2003

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMINAL CODE (THEFT, FRAUD, BRIBERY AND RELATED OFFENCES) AMENDMENT BILL 2003

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
Mr Jon Stanhope MLA

Outline

The Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Bill 2003 (the Bill) amends the *Criminal Code 2002* (the Criminal Code) by inserting a new chapter 3, which will codify the criminal law of the ACT on theft, fraud, blackmail, forgery, bribery and other related matters.

This Bill is the next stage in a process that began in September 2001 to progressively reform the criminal law of the ACT. The reforms are primarily based on the Model Criminal Code (the MCC), developed by the national Model Criminal Code Officers Committee (MCCOC) and established by the Standing Committee of Attorneys-General. All governments committed themselves to the development of a uniform criminal code in 1991 and through the Standing Committee of Attorneys-General established MCCOC for that purpose. MCCOC is made up of Territory, State and Commonwealth criminal law advisers and since 1991 embarked on an extensive consultative program that saw the development of nine chapters of the MCC for implementation by all Australian jurisdictions.

In December 2002 the Legislative Assembly passed the Criminal Code that, but for a few provisions, commenced on 1 January 2003. The Criminal Code currently consists of chapters 1, 2 and 4. Chapter 1 is yet to commence and will eventually contain the mechanical provisions of the Criminal Code. Chapter 2 sets out the general principles of criminal responsibility that apply to all ACT offences created on or after 1 January 2003 and eventually will apply to all ACT criminal law. Chapter 4 contains modern property damage, computer and sabotage offences recommended in the MCCOC report, *Damage and Computer Offences*, issued in February 2001.

The offences in this Bill are primarily based on the MCCOC chapter 3 report, issued in December 1995 and titled "*Theft, Fraud, Bribery and Related Offences*" (the MCCOC report). MCCOC also issued a supplementary chapter 3 report in May 1997, titled "*Conspiracy to Defraud*" (the MCCOC Conspiracy report), which is the basis for the conspiracy to defraud offence in clause 334 of the Bill.

In addition to the MCCOC reports the Bill takes into account improvements on chapter 3 of the MCC that have been developed by the Commonwealth in the Commonwealth Criminal Code (the CCC) and also some improvements that are currently in operation in the ACT *Crimes Act 1900* (the Crimes Act). The Bill also includes some additional offences based on offences in the CCC that MCCOC has not reported on.

Part 3.2 of chapter 3 of this Bill contains modern codified offences on theft and related crimes, including robbery, burglary, receiving, making off without payment and taking motor vehicles without consent. The Crimes Act offences on theft, fraud, forgery and related crimes were incorporated in 1985 as Divisions 6.1 and 6.4 of part 6 of that Act with the enactment of the *Crimes (Amendment) Ordinance (No.4) 1985*. The ordinance offences were based on the 1968 UK *Theft Act* (the Theft Act), which MCCOC used as the basis for the corresponding model offences it developed in the MCC. Therefore, to a large extent the offences in this part operate on principles that are already familiar to ACT practitioners. In particular, the offences continue to make use of the element of "dishonesty" which lies at the heart of the theft, fraud regime of the Theft Act. Indeed, the Bill includes a definition of "dishonesty", which the Crimes Act does not have. There are also some other important changes in the part; the most notable being that

theft (or "stealing" as it is referred to in the Crimes Act) will no longer incorporate the fraud related offence of obtaining property by deception. There will instead be a separate offence of obtaining property by deception.

Part 3.3 of chapter 3 contains modern codified offences on fraud and related conduct. The two key offences in the part are obtaining property by deception (clause 326) and obtaining a financial advantage by deception (clause 332). These are based on the recommended MCC provisions, which in turn are based on similar offences in the Theft Act. In contrast to the Theft Act and the MCC equivalents, the Crimes Act treats property fraud as stealing. This can give rise to problems of considerable complexity in cases where a person fraudulently obtains property but with the owner's consent. In MCCOC's view the matter of consent is vital to the distinction between theft and fraud and treating a consensual appropriation of property as theft strays too far from the central and commonly understood meaning of theft. Accordingly, it recommended the removal of property fraud from the theft offence and the creation of a separate offence (clause 326) of obtaining property by deception.

In addition to property and financial fraud, part 3.3 includes offences of conspiracy to defraud (which is new to the ACT), a general fraud offence, summary offences of obtaining a financial advantage from the Territory and passing valueless cheques. MCCOC recommended the inclusion of conspiracy to defraud offences (clause 334) but the provisions of this Bill have been modified in accordance with some improvements made to the corresponding CCC offences. Deception is not a requirement of these offences but there must be an agreement between two or more persons to engage in the criminal conduct. Like the "theft" offences in part 3.2 and the property/financial fraud offences in this part, the conspiracy to defraud offences "generally" apply whether the victim is a private or government entity. The exception is the offence in subclause 334(4), which targets conspiracies to influence Territory public officials in the exercise of their duties.

The general fraud offences in part 3.3 are based on offences in the CCC and are effectively a codified version of section 29D of the *Crimes Act 1914*, which was the basis for the almost identical offence in section 8 of the ACT *Crimes (Offences against the Government) Act 1989* (the Government Offences Act). It is considered important to retain offences of this kind because of the special problems that governments have in protecting public revenue from dishonest conduct. Accordingly, the offences will only apply where the dishonest conduct is perpetrated against the Territory or a Territory entity, and to dishonest dealings to influence a Territory official.

Part 3.4 contains 4 offences that deal with making false or misleading statements, giving false or misleading information and producing false or misleading documents to ACT government entities or under ACT government law. MCCOC did not consider these offences in preparing the MCC but the Commonwealth has included them in the CCC because of their vital importance to the proper administration of government and their effectiveness in protecting government revenue. Their importance is demonstrated by the fact that there are 90 of these offences throughout the ACT statute book (including the Government Offences Act - sections 6, 7, 21 and 22) but they are not in a standard form and the maximum penalty varies from Act to Act. Centralising these offences in the Criminal Code will ensure equal treatment for what is essentially the same kind of criminal behaviour.

Part 3.5 contains the offence of blackmail (clause 342), which is based on the recommended MCC offence and largely follows the corresponding Theft Act offence,

and its equivalent in section 104 of the Crimes Act. The offence applies generally to blackmail against corporations and governments, as well as individuals. Although there has been some uncertainty in the past about how the blackmail offence applies in cases where the victim is a corporation or government, the Bill clarifies the matter. It also extends the offence to apply in cases where a person uses blackmail to influence the exercise of a public duty, and this includes cases where a public official uses his or her office to blackmail. Other improvements on the Crimes Act offence include a definition for "menace" (which is a vital ingredient of the offence), an extension of the offence to apply in cases where the unwarranted demand relates to a particular vulnerability of the victim and the inclusion of an objective element for determining what constitutes an "unwarranted demand".

Part 3.6 contains the Criminal Code offences on forgery (clause 346) and related matters, including, using and possessing a forged document (clauses 347 and 348), making and possessing forging devices (clause 349), false accounting (clause 350) and false statements by officers of "a body" (clause 351). The provisions of this part are largely similar to the corresponding provisions in the Crimes Act but with some important improvements. In particular, the requirement in the Crimes Act for an intention that the forgery caused the victim to act or omit to act to his or her prejudice, has been replaced with a "dishonesty" requirement. This will eliminate some unnecessary confusion by bringing "forgery" back into line with theft and fraud and will also do away with complex rules (see section 125 of the Crimes Act*)* for determining when an act or omission is to a person's prejudice. Other improvements include recasting the definition of "document" in inclusive terms (thereby increasing the capacity of these offences to keep abreast of technological developments); clarifying a number of matters concerning the definition of "false document" and simplifying the rules for copies of documents, which also eliminates the need for duplicate offences relating to copies.

Part 3.7 contains modern codified offences on bribery, other corrupt benefits, payola and abuse of public office. Traditionally, bribery is a public sector corruption offence and only applies where a person gives a bribe to a public official or a public official takes a bribe. But confining bribery to public sector corruption incorrectly assumes that similar conduct in the private sector does less harm. In reality "commercial bribery" can have a devastating effect on those more immediately affected by it and profoundly undermines community confidence in the integrity of our commercial institutions. Accordingly, the bribery and corrupt benefit offences in the Bill apply to both public sector officials and private sector agents. This will ensure that the same rules apply for what is essentially the same kind of criminal behaviour. There are two levels to these offences. The more serious offences of giving and receiving a bribe will apply where a payment is dishonestly made or offered with the intention that a favour will be given, whereas the less serious corrupt benefits offences will apply to dishonest benefits that tend to influence the performance of a duty.

The payola and abuse of public office offences will be new to the ACT and will fill some gaps in this area of the law. Payola addresses cases where people hold themselves out to the public to be offering independent advice or making independent selections or assessments of goods and services but in fact receive "kickbacks" for their recommendations. On the other hand, the abuse of public office offence targets public officials who improperly use their office to obtain a personal benefit or cause a detriment to someone else.

Part 3.8 contains offences of impersonating and obstructing Territory officials (including police officers) and essentially codifies similar offences in the Government Offences Act. They are related to the other offences in this chapter because they protect government and the community from being disadvantaged by those who pretend to be public officials and exercise powers that they do not have. Often pretences of this kind are part of a wider plan to commit theft, fraud and other deception based offences. The impersonation offences are also an important means of protecting the integrity of public offices but so too are offences designed to ensure that public officials are allowed to properly discharge their duties without obstruction.

Part 3.9 contains procedural and evidentiary provisions related to the offences in chapter 3 that largely adopt the relevant existing provisions in the Crimes Act. It also includes a comprehensive range of alternative verdict provisions to ensure that if the wrong offence is charged the court can convict for the correct offence provided that the defendant is afforded procedural fairness to properly defend the alternative case against him or her.

The Commonwealth prepared a very detailed explanatory memorandum for its similar Bill; the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000. This explanatory statement reproduces extracts from its Commonwealth counterpart and from the MCCOC report. The government is grateful to the Commonwealth Attorney-General's Department and to MCCOC for making the Commonwealth explanatory memorandum and MCCOC report available for use by the ACT. Extracts from the Commonwealth Explanatory Memorandum and MCCOC report included in this statement have been amended slightly to ensure that the references to particular provisions reflect the numbering in the ACT Bill.

Financial Impact

The Bill is not expected to have a financial impact in itself, however, the continuing development of the Criminal Code will involve a considerable amount of drafting. This drafting will be funded from existing resources.

NOTES ON CLAUSES

Chapter 3 Preliminary

Clause 1 Name of Act

This clause explains that the name of the Act is the *Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Act 2003*.

Clause 2 Commencement

This clause explains that the Bill will commence 14 days after the day it is notified.

Clause 3 Acts amended

This clause explains that the Bill will amend the *Criminal Code 2002* (the Criminal Code) and the Acts and Regulations mentioned in Schedules 1, 2 and 3 of this Bill.

Clause 4 Definitions – default application date and immediately applied provisions – section 10

Part 2.5 of the Criminal Code contains the general principles for applying criminal responsibility to corporations. At present, part 2.5 only applies to offences commenced on or after 1 January 2003. This provision will have the effect of applying part 2.5 to all ACT offences regardless of when they commence. Schedule 1 of the Bill will repeal or amend all provisions in ACT statutes that either conflict with or are otherwise rendered redundant by the full commencement of part 2.5 of the Criminal Code.

Clause 5 New chapter 3

This clause sets out the provisions of new chapter 3 of the Criminal Code, which are explained below.

Chapter 3 Theft, fraud, bribery and related offences
Part 3.1 Interpretation for chapter 3
Clause 300 Definitions for chapter 3

The definitions in these clauses apply generally throughout the whole of chapter 3 but for some offences the general definitions are supplemented or qualified. For example, for theft and the offences that rely on it, the definition of dishonesty is supplemented by clause 303.

Cause – this definition explains that when a provision in this chapter refers to "causing a loss" it means causing a loss to another person. For example, see the blackmail offence in clause 342.

Dishonest – This is perhaps the most important definition in the chapter because "dishonesty" is an element that applies to most of the offences in the chapter. However, as the note explains, the test applies in a modified form in relation to theft and the offences that rely on it (see clause 303) and also for the offence of obtaining property by deception (clause 326).

The test is in two parts, consisting of an objective and subjective component. That is, in order for a person's conduct to be dishonest, it must be dishonest according to the standards of ordinary people (the objective component) and the person must know that the conduct is dishonest according to the standards of ordinary people (the subjective component). Both components must be satisfied for the conduct to be dishonest, however, in most cases where a person's action is dishonest by ordinary standards, the jury will easily draw an inference that the defendant knew that he or she was acting dishonestly. Importantly, it would be unusual for a defendant to escape conviction by raising the "Robin Hood" defence because in most cases he or she will have known that taking is dishonest by ordinary standards, even though he or she may have felt morally justified in doing so.

The following extract from the Commonwealth explanatory memorandum (the Commonwealth EM) explains the concept in more detail:

> 62. An important concept in the Model Criminal Code offences is the ... element of `dishonesty' … [The definition in clause 300] contains a straight-forward definition which was developed by the courts and is known as the *Ghosh* test. The *Ghosh* test is a familiar concept in Australia because until February 1998, it had been used in all jurisdictions, both common law and Code, in relation to conspiracy to defraud and in most jurisdictions, including the Commonwealth, in relation to the main fraud offences (s.29D and s71(1) of the *Crimes Act 1914* which use the fault elements of `defraud' and `fraudulent'). In *Peters v R* (1998) 151 ALR 51 the High Court held that the *Ghosh* test was no longer appropriate and developed a new test which does not include a subjective component.
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> 63. The approach in *Peters* is not favoured because it is necessary for offences like theft to retain a broad concept of dishonesty to reflect the characteristic of moral wrongdoing.
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> 64. Paragraph (a) of the definition of `dishonest' seeks to achieve this by linking the definition of dishonesty to community standards (this is not novel, whether a person is negligent is assessed by a jury on the basis of what the reasonable person would have done in the circumstances).
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> 65. Paragraph (b) of the definition requires knowledge on the part of the defendant that he or she is being dishonest according to the standards of ordinary people. This is crucial if the *Criminal Code* is to be true to the principle that for serious offences a person should not be convicted without a guilty mind. It reflects a preference for the law which existed prior to the 1998 decision of the High Court in *Peters* and is particularly important to the *Criminal Code* because it has additional offences which rely on `dishonesty' even more so than the Model Criminal Code offences [see clauses 319 and 335]. The proposed definition was preferred over the *Peters* approach by the Standing Committee of Attorneys-General at its April 1998 meeting.

The definition needs to be read with clause 302 which makes it clear that the issue of dishonesty is a matter for the jury (or the court acting in its capacity as the trier of fact) to decide. It is considered that juries are best able to judge community standards.

The offences in the *Crimes Act 1900* (the Crimes Act) on stealing, robbery, deception and handling also incorporate the element of dishonesty but the term is not defined. Rather the Crimes Act specifies certain states of mind or conduct that are <u>not</u> to be regarded as dishonest. This is discussed in the commentary on clauses 303, 304 and 326.

Duty and public duty – The term "duty" is defined widely to cover any "function" (authority, duty or power) that a public official has by virtue of the office he or she holds and any "function" (authority, duty or power) that the official holds himself or herself to have. The definition should be read with the dictionary definition of "function" in the *Legislation Act 2001* (the Legislation Act), which provides that the term "function" includes authority, duty or power. The term "public duty" is similarly defined. It is included because a number of offences in the chapter refer to a "public

duty" instead of referring simply to "duty". It is important for these definitions to cover duties that the official holds himself or herself to have because generally people will not know precisely what an official's duties are and in some cases a dishonest official will seek favours by promising to do things that have nothing to do with his or her duties. These terms are used in a number of offences in the chapter including general dishonesty (subclause 333(7)), conspiracy to defraud (subclause 334(4)), blackmail (clause 342) and forgery (clause 346).

Gain – This term is defined as any temporary or permanent gain of property or services and includes keeping what a person already has. A person who "fixes the books" to establish ownership of a vehicle he or she dishonestly acquired six months earlier would still make a gain under this definition even though the person already had the vehicle at the time the books were fixed. The definition follows the corresponding definition in the CCC but differs slightly from the MCC version (subsection 14.3(1)(a)) because it includes a gain of services as well as property. This is because services are often very valuable and costly and therefore also need to be covered by the relevant offences in the chapter. Dishonestly obtaining a gain is an element of a number of offences in this chapter, including conspiracy to defraud (clause 334), blackmail (clause 342) and forgery (clause 346).

Loss – This term is defined as any temporary or permanent loss of property and includes not getting what one might get. As explained in the Commonwealth EM:

> [this definition] follows the Model Criminal Code definition and is usually used in the same offences as `gain' to cover the `flip-side' consequence of dishonest behaviour. While there will invariably be a loss to someone whenever there is a gain for another, in some cases it is more appropriate to the facts of the case to prove the defendant dishonestly caused a loss rather than a gain. Either way there is a victim and the culprit should be penalised.

Obtain – This is an inclusive definition so that in addition to obtaining for oneself the notion also covers obtaining for another person and inducing a third person to do something that results in another person obtaining. These concepts are included in the definition because often defendants will be motivated to assist a relative or friend, and whether or not it is for the defendant or another, there will be a victim of the dishonesty.

Public official – This term is defined as any person who has a public official function or who acts in a public official capacity. It expressly includes Territory public officials (which is also defined – see below) and Commonwealth, States and Northern Territory public officials, including members of their respective legislatures (including local councils), executives, judiciary, magistracy and members of their police services; officers, employees and contract workers of their respective agencies and military personnel. This term is an element of the conspiracy to defraud offence (clause 334) and bribery and the related offences in part 3.7.

Services and supply – These terms are broadly defined and are included in support of the definition of "gain", referred to above.

Territory public official – This term is defined as any person who has a public official function for the ACT or who acts in a public official capacity for the ACT. It expressly includes ACT members of the Legislative Assembly, ministers, judges, magistrates, tribunal members, court and tribunal officers, members and special members of the Australian Federal Police (see the dictionary definition of "police officer" in the Legislation Act), ACT statutory office holders, ACT public servants and people who perform work for the ACT on contract. This term is an element of the offences of

general dishonesty (clause 333), conspiracy to defraud (clause 334), the bribery and related offences in part 3.7 and the impersonation and obstruction offences in part 3.8.

Dictionary definitions – Clauses 8 to 10 of the Bill insert a number of definitions in the dictionary of the Criminal Code. Because of their importance to the offences in this chapter it is proposed to discuss them at this point of the explanatory statement.

Explosive, firearm and knife – These definitions have been included in support of the definition of "offensive weapon" referred to below. The MCC does not include definitions for these terms but they are important for the offences of aggravated robbery (clause 310), aggravated burglary (clause 312) and going equipped with an offensive weapon (clause 316). The definitions closely follow the corresponding definitions in section 83 and the dictionary of the Crimes Act.

Offensive weapon – This definition is based on the similar definition in the dictionary of the Crimes Act and the corresponding definition in section 132.3 of the CCC. It is important for the offences of aggravated robbery (clause 310), aggravated burglary (clause 312) and going equipped with an offensive weapon (clause 316). The definition is expressed in wide terms and includes knives, firearms, explosives and things that in the circumstances may reasonably be taken to be a knife, firearm or explosive or to contain an explosive. Paragraph (a) of the definition also catches anything made or adapted for use for causing injury to, or incapacitating a person. The Crimes Act definition makes additional reference to anything capable of being used to cause injury etc but those words have not been included in the Bill definition because they are considered too wide. Virtually anything is capable of being used to cause injury so that, strictly speaking, a robber could be convicted of aggravated robbery if he or she happened to be carrying a fountain pen at the time of the offence. This is not to say that a fountain pen could not qualify as an offensive weapon because paragraph (b) of the Bill definition catches anything that a person has with the intention of using or threatening to use to cause injury or to incapacitate another. Therefore, if a robber puts a fountain pen to a person's throat and demands money, the pen qualifies as an offensive weapon and a case for aggravated robbery can be made out. Paragraph (b) would also cover cases where a person threatens another with a syringe.

Property – This definition supplements the definition of "property" in the dictionary of the Legislation Act. When read with that definition the term is similar to the recommended definition in section 14.4 of the MCC, which closely follows the definition in section 83 of the Crimes Act. The term is widely defined, covering any legal or equitable estate or interest in real and personal property (whether the estate or interest is in the present or future, vested or contingent, tangible or intangible) and includes money, electricity, water, gas, wild creatures and things in action. A thing in action is an intangible personal property right recognised and protected by the law. Examples include debts, shares and a bank balance. So, for example, a person who dishonestly debits another person's bank account could be prosecuted for theft. The reference to electricity has been included because the common law offence of theft did not recognise electricity as property (though it did recognise gas and water) and section 83 of the Crimes Act does not expressly refer to it. Consequently specific offences needed to be created, such as the offence in section 106 of the Crimes Act, which deals with the dishonest appropriation of electricity. There is no reason why a person who dishonestly bypasses the electricity meter or obtains it by deception should not be dealt with under the same offence as anyone else who wrongfully appropriates any other item of another person's property. By including "electricity" in the definition the offence in section 106 is no longer necessary and accordingly the Bill repeals that provision. The

references to gas and water are included to avoid any suggestion that they are not covered because of their absence.

Clause 301 Person to whom property belongs for chapter 3

Except in one important respect, subclause 301(1) closely follows subsection 85(1) of the Crimes Act. The Bill definition sets out the circumstances in which property is taken to belong to a person for the purposes of the offences in this chapter. However, the definition expressly excludes from the notion of property belonging to another "...an equitable interest arising only from … a constructive trust". Subsection 85(1) does not exclude an equitable interest arising from a constructive trust. The definition and the reasons for excluding constructive trusts is explained in the Commonwealth EM as follows:

> 56. This definition is of critical importance to the theft, theft related and property fraud offences (such as proposed sections [308, 313 and 326]. The basic definition at [subclause 301(1)] provides that property belongs to any person who owns it, or has any other proprietary right or interest in it, or who has possession or control of the property. One effect of the section is that co-owners or people with different rights to a piece of property can be guilty of theft from one another. For example, one owner of property can be guilty of theft from another owner (eg theft by one business partner from another), or an owner can be guilty of theft by taking his or her property away from someone who has possession or control of it (eg an owner who dishonestly took back his or her own goods from a pawnbroker). The owner cannot deny appropriation by relying on his or her own consent to the appropriation. Proposed [subclause 304(1)] and [subclause 305(1)] requires the consent of all those to whom it belongs. In the example, the owner of the pawn shop has not consented to the appropriation of his or her right to possession....
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> 57. The definition in proposed [subclause 301(1)] also provides that property also belongs to people who have any proprietary right or interest (not being an equitable interest arising either from an agreement to transfer or grant an interest, or from a constructive trust). One example of the effect of this is that a trustee (who is the legal owner of the trust property) who dishonestly appropriates trust property will be guilty of theft from the beneficiaries (who do not *own* the trust property but do have an equitable proprietary interest in the trust property). Where there is no specific beneficiary (eg in the case of a trust for general public purposes), proposed [subclause 305(2] makes this theft (subsection 15.5(1) of the Model Criminal Code).
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> 58. However, equitable interests arising from agreements to transfer or grant an interest (eg to sell land or shares) are excluded. These equitable interests arise by the operation of legal rules but only in relation to contracts which are specifically enforceable. For example, the defendant agrees to sell a valuable painting to the victim. Before the sale goes ahead and the painting is transferred, the defendant gets a better offer and sells it to X. In general, contracts agreeing to sell goods are not specifically enforceable but they are when the goods have special qualities. Hence, a contract like the one in the example would be specifically enforceable and the victim would have an equitable interest in the painting. However, the framers of the UK *Theft Act* judged that this conduct should not be theft and that civil remedies were sufficient. The qualification in proposed [subclause 305(2)] will mean that this is not property belonging to another and therefore not theft.
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> 59. Similar considerations arise in relation to constructive trusts. In an English case, the proprietor of a tied pub operated it on the basis that he would only sell the brewery's beer. In fact he also sold some of his own home brew. He was charged with theft on the basis of an argument that he was a constructive trustee of the proceeds of the sale of the home brew and that the brewery had an equitable proprietary interest in the proceeds. The Court of Appeal found that no constructive trust arose in these circumstances and, in any event, rejected the notion that a person should be guilty of theft based on the operation of such intricate legal concepts which strayed so far from ordinary conceptions of theft. The same point applies to constructive trusts generally, such as have been found to arise in the case of mistaken overpayment. Hence, proposed [subclause 305(2)] extends the qualification contained in the *Theft Act* so that equitable interests arising from constructive trusts do not fall within the definition of property belonging to another. Constructive trusts - based on equitable notions of unconscionability -

may be appropriate for recovery in civil actions, but they stray too far from the common conception of theft and the much more culpable sort of dishonesty involved in theft to form part of the definition of the offence of theft. Their ambit is uncertain and likely to expand. To attach the boundaries of theft to such an uncertain concept would offend the important principle that the criminal law should be knowable in advance. No doubt that principle calls for judgements of degree on occasion. On this occasion in relation to constructive trusts and the law of theft, the better view is to agree with what the Court of Appeal said in *Attorney-General's Reference (No 1 of 1985)* [1986] 1 QB 491, 503:

> ". . . the court should not be astute to find that a theft has taken place where it would be straining the language so to hold, or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft."

60. The *general* definition of property belonging to another contained in proposed [subclause 301(1)] is supplemented for the purposes of the offence of theft by proposed [clause 305] (section 15.5 of the Model Criminal Code).

61. Proposed [subclause 301(2)] makes it clear that the same rules also apply to money transfers under the property fraud offence [clause 326]. The Model Criminal Code does not have a special provision covering money transfers."

