Victorian Law Reform Commission

Succession Laws

CONSULTATION PAPER | **EXECUTORS**

Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

This report reflects the law as at October 2012.

This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (3rd ed, 2010).

VLRC consultation paper number 14

ISBN 978-0-9872222-8-2

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Victorian
Law Reform
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Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions on page 41 that seek to guide submissions.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. It does not matter if you only have one or two points to make—we still want to hear from you. Please note, however, that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or in the case of those requiring assistance, verbally, to one of the Commission staff. There is no required format. However, we encourage you to consider the questions listed on page 41.

Submissions can be made by:
Online form: www.lawreform.vic.gov.au
Email: law.reform@lawreform.vic.gov.au
Mail: GPO Box 4637, Melbourne Vic 3001
Fax: (03) 8608 7888
Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission:

- if you require an interpreter
- if you need assistance to have your views heard
- if you would like a copy of this paper in an accessible format.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament or, in the case of a community law reform project, when the report is presented to the Attorney-General. Hard copies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982* (Vic), the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide how you want your submission to be treated. Submissions are either public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

Submission deadline 28 March 2013

Terms of reference

The Victorian Law Reform Commission is asked to review and report on the desirability of legislative or other reform in relation to the succession law matters set out in these terms of reference. The purpose of this reference is to:

(a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies

(b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible

(c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General (SCAG).

In particular, the Commission is asked to review and report on the following matters:

Wills

1. whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others
2. whether the current provisions that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised
3. the need to clarify when testamentary property disposed of during the will-maker's lifetime will be adeemed and when it will be protected from ademption

Family provision

4. whether Part IV of the *Administration and Probate Act 1958* concerning family provision applications is operating justly and effectively, having regard to its objective of providing for the proper maintenance and support of persons for whom a deceased had a responsibility to make provision

Intestacy

5. whether Division 6 of Part I of the *Administration and Probate Act 1958* concerning the distribution of an estate on an intestacy is operating effectively to achieve just and equitable outcomes

Legal practitioner executors

6. whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission

Administration of estates

7. how assets are designated to pay the debts of an estate and the effect that this has on the estate available for distribution to beneficiaries or to meet a successful family provision claim
8. whether a court should have the power to review and vary costs and commission charged by executors

Operation of the jurisdiction

9. whether there are more efficient ways of dealing with small estates
10. the costs rules and principles applied in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court
11. any other means of improving efficiency and reducing costs in succession law matters.

In undertaking this reference, the Commission should have regard to, and conduct specific consultation on, any relevant recommendations made by the National Committee for Uniform Succession Laws established by SCAG. The National Committee has released reports and model legislation on wills (1997 and 2006), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009). State and Territory Ministers have agreed to adopt the National Committee's recommendations as the basis for reforming succession laws in their respective jurisdictions with the aim of maximising national consistency.

The reference does not include consideration of the remaining recommendations of the National Committee, unless relevant to the above referred matters.

The Commission should also consider any legislative developments in both Victoria and other Australian jurisdictions since the National Committee released its reports.

The Commission is to report by 1 September 2013.

Glossary

Ademption	The rule of ademption specifies that, when the subject matter of a specific gift to someone is no longer in the will-maker's estate at the date of death (because it has been sold or given away, for example), the beneficiary will receive nothing. In this case, the gift is said to have been adeemed.
Administrator	A person appointed by the court under letters of administration to administer a deceased estate which has no **executor**. This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
Bona vacantia	Property that has no owner. If a person dies intestate (leaving property that is not disposed of by a will) and is not survived by any next of kin, the intestate estate belongs to the Crown as *bona vacantia.* See also **intestacy**.
Collateral relatives	Blood relatives who are related by common ancestry but not through a direct line of descent. For example, the relationship between siblings is collateral. See also **lineal relatives**.
Disbursement	An expense paid by a solicitor on behalf of a client, for which reimbursement will be sought. Disbursements are distinct from solicitors' professional fees and court costs, and might include, for example, the cost of medical reports or a barrister's fees.
Executor	The person appointed by the will to administer the estate.
Grant of letters of administration	A grant of letters of administration is made where there is no will, or where there is a will but no **executor** is available for some reason. It confers upon a court-appointed **administrator** the authority to administer the estate.
Grant of probate	A grant of probate certifies that the will is the last and valid will of the deceased person and confirms the authority of the **executor** named in the will to administer the estate.

Grant of representation	A grant, by the Supreme Court, of probate or of letters of administration.
Hotchpot	The requirement for certain benefits received by a deceased person's child during the deceased person's lifetime to be taken into account when determining that child's share on **intestacy**.
Informal administration	Administration of estate assets without a **grant of representation**.
Inter vivos	Refers to something that occurs during life. In the succession law context, it is most often used to distinguish between gifts or transactions during a person's life and those that occur in accordance with their will.
Intestacy	Occurs when a person dies without having made a valid will, or where their will fails to effectively dispose of all of their property. Intestacy can be partial, where only some of the deceased person's property is effectively disposed of by will, or total, where none of the deceased person's property is effectively disposed of by will.
Issue	A person's children, grandchildren, great-grandchildren and other direct descendants down this line.
Joint tenancy	Common ownership of property when all co-owners (or co-tenants) together own the whole piece of property, each having an undivided share. Property that is owned jointly passes to the surviving co-owner or co-owners on the death of one of the co-owners and does not become part of the deceased person's estate. See also **survivorship** and **tenancy in common.**
Lineal relatives	Blood relatives who are related by a direct line of ancestry, either ancestors or descendants. For example, the parent to child relationship is lineal. See also **collateral relatives**.
Marshalling	The process of adjusting beneficiaries' benefits, after the payment of the estate's debts, to ensure the distribution accords with the order established under the will or by statute.
Next of kin	A person's closest blood relatives. A deceased person's estate is distributed to their surviving next of kin on **intestacy.**
Party and party costs	All costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party. The amount includes the necessary legal costs of prosecuting or defending a case, as calculated by using a standard scale of fees (rather than the fees that were actually charged). A party awarded party and party costs recovers less from the other side than they would if awarded **solicitor and client costs.**

Real property	Land and interests in land, otherwise known as real estate.
Registrar of Probates	An officer of the Supreme Court with both judicial and administrative functions. The Registrar of Probates is appointed under the *Supreme Court Act 1986* (Vic) and may exercise the power of the Court in making grants of representation.
Residuary estate	The remainder of the estate after debts and liabilities are paid, and specific gifts and legacies are distributed.
Solicitor and client costs	All costs reasonably incurred and of reasonable amount. They are likely to cover almost all the legal fees that the party was actually charged. A party awarded solicitor and client costs recovers more from the other side than they would if awarded **party and party costs.**
Statutory will	A will authorised by the court for a person who is alive but lacks the **testamentary capacity** required to make a valid will for themselves.
Survivorship	A right in relation to property held by two or more people as joint tenants. Where a co-owner (or co-tenant) dies, their share in the property passes to the surviving co-owner(s). It cannot be given by will. See also **joint tenancy.**
Tenancy in common	A type of co-ownership where multiple parties own distinct interests in the same piece of property. The share owned by a tenant in common forms part of their estate. See also **joint tenancy.**
Testamentary capacity	The mental capacity required to make a valid will. To have testamentary capacity, a person must be of sound mind, memory and understanding, and must understand the nature and effect of making a will.

1. Background

Background to the review

Terms of reference

1.1 On 1 March 2012, the Attorney-General asked the Victorian Law Reform Commission to report by 1 September 2013 on a number of succession law matters. The terms of reference are on page 6.

1.2 The purpose of the review, as set out in the terms of reference, is to:

(a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies

(b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible

(c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General.

1.3 The terms of reference then specify 11 topics that the Commission should examine in particular.

The Uniform Succession Laws project

1.4 In conducting the review, the Commission is to take account of recommendations made by the National Committee for Uniform Succession Laws. The National Committee guided the National Uniform Succession Laws project, which was an initiative of the former Standing Committee of Attorneys-General (SCAG).[1]

1.5 In 1991, SCAG agreed to develop uniform succession law and practice across Australia. The following year, it asked the Queensland Law Reform Commission to coordinate the project. The project was guided by the National Committee, comprising representatives from all jurisdictions.

