

REPORT
MODEL CRIMINAL CODE
CHAPTER 3
CONSPIRACY TO DEFRAUD

**Model Criminal Code Officers Committee of the
Standing Committee of Attorneys-General**

May 1997

This is a Report. It contains the views of the Model Criminal Code Officers Committee. It does not represent the views of the Standing Committee of Attorneys-General

Content

ISBN 0 642 20891 3

PREFACE

Background to the Model Criminal Code Project

On 28 June 1990, the Standing Committee of Attorneys-General (SCAG) placed the question of the development of uniform criminal codes for Australian jurisdictions on its agenda. That decision flowed from a request of the Northern Territory Attorney-General and took into account that most jurisdictions were either undertaking, or about to undertake, major reviews of their respective criminal laws.

In order to advance the concept, SCAG established a Committee - originally known as the Criminal Law Officers Committee (CLOC) - which consisted of one or more officers from each jurisdiction who had special responsibility for advising his or her Attorney-General on criminal law issues. In November 1993, SCAG changed the name of the Committee to the Model Criminal Code Officers Committee (MCCOC) in order to communicate the Committee's primary role more clearly.

The first formal meeting of the Committee took place in May 1991, when it was decided that priority should be given to principles of criminal responsibility which were seen as the very foundations of any system of criminal justice. The Committee issued a Discussion Draft of a proposed Chapter of a Model Criminal Code dealing with *General Principles of Criminal Responsibility* to SCAG in July 1992 and it was circulated for comment.

Fifty-two written submissions were received in response to that Discussion Draft. In addition to these submissions, the Final Report reflects the substance of many meetings with criminal law experts and detailed comments from delegates to the Fourth International Criminal Law Congress held in Auckland in September 1992. SCAG approved the release of the Report on *General Principles of Criminal Responsibility* and the accompanying Draft Bill for public comment in February 1993.

The following jurisdictions have endorsed the Report on General Principles of Criminal Responsibility, except for the intoxication rule: ACT, Commonwealth, New South Wales, Queensland, South Australia, Tasmania, Western Australia (WA has reserved on some issues) and the Northern Territory. In relation to intoxication, SCAG has decided that the case *DPP v Majewski* [1977] AC 480 provides a better basis for the Model Criminal Code than *O'Connor's case* (1980) 146 CLR 64. The Commonwealth has enacted the Chapter in the *Criminal Code Act 1995*.

Theft, fraud, bribery and related offences

The excesses of the 1980s have focussed a great deal of attention on the prosecution of fraud offences in Australia. Corruption in the public sector has also found focus in the FitzGerald Report in Queensland and the Western

Australian Royal Commission into the Commercial Activities of Government and Other Matters (the so-called “ WA Inc” Royal Commission) in Western Australia.

In September 1992, a special SCAG meeting on complex fraud cases requested MCCOC to give priority to fraud as the first substantive offence chapter of the Model Criminal Code. This request was based in part on recommendation 8 of the National Crime Authority’s Conference on White Collar Crime held in Melbourne in June 1992:

That the various State laws and codes be revised so as to provide uniform fraud legislation as a mechanism for consistency for investigation and presentation of evidence in all Australian jurisdictions.

The Standing Committee had in mind the revision of the various substantive fraud offences into a uniform fraud code as part of its reform agenda on the related issues of criminal procedure and laws of evidence applicable to serious and complex fraud. These evidentiary and procedural reforms are being addressed by the various jurisdictions.

At an early stage of its deliberations on this topic, MCCOC decided that it would be impossible to deal with fraud in isolation from theft and related offences such as blackmail, forgery, bribery and secret commissions. All these offences involve dishonest acquisition of money or property and may generally be termed property offences. Modern codification projects in this area of the law - notably the *Theft Act 1968* (UK), and the theft laws of Victoria and the Australian Capital Territory, which were based on the *Theft Act* - deal with most of these offences as a package. MCCOC has extended the *Theft Act* model to include the offences of forgery, bribery and secret commissions in that package. The relationship between the various offences is such that they cannot sensibly be dealt with in isolation from one another. The *Theft Act* model enables the application of similar concepts across the various offences to produce a logically consistent Code.

The consultation process involved the issue of two discussion papers, *Theft, Fraud and Related Offences* (December 1993), and *Blackmail, Forgery Bribery and Secret Commissions* (July 1994). There was an extensive consultation process on both discussion papers. This process included consultation meetings in Canberra, Melbourne, Sydney and Perth where practising and academic lawyers and police with expertise in these areas gave papers in response to the issues raised in the discussion papers. In addition the Committee received over 40 written submissions and consulted with experts in the field. The Final Report on Chapter 3 of the *MCC, Theft, Fraud, Bribery and Related Offences* was published in December 1995. The Report is currently under consideration by Governments.

Conspiracy to defraud

In the process of developing the Final Report on Chapter 3, the Committee decided that the topic of conspiracy to defraud - initially to be part of that Report - required further consultation.

Under the existing law in most jurisdictions, a person can be convicted of conspiracy in some circumstances for agreeing to a course of conduct which would not be criminal if committed by an individual. In its report on *The General Principles of Criminal Responsibility*, MCCOC recommended that conspiracy in general should be limited to agreements to commit an offence: see s11.5 of the *MCC*. This means that - unlike the present situation - all conspiracies, including conspiracy to defraud, would be limited to conduct which would be an offence if engaged in by an individual. Two related principles lie behind that recommendation. First, the rule of law requires that criminal laws in particular should be specific and knowable in advance (*nulla poena sine lege*). In effect, the breadth of the law of conspiracy allowed courts to legislate to render conduct criminal after the event. Second, the Committee echoed the often-expressed view that if an individual could engage in a given form of conduct without committing a criminal offence, then that conduct should not become criminal merely because a group of people agreed to engage in it. The Committee argued that if the recommended restriction left any unacceptable gaps in particular areas of the law, these should be addressed by the creation of substantive offences in these areas.¹

The Committee noted that conspiracy to defraud is one area where there may be such a gap. Although agreements to commit any of the offences in Chapter 3 would amount to conspiracy under s11.5 of the *MCC*, a number of the decided cases involve dishonest conduct which would not be caught by the offences in Chapter 3 or by other offences. The Committee noted that in England and Victoria, the law of conspiracy has been restricted to agreements to commit offences. However, conspiracy to defraud was exempted from the legislation to allow consideration of whether restricting conspiracy to defraud to agreements to commit an offence (eg obtaining by deception) would leave unacceptable gaps in the law. In 1994 in the most recent in a series of reports on the subject, the English Law Commission has recommended that the common law of conspiracy to defraud continue in place pending a general review of the law of dishonesty.²

Given the difficulty of the policy issues surrounding conspiracy to defraud and its use in a number of recent high profile tax and Corporations Law cases, MCCOC issued a separate discussion paper, *Conspiracy to Defraud* in June 1996 to allow full consultation to occur in the context of the recommendations contained in the *Theft Report*. The *Discussion Paper* posed three questions:

1 Ch 2 Report. 96-9; and see s11.5 of the *MCC*.

2 The statutory provisions are: s5(2) *Criminal Law Act* 1977 (UK) and Vic: s321F(2). The UK statutory provision followed Law Com 56. The more recent Report is Law Com 228.

(1) Should the offence of conspiracy to defraud be included in the *MCC*?

If so,

(2) What form should the offence take?

(3) What implications does this have for a general dishonesty offence?

The Committee received 26 written submissions as listed in Appendix 3. The submissions have been considered by MCCOC which has made a number of changes as indicated in the body of the Report. The Committee warmly thanks those people who assisted the project by making a submission.

In drafting its Reports and the *MCC* legislation, MCCOC has attempted to produce documents which are comprehensive and yet concise and capable of being understood not only by legal practitioners but also by the general public. MCCOC felt that a Code which could only be interpreted by lawyers would fail a basic test of acceptability. The content of such a fundamental area as the criminal law should be accessible to all citizens. To that end, MCCOC requested Parliamentary Counsel to adopt a plain English drafting style. The Committee expresses its gratitude to Mr Don Colagiuri, Deputy Parliamentary Counsel in New South Wales, who has in Chapter 3 admirably carried on the work of Mr Eamonn Moran, Deputy Chief Parliamentary Counsel of Victoria, who drafted the Bill for Chapter 2.

The Committee wishes to thank Dr David Neal who wrote the commentary for this Report on behalf of the Committee.

COMMITTEE MEMBERS

Chairperson

His Honour Judge Rod Howie, QC
District Court of New South Wales

Members

New South Wales

Ms Megan Latham
Crown Advocate of New South Wales

Victoria

Ms Angela Cannon
Director Attorney-General's Policy,
Attorney-General's Department

Queensland

Mr Peter Byrne
Executive Director
Policy and Legislation Division
Attorney-General's Department

Western Australia

Ms Lindy Jenkins
Senior Assistant Crown Counsel

South Australia

Matthew Goode
Senior Legal Officer
Attorney-General's Department

Tasmania

Mr Nick Perks
Crown Counsel

Northern Territory

Mr Jack Karczewski
Acting Director
Policy Division
Attorney-General's Department

Australian Capital Territory

Ms Carolyn Stuart
Justice Section
Attorney-General's Department
(until December 1996)

Ms Karen Greenland
Justice Section
Attorney-General's Department

Commonwealth

Mr Geoff McDonald
Senior Adviser - Criminal Law Reform
Attorney-General's Department

Principal Consultant:

Dr David Neal
Victorian Bar

Advisers

Victoria

Dr Colin Howard QC
Crown Counsel

New South Wales

Mr Richard Button
Director,
Criminal Law Review Division
Attorney-General's Department

Commonwealth:

Mr Andrew Menzies AM, OBE

Ms Allison Will
Criminal Law Reform
Attorney-General's Department

ABBREVIATIONS

| | |
|-------------------------|---|
| <i>Chapter 2</i> | <i>General Principles of Criminal Responsibility</i> Final Report of the Model Criminal Code Officers Committee, December 1992 |
| <i>CLRC (Theft)</i> | <i>Theft and Related Offences</i> Eighth Report of the Criminal Law Revision Committee (UK), May 1966 |
| <i>CLRC (CTD)</i> | <i>Conspiracy to Defraud</i> Eighteenth Report of the Criminal Law Revision Committee, September 1986 |
| <i>Discussion Paper</i> | <i>Conspiracy to Defraud</i> Discussion Paper for the Model Criminal Code Officers Committee, June 1996 |
| Fisse | <i>Howard's Criminal Law</i> (5th ed, 1990.) |
| Gibbs | <i>Review of Commonwealth Criminal Law</i> , 4th Interim Report, 1990. |
| Lanham et al | Lanham, Weinberg, Brown and Ryan, <i>Criminal Fraud</i> (1987) |
| <i>Law Com 56</i> | <i>Criminal Law: Conspiracy to Defraud</i> Working Paper No 56 (1975). |
| <i>Law Com 228</i> | <i>Criminal Law: Conspiracy to Defraud</i> The UK Law Commission Report, (1994) |
| <i>MCC</i> | <i>Model Criminal Code</i> . The <i>MCC</i> currently consists of the Bill attached to the Report on Chapter 3, <i>Theft, Fraud, Bribery and Related Offences</i> and the Bill attached to the Report on Chapter 2, the <i>General Principles of Criminal Responsibility</i> . The <i>Criminal Code Act 1995 (Cth)</i> enacts the <i>Draft Bill</i> attached to the Chapter 2 Report with the exception of the provisions relating to the <i>O'Connor</i> defence. Chapters 2 and 3 of the <i>MCC</i> , including these changes, are appended to this Report. |
| Murray | M. Murray QC, <i>The Criminal Code: A General Review</i> , WA, 1983. |
| O'Regan | R O'Regan QC, J Herlihy and M Quinn, <i>Final Report of the Criminal Code Review Committee to the Attorney-General</i> . Queensland Criminal Code Review Committee, June 1992. |

| | |
|-----------------------|---|
| Smith | Smith, <i>The Law of Theft</i> (7th ed, 1993). |
| <i>Theft Report</i> | <i>Theft, Fraud, Bribery and Related Offences</i> Final Report of the Model Criminal Code Officers Committee, December 1995 |
| Williams and Weinberg | Williams and Weinberg, <i>Property Offences</i> (2nd ed, 1986). |

LEGISLATION

| | |
|-----|---|
| ACT | <i>Crimes Act 1900 (ACT)</i> |
| Cth | <i>Crimes Act 1914 (Cth)</i> |
| NSW | <i>Crimes Act 1900 (NSW)</i> |
| NT | <i>Criminal Code Act 1983 (NT)</i> |
| Qld | <i>Criminal Code 1899 (Qld)</i> |
| SA | <i>Criminal Law Consolidation Act 1935 (SA)</i> |
| Tas | <i>Criminal Code 1924 (Tas)</i> |
| Vic | <i>Crimes Act 1958 (Vic)</i> |
| WA | <i>Criminal Code 1913 (WA)</i> |

Table of Contents

| | | |
|---|---|----|
| 1 | INTRODUCTION | 1 |
| 2 | THE EXISTING LAW | 3 |
| | The fault elements | 3 |
| | Is there a need to prove deception? | 3 |
| | What is the test for dishonesty? | 5 |
| | Is conspiracy to defraud limited to economic loss? | 7 |
| 3 | WOULD ABOLITION OF CONSPIRACY TO DEFRAUD LEAVE GAPS IN THE LAW? | 14 |
| | Conclusion | 23 |
| 4 | OPTIONS | 24 |
| | Should the offence of conspiracy to defraud be included in the MCC? | 24 |
| | - <i>Arguments for abolition</i> | 24 |
| | - <i>Arguments for retention</i> | 25 |
| | Conclusion | 26 |
| | <i>Recommendation 1:</i> | |
| | <i>Conspiracy to defraud should be included in the MCC</i> | |
| 5 | WHAT FORM SHOULD CONSPIRACY TO DEFRAUD TAKE? | 33 |
| | What form should conspiracy to defraud take? - 17.4 | 33 |
| | Dishonesty - s14.2 | 33 |
| | Gain or loss | 33 |
| | - <i>Arguments for including gain</i> | 34 |
| | - <i>Arguments against including gain</i> | 35 |
| | Conclusion | 36 |
| | Should conspiracy to defraud be restricted to economic gains? | 36 |

Recommendation 2:

Conspiracy to defraud should not extend to non-economic gains or losses except in the case of influencing the exercise of a public duty.

| | |
|---------------------------------------|----|
| Recklessness | 37 |
| Recklessness: the degree of risk | 38 |
| Limitations on conspiracy - s11.5 | 39 |
| Jurisdiction | 39 |
| Penalty | 39 |
| APPENDIX 1 | 41 |
| A general dishonesty offence? | 42 |
| - <i>Arguments for</i> | 45 |
| - <i>Arguments against</i> | 47 |
| Conclusion | 50 |
| Recommendation | 50 |
| APPENDIX 2 | |
| Model Criminal Code Chapters 1-3 | 51 |
| APPENDIX 3 | |
| Contributors to Conspiracy to Defraud | 99 |

1 INTRODUCTION

The general rules relating to conspiracy - including the need for an agreement, the requirement that the act agreed to amount to a criminal offence, rules relating to the parties to the conspiracy etc - are discussed in the Committee's *Report on the General Principles of Criminal Responsibility*.³ These general rules about conspiracy all apply to agreements to commit any criminal offence, including the dishonesty offences contained in Chapter 3. Thus agreements to rob or to obtain property by deception are governed by the general rules relating to conspiracy.

However, the common law did not limit conspiracy to agreements to commit crimes. The common law recognised categories of conspiracy where the agreed conduct would not have amounted to a criminal offence if the conduct had been committed by an individual. The categories of criminal conspiracy included agreements to commit a tort, pervert the course of justice, corrupt public morals and commit a public mischief. In a series of cases in the 1970s, the English courts gave notice that they would restrict the ambit of conspiracy. This was followed by the *Criminal Law Act 1977* which restricted conspiracy to criminal offences. However, conspiracy to defraud was expressly retained. In the Australian jurisdictions, Victoria has followed this approach. South Australia and NSW continue to rely on the common law for conspiracy to defraud. The Northern Territory, Queensland and Tasmania have statutory provisions based closely on the common law. The Commonwealth and Western Australia both have a "one person" version of conspiracy to defraud.⁴

At common law, the offence of conspiracy to defraud applies to agreements to commit the whole range of offences involving dishonesty, including not only the offences which would be included within this chapter of the *MCC*, but also dishonesty offences in other legislation such as tax, corporations and customs laws. Indeed, in much of the recent case law, conspiracy to defraud is charged in conjunction with breaches of the tax laws or breaches of the directors' duties

3 Chapter 2, 97ff.

4 ACT: no conspiracy to defraud offence; NSW: a common law offence; NT: s284; Qld: s430; SA: a common law offence, penalty is set by s270; Tas: s297(1)(d); Vic: a common law offence, preserved by s321r(2); WA: s409. The Cth provision is s29D, defrauding the Commonwealth. The effect of s29D is to catch a "one man conspiracy to defraud" by removing the need to prove the agreement element of conspiracy to defraud. This provision was inserted by No 165/1984 along with s86A which re-enacted the previous conspiracy to defraud provision (s86(1)(e)) but increased the penalty from 3 to 5 years. Sections 86 and 86A were replaced by the *Criminal Code Act 1995*. Where a group of people agree to defraud the Commonwealth, they would be charged with a conspiracy to breach s29D of the *Crimes Act 1914* (Cth) pursuant to s11.5 of the *Criminal Code Act 1995*. The former s86(1)(e) *Crimes Act 1914* (Cth) was held to be the same as common law conspiracy to defraud: *Edwards* [1988] VR 481. There is a discussion of the evolution of s86 in Lanham et al, 337-341, of s29D at 86, 363-4, and of conspiracy to defraud generally 442ff. See the discussion rejecting a general dishonesty offence and the s29D approach in the *Theft Report* 153-171, reproduced in Appendix 1 of this Report.

provisions of the *Corporations Law*. However, conspiracy to defraud extends beyond agreements to commit criminal offences. Conspiracy to defraud includes dishonest conduct which would not be criminal if committed by an individual.

2 THE EXISTING LAW

The fault elements

As with any conspiracy, for conspiracy to defraud the first step is for the prosecution to prove that the defendant intended to enter an agreement with others to commit an offence. These aspects of conspiracy are dealt with in s11.5 of the *MCC*. But unlike other criminal conspiracies, conspiracy to defraud does not require proof of an intent to commit a criminal offence. The fault elements of conspiracy to defraud are an intent to enter an agreement to use dishonest means to inflict economic loss on another, to imperil the economic interests of another, or to influence the exercise of a public duty.

