



Victorian  
Law Reform  
Commission

# Succession Laws

CONSULTATION PAPER | **SMALL ESTATES**





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## Published by the Victorian Law Reform Commission

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# Call for submissions

## 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](http://www.lawreform.vic.gov.au)

Email: [law.reform@lawreform.vic.gov.au](mailto: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.

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## 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](http://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](http://www.lawreform.vic.gov.au).

**Submission deadline 28 March 2013**

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## 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 deemed 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



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## **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.

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# Glossary

<b>Ademption</b>	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.
<b>Administrator</b>	A person appointed by the court under letters of administration to administer a deceased estate which has no <b>executor</b> . 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.
<b>Bona vacantia</b>	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 <i>bona vacantia</i> . See also <b>intestacy</b> .
<b>Collateral relatives</b>	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 <b>lineal relatives</b> .
<b>Disbursement</b>	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.
<b>Executor</b>	The person appointed by the will to administer the estate.
<b>Grant of letters of administration</b>	A grant of letters of administration is made where there is no will, or where there is a will but no <b>executor</b> is available for some reason. It confers upon a court-appointed <b>administrator</b> the authority to administer the estate.
<b>Grant of probate</b>	A grant of probate certifies that the will is the last and valid will of the deceased person and confirms the authority of the <b>executor</b> named in the will to administer the estate.

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<b>Grant of representation</b>	A grant, by the Supreme Court, of probate or of letters of administration.
<b>Hotchpot</b>	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 <b>intestacy</b> .
<b>Informal administration</b>	Administration of estate assets without a <b>grant of representation</b> .
<b>Inter vivos</b>	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.
<b>Intestacy</b>	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.
<b>Issue</b>	A person's children, grandchildren, great-grandchildren and other direct descendants down this line.
<b>Joint tenancy</b>	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 <b>survivorship</b> and <b>tenancy in common</b> .
<b>Lineal relatives</b>	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 <b>collateral relatives</b> .
<b>Marshalling</b>	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.
<b>Next of kin</b>	A person's closest blood relatives. A deceased person's estate is distributed to their surviving next of kin on <b>intestacy</b> .
<b>Party and party costs</b>	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 <b>solicitor and client costs</b> .

<b>Real property</b>	Land and interests in land, otherwise known as real estate.
<b>Registrar of Probates</b>	An officer of the Supreme Court with both judicial and administrative functions. The Registrar of Probates is appointed under the <i>Supreme Court Act 1986</i> (Vic) and may exercise the power of the Court in making grants of representation.
<b>Residuary estate</b>	The remainder of the estate after debts and liabilities are paid, and specific gifts and legacies are distributed.
<b>Solicitor and client costs</b>	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 <b>party and party costs</b> .
<b>Statutory will</b>	A will authorised by the court for a person who is alive but lacks the <b>testamentary capacity</b> required to make a valid will for themselves.
<b>Survivorship</b>	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 <b>joint tenancy</b> .
<b>Tenancy in common</b>	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 <b>joint tenancy</b> .
<b>Testamentary capacity</b>	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).<sup>1</sup>
- 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).

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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).<sup>4</sup>
- 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.<sup>5</sup>
  - 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.<sup>6</sup>

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).<sup>7</sup>
- 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.<sup>8</sup> Although consolidated a number of times,<sup>9</sup> 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).<sup>10</sup>
- 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.<sup>11</sup> 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’.<sup>12</sup> 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.<sup>13</sup> The Parliamentary Law Reform Committee presented its report in 1994, and its recommendations included a proposed Wills Act.<sup>14</sup>
- 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.<sup>15</sup>
- 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.<sup>16</sup> The Commission is examining only three specific issues in relation to the law of wills.

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.<sup>17</sup>
- 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.<sup>18</sup> Between 1912 and 1929, all Australian states and territories enacted family provision laws,<sup>19</sup> followed by England and Wales in 1938.<sup>20</sup>
- 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 Family 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 This paper seeks to describe the existing processes that affect small estates. It provides an overview of the current law in Victoria and reviews potential areas of reform in light of the recommendations of the National Committee for Uniform Succession Laws.<sup>21</sup>
- 1.32 The Administration and Probate Act is the primary legislation dealing with small estates, and is the primary focus of this paper. However, other legislation which affects them is also touched on, including provisions of the *Trustee Companies Act 1984* (Vic) and the *State Trustees (State Owned Company) Act 1994* (Vic).
- 1.33 Possible options for reform are suggested. Both the options, and our views about them, will evolve as we continue to explore the issues.
- 1.34 The policy framework within which this paper has been prepared is built on the terms of reference and gives priority to:
- supporting the ability of laypersons to administer small estates
  - promoting ease of administration while protecting the interests that beneficiaries, creditors and others may have in small estates
  - identifying statutory reforms that work hand in hand with non-legislative measures to improve efficiency and reduce costs.

