



Pacific Judicial
Integrity Program

Advanced Judicial Officers' Fraud and Corruption Online Course



**FEDERAL COURT
OF AUSTRALIA**



Papua New Guinea
Centre for Judicial Excellence



Topic 2: Fraud and Corruption Offences

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National and Supreme Courts of Papua New Guinea

Setting the Scene



- Recap of key principles with a focus on corruption
- The offence of money laundering
- Evidentiary issues
- Sentencing
- Decision making
- Scenario

Fraud and Corruption Offences



Two broad categories

- **Fraud related offences**
 - Offences against property or involving dishonesty
- **Corruption offences**
 - Official corruption, bribery or abuse of office



There may be, and often is, significant cross-over between the offences within these categories

Fraud Related Offences



- Generally regarded as a complex area of criminal law
- Because of:
 - The complex nature of property itself:
 - The various forms it takes
 - The rules governing ownership at civil law
 - The response by the criminal law to address those issues and recognise other forms of interest in property
 - The sophisticated way in which fraud is conducted in the modern world, often involving multiple actors and complex schemes



Don't Panic!



The Basics

Elements of an offence

Every offence is made up of elements

Physical element(s)

- The act(s) or omission(s) by the accused & the circumstances in which those acts or omissions took place

Mental element(s) (or “fault” element)

- The intention(s) of the accused at the time they did the acts or made the omissions alleged, e.g. intention, knowledge, wilfulness, negligence or recklessness



Determining Verdict



In determining whether or not the prosecution has established the guilt of the accused beyond reasonable doubt, it is necessary to ask:

- What are the **elements** of the offence?
- What is the **evidence** in support of each of those elements?
- Does the evidence **establish or prove** each of the elements beyond reasonable doubt?
- Is there a **defence**?



Analysing a Charge - Generally



The paramount consideration will be the elements of the offence prescribed in the legislation and the requirements of those elements in your jurisdiction

Identify the elements of the offence on the face of the provision that creates the offence

Identify what is required to prove those elements and the principles applying by reference to:

- Any specifically enacted provisions for that purpose within the legislation
- The general interpretation section within the legislation
- Binding authority in your own jurisdiction
- Persuasive authority in your own jurisdiction
- If necessary, overseas authority which whilst not binding might be regarded as persuasive (BUT be cautious)

Analysing a Charge – Fraud

In general terms fraud charges are concerned with the wrongful use of another person's property (interest or right)

Key issues when considering fraud offences:

- What constitutes the subject of the charge - whether it is “property” or some other thing
- Who owns or has an interest in that property or thing
- What the accused must do with respect to that property or thing
- With what intention (s)



Property or thing



How is the property or thing the subject of the charge defined?

- **Must it be capable of being stolen?**

- What does that mean in your jurisdiction? Some offences require that the property is tangible, or “moveable or capable of being moved”: eg s 364(1), CC, PNG (*Kasaipwalova v The State* [1977] PNGLR 257); 123, 124 Penal Code, Vanuatu (*Public Prosecutor v Wilkins* [\[2003\] VUSC 66](#))

- **Is it defined in broad terms?**

- To apply to all assets, eg “property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property”: S 383A(3)(d) CC PNG
- Property includes “real property, personal property, money, a thing in action or other intangible property..”; and “money” includes anything that is equivalent to money (for this purpose, cheques, negotiable instruments and electronic funds transfers are taken to be equivalent to money): ss288 and 297(4) Crimes Decree, Fiji

To whom does the property belong?



Does the offence require:

- **Legal ownership** or title
- Physical **possession**
- **Control** over the property
- Or a more **extended definition** of ownership, eg:
 - “Any legal or equitable interest in or claim to the property”: s 383A(3) for the purposes of s 383A: CC, PNG (including a conditional grant, *Brian Kindi Lawi v The State* [1987] PNGLR 183; *Wartoto v The State* (2019) SC1834)
 - “a person receives property from or on account of another and the person is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way”: 296(1) for the purposes of Division 2 Offences: Crimes Decree, Fiji

Dealing with the property or thing



Does it require:

- The physical **taking or moving** of tangible property
- The **obtaining** of legal title or ownership and not merely possession
 - Eg traditionally to establish the offence of obtaining by false pretence, the accused must obtain ownership and not merely possession: *Amaiu v The State* [1979] PNGLR 576
- The **obtaining** of possession, custody or control
 - Eg as for obtaining by deception: 317(1)(a) Fiji Crimes Decree
- An **application to the accused's own use** or the use of another
 - Eg s 383A PNG CC
- An **appropriation of the owner's rights**
 - Eg "any **assumption of the rights of an owner to ownership, possession or control** of property, **without the consent** of the person to whom it belongs, amounts to an appropriation of the property": 293(1) Crimes Decree, Fiji

With what intention?

Generally, it is useful to consider the mental element last:

- The accused must hold the requisite intention at the time they do the act(s) constituting the offence.
- So, it follows that you must be satisfied brd that the physical elements are established – that the accused did the act(s) constituting the offence - before you can be satisfied that he held the requisite intention at that time.

Intention to Permanently Deprive



This element appears in almost every one of the penal statutes across the jurisdictions in the Pacific in one offence or other. Some of those statutes explicitly define it, others do not.

