v Lopatta* (1983) 35 SASR 101.

of right to hold them by way of safekeeping, or as security for a loan, yet the actual intention was to sell them;[31]

g) the claim of right must, however, extend to the entirety of the property or money taken. Such a claim does not provide any answer where the property or money taken intentionally goes beyond that to which the bona fide claim attaches;[32]

h) In the case of an offender charged as an accessory, what is relevant is the existence of a bona fide claim in the principal offender or offenders, since there can be no accessorial liability unless there has in fact been a foundational offence,[33] and unless the person charged as an accessory, knowing of the essential facts which made what was done a crime, intentionally aided, abetted, counselled or procured those acts;[34]

i) It is for the Crown to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury.[35]

The above extensive list[36] is adequate testimony to the breadth of the excuse of honest claim of right and each of these principles will be subjected to close scrutiny in the next section of this paper. The collection of common law authorities surrounding the scope of honest claim of right in *R v Fuge* is here utilised for the purposes of analysis given the brevity of language used under the Codes which per force import all the common law surrounding the defence (excuse). For example, s 22(2) of the *Criminal Code* (Qld) simply states:

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31 *R v Lenard* (1992) 57 SASR 164.

32 *Astor v Hayes* (1988) 38 A Crim R 219, 222.

33 *R v Gregory* LR 1 CCR 77, 79. See *R v Lun* (1932) 32 SR (NSW) 363; *R v Richards* (1974) QB 776; *R v Howe* (1987) AC 417.

34 *R v Giorgianni* (1985) 156 CLR 473; *R v Stokes & Difford* (1990) 51 A Crim R 25; *R v Buckett* (1995) 79 A Crim R 302.

35 *R v Lopatta* (1983) 35 SASR 101, 108; *Astor v Hayes* (1998) 38 A Crim R 219; *R v Lenard* (1992) 57 SASR 164; *R v Williams* (1986) 21 A Crim R 460, 475.

36 This list was quoted in its entirety by Gray J in *R v Bedford* (2007) 98 SASR 514, [37].

> But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.[37]

The above four lines do not make the law simple and accessible if a raft of common law principles have to be imported in order to interpret the meaning of an honest claim of right. This paper attempts to construct a model section for honest claim of right that is applicable to all Australian criminal codes that specifically imports the common law rules that are here contended to be the most appropriate if the defence (excuse) is to be retained. By working through the list in *R v Fuge,* a sorting exercise is being undertaken as to which common law rules should be retained and which narrowed or rejected in a model criminal code section for honest claim of right.

II Established Principles underpinning Honest Claim of Right

a) the claim of right must be one that involves a belief as to the right to property or money in the hands of another
b) the claim must be genuinely, ie honestly held, it not being to the point whether it was well founded in fact or law or not
c) while the belief does not have to be reasonable, a colourable pretence is insufficient

Wood CJ at CL quotes *R v Langham*[38] as authority for all three principles. In this case, the accused attempted to return a cross-bow that he had earlier purchased for $675 from a store in Rundle Street, Adelaide. In keeping with the store's policy on refunds, Langham was told he could not have a cash refund but could use the $675 as a credit to purchase other goods in the store. Some two months later, after some trouble where he was residing and his perceived need to set up on his own, Langham's desire to have the cash strengthened. In pursuit of

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[37] *Criminal Code 1899* (Qld); s 22 *Criminal Code 1902* (WA) uses identical language.

[38] *R v Langham* (1984) 36 SASR 48.

this purpose, Langham returned to the store and purchased a shotgun leaving a balance of $301. Later that day Langham again returned and menaced the staff with the shotgun (which was apparently unloaded) and demanded the outstanding cash refund of $301, which he received. Langham then went to a doctor and caused the doctor to ring the store to ascertain whether the store intended 'to press charges'.

The case actually turned on the question of whether it was sufficient that the accused believed that he had a right to the property taken or whether his belief must extend to a right to take the property. King CJ held that 'what is required is simply a genuine belief in the accused's legal entitlement to the property taken and not necessarily to his right to take it, either in the particular way in which he has taken it or in any other way'.[39] In coming to this conclusion, King CJ reviewed *R v Skivington;*[40] *R v Hall*[41] where a poacher threatened violence to a gamekeeper if he did not return three wires and a pheasant; *R v Boden*[42] where the prisoner assaulted the prosecutor who owed him eleven sovereigns having earlier seen the prosecutor paid seven sovereigns for a cow that he had sold; and *R v Hemmings*[43] where the prosecutor owed the prisoner money and the prisoner assaulted him whilst demanding the money. The conclusion King CJ reached following His Honour's review of these cases was that 'it was ... not considered material to ask whether the prisoner believed in his right to take the money ... he is guilty only if his state of mind is dishonest at the time of taking the property'.[44]

The case of *R v Langham* was decided in 1984, but if anything the situation became even more bizarre 23 years later in *R v Bedford*[45] where the prosecution case was that the appellant

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39 Ibid 51.
40 *R v Skivington* (1967) 51 Cr App R 167.
41 *R v Hall* (1828) 3 C & P 409.
42 *R v Boden* (1844) 1 C & K 395.
43 *R v Hemmings* (1864) 4 F & F 50.
44 *R v Langham* (1984) 36 SASR 48, 52
45 *R v Bedford* (2007) 98 SASR 514.

entered a grocery store at night wearing a stocking over his head, armed with a screwdriver, and attempted to steal money from the proprietor's cash register. The appellant claimed at trial that, on the night before the alleged offence, he had purchased heroin from the shopkeeper for $100. He believed that the heroin was of poor quality and claimed that he returned to the store to seek the replacement of the heroin or a refund of his $100. The appellant said that he was not wearing a stocking on his head, and nor was he carrying a screwdriver.

The trial judge directed the jury that the appellant's belief that he was owed $100 was no answer to the charge that he was acting dishonestly. The trial judge directed the jury that such a belief, even if genuine, could not amount to a belief that the appellant had a legal entitlement to the money, because the sale and purchase of heroin is illegal and therefore the law does not recognise any obligations arising out of such a transaction. Consequently, the trial judge removed from the jury's consideration the issue of claim of right.

The South Australian Court of Criminal Appeal by majority set aside the conviction and ordered a retrial on the grounds that the trial judge erred in not leaving claim of right with the jury in applying the following test:

> whether "on the version of events reasonably open to the jury and most favourable to the case for the appellant" a jury acting reasonably might not be satisfied beyond reasonable doubt that the prosecution had negatived the defence of claim of right, and so failed to prove that the appellant acted dishonestly.[46]

Hence, it can be said that the first three principles listed above are supported by considerable authority of long standing. The classic test for claim of right was applied in *R v Nundah*[47] where the appellant was charged with stealing two heifers

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[46] Ibid [17].