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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: Volumes 1–4*, Queensland Law Reform Commission Report No 65 (2009).

## 2. Small estates

### Introduction

- 2.1 Executors are appointed by will, and administrators by the court, but both receive official recognition of their authority to deal with the estate's assets through a grant of representation.
- 2.2 A grant of representation affords the personal representative a level of protection from liability for their dealings with the estate. The grant also allows those dealing with a personal representative some certainty about their legal authority to receive and dispose of assets.
- 2.3 However, the process of getting a grant can be complex, and will cost money and take time. Any cost or difficulty may be disproportionate in an estate with few assets.
- 2.4 To reduce the complexity of procedures, and therefore the time and legal costs involved, there are mechanisms that provide simpler and ostensibly cheaper methods of obtaining a grant for smaller estates.
- 2.5 As well as mechanisms for obtaining a grant of representation, there are also some processes that aim to facilitate simple and direct transfer of assets in certain cases.
- 2.6 The National Committee for Uniform Succession Laws<sup>1</sup> released the final part of its four-volume report on the administration of estates of deceased persons in 2009. The first three volumes of the report review the substantive issues, while the fourth provides a summary of the National Committee's recommendations, as well as a proposed model bill giving effect to the recommendations—the Administration of Estates Bill 2009 (Qld).<sup>2</sup>
- 2.7 The National Committee identified four guiding principles in developing their recommendations concerning the administration of deceased estates.<sup>3</sup> Two of these are of particular relevance to smaller estates, being the focus on simplification of processes, and on the recognition of the extent of informal administration.

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1 The National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General. See [1.4].

2 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).

3 *Ibid* 7.

## Simplified mechanisms for small estates

- 2.8 The simplified mechanisms discussed below can be divided into those that assist in obtaining a grant of representation, and those that assist in administering an estate without a grant.
- 2.9 Depending on the size of the estate, each of these routes is available in obtaining a grant:
- An executor or potential legal representative files an application for a grant of representation<sup>4</sup> at the Supreme Court Probate Registry (grant of representation).
  - An executor or potential legal representative enlists the services of the Supreme Court Probate Registry's Small Estates Officer to assist in preparing an application for a grant of representation (assisted grant).
  - A trustee company (including State Trustees)<sup>5</sup> as, or on behalf of, the legal representative, files an election to administer the estate (election).
  - State Trustees as, or on behalf of, the legal representative, advertises its intention to administer the estate, thereby obtaining a 'deemed' grant of representation (deemed grant).
- 2.10 Having obtained a grant under one of the above mechanisms, the legal personal representative may go on to administer the estate. Alternatively, informal administration—that is, administration without any form of grant—is increasingly available to and utilised by those administering smaller estates. Informal mechanisms can be used for the whole or part of the estate, depending on the assets involved.
- 2.11 To assist those administering an estate without a grant, certain statutory protections aim to afford some certainty to those administering an estate informally, and to those who deal with informal administrators.
- 2.12 Each of these mechanisms will be discussed in turn below.

## Definition of a 'small estate'

- 2.13 Part II of the *Administration and Probate Act 1958* (Vic) defines a small estate as an estate in which the deceased person leaves property:
- not exceeding \$25,000, or
  - not exceeding \$50,000, if the only people entitled to share in the distribution of property are the child(ren), partner and/or sole surviving parent of the deceased person.<sup>6</sup>

The most recent amendment to these figures was in 1995.<sup>7</sup>

- 2.14 The dual thresholds of \$25,000 and \$50,000 determine when the Registrar of Probates can assist an applicant to obtain a grant of representation, and whether State Trustees can take advantage of the deemed grant process.<sup>8</sup>

4 A number of different types of grant may fall into this category, including a grant of probate, of letters of administration, of letters of administration with the will annexed, and a number of other grants that take into account special circumstances surrounding the estate's administration.

5 State Trustees Limited, a company owned by the State of Victoria and operating under the *State Trustees (State Owned Company) Act 1994* (Vic).

6 *Administration and Probate Act 1958* (Vic) s 3 (definition of 'small estate'), s 71(1).

7 *Administration and Probate (Amendment) Act 1994* (Vic) s 12.

8 See discussion of the preconditions for State Trustees to use the deemed grants process below at [2.87]–[2.93]. The monetary limit for elections to administer is \$50,000: *Trustee Companies Act 1984* (Vic) s 11A(4).