1.6 The National Committee conducted extensive research in conjunction with a number of law reform bodies over a period of 14 years and published reports on the law of wills (1997), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009).

1 Now known, since September 2011, as the Standing Council on Law and Justice. It comprises Commonwealth, state and territory attorneys-general and the New Zealand Minister for Justice.

Succession laws in Victoria

1.7 Succession laws regulate how property is administered and distributed on the owner's death. In 2011, 36,733 deaths were registered in Victoria.[2] Many of those who died left a valid will setting out how they wanted their property to be distributed. Property that is not disposed of by a valid will can be distributed under a statutory intestacy scheme.

1.8 Victoria's succession laws are found in:

- the *Wills Act 1997* (Vic) and associated case law on the construction and validity of wills, and
- the *Administration and Probate Act 1958* (Vic) and associated case law dealing with the administration and distribution of assets.

1.9 Other legislation specifies the powers of executors, administrators and others involved in finalising the deceased person's financial affairs and the procedures they should follow.[3] Succession laws also interact with property and taxation laws and laws that determine the legal status of relationships.

1.10 Nevertheless, not all of a deceased person's assets are necessarily managed and administered under succession laws. Succession laws concern the administration and distribution of the deceased person's estate. The estate includes property that the person held or was entitled to at the time of their death. It may be real property (ownership or interest in land, a house or another type of building or immovable object attached to the land) or personal property (other assets such as money, shares, vehicles and other movable personal possessions).[4]

1.11 The following property interests are not normally included in the estate, and therefore are not dealt with by succession laws:

- Death benefits payable by a superannuation fund, as they may be disposed of only by a trustee of the fund. However, fund members often make a binding death benefit nomination asking the trustee to pay their superannuation death benefit to the person they appoint as executor under their will. When this happens, the executor can then distribute the money as directed by the fund member's will.[5]
- Payment under a life insurance policy to someone nominated by the insured person. The payment is made in accordance with the agreement between the insurance firm and the insured person.
- Jointly owned property, such as a house or a bank account, because this passes directly to the other owners.

1.12 As the Commission's terms of reference concern succession laws, they extend only to reviewing the rules that regulate the administration and distribution of property interests that comprise a deceased person's estate.[6]

2 Victorian Registry of Births Deaths and Marriages, *Fast Facts* (3 January 2012) <http://www.bdm.vic.gov.au/utility/about+us/fast+facts/>.
3 For example, trustee companies that act as administrators or executors of estates are regulated by the *State Trustees (State Owned Company) Act 1994* (Vic) and the *Corporations Act 2001* (Cth); and the Supreme Court's procedures for administration and probate are set out in the *Supreme Court (Administration and Probate) Rules 2004* (Vic).
4 For a full description of the types of property that may be disposed of by will, see the *Wills Act 1997* (Vic) s 4.
5 *Superannuation Industry Supervision Act 1993* (Cth) s 59(1A).
6 For a full discussion of the boundaries of succession law, see Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 91–137.

The Wills Act

1.13 When Victoria separated from New South Wales and became an independent colony in 1850, the laws then in force in New South Wales continued to apply here. They included the *Wills Act 1837* (UK).[7]

1.14 An organising principle of the 1837 Act was the doctrine of 'testamentary freedom'. According to this doctrine, a person (the 'testator') should be free to determine how their property is distributed on their death by making a will (or 'testament') that sets out their intentions. The Act regulated who could make a will, the type of property that a will could dispose of, procedural formalities that must be followed in order for the will to be valid, and how to interpret it.

1.15 As a colony, and later as a state, Victoria's wills legislation developed and changed slowly, but sometimes significantly.[8] Although consolidated a number of times,[9] the legislation was not comprehensively reviewed until 1984. In that year the Attorney-General established a working party to review the *Wills Act 1958* (Vic).[10]

1.16 Two years later, in 1986, the working party presented the Attorney-General with a report recommending changes that would bring Victoria's legislation into line with legislation in the other Australian jurisdictions.[11] Work began on drafting a new Wills Act, reflecting the Working Party's recommendations. The eighth draft was referred to the Victorian Parliamentary Law Reform Committee in 1991.

1.17 By that time, moves were being made nationally to establish the Uniform Succession Laws project. The Parliamentary Law Reform Committee sought to assist the national project by 'avoiding unnecessary departures from formulations most likely to be generally adopted'.[12] For its part, the Queensland Law Reform Commission focused the national project on the law of wills in order to accommodate the work of the Parliamentary Law Reform Committee.[13] The Parliamentary Law Reform Committee presented its report in 1994, and its recommendations included a proposed Wills Act.[14]

1.18 The National Committee presented its report on wills in 1996, which took account of the proposed Victorian Wills Act and recommended national model legislation.[15]

1.19 The outcome in Victoria was the passage of the *Wills Act 1997* (Vic). It is a 'reasonably faithful' replica of the model national legislation.[16] The Commission is examining only three specific issues in relation to the law of wills.

7 7 Wm 4 & 1 Vict, c 26.
8 For example, the lowering of the age of majority from 21 to 18 by the *Wills (Minors) Act 1965* (Vic); and the amendment of the witness-beneficiary rule by the *Wills (Interested Witnesses) Act 1977* (Vic).
9 *Wills Statute 1864* (Vic); *Wills Act 1890* (Vic); *Wills Act 1915* (Vic); *Wills Act 1928* (Vic); *Wills Act 1958* (Vic).
10 The Attorney-General's Working Party in 1984 comprised representatives of the Law Department, the Probate Office, the Law Faculty of the University of Melbourne, the Law Institute of Victoria and the Victorian Bar.
11 The report was not published.
12 Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) xiii.
13 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills,* Queensland Law Reform Commission Miscellaneous Paper 29 (1997) i.
14 Law Reform Committee, above n 12.
15 National Committee for Uniform Succession Laws, above n 13.
16 Rosalind Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 730.

The Administration and Probate Act

1.20 Like the Wills Act, the origins of the Administration and Probate Act can be traced back to colonial times. It sets out the procedures for administering the estate until the assets are distributed to family, friends and other beneficiaries under a will or in accordance with the rules of intestacy.

1.21 Early versions of this legislation established: the jurisdiction of the Supreme Court in this area; the powers and responsibilities of executors and administrators; rules for distributing the property of people who die intestate; and court procedures, including special arrangements for small estates. Later, it incorporated 'family provision' legislation, empowering the Court to alter the distribution of property under a will or the intestacy scheme to provide for the maintenance and support of someone for whom the deceased person had responsibility to provide.

1.22 Family provision legislation provides a counterpoint to the doctrine of testamentary freedom. It places limits on the freedom of a will-maker to dispose of their property as they wish. Although testamentary freedom was favoured during Victoria's colonial period, it had previously been restricted in a variety of ways, to greater and lesser degrees, under English law.[17]

1.23 With the passage of the *Widows and Young Children Maintenance Act 1906* (Vic), the new State of Victoria was the first jurisdiction to introduce family provision legislation in Australia. It was based on the *Testator's Family Maintenance Act 1900* (NZ), the first law of its kind in a common law country.[18] Between 1912 and 1929, all Australian states and territories enacted family provision laws,[19] followed by England and Wales in 1938.[20]

1.24 Unlike the Wills Act, the Administration and Probate Act has never been comprehensively reviewed. While not requiring the whole Act to be examined, the Commission's terms of reference extend to many of the key provisions, including those that address the following issues:

- executors' commission for their time and trouble
- applying assets to the payment of debts
- the intestacy scheme for distributing the assets of someone who has died without making a will
- special procedures for administering small estates, and
- family provision.

17 See John K de Groot and Bruce W Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 2–3.

18 Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?'(2009) 17 *Australian Property Law Journal* 62, 64; National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 1. Dainow notes that the successful New Zealand bill followed several unsuccessful attempts at passing family provision legislation: Joseph Dainow, 'Restricted Testation in New Zealand, Australia and Canada' (1937) 37 *Michigan Law Review* 1107, 1108.

19 National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 1; *Testator's Family Maintenance Act 1912* (Tas); *Testator's Family Maintenance Act 1914* (Qld); *Testator's Maintenance and Guardianship of Infants Act 1916* (NSW); *Testator's Family Maintenance Act 1918* (SA); *Guardianship of Infants Act 1920* (WA) s 11; *Administration and Probate Ordinance* (ACT) pt VII; *Testator's Family Maintenance Order 1929* (NT).

