

Should the Current Planning System Review Recommend the Creation of Additional Offences for Misleading or Deceptive Conduct, in the *Environmental Planning and Assessment Act 1979* (NSW)?

Part of Submission Concerning: A New Planning System for New South Wales
by
Jim Sanderson*

Background

The Municipality of Hunter's Hill is by area the smallest of the 152 local government areas in New South Wales.¹ During the last reporting year, about forty development applications had details of the application put before a Council meeting.² In the material that was initially lodged, at least three of these applications had significant errors that tended to disguise the impact of these developments³ on surrounding property. These misrepresentations included drawings, which incorrectly showed the overshadowing of surrounding property⁴ and a drawing, which disguised the size of the proposed development by showing surrounding properties and dwellings substantially larger than their true size.⁵ Similar misrepresentations have been at issue in cases before the Land and Environment Court, confirming that they sometimes go undetected by objectors and consent authorities.⁶

* Jim Sanderson is an Engineer and Graduate at Law who is currently a part time student studying for his Master of Laws at the University of New South Wales. This research essay was written and submitted for assessment in a course studied as part of the requirements for that degree.

¹ Department of Local Government, *Your Council – A Local Government Fact Sheet*, Division of Local Government
<<http://www.dlg.nsw.gov.au/dlg/dlghome/documents/Information/your%20council%20factsheet.pdf>> 1 at 9 October 2011.

² Hunter's Hill Council, *Ordinary Meetings*, Meeting No 4289 26 July 2010 – Meeting No 4308 27 June 2011, <http://www.huntershill.nsw.gov.au/Page/Page.asp?Page_Id=220> at 26 September 2011.

³ I will use the word “development” as it is defined in the *Environmental Planning and Assessment Act 1979* (NSW) s 4, which includes: ‘(a) the use of land, and (b) the subdivision of land, and (c) the erection of a building, and (d) the carrying out of a work, and (e) the demolition of a building or work ...’.

⁴ Hunter's Hill Council, above n 2, Meeting No 4289 26 July 2010, D21; Meeting No 4300 28 February 2011, D25; Meeting No 4308 27 June 2011, J17.

⁵ Ibid, Meeting No 4300 28 February 2011, D28.

⁶ See, eg, *Houlton v Woollahra Municipal Council* [1998] NSWLEC 188, [27]-[28] (Lloyd J) – The original application overstated height of development on adjacent land by 3 metres; *Trenwith v Sutherland Shire Council* [2005] NSWLEC 143, [52] (Pain J) – The failure of the development application ‘to accurately reflect the structure to be built may explain why the Council’s officers failed to fully appreciate the nature of the development proposal’; *Graham v Baulkham Hills Shire Council* [2008] NSWLEC 1247, [26] (Watts AC) – Graham, a surveyor, lodged a development application where ‘the plans [were] inaccurate and misleading as to the levels and the extent of the proposal ...’; *Moorebank Recyclers Pty Ltd v Liverpool City Council* [2009] NSWLEC 100, [62] (Lloyd J) – ‘[R]eports to the Council were materially misleading on the question of whether access could or would be available to Moorebank’s land’.

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It is difficult to estimate the full extent of false or misleading representations in development applications, as I am sure many will go undetected simply because most people cannot read and interpret drawings. Most errors detected err in the direction of disguising problems,⁷ suggesting that a significant number of errors are a deliberate attempt to deceive.

Motivation for False or Misleading Development Applications

A difficulty for affected parties, who the legislation labels ‘objectors’,⁸ is that if they detect errors or inconsistencies in a development application, then part of the submission period will be wasted convincing the consent authority of the errors and waiting for their correction, which may not occur until a short time before a decision is made concerning development consent.⁹ This can reduce the opportunity for affected parties to prepare their objection with a proper understanding of what the applicant plans. On the other hand if the errors go undetected, the applicant will benefit, should the errors show the proposal in a more favourable light. Either way, applicants stand to gain.

