

CHAPTER 8

PROPERTY OFFENCES

The structure of property offences

8.1 Offences against property form complex schemes in all jurisdictions, partly because different offences deal with different ways that property interests can be violated. The Vanuatu scheme is relatively simple compared with those of most other jurisdictions but more complex than the scheme for offences against the person. The focus of this chapter will be on:

- ‘theft’, ‘misappropriation’ and obtaining by ‘false pretences’, all of which are punishable by up to 12 years’ imprisonment: Penal Code s 125;
- receiving property dishonestly obtained; no penalty is specified: s 131;
- malicious damage, for which no penalty is specified, and arson, with penal liability of 5 or 10 years depending on the ownership of the property: ss 133-134;
- robbery, punishable by up to 25 years’ imprisonment: s 137;
- unlawful entry onto or presence in property, with penal liability of 10 or 20 years depending on whether the place is used for human habitation: s 143.

Penal liability for receiving and malicious damage is governed by the Interpretation Act s 36(3), which provides: ‘Where an Act of Parliament omits to prescribe a penalty for an offence created by the Act or for a contravention of a provision of the Act the penalty shall be a fine of VT 5,000 or imprisonment for 1 year or both.’

8.2 Prosecutions can fail if the wrong property offence is charged. However, the Criminal Procedure Code ss 114-115 provide for some alternative verdicts if this is what the evidence establishes: a conviction of theft on a robbery charge; receiving on a theft charge; theft on a charge of obtaining by false pretences (though oddly, not *vice versa*).

8.3 The principles relating to criminal responsibility for property offences differ in some respects from those for offences against the person. Although many offences against the person require proof of subjective fault elements, not all do: some can be committed through inadvertent negligence. In contrast, property offences typically include an express declaration that the offence must be committed intentionally or with some other advertent state of mind. Liability for negligence is not a feature of the law of property offences.

Elements of theft

8.4 The terms 'theft' and 'stealing' are synonyms. The Penal Code uses the term 'theft'. Some jurisdictions have an elaborate and overly complicated range of offences of theft, with maximum penalties varying with what is stolen and in what circumstances. In contrast, Vanuatu has just one offence under s 125, which provides: 'No person shall cause loss to another – (a) by theft'. The maximum penalty is 12 years' imprisonment. Distinctions relating to what is stolen and in what circumstances are left to the sentencing process.

8.5 The Code s 122 provides a definition of theft:

(1) A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;

(2) A person shall also be guilty of theft of any such thing notwithstanding that he has lawful physical control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner.

This definition corresponds closely to that in the model Code developed by the British Colonial Office which was introduced into Vanuatu a few years before independence: see **1.4**.

8.6 The s 122 definition contains two alternative types of physical elements for the offence:

- In *theft by taking* (s 122(1)), the offence is committed when possession of the property is gained.
- In *theft by converting* (s 122(2)), possession of the property is gained lawfully but the property is stolen later, through the person doing an act inconsistent with the rights of the owner such as selling the property.

8.7 Despite the references to 'owner' in s 122(1), stealing is essentially an offence against possession rather than ownership as such. There is an extended definition of 'owner' in s 122(3)(c):

the word "owner" includes any part-owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Under this definition, joint owners of property can steal from each other. It would also

be possible for a person to steal from anyone who has actual possession of the thing, including a person whose possession is unlawful. It is even possible for an owner of a thing, or any person with a legal interest in it, to steal the thing from a person who is entitled to possession of it.

8.8 Things 'capable of being stolen' are not defined in the Vanuatu Code. At common law, theft has been said to require property that is 'capable of physical possession and removal': *Croton v R* (1967) 117 CLR 326 at 330. The object must therefore be tangible and moveable. This excludes:

- intangibles such as power, although there is a special offence of appropriation of generated power under the Vanuatu Code s 126(a);
- real property including items such as fixtures, although they can be stolen after having been severed. Section 122(3)(b) provides that the words 'carried away' in s 122(1) include the removal of an attached thing which has been completely detached.

