Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence

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In 1990 a new Chapter 40 was added to the Western Australian Criminal Code, under the heading "Fraud".

The new Chapter consists of only one offence (in section 409), unlike the old Chapter 40 which comprised five separate offences: obtaining property by false pretences, obtaining the execution of a security by false pretences, cheating, conspiracy to defraud, and fraud on the sale or mortgage of property. Those five offences have now been repealed and replaced by a single new crime.

The replacement of five old offences by one new one might initially seem to be a step in the right direction. But the new section 409 is a vague and highly problematic provision. It manages to preserve many of the complexities of the old law whilst introducing a good number of new difficulties of its own. The purpose of this Note is to explore some of those difficulties.

LEGISLATIVE HISTORY

The new section 409 had its genesis in the Murray Report of 1983.[1] That report made a recommendation for the complete overhaul of the five former offences in Chapter 40 and their replacement by a single new crime.[1A] This recommendation was adopted by Parliament in 1990, subject to one important qualification. Whilst the Murray Report had recommended that the mental element of the new section 409 (an intent to defraud) should

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1. M Murray *The Criminal Code: A General Review* (Perth, 1983). The review was commissioned by the Attorney-General and prepared by Mr Michael Murray QC, formerly Crown Counsel and now a justice of the WA Supreme Court.

1A. S 409 is set out at pp 263-264 infra.

receive a detailed statutory definition in the Code itself,[2] Parliament rejected this in favour of leaving the meaning of this concept to be spelled out by the courts. However, since the term "intent to defraud" has never been given a single, clear meaning in Anglo-Australian case law (indeed it has been given a multiplicity of different meanings in different contexts)[3] Parliament's decision to leave the intent undefined is potentially a recipe for confusion.

There are two central elements in the new section 409. First, as noted above, the defendant (D) must "intend to defraud" another person. Secondly, D must obtain property, or some other benefit, "by deceit or any fraudulent means". This latter phrase ("fraudulent means"), like the element of intent to defraud, is nowhere defined in the Code and its meaning has never been authoritatively settled by case law. This adds a further dimension of uncertainty to the new offence.

It is interesting to note that these two key elements of section 409 (ie, "intent to defraud" and "by deceit or any fraudulent means") are both taken from the old offence of conspiracy to defraud (formerly section 412 of the Code),[4] a crime which was notorious for its vagueness and breadth.[4A] In many ways the new section 409 can be seen to have been modelled on conspiracy to defraud; but whilst that offence was limited by the requirement that it had to be committed by two or more people acting in concert, there is no such limitation on the new offence which can be committed by one person alone.

THE FORERUNNER OF SECTION 409: A BRITISH CONNECTION

It should be noted that the Murray Report claimed as the "substantive precedent" for the new section 409, not the old offence of conspiracy to defraud, but rather clause 15(3) of the Theft Bill 1968 (UK).[5] This provided:

> A person who dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act shall [be guilty of an offence].

Clause 15(3) of the Theft Bill 1968 was drafted by the Criminal Law

2. Murray Report supra n 1, 268-269.
3. See infra pp 271 - 275.
4. S 412 used the words "*conspires* ... to defraud", rather than "*intends* to defraud", but the courts have held that conspiracy to defraud requires proof of such an intent: *Scott v Metropolitan Police Commissioner* infra n 22.

4A. Cf Law Commission (Eng) *Criminal Law: Conspiracy to Defraud* WP No 104 (London: HMSO, 1987), where conspiracy to defraud under English common law is described as "extremely wide in scope": id, ¶¶ 1.2, 5.1 - 5.9.

5. Murray Report supra n 1, 271.

Revision Committee (UK), but it did not gain the unanimous support of all members of that Committee, a substantial minority being against it on the ground that it was far too sweeping and uncertain in scope.[6] The reservations of the minority were shared by many commentators, including Mr Roy Stuart, who said of clause 15(3):

> It places far too much discretionary power in the hands of prosecuting authorities. It could contribute to racial and other discrimination. It could be a potent weapon of blackmail in the hands of unscrupulous employers. One of the most striking objections to [clause 15(3)] is just that it is "unlegal". It is a pity that the [majority of the Criminal Law Revision Committee] ... should in this case have neglected one of the most important of legal virtues; a chronic dislike of vague, sweeping and arbitrary offences.[7]

These strictures carried great weight with the British Parliament which rejected clause 15(3) in favour of a less far-reaching provision. Members of the House of Lords in particular viewed clause 15(3) as an unattractive "catch all" offence which would sweep into the net many forms of conduct too trivial to merit the imposition of criminal sanctions.

Regrettably the criticisms made of clause 15(3) by Mr Stuart, the House of Lords and others do not seem to have carried any weight in Western Australia. For the new fraud offence in section 409, whilst being modelled on clause 15(3), jettisons two of the most important limitations applicable to that clause. Thus, whereas clause 15(3) required proof of a "deception", section 409 broadens this by requiring, as an alternative to deception, that the property or benefit be obtained "by ... any fraudulent means". As noted above, this latter phrase ("fraudulent means") has no settled connotation in Anglo-Australian law and it gives section 409 a most uncertain ambit. Secondly, clause 15(3) was limited by the requirement that D must act "with a view to [*financial*] gain for himself or another".[8] This limitation to financial gain, however, has not been incorporated into section 409. The result is that the new Western Australian offence is even broader than clause 15(3), which was rejected by the British Parliament on the grounds of its vagueness and all-encompassing nature.