20 *Inheritance (Family Provision) Act 1938* (UK).

The Commission's process

1.25 Dr Ian Hardingham QC has been appointed to the Commission to lead the review. Dr Hardingham has extensive experience in teaching, advising and writing about the law, as well as practising in the area as a barrister.

1.26 Since receiving the terms of reference, the Commission has been studying the legislation, cases and academic materials and holding preliminary discussions with the courts and legal practitioners. To help it identify issues and possible areas in need of reform, the Commission formed an advisory committee of experts who have been able to provide insights into how the law works in practice.

1.27 These preliminary discussions were only the beginning of the Commission's consultations. The release of a series of consultation papers, including this one, is an opportunity for people who would like to comment on the topics covered by the terms of reference to contribute to the review.

1.28 It is the Commission's usual practice to publish a single consultation paper addressing all of the terms of reference of a review. In this case, because it is examining a range of disparate subjects, it is releasing six short consultation papers, each focusing on different topics:

- wills
- family provision
- intestacy
- executors
- small estates
- payment of debts.

1.29 The papers describe the law, identify issues, and suggest options for reform.

1.30 Submissions in response to the papers are invited by 28 March 2013. They will guide the Commission's deliberations and further consultations, in accordance with the Commission's community engagement principles.

This consultation paper

1.31 The Commission has been asked to review and report on the following matters concerning charges made to the estate by executors:

- Whether a court should have the power to review and vary costs and commission charged by executors.
- Whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission.

1.32 The terms of reference identify possible changes that would increase the scrutiny of executors' activities and introduce additional rules for legal practitioners who act as executors.

1.33 In considering these possible changes, the Commission is mindful of the fact that a deceased person's estate is administered by a personal representative who may be either an executor named in a will or an administrator appointed by the Supreme Court. Executors and administrators have similar responsibilities, except that an executor must prove the will.[21] Both collect the deceased person's assets, pay any debts and taxes, and distribute the remaining assets to the beneficiaries in accordance with the will or intestacy rules.

1.34 As not all personal representatives are executors, and not all executors are legal practitioners, the Commission's recommendations will need to target the particular problems conveyed by the terms of reference and avoid creating arbitrary disparities and unfair consequences. In general terms the Commission will also be guided by the following principles:

- Reforms should promote clear distinctions between professional and executorial work.
- Executorial entitlements to remuneration should be clear and subject to scrutiny.

1.35 This paper describes the role and duties of executors and the rules according to which they may receive commission or charge for associated professional services. Possible reforms, drawing from the terms of reference, are then considered.

21 *Administration and Probate Act 1958* (Vic) s 27.

2. Executors

The role of executors

Appointment

2.1 Executors are chosen by the will-maker and appointed by the will. The will may appoint anyone as executor, including a minor, although a minor has to reach 18 years of age before being able to take on the role.[1] Generally, an executor is likely to be:

- a family member
- a trusted friend
- a solicitor, accountant or other professional adviser, or
- a trustee company.

2.2 It is common for at least two executors to be appointed, in case one of them dies before the will-maker or is unwilling or unable to take on the role. If two or more are appointed, any one of them may exercise all the powers.[2]

2.3 A person who has been named as executor but does not want to take on the role may avoid it by renouncing the right to be granted probate before probate is granted.[3] In addition, a court may discharge or remove an executor who fails to act within a certain period, is unable or refuses to act, or wants to be discharged from the role after probate has been granted.[4] If another executor is not named in the will, the court will appoint an administrator.

1 If the minor is the sole executor of the will, the estate will be administered by the minor's guardian or other person approved by the court until the minor reaches 18 years of age and probate of the will is granted—*Administration and Probate Act 1958* (Vic) s 26.
2 *Administration and Probate Act 1958* (Vic) s 18.
3 Ibid s 16.
4 Ibid ss 15, 34. This may occur before probate is granted if the executor fails to prove or renounce the will within six weeks of the death of the will-maker. It may occur after probate is granted where the executor remains out of Victoria for more than two years; wants to be discharged from the role; or refuses or is unfit to act as executor or is incapable of doing so.

Responsibilities

2.4 The executor's initial duties are to arrange the funeral, secure the deceased person's assets and locate the will.

2.5 They then often need to apply to the Supreme Court for a grant of probate. The grant certifies the validity of the will and the executor's authority to administer the estate. It provides certainty that the executor has the right to collect and deal with the deceased person's assets and distribute the estate to the beneficiaries. For example, without a grant of probate a bank may not agree to give an executor access to the deceased person's account.[5]

2.6 The task of administering the estate includes collecting the deceased person's assets, paying any debts and taxes, and distributing the remaining assets in accordance with the will.

2.7 Although the person's responsibilities as executor end when the estate is ready for distribution to the beneficiaries, there may be ongoing responsibilities as trustee of some of the assets. The person appointed as executor is commonly also appointed as trustee.

2.8 The powers and responsibilities of the trustee depend upon the provisions of the will and can also be subject to the *Trustee Act 1958* (Vic), the *Settled Land Act 1958* (Vic) or the *Property Law Act 1958* (Vic) as well as the *Wills Act 1997* (Vic) and the *Administration and Probate Act 1958* (Vic).

Payment of commission

No automatic entitlement

2.9 Executors are not automatically entitled to charge the estate for their time and effort in meeting their responsibilities. On the contrary, they have a fiduciary duty[6] not to use the position for personal interest or profit.

2.10 This duty arises from the fiduciary relationship between the executor and the beneficiaries. The executor is entrusted with powers that affect the interests of the beneficiaries. The beneficiaries, in turn, are vulnerable to any abuse of the position by the executor. As a fiduciary, the executor must avoid conflicts of interest, where a potential benefit to the executor conflicts with what is best for the beneficiaries.

2.11 The general rule against executors being entitled to receive remuneration reduces the risk that they will take advantage of their position to advance their own interests by charging exorbitant or arbitrary amounts against the estate. Lord Chancellor Talbot explained the rule in 1734 in the leading case *Robinson v Pett*:

> It is an established rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust, or not.[7]

5 Many executors do not seek a grant of probate. Although about 18,000 grants of probate or letters of administration are made annually, more than twice this number of people die in Victoria each year. Where there is no grant of probate or letters of administration, the estate is administered informally. The informal administration of estates is discussed in the consultation paper on small estates.

6 A 'fiduciary' is a person who is under an obligation to act in another's interests to the exclusion of their own interests. A 'fiduciary duty' is the obligation to act in good faith for the benefit of the other person. The duty arises where there is a 'fiduciary relationship'—in other words, where one person exercises power over another person and pledges to act in the best interest of the other person: *Hospital Products International Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 (Mason J).

7 *Robinson v Pett* (1734) 24 ER 1049, 1049.

2.12 Although executors have no automatic entitlement to be remunerated, it has always been open to will-makers to authorise payment, and to the Supreme Court to grant exceptions to the rule.[8]

Exceptions to the rule

2.13 In Victoria today, executors commonly receive remuneration for their efforts in the form of commission. Payment may be authorised in any of the following circumstances:

- The will contains a clause entitling the executor to receive commission.
- All of the beneficiaries, being of full age and capacity, agree that the executor should be paid commission.
- The Supreme Court has authorised the payment of commission.
- The executor is a trustee company, in which case it is authorised by legislation to charge commission.

Authorisation by the will-maker

2.14 In accordance with the principle of testamentary freedom, a will-maker who wishes to do so can include a 'commission clause' in the will to provide for the payment of commission to the executor. For example:

> I authorise my trustees proving this my will to charge and retain from my estate commission of an amount equal to [ ] per cent of the gross capital value of my estate and an amount equal to [ ] per cent of the income received by my trustees [and in the absence of any contrary agreement by my trustees I direct that the commission shall be divided equally amongst my trustees].[9]

2.15 Commission clauses are usually found in wills that nominate as executor an accountant, solicitor or other person with expertise in estate planning and administration because they expect to be paid for their professional services. Legal and financial practitioners often charge a discounted fee to prepare a will in anticipation of receiving commission and payment from the estate for their services after the will-maker's death.

