

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S28 of 2013

BETWEEN

ROBERT FRANCIS AGIUS

Appellant



and

THE QUEEN

Respondent

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APPELLANT'S FURTHER AMENDED SUBMISSIONS

Part I: Certification

1. I certify that these submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. This appeal raises the following issues:
 - a) Does proof of a conspiracy alleged to have been entered into contrary to *Criminal Code Act 1995* (the Code) s.135.4(5) require evidence of an agreement entered into on or after 24 May 2001?
 - b) Do the Code ss.135.4(5) and 135.4(9) require such proof?
 - c) Can the Code s 135.4(5) apply retrospectively to an agreement entered into before 24 May 2001 as proof of a conspiracy charged under s 135.4(5)?
 - d) Can the physical element of conduct constituted by a conspiracy alleged to have been entered into contrary to s. 135.4(5) of the Code be a 'state of affairs' for the purposes of the definition of conduct in s.4.1(2) of the Code?

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Part III: Certification s 78B Judiciary Act 1903

3. No notice in compliance with section 78B of the *Judiciary Act* 1903 is required.

Part IV: Citations of primary and intermediate courts

4. Primary Court

Supreme Court of New South Wales Criminal Division, Simpson J:

R v Agius; R v Abibadra; R v Jandagi; R v Zerafa [2011] NSWSC 367

5. Intermediate Court

New South Wales Court of Criminal Appeal, Tobias AJA Johnson and Hall JJ:

10 *Agius v R; Abibadra v R; Jandagi v R; Zerafa v R* (2011) 80 NSWLR 486.

Part V: Statement of narrative facts

6. On 31 August 2010 the Director of Public Prosecutions of the Commonwealth presented an indictment in the Supreme Court of New South Wales against the appellant and the three co-accused alleging 2 counts of conspiracy:

- a. between 01/01/97 and 23/05/2001 contrary to *Crimes Act 1914 (Crimes Act)* ss.86(1) and 29D;
- b. between 24/05/2001 and 10/04/2008 contrary to the Code s.135.4(5).

7. In particulars subsequently delivered by the Director it is alleged:

- 20
- a. there was but one agreement (particular 1);
 - b. the agreement was “between about 01 January 1997 and about 10 April 2008” (particular 1);
 - c. the agreement was formed “at a time not known to the prosecution but between 01 January 1997 and 01 May 1997” (particular 6);

- d. the appellant was a party to the conspiracy by the end of 2000 (particular 6);
 - e. the conspiracy is “represented by two counts to reflect a change made to the name and wording of the section under which the first count was drafted which came into effect at about the commencement date of the second count (particular 4).”
8. The indictment was later amended so that the second count was alleged to have occurred between 24/5/2001 and 23/10/2006.
 9. On 27 April 2011 the appellant moved that proceedings under Count 2 of the indictment be permanently stayed as an abuse of process because there was neither an allegation nor proof of a second agreement constituting a second conspiracy.
 10. On 04 May 2011 Simpson J refused the application for a stay: (2011) NSWSC 367.
 11. On 06 May 2011 the appellant applied to the Court of Criminal Appeal for leave to appeal against the judgment of Simpson J pursuant to *Criminal Appeal Act* 1912 s.5F. On 24 May 2011 the Court of Criminal Appeal granted leave to appeal but dismissed the appeal: (2011) 80 NSWLR 486; (2011) NSWCCA 119.
 12. The basis of both decisions was that:
 - a. A condition of guilt required by Code s 135.4(9) could be satisfied by proof of an agreement entered into before s 135.4(5) commenced: (Simpson J [30]; CCA [71]-[72]); and
 - b. The physical element required by s.135.4(5) and the requirement of s.135.4(9)(a) could be satisfied by recourse to a “state of affairs” as satisfying the definition of conduct in Code ss.4.1(1)(a) and 4.1(2): (Simpson J [45]; CCA [76] – [84]).

Part VI: Argument

NEED FOR AGREEMENT

(NOTICE OF APPEAL GROUND 12)

