

OBTAINING A FINANCIAL ADVANTAGE BY DECEPTION (DEFRAUDING CENTRELINK)

If You Have Been Charged with Obtaining a Financial Advantage by Deception You Need Representation

If yes, you must engage a law firm with proven experience in criminal fraud offences and sentencing processes.

The criminal justice system (CJS) comprising police, Courts, Magistrates and Judges is a very unfamiliar and intimidating environment, particularly for unrepresented and/or first-time defendants. The CJS has the prosecutor's and public's best interests and rights, not yours. Obtaining a financial advantage by deception are some of the most commonly prosecuted offences, whereby Courts take dishonesty and fraud related offences very seriously and often impose harsh penalties. The relevant legislation and rules are quite complex and there is a large volume of briefs of evidence that must be worked through. Also, the amount of evidence that must be preserved before it is lost/damaged (like witness statements) and the number of aggravating and mitigating factors that must be considered for this offence means being well prepared and seeking legal advice from us as soon as possible before facing a Court is critical to use helping you receive the most favourable outcome.

MK Law has a team of expert criminal defence fraud lawyers across our 4 offices (Melbourne, New South Wales, South Australia and Western Australia) who have represented thousands of parties with obtaining a financial advantage by deception at contested hearings. We take allegations very seriously. During our confidential consultations, we carefully listen to our clients' unique instructions and side of the allegation, consider all relevant factors, guide you through each stage of the Court process before your matter proceeds to Court, explain the possible penalties and advise you of the most appropriate options (whether to plead not guilty or guilty so a lesser charge can be settled or admitting guilt to the elements of the crime and dispensing the need for the prosecution to prove guilt) to avoid the most serve penalties being imposed. We appear in Court daily and know what works. We have in-house counsel who run trials from the beginning, so you will always receive the same lawyers who work on your case from the very beginning. We have represented many clients and prepared many strong and successful plea and defence strategies in the Victorian Courts by fighting the charge/s if you have been wrongly accused (including conducting our own investigations, requesting disclosure material and statements from witnesses, separating all charges and ensuring you are not improperly charged for entitlements you are entitled to receive, proactively looking for evidence police have overlooked and vigorously cross examining/questioning the prosecution's case (like if they have not drafted statements or spoken to key witnesses), properly explaining the underlying circumstances of your offending and personal history and arranging and tendering evidence which supports your case, including defence witness statements, character references and expert reports (like psychological reports) to the Court). This means we are well equipped in navigating this complex environment of the law to work through the particular legal processes, procedures and factors that guide the Court. We have your best intentions in mind to help defend you and persuade the Court to hand down the fairest and most lenient penalty that reflects both the offence and your personal circumstances (like avoiding an immediate imprisonment sentence, having a shorter period of imprisonment imposed, having the charges dismissed/withdrawn and/or a costs order made out against the prosecution where you are paid all legal costs for your defence).

Our Lawyers regularly attend professional development training to ensure we are up to date with the latest law in the area.

Contact our experienced team of criminal defence lawyers for free legal advice 24/7 on 1800 130 120 or marcus.mklawfirm.com.au.

What Does It Mean to Obtain a Financial Advantage by Deception?

Obtaining a financial advantage by deception is a serious (indictable) offence in Victoria which is provided for under s 134.2 of the *Criminal Code Act 1995* (Cth) (CC). It is defined as a person who intentionally engages in a dishonest act by deceiving a Commonwealth entity (Centrelink) to provide them a financial advantage (payment) they are not entitled to receive. In other words, it involves a person engaging in a dishonest act to obtain a financial advantage from a Commonwealth entity, knowing/believing they were not entitled to receive it.

NB: A person may be charged with the offence even if they did not receive the payment themselves but received the payment by another person to whom they know/believed was not entitled to receive it.

Sentencing for this fraud offence is imposed under Commonwealth (not State - Victorian) legislation, and this applies across all Australian States and Territories.

Other related social security/Centrelink fraud overpayment offences include:

- Obtaining a financial advantage (s 135.2 CC) (see [here](#) for more information)
 - Most commonly charged offence (alongside s 134.2 CC)
 - S 135.2 CC is more broadly drafted - the prosecutor need only establish the defendant engaged in conduct to obtain a financial advantage knowing/believing they were not entitled to the benefit (not that the defendant deliberately deceived Centrelink dishonestly by making payment claims)
- Obtaining financial advantage by deception (s 82 CC) (see [here](#) for more information)
- Defrauding the Commonwealth
- Fraudulently inducing a person to invest money
- False accounting
- Theft
- Falsifying documents
- Obtaining property by deception
- Money laundering
- Forgery
- Bribery
- Procuring sexual acts by fraud

Fraud related offences can range from merely taking a packet of chips from a supermarket to obtaining millions of dollars from a business.