Generally, the intention to permanently deprive the owner of the thing of it means:

To treat as the person's own to dispose of regardless of the other person's rights

“An alleged intention to restore with no reasonable prospect of doing so is, in practical terms, an intention permanently to deprive the owner unless a pious hope be fulfilled”: *Toritelia v The Queen* [1987] SBCA 2. See s 300 Crimes Decree, Fiji



Dishonesty

Subjective Test: The prosecution must establish that:

- What the accused did was dishonest according to the standards of ordinary honest people, and
- The accused in fact knew that what they were doing was dishonest according to those standards
- In determining whether the accused knew that what they were doing was dishonest you may take into account the standards of ordinary honest people, ie whether it might reasonably be inferred that the accused must in fact have known that he or she was acting dishonestly: see eg *Brian Kindi Lawi v The State* [\[1987\] PNGLR 183](#); *Wartoto v The State* (2019) [SC1834](#); *Havila Kavo* (2015) SC1450
- Consider: the age, intelligence, education, experience and conduct of the accused

Intention to Defraud

The leading statement at common law is found in the words of Viscount Dilhorne in *Scott v Metropolitan Police Commissioner* [\[1974\] UKHL 4](#); [\[1975\] AC 819](#) at 838 to 839 in which he said:

“‘to defraud’ ordinarily means ... to deprive a person dishonestly of something which is his or something which he is or would be or might but for the perpetration of the fraud be entitled”.

The accused was convicted of conspiracy to defraud owners of the copyright and distribution rights of cinematographic films. He and other employees of film theatres agreed, without the consent or knowledge of the copyright owners, to temporarily take and make unauthorised copies of films for commercial distribution.

Intention to Defraud

Similarly, the High Court of Australia held in *Peters v The Queen* [\(1998\) 192 CLR 493](#), per Toohey and Gaudron JJ, at [30] to [33] that a conspiracy to defraud involves an agreement **to use dishonest means to deprive another person of money or property, or to put the money or property of that other person at risk, or to imperil some lawful right, interest, opportunity or advantage of another person knowing that he or she has no right to deprive that person of that money or property or to prejudice those rights or interests.**

The accused, a solicitor, was convicted of conspiracy to defraud on the basis that he was a party to an agreement to conceal the true amount of his client's income through sham mortgage transactions and thus deprive the Commissioner of Taxation of tax payable on that income.

More than one intention

Some offences may require more than one intention to be established for instance:

S 291(1), Crimes Decree, 2009

A person commits a summary offence if he or she **dishonestly** appropriates property belonging to another **with the intention of permanently depriving** the other of the property.

Penalty – Imprisonment for 10 years

Adopted from Theft Act, 1968, UK

Honest Claim of Right Without Intention to Defraud

Defence – Honest claim of right



A person is not criminally responsible, as for an offence relating to **property**, for an **act done or omitted to be done by him with respect to any property** in the exercise of an **honest claim of right** and **without intention to defraud**

S 23(2), Criminal Code, PNG

Defence – Honest claim of right

Elements of the defence

In order for s 23(2) to apply it is necessary that:

- the offence must be one relating to property;
- the act done or omitted to be done must be done or omitted to be done with respect to property;
- in the exercise of an honest claim of right; and
- without intention to defraud

Wartoto v The State (2019) SC1834; *Kaya v The State* (2020) SC2026

Defence – Honest Claim of Right

- The accused must honestly believe he is entitled to do what he did with respect to the property the subject of the charge: *R v Pollard* [1962] QWN 13 at 29; *R v Magalu* [1974] PNGLR 188.
- The accused must believe that they have a legal entitlement to the property the subject of the charge (and not a moral one): *Ikalom & Anor v The State* (2019) SC1888. It is not enough that the accused believed they were entitled to do what they did.
- The belief must be honest but it does not have to be reasonable (but one that is unreasonable may be less likely to be believed as being honestly held): *The State v Felix Luke Simon (supra)* adopting *Macleod v The Queen* (2003) 214 CLR 230).
- The accused must act without an intention to defraud.
- The defence must be excluded beyond reasonable doubt by the State once raised on the evidence.

Defence – Honest Claim of Right

Other jurisdictions have similar but not always identical provisions.

Eg, In Vanuatu s 125 Penal Code provides that no person shall cause loss to another-

(a) by theft (122);

(b) by misappropriation (123); or

(c) by false pretences (124).

Penalty: Imprisonment for 12 years.

S 122(1) A person commits theft who, without the consent of the owner, fraudulently **and without a claim of right made in good faith**, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

Claim of right is not referred to in ss 123 or 124 or anywhere else except for forcible detainer of land.

Defence – Honest Claim of Right

Fiji (Nauru)

38(1) A person is not criminally responsible for an offence that has a physical element relating to property if —

(a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a **proprietary or possessory right**; and

(b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

(3) This section **does not negate criminal responsibility for an offence relating to the use of force against a person.**

Forgery

Forgery s 462, Criminal Code, PNG

S 462 creates the offence

Forgery in General: Punishment in Special Cases

(1) A person who forges any document, writing or seal is guilty of an offence that, unless otherwise stated, is a crime.

Penalty: If no other punishment is provided—imprisonment for a term not exceeding three years.

(2) If the thing forged—
purports to be, or is intended by the offender to be understood to be or to be used as—
...[depending on the nature of the document] imprisonment for life.

Elements

The prosecution must establish beyond reasonable doubt that the accused:

- Forged
- Any document, writing or seal

To Forge s 460(2), Criminal Code, PNG

S 460(2) defines “to forge”

460(2): A person who makes a false document or writing, knowing it to be false, and with intent that it may in any way be used or acted on as genuine, whether in Papua New Guinea or elsewhere—

(a) to the prejudice of a person; or

(b) with intent that a person may, in the belief that it is genuine, be induced to do or refrain from doing any act, whether in Papua New Guinea or elsewhere,

is said to forge the document or writing.