13. *Crimes Act* s.29D was repealed on 24 May 2001. The Code s.135.4 commenced on 24 May 2001. As and from 24 May 2001 the offence of conspiracy to defraud the Commonwealth was “wholly contained (and codified) in s.135.4 of the Code”: CCA par.25(16). When *Crimes Act* ss.29D and 86(4) were repealed they continued to apply to conduct before the repeal (*Transitional Provisions and Acts Interpretation Act* s.8) but not after. Section 135.4 of the Code could apply only to conduct on or after 24 May 2001.
- 10 Absent a second agreement, count 2 depends for its validity upon an agreement entered into before the Code section commenced, which would give the Code section a retrospective effect (see later).
14. Sections 135.4(5), 135.4(9)(a) and (b), and this Court’s exposition of s.11.5, plainly require the following proofs to sustain a conviction for a conspiracy contrary to s.135.4(5):
- a. an agreement must have been entered with one or more other persons to commit a fraud;
 - b. an intention by the accused to enter the agreement;
 - c. an intention by the accused and at least one other person to commit the fraud the object of the agreement;
 - 20 d. the accused or at least one other party to the agreement must have committed an overt act.
15. In *R v LK and RK* (2010) 241 CLR 177 this Court closely examined the offence of conspiracy created by the Code s.11.5. The judgments are also relevant to conspiracies charged under s.135.4(5). The following is a brief table comparing one section with the other:

CREATION OF OFFENCE AND PHYSICAL ELEMENT	REQUIREMENT FOR A FINDING OF GUILT	COMPARATIVE SECTION
s.11.5(1), s.135.4(5)	The person must have entered an agreement with one or more other persons.	s.11.5(2)(a), s.135.4(9)(a)
	The person and at least one other party to the agreement must have intended an offence be committed pursuant to the agreement.	s.11.5(2)(b), s.135.4(9)(b)
	The person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.	s.11.5(2)(c), s.135.4(9)(c)

16. Relevantly, the Court held (in brief):

[56] The purpose of s.11.5(2) was to operate on the common law by more clearly distinguishing the elements of agreement and intention to commit the offence the subject of the conspiracy.

[57], [93] and s.11.5(2) operates on the common law concept of conspiracy
[107] but cannot be taken as defining the elements of the offence.

[72] and [100] The Code imported the common law of conspiracy.

[78] and [105] Necessity for intention.

[132] and [133] The reference in s.11.5(2)(a) to “an agreement” is to the
 agreement criminalised in s.11.5(1). Paragraphs (a) and (b)
[117] of s.11.5(2) are epexegetical of what it is to conspire to
 commit an offence within the meaning of s.11.5(1). Section
 11.5(2)(b) looks to the time at which the agreement was
 entered.

17. The requirements of proof of an agreement were reinforced in [141].

EXPRESS STATUTORY MODIFICATION AND RETROSPECTIVITY

(NOTICE OF APPEAL GROUNDS 23(a) AND (c))

18. Subsection 135.4(9) and paragraphs (a), (b) and (c) all govern proof of the offence created by s.135.4(5). They specify particular requirements of a finding of guilt and are therefore express statutory modifications of the common law of conspiracy. A person cannot be
 10 guilty of a conspiracy contrary to s.135.4(5) unless each of the three conditions of guilt in s.135.4(9)(a), (b) and (c) have been proven. None of those conditions can be satisfied by evidence of events occurring before the offence created by s.135.4(5) commenced operation on 24 May 2001.
19. The Court of Criminal Appeal erred in finding that the condition of guilt required by s.135.4(9) could be satisfied by proof of an agreement entered into before s.135.4(5)

commenced [71]-[72]. The finding cannot be reconciled with the requirement that there must be proof of an overt act (s.135.4(9)(c)). It assumes s.135.4(5) has retrospectivity which it does not have.

20. The Court of Criminal Appeal therefore erred in its approach to the express statutory modifications made by s.135.4(9) of the Code.

21. There is no evidence, nor an allegation, of a second agreement to support count 2.

According to the prosecution case, the agreement was entered into by 1 May 1997 and the four participants were all parties to it by the end of 2000. If the conspiracy endured until 23 October 2006, on the prosecution argument they must have continued to be parties to it, having become parties by the end of 2000. It is not alleged anyone left and re-joined on or after 24 May 2001. If, as the Crown says, and Simpson J said [35], the offence of conspiracy depends upon the existence of, or participation in an agreement, and not the precise timing of its formation, the applicants were already parties to an agreement which the prosecution seems to say they joined a second time. There is no such evidence.

R v DOOT

22. *Doot* (1973) AC 807, relied on by the Crown and cited by the primary judge at [36] to [38] and by the Court of Criminal Appeal at [51], [52] and [57] is not analogous to the present case. The applicant does not contend that conspiracy is not a continuing offence. In *Doot* the agreement was formed outside the United Kingdom and continued when the conspirators entered England, but there was no question of the conduct in England being the product of a second conspiracy. *Doot* was decided according to the common law of England in 1973. It sits awkwardly with the common law of Australia as modified by the Criminal Code.

23. The primary judge and the Court of Criminal Appeal [72] were wrong in holding that as the offence of conspiracy depends upon the existence of, or participation in an agreement and not the precise timing of its formation, the inclusion of count 2 was justified.