## Issues

### Determining which estates may use these provisions

- 2.15 Access or otherwise to these processes is quite significant, as it may determine whether an estate is administered formally or informally, which in turn determines whether there is a record of the grant and/or the administration.
- 2.16 The other Australian jurisdictions have a variety of threshold values determining what is meant by a small estate, as shown in the table below. The table shows when a trustee company may elect to administer, when a deemed grant may be obtained (by advertisement of intention to administer) and what the maximum size of the estate must be to initially make use of the provisions. In some jurisdictions, there is also a second threshold, slightly higher than the first—determined either as a static figure, or as a percentage of the first value—which allows for a change in the initially estimated value of the estate. This is also the figure above which a full grant must generally be applied for, and is termed ‘actual value’ in the table.
- 2.17 As the systems for small estates differ between jurisdictions, the impact of different value thresholds cannot be directly compared. However, the categories have been simplified in order to provide as close as possible a comparison with the value thresholds in the Victorian scheme.

**Table 1—Comparison of values for small estates mechanisms**

	Registrar assistance	Elections to administer		Deemed grants	
	Estimated value	Estimated value	Actual value	Estimated value	Actual value
<b>VIC</b>	\$25,000 or \$50,000	\$50,000	\$60,000	\$25,000 or \$50,000	
<b>ACT</b>		\$150,000	\$150,000	\$30,000	
<b>NSW</b>	\$15,000	\$100,000	\$120,000	\$20,000	
<b>NT</b>		\$85,000	\$85,000	\$20,000	\$85,000
<b>QLD<sup>9</sup></b>		\$100,000 or \$150,000	\$120,000 or \$180,000	\$75,000	
<b>TAS</b>		\$60,000	\$65,000	\$20,000	\$25,000
<b>WA</b>	\$10,000	\$50,000	\$50,000		

- 2.18 As there is little utility in comparing the threshold figures in isolation, the value for each of the mechanisms is discussed where relevant below. However, there are general issues relating to the determination, expression and location of these values that are logical to combine here.

<sup>9</sup> In Queensland, the threshold figures for elections to administer differ between the Public Trustee and other trustee companies. For the Public Trustee, the initial limit is \$150,000, with \$180,000 being the amount after which a grant must be applied for. The equivalent limits for private trustee companies are \$100,000 and \$120,000: *Trustee Companies Act 1968* (Qld) ss 12–13; *Public Trustee Act 1978* (Qld) ss 30, 33.

## Dual threshold

- 2.19 The Victorian 'dual threshold' allows for different limits if the only beneficiaries are the children, partner, children *and* partner, or sole parent of the deceased person. It effectively means that the Victorian threshold is \$25,000. Victoria is the only jurisdiction with such a system.
- 2.20 The rationale behind this dual threshold may be that those estates that are being distributed to close family members of the deceased person are likely to be less complex. Access to the small estates provisions for such estates would be significant, as any costs to the estate would directly reduce the eventual entitlement of family member beneficiaries.

## Location of figures

- 2.21 The relevant figures determining size of a small estate in Victoria are contained in the text of the legislation. A number of other jurisdictions stipulate their figures by regulation.
- 2.22 In their submissions to the National Committee for Uniform Succession Laws, neither the Law Institute of Victoria nor State Trustees were in favour of prescription by regulation. The Law Institute reasoned that the figures would be more accessible in legislation, and did not think that they would change regularly enough to warrant taking them out of the head Act.
- 2.23 Those submissions in favour of setting out the figure in regulations, including that of the Victorian Bar, generally cited ease of revision and amendment as justification for this view. Further, statutory rules (including regulations) are subject to an automatic 'sunset clause', revoking the rules ten years after their enactment,<sup>10</sup> which would promote more frequent updates to the figures.

## Questions

- SE1** Should the current figures in the *Administration and Probate Act 1958 (Vic)* determining what is a small estate be raised? If so, what should they be raised to, and how should they be determined?
- SE2** In determining what is a 'small estate':
- (a) should the dual threshold of values, based on the identity of the beneficiaries, be retained?
  - (b) should the value be set by the *Administration and Probate Act 1958 (Vic)*, or be moved to subordinate legislation?
- SE3** Is there a better way to define which estates should have access to the simpler processes relating to small estates? For example, by reference to certain asset profiles?

## Assistance in obtaining a grant of representation

- 2.24 Instead of engaging a lawyer or a trustee company to apply for a grant of representation, the person entitled to a grant for a small estate has the option of seeking assistance from the Supreme Court Probate Registry.
- 2.25 This is effectively a legal aid service, assisting in the preparation and filing of documents, arguably reducing time and costs for those involved with small estates. It also encourages those in control of small estates to obtain a full grant rather than choosing informal administration, potentially avoiding some of the risks around liability that may arise with the informal process. Applicants are encouraged to seek independent legal advice where necessary, and will be unable to use the service where the estate is legally complex or too large.