The prosecution must prove beyond reasonable doubt that the accused:

- Makes
- A false document or writing
- Knowing it to be false
- With intent that it may be used or acted on as genuine
 - To the prejudice of a person OR
 - With intent that a person may, in the belief that it is genuine, be induced to do or refrain from doing any act

To Forge s 460(2), Criminal Code, PNG

Makes:

- Creates a document or writing
- Alters an existing document or writing

Document or writing

S 459(1):

- **“document”** includes–

- (a) a register or register-book, or a part of a register or register-book; and

- (b) any–

- (i) book; and

- (ii) paper, parchment or other material, used for writing or printing,

- that is marked with any letters or marks denoting words, or with any other signs capable of conveying a definite meaning to persons conversant with them, but does not include trade marks on articles of commerce;

- **“writing”** includes a mere signature and a mark of any kind: s 459(1).

That is false



S 459(2): A document or writing is said to be false—

(a) in the case of a document that—

(i) is **a register or record kept by lawful authority**; or

(ii) is an entry in any such register; or

(iii) purports to be issued by lawful authority as testifying—

(A) to the contents of any register or record kept by lawful authority; or

(B) to any fact or event,

if any material particular stated in the document is untrue; or

(b) if the whole or some material part of the document or writing—

(i) **purports to be made by or on behalf of some person who did not make it or authorize it to be made**; or

(ii) where the time or place of making is material—is, with a fraudulent intent, **falsely dated as to the time or place of making** even though it is made by or by the authority of the person by whom it purports to be made; or

(c) if the whole or some material part of the document or writing **purports to be made by or on behalf of a person who does not, in fact, exist**; or

(d) if it is made in the name of an existing person, either by that person himself or by his authority, with the fraudulent intention that it **should pass as being made by a person**, real or fictitious, **other than the person who made it or authorized it to be made**.

That is false

In summary:

- In the case of a register or record kept by lawful authority, or a document purporting to be such a register or record, contains a material particular that is untrue
- Purports to be made by or on behalf of some person who did not make it or authorize it to be made
- Purports to be made at a time or place when it was not made
- Purports to be made or on behalf of a person who does not exist

That is false

Includes alterations or additions:

S 460(1), “make a false document or writing” includes—

- altering a genuine document or writing in a material part, whether by erasure, obliteration, removal or otherwise
- making a material addition to the body of a genuine document or writing
- adding to a genuine document or writing a false date, attestation, seal or other material matter

Purports to be something it is not

- Whether the document or writing is “false” will depend upon the legislation
- But a document is not necessarily false because it contains a false statement
- A false document is one that “purports” to be something which it is not, ie it “must tell a lie about itself”: *R v More* [1988] 86 Crim App R 234; *Brott v R* (1992) 173 CLR 426

Knowledge

The accused must know that the document or writing is false

Intent

The accused must intend that the document or writing be used or acted on as genuine:

- to the prejudice of a person OR
- with intent that a person may, in the belief that it is genuine, be induced to do or refrain from doing any act

The prosecution do not have to prove that the accused intended that a particular person should use or act on the document or writing or be prejudiced by it or be induced to do or refrain from doing any act: s 460(5).

False document or writing ?

- The accused altered a cheque from K100 to K1000
- The accused writes a job application letter to a prospective employer stating that she has a PhD in Law from the University of South Pacific when she has no such PhD
- The accused prepares a PhD certificate in support of the letter
- The accused prepares minutes of a company board meeting which include a resolution to the effect that it was agreed that certain shares would be transferred from one shareholder to another for consideration when no such matter was resolved
- The accused completes a notice of share transfer form for the Registrar of Companies when no shares were transferred



Bribery/Official Corruption

Bribery

Giving or receiving, or offering to give or receive, anything of value in connection with the improper performance of a position of trust.



Official Corruption and Abuse of Office



The offences recognise that:

- Those who are entrusted to exercise the power and authority of public office must be accountable to the public.
- Official corruption or abuse may occur at any level of public service or public office, albeit in general terms, the more senior the official the more serious the offending.

Attorney-General's Reference (No 3 of 2003) [2005] 1 QB 73; Reference by the Attorney General of Papua New Guinea and Principal Legal Adviser to the National Executive Council (2021) [SC2112](#).

Official Corruption

S 87(1), Criminal Code, PNG



(1) A person who—

(a) being—

(i) employed in the Public Service, or the holder of any public office; and

(ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice),

corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of any thing done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office; or

(b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on or for any person, any property or benefit on account of any such act or omission on the part of a person in the Public Service or holding a public office, is guilty of a crime.

Penalty: Imprisonment for a term not exceeding **seven years**, and a fine at the discretion of the court.