RETROSPECTIVITY AND LEGISLATIVE HISTORY

24. The first count is brought under ss.86(1) and 29D of the *Crimes Act (Cth)* and alleges a conspiracy to defraud the Commonwealth between 01 January 1997 and 23 May 2001.
25. The second count is brought under s.135.4(5) of the Criminal Code and alleges a conspiracy between 24 May 2001 and 23 October 2006.
26. As to the legislative history, see paragraph 48 below.
27. The transitional provisions contained in the *Criminal Code Amendment (Theft, Fraud*
 10 *Bribery and Related Offences) Act 2000* related to the repeal of ss.29D and 86(2) of the *Crimes Act*. The effect of the transitional provisions was to save the criminal effect of conduct participated in prior to repeal of both sections on 24 May 2001.
28. The transitional provision is as follows:
- 418 – Transitional – pre-commencement offences*
- (1) *Despite the amendment or repeal of a provision by this Schedule, that provision continues to apply, after the commencement of this item, in relation to:*
- (a) *an offence committed before the commencement of this item; or*
- (b) *proceedings for an offence alleged to have been committed before the commencement of this item; or*
- 20 (c) *any matter connected with, or arising out of, such proceedings;*
- as if the amendment or repeal had not been made.*
- (2) *Subitem (1) does not limit the operation of section 8 of the Acts Interpretation Act 1901.*
29. Item 418 does not extend the application of ss.29D and 86(2) to conduct which takes place after 24 May 2001, but preserves their application to conduct which took place before their repeal.

30. Accordingly, there was no need for the Crown to charge two counts of conspiracy in this matter where the Crown asserted:
- a. An agreement was formed before 24 May 2001;
 - b. Steps were taken in furtherance of the conspiracy from 1997 to 2006.
31. Such conduct could adequately be prosecuted by proceeding on an indictment alleging a breach of ss.29D and 86(2) because of their continuing effect pursuant to Item 418 of Schedule 2 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.
- 10 32. Put simply, a conspiracy entered into contrary to ss.29D and 86(1)(2) prior to 24 May 2001 could still be prosecuted after the repeal. Also, it was open to the CDPP to bring charges in respect of substantive offences (Part 7.3).
33. There is nothing in the transitional provisions to either the *Code Amendment Act* or the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* that shows an intention to give the extended definition of conduct in s.4.1 as including a ‘state of affairs’ or s.135.4, a retrospective effect.
34. There is also nothing in the Explanatory Memorandum or the Second Reading Speech to the Code to suggest that either ss.4.1 or 135.4 were to have a retrospective effect.
35. In fact, the Explanatory Memorandum evidences a clear intention for the Criminal Code to be prospective in nature. See the notes to Clause 2 contained in the Explanatory
20 Memorandum that related to commencement of the Criminal Code.
36. The only relevant statement contained in the Explanatory Memorandum in relation to conspiracy is that contained in the discussion on the general conspiracy sections in s.11.5 (relevantly the same as the provisions in s.135.5(9)) as follows:

“Proposed paragraphs 11.5(2) (a) and (b) are drafted to clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement. It was decided that intention was required and that recklessness would not suffice. This is in accordance

with the proposals of the Gibbs Committee, (s.7D(1)(c)), and the common law (Gerakiteys (1983) 153 CLR 317). The concept of recklessness is foreign to an offence based wholly on agreement.

The requirement of intention to commit the crime which was the object of the agreement (proposed paragraph 11.5(2)(b)) will prevent conviction for conspiracy where, for example, the only parties to the agreement are the accused and an agent provocateur.”

37. The drafter’s intent in relation to 11.5(2)(a) and (b) is clear – the intention to commit the crime had to be central in the minds of the conspirators when they entered the agreement.

10 38. The interpretation urged by the Crown seeks to separate the acts of forming the intention from the agreement and has a retrospective effect. This was not the intention of the drafters of sections 4.12 or 134.5 of the Code.

39. The common law assumes that Parliament may legislate retrospectively, but in the absence of clear words it must be taken that Parliament did not so intend. Legislation therefore, in the absence of clear words to the contrary, must not be given a retrospective construction.

40. The principle was stated thus by R S Wright J in *Re Athlumney* (1898) 2 QB 547:

20 *“Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be constructed as prospective only.”*

41. And see, for example, *Maxwell v Murphy* (1956 – 1957) 90 CLR 261 at [269] and [283] and the judgment of Handley JA in *Roads and Traffic Authority of NSW v Welling and Comerford* (2003) NSWCA 14 at [21].