[47] *R v Nundah* (1916) 16 SR (NSW) 482.

and the defence was that accused believed that the cattle were his own. The Chief Justice said: '[t]he question for the jury is whether the man was honest or not, that is to say, whether he was honest in the act of taking or not.'[48]

On the question of the claim being genuine, in *Margarula v Rose*[49] the basis of the appellant's honest claim of right was that she was a traditional owner and as such was entitled to be on the land in which Energy Resources of Australia (ERA) had an interest. The appellant based her entitlement on statutory recognition of Aboriginal tradition under s 71(1) *Aboriginal Land Rights (Northern Territory) Act*[50] and Aboriginal customary law.

At first instance, the Magistrate found that the appellant did not have a relevant genuine belief as her evidence was to the effect that she knew she was going to be arrested, she knew she had to ask ERA's permission to go into compound and she knew she did not have that permission. On appeal, Riley J upheld the Magistrate's finding that the appellant had no genuine belief in her claim of right as being consistent with the evidence.

A similar conclusion to that of Riley J was arrived at by Hasluck J in *Molina v Zaknich*[51] where His Honour was 'not persuaded that any claim of right was honestly held'[52] by the appellant. At first instance, the appellant was convicted by a Magistrate of remaining on a construction site situated at Canning Vale Prison, after being warned to leave those premises by a person in charge contrary to s 82B(1) of the *Police Act 1892* (WA). Hasluck J upheld the Magistrate's conclusion in finding 'the weight of the evidence indicates that against a background of disputation it could not be said

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48 Ibid 489.
49 *Margarula v Rose* (1999) 149 FLR 444.
50 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
51 *Molina v Zaknich* (2000) 117 A Crim R 346.
52 Ibid [86].

that Mr Molina entered the site pursuant to an honest claim of right'.[53]

However, on appeal to the Full Court[54] the conviction of the appellant was quashed and there was no order for a retrial.

McKechnie J gave the leading judgment in holding that s 22 *Criminal Code 1902* (WA) was capable of applying to the facts of this case. The reasoning on the issue of the availability of s 22 *Criminal Code* turned on an offence under s 82B *Police Act* only being committed if a person remains on the premises without lawful authority after being warned to leave. McKechnie J held that lawful authority is not to be equated with honest claim of right as they involve different concepts; '[a] person may not have lawful authority to remain, but nevertheless honestly claim to have a right to remain'.[55]

With respect, this line of argument rather muddied the waters. Mr Molina claimed, pursuant to the award, that he had a right to remain on the property notwithstanding the warning. Hasluck J, after acknowledging that the Magistrate did not deal with s 22 *Criminal Code 1902* (WA), found that the 'weight of the evidence shows that Mr Molina entered the site under protest and with an awareness that the right of entry he claimed to be asserting was in dispute'.[56] It would appear this point is better characterised as an example of an appellate court taking a different view of the evidence, rather than Hasluck J confusing lawful authority and claim of right. This case will be further discussed in a later section as the Full Court in *Molina v Zaknich* took the opportunity to disapprove *Pearce v Paskov*[57] following the High Court's decision in *Walden v Hensler*[58] on the reach of s 22 *Criminal Code 1902* (WA).

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53 Ibid.
54 *Molina v Zaknich* (2001) 24 WAR 562.
55 Ibid [78].
56 *Molina v Zaknich* (2000) 117 A Crim R 346.
57 *Pearce v Paskov* [1968] WAR 66.
58 *Walden v Hensler* (1987) 163 CLR 561.

Notwithstanding the above discussion of genuine belief, after considering *R v Langham*, even at this early stage it is apparent that the reach of honest claim of right is considerable if one reflects that the claim was upheld some two months after the cross-bow was returned, when only a portion ($301) of the $675 was refunded in cash at the point of a shotgun, and immediately afterwards a telephone call was made to establish whether criminal charges would be laid which goes to the heart of honest belief and objective community standards of what constitutes dishonesty.

d) the belief must be one of a legal entitlement to the property and not simply a moral entitlement

Wood CJ at CL quotes *R v Bernhard*[59] and *Harris v Harrison*[60] as authority for this principle. In *R v Bernhard* the appellant had been the mistress of A, and A agreed to pay the appellant 20 pounds a month for a year but reneged after four months. The appellant threatened to expose A to his wife and the public by placing a notice in a newspaper, and was subsequently charged with demanding money with menaces under the *Larceny Act 1916* (UK). The English Court of Criminal Appeal held that a person has a claim of right 'if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact'.[61]

In *Harris v Harrison* the accused's belief that he ought to be entitled to a pay rise did not amount to a belief in a legal right to a pay rise. In that case, the defendant was employed as a salesman at a weekly wage of ten pounds per week and promised a salary increase when the managing director thought his work worthy of a rise. Without permission, the defendant retained substantial sums and was charged with embezzlement. The court held that 'a belief in a moral right to a sum of money was not a defence to the charge'[62] and the

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[59] *R v Bernhard* (1938) 2 QB 264.
[60] *Harris v Harrison* (1963) Crim LR 497.
[61] *R v Bernhard* (1938) 2 QB 264, 270.
[62] *Harris v Harrison* (1963) Crim LR 497, 498.

attendant commentary noted the decision of the Divisional Court was the only possible one otherwise the door would have opened to endless fraud: 'no doubt Robin Hood thought he had a moral right to rob the rich in order to pay the poor'.[63]

It is contended in this paper that the seemingly bright line between a legal entitlement and a moral entitlement is in reality exceedingly muddied as an examination of the following cases discloses. The starting point is Wells J's powerful dissent in *R v Lopatta*.[64] In that case, the accused was convicted of larceny following his breaking into his former employer's warehouse and stealing 20 large drums of oil worth about $5,000 which he claimed was his estimated entitlement for outstanding holiday pay and other pay which was owed to him. White J gave the leading judgment for the majority. Having acknowledged that the accused's conduct 'was unlawful and even bizarre', His Honour continued that '[n]evertheless, an accused person charged with a crime of dishonesty may be heard to say that he honestly believed in a claim of right even if there is no foundation in fact or law for that wrong-headed belief'.[65]

His Honour was clearly conscious not only of the dissenting judgment of Wells J but also of powerful authority to the contrary. A few lines later in his judgment, White J noted that Lord Goddard in *Gott v Measures* insisted upon the element of reasonableness in the belief in holding that there could not be 'a bona fide claim of right if the right is one which the law does not recognise'.[66] However, White J disposed of Lord Goddard's judgment by stating 'insistence upon reasonableness in the grounds as well as honesty in the belief is not and never has been the law'.[67]

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63 Ibid.
64 *R v Lopatta* (1983) 35 SASR 101.
65 Ibid 107.
66 *Gott v Measures* [1948] 1 KB 234, 239.
67 *R v Lopatta* (1983) 35 SASR 101, 107-108.