## Current law and practice

- 2.26 The Administration and Probate Act sets out the scheme under which people may apply for Registry assistance.<sup>11</sup> The Small Estates Officer—a part-time role at the Supreme Court Probate Registry—obtains instructions from, and prepares and lodges the application on behalf of, the applicant.
- 2.27 Applicants are required to bring several documents to an initial interview, including:
- the original will with details of the names and current residential addresses of the witnesses to the will (if the deceased person died with a will)
  - the original death certificate, and
  - the details and proof of assets, for example, bank statements or passbooks, rate notices, title particulars, share certificates.<sup>12</sup>
- 2.28 The Registrar of Probates may also seek further materials and information, or require proof to establish the identity of the applicant or proof of relationship to the deceased person.<sup>13</sup>
- 2.29 The Registrar may then exercise the power of the Court by making a grant of representation to the applicant,<sup>14</sup> once satisfied that no caveats exist against the application, and that no prior wills have been filed.<sup>15</sup> The affidavits, which would be required regarding caveats and searches in a full grant application, are not required under these small estates provisions.<sup>16</sup>
- 2.30 The Registrar is unlikely to assist where applications are legally complex or contentious, and may reject an application where it is thought proper to refer the matter to the Court for consideration, or that it would be better handled by a legal practitioner.<sup>17</sup>
- 2.31 The Registrar cannot make a grant of representation when:
- there is reason to believe that the estate exceeds the value defining a small estate—the Registrar must refuse to proceed until satisfied as to the actual value, or
  - a caveat has been lodged, or the Registrar thinks it doubtful that a grant ought to be made.<sup>18</sup>

11 *Administration and Probate Act 1958* (Vic) s 71(2)(a).

12 Probate Registry, *Frequently asked questions: Small estates* (25 June 2012) Supreme Court of Victoria <<http://www.supremecourt.vic.gov.au/home/practice+and+procedure/probate+office/probate+office+faqs>>.

13 Further information can be sought either from the applicant, or the Registrar of the relevant Magistrates' Court: *Administration and Probate Act 1958* (Vic) ss 73, 77.

14 *Administration and Probate Act 1958* (Vic) s 12.

15 A caveat is a written notice placed on application documents for grants of representation, operating to prevent the grant being made where there are concerns relating to the validity of the will or entitlement of the person who seeks the grant.

16 *Administration and Probate Act 1958* (Vic) s 72.

17 *Ibid* s 78.

18 *Ibid* ss 74, 12(2)(a), (b).

- 2.32 People living outside the Melbourne metropolitan area can also make use of this service by making an application through the Registrar of their nearest Magistrates' Court. Magistrates' Court Registrars do not make grants themselves, but take initial instructions and facilitate the transfer of documents and fees to the Supreme Court Probate Registry.<sup>19</sup>
- 2.33 A one-off administration fee of \$102.70 is charged for this service, as well as the standard grant application fee of \$281.90.<sup>20</sup> The applicant must also pay any fees and expenses relating to affidavits or other required documents.<sup>21</sup>
- 2.34 Estates valued under \$1000 are charged a reduced fee of \$110.30 for a standard grant application. Although a significant reduction in dollar value, this figure still represents over 10 per cent of any such estate.
- 2.35 In contrast, New South Wales applies a sliding scale to the cost of the grant application, depending on the value of the estate. Estates under \$100,000 pay no fee, and those between \$100,000 and \$250,000 pay \$650. The highest bracket is for those estates over \$5 million, which attract a \$5000 fee.<sup>22</sup>
- 2.36 Legislative provisions for Registrar assistance in other jurisdictions are generally similar, with minor variations in relation to fees and the size of estates eligible to use the service.<sup>23</sup>
- 2.37 The National Committee for Uniform Succession Laws was of the opinion that each jurisdiction's choice to provide such services would depend on resourcing,<sup>24</sup> and did not consider these provisions a 'matter for uniform legislation'.

## Issues

### Role of the Registry

- 2.38 The Registrar of Probates has expressed some concern as to whether it is wholly appropriate for the Probate Registry to provide this service.
- 2.39 As the Registrar is empowered to seek further evidence under the small estates provisions, and is also able to make a grant, there is a conflict that could potentially arise around adjudicating on evidence gathered by the Registry.
- 2.40 The Registry's assistance could also be seen as bordering on the provision of legal advice, creating difficulties for court officers who are otherwise not allowed to provide legal advice.

### Low usage

- 2.41 The total number of grants made under this assisted process has decreased over the last ten years, with 108 grants made in the 2001–2 financial year, compared with 39 in the 2011–12 financial year.<sup>25</sup>
- 2.42 Although the Registry's small estates assistance provides a useful service to those who use it, the fact that only a small number of estates have used it brings into question the utility of the service.

19 Ibid ss 71, 71(3) (inclusion of deputy registrars), 76 (defines 32km limit for those who may apply at the Supreme Court).