In 2008/2009, based on average floor area, new Australian homes were the largest in the world¹⁰ and despite constraints on the supply of land in Sydney,¹¹ New South Wales homes were the largest in Australia.¹² There is status in owning a large home in a good suburb. If ownership of such a home is made more readily achievable through the use of a misleading development applications, then as with white-collar crime, this is motivated by ‘opportunity, a sense of entitlement, arrogance, competitiveness, and rationalization’.¹³

The Risk of Detection and Deterrents

As already suggested, many of the possible misrepresentations in development applications will be of a technical nature so the risk of detection will be quite low.

Even if detected, punishment is unlikely. By way of example, a complaint was made to the NSW Architects Registration Board about an architect, whose firm prepared a development application, which included: a site analysis drawing that was grossly out of scale; a shadow diagram that omitted the shadows cast by substantial elements of the proposed building; and other omissions and inconsistencies which erred in the direction of disguising the scale of the proposed development.¹⁴ The

⁷ Ibid.

⁸ *Environmental Planning and Assessment Amendment Act 1979* (NSW) s 4.

⁹ See, eg, *Houlton v Woollahra Municipal Council* [1998] NSWLEC 188, [28]-[29] (Lloyd J).

¹⁰ Craig James, ‘Australian Homes Are Biggest in the World’, *CommSec Economic Insights*, 30 November 2009, 1, <<http://images.comsec.com.au/ipo/UploadedImages/craigjames3f6189175551497fada1a4769f74d09c.pdf>> at 19 October 2011.

¹¹ See, eg, Productivity Commission, *First Home Ownership*, Inquiry Report No 28 (2004) 132.

¹² James, above n 10, 2.

¹³ Pamela H Bucy et al, ‘Why Do They Do It?: The Motives, Mores, And Character Of White Collar Criminals’ (2008) 82 *S. John’s Law Review* 401, 407.

¹⁴ See, Charles James Sanderson, Statutory Declaration, 2 December 2010.

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Board noted ‘the errors made on the drawings’¹⁵ and ‘the distortion of scales, erroneous contour lines and tree locations on the Site Analysis Drawing’¹⁶ but their ‘Determination’ did not address the issue that ‘shadows cast by a balcony roof and a very substantial chimney’¹⁷ were omitted from the originally submitted 3:00pm winter solstice shadow diagram. The Board found ‘no evidence of either professional misconduct or unsatisfactory professional conduct by the Respondent.’¹⁸

It would appear from this outcome that the NSW Architects Registration Board is reluctant to use its power, conferred by Part 4 of the *Architects Act 2003* (NSW), to discipline architects involved in the preparation of misleading development applications. The Board of Surveying and Spatial Information is similarly empowered, under Part 6 of the *Surveying and Spatial Information Act 2002* (NSW), to discipline registered surveyors. Preparing a development application will generally require technical input from at least one of these professions so these Boards are well placed to discipline members of their respective professions should any be found to be involved in the preparation of misleading development applications. Failure to do so leaves little to deter such conduct.

It would seem, the preparation of misleading development applications is like other occupational transgressions, that

are most often the result of calculated risks that seek to increase ... benefits. The vast majority of persons who commit occupational crimes seem to do so after considering the certainty, celerity, and severity of the formal and nonformal consequences.¹⁹

The low risk of detection and recognition that ‘punishment certainty is far more consistently found to deter crime than is punishment severity’,²⁰ reinforce the notion that there is very little to deter misleading development applications.

Is there a Role for Criminal Law?

Most people who are adversely affected by misrepresentations in development applications will not have the resources to protect their own interests or at times even be aware of the deception until it is too late. So, there appears to be a role for criminal law to protect people and communities from such harm. As the Eighth Report of the Criminal Law Revision Committee suggested:

The aim of this part of the criminal law is to protect the public from dishonest deception being practiced upon them ...²¹

¹⁵ NSW Architects Registration Board, *Determination of a Complaint Against an Architect* (July 2011) [7.2].