OVERLAP WITH OTHER OFFENCES

The new Chapter 40 provides as follows:

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6. Criminal Law Revision Committee (UK) *Eighth Report: Theft and Related Offences* Cmnd 2977 (London: HMSO, 1966) ¶¶ 97-100. In the minority's view: "The terms of [clause 15(3)] are extremely general, whereas it is a principle of English law to give reasonably precise guidance as to what kinds of conduct are criminal": id, ¶ 99.
7. R Stuart "Reform of the Law of Theft" (1967) 30 MLR 609, 633-634.
8. The definition of "gain" in Theft Act 1968 (UK) is limited to financial gain: s 34(2)(a).

"**Fraud**

409. (1) Any person who, with intent to defraud, by deceit or any fraudulent means —

(a) obtains property from any person;
(b) induces any person to deliver property to another person;
(c) gains a benefit, pecuniary or otherwise, for any person;
(d) causes a detriment, pecuniary or otherwise, to any person;
(e) induces any person to do any act that the person is lawfully entitled to abstain from doing; or
(f) induces any person to abstain from doing any act that the person is lawfully entitled to do,

is guilty of a crime ...[9]

(3) It is immaterial that the accused person intended to give value for the property obtained or delivered, or the benefit gained, or the detriment caused."

The extreme width of this offence will be immediately apparent to anyone with knowledge of the criminal law. Its sweeping nature renders many of the offences in Part 7.11 of the Corporations Law (market rigging, stock market manipulation, fraudulent trading, etc) redundant, and there is also an obvious overlap with many of the offences created by the Bankruptcy Act 1966 (Cth).[10] Likewise, there is a significant degree of overlap with the fraud offences contained in the Police Act 1892 (WA), and this has caused the Western Australian Law Reform Commission to recommend the repeal of those offences (a recommendation which has yet to be acted on by the State Government).[11]

The rest of this Note is concerned specifically with the two central elements of section 409(1) (viz, "by deceit or any fraudulent means" and "with intent to defraud"), as the inexactness of these phrases is a major contributing factor to the vagueness and uncertainty of the new offence.

BY DECEIT OR ANY FRAUDULENT MEANS

Section 409(1) provides that D must obtain the property or benefit, or cause the detriment, "by deceit *or* any fraudulent means". The use of the disjunctive "or" clearly suggests that "deceit" and "fraudulent means" are

9. S 409(2), a procedural provision, states: "If the value of — (a) property obtained or delivered; or (b) a benefit gained or detriment caused; is more than $4 000 the charge is not to be dealt with summarily".
10. Bankruptcy Act 1966 (Cth) pt XIV ("offences").
11. WA Law Reform Commission *Police Act Offences* Project No 85 (Perth, 1992) ¶¶ 14.1-14.24.

intended to be alternatives. But what do these phrases mean?

Taking deceit first, this is a term which is commonly found in fraud offences. Its meaning was authoritatively settled in *Re London and Globe Finance Corporation Ltd*, where Buckley J said:

> To deceive is, I apprehend, 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.[12]

Had the new section 409 been limited to cases of deceit (that is, had the alternative mode of acquisition — fraudulent means — *not* been included), the new offence would plainly have been too narrow. It would not have encompassed frauds practised on machines, like automatic vending machines and automatic bank tellers, since deception must be perpetrated on the human mind.[13] Nor would it have encompassed cases where the deception involves a false promise, or a mere statement of law or opinion, since the case law clearly holds that such misrepresentations fall outside the meaning of "deceit" in the criminal law.[14]

The Murray Report recognised that it would not be feasible to limit section 409 to instances of deceit and it included the alternative, fraudulent means, to overcome this problem.[15] The difficulty, however, is that fraudulent means is a term of wide but uncertain ambit: it seems to subsume everything which falls within the concept of deceit (thus rendering that word redundant in section 409), but it also covers much else besides. The implications of this are considered below.

1. Stealing services

The Murray Report recognised that its dual formulation (by deceit *or* fraudulent means) would give section 409 the widest possible reach. For example, the Report claimed that this formulation would cover not only a dishonest individual who gains admission to a cinema by pretending to the doorman that he has lost his ticket (an example of gaining a benefit *by deceit*),[16] but also a rogue who simply sneaks unnoticed into a cinema through an unguarded side door (an example of obtaining a benefit *by any fraudulent means*). Mr Murray QC stated:

> I see no reason in principle why the one case should be punishable and the other

12. [1903] 1 Ch 728, 732.
13. *Davies v Flackett* [1972] Crim LR 708; *Kennison v Daire* (1986) 160 CLR 129. As to the use of "deception" to gain unauthorised access to a computer system, see now Criminal Code (WA) s 440A (introduced in 1990).
14. D Lanham, M Weinberg et al *Criminal Fraud* (Sydney: Law Book Co, 1987) 82-83; J C Smith *The Law of Theft* 7th edn (London: Butterworths, 1993) ¶ 4-21.
15. Murray Report supra n 1, 267. The Report suggested that the concept of fraudulent means "dates back to Roman Law": ibid.
16. The gaining of a benefit, by deceit or other fraudulent means, is covered by s 409(1)(c).