42. Examples of words clearly denoting retrospectivity can be seen in the *Crimes Act (Cth)* 1915, s.3. See *The King v Kidman and Others* (1915) 20 CLR 425. See also the *War*

Crimes Amendment Act 1988 and Polyukhovich v The Commonwealth (1991) 172 CLR 501.

43. There are no such indications in the legislation under consideration.

STATE OF AFFAIRS

(NOTICE OF APPEAL GROUND 23(b))

44. The primary judge [45] and the Court of Criminal Appeal [79] were wrong in holding that the physical element required by s.135.4(5) could be provided by recourse to a “state of affairs” as satisfying the definition of conduct in s.4.1(1)(a) and s.4.1(2). As French CJ in *R v LR and RK* observed at [42] “the concept of engaging in conduct which is a state of affairs, is not explained.” The physical element required by s.135.4(5) and the requirement of s.135.4(9)(a) cannot be set to one side in favour of a doubtful interpretation of the extent of the meaning of “state of affairs” in the relevant context. The CCA findings run contrary to authorities such as *R v Beckwith* (1976)135 CLR 569 at [575]-[577] and *Krakouer v R* (1998) 194 CLR 202 at [62]. Authorities dealing with “state of affairs” are directed to passive circumstances rather than actions (for example) *R v Saengsai & Ors* (2004) 61 NSWLR 135 at [55] referring to *R v He Kaw Teh*, *R v Tang* (2008) 237 CLR 1 at [46]-[47] and *Muslimim v R* (2010) 240 CLR 470 at [16].
45. In relation to clause 4.2 (Voluntariness) the Explanatory Memorandum provided an example of what may be a ‘state of affairs’ for the purposes of s.4.1 in the following terms:
- “Proposed section 4.2(5) provides that if the offence consists only of a state of affairs, for example being a vagrant, then the state of affairs can only be voluntary if the person is capable of exercising control over it.”*
46. “State of affairs” is seen by dictionaries to be read as “status quo” meaning:
- The existing or previously existing state or condition (*Macquarie Encyclopaedic Dictionary* Signature edition).

- The state of affairs at present (*A Dictionary of Modern Legal usage – Gasner – Oxford University Press*).
- The state in which anything was or is; the existing state of affairs (*Webster's Encyclopaedic Dictionary of the English Language, 1972*).
- In the state in which (things were) before, (or are) now... the existing state of things (*Shorter Oxford Dictionary 3rd Edition 1973*).

47. Proof of actively entering an agreement is required and there is no such proof.

Part VII: Relevant Legislation

10 48. The following legislative history is relevant:

Date	Legislation	Effect
As at 01 January 1995	<i>The Crimes Act 1914</i> (Cth)	Section 29D / s.86(1) in force.
15 March 1995	<i>Criminal Code Act 1995</i> receives Royal Assent.	
01 January 1997	The <i>Criminal Code Act 1995</i> commences.	As at date of commencement, no provisions concerning conspiracy to defraud the Commonwealth. However s.11.5 (general conspiracy) in force.
24 November 2000	<i>Criminal Code Amendment (Theft, Bribery & Related Offences) Act 2000</i> receives Royal Assent	

Date	Legislation	Effect
	and partially commences.	
06 April 2001	<i>Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001</i> receives Royal Assent.	
24 May 2001	<i>Criminal Code Amendment (Theft Bribery and Related Offences) Act 2000</i> amendments take effect.	<p>(1) Inserts new Chapter 7 into the Code entitled “The Proper Administration of Government”, which includes s.135.4.</p> <p>(2) Repeals ss.29D and 86(2) of the <i>Crimes Act</i>.</p> <p>(3) Contains transitional provisions in Schedule 2, Item 418 (as set out at par. 28 below).</p>
15 December 2001	<i>Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001</i> amendments take effect.	Repeals s.86 of the <i>Crimes Act</i> .

49. Copies of the following principal and transitional legislation are attached as Annexure A:
- a. *Crimes Act 1914* (Cth): ss29D and 86;
 - b. *Criminal Code Act 1995* (Cth): clause 4.1 and 135.4;
 - c. *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth): ss 1 – 3; Schedule 1, Item 15; Schedule 2, Part 1, Item 149 and 158; Schedule 2, Part 2 Item 418.
 - d. *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth): ss 1 – 2; Schedule 51, Item 4.