¹⁶ Ibid [7.4].

¹⁷ Ibid [3.7], quoting letter from CJ (Jim) Sanderson to NSW Architects Registration Board, 8 December 2010, 3.

¹⁸ Ibid [7.6].

¹⁹ Michael Clarke and Sally Wheeler, *Business Crime: Its Nature and Control* (1990) 68.

²⁰ Daniel S. Nagin and Greg Pogarsky, ‘Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence’ (2001) 39(4) *Criminology* 865, 865.

²¹ Criminal Law Revision Committee, *Theft and Related Offences*, Cmnd 2977 (1996) [98].

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Consideration will be given below to different means of dealing with false or misleading development applications that better reflect the harms such deceit may cause.

Can False or Misleading Applications be Fraud?

False or misleading applications will not come within the Part 4AA Fraud offences of the *Crimes Act 1900* (NSW) (*'Crimes Act'*), without there being the obtaining of a 'financial advantage' or 'property belonging to another' or if any harm caused amounts to 'financial disadvantage'.²²

However, for most who own their own home, it will be their most valuable asset,²³ so to substantially damage its amenity will amount to one of the greatest economic harms they could suffer. Even if the amenity of a home could be 'valued in terms of money'²⁴ to bring any harm within 'financial disadvantage', when amenity is damaged by nearby development, it will normally be impossible to establish the required causal link²⁵ between any deception used in obtaining development consent and damage resulting from the development. This difficulty also stands in the way of civil action that might be taken by those whose property is diminished in value by nearby development, where consent has been obtained with the aid of deception.²⁶

Planning decisions involve the allocation of rights using rules that are spelt out in planning instruments and discretionary standards like development control plans.²⁷ These rights include rights to privacy in one's home and rights to receive some sunlight in outdoor areas and on windows and solar panels. These rights will often be rivalrous²⁸ – even sunlight can be a rivalrous commodity, in that sunlight that illuminates a building on one property can no longer deliver energy to the parts of the adjacent property that lie in the shadows of that building. Such rights are effectively propertised²⁹ with a grant of development consent, which permits the applicant to improve the value of his or her land, which may well diminish the value of surrounding property.

There are cases where it might be argued that some sunlight, intangible property by the above analysis, was obtained through the deception of lodging an incorrect shadow diagram with a development application. However, such intangible rights cannot be regarded as 'property belonging to another' as no other person was in

²² *Crimes Act 1900* (NSW) s 192E(1).

²³ Tom Altobelli, 'The Family Home in Australian Law' (Paper presented at Australian Institute of Family Studies Conference, Sydney, 24-26 July 2000) [2.6].

²⁴ *Coelho v Durbin* [1993] (Unreported, New South Wales Supreme Court, Badgery-Parker J, 29 March 1993, BC9304122) 2.

²⁵ *Crimes Act 1900* (NSW) s 192E(1)(b).

²⁶ See, eg, *Street v Luna Park Sydney Pty Limited* [2009] NSWSC 1, [8] (Brereton J).

²⁷ See, *Environmental Planning and Assessment Act 1979* (NSW) Part 3.

²⁸ For an explanation of rivalrous commodities and propertisation, see, eg, Alexandra George, 'The (In)Justice of Globalisation by Intellectual Propertisation' (2007) 109 *Archiv für Rechts- und Sozialphilosophie* 17, 19-20.

