

‘PLAYING WITH FIRE’: CONTEMPORARY FAULT ISSUES IN THE ENIGMATIC CRIME OF ARSON

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I INTRODUCTION

The decision of the New South Wales (‘NSW’) Court of Appeal in *CB v Director of Public Prosecutions (NSW)*¹ has brought the mental element for ‘arson-type’ offences into sharp focus. These are offences involving damage to, or destruction of, various types of property or injury to, or the death of, persons from intentional or reckless acts of fire-setting. They may be structural fires or bushfires. The subjective mental state of recklessness was interpreted in *CB* in light of the principles established by the NSW Court of Criminal Appeal in *Blackwell v The Queen*,² but in the specific context of the offence of causing damage to, or destruction of, property by fire.³ Essentially, the Court of Appeal reasoned to a broad interpretation of recklessness as a fault element in the context of this offence, requiring the prosecution to prove that the accused had foresight only of the possibility ‘of harm to property to any degree from minor damage to destruction’.⁴ Foresight of the possibility of the specific type of property damage or its magnitude resulting from the act of fire-setting does not have to be established. The actual property that is damaged or destroyed is regarded as a particular, rather than an integral part of the elements of the offence. It will be contended that the decision in *CB* resulted in a misinterpretation of recklessness as a fault element in ‘arson-type’ offences. Alternatively, it is argued that the legislature should reformulate these offences to narrow the fault element

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1 (2014) 240 A Crim R 451 (‘*CB*’). The author thanks Alan Robinson, solicitor from the Shoalhaven region of NSW, who represented the young person in this case and who generously gave his time to discuss the case with the author as well as supplying copies of all relevant documents from the case, including the submissions and summaries of argument for both parties in the Supreme Court and Court of Appeal.

2 (2011) 81 NSWLR 119 (‘*Blackwell*’). In this case, the NSW Court of Criminal Appeal held that for the prosecution to prove recklessness in the context of non-fatal offences against the person, the particular harm specified in the charge, namely grievous bodily harm, had to be foreseen as possible by the accused who then went ahead with the conduct despite that level of foresight.

3 *Crimes Act 1900* (NSW) s 195(1)(b).

4 *CB* (2014) 240 A Crim R 451, 461 [45] (Barrett JA).

consistently with a principled approach to, and fair labelling of, individual responsibility for serious criminal offences.

This article will analyse the meanings of the subjective mental states for 'arson-type' offences in NSW⁵ with particular concentration on defining 'recklessness'. The threshold requirements for proof of this mental element in establishing criminal responsibility for 'arson-type' offences will be evaluated in the context of policy considerations specific to these offences. This evaluation will concurrently encompass consideration of the theoretical framework for the mental element. The need for a principled application of the criminal law to accurately construct the moral blameworthiness of an adult or young person for 'arson-type' offences within the subjective framework of rational thought and action will be accentuated.

In considering the subjective fault elements for 'arson-type' offences and the utility of statutory definitions of such concepts, the enigmatic nature of these offences raises a number of competing concerns for the nature and proof of criminal responsibility. These include significant contextual features of fire-setting conduct and policy-related matters, which are aptly described as 'localised concerns'⁶ that 'bear upon a polity's understanding of culpable wrongdoing [so that it] will vary from context to context'.⁷ The very low clear-up rate of recorded arson incidents⁸ underlines the significant difficulties in detecting the perpetrators of these crimes where such incidents are reported to the police. The even smaller number of court proceedings commenced against alleged perpetrators when they have actually been identified highlights the evidentiary difficulties in proving the commission of arson offences. Unless there are one or more sources of reliable direct evidence, comprehensive circumstantial evidence, or admissions by the fire-setter, the requirement of proof may become insurmountable. Although arson usually requires only minimal effort and limited equipment, the harm caused by arson incidents can range from nominal to catastrophic depending on the particular weather patterns, nature of materials ignited, presence of accelerants, or other conditions conducive to the spread of fire. The extent of harm from the point of ignition of the fire is often unpredictable but potentially very dangerous to both property and human life. Balanced against those difficulties and complexities in investigation, prosecution and accurately predicting the extent of harm, it is apparent that where 'arson-type' crimes have very serious consequences, both in terms of property damage or destruction and loss of life, any convicted offenders can face extended deprivation of liberty through lengthy terms of imprisonment or detention. The appropriateness and proportionality of punishment for this type of offending is

5 Although the focus is on the NSW jurisdiction, examples of cases and legislation from other Australian jurisdictions will be used and some comparative analysis will be undertaken where effective to elucidate, assist or advance the arguments made in this article.

6 See Findlay Stark, 'It's Only Words: On Meaning and Mens Rea' (2013) 72 *Cambridge Law Journal* 155, 160 ff, citing Victor Tadros, 'The System of the Criminal Law' (2002) 22 *Legal Studies* 448.

7 Stark, above n 6, 161.

8 The very low clearance rate of arson incidents as compared to other crimes, including other property offences, will be illustrated in the statistical data analysed in Part III.

another important concern, and judicial sentencing practice may be able to redress the low culpability threshold to some extent. That approach does not, however, provide a principled application of the criminal law in determining the responsibility of fire-setters for ‘arson-type’ offences generally.

Accordingly, it will be argued in this article that the determination of an accused’s responsibility for ‘arson-type’ offences, including various types and degrees of structural and bushfire arson, must result from a principled and consistent application of the criminal law. An approach based on orthodox subjectivism and rational choice theory will be taken to the formulation of the mental element in ‘arson-type’ offences to ensure the autonomous and accurate moral blameworthiness of an adult or young person is reflected within the subjective framework of rational thought and action so that ultimately, where necessary, proportionate punishment is imposed. The mental element must be formulated to ensure there is ‘fair warning’ to, or ‘maximum certainty’⁹ for, the general populace in relation to the circumstances in which they will be criminally liable for fire-setting conduct despite the significant ‘localised concerns’ of this category of criminal offences. The formulation must adhere to the principle of ‘fair labelling’¹⁰ so as to promote effective communication to the general populace of an accessible, intuitive, consistent and principled understanding of the mental element for ‘arson-type’ offences.

Ultimately, it is contended that this translates to the subjective mental element in ‘arson-type’ offences being formulated so that the prosecution must prove that the accused intended to cause destruction of, or damage to, particular property or specific harm to the person resulting from their fire-setting behaviour. Alternatively, the form of recklessness as the subjective mental element must be that the accused foresaw that there was a substantial risk that the damage to, or destruction of, identified property or specific harm to the person would result, but they went ahead and ignited the fire in spite of the actual foreseen risk. The actual property or specific type of personal harm is to be characterised as an integral part of the mental element rather than merely an offence particular.

9 This is a core principle in criminal law reflecting the requirements of predictability and certainty for members of the public, who should not be caught by surprise in finding out they have committed a criminal offence: see Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 62–5; A P Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 5th ed, 2013) 26–31; Winnie Chan and A P Simester, ‘Four Functions of Mens Rea’ (2011) 70 *Cambridge Law Journal* 381, 388–93.

10 This is an important principle concerned with ensuring that ‘offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking’: Ashworth and Horder, above n 9, 77; and the ‘need for offence labels to convey sufficient information to criminal justice professionals to enable them to make fair and sensible decisions’: James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217, 234, 246.

II THE CASE OF *CB V DIRECTOR OF PUBLIC PROSECUTIONS (NSW)*

This case involved the destruction of an unoccupied house by a 14-year-old boy, who had entered the house through a window with a juvenile companion to smoke cigarettes. The curiosity of juveniles in relation to fire and their significant involvement in fire-setting behaviour is well documented in Australia and internationally. The different level of understanding and use of fire throughout the human lifespan is apparent with the fire-fascination experienced in childhood often assuaged with maturity as an adult.¹¹ CB was playing with his companion's cigarette lighter by applying the flame to parts of the fabric on a couch, which he later admitted he had intended '[j]ust to singe'.¹² The foam in the couch cushion ignited and the fire spread throughout the house despite efforts by CB and his companion to extinguish it. Eventually the smoke forced the young persons outside and ultimately the house was totally destroyed by the fire.

