

Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Crimes Act 1900* (the *principal Act*) to reform and modernise the law relating to fraud and forgery offences and to create new offences relating to identity crime. The proposed offences were the subject of a Consultation Paper released by the Criminal Law Review Division of the Department of Justice and Attorney General in July 2009.

The Bill draws on provisions in the following:

- (a) The Final Report on Identity Crime released in March 2008 by the Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General (SCAG).
- (b) The Final Report on Theft, Fraud, Bribery and Related Offences released in December 1995 by the predecessor Model Criminal Code Officers Committee of SCAG, and the Final Report of that Committee on Credit Card Skimming Offences released in February 2006.
- (c) The provisions of the *Criminal Code Act 1995* of the Commonwealth that were also drawn from those Reports.

The Bill also makes related amendments to the *Criminal Procedure Act 1986*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Principal amendments to Crimes Act 1900 No 40

Definition of “dishonest”

Schedule 1 [1] inserts, for the purposes of the fraud, forgery and related offences, a definition of *dishonest* into the principal Act so that the mental element of dishonesty in those offences means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people. In a prosecution for an offence, dishonesty is a matter for the trier of fact (that is, the jury or the Judge/Magistrate if the offence is tried summarily). This definition was recommended by the Model Criminal Code Officers Committee and adopted in the *Criminal Code Act 1995* of the Commonwealth. It follows the decisions of the House of Lords in *Feely* and *Ghosh* and is supported in the High Court case of *Peters v Queen*.

Fraud and related offences

Schedule 1 [3] inserts Part 4AA into the principal Act (and replaces existing provisions of the principal Act omitted by Schedule 2). Proposed sections 192B–192D provide definitions for the purposes of the offences and proposed sections 192E–192H contain the offences.

Proposed section 192E contains the offence of fraud. It will be an offence for a person, by any deception, to dishonestly obtain property belonging to another or obtain any financial advantage or cause any financial disadvantage (maximum penalty: 10 years imprisonment).

Proposed sections 192F–192H contain the following related fraud offences:

(a) it will be an offence to dishonestly destroy or conceal any accounting record with the intention of obtaining property belonging to another or obtaining a financial advantage or causing a financial disadvantage (maximum penalty: 5 years imprisonment),

(b) it will be an offence to dishonestly make or publish, or concur in making or publishing, any statement that is false or misleading in a material particular with the intention of obtaining property belonging to another or obtaining a financial advantage or causing a financial disadvantage (maximum penalty: 5 years imprisonment),

(c) it will be an offence for an officer of an organisation, with the intention of deceiving members or creditors of the organisation about its affairs, to dishonestly make or publish, or to concur in making or publishing, a statement that to his or her knowledge is or may be false or misleading in a material particular (maximum penalty: 7 years imprisonment).

Proposed section 192B refines the definition of **deception** in connection with the offence of fraud so that it 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, a machine or any electronic device to make a response that the person is not authorised to cause it to make.

The deception must be intentional or reckless for a person to commit an offence by a deception.

Proposed section 192C provides that a person *obtains property* if:

(a) the person obtains ownership, possession or control of the property for himself or herself or for another person, or

(b) the person enables ownership, possession or control of the property to be retained by himself or herself or by another person, or

(c) the person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.

A person must intend to permanently deprive the other person of the property and borrowing property may amount to obtaining property if the person's intention is to treat the thing as his or her own to dispose of regardless of the other person's rights.

Proposed section 192D provides that to *obtain* a financial advantage includes:

(a) to obtain a financial advantage for oneself or for another person, and

(b) to induce a third person to do something that results in oneself or another person obtaining a financial advantage, and

(c) to keep a financial advantage that one has, whether the financial advantage is permanent or temporary.

The proposed section also provides that to **cause** a financial disadvantage means:

(a) to cause a financial disadvantage to another person, or

(b) to induce a third person to do something that results in another person suffering a financial disadvantage, whether the financial disadvantage is permanent or temporary.

Schedule 1 [2] re-enacts a current provision of the principal Act that provides that the necessary geographical nexus exists between NSW and an offence of larceny or fraud (or a related fraud offence) to enable a prosecution in NSW if the offence is committed by a public official and involves public money of the State or property held by the public official for or on behalf of the State of NSW (even if the offence is committed outside NSW).

Identity offences

Schedule 1 [3] inserts Part 4AB into the principal Act and creates new offences relating to identity crime. Proposed section 192I contains definitions used in the Part.

Identification information means information relating to a person (whether living or dead, real or fictitious, or an individual or a body corporate) that is capable of being used to identify or purportedly identify the person.

The proposed Part contains the following offences:

- (a) it will be an offence for a person to deal in (including make, supply or use) identification information with the intention of committing, or facilitating the commission of, an indictable offence (maximum penalty: 10 years imprisonment),
- (b) it will be an offence for a person to possess identification information with the intention of committing, or facilitating the commission of, an indictable offence (maximum penalty: 7 years imprisonment),
- (c) it will be an offence for a person to possess any equipment, material or other thing that is capable of being used to make a document or other thing containing identification information if the person intends that the document or thing will be used to commit, or facilitate the commission of, an indictable offence (maximum penalty: 3 years imprisonment).

The Part will apply to a person who intends to commit an indictable offence even if committing the offence concerned is impossible or it is to be committed at a later time.