Is there a need to prove deception?

The use of the word “defraud” in the name of this offence led to questions about whether the prosecution had to prove a deception in addition to the fault elements listed above. This issue arose in the leading English case of *Scott v The Metropolitan Commissioner of Police*.⁵ The defendant paid employees of a cinema to lend him films, without the knowledge of the owners of the cinema, in order that he could make copies which he later distributed commercially. He was charged, among other things, with conspiracy to defraud the owners of the copyright in the films and conspiracy to breach the *Copyright Act*. The defendant was convicted of breaching the *Copyright Act* and conspiracy to defraud. He appealed against the conspiracy to defraud conviction only, because the penalty for conspiracy to defraud was substantially heavier.

The prosecution argued that there could be a conspiracy to defraud without any deception. The argument turned on the meaning of the term “defraud” and the cognate terms “fraud”, “fraudulently” and “intent to defraud”. The prosecution argued that the term “fraudulently” meant “dishonestly” in the context of common law larceny and fraudulent conversion and that no deception was required for those offences.⁶ Similarly, in forgery, the term “intent to defraud” has been held to mean “intent to cause economic loss”.⁷ The defence

5 [1975] AC 819.

6 At 827. Section 1(1) of the *Larceny Act 1916* (UK) codified the common law: “A person steals who, without the consent of the owner, fraudulently and without claim of right takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the other of it.”

7 There may need to be some qualification in the context of forgery since that offence requires a false document which the defendant knows to be false and intends to use to inflict the loss. Cf *Balcombe v De Simoni* (1972) 126 CLR 576 where some members of the High Court (eg Barwick CJ, 584-5; McTiernan J, 588) thought the term “with intent to defraud” as used in the WA Code meant an intent something akin to dishonesty as it came to be defined in the cases of *Feeley* [1973] QB 530 and *Ghosh* [1982] 1 QB 1053. (This test is codified in s14.2(1) of the *MCC*. See the discussion in the *Theft Report* 11-29.) Other members of the Court thought it meant to induce the victim to take a course he or she otherwise would not have taken. See footnote 15, below, and see Lanham et al at 85.

argued that the analogy with these offences was invalid. Conspiracy to defraud was a separate offence which had developed in the nineteenth century, after the evolution of larceny and cognate offences, and was allied to the offence of cheat - the offence of using false weights or other devices to the detriment of the public revenue or an individual - and was a branch of the law of fraudulent misrepresentation and false pretences. The defence cited the famous statement by Buckley J in *In re London and Globe Finance*.

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. *To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury.* More tersely it may be put, that to deceive is to by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action. [emphasis added]⁸

The defence went on to argue that the meaning of defraud depended on its context in a particular offence and that in conspiracy to defraud it necessarily involved deception. Any other meaning would make the offence unacceptably broad.

The House of Lords rejected these arguments. They found that defraud and the cognate terms (fraudulently and intent to defraud) meant dishonestly. They did not accept that Buckley J's definition was exclusive, and found that there were cases of conspiracy to defraud which did not involve deceit (eg where employees used their employer's equipment to make goods for sale and kept the proceeds). Viscount Dilhorne held that:

If, as I think, and as the Criminal Law Revision Committee appears to have thought, "fraudulently" means "dishonestly," then "to defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.⁹

Lord Diplock summarised the law in *Scott* and the contemporaneous House of Lords decision in *Withers* this way:

Where the intended victim of a "conspiracy to defraud" is a private individual the purpose of the conspiracy must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might be entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.¹⁰

8 [1903] Ch 728, 732.

9 [1975] AC 819, at 839.

10 *Ibid* at 841.

What is the test for dishonesty?

The House of Lords did not consider what the test of dishonesty would be for the purposes of conspiracy to defraud, although Viscount Dilhorne obviously thought that the test was the same as for theft. The Court of Appeal confirmed that view in *Landy*. However, the test of dishonesty - whether the test was subjective or objective - was itself the subject of conflicting decisions of the Court of Appeal at the time *Landy* was decided in 1981. That conflict was resolved the following year by *Ghosh* which decided that the test was whether the defendant's conduct was dishonest by ordinary standards, and the defendant realised the conduct was dishonest by those standards. Subsequent decisions of the English courts continue to require proof of dishonesty as an essential element of conspiracy to defraud. Two recent Privy Council decisions have reiterated the requirement. In *Wai Yu-Tsang* their Lordships summarised the offence of conspiracy to defraud as covering the cases where:

the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests may be put at risk. . . . Of course if the conspirators were not acting dishonestly, there will have been no conspiracy to defraud; and in any event, their benign purpose (if it be such) is a matter which, if they prove to be guilty, can be taken into account at the stage of sentence.¹¹

Dishonesty was also in issue in *Adams*, a case from New Zealand involving the Equiticorp group of companies. The defendant argued that he had not been found to have acted dishonestly in relation to the transactions which formed the basis of the charges and that as a result one of the elements of the offence - dishonesty - was missing. The Privy Council did not question the need to prove dishonesty in the least. However, it found that - among other things -

¹¹ *Landy* [1981] 1 WLR 355, 364-366. *Ghosh* [1982] 1 QB 1053 at 1064. The Court of Appeal in *Ghosh* approved the principle in *Landy* that the test for dishonesty is the same for theft and conspiracy to defraud. It rejected the decision in *McIvor* [1982] 1 QB 409 which suggested the contrary, see 1058-1060. Despite the clear requirement of dishonesty in the conspiracy to defraud cases, Archbold expresses the view (17-89 - 17-102) that there is some doubt about the necessity to direct the jury on dishonesty and that the word is superfluous. In other words, dishonesty adds nothing to the meaning of intent to defraud laid down in *Wellham*. With respect, this cannot be correct. There will usually be no need to discuss dishonesty in a forgery case like *Wellham* because there will be a false document. But to say that dishonesty is superfluous in the offence of conspiracy to defraud, and that an intent to inflict an economic loss on another or to imperil such an interest is sufficient fault element to constitute conspiracy to defraud is far too broad. It would mean that legitimate business competition where loss to a competitor is intended or contemplated amounts to conspiracy to defraud. Dishonesty is an essential element of conspiracy to defraud, especially in a case where there is no deceit. *Wai Yu-Tsang* [1992] 1 AC 269 at 280 and *Adams* [1995] AC 52 confirm this.

the defendant's conduct in concealing information from other directors which he was under a duty to disclose was dishonest.¹²

In holding that the prosecution did not have to prove deception for conspiracy to defraud, *Scott* broadened an already broad offence. Proof of dishonesty in conspiracy to defraud distinguishes otherwise legitimate behaviour from criminal behaviour. If intent to inflict economic loss or an intention to do something that put another's economic interests at risk were the *only* fault element for conspiracy to defraud, then an agreement between business partners to inflict an economic loss on a business competitor, or to take steps to make gains for themselves which they know could damage the economic interests of their competitors, would amount to a conspiracy to defraud. It is dishonesty in the *Feely/Ghosh* sense that distinguishes conspiracy to defraud from legitimate business competition where, in pursuit of a profit for themselves, the partners know that they will inflict a loss on competitors.¹³

Scott has been approved in Australia on the point that intent to defraud does not require deceit. Dishonesty of any type suffices.¹⁴

Generally the Australian courts have interpreted the cognate terms fraudulently, intent to defraud and the like as meaning dishonesty. The Australian courts have also held that the test of dishonesty for conspiracy to defraud is also the

12 [1995] AC 52 at 65. The trial was conducted before a judge without a jury, so questions about jury directions did not arise. The atmosphere of dishonesty was supplemented by a false minute saying that the independent directors had been present at the meeting which authorised the sale. The minute was prepared by the defendant in response to a request from the auditors. Hawkins and the defendant also took other steps to make it more difficult for people with a legitimate interest (such as the other directors, the auditors and shareholders) to find out about what was going on. *Adams* involved directors trading in shares owned by the company where they had a duty to disclose the conflict of interest. This contrasted with *Tarling* (1978) 70 Cr App R 77 where the court found that although there was a secret profit, there was no dishonest concealment.

13 Lanham et al, 85, 449.

14 Intent to defraud does not require deception: *O'Donovan v Vereker* (1987) 76 ALR 97 at 110; *Eade* (1984) 14 A Crim R 186 (distinguishing *Weaver v Ward* (1931) 45 CLR 321); *Clark and Bodlavich* (1991) 52 A Crim R 180.

Feely/Ghosh test.¹⁵ There is a suggestion in two cases (decided together) that the *Feely/Ghosh* test is not correct and that the test for dishonesty is purely subjective: if the defendant believes he or she is acting honestly then that is the end of the matter. As discussed above, that view was rejected in *Ghosh* and the weight of Australian authority is against it.¹⁶

Is conspiracy to defraud limited to economic loss?

The next issue is what other fault element beyond dishonesty is required for conspiracy to defraud. In *Scott*, Viscount Dilhorne had indicated his agreement with Lord Radcliffe's view in *Welham* that, like forgery, the offence of conspiracy to defraud probably extended to the special line of cases where the defendant gained but the person deceived was a public office holder and suffered no pecuniary or economic loss. Lord Diplock's summary of the law in *Scott* was as follows:

- (1) Where the intended victim of a "conspiracy to defraud" is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might be entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.
- (2) Where the intended victim of a "conspiracy to defraud" is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means for achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone.

15 On the interpretation of fraudulently and cognate terms as the *Feely/Ghosh* test, see the *Theft Report* footnote 23 and the accompanying text. The High Court came close to a similar test in *Balcombe v De Simoni* where it attempted to spell out the meaning of intent to defraud. See in particular, Barwick CJ, 583-4. For *Feely/Ghosh* as the test for dishonesty in conspiracy to defraud: NSW: *Horsington* [1983] 2 NSWLR 72 at 76; Qld: *Maher* (1986) 21 A Crim R 316 at 329-331; *Briott v Reidel & Castles* (1989) 44 A Crim R 29; *Curry v Saunders* (1987) 30 A Crim R 186; SA: *Eade* (1984) 14 A Crim R 186 at 190 and 194. But cf White J in *Kastratovic* [1985] 42 SASR 59 who prefers the *Salvo/Bonollo* approach to the concept of dishonesty: (*Salvo* [1980] VR 401; *Bonollo* [1981] VR 633); WA: *Cornelius* (1987) 34 A Crim R 49 at 74-5; *Clark* (1991) 52 A Crim R 180, at 193; *Walsh and Harvey* [1984] VR 474 (The Victorian Full Court accepted that *Feely/Ghosh* was correct in Victoria for conspiracy to defraud even though the *Salvo* test applied for theft.) Cth: *Einem v Edwards* (1984) 12 A Crim R 463 at 471 (Fed Ct). The decisions in *Einem v Edwards*, *Curry v Saunders* and *Maher* were decisions on the then s86 of the *Crimes Act (Cth)* - the statutory equivalent of conspiracy to defraud at common law. That provision has now been replaced by s29D which is in all respects the same except that it can be committed by one person.

16 See Pincus J in *Vereker*, (1987) 76 ALR 97 at 127; and *Curry v Saunders* (1987) 30 A Crim R 186 at 192.

This left two related issues for further consideration:

- (1) Whether the restriction to economic loss would be upheld; and
- (2) Whether the restriction in relation to public duties would be upheld.

These issues had arisen in *Withers*,¹⁷ decided at the same time and by the same Law Lords as *Scott*. Withers and his associates ran an enquiry agency which sold credit ratings. The defendants obtained credit information about people from banks and government departments by misrepresenting themselves as entitled to obtain the information. They were charged with two counts of conspiracy to effect a public mischief. Count 1 related to the information obtained from the private banks and count 2 related to the information obtained from public government departments. They were convicted. The House of Lords unanimously allowed the appeal because they held that the law did not recognise any such generalised offence as conspiracy to effect a public mischief. They criticised the amorphous nature of conspiracy to effect a public mischief and said that the courts had no power to legislate outside the existing categories of conspiracy. However, the Lords did consider whether the defendants might have been convicted of conspiracy to defraud. This raised both the questions posed by Lord Diplock's summary of the law: Would *information* constitute economic loss; and would conspiracy to defraud apply to information obtained from the *private* banks?

Viscount Dilhorne said in passing that on the basis of *Welham*, conspiracy to defraud might apply to counts 1 and 2 but expressed no firm view because those charges would have necessitated very different directions to the jury. He allowed the appeal on the basis that conspiracy to cause a public mischief was not an offence known to law. Lord Reid concurred with Viscount Dilhorne's reasons for allowing the appeal but expressed no view about the conspiracy to defraud points.¹⁸ The other Lords (Diplock, Simon and Kilbrandon) dealt with the conspiracy to defraud issues in more detail and *rejected* the view that *Welham* extended beyond the public duty cases. Lord Diplock expressed the view that count 2 might have been charged as conspiracy to defraud because a public official had been induced to act contrary to duty. This conclusion flowed from his summary in *Scott* of the law as it stood after both cases.¹⁹ Lord Simon was prepared, reluctantly, to acknowledge that cases like *Welham* had extended the law so that cases involving agreements to dishonestly procure acts contrary to public duty were within the ambit of conspiracy, but he saw these as best viewed as a separate category of conspiracy and not part of the law of conspiracy to defraud. He rejected the view that conspiracy to defraud applied to count 1

17 [1975] AC 842.

18 Viscount Dilhorne's views about the conspiracy to defraud point are at 860-1. Lord Reid's concurrence is at 854.

19 At 862.

but appeared to think it did apply to count 2.²⁰ Lord Kilbrandon agreed with the proposition from *Wellham* that it was conspiracy to deceive a person responsible for performing a public duty into doing something which he would not have done, but expressly found that it did not apply to the bank officers in count 1. Aside from that, he said that he would not extend conspiracy to defraud any further beyond its normal application to prejudice to proprietary rights. Specifically, he said that the regulation of confidential information was a matter for the legislature. This was consistent with other similar House of Lords decisions on the ambit of conspiracy denying the courts a quasi-legislative role.²¹

In summary, the answers to the two questions after *Scott* and *Withers* were that *Wellham* was an exception to the normal rules relating to conspiracy to defraud, that it would be restricted to cases involving the performance of a public duty, and that in these cases the normal rule restricting conspiracy to defraud to economic loss would be waived in favour of a rule requiring that a person performing the public duty had been induced to do something he or she would otherwise not have done. Conspiracy to defraud did not extend to the causing of non-economic detriment.

The last of the major cases touching this offence is *Wai Yu-Tsang*, a decision about the fault element for conspiracy to defraud. The defendant, chief accountant at a bank, in conjunction with the managing director of the bank and others, had concealed in the bank's accounts dishonoured cheques worth US \$124 million payable to the bank. The public accounts were misleading and the true position was only recorded in private ledgers. The defendant said that he had done this to prevent junior employees from finding out the true position and causing a run on the bank. He said that he believed that subsequent balancing transactions were genuine and that he was acting for the good of the bank. He was charged with conspiracy to defraud the bank, existing and potential shareholders, creditors and depositors. The defendant was convicted.

In the Privy Council, the defendant argued that the fault element for conspiracy to defraud was intent "to cause loss to the victims or expose them to risk of loss, and not merely to contemplate that loss or exposure may occur." In other words, recklessness as to loss was not enough. The defendant argued that his aim had been to save the bank and that this was to the benefit of the bank, and its existing and potential shareholders, creditors and depositors, even though he appreciated the incidental risk. The prosecution argued that the combination of dishonesty plus the imperilment of the economic rights of the victims was sufficient for conspiracy to defraud. The victims were entitled to know the true

²⁰ At 872-3

²¹ At 875 and 877-8. In *Withers*, Lord Kilbrandon clearly thought that *Wellham* required proof of deception. Lord Simon thought that it at least required dishonesty. In *Scott*, Viscount Dilhorne summarises *Wellham* as requiring deception (840); Lord Diplock's summary only requires dishonesty.

situation so that they could make up their own minds about their best interests.

The Privy Council dismissed the appeal. They upheld the prosecution argument that recklessness as to economic loss sufficed for conspiracy to defraud, even where the defendant's motives were benign:

The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise fraud upon somebody. For this purpose it is enough for example that, as in *R v Allsop* and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic harm or that his economic interests will be put at risk.²²

In the course of the decision, the Privy Council rejected Lord Diplock's restriction of conspiracy to defraud in *Scott* to cases where economic loss was intended or there was an intention to influence the exercise of a public duty. This response was primarily directed towards the defence contention that the prosecution had to prove an intent to cause loss and that mere intent to put the victim's economic interests at risk would not suffice for conspiracy to defraud. However, the Privy Council also went on to disagree with Lord Diplock's other restriction on conspiracy to defraud in relation to intent to influence the exercise of a public duty. *Wai Yu-Tsang* clearly involved economic loss to private individuals. Nevertheless, the Privy Council said that the public duty cases were not in a special category and favoured the view expressed by Lord Radcliffe and Lord Denning in *Wellham* that dishonestly inducing any person to do some act to their prejudice *in any way* was sufficient for a conspiracy to defraud. The Privy Council argued that this view was supported by all the Lords, other than Lord Diplock, in *Scott*.²³

With respect to the Privy Council, its view of the decision in *Scott* appears to be wrong. *Scott* clearly did involve economic loss and Viscount Dilhorne was not called on to decide any issue to do with either public duty or non-economic loss. He merely referred in passing to *Wellham* (which was a forgery case involving an intent to deceive a public authority) and "the special line" of public duty cases where economic loss did not have to be shown. He did agree that what was said in *Wellham* about the public duty cases in relation to forgery probably applied equally to conspiracy to defraud. By this he seems to have meant that conspiracy to defraud could be committed on a person who was discharging a public duty without the need to prove an intent to cause that person economic loss. He did not say that this extended *beyond* the public duty cases to the causing of any detriment to anyone.²⁴

²² [1992] 1 AC 269 at 279-80.

²³ At 275-7.

²⁴ At 839.

While *Scott* clearly did not involve non-economic loss, *Withers* did: information from private banks (count 1) and from public authorities (count 2). Thus the limits of the *Wellham* extension were clearly raised by the facts of *Withers*. As outlined above, in *Withers* two of the Lords (Simon and Kilbrandon) - who concurred generally with Viscount Dilhorne in *Scott* - explicitly held that the public duty cases were in a special category and disapproved any extension of conspiracy beyond the public duty cases. Lord Diplock took the same view as he had in *Scott*. Viscount Dilhorne did not discuss this issue in *Withers* although he did say that conspiracy to defraud might have been available on both counts (ie both with respect to the public and private duties). Lord Simon concurred generally. This means that three of the Lords who decided *Scott* and *Withers* firmly stated their view that the public duty cases were a special category. Viscount Dilhorne's view is unclear. The remaining judge, Lord Simon, did not express a specific view.