Clause 302 Dishonesty a matter for trier of fact

This explains that the issue of dishonesty is a matter for the jury (or the court acting in its capacity as the trier of fact) to decide.

Part 3.2 Theft and related offences

This part contains the offences of theft and other related offences such as robbery and burglary and some special interpretative provisions that qualify the general definitions in part 3.1 to the extent that they apply to the offences in this part.

Division 3.2.1 Interpretation for part 3.2
Clause 303 Dishonesty for part 3.2

The primary test for determining whether a person has acted dishonestly in relation to the offences in this chapter is set out in clause 300. This clause contains two special rules for interpreting the term "dishonest" in relation to theft and the offences that rely on theft as an element (such as the robbery offence).

The first of the special rules appears in subclause 303(1). It provides that for the offences in this part a person does not act dishonestly if he or she appropriates another's property in the belief that the owner cannot be found by taking reasonable steps. However, the rule does not apply to trustees or personal representatives who hold property on behalf of another (subclause 303(2)). The qualification is included to ensure that there is no incentive for trustees or personal representatives to benefit from displacing the person to whom the property belongs.

Subclause 303(3) sets out the second of the special rules for dishonesty in this part. It provides that a person who appropriates another's property is not necessarily absolved of dishonesty because he, she or someone else is prepared to pay for the property. The defendant may know, for example, that the owner of a prized family heirloom would not part with it at any price. This provision makes it clear that in such circumstances the defendant could be found to be dishonest even if he or she pays for the property.

The provisions of this clause embody longstanding rules on the law of theft and are in almost identical terms to paragraph 86(4)(d) and subsection 86(3) of the Crimes Act, which they will replace.

Although the Crimes Act does not define dishonesty, it does specify certain states of mind or conduct that are not to be regarded as dishonest. These are where the defendant believes that he or she has a claim of right (paragraph 86(4)(a)); that the appropriation will not cause the owner any significant practical detriment (paragraph 86(4)(b)); that the owner would have consented to the appropriation (paragraph 86(4)(c)); that the owner cannot be found (paragraph 86(4)(d)) and that he or she acquired a bona fide right or interest in the property for value (subsections 86(5)).

For the offences in this part subclauses 303(1), 303(2) and 304(3) (see below) cover the matters set out in paragraph 86(4)(d) and subsections 86(5). Equivalents of these are not necessary for the property fraud offence in clause 326 because they have no practical application to fraud. Further, it is not necessary to include an equivalent of paragraph 86(4)(a) because it is covered by the general claim of right defence in section 38 of the Criminal Code. That defence applies in relation to any property offence if at the time of the appropriation the person mistakenly believed that he or she had a legal right to take the goods and if the right had existed a fault element of the offence (eg appropriating property belonging to another) would not have been made out. Similarly it is not necessary to include equivalents of paragraphs 86(4)(b) and (c) because the matters are covered by the general definition of dishonesty in clause 300. For example, a person who genuinely believes that his friend would consent to him or her "borrowing" the car would not usually be liable for theft because the conduct would not be regarded as dishonest according to the standards of ordinary people. Similarly, with regard to paragraph 86(4)(b), it would not be regarded as dishonest for a person to pour out his brother's whisky bottle in order to prevent him from endangering his life by driving when drunk.

Clause 304 Appropriation of property for part 3.2

This is a critical interpretative provision for theft and closely follows the recommended provision in the MCC (section 15.3). Although this provision will affect some important changes in the way in which theft is understood and applied in the ACT, the practical consequences of the changes are not far reaching. The most important effect of this provision is that it will remove consensual appropriations of property by deception from the ambit of theft.

Subsections 86(1) and (2) of the Crimes Act define "appropriates" as follows:

(i) obtaining the ownership, possession or control of another's property by deception (s86(1)(a));
(ii) adversely interfering with or usurping any of the rights of the owner of the property (s86(1)(b)); or
(iii) acquiring property (whether innocently or not) without theft but later keeping or dealing with it as the owner (s86(2)).

By including (i) and (ii) within the notion of "appropriate", subsection 86(1) of the Crimes Act effectively collapses the distinction between theft and fraud and all cases of obtaining property by deception can be prosecuted as theft. This, in turn, gives rise to another issue and that is whether there can be an appropriation for the theft offence if the owner consents to the taking. MCCOC's view is that appropriation "without

consent" is vital for distinguishing between theft and fraud. However, there has been considerable judicial controversy on this point, centring on three House of Lords decisions in *Lawrence, Morris* and *Gomez,* which are cited in the extract from the Commonwealth EM, reproduced below.

Subclause 304(1) provides that any assumption of an owner's rights to ownership, possession or control of property is an appropriation if it is done without the consent of a person to whom the property belongs. This includes cases where a person comes by property (whether innocently or not) without theft but later assumes the owner's rights (without consent) by keeping or dealing with the property as if it were his or her own (subclause 304(2)).

There are three important differences between the Crimes Act provisions and this clause. First, the Bill definition does not include acquiring property by deception within the notion of appropriation. Conduct of that kind will no longer be covered by the theft offence but by a new and separate offence of obtaining property by deception (clause 326). But it is most important to note clause 372, which will allow alternative verdicts in cases where the wrong offence is charged. Secondly, the definition includes a requirement that the assumption of the owner's rights must be without the owner's consent in order to be an appropriation for the theft offence. This is implied in paragraph 86(1)(b) of the Crimes Act but this provision makes it clear. Thirdly, it is only an assumption of the owner's rights relating to the "ownership, possession, or control" of the property that can amount to an appropriation for theft. In contrast, paragraph 86(1)(b) speaks of "any of the rights of the owner". Strictly speaking this could include a case where a person simply sits on a car bonnet, which is clearly a right of an owner but on the other hand, far too trivial to count as an appropriation. Accordingly, MCCOC recommended restricting the rights to be protected by the theft offence to the rights relating to ownership, possession or control.

The following extract from the Commonwealth EM explains MCCOC's reasons for recommending the removal of property fraud from the ambit of theft:

> 85. . . . The UK *Theft Act* (which is the inspiration for the Model Criminal Code theft provisions) has a definition of appropriation which treats "any assumption of the rights of the owner" as an appropriation. By contrast, the common law equivalent of this element of theft required a taking and carrying away without the consent of the owner. The *Theft Act* term is more abstract on its face than the common law. It is possible to assume the rights of an owner in relation to goods without touching them: to point to someone else's car and offer to sell it would amount to an appropriation. The true breadth of the term has been the subject of considerable controversy.
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> 86. The first view is that "appropriates" is the equivalent of the old term "convert" and has as its natural meaning a one-sided transaction which is *adverse* to the owner. This was the view expressed by the House of Lords in *Morris* in 1984 [1984] AC 320. But *Morris* conflicted with the second view expressed in 1972 in another House of Lords case, *Lawrence* [1972] AC 626. The majority held that an appropriation could occur even if the owner consented. In 1992 in *Gomez* [1992] 3 WLR 1067, the majority of the House of Lords resolved the conflict in favour of the second view. It overturned the *Morris* view and held that appropriation is neutral and not to be read as importing the common law concept of "without the consent of the owner" (a phrase which the majority found to have been deliberately omitted from the new definition of theft). There was a powerful dissent from Lord Lowry. *Gomez* has been subjected to strong criticism . . .
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> 87. The consequences of the distinction can be demonstrated in an example based on *Lawrence*. Say a taxi driver deceives a foreign traveller by telling her that the fare for a journey is $50. In fact it is $20. The customer hands the driver her purse and allows the driver to take whatever money is necessary. The driver takes $50. On the neutral view of appropriation, the driver could be convicted of either theft (despite the fact that the victim consented to the defendant taking the money) or obtaining property by deception. On the "adverse interference" approach, the defendant could only be convicted of obtaining

property by deception: because of the victim's consent, the taking would not amount to an appropriation.

88. Those developing the Model Criminal Code faced a choice between these views. The choice has conceptual and practical consequences. First, if virtually any dealing with goods counts as an appropriation, the more work dishonesty has to do to distinguish theft from innocent transactions. Although considerable reliance is placed on the concept of dishonesty - especially for the difficult cases - it is obviously preferable to rely on more clear-cut criteria where possible. Second, there was strong support in consultation for retaining the distinction between theft and fraud. The effect of *Gomez* is to collapse the distinction between theft and fraud because all obtaining by deception cases will also be theft. This is because under *Gomez*, consent is not relevant to appropriation. The Model Criminal Code Officers Committee concluded that this strays too far from the central and commonly-understood meaning of theft as involving non-consensual takings. So far as possible, the law should reflect common understandings of offences as basic as theft and fraud.

89. The practical consequences of maintaining the distinction between theft and fraud in cases like *Lawrence* and *Gomez* are not great whichever way it is resolved. The penalty for both offences is the same. If all deception cases are charged as obtaining by deception, there will be no difficulty in obtaining a conviction. The difficulty in *Lawrence* and *Gomez* arose because the prosecution made a mistake and charged the defendant with theft instead of fraud and there were no provisions for obtaining alternative verdicts. If the defendant had been charged with obtaining by deception there would have been no difficulty in obtaining a conviction. Under proposed [subclauses 304(1) and 304(2)], if the defendant were charged with theft in a case where the property had been obtained by deception, the result would be not guilty of theft because the victim consented to the appropriation. This consent is not vitiated by fraud. This difficulty is cured by making obtaining by deception an alternative verdict to theft. The consultation on the Model Criminal Code favoured this solution but suggested that it should also work in reverse so that if fraud was wrongly charged it would also be possible to convict of theft [as in clause 372].

90. The issue of consent in cases where there are multiple owners is also important. Proposed [subclause 304(1)] provides that *anyone* to whom the property belongs consents to having their rights assumed ("...without the consent of *a* person to whom it belongs..."). Thus in cases where an object belongs to a number of people - as can be the case under the proposed provisions - if the consent of any one of them is missing at the time of the assumption of their rights, an appropriation may occur. That does not mean that the defendant is automatically guilty of theft. For example, if the defendant did not know of the other owner's interest, then the defendant lacks the fault element for an appropriation (knowledge about the lack of consent) and is not dishonest. On the other hand, a defendant who knows full well of the other owner's interest and dishonestly proceeds to assume those rights cannot rely on the consent of another co-owner to deny the appropriation. Assuming the presence of the other elements, such a defendant will be guilty of theft. So where one co-owner of a painting sells it to the defendant, and the defendant knows that the other co-owner does not and would not consent to the sale, the defendant cannot rely on the consent of the one co-owner to deny appropriation.

Subclause 304(3) deals with bona fide purchasers and recipients. It is similar to subsection 86(5) of the Crimes Act but is slightly wider to include the bona fide recipient of a gift. This is explained in the Commonwealth EM as follows:

92. Proposed [subclause 304(3)] ... covers cases where a person innocently acquires property (eg goods) and subsequently discovers that the person from whom he or she received the goods did not have the right to dispose of them, usually because the goods were stolen. For example, a person sells a car to the defendant who was acting in good faith. Later the defendant finds out that the first person had stolen the car, but the defendant decides to keep it. Despite the fact of payment, this is either dishonest or liable to be regarded as dishonest and the other elements of the offence of theft are present. The defendant could not rely on the consent of the thief because he or she does not have the consent of the owner as required by proposed [subclauses 304(1) and 305(1)]. Proposed [subclause 304(3)] prevents this from being theft by providing it is not an appropriation. . . .

93. . . . [W]here the defendant was *given* the car, the analogous section to [subclause 304(2) - that is, subsection 86(5) of the *Crimes Act*] does not operate because it only protects transactions which were "for value". Both are situations where the defendant was honest at the point he or she acquired the goods and the culpability derives from failure to return the goods. As in other situations where the defendant discovers that goods belong to another, subsequent to acquiring them (where there is a

mistake), the fact that the defendant did not initiate a dishonest transaction distinguishes him or her from the thief or the fraudster. Although the fact that the defendant paid for the goods in the one case but not the other makes some difference to the assessment, payment is not enough of a difference to warrant conviction for theft in one case but not the other. They are also substantially different from the case of a person in possession of goods on some basis of trust (eg an employee or a bailee) who makes off with the goods. In both these cases, the defendant initially believed he or she had become the owner of the goods. It was concluded that as a matter of consistency, the section should be widened slightly to include the *bona fide* recipient of a gift.

94. However, the proposed exemption is limited. If the defendant sold the car to another, he or she would be guilty of obtaining the purchase price by deception (see the proposed fraud offences at [clauses 326 and 332]. This is because the defendant does not obtain ownership of the car and the real owner could claim it back from the defendant or anyone to whom the defendant sold it.

Clause 305 Person to whom property belongs for part 3.2

This clause contains a number of special rules for determining when "property belongs to someone else" for the purposes of theft.

Subclause 305(1) makes it clear that in cases where there are 2 or more owners of an item of property it is taken to belong to each of them. Therefore, a joint owner of property can steal from another joint owner by dishonestly taking the jointly owned property. That is, the requirement in the theft offences (clauses 308 and 321) to appropriate property "belonging to someone else", is satisfied when joint owner "X" dishonestly takes jointly owned property because it is property that "belongs to someone else", that is, joint owner "Y" (albeit that it is also property that belongs to joint owner "X").

Subclause 305(2) deals with property held under trust. The ordinary case of appropriation of trust property by a trustee will be covered by the general definition in clause 301 without the need to rely on subclause 305(2). This is because the beneficiary under the trust has an equitable proprietary interest and therefore, by virtue of clause 301, the trust property is taken to belong to him or her. However, subclause 305(2) has been included to ensure that cases where there may be no specific beneficiary (eg in the case of a trust for general public purposes) are covered. In these cases subclause 305(2) makes this theft by providing that property that is the subject of a trust is taken to also belong to any person who has a right to enforce the trust. Subclause 305(2) also makes it clear that an intention to defeat a trust is an intention to deprive for the purposes of theft. This provision is in similar terms to subsection 85(2) of the Crimes Act, which it will replace.

Subclause 305(3) is in almost identical terms to subsection 85(5) of the Crimes Act and preserves ownership for a corporation sole where there is a vacancy in the corporation.

Subclause 305(4) deals with property that a person has on account of another. The provision is in similar terms to subsection 85(3) of the Crimes Act and is explained in the Commonwealth EM as follows:

102. Proposed [subclause 305(4)] follows subsection 15.5(2) of the Model Criminal Code. The *general* definition of property belonging to another contained in proposed [clause 301] is supplemented for the purposes of the offence of theft by proposed [subclause 305(4)]. So, for example, if the defendant receives money from another person and is under an obligation (this must be a legal obligation) to retain and deal with that money in a particular way but the defendant deals with it another way, the money is said to belong to the victim. The cases have held that the obligation must be legal rather than moral. This is made explicit in proposed [subclause 305(4)]. The application of this provision will depend very much on the facts of the transaction. The most difficult cases involve cash deposits. The section only applies if the particular cash is to be used, for example for the purchase of tickets. If the

cash is to be mixed with the general cash of the organisation and there is a liability to provide tickets or a refund at a later time, then the cash ceases to belong to another. There is a debt to the depositor and the situation is dealt with on the normal principles relating to debtors and creditors.

Subclauses 305(5) and (6) deals with what is perhaps the most complex area in the law of theft. It concerns the issue of when property is obtained by mistake and more particularly, the effect this has on the requirement in the theft offences that property must "belong to someone else". Put simply, if, despite the mistake, ownership of the property passes to the recipient when it is handed to him or her, it is no longer property that "belongs to someone else" and therefore the recipient does not commit theft by keeping it. To overcome this problem the Crimes Act includes subsection 85(4) which deems that the property in the possession of the person who receives it by mistake belongs to the person to whom the receiver is under a legal obligation to make restoration (that is, the person who owned the property before it was mistakenly passed to the recipient). It also provides that an intention not to make restoration amounts to an intention to permanently deprive the owner of it.

Subclause 305(5) is based on the 1968 UK *Theft Act* (the Theft Act) equivalent of subsection 85(4) of the Crimes Act and like subsection 85(4), it only operates where the obligation to make restoration is a legal obligation, in contrast to merely a moral or social one. However, subclause 305(5) has been remodelled to incorporate the concept of "fundamental mistake" established by the High Court in the *Ilich* case (though with some modifications). That is, whereas under subsection 85(4) both fundamental and non-fundamental mistakes can count as theft, subclause 305(5) only applies if the mistake is a fundamental mistake, as defined in subclause 305(6). The following extract from the Commonwealth EM includes an explanation of what amounts to a fundamental mistake at common law and under subclause 305(6); the changes that this will give rise to in this area of the law and MCCOC's reasons for recommending the change:-

103. Proposed [subclauses 305(5) and (6)] follow subsections 15.5(3) and (4) of the Model Criminal Code. It also includes an additional provision that makes it clear that money includes cheques, negotiable instruments and electronic funds transfers [see the definition of "money" in subclause 305(6) and the examples].

104. Proposed [subclauses 305(5) and (6)] deal with the problem when the victim makes a *fundamental* mistake and gives the defendant some property; the defendant does nothing to induce the mistake. Fundamental mistakes are mistakes about the identity of the defendant, the essential nature of the property, or the quantity of the goods (but not the amount of money). The problem is whether the victim's mistake is so fundamental that it vitiates the consent to the defendant appropriating the property and the victim's intention to transfer ownership of the property to the defendant. Other sorts of non-fundamental mistakes (eg the year of manufacture of a car) do not give rise to this problem. These mistakes do not vitiate consent or intent to pass ownership and the defendant does not incur any criminal liability. However, in the case of fundamental mistakes, if the defendant decides to keep the goods the question is whether he or she should be guilty of theft.

105. There are two situations relating to fundamental mistakes: (i) where the defendant knows of the mistake at the time ("T1") of transfer and decides to keep the goods; and (ii) where the defendant does not know of the mistake at T1 but discovers it later ("T2") and then decides to keep the goods. At common law in England, the defendant was guilty of theft in both T1 and T2 situations (*Middleton* (1873) LR 2 CCR 38.

106. The more difficult cases arise when the defendant only finds out about the mistake later at T2 and then the defendant decides to keep the property. This came up in the case of *Ashwell* (1885) 16 QBD 190. The prevailing view was that the taking did not occur at T1 when a valuable coin was handed over. Their view was that the appropriation did not occur until T2, when the defendant discovered what the coin really was, namely a sovereign. At T2, on the authority of *Middleton,* the mistake as to the nature of the subject matter meant that there was no consent to the taking and that ownership had not passed (ie it was still property belonging to another). The opposing view was as follows. The taking occurred

at T1, was with consent and occurred at a time when the defendant lacked fraudulent intent. At T2, when the intent became fraudulent, there was no taking without consent and ownership of the property had passed to the defendant.

107. In Australia, the majority judges in the High Court case of *Ilich* (1987) 162 CLR 110 expressed their disapproval of the reasoning in *Middleton* and *Ashwell*. *Ilich* was a decision on the WA Code but in the course of the decision, the majority indicated its agreement with the reasoning in *Potisk* (1973) 6 SASR 389 (a SA Full Court decision on common law larceny which had also rejected the English cases). In *Ilich*, the High Court ruled that cases where property passes because of a non-fundamental mistake are not theft under the Codes because at the time of the conversion (ie T2) the property belongs to the defendant. The reasoning of
the High Court was that at T1, the owner knew the identity of the payee and the nature of what he was transferring, namely money. The normal presumption with money is that ownership passes with possession. Consent to the taking is not required under the WA Code, so that issue did not arise. At T2, the time of the "conversion", ownership of the $500 in question had passed to Ilich and therefore it was not property belonging to another.

108. Under the UK *Theft Act*, fundamental and non-fundamental mistakes can count as theft, even at T2. The *Theft Act* approach in this type of case is to say that the appropriation occurs at the time the defendant dishonestly decides to keep the money. The question is whether the property belongs to another at this point. There are a variety of routes to the conclusion that it does. This is because the UK *Theft Act* has such a wide definition of property belonging to another: it includes any case where the victim has a proprietary right or interest or is under a legal obligation to return the property.

109. First, in cases of fundamental mistakes as to the identity of the transferee, the nature of the subject matter or the quantity of the goods, the intent to pass ownership is vitiated by the mistake and hence the property still belongs to the victim. If the defendant is aware of the mistake at either T1 or T2 and dishonestly decides to appropriate the property, he or she will be guilty of theft.

110. Second, English cases have held that where certain sorts of mistakes are made, although legal ownership of the property passes, there is a constructive trust and the transferor retains an equitable proprietary interest in the property transferred. Thus, the property still belongs to another under s5(1) of the UK *Theft Act* because the person has a "proprietary right or interest" in it. The type of mistake here is not so fundamental as to prevent ownership passing but must be serious enough that it would be unconscionable for the defendant to retain the property; hence he or she becomes a constructive trustee for the victim who, as beneficiary, has an equitable proprietary interest in the property. Exactly when this is so will vary according to the essentials of the transaction, but it is wider than mistakes as to the identity of the transferee or the nature of the subject matter. In England, the Court of Appeal has cast doubt on the notion of using constructive trusts as a basis for the law of theft. For the reasons outlined above, proposed [subclause 301(1)] specifically excludes constructive trusts from the ambit of property belonging to another and hence from the ambit of theft. Hence, this route to a conviction for theft is not open under the proposed provisions.

111. The third category of cases produces the most difficult problem. These are cases of non-fundamental mistake where the ownership does pass - such as in a case where a $200 debt is mistakenly paid twice. Under the *Theft Act,* this will be theft if the defendant is under a legal obligation to repay the money. This is because s5(4) of the UK *Theft Act* deems the property to belong to the victim if the defendant receives the money by another's mistake and is under a legal obligation to make restoration in whole or in part of the property or its proceeds.

112. Whether the defendant is under such an obligation is a matter of civil law and may include, among other things, decisions about the law of quasi-contract and whether a contract is void or voidable. If the contract is voidable, it may be argued that the defendant is not under a legal obligation to return the property until the contract is avoided. In many of these cases, the intricacies of the civil law are such that the defendant may be able to argue that he or she is not dishonest because he or she did not know that keeping the property was dishonest. However, defendants who take advantage of other's mistakes or who make secret profits may be regarded as dishonest. But that does not necessarily mean that such people are guilty of theft. Dishonesty is an important element of the law of theft and fraud but it is not the only element. Leaving such cases to be determined solely by reference to the concept of dishonesty avoids the basic question about whether the intricacies of the civil law appropriately mark out the boundary of the physical elements of theft.

113. Proposed [subclauses 305(5) and (6)] is therefore a rejection of the uncertain ambit of constructive trusts for the purpose of extending the boundaries of when property belongs to another for the purposes of the law of theft.

114. There are strong arguments that the mistake cases - particularly the T2 cases - should not be treated as theft but as matters involving civil liability. The victim has brought about his or her own misfortune and it is unduly harsh to cast the onus of rectifying the situation onto the defendant on pain of committing theft. Thus, while the victim in *Ilich* is certainly entitled to sue to recover his money, he should not be able to have the other person arrested and prosecuted for theft, any more than any other creditor could if the debtor spent money on a holiday rather than paying the creditor's account. In some cases these overpayments will arise because the victim has chosen to set up business arrangements which are prone to error because this is cheaper than setting up a less error-prone system. Although the defendant may be under an obligation to return the property, the culpability is of a much less serious sort than theft or fraud where the defendant initiates a dishonest transaction. In these cases, the defendant has had temptation thrust upon him or her. To make a defendant like Ilich, or the recipient of a social security overpayment, guilty of theft in these T2 cases is to cast a duty to act in relation to innocently acquired property on pain of committing theft.

115. The potential width of this sort of liability is also of concern. In theory, it turns civil obligations into criminal ones where hitherto that has not been the case. It may be that all sorts of business transactions involving mistakes would now carry potential criminal liability. The 1995 Model Criminal Code report mentions the following examples of cases which now would be brought within the law of theft. (1) A purchaser pays a vendor for goods; neither realised that the purchaser already owned them. The vendor refuses to repay the money. (2) An insurer pays money to an insured for goods that both believed to have been destroyed by fire. Subsequently the defendant finds the goods but does not tell the victim. (3) An employer pays a manager a lump sum to terminate her contract. It turns out that breaches of the contract would have entitled the employer to terminate the contract without payment. Neither knew of the breaches at the time of the contract. They subsequently discover this but the employee refuses to repay. The House of Lords and the Court of Appeal in England differed on whether the defendant was under an obligation to repay in the employment case. In all these cases (save the last), the defendant would be civilly liable to give back the money or goods mistakenly given to him or her. The question is whether it is justifiable to impose criminal liability for the offence of theft as well.

116. While the consultation on the Model Criminal Code revealed that opinion was divided on this issue, for the reasons advanced in relation to constructive trusts, it has been concluded that the civil law distinctions – while appropriate to the context of determining civil recovery - are too obscure on the whole to define the boundaries of an offence as serious as theft. It is therefore proposed that it is appropriate to limit the use of the law of mistake to the existing Australian law as stated by the High Court in *Ilich*, subject to the qualifications outlined below. This involves the following rules:

(a) Mistakes as to the nature of the subject matter or the identity of the transferee will continue to negate the intent to confer ownership [paragraphs 305(6)(a) and (b)]. If the defendant knows of this sort of mistake either at T1 or T2, the property still belongs to the victim and the victim will be deemed not to have consented to its appropriation and the defendant will commit theft. (Mistakes as to quantity are not included on the basis that they are not sufficiently fundamental: the person intends to hand over goods of that sort and there is no mistake about the identity of the transferee).

(b) Other mistakes do not vitiate either the consent to the appropriation or the intention to pass ownership. The defendant does not commit theft if he or she knows of the mistake either at T1 or T2 because the property no longer belongs to another.