CB was prosecuted for an offence under section 195(1)(b) of the *Crimes Act 1900* (NSW) and following a hearing before a Children's Court magistrate, the offence was found proved. The magistrate rejected the defence's argument that the prosecution, when relying on recklessness as the mental element, had to prove beyond reasonable doubt that CB foresaw the possibility that the house would be destroyed by fire. On appeal to the NSW Supreme Court, Adamson J found that the magistrate had properly formulated the elements under section 195(1)(b). Her Honour held that the requisite mental element of recklessness was established by proof that the young defendant 'foresaw the possibility that his actions might lead to property being destroyed, rather than that he had the foresight that his actions might lead to the house being destroyed'.¹³

This finding by Adamson J in relation to the mental element was challenged in the NSW Court of Appeal with the appellant arguing that when the particular

11 See, eg. James A Inciardi, 'The Adult Firesetter: A Typology' (1970) 8 *Criminology* 145; Kenneth R Fineman, 'A Model for the Qualitative Analysis of Child and Adult Fire Deviant Behaviour' (1995) 13(1) *American Journal of Forensic Psychology* 31; George A Sakheim and Elizabeth Osborn, 'Severe vs Nonsevere Firesetters Revisited' (1999) 78 *Child Welfare* 411; Charles T Putnam and John T Kirkpatrick, 'Juvenile Firesetting: A Research Overview' (Juvenile Justice Bulletin, United States Department of Justice, May 2005); Jessica Gaynor, 'Juvenile Firesetter Intervention Handbook' (Handbook, United States Fire Administration Federal Emergency Management Agency, January 2002); Shane McCardle, Ian Lambie and Suzanne Barker-Collo, 'Adolescent Firesetting: A New Zealand Case-Controlled Study of Risk Factors for Adolescent Firesetting' (New Zealand Fire Service Commission Research Report No 46, Psychology Department, University of Auckland, 2004); Mark R Dadds and Jennifer A Fraser, 'Fire Interest, Fire Setting and Psychopathology in Australian Children: A Normative Study' (2006) 40 *Australian & New Zealand Journal of Psychiatry* 581; Mairead Dolan et al, 'Risk Factors and Risk Assessment in Juvenile Fire-Setting' (2011) 18 *Psychiatry, Psychology and Law* 378; Penny Wolf and Kate McDonald, 'Treatment and Intervention with Juvenile Firesetters' in Janet Stanley and Tahl Kestin (eds), 'Advancing Bushfire Arson Prevention in Australia: Report from "Collaborating for Change: Symposium Advancing Bushfire Arson Prevention in Australia"', Held in Melbourne, 25–26 March 2010 (Report No 10/3, Monash Sustainability Institute, Monash University, June 2010) 33; Theresa A Gannon et al, 'The Multi-Trajectory Theory of Adult Firesetting (M-TTAF)' (2012) 17 *Aggression and Violent Behavior* 107.

12 *CB* (2014) 240 A Crim R 451, 463 [55] (Barrett JA).

13 *Ibid* 455 [18] (Barrett JA).

property was identified in the information on the court attendance notice,¹⁴ the prosecution had to establish that the conduct of the appellant resulted in the destruction of the identified property and that the appellant was reckless towards the destruction of that specific property. That is, the specific property is a component of the mental element to be proved beyond reasonable doubt and not simply a particular provided by the prosecution for the information of the defence to allow a fair opportunity to meet the prosecution case.¹⁵ There is an important distinction in this argument between elements of the offence to be proved beyond reasonable doubt, reasonable particulars of the offence to provide an accused with sufficient information about the allegation, and evidence to be adduced through witnesses and other sources that go to proof of the elements. The appellant relied on the principle stated by the Court of Criminal Appeal in *Blackwell*, which it was argued supported the proposition that recklessness is only established by foresight of the particular consequence and not a general class of consequence of which the particular consequence forms part.¹⁶ In dismissing the appeal, Barrett JA reasoned that the *Blackwell* principle did not support this proposition but rather it depended on the construction of the particular statutory provision as to the requirement for proof of the nature of the accused's foresight.¹⁷ That is, the meaning of recklessness must be determined in the context of the specific criminal offence and how the elements of that offence are drafted in the legislation.

In relation to section 195(1)(b) it was held that as the provision was constructed in terms of a consequence of damage to, or destruction of, property then foresight extends generally across the spectrum of minor damage through to total destruction of property.¹⁸ Therefore, even though the young defendant stated that he only intended to singe the couch and didn't know 'it was gunna set the whole couch on fire', his answer in relation to his appreciation that it was not the right thing to do, namely because 'it could have endangered people around us. Houses, people, animals', demonstrated sufficient foresight in a general sense of 'the possibility of damage to property'.¹⁹ This showed that he 'realised that the

14 See *Criminal Procedure Act 1986* (NSW) s 175 for the requirements as to the form of, and matters to be included in, a court attendance notice as an initiating process. See also Francine Feld, Andrew Hemming and Thalia Anthony, *Criminal Procedure in Australia* (LexisNexis Butterworths, 2015) 417–18.

15 See *Ex parte Ryan; Re Johnson* (1943) 44 SR (NSW) 12, 16, where Jordan CJ stated:
it is quite clear that the accused is entitled to have sufficient particulars of what is charged against him to enable him to prepare his defence ... it is at least proper for the prosecutor, when stating the offence in the course of laying an information, not merely to state it in the language of the statute but to add all such particulars of the circumstances as are reasonably necessary to enable the accused to know what he is being charged with.

See also *R v Saffron* (1988) 17 NSWLR 395, 447–8. There are no set rules as to the degree of particularity necessary and particulars are usually those matters that are not an essential part of the offence such as the date, time and place of the offence: see John B Bishop, *Criminal Procedure* (Butterworths, 2nd ed, 1998) 286–7.

16 *CB* (2014) 240 A Crim R 451, 453–4 [11], 459 [36] (Barrett JA).

17 *Ibid* 460–1 [40]–[46]. President Beazley and Emmett JA (with separate reasons) agreed with Barrett JA at 452 [1] (Beazley P), 465 [71] (Emmett JA).

18 *Ibid* 460–1 [43]–[46] (Barrett JA).

19 *Ibid* 463 [55]–[56] (Barrett JA).

particular type of harm constituting the offence (damage to property, to any degree up to and including destruction) may possibly be inflicted – even would be inflicted – yet [he] went ahead and acted'.²⁰ The upshot of this judicial reasoning was that it was not necessary for the prosecution to prove the more specific subjective foresight of the possibility of 'the destruction of the house alone'²¹ but only a general foresight of damage to any property resulting from the accused's fire-setting conduct. The specific property was relegated to the status of an offence particular, simply a piece of information reasonably necessary for the accused to clearly know the nature of the charge against him.

It is arguable that the answer by the young defendant during his interview with the police, which was relied upon to infer subjective foresight of possible damage, could equally or even preferably be described as hindsight rather than foresight. The young defendant realised the extent of the potential harm of his conduct *ex post facto* the actual event when the damage had been done. Further, when asked to explain his understanding of what 'recklessly' means, the young defendant replied: 'It means I've done it without thinking and careless, carelessly' and he did not think of what the possible outcome might be.²² This together with the fact that he 'didn't think it was gunna set the whole couch on fire' and was amazed that the 'little thing lit the whole, made a big deal'²³ illustrates clear practical difficulties in lay understanding of the broad conception of recklessness as a subjective fault element, particularly by children but also generally in the community.

This formulation of the test for reckless destruction of, or damage to, property thus sets a comparatively low threshold of proof of the fault element for what is often a very serious criminal offence, which can encompass a vast range of harmful consequences and the conviction for which can lead to lengthy periods of detention or imprisonment for the young person or adult perpetrator. The prosecution simply has to prove subjective foresight on the part of the accused of the possibility of any damage to any property from their particular fire-setting conduct. This leads to unfair labelling, as substantial moral blameworthiness can attach to what arguably may be inquisitive, ignorant and morally innocent behaviour, particularly in children, youths and those persons with an intellectual impairment. The label of 'reckless' fire-setting can also attach to other behaviour or causes, such as revenge, violence or concealing other crimes, more often by adults. These behaviours are significantly more morally blameworthy but carry the same offence label as fire-setting resulting from the inquisitiveness and immaturity of youth.

20 Ibid 463 [56] (Barrett JA).

21 Ibid 469 [91] (Emmett JA).

22 Detective Sergeant Shalala and Detective Senior Constable Molyneux, Interview with the young person (Transcript of Electronic Recording of Interview of Suspected Person, Nowra Police Station, 29 March 2012) 17–18 (copy on file with author).

23 Ibid 17.

III ARSON IS AN ENIGMATIC CRIME

The formulation of the threshold for proof of recklessness at this low level could possibly be justified on policy grounds given the perplexing nature of the crime of arson and the practical difficulties in proving such crimes beyond reasonable doubt. These contextual policy arguments, or ‘localised concerns’ as labelled by Stark,²⁴ apply to particular offence categories where the public understanding of culpable wrongdoing changes from context to context as certain crimes involve more serious and extensive risks to property and human life or are more difficult to detect and prosecute.