²⁹ *Ibid.*

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‘possession or control of the property’³⁰ nor had ‘a proprietary right or interest in the property’.³¹

In 2005, an Independent Commission Against Corruption report raised the prospect that knowingly including false information with an application could constitute the criminal offence of obtaining a ‘valuable thing’, in that case a building licence, by deception contrary to the then s 178BA of the *Crimes Act*.³² The prospect of fraud offences extending to false or misleading application cases ended in 2010 with the repeal of s 178BA and its replacement with the Part 4AA Fraud offences. The new offences replaced ‘[m]ore than 30 fraud provisions’³³ and largely followed the approach of the Model Criminal Code, concerning the forms of benefit or detriment that should be considered. The Model Criminal Code states:

How far the concept of a financial advantage extends is open to question but what is obtained must be characterisable somehow as an advantage in money terms.³⁴

One assumes the same applies to financial disadvantage. The Model Criminal Code continues:

Clearly this provision does not go as far as provisions in WA and Queensland which extend to dishonestly obtaining any benefit or causing any detriment, financial or otherwise, and to getting a person to do or refrain from doing any lawful act. ... MCCOC has decided that the offences in this chapter should be restricted to offences against property and that other forms of benefit or detriment should be considered, if at all, in the context of specific offences ...³⁵

Expanding the requisite benefit, advantage or detriment obtained or caused could allow rights such as those granted by development consent, where obtained dishonestly through deception, to come within the statutory fraud offence. However, great care would need to be taken as to how this expansion might be achieved by legislative amendment. As Steel cautions, there is ‘potential to expand into areas of life that have traditionally been seen as being governed by morals rather than criminal law’.³⁶

This suggests that unless specific legislation is enacted, the intangible nature of the rights allocated by development consent means any deception used in obtaining these rights is only likely to be caught by offences where the intended harm is ‘to influence the exercise of a public duty’³⁷ or where the false or misleading statement or

³⁰ *Crimes Act 1900* (NSW) s 192C(3)(a).

³¹ *Crimes Act 1900* (NSW) s 192C(3)(b).

³² New South Wales, Independent Commission Against Corruption, *Report on Investigation into Schemes to Fraudulently Obtain Building Licences* (2005) 59.

³³ New South Wales, *Crimes Amendment (Fraud, Identity And Forgery Offences) Bill 2009 Second Reading*, Legislative Council, 12 November 2009, 19507 (John Hatzistergos, Attorney General).

³⁴ Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 3: Theft, Fraud and Bribery Related Offences* (1995) 135.

³⁵ *Ibid* 135, 137.

³⁶ Alex Steel, ‘General Fraud Offences in Australia’ (Paper presented at the Australasian Law Teachers Association – ALTA Annual Conference, Melbourne, 4 – 7 July 2006) 7.

³⁷ *Crimes Act 1900* (NSW) ss 253(b)(iii), 255(b)(iii). See also s 254(b)(iii).

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information is made or given ‘to a public authority’³⁸ or is made or given ‘to a person who is exercising or performing any power, authority, duty or function under, or in connection with, a law of the State’.³⁹

However, the intention ‘to influence the exercise of a public duty’ is only caught by the Part 5 Forgery offences of the *Crimes Act* and the common law offence of conspiracy to defraud⁴⁰ and most misrepresentations in development applications will not involve forgery, which requires that a document ‘purports to be something which it is not.’⁴¹

Consideration might be given to the addition of ‘to influence the exercise of a public duty’ to the harms included in the *Crimes Act* s 192E Fraud and s 192G Intention to Defraud by False or Misleading Statement. However s 192G, which only requires a person to ‘dishonestly make[] or publish[], or concur[] in making or publishing, any statement ... that is false or misleading in a material particular’,⁴² does not require knowledge of the falsity – dishonesty ‘does all the work’.⁴³ Should public duty extend beyond administrative matters, it would be of concern if criminal law were to impinge upon the rights of individuals to influence political decision making – after all political debate is not without shades of truth.

The Part 5A False and Misleading Information offences, which among other things deal with false or misleading applications or information made or given ‘to a public authority’, are discussed further below.

The above analysis suggests the present Part 4AA Fraud offences have little application in resolving the problem of misrepresentations made to acquire rights such as development consent and that there is little prospect of expanding their scope without creating other problems. However, other fraud related offences and Australia’s constantly evolving consumer law⁴⁴ imply there are other approaches that might be taken.