10 **Part VIII: Order Sought**

50. Count 2 ~~en in~~ the indictment and the conviction on Count 2 ~~be are~~ quashed.

Part IX: Time Estimate

51. The appellant's argument will take approximately one half day to present.

Dated: ~~22 March~~ 3 April 2013

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20 Senior Legal Practitioner
 Name: Ian Barker QC
 Telephone: (02) 4464 3463
 Facsimile: (02) 4464 3462
 Email: ianbarkerqc@bigpond.com

Senior Legal Practitioner
 Name: Paul Coady (~~on behalf of Ian Barker QC~~)
 Telephone: (02) 8233 0300
 Facsimile: (02) 8233 0333
 Email: p.coady@mauricebyers.com

ANNEXURE A – LEGISLATIVE PROVISIONS



Crimes Act 1914

Act No. 12 of 1914 as amended

Volume 1

This compilation was prepared on 4 May 2001
taking into account amendments up to Act No. 24 of 2001

The text of any of those amendments not in force
on that date is appended in the Notes section

Volume 1 includes: Table of Contents
Sections 1-23WLA

Volume 2 includes: Table of Contents
Sections 23WM-91
Schedule
Table of Acts
Act Notes
Table of Amendments
Endnotes
Table A

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Section 29D

Penalty: Imprisonment for 2 years.

29D Fraud

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

Penalty: 1,000 penalty units or imprisonment for 10 years, or both.

30 Seizing goods in Commonwealth custody

Any person who, without lawful authority, takes any goods or property out of the possession, custody, or control of the Commonwealth or a public authority under the Commonwealth or out of the possession, custody, or control of a Commonwealth officer who has the possession, custody, or control thereof by virtue of his office, shall be guilty of an offence.

Penalty: Imprisonment for 1 year.

Part VIII—Miscellaneous

86 Conspiracy

(1) A person who conspires with another person to commit an offence against a law of the Commonwealth 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.

(2) Despite subsection (1), if the person conspires with another person to commit an offence against section 29D of this Act, the conspiracy is punishable by a fine not exceeding 2,000 penalty units, or imprisonment for a period not exceeding 20 years, or both.

Note: Penalty units are defined in section 4AA.

(3) 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.

(4) 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 (5)(a), all other parties to the agreement have been acquitted of the conspiracy.

Section 87

- (5) 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.
- (6) 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.
- (7) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (8) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (9) 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.
- (10) In any law of the Commonwealth:
 - (a) a reference to paragraph 86(1)(a) of this Act is taken to be a reference to subsection (1) of this section; and
 - (b) a reference to the application of subsection (1) of this section because of or by virtue of paragraph 86(1)(a) of this Act is taken to be a reference to subsection (1) of this Section; and
 - (c) a reference to section 86A of this Act is taken to be a reference to subsection (2) of this section.

87 False certificates

Any person who, being authorized or required by a law of the Commonwealth to give any certificate touching any matter by



Criminal Code Act 1995

Act No. 12 of 1995 as amended

This compilation was prepared on 24 May 2001
taking into account amendments up to Act No. 24 of 2001

The text of any of those amendments not in force
on that date is appended in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Clause 4.1

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.

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

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 unwillful 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.

Clause 4.3

- (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.

Schedule The Criminal Code
Chapter 7 The proper administration of Government
Part 7.3 Fraudulent conduct

Clause 135.4

Commonwealth entity to do something that results in the other person obtaining the financial advantage.

- (4) The definition of *obtaining* in section 130.1 does not apply to this section.

135.4 Conspiracy to defraud

Obtaining a gain

- (1) A person is guilty of an offence if:
- (a) the person conspires with another person with the intention of dishonestly obtaining a gain from a third person; and
 - (b) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the third person was a Commonwealth entity.

Causing a loss

- (3) A person is guilty of an offence if:
- (a) the person conspires with another person with the intention of dishonestly causing a loss to a third person; and
 - (b) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (4) In a prosecution for an offence against subsection (3), it is not necessary to prove that the defendant knew that the third person was a Commonwealth entity.

- (5) A person is guilty of an offence if:
- (a) the person conspires with another person to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person; and

Clause 135.4

- (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
- (c) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (6) In a prosecution for an offence against subsection (5), it is not necessary to prove that the defendant knew that the third person was a Commonwealth entity.

Influencing a Commonwealth public official

- (7) A person is guilty of an offence if:
 - (a) the person conspires with another person with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and
 - (b) the public official is a Commonwealth public official; and
 - (c) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 10 years.

- (8) In a prosecution for an offence against subsection (7), it is not necessary to prove that the defendant knew:
 - (a) that the official was a Commonwealth public official; or
 - (b) that the duties were duties as a Commonwealth public official.