Lord Goddard's authority was sufficient for Gaudron J to address His Lordship's judgment in *Waldren v Hensler*[68] in asserting 'that the statement by Lord Goddard is expressed too widely'.[69] Her Honour instead stated that 'the question is not whether the right is recognised by the law but whether it is claimed by reason of the supposed operation of law'.[70]

Justice Gaudron needed to distinguish Lord Goddard's statement of the law by categorising it as too wide and therefore allowing a claim of right to encompass 'the supposed operation of law' in order to find for Mr Walden. It was but a small step from this arguable proposition to the key passage of Her Honour's judgment.

> In the present case, the foundation of Mr Walden's claim of right is based on his membership of an Aboriginal community and the customs of that community. That seems to me to lay a sufficient foundation for a claim of right, provided that the claim is made by reference to some *supposed operation of the law*, for within a legal context, rights do not exist in the abstract. A right must mean a *right in law*, and not merely one which owes its existence to a moral order, religious code or other *non-legal regimen*.[71]

Judicial sophistry is plainly evident in the above passage as immediately following the alleged foundation in support of a claim being some 'supposed operation of the law', whatever that is supposed to mean, a highly confusing qualification is made that the right must mean a 'right in law' and not a 'non-legal regimen'. Clarification on this very point can be found in Martin CJ's judgment in *Director of Public Prosecutions Reference No 1 of 1999* with the statement that 'the belief must be that the claim is founded in law, that the belief is that the claim is "lawful", even though that belief is unfounded in law'[72] and was also forcefully made by Wells J in *R v Lopatta*.

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[68] *Walden v Hensler* (1987) 163 CLR 561.

[69] Ibid 607.

[70] Ibid.

[71] Ibid 608-609 (emphasis added).

[72] *Director of Public Prosecutions Reference No 1 of 1999* (1999) 8 NTLR 148, 161.

Wells J identified the following test, with which the author respectfully agrees, namely, the right 'was of a kind that is, given favourable circumstances, recognised by our system of law'.[73] His Honour went on to rule out a claim which 'in no circumstances ... would be recognised in our system of law' for the reason that the belief is in something 'the nature of which is unknown to the law'.[74]

If the above test had been applied in the case of *R v Craigie and Pattern*,[75] where the defence of honest claim of right was successfully relied upon by two Aboriginal defendants, the outcome would have been different. In that case the defendants were charged with breaking and entering into an art gallery and stealing aboriginal paintings. They were acquitted because the court found that they held an honest belief that the law of New South Wales recognised their right under aboriginal customary law to claim possession of the paintings.

Under this paper's proposed revised s 9.5 *Criminal Code 1995* (Cth), discussed in a later section, the defendants would have failed on two counts: firstly, it was not a claim recognised by Australia's system of law and, secondly, a person is criminally responsible for any other offence arising necessarily out of the exercise of the honest proprietary or possessory right such as breaking and entering.

The matter of Wells J's dissent clearly rankled with White J because, nine years after *R v Lopatta* was decided, His Honour had the opportunity to revisit the legal issue in *Lenard v The Queen*.[76] In the later case, White J, having noted that in *R v Lopatta* Wells J would have excluded claims inconsistent with our system of law, interpreted this as meaning that 'if the defence of claim of right was articulated too widely it

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[73] *R v Lopatta* (1983) 35 SASR 101, 103.

[74] Ibid.

[75] *R v Craigie and Pattern* (Unreported, District Court of New South Wales, 1980).

[76] *Lenard v the Queen* (1992) 57 SASR 164.

would open up the floodgates'.[77] White J was fortified that the majority view in *R v Lopatta* 'appeared to be accepted in *Langham*'.[78]

Justice White was not content to let the matter rest there and continued his critique of Wells J by calling in aid remarks made by Brennan and Deane JJ in *Barker v The Queen*.[79] This was a case where a neighbour had a key and a limited right to enter his friend's house in case of emergency, but instead the neighbour entered and took away some furniture. White J in *Lenard v The Queen* makes the startling claim that '[t]he importance of *Barker v The Queen* in *Lopatta's* case was the answer which it contained to the proposition being put forward by Wells J in *Lopatta's* case'.[80]

Justice White singles out a passage from the joint judgment of Brennan and Deane JJ in *Barker v The Queen* which refers to Dixon J in *Thomas v The King*[81] observing that s 22 of the *Criminal Code* (Qld) stated the common law 'with complete accuracy'[82] and goes on to hold that a trespasser who enters in exercise of an honest claim of right, despite knowledge or being reckless as to facts making him a trespasser, 'is not liable to conviction though he be wrongheaded in asserting that claim'.[83]

Justice White's claim that the joint judgment of Brennan and Deane JJ in *Barker v The Queen* completely meets the argument

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[77] Ibid 175

[78] Ibid.

[79] *Barker v The Queen* (1983) 153 CLR 338.

[80] *Lenard v the Queen* (1992) 57 SASR 164, 177.

[81] *Thomas v The King* (1937) 59 CLR 279, 306.

[82] Deane J in *Walden v Hensler* (1987) 163 CLR 561, 580 stated that the comprehensiveness of Dixon J's statement is 'open to question' and cited Philp J in *Anderson v Nystrom* (1941) St R Qd 56, 69-70 as authority. Similarly, in the same case, Brennan J at 573 also citing *Anderson v Nystrom* said that s 22 *Criminal Code 1899* (Qld) had 'a narrower operation than the common law defence in that it applies only to offences relating to property'.

