The Mental Element in Forgery — A Worthwhile Reform?

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In 1990, State Parliament enacted major changes to the law of forgery. This article questions whether the change to the mental element of this offence was a change for the better.

INTRODUCTION

The responsibility for reforming and updating the Western Australian Criminal Code lies ultimately with State Parliament. For many years, however, Parliament seemed indifferent to this responsibility, making no changes to the Code even where they seemed desirable.

But recently, and largely as a result of the recommendations of the Murray Report,[1] Parliament has adopted a different stance: whereas it previously showed no interest in criminal law reform it has now become hyperactive in the field. As a result, significant changes have been made to the Criminal Code each year since 1985.

Whilst some of these reforms have undoubtedly improved the Code, this is not true of all of them. A recurring problem has been that the legislation implementing the various reforms has rarely been drafted in clear and unambiguous language. The result is that the reform process has often left the law in an unhappy and uncertain state.

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† I am grateful to my colleague, Mr Neil Morgan, for his helpful comments on an earlier draft of this paper. The responsibility for any errors which remain is mine alone.

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

1. Fraud

A recent example of this phenomenon can be seen in the reform of section 409 of the Code, which deals with criminal fraud. The revised section 409 (which came into force in 1990) replaced five old offences, which were couched in antiquated and obscure language, with one new offence, drafted in modern English. At first sight, this seems like a change for the better. The problem is that the new offence of fraud is not only breathtakingly wide (it is far wider than its antecedents), but it is also extremely vague and uncertain in scope. This uncertainty has already begun to cause serious problems for prosecutors and defence counsel, and it may well be that the new section 409 will eventually give rise to extensive litigation in the appellate courts.[2]

2. Forgery

Another example of the same phenomenon is the new offence of forgery in section 473 of the Code. As with fraud, the reform of this part of the law has been only partially successful. On the positive side, Parliament has abolished many of the antiquated and little-used offences which previously formed part of the law of forgery, and has created in their place two modern and relatively simple crimes covering (i) forgery itself and (ii) uttering a forged document.[3] Parliament has also done away with the myriad of different maximum penalties which previously applied to the various different types of forgery and replaced them with a single maximum penalty of 7 years' imprisonment applicable to all who are found guilty of this offence. These are the two most notable improvements resulting from the recent reform of the law of forgery.

The downside of that reform concerns the mental element of the new crime. Whilst the mental element of forgery *prior* to the recent reform was in a relatively settled and satisfactory state, Parliament has now amended the law in such a way as to make the exact parameters of the new offence uncertain and obscure. It may also be that the amendment to the mental element has, quite unintentionally, made the new offence of forgery much *less* wide in scope than its predecessor. The purpose of this article is to explore that possibility and also to make some general observations about the mental element of forgery and uttering under the revised law.

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2. See Syrota 'Criminal Fraud in Western Australia: A Vague, Sweeping and Arbitrary Offence' (1994) 24 UWAL Rev 261. N Morgan has also criticised the new s 409 in a paper delivered to the Cth Model Criminal Code Committee (Perth, 5 Sept 1994) 7.
3. S 473 is set out at p 171 infra.

THE MENTAL ELEMENT IN FORGERY: A BRIEF HISTORY

Prior to the recent reforms forgery was defined by section 471 of the Code as follows:

> A person who makes a false document or writing, knowing it to be false, and *with intent that it may in any way be used or acted upon as genuine...to the prejudice of any person* or *with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act...*is said to forge the document or writing.

This definition was modelled on the common law of forgery as it existed in England at the turn of the century, but with one important difference. Whereas under the English common law the mental element in forgery consisted of an *intent to defraud*,[4] the draftsman of section 471 chose not to adopt this term but to refer instead to an intent that the false document 'may...be used or acted upon as genuine...to the *prejudice* of any person' or, alternatively, an intent that any person, 'in the belief that [the document] is genuine, be induced to do or refrain from doing any act' (see the wording of section 471 set out above).

The reason why the draftsman adopted this more elaborate formula, in preference to the English common law's 'intent to defraud', seems to be that it was feared that the English phrase was too ambiguous and that it might be interpreted narrowly by the courts to cover *only* those cases where the forger intended to cause his victim *economic* or *financial* harm.[5]

By using the broad formulation set out in section 471, the draftsman ensured that forgery in Western Australia would cover not only intent to inflict economic injury on the victim[6] but also cases where the forger, though not intending such injury, intended to prejudice or hurt the victim in some other way.