In the context of ‘arson-type’ offences, this is demonstrated by the fact that although arson attacks are reasonably frequent, particularly when they are more detectable and unlikely to be contained during the Australian spring and summer seasons, comparatively few incidents of arson are solved or ‘cleared’ by police.²⁵ Identifying and profiling the perpetrators of arson is generally an extremely challenging task.²⁶ The nature of the offence means that there is usually little or no direct evidence to link the accused to the crime unless there is an eyewitness who saw the act of fire-setting and can positively identify the arsonist, or genuine admissions are made by the accused.²⁷ Further, although comparatively minimal damage may result, there are a considerable number of arson incidents which do lead to significant loss of structural and personal property, fauna and flora, and have, in certain cases, extended to loss of human life. In 2003, for example, the annual cost of arson in Australia was estimated to be \$1.35 billion, which includes direct costs of property damage and loss, indirect and intangible losses, fire and ambulance service costs and volunteer effort.²⁸ Further and particularly stark examples are the January and February 2009 Victorian bushfires where the total insurance costs alone were estimated at \$1.07 billion.²⁹ This included the

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- 24 See Stark, above n 6, 160 ff, citing Victor Tadros, ‘The System of the Criminal Law’ (2002) 22 *Legal Studies* 448.
- 25 See, eg, Derek Goh and Stephanie Ramsey, ‘New South Wales Recorded Crime Statistics 2015’ (Report, NSW Bureau of Crime Statistics and Research, April 2016) 39–40; Victoria Police, ‘Crimes Statistics 2013/2014’ (Report, 27 August 2014) 36–7.
- 26 See, eg, Jeffrey L Geller, ‘Arson in Review: From Profit to Pathology’ (1992) 15 *Psychiatric Clinics of North America* 623; David Canter and Katarina Fritzon, ‘Differentiating Arsonists: A Model of Firesetting Actions and Characteristics’ (1998) 3 *Legal and Criminological Psychology* 73; Richard N Kocsis, ‘Arson: Exploring Motives and Possible Solutions’ (Trends and Issues in Crime and Criminal Justice No 236, Australian Institute of Criminology, August 2002); Australian Institute of Criminology, ‘The Use of Profiling in Bushfire Arson: Part 1 – Offender Profiling’ (BushFIRE Arson Bulletin No 26, 22 November 2005); Katarina Fritzon, Heather Lewis and Rebekah Doley, ‘Looking at the Characteristics of Adult Arsonists from a Narrative Perspective’ (2011) 18 *Psychiatry, Psychology and Law* 424.
- 27 See Peter John Thatcher, ‘The Trouble with Arson ...’ (1982) 15 *Australian Journal of Forensic Sciences* 32, 39, where it is noted that ‘the number of charges laid for arson or arson-related crimes remains very low ... [t]he reason for this is that the most important point of proof – identification – is seldom proved’.
- 28 Pat Mayhew, ‘Counting the Costs of Crime in Australia: Technical Report’ (Technical and Background Paper Series No 4, Australian Institute of Criminology, 2003) 50–5.
- 29 Laurie Ratz and Phil James, ‘The Impact of Bushfire Arson on Insurance’ in Janet Stanley and Tahl Kestin (eds), ‘Advancing Bushfire Arson Prevention in Australia: Report from “Collaborating for Change: Symposium Advancing Bushfire Arson Prevention in Australia”’, Held in Melbourne, 25–26

notorious 'Black Saturday' bushfires, some of which are known to have resulted from arson. These bushfires involved a huge loss of human lives, 173 in total, together with substantial destruction of over 2000 homes, other buildings and the natural environment. It is one of the worst disasters in Australian history.

The latest statistical information from the NSW Bureau of Crime Statistics shows that from January to December 2014 there were 5630 arson crime incidents recorded by police but only 441 were cleared within 30 days and 492 within 90 days of reporting; a clear-up rate of 8.7 per cent, which is one of the lowest for all crime categories. This rate is even lower when consideration is given to whether criminal proceedings were actually commenced against an identified person. In that regard only 180 proceedings were commenced within 30 days and 219 within 90 days of reporting. Taking proceedings commenced as the measure, the clear-up rate was an ineffectual 3.9 per cent.³⁰ The most recent figures available for January to September 2015 are similar although they show lower clear-up rates with 258 arson incidents cleared in 90 days (7 per cent) and criminal proceedings commenced in relation to only 94 incidents (2.6 per cent) from a total of 3648 recorded incidents of arson.³¹ Statistics for NSW throughout the past decade paint a very similar picture, with the average clear-up rates for incidents of arson at approximately 7 per cent overall and criminal proceedings commenced in approximately only 3 per cent of total incidents.³² Although these statistics are somewhat alarming with recorded 'arson' incidents being cleared at the lowest rate for all criminal offence categories, the generally public and conspicuous nature of such incidents means they are more likely to be reported and/or detected than many other types of crimes. Serious offences against the person such as assaults and sexual assaults, plus other property offences, including robberies and other forms of damage to property, have much higher clearance rates.³³ However, they are notoriously under-reported so that the high reporting and low clear-up rate of arson offences may not provide a totally accurate representation of the statistical comparison with other criminal offence categories. Victims of arson may have much stronger motivations to report fire-setting incidents particularly if they want to make an insurance claim for their property losses. Nonetheless, even taking these qualifying factors into account, it is patently clear that identifying and successfully prosecuting arsonists continues to be largely elusive and may well figure as an important policy consideration in the legal construction of 'arson-type' offences.

March 2010' (MSI Report No 10/3, Monash Sustainability Institute, Monash University, June 2010) 75, 75.

30 Goh and Ramsey, above n 25, 39 (Table 5.2).

31 Ibid 40 (Table 5.3), 41 (Figure 5.1).

32 General approximations taken from data sources dating back to 2003, including Steve Moffatt, Derek Goh and Suzanne Poynton, 'New South Wales Recorded Crime Statistics 2005' (Report, NSW Bureau of Crime Statistics and Research, March 2006) 36–8, Derek Goh and Steve Moffatt, 'New South Wales Recorded Crime Statistics 2008' (Report, NSW Bureau of Crime Statistics and Research, April 2009) 52–5, Derek Goh and Steve Moffatt, 'New South Wales Recorded Crime Statistics 2012' (Report, NSW Bureau of Crime Statistics and Research, April 2013) 38–41; Goh and Ramsey, above n 25, 38–41.

33 Goh and Ramsey, above n 25, 41 (Figure 5.1).

The enigmatic nature of arson is further reflected in a public fascination with, and an enduring media interest in, various acts of fire-setting. Bushfires, building and other forms of property fire,³⁴ particularly where arson is suspected and there is large-scale destruction of, or risk to, property and threats to human life, do have a significant profile in the news media.³⁵ This heightened media attention has attracted some volunteer firefighters and others in ‘first responder’ service roles seeking recognition, attention and ‘hero’ status who have set fires and then reported and assisted fighting the fires or helped the victims.³⁶ Although arson-associated homicides are rare, there have been large annual fluctuations and a recent increase in frequency.³⁷ There are also disturbing high-profile examples of deliberately lit fires that have spiralled out of control causing major destruction

34 Including other structures, vehicles and vessels.

35 For example, this is particularly evident in relation to the explosion and fire in a convenience store with upstairs residential apartments in the inner western Sydney suburb of Rozelle on 4 September 2014. Three people were killed, including a one-year-old child, in this fire that resulted from an alleged arson attack: James Law, ‘Rozelle Explosion: What Caused the Deadly Blast?’, *News.com.au* (online), 9 September 2014 <<http://www.news.com.au/national/nsw-act/rozelle-explosion-what-caused-the-deadly-blast/story-fnj3rq0y-1227051673250>>; Antonette Collins, ‘Rozelle Blast: Funeral Held for Bianca O’Brien and Baby Jude, Killed after Convenience Store Explosion’, *ABC News* (online), 17 September 2014 <<http://www.abc.net.au/news/2014-09-17/funeral-for-bianca-and-jude-obrien-killed-in-rozelle-blast/5749432>>. Police investigations into this incident resulted in charges of murder and multiple other offences, including dishonestly damaging property by fire for financial gain against the owner of the convenience store, Adeel Khan, on 23 September 2014: Nick Ralston, ‘Rozelle Store Owner Adeel Khan Charged with Murder’, *The Sydney Morning Herald* (online), 23 September 2014 <<http://www.smh.com.au/nsw/rozelle-store-owner-adeel-khan-charged-with-murder-20140923-10ktjv.html>>. The high-profile of this case has been maintained in 2016 through the almost daily reports of Khan’s trial in the Sydney Supreme Court and his consequent convictions and sentencing for murder, manslaughter and dishonestly destroying the property for financial gain on 5 August 2016: *R v Khan* [2016] NSWSC 1073; Lucy Carter, ‘Adeel Khan Sentencing: Rozelle Shop Owner Gets 30 Years’ Jail over Fatal Fire’, *ABC News* (online), 5 August 2016 <<http://www.abc.net.au/news/2016-08-05/rozelle-shop-owner-adeel-khan-sentenced-to-30-years-jail/7692802>>. A high level of national media attention was also evident in the coverage of the comparatively recent fatal bushfires near Esperance, WA and the Barossa Valley region of SA in November 2015 where several deaths resulted in addition to significant property losses and damage: AAP, ‘WA Bushfires Claim At Least Four Lives, Three Homes’, *SBS News* (online), 19 November 2015 <<http://www.sbs.com.au/news/article/2015/11/18/four-feared-dead-esperance-bushfires>>; AAP, ‘SA Fires: Two People Killed in an Out-of-Control Bushfire North of Adelaide’, *The Sydney Morning Herald* (online), 26 November 2015 <<http://www.smh.com.au/national/sa-fires-south-australian-premier-jay-weatherill-confirms-deaths-20151125-gl86qb.html>>. It is also important to note in the contemporary context that climate change through global warming is another possible factor in the increased frequency and seriousness of bushfires, including the severity of those that can be traced to arson activity.