Deception Offences

According to Buckley J’s definition in *Re London and Globe Finance Corporation Ltd*, deceit is ‘to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false.’⁴⁵ As Steel points out:

deceit can be seen to have an actus reus of false statement and a mens rea of knowledge of the falsity and intent to dupe. Although never a common law offence,

³⁸ *Crimes Act 1900* (NSW) ss 307A(1)(d)(i), 307B(1)(c)(i).

³⁹ *Crimes Act 1900* (NSW) ss 307A(1)(d)(ii), 307B(1)(c)(ii).

⁴⁰ *Peters v The Queen* [1998] HCA 7, [73] (McHugh J).

⁴¹ *R v Fischetti and Sharma* [2003] ACTSC 16, [8] (Gray J).

⁴² *Crimes Act 1900* (NSW) s 192G.

⁴³ The Law Commission, *Fraud*, Law Com No 276 (2002) [3.6].

⁴⁴ See, *The Australian Consumer Law 2010* (Cth).

⁴⁵ (1903) 1 Ch 728, 732–3.

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deceit can be seen as a complete offence in itself, and defrauding as compound offence.⁴⁶

The Part 5A False and Misleading Information offences of the *Crimes Act*, in various circumstances, criminalise acts of less culpability than deceit as defined by Buckley J. Section 307A proscribes knowingly or recklessly making false or misleading statements, ‘in connection with an application for an authority or benefit,’⁴⁷ where:

- (i) the statement is made to a public authority,
- (ii) the statement is made to a person who is exercising or performing any power, authority, duty or function under, or in connection with, a law of the State,
- (iii) the statement is made in compliance or purported compliance with a law of the State.⁴⁸

Section 307A has an actus reus of false or misleading statement made in the above circumstances and a mens rea of knowledge of, or reckless indifference as to the falsity – there is no need to prove an intent to dupe. It is not necessary to show that a ‘financial advantage’ or ‘property belonging to another’ was obtained, or if harm was caused, that it amounted to ‘financial disadvantage’, nor that any of these outcomes were intended. Understandably, without the need to prove intent beyond knowledge of, or reckless indifference as to the falsity or misleading nature of the statement, the maximum penalty, of ‘[i]mprisonment for 2 years, or a fine of 200 penalty units, or both’,⁴⁹ is very much less than the maximum penalty of ‘[i]mprisonment for 10 years’⁵⁰ for fraud or forgery.

The False and Misleading Information offences were inserted into the *Crimes Act* by the *Licensing and Registration (Uniform Procedures) Act 2002* (NSW), signifying the offences were aimed at broad range of misrepresentations made in applications for

a diverse range of business, occupational and other licences issued by [Government] agencies such as building contractors licences, authorities to conduct charitable fundraising events and registration of items of plant and equipment.⁵¹

The drafting of the Part 5A False and Misleading Information offences makes their application even broader than suggested by the above extract from the Minister’s second reading speech. However, only 90 people have been charged under s 307A from 2004 to 2010 inclusive, although the number of charges per year increased to 29 in 2010.⁵²

⁴⁶ Alex Steel, ‘Describing Dishonest Means: The Implications of Seeing Dishonesty as a Course of Conduct or Mental Element and the Parallels with Indecency’ (2010) 31(1) *Adelaide Law Review* 7, 10.

⁴⁷ *Crimes Act 1900* (NSW) s 307A(1)(c).

⁴⁸ *Crimes Act 1900* (NSW) s 307A(1)(d). See also s 307B(1)(c).

⁴⁹ *Crimes Act 1900* (NSW) s 307A(1).

⁵⁰ *Crimes Act 1900* (NSW) ss 192E(1), 253.

⁵¹ New South Wales, *Licensing and Registration (Uniform Procedures) Bill Second Reading*, Legislative Assembly, 8 May 2002, 1796 (Kim Yeadon, Minister for Energy).