The following examples illustrate some of the types of *non*-economic

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4. See *Welham v DPP* [1961] AC 103; Lord Radcliffe, 123; Lord Denning, 131; *R v Brott* (1991) 173 CLR 426; Brennan J, 430.
5. Murray Report supra n 1, 313.
6. Eg by forging the victim's signature on a cheque (or credit card sales voucher) and tendering the cheque (or voucher) in payment for goods or services supplied to D. D could be charged either with forgery or fraud in such a case. For another example of forgery involving an intent to cause economic loss see *R v Draper* [1962] Crim L Rev 107 (forged signature on a will). Note that an intent to put the victim's economic interests *at risk* also constitutes an intent to defraud even though no loss eventuates. For example, in *R v Geach* (1840) 9 C & P 499, D drew a bill of exchange for £1 000 and forged an acceptance on the bill in the name of 'Edmund Williams'. D intended all along to meet the bill and indeed paid the bank who honoured it so there was no financial loss. This was nonetheless held to be forgery. Cf *R v Hill* (1838) 2 Mood CC 30.

injury which were clearly encompassed by the broad definition of forgery in the former section 471:

- D presents a forged birth certificate to the Commonwealth Department of Foreign Affairs in order to obtain an Australian passport to which he is not entitled. D pays the prescribed fee for the passport so the government suffers no financial loss.
- D presents a forged doctor's prescription to a pharmacist in order to obtain drugs to which he is addicted. D pays for the drugs so the pharmacist is not left out of pocket.[7]
- D forges the signature on a testimonial to the Solicitor-General with a view to securing another person's appointment as a J.P. (an honorary position).[8]
- D, an employee, steals money from his employer. Shortly afterwards, D forges a receipt or other document so as to cover up the theft.[9]

There was never any doubt that these cases were covered by the definition of forgery in section 471, notwithstanding the absence of an intent to cause the victim financial injury, because in each case D intended to induce the victim to 'act to his prejudice' or to do some act which he would not have done had he known the truth. This was sufficient to satisfy the mental element required for a conviction under that section.

In contrast, the foregoing cases did originally cause difficulty under the English common law of forgery because it was unclear whether the relevant intent (viz, intent to defraud) extended to *non*-economic as well as economic harm. These doubts were laid to rest, however, in 1960 by the House of Lords decision in *Welham v Director of Public Prosecutions*.[10] This case recognised that intent to defraud is a nebulous concept whose meaning can vary according to the particular context in which it is found.

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7. See *Welham* supra n 4, 131, where Lord Denning cites this as an example of non-economic harm covered by forgery. See also *R v Elton* [1910] VLR 1, where D forged a JP's certificate to marry without the normal 3 days' notice. He was convicted of forgery at common law, Madden CJ holding that the absence of intent to cause economic injury was immaterial. For other examples of non-economic loss covered by forgery, see eg *Conor v Sankey* [1976] 2 NSWLR 570 (conspiracy to induce the Governor-General to act contrary to his public duty); *R v Turner* (1980) 72 Cr App Rep 117 (concocting witness statements with a view to securing the wrongful conviction of a defendant in a criminal trial). Such cases could now also equally be charged under s 409 (fraud)
8. *R v Flynn* (1883) 4 AJR 91.
9. *R v Martin* (1836) 1 Mood CC 489, cited with approval by Lord Denning in *Welham* supra n 4, 132 Cf *R v Franklin* [1991] Tas R 54 for a more recent example of such a case.
10. Supra n 4. In *Welham,* D forged documents relating to a hire-purchase contract, not for purposes of causing economic loss to anyone, but with a view to circumventing government credit restrictions in force at the time. This was held to be forgery under the Forgery Act 1913 (Eng), and also under common law, notwithstanding the absence of intent to cause economic loss.

But, with respect to forgery, the House of Lords concluded that it should be given a meaning sufficiently wide to cover (i) economic and (ii) at least *some* forms of non-economic loss. Lord Radcliffe said:

> There is nothing. .that suggests that to defraud is, in ordinary speech, confined to depriving a man by deceit of some economic advantage or inflicting on him some economic loss. Has the law ever so confined it?....[T]here is no warrant for saying that it has. What it has looked for in considering the effect of cheating on another person and so in defining the criminal intent is the *prejudice* of that person; what Blackstone's Commentaries... called '*to the prejudice of another man's right*'.[11]

The House of Lords ruling effectively put the English common law of forgery[12] on the same footing as the Criminal Code (WA): after 1960, the definitions of forgery in *both* jurisdictions covered non-economic as well as economic harm. *Welham*, however, did not resolve all the problems inherent in the notion of intent to defraud in forgery. Some of the outstanding problems will be discussed below, as they have now become relevant to the interpretation of the revised definition of forgery under section 473 of the Code.