20 Probate Registry, *Supreme Court—Probate Office Fees* (1 July 2012) Supreme Court of Victoria <<http://www.supremecourt.vic.gov.au/home/practice+and+procedure/probate+office/probate+office+fees>>.

21 *Administration and Probate Act 1958* (Vic) s 71(2)(d).

22 Supreme Court of New South Wales Registry, *Probate Filing Fees* (1 September 2012) Lawlink NSW <[http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wrf/\\_assets/supremecourt/m6700011711802/filing%20fees%20\(from%201.9.12\).pdf](http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wrf/_assets/supremecourt/m6700011711802/filing%20fees%20(from%201.9.12).pdf)>.

23 See, eg, *Probate and Administration Act 1989* (NSW) ss 98–106; *Administration Act 1903* (WA) ss 56–7; *Administration and Probate Act* (NT) ss 106–10 (the NT provision uses the net value of the estate, all others use the gross value); *Court Procedure Rules 2006* (ACT).

24 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 3*, Queensland Law Reform Commission Report No 65 (2009) 121.

25 Data provided by the Supreme Court Probate Registry.



- 2.43 Possible reasons for the decrease in use of these provisions may include:
- lack of knowledge of the existence of the provisions
  - the static threshold values limiting the provisions to only very small estates not having been lifted since 1995
  - a decrease in funding for the Small Estates Officer position at the Supreme Court
  - an increase in the use of State Trustees as legal personal representative, opening up access to the deemed grants mechanism
  - an increase in the informal administration of small estates.

### Options for reform

- 2.44 In addition to the help that the Small Estates Officer provides in making applications for grants of representation, the Probate Registry in Victoria and in other jurisdictions provides a valuable service in answering questions about the grants process.
- 2.45 Improvements to the information available generally would assist all applicants, and may be of particular value to small estates. It is possible that the formal assistance in preparing a grant application currently provided by the Small Estates Officer could be replaced with a more streamlined information service.
- 2.46 The work of two other jurisdictions discussed in the models below may equally achieve the goals of encouraging full grants over informal administration, reducing costs and directing applicants to seek legal advice where necessary, while retaining supervision by the court of the final application. The static provision of information may also relieve court officers of their potentially conflicting role.

### Probate kits

- 2.47 There are a number of commercially available 'probate kits', which purport to guide an applicant through the process of obtaining a grant of representation. These vary in quality and accuracy.
- 2.48 Often those in control of smaller estates will contact the Probate Registry seeking advice immediately they find out they are the legal representative. The advice of the Registry is generally to seek independent legal advice. However, where the potential applicant does not wish to engage legal assistance, the Registry staff draw their attention to the more reputable kits.<sup>26</sup>
- 2.49 Almost all jurisdictions' court websites provide information on grants and links to forms, legislation and frequently asked questions. However, these are often quite difficult to navigate, and do not provide a clear overview of the process to be undertaken.
- 2.50 The Supreme Court of the Northern Territory publishes its own online probate kit, which sets out a variety of considerations, and explains how to fill in the appropriate forms, which are also included.<sup>27</sup> It also supplements the legislation by setting it out in question-and-answer format, arguably providing more easily accessible and logically ordered information.
- 2.51 The consolidation of this complex information into a linear, narrative approach to the process makes the Northern Territory kit clear and easily navigable. Also, presenting all relevant information in one kit may serve to reassure people that they have all of the (at least preliminary) information at hand, and have not missed a link or information page on the website, as may be the case with other sites.

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Based on informal consultations with the staff of the Victorian Supreme Court Probate Registry. Probate Clerk, *Probate Kit* (30 September 2011) Supreme Court of the Northern Territory, <[http://www.supremecourt.nt.gov.au/about/registry/documents/Probate\\_Kit.pdf](http://www.supremecourt.nt.gov.au/about/registry/documents/Probate_Kit.pdf)>.

### Online 'smart forms'

- 2.52 Another innovation is found in the probate application form provided on the Supreme Court of Western Australia website, designed to assist in the preparation of a probate application where 'the circumstances surrounding the application are not complex'. This not only elicits but also provides information during the process, explaining what evidence must be gathered to complete each section, and expands and contracts sections depending on the structure and complexity of the estate.<sup>28</sup>
- 2.53 The form also clarifies the situations in which the applicant should seek legal advice, and will not allow the application to continue should certain complicating factors be present.<sup>29</sup>

## Questions

- SE4** Should the Supreme Court Probate Registry retain responsibility for providing assistance in obtaining grants of representation in relation to small estates?
- SE5** Could formal assistance through the Supreme Court Probate Registry be replaced by the provision of clearer, more comprehensive, court-generated information?
- SE6** Would the introduction of a sliding fee scale, perhaps with a nil fee for grants of representation for small estates, encourage people to seek grants of representation in small estates?