36 See Lauren Ducat and James R P Ogloff, ‘Understanding and Preventing Bushfire-Setting: A Psychological Perspective’ (2011) 18 *Psychiatry, Psychology and Law* 341, 352–4. Case examples include *R v Mills* (2005) 154 A Crim R 40 in relation to the Ku-ring-gai National Park fires in NSW; *R v Sokaluk* [2012] VSC 167 in relation to the Churchill fire that was part of the ‘Black Saturday’ bushfires in Victoria; and recently the case of Alex Gordon Noble who was convicted after trial in the Newcastle District Court of deliberately lighting fires which burned thousands of hectares of land in and around Catherine Hill Bay in 2013: Damon Cronshaw, ‘The Hunter Recorded 700 Incidents of Arson in a Year’, *Newcastle Herald* (online), 3 April 2016 <<http://www.theherald.com.au/story/3827221/firebugged-the-hunters-arson-problem/>>.

37 Claire Ferguson et al, ‘Arson-Associated Homicide in Australia: A Five Year Follow-Up’ (Trends & Issues in Crime and Criminal Justice No 484, July 2015) 5–10.

of property, flora and fauna or have had fatal consequences for human beings.³⁸ When there is significant destruction of property and/or loss of human life there is always high-profile and sustained media coverage, at times reaching saturation levels.

A most prominent example is the 2009 ‘Black Saturday’ bushfires in Victoria and the case of *R v Sokaluk*³⁹ where the offender was ultimately found guilty of 10 counts of ‘arson causing death’⁴⁰ in relation to lighting the fire at Churchill. This fire spread rapidly from where it was ignited through eucalypt and pine plantations, and eventually burnt 36 000 hectares, destroyed 156 homes and a community hall, and resulted in the deaths of 10 people.⁴¹ Another very high-profile Australian case is *R v Dean*,⁴² involving extensive structural arson and tragic loss of human life. The offender, who was a nurse at the Quakers Hill Nursing Home in north-western Sydney, was convicted of the murder of 11 elderly residents whose deaths were caused by fires that the offender had ignited in two wings of the nursing home. The fires were started by the offender in an attempt to conceal the theft of drugs by him from the treatment room of the nursing home; and he later assisted the residents rescued from the building and was interviewed by television crews filming the events.⁴³ Justice Latham sentenced Dean to life imprisonment characterising his crimes as falling into the ‘worst case category’.⁴⁴ Her Honour observed that there was deception and selfishness in the offender’s motive of attempting to cover up his stealing of prescription drugs, which compounded the objective gravity of the murder

38 Significant Australian examples date back to February and March 1926 where 60 people were killed over a two month period in the Gippsland and Black Sunday bushfires, and later the Victorian and SA ‘Ash Wednesday’ bushfires in February 1983 during which 75 people died and nearly 1900 homes were destroyed from a series of fires mostly started by arsonists: Liz T Williams, ‘The Worst Bushfires in Australia’s History’, *Australian Geographic* (online), 3 November 2011 <<http://www.australian-geographic.com.au/topics/science-environment/2011/11/the-worst-bushfires-in-australias-history/>>. Examples of prosecutions of serious arson and arson-related homicide offences in Australia include: *R v Long; Ex parte A-G (Qld)* (2003) 138 A Crim R 103 in relation to the Palace Backpackers Hostel fire in Childers, Queensland; *R v Mills* (2005) 154 A Crim R 40 in relation to the Ku-ring-gai National Park fires in NSW; *R v Sokaluk* [2012] VSC 167 in relation to the Churchill fire that was part of the ‘Black Saturday’ bushfires in Victoria; *R v Dean* [2013] NSWSC 1027 in relation to the Quakers Hill Nursing Home fire in NSW; *R v Khan* [2016] NSWSC 1073 (for more information about this case, see above n 35).

39 [2012] VSC 167.

40 This is an offence under the *Crimes Act 1958* (Vic) s 197A. This offence is formulated so that liability is strict in relation to the causing of the death of human beings. There is a mental element only in relation to the ‘arson’ part of the offence, which corresponds to the general arson offence under the *Crimes Act 1958* (Vic) s 197(1). This formulation is similar to the ‘assault causing death’ offence under the *Crimes Act 1900* (NSW) s 25A, which was created in January 2014 in response to a series of fatal ‘one-punch’ assaults in the Kings Cross area of Sydney. This was later followed in Victoria with the enactment of the so-called ‘coward punch’ offence, which criminalises one-punch manslaughter under the *Crimes Act 1958* (Vic) s 4A: *Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014* (Vic), which commenced operation on 1 November 2014.

41 *R v Sokaluk* [2012] VSC 167, [29]–[30] (Coghlan J).

42 [2013] NSWSC 1027. See also *Dean v The Queen* [2015] NSWCCA 307.

43 *R v Dean* [2013] NSWSC 1027, [14]–[32] (Latham J).

44 *Ibid* [69]. This characterisation was upheld on appeal: *Dean v The Queen* [2015] NSWCCA 307, [104]–[110] (Ward JA), [158] (Adams J), [159] (Hulme J).

offences established to have been committed with reckless indifference to human life. Importantly, because the mental element relied on in the murder charges against Dean was recklessness, the prosecution had to prove subjective foresight by him of the probability of the death of each of the nursing home residents from his fire-setting conduct. This formulation of recklessness sets a much higher threshold for proof of the subjective mental state where there is loss of human life and the accused is charged with the most serious criminal offence of murder.

Overall, there are significant and challenging practical 'localised' issues presented by the enigmatic crime of arson. Unfortunately, it is a comparatively prevalent offence and can lead to very serious and tragic consequences. It has a high profile for various reasons, including the unique Australian ecology,⁴⁵ the potentiality and reality of catastrophic property destruction and loss of human life, and the sustained media focus notably during the hot, dry, summer months. At the same time, arson attacks are often furtively and easily carried out by individuals and so are notoriously difficult to solve. Very few result in criminal prosecution due to evidentiary difficulties in identifying perpetrators and gathering sufficient direct or circumstantial evidence to prove the case beyond reasonable doubt, particularly establishing the mental state of the accused.⁴⁶ These practical and policy considerations thus raise the critical question as to whether the legal test for proof of the fault elements in relation to 'arson-type' offences should remain at the low threshold affirmed in the case of *CB* or perhaps even be replaced with strict liability formulations to ensure the guilty are convicted.⁴⁷

On the other hand, as esteemed criminal law academic Andrew Ashworth has observed, '[a]nyone can cause injury, death or damage by misfortune or coincidence, but that should not be enough for criminal liability, however great the harm'.⁴⁸ As the criminal law involves censure of conduct and punishment that often comprises limitations on, or deprivation of, liberty then 'intention (and, to a lesser extent ... recklessness) ... [should] be a requirement of the paradigm crime',⁴⁹ that is, those crimes where there is 'substantial wrongdoing'.⁵⁰ This fault

45 See the comparison of the unique Australian climatic conditions to the South Mediterranean and Southern California areas of the world where forest and wildfires are also regularly experienced: Gaye T Lansdell, John Anderson and Michael S King, "'Terror among the Gum Trees' – Is Our Criminal Legal Framework Adequate to Curb the Peril of Bushfire Arson in Australia?" (2011) 18 *Psychiatry, Psychology and Law* 357, 365.

46 John Anderson, "'Smoke Gets in Your Mind": The Legal Framework for the Crime of Arson' (2004) 28 *Criminal Law Journal* 26, 35–6.

47 See above n 40 in relation to the Victorian offence of 'arson causing death' where there is a subjective mental element for proof of the 'arson' component but there is no mental element in relation to causing the death as a consequence of the arson. In this sense, it is a strict liability offence if the culpable fire-setting conduct simply results in a death whether or not the death is intended or foreseen by the accused when engaging in the fire-setting conduct. See also Sentencing Advisory Council, 'Arson & Deliberately Lit Fires' (Final Report No 1, Department of Justice (Tas), December 2012) 21–2, where this offence is discussed but a 'fairer' option modelled on the 'causing death by dangerous driving' offence in s 167A of the *Criminal Code Act 1924* (Tas) sch 1 (*Tasmanian Criminal Code*) was proposed, that is, 'causing death by dangerous use of fire' involving the requirement of proving the defendant foresaw the likelihood of setting fire to particular property in circumstances that were objectively dangerous to any person.

48 Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 16.