Forgery offences

Schedule 1 [4] repeals Divisions 1 and 2 of Part 5 of the principal Act and replaces outdated provisions with a modernised and simplified set of provisions relating to forgery offences. Proposed section 250 sets out when a document is considered to be a false document. Proposed section 251 makes it clear that a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to a document as if it were a genuine document. The proposed section also provides that if it is necessary to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove the accused intended so to induce a particular person. Proposed section 252 provides that certain concepts used in relation to fraud offences (that is, “obtaining property belonging to another” and “obtaining financial advantage or causing financial disadvantage”) apply in relation to forgery in proposed Part 5.

Proposed sections 253–256 contain the following offences:

- (a) it will be an offence for a person to make a false document with the intention of using it to induce some person to accept it as genuine, and because of its being accepted as genuine, to obtain another person’s property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty (maximum penalty: 10 years imprisonment),
- (b) it will be an offence for a person to use a false document, knowing that it is false, with the intention of inducing some person to accept it as genuine, and because of its being accepted as genuine, to obtain another person’s property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty (maximum penalty: 10 years imprisonment),
- (c) it will be an offence for a person to have in his or her possession a false document, knowing that it is false, with the intention of using it to induce some person to accept it as genuine, and because of its being accepted as genuine, to obtain another person’s property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty (maximum penalty: 10 years imprisonment),

(d) it will be an offence for a person to make, or have in his or her possession, any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted and with the intention of using it to commit the offence of forgery (maximum penalty: 10 years imprisonment),

(e) it will be an offence for a person to make or possess, without reasonable excuse, any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted (maximum penalty: 3 years imprisonment),

(f) it will be an offence for a person to possess any equipment, material or other thing that is capable of being used to make a false document, with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery (maximum penalty: 3 years imprisonment).

Proposed provisions and corresponding provisions in Model Code, Commonwealth Criminal Code and NSW Crimes Act

The following Table sets out the provisions relating to dishonesty, fraud, identity crime and forgery in the proposed Act and the corresponding provisions of the Model Criminal Code (*Model Code*) and the *Criminal Code Act 1995* of the Commonwealth (*Cth Code*), and, where there is no Code equivalent, the existing provisions of the *Crimes Act 1900* of New South Wales (*NSW Crimes Act*):

Proposed provision	Corresponding provision Dishonesty
s4B	s14.2 Model Code; s130.3 and 130.4 Cth Code
Fraud	
s192B	s17.1 Model Code; s133.1 Cth Code
Proposed provision	Corresponding provision
s192E Code	ss 17.2 and 17.3 Model Code; ss 134.1, 134.2 and 135.1 Cth
s192F	s158 NSW Crimes Act
s192G	s178BB NSW Crimes Act
s192H	s19.8 Model Code, s176 NSW Crimes Act
Identity crime	
s192I	s3.3.6 (1) Model Code
s192J	s3.3.6 (2) Model Code
s192K	s3.3.6 (3) Model Code
s192L	s3.3.6 (4) Model Code
Forgery	
s250	s19.2 Model Code, s143.2 Cth Code
s251	s19.1 Model Code, s143.4 Cth Code
s253	s19.3 Model Code, s144.1 Cth Code
s254	s19.4 Model Code, s145.1 Cth Code
s255	s19.5 Model Code, s145.2 Cth Code

Schedule 2 Consequential and other amendments to Crimes Act 1900 No 40

Schedule 2 omits the following sections relating to certain existing fraud and forgery offences that are made redundant by the provisions of proposed Parts 4AA and 5:

- (a) section 158 (Destruction, falsification of accounts etc by clerk or servant),
- (b) Subdivision 7 of Division 1 of Part 4 (sections 164–178) (Frauds by factors and other agents),
- (c) section 178A (Fraudulent misappropriation of moneys collected or received),
- (d) section 178B (Valueless cheques),
- (e) section 178BA (Obtaining money etc by deception),
- (f) section 178BB (Obtaining money etc by false or misleading statements),
- (g) section 178C (Obtaining credit by fraud),
- (h) Subdivision 13 of Division 1 of Part 4 (sections 179–185) (False pretences),
- (i) section 185A (Inducing persons to enter into certain arrangements by misleading etc statements etc),
- (j) section 186 (Taking reward for helping to recover stolen property),
- (k) section 527 (Fraudulently appropriating or retaining property),
- (l) section 527A (Obtaining money etc by wilfully false representation),
- (m) section 527B (Framing a false invoice),
- (n) section 528 (Advertising reward for return of stolen property),
- (o) section 545A (Bogus advertisements),
- (p) section 547A (False statement respecting births, deaths or marriages).

Schedule 2 also contains consequential amendments that renumber provisions and replace headings in order to re-structure surrounding parts of the principal Act in a clearer and more logical manner.

Schedule 3 Amendment of Criminal Procedure Act 1986 No 209

Schedule 3 [1] makes a consequential amendment.

Schedule 3 [2] enables a victim of an identity offence to obtain a certificate from the Local Court that such an offence has been committed to assist with problems the offence has caused in relation to the victim's personal or business affairs.

Schedule 3 [3]–[6] provide that fraud, identity and forgery offences (under Parts 4AA, 4AB and 5 of the *Crimes Act 1900* as inserted by Schedule 1 [3] and [4]) are triable summarily unless the prosecutor or the person charged elects otherwise, other than offences under section 192L (Possession of equipment etc to make identification documents or things) and section 256 (2) or (3) (Making or possession of equipment etc for making false documents) of that Act, which are triable summarily unless the prosecutor elects otherwise.

Schedule 4 Consequential amendment of other Acts

Schedule 4 makes consequential amendments to a number of Acts that contain references to Part 4 of the *Crimes Act 1900* that require updating as a result of the restructure of that Part by Schedule 2.