Financial Advantage by Deception Statistics

In Victoria, financial advantage by deception offences are growing at a steady pace. Approximately 5000 allegations were referred to the Victorian Commonwealth Director of Public Prosecutions (DPP) in 2010. During 2012, it was reported that about 57% of defendants who were found guilty of committing an offence by deceptively obtaining a financial advantage were sentenced to serve an immediate term of imprisonment. These offences are not taken lightly - even where a person has defrauded the government for a small amount of money, it will likely result in the DPP pursuing a charge against them. Any amount is punishable by the Courts.

In Victoria during 2007-2012, defendants who received a financial fine paid an average \$5000 (ranging from \$100-\$30000). The fine imposed depends on the timeframe the fraud occurred over and the amount of money the defendant received in benefits that they were not entitled to receive.

Centrelink are renowned for their success investigating and detecting fraud. Recent studies show Centrelink's anti-fraud and early intervention strategies (like recovery actions, data analysis, investigations and public tip offs) have helped prevent many fraud cases and allow them to recover billions of dollars (\$250 million between 2008-2009) that were fraudulently obtained.

Examples of Obtaining a Financial Advantage by Deception

Obtaining a financial advantage by deception covers a broad range of actions and behaviours, and common everyday examples include:

- A person submitting false documents (like falsifying medical certificates or forging pay slips)
- A person claiming a Centrelink payment (like Newstart or Youth Allowance) to which they do not meet the threshold for entitlement to it
- A person underreporting their employment income to Centrelink or the ATO and receiving more money than they are entitled to receive
- A person wrongly declaring their employment status to Centrelink to obtain a pension
- A person wrongly declaring their capacity to work to Centrelink to obtain a disability pension
- A person making false statements (like falsifying the circumstances of their health condition/disease)
- A person continuing to receive a payment from Centrelink even after the person they cared for has died

Centrelink and Police Interview

If Centrelink believe a person has committed fraud, they will launch an investigation to determine which payment/s were fraudulently received, the value of the overpayment/s and the timeframe the government were deceived for. The alleged defendant will then be asked by Centrelink to attend an interview with them to discuss the alleged conduct and overpayment/s. The defendant has a right to not consent to attend the interview. However, where you attend, it is important to remember what you admit and provide in the interview will impact whether or not you are charged with the alleged offence.

If you have been alleged of Centrelink fraud, often you would then be asked to attend a formal police interview that is recorded for the purposes of evidence and whether or not to formally charge you. At this stage, police have investigated the offence and have a range of evidence already against you that they will not inform you about (like statements from witnesses and the victim). Before the interview, you are given the option to contact a lawyer for legal advice/support /representation. We can provide you with specialised confidential legal advice over the phone or in conference at our offices that addresses all your concerns before beginning a police interview. This includes: whether it is in your best interests to cooperate with police, make a statement to police and attend a police interview (if evidence against you is very strong), what to expect at the interview, what your rights and obligations are during the interview (like what you are not obliged to tell/give them), whether you should provide your side to the allegation, whether you should exercise your right to silence and not answer all questions asked of you or give a 'no comment', whether you have to provide DNA and/or your mobile phone and whether you will be reprimanded if you refuse to follow an order/instruction. We also prepare you well for answering questions police ask you to ensure you do not tarnish the defence that is later given in Court and help police that exceeds what they need in their investigation. We can accompany you at the formal police interview to help ease your apprehension and stress. Police take note of everything to do and say - they are experts in interrogation and obtaining admissions from you to help them build a strong case against you. It is important to be courteous during the interview as it will be played in Court, and if you are disrespectful, it may harm your credibility.

A final decision on whether or not there is a reasonable prospect of making out the case against the defendant in Court is for the Commonwealth Director of Prosecutions (CDPP) to decide, by weighing up all evidence gathered by Centrelink and the police in their investigations.

NB: Where Centrelink are not satisfied you were fraudulent or acted deceptively, Centrelink do not have to charge you. Instead, they may commence taking some of your entitlements and use it to repay the money you are alleged to have taken. If you disagree with the amount Centrelink believe you have been overpaid, you can make an application for it to be internally reviewed or appeal the decision to the Social Security Administrative Tribunal.