49 *Ibid.*

requirement must be clearly and appropriately formulated to ensure that it reflects the criminality of such substantial wrongdoing and allows for proportionate censure and punishment of the explicit moral blameworthiness of the offender. In this regard, defining the constituent elements of offences with sufficient certainty so as to differentiate and ‘represent fairly the nature and magnitude of the law-breaking’⁵¹ is a pivotal general requirement of the criminal law that promotes due process, a fair trial, proportionate sentencing and liberty of the individual.⁵²

IV PRINCIPLED USE OF THE CRIMINAL LAW IN FORMULATING THE MENTAL ELEMENTS IN ‘ARSON-TYPE’ OFFENCES

Variations of intention, wilful, reckless and dishonest states of mind characterise the array of mental elements for the assorted ‘arson-type’ offences.⁵³

A Intention

In NSW, a statutory definition of the subjective mental element of ‘intention’ is not provided for any crimes, including ‘arson-type’ offences. Intention is said to have its ordinary meaning. In practice, this essentially equates to deliberate conduct; it is the accused’s purpose to commit a distinct act. The accused means to undertake or participate in the particular conduct. As to crimes where an act must result in certain consequences, these are intended when the accused means to produce that specific result. These ordinary meanings are reflected in the statutory definition of ‘intention’ in section 5.2 of the *Criminal Code Act 1995* (Cth) schedule 1 (*‘Commonwealth Criminal Code’*):⁵⁴

50 Ibid 28 (emphasis altered).

51 Ashworth and Horder, above n 9, 77.

52 See Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 4th ed, 2010) 30–5 in relation to the *Human Rights Act 1998* (UK) c 42 and the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), particularly arts 5–6. See also Ben Emmerson, Andrew Ashworth and Alison Macdonald (eds), *Human Rights and Criminal Justice* (Sweet & Maxwell, 3rd ed, 2012).

53 In NSW, for example, the various ‘arson-type’ offences are found in the *Crimes Act 1900* (NSW) ss 195–8. It is noteworthy that the label ‘arson’ is not used in NSW. This is unusual as all other Australian jurisdictions, apart from WA, use the ‘arson’ label in this offence category: see Lansdell, Anderson and King, above n 45, 358–60.

54 The general concepts of the criminal law, including the mental or fault elements of offences are statutorily defined in *Commonwealth Criminal Code* ch 2 entitled ‘General Principles of Criminal Responsibility’. This chapter has also been enacted in the two Australian territories through the *Criminal Code 2002* (ACT) and the *Criminal Code Act* (NT). For a comparatively recent consideration of the concurrent operation of the criminal laws of the various Australian states and territories with the *Commonwealth Criminal Code*, or the ‘criminal law worlds’, see Stella Tarrant, ‘Building Bridges in Australian Criminal Law: Codification and the Common Law’ (2013) 39 *Monash University Law Review* 838.

5.2 Intention

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Even though these definitions are not directly applicable for offences under the *Crimes Act 1900* (NSW) or the criminal law statutes and codes of other Australian states, they usefully accord with the ordinary meaning of ‘intention’. Generally, there is a straightforward application of this mental element to ‘arson-type’ offences in practice.

The experience of the English common law where ‘intention’ has also been held to encompass foresight of a virtual certainty of particular consequences,⁵⁵ often referred to as ‘oblique’ intention, has not transpired in Australian common law. This is largely because the mental element for the crime of murder is not restricted to an intention to kill or to cause grievous bodily harm in Australian common law jurisdictions. The available alternative mental element of reckless indifference to human life for murder has meant that the development of the concept of ‘oblique’ intention was avoided in Australian criminal laws. Ultimately though, this second ‘type’ of intention is applicable only in rare cases and ‘it is supplementary to, and not a substitute for, intention in the core sense’.⁵⁶ Simester et al usefully and simply describe this core sense of intention as follows: ‘D tries (seeks, attempts) to bring about the relevant outcome. For whatever reason, he wants or needs to bring about that outcome, and that is why he acts as he does’.⁵⁷

At the same time, being aware that a consequence ‘will occur in the ordinary course of events’ as provided in the *Commonwealth Criminal Code* definition of intention could arguably be equated with the second ‘type’ of intention in English common law. This would be so in situations where it is a moral or objective certainty that there will be a particular result from individual conduct. Further, in Victoria, there is a legislative definition of what it means to act intentionally in ‘arson-type’ offences,⁵⁸ which encompasses the straightforward notion of the accused’s purpose as well as an accused’s subjective knowledge or belief that the

55 See *R v Woollin* [1999] 1 AC 82 and various commentaries on the case and later developments in English criminal law, including M Cathleen Kaveny, ‘Inferring Intention from Foresight’ (2004) 120 *Law Quarterly Review* 81; Simester et al, above n 9, 126–40; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014) 67–70; Stark, above n 6, 156–8.

56 Simester et al, above n 9, 135.

57 *Ibid* 127.

58 See *Crimes Act 1958* (Vic) s 197(4) which provides that:

For the purposes of subsections (1) and (2) a person who destroys or damages property shall be taken as doing so intentionally if, but only if –

- (a) his purpose or one of his purposes is to destroy or damage property; or
- (b) he knows or believes that his conduct is more likely than not to result in destruction of or damage to property.

fire-setting conduct is ‘more likely than not to result in destruction of or damage to property’. This second ‘type’ of intention is based on actual knowledge of, or belief in, a virtually certain result, which is similar to the English common law concept and the alternative in the *Commonwealth Criminal Code* discussed above. Essentially such situations would involve proof that the accused’s subjective knowledge was that he or she was aware that it was virtually certain that specific consequences would flow as a result of their individual conduct. It is likely in practice, however, that this conception would be a rarely used alternative to the primary form of intended consequences in the sense of it being the accused’s purpose to achieve that result or meaning to bring about those particular consequences.

Overall, evidencing intention involves proof of a deliberate act or planned consequences directly by admissions from the accused or through inference from their actual conduct, the words accompanying their conduct, or words and acts proximate to or associated with the incident. It is directed to specific conduct or consequences. In arson offences, intentional fire-setting conduct is for the most part where the accused means to undertake that precise behaviour and with the intention of causing particular consequences to identified property. It is the individual’s purpose to damage or destroy specific property.

B Dishonestly

The subjective mental state of acting ‘dishonestly’ is used in the ‘arson-type’ offence of ‘dishonestly damaging or destroying property by means of fire’.⁵⁹ This is equivalent to fraud⁶⁰ as the dishonesty must be ‘with a view to making a gain’, that is, in the form of an increase in ‘possessions, resources or advantages of any kind’.⁶¹ In the context of ‘arson-type’ offences the gain will often be financial and involve a claim on an insurance policy. At common law ‘dishonesty’ is a question of fact to be determined by the fact finder applying the current standards of ordinary decent people.⁶²

Interestingly, in NSW there is now a statutory definition of ‘dishonesty’ in section 4B of the *Crimes Act 1900*, which replaced the longstanding common law definition.⁶³ Dishonesty is defined to mean ‘dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people’.⁶⁴ This definition involves the fact finder first making an objective assessment of what is dishonest by reference to the

59 See *Crimes Act 1900* (NSW) s 197(1). Some other Australian jurisdictions have similar offences, see, eg, *Crimes Act 1900* (ACT) s 117(2); *Crimes Act 1958* (Vic) s 197(3).

60 See, eg, *Crimes Act 1900* (NSW) s 192E, which provides that the offence of ‘fraud’ is committed where an accused person dishonestly by deception obtains property belonging to another or a financial advantage.

61 *DPP (Vic) Ref No 1 of 1988* [1989] VR 857, 862 (The Court).

62 *R v Feely* [1973] 1 QB 530; *Peters v The Queen* (1998) 192 CLR 493; *MacLeod v The Queen* (2003) 214 CLR 230.

63 This statutory definition was inserted by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW), which commenced operation on 22 February 2010.

64 This definition essentially reflects the English common law position established in the cases of *R v Feely* [1973] 1 QB 530 and *R v Ghosh* [1982] 1 QB 1053 taken together.

standards of ordinary people. Certainly destroying or damaging a building or other property by fire to make a financial gain through an insurance claim would be regarded as dishonest by those standards.⁶⁵ Second follows a subjective assessment of the accused's knowledge of the dishonesty of his or her particular conduct according to the standards of ordinary people. It will generally be straightforward for a fact finder to make a determination about an accused's subjective knowledge as to what is dishonest where there is proof of direct or complicit involvement in fire-setting conduct by them, which was motivated by some prospect of individual or collective financial gain.

Again, this definition in its practical application to 'arson-type' offences is not particularly complicated.⁶⁶ It has an important subjective focus on the awareness of the accused as to the dishonesty of their specific conduct in relation to certain selected property.

C Recklessness

In contrast to the subjective mental states of intention and dishonesty, recklessness presents a dual dilemma in relation to both definition and practical application.⁶⁷ The common law definition of recklessness still applies in NSW. The meaning of recklessness depends on the specific criminal offence for which it is provided as a mental element and where an offence involves 'a result of a particular quality ... foresight of a result of that quality [is required], not some other result'.⁶⁸

In *Blackwell*, the meaning of recklessness was considered in light of legislative changes to mental element terminology in the *Crimes Act 1900* (NSW), specifically the removal of the expression 'maliciously' from all criminal offences and its replacement with the words 'intention' and/or 'recklessness'. All three judges in *Blackwell*, with the leading judgment from Beazley JA, agreed that the interpretation of recklessness had to be considered in the particular context of the repeal of section 5 of the *Crimes Act 1900* (NSW). This resulted in the elimination of the archaic expression 'maliciously' and its convoluted definition, which included language equated with recklessness, from the legislative lexicon. This expression had been the subject of interpretation in *R v Coleman*,⁶⁹ where the NSW Court of Criminal Appeal held that the degree of recklessness required to establish that an act, other than one resulting in murder, was done maliciously was when there was 'a realisation on the part of the

65 See, eg, *R v Ahmed* [2001] NSWCCA 450.

66 There are contrary views as to the complexity of the concept of 'dishonesty' in criminal offences generally: see, eg, Alex Steel, 'The Appropriate Test for Dishonesty' (2000) 24 *Criminal Law Journal* 46; Alex Steel, 'Describing Dishonest Means: The Implications of Seeing "Dishonesty" as a Course of Conduct or Mental Element and the Parallels with Indecency' (2010) 31 *Adelaide Law Review* 7; Alex Steel, 'The Meanings of Dishonesty in Theft' (2009) 38 *Common Law World Review* 103.

