

FRAUD ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 9: Participating in fraudulent business carried on by sole trader etc.

29. **Section 9** makes it an offence for a person knowingly to be a party to the carrying on of fraudulent business where the business is not carried on by a company or (broadly speaking) a corporate body. This new offence parallels the existing offence that applies in the case of fraudulent businesses carried on by companies and certain other corporate bodies. The existing offence is contained in section 458 of the Companies Act 1985 (for England and Wales and Scotland) or (for Northern Ireland) in Article 451 of the Companies (Northern Ireland) Order 1986. The extension of this criminal liability under the companies legislation to non-corporate traders was recommended by the Law Commission in their Report on *Multiple Offending* (Law Com No. 277, Cm 5609, 2002). Non-corporate traders covered by the new offence include sole traders, partnerships, trusts, companies registered overseas, etc.
30. A person commits the offence of fraudulent trading under the companies legislation if he is knowingly party to the carrying on of a company's business either with intent to defraud creditors or for any other fraudulent purposes. This section creates a similar offence that applies to persons knowingly party to the carrying on of non-corporate businesses in either of those ways. Fraudulent trading is in effect a general fraud offence, comparable to conspiracy to defraud, but requiring the use of a company instead of the element of conspiracy. The case law has established that:
- dishonesty is an essential ingredient of the offence;
 - the mischief aimed at is fraudulent trading generally, and not just in so far as it affects creditors;
 - the offence is aimed at carrying on a business but can be constituted by a single transaction; and
 - it can be committed only by persons who exercise some kind of controlling or managerial function within the company.

It is intended that these principles should apply to the new offence in section 9 too.

31. **Section 9** refers to the case where a business is carried on by a person who is "outside the reach of" section 458 of the Companies Act 1985 or Article 451 of the Companies (Northern Ireland) Order 1986. This is done because although the basic application of section 458 and Article 451 is to "companies" (as defined for the purposes of that legislation), the offence is applied by other legislative provisions to other corporate bodies that are not companies. (Section 718 of the Companies Act 1985 and Article 667 of the Companies (Northern Ireland) Order 1986 are relevant here. There are also regulations that apply these offences to limited liability partnerships and European Economic Interest Groupings.) Moreover, the new offence does not apply in relation to corporate bodies whose businesses could be subject to section 458 or Article 451,

*These notes refer to the Fraud Act 2006 (c.35)
which received Royal Assent on 8 November 2006*

but who have been exempted from the application of that section or that Article (see subsection (3)(c) and (4)(c)).

32. The maximum custodial sentence for this new offence is 10 years.