Questions to Consider Before Pleading Guilty or Not Guilty

To determine whether you have a good prospect of success in defending your offence for obtaining a financial advantage by deception in Court, it is important to weigh up the following important points:

- Has the prosecution correctly given me particulars of the charge/s I have been charged with?
- Does the prosecution have a strong case against me?
- Should I plead guilty or not guilty where I defend my charge at trial?
 - Did I engage in conduct that was deliberately deceptive towards Centrelink (like intentionally provide misleading information)?
 - Did I obtain a financial advantage for myself/another person?
 - Did I induce Centrelink to award me a financial benefit I was not entitled to receive?
 - Did I make false statements?
 - Did I forge pay slips, bank statements or other documents?
 - Was a co-accused charged?
 - When did the offence occur and when was I charged by police?
 - What options are available to minimise my penalty?

- Do I have a lawful reason to justify why I committed the fraud (can a defence be relied on to argue my innocence - like being mistaken when completing the Centrelink form or changed circumstances since last providing the information)? See below
- Should we subpoena (legally seek access to inspect) relevant material from the opposing party?

Our experienced Lawyers will help answer all these questions and prepare a strong case for you.

What to Consider/Needs to be Established?

To determine whether you have been charged with obtaining a financial advantage by deception, it is important to consider what constitutes the offence (see definition above). In other words, can the disputing party (Centrelink bringing the charge) establish beyond reasonable doubt all elements of the offence?

- You *intentionally* (had full knowledge) *engaged in a dishonest and deceptive act*?
 - The Judge can direct the jury to whether or not the act engaged in by the defendant was dishonest - this requires weighing up all surrounding circumstances of the act (*R v Salvo* [1980] VR 401)
 - Deception means to ‘permanently deprive’ another person from property they are entitled to, without intending to return it or disposing it and treating it like it is their own
- You *obtained a financial advantage* (payment) you/another person knew you were not entitled to receive?
 - If this act occurred over a long period of time, Centrelink may also need to show all deceptive events by the defendant to make out this element
 - A person has obtained property (for the purposes of the CC) if:
 - They obtain ownership, possession or control of the property for themselves/another person
 - They enable ownership, possession or control to be retained
 - They induce a third person to pass ownership, possession or control to another person (like convincing a person to obtain a transfer of money from the Commonwealth and then forward it to another person)
 - They induce another person to enable the third person to retain ownership, possession or control of the property (like person A making person B believe that fraudulently obtained money from the Commonwealth is owned by Person C)
- The benefit received was from a *Commonwealth entity*?
 - Centrelink, the ATO and other entitled satisfy this element

If Centrelink cannot establish beyond reasonable doubt all elements of the offence, you are not guilty of the offence.

Defences

If you are pleading not guilty to your charge for deceptively obtaining a financial advantage, possible defences you have available to lawfully explain your behaviour will depend on the circumstances surrounding the alleged offending. Every case is unique and requires an individualised plan and approach. Possible defences include:

- The opposing party not being able to establish to the criminal standard of beyond reasonable doubt all elements of the offence (see above)
 - You did not intend to act dishonestly
 - You never gained a financial advantage
- Honest and reasonable belief
 - You misunderstood your obligations and did not know/believe you should have been declaring certain information (like living arrangements) to Centrelink
- Mistaken identity - there is factual dispute about the real facts to the case (what happened)
 - A different person was responsible for the fraud
 - A different amount of property was involved in the fraud
- Mistake of fact
 - Centrelink experienced a problem and miscalculated the amount
 - This is not uncommon as Centrelink files are very large and calculations are often difficult to follow
- Duress or there being an emergency (is a complete defence) (*R v Japalijarri* (2002) 134 A Crim R 261)
 - You must have felt so constrained and a fear you would be a victim or believed you could not sufficiently respond to an emergency situation
- Mental impairment/illness (is a complete defence) (s 20 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*)
 - The defendant must be suffering at the time of the offending
 - The defendant must have not known the nature and quality of what they were doing, or did not know their conduct was unlawful
 - If this is satisfied, the defendant cannot be found guilty
- Necessity

Where Will my Matter be Heard?

Obtaining a financial advantage by deception charges are indictable (serious) offences; however they are generally dealt with in the lower Court (Magistrates Court of Victoria). Higher Courts (the County and Supreme Courts of Victoria) also have jurisdiction to deal with these matters.

The Court that ultimately deals with the matter will depend on the seriousness of the circumstances and value of the financial advantage obtained.

The Magistrates Court will deal with the matter if:

- The value of the money fraudulently received is under \$100000
- The Magistrate satisfies themselves the charge can be dealt with summarily
- The defendant consents for the matter to be dealt with summarily

Our Lawyers have expertise deciding the most appropriate Court to bring a matter before.