In the case of a judicial officer, the maximum is 14 years, and a fine at the discretion of the court: s 119 Criminal Code, PNG



Official Corruption

S 87(1), Criminal Code, PNG



A person who—

(a) being—

(i) employed in the Public Service, or the holder of any public office; and

(ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice),

corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of any thing done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office

Elements, s 87(1)(a)(i)(ii), Criminal Code



The State must prove beyond reasonable doubt that the accused:

- being employed in the Public Service or the holder of any public office
- charged with the performance of any duty by virtue of that employment or office
- corruptly
- asks, receives or obtains, or agrees or attempts to receive or obtain;
- any property or benefit
- for himself or any other person
- on account of any thing done or omitted to be done, or to be done or omitted to be done by him
- in the discharge of the duties of his office

Being employed in the Public Service or the holder of any public office



S 83A(c), Criminal Code “person employed in the Public Service” **includes**–

- (a) a member of any of the State Services established under or by authority of Section 188 (*Establishment of the State Services*) of the *Constitution*; and
- (b) a constitutional office-holder as defined in Section 221 (*Definitions*) of the *Constitution*; and
- (c) a member of or person employed by a constitutional institution, being any office or institution established or provided for by the Constitution including the Head of State, a Minister or the National Executive Council; and
- (d) a member of the National Parliament or of a provincial assembly; and
- (e) a person employed under the *Official Personal Staff Act 1980* or the *Parliamentary Members’ Personal Staff Act 1988*; and
- (f) a person employed by a provincial government; and
- (g) a member, officer or employee of a body or corporation established by statute;

S 83A(c) provides an inclusive definition and “employed in the Public Service” should be interpreted broadly: *Reference by the Attorney General of Papua New Guinea and Principal Legal Adviser to the National Executive Council* (2021) SC211.

Charged with the performance of a duty by virtue of that employment or office

The prosecution must particularise the duty it alleges the accused is charged with the performance of by virtue of that employment or office.

“By virtue of” means “because or as a result of”.

So, the duty must arise because of the employment or office held.

Eg

- the accused whilst holding public office as the Minister for Forestry charged with the duty of issuing forest permits ...
- the accused whilst employed in the public service as a customs officer charged with the duty of inspecting cargo ...



Asks, receives or obtains, or agrees or attempts to receive or obtain

It is not necessary for the prosecution to prove that the accused actually received the benefit, it is enough that the accused asked, agreed or attempted to receive it:

The State v Terence Hetinu (2020) N9250;

Any property or benefit

The benefit does not have to be financial.

The word “benefit” in the phrase “property or benefit of any kind” should be given its natural meaning. It is not limited to a proprietary benefit of any kind: *see R v Smith* [1993] 1 Qd R 541





For himself/herself or any other person

The benefit can be sought or obtained for the accused or for someone else.

On account of any thing done or omitted to be done, or to be done or omitted to be done by him



- “On account of” bears its ordinary meaning: “because of”, “by reason of”, or “in recognition of”: *Hetinu; Smith (supra)*
- The asking, receiving or agreeing may be for any thing done or omitted to be done
 - Eg, *State v Runny Dau* (2021) N9253, a customs officer deliberately failed to screen a container leaving the port (which contained counterfeit cigarettes)
- The thing may be done or omitted to be done – at the time, in the past, or in the future
 - le, an accused may ask for a benefit on account of something he/she has already done, is doing at the time, or will do in the future

On account of any thing done or omitted to be done, or to be done or omitted to be done by him



- The accused does not have to implement the agreement or even intend to implement the agreement.
- The offence lies not in the act done or omitted, or to be done or omitted but in the asking or receiving of the benefit “on account of” such an act: *Herscu v The Queen* (1991) 173 CLR 276.
- “It is not required, of course, that the receiver of the benefit should subsequently fully implement the plot or even perhaps genuinely intend to do so at the time that he receives the benefit but an arrangement or actions having the features described in the subsection must be arrived at or performed”: *R v Lewis* [1994] 1 Qd R 613.

On account of any thing done or omitted to be done, or to be done or omitted to be done by him



Eg the Minister for Forestry commits the offence when he asks for K150,000 to grant a forestry permit regardless of whether or not he ever grants the forestry permit.

In the discharge of the duties of his or her office



The thing to be done or omitted to be done must be a thing done or omitted in the discharge of “the duties of his office”, i.e. it must be connected or concerned with the duties of the public office held



The State v Waesa Mollo [1988] PNGLR 49



Major Loa was charged under s 87(1)(a) that whilst being employed in the Public Service as a Major in the PNGDF, and charged by virtue of such employment with acting as the Chairman of PNGDF Savings and Loans Society, a body established under the *Savings and Loans Societies Act*, he corruptly received the sum of K2000 on account of him purchasing, in the discharge of the duties, a property in which Mr Mollo had a proprietary interest. Mr Mollo was charged under s 87(1)(b) with giving him the K2000 for that purpose.

Both were acquitted because the Court found that Major Loa's duties as Chairman were not those of a public servant but rather those of a private person in a private corporation.

Therefore:

- The receipt of moneys was not in connection with the corrupt use of any office held in the Public Service.
- It followed that Mr Mollo did not give him the monies for the discharge of any duty held by the Major in the public service.

But it is not necessary for an offence to be committed by both persons



The conduct does not have to be mutual

“Whilst the two offences in s 87 are reflections of one another, it is not necessary that an offence be committed by both persons before one can be convicted.... In the case of an offence under s 87(1) **it is the fact that the office-holder asks for or agrees or attempts to receive property or a benefit that is critical.** If he does that and the other elements are established it is immaterial that the person in respect of whom the request or attempt is made does not respond positively in any way to the approach, or that although the other person may give the appearance of agreeing, he had no intention other than to expose the criminal conduct of the office-holder in so doing, or that he simply intended to appropriate the gift or benefit and not fulfill his part of the “bargain”: *Herscu*

Act or omission need not be in the proper exercise of duty



“The section is concerned with the violation or attempted violation of official duty rather than with the actual performance of official duty.

Official corruption necessarily involves impropriety and it is not to be supposed that s.87 is limited to those cases where the act or omission in question would, apart from the corrupt influence, be proper.”: *Herscu*.