The Privy Council's claim in *Wai Yu-Tsang* that the House of Lords in *Scott* was adopting a very broad view of conspiracy to defraud misreads *Scott* and overlooks *Withers* entirely (*Withers* does not even appear to have been cited in argument). Such a wide reading of conspiracy to defraud runs against the tide of House of Lords decisions in the mid-1970s which were restricting the ambit of conspiracy and closing amorphous categories of conspiracy, like conspiracy to effect a public mischief, the offence charged in *Withers*. That judicial policy echoed even more strongly in Australia. Rejecting the category of conspiracy to corrupt public morals in the Australian context and criticising vague categories of conspiracy generally, Sir Laurence Street said:

Lord McDermott CJ voiced a warning in respect of another aspect of the law of criminal conspiracy which is apposite in relation to a conspiracy such as the Crown seeks to establish in this case. His Lordship said that to recognise as indictable crimes all acts or attempts which tended to the prejudice of the community would bring about the result that: "not only would one wide field of the criminal law lose all claim to certainty, but the guilt or innocence of persons charged within it could, to an unwholesome degree, depend upon the personal views or prejudices of the tribunal appointed for their trial."²⁵

25 *Cahill* (1978) 22 ALR 361, 364 (conspiracy to prevent the enforcement of an Act of Parliament). See too the judgment of Lord Roskill in *Hollinshead* [1985] 1 AC 975, 993: who "deplored the practice of expanding and extending the common law offence of conspiracy in order to make criminal conduct by two or more persons which in the case of individuals would not be criminal . . .". The other major cases in the 1960s and 1970s on the ambit of conspiracy were *Shaw* [1962] AC 220; *Knulier* [1973] AC 435 (conspiracy to corrupt public morals); *Kamara* [1974] AC 104 (conspiracy to commit a tort); and *Bhagwan* [1972] AC 60 (conspiracy to frustrate the purpose of a statute). See the discussion in Gillies, *The Law of Criminal Conspiracy* (1981) ch 9-11.

The trend of the English decisions led to a Law Commission report and then to the *Criminal Law Act 1977* which restricted conspiracy to agreements to commit offences (cf unlawful act), with the exception of conspiracy to defraud. This approach has been followed in Victoria and is the approach taken in s11.5 of the Commonwealth's *Criminal Code Act 1995*. But to close vague categories of conspiracy on the one hand, while opening conspiracy to defraud to any dishonest agreement to get anyone to do anything to their detriment on the other, contradicts the principle of certainty in the criminal law and the judicial and legislative policy against judicial legislation to plug gaps in the law.

The most recent decision of the English courts on conspiracy to defraud is the Privy Council decision in *Adams*, an appeal from New Zealand by the deputy-chairman of Equiticorp. The defendant, Hawkins and a small group of others, who formed the "investment group" within the company, had set up an elaborate loop of companies controlled by them to conceal the movement of money from Equiticorp to themselves. One of the transactions involved members of the "investment group" buying a large number of shares in a company owned by Equiticorp at \$2.00 and later selling them back to Equiticorp at \$2.50. Questions about the dealing in the shares were raised at an Equiticorp board meeting but none of the investment group disclosed that they had been trading in the shares.

As noted above, the Privy Council held that in view of their duties, the failure to disclose information which they owed a duty as directors to disclose constituted clear dishonesty. This was not merely a failure to answer candidly when asked about the transaction: they had a positive duty to lodge a declaration of their conflict of interest.²⁶

In relation to the interest to be protected, the Privy Council held that conspiracy to defraud based on economic loss requires more than a mere plan to deceive people generally. The prosecution must identify some person whose economic interest has been harmed or put at risk. To deceive someone who had no economic interest at stake would not be enough in this sort of case. The Privy Council held that Equiticorp was entitled to the secret profit made at the company's expense and that the dishonest concealment of the relevant information from the independent directors on the board was sufficient dishonesty to constitute conspiracy to defraud.²⁷

The view that an intent to imperil the victim's economic interests is sufficient for conspiracy to defraud has been accepted in Australia for some time; *Wai Yu-Tsang* has been expressly approved on this point in two recent cases: *Barker* (1994) and *Campbell* (1995).²⁸

26 *Adams* [1995] 1 WLR 52 at 64-5. The circumstances of dishonesty in this case are set out at footnote 12.

27 At 64. See too footnote 55 below.

28 (1994) 127 ALR 280, 305-7 and (1995) 78 A Crim R 1. Both were cases on s29D of the *Crimes Act 1914* (Cth) but s29D is the same as conspiracy to defraud in these respects.

Australian courts have also accepted that the public duty cases are included in conspiracy to defraud. Whether it extends beyond the public duty cases has not specifically arisen in the Australian cases.²⁹ For the reasons to be outlined in part 4 of this Report, MCCOC believes the position should be clarified and that conspiracy to defraud should be restricted to cases of economic loss or imperilment, and influencing the exercise of a public duty.

²⁹ *Connor and Whitlam v Sankey* [1976] 2NSWLR 570 at 597 treated the case as within the public duty head of conspiracy. See too *Howes* (1971) 2 SASR 293.

3 WOULD ABOLITION OF CONSPIRACY TO DEFRAUD LEAVE GAPS IN THE LAW?

The Committee's Report on the *General Principles of Criminal Responsibility* (1992), adopted the principle that conspiracy should only apply to conduct which would be an offence if committed by an individual. The Committee remains convinced that the principle is a good one. None of the submissions to the *Discussion Paper* doubted that principle. In view of this principle, it can be strongly argued that conspiracy to defraud should not be included in the Code. On the other hand that principle was expressed subject to the proviso that the abolition of conspiracy to defraud should not leave unacceptable gaps in the law. In a 1994 Report on conspiracy to defraud, the English Law Commission has identified gaps if conspiracy to defraud were abolished in England. This chapter examines whether any of these gaps would arise in Australia - keeping in mind the recommendations of the *Theft Report* - if conspiracy to defraud was not included in the *MCC*. The gaps identified by the Law Commission were as follows:

- (1) Property that cannot be stolen;
- (2) Confidential information;
- (3) The temporary deprivation of property;
- (4) Cases in which there is no "property belonging to another";
- (5) Secret profits made by employees and fiduciaries;
- (6) Obtaining loans by deception;
- (7) The obtaining without deception of benefits other than property;
- (8) Deception of computers and other machines;
- (9) Evasion of liability without intent to make a permanent default;
- (10) Obtaining by giving a false general impression;
- (11) Dishonest failure to pay for goods or services;
- (12) Gambling swindles;
- (13) Corruption not involving consideration;
- (14) "Prejudice" without economic loss;
- (15) Assisting in fraud by third parties;
- (16) Ignorance of the details of the fraud;
- (17) Commercial swindles.

The Law Commission deferred consideration of a number of these items pending a general review of dishonesty offences and recommended the retention of conspiracy to defraud pending that review. By comparison, MCCOC has

completed that review in its *Theft Report* (1995). Many of the gaps identified by the Law Commission are covered by the MCCOC *Theft Report*. Some of the other gaps should be dealt with in legislation specific to the subject (eg confidential information), while others are not properly the subject of criminalisation (eg temporary borrowings). However, some of the gaps which would be left if conspiracy to defraud were to be abolished may justify its retention. It is appropriate to indicate MCCOC's response to each of the matters raised by the Law Commission.

A number of the gaps identified by the Law Commission would not be open under the proposals in this chapter and would be offences if committed by an individual or as the subject of a conspiracy. The most pressing problem in England - and the only one producing a recommendation for immediate change - is obtaining certain sorts of loans by deception (Item 6) through financial transactions, such as direct crediting of the recipient's account. In these cases what is obtained does not take the form of property. In the example, what is obtained is credit or the creation of a right to draw on an account which is credited with the loan amount (ie a new *chose in action* which is property but did not previously belong to another³⁰). This gap is produced because the English *Theft Act* has adopted the approach - rejected in the *Theft Report* - of narrowly specifying the things obtained by deception - pecuniary advantage (narrowly defined), services, remission of a liability, etc.³¹ These problems are overcome in s17.3 of the *MCC* by the term "financial advantage" which has the necessary breadth to catch these sorts of cases.³² It is also wide enough to capture obtaining services for which payment is due. It may also cover some cases of temporary obtaining of property, where that amounts to a financial advantage (Item 3) (eg using a deception to borrow an employer's tools which enables the employee to earn additional income). However, in general, MCCOC does not recommend criminalising temporary borrowings.³³

Item 7 on the Law Commission's list of gaps concerns "benefits" other than property. In the *Theft Report*, MCCOC recommended that, with the exception of bribery, the offences in Chapter 3 of the *MCC* should be confined to money, property or financial advantage. This is consistent with the focus of this chapter on property offences. But, more importantly, the concept of "benefit" is far too broad and unspecific. It includes some benefits which might properly be the subject of other prohibitions (eg fraudulently obtaining sexual favours) and others which no-one would think of making a criminal offence (eg lying to the school principal to avoid Saturday detention). Submissions on this issue in response to the *Discussion Paper* for the *Theft Report* supported the restriction

30 See the recent House of Lords decision, *Reg v Preddy* [1996] 3 WLR 255.

31 Law Com 228, 37-40; see too s16, 20(2) *Theft Act* 1968 (UK) and s1-2 *Theft Act* 1978 (UK).

32 See *Mathews v Fountain* [1982] VR 1045.

33 Services are covered separately in England by s1 *Theft Act* 1978 (UK). On temporary borrowings, see the discussion of intention to permanently deprive in the *Theft Report* 70-75.

to money, property and financial advantage. With 7 exceptions, submissions to this *Discussion Paper* also supported that approach.³⁴

However, the Law Commission also deals with a more general problem under this heading, namely how to deal with credit card frauds where the deception does not *cause* the obtaining, be that of property or a financial advantage. For example, the defendant may use his or her credit card to pay for services when the card has been revoked. The implied representation that the defendant is entitled to use the credit card is false but that has no causal effect in the usual transaction because the salesperson knows that the credit card company will pay and does not turn his or her mind to the question of its validity. The House of Lords has dealt with this argument by saying that there is a causal relationship because the salesperson would not have accepted the card if he or she had known the true position.³⁵ However, the Law Commission says that in court, sales staff will often say they would have accepted the card, even if they had known the true position. This is surprising, if true, but it does not seem proper to base legislation on the fact that the salesperson is prepared to be dishonest and to engage in what may amount to a conspiracy between the customer and the merchant to defraud the credit card company. On a practical level, it would appear that the courts in Australia have adopted the House of Lords position on this issue and it was not raised as a problem in consultation on the *Theft Report* despite the fact that credit card fraud convictions are a daily phenomenon in the courts. Submissions to the *Discussion Paper* did not raise this as an issue.³⁶

Similar arguments regarding the restriction of these offences to money and property apply to the Law Commission's discussion of causing *prejudice* which does not amount to economic loss (Item 14). In effect this is the flip side of the discussion of "benefit". The common law meaning of intent to defraud was restricted to intent to cause loss; intent to "gain" was not covered. The MCCOC recommendations overcome that difficulty by defining the new offences in terms of *gain* and loss. However, those terms are restricted to gain or loss in money or property [s14.3(1)], supplemented by the inclusion of fraud on persons performing public duty for blackmail (s18.1) and forgery (s19.3). Beyond this, MCCOC believes that, like "benefit", the concept of "prejudice" is too nebulous and casts the net of criminalisation far too broadly. Whether particular forms of benefit or prejudice merit the protection of the criminal law requires separate and individual consideration.

A similar argument applies to "theft" of confidential information (Item 2), be that information on paper or on computer. Information protection is a very specialised area and requires specific regulation. It should be noted that

34 See *Theft Report* 166-7, 207, 239-241.

35 *Charles* [1977] AC 177 and *Lambie* [1982] AC 449.

36 *Clarkson* [1987] VR 980 and see the discussion in the *Theft Report* 139-141.

conspiracy to defraud would cover situations where a person performing a public duty is caused to provide information that would not otherwise have been provided.³⁷

Deception of computers and other machines (Item 8) is covered by s17.1(b) of the *MCC*. For the purposes of fraud, computers and the like are treated as instruments used to transmit the deception to the victim.³⁸

MCCOC has given consideration to including certain property currently treated as not capable of being stolen within the offence of theft (Item 1). The Discussion Paper for the *Theft Report* called for submissions on whether land should be included. For the reasons outlined in the *Theft Report*, this has not been done. Electricity has been included. Wild game and things growing in the wild have not been included in theft. The Law Commission concluded that they should not be part of the law of theft and referred to recommendations that conspiracy to defraud should not cover them either. MCCOC agrees with these views. However, the Law Commission's Report concludes that pending its review of dishonesty offences, conspiracy to defraud should continue to cover "a concerted dishonest appropriation of such property".³⁹ MCCOC does not believe these things should be capable of forming the subject matter of conspiracy to defraud. They may need to be subject to conservation legislation or similar protection but they should not be the subject of conspiracy to defraud. Although a defendant may gain for the purposes of s17.4, where the game is wild, it is hard to see how taking it could be dishonest. Where the wild game was protected by, say a conservation statute, the appropriate charge would be of conspiracy to breach the relevant conservation statute.

The Law Commission has expressed concern about cases where theft cannot be charged because the property does not "belong to another" (Item 4). Situations arise where the defendant is in possession of money but there is doubt about how the defendant is entitled to deal with the money. For example, the victim places money with the defendant for investment or gives money to a travel agent as the purchase price of air tickets but something goes wrong (eg the business fails) before the money is spent on the victim's behalf. The defendant's liability for theft depends on whether there was a *legal* obligation to deal with the money in a certain way or whether the defendant was entitled to pay the money into the general funds of the business, so long as an equivalent amount is spent on the victim's behalf. In the latter case, the money will no longer fall within the category of property belonging to another. It will only be theft if the defendant is under a legal obligation to deal with the money in a particular way and the defendant deals with the money contrary to the legal obligation. These

37 See *Withers* at 138-9 and the discussion of that case above.

38 See the discussion of this issue in the *Theft Report* 137-8.

39 30-1. Compare this with the definition of property in s14.4 and 15.4 of the *MCC* and the discussion in the *Theft Report* 47-49

are difficult issues but there does not appear to be a simple solution, other than the current situation which requires a *legal* obligation on the defendant before he or she can be guilty of theft. As Smith says, it is harsh to convict the defendant of theft in such cases if the civil law did not impose an obligation to deal with the money in a particular way.⁴⁰ In cases where there was no obligation to deal with the money in a particular way, the only obligation is as a debt and the victim has to take his or her place with the other creditors. Non-payment of debt should not be treated as theft. Even if there was dishonesty, under the current law it would not be theft. However, such is the breadth of conspiracy to defraud under current law - and the same would be true under s17.4 - if the debt is avoided dishonestly and that is done pursuant to an agreement between two or more people, it would amount to a conspiracy to defraud. This breadth is one of the strongest criticisms of conspiracy to defraud.

Under the English Act, using a deception to dishonestly evade a debt - so long as it is not intended to be a permanent default - does not constitute an offence (Item 10).⁴¹ Under s17.3 of the *MCC*, this gap does not arise because such a person would be guilty of obtaining a financial advantage by deception.⁴² Similarly, under the English provision, to make off without payment is only an offence if the intent is *never* to pay.⁴³ Since s16.6 follows the English provision, the same interpretation is likely to follow. Conspiracy to defraud (s17.4) would apply where two or more people agreed to make off without payment to gain a temporary avoidance of liability. This appears to be another example of the excessive breadth of conspiracy to defraud.

Gambling swindles (Item 12) may be perpetrated without anything clearly identifiable as a deception being practised. The facts of *Eade* illustrate this situation. The defendant agreed with another person to "fix" a greyhound race by installing a device which would discharge ammonia into the starting boxes of all the dogs except the favourite. The defendant was convicted of conspiracy to cheat and defraud persons having a financial interest in the outcome of the race. There was no doubt that this was dishonest. However, the defendant argued that he had not committed conspiracy to defraud because there was no deception. This argument was rejected on the basis that *Scott* held that it is not necessary to prove that there was a deception to establish conspiracy to defraud. (Arguably there was a deception, namely that all the dogs would run on their merits. The defendant falsified that expectation. The Law Commission was

40 See the discussion of s15.5(1),(2) and (3) in the *Theft Report* 51-55, and Smith, 37. There are parallels here to *Roffel* [1985] VR 511 where the only 2 director/shareholders spent the company's assets leaving the creditors unpaid. If this is dishonest' the criteria for conspiracy to defraud appear to be satisfied. This is another context in which the breadth of conspiracy to defraud appears to cross over into the debtor/creditor relationship.

41 Section 2 *Theft Act 1978* (UK).

42 Williams and Weinberg 176-179.

43 *Allen* [1987] AC 1029.

not confident that this argument would succeed.)⁴⁴

If the defendant had engaged in this conduct by himself, he would not be guilty of theft or, assuming no deception, of obtaining by deception. When the bookmakers handed over the winnings, it would not be theft because there would be no appropriation: the owners of the property consented to handing it over. If in the end, the defendant's conduct cannot be classified as a deception, there would be no obtaining by deception (s17.2). Most people would regard this conduct as worthy of criminal penalty. It would be possible to achieve this by a general offence of dishonesty. However, for the reasons outlined below, the Committee believes that a general offence of dishonesty is not consistent with the need for specificity in the definition of criminal offences and that the best solution to this problem lies with specific gambling offences - use unlawful devices in relation to gambling - such as exist in most jurisdictions. Where a gambling swindle such as this is perpetrated pursuant to an agreement between two or more, conspiracy to commit one of the specific gambling offences is the most appropriate charge although section 17.4 would also clearly cover such cases.⁴⁵

The Law Commission was also concerned about cases of employees behaving dishonestly in relation to their employers. There are two situations. The first is where an employee makes a secret profit out of his or her employment, for

44 *Eade* (1984) 14 A Crim R 186. Note: *Zelling J* distinguished conspiracy to cheat on the basis that there needed to be a cheat on the public in general (eg false weights or tokens) whereas it would be sufficient for conspiracy to defraud if one person is defrauded, 194. For a very similar fact situation, see *Walsh and Harney* [1984] VR 474 (FC).