> case not. Certainly the proposed formulation incorporating "fraudulent means" would be wide enough to cover the situation where the individual "steals" services rather than tells a lie to obtain them.[17]

If this view is correct, the implications are far-reaching. After all, if fraudulent means includes "stealing" a service like admission to a cinema, then logically it must cover the stealing of a host of other services as well. This opens up a broad vista of criminal liability. Take the case of a person who parks his car in a roadside car parking bay without putting money in the parking meter, knowing that he should have done so. He has "gained a benefit" under section 409(1)(c) (use of the parking bay); and, although no deceit is involved, the service has been "stolen" — or obtained by fraudulent means — if the wide interpretation given to that phrase in the Murray Report is accepted. Thus what was previously regarded as a mere parking infringement, and nothing more, now falls within the purview of a major criminal offence.

2. Unauthorised borrowings made criminal

If the Murray Report is right to suggest that "fraudulent means" brings the stealing of *services* within section 409(1)(c), it must follow logically that it brings the stealing of *property* within section 409(1)(a). This might seem to introduce nothing more than an unnecessary and inelegant overlap between fraud under section 409(1)(a) and theft under section 371 of the Code; but it is important to note that section 371 is limited by the requirement that D must intend to deprive the owner *permanently* of his or her property,[18] whereas no such limitation appears in section 409(1)(a). This means, in effect, that many unlawful temporary *borrowings* (where no intention of *permanent* deprivation exists) may now have become a serious offence under section 409 of the Code, whereas previously they were not criminal.[19]

To illustrate the point, take the well known case of the art student who managed to sneak a statuette by Rodin out of the National Gallery in London in order (as he said) "to live with it for a while". He returned the statuette unharmed to the National Gallery some four months later, as he had intended from the outset. He was acquitted of stealing the statuette under English law[20] and would equally (if the facts arose here) be acquitted of theft under section 371 of the Code on the ground that he lacked the intention of

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17. Murray Report supra n 1, 267.
18. Criminal Code (WA) s 371(2)(a)-(f). Sub-ss (2)(b)-(f) inclusive merely provide examples of what is deemed to constitute an intention of permanent deprivation at common law and do not extend the definition in sub-s (2)(a): see Smith *The Law of Theft* supra n 14, ¶ 2-119, commenting on the equivalent English provision (Theft Act 1968 s 6).
19. Except in the case of the temporary taking of a vehicle without consent ("joy-riding"). This was made a specific offence in 1991: Criminal Code (WA) s 371A.
20. CLRC *Eighth Report* supra n 6, ¶ 57.

permanent deprivation. However, the art student could now be convicted under section 409(1)(a) of obtaining property (the statuette) "by any fraudulent means", assuming the broad interpretation given to that phrase in the Murray Report is correct.[21] A possible objection to this view is that, since D intended to return the statuette to the Gallery after "living with it for a while", he had no intent to defraud the Gallery, as required by section 409(1). The difficulty with this argument is that the courts have consistently held that the concept of intent to defraud covers temporary as well as permanent deprivation.[22] Assuming therefore that the broad interpretation given to "fraudulent means" in the Murray Report is upheld by the courts, it would seem to follow that the unauthorised temporary borrowing of property, which has traditionally fallen outside the criminal law, now falls within it.

3. Theft of land made criminal

Two other well established principles of the criminal law have also been overturned by the side-wind of section 409. First, it is clear that land cannot generally be stolen under section 371, *except* by asportation. Thus, if D surreptitiously moves his boundary fence to encompass a part of his neighbour's land, he cannot be guilty of theft (notwithstanding that he is dishonest and intends to deprive his neighbour permanently of the land appropriated), because the neighbour's land is not "moved" or "asported", as the law of theft requires.[23] However, this limitation on section 371 can now be by-passed, it seems, simply by charging D under section 409(1)(a) with having obtained the land[24] by fraudulent means (viz, by surreptitiously moving the boundary fence). The requirement of "asportation" in section 371 does not apply to section 409(1)(a); and, given that the broad definition of "property" in section 1 of the Code encompasses "everything capable of being the subject of ownership", it is difficult to see how the reference to

21. Note that "obtaining" in s 409(1)(a) includes obtaining possession of property: Criminal Code (WA) s 1.
22. *Balcombe v De Simoni* (1972) 126 CLR 576, Gibbs J, 594 - 595; *Scott v Metropolitan Police Commissioner* [1975] AC 819 (temporary misappropriation of feature films by employees of cinema); A Arlidge & J Parry *Fraud* (London: Waterlow, 1985) ¶ 12.42; but see *R v Zemmel and Melick* (1986) 82 Cr App Rep 279, 284 for an exceptional case confining the intent to defraud to permanent deprivation.
23. See Criminal Code (WA) s 371(1), (6). Note that s 371(1) encompasses not only the *taking* (ie, asportation) of property but also its *fraudulent conversion.* Fraudulent conversion has been held in England to apply to land, but only in cases where, for example, the land is wrongly sold by a trustee or other fiduciary and not to a simple case of misappropriation by moving a boundary fence: see CLRC *Eighth Report* supra n 6, ¶ 44; A T H Smith *Property Offences* (London: Sweet & Maxwell, 1994) ¶¶ 3.34 - 3.35. Lanham & Weinberg supra n 14 are of the view that, in general, land cannot be the subject of a charge of theft or fraudulent conversion in Australia: id, 105.
24. In the case of land "obtaining" includes obtaining occupation of the land: Criminal Code (WA) s 1.