REFORM OF THE MENTAL ELEMENT: THE ABANDONMENT OF INTENT TO DEFRAUD

In the wake of the decision in *Welham*, many jurisdictions took the opportunity to review and modernise their laws of forgery. In doing so they chose, more or less uniformly, to abandon the concept of intent to defraud (with its attendant difficulties) and to replace it with a mental element similar, though not always identical, to that found in the former section 471 of the Criminal Code (WA). Such was the case in Victoria,[13] New South Wales,[14] the Northern Territory[15] and the Australian Capital Territory.[16] The Crimes Act 1914 (Cth) also abandoned the notion of intent to defraud in favour of a formulation close to that in section 471.[17]

The same approach was also adopted by the British Parliament in enacting the Forgery and Counterfeiting Act 1981: indeed the English Law Commission, on whose recommendations the 1981 Act was based,

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11. *Welham* supra n 4, 124. Whilst Lord Radcliffe recognised that forgery covers non-economic loss, he felt such cases would be rare. '[I]n ninety-nine cases out of a hundred', he said, the forger's intent would be to cause his victim economic prejudice.
12. In *Welham*, the prosecution was brought under the Forgery Act 1913 (Eng) s 6, but the Lords accepted that the same principles applied to forgery at common law: id, 134.
13. Crimes Act 1958 (Vic) s 83A(8)-(10).
14. Crimes Act 1900 (NSW) s 305.
15. Criminal Code (NT) s 258.
16. Crimes Act 1900 (ACT) s 135B.
17. Crimes Act 1914 (Cth) s 63(1).

specifically commended the formulation of the mental element in forgery in section 471.[18] The Commission took the view that this formulation should form the basis of the codification of the law of forgery in England.

Given that so many other jurisdictions decided to revise their definitions of forgery so as to ally them with the former section 471, it is ironic that the Western Australian Parliament, in revising the law of forgery in this State, should resolve to drop the familiar and well understood phraseology in that section and replace it with the ambiguous concept of intent to defraud. Yet this is what was done. The new offence of forgery, now contained in section 473 of the Code, states:

> (1) Any person who *with intent to defraud* —
> (a) forges a record; or
> (b) utters a forged record,
> is guilty of a crime and is liable to imprisonment for seven years.[19]

A number of questions are raised by this new definition. But perhaps the first to consider is: why did State Parliament choose to adopt terminology — intent to defraud — which had been jettisoned by every other comparable jurisdiction which had revised its definition of forgery? To answer this it is necessary to go back to the Murray Report, whose recommendations led to the enactment of the new forgery offence. Three of the report's recommendations are relevant to the present inquiry. First, the report recommended that State Parliament should enact the statutory definition of forgery set out above.[20] Secondly, the report recommended that, in view of the uncertainties surrounding the meaning of 'intent to defraud' at common law, there should be a precise statutory definition of this term in section 1 of the Code (the interpretation section). This definition would make it clear that intent to defraud covers cases of inducing a victim to act to his prejudice or to do or refrain from doing any act (in effect, preserving the law as it formerly stood under section 471). Thirdly, the report proposed that this new statutory definition of intent to defraud should apply not only to forgery but to *all* offences in the Code which used this term.[21]

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18. Law Comm (Eng) *Forgery* Rep No 55 (London: HMSO, 1973) ¶ 32: 'The essential feature of the mental element in forgery is an intention to induce another to accept the forged document as genuine and, by reason of that, to do or refrain from doing some act. Indeed in the Australian and Canadian Codes the required intention is defined in this way'.
19. Emphasis added. S 473(2) states: 'It is immaterial that the record is incomplete or that it is not, or does not purport to be, binding in law'. For definitions of 'record', 'forge', and 'utter', see s 1.
20. Murray Report supra n 1, 312 and Appendix A.
21. Id, 268-269, 312-313. Code offences based on intent to defraud include ss 380, 381, 385, 389, 409, 419, 420, 424, 442, 473, 527: see N Morgan's commentary on *R v Clark and Bodlovich* (1991) 15 Crim L Journ 373, 375.