45 A number of jurisdictions have a general cheating offence in their lotteries and gaming legislation. The NSW offence is a good example:

15. Whosoever by any fraud, unlawful device or ill practice:
 - (a) in playing at or with cards, dice, tables, or other games; or
 - (b) in bearing a part in the stakes, wagers, adventures, or in betting on the sides or hands of them that do play; or
 - (c) in wagering on the event of any game, sport, pastime, or exercise, wins from any person to himself or others any sum of money or valuable thing shall be deemed guilty of obtaining such money or valuable thing from such person by a false pretence with intent to cheat and defraud such person of the same, and being convicted thereof shall be punished accordingly.

Others have an additional offence in their casino legislation, while others rely on the general law. Victorian gaming police advised that their practice is to use theft charges for machine offences rather than the specific gaming offence. The provisions in the various jurisdictions are as follows: ACT: *Unlawful Games Act 1984* s7, *Casino Control Act 1988* s77; NSW: *Gaming and Betting Act 1912* s15, *Casino Control Act 1992* s87; NT: *Summary Offences Act* s68; Qld: *Casino Control Act 1982* s103; SA: *Lottery and Gaming Act 1936* s49; Vic: *Lotteries, Gaming and Betting Act 1966* s14; WA: *Gaming Commission Act 1987* s44, 45.

example, by using the employer's premises or equipment to sell or make up some of the employee's own product (Item 5). One case involved a salaried hotel manager selling some of his own home-brewed beer from the hotel and keeping the proceeds. Although this was a breach of his contract, it was not theft because the money received from the customer does not *belong* to the employer and the manager is not "under an obligation to retain and deal with the money in a particular way" (see s15.5(2)). This would not amount to obtaining by deception because there was no deception. However, if the manager had agreed with someone else to sell his own beer, conspiracy to defraud might be relied on - assuming such conduct would be found dishonest. They certainly intended to obtain a gain or to cause the victim a loss.⁴⁶

Similar cases have involved employees receiving "bribes" to do something contrary to the employee's duty to their employer (eg a turnstile operator taking money to let spectators into a football match without paying). These cases differ from the cases discussed in the previous paragraph because they involve receipt of the money on the basis that the recipient will breach his or her duty to the principal. In Australia, the "bribery" cases would amount to the offence of receiving a secret commission and under the *MCC* - which extends the offence of bribery to the private sector - there would be an offence against s20.2 or s20.3.⁴⁷

The other similar situation nominated by the Law Commission involves employees "turning a blind eye" while something contrary to their employer's interests is done but the employee does not receive a benefit or it cannot be proved that the employee received a benefit (Item 13 - Corruption not involving consideration). The case where it cannot be proved that the employee received a benefit ought to be put to one side; if there is a shortfall of proof, that ought not be cured by the creation of new offences.

46 *Attorney-General's Reference (No 1 of 1985)* [1986] QB 491; discussed in Smith, 2-69 - 2-71. Cf *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 which held that money paid by way of a bribe was held on a constructive trust for the victim. See the discussion in *Law Com 228*, at 35-7. Contrast this with the approach in *Attorney-General's Reference (No 1 of 1985)* which rejected reliance on constructive trusts as a basis for a theft conviction. This rejection is followed in s14.5 of the *MCC*: see the discussion in the *Theft Report* 53-55. The situation of a group of employees came up in *Cooke* [1986] AC 909, where the House of Lords found there was a conspiracy to defraud. But in *Tarling v Singapore Republic Government* (1979) Crim App Rep 77, directors received secret profits for which they did not account to their shareholders. The House of Lords found that there was no conspiracy to defraud because, according to Lord Wilberforce, "the making of a secret profit is no criminal offence, whatever other epithet may be appropriate." See Smith, 2-71.

47 The English equivalent appears to be the *Public Bodies Corrupt Practices Act 1889* and the *Prevention of Corruption Act 1906*.

In a case where an employee does not receive a benefit, he or she may still be complicit in any offence committed by the third party.⁴⁸ For example, if the third party is defrauding the employer (eg not supplying the full amount of goods ordered and paid for by the employer), and the employee responsible for policing these contracts knows of the fraud and does anything to aid and abet it (eg telling the fraudster that he or she will turn a blind eye), the employee would be complicit in the fraud on normal principles of complicity (s11.2). If, however, the employee has simply decided to do something which breaches the employment contract and is detrimental to his or her employer's interests, that by itself does not warrant the imposition of criminal liability. Thus the turnstile keeper who simply lets a spectator into the stadium without paying may have breached contract and may warrant dismissal. But such is the breadth of conspiracy to defraud that if an agreement can be spelled out of the turnstile situation, it seems to satisfy all the other elements of conspiracy to defraud. To allow this to occur runs dangerously close to making breach of contract a criminal offence. If the wider view of conspiracy to defraud applies - and conspiracy to defraud is not confined to economic gains and losses - it would mean that employees who agree to do *anything* detrimental to their employer will have committed conspiracy to defraud, provided their conduct can be said to be dishonest. It may be that the mere fact of doing something contrary to the interests of an employer or other fiduciary has the colour of dishonesty about it. In these sorts of cases the only bound on the generality of conspiracy to defraud is dishonesty.

The Law Commission also drew attention to cases where a false general impression is given (Item 10). The sort of case the Law Commission has in mind is where a person purports to be carrying on a business but the real intention is to defraud suppliers; the defendant has no intention of ever paying for the goods supplied. Again, the problem here seems to be more to do with proof than any substantive defect in the law. The problem is to point to facts from which the jury can be satisfied that there has been a deception. Clearly, a person who accepts supply of goods from commercial suppliers in the normal course of business represents that he or she is going to pay for them. The difficulty may be in *proving* that there was no intent to pay at the time the goods were obtained. But, as the Law Commission concludes, that is a practical problem. However, some caution needs to be exercised before the notion of deception is diluted to the creation of false general impression lest the struggling firm which furnishes its offices luxuriously to convey the impression of success and thus attract customers falls foul of the criminal law.⁴⁹

48 The Law Commission also mentions a case where an employee turns a blind eye while a third party obtains confidential information. For the reasons given above, MCCOC believes that the issue of confidential information requires separate consideration. If it becomes an offence to dishonestly obtain secret information, then the employee may be complicit in the offence on normal complicity principles.

49 *Law Com 228* at 48.

The facts of *Hollinshead* raise another issue: what should be done about a defendant who manufactures a product whose only purpose is a dishonest one (Item 15)? In *Hollinshead* the conspirators were involved in manufacturing devices to defraud the electricity supplier, but the same issue would arise if it had been safe-cracking equipment or devices to cheat gambling machines. The defendants in *Hollinshead* planned to sell to a distributor who would in turn sell to people who would use the devices to commit the offence of dishonestly obtaining the electricity (ie the offence was to have been committed by people who were not part of the conspiracy). In fact the defendants sold the devices to an undercover police officer.

No individual could have been charged with any offence in *Hollinshead*. The conduct had not proceeded far enough to constitute an attempt. Because the distributor committed no offence in buying the device and it never reached an intended customer, there could be no complicity in the offence of obtaining electricity by deception. The Court of Appeal held that the defendants could not be guilty of *conspiracy* to aid and abet the obtaining by deception because the offence was not going to be committed by one of the parties to the conspiracy. Whether there can be a conspiracy to aid and abet was left as an open question by the House of Lords. The manufacturer of the device could be held to have aided and abetted the actual fraudster or the “retailer” who sold to the actual fraudster, had the offence in fact been committed.⁵⁰ As the Court of Appeal pointed out, the defendants could have been indicted for a conspiracy to incite the commission of the offence (see s11.4 *MCC*).

These issues became irrelevant in *Hollinshead* itself because the House of Lords found that there was a conspiracy to defraud. Abolition of conspiracy to defraud would mean that this route to conviction would not be open. But the gap, if any, would be small and, in any event, conspiracy to defraud does not cover the case of an individual who manufactures such devices. The availability of conspiracy to incite, incitement, attempt and complicity provides resources to deal with these sorts of cases in general. It may be that there is a need for a summary offence of facilitation of crime - such as suggested by the Law Commission - to cover cases where a person intentionally provides assistance to someone intending that a crime will be committed, even though that crime is not actually committed. Alternatively, some devices - such as radar devices to detect speed checks on the roads - can be the subject of specific summary offences, as they are now in some jurisdictions. The need for such summary offences can be determined by individual jurisdictions. However, retention of conspiracy to defraud to cover this sort of problem is very difficult to justify.

50 *Hollinshead* [1985] 3 WLR 159. It is not clear why this analysis does not also apply to the English provision. Note that under s14.4(1)(c) of the *MCC* electricity is included within the definition of property and under s17.1(b) deception includes deception of computers or machines.

Ignorance of the details of the fraud (Item 16) goes to questions of evidence about whether the defendant was a party to an offence or party to a conspiracy to commit an offence. The essential question in either case is a question of degree and MCCOC believes the legal principles laid down in *Bainbridge*⁵¹ - namely that the prosecution must prove that the defendant knew the type of (not the specific) offence to be committed - take the issue as far as it can be taken.

In relation to commercial swindles (Item 17), the Law Commission concluded that the cases it had previously thought would not be covered if conspiracy to defraud were abolished could in fact be covered by conspiracy to commit other offences.

Conclusion

The question raised at the start of this chapter was whether abolition of conspiracy to defraud would open unacceptable gaps in the law. MCCOC's conclusion at this stage is that none of the items identified by the Law Commission would leave unacceptable gaps under the *MCC*. This is because some of the gaps have already been closed (or closed to the extent necessary) by the provisions contained in Chapter 3 of the *MCC* (Items 1, 5, 6, 8, 11), some should be the subject of specific legislation (Items 2, 7, 12 and possibly 15) and the balance (items 3, 4, 9, 10, 13, 14, 16 and 17) do not justify the intervention of the criminal law.

51 [1960] 1 QB 129 and the other cases from Archbold. See too s11.2(3)(a) *Criminal Code Act 1995* (Cth).

4 OPTIONS

The preceding review of the existing law of conspiracy to defraud and the gaps which would remain if the offence were abolished lead us back to the questions posed in the Preface to this Report:

- (1) Should the offence of conspiracy to defraud be included in the *MCC*?

If so,

- (2) What form should the offence take?
- (3) What implications does this have for a general dishonesty offence?

Should the offence of conspiracy to defraud be included in the MCC?

-Arguments for abolition

The criticisms of the offence of conspiracy generally - as outlined in the Chapter 2 Report on the *General Principles of Criminal Responsibility* - apply with greater force to conspiracy to defraud because it can apply to conduct which would not amount to any offence if committed by an individual. In essence those criticisms are founded on two principles. First, the rule of law requires that criminal laws in particular should be specific and knowable in advance (*nulla poena sine lege*). In effect, the breadth of the law of conspiracy allowed courts to legislate to render conduct criminal after the event. Second, if an individual can engage in a given form of conduct without committing a criminal offence, then that conduct should not become criminal merely because a group of people agreed to engage in it. The vagueness and breadth of conspiracy to defraud breaches both principles. Similar arguments have led to a recommendation from the Hong Kong Law Reform Commission to abolish conspiracy to defraud. It has recommended a basic fraud offence requiring proof of deception and rejected the *Scott* approach.⁵²

The Committee argued that if the recommended restriction left any unacceptable gaps in particular areas of the law, these should be addressed by the creation of substantive offences in these areas. In reviewing the law of dishonesty and in reviewing the gaps which might arise if conspiracy to defraud were abolished, the analysis shows that the areas of justifiable concern have already been addressed by the Chapter 3 provisions. That analysis repeatedly came to the borders of the criminal law property offences. On many of these issues, in its *Theft Report* the Committee made decisions about the proper boundaries of these offences and rejected the idea of a general dishonesty offence. The inclusion of conspiracy to defraud in the *MCC* would undermine these decisions.

⁵² Hong Kong Law Reform Commission, *Report on Creation of a Substantive Offence of Fraud*, July 1996, 75-6.

Dishonesty by itself does not supply a sufficiently certain criterion for distinguishing criminal from non-criminal conduct. Because conspiracy to defraud relies so heavily on dishonesty, it fails the test of certainty which is said to be one of the hallmarks of the criminal law. As the Committee has said in relation to proposals to introduce a general dishonesty offence, while it has great faith in the concept of dishonesty *in conjunction with other more objective criteria* as the basis for the offences contained in Chapter 3, conspiracy to defraud has become so vague as to rely almost exclusively on dishonesty in too many situations. Taken to its logical extreme, it would apply to any form of dishonest conduct where one person did anything which might cause a detriment to anyone else. It makes the criminal law applicable to a number of relationships previously thought to be in the realm of civil remedies. Some of the gaps identified to the Law Commission by prosecutors amount to a call to use the criminal law to resolve conflicts between debtor and creditor, and employer and employee. The lack of specificity of the offence leaves it open to abuse and to courts legislating after the fact to plug gaps in the law. These are the very criticisms that have been directed at conspiracy generally.

Arguments that it is necessary to retain conspiracy to defraud to cover the sorts of tax and corporate fraud cases where it has been employed in the 1980s and 1990s supplies a powerful argument for attending to the relevant legislation in those areas to ensure that it is effective and that it carries appropriate penalties. To rely on conspiracy to defraud as a legislative gap filler blatantly breaches the principle of certainty and non-retrospectivity in a way that should cause grave concern to those who plan their financial and business affairs on the basis of the existing law and those who provide advice to them. The excessive reliance on dishonesty at the margins of conspiracy to defraud makes for uncertainty. To the extent that it is argued that conspiracy to defraud is needed to reflect the true criminality of the conduct, the answer is that the legislature has the task of setting the maximum penalty for offences like breaches of directors' duties and that its decision should not be subverted by resort to conspiracy to defraud. In effect this is what happened in *Scott* where the maximum penalty for the offence committed - breach of copyright - was perceived to be too low.

Retention of conspiracy to defraud cannot be justified by the procedural advantages of conspiracy counts in difficult fraud cases. Anyway, these advantages are available in appropriate cases for conspiracy to commit the relevant substantive offences of obtaining by deception and the like.

-Arguments for retention

Conspiracy to defraud has been an established part of the criminal law for over 200 years. The courts have been able to give the offence sufficient definition to avoid the charges of uncertainty and legislation after the fact by courts. All prohibitions have to be expressed at a certain level of generality and although conspiracy to defraud presses the limits of this generality, it remains within

those limits. It supplies a legitimate and necessary means of catching novel forms of dishonesty which have escaped the specific attention of the legislature. Although there is no longer a need to use conspiracy to defraud against “bottom of the harbour” tax schemes since the advent of specific legislation in that area,⁵³ there needs to be a foil against the ingenuity of fraudsters.

Conspiracy to defraud supplies an important weapon in the prosecution armoury against major crimes of dishonesty. Conspiracy to defraud prosecutions were used extensively in the 1980s to prosecute “bottom of the harbour” frauds and in the 1980s and 1990s to prosecute company frauds where company directors were charged with conspiracy to defraud as well as, or instead of breach of director’s duties offences under *Corporations Law*.⁵⁴ The recent appellate decisions in cases overseas like *Wai Yu-Tsang* and *Adams* (the Equiticorp case) - to say nothing of a number of high profile conspiracy to defraud prosecutions against company directors on foot at the moment - show what a radical step it would be to abolish conspiracy to defraud. In some of these cases, it will be difficult or impossible to prove that the director has practised a deception (although the conduct may amount to theft), although there may be deceptions after the obtaining to conceal the fact that there has been an obtaining of corporate funds. Assuming that there may be cases where it is not possible to prove an offence against Chapter 3, it would still be possible to prove a breach of directors’ duties (eg to act in the best interests of the company) which does not require proof of dishonesty. However, reliance on these provisions is difficult at present in view of the fact that the directors’ duties provisions of the *Corporations Law* (the combination of s1317FA and s232) are so extremely complex and arguably unworkable. Also the stigma of a conviction for these offences and the available penalties may not adequately reflect the true criminality.

Conclusion

All the submissions made to the Committee - except the submissions from the Legal Aid Office of Queensland and Justice Higgins - supported the retention of an offence of conspiracy to defraud. In general, contributors were concerned that the ingenuity of fraudsters would always lead to behaviour that was truly criminal falling between gaps in the general law of fraud. Legal Aid of Western Australia commented on the difficulty of bringing to justice corporate fraudsters with strong overseas networks. The Australian Federal Police reflected the views of law enforcement bodies in general when it stated that in the environment of law enforcement, the ability for wide application of the law, with appropriate

⁵³ *Crimes (Taxation Offences) Act 1980*.

⁵⁴ *Adams* is such a case. Other prosecutions for director’s duties breaches could easily have supported conspiracy to defraud charges and a number of the concepts used in the directors duties provisions overlap with conspiracy to defraud, both under the old s229 of the *Companies Codes* and under the combination of s232 and s1317FA of the *Corporations Law*. For example, *Yuill* (1194) 77 A Crim R 314 (Spedley Securities case) could have proceeded as a conspiracy to defraud case but in fact proceeded on the basis of a breach of a director’s duty to act honestly.

safeguards, is essential. In virtually all the submissions, the basis for including conspiracy to defraud in the *MCC* was the general ingenuity rationale. In the *Discussion Paper*, the Committee concluded that the gaps identified by the English Law Commission have been closed to the extent necessary by Chapter 3 of the *MCC* or by other means. The large majority of submissions agreed with this assessment.⁵⁵

On balance, MCCOC concludes that the arguments for retaining conspiracy to defraud are the more persuasive. Although this decision leaves open the criticism that the same conduct concerned would not be criminal if committed by an individual, the Committee concludes that the long history of the offence and its recent use in significant cases shows its importance. At the end of the day, it may not be that conspiracy to defraud is justified on the basis of gaps in the existing law (all of which could be addressed through specific legislation) but on the basis that human ingenuity is such that there is a need to have an offence which can be used in relation to newly-devised gaps. Addressing them with specific legislation after the event may be too late. It may be too that there is some room to argue here - although the Committee has serious reservations about this argument in general⁵⁶ - that the additional dangers generally posed by agreement among a number of people, combined with the serious nature of the dishonesty in the sorts of cases mentioned, warrants the retention of conspiracy to defraud.

The Law Commission also reached the conclusion that conspiracy to defraud should be retained, at least pending its review of dishonesty offences generally, although it proposes continued reliance on the common law. To rely on the common law would not be consistent with the nature of the *MCC* project, nor would it deal with the uncertain and extremely wide ambit of the offence suggested in some of the cases. MCCOC proposes to codify the offence, to limit its scope to economic gains and losses, and agreements to influence the exercise of a public duty.