"property" in section 409(1)(a) might be construed to exclude real property.

Of course, many people may think that the dishonest acquisition of part of a neighbour's land by the surreptitious moving of a boundary fence *should* be made criminal; but the point is contentious and there are arguments against extending the criminal law in this way.[25] After all, D gets good title to the land which he has wrongfully acquired from his neighbour after a 12 year period, by virtue of adverse possession. It would be incongruous if, *after* such title had been gained by D, he could still be convicted of a criminal offence in respect of the wrongful means of acquisition. This is one of the reasons why, historically, theft of land has not been possible.[26] It seems, however, that this ancient principle has now been subverted by the enactment of section 409 which, on its face, appears to leave D open to a prosecution in respect of the wrongful acquisition of the land, even after he has gained title to it by adverse possession. Whether a court could, on convicting D under section 409(1)(a), order restitution of the land to the innocent neighbour notwithstanding that title to it had vested in D under the civil law, is a question which is not easily answered.

4. Non-payment of debts made criminal

The other major change in the law effected by the side-wind of section 409 concerns the stalling debtor who uses deception in order to "buy time" to pay his debt. Suppose, for example, that D borrows $1 000 from a friend and, when the time for repayment comes, tells the friend a false hard-luck story which induces the friend to give him extra time to pay the debt. Is D guilty of an offence? Should he be?

In England, after much debate, Parliament decided that such cases of "stalling" by debtors were too common — and often too trivial — to merit the imposition of criminal sanctions. It therefore resolved that a debtor who uses deception to get his creditor to extend the deadline for payment of the debt should not be penalised unless it can be shown that he intended *never* to pay the debt (ie, he intended *permanent* default).[27]

The same restriction, however, does not apply under section 409. The debtor who by deception gets his creditor to postpone the date for repayment of the debt obtains a "benefit" under section 409(1)(c) (the additional time), regardless of whether he intends to pay up in the end or to make permanent default. In either case he is guilty of the offence. It may be objected that, if D intends to pay the creditor in full eventually (ie, he is simply "stalling"),

25. CLRC *Eighth Report* supra n 6, ¶¶ 41-44 sets out the arguments for and against criminalising the dishonest appropriation of land.

26. Id, ¶ 43.

27. Theft Act 1978 (UK) s 2(1)(b), overruling *DPP v Turner* [1974] AC 357. See Syrota "The Theft Act 1978" (1979) 42 MLR 301; and my annotations to this Act in Butterworth's *Current Law Statutes Annotated* (London: Butterworths, 1978).

he does not intend to defraud the creditor, as required by section 409(1). The answer to this, as previously pointed out, is that the notion of intent to defraud does not necessarily connote an intent to make *permanent* default; a temporary detriment to the creditor will suffice, as the cases show.[28]

The plight of the stalling debtor is made worse by the fact that section 409 does not necessarily require deceit: it is sufficient that the benefit is secured "by any fraudulent means", a phrase of uncertain import. Suppose, to illustrate the point, that D fails to respond to a written request by his creditor to pay an overdue debt, thus causing the creditor further delay in obtaining payment. Can D be convicted of "causing a detriment" to the creditor by fraudulent means, contrary to section 409(1)(d)? Whilst the point is debatable it is thought that the answer is no: this case is distinguishable from that discussed in the previous paragraph on two grounds. First, since the debtor has not obtained the creditor's *agreement* to postpone the due date for payment, the creditor's right the sue the debtor forthwith in respect of the debt is unimpaired. Thus it can be argued that the creditor suffers no "detriment", in the legal sense, as a result of the debtor's failure to respond to his request for payment.[29] Secondly, since there is no deceit in the instant case, the prosecution can succeed only if it proves "fraudulent means". Wide though this phrase is, it could surely be argued that it does not apply to a mere failure by a debtor to respond to a creditor's request for payment. To hold otherwise would be to increase the scope of the criminal law greatly, something which a court might be reluctant to do without the clearest authorisation from Parliament. It has to be acknowledged, however, that the introduction of section 409 has left the legal position of the stalling debtor unclear.

5. Alternative interpretations of fraudulent means

Can the phrase "by any fraudulent means" in section 409 be given a more limited interpretation which would avoid the far-reaching consequences described above? One possibility would be to insist that this requirement involves some *act* on the part of D: on this view merely to do nothing, or to remain silent, would not be enough. This interpretation would be consistent with the general principle that the criminal law punishes acts, not omissions, and with the natural meaning of the phrase "by ... any fraudulent means", which seems to connote something more than mere inertia by D.

If this view were accepted, it would follow that a debtor who refuses or fails to respond to a request for payment by his creditor would not fall within

28. Supra n 22.
29. Cf Syrota "The Theft Act 1978" supra n 27, 304-306 for a discussion of debt default in the context of the equivalent English legislation. See also the further discussion of the terms "benefit" and "detriment" at pp 275-277 infra.

section 409, notwithstanding that he arguably "gains a benefit" for himself (extra time) and "causes a detriment" to the creditor (delay in obtaining payment), since neither the benefit nor the detriment would be obtained "by fraudulent means". The result would be that the most common cases of non-payment (or, alternatively, delay in payment) of debts would remain outside the reach of the criminal law, as has traditionally been the case.