General provisions

- (9) For a person to be guilty of an offence against this section:
 - (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.
- (10) A person may be found guilty of an offence against this section even if:

Schedule The Criminal Code
Chapter 7 The proper administration of Government
Part 7.3 Fraudulent conduct

Clause 135.5

- (a) obtaining the gain, causing the loss, causing the risk of loss, or influencing the Commonwealth public official, as the case may be, is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is a person who is not criminally responsible; or
 - (d) subject to subsection (11), all other parties to the agreement have been acquitted of the offence.
- (11) 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
 - (b) a finding of guilt would be inconsistent with their acquittal.
- (12) 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.
- (13) A court may dismiss a charge of an offence against this section if the court thinks that the interests of justice require the court to do so.
- (14) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, before the necessary consent has been given, a person may be:
- (a) arrested for an offence against this section; or
 - (b) charged with an offence against this section; or
 - (c) remanded in custody or released on bail in connection with an offence against this section.

135.5 Geographical jurisdiction

Section 15.4 (extended geographical jurisdiction—category D) applies to each offence against this Division.



Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000

Act No. 137 of 2000 as amended

This compilation was prepared on 5 April 2006

[This Act was amended by Act No. 63 of 2002; No. 9 of 2006]

Amendments from Act No. 63 of 2002

[Schedule 2 (item 7) amended item 185 of Schedule 2

Schedule 2 (item 7) commenced immediately after 24 May 2001]

Amendment from Act No. 9 of 2006

[Schedule 2 (item 16) amended item 277 of Schedule 2

Schedule 2 (item 16) commenced immediately after 24 May 2001]

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

An Act to amend the *Criminal Code Act 1995*, and for other purposes

[Assented to 24 November 2000]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.

2 Commencement

- (1) The following provisions of this Act commence on the day on which this Act receives the Royal Assent:
 - (a) sections 1, 2 and 3;
 - (b) items 1, 4, 6, 7, 9, 10, 11 and 32 of Schedule 1.
- (2) Subject to this section, the provisions of this Act that are not covered by subsection (1) commence on a day to be fixed by Proclamation.
- (3) If item 15 of Schedule 1 to this Act does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, the provisions of this Act that are not covered by subsection (1) commence on the first day after the end of that period. This subsection has effect subject to the following subsections of this section.
- (5) If item 2 of Schedule 1 to the *Human Rights Legislation Amendment Act 2000* commences before the commencement of item 15 of Schedule 1 to this Act, this Act has effect as if the amendments of the *Human Rights and Equal Opportunities Commission Act 1986* contained in Schedule 2 to this Act were amendments of the *Human Rights and Responsibilities Commission Act 1986*.
- (9) If the *Superannuation Act 1976* is repealed before the commencement of item 15 of Schedule 1 to this Act, this Act has effect as if the amendments of the *Superannuation Act 1976* contained in Schedule 2 to this Act were amendments of the

Superannuation Act 1976 as that Act continues to apply under subsection 11(1) of the Superannuation Legislation (Commonwealth Employment—Saving and Transitional Provisions) Act 2000.

3 Schedule(s)

- (1) Subject to section 2, each Act, and each regulation, that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
- (2) The amendment of any regulation under subsection (1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

it were used in a geographical sense in the provision creating the primary offence.

- (2) For the purposes of the application of this Part to a particular ancillary offence, *Australia* has the same meaning it would have if it were used in a geographical sense in the provision creating the primary offence to which the ancillary offence relates.
- (3) For the purposes of this Part, if a provision creating an offence extends to an external Territory, it is to be assumed that if the expression *Australia* were used in a geographical sense in that provision, that expression would include that external Territory.
- (4) This section does not affect the meaning of the expressions *Australian aircraft*, *Australian citizen* or *Australian ship*.

16.4 Result of conduct

A reference in this Part to a *result of conduct* constituting an offence is a reference to a result that is a physical element of the offence (within the meaning of subsection 4.1(1)).

13 The Schedule (section 70.1 of the *Criminal Code*, definition of *foreign country*)

Repeal the definition.

14 The Schedule (subsection 70.5(4) of the *Criminal Code*)

Repeal the subsection.

15 The Schedule (before Chapter 8 of the *Criminal Code*)

Insert:

Chapter 7—The proper administration of Government

Part 7.1—Preliminary

Division 130—Preliminary

130.1 Definitions

In this Chapter:

duty:

- (a) in relation to a person who is a Commonwealth public official—means any authority, duty, function or power that:
 - (i) is conferred on the person as a Commonwealth public official; or
 - (ii) the person holds himself or herself out as having as a Commonwealth public official; and
- (b) in relation to a person who is a public official—means any authority, duty, function or power that:
 - (i) is conferred on the person as a public official; or
 - (ii) the person holds himself or herself out as having as a public official.

gain means:

- (a) a gain in property, whether temporary or permanent; or
- (b) a gain by way of the supply of services;

and includes keeping what one has.

loss means a loss in property, whether temporary or permanent, and includes not getting what one might get.

obtaining includes:

- (a) obtaining for another person; and
- (b) inducing a third person to do something that results in another person obtaining.

property includes:

- (a) real property; and

- (2) A person is guilty of an offence if the person obtains a financial advantage for another person from a Commonwealth entity knowing or believing that the other person is not eligible to receive that financial advantage.