## Elections to administer

- 2.54 Election to administer is a mechanism for obtaining a grant of representation available to trustee companies. Trustee companies, including State Trustees, can become responsible for administering an estate in a number of ways. Where a trustee company has been named as executor of a will, it may apply for and obtain a grant of representation. Any person named as executor or otherwise entitled to administer may also either act jointly with a trustee company, or authorise the company to take on the role. The trustee company is authorised to perform all of the acts and duties of a private individual representative.<sup>30</sup>
- 2.55 As the public trustee company of Victoria, State Trustees has express power under section 5 of the *State Trustees (State Owned Company) Act 1994 (Vic)* to apply for administration of the estate of any person<sup>31</sup> where the Court is satisfied that there is no one else entitled to, capable of and ready to take a grant of administration.
- 2.56 The election to administer mechanism is designed to reduce the cost and complexity of administering small estates. On compliance with the filing and notice requirements detailed below, a filing trustee company will have the authority to administer the estate.

28 Note that the form cannot be submitted online, but must be printed and submitted in person to the Registry. Supreme Court of Western Australia, *Probate Online Application* (2006) Probate Registry <<http://www.justice.wa.gov.au/ProbateOnlineForms>>.

29 Including where there is a missing will, no will or only a copy of the will; the applicant is not a named executor, the will is unsigned, etc. In these cases it is suggested that the applicant seek independent advice from a lawyer or the Public Trustee. It is also noted that 'legal restrictions prevent officers of the Supreme Court and the Probate Office from providing legal advice': Probate Registry, *Probate Online Application*, Supreme Court of Western Australia <<http://www.justice.wa.gov.au/ProbateOnlineForms>>.

30 *Trustee Companies Act 1984 (Vic)* ss 9–11. Note that an authorisation under s 10(1)(b) will not be granted where a testator has expressed by will a desire that the office of executor not be delegated.

31 Being a person who has died at any time either within Victoria or elsewhere either possessed of or entitled to property within Victoria: *State Trustees (State Owned Company) Act 1994 (Vic)* s 5.

- 2.57 Although the simplified process is available to all trustee companies, it is rarely used. This is probably because private trustee companies have little financial incentive to administer small estates, and State Trustees has access to a cheaper and simpler process in deemed grants.

### Current law and practice

- 2.58 A trustee company acting as either executor or potential administrator of a small estate can file an election to administer the estate. The filing of the election at the Supreme Court, along with an inventory of the estate, is taken to be the granting of representation of the estate.<sup>32</sup>
- 2.59 Section 11A of the *Trustee Companies Act 1984* (Vic) sets out the following pre-conditions to filing:
- The estate must not, in the opinion of the trustee company, exceed \$50,000.
  - The trustee company must be otherwise entitled to a grant of representation.
  - There cannot be another grant or any caveat in force against an application.<sup>33</sup>
- 2.60 The company must publish notice of its intention to file an election in a daily newspaper at least 14 days before filing, and notice of the election within one month of filing. This notice after filing is considered 'conclusive evidence' that the company is entitled to administer the estate.<sup>34</sup>
- 2.61 Elections under this section may be revoked by the Court where:
- the Court sees fit to grant an application by any other person
  - the value of the estate is found to exceed \$60,000
  - the deceased person, believed to have died without a will, is found to have left a will, or the will relied upon has been revoked or is invalid.<sup>35</sup>
- 2.62 The fee to file an election to administer is currently \$186.70, as compared to the \$281.90 commencement filing fee for a standard grant of representation.<sup>36</sup>
- 2.63 Despite the high volume of estates that would fall within the threshold for election, only two elections to administer have been filed since the introduction of the provision in 2006.
- 2.64 Private trustee companies may deal with small estates from time to time, but overall their interests lie in larger estates. The Commission has been informed that most trustee companies would probably only deal with small estates for long-standing clients or families with whom they are otherwise involved.
- 2.65 State Trustees deals with small estates frequently, as estates under \$50,000 represent approximately half of the estates it administers.<sup>37</sup> However, State Trustees has a cheaper and simpler method available to it in the deemed grant process in section 79 of the Administration and Probate Act, discussed below at [2.87]–[2.102].

32 *Trustee Companies Act 1984* (Vic) ss 11A(1)–(3), (5)(c). The size of the estate is measured as gross value as estimated by the trustee company: s 11A(4).

33 *Trustee Companies Act 1984* (Vic) ss 11A(1)(a)–(b), (2)(a)–(b), (5)(a).

34 *Ibid* ss 11A(5)(b), (6)–(7).

35 *Ibid* ss 11A(8)–(11).