But even if this limitation were accepted, it is clear that "fraudulent means" would still have a very wide scope. As noted above, it would cover everything comprehended by the notion of deceit, thus rendering that term redundant in section 409. There is, however, an alternative, and much narrower, interpretation of fraudulent means which would not have this result. It will be recalled that, at common law, the concept of deceit is restricted in a number of seemingly arbitrary ways: it does not cover false promises, statements of law or opinion, and deceptions practised on machines as opposed to the human mind.[30] Legislation in England and some Australian States has overcome this problem by providing a broad statutory definition of deception which supplants the old common law.[31] It could be argued that "fraudulent means" was incorporated into section 409 for a similar purpose, that is, to cover those cases — and *only* those cases — which fall outside the meaning of deception at common law, but which fall within the layperson's understanding of the term. This would cast "fraudulent means" in a minor role which is supportive of, but subordinate to, the central concept of deceit rather than in a major role which totally supplants it. From the point of view of statutory construction, this might seem preferable to the Murray approach, which effectively subsumes "deceit" within the broader concept of "fraudulent means" and thus makes the former redundant.[32]

Whilst there is clearly an argument for giving "fraudulent means" in section 409 this restrictive interpretation, two points can be made against it. First, it would involve holding that a case like *Scott v Metropolitan Police Commissioner*[33] could no longer be prosecuted under the Criminal Code, whereas the Murray Report made it crystal clear that this case would continue to be covered by the revised Chapter 40. *Scott's* case involved the unauthorised copying of "movies" by employees of a cinema, in breach of copyright and without lawful excuse, in order to sell the copies at a profit. No deception was involved in copying the films but the House of Lords had

30. See supra nn 13 & 14, and accompanying text.
31. See eg Theft Act 1968 (UK) s 15(4); Crimes Act 1958 (Vic) s 81(4); Crimes Act 1900 (NSW) ss 178BA, 179; Criminal Code (Qld) ss 426, 427(2); Crimes Act (ACT) s 93; Criminal Code (NT) s 1.
32. Cf Lanham & Weinberg supra n 14, 126, 138, 432 interpreting "fraudulent means", "fraud" and "other fraud" in other State and Commonwealth statutes in a similarly restricted sense, ie, to cover statements of law and opinion, false promises and frauds practised on machines.
33. Supra n 22.

no doubt that the employees were guilty of conspiracy to defraud. There is no doubt, too, that they could have been convicted of this offence under the former section 412 of the Criminal Code; and it seems unlikely that a court would hold that they could not now be convicted under the new section 409. But, given the absence of any deception in copying the films, this result could be achieved only by interpreting "fraudulent means" as the Murray Report suggests, that is, as covering virtually any form of dishonest, underhand or secretive means.

Secondly, it is worth noting that the phrase "by ... other fraudulent means" appears in section 338(1) of the Canadian Criminal Code. This section creates a broad offence of fraud not dissimilar to Western Australia's section 409. In *R v Olan*,[34] the Canadian Supreme Court had no difficulty in concluding that the phrase "by ... other fraudulent means" should be given the broadest possible meaning in section 338(1) notwithstanding that this would render another phrase in the section ("by deceit [or] falsehood") superfluous. The Court held that for purposes of the section "other fraudulent means" includes "means which are not in the nature of a falsehood or deceit; *they encompass all other means which can properly be stigmatised as dishonest*".[35] Given the similarities between the Canadian and Western Australian offences, it seems likely that our State Supreme Court would have regard to *Olan* and interpret "fraudulent means" in section 409 in the same sense.

But, broad though the *Olan* definition of "fraudulent means" is, it would not appear to cover cases of pure omission. It follows that the stalling debtor who refuses to respond to a demand for payment by his creditor would still fall beyond the reach of section 409, even if the Canadian test were adopted. Such an interpretation would clearly be consistent with recent legislation in Western Australia whose purpose has been to reduce the use of imprisonment in respect of the non-payment of debts and fines.[36]

INTENT TO DEFRAUD

The mental element of section 409 is an intent to defraud. The Murray Report preferred to retain this term, antiquated though it is, rather than substitute the more modern term "dishonesty" (which is used in the equivalent English fraud offences) claiming that:

> [Dishonesty] is a difficult concept for judges in jury trials, and I suspect for juries themselves, because the word is of uncertain ambit in any given situation.[37]

34. *R v Olan, Hudson & Hartnett* (1978) 41 CCC (2nd) 145.
35. Id, 149 (emphasis added).
36. See Restraint of Debtors Act 1984 (WA) repealing Absconding Debtors Act 1877 (WA); and Fines, Penalties & Infringement Notices Enforcement Act 1994 (WA).
37. Murray Report supra n 1, 268.