This decision has obvious implications for a general dishonesty offence - the so-called "conspiracy of one". If conspiracy to defraud, which is a general dishonesty offence involving an agreement between two or more, is retained, should the offence be extended to conduct by an individual acting alone? MCCOC has rejected a general dishonesty offence for the reasons outlined at length in the *Theft Report*. For ease of reference, those reasons have been reprinted in Appendix 1 of this Report. The arguments for retention of conspiracy to defraud are finely balanced. Ultimately the balance is tipped by the argument that conspiracy to defraud has a long history and the additional dangers posed

55 7 submissions wanted to extend the offence to non-economic benefits. See below. The Australian Institute of Criminology wanted the offence to include confidential information. For the reasons given above, MCCOC does not agree with this suggestion.

56 See Dennis, "The Rationale for Criminal Conspiracy" (1977) LQR 39.

by dishonest agreements. Neither argument supports a general dishonesty offence and the Committee remains opposed to such an offence.

Two submissions - one from the Commonwealth DPP and one from the WA DPP - argued that the decision to retain conspiracy to defraud was inconsistent with the decision not to have a general dishonesty offence. Both argued that this inconsistency should be resolved in favour of having a general dishonesty offence.

The Commonwealth DPP argued that dishonesty was a sufficient measure of criminality for the purposes of conspiracy to defraud despite having argued strongly against the *Feely/Ghosh* test of dishonesty on the basis of its vagueness for the other offences in chapter 3. While the Committee has confidence in the *Feely/Ghosh* test in the context offences like theft which have a number of other criteria operating in conjunction with dishonesty, an offence which depends solely on dishonesty fails any reasonable test of specificity.

The WA DPP advocated s409 of the WA Code as the model for a general dishonesty offence. The Committee has little to add to the criticisms of s409 - contained in Appendix 1 - as vague, sweeping and arbitrary. Indeed, at a consultation seminar in Perth on chapter 3, the Committee understood that the WA DPP had accepted that the fault elements for 409 were unclear and that its breadth was such that a school student who lied to a teacher in order to avoid detention would commit the offence. Representatives of the WA Police at the seminar spoke against such sprawling offences on the basis that they gave insufficient criteria as to where police resources should be directed. The submission from the South Australia Police also considered a general dishonesty offence to be too broad.

The Committee regards consistency as a very important value. However, if consistency had been the overriding consideration in this decision, MCCOC would have recommended against inclusion of conspiracy to defraud. The factor tipping the balance for its inclusion is that it represents a compromise based on the *status quo*. Although the Committee appreciates the attraction of a general dishonesty offences to prosecution authorities, the rule of law and the principle of specificity in relation to criminal offences is already stretched by conspiracy to defraud. To take the further step of a general dishonesty offence would not be justified.

Recommendation 1

Conspiracy to defraud should be included in the MCC.

Conspiracy to defraud

- 17.4(1) A person who conspires with another person to do something dishonestly:
- (a) with the intention of obtaining a gain; or
 - (b) with the intention of causing a loss or being reckless with respect to that result; or
 - (c) with the intention of influencing the exercise of a public duty, is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
 - (b) the person and at least one other party to the agreement must have intended to do the thing pursuant to the agreement; and
 - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (3) A person may be found guilty of an offence against this section even if:
- (a) doing the thing, or obtaining the gain or causing the loss, or influencing the exercise of the public duty is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible;
 - (ii) in the case of an agreement to commit an offence - a person for whose benefit or protection the offence exists;
or
 - (d) subject to subsection (4), all other parties to the agreement have been acquitted of the offence.
- (4) A person cannot be found guilty of an offence against this section if:
- (a) all other parties to the agreement have been acquitted of such an offence and a finding of guilty would be inconsistent with their acquittal; or
 - (b) in the case of an agreement to commit an offence - he or she is a person for whose benefit the offence exists.

- (5) A person cannot be found guilty of an offence against this section if, before the commission of an overt act pursuant to the agreement, the person:
 - (a) withdrew from the agreement; and
 - (b) took all reasonable steps to prevent the doing of the thing.
- (6) A court may dismiss a charge of an offence against this section if it thinks that the interests of justice require it to do so.
- (7) In the case of an agreement to commit an offence, any defences, procedures, limitations of qualifying provisions that apply to the offence apply also to the offence against this section.
- (8) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence against this section before the necessary consent has been given.

Note: Section 11.1(7) of Chapter 2 is to be amended to provide that a person cannot attempt to commit the offence of conspiracy to defraud.

Conspiracy (*Excerpted from the MCC*)

11.5(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

- (2) For the person to be guilty:
 - (a) the person must have entered into an agreement with one or more other persons; and
 - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

- (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (3) A person may be found guilty of conspiracy to commit an offence even if:
- (a) committing the offence is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible;
 - (ii) a person for whose benefit or protection the offence exists; or
 - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy. .
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
 - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
- (a) withdrew from the agreement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the *Director of Public Prosecutions*. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

Dishonesty (*Excerpted from the MCC*)

14.2 (1) In this Chapter, “dishonest” means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

- (2) In a prosecution for an offence, **dishonesty** is a matter for the trier of fact.

Note: Section 15.2 affects the meaning of dishonesty in offences related to theft and section 17.2(3) affects the meaning of dishonesty in the offences of obtaining property or a financial advantage by deception. See also section 9.5 (Claim of right).

Gain and loss

14.3 (1) In this Chapter:

“gain” or “loss” means gain or loss in money or other property, whether temporary or permanent, and:

- (a) “gain” includes keeping what one has; and
 - (b) “loss” includes not getting what one might get.
- (2) In this Chapter:
- (a) “obtaining” a gain means obtaining a gain for oneself or for another; and
 - (b) “causing” a loss means causing a loss to another.

Property

14.4 In this Chapter:

“property” includes all real or personal property, including:

- (a) money; and
- (b) things in action or other intangible property; and
- (c) electricity; and
- (d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person.

5 WHAT FORM SHOULD CONSPIRACY TO DEFRAUD TAKE?

What form should conspiracy to defraud take? - 17.4

The general requirements in relation to conspiracy are set out in s11.5 of the MCC. Both the substantive and procedural limitations on conspiracy charges are applied to s17.4. The crucial difference between s17.4 and s11.5 is that s17.4 does not require an agreement to commit an *offence*. It simply requires an agreement to do *something* dishonestly. However the general provisions of s11.5 (for example, the requirement of an agreement between two or more people, an overt act pursuant to that agreement, withdrawal, and the consent of the DPP) are required. The commentary in relation to these general provisions may be found in *Report on the General Principles of Criminal Responsibility*.

The key issues in relation to the section s17.4 offence are its fault elements.

Dishonesty - s14.2

The fault element of common law conspiracy to defraud is an intent to defraud. As has been seen, this phrase has been interpreted to include within it the concept of dishonesty and an intent to cause a loss, imperil a person's economic interests, or to influence the exercise of a public duty.

In relation to dishonesty, the cases on conspiracy to defraud have consistently applied the *Feely/Ghosh* test of dishonesty which has been codified in s14.2.⁵⁷ Section 17.4 follows these cases by including the fault element of dishonesty. Only one submission opposed the use of the *Feely/Ghosh* test as the fault element for conspiracy to defraud. The Legal Aid Office of Queensland argued that using this test 'compounds the uncertainty already inherent in the vague scope of the offence'. MCCOC considers that the dishonesty test is both more precise and fairer than other tests, and that the cases on conspiracy to defraud have consistently applied the *Feely/Ghosh* test. For these reasons, MCCOC does not agree with this submission.

Gain or loss

However, the meaning of the term "intent to defraud" extends beyond dishonesty. How far it extends - as seen above in the discussion of *Wai Yu-Tsang* - is a matter of some uncertainty. Certainly, the focus of the common law term was on causing a *detriment* to another. The cases have clearly extended this to

⁵⁷ See the cases cited in footnote 15. Note that there is a suggestion in *Adams* that the failure of the directors to disclose information about their conflict of interest was the basis of part of the decision. It is important to understand that the Privy Council was responding to an argument by the defendant that the trial judge had not found dishonesty. The Privy Council found that in the circumstances of the case, the failure to disclose was dishonest. In other words the failure to disclose was a particular instance of the general requirement in conspiracy to defraud that dishonesty be proved. See the discussion under the heading of dishonesty in chapter 2 of this Report.

include recklessness about the causing of a loss to another - although the Privy Council in *Wai Yu-Tsang* prefers to avoid the language of recklessness and to describe this as an intent to imperil the economic interests of others. Thus it is not a defence to argue that the defendant did not intend to cause a loss. He or she may have intended to obtain a gain for him or herself or another but hoped that the victim would not suffer any loss. However, if the defendant knew that the intended conduct would put the victim's economic interests at risk, that is sufficient for conspiracy to defraud. The victim must have some existing economic right or interest at stake; the defendant can be as dishonest as he or she likes to someone who has no economic right at stake (eg the busybody who wants to know about the company's financial affairs).

The common law meaning of intent to defraud was framed in terms of actions intended to cause *loss* or to imperil the economic interests of others. It was not expressed in terms of *gains*. There is an issue about whether this should continue to be the case. The same issue arose in relation to the offences of blackmail and forgery. In both cases, MCCOC recommended that the fault element for those offences be extended to include those who intend to gain as well as those who intend to cause a loss.⁵⁸

-Arguments for including gain

Why should a dishonest intention to obtain a gain not be treated in the same way as a dishonest intention to cause a loss? In most cases, it will be more natural to describe the defendant's state of mind as intending to obtain a gain for himself, herself or another; personal greed rather than sheer malevolence is the more usual motivation. In *Adams*, the defendant's primary aim appears to have been to obtain large profits for himself rather than any desire to inflict losses on shareholders. *Wai Yu-Tsang* appears to be more complex: the defendant said he was desperately trying to avoid a run on the bank. In neither case was the primary aim a desire to inflict loss on others. However, in *Adams*, the defendant knew this was a certainty and in *Wai Yu Tsang*, the defendant knew at least that the interests of shareholders and depositors were put at risk. In both cases, the defendants probably gave little thought to the fact that they would or might cause loss to others. Like the thief, the defendant's primary focus will almost always be the gain for the defendant rather than a loss for the victim. In most cases, the defendant's gain and the victim's loss will merely be the flip side of the same coin. However, even if there were examples of the defendant obtaining a gain which did not involve the causing of a loss to the victim, this is equally as

⁵⁸ *Theft Report* 207 and 237. And see ss18.1 and 19.3.

culpable as the defendant intending to cause a loss to the victim, even if this does not result in a corresponding gain to the defendant or to another.⁵⁹

The argument that the inclusion of gain will open a much larger range of transactions to scrutiny misconceives the existing scope of conspiracy to defraud. Dishonest gains will always or virtually always have come at the expense of another and it will be possible to characterise them as involving an intent to cause a loss or to imperil the economic interests of others. The virtue of including gain is that it more naturally captures what will usually be the defendant's real intent.

It is important to notice in passing here that the fact that a person intends to cause loss to another does not mean that the person is guilty of an offence. Business competitors may well do things like cut the price of goods or point out their competitors' defects in order to cause loss to that competitor. So long as there is nothing dishonest in that conduct, there is no conspiracy to defraud. Dishonesty is the key factor and may well colour the characterisation of the effects of a transaction as involving a loss to one party (who may see the outcome as a gain until he or she finds out about the dishonesty).

-Arguments against including gain

The common law focus on the intention to cause loss or to imperil the economic interests of others is the traditional restriction and this should remain the focus of an offence which is already criticised for its breadth. Sir Harry Gibbs' submission opposed the extension to gain on this basis and pointed out that the plain meaning of the word "defraud" focussed on the effect on the victim.

The vast majority of economic transactions are directed to making a gain. From buying a dozen eggs to negotiating terms of employment, the transactions are directed towards mutual gain. Only in a very few is the objective to cause a loss. Only those who can be shown to have intended to cause a loss or to risk the interests of others should be subject to the offence. To include gain renders all those mundane economic transactions open to scrutiny subject only to the uncertainties of the test of dishonesty. The virtue of restricting the test to loss is that it narrows the range of transactions which are *potentially* the subject of conspiracy to defraud charges.

59 An example of the sort of problem that can occur arose in *Balcombe v De Simoni* (1971) 126 CLR 576, a case involving the fraud section of the WA Code. The defendant sold a cook book on the false pretence that he was a student in a competition. The offence is to obtain money by deception *with intent to defraud*. But what loss does the victim suffer? She received the book that she paid for. Under the MCC proposal, the defendant would be guilty (assuming a conspiracy) because he dishonestly obtained a gain. He would also be guilty of dishonestly obtaining property (the money) by a deception. The difficulties in *Balcombe v De Simoni* would not arise.

The argument for consistency based on an analogy with blackmail and forgery is false. Both blackmail and forgery have other elements (an unwarranted demand plus a menace in the case of blackmail, and a false document in the case of forgery) which differentiate the defendant's conduct from legitimate transactions. Both the Australian Institute of Company Directors and the Law Society of NSW considered that including gain in conspiracy to defraud places too heavy a burden on the element of dishonesty.

Conclusion

Submissions generally supported the inclusion of intent to a gain in this offence. The Australian Law Reform Commission agreed that in virtually all cases where a person dishonestly causes a loss or detriment to another, the intention is to obtain a gain or financial advantage and that in major attacks on large public or private institutions fraudsters pay little heed to where losses may fall, but certainly have gains for themselves very much in mind. The South Australian Police pointed out that including gain in the offence will avoid an artificial or convoluted description of the conduct of the offender so as to fit into the description of causing a loss.

MCCOC believes that the arguments for including gain are more persuasive. Section 17.4(1)(a) reflects this conclusion. The general definitions of gain and loss in s14.3 of Chapter 3 apply. These definitions are in terms of money or property. Gain is defined to include keeping what one already has and obtaining a gain for another. Loss included not getting what one may have got. Property is itself broadly defined in s14.4. The NSW DPP submitted that this definition might be further expanded to include financial advantage. Given the width of conspiracy to defraud, the expansion of the offence to include gain, and the width of the definitions of gain and loss, the Committee does not believe any further expansion is justified.⁶⁰

Should conspiracy to defraud be restricted to economic gains?

The argument that intent to defraud should be restricted to *economic* detriment was rejected in *Welham* which held that it also extended to influencing the exercise of a public duty and probably to any act to another's detriment. While prepared to acknowledge the public duty extension, the extension to any

⁶⁰ The suggestion from the NSW DPP is based on NSW: s178BA which refers to "money or valuable thing or any financial advantage of any kind whatsoever". However that section requires both dishonesty and a deception and is equivalent to s17.2 and s17.3 of the MCC. There is no reference to "gain and loss" in these provisions. In cases where a group agrees to dishonestly obtain a financial advantage by deception, they can be charged under the MCC with conspiracy to commit an offence against s17.3. In the absence of a deception, however, to rely on the concept of financial advantage, in addition to gain and loss, would be to take a step too far. The NSW DPP's example of dishonestly avoiding a debt, illustrates the difficulty. When will simply not paying a debt be regarded as dishonest? For reasons outlined in the *Theft Report*, the Committee is concerned about the expansion of the criminal law into debt collection.

detriment was disapproved in the context of conspiracy to defraud by the House of Lords in *Withers*. In *Wai Yu-Tsang*, the proposition that conspiracy to defraud was limited to economic loss or the exercise of a public duty was rejected in favour of the view that it extended to inducing a person to do any act to his or her prejudice. However, that case clearly involved economic loss. The reported cases all appear to involve economic loss or the intent to influence the exercise of a public duty.

Although the majority of submissions both to this Report and to the chapter 3 Report generally favoured the restriction of these offences to economic loss and breach of public duty, some submissions supported extending conspiracy to defraud to cover non-economic loss. The AFP are concerned that cases which involve the loss of copyright or other forms of information would not be covered, although they could involve an indirect economic loss. For the reasons outlined in chapter 2 of this Report, MCCOC does not recommend the use of this area of the law as a substitute for specific statutory regimes for the protection of either copyright or information. The NSW Ministry for Police and Emergency Services wants conspiracy to defraud to encompass inducing a person to act to their own prejudice. The Australian Institute of Criminology pointed to the possibility of frauds that could be committed in relation to electronic funds on the internet. Where such agreements involve deception of a computer, they are already covered by s17.1(b). Where there is no deception, where the dishonest agreement would result in a gain to the offender, or a loss to another, it would be covered by s17.4.

Consistent with its decisions in relation to forgery and blackmail, MCCOC believes that the extension of the offences in Chapter 3 beyond economic gains and losses is too broad. This is especially true in relation to conspiracy to defraud which is a broad offence even when only applied to economic matters. This is consistent with the *Theft Act* model and picks up the definitions of gain and loss in s14.3. Like blackmail and forgery - and again for the same reasons - the restriction to economic gains and losses is extended to the exercise of a public duty (s17.4(1)(c)).

Recklessness

The Discussion Paper outlined the Committee's proposal that recklessness be the default fault element for each of the consequences in s17.4(a) - (c), namely obtaining a gain, causing a loss or influencing the exercise of a public duty.

In relation to causing a loss, providing for recklessness with respect to loss is consistent with the common law position stated in *Wai Yu-Tsang*: it was not necessary that the defendant intended to cause loss to the victims; it was sufficient that he was prepared to expose them to the risk of loss. In reality in *Wai Yu Tsang*, the conspirators agreed to do something - to issue false accounts - and were reckless as to the consequences of that act on others. In other words, they were prepared to do the act and, although they did not intend to cause a loss,

they were prepared to run that risk. Although the Privy Council preferred to use the language of intent instead of recklessness, the concept of risk-taking is classically the sphere of recklessness. The Committee believes that it is clearer to deal with the issue that way.⁶¹

However, there are different considerations in relation to recklessness as to gain and influencing the exercise of a public duty. Intention to gain was not a fault element for conspiracy to defraud at common law but it has been added to s17.4 for the reasons given above. The Committee has considered whether there are reasons to extend this further by adding *recklessness* as to gain. There is an awkwardness about this concept: generally a person intends to gain or they do not. There is something odd about saying that someone has taken a substantial and unjustifiable risk as to gain. Where someone did foresee a “risk” of gain but there was no recklessness as to loss, this is not a sufficient fault element for such a serious offence. Where there is recklessness as to loss, that is separately covered. The Committee has concluded that mere recklessness as to gain is not a sufficient fault element for this offence.

Similarly, recklessness with respect to the influencing of the exercise of a public duty should be restricted to situations where the defendant intended that result; mere recklessness is not a sufficient fault element.