2.16 Commission clauses appear less often in wills that nominate someone who is also a beneficiary, such as a spouse, partner, other relative or friend. However, the will-maker may have determined the size of the beneficiary's gift in contemplation of their executorial duties. Unless the will clearly states otherwise, the gift is unaffected if an executor who is also a beneficiary decides to renounce the role.

2.17 If the commission clause is validly included in the will, the executor is authorised to charge commission in accordance with it—even if the amount is substantial—on the basis that it is what the will-maker wanted. In this case, the beneficiaries are unable to challenge the level of remuneration or subject it to external scrutiny.

8 The Court of Chancery had jurisdiction to allow executors and trustees to be remunerated for their pains and trouble, though it was not the practice to exercise it. This was part of the equitable jurisdiction of the Lord High Chancellor that was expressly given to the Supreme Court in 1852 by *An Act to make provision for the better Administration of Justice in the colony of Victoria* 15 Vict 10 s 14.

9 Alan Box et al, 'The Solicitor-executor and Remuneration Clauses' (2002) 76(8) *Law Institute Journal* 77, 78.

The will-maker's informed consent

2.18 A legal or financial practitioner engaged to prepare a will because of their professional expertise owes a fiduciary duty to act in the will-maker's interests. Including a commission clause that benefits the practitioner may represent a conflict of interest and a potential breach of the fiduciary duty. The breach can be avoided if the clause is included with the will-maker's informed consent.

2.19 Informed consent means not only agreeing to include the clause but knowing the implications of the decision. For example, although the will-maker in the recent case of *Szmulewicz v Recht*[10] had suggested that the will provide for the executors to charge the estate for their efforts, Justice Habersberger found that the commission clause was included without informed consent. The executors were the solicitor who prepared the will and an accountant.

2.20 Justice Habersberger concluded that there had been a breach of fiduciary duty because there was a conflict between the solicitor's duty to the will-maker and his personal interest resulting from the inclusion of the commission clause, and that the solicitor had failed to fully disclose all relevant facts to the will-maker.

> In my opinion, a solicitor putting forward a will for a client to sign, which contains a clause such as the one in this case, must explain to the client all of the pros and cons of the inclusion of the clause, even if it was the client who suggested the clause, so that it is clear that the client has given his or her informed consent to a clause which otherwise would give rise to an objection on the ground of conflict between fiduciary duty and personal interests. The solicitor cannot assume that the client understands all of the ramifications of including the suggested clause, no matter how sophisticated or astute the client may be with respect to financial matters.[11]

2.21 In Victoria, solicitors preparing wills that nominate them as executors and include commission clauses must follow professional rules that require them to inform the will-maker about certain facts before the will is signed.[12] The Commission is unaware of any similar rules for accountants, financial advisers or other professionals when preparing a will from which they stand to benefit, although they have the same fiduciary duty to the will-maker.

Authorisation by the beneficiaries

2.22 If the will does not include a commission clause, the executor may enter into an agreement with the beneficiaries to charge commission. The agreement must be with all of the beneficiaries, all of whom must be of full age and not under a legal disability.

The beneficiaries' informed consent

2.23 An executor breaches their fiduciary duty if they acquire any benefit or gain by reason of holding the position in circumstances where there is a significant possibility of conflict, without securing the informed consent of the beneficiaries (or, as indicated above, of the will-maker).

2.24 For this reason, the Supreme Court scrutinises the circumstances in which any agreement with beneficiaries for an executor to charge commission was made, to ensure that the beneficiaries were fully informed and not treated unfairly or placed under undue pressure.

10 [2011] VSC 368 (10 August 2011).
11 *Szmulewicz v Recht* [2011] VSC 368 (10 August 2011) [44].
12 Law Institute of Victoria Limited, *Professional Conduct and Practice Rules* (at 30 June 2005) ('*Professional Conduct and Practice Rules 2005*'). These rules are discussed later in this paper.

2.25 What the beneficiaries need to know before they can make an informed decision depends on the circumstances. In *Walker v D'Alessandro*,[13] Justice T M Forrest considered the factors that affect how much information the executor should disclose:

> Whilst the extent of disclosure sufficient to procure an informed consent varies from case to case, it is never less than fulsome. Factors that impact on the degree of disclosure required include the relative sophistication of the beneficiaries, the need to explain the desirability of taking independent advice and the real possibility of an actual conflict. It is also relevant to determine what services are required of a fiduciary. Where (for instance) a solicitor offers advice about the wisdom of a transaction he may be obliged to offer fuller disclosure than if he merely is engaged to carry out a conveyance within the transaction.[14]

Authorisation by the Supreme Court

2.26 Obtaining the beneficiaries' agreement is not always possible. They may disagree with the executor or each other, or may not all be of full age and legally competent. The alternative for an executor of a will that does not contain a commission clause is to seek authorisation from the Supreme Court.

2.27 Section 65 of the Administration and Probate Act provides for the Court to allow, out of the estate, commission of no more than five per cent, as is 'just and reasonable', for a personal representative's or trustee's 'pains and trouble'.[15] Applications for commission are heard by an Associate Judge.

2.28 Any executor can claim under this provision. Trustee companies rely on other legislation to charge for commission, as discussed below.

2.29 Beneficiaries, or anyone else with an interest in the estate, can require the Court to alert them if an application for commission is made.[16]

2.30 The procedures for making applications are set out in Supreme Court Rules.[17] An executor making an application must file an account of the administration of the estate, showing all receipts, disbursements, assets, liabilities and details about the distribution of all assets. The application must include details of all affected beneficiaries and the written consent of those who agree to the account.

2.31 The beneficiaries may either consent to the application for commission, without further involvement in the process, or object to the application.

Amount that may be authorised

2.32 Section 65 of the Administration and Probate Act caps the commission payable out of the deceased person's assets at five per cent. If the executor, administrator or trustee is a licensed trust company, the statutory limit is no more than what may be charged under Chapter 5D of the *Corporations Act 2001* (Cth) (discussed below).

2.33 However, the Court's jurisdiction to allow executors to receive commission is neither dependent on nor confined by the legislation. When the Supreme Court was established in the new colony of Victoria, it was given the equitable jurisdiction of the Lord High Chancellor, which included the jurisdiction to allow executors and trustees to be remunerated.[18] The Court retains this inherent jurisdiction.

13 [2010] VSC15 (5 February 2010).
14 Ibid [29].
15 An equivalent provision appears at s 77 of the *Trustee Act 1958* (Vic), which allows the Court or an Associate Judge to permit the trustee of a settlement to receive commission of up to five per cent of trust funds. It refers to circumstances where real property is limited to, or held in trust for, a minor or other person under a will. This provision does not affect the payment of commission to licensed trustee companies, which are regulated by the *Corporations Act 2001* (Cth).
16 *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 10.05.
17 Ibid O 10.
18 *An Act to make provision for the better Administration of Justice in the Colony of Victoria* 15 Vict 10 s 14.

2.34 Section 65 of the Administration and Probate Act does not refer to income commission but the Court may grant it under its inherent jurisdiction. Even if a rate of commission is specified in the will, the Court is not disqualified from deciding whether it is justified in all the circumstances.[19]

2.35 In determining whether to allow commission to be paid, the Associate Judge reviews the work done by the executor, the length of time it took, and the difficulties encountered. The following criteria, identified in *Re the Estate of Stone (deceased); Patterson v Halliday*[20] have provided a useful guide to the exercise of the Court's discretion:[21]

(a) the work and judgment involved in the realisation of assets and earning income,

(b) the extent of administrative activities,

(c) the responsibility generally,

(d) the amount of work done not reflected in financial terms,

(e) how long the estate was administered,

(f) the size of the estate and its capacity to pay,

(g) the work of a non-professional character not undertaken by the applicant and performed by professionals, and

(h) executors' pains and troubles relative to the result.

2.36 Accurate and current information about the amounts of commission permitted by the Court in different circumstances is not available. The commission usually allowed where the estate is not excessively complex and does not require an unreasonable amount of work appears to be between two and three per cent of the capital value of the assets, and about five per cent on the income of the estate. The statutory maximum of five per cent is rarely awarded.[22]

Trustee companies

2.37 Unlike individual executors, trustee companies have a right to charge commission for acting as an executor or administrator of a deceased estate. The amount they charge was once regulated by part IV of the *Trustee Companies Act 1984* (Vic), which capped the rate and provided for the Supreme Court to review the amounts charged.