⁵² NSW Bureau of Crime Statistics and Research, *NSW Local and Higher Criminal Courts Statistics 2003 to 2010*, Reference: kg10-10068 (2011).

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While s 307A clearly has application where misrepresentations are made in development applications, what is of concern is that s 307A might be used for matters as trivial as a parent intentionally misstating a minor detail in an application to enrol their child in a Government school or for far more serious matters like major deception in an attempt to obtain a gaming licence.

This brings into question whether a developer, who by deception obtains consent for a development, which causes major long term damage to surrounding properties, if convicted under s 307A, should be liable to a maximum penalty of imprisonment for two years, when a burglar who, without menace, steals property 'in a dwelling-house', if convicted under s 148, is 'liable to imprisonment for seven years.'⁵³

There is a large gap, in terms of culpability, between the Part 5A False and Misleading Information offences and fraud. Punishment should increase with culpability and harm caused by an offence, as various elements are added to the basic offence of knowingly making a false statement. Adding the mens rea element, of intending the statement to deceive, creates deception as defined by Buckley J. If the statement is made or published dishonestly and 'is false or misleading in a material particular with the intention of'⁵⁴ 'obtaining a financial advantage'⁵⁵ or 'property belonging to another'⁵⁶ or 'causing a financial disadvantage',⁵⁷ these remaining elements will bring the matter within the s 192G offence of Intention to Defraud by False or Misleading Statement, for which the maximum penalty is '[i]mprisonment for 5 years.'⁵⁸ When proprietary or financial advantage or financial disadvantage actually eventuates, by deception and dishonestly,⁵⁹ the offence moves from one of an inchoate nature to the 'consequence-based'⁶⁰ offence of fraud.

When the benefit, advantage or detriment concerned is of an intangible nature, like rights granted by development consent, there is no progression of statutory offences as there is for misrepresentations involving tangible property. In the absence of forgery, the only statutory offences available are those of the *Crimes Act* Part 5A False and Misleading Information. Where the misrepresentation involves more than a mere knowingly making a false statement, this lacuna might be filled by the common law offence of conspiracy to defraud. Various gap-filling roles have been performed by conspiracy to defraud, which is a principal reason for the continued existence of this offence.⁶¹

⁵³ *Crimes Act 1900* (NSW) s 148.

⁵⁴ *Crimes Act 1900* (NSW) s 192G.

⁵⁵ *Crimes Act 1900* (NSW) s 192G(b).

⁵⁶ *Crimes Act 1900* (NSW) s 192G(a).

⁵⁷ *Crimes Act 1900* (NSW) s 192G(b).

⁵⁸ *Crimes Act 1900* (NSW) s 192G.

⁵⁹ *Crimes Act 1900* (NSW) s 192E(1).

⁶⁰ Steel, above n 46, 10.

⁶¹ See, eg, The Law Commission, *Legislating the Criminal Code Fraud and Deception*, Consultation Paper No 155 (1999) [1.8].

Conspiracy to Defraud

Defrauding for the purposes of the common law offence of conspiracy to defraud is a broader concept than statutory fraud in New South Wales. In *Welham v DPP* ('*Welham*'),⁶² a unanimous decision of the House of Lords, Lord Ratcliffe said:

in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated.⁶³

In *Scott v Metropolitan Police Commissioner*,⁶⁴ Viscount Dilhorne cited this passage from *Welham* to establish that there can be an intent to defraud public authorities in the absence of any intent to cause pecuniary or economic loss.⁶⁵

In *Peters v The Queen* ('*Peters*'),⁶⁶ McHugh J regarded it as 'well established that a conspiracy to defraud may be established if the defendants agree to deceive a person into acting or refraining from acting contrary to his or her public duty.'⁶⁷ His Honour opined:

In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's right or interest or performance of public duty by:

- making or taking advantage of representations or promises which they knew were false or would not be carried out;
- concealing facts which they had a duty to disclose; or
- engaging in conduct which they had no right to engage in.⁶⁸

McHugh J's opinion was quoted with approval in *Spies v The Queen*,⁶⁹ where a majority of the High Court explained:

In *Peters* ... this Court ... denied that dishonesty was an independent element of a conspiracy to defraud. All members of the Court, with the exception of Kirby J, held that *dishonest means*, but not dishonesty by itself or additionally, is what must be proved to constitute a conspiracy to defraud.⁷⁰

In *Peters*, Kirby J's preference for the judgment of Toohey and Gaudron JJ made their joint judgment the majority opinion, which only differed in one area from the

⁶² [1960] 1 All ER 805.

⁶³ *Welham v DPP* [1960] 1 All ER 805, 808.

⁶⁴ [1974] 3 All ER 1032 (House of Lords).

⁶⁵ *Scott v Metropolitan Police Commissioner* [1974] 3 All ER 1032, 1038.

⁶⁶ [1998] HCA 7.

⁶⁷ *Peters v The Queen* [1998] HCA 7 [73].

⁶⁸ *Ibid* [84].

⁶⁹ [2000] HCA 43 [80].

⁷⁰ *Spies v The Queen* [2000] HCA 43 [77] (Gaudron, McHugh, Gummow and Hayne JJ).

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approach taken by McHugh J,⁷¹ with whom Gummow J agreed. Toohey and Gaudron JJ held that:

Ordinarily, the means will be dishonest if they assert as true something which is false and which is known to be false or not believed to be true or if they are means which the conspirators know they have no right to use or do not believe that they have any right to use the means in question. And quite apart from the use of dishonest means, the offence involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. That, too, is dishonest by ordinary standards.⁷²

The above authority suggests that misrepresentations made in development applications will be caught by the common law offence of conspiracy to defraud, where parties involved in the application were aware of the falsity and there was agreement between at least two of them to lodge the false material, intending that it influence the decision as to whether development consent would be granted and hence ‘intend[ing] to prejudice [the] performance of public duty.’⁷³

However, in *R v LK*,⁷⁴ it was held:

At the trial of a person charged with conspiracy it is incumbent on the prosecution to prove that he or she meant to conspire with another person to commit the non-trivial offence particularised as being the object of the conspiracy.⁷⁵

Therefore, situations like an instruction from an applicant to one of his or her agents to do what ever is necessary to obtain development consent or an instruction to a draftsman to alter some aspect of a drawing, which has the effect of hiding a non-complying aspect of a development, will not amount to the requisite agreement. On the other hand, should a draftsman prepare a deceptive drawing, which is intended to be lodged with a development application, and others become aware of the deception and agree to the lodgement of the deceptive material then the requisite agreement might be proved.

There has been much criticism of the

indefensible anomaly represented by the continuing survival of conspiracy to defraud, under which it may be a crime for two people to *agree* to do something which, in the absence of an agreement, either of them could lawfully do.⁷⁶

The example above illustrates the potential anomalies that may occur because a slight difference in circumstances will produce quite different results depending on whether there is proof that an agreement was made. This creates a further problem

⁷¹ *Peters v The Queen* [1998] HCA 7 [34] (Toohey and Gaudron JJ).

⁷² *Ibid* [33].

⁷³ *Ibid* [84] (McHugh J).

⁷⁴ [2010] HCA 17 [141].

⁷⁵ *R v LK* [2010] HCA 17 [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁶ The Law Commission, above n 43 [1.4].