Penalty: Imprisonment for 12 months.

- (3) For the purposes of subsection (2), a person is taken to have obtained a financial advantage for another person from a Commonwealth entity if the first-mentioned person induces the Commonwealth entity to do something that results in the other person obtaining the financial advantage.

- (4) The definition of *obtaining* in section 130.1 does not apply to this section.

135.4 Conspiracy to defraud

Obtaining a gain

- (1) A person is guilty of an offence if:
- (a) the person conspires with another person with the intention of dishonestly obtaining a gain from a third person; and
 - (b) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the third person was a Commonwealth entity.

Causing a loss

- (3) A person is guilty of an offence if:
- (a) the person conspires with another person with the intention of dishonestly causing a loss to a third person; and
 - (b) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (4) In a prosecution for an offence against subsection (3), it is not necessary to prove that the defendant knew that the third person was a Commonwealth entity.

- (5) A person is guilty of an offence if:
- (a) the person conspires with another person to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person; and
 - (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
 - (c) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

- (6) In a prosecution for an offence against subsection (5), it is not necessary to prove that the defendant knew that the third person was a Commonwealth entity.

Influencing a Commonwealth public official

- (7) A person is guilty of an offence if:
- (a) the person conspires with another person with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and
 - (b) the public official is a Commonwealth public official; and
 - (c) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 10 years.

- (8) In a prosecution for an offence against subsection (7), it is not necessary to prove that the defendant knew:
- (a) that the official was a Commonwealth public official; or
 - (b) that the duties were duties as a Commonwealth public official.

General provisions

- (9) For a person to be guilty of an offence against this section:
- (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.

Schedule I Amendment of the Criminal Code Act 1995

- (10) A person may be found guilty of an offence against this section even if:
- (a) obtaining the gain, causing the loss, causing the risk of loss, or influencing the Commonwealth public official, as the case may be, is impossible; or
 - (b) the only other party to the agreement is a body corporate; or
 - (c) each other party to the agreement is a person who is not criminally responsible; or
 - (d) subject to subsection (11), all other parties to the agreement have been acquitted of the offence.
- (11) 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
 - (b) a finding of guilt would be inconsistent with their acquittal.
- (12) 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.
- (13) A court may dismiss a charge of an offence against this section if the court thinks that the interests of justice require the court to do so.
- (14) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, before the necessary consent has been given, a person may be:
- (a) arrested for an offence against this section; or
 - (b) charged with an offence against this section; or
 - (c) remanded in custody or released on bail in connection with an offence against this section.

135.5 Geographical jurisdiction

Section 15.4 (extended geographical jurisdiction—category D) applies to each offence against this Division.

**146 Subsection 3(1) (paragraph (c) of the definition of
Commonwealth officer)**

Omit “sections 70, 72, 73, 74 and 75”, substitute “section 70”.

**147 Subsection 3(1) (paragraph (d) of the definition of
Commonwealth officer)**

Omit “sections 70, 72, 73, 74, 75 and 76” substitute “section 70”.

148 Subsection 17B(3) (definition of *section 17B offence*)

Omit “any of sections 29, 29A, 29B, 29C, 29D, 71 and 72”, substitute
“section 29 of this Act, an offence against section 131.1, 132.1, 132.6,
132.7, 134.1, 134.2, 135.1, 135.2, 135.4, 145.4 or 145.5 of the *Criminal
Code*”.

149 Sections 29A, 29B, 29C, 29D and 30

Repeal the sections.

150 Paragraph 30K(a)

Repeal the paragraph.

151 Sections 32 and 33

Repeal the sections.

152 Section 50

Repeal the section.

153 Part V

Repeal the Part.

154 Sections 71, 71A, 72, 73, 73A, 74, 75 and 76

Repeal the sections.

155 Sections 85J, 85K, 85L and 85M

Repeal the sections.

156 Section 85P

Repeal the section.

157 Section 85ZF

Repeal the section.

158 Subsection 86(2)

Repeal the subsection.

159 Paragraph 86(10)(b)

Omit "of this section; and", substitute "of this section."

160 Paragraph 86(10)(c)

Repeal the paragraph.

161 Section 88

Repeal the section.

Customs Act 1901

**162 Subsection 4(1) (paragraph (c) of the definition of
Records offence)**

Omit "section 29D or 86A of the *Crimes Act 1914*", substitute "section 134.1, 134.2 or 135.1 of the *Criminal Code*".

