

# Criminal Deception in Real Estate

**Real estate agents in NSW are often unaware that practices regarded as "standard" in the real estate industry are, in fact, serious criminal offences.**

Furthermore, because the concept of agency involves a high degree of trust, an estate agent who commits a criminal offence through a "breach of trust" will be sentenced more harshly if found guilty.

Any breach of trust is an aggravating factor in sentencing. The greater the breach of trust, the more likely it is that a term of imprisonment will result - even for someone with no prior criminal history.

The fact that such practices may be common in the industry is neither a defence nor a mitigating factor to warrant leniency.

## Obtaining Financial Advantage or Causing Financial Disadvantage

Under section 192D of the Crimes Act, obtain a financial advantage includes: obtain a financial advantage for oneself or for another person, and induce a third person to do something that results in oneself or another person obtaining a financial advantage, and keep a financial advantage that one has, whether the financial advantage is permanent or temporary.

In this part of the law it also states that a financial disadvantage means causing a financial disadvantage to another person, or inducing a third person to do something that results in another person suffering a financial disadvantage, whether the financial disadvantage is permanent or temporary.

The criminal offence of Obtaining Financial Advantage is a form of fraud.

Section 192E Fraud of the Crimes Act 1900 states:

*"A person who, by any deception, dishonestly obtains property belonging to another, or obtains any financial advantage or causes any financial disadvantage, is guilty of the offence of fraud and liable to imprisonment for a term not exceeding ten years."*

## What Is A Deception?

Deception is an act to propagate beliefs that are not true, or not the whole truth (as in half-truths or omission). Deception can involve dissimulation, propaganda, and sleight of hand. It can employ distraction, camouflage or concealment.

Section 192B of the Crimes Act states:

*"deception means any deception (whether intentional or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person."*

**Examples of Obtaining Financial Advantage or Causing Financial Disadvantage by Deception in the property industry may fall under the following:**

- using conditional contracts as a deception tool to avoid having to pass on a higher offer to the vendor
- avoiding to disclose the reserve price before the start of an auction – in order to get higher than the price that those who are aware of those facts would be prepared to pay



- inducing potential purchasers of property to believe that the stated price of a property is a fair market value when the price has been inflated by matters irrelevant to the value of the property, such as marketing fees, commissions and profits
- quoting a minimum sale price to prospective bidders at auction, that is less than the agents true estimate price and being the price, which the vendor is unwilling to sell for
- stating that disclosing the nature of buyer A's offer to buyer B is "confidential", when disclosure is reasonable in the circumstances. The statement must be made - with the intention of disregarding that such a statement could be false and misleading and as a consequence of that statement being made, buyer B is induced to pay much more for the property
- concealing or refusing to disclose a buyer's contractual rights before the start of an auction – in order to induce a contract on the fall of the hammer
- concealing the nature of a counter offer to a buyer whose original offer was accepted and then later refused – the agent knowingly disregards that concealing such information could be false and misleading, and as a consequence of that statement being made buyer A is induced to pay much more for the property.

**Note:** Intentionally using non-price advertising to induce someone to pay more than the undisclosed price quoted in the agency agreement, can lead to a charge of criminal deception or a charge for intention to defraud by false or misleading statement under section 192G.

A person who dishonestly makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) that is false or misleading in a material particular with the intention of obtaining property belonging to another, or obtaining a financial advantage or causing a financial disadvantage, is guilty of the offence of fraud and liable to imprisonment for a term not exceeding five years.

### **Intentional or Reckless**

An estate agent may say to a purchaser, "We already have an offer of \$260,000 for this property, so you'll have to increase your offer to beat that".

If he makes that statement not knowing whether other offers have been made or not and either not caring whether the statement is true or false or hoping that the statement will turn out to be true, he is guilty of an offence if the statement does turn out to be untrue and, in consequence, the purchaser is induced to pay more for the property.

It is sufficient to constitute a criminal offence if the estate agent, to obtain a financial advantage, makes a statement which he knows to be false or does not know to be true.

### **Words or Conduct**

While false statements are probably the most common methods of deception, conduct can also be sufficient. Doing something to conceal defects can amount to a deception.

For example, if an estate agent advises a vendor to paper over cracks in a wall so that a purchaser will be deceived into paying more for the property than its true condition warrants, then both the vendor and the estate agent could be found guilty of deception.

Or

The estate agent shows a house to a prospective purchaser, but is careful not to mention that the basement always flooded after moderate rainfall. He also agrees with the buyer that the basement would make a wonderful carpeted rec room. This is another example where an agent could be found guilty of deception.

"Caveat emptor" (let the buyer beware) is not a defence to a criminal offence.

### **What Must The Prosecution Prove?**

To have a person found guilty of Obtaining Financial Advantage by Deception, the prosecution must prove:

*Identity* - It must be shown that the accused is the person who committed offence. This is usually done by way of admissions made by the accused, witnesses providing evidence of statements made or the conduct of the accused, or circumstantial evidence.

*Deception* - A deception may be made by any misleading conduct or statement, whether by an act or omission. It may be a deception as to fact or law or as to the present intentions of the accused or another person. The deception may be either deliberate or reckless. It needs to be proved that a financial advantage was obtained by means of the deception.

*Obtaining* - This includes obtaining for another or enabling another to obtain or retain. For example, the estate agent is aware that a garden shed is a "fixture" that the purchaser is entitled to own as part of the purchase, but tells the purchaser that she can have it in return for allowing the vendor to remain in the property after settlement. The agent has obtained an advantage, not for himself, but for the vendor.

*Financial Advantage* - The Oxford dictionary definition defines "financial" as being of or pertaining to finance or money matters. It defines "advantage" as having the better of another in any respect, superiority, benefit, profit.

An easy way to understand the concept is in terms of reducing, delaying or deferring, or evading the payment of a debt. Even if payment is delayed for a period of time, and then paid, the offence is still committed if the delay is the result of a trick.