2.38 Part IV of the Trustee Companies Act was repealed in 2010[23] though it still applies to State Trustees Limited, which is owned by the State of Victoria.[24]

2.39 The Corporations Act now regulates the provision of 'traditional trustee company' services by non-government trustee companies across Australia. Traditional trustee company services include:

- preparing a will, trust document, powers of attorney and agency arrangements
- estate administration including acting as a trustee and managing a trust
- acting as an executor or administrator of a deceased estate
- acting as an agent, attorney or nominee; a manager or administrator of an estate of a person who has lost capacity; a financial guardian for a child or an injury-affected person; or as a receiver or custodian of property.[25]

19 *Re White; Tweedie & Ors v Attorney-General* (2003) 7 VR 219.
20 [2003] VSC 298 (18 August 2003) [27].
21 For example, as recently observed by Gardiner AsJ in *Re the will of June Beryl Buckland* [2010] VSC 649 (4 May 2010) [55].
22 Thomson Reuters, *Lawyers Practice Manual Victoria* (at 1 June 2010) [13.4.902].
23 *Trustee Companies Legislation Amendment Act 2010* (Vic) s 8.
24 *State Trustees (State Owned Company) Act 1994* (Vic) s 20A.
25 *Corporations Act 2001* (Cth) s 601RAC.

2.40 Chapter 5D of the Corporations Act allows trustee companies to be paid commission for traditional trustee company services from both income and capital of an estate. It requires them to publish their fee schedules but sets an upper limit only for charitable trusts.[26]

The difference between commission and professional fees

Commission

2.41 Commission is compensation for the executor's 'pains and trouble'. The pains refer to the responsibility, anxiety and worry generated by the executorial duties. The trouble is the work done in administering the estate.[27] Unlike professional fees, it is not a source of profit.

2.42 The way in which commission is calculated varies, depending on the size and composition of the estate, but in general terms it is based on percentages of:

- the capital, including both money from realised assets and assets that are not realised but are transferred direct to beneficiaries, and
- income received by the estate.

Professional fees

2.43 Depending on the size and composition of the estate, the executor may require professional assistance in assembling and preserving assets for the benefit of the estate and the beneficiaries, ascertaining liabilities, paying debts and income tax to the date of final distribution and keeping necessary records. Professional advice is certain to be required if any of the estate is to be held in trust, a business needs to be wound up or property sold.

2.44 Fees charged by professionals who provide services such as these, in support of the executor's role, are paid out of the estate.

2.45 Professional fees can escalate significantly whenever the validity of a will is contested, or someone who claims that the will-maker had responsibility to provide for them and failed to adequately do so applies under part IV of the Administration and Probate Act for the estate to be redistributed.

2.46 The professional fees that may be paid out of the estate to a legal practitioner for obtaining a grant of probate are prescribed by the *Supreme Court (Administration and Probate) Rules 2004* (Vic). Under rule 9.01, the amount of remuneration is linked to the gross value of the estate. The legal practitioner may also charge the estate 'any fees, charges or expenses reasonably incurred' and for 'special work' but in these cases the amount is not prescribed and could, for example, be charged at an hourly rate.[28]

26 Ibid ss 601TAA, 601TCA–601TDJ. Trustee companies can charge charitable trusts either a management fee or commission. If charging commission, the capital commission cannot exceed 5.5 per cent of the gross value of the trust assets. The annual income commission cannot exceed 6.6 per cent: s 601TDC.

27 *Re Estate of Zsuzanna Gray* [2010] VSC 173 (30 April 2010) [7].

28 *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 9.03.

Remuneration of professionals who are appointed as executors

2.47 A professional person who has been appointed executor cannot charge professional fees unless specifically permitted by the will. The will needs to include a charging clause, which authorises the remuneration of the executor for professional services performed in administering the estate.

2.48 Executors may not charge a professional fee and receive commission for the same work. They must separate their professional services from the tasks they perform as executor. However, in practice, the distinction between executorial and professional services, and the different ways in which the estate is charged, can become blurred.

2.49 The need to distinguish executorial and professional services is particularly acute for legal practitioners who draft a will that appoints them as executor. The importance of making the distinction was reinforced in *Re Will of Mary Irene McClung*,[29] a case in which a solicitor executor who had charged for both executorial and professional services under a charging clause applied for commission under section 65 of the Administration and Probate Act:

> The occasion on which a solicitor receives instructions for the preparation of a will for a client … can place the solicitor on the horns of a dilemma if the solicitor is asked to act as executor under the will. It is not a position which the solicitor should seek. It is reasonable for the solicitor to preface acceptance with a requirement that the will contain a charging clause in relation to any legal services performed for the estate. To request inclusion of a charging clause so wide as to enable the solicitor to charge for all executorial functions is not reasonable unless the solicitor ensures that the will provides that such charges may be made in lieu of any entitlement to commission and the full import of the clause is explained to the client.[30]

Concerns about costs and commission charged by executors

2.50 The Commission is aware of concerns held within the judiciary, the legal profession and the wider community about executors charging excessive amounts for legal services or executorial services, or charging both commission and professional fees for the same services.

2.51 The Legal Services Commissioner has consistently received a high number of complaints relating to succession matters every year since the office was established. They have most commonly concerned the following problems:

- overcharging, for work done, not done or by way of a bill exceeding the quote
- failure to communicate with the client or another solicitor
- negligent service
- delays
- other professional conduct matters.[31]

29 [2006] VSC 209 (9 June 2006).
30 Ibid [34].
31 Legal Services Commissioner, *Summary of the 2010 Succession Law Round Table Convened by the Legal Services Commissioner of Victoria* (22 August 2012) <http://www.lsc.vic.gov.au/forms-and-publications/reports/>.

2.52 In June 2010, the Legal Services Commissioner held a round table conference on succession laws with representatives from the judiciary, the legal profession, consumer advocacy groups and service organisations. It emerged that there was generally a poor understanding among legal practitioners of:

- the costs they can legitimately charge if acting as executor
- whether they can charge commission if they are acting as executor
- the fact that they cannot charge twice for the same work, that is, charging both legal fees and a commission
- the fact that a charging clause in the will does not give them an automatic right to claim commission.[32]

2.53 Problems that are most relevant to the Commission's terms of reference are discussed in the following sections.

Excessive charges

2.54 Of the 919 succession law complaints received by the Legal Services Commissioner over the four year period from 1 January 2006 until 31 December 2009, more than one third concerned a cost dispute with a legal practitioner.[33]

Professional fees

2.55 The Legal Services Commissioner can deal with complaints by beneficiaries about the amount a legal practitioner has charged an estate for providing legal services, where those costs do not exceed $25,000.[34]

2.56 Alternatively, beneficiaries who dispute the professional fees charged by a legal practitioner may apply to the Costs Court at the Supreme Court for an assessment, known as 'taxation'. This is a more expensive course of action and is therefore likely to be followed only if the amount exceeds $25,000.

2.57 If the Costs Court reduces the amount charged by less than 15 per cent, it may order the beneficiaries to pay the costs incurred by the legal practitioner because of the taxation process. If it reduces the amount by more than 15 per cent, the legal practitioner may be ordered to pay the costs of the taxation process.[35] No probate matters have been taxed since the Costs Court was established in 2010.[36]

Commission

2.58 The Legal Services Commissioner's jurisdiction does not extend to complaints about the amount of commission claimed for executorial services, because these are not legal services.

2.59 The Supreme Court Probate Users Committee[37] has been concerned for some time that some executors charge commissions that cannot be justified. The Committee believes the problem is not limited to solicitors but extends to many other professional advisers and is getting worse.[38]

32 Ibid.
33 Ibid.
34 *Legal Profession Act 2004* (Vic) s 4.2.2(2)(b)(ii).
35 Supreme Court of Victoria, *Disputing Your Solicitor's Bill* (16 October 2012) <http://www.supremecourt.vic.gov.au/home/unrepresented+litigants/disputing+your+solicitors+bill>.
36 Information provided by Costs Registrar, Costs Court, 28 May 2012.
37 The Supreme Court Probate Users Committee maintains appropriate lines of communication between the legal profession and those who regularly deal with the Probate Office. In addition, the Committee serves as a platform for discussing proposals to reform probate law and practice.
38 Information provided by Committee members.