Therefore, s17.4 now expressly provides for recklessness with respect to loss but requires proof of intention with respect to gain or the exercise of a public duty.

Recklessness: the degree of risk

A further issue with recklessness is the degree of risk which must be foreseen. *Wai Yu Tsang* appears to allow foresight of any degree of risk to another’s economic interests. However, the definition of recklessness in s5.4(2) requires the prosecution to prove that the defendant intended to expose the victim to a *substantial and unjustifiable* risk of loss.

Some submissions from prosecution agencies considered that an intention to expose another to *any* risk of loss should be sufficient for this offence. MCCOC does not accept these submissions. The test for recklessness should not be different for this offence than it is for every other offence under the *MCC*. Indeed the vagueness of this offence would suggest if anything that the test should be more severe. Given the seriousness of the offence, where the prosecution proposes to rely on recklessness rather than intent, it is fair and reasonable to require proof that the defendant knew he or she was exposing the victim to a substantial risk of loss and that it was unjustifiable to do so. Nor is it legitimate to argue that a test based on any risk would merely preserve the *status quo* for this offence. The offence has been cogently criticised for being too wide. Further, as discussed above, the Committee has opted to include

⁶¹ See pp279-8.

obtaining a gain as part of the offence. This expansion of the common law position should not be accompanied by any diminution of the standard *MCC* requirement of a substantial and unjustifiable risk in the definition of recklessness.

Limitations on conspiracy - s11.5

In the Discussion Paper, the Committee recommended that s11.5 of the *MCC* apply - with any necessary modifications - to conspiracy to defraud in the same way as it applies to other conspiracies. A number of the submissions preferred the modifications to s11.5 to be spelled out. For example, s11.5(2)(b) speaks in terms of “an offence” when the “something” to be done pursuant to the agreement in a conspiracy to defraud may not be an offence. The Committee agrees that the position in the *Discussion Draft Bill* was not clear. Accordingly, rather than referring back to s11.5, s17.4 now incorporates the principles of s11.5 with the specific modifications necessitated by the fact that the subject matter of a conspiracy to defraud may not be an offence. The section is intended to replicate s11.5 as nearly as possible.

Jurisdiction

Two recent cases have confirmed that where an agreement to commit a conspiracy to defraud is reached in one jurisdiction but the whole of the unlawful conduct is to take place in another jurisdiction, that there is no offence in the first jurisdiction.⁶² This is because conspiracy is a preliminary offence and if everything was done according to plan under the agreement, no crime would have been committed in that jurisdiction. This issue relates to jurisdiction and has no particular relevance to conspiracy to defraud. The issue will be discussed in a separate discussion paper as part of Chapter 1 of the *MCC*.

Penalty

In the Discussion Paper, MCCOC recommended that the maximum penalty for this offence be 5 years. The reasons for this proposal were the generality of the offence, the fact that it is to some extent a gap-filling offence, and that it does not require proof of elements such as deception which render conduct more culpable. There would be less incentive for the prosecution to charge theft or deception which require proof of additional elements and carry a 10 year penalty if conspiracy to defraud carried the same maximum penalty. Where a substantive offence can be charged that should be done. The lower maximum penalty also reflects the fact that conspiracy is a preliminary offence.

However, a number of submissions objected to a penalty of five years as too low. The Federal Police supported a penalty of 10 years, so that conspiracy to defraud was punishable in the same way as s29D of the Commonwealth *Crimes Act*. Some suggested that the penalty be tied to the substantive offence, but as

⁶² *Hamilton-Byrne* [1995] 1 VR 129; *Isaac* (Unreported, NSW CCA 5/2/96); *Catanzariti* (1995) 65 SASR 201.

conspiracy to defraud will sometimes operate on conduct that would not constitute an offence if performed by an individual this would not work.

The Committee's argument that imposing a larger penalty for conspiracy to defraud would encourage the prosecution to charge this offence, rather than substantive offences, was rejected by both the Victorian Police and Judge Mullaly of the Victorian County Court. The Victorian Police argued that the offence of conspiracy facilitates early intervention prior to the commission of the substantive offence, while Judge Mullaly said that, in his experience, it was easier to explain a substantive offence to a jury than to rely on an agreement to commit an offence, especially when the substantive offence had actually been committed. Moreover, the subject matter of the conspiracy may range into huge monetary amounts and it is therefore important that an appropriately severe maximum sentence is available.

In light of these submissions, the Committee has decided that the maximum sentence for the offence should be 10 years.

Excerpt from

CHAPTER 3

THEFT, FRAUD, BRIBERY AND RELATED OFFENCES

FINAL REPORT

pp153 - 171

December 1995

A general dishonesty offence?

Despite the flexibility of the *Theft Act* provisions on theft and fraud, some still argue the need for a general dishonesty offence to cover cases which fall outside the ambit of the offences of theft, obtain property by deception, and obtain a financial advantage by deception. A recent Report by the English Law Commission on the offence of conspiracy to defraud has foreshadowed this possibility in view of what it saw as some gaps in the *Theft Act* model.⁶³ Most of those gaps are in fact closed by amendments to the *Theft Act* model recommended in this Report (eg deception of computers, obtaining loans by deception). The offence of conspiracy to defraud covers some others but that offence exists independently of the *Theft Act*. Conspiracy to defraud is to be the subject of a separate MCCOC discussion paper to be issued shortly and accordingly no recommendation regarding that offence is made in this Report. Nevertheless, the question arises as to whether conduct currently covered by conspiracy to defraud if committed by two or more should be criminalised if committed by an individual. The most obvious case of such conduct is dishonest conduct where there has been no deception. Sometimes such an offence is referred to as a general fraud offence but this is misleading. Fraud implies deception but the point of the offence is to cover cases where there is no deception but there is dishonesty. Hence it is clearer to refer to it as a general dishonesty offence.

The most obvious examples of cases which might be caught by a general dishonesty offence are cases where there is some form of dishonest acquisition of property but the conduct does not involve theft or fraud (eg the employee who uses the employer's premises to make a secret profit, the cinema projectionist who secretly makes copies of films and sells the copies). These cases are not theft because they do not involve an appropriation, nor there is no intent to permanently deprive. Nor are they either of the deception offences because there was no deception. An agreement to do these sorts of things has been held to be a conspiracy to defraud, notwithstanding that the conduct if done by an individual would not amount to either theft or fraud.⁶⁴ The creation of a general dishonesty offence along the lines of conspiracy to defraud offence - but without the need to prove an agreement - would mean that a person like some of the defendants in the conspiracy to defraud cases could be convicted of an offence of general dishonesty even if they were the sole participant in the scheme. Such an offence could take the form of the existing deception offences but simply drop the requirement that there be a deception. The offence would then be as follows:

- (1) A person who dishonestly obtains property belonging to another, with the intention of depriving the other permanently of it, is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

⁶³ *Law Com 228*

⁶⁴ *Scott v Metropolitan Police Commissioner* [1975] AC 819; *Cooke* [1986] AC 909.

- (2) A person who dishonestly obtains a financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

The creation of such an offence would obviate the need to retain a separate offence of conspiracy to defraud because the concerns which led to its codification - the existence of cases which involve dishonest gains or losses but do not fit within any of the existing theft/fraud offences - would have disappeared. Such cases could simply be charged as conspiracies to commit the general dishonesty offence. However the ramifications of such an offence extend far beyond the offence of conspiracy. A general dishonesty offence would make most of the offences in this chapter superfluous. So long as the prosecution could prove a dishonest obtaining of property or a financial advantage, the offence would be proved without the need to prove any of the other elements - such as appropriation without consent, property belonging to another, intention to permanently deprive, deception, use of menaces, the intent to influence the exercise of an agent's duty - of the existing offences. Guilt or innocence in these cases would turn almost solely on the element of dishonesty.

General offences of this sort have not existed anywhere in the common law world until recent years. However, there are now three different examples of a general dishonesty offence: s29D of the *Crimes Act 1914 (Cth)*, s409 of the *Criminal Code Act 1913 (WA)*, and s380 of the *Criminal Code (Canada)*. MCCOC has carefully considered whether such an offence should be included in the *MCC*.

Section 29D of the *Crimes Act 1914 (Cth)* is as follows:

A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.

Penalty: 1000 penalty units or imprisonment for 10 years, or both.

There is no appellate interpretation of this provision but the relevance of the conspiracy to defraud cases is patent. Effectively, this offence is conspiracy to defraud without the need for a conspiracy: the wording of s29D follows the conspiracy to defraud provision (s86A) of the *Crimes Act 1914 (Cth)* which is itself a codification of common law conspiracy to defraud. Thus, it is to be expected that the provision will be interpreted to mean that a person who dishonestly causes an economic loss to the Commonwealth or influences the exercise of a public duty will be guilty of the offence. If the recent Privy Council decision in *Wai Yu-Tsang* is followed it may extend to inducing the Commonwealth or a Commonwealth agency to do any act to its detriment.

Dishonesty will be measured by the *Feely/Ghosh* test and it will not be necessary to prove a deception.⁶⁵

Like s29D, section 409 of the *Criminal Code Act (WA)* does not require a deception but it is a much broader and more complex provision than s29D. It was introduced in 1990 and is as follows:

- (1) Any person who, with intent to defraud, by deceit or any fraudulent means-
 - (a) obtains property from any person;
 - (b) induces any person to deliver property to another person;
 - (c) gains a benefit, pecuniary or otherwise for any person;
 - (d) causes a detriment, pecuniary or otherwise to any person;
 - (e) induces any person to do any act that the person is lawfully entitled to abstain from doing;
 - (f) induces any person abstain from doing any act that the person is lawfully entitled to do,

is guilty of a crime and is liable to imprisonment for 7 years.

Summary conviction penalty (subject to subsection (2)):
Imprisonment for 2 years or a fine of \$8000.

- (2) If the value of -
 - (a) the property obtained or delivered; or
 - (b) a benefit gained or a detriment caused;is more than \$4000 the charge is not to be dealt with summarily.
- (3) It is immaterial that the accused person intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused.

⁶⁵ On Cth: s86A and WA: s29D, see Lanham et al. A limited form of this offence appears in NSW: s176A. It is limited to company directors, officers or members and dealings with the company. It is subject to the same criticisms as s29D and to the criticism that it discriminates against company directors, officers and members. *Wai Yu-Tsang* [1992] 1 AC 269 (Privy Council).

⁶⁶ WA: s409. The common law interpretation of intent to defraud as dishonesty plus intent to cause loss or influence the exercise of a public duty is apparently displaced in this section by dishonesty plus the list of matters which may be obtained, etc. On dishonesty in the context of conspiracy to defraud, see the commentary on s14.2 - dishonesty at *Theft Report* 11-29, esp footnote 23.

The Western Australian offence requires proof of intent to defraud which is likely to be interpreted to mean dishonesty on the *Feely/Ghosh* test⁶⁶. Although the offence can be committed by a deception (“deceit”), deception is *not* a necessary requirement: “any fraudulent means will suffice”. Presumably - because of the conspiracy to defraud cases and the juxtaposition of “deceit” and “fraudulent means” in the section - this means any “dishonest” means of obtaining will suffice, a seeming duplication of the fault element “intent to defraud”. Finally, the offence is not limited to economic gain or loss but extends to obtaining *any* benefit pecuniary or otherwise, and getting any person (not just a public official) to do or not to do any lawful act.

The Canadian offence is also based on “deceit, falsehood or other fraudulent means...” and does not necessarily require deception. In *Zlatic*, the defendant ran a clothing business and had a lot of goods on credit from suppliers. He sold clothes to customers and used the proceeds for gambling. When he lost this money, he was charged with the general dishonesty offence in relation to the creditors. The court held that fraudulent means dishonest which is defined by a reasonable person test: what a reasonable, decent person would consider dishonest and unscrupulous. The conviction was upheld 3:2 by the Supreme Court. This appears to make non-payment of debts without any deception on the defendant’s part into a serious criminal offence, so long as the conduct can be said to be dishonest. This is a considerable extension of the existing law.⁶⁷

The question is whether a general dishonesty offence along the lines of these offences should be included in the *MCC*.

-Arguments for

The conspiracy to defraud cases show that there can be significant offences of dishonesty which can only be prosecuted if committed pursuant to a conspiracy. Primarily, they are cases where nothing in the nature of a deception can be

⁶⁷ *Zlatic* (1993) 79 CCC (3d) 466. See too *R v Olan, Hudson and Hartnett* (1978) 41 CCC (2d) 145. Section 308(1) of the *Canadian Code* defines the offence as follows:

- 380** (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,
- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding 10 years, where the subject matter of the offence is a testamentary instrument of where the value of the offence exceeds five thousand dollars; or
 - (b) is guilty
 - (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
 - (ii) of an offence punishable on summary conviction.
 where the value of the subject matter of the offence does not exceed five thousand dollars.

⁶⁸ *Scott v Metropolitan Police Commissioner* [1975] AC 819, *Hollinshead* [1985] AC 975; *Cooke* [1986] 1 AC 909.

shown but there is clear dishonesty. Examples of such cases are *Scott* (illegal copying of films), *Hollinshead* (manufacture of electricity meter devices) and *Combe* (using employer's premises to make profits).⁶⁸ Similarly, ongoing payment schemes - such as social security - can be defrauded without any deception where the recipient fails to inform the authority of a change in circumstance which means that the pension or benefit is no longer payable. The most dramatic example of the need for a general dishonesty provision occurred in what were known as "bottom of the harbour" taxation schemes. These schemes involved defendants buying a profitable company with a large tax liability and, through a series of transactions, taking the cash out of the company, leaving it with the tax liability but in the hands of people with no assets. None of these transactions involved a deception. Although these schemes have now been made specifically illegal under the *Crimes (Taxation Offences) Act 1980(Cth)* they demonstrate the ingenuity of dishonest people and the massive amounts of money that can be misappropriated by people who can put themselves outside the ambit of the existing dishonesty offences.

The absence of a general dishonesty offence will also make it more difficult to regulate cases where benefits are obtained which do not amount to money or property or a financial advantage. For example, a person may obtain a visa to enter the country by deception.

There are also procedural and sentencing disadvantages in having to rely on conspiracy counts in the serious cases. Commonwealth Special Prosecutor, Roger Gyles QC, pointed out these difficulties in his 1982/3 Report to Parliament. The result of this was the enactment of s29D of the *Crimes Act 1914 (Cth)* in 1984. The ongoing importance of procedural issues should not be overlooked at a time when the length and complexity of serious fraud cases is of serious concern.

Nor should the other advantages of the s29D offence be overlooked. The Commonwealth DPP laid charges under 29D in 70 cases in 1993/4. Although the majority of these cases did involve a deception, the practical advantage of this charge over other available charges is an important factor. The problem in a case of dishonesty not involving deception, is that the prosecution will be forced to use either a charge of conspiracy to defraud (assuming conspiracy can be established) or charge under specific legislation. Existing specific legislation - with few exceptions such as the *Crimes (Taxation Offences) Act* is not designed for serious fraud offences; the *Crimes (Taxation Offences) Act* only deals with one particular form of fraud on the revenue (asset stripping). As one example of specific legislation, s1350 of the *Social Security Act 1991* provides, inter alia, for an offence of knowingly obtaining a pension by means of a fraudulent device but the penalty is limited to 12 months imprisonment. To enact a series of provisions dealing with frauds on the various organisations of Government with adequate penalties would be a major legislative exercise. With the possible

exception of s.1350 of the *Social Security Act*, it would not be sufficient to merely increase the penalties under existing provisions. The provisions would need to be re-written to justify the substantial increase in penalty. Nor would it be sufficient to limit the exercise to amendment of existing Acts as many of the activities of Government are not provided for by legislation.

It has been suggested that the cure to these problems is to enact specific offences to deal with them rather than a general dishonesty offence. However there are very significant difficulties with this approach. The ingenuity of fraudsters is such that the statute book has little or no chance of keeping up with them. The specific offence is usually never devised until it is all too late. Some dishonest people will never be charged or will be acquitted before the gap is closed. There will be a plethora of offences - the opposite to what we are hoping to achieve under the Model Criminal Code.

The strength of the case for a general dishonesty offence found favour in the Murray Report in Western Australia and, following the Murray approach, the O'Regan Review in Queensland. The Gibbs Committee favoured the retention of s29D of the *Crimes Act 1914 (Cth)*. However, the new Queensland Code (s184) retains the requirement to prove a deception. The English Law Commission canvassed the arguments for and against such an offence in its 1984 Working Paper 104 but in its 1994 Report decided to retain conspiracy to defraud pending a general review of its dishonesty offences.

-Arguments against

Both the Commonwealth and the Western Australian provisions have been criticised in the strongest terms. For example, Lanham, Weinberg, Brown and Ryan describe s29D in the following terms:

A new and extraordinarily vague offence of fraud is contained in s29D which was inserted into the *Crimes Act* in 1984. It is to be hoped that this draconic provision will not be widely used in the future, though it may be preferable to the vagaries of the offence of conspiracy to defraud the Commonwealth under s86. There is no case law yet in existence to elucidate the meaning of the word "defrauds" in s29D. Presumably, it will be construed as requiring deception on the part of the defendant designed to induce a particular course of action which would not otherwise be undertaken. Just how much more will be required is a matter of speculation.⁶⁹

The speculation is that in fact *less* will be required: if *Scott* continues to be followed in Australia, it will not be necessary to prove deception. Similarly, s409 of the *Criminal Code Act (WA)* has been criticised as "vague, sweeping and

⁶⁹ Lanham et al: 86 and 383. As noted above, on the basis of *Scott* and the Australian cases following it, there seems to be little reason to believe that deception is required as part of this offence.

arbitrary”.⁷⁰ The author quotes criticisms of a similar but narrower provision proposed by the English Criminal Law Revision Committee as part of the *Theft Act 1968* but rejected by the British Parliament.

It places far too much discretion in the hands of prosecuting authorities. It could contribute to racial and other discrimination. It could be a potent weapon of blackmail in the hands of unscrupulous employers. One of the most striking objections to [clause 15(3)] is just that it is “illegal”. It is a pity that the [majority of the Criminal Law Revision Committee] ... should in this case have neglected one of the most important of legal virtues; a chronic dislike of vague, sweeping and arbitrary offences.