Penalties

If you are found guilty of obtaining a financial advantage by deception, one of the following penalties will likely be imposed:

- Term of **imprisonment** (maximum **10 years**) and/or
 - The most serious of matters often result in a term of imprisonment
 - More cases are showing it is becoming more difficult to avoid a term of imprisonment (unless you plead guilty and/or are a first-time offender)
- A **diversion** (conviction or non-conviction) and/or
 - Most likely if first time offender or offender with a mental illness
 - No disclosable outcome is made against you, which means whilst you take responsibility for the offence, it occurs in circumstances where your criminal record remains clean
- A **promise** (to the Court to be of good behaviour) and/or
- A **financial fine** to repay the debt to Centrelink (minimum **\$10000**, maximum **\$100000**) (conviction or non-conviction) and/or
 - In many cases a term of imprisonment is imposed alongside a very large financial fine
- A **community corrections order** (CCO) (conviction or non-conviction) and/or
- A **youth justice centre order** (see [here](#) for more information)

Quite often the relevant Magistrate or Judge will establish the offence but dismiss it or impose an immediate term of imprisonment.

What is a Diversion?

A diversion is a type of penalty a Court may impose as a response to a stalking offence by a defendant. It is a program run by the Magistrates Court which the defendant participates in, which is aimed at diverting the defendant away from the CJS and protecting the defendant from having a criminal record (as the charge is discharged). The process involves the police or prosecution filing a notice of diversion with the Court and the Magistrate or judge reviewing the notice and deciding whether it is appropriate in the circumstances for the defendant to participate in the program.

If the Magistrate or Judge decides it is not appropriate in the circumstances for the defendant to participate in the program, as counsel for the defendant we can make submissions to the Court to defend why it is appropriate in the circumstances and should be allowed. If the Magistrate or judge upholds their original decision, the defendant need not plead guilty as the decision is not a plea of guilt (s 59(3) *Criminal Procedure Act 2009* (Vic)). The notice will then be withdrawn, and the matter will proceed to open Court (like all other matters).

Successfully completing the program means the charge/s are discharged, whilst unsuccessfully completing the program means the charge/s are referred to open Court. Where a Magistrate does not record a conviction, the offence is included on the defendant's criminal record and this may not be removed until a given time.

Considerations When Sentencing

Magistrates and Judges consider a range of factors when determining the most appropriate penalty for the defendant, including:

- Nature/gravity of the offending conduct - the defendant's precise role in the fraud
- Whether a guilty plea has been entered at the earliest possible opportunity (if so, Courts often give a more lenient penalty)
- Whether there was a breach of trust whilst committing the fraud
- Facts surrounding the offence (like personal matters and criminal history of the defendant)
- Whether the offence has a mandatory (or standard) sentence
- Level of planning involved, and method used to obtain the property
- Whether part/all money has been repaid to Centrelink or not
- Length of time the fraud occurred over
- Type/amount of property obtained
- Whether drugs/alcohol was involved, and the type/quantity used
- Location of the fraud
- Type of victim impacted and impact on them (in both the short and long term)

A record for fraud/dishonesty offences can have severe and life-long consequences. For instance, a defendant may face the stigma of a criminal conviction, not be able to obtain the job they have always wished for, not be able to travel overseas, not be able to receive a loan approval and/or experience repercussions in their current employment.

Persons with a criminal history and/or who commit the most carefully planned, motivated and sophisticated dishonesty cases will attract the harshest penalties.

Our Lawyers have expertise arguing to the Court the unique circumstances of your offending to ensure they are aware of who is being sentenced, not just what you have unlawfully done (i.e., conveying that you are a good person but happened to exercise bad judgment).

Recent Obtaining a Financial Advantage by Deception Case

The following case illustrates the approach and outcome Courts may take in response to obtaining a financial advantage by deception:

- **Charge:** obtaining a financial advantage by deception (s 134.2 CC)
- **Facts:** the defendant underreported their part time income over a period of 5 years to Centrelink. Therefore, the defendant received benefits they were not entitled to receive. The defendant engaged our Lawyers to help prepare a strong plea strategy. We relied on the defendant's deep remorse for their charges, including consenting to the need to repay entitlements to Centrelink and adhering to a payment plan to ensure compliance; and personal circumstances - currently studying to become a nurse and how a conviction would impact their chance of obtaining employment
- **Decision:** the Magistrate was satisfied with our submissions and agreed a conviction was not appropriate in the circumstances. They ordered the defendant to a good behaviour bond without conviction

Relevant Important Resources

- SACStat Higher Courts: s 134.2(1) CC - obtaining financial advantage by deception - Commonwealth entity