67 See Adam Webster, 'Recklessness: Awareness, Indifference or Belief?' (2007) 31 *Criminal Law Journal* 272, 272, who states that '[d]efining recklessness in criminal law has proved to be a great challenge for courts, legislatures and legal theorists'. Further, Webster observes that the challenge 'is to describe adequately the fault element which falls between intention and negligence': at 273.

68 *CB* (2014) 240 A Crim R 451, 460 [44] (Barrett JA).

69 (1990) 19 NSWLR 467.

accused that the particular kind of harm in fact done (that is, some physical harm – but not necessarily the degree of harm in fact so done) might be inflicted (that is, may possibly be inflicted) yet he went ahead and acted'.⁷⁰ With the repeal of section 5 and the replacement of 'maliciously' with new terminology, Beazley JA considered the meaning of 'recklessly' afresh through a line of other authorities including seminal cases from the United Kingdom⁷¹ and the comparatively recent Australian High Court authorities of *R v Lavender*⁷² and *Banditt v The Queen*.⁷³ In this fresh approach, her Honour also declined to follow the Victorian Court of Appeal decision in *R v Campbell*⁷⁴ in coming to the conclusion that the legislative term 'recklessly' for the mental element of criminal offences must be interpreted to involve foresight by the accused that their conduct will possibly⁷⁵ cause something and that 'something' depends on the elements of the offence charged, specifically the required consequences of the conduct.⁷⁶ In the particular context of a non-fatal offence against the person, namely, recklessly causing grievous bodily harm under section 35(2) of the *Crimes Act 1900* (NSW), recklessness could not be read down to mean foresight of 'some physical injury' as had been the case at common law.⁷⁷

Justice Beazley presented a persuasive case through her consideration of the principles from the relevant case authorities for the interpretation of 'recklessly' to involve actual foresight of the specific type of harm. Arguably, however, the other interpretative issue relating to the degree of foresight required in the sense of whether it is the possibility or probability that the foreseen risk or injury will result, was not thoroughly evaluated by the Court. There is, in fact, much to commend the submission of the appellant in *Blackwell* that the same principles for determining the meaning of recklessness in murder⁷⁸ should be applied to non-fatal offences against the person involving serious injuries so that foresight should be of the probability of such serious consequences. The term 'probability', with its emphasis on the likelihood of a particular event or consequence occurring, more appropriately reflects the level of appreciation of the risk required for the moral blameworthiness of an accused person in the circumstances of such substantial wrongdoing. The censure and punishment resulting from such serious crimes demand that there be fair labelling of the offence elements and rigorous proof of fault by the prosecution.

70 Ibid 475 (Hunt J) (emphasis altered).

71 *Blackwell* (2011) 81 NSWLR 119, 132–3 [70]–[72]. These cases included *R v Cunningham* [1957] 2 QB 396 and *R v G* [2004] 1 AC 1034. In this regard see also N P Metcalfe and A J Ashworth, 'Arson: Mens Rea – Recklessness Whether Property Destroyed or Damaged' [2004] *Criminal Law Review* 369.

72 (2005) 222 CLR 67.

73 (2005) 224 CLR 262. See *Blackwell* (2011) 81 NSWLR 119, 132–3 [72]–[76].

74 [1997] 2 VR 585.

75 Not 'probably', as laid down in *ibid* 592 (Hayne JA and Crockett AJA).

76 It must be foresight of the possibility of the relevant consequence: *Blackwell* (2011) 81 NSWLR 119, 134–5 [82] (Beazley JA), 141 [121] (James J), 149 [171] (Hall J).

77 See *R v Coleman* (1990) 19 NSWLR 467; *Stokes v The Queen* (1990) 51 A Crim R 25.

78 Articulated in *R v Crabbe* (1985) 156 CLR 464, 469–70 (The Court). See *Blackwell* (2011) 81 NSWLR 119, 133–4 [77] (Beazley JA).

Interestingly, the higher threshold of foresight set in relation to awareness of the risk of the specific result of the conduct for the offence under section 35(2) of the *Crimes Act 1900* (NSW) was reduced again through consequent legislative action just over a year after the decision in *Blackwell*. The NSW Parliament amended the evidentiary requirement for recklessness for certain offences against the person, including section 35(2), so that the prosecution now has to prove that an accused acting recklessly had foresight of the possibility of harm only at the specific level of actual bodily harm.⁷⁹ That is, hurt or injury that is ‘more than merely transient and trifling’⁸⁰ and not in the nature of the ‘really serious’ bodily harm,⁸¹ which actually resulted from the accused’s conduct. This demonstrates the ability of the legislature to make more specific reformulations of the mental element requirements for serious offences and align maximum penalties to more appropriately reflect the level of culpability when such elements are proved beyond reasonable doubt.

It is that context at common law, including some statutory modifications, in which the meaning of ‘recklessness’ comes to be analysed in relation to ‘arson-type’ offences. Taking the relevant case authorities and statutory provisions together,⁸² an accurate synthesis is that recklessness is proved by evidence of the accused’s subjective foresight of the possibility of property destruction or damage and that he or she acted by lighting the fire despite the foreseen possible risk to any property. The reckless nature of the conduct can be that it was undertaken with indifference to the actual foreseen possible risk of property damage or while the accused hopes the foreseen risk of property damage does not eventuate, that is, advertent recklessness. Alternatively, recklessness can be inadvertent in the sense of indifference by the accused in failing to advert at all to the foreseeable risk of property damage.⁸³ Therefore, a low threshold of proof is set by the common law in terms of the subjective anticipation of property damage or destruction occurring as a possible outcome of fire-setting conduct. Although this interpretation is strictly consistent with *Blackwell* in that the focus is on the consequence stated in the legislative provision, which is general in nature, it is arguably against the spirit of the judicial reasoning in *Blackwell* in sweeping away the archaic language of ‘maliciously’ and reinterpreting the requirement of ‘recklessness’ as to what must be foreseen, namely the specific consequences where serious harm results from an accused’s conduct. Retaining a low threshold for the recklessness in ‘arson-type’ offences arguably does not reflect the serious nature and potential harmful consequences of many such offences and the significant censure and punishment that results from such a conviction. It is not fair labelling in the sense of seeking to properly reflect what must be foreseen

79 *Crimes Amendment (Reckless Infliction of Harm) Act 2012* (NSW), which commenced operation on 21 June 2012.

80 *R v Donovan* [1934] 2 KB 498, 509 (The Court).

81 *R v Hunter* (1989) 44 A Crim R 93, 96 (King CJ). See *Crimes Act 1900* (NSW) s 4 for a non-exhaustive definition of the term ‘grievous bodily harm’.

82 Including *CB* (2014) 240 A Crim R 451.

83 See *R v Coleman* (1990) 19 NSWLR 467; *Stokes v The Queen* (1990) 51 A Crim R 25; *R v Kitchener* (1993) 29 NSWLR 696; *R v Tolmie* (1995) 37 NSWLR 660; *Banditt v The Queen* (2005) 224 CLR 262.

relative to 'the type of property damaged or the magnitude of the damage inflicted'.⁸⁴

Returning to the measure of an accused's awareness, the statutory definition of 'recklessness' in relation to circumstances and consequences in section 5.4 of the *Commonwealth Criminal Code* goes further than the common law in demonstrating the significance of this fault element in crimes involving serious wrongdoing. The threshold for proof is set at a much higher level in relation to measuring the foresight required. The prosecution must establish the accused was aware that there was a substantial risk that a circumstance exists or a particular result will occur:

5.4 Recklessness

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

The use of the phrase 'substantial risk' can be equated with a material or real risk of the occurrence of the actual result, which in turn can be aligned with foresight of the likelihood or probability of certain consequences, such as is required for murder at common law. This is in contrast to the requirement for simply foreseeing the possibility of a result that falls within the scope of the general consequence as set out in the particular legislative provision. Possibility is more akin to a chance or generalised risk of something happening rather than there being a real, weighty and substantial risk. The appropriate use of measurement terminology here is critical in ensuring that there is an accurate and morally significant labelling and reflection of criminal responsibility and culpability when the accused is exposed to punishment involving potentially lengthy deprivation of liberty.