Act or omission need not be in the proper exercise of duty



S v Gamato and Hetinu (2021) N9250

The offender whilst being employed in the Public Service as the Election Manager of the National Capital District (NCD), charged with the responsibility of organising and conducting elections in the NCD, corruptly received monies in the sum of K184,300 on account of paying polling officials to ensure the election of one Michael Kandiu to the NCD Regional Seat.

Act or omission need not be in the proper exercise of duty



S v Tatut (2021) N9023

Ms Tatut was a Lodgement Officer in the Titles Section of the Department of Lands and Physical Planning. The complainant went to the Department to apply for a replacement title for his property. Ms Tatut served him. The complainant paid the requisite K500 application fee and was issued an official receipt. The offender then asked the complainant to give her some extra cash so that she would get the title for him. He gave her K450 in cash.

The matter was only reported to police because Ms Tatut was unable to issue the title document because of a caveat/mortgage over it.

Corruptly: Dishonestly or Improperly?



The meaning of “corruptly” has been the subject of much judicial debate.

In PNG the weight of authority says that it means **dishonestly**: *State v Toamara* [1989] PNGLR 24; *State v Mataio* (2004) N2531; *State v Duncan* (2015) N5010 but cf *Hetinu*.

In Australia, the weight of authority says that “corruption is not to be equated with dishonesty and dishonesty does not necessarily connote corruption”: *Re Lane*, QSC, Ryan J, 9 October 1992, unreported.

“A power was used corruptly if it was used to obtain some private advantage or for any purpose foreign to the power”: *Re Austin* (1994) 1 Qd R 255; *DPP (Cth) v Hogarth* (1995) 93 A Crim R 452.

The word “corruptly” means the discharge of the person’s duty for an **improper purpose**: *Willers v R* (1995) 81 A Crim R 219.



Abuse of Office

Abuse of Office, s 92 Criminal Code, PNC



(1) A person employed in the Public Service who, in abuse of the authority of his office does, or directs to be done, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour.

Penalty: Subject to Subsection (2), imprisonment for a term not exceeding two years.

(2) If an act prohibited by Subsection (1) is done, or directed to be done, as the case may be, for purposes of gain, the offender is liable to imprisonment for a term not exceeding three years.”

Elements

The State must prove beyond reasonable doubt that the accused:

- Whilst employed in the Public Service
- In abuse of the authority of his or her office
- Did or directed to be done any arbitrary act
- Prejudicial to the rights of another

If the State also pleads and proves in aggravation that it was done for the purposes of gain, this will attract a higher maximum penalty under s 92(2).

Whilst employed in the Public Service



See again the broad definition of “public service”.

Broad in Nature

S 92 of the *Criminal Code* is cast in broad terms.

“[T]he circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse”:

Attorney-General’s Reference (No 3 of 2003) [2005] 1 QB 73 at [61]; *The State v Joel Luma* (2020) N8798.



Did or directed to be done any arbitrary act



An “arbitrary act” is one that is not based on a reason, system, or plan, or is unfair or done without restriction or without considering other people: *The State v Joel Luma* (2020) N8798; *State v O’Neill* (2021) N9213.

Prejudicial to the rights of another



As act is prejudicial to the rights of another person if it is detrimental to or puts at risk the rights of another person.

It may be prejudicial to the rights of a natural person, a corporation or the State.



In abuse of the authority of his or her office



Abuse of authority will occur when bad, improper or wrongful use is made of the authority of the public office: *Luma; State v O'Neill* (2021) N9213.

But it need not be dishonest, nor corrupt, nor done for profit nor in a conflict of interest. The conduct need not be done out of malice, friendship or indifference. The presence of such matters may be relevant to establishing the offence but they are not necessary to it.

Wilful and warranting criminal punishment



- The abuse must be wilful.
- It must be so serious that it is worthy of condemnation and criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.
- The conduct must fall so far below acceptable standards as to amount to an abuse of the public's trust in the officer holder warranting criminal punishment.

Luma; R v Quach (2010) 201 A Crime R 522; *Attorney General's Reference No 3 of 2003; R v Chapman* [2015] 2 Cr App R 10 adopted; *R v Boulanger* [2006] 2 SCR 49; and *Potape v State* (2015) SC1613 considered.

State v Joel Luma

The accused was the Secretary of the Department of Works. As Secretary he was authorised to approve the expenditure of Department monies up to K300,000. The State alleged that the accused approved 44 contracts for pothole patching material from one particular company to a value of K9,594,860.79 in abuse of the authority of his office contrary to s 92(1) of the *Criminal Code*. There was no evidence that he had any relationship with the company awarded the contracts, and no evidence that he benefited financially or otherwise from his conduct.

He was found guilty of approving 16 contracts to the value of K4,309,000 in abuse of office. He deliberately avoided the normal procurement processes. He concealed the contracts from the First Assistant Secretary Operations. He deliberately structured the contracts to fall just below his financial limit as Secretary of the Department in each case, to circumvent the tender process required under the *Public Finance (Management) Act*, and knowingly issued certificates of inexpediency in his position as Secretary without any such authority and without any justification. He directed his First Assistant Secretary, Finance to pay the company on the basis that the Central Supply and Tenders Board had been unable to meet for three weeks to consider the Department's submission when no submission had been made.