[83] *Barker v The Queen* (1983) 153 CLR 338, 365 – 366.

of Wells J in *R v Lopatta* is startling for three reasons. Firstly, there is nothing in the words of the joint judgment to support such a sweeping proposition. Secondly, Brennan and Deane JJ were in dissent in *Barker v The Queen* over the doctrine of trespass *ab initio* where the majority found that if a person with a licence enters land with the sole purpose of exceeding the terms of that licence, then that person will be a trespasser because by committing some positive wrongful act the entrant is treated as trespasser from the time of entry no matter how innocent the conduct up until the time of the wrongful act. Thirdly, both Brennan J and Deane J in separate judgments in *Walden v Hensler*[84] dismissed the claim of right. Brennan J was of the view that s 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) did not create an offence relating to property,[85] and Deane J held that the claim that the acts had been done in honest exercise of traditional hunting rights amounted to no more than an assertion that Walden was unaware that the criminal law had outlawed the particular exercise of those rights.[86]

However, for the purpose of this paper it is the judgment of Dawson J in *Walden v Hensler* that, with respect to the other members of the High Court, provides the clearest exposition of the relevant law. His Honour carefully crafted the appropriate analysis within the framework of the *Criminal Code* (Qld). Dawson J began by noting the significance that the appellant did not seek to avail himself of any defence under s 24 of the *Criminal Code* (Qld) which covers mistake of fact (and not mistake of law) for the simple reason that 'he could not do so for he was not mistaken about the nature of his acts'.[87] His Honour then turned to Stephen for the statement '[a]s regards knowledge of the law the rule is that ignorance of the law is no excuse for breaking it'[88] which finds expression in s 22(1) *Criminal Code* (Qld). This culminated in the central passage of

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84 *Walden v Hensler* (1987) 163 CLR 561.
85 Ibid 575.
86 Ibid 583.
87 Ibid 592.
88 Stephen, *History of the Criminal Law of England* (1883), Vol II, 114 – 115.

Dawson J's judgment where His Honour metaphorically puts to the sword the arguments of Gaudron J in the same case, and White J in *Lopatta* and *Lenard*.

> It is not ignorance of the criminal law which founds a claim of right, but ignorance of the civil law, because a claim of right is not a claim to freedom to act in a particular manner - to the absence of prohibition. It is a claim to an entitlement in or with respect to property which goes to establish the absence of mens rea.[89]

To cement the principle, Dawson J examined the case of *R v Pollard*[90] and the judgment of Gibbs J which was the opening case discussed in the introduction to this paper. This was a case where a claim of right was raised to answer a charge of unlawful use of a motor vehicle. Dawson J pointed out that Gibbs J was not referring to a belief in an entitlement in the mere absence of prohibition, but to a legal entitlement under the civil law which would negate the criminal intent involved in the offence.[91] Thus, Dawson J was able to dispose of Walden's claim of right by stating s 22(2) of the *Criminal Code 1899* (Qld) was inapplicable because s 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) 'imposes a prohibition against the keeping of fauna which is of general application irrespective of any proprietary or lesser right in the fauna and so affords no scope for the exercise of any claim of right'.[92]

Significantly, in *Macleod v The Queen*,[93] which concerned the fraudulent application of company property by a director where the accused was also the sole beneficial shareholder

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89 *Walden v Hensler* (1987) 163 CLR 561, 592. Similarly, in *Basso-Brusa v City of Wanneroo* [2003] WASCA 103, [20] Pullin J stated that: '[p]lainly, the fact that a person can honestly say that he thought he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law, does not provide him with a defence of honest claim of right under s 22 of the *Criminal Code*'.

90 *R v Pollard* [1962] QWN 13.

91 *Walden v Hensler* (1987) 163 CLR 561, 593.

92 Ibid 593-594.

93 *Macleod v The Queen* (2003) 214 CLR 230, [41].

of the company, Gleeson CJ and Gummow and Hayne JJ approved the above passage from Dawson J's judgment in *Walden v Hensler*, going on to endorse the remarks of Callaway JA in *R v Lawrence*[94] that 'although an honest claim "may be unreasonable and unfounded", if it is of that quality then the claim "is less likely to be believed or, more correctly, to engender a reasonable doubt"'.[95] Their Honours were clearly concerned as to the reach of claim of right which had similarly troubled the majority in *Walden v Hensler*.

In *Walden v Hensler*, Deane J observed that a special entitlement such as a belief of ownership would only constitute a defence under s 22(2) of the *Criminal Code* (Qld) 'if that entitlement would, if well-founded, preclude what was done from constituting breach of the relevant criminal law which an accused is assumed to know'.[96] This principle came sharply into focus in *Director of Public Prosecutions Reference No 1 of 1999*[97] where Y, an Aboriginal elder, was charged with assault and criminal damage to a camera following a dispute with a photographer.

The defence (more properly excuse) was an entitlement under Aboriginal law to act as Y did, which in turn was sufficient to found an honest claim of right. Martin CJ accepted the submission of the DPP that Y could only succeed under s 30(2) of the *Criminal Code 1983* (NT) if Y honestly believed that the rights he asserted were 'recognised by the general law in force in the Territory sufficient to displace the operation of the criminal responsibility arising from the commission of the offences, even if that was not the correct legal position'.[98] In other words, for Y to succeed he needed to argue that a law operated in the Northern Territory that allowed Y to assault a person and to damage property under the application of

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[94] *R v Lawrence* [1997] 1VR 459, 467.
[95] *Macleod v The Queen* (2003) 214 CLR 230, [42].
[96] *Walden v Hensler* (1987) 163 CLR 561, 581.
[97] *Director of Public Prosecutions Reference No 1 of 1999* (1999) 8 NTLR 148.
[98] Ibid 166.

Aboriginal law. This Y was not prepared to assert, but somewhat amazingly it would seem that Y could have succeeded had he asserted that the general law recognised the lawfulness of his claim.

In the absence of such an assertion by Y, Martin CJ was able to dispose of the DPP's reference under well-settled law by finding that 'neither under the common law nor the statutes are the rights asserted by Y granted or recognised'.[99] His Honour then cited the authority of Mason CJ in *Walker v New South Wales*[100] for the proposition that the criminal law 'is inherently universal in its operation'. Mason CJ, in turn, quoted Griffith CJ in *Quan Yick v Hinds*[101] that 'it has never been doubted that the general provisions of the criminal law were introduced by the [*Australian Courts Act 1828*]'. Martin CJ was then able to conclude that there was nothing in *Mabo [No 2]*,[102] the *Native Title Act*[103] or the *Aboriginal Land Rights (Northern Territory) Act*[104] to support the proposition that criminal laws of general application do not apply to Aboriginal people in answering the question 'can traditional Aboriginal law found an honest claim of right within the meaning of s 30(2) *Criminal Code 1983* (NT)' in the negative.[105]

The propositions for which this paper contends and that can be drawn from the foregoing analysis under principle (d) above, namely, *the belief must be one of a legal entitlement to the property and not simply a moral entitlement*, and will be formulated into a revised s 9.5 *Criminal Code 1995* (Cth)[106] in a later section of this paper, can be briefly stated. First, the belief must be that

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[99] Ibid 167.