8.9 Property capable of being stolen must also be capable of ownership. Material on which information is recorded, such as paper, can be stolen. However, information itself, however confidential, is not capable of being stolen: see *Oxford v Moss* (1979) 68 Cr App R 183 (CA); *Stewart* (1988) 59 DLR 1 (SCC). To compensate for this limitation, some jurisdictions have created separate offences relating to the unauthorised use of computers and to dishonestly obtaining or using personal financial information. In Vanuatu, the offence of obtaining by deception under the Code s 130B(2)(b) covers an act done with the intention of causing a computer system to make a response that the person is not authorised to cause.

Theft by taking

8.10 Theft by taking requires that the offender 'takes and carries away' the item. This signifies that the offender must move the thing or cause it to be moved. This is sometimes called the requirement for 'asportation'.

8.11 Theft by taking generally cannot be committed when property has been given by the owner to the recipient, either physically or by permitting the recipient to obtain physical control of it. However, the distinction between taking and being given may sometimes be a fine one. Making an unauthorised withdrawal from an automatic teller machine has been held to be a taking, although the issue has been the subject of debate: see *Mujunen v R* [1994] 2 Qd R 647. In any event, in Vanuatu the offence of obtaining by deception has been drafted under the Code s 130B(2)(b)(ii) to include an unauthorised withdrawal 'from a machine that is designed to operate by means of payment or identification'.

8.12 Under s 122(3)(a), the concept of ‘taking’ is extended to include some instances of being given the property:

the word "takes" includes obtaining physical control —

(i) by any trick or by intimidation;

(ii) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained...

Nevertheless, these provisions are confined to obtaining physical control (possession) alone; they do not extend to obtaining ownership. Suppose, for example that someone seeks to trick an owner into giving up some property. If the transfer is expressed to be for a particular temporary purpose such as obtaining a valuation, possession alone has been transferred and the property has been ‘taken’ by virtue of s 122(3)(a). If, however, the owner gives up the property unreservedly in return for a promise of future payment, ownership has been transferred and the property has not been taken.

8.13 The concept of ‘taking’ has also been extended by s 122(3)(iii) to include instances of finding property and keeping it:

the word "takes" includes obtaining physical control —...

(iii) by finding, whether or not at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps.

This cumbersome phraseology means that a person who finds property and retains possession ‘takes’ the property and can therefore steal it if there is intent to permanently deprive the owner.

Theft by converting

8.14 The term ‘converts’ is not defined in the Penal Code. At common law, conversion involves ‘a dealing with the thing said to be converted in a manner inconsistent with the owner’s right in the thing’: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110, at 115-6, 124. In this context, the phrase ‘the owner’s right in the thing’ seems to mean the owner’s right to dispose of property by, for example, transferring legal claims to it or destroying it. Mere failure to return property does not amount to conversion at common law even if the failure was deliberate. Conversion requires some sort of physical dealing with the goods: see *R v Angus* [2000] QCA 29 at [15].

Fault elements of theft

8.15 There are two components to the fault elements of theft:

- *'fraudulently and without claim of right made in good faith'*. In the context of theft, 'fraudulently' appears to mean something like 'dishonestly', or acting in disregard of the interests of other persons. A claim of right is a claim, albeit mistaken, of legal entitlement to take or deal with property. The claim must be a legal claim to the property and not just a moral claim. A claim of right constitutes an exception to the general principle that ignorance of the law is no defence to a criminal charge: Code s 11(1).
- *'with intent permanently to deprive the owner'* of the property. A mistake of fact may be inconsistent with an intention to deprive. For example, a person who mistakes a mobile phone belonging to someone else for her or his own mobile phone does not intend to deprive the owner when taking it.

8.16 Deprivation means the experience of loss. In a case of theft, actual deprivation might not occur; it is the intention to deprive that founds criminal liability. For example, there is no deprivation if the property is recovered by the police and returned to the owner before its loss is experienced. Yet the offence may still be committed. An intent permanently to deprive is an ulterior intent, meaning that it is an intention with respect to something lying beyond the appropriation of the property.