It is true that, throughout the 1960s and 1970s, the concept of dishonesty caused problems for the English courts. But most of those problems were resolved in 1983 by *R v Ghosh*,[38] a decision of the English Court of Appeal which held that dishonesty bears the same meaning in *all* fraud offences, including conspiracy to defraud. Following *Ghosh*, State Parliaments in Australia have increasingly fallen into line with the English approach and are steadily replacing the requirement of intent to defraud with the alternative of dishonesty when drafting new offences of theft and deception.[39] In opting to retain the old fashioned term "with intent to defraud", the Western Australian Parliament has shown itself to be the "odd man out".

The retention of the anachronistic "with intent to defraud" is particularly difficult to justify in view of the multiplicity of different meanings attributed to this term by the courts. As long ago as 1883, Sir James Fitzjames Stephen remarked on the reluctance of judges to provide an authoritative, universally applicable definition of this ancient phrase[40] and some 50 years later Maugham J commented: "No judge has ever been willing to define fraud and I am attempting no definition".[41] More recently, the Supreme Court of Western Australia has remarked on the "long-standing controversy" and "real difficulty" surrounding the meaning of this term.[42]

Conscious of this uncertainty, the Murray Report recommended the enactment of a broad statutory definition of intent to defraud, based on the meaning of that term in the offence of forgery under English common law.[43] This definition, *had* it been accepted by Parliament, would have applied to all offences in the Code requiring an intent to defraud, and not only to section 409. According to the Murray Report's proposal, an intent to defraud would have involved:

> An intent to act or induce another to act in a way which would be to the detriment or prejudice, *pecuniary or otherwise*, of another person.

Insofar as this proposed definition covered pecuniary (ie, economic) detriment, it was unremarkable. The difficulty lay in the extension of the intent to cover *non*-pecuniary harm. This extension, had it been accepted, would have opened up a broad field of criminal liability as the following examples show.

1. Practical jokes

D sends X a forged invitation to a social function with no more wicked

38. [1982] QB 1053.
39. See eg Crimes Act 1958 (Vic) ss 73, 81-83; Crimes Act 1900 (NSW) s 178BA; Crimes Act (ACT) ss 96, 104-107; Criminal Code (Tas) ss 226, 252A.
40. J F Stephen *History of the Criminal Law* (London: Macmillan, 1883) vol 2, 121.
41. *Re Patrick & Lyon Ltd* [1933] Ch 786, 790.
42. *R v Tan* [1979] WAR 149, Burt CJ, 153.
43. Murray Report supra n 1, 268-269.

intention than that of raising a laugh at X's expense by inducing him to act on the invitation. Had intent to defraud covered *non*-pecuniary detriment (as the Murray formulation proposed), D could have been convicted under section 409(1)(d) or (e).[44]

2. Gullible victims

D induces a gullible young woman to sleep with him by pretending to be a pop star or other celebrity. This would not constitute rape or assault under the Code because the deception relates to a characteristic of D (his status) and not to his identity or to the nature of the act.[45] But it seems that D could have been convicted of fraud under section 409(1)(e) if the Murray test of intent to defraud had been accepted: it would not have mattered that the harm caused to the woman was non-pecuniary in nature.

3. Queue-jumping

D is scheduled to go into hospital for minor surgery in six months' time. By falsely pretending to be in great pain, D persuades the hospital to admit her before the scheduled date and ahead of other patients. If intent to defraud implies only economic detriment, then D must be acquitted in this "queue-jumping" case;[46] but if it were to be given a broader meaning encompassing non-economic prejudice, as under the Murray Report's proposed definition, then seemingly she could be convicted under section 409(1)(c), (d) or (e) on the ground that her selfish behaviour was detrimental to the rights of the hospital and its other patients.

In England, the Law Commission balked at a definition of intent to defraud which would be wide enough to cover such forms of misconduct[47] and it seems the Western Australian Parliament, which rejected the Murray definition, was of the same view. However, rather than drafting a narrower and more restrictive definition, State Parliament resolved to leave it to the courts to decide what this phrase means in the context of section 409.[48] This

44. The example is taken from Law Commission (Eng) *Forgery* Report No 55 (London: HMSO, 1973) ¶ 32; repeated in *Criminal Law: Conspiracy to Defraud* WP No 56 (London: HMSO, 1974) ¶ 32.

45. *R v Papadimitropoulos* [1957] 98 CLR 249; but see the revised definition of "consent" in s 319(2)(a) of the Criminal Code (WA), discussed in the Murray Report supra n 1, 220-221. This new definition, which came into effect on 1 August 1992, arguably overrules *Papadimitropoulos*; but this is not certain.

46. Cf Parry "Queue-Jumping and the Theft Bill" (1978) 128 New LJ 663.

47. Law Commission (Eng) *Conspiracy to Defraud* supra n 4, ¶¶ 12.5-12.6; *Forgery* supra n 44, ¶ 32.

48. The Law Commission (Eng) rejected such an approach when revising the law of forgery. It stated: "It is obviously not satisfactory in the codification of the law...merely to retain the phrase 'with intent to defraud' leaving its meaning to be ascertained from the many cases on the earlier statutes. This is particularly so when the cases, while not putting any

has left the law in a state of uncertainty. The following points however are clear.