Refusing or failing as a public officer to perform his duty: s 202 CC, PNG



- S 202 is complementary to s 92, Criminal Code.
- Both offences codify the common law offence of misconduct in office which criminalised the wilful misconduct of a public officer by act or omission.
- S 92 is concerned with the doing of an arbitrary act prejudicial to the rights of another in the abuse of authority of the office held in the public service.
- S 202 is concerned with the perverse omission or refusal to do an act that is the person's duty to be done by virtue of their employment in the public service.

Refusing or failing as a public officer to perform his duty: s 202 CC, PNG



Examples from other jurisdictions:

- Failure of police officers to:
 - Intervene during a disturbance when a man was kicked to death
 - Prevent death of an injured man in their custody
 - Act on credible complaints of serious offences
 - Report or take action in relation to suspected offences by other officers or associates
 - Failure of prison officers and other employees to report the possession of contraband by a prisoner or a sexual relationship between another officer and a prisoner
- Failure of senior officer at a public hospital to report a serious theft by an employee



Advanced Judicial Officers' Fraud and Corruption Workshop

**12-14 March 2024
Port Vila, Vanuatu**

Justice Michael Wigney

Bribery offences in the Criminal Code



Bribery of a Commonwealth public official – s 141.1

Giving a bribe (s 141.1(1))

1. **Conduct** – provide a benefit, cause a benefit to be provided, offers or promises to provide a benefit, causes an offer or promise etc – to another person
2. **Dishonestly**
3. **Fault element** – intention of influencing a public official (who may be the other person) in the exercise of their duty
4. The public official is a Commonwealth Public Official (**CPO**) and has duties as a CPO (no need to prove knowledge of this)

Receiving a bribe (s 141.1(2))

- 1. Conduct** – CPO asks for benefit (for himself, herself or other person), receives or obtains benefit, agrees to receive or obtain
- 2. Dishonesty**
- 3. Fault element** – intention that the exercise of the official's duties as a CPO will be influenced or inducing, sustaining or fostering a belief that the exercise of the official's duties will be influenced

Meaning of dishonesty

- Defined in s 130.3
 - (a) Dishonest according to the standards of ordinary people (partly objective element)*
 - (b) Known by the defendant to be dishonest according to the standards of ordinary people

Based on *R v Ghosh* [1982] QB 1053

*partly objective because difficult to separate this from the defendant's subjective belief – e.g. if took someone's property but believed it was his, or took property because necessary to save someone's life – would not be thought to be dishonest according to standards of ordinary people

Corrupting benefits s 142.1

Giving a corrupting benefit

1. **Conduct** – provides a benefit, causes a benefit, offers to provide, causes an offer to provide...to another person
2. **Dishonestly**
3. **The receipt**, or expectation of the receipt of the benefit would tend to influence a public official (who may be the other person) in the exercise of the officer's duty as a Commonwealth public official (i.e. a circumstance)
4. **Fault element** (not specified, but by virtue of s 5.6(2) – fault element would be **recklessness** – but by virtue of s 5.4(4) proof of intention or knowledge would also prove recklessness

Abuse of public office s 142.2

Abuse of public office

S 142.2(1)

- 1. Conduct** - must be by a Commonwealth public official (**CPO**). The CPO exercises influence in official's capacity, engages in "any other conduct" in the exercise of duties, uses any information obtained in official's capacity
- 2. Fault element** – intention of dishonestly obtaining a benefit for himself or another person, or causing a detriment to another person

Abuse of public office

S 142.2(2)

1. Person has ceased to be a CPO
2. **Conduct** – uses information obtained in capacity of CPO
3. **Fault** – intention of dishonestly obtaining a benefit for himself or another person, or causing a detriment to another person

Bribery of foreign official – s 70.2

Bribery of foreign official

1. **Conduct (by first person)** – provides a benefit, causes a benefit, offers to provide, causes an offer to provide... a benefit to another person
2. **The benefit** is not legitimately due to the other person (i.e. a circumstance)
3. **The fault element** for element 2 is recklessness (see s 5.6(2) CC)
4. First person does this with the intention of influencing a foreign public official (who may be the other person) in the exercise of that official's duties in order to obtain or retain business or a business advantage not legitimately due

Bribery of foreign official

- Note: many defined terms including: business advantage, foreign government official
- See 70.2(2) re working out if a benefit is not legitimately due
- Defence in s 70.3 – no offence where, it is lawful (mostly in a written law) for the foreign public official to receive a benefit in that foreign country
- Also defence in s 70.4 where benefit is minor and conduct engaged in for the purpose of expediting a routine government action (defined) of a minor nature
- S 70.5 – territoriality and nationality



Where to Now?

All roads lead to the offence provision...



As in any case, the offence charged, its elements and the way it has been particularized by the prosecution, will be central to the issues to be determined at almost every stage and with respect to almost every decision to be made during the course of a matter, from giving directions for the management of the case to determining the admissibility of evidence, whether the prosecution has established its case beyond reasonable doubt, and if it has what sentence to be imposed.





Pacific Judicial
Integrity Program

Advanced Judicial Officers' Fraud and Corruption Online Course

Justice Michael Wigney

Topic:2: Money Laundering

"Follow the Money"



**FEDERAL COURT
OF AUSTRALIA**



Papua New Guinea
Centre for Judicial Excellence

Money laundering

- Background
- Regulatory regimes
- Offences
- Issues – Proof and Sentencing

Background

In lay terms:

- Money laundering is the process of making illegally gained proceeds appear legal
- Criminals try to disguise the origins of their illegal profits by turning “dirty” money into “clean” funds – hence “laundering”



Offence provisions (Aus)

- Often capture a wide range of conduct
- Not limited to dealing with money
- Not limited to proceeds of crime
- Also covers the “instruments of crime”

Why launder?