8.17 Unauthorised borrowing or use of another person's property is not generally stealing because there is no intent *permanently* to deprive. Nevertheless, there can be an intent permanently to deprive despite an intent to restore the property if the intent to restore is unrealistic: for example, if money is taken in order to gamble with it. As it was put by Connolly J in *Toritelia v R* [1987] SBCA 2:

Intention to restore coupled with an ability to do so is inconsistent with the intention permanently to deprive. On the other hand, an alleged intention to restore with no reasonable prospect of doing so is, in practical terms, an intention permanently to deprive the owner unless a pious hope be fulfilled.

Moreover, there is a separate offence relating to the unlawful use of the property of another person: Code s 126(b):

No person shall...(b) without lawful authority use any property of another notwithstanding that he does not have the intention permanently to deprive the owner of it.

This offence carries liability to 8 years' imprisonment. Similar offences are found in other jurisdictions but are usually restricted to particular types of property such as motor vehicles.

8.18 On the different meanings of 'intention', see **4.9-4.13**. In the context of theft, intention will usually take the form of knowledge rather than purpose. It is rare for one person to steal the property of another in order to deprive the other person of it.

A person who steals the property of another will usually do so simply in order to gain the benefit of the property, but with the incidental knowledge that the other person will thereby be deprived of it.

8.19 Intention to deprive can be proved by inference as well as directly. Moreover, it is not necessary that there be direct evidence tying the accused to the taking or conversion. Possession of recently stolen property can be a sufficient basis to infer that the possessor appropriated the property with the intent to permanently deprive the owner: see *Bruce v R* (1987) 74 ALR 219. This is sometimes called the doctrine or presumption of 'recent possession'.

Theft and property transactions

8.20 Theft can only be committed when a taking or conversion occurs 'without the consent of the owner': s 122(1). In cases where property was given by one person to another, rather than taken by the recipient, it may be necessary to determine whether what was given was either ownership of the property (including the right to dispose of it) or mere possession.

- When possession alone has been transferred, the recipient can commit a subsequent offence of stealing by conversion.
- Transfer of ownership, however, generally excludes the operation of the law of theft. It is well established as a matter of common law that there cannot be a conversion by a person who owns the property: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110, at 115-6, 124. The law of theft has no application where a dishonest disposal of property occurred after ownership was transferred.

However, where ownership has passed, another offence may be committed: misappropriation contrary to s 125(b) if there has been a breach of some condition attached to the transfer; obtaining property by a false pretence contrary to s 125(c) if the property was obtained dishonestly.

8.21 Ownership of property is generally a matter of civil law. The general test of what is transferred is the intention of the person who makes the transfer. Ownership passes if that was what is intended. If the owner of something gives it to another person for a particular purpose such as temporarily using it, the intent is to transfer possession alone: the owner expects to get the thing back. If, however, the owner gives the property to another person, not expecting to get it back, in return for a promise of future payment for it, the intent is to transfer ownership.

8.22 There is, however, an exception for money because of its peculiar nature as a medium of exchange. It has been said that: 'Money in most circumstances cannot be followed, which is to say that property, or ownership, generally passes with

possession': *Ilich* [1987] HCA 1; (1987) 162 CLR 110 at 128. This is why someone who borrows cash need not return the same notes or coins.

8.23 In most criminal cases, principles of civil law will determine whether ownership has passed in a transaction. However, special provision has been made in many criminal statutes for two types of cases that have been problematic, especially where money is involved: transfers of property with a direction as to what is to be done with it; and transfers of property to one person with intent that it be passed on to someone else. It has been commonly thought that these cases justify exceptions to the general principle that a person given possession of money is also given ownership. However, the problem has been tackled in different ways in different jurisdictions.