(c) Mistaken overpayments by cash, cheque or direct credit are a special case [305(6)(c)]. Where the defendant is aware of the mistake at the point of transfer (T1), the absence of what may be termed the inertia factor makes this case sufficiently like the finding cases to warrant the offence of theft. This raises a question about when the relevant time is. In a supermarket if the defendant immediately knows the overpayment at the register, this is clearly a T1 situation. On the other hand, in a case like *Ilich,* where the defendant does not become aware of the mistake until some time after transfer, it is clearly a T2 situation. The defendant will not be guilty of theft but the victim would be able to recover the money civilly. Cases where the defendant receives a cheque in the mail are more difficult. In accordance with the reasoning of Kriewaldt J in *Wauchope* that this would not be theft because the defendant did not become aware of the mistake until some time after the drawer intended to convey ownership (ie it is a T2 situation). Mistaken direct credits to bank accounts are similar to cheques. If a bank customer saw the teller mistakenly credit his or her account with $2000 rather than $200, and

said nothing, that would be theft. In practice, direct credits will overwhelmingly be T2 cases because the defendant will only find out about the mistake some time after the transfer. If there was a fundamental mistake (eg wrong account because of a mistaken identity), the defendant would be liable for theft at T2. If it was a non-fundamental mistake (eg the correct account but the wrong amount), the defendant would not be guilty of theft. The victim would have civil remedies to recover what is in effect a debt.

117. These are fair rules developed after consultation and a thorough review of the relevant case law by the Model Criminal Code Officers Committee.

Clause 306 Intention to permanently deprive for part 3.2

The proposed theft offences (clauses 308 and 321) retain the longstanding common law element of "intention to permanently deprive" and the provisions of this clause provide guidance on the application of that element in the particular cases specified in the clause. However, as subclause 306(4) makes clear, the provisions of this clause do not limit the circumstances in which a person can be taken to intend to permanently deprive.

The provisions in this clause are based on section 15.6 of the MCC, which is similar to subsections 87(1), (2) and (3) of the Crimes Act (which this clause will replace). Subclause 306(1) expands the concept of intending to permanently deprive by including an intention to treat the property as one's own to dispose of, regardless of the rights of the other person. In other words, although the defendant may not mean to permanently deprive the owner, the subclause deems that intention to exist where the defendant intends to treat the property as his or her own to dispose of, regardless of the rights of the other person. This is a helpful crystallisation of the common law position and judicial interpretations seem to favour that view.

Subclause 306(2) also expands the meaning of "intention to permanently deprive" to include an intention to borrow or lend property. But this extended meaning only applies if the borrowing or lending is for a time and in circumstances that effectively amount to an outright taking or disposal of the property. To satisfy subclauses 306(1) and (2) the "disposal" or "borrowing" of the property will need to have a quality of permanence about it, such as where a person melts down another's antique bracelet intending to give back the melted silver.

Subclause 306(3) deals with cases where a person who has another's property, parts with it (for his or her own purposes and without the owner's authority) under a condition for its return that the person may not be able to perform. In such cases the person is taken to have intended to permanently deprive the owner of his or her property. The provision would cover cases where a person pawns the property of another as security for a loan intending to redeem it and return it to the owner at a later time.

Subsection 87(4) of the Crimes Act provides, in effect, that a person who takes money intending to return an equivalent amount but not the actual notes themselves is not to be taken to have intended to permanently deprive the owner of the money. This provision is unnecessary because such conduct would not be considered dishonest under the terms of the general dishonesty test in clause 300.

Clause 307 General deficiency

This provision follows section 15.7 of the MCC and replaces a similar provision at section 112 of the Crimes Act. It is an evidentiary provision that allows the defendant to be found guilty of theft if, although the prosecution cannot identify the particular sums of money or property taken, it can prove a general deficiency in the victim's money or property referable to the defendant's conduct. A typical example is where the defendant is an employee and takes small amounts of money from the till over a period of time.

Division 3.2.2 Indictable offences for part 3.2

This division contains the major theft offence and the associated offences of robbery, aggravated robbery, burglary, aggravated burglary and receiving. The division also contains the lesser offences of taking a motor vehicle without consent, making off without payment, going equipped for theft (or a related offence) and dishonestly taking or retaining Territory property.

Clause 308 Theft

This clause contains the core offence in this part, which is the offence of theft. It provides that a person commits the offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property. The elements of the offence have been explained in detail above. However, it is important to note that all these elements must exist at the same time in order for the offence to apply. The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both. This offence will replace the theft offence in section 89 of the Crimes Act, which also applies a maximum term of 10 years imprisonment.

Clause 309 Robbery

This clause sets out the elements for the robbery offence. It is based on the Theft Act equivalent of subsection 315(1) of the Crimes Act. Put simply, robbery is the use or threat of force to commit theft. In addition to the elements of theft (see clause 308), robbery requires proof that at the time of the theft or immediately before or immediately after, the defendant used force on any person or threatened to use force on any person then and there, with the intention to commit theft or to escape from the scene. The maximum penalty is 14 years imprisonment or 1400 penalty units ($140,000) or both. This offence will replace the similar offence in section 90 of the Crimes Act, which also applies a maximum term of 14 years imprisonment.

To establish robbery the force or threats must be causally linked to the theft and not merely coincidental. For example, if the defendant hits the victim in an argument, the victim's wallet falls out of his or her pocket and the defendant then decides to steals it, the defendant will be guilty of theft and assault but not robbery because the force was not used with the intention to steal. Also, in the case of a threat it must be a threat to use force then and there. Threats of force at some later time or against property, or other sorts of threat (eg to embarrass) are not included. However, the offence of blackmail does extend to these sorts of threats (see clause 342 below).

It is not necessary for there to be a link between the person subjected to the force or threat and the property being stolen. A threat to a third person in order to get the victim to hand over property will be robbery. The only necessary link is the defendant's purpose in using the threat or force in order to steal.

The robbery offence in this clause differs from the offence in subsection 91(1) of the Crimes Act in a number of respects. First, clause 309 includes force or threats used immediately after the theft, as well as immediately before and at the time of the theft. This is already the law in most Australian jurisdictions. The change is significant because it will avoid hair-splitting distinctions about the precise moment of appropriation. Also, take a case where the defendant picks the victim's pocket and the victim then grabs the defendant's arm. If the defendant punches the victim to break away and make good the theft, it should not matter that the force was used moments after the appropriation rather than moments before, because the force is so intimately tied up in the theft. The defendant has used force in order to steal and ought to be found guilty of robbery.

Paragraph 309(b)(ii) of this clause refers to a person threatening to use force. In contrast the robbery offence in the Crimes Act uses the expression "puts or seeks to put another person in fear [of] … force". In addition to being clearer, the Bill offence will cover the kind of case that arose sometime ago in Victoria. There the defendant threatened a shopkeeper by pretending he would harm a bystander who was in fact an accomplice to the robbery and therefore not put in fear. Under this clause the defendant would be convicted because he threatened to use force on another person. It would not matter that the bystander/accomplice was not put in fear. The nub of the offence is that the defendant appropriated the money from the victim by threat of force against the third person.

Clause 309 is also different to section 91 of the Crimes Act because it does not include a separate offence of assault with intent to rob (subsection 91(2)). That offence is unnecessary because the conduct is covered by the relevant offences on threat and inflicting injury in part 2 of the Crimes Act (and causing harm/serious harm and threatening to cause harm/serious harm in the MCC). Also if the assault occurs in the course of a failed robbery the defendant can be dealt with for attempted robbery or attempted aggravated robbery (under the general attempt provisions in section 44 of the Criminal Code), for which maximum penalties of 14 and 25 years imprisonment will apply.

Clause 310 Aggravated Robbery

This provision contains a separate, more serious robbery offence, where the robbery is committed in the company of others or with an offensive weapon. The term, "offensive weapon" is defined in the dictionary. In addition to knives, firearms, explosives and things that could be taken to be knives, firearms and explosives, the definition also extends to things " ... that a person has with the intention of using or threatening to use to cause injury". This would cover a case where, for example, a person threatens another with a syringe.

The armed robbery offence in section 92 of the Crimes Act only applies if the defendant is armed but the offence in this clause follows the trend in a number of Australian jurisdictions by treating robbery "in company" as an aggravating circumstance.

The maximum penalty for this offence is 25 years imprisonment or 2500 penalty units ($250,000) or both. This offence will replace the similar offence in section 92 of the Crimes Act, which also applies a maximum term of 25 years imprisonment.

Clause 311 Burglary

This clause sets out the elements for the offence of burglary. It is based on the Theft Act equivalent of section 93 of the Crimes Act. To commit the offence a person must enter or remain in a building as a trespasser, with the intention of stealing or committing another offence (including a Commonwealth offence - subclause 311(2)) that involves causing harm or threatening to cause harm to someone or an offence that involves damaging property and is punishable by five years imprisonment or more. The maximum penalty for this offence is 14 years imprisonment or 1400 penalty units ($140,000) or both. This offence will replace the similar offence in section 93 of the Crimes Act, which also applies a maximum term of 14 years imprisonment.

To establish burglary the entry must amount to a trespass, in contrast with the common law that required a breaking plus an entry. Thus, to enter a house without permission through an open door is not burglary at common law but it is under this provision (and also under section 93 of the Crimes Act). To establish a trespass for the burglary offence the prosecution must not only prove that the defendant had no right to enter or remain in the building but also that the defendant knew that he or she had no such right or was reckless about having such a right.

Whether a person is a trespasser for the purposes of the burglary offence is a matter to be determined according to the principles of the civil law. In most burglary cases the issue will be clear because the occupier will not have given his or her permission to the defendant to enter or remain in the premises. However, as the High Court case of *Barker* demonstrates (see below), the civil law of trespass can be extremely complex and give rise to considerable uncertainty as to whether a person is in fact a trespasser. To avoid these difficulties MCCOC has recommended the inclusion of subclause 311(4). It provides that a person is not a trespasser merely because he or she is permitted to enter or remain in a building for one purpose but enters or remains for another purpose or merely because he or she enters or remains in the building as a result of fraud, misrepresentation or another's mistake. This provision has no equivalent in section 93 of the Crimes Act.

The following extract from the MCCOC report (pages 75-81) demonstrates the merits of this provision:

> The first problem occurs when the defendant has licence to enter for one purpose but enters with a different purpose. For example in one case, the defendant's neighbour gave him the key to their house so that he could take care of it while they went away. He used the key to steal their goods. The High Court in *Barker* found that this went outside the purposes of his licence to enter, that the entry was a trespass and that he had therefore committed burglary. The more difficult case involves a shoplifter who enters a shop along with other members of the public but intends to steal. Their licence to enter does not extend to entry for the purposes of theft. On the other hand to describe this as burglary strains the concept of burglary well beyond its proper bounds. In *Barker,* two judges said that where the defendant had a *general* licence to enter, he or she did not become a trespasser simply because the victim would not have given permission had he or she known the victim's purpose. The question was the actual limit of the defendant's authority to enter. Second, they said that the prosecution must prove that the defendant knew he had no right to enter (or was reckless about this). That would usually be difficult to prove in shoplifting situations as the defendant would usually think he or she was entitled to enter along with everybody else. The result would be not guilty of burglary but guilty of theft.
>
> Murphy J in *Barker* thought the introduction of these concepts into the criminal law was too metaphysical and turned pilfering by cleaners, employees and shoplifters into burglary. Dawson J said it would be simpler to remove the notion of purpose altogether from this part of the law:
>
> 'Trespass is concerned with the physical violation of possessory rights and it would do no harm to principle to say that there is no violation of possessory rights where the act which would otherwise

constitute the violation is permitted even if it is done for a purpose other than the purpose for which the permission is given.'

The Committee respectfully agrees with this view. In a case like *Barker,* it cannot be said that there has been a physical violation of the victim's possessory rights to restrict entry: he agreed to the defendant being on his premises, though not for the purpose of theft. The sort of violation involved in entry without any permission - the essence of burglary - is lacking. This is even more true in the case of shop-lifting. To include such cases in burglary - a significantly more serious offence than theft - erodes the basis for the distinction between theft and burglary. Although at some points the law of theft has to resort to the refinements of the civil law, this should be minimised. Hence, [subclause 311(4)] provides that if the defendant is permitted to enter a building for one purpose, the fact that he or she enters the premises for another purpose does not make him or her a trespasser. In these circumstances, the defendant will not be guilty of burglary but will be liable for any other offence committed (eg theft). This will not completely remove the need to go into the terms of a permission to enter in some cases. For instance, take the example of a cleaner who has permission to enter premises on Mondays during the day to clean. If the cleaner entered on a Monday during the day but on this day intended to steal, by virtue of [subclause 311(4)] he or she would not be a trespasser. The offence would be theft, not burglary. On the other hand, if the entry was on Saturday, or on Monday at 11pm, he or she would be outside the terms of the permission to enter, would be a trespasser and would be guilty of burglary. . .

The second problem is when the defendant obtains entry by fraud or intimidation. At common law, these situations were treated as "constructive breaking and entering". In the case of intimidation, there is no difficulty in saying there is no valid consent to enter and that the defendant is a trespasser. Indeed, such a person may well be guilty of robbery.

However, as discussed in relation to mistake, fraud does not generally negative consent. Only fraud (or mistake) as to the identity of the person or the nature of the subject matter vitiates consent. However, applying these principles to burglary leads to complex and contradictory results akin to those identified in *Barker*. Take the following examples. The defendant plans to steal a TV set from the victim's house. The defendant gives the victim a false name and falsely represents that he is a meter reader to obtain permission to enter the house. The victim allows him to come in. While the victim is not looking, the defendant steals the TV and leaves. This is a long way from the standard case of burglary where the defendant breaks into the house at night. However, on standard principles, the fraud as to the defendant's identity vitiates the consent, and the defendant is guilty of burglary. However, if the defendant gave his correct name, arguably there would be no fraud as to identity, merely fraud as to his attributes (that he was a meter reader) and his purpose (that he intended to read the meter). In that case he would be guilty of theft but not of burglary. If in fact he was a meter reader and intended to read the meter but also to steal the TV, there would be no fraud at all and he would be guilty of theft. On the other hand, if he did not intend to read the meter but just to steal the TV, it could be argued that the fraud about reading the meter was a fraud as to the subject matter of the transaction and this vitiated the consent. This would mean the defendant was guilty of burglary.

Reliance on the general rules about fraud and mistake does not offer a good basis for distinguishing these various cases. Objectively, the harm to the victim's interests is the same in all of these fact situations. And that harm is of a different and significantly lesser degree than the standard case of burglary in which there is no permission to enter at all. The passage quoted above from *Barker* is relevant again here. These cases should be treated like the cases where the person has permission to enter for one purpose but does so for another purpose. Cases where entry is gained by fraud or by mistake will also be deemed not to be trespasses for the purposes of burglary [subclause 311(4)]. The defendant will be guilty of theft. The courts can reflect the defendant's culpability in practising fraud or exploiting trust in the sentence imposed for theft.

The burglary offence in this clause is wider than the offence in section 93 of the Crimes Act because it also applies to a person who <u>remains</u> in a building as a trespasser with the relevant intention. This will cover cases where, for example, a person hides in a shop intending to commit theft and then sneaks away after it closes. In such cases the defendant would not be a trespasser when he or she entered the shop but would become so either because he or she had no permission to remain on the premises after closing time and/or no permission to be in that part of the building.

As noted above, one of the ways a person can commit burglary is if he or she trespasses onto premises intending to commit another offence that involves causing damage to property and is punishable by imprisonment for five years or longer (subparagraph 311(1)(c)(ii)). Subclause 311(3) is an important provision that provides that absolute liability applies to the requirement that the intended offence must be punishable by five years or more. In other words, it is not necessary to prove that the defendant had any awareness (or any other fault element) about the penalty that applied to the intended offence and it is not relevant that he or she may have made a mistake about the penalty that applied (see subsection 24(3) of the Criminal Code). It is sufficient that the defendant intended to commit a property damage offence and that the maximum penalty for that offence was in fact five years prison or longer.

It is important to stress that subclause 311(3) does not render the whole of the burglary offence an absolute liability offence. Rather, it simply applies absolute liability to the one particular element of the offence referred to above. This is considered appropriate because offenders usually have no awareness of the penalty that applies to the offences they intend to commit and their knowledge or otherwise of that matter has no real bearing on their culpability. On the other hand, it is important to include the five year prison restriction to ensure that the very serious burglary offence (for which a maximum penalty of 14 years prison applies) is not applied to cases where the intended property damage is relatively minor or even insignificant. The corresponding Crimes Act offence applies the same restriction (paragraph 93(1)(c)).

Finally, subclause 311(5) defines "a building" to include part of a building, a mobile home or caravan or other structure adapted for residential purposes. The current definition in subsection 93(2) of the Crimes Act is to similar effect.

Clause 312 Aggravated burglary

This provision is similar to clause 311, in that it provides for a separate, more serious offence, where the burglary is committed in the company of others or with an offensive weapon. A maximum penalty of 20 years imprisonment or 2000 penalty units ($200,000) or both will apply. This offence will replace the similar offence in section 94 of the Crimes Act, which also applies a maximum term of 20 years imprisonment.

The aggravating factors listed in this provision are consistent with the aggravating factors for robbery. The definition of "offensive weapon" in the dictionary also applies to this offence. Other aggravating factors such as burglary "at night" or "in a dwelling house" can be dealt with adequately on sentencing.

To establish aggravated burglary the prosecution must satisfy all the elements of the basic burglary offence and also prove that one or both of the aggravating factors was present (that is, that the burglary was committed in the company of others or with an offensive weapon). It is important to also note that if the aggravated burglary involves the elements in paragraph 311(1)(c), absolute liability will apply to the matter concerning the level of penalty that applies to the intended property damage offence (subparagraph 311(1)(c)(ii)). The reasons for this are explained in the commentary to clause 311.

Clause 313 Receiving

Subclause 313(1) sets out the elements of the offence of receiving. It provides that a person commits an offence if he or she dishonestly receives "stolen property", knowing or believing the property to be stolen. The term, "stolen property" is defined in clause 314.

The provisions of this clause and clause 314 are based on section 16.8 of the MCC, although the drafting more closely follows section 132.1 of the CCC. Together clauses 313 and 314 will replace the "handling" offence in section 105 of the Crimes Act and the related definition of "stolen property" in section 88. The special verdict provision in subsection 114(1) of the Crimes Act relating to handling and theft will also be replaced by clause 372 of the Bill (see the commentary on this clause below). The Commonwealth EM includes the following passages in support of retaining a receiving offence:

> 127. While both the Gibbs Committee and the Model Criminal Code Officers Committee thought there was scope for eliminating the offence of receiving and relying on theft, there was very strong support in consultation for having a separate offence of receiving. Most considered the `receiving' label corresponded with community understanding of a form of criminality which is different from theft. It is important that where it is appropriate the language of the *Criminal Code* should reflect community understanding.
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> 128. Apart from that reason, receiving is also relevant to the property fraud offence [clause 326] where the property is obtained by deception. Unlike fraud, theft does not cover property appropriated with the consent of the owner. There will also be situations where there was uncertainty about whether the property had been stolen or obtained by deception - but certainty that one or the other occurred. There are good reasons for having an offence of receiving.

There are some important differences between the offence in subclause 313(1) and the handling offence in section 105 of the Crimes Act.

The "handling" offence in section 105 applies to three categories of conduct; namely, cases where the defendant (i) receives the stolen property on his or her own account; (ii) receives, stores or disposes of the property for the benefit of another or arranges to do so; and (iii) simply possesses stolen property. On the other hand, the receiving offence in subclause 313(1) is confined to the first category. That is, it applies to receiving only.

In all cases that fall within category (ii) the defendant's conduct involves assisting a principal offender. Accordingly, this category is unnecessary because the usual offences relating to complicity and accessory after the fact will apply. For example, where the principal is the thief and the defendant helps him or her sell the stolen goods, the defendant is an accessory after the fact to theft. If the principal is a receiver and the defendant helps him or her unload the truck delivering the stolen goods, the defendant is an accessory to receiving. As MCCOC points out, there is nothing about the offence of receiving that warrants separate complicity rules and it is clearer and more consistent to deal with these cases under those offences.

The inclusion of category (iii) in the Crimes Act offence can produce unfair results in cases where the defendant innocently comes into possession of property (for example, by buying them or letting them be stored at his or her premises) and *subsequently* discovers that they are stolen. To make this receiving would effectively place the defendant under an obligation to return the goods or commit a serious offence for which a maximum penalty of 10 years imprisonment applies. MCCOC considers that this "draws the line on the wrong side in a difficult line-drawing exercise" and has

recommended against expanding the offence in this way. Of course, if the defendant subsequently assists the principal to keep the goods or to dispose of them, he or she may be liable as an accessory after the fact. Also the summary offence of unlawful possession (clause 324) will apply to catch mere possession in these circumstances but the maximum penalty of six months imprisonment is considered a more appropriate punishment.

For property acquired in the ACT, the handling offence in the Crimes Act also applies to property (or the proceeds from property) that has been stolen or obtained by blackmail (see paragraph 88(1)(a)(i) and subsection 88(2)). The receiving offence in this clause does not include property obtained by blackmail because the offences of blackmail (clause 342) and accessary after the fact would apply. In MCCOC's view the definition of receiving ought to be targeted at the specific evil for which it was designed; namely the intermediary, or "fence", who trades in stolen goods.

The maximum penalty for this offence is 10 years imprisonment or 1000 penalty units ($100,000) or both, compared to 14 years imprisonment for handling in section 105 of the Crimes Act. The corresponding CCC offence also applies a maximum term of 10 years imprisonment and was justified in the Commonwealth EM on the basis that receiving involves much the same type of activity as theft and obtaining property by deception. MCCOC also considered that the penalty for receiving should be the same as theft and offered the following in support of its view:

> "... generally receiving carries a heavier penalty than theft. The rationale for this is that without the "fence", theft is a lot less attractive and the fence may be someone who is more of a "professional". There is a heavier penalty for receiving because it was the original organised crime offence. However, it could equally be said that without the thief there would be no work for the fence and there is no essential difference in culpability between theft and handling. The likelihood is that the great bulk of receiving cases involve people who have bought goods because they were cheap rather than because the people themselves were professional or even amateur fences. The penalty for theft (10 years) allows sufficient range to punish organised receiving of stolen goods. Where the receiver has been involved in a number of cases of handling, multiple counts can be laid which gives the sentencer ample scope to punish according to the true criminality of the conduct. Accordingly, s16.8(1) provides a penalty of 10 years - the same as theft." [p. 111]

Subsection 105(2) of the Crimes Act provides that the handling offence does not apply to the handling of stolen property in the course of stealing it. The provision operates as a kind of double jeopardy provision to avoid the thief being guilty of receiving if he or she keeps the stolen goods. Subclause 313(2) is drafted differently but achieves the same result by providing that a person cannot be found guilty of both "theft" (or "a related offence") and receiving in respect of the same property, if the person retains possession or custody of the property. For the purposes of subclause 313(2) the term "related offence" is defined as robbery, burglary, aggravated robbery and burglary and obtaining property by deception (subclause 313(4)). Also, in this context "theft" means both the indictable (clause 308) and summary offences (clause 321) of theft (see clause 8 of the Bill and the definition of theft that will be inserted in the dictionary of the Criminal Code), which is consistent with the current position under subsection 105(2) of the Crimes Act.

Subclause 313(3) is a transitional provision designed to ensure that property illegally appropriated or obtained before the commencement of the legislation will be caught by the receiving offence. The provision recognises that the existing offences of theft and handling vary from the Bill offences of theft, obtaining property by deception (clause 326) and receiving and is therefore carefully drafted to ensure there is no retrospectivity.

Part 3.9 of the Bill contains procedural and evidentiary provisions that relate to the offences in chapter 3 and it is convenient at this point to consider clause 371 of that part which contains the alternative verdict provisions that will operate for receiving and the offences of theft and obtaining property by deception.

Subclause 371(1) provides that if a defendant is on trial for theft or obtaining property by deception and the jury (or the court if there is no jury) is not satisfied that the defendant committed the charged offence, it may return a guilty verdict for receiving, provided that the defendant has been allowed a proper opportunity to defend the case for receiving and the jury is satisfied beyond a reasonable doubt that the defendant committed the receiving offence. Subclause 371(2) is similar except that it applies in the reverse situation where the defendant is on trial for receiving and the jury is satisfied beyond a reasonable doubt that instead of receiving, the defendant committed theft or obtaining property by deception.

There is no equivalent of subclauses 371(1) and 371(2) in the Crimes Act. Under section 296 of that Act, if a defendant is on trial for an offence and it is apparent that the defendant did not commit the charged offence but committed another offence the court is limited to discharging the jury and directing that the defendant be indicted for the other offence. Under this clause the jury can return a guilty verdict for the alternative offence provided that the defendant has been given a proper opportunity to defend the case against him or her for that offence.

Clause 373 contains special provisions for alternate verdicts in cases where theft and receiving are charged together. It is based on subsection 16.8(4) of the MCC and is similar to subsection 114(1) of the Crimes Act, which it will replace. Both provisions deal with the situation where the jury (or the court if there is no jury) is satisfied beyond a reasonable doubt that the defendant is guilty of theft or receiving but cannot decide which the defendant committed. If that situation arises under the Crimes Act the court is required to convict the defendant of theft. Under this provision the defendant must be convicted of the offence the jury etc regards as more probable and it is only if it cannot decide which is more probable that the defendant must be convicted of theft.