[100] *Walker v New South Wales* (1994) 182 CLR 45, 50.

[101] *Quan Yick v Hinds* (1905) 2 CLR 345, 359.

[102] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[103] *Native Title Act 1993* (Cth).

[104] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

[105] *Director of Public Prosecutions Reference No 1 of 1999* (1999) 8 NTLR 148, 169.

[106] Section 43AZ *Criminal Code 1983* (NT) and s 38 *Criminal Code 2002* (ACT) are identical to s 9.5 *Criminal Code 1995* (Cth).

the claim is founded in law, in a belief that the claim is 'lawful', and must be of a kind that given favourable circumstances is recognised by Australia's system of law in the sense it cannot be a belief in something the nature of which is unknown to the law. Secondly, a claim of right being based in ignorance of the civil law does not found an excuse where there is a criminal prohibition of general application irrespective of any proprietary right. The significant statutory exception represented by s 211 of the *Native Title Act* will be addressed in a later section of this paper where it will be argued s 211 should be amended to exclude any totally protected species under any Commonwealth, State or Territory law from the operation of s 211.

e) the existence of such a claim when genuinely held, may constitute an answer to a crime in which the means used to take the property involved an assault, or the use of arms; the relevant issue being whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it.

Wood CJ at CL quotes a variety of authorities for this principle, three of which, *R v Langham*,[107] *R v Barker*[108] and *R v Boden*[109] have already been discussed above. One of the cases listed by His Honour is *R v Salvo*[110] where the appellant had knowingly passed a dud cheque in order to regain possession of a vehicle from a motor car dealer because Salvo maintained he believed the vehicle belonged to him. In that case, the court rejected the approach taken in *R v Feely*[111] of leaving the issue of dishonesty to the jury without further guidance from the judge and in particular the appellant's claim of right. The reasoning in *R v Salvo* was applied in *R v Love*,[112] a case involving a family dispute over the ownership of a parcel of

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[107] *R v Langham* (1984) 36 SASR 48.
[108] *R v Barker* (1983) 153 CLR 338.
[109] *R v Boden* (1844) 1 C & K 395.
[110] *R v Salvo* [1980] VR 401.
[111] *R v Feely* [1973] 1 QB 530, 535-541.
[112] *R v Love* (1989) 17 NSWLR 608.

land. The appellant believed he had a right to the land and by employing deception induced family members to transfer the land to a fictitious person whose identity the appellant assumed.

The court, in construing s 178BA of the *Crimes Act* (NSW)[113] which deals with deception, held that claim of right succeeded provided the prosecution could not disprove the appellant's claim to a belief in the legal right to obtain the property even if he had no such belief in the legal right to practise the deception to secure the property. The court construed s 178BA as contemplating that 'there may be a deceptive obtaining of property which is not dishonest'.[114] This paper contends that such a subjective test for dishonesty is completely unsatisfactory and that the better course is to adopt a simplified form of the *Ghosh*[115] test for dishonesty currently employed in the Commonwealth, ACT and South Australia.[116]

Under s 130.3 of the *Criminal Code 1995* (Cth), dishonesty is defined as meaning (a) dishonest according to the standards of ordinary people; and (b) known by the defendant to be dishonest according to the standards of ordinary people.

It is instructive to apply the above test of dishonesty to a case like *R v Kastratovic*[117] where the appellant was convicted of an intention to defraud by knowingly using a forged instrument under s 234 *Criminal Law Consolidation Act* (SA).[118] The appellant used a forged document to obtain money he believed was lawfully his. King CJ concluded that 'a person is not defrauded if he is caused to do no more than pay his just debt' because 'he has been caused to do no more than perform

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[113] *Crimes Act 1900* (NSW)

[114] *R v Love* (1989) 17 NSWLR 608, 614.

[115] *R v Ghosh* [1982] 1 QB 1053, 1063-64.

[116] See *Criminal Code 1995* (Cth) s 130.3; *Criminal Code 2002* (ACT) s 300; *Criminal Law Consolidation Act 1935* (SA) s 131.

[117] *R v Kastratovic* (1985) 42 SASR 59.

[118] *Criminal Law Consolidation Act 1935* (SA).

his legal obligation'.[119] Thus, an intent to procure the payment of a debt to the appellant is not an intent to defraud and 'is not converted into an intent to defraud by the employment of dishonest means'.[120]

It is argued here that the outcome in *R v Kastratovic* would have been different if it had been decided against the simplified *Ghosh* test for dishonesty under s 131 *Criminal Law Consolidation Act* (SA). Utilising the forged instrument was a dishonest act according to the standards of ordinary people and the appellant would have known this was the case. Furthermore, as Gleeson CJ and Gummow and Hayne JJ observed in *Macleod v The Queen*, 'fraud being inconsistent with a claim of right made in good faith to do the act complained of, that act has, as a necessary element of criminal liability, the quality of dishonesty according to ordinary notions'.[121]

The case most often cited in relation to an honest claim of right and assault is *R v Skivington*[122] which was discussed in the introduction. A recent Australian example of its application was in *R v Jeffrey and Daley*[123] where the appellants having noticed damage to Jeffrey's car and suspecting the complainants, went to their house and confronted the complainants before assaulting them in pursuit of compensation. The court held there was no reason to doubt the correctness of *R v Skivington* in which it was held that on a charge of robbery with aggravation, an honest belief by the accused person of his entitlement to the money in question, was enough to raise the defence of honest claim of right. The same issue was raised in *R v Fuge*[124] in which a robbery was attempted at a fast food outlet in Maitland by one of a group which included a former employee of the restaurant who had recently been dismissed for lateness. Staff leaving

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[119] *R v Kastratovic* (1985) 42 SASR 59, 64.
[120] *R v Kastratovic* (1985) 42 SASR 59, 65.
[121] *Macleod v The Queen* (2003) 214 CLR 230, [43].
[122] *R v Skivington* [1968] 1 QB 166.
[123] *R v Jeffrey and Daley* (2002) 136 A Crim R 7.
[124] *R v Fuge* (2001) 123 A Crim R 310.

the restaurant were stopped at knifepoint and told to open the safe. The sole appeal point was whether honest claim of right should have been put to the jury on the basis of evidence that the former employee had said to her companions that the restaurant owed her money and a robbery was the only way she thought she could get it, notwithstanding other members of the group took it as a joke.