- First, it seems certain that the requirement of intent to defraud will be given the same meaning throughout section 409, regardless of the particular subsection under which D is charged. It could only produce confusion to hold that this concept has one meaning, for example, for purposes of section 409(1)(a) and (b); another for purposes of section 409(1)(c) and (d); and yet another for purposes of section 409(1)(e) and (f). The same meaning must be given throughout the section.
- Secondly, it is clear that the term "intent to defraud" implies moral turpitude, so that if D acts under a bona fide claim of legal right, he cannot be convicted, even if his claim is unreasonable. This is in accord with a long line of precedents which hold that honest belief in the lawfulness of one's acts (whether reasonable or not) is inconsistent with this guilty state of mind.[49]

Beyond this there is much uncertainty. Perhaps the most difficult issue is whether the phrase implies an intent to inflict *economic* detriment (as some cases hold), or whether any detriment (economic or otherwise) will do. The difference between the two interpretations is illustrated by the three hypotheticals cited above. If intent to defraud implies economic detriment alone,[50] then the defendant in each of these cases must be acquitted; but if it includes non-economic (as well as economic) harm, then probably they can be convicted.

Cases in Australia are divided on the question of whether intent to defraud encompasses both economic and non-economic prejudice, or only the former. On the whole, Western Australian authority leans towards the narrower interpretation (requiring economic detriment);[51] and it may be inferred that Parliament also favours this interpretation given its rejection of the Murray formulation, which espoused the broader view. Reference

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precise limitation upon the nature of the disadvantage which must be intended, have not limited the disadvantage to economic loss, a limitation which the ordinary person might think follows from such a word as defraud": *Forgery* supra n 44, ¶ 32.

49. J Ll J Edwards *Mens Rea in Statutory Offences* (London: Macmillan, 1955) 184-189; Lanham & Weinberg *Criminal Fraud* supra n 14, 85, 262 - 268.

50. I use "economic detriment alone" to include the *risk* of such detriment, as it is clear that the expression "intent to defraud" covers both cases: see *R v Sinclair* [1968] 1 WLR 1246; *R v Allsop* (1977) 64 Cr App Rep 29. In *Allsop,* the Court of Appeal held (obiter) that an act of dishonesty "which puts [the] other's economic interests in jeopardy" constitutes an intent to defraud "even though [D] does not desire or intend that actual loss should ultimately be suffered by that other": id, 32.

51. *R v Tan* supra n 42, 153, Burt CJ (Brinsden J concurring); but note that Wallace J, 156, took a broader view. See also *Re A-G's Reference (No 1 of 1981)* [1982] WAR 96, 99, where Burt CJ echoed his earlier view. In *Balcombe v De Simoni* supra n 22, the High Court refused to limit intent to defraud under the former s 409 (obtaining property by false pretences) to an intent to cause economic loss, but assumed instead that D must intend to injure some *proprietary* right of the victim.

may also be made to section 409(2),[52] a procedural provision, which assumes that the property or benefit gained, or the detriment caused, can be valued in monetary terms. This is consistent with the view that subsections 409(1)(a)-(d) inclusive are concerned solely with harms on which a pecuniary value can be placed and thus, by implication, that the intent to defraud applicable to these subsections means an intent to cause harm of an economic nature.

It should also be noted that in *Re Attorney-General's Reference (No 1 of 1981),* Burt CJ took the view that where Parliament intends an offence to penalise both economic *and* non-economic prejudice (as in forgery, for example) it does not use the phrase "with intent to defraud" but chooses different phraseology instead, as in the former section 471. On the other hand, where it intends an offence to penalise economic detriment only, it uses "intent to defraud".[53] Though the court in *Re Attorney-General's Reference* was dealing with false accounting under section 419 of the Code, the same reasoning can be applied to section 409: by rejecting the Murray formulation (which would have introduced a broad test of intent akin to that in section 471) and opting instead for the unvarnished "with intent to defraud", Parliament has chosen to limit the new offence to economic harm alone.[54]

On the other hand, sections 409(1)(c) and (d) specifically state that the benefit obtained or detriment caused may be "pecuniary *or otherwise*", which is a strong indication that at least some forms of non-economic consequence are meant to fall within these subsections. It must also be remembered that in *Scott v Metropolitan Police Commissioner*, the House of Lords held that conspiracy to defraud embraces at least one form of non-economic harm, that is, where D induces a public official to act contrary to his public duty.[55] In view of the wording of sections 409(1)(c) and (d), referring inter alia to *non*-pecuniary benefits and detriments, it is likely that the intent to defraud will be interpreted to cover at least this type of non-economic harm. Whether or not it will be interpreted to cover other forms of non-pecuniary detriment (eg, the queue-jumping and practical joke cases[56] described on pages 272-273 above) is far from clear.