The problem is that Parliament rejected the Murray Report's proposed statutory definition of intent to defraud (probably because it felt that this definition was simply too wide to apply to *all* offences under the Code). It therefore enacted the Murray Report's proposal for a new offence of forgery, based on intent to defraud, but without providing any statutory guidance as to the meaning of the term. In effect this means that the courts will now have to decide what intent to defraud means for purposes of the new offence of forgery, without legislative assistance.

Given that the meaning of intent to defraud has always been shrouded in mystery,[22] it seems unfortunate that it should have been made a key element of the new offence. As noted above, the English Law Commission specifically rejected the possibility of incorporating that term into the Forgery and Counterfeiting Act 1981 preferring instead to use a formulation close to that in the old section 471. The Commission's reason for rejecting the term 'intent to defraud' was that it had given rise to a mass of conflicting case law in English and Commonwealth jurisdictions.[23] Regrettably the courts of Western Australia will now have plough through that case law in order to determine the exact parameters of the new offence. Some of the more important questions which they may be called upon to resolve are discussed below.

SECTION 473 AND NON-ECONOMIC HARM

Perhaps the first question to ask of the new section 473 is, does it cover an intent to cause non-economic harm? Unfortunately the answer is unclear. It would certainly be possible for the Supreme Court of Western Australia to adopt the House of Lords ruling in *Welham* that, for purposes of forgery, intent to defraud covers both economic and non-economic prejudice. If this was done, the new offence of forgery in section 473 would be broadly similar in coverage to the old section 471.

However, there is no certainty that the Supreme Court will adopt *Welham* in construing the mental element in section 473. This is because of two cases, decided by the Supreme Court in the late 1970s and early 1980s,

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22. See eg *Welham* supra n 4, 131: '[T]he more I consider the phrase "with intent to defraud". the more doubtful do I find its import' (Lord Denning). See also the authorities collected in Syrota supra n 2, 272 For an illuminating discussion of the intricacies of intent to defraud in the context of the former section 479, see Morgan supra n 21.

23 Law Comm *Forgery* supra n 18, ¶ 32: '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 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'

which gave the phrase 'intent to defraud', as used in the Criminal Code, a more limited interpretation than that in *Welham*, effectively restricting it to *economic* harm. The cases in point were *R v Tan*[24] and *Re Attorney-General's Reference (No 1 of 1981)*.[25] If these cases were adopted in relation to section 473, in preference to *Welham,* that would have serious repercussions for the law of forgery. In effect the new crime would be limited to cases where the forger intends to inflict economic prejudice on the victim — and all other cases, such as those listed on page 169 above, would be beyond the reach of the new offence.

There are, however, two reasons for thinking that the Supreme Court will adopt the *Welham* definition of intent to defraud, in preference to the *Tan/A-G's Reference* definition, in construing the new section 473. First, neither *Tan* nor the *A-G's Reference* was dealing with the crime of forgery, but rather with false accounting (*Tan*)[26] and theft by an employee (*A-G's Reference*).[27] Thus what was said in those cases regarding intent to defraud cannot bind the courts in their interpretation of section 473. Secondly, the court in *Tan*, whilst recognising that the meaning of intent to defraud can vary from offence to offence, nevertheless took the view that there were sound reasons of policy (as well as historical reasons) why forgery should be held to cover non-economic as well as economic prejudice.[28] There was certainly no suggestion in the case that the law of forgery should be revised by the courts or Parliament so as to confine it to economic harm. There is therefore no reason to assume that the restricted meaning given to 'intent to defraud' by *Tan* and the *A-G's Reference*, for purposes of crimes other than forgery, will prevent the Supreme Court from adopting a broader test — the *Welham* test — for the purposes of section 473.

NON-ECONOMIC HARM AND PUBLIC DUTY

Even if it is accepted that the Supreme Court is likely to adopt *Welham*, rather than *Tan*, in construing section 473, this does not resolve all difficulties. For *Welham* does not give a clear picture of the exact circumstances in which an intent to cause non-economic harm can amount to an intent to defraud. Two different views were expressed in the case — one by Lord Radcliffe, the other by Lord Denning.