36 Probate Registry, Supreme Court of Victoria, above n 20.

37 Based on informal discussions with State Trustees Limited.

## Issues

### Size of estate

- 2.66 As noted above, the initial threshold for the process of election is a gross value of \$50,000, with a 'safety-net' of \$60,000, above which the process cannot be used. This second threshold acknowledges that it may take time for the actual value of assets to be confirmed.<sup>38</sup>
- 2.67 The Victorian figure is the lowest of all Australian jurisdictions. The figures vary widely. An increase in the size of the estates that can be brought under these provisions could potentially encourage private trustee companies to administer smaller estates, promoting competition and choice for those wishing to have small estates administered.

### National Committee's recommendations

- 2.68 The National Committee for Uniform Succession Laws recommended that the limit for estates that are subject to election be set at \$100,000 (a \$50,000 increase from the current Victorian ceiling)<sup>39</sup> and be indexed to annual increases in the consumer price index.<sup>40</sup>
- 2.69 The National Committee proposed that the second figure, above which a full grant must be sought, be set out as a percentage of the initial figure, and recommended that 150 per cent would be appropriate.
- 2.70 The National Committee also recommended that the relevant amounts refer to the net rather than the gross value of the estate, in recognition of the actual pool of assets available and the goal of election provisions—to facilitate cost effective administration.<sup>41</sup>

## Questions

- SE7** What should be the value that determines the size of estates that can be administered under an election to administer?
- SE8** Should the second threshold, above which an application for a full grant must be made, be retained? How should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?
- SE9** Should the threshold figures for elections to administer refer to the net or gross value of the estate?

38 *Trustee Companies Act 1984* (Vic) ss 11A(4), (10).

39 Current Victorian legislation accepts estates under \$50,000 gross value as estimated by the trustee company: *Trustee Companies Act 1984* (Vic) s 11A(4).

40 National Committee for Uniform Succession Laws, above n 24, 168.

41 *Ibid* 105.

### Inclusion of legal practitioners

- 2.71 Allowing legal practitioners access to this expedited process may provide greater choice for those seeking to engage a professional administrator. It would also mean that legal practitioners could pick up small estate administration work without having to seek a full grant, potentially encouraging people to choose this route over informal administration.
- 2.72 While most jurisdictions allow the public trustee and often other trustee companies the right to file elections, the Northern Territory has broadened the provision in its Act to include legal practitioners.<sup>42</sup>
- 2.73 This change—effected by a broadening of the definition of ‘professional personal representative’—was purportedly introduced in order to ‘level the playing field’ in respect of those professionals who administer estates and trusts.
- 2.74 The Commission has been informed that approximately ten elections to administer have been filed by practitioners in the Northern Territory since 2002.

### National Committee’s recommendations

- 2.75 The National Committee for Uniform Succession Laws sought submissions on who should be entitled to file an election. Among the Victorian responses, the Victorian Bar, State Trustees and the Law Institute of Victoria supported legal practitioners being able to elect, based generally around arguments of fair competition.<sup>43</sup> The Law Institute also noted that few private trustee companies are prepared to administer smaller estates, and those practitioners with skill and experience in succession law should be allowed to take up this role.
- 2.76 The National Committee also recommended that if practitioners were to be given the ability to elect, the provisions relating to elections should be found in the Administration and Probate Act, not in the legislation governing trustee companies, as is currently the case in Victoria. This change is reflective of the push throughout the National Committee’s reports to avoid confusing duplications across legislation, and to ensure that the Administration and Probate Act is the major repository of powers and procedures that pertain to the administration of deceased estates.

## Question

**SE10** Should legal practitioners be permitted to file elections to administer? What would be the advantages of such a change?

<sup>42</sup> *Administration and Probate Act 1969* (NT) s 6(1): definition of ‘professional personal representative’ includes public trustee, trustee companies and legal practitioners.

<sup>43</sup> 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: Volumes 1–4*, Queensland Law Reform Commission Report No 65 (2009) submissions 24, 22, 19A.

## Procedural safeguards and notice requirements

- 2.77 The Commission's initial consultations with the Supreme Court Registry have highlighted some concerns about the process of election, namely that its potential utility is outweighed by the lessened procedural safeguards required.
- 2.78 Section 11A of the Trustee Companies Act sets out the applicable safeguards, including a requirement that there must be no extant caveats, that an inventory accompany the election and that a 14-day notice period must be complied with.
- 2.79 It also requires that a notice be published in a newspaper after the election has been filed. This reflects the fact that the grant resulting from an election is not an order of the Court and the authority to act under an election comes from the filing itself.<sup>44</sup> This notice is one form of protection for the rights of potential claimants, beneficiaries or others with an interest in the estate.
- 2.80 Criticisms of the election process centre on the fact that elections are extremely difficult to review, as there is little contact with the Court, and elections do not form part of the searchable database of grants made.
- 2.81 It has been suggested that there be a requirement to file the will, not just an inventory, with the Court. Given that those with a potential interest in an estate are most likely to begin any search with the Probate Registry, this would be logical. Further, filing the will would allow a level of scrutiny by the Registry, and potentially avoid elections going ahead where wills are defective.
- 2.82 Updating the advertising requirement from newspaper advertising to advertisement on the Supreme Court website would bring elections into line with standard grant applications. The advertisements would then be searchable, without making the election process more onerous for those using it.