Unauthorised charges

2.60 The Legal Services Commissioner has received a number of complaints about legal practitioners charging commission to estates when acting as executor or on behalf of an executor client without the appropriate authority to do so.[39]

Double dipping

2.61 A number of complaints about legal practitioner executors charging both commission and legal fees for the same work have been made to the Legal Services Commissioner, leading in one case to a successful prosecution for misconduct.[40] At the Round Table convened by the Legal Services Commissioner, it was acknowledged that some legal practitioners failed to appreciate that they cannot charge twice for the same work.[41]

2.62 Even where legal practitioners legitimately charge both legal fees and a commission, the practice can appear to beneficiaries to be unethical or unlawful:

> It is extremely common for beneficiaries to view the charging of legal fees and commission as double dipping. A detailed bill describing the nature and level of an executor's commission as well as legal costs provide[s] a level of transparency that might avoid complaints being made.[42]

Lack of transparency for beneficiaries

2.63 Legal practitioners are required by the *Legal Profession Act 2004* (Vic) to disclose their costs to their clients, including—among other things—the basis on which they are calculated and either an estimate of the likely costs or the range of estimated costs.[43] Accordingly, a legal practitioner must disclose details of this type to an executor to whom they provide legal services.

2.64 When the legal practitioner is also the executor, the disclosure requirement is ineffective. There is no equivalent obligation under the legislation for legal practitioner executors to make full costs disclosure to beneficiaries.

2.65 Complaints to the Legal Services Commissioner have revealed a lack of transparency and accountability by legal practitioner executors to the beneficiaries under the will.[44] This is especially of concern when, in the absence of a commission clause in the will, beneficiaries are asked by executors to authorise the payment of commission at a certain percentage in lieu of incurring the costs to the estate, and the delay, of the executor applying to the Supreme Court.

39 Legal Services Commissioner, *Practitioners Warned about Charging Unauthorised Fees when Administering Estates* (24 July 2011) <http://www.lsc.vic.gov.au/practitioners-warned-about-charging-unauthorised-fees-when-administering-estates>.
40 *Legal Services Commissioner v Hession (Legal Practice)* [2010] VCAT 1328 (11 August 2010).
41 Legal Services Commissioner, above n 31.
42 Ibid.
43 *Legal Profession Act 2004* (Vic) s 3.4.9.
44 Legal Services Commissioner, above n 31.

Non-compliance with professional rules

2.66 There is a potential conflict of interest and duty whenever legal practitioners are asked to draft a will appointing themselves as executors and including a commission clause. However, 'the evil in it disappears if the [will-maker] is fully informed as to the effect of the proposed clause and consents to it'.[45]

2.67 Rule 10.1 of the *Professional Conduct and Practice Rules 2005*, with which legal practitioners are required to comply, addresses the potential conflict of interest by directing the practitioner to ensure that the will-maker is aware of the implications of and alternatives to making a will that includes a commission clause:

> 10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner or an associate of the practitioner an executor must inform the client in writing before the client signs the will—
>
> 10.1.1 of any entitlement of the practitioner, or the practitioner's firm or associate, to claim commission;
>
> 10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs in relation to the administration of the estate, and;
>
> 10.1.3 if the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.[46]

2.68 Failure to comply with the Professional Conduct and Practice Rules may constitute unsatisfactory professional conduct or professional misconduct.[47] Complaints about the professional conduct of legal practitioners may be made to the Legal Services Commissioner, who can take disciplinary action if the allegations are proved.

2.69 The Probate Users Committee has expressed concern about the significant numbers of solicitors who continue to prepare wills that appoint them as executors, and authorise them to charge commission as well as charging fees for their professional services, without complying with the directions contained in the Professional Conduct and Practice Rules.[48]

2.70 On 14 May 2010, the Registrar of Probates, responding to concern about the lack of awareness of the professional rules, issued a notice to practitioners to remind them of the need to comply with rule 10.

45 *Re Shannon* [1977] 1 NSWLR 210, 217.
46 *Professional Conduct and Practice Rules 2005*.
47 *Legal Profession Act 2004* (Vic) s 3.2.17(2).
48 Information provided by Committee members.

Court review of costs and commission charged by executors

2.71 The terms of reference require the Commission to consider whether a court should have the power to review and vary the fees and commission charged by executors.

2.72 Introducing court review would not only open the practices of executors to scrutiny. Arguably, it would also invite reappraisal of the will-maker's intention to permit the executor to be paid commission and charge for professional services in accordance with commission and charging clauses in the will. The court would have greater latitude to examine the circumstances in which the will was made, particularly whether the will-maker understood the meaning of such clauses and the consequences of including them. In this way, court review could drive general improvements to the level of skill and attention that legal practitioners give to the task of preparing wills for their clients.

Options for reform

2.73 There are a number of possible approaches to empowering the court to review the amounts charged by executors. Suggestions made by the National Committee for Uniform Succession Laws and legal practitioners in Victoria, and the review provision that applies to trustee companies under the Corporations Act, are outlined in the following sections.

2.74 The Supreme Court has already exercised a review power of this type. Section 21(3) of the Trustee Companies Act gave the Court the power to review commission charged by trustee companies. It provided that:

> Notwithstanding [the provisions that authorise trustee companies to charge commission at up to a specified maximum rate] if, in any case, on application by or on behalf of any person interested in the estate made upon summons served on the trustee company, the Supreme Court is of the opinion that the commission is excessive, the Supreme Court may review and reduce the rate of commission.

2.75 Section 21(3) and many other provisions of the Trustee Companies Act were repealed when trustee companies began to be regulated by the Commonwealth Corporations Act in 2010. However, the Trustee Act as in force immediately before the 2010 amendments continues to apply to State Trustees.[49]

National Committee for Uniform Succession Laws

2.76 The National Committee for Uniform Succession Laws has recommended that all jurisdictions adopt a review provision based on New South Wales legislation.

2.77 The New South Wales Supreme Court has broad powers to review and reduce the commission charged, or proposed to be charged, by executors and other amounts charged to the estate. The review can be initiated either by a person interested in the estate or the Court itself. Section 86A of the *Probate and Administration Act 1898 (*NSW) provides as follows:

> **86A Reduction of excessive commission etc**
>
> Where the Court is of the opinion that a commission or amount charged or proposed to be charged in respect of any estate, or any part of any such commission or amount, is excessive, the Court may, of its own motion, or on the motion of any person interested in the estate, review the commission, amount or part and may, on that review, notwithstanding any provision contained in a will authorising the charging of the commission, amount or part, reduce that commission, amount or part.

49 *State Trustees (State Owned Company) Act 1994* (Vic) s 20A.

2.78 The provision recommended by the National Committee would apply to trustees as well as to executors and administrators (because the definition of 'personal representative' in the provision includes trustee).[50] In view of the subsequent transfer of regulatory responsibility for trustee companies to the Commonwealth, the only trustee company covered in Victoria would be State Trustees. The provision also makes clear that the court's power to review could be exercised despite any commission clause or charging clause in the will, or any statutory provision authorising the amount to be charged.

2.79 The recommended provision appears as clause 432 of a model Administration and Estates Bill prepared by the National Committee:

> **432 Supreme Court may reduce amounts that are excessive**
>
> (1) This section applies if the Supreme Court considers that either of the following amounts is excessive—
>
> (a) an amount payable to a personal representative for the personal representative's services;
>
> (b) an amount charged or proposed to be charged by the personal representative in relation to the deceased person's estate.
>
> (2) The Supreme Court may, on its own initiative or on the application of a person interested in the estate, review the amount and may, on the review, reduce the amount.
>
> (3) Subsection (2) applies despite—
>
> (a) any provision of a will authorising the charging of the amount; or
>
> (b) any provision of an Act [or subordinate legislation] authorising the charging of the amount.
>
> (4) In this section—
>
> *amount* includes a part of the amount.[51]

Legal practitioners in Victoria

2.80 Legal practitioners with expertise in succession laws have proposed amending the Administration and Probate Act to give the Supreme Court the power to review and reduce amounts charged by an executor or administrator, on the application of an interested person or any creditor. There is general agreement that the power could be given by inserting a new section 65A into the Act.

2.81 Two distinct proposals for a new section 65A have been developed: one considered by the Probate Users Committee, and another put forward by the Law Institute of Victoria.