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24. [1979] WAR 149.
25. [1982] WAR 96.
26. Criminal Code s 424 (amended, 1990).
27. Criminal Code s 419 (amended, 1985). The heading for the amended s 419 reads. 'Fraud by company directors, etc, as to accounts'.
28. *Tan* supra n 24, 153; *A-G's Reference* supra n 25, 97-98. The narrow interpretation of intent to defraud, confined to economic loss, probably still continues to apply to the amended ss 419 and 424: see Morgan supra n 21.

Lord Radcliffe took the more conservative stance holding that, in cases of non-economic harm, it must be shown that the victim was a public official and that the forger intended to induce that official to act contrary to his public duty. He 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 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.[29]

A different view was expressed by Lord Denning.[30] Like Lord Radcliffe, his Lordship was of the opinion that intent to defraud embraces both economic and non-economic prejudice. But unlike Lord Radcliffe, Lord Denning was not prepared to confine non-economic prejudice to cases where a public official is induced by D to act contrary to his public duty. This is a far wider approach than Lord Radcliffe's, and one which leaves the boundaries of the offence in an uncertain state.

How do the two approaches compare? It is clear that they both cover the case of inducing a public official to act contrary to his public duty. So, for example, they both cover the case of the rogue who uses a forged birth certificate to obtain an Australian passport from the Commonwealth government. It is immaterial that the rogue intends to pay for the passport so that no one is left out of pocket.

The difference between the two approaches emerges where the victim is someone other than a public official and the forger intends to cause him non-pecuniary harm. Such cases fall outside the Radcliffe test, but within the alternative propounded by Lord Denning. The following cases illustrate this distinction.

- A private detective uses a forged authority to persuade a bank manager to reveal to him details of another person's bank account. The bank manager is not a public official and the prejudice he suffers is non-pecuniary in nature. Hence the private detective is not guilty of forgery under the Radcliffe test, though he may be under Lord Denning's alternative view.[31]
- A school leaver forges a TEE exam certificate to obtain entrance to a

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29. *Welham* supra n 4, 124. Cf *Scott v Metropolitan Police Commissioner* [1975] AC 819; Lord Diplock, 840-841.
30. Id, 131 - 133.
31. The detective's use of the forged authority would give rise to a charge of uttering under s 473(b) rather than forgery under s 473(a). Alternatively the detective could be charged under s 409 (fraud).

private college of further education. Given that the college is a private institution, and that there is no intent to cause it any monetary loss, no offence is committed by the school leaver under the Radcliffe test,[32] though it is under Denning's. On the other hand, if the college was a *public* institution, then its admissions officer would qualify as a public officer, thus making the school leaver's conduct an offence regardless of whether one adopts the Radcliffe or Denning view.

- A woman forges a malicious letter to a wife purporting to be written by her husband's mistress and telling of their affair. In fact no such mistress exists. The letter causes the wife to leave her husband. This case would certainly not fall within the Radcliffe test of intent to defraud. Whether the prejudice suffered by the wife is sufficient to bring it within the Denning formulation is unclear.[33]

In England, the courts were never called upon to decide between the Radcliffe and Denning tests. The issue became otiose with the enactment of the Forgery and Counterfeiting Act 1981 which extended forgery (in the case of *non*-economic harm) to cases where the forger induces a person to act contrary to '*any* duty'. Under the Act it is irrelevant whether that duty is public or private, or whether it is imposed by statute, common law, contract or equity.[34] This approach would be wide enough to cover the first two hypothetical cases outlined above, since in both of them the victim is induced to act contrary to a duty (either statutory or contractual); but the third case would not be covered since in leaving her husband the wife is not acting contrary to 'any duty', whether public or private.

What approach should the courts of Western Australia adopt to this issue? It would certainly be possible for them to adopt Lord Radcliffe's approach limiting intent to defraud (in cases of *non*-economic loss) to those cases where a public officer is induced by D to act contrary to his public duty. Section 1 of the Criminal Code contains a definition of 'public officer' and this could be used for purposes of determining what 'public official' and 'public duty' mean for purposes of the Radcliffe test.

The problem with the Radcliffe approach, however, is that it draws a

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32. Note, however, that Lord Radcliffe drew attention to the distinction between documents of a private and public character in forgery at common law. For purposes of the former there had to be an intent to *defraud,* but for the latter merely an intent to *deceive.* S 473 of the Code makes no distinction between private and public documents, requiring an intent to defraud in both cases. It is therefore not important under the Code to decide whether the TEE exam certificate is a public or private document, though this distinction would have been critical at common law. *Welham* supra n 4, 132. On the distinction between public and private documents, see Law Comm *Forgery* supra n 18, ¶ 30.