An illustration of the operation of the *Commonwealth Criminal Code* formulation of recklessness and its contrast with the common law can be provided through the specific bushfire arson offence. This offence has been adopted from the Model Criminal Code in largely the same form into the criminal statutes of various Australian states, including NSW where section 203E(1) of the *Crimes Act 1900* (NSW) provides for this offence as follows:

A person:

- (a) who intentionally causes a fire, and

84 Ashworth and Horder, above n 9, 78.

- (b) who is reckless as to the spread of the fire to vegetation on any public land or on land belonging to another, is guilty of an offence.

Maximum penalty: Imprisonment for 14 years.

Although the same language is used as the bushfire arson provision in the Model Criminal Code,⁸⁵ the *Crimes Act 1900* (NSW) does not concurrently adopt the section 5.4 definition of recklessness to ensure the accused must be aware that there is a substantial risk that the fire will spread ‘to vegetation on any public land or on land belonging to another’ person before he or she would be criminally responsible. Instead the common law conception of recklessness applies so all that is required is foresight of a possibility of the spread of the fire to vegetation on such land. Arguably these two jurisdictional interpretations result in a significant threshold difference in the degree of foresight required to establish the mental element for this offence, which is focussed on the risk of fire destroying collective public property in the national natural landscape. The offence was created to reflect the criminality in ‘the potentially catastrophic circumstances of wildfire in the vast tracks of public bush and park lands in Australia, which may destroy valuable shared community assets of flora, fauna and animal habitat’.⁸⁶ In the unique Australian ecology, this is a distinctively national offence with no regard for state borders and the clear potential for extensive and costly damage to property and significant loss of flora, fauna and human lives. It is predicated on the creation of risk rather than infliction of harm, which is the main difference to structural arson offences. In employing the same mental element terms that are defined in chapter 2 of the *Commonwealth Criminal Code* in provisions directly co-opted from this Code, it is strongly arguable that the NSW and Commonwealth provisions are *in pari materia*.⁸⁷ Accordingly, the requirement for consistent interpretation between the two provisions means that the definitions from chapter 2 of the *Commonwealth Criminal Code* should be applied in interpreting the specific NSW provision. This argument could then be extrapolated to ensure complete consistency in the use of the concept of recklessness across all criminal offences in NSW, thus providing an appropriately higher threshold of proof for this subjective fault element.

Further, it may be contended that both bushfire and structural arson offences can be paralleled to the seriousness of a murder offence when recklessness is measured by the accused’s foresight of the probability of the death of a specific

85 See draft cl 4.1.8 of the Model Criminal Code: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Model Criminal Code Report Chapter 4: Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction’ (Report, Commonwealth Attorney-General’s Department, January 2001) 46.

86 Lansdell, Anderson and King, above n 45, 358 (citations omitted).

87 See above n 5. The principle of being *in pari materia* refers to similar statutes or statutory provisions in the same or different jurisdictions and allows for reference to be made to such statutes or statutory provisions as an aid to interpretation of the meaning of the same words in analogous legislative provisions: see *Danziger v The Hydro-Electric Commission* [1961] Tas SR 20; *Imperial Chemical Industries of Australia and New Zealand Ltd v Federal Commissioner of Taxation* (1972) 46 ALJR 35; *Kerr v Verran* (1989) 88 ALR 125; *PT Ltd v Maradona Pty Ltd [No 2]* (1992) 27 NSWLR 241; *Dampier Salt (Operations) Pty Ltd v Collector of Customs* (1995) 133 ALR 502.

person.⁸⁸ In relation to murder offences, there is a practical equivalence of the subjective mental states of intention and recklessness based on the notion of blameworthiness,⁸⁹ although the former may be regarded as the more culpable state for offences less serious than murder. Interestingly, in comparing the subjective mental states of intention and recklessness, section 4A of the *Crimes Act 1900* (NSW) provides that ‘if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge’.⁹⁰ This legislative provision does not seem to assist with a practical interpretation of the concept of ‘recklessness’ but simply provides scope for proof at a higher subjective threshold if such evidence is available even though an offence may be formulated with a mental element of recklessness. It is seemingly facilitative. However, it is open to contend that it elucidates the overlap between these subjective mental elements and highlights that they are not mutually exclusive. Thus it is arguable that the substantive import of section 4A of the *Crimes Act 1900* (NSW) has not been recognised by the courts, particularly in relation to the most serious crimes; if recklessness can also be proved by intention then there is practical equivalence in blameworthiness and this should be reflected in the way each mental state is defined. Although one mental state may ultimately be regarded as more culpable, the degree of foresight required should in both cases be set at the likelihood or probability of foreseeing the specific consequence and not the possibility of foreseeing the potential range of consequences reflected in the statutory formulation of the offence as held in *CB*.

Overall, there is a compelling argument that recklessness should be measured in terms of foresight of probable consequences and the precise consequence must be regarded as significantly more than an offence ‘particular’ that is supplied only because it is reasonably necessary for the accused to know what they are being charged with and to enable preparation of their defence. What is actually foreseen by the accused as likely to happen is pivotal to their moral blameworthiness and should be characterised as an integral part of the offence definition where recklessness is an available mental element.

V A PRINCIPLED INTERPRETATION OF RECKLESSNESS IN THE ORTHODOX SUBJECTIVIST AND RATIONAL CHOICE FRAMEWORK FOR CRIMINAL RESPONSIBILITY

As the mental state of recklessness in criminal offences is a ‘key ... [tool] in a communicative enterprise’,⁹¹ then to accord with the principles of fair labelling, fair warning and maximum certainty and to ensure an accessible and commonly shared understanding of the term, it must be defined in such a way as to reflect

88 *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Royall v The Queen* (1991) 172 CLR 378; *R v Solomon* [1980] 1 NSWLR 321; *R v Annakin* (1988) 37 A Crim R 131.

89 See *R v Crabbe* (1985) 156 CLR 464, 469 (The Court); *Dean v The Queen* [2015] NSWCCA 307, [42]–[56], [120]–[135] (Ward JA), [158] (Adams J), [159] (R A Hulme J).

90 A similar phrase is also included in the *Commonwealth Criminal Code* s 5.4(4), extracted above.

91 Stark, above n 6, 162.

the citizen's capacity for rational thought and action, including choosing and planning their conduct.⁹² This applies both to adults and to children who know the act is wrong, noting particularly that the young defendant in the case of *CB* was a 14-year-old child.⁹³ In relation to a principled use of the criminal law and how offences should be constructed to accord with an individual's capacity for rational thought and action, the important core principles⁹⁴ in the orthodox subjectivist tradition are individual justice, equal treatment, and proportionality following the autonomous choice and individual guilt roots of influential 18th century philosopher, Immanuel Kant.⁹⁵ The principled core of the criminal law encompasses 'four interlinked principles':

1. 'criminal law should be used, and only used, to censure persons for substantial wrongdoing';
2. 'criminal laws should be enforced with respect for equal treatment and proportionality';
3. 'persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences'; and
4. 'maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing'.⁹⁶

Importantly, in employing these principles, 'criminal offences, or at least serious offences, should require proof of fault'.⁹⁷ Drawing on the 'rule of law' arguments of eminent legal philosopher Herbert Hart, this requirement to emphasise subjective advertence to the consequences of serious wrongdoing to ensure there has been 'a fair opportunity' to comply with the criminal law is emphasised by Ashworth and encapsulates the orthodox subjectivist approach to criminal responsibility:

The principle of *mens rea* is therefore identified as central to fairness in the criminal law, requiring advertence by the defendant to the prohibited consequences and/or prohibited circumstances ... The fundamental notion of human dignity entails respect for individuals as autonomous subjects, which in turn calls for recognition that people should be able to plan their lives in order to secure maximum freedom to pursue their interests. In order to facilitate this, the criminal law should operate so as to guide people away from certain courses of conduct, and should provide for the conviction only of persons who intend or knowingly risk the prohibited consequences.⁹⁸

92 Ibid 166.

93 This relates to the *doli incapax* presumption at common law: see *JM (A Minor) v Runeckles* (1984) 79 Cr App R 255; *R v M* (1977) 16 SASR 589; *R v CRH* (Unreported, NSW Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996); *RP v R* [2015] NSWCCA 215. A full analysis and evaluation of this presumption is beyond the scope of this article but for further and useful commentary, see Thomas Crofts, 'Doli Incapax: Why Children Deserve Its Protection' (2003) 10(3) *Murdoch University Electronic Journal of Law* 1; Lisa Bradley, 'The Age of Criminal Responsibility Revisited' (2003) 8 *Deakin Law Review* 73; Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21 *Psychiatry, Psychology and Law* 791.