163 At the end of section 183UA

Add:

(3) For the purposes of this Part, an offence against section 141.1, 142.1, 142.2 or 149.1 of the *Criminal Code* that relates to this Act is taken to be an offence against this Act.

164 Section 232

Repeal the section.

165 Paragraph 232A(b)

Omit "any officer, or any person assisting an officer, in the execution of his duty", substitute "any person assisting an officer in the execution of the officer's duty".

Dairy Produce Act 1986

166 Section 112

Part 2—Transitional provisions

418 Transitional—pre-commencement offences

- (1) Despite the amendment or repeal of a provision by this Schedule, that provision continues to apply, after the commencement of this item, in relation to:
- (a) an offence committed before the commencement of this item; or
 - (b) proceedings for an offence alleged to have been committed before the commencement of this item; or
 - (c) any matter connected with, or arising out of, such proceedings;
- as if the amendment or repeal had not been made.
- (2) Subitem (1) does not limit the operation of section 8 of the *Acts Interpretation Act 1901*.

419 Transitional—pre-commencement notices

If:

- (a) a provision in force immediately before the commencement of this item required that a notice set out the effect of one or more other provisions; and
 - (b) any or all of those other provisions are repealed by this Schedule; and
 - (c) the first-mentioned provision is amended by this Schedule;
- the amendment of the first-mentioned provision by this Schedule does not affect the validity of such a notice that was given before the commencement of this item.



**Law and Justice Legislation Amendment
(Application of Criminal Code) Act 2001**

No. 24, 2001

An Act relating to the application of the *Criminal Code* to certain offences, and for related purposes



Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001

No. 24, 2001

An Act relating to the application of the *Criminal Code* to certain offences, and for related purposes

[Assented to 6 April 2001]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.

2 Commencement

- (1) Subject to this section, this Act commences at the later of the following times:

-
- (a) immediately after the commencement of item 15 of Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*;
 - (b) the start of the 28th day after the day on which this Act receives the Royal Assent.
- (2) Schedule 1 commences on the 28th day after the day on which this Act receives the Royal Assent.
 - (3) Schedules 21 and 51 commence on the day mentioned in subsection 2.2(2) of the *Criminal Code*.
 - (4) If section 1 of this Act has not commenced before the commencement of item 78 of Schedule 1 to the *Crimes Amendment (Forensic Procedures) Act 2001*, items 20, 21 and 22 of Schedule 10 to this Act do not commence.
 - (5) If section 1 of this Act has not commenced before the commencement of Parts 2, 5 and 6 of Schedule 1 to the *Human Rights Legislation Amendment Act 2001*, the following provisions of this Act do not commence:
 - (a) items 5, 6 and 7 of Schedule 24;
 - (b) items 3, 4 and 5 of Schedule 43;
 - (c) items 7, 8 and 9 of Schedule 45.
 - (6) If item 2 of Schedule 1 to the *Human Rights Legislation Amendment Act 2001* commences before the commencement of Schedule 32 to this Act, this Act has effect as if the amendments of the *Human Rights and Equal Opportunities Commission Act 1986* contained in Schedule 32 to this Act were amendments of the *Human Rights and Responsibilities Commission Act 1986*.
 - (7) If item 106 of Schedule 1 to the *Privacy Amendment (Private Sector) Act 2000* has not commenced before the commencement of section 1 of this Act, item 10 of Schedule 40 to this Act commences immediately after the commencement of the first-mentioned item.
 - (8) If paragraph 234(1)(c) of the *Customs Act 1901* is repealed by another Act on or before the commencement of Schedule 21 to this Act, items 122 and 124 of that Schedule do not commence.

Amendments (except for Customs Act) commencing on the day mentioned in
subsection 2.2(2) of the Criminal Code Schedule 51

**Schedule 51—Amendments (except for
Customs Act) commencing on the day
mentioned in subsection 2.2(2) of the
Criminal Code**

Commonwealth Places (Application of Laws) Act 1970

1 Subsection 5(2)

Omit "Sections 4," substitute "Sections".

2 Subsection 5(2)

Omit ", 5, 6, 7, 7A and 86", substitute "and 6".

3 Clause 1 of the Schedule

Omit "14, 15, 15A, 15B, 15C and 15D", substitute "15, 15A, 15B and
15C, and".

Crimes Act 1914

4 Sections 3BB, 4, 5, 7, 7A, 14, 15D and 86

Repeal the sections.

Transfer of Prisoners Act 1983

5 Paragraph 27(b)

Repeal the paragraph.

[Minister's second reading speech made in—
Senate on 6 December 2000
House of Representatives on 29 March 2001]

(207/00)