50 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 4,* Queensland Law Reform Commission Report No 65 (2009) 81 (Administration of Estates Bill cl 430).

51 Ibid 82.

Proposal put to the Probate Users Committee

2.82 The Probate Users Committee believes that the Administration and Probate Act should be amended to give the Supreme Court the power to review and reduce amounts charged by an executor or administrator, on the application of an interested person or any creditor.

2.83 The Committee considered the following new section 65A:

> **65A Reduction of excessive commission or disbursements**
>
> The Court may upon application made by any person interested under the will or in the estate, or any creditor, review
>
> (a) the commission charged or retained by any executor or administrator or payable to any executor or administrator pursuant to the terms of the will
>
> (b) any costs expenses or disbursements for which any executor or administrator has been reimbursed or claims to be reimbursed out of the estate and may reduce such commission costs expenses or disbursements to the extent that they are excessive and make such orders as may be appropriate for the repayment of such commission costs expenses or disbursements.[52]

2.84 A majority of the Committee members agreed with this proposal but it has not been formally adopted.

2.85 Unlike the model provision proposed by the National Committee for Uniform Succession Laws and section 86A of the New South Wales Act, this new section 65A of the Administration and Probate Act would not allow for the court to initiate a review. Nor would it apply to trustees. Further, while the National Committee's model provision would allow the court to review any amount charged by an executor, it is not clear whether the provision considered by the Probate Users Committee extends to professional fees charged in accordance with a charging clause under a will.

Proposal by the Law Institute of Victoria

2.86 The Law Institute of Victoria has proposed inserting a new section 65A into the Administration and Probate Act, but recommends a different approach.[53]

2.87 Its proposed amendment differs from the one considered by the Probate Users Committee in the following ways:

- The Court's power to review is restricted only to commission that the executor or administrator has charged or retained.
- The Court's power is ousted if the will-maker has obtained independent legal advice about the executor's entitlement to commission or, if the executor is a legal practitioner, the practitioner has complied with rule 10 of the Professional Conduct and Practice Rules.
- An application for review must be made within three months of the beneficiary being notified of the commission charged.
- The applicant could be required to bear the costs of the application if it was made frivolously, vexatiously or with no reasonable prospect of success.

52 Information provided by Committee members.
53 Law Institute of Victoria, *Uniform Succession Laws—Administration of Estates of Deceased Persons, Submission #3* (7 August 2007) <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Succession-Law/Submissions.aspx.au/>.

2.88 This approach reinforces compliance with the Professional Conduct and Practice Rules, seeks to reduce uncertainty about the final distribution of the estate and discourages unmeritorious applications. It allows the Court less power than permitted by the amendments proposed by the National Committee for Uniform Succession Laws and considered by the Probate Users Committee.

2.89 The amendment recommended by the Law Institute of Victoria is as follows:

> **65A Variation of commission**
>
> (1) Where application is made by any person interested under a will or in an estate, the Court may review the commission charged or retained by any executor or administrator or payable to any executor or administrator pursuant to the terms of the will and may vary such commission and make such orders as may be appropriate for the payment or repayment of such commission.
>
> (2) The court shall not make any order varying commission if the [will-maker] has obtained independent legal advice in relation to the executor's entitlement to commission under the will prior to its execution or, where the executor is a legal practitioner, that practitioner has complied with Rule 10 of the *Professional Conduct and Practice (Amendment) Rules 2005*.
>
> (3) Application under this section cannot be made after three months from the date of notification of commission to the beneficiary by the executor.
>
> (4) If the Court is satisfied that an application for an order under this section has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant.[54]

Corporations Act review provisions

2.90 The amounts charged by private sector trustee companies when administering estates can be reviewed under section 601TEA of the Corporations Act. This legislation is more prescriptive than the models that have been proposed for legal practitioners.

> **601TEA Power of the Court with respect to excessive fees**
>
> (1) If the Court is of the opinion that fees charged by a licensed trustee company in respect of any estate are excessive, the Court may review the fees and may, on the review, reduce the fees.
>
> (2) …
>
> (3) In considering whether fees are excessive, the Court may consider any or all of the following matters:
>
> (a) the extent to which the work performed by the trustee company was reasonably necessary;
>
> (b) the extent to which the work likely to be performed by the trustee company is likely to be reasonably necessary;
>
> (c) the period during which the work was, or is likely to be, performed by the trustee company;
>
> (d) the quality of the work performed, or likely to be performed, by the trustee company;
>
> (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the trustee company;
>
> (f) the extent (if any) to which the trustee company was, or is likely to be, required to deal with extraordinary issues;

54 Ibid.

(g) the extent (if any) to which the trustee company was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;

(h) the value and nature of any property dealt with, or likely to be dealt with, by the trustee company;

(i) if the fees are ascertained, in whole or in part, on a time basis—the time properly taken, or likely to be properly taken, by the trustee company in performing the work;

(j) any other relevant matters.

(4) The Court may exercise its powers under subsection (1) either on its own motion or on the application by or on behalf of a person with a proper interest in the estate.

(5) If the fees are reduced by more than 10%, the trustee company must, unless the Court in special circumstances otherwise orders, pay the costs of the review.

(6) Subject to subsection (5), all questions of costs of the review are in the discretion of the Court.

2.91 Significantly, a trustee company whose fees are reduced by more than 10 per cent must usually bear the costs of the review. The other models do not specify a threshold amount.

Question

E1 Should the Supreme Court have the power to review amounts charged by executors? If so—

(a) should the scope of the power be limited to commission, or should it extend to disbursements, fees and any other amounts?

(b) should the Court be able to conduct a review on its own initiative or should it be able to do so only on the application of a person interested in the estate?

(c) should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the *Professional Conduct and Practice Rules 2005*?

(d) should there be a time limit within which an application for review should be made?

(e) should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success?

(f) should the Court be required in normal circumstances to order the executor to pay the costs of the application if the amount is reduced by more than 10 per cent?

(g) should the same provisions apply to review of amounts charged by administrators, individual trustees and State Trustees?

Special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate

2.92 Legal practitioner executors have knowledge and skills that set them apart from non-professional executors and even other professional executors. They are familiar and comfortable with the laws, legal procedures and court processes associated with administering an estate. They may have drafted the will under which they were appointed, giving them insights into the will-maker's intentions and information about their assets. Executors commonly need legal assistance at some stage, but when legal practitioner executors can provide legal services that other executors need to engage someone else to provide, the legal costs charged to the estate can be reduced.

2.93 However, although there is an inherent conflict of interest whenever a professional is appointed executor, because they have a legitimate expectation to be paid for the role, the risk is particularly acute when that person is a legal practitioner who provides legal as well as executorial services.

2.94 Concerns about excessive and unauthorised charges, real or apparent double dipping and failures to comply with professional rules have led to suggestions that legal practitioner executors should be subject to additional rules. In the following sections, a number of possible special rules for legal practitioners are outlined. The Commission has not formed a view as to which, if any, to recommend and seeks comments on them.

Options for reform

2.95 The possible rules discussed below are directed to preventing or managing the inherent conflict of interest that occurs when a legal practitioner provides both executorial and legal services to an estate. They include rules which would:

- prohibit legal practitioner executors from also providing legal services to the estate
- introduce special witnessing requirements
- strengthen the requirement to obtain the will-maker's informed consent
- require cost disclosure to beneficiaries
- strengthen the requirement to obtain beneficiaries' consent to charge commission
- allow or require legal practitioner executors to charge fees for executorial services rather than commission.

Prohibit legal practitioner executors from providing legal services to the estate

2.96 One possible rule to prevent a conflict of interest would be to prohibit legal practitioner executors from providing legal services to the estates they are administering. The executor would instead be required to instruct another, unrelated, law practice to act for the estate. The other law practice would provide legal services and hold the estate money in its trust account.

2.97 This proposal addresses the problem of double dipping as it would separate payments for executorial services from charges for legal services. The disadvantage is that the estate might be charged more for professional fees than would otherwise be the case, or the process of administering the estate may be more drawn out, because there are more people involved. For example, a legal practitioner who is instructed by an executor will charge for receiving those instructions, and for keeping the executor and beneficiaries informed about progress made.

Question

E2 Should legal practitioner executors be required to instruct another law practice to act in relation to an estate?