- Possession of large quantities of cash may have evidentiary value in relation to establishing the commission of a substantive offence
- Conversion: giving the appearance of a legitimate source means money can be spent without raising suspicions

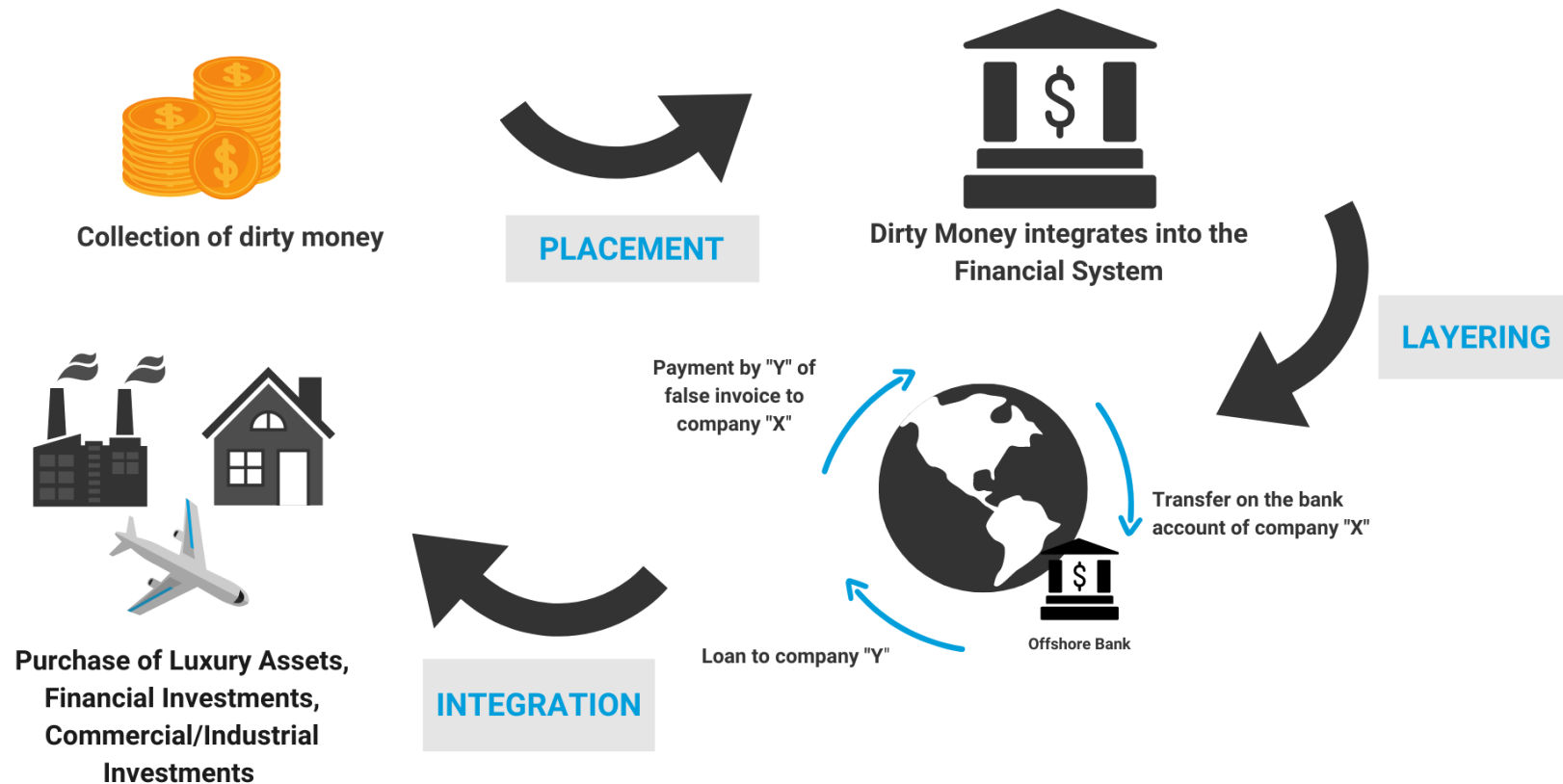




Stages

- **Placement** – introducing illegally obtained funds into the financial system
 - E.g. “structured” cash transactions
- **Layering**- moving, dispersing and disguising funds to conceal origins
 - Often complex transaction using multiple accounts, companies, trusts, offshore entities
- **Integration** – investing the now distanced funds in a legitimate business, or purchasing high value assets or luxury goods

Money Laundering Cycle





Regulation

AUSTRAC



- Australia's anti-money laundering and counter-terrorism financing (AML / CTF) regulator
 - Financial intelligence unit
- Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML / CTF Act)
- Financial Transaction Reports Act 1988 (Cth)
- Proceeds of Crime Act 2002 (Cth)
- Criminal Code Pt 10.2 – Offences

AML / CTF Act

Reporting Obligations:

- Financial institutions and providers of other financial services
- Providers of gambling services – e.g. casinos, betting services
- Suspicious transactions
- “Threshold” transactions – cash transactions of A\$10, 000 or more
- International funds transfers

AML / CTF Act

- Some of the most common prosecutions for money laundering involve “structured transactions”
- Structuring transactions to avoid a bank’s reporting obligations
- E.g. multiple deposits of \$9,000