But the rejected clause 15(3) was significantly narrower than s409. It still required a deception and an intention to gain or cause loss in money or property. As Syrota points out, simply driving off, hiding when the debt collector comes to call, not paying at a parking meter and “sneaking” into a picture theatre become indictable offences under s409 because there is no need for any deception. Similarly the school student who tells the principal that the train was late in order to avoid detention, the woman who tells a man that she loves him in order to get him to have sex with her, and the former unionist who is elected president of the Chamber of Commerce after telling members that he has never had anything to do with unions, all commit an offence under s409 which extends to non-pecuniary benefits and inducing people to do things they would otherwise not do. The breadth of s409 seems to make any form of dishonesty which leads to any benefit or action by another person (subject to lawfulness) an indictable offence. Its implications for business transactions that might in any way be construed as dishonest are uncertain. However, it would seem that many actions that currently contravene the misleading and deceptive practices provisions (s52) of the *Trade Practices Act 1974* would fall foul of a general dishonesty offence.

The impact of such a broad offence on a range of practices not currently thought to be criminal also needs to be considered carefully. No doubt there will always be cases which - in hindsight - most people would wish to see as criminal which will elude the existing criminal offences if they continue to be drawn with any precision. On the other hand, vague, sprawling offences sweep up cases that most people would not consider to be criminal. (There are also cases at the margin which should either be clearly criminal or clearly not criminal.) For example, a group of courier companies make a secret arrangement in breach of the *Trade Practices Act* not to undercut each other's fees with each other's customers. They all benefit from the higher charges they are able to sustain. Is this a dishonest infliction of a detriment on the customers in breach of the

70 Syrota, “Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence” (1994) 24 *Western Australian Law Review* 261.

general dishonesty offence? The width of the current conspiracy to defraud offence would probably catch such a case although the common perception may well be that although this is properly a breach of prohibitions on anti-competitive practices under the *Trade Practices Act*, it would be going too far to make this an indictable offence. As Williams and Weinberg say in the context of an offence containing both the elements of dishonesty and deception, “The line distinguishing sharp business practices from unlawful conduct is at best a fine one.”⁷¹

One of the strengths of the existing law is its requirement that there be proof of a number of discrete elements making up the overall offence of theft or fraud. The criticism of the English approach to the concept of appropriation is that it has virtually deprived that concept of any work to do in distinguishing theft from legitimate transactions and that it makes the whole offence turn on the concept of dishonesty.⁷² Removing deception from the fraud offences does the same thing. It makes guilt or innocence turn solely on the concept of dishonesty.

While the concept of dishonesty *in conjunction with* the other more objective elements of these offences has much to recommend it, to make dishonesty the sole criterion would offend the rule of law principle that criminal offences should be certain and knowable in advance. Those who criticise the dishonesty test even in the context of offences which have other more objective elements would be even more critical of an offence based almost solely on the element of dishonesty.

No doubt there is a strong concern to weed out dishonest practices in business and elsewhere, but to turn every shady business practice into theft or fraud runs the risk of over-criminalisation and selective prosecutions. Not every case of dishonesty does amount to theft or fraud. Apart from theft and fraud, there are a number of offences in legislation such as the *Corporations Law* and the *Trade Practices Act* making specific forms of dishonest or misleading conduct an offence. The price of this specificity is that occasionally innovative forms of dishonest conduct will elude the scope of the existing offences. In the Committee's view, this price is worth paying in order to stay within the important rule of law that criminal offences should be certain and knowable in advance. The *Theft Act* offences are already expressed in a more general or abstract way than the preceding law. To take the further step of dispensing with the need to prove an appropriation without consent or that there was a deception is to go too far.⁷³

71 Williams and Weinberg, 169.

72 See generally Smith's discussion of the *Gomez* decision, ch2.

73 The House of Lords has said something similar in the context of a conspiracy to defraud case: “the making of a secret profit is no criminal offence, whatever other epithet may be appropriate.” *Tarling v Singapore Republic Government* (1979) Crim App Rep 77. If there is a need for such an offence, that can be specifically provided for as it is in relation to secret commissions or specifically in the *Corporations Law*.

Problems in specific areas like tax and social security can and have been dealt with under specific legislative provisions. The bottom of the harbour cases have been dealt with by specific tax legislation, non-declaration of changes in social security status are dealt by specific offences in social security legislation, as are false declarations in relation to obtaining visas and the like. These cases need individual consideration and although that may impose a legislative burden, this is better than creating sweeping new offences which draw in a vast amount of conduct which is not justifiably categorised as criminal. In response to enquiries about the need for a general dishonesty offence to combat bottom of the harbour tax cases, the former Royal Commissioner, Mr Frank Costigan QC, said that he did not believe such offences are necessary and that they are contrary to the principle that criminal offences should be specific and knowable in advance. Reports by the Special Prosecutor established as a result of the Costigan and Stewart Royal Commissions, Mr Robert Redlich QC make no mention of the need for a general dishonesty offence, although they do make a series of law reform proposals and review a large number of prosecutions instituted under various Acts as a result of the Royal Commissions.⁷⁴

Conclusion

Ultimately, the criticism of a general dishonesty offence is that it has all the vices of the old law of conspiracy - vices to some extent ameliorated in that offence by the requirement that there be an agreement. MCCOC has considered the arguments for and against a general dishonesty offence and has concluded that such an offence should not be included in the *MCC*.

Although the Committee believes that generally fraud offences in the Model Criminal Code should be no broader than proposed in this report, it recognises that in this area of the criminal law, there are special problems (which may be peculiar to a particular jurisdiction) that may justify the creation of special offences of a general nature. However, consistently with its decision to limit the scope of offences of dishonesty within the *MCC*, the Committee believes that where the creation of a special offence can be justified, its application should be no wider than is necessary to address the particular problem identified and it ought to be restricted to a specific subject matter or a particular class of conduct. Of course any such offence should otherwise accord with the general principles contained in the Code.

Recommendation

The MCC should not contain a general dishonesty offence.

⁷⁴ *Annual Report of the Special Prosecutor* 1982-3, and 1983-4.

Model Criminal Code Chapters 1-3

CRIMINAL CODE OF STATE/TERRITORY

A BILL FOR

An Act to codify the criminal law.

The Parliament of [Name of State/Territory] enacts:

Short title

1. This Act may be cited as the *Criminal Code ([Name of State/Territory]) Act 1994*.

Commencement

2. (1) This Act commences on a day or days to be fixed by Proclamation.
(2) Different days may be fixed for the commencement of different provisions of the Schedule.

The Criminal Code

3. (1) The Schedule has effect as a law of [(Name of State/Territory)].
(2) The Schedule may be cited as the *Criminal Code of ([Name of State/Territory])*.

Definitions

4. (1) Expressions used in the Code (or in a particular provision of the Code) that are defined in the Dictionary at the end of the Code have the meanings given to them in the Dictionary.
(2) Definitions in the Code of expressions used in the Code apply to its construction except in so far as the context or subject matter otherwise indicates or requires.

SCHEDULE

THE CRIMINAL CODE OF [(NAME OF STATE/TERRITORY)]

CHAPTER 1 - CODIFICATION

Division 1

1.1 Codification

The only offences against laws of [Name of State/Territory] are those offences created by, or under the authority of, this Code or any other Act of [Name of State/Territory].

CHAPTER 2 - GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

PART 2.1 - PURPOSE AND APPLICATION

Division 2

2.1 Purpose

The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of [Name of State/Territory]. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

2.2 Application

- (1) This Chapter applies to all offences against this Code.
- (2) On and after the day occurring 5 years after the day on which the Criminal Code Act 1994 of [Name of State/Territory] receives the Royal Assent, this Chapter applies to all other offences.
- (3) Section 11.6 applies to all offences.

PART 2.2 - THE ELEMENTS OF AN OFFENCE

Division 3 - General

3.1 Elements

- (1) An offence consists of physical elements and fault elements.
- (2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
- (3) The law that creates the offence may provide different fault elements for different physical elements.

3.2 Establishing guilt in respect of offences

In order for a person to be found guilty of committing an offence the following must be proved:

- (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
- (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note: See Part 2.6 on proof of criminal responsibility.

Division 4 - Physical elements

4.1 Physical elements

- (1) A physical element of an offence may be:
 - (a) conduct; or
 - (b) a circumstance in which conduct occurs; or
 - (c) a result of conduct.

- (2) In this Code:

“**conduct**” means an act, an omission to perform an act or a state of affairs.

4.2 Voluntariness

- (1) Conduct can only be a physical element if it is voluntary.
- (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

- (3) The following are examples of conduct that is not voluntary:
 - (a) a spasm, convulsion or other unwilled bodily movement;
 - (b) an act performed during sleep or unconsciousness;
 - (c) an act performed during impaired consciousness depriving the person of the will to act.
- (4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.
- (5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.
- (6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.
- (7) Intoxication is self-induced unless it came about:
 - (a) involuntarily; or
 - (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

4.3 Omissions

An omission to perform an act can only be a physical element if:

- (a) the law creating the offence makes it so; or
- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

Division 5 - Fault elements

5.1 Fault elements

- (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
- (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Example: The fault element for the offence of judicial corruption under section 32 of the *Crimes Act* 1914 of the Commonwealth is that the relevant conduct be carried out 'corruptly'.

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.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

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.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

- (b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

- (1) If the law creating the offence does not specify a fault element for a physical element of an offence that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element of an offence that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Division 6 - Cases where fault elements are not required

6.1 Strict liability

- (1) **If a law that creates an offence provides that the offence is an offence of strict liability:**
 - (a) **there are no fault elements for any of the physical elements of the offence; and**
 - (b) **the defence of mistake of fact under section 9.2 is available.**
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

6.2 Absolute liability

- (1) **If a law that creates an offence provides that the offence is an offence of absolute liability:**
 - (a) **there are no fault elements for any of the physical elements of the offence; and**

- (b) the defence of mistake of fact under section 9.2 is unavailable.**
- (2)** If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3)** The existence of absolute liability does not make any other defence unavailable.

PART 2.3 - CIRCUMSTANCES IN WHICH THERE IS NO CRIMINAL RESPONSIBILITY

Note: This Part sets out defences that are generally available. Defences that apply to a more limited class of offences are dealt with elsewhere in this Code and in other laws.

Division 7 - Circumstances involving lack of capacity

7.1 Children under 10

A child under 10 years old is not criminally responsible for an offence.

7.2 Children over 10 but under 14

- (1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.**
- (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.**

7.3 Mental impairment

- (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:**
 - (a) the person did not know the nature and quality of the conduct; or**
 - (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or**
 - (c) the person was unable to control the conduct.**
- (2) The question whether the person was suffering from a mental impairment is one of fact.**
- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.**

- (4) The prosecution can only rely on this section if the court gives leave.
- (5) The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.
- (6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.
- (7) If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
- (8) In this section: “mental impairment” includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.
- (9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.

Division 8 - Intoxication

8.1 Definition - self-induced intoxication

For the purposes of this Division, intoxication is self-induced unless it came about:

- (a) involuntarily; or
- (b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

8.2 Intoxication (offences involving basic intent)

- (1) **Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.**
- (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

- (3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.
- (4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.
- (5) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

8.3 Intoxication (negligence as fault element)

- (1) **If negligence is a fault element for a particular physical element of an offence, in determining whether that fault element existed in relation to a person who is intoxicated, regard must be had to the standard of a reasonable person who is not intoxicated.**
- (2) However, if intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.

8.4 Intoxication (relevance to defences)

- (1) **If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed.**
- (2) **If any part of a defence is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.**
- (3) If a person's intoxication is not self-induced, in determining whether any part of a defence based on reasonable belief exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (4) If, in relation to an offence:

- (a) each physical element has a fault element of basic intent; and
- (b) any part of a defence is based on actual knowledge or belief;

evidence of self-induced intoxication cannot be considered in determining whether that knowledge or belief existed.

- (5) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

Note: A fault element of intention with respect to a circumstance is not a fault element of basic intent.

8.5 Involuntary intoxication

A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

Division 9 - Circumstances involving mistake or ignorance

9.1 Mistake or ignorance of fact (fault elements other than negligence)

- (1) **A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:**
 - (a) **at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and**
 - (b) **the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.**
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

9.2 Mistake of fact (strict liability)

- (1) **A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:**

- (a) **at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and**
 - (b) **had those facts existed, the conduct would not have constituted an offence.**
- (2) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
 - (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

Note: Section 6.2 prevents this section applying in situations of absolute liability.

9.3 Mistake or ignorance of statute law

- (1) **A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.**
- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:
 - (a) the Act is expressly or impliedly to the contrary effect;
or
 - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.

9.4 Mistake or ignorance of subordinate legislation

- (1) **A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence he or she is mistaken about, or ignorant of, the existence or content of the subordinate legislation that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.**

- (2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:
- (a) the subordinate legislation is expressly or impliedly to the contrary effect; or
 - (b) the ignorance or mistake negates a fault element that applies to a physical element of the offence; or
 - (c) at the time of the conduct, copies of the subordinate legislation have not been made available to the public or to persons likely to be affected by it, and the person could not be aware of its content even if he or she exercised due diligence.
- (3) In this section:
- “**available**” includes available by sale;
- “**subordinate legislation**” means an instrument of a legislative character made directly or indirectly under an Act, or in force directly or indirectly under an Act.

9.5 Claim of right

- (1) **A person is not criminally responsible for an offence that has a physical element relating to property if:**
- (a) **at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and**
 - (b) **the existence of that right would negate a fault element for any physical element of the offence.**
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

Division 10 - Circumstances involving external factors

10.1 Intervening conduct or event

A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

- (a) **the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and**
- (b) **the person could not reasonably be expected to guard against the bringing about of that physical element.**

10.2 Duress

- (1) **A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.**
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way that the threat can be rendered ineffective; and
 - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

10.3 Sudden or extraordinary emergency

- (1) **A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.**
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
 - (a) circumstances of sudden or extraordinary emergency exist; and
 - (b) committing the offence is the only reasonable way to deal with the emergency; and
 - (c) the conduct is a reasonable response to the emergency.

10.4 Self-defence

- (1) **A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.**
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
 - (a) to defend himself or herself or another person; or
 - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
 - (c) to protect property from unlawful appropriation, destruction, damage or interference; or
 - (d) to prevent criminal trespass to any land or premises; or
 - (e) to remove from any land or premises a person who is committing criminal trespass;and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
 - (a) to protect property; or
 - (b) to prevent criminal trespass; or
 - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
 - (a) the person is responding to lawful conduct; and
 - (b) he or she knew that the conduct was lawful.However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

PART 2.4 - EXTENSIONS OF CRIMINAL RESPONSIBILITY

Division 11

11.1 Attempt

- (1) **A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.**
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

- (4) A person may be found guilty even if:
 - (a) committing the offence attempted is impossible; or
 - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying-provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose) or section 11.5 (conspiracy).

11.2 Complicity and common purpose

- (1) **A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.**
- (2) For the person to be guilty:
 - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
 - (b) the offence must have been committed by the other person.

- (3) For the person to be guilty, the person must have intended that:
 - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
 - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
 - (a) terminated his or her involvement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

11.3 Innocent agency

A person who:

- (a) **has, in relation to each physical element of an offence, a fault element applicable to that physical element; and**
- (b) **procures conduct of another person that (whether or not together with the conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;**

is taken to have committed that offence and is punishable accordingly.

11.4 Incitement

- (1) **A person who urges the commission of an offence is guilty of the offence of incitement.**
- (2) For the person to be guilty, the person must intend that the offence incited be committed.
- (3) A person may be found guilty even if committing the offence incited is impossible.

- (4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.
- (5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).
Maximum penalty:
 - (a) if the offence incited is punishable by life imprisonment - imprisonment for 10 years; or
 - (b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment - imprisonment for 7 years; or
 - (c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more - imprisonment for 5 years; or
 - (d) if the offence is otherwise punishable by imprisonment - imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
 - (e) if the offence incited is not punishable by imprisonment - the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B (2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B (3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

11.5 Conspiracy

- (1) **A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.**

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

- (2) For the person to be guilty:
 - (a) the person must have entered into an agreement with one or more other persons; and
 - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
 - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (3) A person may be found guilty of conspiracy to commit an offence even if:
 - (a) committing the offence is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible;
 - (ii) a person for whose benefit or protection the offence exists; or
 - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
 - (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
 - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
 - (a) withdrew from the agreement; and

- (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

11.6 References in Acts to offences

- (1) A reference in an Act to an offence against an Act (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.
- (2) A reference in an Act (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.
- (3) Subsection (1) or (2) does not apply if an Act is expressly or impliedly to the contrary effect.

Note: Sections 11.2 (complicity and common purpose) and 11.3 (innocent agency) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY

Division 12

12.1 General principles

- (1) **This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.**
- (2) **A body corporate may be found guilty of any offence, including one punishable by imprisonment.**

Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

[Drafting note: The note will have to be adapted to suit the relevant jurisdiction.]

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2) (c) or (d) include:
 - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:
 - “**board of directors**” means the body (by whatever name called) exercising the executive authority of the body corporate;
 - “**corporate culture**” means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place;
 - “**high managerial agent**” means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

- (a) negligence is a fault element in relation to a physical element of an offence; and
- (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems or conveying relevant information to relevant persons in the body corporate.

12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
- (b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

PART 2.6 - PROOF OF CRIMINAL RESPONSIBILITY*Division 13***13.1 Legal burden of proof prosecution**

- (1) **The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.**

Note: See section 3.2 on what elements are relevant to a person's guilt.

- (2) **The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.**

- (3) In this Code:

“legal burden”, in relation to a matter, means the burden of proving the existence of the matter.

13.2 Standard of proof prosecution

- (1) **A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.**
- (2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

13.3 Evidential burden of proof - defence

- (1) **Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.**
- (2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.
- (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
- (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
- (5) The question whether an evidential burden has been discharged is one of law.
- (6) In this Code:

“evidential burden”, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

13.4 Legal burden of proof - defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or**
- (b) requires the defendant to prove the matter; or**
- (c) creates a presumption that the matter exists unless the contrary is proved.**

13.5 Standard of proof - defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

13.6 Use of averments

A law that allows the prosecution to make an averment is taken not to allow the prosecution:

- (a) to aver any fault element of an offence; or**
- (b) to make an averment in prosecuting for an offence that is directly punishable by imprisonment.**

CHAPTER 3 - THEFT, FRAUD, BLACKMAIL, FORGERY, BRIBERY AND RELATED OFFENCES

PART 3.1 - PURPOSE AND DEFINITIONS

Division 14

14.1 Purpose

The purpose of this Chapter is to codify the law of theft, fraud, blackmail, forgery, bribery and related offences.

14.2 Dishonesty

- (1) In this Chapter, “**dishonest**” means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.
- (2) In a prosecution for an offence, **dishonesty** is a matter for the trier of fact.