Introduce special witnessing requirements

2.98 It has been suggested that a will that appoints a legal practitioner as executor should be witnessed by someone who is independent and external to the legal practice. This could provide some measure of protection against unfair practices if the witness were able to read the will, understand the consequences of any charging and commission clauses, and assess whether or not they were reasonable. However, a witness without the opportunity or ability to assess the provisions of the will is unlikely to be able to warn the will-maker of any possible impropriety.

Question

E3 How could existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor be improved? Should a will that appoints a legal practitioner executor have to be witnessed by an independent witness?

Strengthen the requirement to obtain the will-maker's informed consent

2.99 In response to the reported lack of awareness or regard among legal practitioners about their obligations under rule 10 of the Professional Conduct and Practice Rules to inform will-makers about commission and charging clauses, the rule could be incorporated into the Wills Act.

2.100 This would reinforce the need to ensure that the will-maker understands the implications of the relevant clauses in their will. Giving the rule statutory status would also open an opportunity to extend the reach of the obligation to all professionals who act as executors, and to administrators as well.

2.101 A possible disadvantage of incorporating the rule into the Wills Act is the risk that enforcement could be taken beyond the reach of beneficiaries of small estates. Currently, a complaint about a practitioner's failure to comply with the rule can be made to the Legal Services Commissioner at relatively little cost, particularly when compared to the likely cost of enforcing it in the Supreme Court. If the rule were elevated to a statutory duty, the forum for enforcement could also be elevated to a court. However, so long as the statutory rule was confined to legal practitioners, it would be possible for the legislation establishing the rule to confer jurisdiction on the Legal Services Commissioner to enforce it.

2.102 Another consideration is that a legal practitioner who complies with the rule as it currently stands will not necessarily thereby ensure that the will-maker gives informed consent. The list of facts provided to the will-maker under the rule may be narrower than the circumstances require.

2.103 For example, the list is certainly narrower than the range of information that Justice Habersberger considered the will-maker should have been given in *Szmulewicz*.[55] In that case, the will-maker should have been informed that:[56]

- the executors had no automatic right to receive commission, so the will-maker did not have to include the clause
- in the absence of the clause, the executors could still apply under section 65 of the Administration and Probate Act and be allowed commission not exceeding 5 per cent for their 'pains and trouble as is just and reasonable'
- including the commission clause entitled the executors to receive 3.5 per cent of capital and 5 per cent of income irrespective of the amount of work performed by them in the administration of the estate and without any independent scrutiny, such as by the Supreme Court under section 65
- including the commission clause meant that the beneficiaries would be unable to challenge the level of remuneration or subject it to independent scrutiny, such as by the Supreme Court under section 65
- the rates included in the clause were those decided by the solicitor and accountant who were nominated as executors; they were not fixed by law and thus could ultimately be reduced by the will-maker.

Question

E4 Should rule 10 of the *Professional Conduct and Practice Rules 2005* be incorporated into the *Wills Act 1997* (Vic)?

Require costs disclosure to beneficiaries

2.104 As noted above, legal practitioner executors are not required to disclose to beneficiaries the basis on which their costs are calculated. Nor do they need to provide an estimate of the total amount they will charge. The Legal Services Commissioner has observed that full costs disclosure to beneficiaries would prevent complaints.[57]

2.105 It has been suggested that legal practitioner executors should be required to disclose to beneficiaries the basis of charging legal costs and commission, much as they are currently required to do for their clients.

Question

E5 Should legal practitioner executors be required to disclose to beneficiaries the basis on which they charge the estate for their executorial and legal work? If so, should the requirement be set out in legislation or in professional rules?

55 [2011] VSC 368 (10 August 2011).
56 *Szmulewicz v Recht* [2011] VSC 368 (10 August 2011) [43].
57 Legal Services Commissioner, above n 31.

Strengthen the requirement to obtain beneficiaries' consent to charge commission

2.106 When the will does not include a commission clause, it is open to the executor to seek the consent of the beneficiaries to charge commission. It appears to be common practice for executors to tell beneficiaries that authorising the payment of commission at a certain percentage would save the greater cost to the estate of requiring the executor to apply to the Supreme Court. They are also told that authorising the commission will enable the estate to be distributed sooner.

2.107 However, beneficiaries should not be pressured or misled into agreeing to the payment of commission. In *Walker v D'Alessandro*,[58] Justice TM Forrest set out the 'bare minimum' that beneficiaries should be told when being asked to consent:

> (a) The work that he has done to justify the commission. This should be done with particularity.
>
> (b) If he is invoicing the estate for legal fees and disbursements he ought identify with particularity what constitutes the basis for same. Only then can a beneficiary accurately measure the 'pains and troubles' occasioned to the executor beyond the subject matter of those legal fees and disbursements.
>
> (c) That the beneficiaries are entitled to have this Court assess his commission pursuant to s 65 of the [Administration and Probate] Act. This needs to be explained fully.
>
> (d) That it is desirable that the beneficiaries seek independent legal advice as to their position on this issue of consent. In many cases where the beneficiaries are unsophisticated people and the issues are complex he ought insist upon them receiving independent legal advice and ought not enter into any commission agreement until they have.[59]

2.108 It has been suggested that the common law, as expressed in *Walker v D'Alessandro* and other cases, should be set out in legislation. An amendment along these lines could apply to all executors, and not only those who also provide legal services to the estate.

Question

E6 Should the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission be set out in legislation?

58 [2010] VSC 15 (5 February 2010).
59 *Walker v D'Alessandro* [2010] VSC 15 (5 February 2010) [30].

Allow or require legal practitioner executors to charge fees for executorial services instead of claiming commission

2.109 Another possible rule, which could apply to legal practitioner executors whether or not they also carry out legal work for the estate, would be to provide an alternative to the payment of commission. This may circumvent confusion about the distinction between which of the legal practitioner's services are executorial and may attract commission, and which are legal and for which a professional fee may be charged.

2.110 One way of achieving this would be to adopt the approach recommended by the National Committee for Uniform Succession Laws, based on legislation in New South Wales.[60]

2.111 The National Committee recommended that an executor (or administrator or trustee) who renounces their right to commission over any 12 month period should be able to be indemnified by the estate for the amount that a legal practitioner would be entitled to charge for undertaking executorial duties of a non-professional nature. The amount would be calculated in accordance with the relevant professional scale for non-professional work, and could not exceed the amount which the executor would have been entitled to receive as commission.

2.112 The model provision proposed by the National Committee is as follows:

> **433 Limited right to indemnity for costs in a particular case**
>
> (1) This section applies if a personal representative renounces the personal representative's right to an amount for the personal representative's services for a particular 12 month period.
>
> (2) The personal representative is entitled to indemnity out of the deceased person's estate for the charges and disbursements of an Australian legal practitioner engaged by the personal representative to undertake non-professional work in the 12 month period.
>
> (3) However, the entitlement under subsection (2) cannot be more than the lesser of the following amounts—
>
> (a) the amount to which the personal representative would have been entitled if the personal representative had undertaken the work personally and not renounced the personal representative's right to an amount for the services;
>
> (b) [the amount of the legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale].[61]

2.113 A stronger proposal suggested to the Commission is that legal practitioner executors should not have the right to a set percentage of the estate as commission. They would instead only be able to charge an hourly rate for executorial work, which may be lower than the rate for legal work.

Question

E7 Should legal practitioner executors be entitled to charge an hourly rate for executorial services, rather than being able to claim a percentage of the estate or its income, for commission? Should Victoria adopt the model provision proposed by the National Committee for Uniform Succession Laws?

60 *Probate and Administration Act 1898* (NSW) s 86(3).
61 National Committee for Uniform Succession Laws, above n 50, 82 (Administration of Estates Bill cl 433).

Questions

Court review of costs and commission charged by executors

E1 Should the Supreme Court have the power to review amounts charged by executors? If so—

(a) should the scope of the power be limited to commission, or should it extend to disbursements, fees and any other amounts?

(b) should the Court be able to conduct a review on its own initiative or should it be able to do so only on the application of a person interested in the estate?

(c) should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the *Professional Conduct and Practice Rules 2005*?

(d) should there be a time limit within which an application for review should be made?

(e) should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success?

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E6 Should the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission be set out in legislation?

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Victorian
Law Reform
Commission

Succession Laws
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