33. See MCCOG/SCAG *Model Criminal Code: Blackmail, Forgery, Bribery and Secret Commissions* Discussion Paper (Canberra, 1994) 39, where this example is discussed.

34. S 10(1)(c). See A T H Smith *Property Offences* (London: Sweet & Maxwell, 1994) ¶ 23 38.

distinction between public and private duties which it is hard to defend. In the hypothetical case cited above, why should it be forgery for the school leaver to use a forged TEE certificate to obtain entrance to a public college of higher education but not to a private one? This problem is overcome by the English legislation which covers *both* cases; and it is submitted that the phrase 'intent to defraud' in section 473 could, and should, be interpreted to produce the same result (ie, to cover all cases where the victim is induced to act contrary to a legal duty, whether private or public). On the other hand, it is thought that the intent should not be interpreted so widely as to cover the case of the malicious letter writer (the third case cited above): to do so would be to make the law of forgery unacceptably wide.[35]

CLAIM OF RIGHT

Another question which arises under section 473 is, does D have an intent to defraud if he uses a forged document to secure payment of a debt? In England, this question arose in *R v Parker*,[36] where D, a naval rating, forged a letter from the War Office in London urging a fellow rating who owed him £3 to pay the debt. This was held to be forgery under English law, notwithstanding that the money was actually owed to D.

Parker has never been formally overruled in England, but it was decided many years before *Welham* and appears to be inconsistent with it. *Welham* makes *prejudice* to the victim (whether economic or non-economic) the key element in forgery,[37] but a debtor who is induced by a false document to pay his debt cannot be said to be prejudiced thereby. In *R v Kastratovic*, the Supreme Court of South Australia adopted this view stating: '[A] person is not defrauded if he is caused to do no more than pay his just debt'.[38]

In England, the Law Commission took the same view but noted that if the forged document contains threats or menaces, the writer may be charged with blackmail or extortion.[39] The same principle should apply in Western Australia.

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35. Cf Law Comm *Forgery* supra n 18, 32. The Commission felt that to extend the law to *all* cases of non-pecuniary loss would be unacceptable. It instanced the case of a person who issues a forged invitation to a social function as a practical joke, the aim being to raise a laugh at another person's expense by inducing him to act on the invitation. This ought not to be forgery, the Commission said.
36. (1910) 74 JP 208; cf *R v Smith* (1919) 14 Cr App Rep 101.
37. *Welham* supra n 4; Lord Radcliffe, 124; Lord Denning, 134.
38. *R v Kastratovic* (1985) 42 SASR 59. It seems that, wide though the new offence of fraud in s 409 is, it would not cover the case of inducing the victim by deception to pay a debt: see the discussion of 'benefit' and 'detriment' in s 409(1)(c) and (d) in Syrota supra n 2, 276-277.
39. Law Comm *Forgery* supra n 18, 34. Note that claim of right can also arise if D signs a cheque or other document in X's name mistakenly believing he has X's authority to do

RESIDUAL PROBLEMS

Two other problems arise with regard to the mental element in section 473. The first is whether it extends to temporary as well as permanent loss. For example, would a person who uses a forged driving licence in order to hire a car from a hire company be guilty of the offence of uttering a forged document under section 473(b), notwithstanding that he intends to pay the hire charge and to return the car at the end of the hire period? This raises the preliminary question, already canvassed, of whether there can be an intent to defraud if D intends to pay for the goods or services he receives and thus intends his victim no economic loss.

With respect to this question, it has been suggested above that there *can* be an intent to defraud in these circumstances — but an opposing argument can be based on the wording of sub-section 409(2) of the Code. This sub-section applies exclusively to the offence of fraud in section 409(1), an offence which requires proof of an intent to defraud, and provides that: '[I]t is immaterial that the accused person intended to give value for the property obtained...or the benefit gained'. It could be argued that the absence of an equivalent provision in respect of section 473 means that an intent to give value (ie, to pay the hire charge) *is* material for purposes of the crimes of forgery and uttering — and indeed provides a defence to them. In the words of the Latin maxim: 'Expressio Unius est Exclusio Alterius'.