Proceeds of Crime Act

- Establishes a scheme to enable the confiscation of the proceeds of crime





Offences

Offences

- Money laundering offences
 - Contained in Part 10.2 Division 400 of the Criminal Code
- Cascading series of money laundering offences depending on:
 - Amount of money or value of property involved
 - The accused's mental element
- The most serious offences carry a penalty of imprisonment for life

Offences

- In general and simplified terms, the offences involve **three elements**:
 - (1) engage in certain **conduct**:
 - Deal with money or property
 - Engage in conduct in relation to money or property
 - (2) in certain **circumstances**:
 - The money is the proceeds of crime
 - It is reasonable to suspect that the money or property is the proceeds of crime
 - The conduct concealed or disguised the nature, value, source etc. of the money or property
 - At the time, the money or property was of a certain value
 - (3) The **fault element** (or mental element)

The conduct element

- “deals with money or property” is defined in very broad terms and includes:
 - “receives, possesses, conceals, disposes of”
 - importing or exporting money
 - engaging in a banking transaction

The circumstance element



- “proceeds of crime” defined broadly
- wholly or partly derived or realised, directly or indirectly by any person from the commission of an offence
- may be difficult for prosecutor to prove that the money or property “is” the proceeds of crime in the absence of direct evidence
- might involve inferences from circumstantial evidence and this is where there are likely to be issues at the trial
- “reasonable to suspect” is:
 - not concerned with the accused’s knowledge or belief
 - an objective element
 - does not have to be reasonable to suspect at the time of the accused’s dealing
 - to be inferred from all the surrounding circumstances

The fault element

- the accused believes the money or property is the proceeds of crime – the most serious offence
- the accused is **reckless** as to the fact that the money or property is the proceeds of crime
- the accused is **negligent** as to the fact that the money or property is the proceeds of crime
- where the circumstance is that it is reasonable to suspect that the money or property is the proceeds of crime – **there is NO mental element** (absolute liability)
- where the circumstance is that the conduct concealed or disguised the nature or value of the money / property – the mental element is that the accused **intended** that the conduct concealed or disguised

“Instrument of crime”

- The Criminal Code also creates offences of dealing with money or property:
 - That the accused intends will become an instrument of crime; or
 - Where there is a risk that the money or property will become an instrument of crime and the accused is reckless or negligent
- Instrument of crime: used in the commission of, or to facilitate the commission of an offence



Issues

Proof of the offence

- Was the money / property the proceeds of crime?
- Did the accused believe the money / property was the proceeds of crime?
- Was the accused reckless or negligent as to the fact that the money/property was the proceeds of crime?
- Is it reasonable to suspect that the money / property was the proceeds of crime?
- Might require inferences from the surrounding facts

Sentencing

- Wide range of criminality and therefore a wide range of possible sentences
- It might also be necessary to consider:
 - The amount of money involved
 - Whether the accused believed the money/property was the proceeds of crime or was reckless or negligent
 - Nature of the dealings
 - Period of time during which the conduct occurred
 - Degree of planning and deceit
 - Extent of loss



Examples



The Accused (A) acquired a mobile telephone in a false name. He subsequently received a telephone call from M, with whom he had no previous contact. A subsequently met with M who gave him a backpack containing A\$500,100. M was subsequently arrested after giving another backpack containing \$509,000 to another person. A was convicted of dealing (receiving) money which was reasonably suspected of being the proceeds of crime. A convicted: 10 months imprisonment, released on recognizance after 6 months: *Singh v the Queen* [2016] VSCA 163.

The Accused (A) operated a money exchange business. Z arrived in Australia from Romania and picked up A\$2 million from an apartment. Z delivered that money in batches to A over a 10 day period. A then arranged for H to deposit the money into various bank accounts in sums of less than A\$10,000 over several months. Convicted of conspiracy and sentenced to 7 years imprisonment with a non-parole period of 5 years and 5 months: *R v Ansari* [2007] NSWCCA 204.



The Accused each made numerous structured cash deposits of less than A\$10, 000 over a period of time to avoid the AML / CTF reporting requirements. Convicted and sentenced to between 2 years and 3 months to 6 years imprisonment: *Betka v R* [2020] NSWCCA 191. See also *R v Huang; R v Siu* [2007] 174 A Crim R 370 (another structuring case)

The Accused (A) engaged in an unlawful internet-based activity called “muling.” A contacted a company online which transferred money to his bank accounts. A withdrew the money, kept a commission of 5% and sent the balance to an address in Singapore. Convicted, sentenced to 15 months imprisonment to be released after 5 months: *R v Columbus* [2007] QCA 396.



The Accused hid cash totalling over A\$1 million in his own checked luggage and in the checked-in luggage of his father and two associates for an overseas flight. Convicted and sentenced to imprisonment for 4 years and 9 months with a non-parole period of 3 years and 6 months: *Islam v R* [2016] NSWCCA 233.



The Accused open bank accounts in various business names on the instructions of “scammers”. Funds obtained by scams perpetrated by others were deposited in those accounts and A transferred those funds to overseas accounts and made cash withdrawals on instructions of the scammers. Convicted and sentenced to imprisonment for 3 years, released on recognizance: *R v Eckl* [2023] QSC 178.

Asia Pacific Group on Money Laundering



- 42 member jurisdictions including: Nauru, Samoa, Solomon Islands, Vanuatu, Australia, Fiji, Marshall Islands, Palau, Tonga
- Objectives: ensure that members effectively implement the international standards against money laundering
- Mutual evaluations: peer review system to determine level of compliance with international AML / CTF standards
- Reports available on website: <https://apgml.org/>