Clause 314 Receiving – meaning of stolen property

This clause defines "stolen property" for the purposes of the receiving offence and will replace the definition of that term in section 88 of the Crimes Act. As indicated above, although this clause is based on section 16.8 of the MCC, the drafting more closely follows section 132.1 of the CCC. Subclause 314(1) provides that "stolen property" is stolen whether it is "original stolen property", "previously received property" or "tainted property". The Commonwealth EM provides the following explanation for the meaning of those terms and for the provisions relating to money transfers in clause 314(7):

> 130. The definition of `original stolen property' in [subclause 314(4)] covers property, or part of property, appropriated in the course of theft and in the possession and custody of the person who appropriated it. Alternatively it is property in the possession of the person who obtained it in the course of property fraud [clause 96]. This is the equivalent of paragraphs 16.8(2)(a) and (b) of the Model Criminal Code.
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> [The definition of 'previously received property' in subclause 314(5) makes it clear that no matter how the property was received in the first place (whether by theft or fraud), subsequent receiving will also be caught by the offence.]

131. Proposed [subclause 314(6)] makes it clear that after the property is restored it ceases to be original stolen property for the purposes of the proposed offence. The same is also the case where the person who previously had it ceases to have a right to its restitution. This follows similar provisions in Victoria and the ACT [subsection 88(3) of the *Crimes Act*]. There is a public interest in encouraging people to return stolen property or to regularise ownership where there is a dispute over the property. This is similar to subsection 16.8(3) of the Model Criminal Code.

132. Proposed [subclause 314(7)] deals with `tainted property'. The definition ensures that the offence of receiving still attaches to the receiver where stolen property is sold or exchanged. The `proceeds' of the transaction is defined as `tainted property' if the receiver still has possession or custody of them whether it derived from theft or property fraud. The aim here is not to make receiving an offence that can continue down a chain of people. To do so would make the offence too open ended. Although the drafting is different, this approach follows subsection 16.8(2)(c) of the Model Criminal Code.

133. Proposed [subclause 314(8)] extends the offence to make it clear that it covers the receipt of funds credited into an account. This additional provision is as a consequence of changes to the property fraud offence (proposed clause 330), which clarifies the position with respect to money transfers. The money transfer provisions will be dealt with in more detail in the notes on proposed [clause 330]. However it should be noted that [paragraph 314(8)(b) is included to provide for an equivalent to [clause 314(6)] in the context of money transfers.

The Bill definition of "stolen property" includes property or the proceeds from the sale of property that is illegally appropriated obtained or received, outside as well as inside the ACT (see paragraphs 314(3)(a), 314(3)(b) and 314(4)(a)). This is the same under the Crimes Act (paragraph 88(1)(a)(ii)). For jurisdictional reasons this aspect is not included in the corresponding CCC provision.

Clause 315 Going equipped for theft etc

The offence in this clause is based on section 16.7 of the MCC and is similar to the offence in sections 107 of the Crimes Act, which it will replace. The clause provides that it is an offence for a person who is not at home to have an article with the intention of using it for theft or a related offence. Subclause 315(3) defines "related offence" as robbery, burglary, aggravated robbery and burglary, obtaining property by deception and taking a motor vehicle. The maximum penalty is three years imprisonment or 300 penalty units ($30,000) or both, which is the same as the maximum term of imprisonment for the offence in section 107 of the Crimes Act.

This is a preparatory offence that can be committed well before it could be said that an attempted theft or burglary etc has occurred. It has been argued that the law for these matters should be restricted to attempt. However, offences of this kind have a long history and where it can be proved, from the nature of the article and the defendant's admissions, that the article is intended for use in the commission of a relevant crime, these offences are justified.

Any article will suffice for the offence as long as the defendant's purpose is to use it for theft or one of the offences referred to in subclause 315(2). Gloves to prevent leaving fingerprints or a screwdriver to jemmy a window will do. But there are some important confining elements of the offence. First, it is not simply "having" a relevant article but having it away from home that is important. This puts the defendant closer to the commission of the relevant offence. Secondly, the prosecution must prove that the defendant intended to use the article to commit a relevant offence. The more common the article (eg gloves, screwdriver etc) the more difficult it will be to prove intent in the absence of an admission.

This clause does not include a provision similar to subsection 107(2) of the Crimes Act that provides, in effect, that proof that the defendant was carrying an article made or adapted for use in a relevant offence is prima facie evidence that he or she intended to use it for that purpose. In recommending against the inclusion of provisions of this kind, MCCOC made the following points:

> This is essentially an averment of a fault element contrary to section [61 of the Criminal Code]. Accordingly, it has been omitted. Where it can be shown that an article is made or adapted for theft, burglary or cheat (eg a device for deceiving gambling machines), that will be evidence from which inferences can be drawn that the defendant had the article for that purpose. Where the article is clearly adapted for use, the inferences and proofs are easily dealt with in the normal way. The more difficult cases involve articles which have legitimate uses and the presumption does not apply in those cases. [p. 93]

It is important to note that if the defendant has the relevant article with the intention of using it to commit burglary or aggravated burglary, absolute liability will apply to the element referred to in subparagraph 311(1)(c)(ii)). This is explained in more detail in the commentary to clause 311.

Subclause 375(1) in Part 3.9 contains a forfeiture provision for this offence, which is in almost identical terms to subsection 107(3) of the Crimes Act, which it will replace. It provides that if a person is found guilty of an offence against this clause, any article that the person has in his or her possession or custody to commit the theft or related offence and any article of that kind must be forfeited to the Territory. It is important for the forfeiture to extend to articles of the kind that the defendant possessed to ensure that any specialist items designed for theft or burglary etc is taken out of circulation. Subsection 107(3) of the Crimes Act also allows for forfeiture of articles of the kind involved in the offence.

The *Confiscation of Criminal Assets Act 2003* is essentially designed for the forfeiture of criminal assets that can be readily sold and converted into cash. Items forfeited under subclause 375(1) will not usually be of that kind. Accordingly, it is not proposed to alter the forfeiture arrangements that currently apply under the Crimes Act with respect to forfeiture under subclause 375(1).

Clause 316 Going equipped with offensive weapon for theft etc

The offence in this clause is the same as the offence in clause 315 except that it applies to a person who has an offensive weapon with intent to use it in connection with a theft or related offence. The definition of "offensive weapon" in clause 300 applies to this offence. In addition to knives, firearms, explosives and things that could be taken for them, the term also extends to things made or adapted for causing injury and things that a person has with the intention of using or threatening to use to cause injury.

The offence in this clause is based on section 16.7 of the MCC but is intended to cover the core mischief that section 150 of the Crimes Act is directed against; namely the carrying of a weapon with intent to commit a crime. In view of the added seriousness of this offence, compared to the offence in clause 315, the maximum penalty is increased to five years imprisonment or 500 penalty units (50,000) or both. This will replace the offence in section 150 of the Crimes Act, which also applies a maximum term of five years imprisonment.

It is important to note that if the defendant has the offensive weapon with the intention of using it to commit burglary or aggravated burglary, absolute liability will apply to the

element referred to in subparagraph 311(1)(c)(ii)). This is explained in more detail in the commentary to clause 311.

Subclause 375(2) in part 3.9 contains a forfeiture provision for this offence that is similar to the forfeiture provisions in subclause 375(1) referred to above and subsection 150(2) of the Crimes Act. The forfeiture provision in subsection 150(2) is slightly different in that it does not refer to offensive weapons of the kind possessed by the defendant but it is considered appropriate to include this extension to ensure that dangerous items are removed from circulation in the community. Because of the nature of the property involved, the current arrangements for forfeiture under the Crimes Act will continue to operate with respect to forfeiture under subclause 375(2).

Clause 317 Making off without payment

This offence is based on section 16.6 of the MCC and closely follows the offence in subsection 98(1) of the Crimes Act.

The offence is necessary to address situations where a person innocently obtains property or services in circumstances where immediate payment is required, but then decides to make off without paying. The problem often occurs in relation to service stations, restaurants, taxis and hotels. For example, the defendant enters a service station intending to pay and fills the tank. He or she then notices that the cashier is distracted and takes the opportunity to leave without paying. This is not theft because ownership in the petrol passed to the defendant when he or she put it in the tank (that is, at the time of the decision not to pay the petrol was no longer property "belonging to another"). Nor is it obtaining property or a financial advantage by deception because the defendant did not practise any deception to obtain the petrol or the financial advantage. He or she just simply drove off.

This clause provides that it is an offence for a person to acquire goods or services, knowing that immediate payment is required or expected, and to dishonestly make off without paying, intending to avoid payment. The maximum penalty is two years imprisonment or 200 penalty units ($20,000) or both. This will replace the offence in subsection 98(1) of the Crimes Act, which also applies a maximum term of two years imprisonment.

Subclause 317(2) provides that this offence does not apply to payment for illegal goods or services. However, unlike paragraph 98(3)(b) of the Crimes Act, it does not also exclude unenforceable transactions from the ambit of the making off offence. Consequently a person of 14 who, for example, makes off with petrol will be liable for this offence in the same way as he or she would be liable for its theft. The special rules relating to the criminal responsibility of children are set out in sections 25 and 26 of the Criminal Code, which fix the age of criminal responsibility at 10 (with a presumption against responsibility between 10 and 14). There is no reason why any further special exclusion should apply specifically for this offence.

Subclause 317(3) follows subsection 98(4) of the Crimes Act and provides that the term "immediate payment" includes payment when collecting goods in relation to which a service has been supplied. For example, collecting a vehicle that has been repaired.

Clause 318 Taking etc motor vehicle without consent

The two offences in this clause are based on section 16.5 of the MCC and the similar offence in section 111 of the Crimes Act, which this clause will replace. Subclause 318(1) provides that a person commits an offence if he or she dishonestly takes someone else's motor vehicle without consent. The offence in subclause 318(2) is similar, except that it applies to a person who dishonestly drives or rides in or on a motor vehicle that was dishonestly taken without the consent of a person to whom it belongs (and the person was reckless about the fact that the vehicle was taken without consent – see below). The offence in subclause 318(2) has been adapted from section 111 of the Crimes Act and does not have an equivalent in the MCC. The maximum penalty for these offences is 5 years imprisonment or 500 penalty units ($50,000) or both, which is the same maximum term of imprisonment that applies for the offence in section 111 of the Crimes Act.

An important feature of these offences (which distinguishes them from theft) is that there is no requirement for the perpetrator to intend to permanently deprive the victim of the property. This accords with the primary purpose of the offences, which is to target those who take motor vehicles for "joy-riding" and not to dispossess the owner. Of course, if the perpetrator intends to keep the vehicle or subsequently decides to do so, the theft offence will apply.

MCCOC's reasons for recommending the inclusion of a motor vehicle taking offence are set out in the following passage from page 85 of it's report:

> The decision to treat unauthorised use of cars as an offence despite the absence of intent to permanently deprive can be justified as a matter of public policy by the prevalence of this type of behaviour and the interference with items which will often be the most valuable single item of property owned by the victim. However, the temporary nature of the borrowing and the stigma associated with theft – especially in view of the fact that a conviction for theft results in disqualification from a variety of jobs - does not justify treating illegal use of cars as theft. It should be a separate offence. Submissions accepted the need for this as a separate offence.

The offence in section 111 of the Crimes Act expressly excludes liability if the taking etc is authorised or excused under law or if the defendant believes that it is lawfully authorised or excused or that the owner would have consented. The defence of lawful authority or excuse (see section 43 of the Criminal Code) applies generally to offences under the Criminal Code and therefore it is not necessary to expressly exclude liability on this ground. Also because the Bill offences include a dishonesty element it is not necessary to expressly exclude liability on the ground that the defendant believed that he or she had lawful authority because in those circumstances the defendant would not be acting dishonestly. Similarly, in most cases a defendant would not be acting dishonestly if the owner would have consented to the taking etc.

Section 111 of the Crimes Act provides that a person who drives or rides in a "taken" motor vehicle is liable if he or she knows that it was taken without consent. However, for the Bill offence in subclause 318(2) it is sufficient for the driver/rider to be reckless about those matters (see subsection 22(2) of the Criminal Code). Section 20 of the Criminal Code provides that a person is reckless about a circumstance (in this case, that the car was dishonestly taken without consent) if he or she is aware of a substantial risk that the circumstance exists and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. In cases where the driver/rider is "picked up" after the motor vehicle is taken it is considered unreasonable to require the prosecution to prove that the defendant "knew" about those matters beyond a reasonable doubt.

Given that the justification for including these offences (without the requirement to permanently deprive) is the prevalence of car theft, MCCOC took the view that the offence should be restricted to cars. Accordingly it is proposed not to extend the reach of these offences to bicycles, aircraft and boats, as is currently the case in section 111 of the Crimes Act. The offence will apply to cars and motorbikes.

Part 3.9 of the chapter contains procedural and evidentiary provisions relating to the offences in the Bill. Subclause 370(1) in that part contains an alternative verdict provision that applies to this offence. The provision is based on subsection 111(3) of the Crimes Act, which it will replace. It provides that if a person is on trial for theft and the jury (or the court if there is no jury) is not satisfied that theft was committed, it may return a verdict of guilty for this offence provided that the defendant has been allowed a proper opportunity to defend the case for this offence and the jury is satisfied beyond a reasonable doubt that the defendant committed this offence.

If a person is found guilty of this offence (or theft or attempted theft), clause 369 in part 3.9 allows the court to disqualify the person from holding or obtaining a licence for a period it considers appropriate. Clause 369 will replace the similar provision in section 349 of the Crimes Act (see also the commentary in relation to clause 369 below).

Clause 319 Dishonestly taking Territory property

The purpose of this offence is to protect ACT government equipment, computers and other such items. It applies if on a particular occasion and without the consent of someone who has authority to give it, a person dishonestly takes one or more items of property belonging to the "Territory". However, the offence only applies if the total replacement value of the item or items is more than $500 or the absence of the property would be likely to cause substantial disruption to the activities of the Territory. Subclause 319(3) defines "Territory" for this offence to include a Territory authority, a Territory owned corporation and a Territory instrumentality, which are terms defined in the Legislation Act. The offence is based on similar offences in the CCC and applies the same maximum penalty of two years imprisonment or 200 penalty units ($20,000) or both.

Unlike theft, this offence does not include a requirement to prove that the perpetrator intended to permanently deprive the Territory of the property. A person who "borrows" the property without consent would be caught. It is considered appropriate not to include that requirement because of the significant public interest in ensuring the protection of government property and its operations. However, given the absence of that element it is also appropriate to apply a maximum penalty that is significantly lower than the maximum penalty for theft (that is, 2 years imprisonment instead of 10 years as in the case of theft). Of course, if the perpetrator intends to keep the property or subsequently decides to do so, he or she can be charged with theft.

Subclause 319(2) is an important provision that provides that absolute liability applies to the requirements of this offence that the "victim" must be "the Territory" and that the relevant property must be worth at least $500 or that absence of the property is likely to cause substantial disruption to the activities of the Territory. In other words, it is not necessary to prove that the defendant had any knowledge (or any other fault element) about whom he or she was taking the property from or how much the property was worth or what effect its absence would have. Nor is it relevant that the defendant may have been mistaken about those things (see subsection 24(3) of the Criminal Code). It

is sufficient that the defendant intentionally and dishonestly took the property without consent.

It is considered appropriate to apply absolute liability to the "Territory" element of this offence, primarily because the defendant's moral culpability is essentially the same whether the victim is the Territory or someone else. Secondly, it is in the interests of the whole community to protect Territory assets with effective offences. If absolute liability does not apply an offender could easily avoid liability by claiming that he or she believed the property belonged to someone else and not the Territory. More particularly, if absolute liability does not apply the default fault element that would operate is "recklessness", which requires conscious awareness that the prescribed circumstances exist. Thus a person would escape liability by simply giving no thought to who the property belonged. For similar reasons absolute liability has been applied to the requirements concerning the value of the property or the consequences of taking it. In most cases offenders will give no thought to these matters.

This offence will replace section 9 of the Government Offences Act, which is a very broad offence that could cover very minor infringements. The coverage of this offence is limited to significant items because the property must be worth more than $500 or its removal must be likely to cause substantial disruption.

The offence in section 9 of the Government Offences Act includes a qualification to the effect that the offence does not apply if the property is taken "without lawful authority". It is not necessary to expressly include a similar qualification in this offence because the defence of lawful authority or excuse in section 43 of the Criminal Code applies to all offences in the Criminal Code.

Clause 320 Dishonestly retaining Territory property

The offence in this clause is essentially the same as the offence in clause 319 except that it applies to cases where the person innocently takes the property but then later dishonestly retains it.

Division 3.2.3 Summary offences for part 3.2

This division contains summary offences of theft, making off without payment, removing articles on public exhibition and unlawful possession of stolen property.

Clause 321 Minor theft

This clause provides for a summary theft offence. The maximum penalty is six months imprisonment or 50 penalty units ($5000) or both. The offence will replace the similar offence in section 90 of the Crimes Act, which has the same maximum penalty.

The elements of the offence are essentially the same as the elements for the main theft offence in clause 308 but with some important differences. First, the stolen property must have a replacement value (at the time of the offence) of $2,000 or less and secondly, absolute liability applies to this element of the offence. That is, it is not necessary to prove that the defendant had any knowledge (or any other fault element) about the value of the stolen property and nor is it relevant that the defendant may have been mistaken about the value (see subsection 24(3) of the Criminal Code). Absolute liability has been applied to this element of the offence for essentially the same reasons as those indicated in the commentary to clause 319. Also it would be contrary to the

purpose of this offence if it were more difficult to prove than the main theft offence in clause 308, which does not include an element about the value of the stolen property.

Subclause 321(3) makes it clear that this offence does not prevent a person being charged with the major theft offence in clause 308 even if the property involved is worth less than $2000. There can be a number of good reasons for this (eg in some cases a missing item of relatively little value can have enormous consequences) and any improper use of the major theft offence in inappropriate circumstances can be dealt with as an abuse of process.

Clause 322 Removal of articles on public exhibition – summary offence

This clause makes it an offence for a person to dishonestly remove from premises open to the public any article that is on public exhibition or kept for public exhibition and the person does not have consent to remove the article from anyone authorised to give consent. Subclause 322(3) defines "premises" for this offence as including a building or part of a building. The maximum penalty is 12 months imprisonment or 100 penalty units ($10,000) or both.

For similar reasons to those indicated in the commentary to clause 319, absolute liability has been applied to the elements of this offence about the premises being open to the public and the relevant article being on public exhibition or kept for public exhibition at the premises (subclause 322(2)). These elements have no real bearing on the culpability of the defendant but serve a useful purpose in confining the offence.

This offence also has no requirement for the perpetrator to intend to permanently deprive the victim of the property. However, the offences will not apply if the defendant has consent to remove the article or is otherwise excused or authorised to do so under law (see below).

The purpose of this offence is to protect articles of cultural significant (such as would be displayed in a museum), in which the public as a whole has an interest. Accordingly, subclause 322(3) expressly provides that the offence does not apply in cases where the article is exhibited or kept for exhibition to sell or for some other commercial dealing, such as where it is displayed as a sample of what is on sale. In such cases the usual rules for theft apply.

This offence will replace the similar offence in section 149 of the Crimes Act, which expressly excludes liability if the removal is authorised or excused under law or if the defendant believes that it is lawfully authorised or excused (although it may not be). As noted above the defence of lawful authority or excuse (see section 43 of the Criminal Code) applies generally to offences under the Criminal Code and therefore it is not necessary to expressly exclude liability on this ground. Also because this offence includes a dishonesty element it is not necessary to expressly exclude liability on the ground that the defendant believed that he or she had lawful authority because in those circumstances the defendant would not be acting dishonestly.

The maximum penalty for the equivalent Crimes Act offence is five years imprisonment. This is considered too harsh given that a vital ingredient of theft (an intention to permanently deprive) is not present. If there is that intention the person can be charged with theft but if there is not a lower penalty is appropriate.

Clause 323 Making off without payment

This clause provides for a summary offence of making off without payment. The maximum penalty is six months imprisonment or 50 penalty units ($5000) or both. The offence will replace the similar offence in subsection 98(2) of the Crimes Act, which has the same maximum penalty.

This clause provides for a summary theft offence. The maximum penalty is six months imprisonment or 50 penalty units ($5000) or both. The offence will replace the similar offence in section 90 of the Crimes Act, which has the same maximum penalty.

The elements of the offence are essentially the same as the elements for the main "making off" offence in clause 317 except that the amount owing must be $2,000 or less. As in the case of the minor theft offence, absolute liability applies to this element of the offence (subclause 323(2)). See the commentary on clauses 319 and 321 for the reasons for applying absolute liability to this element of the offence. Also subclause 323(4) makes it clear that this offence does not prevent a person being charged with the major "making off" offence in clause 317 even if the amount owing is less than $2000.

Clause 324 Unlawful possession of stolen property

This provision makes it a summary offence for a person to have property or to give possession of property to another person not lawfully entitled to it, if the property is reasonably suspected of being "stolen" or "otherwise unlawfully obtained". A person will be taken to have the relevant property if the person has it in his or her possession or the possession of another or at any premises, whether or not the premises are owned or occupied by the person or the property is held there for his or her use or the use of someone else. The term "stolen property" has the same meaning for this offence as it does for the receiving offence (subclause 324(4)). Property that is "otherwise unlawfully obtained", covers such things as property obtained by blackmail, fraudulent deception or by use of a forged instrument. This offence is modelled on the corresponding possession offence proposed at pages 125 to 127 of the MCCOC report and section 386 of the Crimes Act, which it will replace. The maximum penalty is six months imprisonment and/or 50 penalty units ($5,000) which is the same as the offence in section 386 of the Crimes Act.

As noted in the commentary to clause 313 this offence is closely linked to receiving but "possession" is the key element of the offence. Consequently, if a person innocently receives stolen goods and subsequently discovers that they are stolen he or she is caught by this offence.

To establish the offence the prosecution must show that the property was in the defendant's possession (in one of the ways indicated in the opening paragraph of the commentary to this clause) and that someone (not necessarily the defendant) had a reasonable suspicion that the property was "stolen" or "unlawfully obtained". Like section 386 of the Crimes Act, it is not a requirement of this offence that the prosecution prove that the defendant knew or suspected that the property was stolen. Rather this clause and the Crimes Act include a reverse onus provision (see subclause 324(3) and subsection 386(2)) that allows the defendant to avoid liability if he or she can prove, on the balance of probabilities, that he or she had no reasonable grounds for suspecting that the property was stolen etc. The following passage from the MCCOC report sets out its reasons for recommending the retention of the reverse onus of proof provision in subclause 324(3):

> In DP1, the Committee argued that the reverse onus of proof provision for this offence was inconsistent with principle and led to convictions in cases where the defendant could not provide proof of ownership or innocent possession. Submissions - particularly from police and magistrates - strongly opposed this recommendation on the ground that people who are clearly guilty could avoid conviction if the prosecution had to prove that the defendant knew the goods were stolen. Against the view that very few people in the community could provide proof of innocent possession of a large number of their goods – especially if it turns out that the second hand TV bought was in fact stolen - it was pointed out that the prosecution has to prove first that there are reasonable grounds for suspecting the goods of being stolen.
>
> MCCOC accepts the weight of the submissions and recommends the retention of the summary offence of unlawful possession. [p. 113]

One important difference with section 386 of the Crimes Act is that subclause 324(2) provides that absolute liability applies to the requirement that the property must be reasonably suspected of being stolen or unlawfully obtained. If subclause 324(2) is not included it would mean that the default fault element of recklessness would apply (see subsection 22(2) of the Criminal Code)), which would conflict with the defence that the defendant had "no reasonable grounds for suspecting that the property was stolen" etc. That is, one cannot be reckless about whether property is reasonably suspected of being stolen and also have no reasonable grounds for suspecting that the property is stolen. In practical terms the application of absolute liability does not increase the burden on the defendant (it is still necessary for the prosecution to prove that the property is reasonably suspected by someone that the property is stolen etc) but removes any confusion with the defence in subclause 324(3).

Clauses 376, 377 and 378, in part 3.9 contain forfeiture provisions relating to this offence. They closely follow sections 386A, 386B and 386C of the Crimes Act, which they will replace.

Under clause 376, where a person is guilty of an offence under clause 324, the relevant property (including money) becomes forfeited to the Territory, unless the owner of the property is located and is not a person who has been convicted of a relevant offence. The forfeited property is to be transferred to the public trustee. Under clause 377, the public trustee must pay any forfeited money obtained under clause 376 into the confiscated assets trust fund under the *Confiscation of Criminal Assets Act 2003*. Similarly, any proceeds from the sale of other property forfeited under clause 376 are to be paid into the confiscated assets trust fund. Clause 378 allows the previously unknown owner of any property that has been forfeited under clause 376 to come forward and seek the return of the forfeited property or compensation.

Part 3.3 Fraudulent Conduct

This part contains the fraud and fraud related offences in the Bill. It includes the two basic fraud offences of obtaining property by deception (property fraud), which relates to physical objects, and obtaining a financial advantage by deception (financial fraud), which relates to financial advantage. The part also includes general dishonesty offences against the Territory or to improperly influence Territory officials and an offence of conspiracy to defraud. There is also a division of summary offences of obtaining a financial advantage from the Territory and passing valueless cheques. The part has more offences than the equivalent part of the MCC because it is intended that all fraud related offences (not only the serious offences) will be centralised together in the Criminal Code. This will standardise the law on fraud in the ACT and enable the repeal of a number of similar offences in ACT legislation that unnecessarily employ different terminology and apply different penalties. This in turn will simplify and reduce the size of the ACT statute book.

The most fundamental change that this part will effect in the criminal law of the ACT is that it will create a new and separate offence for fraud in relation to property. Under the Crimes Act property fraud is incorporated in the theft offence because "appropriation" is defined to include obtaining property by deception (see paragraph 86(1)(a)). The effect is that a person who unlawfully obtains property by deceiving the owner into agreeing to part with it is charged in the ACT with theft and not fraud.