- Some jurisdictions have dealt with these cases by bringing them within the scope of the offence of theft: they either specifically provide that ownership does not pass to the person receiving the property (see eg the Fiji Crimes Act 2009 s 296) or they expressly extend the scope of the offence to cover the two types of cases, so that there is no need to determine what was given (see eg the Samoa Crimes Act 2013 s 162).
- However, a different approach has been taken in Vanuatu, and also in Solomon Islands, Kiribati and Tuvalu. In these jurisdictions, the problematic cases are covered by the separate offences: misappropriation under s 126(b) in Vanuatu; fraudulent conversion or embezzlement by a clerk or servant in Solomon Islands, Kiribati and Tuvalu: see Penal Codes Solomon Islands ss 273(a)(ii), (b)(ii), 278; Kiribati and Tuvalu ss s 266; (a)(ii), (b)(ii), 271. On these offences, see below, **8.26-8.31**.

8.24 There can sometimes be an intention to transfer ownership even if the transfer was made under a mistake. This depends on the category of mistake. In Vanuatu, the matter is governed by common law.

- A mistake of a 'fundamental' kind negatives an apparent agreement to transfer ownership, so that possession alone is transferred and there can be a subsequent act of conversion. In *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110 at 126, it was said that only three kinds of mistake can be regarded as fundamental: mistakes 'as to the identity of the transferee or as to the identity of the thing delivered or as to the quantity of the thing delivered'.
- Mistakes that are not 'fundamental' do not prevent a transfer of ownership: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110, at 127. An example of a non-fundamental mistake would be a mistaken belief that a payment has been made and that there is therefore an obligation to transfer the property. In such cases, theft is not committed even if the recipient is or becomes aware of the mistake. There may be a civil action for recovery of the property but that is a different matter that does not involve criminal responsibility.

8.25 Money is an exceptional category of property subject to special rules. A common law principle has developed to the effect that when money ‘passes into currency’, through a bona fide transaction, ownership of the money generally passes with its possession: *Ilich v R* [1987] HCA 1; (1987) 162 CLR 110, at 128, 143. This principle applies even when there has been an overpayment that would otherwise constitute a ‘fundamental’ mistake. The same principle should apply to all types of mistake about matters of money. The result is to limit the scope for commission of an offence of theft by subsequent conversion. However, an offence of misappropriation may still be committed.

Misappropriation

8.26 Causing loss to another by ‘misappropriation’ of property is an offence under the Code s 125(b), with liability of up to 12 years’ imprisonment. ‘Misappropriation is defined in s 123:

A person commits misappropriation of property who destroys, wastes, or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption).

There is no restriction to the property of another person as there is in the offence of theft. The offence can therefore apply to both the property of another person and a person’s own property which is held subject to some condition. The term ‘converts’ is used but, in the context of a separate offence, appears to carry a meaning extended beyond that in the offence of theft by conversion. It can therefore apply to the disposal of a person’s own property in breach of a condition on which it is held.

8.27 The offence of misappropriation covers various forms of dishonesty that escape the restrictions on liability for theft. Many cases of misappropriation will also be cases of theft by conversion. In these cases, a prosecutor will need to decide which offence to charge. However, the scope of the offence of misappropriation is broader for several reasons.

8.28 First, the offence appears designed to bypass the question of whether ownership may have passed to the recipient of the property, in the same way that some other jurisdictions have extended the offence of theft to cover these types of cases: see above, **8.23**. The offence of misappropriation is particularly useful for two types of cases which have been problematic for the law of theft because of the principle that ownership of money passes with its possession: see above, **8.23**.

- Cases where property is given with a direction as to what is to be done with it and the recipient uses the property for their own benefit. For example, one person may give money to another with an instruction to make a particular purchase on his or her behalf.
- Cases where property is given to one person with intent that it be passed on to someone else and the recipient uses the property for another purpose. For example, the purchaser of goods in a shop typically intends the money to go to the owner of the business, even when the money is initially paid to a shop assistant.

In such cases, misappropriation may be the appropriate charge.