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52. Supra n 9.
53. [1982] WAR 96, 97-98, Burt CJ (with whom Wallace and Smith JJ concurred).
54. Or at least the *risk* of causing economic harm: see supra n 50. In *Olan* supra n 34, the Supreme Court of Canada limited section 338(1) of the Canadian Code to cases of "detriment, prejudice, or risk of prejudice to the *economic* interests of the victim". The similarity in the wording of ss 338(1) and 409(1) suggests that intent to defraud may be given the same meaning in W.A.
55. [1975] AC 819, Viscount Dilhorne, 839; Lord Diplock, 841; cf *R v Withers* [1975] AC 842. For the meaning of "public duty" in this context, see Law Commission (Eng) *Conspiracy to Defraud* supra n 4, ¶¶ 4.45 - 4.58; P Gillies *The Law of Criminal Conspiracy* 2nd edn (Annandale: Federation Press, 1990) 115 - 120.
56. In *Balcombe v De Simoni* supra n 22, 592 - 593, Gibbs J opined that a remark made "in jest" would not involve an intent to defraud. On the other hand, there can be an intent to defraud notwithstanding that D intends to give value for the property or benefit gained

OTHER PROBLEMS

It should not be thought that the phrases "by ... any fraudulent means" and "with intent to defraud" are the only ones which are problematic. Subsections 409(1)(a)-(f) have other difficulties too. Take the words "benefit" and "detriment" in subsections (1)(c) and (d) respectively. The Murray Report stated that these terms should be interpreted to include benefits and detriments on which it is not possible to place a monetary value.[57] On the other hand, section 409(2) requires that, in every case, the benefit or detriment *must* be given a dollar value for purposes of determining the mode of trial.[58] How this procedural provision is to be applied in the case of benefits and detriments whose value cannot be quantified in dollar terms is far from clear.

Another problem arises because, although "benefit" and "detriment" have a settled meaning in ordinary speech (their "ordinary usage meaning"), they also have a separate and narrower meaning in the law of contract, where they are used in connection with the doctrine of consideration (their "contractual meaning").[59] This raises the question, which meaning do "benefit" and "detriment" have in the context of section 409(1)(c) and (d) — their ordinary usage meaning or the narrower contractual meaning? The difference between the two meanings is that there can be no benefit or detriment, in the contractual sense, as opposed to the ordinary usage sense, where the victim, P, is induced to do an act which he or she is already contractually obligated to do. The facts of *Stilk v Myrick*[60] can be used to illustrate this. The crew of a ship were required, by the terms of their contract, to sail the ship from A to B, but they wrongly refused to do so until their wages were increased. The captain persuaded the crew to set sail by falsely promising to pay them the extra wages at the end of the journey. He later reneged on this promise (after the ship had arrived at B) and the question was whether the crew could sue him for the extra wages promised.

The court held that, although the captain obtained a benefit *in fact* (ie, the journey was duly completed), he obtained no benefit for purposes of the doctrine of consideration since the crew were contractually required to sail

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or detriment caused: Criminal Code (WA) s 409(3). This subsection is aimed at cases like *Balcombe v De Simoni*; *R v Potger* (1970) 55 Cr App Rep 42; and *R v Naylor* (1865) LR 1 CCR 4.

57. Murray Report supra n 1, 269. No examples of such benefits or detriments are cited in the Report.
58. Supra n 9.
59. G H Treitel *The Law of Contract* 8th edn (London: Sweet & Maxwell, 1991) 64 et seq; P J Hocker & P G Heffey *Contract: Commentary and Materials* 7th edn (Sydney: Law Book Co, 1994) 157.
60. (1809) 2 Camp 317.

the ship from A to B without any increase in wages.[61] If the captain was charged under section 409(1)(c) or (d), there would be both benefit (to him) and detriment (to the crew) if those terms were interpreted in their ordinary usage sense, but *not* if interpreted in their contractual sense. So which interpretation is correct? The High Court has held, in the context of section 29B of the Crimes Act 1914 (Cth), that "benefit" must be given its ordinary meaning.[62] This suggests that "factual benefit" rather than "contractual benefit" is the test. On the other hand, it should be noted that the ship's captain could *not* be charged under section 409(1)(e) because this subsection is expressly limited to cases where the victim (the crew) is induced by deception or other fraudulent means to do an act which it is "lawfully entitled to abstain from doing": but in this case the crew had no lawful right to refuse to sail the ship from A to B unless extra wages were paid, as this refusal was contrary to the terms of their contact. In order to ensure that the limitation in section 409(1)(e) cannot be circumvented simply by charging D under section 409(1)(c) or (d), it is necessary to restrict "benefit" and "detriment" in these subsections to benefit and detriment "in the eye of the law", that is, to give them the same meaning they have in the doctrine of consideration.[63]

CONCLUSION

Many though not all the problems in section 409 are attributable to the inclusion in it of the phrases "with intent to defraud" and "by deceit or any fraudulent means". These phrases were taken from the old offence of conspiracy to defraud,[64] which was notable for its vagueness and breadth. These characteristics have been carried forward into the new section 409. It will take many years and much litigation before all the problems to which the new offence gives rise have finally been resolved by the courts.

It is a pity that Parliament chose not to provide a clear statutory definition of the key terms in section 409. Had it done so many of the problems alluded to in this Note could have been avoided.

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61. Likewise there was no "detriment" to the crew in doing what they were obliged to do by the terms of the contract: Treitel *The Law of Contract* supra n 59, 88.
62. *Bacon v Salamane* (1965) 112 CLR 85 (Taylor J dissenting).
63. Query whether the captain could be said to intend to defraud the crew if the crew had no right to demand extra wages as the price of completing the voyage. Possibly *Stilk v Myrick* provides a rare example of a case where the prosecution could prove a deception (the false promise of extra payment) but no intent to defraud, the result being an acquittal.
64. "Intent to defraud" was an implicit, rather than explicit, requirement of the former s 412: see supra n 4.