94 Ashworth, above n 48, 28–9.

95 See generally Ashworth and Horder, above n 9, 155–6.

96 Ashworth, above n 48, 28–9 (emphasis altered).

97 Ibid 112.

98 Ibid 113 (citations omitted).

Knowingly risking the causing of prohibited consequences is evidently aligned with the mental element of recklessness in criminal responsibility and certainly expresses a requirement for conviction that goes well beyond carelessness and not thinking about the consequences of certain conduct.⁹⁹ As the criminal law censures and penalises people for contravening it, they must have had ‘a fair opportunity to avoid contravening it’, and as legal philosopher Antony Duff has argued:

the coercive apparatus of the criminal law is rightly used to call people to account for their conduct, but to proceed to conviction without proof of fault as to a *material element* is to impose public condemnation without properly laying the foundations for it.¹⁰⁰

The concepts of equal treatment and proportionality in relation to subjective fault elements call attention to the magnitude of the consequences as a material element of an offence and assigning responsibility commensurate with the known or probable harm or injury. Censure of wrongdoing and proportionate sentences must be reflected in the requirements for proof of the defendant’s fault, that is, the mental element threshold must be proportionate to the level of responsibility assigned for the seriousness of the conduct and its ramifications. The comprehensible labelling of fault standards in criminal responsibility will take clear account of the resultant censure, stigma and punishment associated with particular forms of wrongdoing. This employs a moral context to the fault standard that appropriately informs and moderates the assignment of individual criminal responsibility for material conduct within a framework of rational thought and action.

There is a clear interrelationship with proportionality in sentencing once an appropriate level of fault has been determined within the offence category. A broad interpretation of recklessness encompassing foresight of the possibility of any damage to any property with no regard for the nature and magnitude of the actual consequences of the fire-setting conduct will arguably lead to disparity and unfairness in sentencing. It will not facilitate a principled approach to the criminal law. Although judicial officers have discretion in deciding appropriate punishments through the sentencing process and account will be taken of a defendant’s actual culpability in the intuitive synthesis of material factors, there is a clear danger that a broad conception of fault will lead to disproportionate sentencing outcomes as judges individually interpret criminal responsibility and culpability relative to the offence label. As the ‘arson’ label is applied to a wide range of fire-setting conduct and mental states that result in an infinite variety of damage and harm, proportionality and consistency in outcomes will be difficult to achieve across the spectrum of offending unless there is more specificity in relation to the degree and nature of foresight required to prove a reckless state of mind. Once convicted, an offender’s criminal record will simply show a conviction for the ‘arson-type’ offence and the punishment imposed, which raises the danger that the offence label may not accurately reflect the material elements

99 See above n 22.

100 Ashworth, above n 48, 114 (emphasis added), citing R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007) 231–2.

of the fire-setting behaviour. If the offender is subsequently convicted of any crimes, including ‘arson-type’ offences, the prior conviction will be used as part of the judicial synthesis in the sentencing process with only the offence label and punishment imposed usually available to the sentencing judge. The potential for disproportionate and inequitable treatment in sentencing through unfair labelling and uncertainty is readily apparent.

In relation to the protective function of the criminal law, this highlights the need to ensure that a finding of criminal responsibility for serious wrongdoing is not made at the expense of individual rights in both procedural and substantive senses – understanding and fairness of the process and the legal standards by which wrongdoing is to be judged. In this way, the orthodox subjectivist approach is logically supplemented by rational choice theory to allow some flexibility to clearly reflect the autonomous choices and attitude of the defendant towards the consequences of their actions in ensuring a moral equivalence between intention and recklessness.¹⁰¹ This theoretical approach ensures an explicitly high threshold of subjective responsibility in fault elements like recklessness. Accordingly, applying these various principles grounded in orthodox subjectivist and rational choice theory and proceeding on the basis of a dualist but coincidental conception of criminal responsibility,¹⁰² it is strongly arguable that proof of recklessness in ‘substantial wrongdoing’ must require a level of fault that demonstrates advertence to the specific prohibited consequences, which constitute material elements of the offence for which an accused person is prosecuted. In the context of ‘arson-type’ offences this translates to subjective advertence to the form and magnitude of damage or destruction of specific property or a particular degree of injury to, or death of, a human being when engaging in the fire-setting conduct. These are integral components of blameworthiness to properly differentiate the extent of an individual’s criminal responsibility for fire-setting conduct, their capacity for rational thought and action, and the punishment that is proportionate upon proof of the appropriate extent of responsibility.

101 Compare the revisionist approach to criminal responsibility, through dialectical and relational critique of dualism, with its focus on real moral value: Alan Norrie, *Punishment Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000) chs 3, 8.

102 Dualism involves the assumption that human beings are composed of two distinct elements: physical bodies and non-physical bodies (minds). Physical bodies are observable by others but the mind is private such that no-one else can have direct access to another person’s mind. Mental states must be inferred primarily from external behaviour: see R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Basil Blackwell, 1990) 28–9. Also, note that in *Simpson v The Queen* (1998) 194 CLR 228, 244 [44], Kirby and Callinan JJ observed that ‘[i]n establishing the “knowledge” and “awareness” of an accused person, it is usually necessary (in the absence of clear admission) to rely on inference. This is normally the way in which such matters are established in a criminal trial. It can hardly be otherwise’. Further, it is a general principle of criminal responsibility that the conduct and mental elements must coincide in time: see *Meyers v The Queen* (1997) 147 ALR 440, 442 (The Court); *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *R v Potisk* (1973) 6 SASR 389.

VI A REFORMULATION OF THE MENTAL ELEMENT IN ARSON-TYPE OFFENCES

In constructing a normative framework from the foregoing extensive analysis and evaluation of recklessness as a fault element in the context of ‘arson-type’ offences, it is contended that a principled approach to the operation of the criminal law in relation to these offences results in a reformulation of the subjective mental elements at common law. This reformulation reflects the seriousness of the wrongdoing in relation to the potentiality for grave and extensive harm to property and human life. It is grounded in subjectivist orthodox conceptions of fault in criminal law theory but extending to and combining with rational choice theory – ‘those who are aware of the risk and still choose to engage in the conduct *choose* to bring about the ... [particular] consequences which lead to criminal responsibility’.¹⁰³

The barriers to investigation and prosecution have to some extent understandably resulted in a pragmatic approach to the common law construction of arson offences, notably in relation to the threshold of proof for the mental element and the characterisation of the nature and extent of the harm to property simply as offence particulars. The broad scope of ‘recklessness’ as interpreted in *CB* is a clear example of this approach to determining criminal responsibility. However, in ensuring individualised justice, equal treatment and proportionality there must be an approach to subjective mental states that demands proof of clear and unequivocal criminal responsibility when an individual is put at risk of punishment, particularly loss of liberty through incarceration for lengthy periods of time. Accordingly, this culminates in the contention that the prosecution must prove beyond reasonable doubt that the accused either intended to cause the specific harm to nominated property or to the person resulting from their fire-setting behaviour, or that they foresaw that there was a substantial risk of the specific harm in the sense of likelihood that it would occur but went ahead and ignited the fire in spite of the foreseen risks.

Alternatively and ensuring adherence to the principle of fair labelling, there is a strong argument that the arson offences created by the legislature should be carefully reformulated by amending the relevant statutory offences into different grades or ‘subdivisions to reflect the type of property damaged or the magnitude of the damage inflicted’¹⁰⁴ and re-calibrating the maximum sentences accordingly. This would clearly allow the criminal law in relation to this offence category to ‘[track] the reasonable moral convictions of the community’¹⁰⁵ and enable the lawmaker ‘to say in advance that those who deliberately bring about [specified and progressively] bad consequences for others ... will be labelled as

103 Webster, above n 67, 277 (emphasis in original), citing R A Duff, ‘Choice, Character, and Criminal Liability’ (1993) 12 *Law and Philosophy* 345, 347.

104 Ashworth and Horder, above n 9, 78.

105 Victor Tadros, ‘Fair Labelling and Social Solidarity’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 67, 79.

criminals and punished in proportion with the seriousness of their offending'.¹⁰⁶ This unequivocally places the type and degree of harm to property or the person within the material elements of arson offences, including the mental element, thus plainly and justly distinguishing them from mere particulars of the offence and more readily allowing for the imposition of proportionate punishment where the elements of the offence are proved beyond reasonable doubt.

VII CONCLUSION

It is manifest that 'arson is a crime difficult of detection'¹⁰⁷ and there are very low clear-up rates for these offences. These and other 'localised concerns' do not, however, in any way justify a low threshold for proof of the mental element of the substantial wrongdoing involved in serious 'arson-type' offences. Most significantly, the concept of recklessness must reflect the considerable moral blameworthiness of the serious conceivable consequences of bushfire and structural arson offences. The potentiality of severe punishment involving extended deprivation of liberty for this substantial wrongdoing is an important consideration in formulating appropriate subjective fault elements. The case of *CB* highlights an inappropriate and continuing tendency of the courts to facilitate proof of serious offences with broad conceptions of fault that do not accurately reflect the criminal responsibility and culpability of those accused of such crimes, which can then lead to disproportionately severe sentencing outcomes. Subjective conceptions of fault which promote individualised justice, fair labelling, maximum certainty and proportionality provide the normative framework within which the concept of recklessness can be formulated and given appropriate meaning to reflect the substantial moral blameworthiness of the rational thought and action of individual adults and young persons convicted of serious crimes, notably the focal 'arson-type' offences.

106 Dennis J Baker, *The Right Not to Be Criminalized: Demarcating Criminal Law's Authority* (Ashgate, 2011) 254.

107 Sir Ninian Stephen, 'Opening Address' (Paper presented at National Conference on Arson, Australian Institute of Criminology, Canberra, 26–29 April 1983) v.