MCCOC has strongly argued that there should be a distinction between theft and fraud and to this end it has recommended that the definition of "appropriation" in clause 304 (relating to theft) should require proof that the owner did not consent to the taking. The reasons for this approach are set out in the following passages from pages 119 to 121 of the MCCOC report:

> The main argument in favour of maintaining two offences is the traditional conceptual separation between takings without the owner's consent and those which occur with the owner's consent, where the consent was obtained by fraud. Although community understanding does not extend to the myriad of fine distinctions made by the common law, the community does make a distinction between theft and fraud: people see stealing and fraud as different kinds of offences. Public comprehensibility has led a number of law reform bodies to reject substituting terms like unlawful homicide for murder. The law should employ terms which communicate the nature of the proscribed conduct unless there are strong reasons to the contrary. Artificially collapsing categories is as bad as artificial distinctions. It undermines public acceptance of the law and confuses juries by lumping disparate forms of behaviour together. To define "appropriations" so as to include deceptions is playing with definitions to no clear advantage. Indeed there may be disadvantages: since "deception" itself still requires separate definition, this will add a layer of complexity to the jury direction on theft in fraud cases. It is much more straightforward to maintain the distinction between theft and fraud. . .
>
> In any event, even if theft and fraud were collapsed for offences relating to goods, there still needs to be a separate offence for obtaining financial advantage by a deception. It is more consistent to deal with fraud in relation to goods and financial advantages in the same basic way.
>
> The problems that have arisen in cases like *Lawrence* - a taxi driver who deceived his passenger but was charged with theft instead of obtaining by deception – are the result of the prosecution charging the wrong offence: it charged theft when it should have charged obtaining by deception. This should not happen but where it does, it will be possible under the *MCC* to return a conviction of obtaining property by deception. … Where the defendant is wrongly charged with theft, but the evidence shows that because of the defendant's deception, the victim consented to the defendant taking his or her goods, [clause 371] will mean that the defendant can be convicted of obtaining by deception. This is preferable to a very wide definition of appropriation in theft which includes all cases of obtaining by deception.
>
> There are also practical advantages to retaining separate offences. Apart from general public understanding, the police who have to make charging decisions are often inexperienced and defining fraud as theft in a complex single provision is likely to be confusing. … Given that the labels theft and fraud are well understood, that the penalties for the two offences are the same and that the practical problem in cases where the wrong offence is charged is solved by an alternative verdict provision, it would be clearer to retain the separate offence and hard to see what is achieved by merging the two offences.

Division 3.3.1 Interpretation
Clause 325 Definitions for part 3.3

This clause contains some definitions that apply to the fraud offences in this part.

Account: This term is defined as an account with a bank or other financial institution and includes a loan, credit card or similar account. The definition has been included to

assist with the scope of the provisions concerning money transfers which are covered by the property fraud offence. This is discussed in more detail in the commentary to clause 330 below.

Deception: This definition is critical to the two basic fraud offences in clauses 326 and 332. The requirement to prove "deception" distinguishes these two serious offences (with maximum penalties of 10 years imprisonment) from the less serious offences in the remainder of the part. The definition is based on section 17.1 of the MCC and closely follows the corresponding definition in section 311 of the Crimes Act with one important addition.

The clause defines "deception" as any intentional or reckless deception, whether it is by words or by conduct and whether it is about a fact, the law or the intentions of any person (not just the person making the deceptive representation). This provision also expands on the Crimes Act definition by providing that deception includes any conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to make. Thus a person who obtains money from an automatic teller machine by dishonestly using someone else's card will be caught by this aspect of the definition and the offences in clauses 326 and 332 (assuming all the other elements are made out).

As noted above, a deception can be by words or by conduct. Silence by itself is usually not enough but it can be if the circumstances and the defendant's conduct is such that it amounts to a representation. For example, a person who orders food in a restaurant but says nothing about payment represents an intention to pay because that is the convention in restaurants. If, in fact, the person has no intention of paying, there would be deception because the person's conduct (ordering food and silence as to payment) misrepresented his or her intention about payment.

Division 3.3.2 Indictable offences for part 3.3
Clause 326 Obtaining property by deception

This provision makes it an offence for a person to dishonestly obtain property belonging to another, by deception and with the intention of permanently depriving the other of the property. Many of the elements of this offence have already been explained in the context of the theft offence. The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both. This is the same as theft in clause 308 and obtaining a financial advantage by deception in clause 332. It is also the same maximum term of imprisonment that applies for theft under the Crimes Act, which incorporates property fraud.

The word "by" in the phrase, "by deception" in clause 326 makes it clear that there must be a causal link between the deception and the obtaining. Simply engaging in a deception is not enough. It must be the cause of obtaining the property. For example, if the defendant falsely represented that he or she was starving in order to obtain food from another person but, unbeknown to the defendant, that person was giving food away to anyone as part of a sales promotion, the defendant's deception would not have been the cause of obtaining the food. However, the person may be guilty of attempting the offence (see section 44 of the Criminal Code).

The general definition of dishonesty in clause 300 applies to this offence (although it is supplemented by clause 327). Consequently, in addition to proving a deception, the prosecution must also show that the defendant was dishonest. This is also the case under

the Crimes Act, which incorporates property fraud in the theft offence (see section 84 and paragraph 86(1)(a)).

Although deception and dishonesty often go hand in hand it is not always the case. There will be instances where there is a deception but the obtaining may not be dishonest according to the standards of ordinary people. The claim of right defence is one example, where, for instance, an owner uses deception to regain property he or she believes is being unlawfully withheld by another refusing to return it. Another example may involve a daughter who deceives her elderly mother into transferring property into her name (eg antique furniture which the mother refuses to sell) by telling "white lies" in order to sell the property and pay for her mother's care. Such a person practises a deception but is unlikely to be regarded as dishonest according to the standards of ordinary people.

The general definitions of "property" and property that "belongs to" another also apply to this offence. See the commentaries on clauses 300 and 301 for an explanation of those definitions.

Part 3.9 of the chapter contains procedural and evidentiary provisions relating to the offences in the Bill. Clause 372 in that part contains alternative verdict provisions that apply to theft and property fraud. It provides that if a person is on trial for theft and the jury (or the court if there is no jury) is not satisfied that theft was committed, it may return a guilty verdict for property fraud provided that the defendant has been allowed a proper opportunity to defend the case for that offence and the jury is satisfied beyond a reasonable doubt that the defendant committed property fraud. Subclause 372(2) is similar except that it applies in the reverse situation where the defendant is on trial for property fraud and the jury is satisfied beyond a reasonable doubt that instead of that offence the defendant committed theft.

This is an important provision because theft and property fraud are similar offences and consequently it is not always easy to identify the most appropriate charge from the outset. Importantly it is not necessary for the defendant to be charged with both theft and property fraud. As long as one of those offences is charged the alternative verdict provision will apply. However, the provision makes specific reference to procedural fairness. It is critical that when the alternative verdict becomes a more realistic proposition than the original charge, the defendant is provided with a proper opportunity to address the elements of the alternative offence.

Subclause 372(3) provides that this alternative verdict provision does not apply in cases where the trial is for the summary theft offence (clause 321). This is because of the wide disparity in the maximum penalties that apply for minor theft (six months imprisonment) and property fraud (10 years imprisonment).

Clause 327 Meaning of dishonesty for division 3.3.2

This clause affects the meaning of dishonesty in relation to the property fraud offence by providing that a person who obtains another's property is not necessarily absolved of dishonesty because he or she or someone else is prepared to pay for it. The same rule applies to theft under this Bill (subclause 303(3)) and the Crimes Act (subsection 86(3)). On the other hand, for similar reasons outlined in relation to clause 303 (concerning dishonesty and the theft offences) it is unnecessary to include equivalents

of paragraphs 86(4)(a) to (c) of the Crimes Act. Paragraph 86(4)(d) and subsection 86(5) of the Crimes Act have no application to fraud.

Clause 328 Meaning of obtains for division 3.3.2

The definition of "obtains" in subclause 328(1) applies to the property fraud offence in clause 96 and also for the purposes of applying the receiving offence (clause 313) to property fraud. It is wider than the definition of appropriation in clause 304 in that it does not involve any absence of consent. The deception causes the defendant to consent to the transfer. Like paragraph 86(1)(a) of the Crimes Act, paragraph 328(1)(a) provides that a person obtains property if he or she obtains the ownership, possession or control of property for himself, herself or another. Thus where the defendant deceives the victim into giving goods to another person, the defendant is guilty. However, subclause 328(1) is wider than the Crimes Act provision because "obtaining" is also defined to include cases where a person enables himself, herself or another to retain ownership etc; induces another to pass ownership etc to a third person; and induces another to enable a third person to retain ownership etc. Paragraph 328(1)(e) also expands on paragraph 86(1)(a) of the Crimes Act by applying this definition of "obtaining" to money transfers (see clause 330 below). Accordingly, obtaining property also includes cases where a person causes an amount from another's account to be transferred to the person or someone else. Subclause 328(2) is included to make it clear that the general definition of obtaining in clause 300 does not apply to this offence or for the purposes of applying the receiving offence (clause 313) to this offence.

Clause 329 Intention of permanently depriving for division 3.3.2

As in the case of theft, property fraud includes a requirement to prove that the defendant had an intent to permanently deprive a person of property. This clause extends the meaning of that element for the purposes of the property fraud offence in terms that are almost identical to clause 306 in relation to theft. The element is satisfied if the defendant intends to treat the property as his or her own to deal with, or retains it in circumstances equivalent to a permanent deprivation, or parts with it on conditions he or she may not be able to comply with. An intention to return the equivalent quantity of a fungible (an interchangeable commodity such as money) is a sufficient fault element for the offence. A fraudster who obtains money by deception with the intention of repaying an equivalent amount at a later time will be convicted of the offence so long as the court is satisfied that the money was obtained dishonestly. The intention to return an equivalent sum is no answer to the charge.

Subclause 329(4) has been included to make it clear that the provisions of this clause do not limit the circumstances in which a person can be taken to intend to permanently deprive.

Clause 330 Money transfers

This clause extends the reach of the property fraud offence in clause 326 to cover cases where a person fraudulently induces an electronic transfer of money from one account to another. The provisions are explained in the Commonwealth EM as follows:

> 174. Proposed [clause 330] extend[s] the offence of obtaining property by deception to cover fraudulently induced electronic money transfers. In these cases, a deception by the offender induces an electronic transfer of funds from the victim's account to an account held by the defendant or another person. The proposed provisions are intended to outflank the decision of the House of Lords in *Preddy*

[1996] 3 WLR 255, which held that fraudulent inducement of an electronic money transfer did not fall within the scope of the equivalent to this offence.

175. The problem which concerned the House of Lords arises when A, a fraudster, deceives in order to induce an electronic transfer of funds from the account of B to an account held by A or a third person. Though most people speak of` having money in the bank', the money has no tangible existence. If the account is in credit, the bank is merely a debtor and the bank customer B is a creditor who has no more than a `chose in action' (an enforceable legal right) against the bank. In *Preddy*, the House of Lords held that the fraudster does not obtain or appropriate property belonging to another when funds are transferred electronically from the victim's account. The effect of the transfer is to extinguish, in part or whole, B's claim against the bank by the fraudster A or the third person. The House of Lords declined to take the view that customer B's rights had been transferred from B to A.

176. The analysis in *Preddy* is remote from community understanding of bank transactions and it is possible that the High Court might decline to follow that case. However, in view of the rapid growth of electronic transactions and the corresponding decline in transactions involving tangible tokens of monetary value, a cautious approach is warranted. The proposed provisions accordingly extend the scope of the offence of obtaining property by deception to include electronic money transfers.

177. It should be noted that the need to rely on the new provisions only arises when the money transfer does not involve the use of a cheque or other tangible token of value. The High Court has recently held in *Parsons* that the unmodified offence of obtaining property by deception applies if the transfer is effected by means of a cheque or other valuable security.

178. The Model Criminal Code Officers Committee made the point in its May 1997 Conspiracy to Defraud Report, that fraudulently induced money transfers will be covered by the obtaining a financial advantage by deception fraud offence [clause 332]. It is nevertheless desirable to maintain the existing structure of liability in which the offence of obtaining property by deception extends to cover fraudulent inducement of a money transfer. The offence of obtaining property by deception is linked to the offence of receiving [clause 313]. The new provisions, which treat an electronic transfer of funds as a transfer of property, ensure that a person who receives the benefit of the transfer, knowing that it was a product of fraud, will be guilty of the offence of receiving.

179. Turning to the new provisions, proposed [subclause 330(2)] makes it clear that the offence covers money transfers by providing that such amounts are taken to be property belonging to the victim and that the other person arranging the transfer is taken to have obtained the property with the intention of permanently depriving the victim. Proposed subsection [subclause 330(3)] stipulates that the amount transferred should be taken to be the property of the victim and that there was an intention to permanently deprive the person of it. Proposed [subclause 330(4)] stipulates that a debit to one account debits which is causally related to a credit in another account is taken as the transfer of the amount of credit from the debited account to the credited account.

Subclause 330(2) and 330(3) both refer to a person who “causes an amount to be transferred from an account”. Subclause 330(5) provides that a person will be taken to cause the transfer if he or she induces another person to transfer the amount even if the other person is not the account holder. Therefore a person who induces a bank teller to transfer funds from a customers account will be taken to cause the transfer for the purposes of subclause 330(2) and 330(3).

Clause 331 General deficiency for division 3.3.2

This clause contains a general deficiency provision for the property fraud offence that closely follows the general deficiency provision in clause 307 in relation to theft. Like theft, property fraud can take place over a period of time in small hard to identify sums. This provision allows the prosecution to prove the defendant guilty of property fraud even though it cannot identify the particular sums of money or items of other property taken provided that it can prove a general deficiency in the victim's money or property referable to the defendant's conduct.

Division 3.3.3 Other indictable offences for part 3.3

Clause 332 Obtaining financial advantage by deception

Clause 332 contains the financial fraud offence that will replace the offences in sections 95, 96 and 97 of the Crimes Act. Although this offence will extend to cases in which money or other tangible items of value are obtained by deception, the primary focus of the offence is to impose criminal liability on those who obtain intangible financial benefits by deception. Obtaining services without payment by means of a deception is a classic instance falling within the scope of this offence.

To establish this offence the prosecution must prove that the defendant, by a deception, dishonestly obtained a financial advantage for himself, herself or another. The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both, which is the same as theft in clause 308 and the property fraud offence in clause 326. This is appropriate given that the conduct involved is similar. The offence is based on section 17.3 of the MCC.

The "deception" element of this offence is defined in clause 325, which also applies to this clause. Similarly, the element of "dishonesty" relies on the general definition of that term in clause 300. In contrast to property fraud, it is not necessary to include an extended definition of "obtaining" in this offence because of the abstract nature of a financial advantage compared to property. Therefore, the general definition of "obtain", in clause 300, applies. It is also not a requirement of this offence to prove intent to permanently deprive. It is enough that the financial advantage is temporary. Again, the abstract nature of a financial advantage does not easily lend itself to permanence. The advantage once gained may lead to gains in money or property which may only require that the financial advantage was gained temporarily. Nor is financial advantage something that could be said to have previously "belonged" to another and accordingly that concept is also not an element of this offence.

The term "financial advantage" is not defined in the Bill. This is similar to section 82 of the Victorian Crimes Act, which also does not attempt to define "financial advantage". Section 95 of the Crimes Act uses the term "financial advantage" but restricts the concept to such things as obtaining an overdraft or an increase in remuneration. Sections 96 and 97 then create separate offences for obtaining a service and evading a liability. This follows amendments to the UK Theft Act in 1978, but in MCCOC's view there is no justification for limiting the concept of financial advantage. The Victorian provision covers at least the same conduct as the UK approach but has not led to the same difficulties or the same possible gaps of coverage (eg in England the obtaining of some sorts of loans by deception are covered but others are not).

The meaning of "financial advantage" has been rarely litigated in Victoria, where the legislation leaves it undefined. In *Matthews v Fountain* [1982] VR 1045, 1049-50 the Victorian Supreme Court held that 'financial advantage' was a simple concept wisely left to the common sense interpretation of juries and magistrates. In that case, the court held that a penniless debtor, who wrote a valueless cheque to gain relief from being harried by a creditor, gained a financial advantage by deferring the demand for payment. Reliance on the ordinary meaning of the words has not resulted in uncertainty or confusion.

Although the concept of financial advantage is broad enough to cover virtually all cases of obtaining property by deception, the practice in Victoria, supported by the principal

text for prosecutors, appears to be to confine the offence in this clause to cases that do not involve obtaining tangible property (eg credit, services, etc). This approach conforms to the structure of the legislation.

Clause 333 General dishonesty

The offences in this clause only apply to relevant cases of dishonesty perpetrated against "the Territory" and to dishonest dealings to influence Territory officials in the exercise of their duties. The term "Territory" for this offence has the same meaning as it has in clause 319. That is, the term includes a Territory authority, a Territory owned corporation and a Territory instrumentality, in accordance with the definition of those terms in the dictionary of the Legislation Act.

Although the offences in this clause are not included in the MCC they are considered justified because of the significant public interest in ensuring the protection of government revenue and government operations. The offences are based on equivalent offences in section 135.1 of the CCC. The CCC offences are a codified version of section 29D of the *Crimes Act 1914,* which was the basis for the almost identical offence in section 8 of the Government Offences Act, which this clause will replace.

The Commonwealth EM includes the following comprehensive explanation of these offences:

> 189. . . Section 29D cannot fairly be described as a transparent offence. It relies on the meaning of `defraud' which is dependent on case law for its meaning. Indeed most jurisdictions do not have a `defraud' offence and the Model Criminal Code Officers Committee did not consider it to be suitable for general use. However, the Gibbs Committee favoured retaining it and there is a case for using it to protect Commonwealth entities because of their vulnerability to dishonest conduct.
>
> 190. Consistent with decisions such as that of the House of Lords in *Scott* [1975] AC 819 and Australian cases *O'Donovan v Vereker* (1987) 76 ALR 97 at 110 and *Eade* (1984) 14 A Crim R 186, the proposed offence does not require the prosecution to prove that the accused deceived the victim and as such falls below the appropriate level of culpability required for an offence with a maximum penalty of 10 years imprisonment. In recognition that the offence is much broader than fraud, it is proposed that [clause 333] should have a maximum penalty of 5 years imprisonment. Where there is evidence of deception, the more serious fraud offences should be charged [clauses 326 and 332]. Indeed the vast majority of the offences charged under section 29D of the *Crimes Act 1914* involve deception and can be charged under proposed [clauses 326 and 332]. There will be the occasional case where obtain by deception cannot be charged. In those circumstances there may be questions as to whether it is appropriate that the person be charged with a serious offence, but there will no doubt be some cases where it is justified. Human ingenuity is such that schemes have been and will continue to be devised that make it difficult to establish that the accused deceived the victim. In most jurisdictions, including the UK, it has been decided that such schemes should only be dealt with where there is a conspiracy or by specific offences developed to combat the scheme after it is discovered (for example, taxation legislation).
> . . .
> 192. The idea of special protection for the public revenue is also consistent with the way the law developed in the UK where section 32(1)(a) of the *Theft Act* preserved the common law offence of cheating the public revenue. Cheating the public revenue does not require proof of deception, though it is narrower than conspiracy to defraud in that it must be shown that the public is affected by the conduct (*Mavji* (1987) 84 Cr.App.R 34 at p.38).
>
> 193. Turning to the substance of proposed [clause 333], the first part of it [subclause 333(1)] concerns the person who does anything with the intention of dishonestly obtaining a gain from another - in this case [the Territory]. [Subclause 333(2)] makes it clear that it is not necessary to prove the person knew the other person was [the Territory]. While the common law interpretation of `defraud' tends to focus on causing losses, it would be anomalous and artificial to require the prosecution to prove losses if it is more natural to present the case as one of obtaining a gain.

194. Proposed [subclause 333(3)] focuses on doing anything with the intention of dishonestly causing a loss to [the Territory]. This is at the heart of the common law meaning of `defraud'. Proposed [subclause 333(4)] removes the requirement to prove the person knew it was [the Territory].

195. Proposed [subclause 333(5)] imposes liability for conduct where the person dishonestly causes a loss or risk of loss, provided the person realised that the conduct involved substantial risk, at least, of causing loss. The offence resembles section 17.4 of the Model Criminal Code which is the conspiracy to defraud offence, which specifies a fault element of recklessness. In the Model Criminal Code and the *Criminal Code* `recklessness' requires proof that the defendant was both aware of a substantial risk and also lacked justification for incurring that risk [section 20]. The proposed offence requires awareness of a substantial risk, but omits the implied reference to community standards of acceptable conduct in the definition of recklessness, where it refers to the unjustifiability of the risk. Since liability for the proposed offence requires proof of `dishonesty', which is determined by reference to the standards of ordinary people, any further reference to general standards of conduct inherent in the concept of recklessness is unnecessary and would be likely to breed confusion.

196. Proposed [subclause 333(5)] imposes liability if loss or a risk of loss is caused dishonestly and the offender was aware that loss would occur or that there was a substantial risk of loss. The element of dishonesty requires proof that the offender realised that the conduct which caused the loss or risk of loss would be considered dishonest according to the standards of ordinary people in the community. This captures the common law meaning of `defraud' that it should also include imperilling another person's assets (*Wai Yu -Tsang* [1992] 1 AC 269 at 280). Proposed [subclause 333(5)] is an improvement on the Model Criminal Code provision and is repeated in comparable offences elsewhere in the Bill (for example, conspiracy to defraud at proposed [subclause 334(3)]. [Subclause 333(8)] excludes the requirement to prove the person knew it was [the Territory].

197. Finally, [subclause 333(7)] reflects another meaning that has been given by the courts to `defraud'. A person is guilty of the offence if the person does anything with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official. This is also consistent with the case law in *Withers* [1975] AC 842 and *Scott*. It is proposed that `public official' should be defined in [clause 300] as covering State, Territory and Commonwealth officials in recognition that many in the community are not knowledgably of the distinction between different governmental functions and officials. It would therefore be unreasonable to require the prosecution to prove that the person knew the public official was a [Territory] public official. [Subclause 333(8)] provides for this.

As indicated above, the offences in subclauses 333(1), 333(3) and 333(5) only apply if "the Territory" is the person from whom the gain would be obtained or to whom the loss is or would be caused. Similarly, the offence in subclause 333(7) only applies if the public official that the defendant seeks to corrupt is in fact a "Territory" public official and the duties involved are the duties of a "Territory" public official. Importantly, subclauses 333(2), 333(4), 333(6) and 333(7) provide that absolute liability applies to these requirements. In other words, it is not necessary to prove, for example, that the defendant knew or believed that the loss etc would be caused to the Territory or that the defendant had any other state of mind about who the loss would be caused to. It is also irrelevant that the defendant may have been mistaken about who would suffer the loss (see subsection 24(3) of the Criminal Code). As long as the loss would be caused to the Territory it does not matter that the defendant did not know etc that the Territory would be the victim of his or her criminal activities. This is reasonable otherwise a defendant could escape liability by arguing that he or she thought that someone else, other than the Territory, would suffer the loss. Also the fact that the defendant thought that he or she was causing someone else a loss etc instead of the Territory or that he or she was seeking to corrupt a Commonwealth official instead of a Territory official has no real bearing on the defendant's moral culpability.

The maximum penalty for these offences is the same as the CCC penalty of five years imprisonment or 500 penalty units ($50,000) or both. Although this is lower than the current penalty in the Government Offences Act, it is appropriate given the very broad

nature of the offences involved and that proof of deception is not required as it is in the case of the more serious offences in clauses 96 and 332.

Clause 334 Conspiracy to defraud

Like clause 333, the offences in this clause are serious general dishonesty offences. Proof of deception is not required. However, there are a number of important differences. First, the offences are not limited to causing a gain or loss etc to the ACT government. Except for subclause 334(4) (conspiracy to influence a public official in exercising his or her duties), the offences will also apply if the intended victim is a private individual or company. Secondly, there must be a conspiracy. Essentially, this means that there must be an agreement between two or more persons to engage in the criminal conduct. This element is explained in more detail below. Thirdly, the maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both. Although conspiracy usually carries the same penalty as the primary offence, the penalty in this clause accords with the penalty recommended in the MCCOC Conspiracy report and is the same as the penalty for the similar offence in the CCC.

Since the MCCOC Conspiracy report was published, the High Court in *Peters v R* (1998) 151 ALR 51 (a case which concerned the Commonwealth *Crimes Act 1914* conspiracy to defraud offence) commented that it disagreed with the way the MCC conspiracy to defraud offence was drafted. Accordingly, the provisions of this clause are based on the corresponding CCC provisions in section 135.4, which take into account the suggestions of the High Court by attaching dishonesty to the various types of conduct. The Standing Committee of Attorneys-General at its April 1998 meeting endorsed this approach.

Subject to the differences mentioned above, the offences in this clause have the same components as the general dishonesty offences in clause 333 and it is therefore not proposed to repeat the explanation for those components here. However, subclauses 334(5) to (12) contain a number of interpretative and procedural provisions that follow similar provisions in the general conspiracy offence in section 48 of the Criminal Code.

Subclause 334(5) outlines the key components of a conspiracy. That is, the defendant must enter into an agreement with one or more other persons; the defendant and at least one other party to the agreement must intend to do the agreed thing that will, for instance, cause the prospective victim a loss; and the defendant or at least one other party to the agreement must commit an overt act pursuant to the agreement. The requirement of intention to do the agreed thing (paragraph 334(5)(b)) will prevent conviction where, for example, the only parties to the agreement are the accused and an agent provocateur. The requirement for an overt act has been included because it is considered that a simple agreement to defraud without any further action by any of the parties is insufficient to warrant the attention of the criminal law.