As it transpired, the New South Wales Court of Criminal Appeal dismissed the appeal because honest claim of right was not sufficiently raised by the evidence in the circumstances. However, two members of the court took the opportunity to doubt whether honest claim of right should be available where robbery was involved. Heydon JA described the availability of the defence as 'an astonishing proposition' and that statements in other intermediate courts of appeal which justify it 'call for reconsideration by this Court in a suitable case, there being no High Court decision preventing that course'.[125] Sully J expressed his complete agreement with Heydon JA in describing the 'absurdity to which His Honour draws attention' as sufficiently pressing to recommend 'prompt and specific legislative correction'.[126]

The author respectfully agrees with the observations of Heydon JA and Sully J in proposing the appropriate amendment to s 9.5 *Criminal Code 1995* (Cth)[127] in a later section of this paper where all the proposed amendments to honest claim of right are collected. Essentially, the present s 9.5(2) *Criminal Code 1995* (Cth) follows *R v Skivington* in absolving criminal responsibility 'for any other offence arising necessarily out of the exercise of the proprietary or possessory right that the person mistakenly believes to exist'. Clearly, the use of the phrase 'any other offence' maximises the present reach of honest claim of right and is ripe for amendment such that, for

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[125] Ibid [2].

[126] Ibid [49].

[127] Section 43 AZ *Criminal Code 1983* (NT) and s 38 *Criminal Code 2002* (ACT) are identical to s 9.5 *Criminal Code 1995* (Cth).

example, property could only be claimed without recourse to violence or breaking and entering.

f) the claim of right is not confined to the specific property or banknotes which were once held by the claimant, but can also extend to cases where what is taken is their equivalent in value, of which Langham[128] *and Lopatta*[129] *provide examples; although that may be qualified when, for example, the property is taken ostensibly under a claim of right to hold them by way of safekeeping, or as security for a loan, yet the actual intention was to sell them.*

Wood CJ at CL quotes *R v Lenard*[130] as authority for this principle. In that case, the appellant entered a dwelling and took away various goods alleging the owner of the goods owed him money to the value of these items and had agreed that if she failed to pay by a due date he could enter her premises and take the goods as collateral.

The appellant made little effort to make the owner redeem the goods and sold them the next day. The court found that if, while taking goods purportedly pursuant to an agreement to retaining them as collateral for a loan, the appellant entertained another intention to sell the goods regardless of the owner's right to redemption, then this would be fraudulent and inconsistent with a claim of right.

Perhaps a better example and more revealing demonstration of the above proposition is *R v Bowman*.[131] In that case, Bowman sold his Chevrolet truck to his employers for which he remained unpaid. Bowman then left his employers' premises with their Toyota truck which he registered in his name honestly believing that he had a legal right to do so to protect his debt. The prosecution submitted that Bowman's taking of the Toyota truck was not an act for which claim of right could

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[128] *R v Langham* (1984) 36 SASR 48.
[129] *R v Lopatta* (1983) 35 SASR 101.
[130] *R v Lenard* (1992) 57 SASR 164.
[131] *R v Bowman (No 2)* (1987) 87 FLR 472.

be made but rather was an act to which s30(1) *Criminal Code 1983* (NT) applied, being at most an act based on ignorance of the law.

Asche CJ rejected the prosecution's argument in distinguishing between a breach of the law not based on any specific claim to any particular property, but based on an erroneous view that there was a general right to deal in certain property, as opposed to acts based on positive and particular claims, albeit erroneous, but personal to the actor and to specific property.[132] His Honour relied on *Walden v Hensler*[133] where a generalised defence to shooting a protected bird without any licence based on tradition was not regarded as a claim of right within s 22 *Criminal Code* (Qld), as opposed to a specific claim to that specific animal based on circumstances peculiar to the actor himself.

The significance of Asche CJ's judgment is that not only is it the clearest judicial explanation of the *ratio decidendi* of the majority in *Walden v Hensler*, but also it is *contra* to Toohey J's judgment in *Walden v Hensler* where his Honour stated that it was not necessary for a honest claim of right to be a claim peculiar to the defendant.[134] This paper contends that, with respect, Asche CJ's view is to be preferred, and that for Code jurisdictions, the authority of Virtue J in *Pearce v Paskov*[135] should be restored.

Pearce v Paskov was a case involving a licensed fisherman in possession of undersized crayfish, where Virtue J was construing s 22 *Criminal Code* (WA). His Honour interpreted the phrase "offences relating to property" in s 22 'as applying exclusively to offences of the character of those defined in Part

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[132] Ibid 477-478.

[133] *Walden v Hensler* (1987) 163 CLR 561. Asche CJ also cited *R v George* (1890) NSWLR 373 where a watch was seized against a one pound debt.

[134] *Walden v Hensler* (1987) 163 CLR 561, 600.

[135] *Pearce v Paskov* [1968] WAR 66.

VI of the Code'.[136] These offences involved deprivation of or interference with the proprietary rights of the true owner or acts involving the destruction or damage to the property of others. His Honour held that a charge relating to undersized crayfish was not an offence relating to property because it did not involve as an element 'any interference by the person charged with the proprietary and possessory rights of others'.[137] In an important passage highly relevant to s 211 *Native Title Act*,[138] which is treated in the next section of this paper, Virtue J amplified his reasons:

> They [the offences] come within the prohibition in the Code of acts injurious to the public in general and involve an interference by the State with proprietary and possessory rights of the individual in the interest of the State and for the protection of an industry which is of benefit to the community as a whole.

The above words were written in 1968 and apply *a fortiori* today with society's greater appreciation of the needs of the environment and delicate ecosystems. It is therefore greatly to be regretted that the majority on this point in *Walden v Hensler*, comprising Deane, Toohey and Gaudron JJ, who were construing the identical s 22 in the *Criminal Code 1899* (Qld), in separate judgments, each stated that there was no warrant for reading s 22 down in the way Virtue J had approached the task.[139] This High Court disapproval of *Pearce v Paskov* was applied in the later Western Australian case of *Molina v Zaknich*[140] (discussed in an earlier section of this paper on the genuine nature of the belief) where a conviction for remaining on a construction site without lawful authority was quashed because claim of right extended to any offence relating to property.

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[136] Ibid 72.

[137] Ibid.

[138] *Native Title Act 1993* (Cth).

[139] *Walden v Hensler* (1987) 163 CLR 561, 580 (Deane J), 599 (Toohey J), 606 (Gaudron J).

[140] *Molina v Zaknich* (2001) 24 WAR 562 .