Note: Section 15.2 affects the meaning of dishonesty in offences related to theft and section 17.2(3) affects the meaning of dishonesty in the offences of obtaining property or a financial advantage by deception. See also section 9.5 (Claim of right).

14.3 Gain and loss

- (1) In this Chapter:
“**gain**” or “**loss**” means gain or loss in money or other property, whether temporary or permanent, and:
 - (a) “**gain**” includes keeping what one has; and
 - (b) “**loss**” includes not getting what one might get.
- (2) In this Chapter:
 - (a) “**obtaining**” a gain means obtaining a gain for oneself or for another; and
 - (b) “**causing**” a loss means causing a loss to another.

14.4 Property

In this Chapter:

“**property**” includes all real or personal property, including:

- (a) money; and
- (b) things in action or other intangible property; and
- (c) electricity; and
- (d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person.

14.5 Person to who property belongs

For the purposes of this Chapter, **property belongs** to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

Drafting note: The following provision is only required in jurisdictions that have laws that prevent a husband or wife from taking proceedings against the other party to the marriage for an offence in relation to property belonging to the husband or wife if the parties were living together at the time (for example, see section 16A of the Married Persons (Property and Torts) Act 1901 (NSW).) The provision could be included in the relevant legislation.

14.6 Proceedings for offence may be taken by husband against wife and vice versa

Despite anything to the contrary in any other Act, proceedings for an offence against this Chapter relating to property belonging, or claimed to belong, to a person who was married at the time of the alleged offence may be taken by the person against the other party to the marriage, whether or not the parties were living together at the time of the alleged offence.

PART 3.2 - THEFT AND RELATED OFFENCES***Division 15 - Theft*****15.1 Theft**

- (1) A person who dishonestly appropriates property belonging to another, with the intention of permanently depriving the other of it, is guilty of the offence of theft.

Maximum penalty: Imprisonment for 10 years.

- (2) The following provisions of this Division apply to the offence of theft.

15.2 Dishonesty - interpretation

- (1) A person's appropriation of property belonging to another is not dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. This subsection does not apply if the person appropriating the property held it as trustee or personal representative.
- (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

15.3 Appropriation - interpretation

- (1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom it belongs, amounts to an appropriation of the property. This includes, if a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner.
- (2) If property or a right or interest in property is or purports to be transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring, does not, because of any defect in the transferor's title, amount to an appropriation of the property.

15.4 Property - interpretation

- (1) A person cannot commit theft of land or things forming part of land and severed from it by the person or by the person's directions, except in the following cases:

- (a) when the person is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and the person appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in the person; or
 - (b) when the person is not in possession of the land and appropriates any thing forming part of the land by severing it or causing it to be severed, or after it has been severed; or
 - (c) when, being in possession of the land under a tenancy, the person appropriates the whole or part of any fixture or structure let to be used with the land.
- (2) For the purposes of this section:
- (a) **land** does not include incorporeal hereditaments;
 - (b) **tenancy** means a tenancy for years or any less period, and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and **let** is to be construed accordingly.

15.5 Belonging to another - interpretation

- (1) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust. Accordingly, an intention to defeat the trust is an intention to deprive any such person of the property.
- (2) If a person receives property from or on account of another, and is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds belong (as against the person) to the other.
- (3) If a person gets property by another's fundamental mistake, and is under a legal obligation to make restoration (in whole or in part) of the property or its proceeds, then to the extent of that obligation the property or proceeds belongs (as against the person) to the person entitled to restoration. Accordingly, an intention not to make restoration is an intention to deprive the person so entitled of the property or proceeds, and an appropriation of the property or proceeds without the consent of the person entitled to restoration.

- (4) For the purposes of subsection (3), a fundamental mistake is:
 - (a) a mistake about the identity of the person getting the property or a mistake as to the essential nature of the property; or
 - (b) a mistake about the amount of any money, direct credit into an account, cheque or other negotiable instrument if the person getting the property is aware of the mistake at the time of getting the property.
- (5) Property of a corporation sole belongs to the corporation despite a vacancy in the corporation.
- (6) If property belongs to 2 or more persons, a reference in this Division to the person to whom the property belongs is a reference to all those persons.

15.6 Intention of permanently depriving - interpretation

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person's intention is to treat the thing as his or her own to dispose of regardless of the other's rights. A borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1), if a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return that the person may not be able to perform, this (if done for purposes of his or her own and without the other's authority) amounts to treating the property as his or her own to dispose of regardless of the other's rights.

15.7 General deficiency

A person may be convicted of theft of all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were appropriated over a period of time.

Division 16 - Offences related to theft

16.1 Robbery

A person who commits theft and, at the time of or immediately before or immediately after doing so:

- (a) uses force on any person; or
 - (b) threatens to use force then and there on any person,
- with intent to commit theft or to escape from the scene, is guilty of the offence of robbery.

Maximum penalty: Imprisonment for 12 years and 6 months.

16.2 Aggravated robbery

A person who:

- (a) commits any robbery in company with one or more other persons; or
- (b) commits any robbery and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated robbery.

Maximum penalty: Imprisonment for 20 years.

16.3 Burglary

- (1) A person who enters or remains in any building as a trespasser with intent:

- (a) to commit theft in the building; or
- (b) to commit an offence in the building that is punishable with imprisonment for 5 years or more and that involves causing harm to a person or damage to property,

is guilty of the offence of burglary.

Maximum penalty: Imprisonment for 12 years and 6 months.

- (2) A person is not a trespasser merely because the person is permitted to enter or remain in the building for a purpose that is not the person's intended purpose, or as a result of fraud, misrepresentation or another's mistake.

- (3) In this section, "**building**" includes:

- (a) a part of a building; or

- (b) a structure (whether or not moveable), a vehicle, or vessel, that is used, designed or adapted for residential purposes.

16.4 Aggravated burglary

A person who:

- (a) commits any burglary in company with one or more other persons; or
- (b) commits any burglary and at the time has an offensive weapon with him or her,

is guilty of the offence of aggravated burglary.

Maximum penalty: Imprisonment for 15 years.

16.5 Taking motor vehicle without consent

(1) A person:

- (a) who dishonestly takes a motor vehicle belonging to another person; and
- (b) who does not have the consent to do so from a person to whom the vehicle belongs,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

16.6 Making-off without payment

(1) A person who, knowing that immediate payment for any goods supplied or services provided is required or expected from him or her, dishonestly makes off without having paid and with intent to avoid payment of the amount due, is guilty of an offence

Maximum penalty: Imprisonment for 2 years.

(2) This section does not apply if the supply of the goods or the provision of the service is contrary to law.

(3) For the purposes of this section, **immediate payment** includes payment at the time of collecting goods in respect of which the service has been provided.

16.7 Going equipped for theft, robbery, burglary or other offences

(1) A person who, when not at home, has with him or her any article with intent to use it in the course of or in connection with any theft or related offence is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

- (2) For the purposes of this section, a **related offence** is robbery, burglary, an offence against section 16.5 or an offence against section 17.2.

16.8 Receiving

- (1) A person who dishonestly receives stolen property, knowing or believing the property to be stolen, is guilty of the offence of receiving.

Maximum penalty: Imprisonment for 10 years.

- (2) Property is **stolen property** if:
- (a) it was appropriated or obtained in the course of any theft or any offence against section 17.2; or
 - (b) it was appropriated or obtained outside this jurisdiction in the course of an offence outside this jurisdiction (and that would have amounted to theft or an offence against section 17.2 if it had occurred in this jurisdiction); or
 - (c) it is (in whole or in part) the proceeds of sale of, or property exchanged for, stolen property and is in the possession or custody of the person who so appropriated or obtained the stolen property or who received the stolen property (or the proceeds of property) in the course of an offence against this section.

Stolen property does not include land obtained in the course of an offence against section 17.2.

- (3) Property ceases to be stolen property:
- (a) after the property is restored to the person from whom it was appropriated or obtained or to other lawful possession or custody; or
 - (b) after that person or any person claiming through him or her ceases to have any right to restitution in respect of the property.
- (4) A person charged with theft may be convicted of receiving and a person charged with receiving may be convicted of theft. If the trier of fact is satisfied beyond reasonable doubt that a person has committed either theft or receiving but is unable to determine

which of those offences the person has committed, the person is to be convicted of theft.

- (5) A person may not be convicted of both theft and receiving in respect of the same property if the person retains possession or custody of the property.
- (6) In proceedings for the offence of receiving, it does not matter whether the property concerned was stolen before or after the commencement of this section.

PART 3.3 - FRAUD

Division 17

17.1 Deception - definition

In this Part, “**deception**” means any deception, by words or other conduct, as to fact or as to law, including:

- (a) a deception as to the intentions of the person using the deception or any other person; or
- (b) conduct by a person that causes a computer system or any machine to make a response that the person is not authorised to cause it to do.

17.2 Obtaining property by deception

- (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) For the purposes of this section, a person is to be treated as **obtaining property** if the person obtains ownership, possession or control of it, and **obtain** includes obtaining for another or enabling oneself or another to obtain or to retain.
- (3) A person's obtaining of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.
- (4) Section 15.6 applies to this section as if references to appropriating property were references to obtaining property.
- (5) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.
- (6) A conviction for an offence against this section is an alternative verdict to a charge for the offence of theft and a conviction for the offence of theft is an alternative verdict to a charge for an offence against this section.

17.3 Obtaining financial advantage by deception

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

Maximum penalty: Imprisonment for 10 years.

17.4 Conspiracy to defraud

- (1) A person who conspires with another person to do something dishonestly:
- (a) with the intention of obtaining a gain; or
 - (b) with the intention of causing a loss or being reckless with respect to that result; or
 - (c) with the intention of influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
 - (b) the person and at least one other party to the agreement must have intended to do the thing pursuant to the agreement; and
 - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
- (3) A person may be found guilty of an offence against this section even if:
- (a) doing the thing, or obtaining the gain or causing the loss, or influencing the exercise of the public duty is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is at least one of the following:
 - (i) a person who is not criminally responsible;
 - (ii) in the case of an agreement to commit an offence - a person for whose benefit or protection the offence exists; or
 - (d) subject to subsection (4), all other parties to the agreement have been acquitted of the offence.

- (4) A person cannot be found guilty of an offence against this section if:
 - (a) all other parties to the agreement have been acquitted of such an offence and a finding of guilty would be inconsistent with their acquittal; or
 - (b) in the case of an agreement to commit an offence - he or she is a person for whose benefit the offence exists.
- (5) A person cannot be found guilty of an offence against this section if, before the commission of an overt act pursuant to the agreement, the person:
 - (a) withdrew from the agreement; and
 - (b) took all reasonable steps to prevent the doing of the thing.
- (6) A court may dismiss a charge of an offence against this section if it thinks that the interests of justice require it to do so.
- (7) In the case of an agreement to commit an offence, any defences, procedures, limitations of qualifying provisions that apply to the offence apply also to the offence against this section.
- (8) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence against this section before the necessary consent has been given.

PART 3.4 - BLACKMAIL***Division 18*****18.1 Blackmail**

A person who makes any unwarranted demand with menaces:

- (a) with the intention of obtaining a gain or of causing a loss; or
- (b) with the intention of influencing the exercise of a public duty,

is guilty an offence.

Maximum penalty: Imprisonment for 12 years and 6 months.

18.2 Unwarranted demands - interpretation

- (1) A **demand is unwarranted** unless the person believes that he or she has reasonable grounds for making the demand and reasonably believes that the use of the menaces is a proper means of reinforcing the demand.
- (2) The demand need not be a demand for money or other property.

18.3 Menaces - interpretation

- (1) For the purposes of this Division, **menaces** includes:
 - (a) an express or implied threat of any action detrimental or unpleasant to another person; and
 - (b) a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office.
- (2) A threat against an individual does not constitute a menace unless:
 - (a) the threat would cause an individual of normal stability and courage to act unwillingly in response to the threat; or
 - (b) the threat would cause the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.
- (3) A threat against a Government or body corporate does not constitute a menace unless:

- (a) the threat would ordinarily cause an unwilling response, or
 - (b) the threat would cause an unwilling response because of a particular vulnerability of which the person making the threat is aware.
- (4) It is immaterial whether the menaces relate to action to be taken by the person making the demand.

PART 3.5 - FORGERY AND RELATED OFFENCES*Division 19***19.1 Definitions - general**

- (1) In this Part:
- “document” includes:
- (a) any paper or other material on which there is writing or on which there are marks, symbols or perforations that are capable of being given a meaning by qualified persons qualified or machines; or
 - (b) a disc, tape or other article from which sounds, images or messages are capable of being reproduced; or
 - (c) a card by means of which credit or other property can be obtained; or
 - (d) a formal or informal document.
- (2) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.
- (3) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

19.2 Definition - false document

- (1) For the purposes of this Part, a **document is false** if, and only if, the document purports:
- (a) to have been made in the form in which it is made by a person who did not in fact make it in that form; or
 - (b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or
 - (c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
 - (d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or

- (e) to have been altered in any respect by a person who did not in fact alter it in that respect; or
 - (f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
 - (g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
 - (h) to have been made or altered by an existing person who did not in fact exist.
- (2) For the purposes of this Part, a person is to be treated as **making a false document** if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart from that alteration).
- (3) For the purposes of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

19.3 Forgery - making false document

A person who makes a false document with the intention that the person or another will dishonestly use it:

- (a) to induce some person to accept it as genuine; and
- (b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.4 Using false document

A person who dishonestly uses a false document, knowing that it is false, with the intention of:

- (a) inducing some person to accept it as genuine; and
- (b) by reason of so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.5 Possession of false document

A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will dishonestly use it:

- (a) to induce some person to accept it as genuine; and
- (b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.6 Making or possession of devices etc. for making false documents

- (1) A person who makes, or has in his or her possession, any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, with the intention that the person or another person will use it to commit forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

- (2) A person who, without lawful excuse, makes or has in his or her possession any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

19.7 False accounting

A person who dishonestly, with the intention of obtaining a gain or causing a loss:

- (a) destroys, defaces, conceals or falsifies any document made or required for any accounting purpose; or
- (b) in furnishing information for any purpose, produces or makes use of any document made or required for any accounting purpose that to his or her knowledge is or may be misleading, false or deceptive in a material particular

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.8 False statement by officer of organisation

- (1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly publishes or concurs in publishing a document containing a statement or account that to his or her knowledge is or may be misleading, false or deceptive in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

- (2) In this section:

“**creditor**” of an organisation, includes a person who has entered into a security for the benefit of the organisation;

“**officer**” of an organisation, includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation;

“**organisation**” means any body corporate or unincorporated association.

PART 3.6 - BRIBERY AND OTHER CORRUPT PRACTICES*Division 20***20.1 Definitions**

(1) In this Part:

“**agent**” includes the following:

- (a) A person who acts on behalf of another person with that other person’s actual or implied authority (in which case the other person is the principal).
- (b) A public official (in which case the Government or Government agency of or for which the official acts is the principal).
- (c) An employee (in which case the employer is the principal).
- (d) A legal practitioner acting on behalf of a client (in which case the client is the principal).
- (e) A partner (in which case the partnership is the principal).
- (f) An officer of a corporation or other organisation, whether or not employed by it (in which case the corporation or other organisation is the principal).
- (g) A consultant to any person (in which case that person is the principal).

“**benefit**” includes any advantage and is not limited to property;

“**function**” of an agent includes any power, authority or duty of the agent or any function that the agent holds himself or herself out as having;

“**exercise**” a function includes perform a duty;

“**public official**” means any official having public official functions or acting in a public official capacity, and includes the following:

- (a) A member of Parliament or of a local government authority.
- (b) A Minister of the Crown.
- (c) A judicial officer.

- (d) A police officer.
- (e) A person appointed by the Government or a Government agency to a statutory or other office.
- (f) A person employed by the Government or a Government agency (including a local government authority).

- (2) For the purposes of this Part, a person is an agent or principal if the person is, or has been or intends to be, an agent or principal.
- (3) For the purposes of this Part, the provision of a benefit may be dishonest notwithstanding that the provision of the benefit is customary in any trade, business, profession or calling.

20.2 (1) Giving a bribe. A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person with the intention that the agent will provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) **Receiving a bribe.** An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention of providing a favour is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (3) For the purposes of this section, a **favour** is:
 - (a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or
 - (b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or
 - (c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

20.3 Other corrupting benefits

- (1) **Giving other corrupting benefits.** A person who dishonestly provides, or offers or promises to provide, a benefit to any agent or other person in any case where the receipt, or expectation of the receipt, of the benefit would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (2) **Receiving other corrupting benefits.** An agent who dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another person in any case where the receipt, or expectation of the receipt, of the benefit by the agent would in any way tend to influence the agent to provide a favour is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

- (3) For the purposes of this section, a **favour** is:
- (a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or
 - (b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or
 - (c) the agent causing or influencing his or her principal or other agents of the principal to do or not to do something.

20.4 Payola

A person who:

- (a) holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services; and
- (b) dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another in order to influence his or her selection, examination or opinion,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

20.5 Abuse of public office

A public official who dishonestly:

- (a) exercises any function or influence that the official has because of his or her public office; or
- (b) refuses or fails to exercise any function the official has because of his or her public office; or

(c) uses any information the official has gained because of his or her public office,

with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Contributors to Conspiracy to Defraud:

- 1 Aboriginal and Torres Strait Islander Commission
- 2 Australian Bureau of Criminal Intelligence
- 3 Australian Federal Police
- 4 Australian Institute of Criminology
- 5 Australian Institute of Company Directors
- 6 Australian Law Reform Commission
- 7 Commonwealth Department of Primary Industries and Energy
- 8 Commonwealth Director of Public Prosecutions
- 9 Department of Defence
- 10 Director of Public Prosecutions, NSW
- 11 Director of Public Prosecutions, NT
- 12 Director of Public Prosecutions, Victoria
- 13 Director of Public Prosecutions, WA
- 14 Independent Commission Against Corruption
- 15 Judge P Mullaly
County Court of Victoria
- 16 Justice T J Higgins
Supreme Court of the ACT
- 17 Land Titles Office
- 18 Law Society of NSW
- 19 Legal Aid Office of Queensland
- 20 Legal Aid, Western Australia
- 21 Ministry for Police and Emergency Services - NSW
- 22 Northern Territory Police
- 23 NSW Police Service
- 24 Police Commissioners' Policy Advisory Group
- 25 Queensland Police Service
- 26 Sir Harry Gibbs, GCMG, AC, KBE
- 27 South Australia Police
- 28 Victoria Police