Subclause 334(6) clarifies some important matters about when a person may be found guilty of the conspiracy to defraud offences. It provides that a person may be liable even if causing the loss or obtaining the gain etc is impossible or if the other parties to the agreement are not criminally responsible (for example, a child under 10 years of age) or are all corporations. It is well established at common law that a company can be guilty of conspiracy, see *ICR Haulage* [1944] 1 KB 551; *Simmonds* (1967) 51 Cr App R 316. Subparagraph 334(6)(c)(ii) of this provision needs to be read with subclause 334(8). Paragraph 334(6)(c)(ii) provides, in effect, that if the agreement is to commit an offence, the defendant may be found guilty even if the only other party to the

agreement is a person for whose benefit the offence exists. On the other hand the person who is the protective object of an offence cannot be found guilty of these offences (subclause 334(8)). Paragraphs 334(6)(d) provides that a person may be liable even if all other parties to the alleged agreement have been acquitted but if finding the person guilty would be inconsistent with their acquittal the person cannot be found guilty of the offences in this clause. This accords with *Darby* (1981) 148 CLR 668 and section 321B *Crimes Act 1958* (Vic).

Subclause 334(7) provides for disassociation from the offence. That is, a person cannot be found guilty of these offences if, before an overt act is taken pursuant to the agreement, the person withdraws from the agreement and takes all reasonable steps to prevent the doing of the thing that is the subject of the agreement. What amounts to taking all reasonable steps will vary from case to case. Examples might include informing the other parties of the withdrawal, advising the intended victims and/or giving a timely warning to the appropriate law enforcement agency.

Where the conspiracy to defraud involves an agreement to commit an offence, subclause 334(9) allows any defences, procedures, limitations or qualifying provisions that apply to that offence to also apply to a conspiracy to defraud offence under this clause.

In the past the courts have been critical of the "overuse" of conspiracy offences. To address this concern subclause 334(10) allows a court to dismiss a conspiracy to defraud charge if it considers that the interests of justice require it to do so. The most likely use of the power to dismiss will arise when the substantive offence could have been used, a criticism repeatedly voiced by the courts (see, for example, *Hoar* (1981) 148 CLR 32).

In addition, subclause 334(11) provides that the consent of the Attorney General or Director of Public Prosecutions must be obtained before conspiracy to defraud proceedings can be commenced. However, in recognition of the urgent circumstances that may sometimes arise, subclause 334(12) provides that a person may be arrested, charged, remanded in custody or on bail before consent is given.

Division 3.3.3 Summary offences for part 3.3

This division contains summary offences of obtaining a financial advantage from the Territory and passing valueless cheques.

Clause 335 Obtaining financial advantage from the Territory

The offences in this clause are summary offences intended to supplement the protection provided by the general fraud offence in clause 333. They apply to cases where a person obtains a financial advantage for himself, herself or another from the Territory "knowing or believing" that he, she or the other is not eligible to receive the financial advantage. While these offences will often overlap with more serious theft and fraud offences, they provide an alternative with a lower penalty where it is difficult to establish dishonesty. This is reflected in the maximum penalty which is 12 months imprisonment or 100 penalty units ($10,000) or both. These offences are suited for use in less serious instances of fraud against the government.

To establish these offences the financial advantage must be obtained from "the Territory". However, as in the case of the general dishonesty offences absolute liability

applies to this requirement. In other words, it is not necessary to prove what the defendant's state of mind was about who the financial advantage would be obtained from. Nor is it relevant that the financial advantage may have been obtained from the Territory etc (instead of someone else) because of a mistake. The defendant is liable as long as the financial advantage was in fact obtained from the Territory and the defendant knew or believed that he, she or the other person was not entitled to it.

Subclause 335(5) also includes an extended definition for the offence in subclause 335(3). It provides that a person is taken to have "obtained" a financial advantage for another if the person induces the Territory to do something that results in the other person obtaining the financial advantage. This is consistent with the general definition of "obtain" in clause 300 but because of the way these offences have been structured that definition is excluded by subclause 335(6).

Clause 336 Passing valueless cheques

This is a summary offence based on the fraud offences in clauses 17.2 and 17.3 of the MCC and section 99 of the Crimes Act, which it will replace. The offence applies if a person obtains property, a financial advantage or other benefit by passing a cheque to someone else without reasonable grounds for believing that the cheque will be paid in full on presentation or with the intention of dishonestly obtaining the property, financial advantage or benefit. Although the Crimes Act offence also expressly applies to cases of passing a valueless cheque to obtain "services", "credit" or to "discharge a debt or liability", these matters are covered in the Bill offence by the term "financial advantage". This offence also includes an equivalent of subsection 99(3) of the Crimes Act by providing that a person may be liable even though there was some money in the account on which the cheque was drawn. In accordance with section 99 of the Crimes Act, the maximum penalty for this offence is 12 months imprisonment or 100 penalty units ($10000) or both.

Part 3.4 False or misleading statements, information and documents

The offences in this part are based on offences in sections 136.1, 137.1 and 137.2 of the CCC. Like the CCC, the offences only apply where the statements or documents are submitted to government; to persons exercising government powers or functions or submitted in purported compliance with ACT law.

Although the MCC does not have offences of this kind they have been included because of their considerable importance to the proper administration of government. False and misleading statements are often made as a prelude to committing fraud and offences of this kind are useful where a person is caught early in the process and the particular conduct does not involve large amounts of money. The importance of these offences is evidenced by the fact that the ACT statute book currently has 90 false or misleading statements, information and document offences in 65 different Acts and Regulations. These have been enacted over many years and employ different elements and language and apply different penalties ranging from fines to two years imprisonment. In 1990 the Gibbs Committee concluded that standardising these offences and centralising them in the Criminal Code would be more efficient and would be of considerable assistance to practitioners.

Clause 337 Making false or misleading statements in applications

This clause contains two offences of making false or misleading statements, however, they will only apply if the statements are made to the Territory; or to a person exercising a function (authority, duty or power) under Territory law or if they are made in compliance or purported compliance with Territory law. The term "Territory" has the same meaning as in clause 319 and includes a Territory authority, instrumentality or Territory owned corporation.

The false or misleading statements can be made orally, in a document or in any other way (paragraph 337(1)(a)) but they must be made in or in relation to an application or a claim for a "statutory entitlement" or "benefit" (paragraph 337(1)(d)). The term "statutory entitlement" is widely defined (subclause 337(7)) so that the offences will apply to statements made for such things as a licence, a certificate, accreditation, registration, a decision, an exemption, an assessment and anything that gives a status, privilege or benefit under law. The definition is in inclusive terms so that anything else that can properly be characterised as a statutory entitlement would be covered. The term "benefit" is also widely defined to include any advantage and is not limited to a benefit of money or other property. For example, it could be a benefit derived from an award of an honorary title.

The offences will apply if the statement is false or misleading because of what it states and also if there is an omission that makes the statement misleading (subparagraphs 337(1)(c)(ii) and 337(3)(c)(ii)). However, the statement must be false or misleading in a material particular for the offences to apply (subclauses 337(5) and 337(6)).

The Commonwealth EM includes the following further commentary on these offences:

> 205. There are two types of offences. The more serious offence requires proof that the defendant knew the statement in the application was false and misleading. It provides for a maximum penalty of 12 months imprisonment [subclause 337(1)]. The other only requires proof that the defendant was reckless as to whether the statement was false and misleading. It provides for a maximum penalty of 6 months imprisonment [subclause 337(3)].
>
> 206. Both offences provide for a defence where the defendant can point to evidence that the false or misleading statement was not false or misleading in relation to a material particular [subclauses 337(5) and (6)]. It would be too onerous to require the prosecution to prove that the defendant knew or was reckless as to materiality. However the proposed defence should ensure that materiality is taken into account.
>
> 207. Proposed [clause 374] provides for alternative verdicts in similar terms to other provisions elsewhere in the Bill. There will be situations where it becomes apparent during the hearing that the defendant is guilty of the second offence rather than the first.
> . . .
>
> 209. It is important that `benefit' is defined broadly at proposed [subclause 337(7)] because the applications covered by this offence covers a wide range of functions.

Similar to clauses 333 and 335, subclauses 337(2) and (4) provide that absolute liability applies to the requirement in paragraph 337(1)(e) that the false or misleading statement be made to the Territory etc. That is, it is not necessary to prove that the defendant knew or believed that he or she was making the statement to the Territory etc or that the defendant had any other state of mind about who he or she was making the statement to. It is also irrelevant that the defendant may have mistakenly made the statement to the Territory etc instead of someone else.

Clause 338 – Giving false or misleading information

This offence relates to the giving of false or misleading information to the Territory; or to a person exercising a function (authority, duty or power) under Territory law or information that is given in compliance or purported compliance with Territory law. "Territory" has the same meaning as it has in clause 319 (subclause 338(8)).

In contrast to the previous offence there is no requirement for the information to be given in or in relation to an application or claim for a statutory entitlement or benefit. Provided that it is given to the Territory, or to the person or for the purpose specified in paragraph 338(1)(d) the offence will operate. However, the person must know that the information is false or misleading or that something that is omitted will render the information misleading (paragraph 338(1)(c)). Also the information must be false or misleading in a material particular (subclauses 338(3) and (4)). The maximum penalty is 12 months imprisonment or 100 penalty units ($10,000) or both. While a recklessness offence is appropriate where the person is involved in completing an application, it would go too far to extend it to this offence.

Subclauses 338(5) and (6) include additional defences that provided that the offences do not apply if before the information is given the Territory does not take reasonable steps to inform the person of the existence of the offence in this clause. Subclause 338(7) provides for a concise short form of a notice, which should be taken as sufficient to inform people of the existence of the offence. These defences are necessary because there may be cases where people do not consider that by providing false information they may be committing a criminal offence.

As in the previous offence subclause 338(2) provides that absolute liability applies to the requirement in paragraph 338(1)(d) that the false or misleading information be given to the Territory etc.

Clause 339 – Producing false or misleading documents

A person commits an offence under this clause if he or she produces a document in compliance or purported compliance with ACT law, knowing that it is false or misleading. As in the case of the other similar offences the document must be false or misleading in a material particular. The maximum penalty matches the other offences - 12 months imprisonment or 100 penalty units ($10,000) or both. Subclause 339(3) contains a defence often found in this type of offence where the document has been identified as being false. It provides that the offence will not apply if the document is accompanied by a suitably signed written statement that (i) states that the document is false or misleading in a material particular and (ii) sets out or refers to the material particular in which, to the person's knowledge, the document is false or misleading.

Part 3.5 Blackmail

Blackmail is essentially the unwarranted demanding of property with "menace" (see below). There are two principle differences between blackmail and robbery. First, unlike robbery, blackmail is complete when the demand is made. That is, the perpetrator does not have to obtain the property demanded. Secondly, for blackmail a wider range of threats will suffice. It is not confined to the use or threat of force.

Clause 340 Meaning of menace for part 3.5

To be blackmail the demand must be reinforced by words or conduct amounting to a "menace". The Crimes Act does not define what a "menace" is but clause 340 does.

The definition largely codifies the common law cases but with two important additions (referred to below). The definition is inclusive, which means that other conduct not expressly referred to in the provision could be found to constitute a menace having regard to the circumstances involved.

The general rules for determining a menace are set out in subclause 340(1) but these are qualified with respect to natural persons in subclause 340(2) and governments or companies in subclause 340(3). Subclause 340(1) provides that a menace includes any express or implied threat of action that is detrimental or unpleasant to another person and also any general threat of detrimental or unpleasant action that is implied because the person making the threat is a public official. This last aspect recognises that a public official's demeanour and mere presence can amount to a threat of menace in certain circumstances.

To constitute a menace with respect to a natural person the threat must also be such that it would be likely to cause a person of normal stability and courage to act unwillingly in response to the threat (paragraph 340(2)(a)). This accords with the common law, however, paragraph 340(2)(b) extends the common law position. It provides that a threat will also amount to a menace if it is likely to cause the particular individual to act unwillingly and the person making the threat is aware of that individual's vulnerability to the threat. This is important because it ensures that blackmailers who seek out and trade on the special vulnerabilities of their victims cannot escape conviction for lack of the element of menace. However, to establish a menace under this provision the prosecution must prove that the defendant knew of the special vulnerability.

There may be some doubt about how the common law rules on menaces apply in cases where the victim of the threat is a government or a company. The test for natural persons (that is, a threat "that would be likely to cause a person of normal stability and courage to act unwillingly) is not suited to the circumstances of a company or governments. Accordingly the Bill includes subclause 340(3) for these cases. It provides, in effect, that a threat against a government or corporation will amount to a menace if it is such that it would ordinarily make a government or corporation act unwillingly. This is to be judged by reference to the attitudes, rules etc of governments and corporations generally. Alternatively, if there is a special vulnerability of the particular government or corporation concerned, paragraph 340(3)(b) applies. Again, the prosecution must prove that the defendant knew of the special vulnerability.

Clause 341 Meaning of *unwarranted demand with a menace* for part 3.5

This clause defines what is meant by an unwarranted demand with a menace for the purposes of the blackmail offence. The corresponding CCC provision is to the same effect as the definition in this clause but employs the more traditional expression "menaces" instead of "a menace". The definition is explained in the Commonwealth EM as follows:

> 218. Proposed [clause 341] defines what is an `unwarranted demand with menaces.' This is based on section 18.2 of the Model Criminal Code. [Subclause 341(1)] provides that the person making the demand must not believe that he or she has reasonable grounds for making the demand and does not reasonably believe that the use of menaces is a proper means of enforcing the demand. Not all demands with menaces count as blackmail. The fault element of the offence is to make an *unwarranted* demand. Whether the demand is warranted (eg whether a sum of money is owed) and whether the menace is

warranted (eg whether that type of threat is a proper means of enforcing that demand) distinguish criminal from non-criminal demands backed by menaces. If a demand for payment is backed by a menace (eg a threat to sue where a debt is owed), that is not an offence under proposed Part [3.4]. A threat to sue for that debt is a proper means of enforcing that demand.

219. The first limb of the test proposed in [paragraph 341 (1)(b)] is subjective: did the *defendant* believe there were reasonable grounds for making the demand. The test for the second limb [paragraph 341 (1)(c)] is objective: did the defendant *reasonably* believe that the use of the menace was a proper means of enforcing the demand.

220. Under the UK *Theft Act* and [section 104 of the *Crimes Act*] … the test for whether a menace is proper is subjective. In the non-*Theft Act* jurisdictions, the test of whether the demand or the threat was proper is *objective*: The objective test was criticised by the Criminal Law Revision Committee in the UK because it had led to cases such as *Dymond* where a woman had written to a man who she alleged had sexually assaulted her demanding that he apologise and pay her money. If he did not, she threatened to "summons" him and "let the town know all about your going on". The fact that the threat was construed as a threat to bring a *criminal* rather than a civil prosecution was found to be improper, despite the fact that the woman believed it was proper and that she would have been entitled to threaten civil action. (For example, it is not blackmail to write a solicitor's letter demanding compensation for a negligently caused injury, threatening to bring a civil action for damages if the compensation is not paid). It was also said to be improper to threaten to tell the town about it, though it would not be improper to tell the town that he refused to pay the damages in respect of the civil assault claim. These are very fine distinctions for a serious blackmail type offence.

As noted in the Commonwealth EM, the definition of "unwarranted demand with a menace" in this clause is different in one important respect to the corresponding definition in subsection 104(2) of the Crimes Act. The Crimes Act definition has both legs but the test for each is subjective. That is, under the Crimes Act definition a person would not be guilty of blackmail if he or she believed that the threat was a proper means of enforcing the demand (the second limb) even if most would disagree. On the other hand, the definition in this clause includes an objective component for assessing the propriety of using threats. That is, the defendant must reasonably believe (reasonable according to the standards of ordinary people) that the use of the threat is proper. This approach provides for a carefully balanced test and is consistent with the test for dishonesty in clause 300, which also has objective components. This is also consistent with the evaluative elements in the general defences of duress (section 40), sudden or extraordinary emergency (section 41) and self-defence (section 42) in Chapter 2 of the Criminal Code.

A demand may be made orally or in writing and will be regarded as a demand if an ordinary person would regard the communication as a demand. Also the nature of the demand does not matter. Subclause 341(2) makes it clear the demand may be for something other than money or property. It could be a demand to do or refrain from doing a particular act, however, the demand must be made with the intention of obtaining a gain or causing a loss or influencing the exercise of a public duty (clause 342 below). The terms "gain", "loss" and "duty" (in relation to a person exercising a public duty) are defined in clause 300 and are explained in the commentary to that clause. Subclause 341(3) makes it clear that it does not matter whether the threat is that the person making the threat will carry out the menace or someone else. The blackmailer may well be associated with someone else who enforces the demands.

Clause 342 Blackmail

This provision sets out the elements of the offence of blackmail. To establish the offence the prosecution must prove that the defendant made an unwarranted demand with a menace and with the intention of making a gain, causing a loss or influencing the exercise of a public duty. The maximum penalty is 14 years imprisonment or 1400

penalty units ($140,000) or both. This is the same for burglary and robbery and is justified on that basis because the illegitimate obtaining of property or money is accompanied by a threat, which may be a threat of violence. This will replace the blackmail offence in section 104 of the Crimes Act, which also applies a maximum term of 14 years imprisonment.

The offence in this clause is based on section 18.1 of the MCC and largely follows the corresponding UK Theft Act offence and its equivalent in section 104 of the Crimes Act. However, there are important differences. Some of these have already been mentioned in connection with clauses 340 and 341. Another important difference is that this offence also covers cases where a person uses blackmail to influence the exercise of a public duty. This additional arm to the offence will apply in cases where a person makes an unwarranted demand with a menace to an official to influence the way he or she exercises the duty or conversely, in cases where the demand is made by an official to influence the way he or she exercises the duty. Under section 83 of the Crimes Act and clause 300 of this Bill, "gain" and "loss" is confined to gain or loss of property (including money). It is important, therefore, to include this additional arm so that people who use unwarranted demands to improperly obtain other, no property based, benefits (such as appointment to an honorary office or the release of a prisoner) are also caught. This is an important feature, not only because of the protection it affords to those in public office but also because it protects the integrity of public officer generally.

PART 3.6 Forgery and related offences

This part will insert offences in the Criminal Code of forgery (clause 346), using a forged document (347), possession of a forged document (clause 348) making or possessing forging devices (clause 349), false accounting (clause 350) and false statements by officers of "a body" (clause 351). The provisions of this part largely follow the recommendations of the *United Kingdom Law Reform Commission Report on Forgery and Counterfeit Currency* (1973), which, in turn, was the basis for the UK *Forgery and Counterfeiting Act 1981* (the UK Forgery Act). The part will replace the definition of "instrument" in section 83 of the Crimes Act and all of Division 6.4 and sections 100 to 102 inclusive of that Act, which are in almost identical terms to the corresponding provisions the UK Forgery Act.

Forgery is another offence that is reproduced in a number of ACT statutes. Centralising forgery and related offences in the Criminal Code will do away with unnecessary duplication and the confusion that can sometimes arise because of differences in drafting. It will also do away with the wide range of maximum penalties that apply for what is essentially the same criminal conduct. In the Commonwealth context the Gibbs Committee concluded that there should rarely be a need to include forgery offences outside the CCC.

Division 3.6.1 Interpretation for part 3.6
Clause 343 Definitions for part 3.6

The definition of "document" in this clause supplements the dictionary definition of that term in the Legislation Act. When read together "document" is defined for this part in terms that closely follow the definition of "instrument" in section 83 of the Crimes Act and cover everything from traditional paper based documents with writing on them to coding for computers. However, there are some significant differences with the Crimes Act definition. First, the combined definition in the Bill and the Legislation Act is

expressed in inclusive terms, leaving room for a court to find that other things are documents. This is an important feature to ensure that the offences in this part remain abreast of technological developments. Secondly, they expressly refer to paper and other materials capable of being given a meaning by qualified persons and computers and also cover debit cards and credit cards. This is particularly important given the increasing incidences of card fraud and the fact that forgery is a common means by which fraud is perpetrated.

It is important to note that the definition makes no distinction between public and private documents or any other class of document (subclause 343(c)). The Crimes Act definition is the same in this respect. Thus the offences in this part will apply whether the falsified document is a letter, a will or an official document of a government agency, such as a certificate issued by the Registrar-General's Office. The virtue of this approach is its simplicity and the avoidance of unnecessary distinctions between various forms of criminal conduct, which are primary objectives of the MCC. Also, there are significant difficulties involved in determining where the dividing line between public and private should be drawn and in any case, it does not automatically follow that forgery of public documents is more serious than forgery of private documents.

Clause 344 Meaning of false document etc for part 3.6

This clause defines what constitutes a "false document", which is a key element in all the more serious forgery and forgery related offences in this part. The provision closely follows section 124 of the Crimes Act and covers documents that suggest that:

- they were made or authorised by someone in a form that they were not;
- they were made or authorised by someone in terms that they were not;
- they were changed by, or changed on the authority of someone when they were not;
- they were made or changed on a day when they were not or at a place or in circumstances that they were not; or
- they were made or changed, or made or changed on the authority of an existing person, who did not exist.

Subclause 344(1) improves on section 124 of the Crimes Act in a number of respects. First, although the list was intended to be exhaustive of what makes a document false, section 124 does not make this clear. Subclause 344(1) rectifies this by stating that a document is false "only if" it falls into one of the listed categories. It also makes it clear that a document can be false even if only part of it falls into one of the listed categories.

Subclause 344(2) explains that "making" a false document includes changing a document in a way that makes it false under subclause 344(1) and that this is so whether or not it was already a false document before the change. This is an important provision for the offences in clauses 346 and 349 which refer to "the making" of false documents. Subsection 124(2) of the Crimes Act is similar but again it is expressed in a way that suggests that changing a document that makes it false in any respect amounts to "making" a false document, even if the falsehood is not of a kind listed in subclause 344(1). This does not seem to have been the original intention and accordingly subclause 344(2) makes it clear that it only applies if the change renders the document false under subclause 344(1).

Subclause 344(3) is an important provision concerning copies of documents. However, before dealing with that provision it is important to note that copies are generally covered by the definition of "document" for this part. Therefore, as is the case with all documents, for copies to be "false documents" they must fall within one of the

definitions in subclauses 344(1) or s344(2). Take the example of a defendant who alters the form of the school principal's original draft letter on plain paper by copying it onto letterhead so that the defendant's copy appears to be the original letter. It is a "false document" because it purports to have been made in that final form by the principal when that was not the case (paragraph 344(1)(a)).

The problem becomes more complex where the document is obviously a copy. For example, say the defendant tells the victim that he or she will provide a copy of the school principal's letter and then transfers the principal's draft onto letterhead and stamps it "copied by the defendant". The *copy* itself purports to have been made in that form by the defendant and in fact the defendant made the copy in that form. However, there is a deception because the defendant's copy purports to be a true copy of the original when in fact the original is not in that form.

To overcome this problem subclause 344(3) provides that a document that purports to be a true copy of another document is to be treated as if it is the original document. Thus, if the copy is false within the meaning subclauses 344(1) or 344(2), it will be a false document. In the above example, the copy purports to be a true copy of the principal's letter. Therefore, it will be treated as if it were the original letter. The question then becomes, did the principal write the original in the form represented by the copy (paragraph 344(1)(a)). The answer is that the principal did not put his or her letter in that form because the original letter was not on letterhead. Therefore, the copy is a false document. The same analysis will flow if the defendant alters the original and then makes a copy of it. The copy is still a false document because it is deemed to be the original and the original was not made in that form.

There is no equivalent of subclause 344(3) in Division 6.4 or the related sections of the Crimes Act. However, the provision is clearly very useful, not only because of the matters referred to above but also because it eliminates the need for duplicate offences and related provisions for copies of documents as in section 125 and subsections 126(3) and 126(4) of the Crimes Act.

Clause 345 Inducing acceptance that document genuine

This is an important provision where the forgery and other relevant offences involve a computer, machine or electronic device. One of the elements that must be proved to establish forgery (and some of the related offences) is that the defendant intends to induce a person to accept a false document as genuine. Subclause 345(a) ensures that this element can apply to computers etc by providing that 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. In other words, the provision effectively puts computers in the position of people for the purposes of accepting documents as genuine. This is similar to the approach adopted in relation to the deception offences (see paragraph (b) of the definition of "deception" in clause 325).

Paragraph 125(2)(a) of the Crimes Act is to the same effect as subclause 345(a). However, this clause does not include an equivalent of paragraph 125(2)(b)) which effectively deems the computer to be a person for the purposes of the definition of prejudice. This is unnecessary. As MCCOC points out, the purpose of these provisions is to protect the person who owns or is associated with the computer (not, of course, the computer itself). Deceiving the computer is a means by which the forger obtains a gain

or causes a loss to another person. To include a provision that deems the computer a person does not advance this purpose in any way.

Subclause 345(b) clarifies an important issue by providing that to prove an intent to induce a person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person. This will ensure that the forgery offences will apply in cases where the defendant falsifies a document without a particular victim in mind. Subclause 345(b) is similar to section 130 of the Crimes Act.

Division 3.5.2 Offences
Clause 346 Forgery

To establish this offence the prosecution must prove that the defendant made a false document with the intention that he, she or another would use it to dishonestly induce a third person to accept it as genuine and thereby dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty. The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both, which is consistent with the maximum penalty for forgery in section 126 of the Crimes Act, the serious theft and fraud offences in this Bill and the corresponding offence in the CCC. Although MCCOC recommended a lower maximum penalty (seven years and six months) on the basis that forgery is preparatory to fraud, such conduct causes significant harm in its own right, quite apart from fraud. The distinction is hard to justify.