In *Molina v Zaknich* the appellant was an accredited representative of the Construction, Mining and Energy Workers Union of Australia (Western Australian Branch). He was charged and convicted of remaining on the construction site at Canning Vale Prison, after being warned to leave pursuant to s82B(1) *Police Act*.[141] He unsuccessfully appealed to a single Judge of Western Australian Supreme Court, and then appealed to the Full Court. Justice McKechnie gave the leading judgment and, consistent with *Walden v Hensler*, adopted a broad rather than a restricted approach as regards the definition of property: '[t]he time has come to say that the passage quoted in *Pearce v Paskov* no longer represents the law in Western Australia and should not be followed'.[142] Consequently, a claim in respect of an honest claim of right could be applied on the facts of the case irrespective of the right arising under s 22 *Criminal Code 1902* (WA) rather than under the common law.

A recent example of another fishing case is *Stevenson v Yasso*[143] where the defendant was charged under s84 of the Queensland *Fisheries Act*[144] of unlawfully possessing commercial fishing apparatus in the form of a fishing net (a monofilament net of dimensions greater than prescribed in s 12(4) of Pt 3 of Schedule 8 of the *Fisheries Regulations*).[145] The defendant claimed to have used the net in accordance with Aboriginal tradition. The District Court found that there was no evidence given as to the content of the body of traditions and customs of Aboriginal people to support a finding that the possession of the net was consistent with using fisheries resources under Aboriginal tradition. Mr Yasso then appealed to the Court of Appeal.

McMurdo P held that s 22 *Criminal Code 1899* (Qld) applied to the offence because the issue of Mr Yasso's entitlement to possess the net in the exercise of an honest claim of right under s 22

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[141] *Police Act 1892* (WA).
[142] *Molina v Zaknich* (2001) 24 WAR 562, [100].
[143] *Stevenson v Yasso* (2006) 163 A Crim R 1.
[144] *Fisheries Act 1994* (Qld).
[145] *Fisheries Regulations 1995* (Qld).

Criminal Code 1899 (Qld) was raised on the evidence. However, McPherson J held that s 22 *Criminal Code 1899* (Qld) had no application because the offence was constituted independently of any use of the net to catch fish and consequently possession was unrelated to Aboriginal tradition.[146]

Neither the Western Australian nor Queensland legislatures have seen fit to amend s 22 of their respective codes to restore the narrower reading of Virtue J in *Pearce v Paskov*, but this paper contends that it is essential if claim of right is to have sensible objective boundaries.

g) the claim of right must, however, extend to the entirety of the property or money taken. Such a claim does not provide any answer where the property or money taken intentionally goes beyond that to which the bona fide claim attaches.

Wood CJ at CL quotes *Astor v Hayes*[147] as authority for this principle. In that case, the appellant was convicted of larceny of a handbag, its contents and a small sum of money. The appellant did not dispute that he took the goods in question but claimed it belonged to X and that he was getting back at her for stealing his wallet on a previous occasion. The handbag did not belong to X. The appellant relied on claim of right.

Perry J held a claim of right cannot succeed where 'property is taken with a view permanently to deprive the owner of the property unless the claim of right extends to the whole of that property'.[148] His Honour went on to observe that where there was evidence that the defendant did not intend to return the handbag to which he had no claim, and therefore the claim of right only extended to part of the property taken, then his Honour could 'not see how a claim of right can successfully be made out'.[149]

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[146] *Stevenson v Yasso* (2006) 163 A Crim R 1, 21 (McMurdo P), 31 (McPherson J).
[147] A*stor v Hayes* (1988) 38 A Crim R 219, 222.
[148] Ibid.
[149] Ibid.

There is no other discernible authority for this principle, which in any event is logically consistent with the essence of the claim of right. However, in keeping with a Code being an attempt comprehensively to state the relevant law, there is no impediment and indeed every good reason, to place this principle in a subsection within the section on claim of right.

h) In the case of an offender charged as an accessory, what is relevant is the existence of a bona fide claim in the principal offender or offenders, since there can be no accessorial liability unless there has in fact been a foundational offence, and unless the person charged as an accessory, knowing of the essential facts which made what was done a crime, intentionally aided, abetted, counselled or procured those acts.

Wood CJ at CL quotes a variety of authorities for the two principles listed above, however, a review of the listed Australian authorities reveals no instance of claim of right being involved. In *R v See Lun and Welsh*[150] the appellants had been found guilty of maliciously setting fire to a shop at Guyra and the trial was concerned with proving that the appellants were accessories before the fact. The case is authority for the principle that if it is sought to prove that a person was an accessory and not a principal, it is an essential part of the Crown case to prove that there was a felony committed.

In *R v Stokes and Difford*[151] the appellants had been convicted of maliciously inflicting grievous bodily harm on a fellow inmate of the Malabar prison. The case is authority for the principle that the Crown had to prove an accessory knew or was aware of the principal's intention to do the act that caused the harm and that the act would be done maliciously.

In *R v Buckett*[152] the appellant had been convicted of being knowingly concerned in the commission of the offence of

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[150] *R v See Lun and Welsh* (1932) 32 SR (NSW) 363.
[151] *R v Stokes and Difford* (1990) 51 A Crim R 25.
[152] *R v Buckett* (1995) 79 A Crim R 302.

disposing of $4 000 000 reasonably suspected of being proceeds of crime. The court held that the Crown had to establish that an accessory had knowledge of the intention to dispose of the money, which was reasonably suspected of being proceeds of crime, where the principal would have been unsuccessful on the balance of probabilities of establishing he had no reasonable grounds for suspecting the money was derived from unlawful activity, and with that knowledge the accessory deliberately became involved in the commission of the offence.

A more recent case specifically on point with being an accessory to a claim of right is *R v Waine*.[153] In that case, the appellant was convicted of wilful damage by spray-painting of the insignia "AUA" on six huts on Fraser Island that were owned by the Director-General of the Department of the Environment. The appellant was tried along with two others, one of whom, Sempf, claimed certain native title rights over the land on behalf of one of the clans of Aboriginal people who had traditionally lived on Fraser Island. The evidence showed that the appellant had carried out the spray-painting at the direction of Sempf. The trial judge had allowed a claim of right under s 22(2) *Criminal Code 1899* (Qld) to go to the jury for Sempf, but not for the appellant. The court held that the trial judge had erred in not leaving a claim of right for the appellant with the jury and ordered a retrial. The court was of the view that once a defence of honest claim of right was available to Sempf, then there was no reason why the appellant was not equally entitled.