8.29 Secondly the offence does not require any physical dealing with the property. See, for example, *R v Davenport* (1954) 38 Cr App R 37, at 41-42. In that case, a company secretary received blank cheques from the company, with the understanding that he would fill in the name of a proper payee. Instead, he inserted the name of a creditor of his own. The creditor presented the cheques at his own bank, the payment was made and the company's bank account was debited. The company secretary was initially convicted of larceny of the company's money. That conviction was quashed on the ground that there was no dealing with the company's money: the money paid to the creditor was the bank's money. However, it was suggested that the loss to the company because of the debit involved a form of conversion.

8.30 Thirdly, the offence does not require intention to permanently deprive the owner of the property, which is the distinctive fault element of theft by conversion: see above, **8.15-8.19**. Suppose that someone is entrusted to look after property such as a building or a vehicle for a period of time, and rents out that property for his or her own benefit without the consent of the owner. Renting out might be regarded as a form of conversion similar to selling the property: both involve assuming the rights of an owner. Theft of the property by conversion would not be committed because there would be no intention to permanently deprive the owner of the property. Misappropriation of the property, however, would be committed. In such a case, an alternative charge would be unlawful use of the property contrary to s 126(b): see above, **8.17**.

8.31 In addition to the offence of misappropriation, there are other, lesser offences that also address dishonest dealings in a person's own property.

- Section 126(c) makes it an offence for a person to 'take or misappropriate his own property which is charged by any debt due by him.' There is liability to imprisonment for 8 years.
- Section 128 makes it an offence for a trustee to convert any property to any use not authorised by the trust with intent to defraud. This offence could

involve a legal owner who is a trustee defrauding a person who a beneficial owner under the trust. There is liability to imprisonment for 7 years.

Obtaining by false pretences

8.32 Causing loss of property to another person by a false pretence about a matter of fact is an offence under Code s 125(c), with liability of 12 years' imprisonment. The offence extends to obtaining property for oneself or for another person. 'False pretence' is defined in s 124:

Every person obtains property by false pretences who, by a false pretence, that is to say, any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true with intent to defraud, either directly or indirectly, obtains possession of or title to anything capable of being stolen or procures anything capable of being to be delivered to any person other than himself.

8.33 The offence of obtaining property by false pretences covers transfers of either possession or ownership, although in its main relevance under the Penal Code is in cases where ownership has been obtained. The offence has played an important role in overcoming some of the historical limitations to the offence of theft. The use of deception to induce the transfer of property, either of its possession or its ownership, did not traditionally amount to theft, even though subsequent disposition of the property might have amounted to theft by conversion if all that was transferred was possession. In most jurisdictions, the only relevant offence for the deception itself was an offence like obtaining by false pretences. In Vanuatu, however, obtaining possession by a trick is a 'taking' under s 122(a)(i) and can therefore constitute theft. The main role of the offence of obtaining by false pretences is therefore in cases where ownership has passed.

8.34 The representation must not only be factually false but must also be known by the person to be false or not believed to be true.

- A representation known to be false is intentionally made.
- A representation not believed to be true is made with foresight of the risk that it may be untrue and is therefore made recklessly.

The fault element of the offence is therefore either intention or recklessness.

8.35 The false pretence must be made 'with intent to defraud'. It is sometimes said that to defraud ordinarily means to deprive a person dishonestly: see, for example,

Peters v R (1998) 192 CLR 493; 151 ALR 51. *Peters* involved a charge of conspiracy to defraud under Australian Commonwealth law. In *Peters*, Kirby J went so far as to say, 'I believe that the nouns "fraud" and "dishonesty", and the corresponding adverbs "fraudulently" and "dishonestly", may be used interchangeably': 151 ALR 51 at 86

8.36 In addition to the offence of obtaining property by false pretences, there are several other offences of deception in the Code:

- Section 127 makes it an offence to use a false pretence or any other fraud to obtain credit, with liability to one year's imprisonment. This would include obtaining access to a facility or service without paying or on favourable terms. It is sufficient that credit is obtained. Unlike s 125(c), it need not be proved that loss was caused: causing loss is not an element of the offence.
- Section 130B makes it an offence to dishonestly obtain money, a valuable thing or a financial advantage by deception. Liability is up to 12 years' imprisonment. This offence overlaps with the offence of obtaining property by false pretences but extends further in some ways:
 - It applies to obtaining a financial advantage, which could include something like valuable information rather than any form of property;
 - The deception may be as to the present intentions of the person rather than involving a representation concerning a matter of fact: s 130B(2)(a);
 - 'Deception' extends to acts done with intent to cause computers and machines (including ATMs) to respond in ways that a person is not authorised to cause.
- Section 130C makes it an offence to make or publish, with intent obtain money, a valuable thing or a financial advantage, any statement that is known to be false or misleading in a material particular or is made with reckless disregard as to its truth or falsehood. Liability is up to 12 years' imprisonment. It need not be proved that any property or financial advantage was actually obtained.

Receiving

8.37 When property that has been stolen or otherwise dishonestly obtained is passed on to another person, that person may commit the offence of receiving: Code s 131.

No person shall receive anything obtained by any offence, or by any act wherever committed which, if committed within the Republic would constitute an offence, knowing that thing to have been dishonestly obtained.

No penalty is specified, so the Interpretation Act s 36(3) applies and the maximum penalty is a fine of VT 5,000 or imprisonment for 1 year or both.

8.38 The offence of receiving may be committed with respect to any property offence. It therefore applies to property obtained by misappropriation or false pretences as well as by theft.

8.39 A receiver must have acted 'knowing' the property to have been dishonestly obtained. The offence cannot be committed inadvertently, even with negligence. It also cannot be committed recklessly, in the sense of with awareness of a risk that property has been dishonestly obtained. 'Knowing' requires greater confidence.

8.40 The significance of requirement for knowledge may be lessened if the law of receiving is taken to incorporate the doctrine of wilful blindness. This is a common law doctrine, under which a person who was suspicious of something, and chose not to make further inquiries in order to avoid learning an uncomfortable truth, is deemed to have knowledge of the matter. In the Canadian case of *R v Briscoe* [2010] 1 SCR 411, 2010 SCC 13 at [210], it was said: 'The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries.' The doctrine has a long history in the law of receiving, although its current status is questionable. In *Pereira v DPP* (1988) 192 CLR 597; 82 ALR 217, the High Court of Australia broke with tradition and ruled that, although suspicious circumstances may provide a basis for inferring knowledge, wilful blindness cannot be substituted where knowledge is required but cannot be proved. *Pereira* was a case about drugs offences and the implications for the law of receiving were not discussed. Nevertheless, its reasoning has subsequently been applied to receiving: see, for example, *R v English* (1993) 10 WAR 355. It remains to be seen whether Pacific courts will follow this reasoning or will accept the traditional view that wilful blindness is equivalent to knowledge.

Arson, destruction and damage

8.41 'Wilful and unlawful' destruction of or damage to the property of another person is an offence under the Code s 133:

No person shall wilfully and unlawfully destroy or damage any property which to his knowledge belongs to another.

No penalty is specified, so the Interpretation Act s 36(3) applies and the maximum penalty is a fine of VT 5,000 or imprisonment for 1 year or both.' However, under some circumstances, there can be more serious offences carrying higher penalties:

- Where an explosive is used to set fire to or damage the property of another person, the offence of arson under s 134 is committed. Arson carries liability to 5 years' imprisonment. 'Explosive' is not defined but could cover simple devices such as a match.
- Destruction of a ship or aircraft constitutes the offence of wrecking, with liability to 14 years. The offence extends to interfering with navigational marks, lights, or signals or equipment. or falsely exhibiting or transmitting navigational marks, lights, or signals.

8.42 For each of the offences relating to destruction of or damage to property, the defendant must have acted 'unlawfully'. 'Unlawfulness' in relation to these offences is not defined. Presumably, it covers harm to the property interests of another person, unless the action is reasonably necessary to defend or protect either persons or property from injury. Thus, a lessee or a part owner can act unlawfully in destroying or damaging property.