This offence will replace the corresponding offences in subsections 126(1) and 126(2) of the Crimes Act. The most significant difference in the Crimes Act offences is that instead of requiring proof of intent to "dishonestly" obtain a gain etc they require proof of an intent that the victim will act (or not act) on the false document to his, her or another's "prejudice". "Prejudice" is defined in a complex provision is section 125 of the Crimes Act. It covers such things as the loss to the victim of his or her property, or an opportunity to earn or earn more remuneration or to obtain a financial advantage of another kind. The concept also extends beyond the normal meaning of detriment to another to include circumstances where the forger gains remuneration or a financial advantage from the victim, and to cases where the forgery procures any act from a person in connection with the performance of that person's duty.

The MCCOC report lists the following advantages of substituting "dishonestly" obtaining a gain etc for "intent to prejudice":

- it is consistent with the theft and fraud provisions in that it employs the concept of dishonesty as the substitute for the common law concepts of "fraudulently" and "intent to defraud";
- it avoids the complexity and inadequacy of the definition of prejudice;
- it allows for cases where there may be no dishonesty (eg claim of right [section 38 of the *Criminal Code*]: where a person uses a false document to regain property which he or she believes she is legally entitled to, or is not dishonest in some other respect);
- it clearly includes an intent to gain by the defendant rather than simply an intent to cause a loss to the victim. A person who uses a false document to obtain a gain for himself merits punishment just as much as someone who intends to cause loss to another;
- chapter 3 of the Model Criminal Code already has established definitions of "gain" and "loss" in [clause 14.3] taken from the *Theft Act* and those terms are used not only in false accounting but also in blackmail [section 104 of the *Crimes Act* and clause 342 of the Bill] .[pp 217 – 219]

The offence in this clause applies where there is intent to obtain a "gain" or cause a "loss" in money or property (clause 300) and also intent to influence a public duty. For example, for this last aspect a person might falsify papers to cause a public official to

incorrectly make a honorary award to the wrong person. Although no gain or loss of money or property may be involved the offence would apply because the forgery was performed to influence a public duty. This approach is consistent with the blackmail offence (clause 342). However, the forgery offences in Division 6.4 of the Crimes Act are slightly broader in this respect because they apply where the intent is to influence any duty (paragraph 125(1)(c)). This is too vague and extends well beyond the common law position.

Clause 347 Using false document

The offence in this clause is similar to the forgery offence in clause 346, except that it relates to "using" a false document (instead of "making" a false document). It also requires proof that the defendant "dishonestly" used the false document and that he or she "knew" that it was false. Whether the use is "dishonest" is a matter to be determined in accordance with the general definition of dishonesty in clause 300 (which has already been discussed). As to the element of "knowledge", section 19 of the Criminal Code provides that a person has knowledge of a circumstance (in this case that the document is false) if he or she is aware that it exists or will exist in the ordinary course of events. Accordingly a person will commit an offence under this clause if he or she knows (is aware) that the document is false and dishonestly uses it for the intended outcomes detailed above in relation to the forgery offence (clause 346). The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both, which is justified for the same reasons indicated above in relation to the forgery offence.

This offence will replace the corresponding offences in subsections 126(2) and 126(4) of the Crimes Act, which also require proof of knowledge of the falsity of the document used and also applies a maximum prison term of 10 years imprisonment. The differences between this offence and the Crimes Act offences (eg substitution of the mental element of "dishonesty" for an "intent to prejudice") have already been discussed in relation to forgery offence in clause 346.

Clause 348 Possessing false document

The offence in this clause follows the same pattern as the "making" and "using" forgery offences, except that it relates to the possession of false documents. To commit the offence a person must possess the false documents, knowing that they are false and intending that they will be dishonestly used (by him, her or another) for the intended outcomes already detailed above in relation to the offences in clauses 346 and 347. The maximum penalty is the same as forgery - 10 years imprisonment or 1000 penalty units ($100,000), or both.

This offence will replace the corresponding offence in section 127 of the Crimes Act, which also applies a maximum term of 10 years imprisonment. The Crimes Act offence uses the expression "custody" and "control" instead of "possession". The concept of possession includes custody and control and is therefore preferred. Except for the other differences referred to in relation to forgery, the Crimes Act offence in section 127 is similar to this offence.

Clause 349 Making or possessing devices etc for making false documents

This clause contains four offences that relate to making and possessing devices for making false documents. The offences closely follow the offences in section 128 of the Crimes Act, which this clause will replace.

The first two offences in the clause are the more serious. Subclause 349(1) provides that a person is guilty of the offence if the person makes or adapts a device, material or other thing designed or adapted for making a false document (even though it may also have another purpose), with the knowledge that it is designed or adapted for that purpose and with the intention that the person or another will use it to commit forgery under clause 346. The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both, which is the same as the penalty for forgery and is consistent with the offence in subsection 128(1) of the Crimes Act.

The offence in subclause 349(2) is similar except that it applies to possessing a device for forgery. It provides that a person is guilty of the offence if the person knows that a device, material or other thing is designed or adapted for making a false document (even though it may also have another purpose) and the person has it in his or her possession with the intention that the person or someone else will use it to commit forgery under clause 346. The maximum penalty is also 10 years imprisonment or 1000 penalty units ($100,000) or both.

The offences in subclauses 349(3) and 349(4) deal with the same situation but apply where it cannot be shown that the person possessed or made etc the device with the intention of committing forgery. The offence in subclause 349(3) relates to the "making" of a device for making false documents and in subclause 349(4) it concerns the "possession" of a device for making false documents. The maximum penalty for both offences is two years imprisonment or 200 penalty units ($20,000) or both, which is the same as the penalty for the offence in subsection 128(2) of the Crimes Act.

An important difference between these two offences is that the possession offence includes a reasonable excuse defence (subclause 349(5)). While this will be a departure from the MCC equivalent (section 19.6) it is appropriate in relation to possession because a person could possess such a device for innocent reasons. For example, a person may discover a forging device and be on his or her way to hand it in to police. In accordance with subsection 58(3) of the Criminal Code, the defendant will only bear an evidential burden in relation to a claim of reasonable excuse.

A reasonable excuse defence is not necessary for the offence in subclause 349(2) because that offence includes a requirement to intend forgery to be committed. A person with a reasonable excuse will not have that intention. Similarly it is not appropriate to have a reasonable excuse defence for "making" or adapting a device to create false documents and accordingly that defence has not been included in the offences in subclauses 349(1) and (3).

The offences in this clause substitute the expression "device, material or other thing" for the words "machine, implement, paper or other material" in the two offences in section 128 of the Crimes Act. The formulation in these offences covers the same ground as the Crimes Act expression and includes everything from a scanner to credit card blanks. The word "possession" has also been used in preference to "custody and control" because the concept of possession includes custody and control.

Clause 350 False accounting

The offences in this clause will replace the offence in section 100 of the Crimes Act, which is in similar terms. MCCOC considered it important to retain the offences of false accounting because of "the central importance of accounts in the world of commerce" and also because forgery is essentially an offence about altering other people's documents and so does not cover a person who authors a false account.

The offences in subclauses 350(1) and 350(2) correspond to the Crimes Act offences in paragraph 100(1)(a) and subsection 100(2). Subclause 350(1) provides that it is an offence for a person to dishonestly damage, destroy or conceal an "accounting document", with the intention of obtaining a gain for himself, herself or another or causing someone a loss. The term "accounting document" is defined in subclause 350(4) as an account, record or document made or required for an accounting purpose.

Subclause 350(2) provides that it is an offence for a person to dishonestly make or concur in making an entry in an accounting document that is false or misleading in a material particular or to omit or concur in omitting a material particular from an accounting document and in doing so the person intends to obtain a gain for himself, herself or another or causing someone a loss. It is recognised that a misleading entry or the failure to make a material entry can render a document false or misleading and this provision ensures that such conduct is caught. Subsection 100(2) of the Crimes Act is in similar terms.

Subclause 350(3) provides that in giving information for any purpose, a person commits an offence if he or she dishonestly, and with the intention of making a gain for himself, herself or another or causing a loss to someone, produces or makes use of an accounting document that is false or misleading in a material particular and the person is reckless about whether the accounting document is false or misleading in a material particular. Applying "recklessness" to the false and misleading element of this offence is consistent with the equivalent MCC offence (subsection 19.7(b) – note the words, "or may be") but makes this offence wider than the corresponding Crimes Act offence in subparagraph 100(1)(b). In view of the commercial importance of accounting documents it is considered appropriate to cast a heavier burden on those who prepare them to ensure that they are not false or misleading etc.

The maximum penalty for both offences in this clause is seven years imprisonment or 700 penalty units ($70,000) or both, which is the same maximum prison term that applies for the offences in section 100 of the Crimes Act.

Clause 351 False statement by officer of a body

The fraud offences in this Bill apply regardless of the identity of the defendant or the victim. Thus, if a company or its officers commit a fraud, they can be charged with the offences under clauses 326 and 332. For cases that fall short of fraud the *Corporations Law* also includes offences that apply to officers of companies who make false statements to shareholders or investors, with the intention to deceive them. However, as MCCOC points out, the relationship between the *Corporations Law* offences and the Crimes Act offences is not well worked out. Also there are corporate entities not covered by the *Corporations Law,* like statutory corporations. Therefore, to ensure that sufficient coverage is maintained MCCOC has recommended the offence in this clause to deal with false and misleading statements made by officers of "corporations" and other organisations. The proposed offence is based on the offence in section 102 of the Crimes Act, which it will replace.

Subclause 351(1) provides that an officer of "a body" commits an offence if the officer dishonestly publishes or concurs in publishing a document that contains a statement or account that is false or misleading in a material particular; the officer is reckless about whether the statement etc is false or misleading in a material particular and the officer publishes or concurs in publishing the document with the intention of deceiving members or creditors of "the body" about its affairs. The maximum penalty is seven years imprisonment or 700 penalty units ($70,000) or both. Section 102 of the Crimes Act also applies a maximum term of seven years imprisonment.

There are some important differences between this and the Crimes Act offence. First, subclause 351(2) relies on the definition of a "body" in the dictionary of the Legislation Act. That Act defines a "body" as including any group of people joined together for a common purpose, whether or not it is incorporated. Such organisations as companies, statutory corporations, joint ventures, associations, clubs and partnerships are covered by the definition. This gives a broader application to the Bill offence compared to the Crimes Act equivalent, which only applies to officers of unincorporated associations. Under this offence an officer of any corporate entity, including a statutory corporation, will be caught. Secondly, the Crimes Act requires proof that the officer intended to obtain a gain (for him, her or another) or to cause a loss, whereas this offence requires proof of an intention to deceive members or creditors of the organisation about its affairs. Again, this offence is wider than the Crimes Act equivalent because it applies whether the defendant's purpose is economic loss or gain or something else, such as the prestige of being seen to head a highly successful organisation. As long as the officer intends to deceive about the affairs of the body (and the other elements are made out), the offence will apply regardless of the outcome planned by the officer. The definitions of "deception" and "dishonesty" in clauses 325 and 300 will apply to this offence in determining whether those elements are made out. Thirdly, the Crimes Act offence applies if the officer knows that the publication is false or misleading whereas this offence also applies if the officer is "reckless" about that fact. As with the offence in subclause 350(3) it is considered appropriate to cast a heavier burden on officers to ensure that suspect information on material matters is not published to shareholders and members.

Subclause 351(2) contains definitions for terms used in this offence. The definition of "body" has already been discussed above. The term "officer" is defined to include any member of the body who is concerned in its management and any person purporting to act as an officer of the body. Apart from the underlined words, subsection 102(2) is to the same effect. Again, this extended definition widens the ambit of this offence compared to the Crimes Act equivalent. On the other hand, the definition of "creditor" follows subsection 102(3) of the Crimes Act by providing that that term includes a person who has entered into a security (eg a mortgage) for the benefit of the body.

Part 3.7 Bribery and related offences

The offences in this part make no distinction between public and private sector "bribery". Traditionally bribery is a public sector corruption offence directed at those who offer undue rewards to public officials and public officials who accept them in exchange for departing from the proper exercise of their public duty. There was no equivalent to address similar practices in the private sector until the turn of the twentieth century when a series of scandals in the commercial sectors in Australia and England gave rise to the first statutory offences on "secret commissions". The relevant Act for the ACT was the Commonwealth *Secret Commissions Act 1905* (the Secret

Commissions Act), which had an extended application in the Territory to "trade and commerce in or with the Territory" (see section 7 of the *Seat of Government (Administration) Act 1910*). The Commonwealth Act was repealed by the Commonwealth *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, which came into force on 24 May 2001.

Secret commission offences are essentially the private sector equivalent of bribery and apply where an agent dishonestly receives money or other benefits in order to depart from the duty owed to his or her principal. For example, a bank manager (the agent) who corruptly receives money from an indigent customer to approve a loan (the bank being the principal). In such cases the bank manager would be guilty of receiving a secret commission and the customer would be guilty of giving a secret commission.

Applying bribery and secret commission offences to both the private and public sectors ensures that the same rules will apply in cases where the serious matter of corrupt payments is involved. MCCOC noted the following arguments in favour of extending bribery to apply to both the public and private sectors:

> The distinction between the public and the private sector has never been clear and, as an increasing number of functions which have traditionally been performed by the public sector are being privatised, making the distinction between public and private increasingly difficult to draw. Given that the distinction between the functions to be privatised are based primarily on economic criteria, linking the offence of bribery to functions which *happen* to be performed in the public sector for the time being is arbitrary. For example, whether a corrupt payment to a prison official constitutes bribery will depend on whether the official works in a prison that is privatised. In a state like Queensland where some prisons are private and some public, the arbitrariness of the public/private distinction is stark.
>
> One answer to this argument is to say that the offence applies to anyone performing a *public function* - anything in which the public is interested – rather than whether the person is employed by the public service. There is some force in this but it raises a further question about which functions the public is interested in. The public has an interest in a variety of people who might be taking corrupt payments, from the jockeys who ride in the horse races on which the public wagers to the employees of companies in which the public invests.
>
> Confining bribery to the public sector assumes that public sector corruption does more harm to the community than private sector corruption. That assumption is questionable. The secret commissions paid to Johns in the Tricontinental Bank case amounted to $2 million. The corrupting effect of a secret commission of that amount on confidence in the *general* commerce and finances of the community were very serious and more harmful than many instances of bribery in the public sector. Yet the maximum penalty in Victoria for a secret commission at the time of the *Johns* case was 2 years. It is now 10 years. The public needs to be able to have confidence in the integrity of both the public and the private sector. It should not be statutorily presumed that corrupt payments in the public sector do more harm than corrupt payments in the private sector. The amount of damage in a particular case should be a question for sentencing rather than the subject of a separate offence. [pp 245 – 247]

MCCOC has recommended two-levels of offence. The more serious offences of giving and receiving a bribe will apply to cases where a payment is dishonestly made, offered or asked for with the intention that a favour will be given. The less serious offences of corrupting benefits will extend to dishonest benefits that "tend" to influence the performance of a duty. It was decided not to use the existing term "secret commissions" to describe these lesser offences because secrecy is not an element of either the statutory secret commission offences or the bribery and corrupting benefit offences in this Bill. The term "corrupting benefits" is more descriptive of the offences in clause 357 and will avoid confusion with the former secret commissions offences.

Division 3.7.1 Interpretation for part 3.7
Clause 352 Definitions for part 3.7

This clause contains some important interpretative provisions for this part.

Benefit – This term is a common element in the four offences in this part. It is defined to include any advantage and is not limited to property. Bribes can be paid by many different means.

Favour – This provision defines what a favour is for the bribery and corrupting benefit offences in clauses 356 and 357. It is where the agent (i) does or does not do something as agent or because of his or her position as agent; (ii) is influenced or affected in exercising his or her "function" (see below on the meaning of this term) as agent; or (iii) causes or influences the principal or other agents of the principal to do or not do something. It is clear from the definition that the favour must be something that is sought from the agent in connection with his or her position as agent. For example, it would not normally be bribery to ask a friend to ignore that the parking meter has expired but it may well be if the friend is an on duty parking inspector.

Function – This term is relevant to the definition of "favour" for the two bribery offences in clause 356 and the abuse of public office offence in clause 359. The definition should be read with the dictionary definition of that term in the Legislation Act. In that Act "function" is given an extended meaning to include "authority, duty or power". Therefore, if an agent is influenced in the way he or she exercises any authority, power, duty or function he or she has (say, for example, in exchange for a benefit he or she is given), the agent will be taken to provide a "favour". The Bill definition also extends the meaning of the term "function" to include any function, authority, duty or power that the agent holds himself or herself to have. This will ensure that people who give bribes and agents who take them to do something that the agent cannot do are still caught by the offences.

Clause 353 Meaning of agent and principal for part 3.8

This is an important provision that defines what is meant by the terms "agent" and "principal" for this part. Because the bribery and corrupt benefit offences will apply to the public and private sectors, common terms need to be used to define the class of people affected. The term "agent" was selected because it is the term used in the various Commonwealth and State secret commission offences.

The definition is drawn very widely to catch a pool of relationships where one person acts for another in a relationship of trust. Item (a) of the definition sets out in general terms the persons to be regarded as "agents" and "principals" for the offences in this part. An agent is a person who acts on behalf of another person with that other person's actual or implied authority and the principal is the other person on whose behalf the agent acts. The definition then goes on to list categories of people who clearly fall within the concept of agent. However, the definition is in inclusive terms so that someone else not listed in the provision, who acts for another with actual or implied authority can qualify as an "agent". The express categories include a "public official" (in which case the government or government agency for which the official acts is the principal), "an employee" (the employer being the principal), "a lawyer" acting for a client (the client being the principal), "a partner" (the partnership being the principal), "an officer of a corporation or other organisation", whether or not employed by it (the corporation or organisation being the principal) and "a consultant" to any person (that person being the principal).

The definition of agent includes "public officials" (paragraph (b)), who are in turn defined in clause 300 as any public official having public official functions or acting in a public official capacity. The definition also expressly provides that the term includes Commonwealth, State and Territory members of Parliament and the Legislative Assembly, local government councillors, ministers, judicial officers, police officers, some statutory office holders and government employees, including local government employees.

The ACT, in common with other jurisdictions, has a range of separate bribery offences for government employees, members of the Legislative Assembly and judicial officers (eg sections 14, 15 and 20 of the Offences Against the Government Act). By applying the bribery offences to "public officials" and adopting a broad definition for that term there is no longer any need for separate offences based on the status of the official concerned.

It is important to read the definition of "agent and "principal" with subclause 353(2) which extends the meaning of those concepts to cover people who are, have been and who intend to become an agent or principal. This will ensure that a person cannot avoid liability by taking the precaution of arranging for payment of a corrupt benefit after resigning or seeking a corrupt benefit just before taking up an appointment.

Clause 354 Dishonesty for part 3.6

All the offences in this part include an element of "dishonesty" (eg dishonestly giving a benefit or exercising a function). Whether a benefit is given dishonestly or not is to be determined in accordance with the general test for dishonesty in clause 300 at the beginning of this part. However, this clause adds an important clarification. It provides that the provision of a benefit may be dishonest even if it is customary for a benefit to be given in the particular trade, profession, or business etc in which the agent is involved. Whether or not the payment of a "customary" benefit is dishonest will depend on the circumstances of each case.

Clause 355 Meaning of obtain for part 3.6

This provision makes it clear that a person is taken to have obtained a benefit for another if he or she induces someone else to give that person a benefit. Subclause 355(2) is included to make it clear that the general definition of "obtaining" in clause 300 does not apply to this part.

Division 3.7.2 Offences for part 3.7
Clause 356 Bribery

Subclause 356(1) concerns the giving of bribes. It provides that it is an offence for a person to dishonestly give, offer or promise to give a benefit to any agent or other person with the intention that the agent will provide a favour. It also covers cases where a person causes a benefit to be given or causes an offer or promise of a benefit to be made to an agent or someone else. The elements of the offence are explained in more detail below. However, as noted above, the offence applies to any agent, whether he or she is a public official or a private agent working in the private sector. The offence will replace subsections 14(2), 15(2) and 20(b) of the Government Offences Act (in relation to "public officials") and will cover conduct of the kind that was formally covered by paragraph 4(1)(b) of the Secret Commissions Act in its application to the ACT.

In accordance with the recommendation by MCCOC, the maximum penalty for this offence is 10 years imprisonment or 1000 penalty units ($100,000) or both. This is the same as the penalty for theft and fraud and the corresponding offences in the CCC (section 141.1). The maximum penalty in the Government Offences Act and the Secret Commissions Act is only two years imprisonment but the higher penalty is justified, not only because the crime involves dishonesty and is akin to theft and fraud but also because it undermines community confidence in the integrity of government and the commercial sector.

As indicated above the offence of giving a bribe extends, not only to the actual giving of a benefit but also to an offer or a promise to give a benefit. It also covers cases where someone causes a benefit to be given or causes an offer of a promise of a benefit to be made. Thus if a government employee improperly adds the name of the agent on a list of prospective recipients for a government grant, the employee would be causing a benefit (the agents name on the list of prospective recipients) to be given to the agent. Also the benefit need not be a benefit to the agent. It could be a benefit to a third person (eg the agent's mother) in return for a favour from the agent.

In many cases, it will be clear that a benefit given to a public official in order to influence his or her duty to do or refrain from doing an act will constitute a bribe. However, unless some additional fault element is specified, payment of the official's salary would constitute bribery because it is a benefit given in order to influence the official's duty (as would an official's demand for salary or a salary increase as a condition of doing his or her job). There are also very difficult questions in this area about the legitimate ambit of politics. Offering a Member of the Legislative Assembly a benefit to vote in a certain way seems a clear case of bribery, but few would want to see ordinary political negotiations coming within the scope of the bribery offence. The element of "dishonesty" therefore provides an important safety valve. "Dishonesty" provides for a flexible assessment of the particular dealing against the standards of ordinary people and provides a workable way of capturing the essence of bribery and corrupt payments.

The bribery offences in sections 14, 15 and 20 of the Government Offences Act do not include an element of dishonesty. For example, subsection 14(2) makes it an offence for a person to give, offer or promise a benefit in order to influence or affect an officer in the exercise of his or her duty or authority. This casts the net too widely because it fails to distinguish between bribes and legitimate benefits. Take for instance a person who offers to buy an inspector lunch while they talk over some issues that need to be discussed for the inspector's report. Depending on the circumstances the offer may be improper but it may not. The inspector could have paid for lunch on the last occasion.

The essence of bribery is not mere payment but actual disloyalty or dishonesty. In MCCOC's view the need to maintain trust and confidence in public administration and commerce must be balanced against the potential injustice to individuals of imposing penalties on them for conduct which by prevailing ethical standards is not intrinsically corrupt. Including the "dishonesty" element ensures that the offences are properly targeted to punish corrupt practices.

In addition to dishonestly giving or offering etc a benefit, it must be proved that the defendant did so with the intention of causing the agent to give a favour. This does not mean that the prosecution has to show that there was an actual agreement between the parties but only that the giver intended the agent to do him, her or another person a

favour. Therefore, a person is liable even if, for example, the agent does not "take" the bribe or it is not within the agent's duties or function to do what the defendant asks.

Subclause 356(2) concerns the taking of bribes. It provides that it is an offence for an agent to dishonestly ask for a benefit, "obtain" a benefit or agree to "obtain" a benefit for himself, herself or someone else, with the intention of providing a favour or inducing, fostering or sustaining a belief that he or she will provide a favour. The underlined words have been added to this offence (compare subclause 356(1)) to make it clear that it will apply in cases where an agent takes a bribe but with no intention of acting upon it. The qualification on the meaning of "dishonesty" in clause 354 and the extended meaning of "obtain" in subclause 355(1) also apples to this offence. That is, the agent will be taken to obtain or agree to obtain a benefit for another if the agent induces a third person to do something that results in the other person obtaining a benefit. The remaining elements of this offence have already been discussed in relation to the offence of giving a bribe in subclause 356(1).

This offence will replace subsections 14(1), 15(1) and 20 (b) of the Government Offences Act (in relation to "public officials") and will cover conduct of the kind that was formally covered by paragraph 4(1)(b) of the Secret Commissions Act in its application to the ACT. The maximum penalty is the same as that for the other bribery offence. That is, 10 years imprisonment or 1000 penalty units ($100,000) or both.

Neither of the bribery offences in this clause include an equivalent of subsection 4(2) of the former Secret Commissions Act, which deems any gift or reward to be an inducement if the receipt of it "would be in any way likely to influence the agent to do or to leave undone something contrary to his duty". The accused cannot even escape liability by proving the gift did not influence him or her. The provision has been described by a leading Australian commentary on fraud offences as a "conclusive presumption". However, it is contrary to the principles governing the standard of proof in the Criminal Code that a serious offence that can result in significant stigma and loss of employment and imprisonment for as much as 10 years should be able to be "proven" in this way. Accordingly an equivalent of subsection 4(2) of the Secret Commissions Act has not been included in these offences.

Clause 357 Other corrupting benefits

The offence in subclause 357(1) concerns the giving of a corrupting benefit. It provides that it is an offence for a person to dishonestly give/offer (etc) a benefit to an agent or other person in circumstances where obtaining or expecting to obtain the benefit would in any way tend to influence the agent to provide a favour. The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both.

The offence will cover conduct of the kind that was formally covered by paragraph 4(1)(b) of the Secret Commissions Act in its application to the ACT. However, for the reasons indicated above this offence does not include a deeming provision like the one in subsection 4(2) of the former Secret Commissions Act.

The offence in subclause 357(2) concerns the receipt of a corrupting benefit. It provides that it is an offence for an agent to dishonestly ask for, obtain, agree to obtain (etc) a benefit for himself, herself or another and obtaining or expecting to obtain the benefit would in any way tend to influence the agent to provide a favour. The

maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both. This offence will cover conduct of the kind that was formally covered by paragraph 4(1)(a) of the Secret Commissions Act in its application to the ACT.

The corrupting benefit offences in this clause share a number of elements with bribery, such as "dishonesty", "favour", "benefit", "obtain" and "agent", which have already been discussed. However, there are some important differences.