Assuming this barrier to a conviction can be overcome, there is still the question whether intent to defraud in section 473 covers *temporary* deprivation (ie, deprivation during the period of hire). In England, the authorities clearly suggest that the answer to this is 'yes';[40] but in Australia the issue has yet to be finally decided. In *Balcombe v De Simoni*,[41] Gibbs CJ clearly felt that intent to defraud does cover temporary deprivation. But his remarks were made in the context of the offence of obtaining property by deception, not forgery, and their applicability to the latter is uncertain. On balance it is submitted that temporary deprivation does constitute 'prejudice', as that word is commonly understood, and thus it falls within the meaning of intent to defraud as defined in *Welham.*

The second, entirely separate issue concerns the offence of uttering a

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so. This is not forgery: *R v Forbes* (1835) 7 C & P 224. Cf Criminal Code (WA) s 22. But see *R v Baldock* [1993] ACLR 130, giving a restrictive interpretation to s 22.

40. *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 Zemel and Melick* (1986) 82 Cr App Rep 279, 284 for an exceptional case confining intent to defraud to permanent deprivation. Temporary deprivation is now expressly covered in England by the Forgery and Counterfeiting Act 1981 s 10(1)(a).

41. (1972) 126 CLR 576, 594-595.

forged record contrary to section 473(b) of the Code. 'Uttering' is defined in section 1 to mean using or dealing with a record '*knowing* that the record is forged'. But what is meant by 'knowing' in this context? Does it include mere suspicion or belief? And is the question of knowledge to be judged subjectively or objectively? In view of the seriousness of the offence, and the maximum penalty of seven years' imprisonment which applies to it, the reference to 'knowing' in section 1 ought to be narrowly construed. That is, knowledge should be judged subjectively and it should be limited to *actual* knowledge (thus excluding cases of constructive knowledge, belief and mere suspicion). Whilst knowledge has sometimes been given a wider meaning in regulatory offences,[42] it is submitted that a different and narrower view is apposite in a serious offence such as forgery.[43].

In England, Parliament chose to broaden the law in the Forgery and Counterfeiting Act 1981, expressly extending the offence of uttering to cases of 'knowledge *or* belief'. The absence of the alternative term (ie 'belief') in the Criminal Code suggests that a narrower test applies in Western Australia.

CONCLUSION

Many of the problems discussed in this article could have been avoided if the term 'intent to defraud' had not been used in the new definition of forgery in section 473. It is notable that the Murray Report, in reviewing this offence, chose to ignore the very detailed mental element which the English Law Commission recommended should form the basis of a new offence of forgery in that country. Yet the Law Commission's recommendations have now been implemented not only in England, but also in Victoria, New South Wales and the Australian Capital Territory.[44] The current project for codification of the Commonwealth criminal law also favours the English Law Commission's test.[45] Almost all the problems discussed above could have been avoided had that test been adopted in

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42. J Ll J Edwards *Mens Rea in Statutory Offences* (London: Macmillan, 1955) 52. Cf *Model Criminal Code* supra n 33, 39-42.
43. Note, however, that if D pleads he mistakenly believed that the document he uttered was not forged, his mistake must be honest and reasonable: Criminal Code (WA) s 24.
44. Nn 13, 14, 16 supra.
45. *Model Criminal Code* supra n 33, 39. In view of the extreme width of the new offence of fraud in s 409 (see p 167 supra) it is questionable whether there was any need to retain an offence of forgery in Western Australia. Almost all cases of forgery could equally be charged as fraud. However, it may be necessary to charge forgery, and not fraud, in some cases where D's illicit purpose is not achieved. For example, D forges a doctor's prescription with a view to obtaining restricted drugs from a pharmacist. D is arrested before presenting the prescription to the pharmacist. It is unlikely that he can be charged with attempted fraud (because his acts are 'merely preparatory') but he can be charged with forgery under s 473.

Western Australia. The present test, based on the antiquated notion of intent to defraud, is far more obscure than its English counterpart.

Whilst it is understandable that State Parliament should wish to retain concepts and phrases with which lawyers are familiar ('uttering' is an example), this can hardly apply to a phrase like 'intent to defraud' which has given rise to so much difficulty over the years. The decision to retain this phrase in the new offence of forgery is difficult to understand. Parliament has left the many problems to which it gives rise to be resolved by the courts and has thus abrogated its responsibility to provide the community with a definition of forgery which is simple and clear.