8.43 Arson under s 134(b) extends to a person's own property where any property belonging to another person 'is or is likely to be' injured by fire. In some other jurisdictions, the meaning of 'unlawful' is extended to cover destruction or damage to one's own property with intent to defraud, for example by collecting insurance money. However, in Vanuatu this kind of scenario would need to be handled by reference to the offence of obtaining by false pretences under the Code s 125(c).

8.44 The Penal Code does not impose liability for failing to prevent destruction of or damage to property. Thus, arson is not committed by a person who fails to put out a fire that they have caused accidentally, unless a common law duty respecting responsibility for dangerous things is imported into the Code: see **3.6-3.7**.

8.45 The offences relating to destruction of or damage to property require the defendant to have acted 'wilfully'. This term is not defined but has been the subject of case-law: see **4.25**. In *R v Lockwood; Ex parte Attorney-General* [1981] Qd 4 209, the court concluded that 'wilfully' encompasses both intentionally and recklessly in the sense of there being foresight that injury to property is likely to result. Common law principles of criminal responsibility were invoked to justify this interpretation. It is a general principle of criminal responsibility at common law that the conduct must have been intentional or at least reckless: see *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449. It was said in *Lockwood* that 'wilfully' is an ambiguous word and therefore it is permissible to consider the common law on liability for recklessness in its interpretation.

Robbery

8.46 The offence of robbery under the Penal Code s 137 carries liability to imprisonment for 25 years. Robbery involves theft accompanied by violence. Section 137 provides:

No person shall commit theft accompanied by violence or threats of violence to any person or property, used to extort the property stolen or to prevent or overcome resistance to its being stolen.

There is a typographical error in the 2006 Consolidation of the Code. It uses the word 'export' instead of 'extort'. However, 'extort' was the word included when the Code was originally enacted.

8.47 Robbery is a compound offence, involving theft coupled with violence or a threat of violence against a person or property. The violence will usually take the form of an assault but could also involve wilful damage to property. Violence or the threat of violence can be used before or after the theft, with intent to commit the theft or to escape from the scene. The violence will usually be against the victim of the theft but it can be directed to any person including, for example, a third party who attempts to prevent the robber escaping.

8.48 Each physical part of a robbery has a fault element. Theft requires an intention to permanently deprive the owner of property: Code s 122. Moreover, the violence must be intentional or at least recklessness in order to constitute an assault or wilful damage: Code s 107 and s 6(2), ss 133-134.

8.49 The offence of extortion under Code s 138 covers some threats, other than of violence, that are made with 'intent to extort or gain anything from any person'. The offence applies to a range of threats including threats to make an accusation or disclosure of misconduct and threats to publish defamatory words. There is liability to imprisonment for 14 years.

Unlawful entry

8.50 There are two offences in the Penal Code relating to unlawful entry into property.

- Section 143(1) makes it an offence to enter or be in any place 'with intent to commit an offence therein'. Penal liability is 20 years if the place is used for human habitation; 10 years otherwise,
- Section 144 makes it an offence to enter property, or to remain after lawful entry, 'with intent to intimidate, insult or annoy any person lawfully in possession of such property'.

8.51 The intended offence that is most commonly in issue under s 143(1) is theft. However, the entry offence applies to any intended offence, including offences against the person such as assault and rape as well as offences against property.

8.52 Section 143(1) corresponds to offences of 'breaking and entering' in some other jurisdictions. However, it applies to a person who is already lawfully in the property, and also to a person who enters by any means, Section 143(2) provides:

(2) Subsection (1) shall apply whether or not the offender entered the premises with lawful authority or whether or not he broke any part of the premises in order to enter them and whether or not he obtained entrance by means of any threat or artifice, or by collusion with any person in the premises.

8.53 The offence under s 143(1) is complete when the intention is formed. The theft or other offence need not be committed. In some other jurisdictions there is a separate offence relating to unlawful entry or presence in a place coupled with the actual commission of an offence. In Vanuatu, however, the commission of the intended offence would have to be subject of a separate charge.