The outcome of this case is not contentious as regards the right of an agent to a claim of right, however, it is the foundation of the principal's claim that is open to criticism and correction. The court rejected the Crown's case that s 22(2) *Criminal Code 1899* (Qld) does not afford a defence unless the accused claims some right in the property the subject of the charge that is personal to him or her. If this not be the law, then this paper

[153] *R v Waine* [2006] 1 Qd R 458.

contends that it should be, as per Asche CJ's judgment in *R v Bowman* discussed above.

i) It is for the Crown to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury.

Wood CJ at CL quotes a variety of authorities for this principle and it is undoubtedly well-settled law. There is currently nothing in any of the Criminal Codes in Australia that places the legal onus on the defendant. This paper argues that position should change, and that contrary to long standing common law authority a defendant should be required to prove on the balance of probabilities that the claim of right is both genuine and reasonable.

The underlying reason in support of this contention is that honest claim of right operates as an exception to the general rule that ignorance of the law does not afford an excuse. The justification for an evidential burden rather than a legal burden on the defence typically finds expression in the following passage from the judgment of Brennan J in *Walden v Hensler*:

> Prosecutions for offences relating to property often raise difficult questions of private law to which members of the community without special knowledge and special skills cannot be expected to know the answer. To render a person liable to punishment for an offence relating to property when, under a mistake of law, he acts honestly claiming a right to do what he does and when he has no intention to defraud would make the criminal law unjustly oppressive: it would expose him to the peril of conviction for an offence because of a legal mistake about his private rights.[154]

Thus, the law treats property offences differently from all other offences as regards ignorance of the law on the thin premise that property offences are so difficult to understand they need to be in a special category. It is suggested here that there are many areas of the law that are arguably equally difficult for

[154] *Walden v Hensler* (1987) 163 CLR 561, 570.

members of the community to understand but they do not enjoy the special status of honest claim of right. The issue is further compounded given honest claim of right has been expanded to include such offences as robbery and any other offence arising necessarily out of the exercise of the honest claim of right such as breaking and entering.

The lurking spectre of *Woolmington v DPP*[155] and the lustre of the famous golden thread speech of Viscount Sankey inevitably appears whenever the onus of proof is raised. In this context, it should be recalled that Viscount Sankey qualified 'one golden thread' as 'subject also to any statutory exception'.[156]

However, as has been pointed out in '*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*',[157] the Senate Scrutiny of Bills Committee 'usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged'.[158] Significantly, for the purposes of this paper, whilst the matter being within the defendant's knowledge has not been considered sufficient justification, the Senate Committee 'is most inclined to support reversal where the defence consists of pointing to the defendant's state of belief'.[159] Given that mistaken belief is at the heart of the excuse of claim of right, the Committee's view appears to be promising.

Governments routinely refer legal issues to Law Reform Commissions and then change the law based on the ensuing report's recommendations. An example would be the controversial partial defence to murder of provocation which has traditionally only required an evidential burden to be discharged. In recent times, Tasmania, Victoria and Western

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

[156] Ibid 481.

[157] Australian Government, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004).

[158] Ibid 29.

[159] Ibid.

Australia have abolished the defence completely. In September 2008, the Queensland Law Reform Commission recommended the retention of the partial defence of provocation in Queensland because the Queensland government had previously indicated that mandatory life imprisonment for murder would remain. Instead, the Queensland Law Reform Commission recommended that the onus of proof on the defence in raising provocation be changed from an evidential burden to a legal burden on the balance of probabilities.[160]

Consequently, there is nothing exceptional in changing the law as regards the onus of proof, and arguably this is more pertinent when the criminal law is expressed in a criminal code that is intended to be comprehensive.

III Section 211 *Native Title Act 1993* (Cth)

Section 211 of the *Native Title Act*,[161] an Act that post dates *Walden v Hensler*,[162] allows specified classes of activity such as hunting or fishing for the purpose of satisfying personal, domestic or non-commercial needs and overrides any State law that completely protects a particular fish or fauna by virtue of s 109 of the Constitution. In *Yanner v Eaton*,[163] the High Court by a majority of 5 to 2 (in reliance on s 211 of the *Native Title Act*) upheld the dismissal of a similar charge to *Walden v Hensler*.

In *Yanner v Eaton*, the appellant used a traditional form of harpoon to catch two juvenile estuarine crocodiles in Cliffdale Creek in the Gulf of Carpentaria area of Queensland. The appellant was not the holder of a licence under the *Fauna Conservation Act*,[164] and like Walden before him was charged under s 54(1)(a) of that Act.

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[160] Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64, (2008) 11.

[161] *Native Title Act 1993* (Cth).

[162] *Walden v Hensler* (1987) 163 CLR 561.

[163] *Yanner v Eaton* (1999) 201 CLR 351.

[164] *Fauna Conservation Act 1974* (Qld).

The case hinged on whether the *Fauna Conservation Act*, which came into existence in 1974, extinguished the native title rights upon which the appellant relied under s 211 of the *Native Title Act*, which became effective in 1993. The majority answered this question in the negative and the minority in the affirmative. This paper contends, with respect, that the better view was taken by McHugh J and Callinan J in dissent, but has to proceed on the basis that in order to overcome the majority decision and the subsequent cases that have followed *Yanner v Eaton*, legislative amendment to s 211 is required.

Another case decided in the same year, 1999, but three months before *Yanner v Eaton*, was *Wilkes v Johnsen*.[165] The appellant was convicted under the Western Australian *Fish Resources Management Act*[166] of being in possession of totally protected fish (undersize marron) contrary to s 46(b) of that Act. The appellant claimed at trial that he had a native title right to fish for undersize marron which was either not affected by the Act or was preserved by s 211 of the *Native Title Act*. The court, in correctly anticipating the outcome of *Yanner v Eaton*, held that s 211 had the effect of permitting fishing by native title holders, contrary to s 46(b) *Fish Resources Management Act*, provided that they complied with s 211(2) of the *Native Title Act*.

A similar case in that it concerned the same legislation occurred in 2007 in *Mueller v Vigilante*.[167] This case involved undersized brown crabs which are 'totally protected fish' and pursuant to s 45 *Fish Resources Management Act* a person must not have in their possession totally protected fish. Honest claim of right was raised because when the respondent (who was not of Aboriginal descent) went fishing he was accompanied by two Aboriginal boys, and he believed that the boys were within their rights to keep the crabs under their lore and customary rights.

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[165] *Wilkes v Johnsen* (1999) 21 WAR 269.
[166] *Fish Resources Management Act 1994* (WA).
[167] *Mueller v Vigilante* (2007) 215 FLR 68.