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with reliance on conspiracy to defraud in that uncertainty about prosecution outcomes fails “to provide a person of ordinary intelligence fair notice of what is prohibited”.⁷⁷

Consumer Law

In *Street v Luna Park Sydney Pty Ltd*,⁷⁸ it was held that even if the representations in development applications ‘were regarded as directed to owners and occupiers or potential purchasers or developers of nearby properties’,⁷⁹ the relationship of the developer with those parties ‘of itself involves no element of trade or commerce’⁸⁰ to bring the representations within the scope of the then *Trade Practices Act 1974* (Cth) – now *The Australian Consumer Law 2010* (Cth). *Street v Luna Park* also found developers owe neighbours no duty of care to bring their misrepresentations within the tort of negligent misrepresentation.⁸¹

Even if misrepresentations made in development applications were to come within any of *The Australian Consumer Law 2010* (Cth) Part 4-1 offences, which is unlikely, it would be inappropriate for the offence to be one of strict liability. Even the *Crimes Act* Part 5A offences require knowledge of the falsity. Legislation should not catch honest mistakes, which will inevitably occur from time to time in the preparation of material lodged with development applications.

Conclusion

There is evidence that misleading and deceptive material is lodged with development applications. The full extent of the problem is difficult to assess because the low risk of detection. Lack of deterrents and the current demand for extremely large homes, despite constraints on the supply of land in Sydney, means there is motivation to obtain development consent by whatever means are required.

The intangible nature of the rights allocated by development consent and the harms caused by poor or non-complying development means these benefits and detriments are not recognised by the statutory fraud offences of New South Wales. Although the fraud offences in Western Australia and Queensland recognise more intangible rights and harms, there is a problem that recognition of intangible benefits and detriments might allow the law of fraud ‘to expand into areas of life that have traditionally been seen as being governed by morals rather than criminal law.’⁸² Criminalising dishonesty, in relation to ‘the exercise of a public duty’, may also have implications for freedom of political discussion.

The potential harm to communities as well as individuals of non-complying development warrants the intervention of criminal law but it must be applied in a

⁷⁷ *Skilling v United States*, 130 S Ct 2896, 2935, Justice Scalia, quoting *United States v Williams*, 553 US 285, 304, in his criticism of the vagueness of the 18 USCS § 1346, concerning honest services fraud.

⁷⁸ [2009] NSWSC 1.

⁷⁹ *Street v Luna Park Sydney Pty Limited* [2009] NSWSC 1 [218] (Brereton J).

⁸⁰ *Ibid*.

⁸¹ *Ibid* [8].

⁸² Steel, above n 36.

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uniform and visible manner. Reliance should not be placed on conspiracy to defraud, which makes it ‘a crime for two people to *agree* to do something which, in the absence of an agreement, either of them could lawfully do.’⁸³

Although the Part 5A False and Misleading Information offences of the *Crimes Act* apply to false and misleading development applications, these offences do not require an intent to dupe nor do they have the scope to punish where the potential harm of the misrepresentation is great.

The preceding analysis demonstrates the need for a statutory offence within the *Environmental Planning and Assessment Act 1979* (NSW) or any legislation that replaces it. This will make the law relating to misrepresentations, concerning matters coming within the ambit of the Act, visible to those whose work is regulated by the Act. The section proscribing the offence might be drafted as follows:

A person who engages in any deception, dishonestly, intending to influence the exercise of a public duty, in connection with any application made under this Act, is guilty of an offence.

By requiring deception rather than mere dishonesty, and a dishonest intention to influence over some matter, the penalty for the offence should be greater than for the Part 5A False and Misleading Information offences but less than that for fraud.

Importantly, by confining the operation of the section to matters in connection with applications made under the Act, unintended interference with political discussion, or matters normally governed by morals, is minimised.

As implied by the Model Criminal Code,⁸⁴ the location of offences in specific legislation is preferable to reliance on statutory offences of very broad application like the Part 5A False and Misleading Information offences. However, as conspiracy to defraud has done, Part 5A should play a gap-filling role, while specialised offences should be located in specific legislation, where both the offence and the penalty can be tailored to suit the need.

⁸³ The Law Commission, above n 43 [1.4].

⁸⁴ Model Criminal Code Officers Committee, above n 34, 137.

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