To establish bribery the prosecution must prove that the defendant dishonestly gave/offered etc the benefit with the intention that the agent would provide a favour. On the other hand it is sufficient for the corrupting benefit offences that the benefit had a tendency to influence the agent to show the person favour or disfavour in relation to the principal's business. There is no need to prove a prior arrangement intended to influence the agent's duty. Rather, the benefit could be conferred as a reward for a previous breach of duty. To make this last matter clear subclause 357(3) provides that for both the corrupting benefit offences it is immaterial whether the benefit is in the nature of a reward. This is consistent with the former Secret Commissions Act, which specifically covered benefits in the nature of a reward.

Another important difference is that for bribery the prosecution must prove that the defendant dishonestly gave/offered etc the benefit with the intention that the agent would provide a favour. But under this offence a person will be guilty if he or she is reckless as to the circumstance that the benefit may tend to influence the agent to provide a favour. This is because section 22 of the Criminal Code provides that if the offence does not specify a fault in relation to a circumstance of conduct, recklessness is the fault element that applies. Accordingly, a person will be guilty if the prosecution can prove that he or she was aware of a substantial risk that the tendency to influence exists or will exist and having regard to the circumstances it is unjustifiable to take that risk (see subsection 20(2) of the Criminal Code). It is because this offence encompasses a lower order fault element that the maximum penalty is five years imprisonment instead of the 10 years that applies for bribery.

Clause 358 Payola

This offence applies to a particular kind of corrupt practice that can occur where people hold themselves out to the public as being engaged in the business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services. The clause provides that it is an offence for a person to hold himself or herself out in this way and to dishonestly ask for, obtain or agree to obtain a benefit for himself, herself or another in order to influence his or her selection, examination or opinion. The maximum penalty is five years imprisonment or 500 penalty units ($50,000) or both, which, because of the similarities involved, is the same as the maximum penalty for the offences of giving or receiving a corrupting benefits.

The offence is modelled on section 237 of the Northern Territory *Criminal Code Act 1991* and essentially targets those who receive "kickbacks" for making what they incorrectly purport to be independent selections or assessments of goods and services. Restaurant and theatre reviewers, financial advisers, television presenters and others who make dishonest recommendations about goods or services would be caught by this

offence. Also in the past there have been a number of cases of record companies making large payments to disc jockeys to play their records on radio.

MCCOC makes the following points in its report for the need to include this offence:

> Independent advisers may be acting for an individual principal and in that case they will be agents for the purposes of the bribery and corrupting payments provisions. However, where such people are giving advice or selections to the public at large, they are not agents and are not covered by the bribery or other corrupting benefits provisions. Such independent advisers owe their duty to the public generally rather than a specific principal, even where their opinions are published through a media outlet, their duty is not so much to the owner of that outlet as it is to the public at large. There can be no doubt that the culpability involved in receiving money for giving dishonest opinions in these circumstances merits a punishment similar to the giving or receiving corrupting benefits provisions. [p 281]

The principal fault element for this offence is "dishonestly" asking for or receiving etc a benefit in order to influence the examination, opinion or selection of property or services. It is also necessary to prove that the person intended to hold him or herself out as offering a disinterested opinion about goods or services.

Remuneration for doing the work necessary to give the selection would not be caught by this offence because it is not dishonest and is not intended to influence the selection or opinion. Similarly the offence would not apply to paid advertisements because the payment is not dishonest and the advertisement is clearly not being held out as offering independent, disinterested opinions or selections. On the other hand the things like free trips to travel writers may or may not be dishonest, depending on the circumstances. A disclosure that the trip had been provided would remove the suggestion of dishonesty.

Clause 359 Abuse of public office

This clause contains two offences that relate only to public officials. In general terms the offences are aimed at public officials or former public officials who discharge or refuse to discharge their duty with the intention of dishonestly obtaining a benefit for themselves or another or causing a detriment to someone else. The term "public official" is defined in clause 300 to include ACT public officials as well as public officials of other jurisdictions.

Subclause 359(1) makes it an offence for a public official to (a) exercise any function or influence he or she has because of holding a public office or (b) fail or "refuse" to exercise a function he or she has because of holding a public office or (c) engage in any conduct to exercises his or her duties as a public official or (d) use any information he or she has gained because of holding a public office, with the intention of dishonestly obtaining a benefit for himself, herself or another or causing a detriment to another person. Failing to exercise a function includes refusing to exercise a function (see the dictionary definition of "fail" in the Legislation Act).

The offence in subclause 359(2) applies to people who have ceased to be a public official or moved on to occupy another public office. In such cases it is an offence for a person to use any information he or she gained as a public official, with the intention of dishonestly obtaining a benefit for himself, herself or another or causing a detriment to another person. Subclause 359(3) makes it clear that this offence will apply whether the person ceased being a public official before, after or at the time this offence came into force. It also makes it clear that the offence will apply even if the person is still a public official but holds another public office.

The maximum penalty for these offences is five years imprisonment or 500 penalty units ($50,000) or both, which, because of the similarities involved, is the same as the maximum penalty for the offences of giving or receiving a corrupting benefits.

The offences in this clause have their origins in the common law offence of "misfeasance of office", which deals with public office holders who improperly use their position for their own benefit. Some examples of misfeasance are nepotism (eg improperly appointing a relative to a position) or the use of information gained in public office (eg a public servant who passes information to undisclosed business associates who put in a winning tender for a government contract).

The important difference between these offences and bribery is that the abuse of public office does not require the office holder to act at the instigation of another or seek to influence another. Also these offences differ from blackmail because they do not involve threats or coercion.

Like the other corruption offences in this part, the key fault element for these offences is dishonesty. As MCCOC explains in its report:

> All public servants exercise their power to benefit themselves in the sense that they are paid a salary. Similarly, they often leave the public service and set up in business as consultants and use the information they have accumulated as public servants in the new business for their own benefit. But for the word "dishonestly", these activities would constitute serious offences. [p 283]

Part 3.8 Impersonation or obstruction of Territory public officials

Although the primary purpose of this Bill is to improve the ACT law on theft, fraud, forgery and bribery, the offences in this part are related because they protect government and the public from being disadvantaged by persons who pretend to be public officials and exercise powers that they are not empowered to exercise. Often pretences of this kind are part of a wider plan to commit theft, fraud and other deception based offences. The provisions of this part are also intended to protect the integrity of public offices. The impersonation offences are an important means of achieving that purpose but so too are offences designed to ensure that public officials are allowed to properly discharge their duties without obstruction.

The primary offences in the ACT relating to the impersonation and obstruction of public officials are in sections 17, 17A and 18 of the Government Offences Act but there are also similar offences throughout the ACT statute book. Such duplication is unnecessary and can give rise to considerable confusion. In 1991 the Gibbs Committee remarked, in relation to a similar situation in Commonwealth legislation, that a reduction in the number of these offences will mean that "...the courts, the legal profession and the police would...be able to deal more effectively with a limited number of omnibus offence provisions with which they would become familiar than [with] a much greater number of provisions in particular Acts" and "...some matters are of such significance in the administration of law and justice that it is desirable that they be governed by general provisions carefully thought out in advance rather than provisions drafted ad hoc for the purposes of each particular statute".

The offences in this part are modelled on the similar offences in Part 7.8 of the CCC and will replace the offences in sections 17, 17A and 18 of the Government Offences Act and also the similar offences in other ACT legislation.

Division 3.8.1 Indictable offence for part 3.8

Clause 360 Impersonating Territory public official

This clause contains three offences relating to the impersonation of Territory public officials. The term "Territory public official" is defined widely in clause 300 and expressly includes ACT members of the Legislative Assembly, ministers, judges, magistrates, tribunal members, court and tribunal officers, members and special members of the Australian Federal Police (see the dictionary definition of "police officer" in the Legislation Act), ACT statutory office holders, ACT public servants and people who perform work for the ACT on contract.

Subclause 360(1) provides that it is an offence if on a particular occasion, a person impersonates a Territory public official in the official's capacity as a Territory official, and the person does so knowing that the impersonation is being done in circumstances that the official is likely to be performing his or her duty and the person intends to deceive someone that the person is a Territory public official. The maximum penalty is two years imprisonment or 200 penalty units ($20,000) or both. This is the same as the maximum penalty for the corresponding CCC offence and the similar offence in subsection 17(a) of the Government Offences Act, which it will replace.

The definition of "impersonation" has been included in subclause 360(4) to make it clear that people who impersonate public officials solely for purposes of entertainment (such as for theatre, including street theatre) are not caught by this offence.

Subclause 360(2) provides that it is an offence for a person to falsely represent himself or herself to be a Territory public official in a particular capacity and does so in the course of doing an act or attending a place in the assumed capacity of such an official. The focus of this offence is not on those who pretend to be someone else but rather misrepresent themselves as occupying a public office of some kind, with particular duties and functions, whether or not a public official with those duties and functions exists or not. Subclause 360(4) also provides that the term "false representation" does not include any conduct engaged in solely for entertainment purposes. The offence is similar to the offence in subsection 17(b) of the Government Offences Act, and like that offence (and the corresponding CCC offence) has a maximum penalty of two years imprisonment or 200 penalty units ($20,000) or both.

Subclause 360(3) provides that it is an offence for a person to impersonate another in that other person's capacity as a Territory public official or falsely represent himself or herself to be an Territory public official in a particular capacity, with the intention of obtaining a gain, causing a loss, or influencing the exercise of a public duty. This offence was recommended by the Gibbs Committee and has no equivalent in the Government Offences Act. The special meanings of "impersonation" and "false representation" in subclause 360(4) also apply to this offence. Also, for the "false representation" leg of the offence it does not matter whether the false representation relates to a Territory official's capacity that does not exist. The maximum penalty for these offences is five years imprisonment or 500 penalty units ($50,000) or both, which is the same as the penalty in the corresponding CCC offence. The higher penalty is justified because of the additional element of intent to obtain a gain, cause a loss or influence the exercise of a public duty.

Clause 361 Obstructing Territory public official

Subclause 361(1) provides that it is an offence for a person who knows that another person is a Territory public official to obstruct the official in the performance of his or

her "functions". The term function has an extended meaning and includes "authority, duty or power".

The maximum penalty for the offence in this clause is 2 years imprisonment or 200 penalty units ($20,000) or both, which is the same as the penalty in the corresponding CCC offence and the similar offences in section 18 of the Government Offences Act, which this clause will replace.

The meaning of wilfully (or knowingly) obstruct has been considered in a number of cases relating to obstruction of police in the performance of their duties. Lying to an officer who asks questions in the performance of a duty to investigate was held in *Tankey v Smith* (1981) 36 ACTR 19 to amount to wilful obstruction. However, mere failure to answer questions does not amount to wilful obstruction (*Rice v Connolly* [1966] 2 All ER 649). The distinction is that a citizen has a right to refuse to answer questions but no right to deliberately deceive. There may, however, be exceptional cases where the manner of a person together with his or her silence amounts to wilful obstruction, (eg an innocent person deliberately seeking to attract suspicion to protect the guilty person).

Proposed subclause 361(2) provides that absolute liability applies to the requirement that the person the defendant obstructed etc was a Territory public official. That is, although the prosecution must prove that the defendant knew that the person he or she was obstructing etc was a public official of some kind ((paragraph 361(1)(b)), it is not necessary to prove that the defendant knew (believed or had any other fault element) that the person he or she was obstructing was a Territory public official. Nor is it relevant that the defendant made a mistake about the person being a Territory public official (see subsection 24(3) of the Criminal Code). This is considered appropriate because the fact that the defendant may have thought that he or she was obstructing a Commonwealth official instead of a Territory official has no real bearing on his or her moral culpability.

Proposed subclause 361(3) relates to the requirement in this offence that the defendant must obstruct etc the Territory official in the exercise of his or her functions as a Territory official. It provides that strict liability applies to this requirement. That is, it is not necessary to prove that the defendant knew (believed or had any other fault element) that the person he or she was obstructing was exercising Territory public official functions. It is sufficient that that is in fact what the Territory official was doing when he or she was obstructed etc. However, in contrast to subclause 361(1)(2), the application of strict liability (as opposed to absolute liability) to this requirement means that the defendant is not liable if he or she makes an honest and reasonable mistake (in accordance with the terms of section 36 of the Criminal Code) about the fact that the Territory official was exercising official functions (see subsection 23(2) of the Criminal Code).

Division 3.8.2 Summary offences for part 3.8
Clause 362 Impersonating police officers

This clause contains summary offences concerning the impersonation of police officers. The offences are justified because police officers tend to be the "preferred" public office for impersonations.

Subclauses 362(1) and 362(2) provide that it is an offence for a person who is not a police officer to (a) wear the uniform or badge of a police or (b) represent that he or she

is a police officer. The important distinction between these offences is that the offence in subclause 362(1) applies whether or not the defendant is representing himself or herself to be a police officer. To prove the offence in subclause 362(1) it is sufficient that the person is not a police officer and that he or she is wearing the genuine uniform or badge of a police officer. These are strict liability offences that apply a maximum penalty of six months imprisonment or 50 penalty units or both. The offences in subclauses 362(1) and 362(2) will replace the similar offences in paragraphs 17A(1)(a) and 17A(1)(b) of the Government Offences Act, which apply the same maximum penalty.

The offence in subclause 362(3) is directed at non police officers who wear clothing or badges that, even though they are not genuine, nevertheless cause a person to believe that the wearer is a police officer. To establish this offence it is not necessary to show that the defendant intended to misrepresent him or herself as a police officer. Rather, it is sufficient to show that the defendant was reckless about that matter. Under section 20 of the Criminal Code a person is reckless about a result (in this case that the clothing or badge would cause someone to believe that the person is a police officer etc) if the person is aware of a substantial risk that the result will happen and having regard to the circumstances known to him or her it is unjustifiable to take the risk. The maximum penalty for this offence is six months imprisonment or 50 penalty units or both, which is the same as the similar offence in paragraph 17A(1)(c) of the Government Offences Act, which this offence will replace.

Subclause 362(5) makes it clear that the offences in this clause do not apply where a person engages in the relevant conduct solely for entertainment. This is consistent with the similar exclusion that applies to the impersonation offences concerning Territory public officials (see subclause 360(4)).

Clause 363 Obstructing Territory public official

This clause provides for a summary offence of obstructing etc a Territory public official, intended for the less serious obstruction cases. The offence is essentially the same as the main "obstruction" offence in clause 361 except that the defendant need only be reckless about the fact that he or she is obstructing etc a public official (compare paragraphs 361(1)(b) and 363(1)(b)). Because of the application of the less serious fault element of "recklessness" instead of "knowledge", the maximum penalty has been reduced to six months imprisonment or 50 penalty units or both.

Part 3.9 Procedural matters for chapter 3
Division 3.9.1 General

This part contains procedural and evidentiary provisions that relate to the offences in this chapter. The provisions closely follow the corresponding provisions in the Crimes Act.

Clause 364 Stolen property held by dealers etc - owners rights

This clause sets out a speedy process by which an owner can recover any of his or her stolen property that has come into the hands of a second hand dealer or someone who has lent money on the property. The clause closely follows section 109 of the Crimes Act, which it will replace.

If the owner files a complaint under this clause a magistrate may make an order for the dealer or lender to give the property to the owner on payment of an amount (if any) that the magistrate considers appropriate. Subclause 364(2) provides that the dealer or lender is liable to the owner for the full value of the property if they dispose of it after the owner tells them that it is stolen or if they contravene the magistrate's order to return the property to the owner.

For this clause, "stolen property" means property appropriated or obtained by theft or a "related offence" and "related offence" means robbery, burglary, aggravated robbery and burglary and property fraud.

If there is any dispute about the true ownership of the property the matter would need to be dealt with by the usual civil procedures.

Clause 365 Stolen property held by police - disposal

This clause sets out a procedure for the court to dispose of stolen property. The clause closely follows section 110 of the Crimes Act, which it will replace.

There are three requirements for the clause to operate. First, the property must be in the lawful custody of police. Secondly, a person must have been charged with theft or a "related offence" (which means the same as "related offence" in clause 364) concerning the property and thirdly, either the accused cannot be located or he or she has been found "guilty", discharged or acquitted of the relevant offence. If these conditions are satisfied the magistrate may make an order for the property to be given to the person who appears to be the owner or if no one appears to be the owner, any order about the property that the magistrate considers appropriate.

If an order is made under subclause 365(2) it does not prevent anyone else who considers that they are legally entitled to the property from taking civil action to recover it provided that proceedings are commenced within six months after the magistrate's order (subclause 365(3)).

Clause 366 Procedure and evidence – theft, receiving etc

This clause contains procedural and evidentiary matters relating to theft, property fraud and receiving.

Subclause 366(1) corresponds to subsection 113(1) of the Crimes Act, which it will replace. It allows for several people to be charged in one indictment and tried together for theft or receiving in relation to the same property. Subclause 366(2) is similar except that it allows for several people to be charged in one indictment and tried together for property fraud and receiving in relation to the same property. Since property fraud is also theft under the Crimes Act this provision also corresponds to subsection 113(1) of the Crimes Act.

Subclause 366(3) provides that on a trial of one or more defendants for theft a count on the indictment may include an allegation that the defendant or defendants stole two or more items of property. However, this is subject to a contrary ruling by the court. Subclause 366(4) is similar except that it relates to receiving. It provides that on a trial of one or more defendants for receiving a count on the indictment may include an allegation that the defendant or defendants received two or more items of property.

Paragraph 366(4)(b) adds that this allegation may be included whether or not all the items of property were received from the same person or at the same time. Subclause 366(4) is also subject to a contrary ruling by the court.

Subclauses 366(5) and 366(6) also relate to trials for receiving and are intended to deal with a problem that often occurs where a defendant is caught in possession of a large number of stolen items. In such cases it would be unreasonable to require the prosecution to prove that the defendant knew or believed that the goods were stolen when they were received (see clause 313). Accordingly, subclause 366(5) provides that where the prosecution proves that the defendant had four or more items of stolen property in his or her possession, it is presumed that the defendant received the items and that he or she knew them to be stolen property at the time of receipt. However, the presumption is subject to contrary evidence and the defendant only bears an evidentiary burden in respect of evidence to the contrary (see subclause 366(6) and subsection 58(7) of the Criminal Code).

Subclause 366(7) provides that where two or more people are on trial for jointly receiving stolen property any one of the defendants can be convicted irrespective of whether or not the property was received jointly. This provision corresponds to subsection 113(2) of the Crimes Act, which it will replace.

Subclause 366(8) has its equivalent in subsection 114(2) of the Crimes Act, which it will replace. It provides that where two or more people are on trial for theft and receiving, all can be convicted of theft or all can be convicted of receiving and some can be convicted of theft whilst others may be convicted of receiving. Subclause 366(9) is similar except that it applies to joint trials of property fraud and receiving. Since property fraud is also theft under the Crimes Act this provision also corresponds to subsection 114(2) of the Crimes Act.

Subclauses 366(10) and 366(11) correspond to subsection 113(3) of the Crimes Act, which they will replace. They concern the admissibility of evidence in a trial for theft or receiving where it is alleged that the property was stolen in transit (by post or otherwise) or that property was received after a theft of that kind. In such cases clause 366(11) provides that a person may sign a statutory declaration that he or she sent, received or failed to receive the goods or a postal packet or that the goods or postal packet were in a certain condition when sent or received. The declaration is admissible in evidence to the extent that any oral evidence about the matters in the declaration is admissible in the proceedings. However, it will not be received into evidence unless a copy is given to the defendant seven days before the trial and the defendant does not give written notice to the prosecution (within three days of the trial or any other time the court in special circumstances allows) that he or she requires the witness to attend the court.

Subclause 366(12) makes it clear that the term "stolen property" in this clause has the same meaning as that term has in clause 314.

Clause 367 Certain proceedings not to be heard together

This provision was recommended by MCCOC as part of the model possession offence it proposed at pages 125 to 127 of its report. It provides that if a person is charged with both the summary possession offence (clause 324) and receiving (clause 313) in relation to the same property, proceedings for the offences must not be heard together.

Clause 368 Indictment for offence relating to deeds, money etc

Subclause 368(1) corresponds to section 155 of the Crimes Act, which it will replace. It provides that for an offence against chapter 3 concerning a document of title to land, it is sufficient to state in the indictment that the document is or contains evidence of the title to the land and to mention the persons with an interest in the land.

Subclause 368(2) corresponds to section 156 of the Crimes Act, which it will replace. It provides that for an offence against chapter 3 concerning money or a valuable security, it is sufficient to describe it in the indictment as a certain amount of money or certain valuable security without specifying a particular kind of money or security.

Clause 369 Theft of motor vehicle – cancellation of licence

If a person is "found guilty" of the theft or taking of a motor vehicle (clause 318), this provision allows the court to disqualify the person from holding or obtaining a licence for a period it considers appropriate. This clause will replace the similar provision in section 349 of the Crimes Act. Section 349 expressly applies to persons "convicted" of theft, "attempted theft" or taking a motor vehicle. It also applies to persons against whom an order is made (in relation to those offences) for conditional release without conviction, under section 402 of the Crimes Act or the court has taken those offences into account under section 357 of that Act. The term "found guilty" (which is used in this clause) is defined in the Legislation Act to include orders made under section 402 and 357 of the Crimes Act. Similarly, it is not necessary for this clause to refer to "attempted theft" because section 189 of the Legislation Act provides that a reference to an offence includes a reference to a related ancillary offence, such as an attempt.

Division 3.9.2 Alternative verdicts
Clause 370 Alternative verdicts – theft and taking motor vehicle without consent

This clause is explained in the commentary on clause 318 concerning the offence of taking motor vehicles without consent.

Subclause 370(3) provides that this alternative verdict provision does not apply in cases where the trial is for the summary theft offence (clause 321). This is because of the wide disparity in the maximum penalties that apply for minor theft (six months imprisonment) and taking of a motor vehicle (five years imprisonment).

Clauses 371 - 373 Alternative verdicts – theft or obtaining property by deception and receiving

These clauses are explained in the commentary on clause 313 and 326 concerning the offences of receiving and property fraud.

Clause 374 Alternative verdicts – making false or misleading statements

This clause provides for alternative verdicts in similar terms to clauses 318, 313 and 326.

Division 3.9.3 Forfeiture
Clause 375 Going equipped offences - forfeiture

This clause is explained in the commentary on clauses 315 (Going equipped for theft etc) and 316 (Going equipped with offensive for theft etc).

Clauses 376 – 378 Unlawful possession offence – forfeiture

These clauses are explained in the commentary on clause 324 (unlawful possession of stolen property).

Clause 379 Forgery offences - forfeiture

This clause closely follows section 129 of the Crimes Act, which it will replace. It provides that if a person is "found guilty" of forgery (clause 346), using false document (clause 347), possessing false document (clause 348) or making or possessing devices for making false documents (clause 349), the court may, in accordance with the procedure set out in section 367 of the Crimes Act, order any articles used in relation to the offence to be forfeited. The extended meaning of "found guilty" in the dictionary of the Legislation Act applies to this clause (see the commentary on clause 369 above). Also, schedule 3 of the Bill includes an amendment to section 367 of the Crimes Act that will apply that section to relevant provisions of the Criminal Code, including clause 379.

Because of the nature of the property involved in the offences referred to in this provision the current arrangements for forfeiture under the Crimes Act will continue to operate for forfeiture under this provision. The *Confiscation of Criminal Assets Act 2003* is essentially designed for the forfeiture of criminal assets that can be readily sold and converted into cash. Items forfeited under this clause will not usually be of that kind because they will not generally be suitable for resale to the community. Accordingly, it is not proposed to alter the forfeiture arrangements that currently apply under the Crimes Act with respect to forfeiture under this clause.

Schedule 1 Consequential amendments – corporate criminal responsibility

This schedule will amend a total of 37 Acts in the ACT statute book that contain provisions that will be rendered redundant by the full commencement of part 2.5 of the Criminal Code (see the commentary to clause 4 of the Bill). Most of the relevant sections in these Acts deal with both corporate criminal responsibility and the criminal responsibility of principles for their employee's and agents. Accordingly, in most cases the schedule substitutes revised sections (for the existing sections) that remove the corporate criminal responsibility components but leave the principle/agent components (with some modifications) to continue to operate. However, the sections referred to in parts 1.10, 1.12, 1.19, 1.33 and 134 have been entirely omitted, either because they only deal with corporate criminal responsibility or are otherwise considered unnecessary.

Schedule 2 Consequential amendments – redundant offences

This schedule will repeal a total of 159 offences throughout the ACT statute book that will no longer be necessary because the conduct they prescribe will be covered by the standardised offences in chapter 3. The four offences in part 3.4 of chapter 3 of the Bill (which relate to the giving of false or misleading statements, information and documents to the Territory or in purported compliance with Territory law) will themselves displace 90 offences in the statute book and the two offences of obstructing a Territory official in clauses 361 and 363 will displace a further 55 offences. The

schedule will also make a number of minor consequential amendments that are necessary because of the provisions that have been repealed from the various Acts referred to in the schedule.

Schedule 3 Other consequential amendments

This schedule will repeal the Government Offences Act (see clause 3.8 of the schedule) and various other provisions in the Crimes Act. Item 3.6 of part 3.1 of the schedule sets out the provisions of the Crimes Act that will be repealed and the remainder of part 3.1 includes consequential amendments. The replacement of the provisions in Item 3.6 has been discussed throughout the commentary of this Explanatory Statement. Similarly the commentary refers to the offences in the Government Offences Act that will be replaced.

Section 10 of the Government Offences Act contains two offences concerning the disclosure of information by public employees and section 19 contains a further offence of trespassing on government premises. These offences will not be replaced by the offences in chapter 3 and accordingly they will be relocated (together with associated definitional provisions) to the Crimes Act as sections 153 and 154 respectively.