## National Committee's recommendation

- 2.83 The National Committee for Uniform Succession Laws, having regard to the small amounts being dealt with under these provisions, recommended that there be no notice requirements for the filing of an election, either beforehand or afterwards.

## Questions

- SE11** Should elections to administer require the filing party to file the will with the Court?
- SE12** Should advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website?
- SE13** Should notice requirements in relation to an election to administer be abandoned altogether?

## Utility of the provisions

- 2.84 As discussed above, the election to administer provision is almost never used. This raises questions as to whether elections to administer are worth retaining at all.

### National Committee's recommendations

- 2.85 The National Committee for Uniform Succession Laws was initially of the opinion that elections to administer should be abolished. After initial consultations with Registrars from a number of jurisdictions, the National Committee sought submissions, and formed the preliminary view that where estates cannot be 'effectively administered informally, a grant, with its inherent protections and safeguards ... should be sought'.<sup>45</sup>
- 2.86 However, the majority of submissions, including that of the Law Institute of Victoria,<sup>46</sup> argued for the retention of elections to administer. The New South Wales Law Society pointed out that elections to administer provide people with low-value estates with a cost-effective 'choice ... to appoint [a trustee] ... without running the risk of informal administration'. The National Committee consequently concluded that elections to administer play an important role and should be retained.

## Questions

**SE14** Should elections to administer be subject to stricter procedural safeguards? Are there other improvements that could be made?

**SE15** Do elections to administer, in their current form, serve a valuable function for small estates? If not, should elections to administer be abolished?

## Deemed grants

### Current law and practice

- 2.87 As well as elections to administer, a further simplified process is available to State Trustees under section 79 of the Administration and Probate Act. The authority derived from this process is referred to in this paper as a deemed grant.
- 2.88 For the deemed grant to be validly obtained, the estate in question must fit within the values that define a small estate,<sup>47</sup> and State Trustees must otherwise be eligible to apply for a grant of representation<sup>48</sup> or to elect to administer.
- 2.89 State Trustees must give notice of its intention to administer by advertising in a daily newspaper. Fourteen days after the advertisement has been published, it will be taken to have been granted representation.<sup>49</sup> State Trustees may then proceed as if it had a grant of representation.
- 2.90 It is standard business practice for State Trustees to use the deemed grants process wherever an estate fits within the monetary thresholds. In the past, State Trustees would administer some estates informally (without a deemed grant), but this has changed in recent years.<sup>50</sup>
- 2.91 State Trustees has informed the Commission that the existence of deemed grants means it does not need to use the section 11A election procedure.

45 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons*, Discussion Paper MP37 (1999) 164.  
46 'It is important that there be an economical and uncomplicated alternative to administer small estates': National Committee for Uniform Succession Laws, above n 43, submission 19A.

47 *Administration and Probate Act 1958* (Vic) ss 3(1), 71(1)(a).

48 Under s 5 of the *State Trustees (State Owned Company) Act 1994* (Vic) or ss 9, 10, 11 or 11A of the *Trustee Companies Act 1984* (Vic): *Administration and Probate Act 1958* (Vic) s 71(1)(b).

49 *Administration and Probate Act 1958* (Vic) ss 79(2)–(3).

50 Based on informal discussions with State Trustees Limited, 30 July 2012.

- 2.92 State Trustees also files wills with the Court where estates are at the higher end of the value spectrum, even though not required to do so. The fact that the provision does not require filing of the will, or an inventory, at the Probate Registry means that it is difficult for the Commission to ascertain the proportion of deceased estates that are administered under a deemed grant.
- 2.93 Because the value of the estates administered under this provision is often very low, State Trustees receives a subsidy to ensure that a form of official administration remains available to those with smaller estates. Under their Community Services Agreement with the Department of Human Services, State Trustees receives funding from the government to 'ensure that members of the public have access to services relating to managing and administering their estates and property'.<sup>51</sup> This relates not only to deceased estates, but also to trust administration and guardianship services.

## Issues

### Size of estate

- 2.94 The prescribed value of the estate for deemed grant purposes is the same as that for Registrar-assisted grants, being the values defining a small estate in the Administration and Probate Act: \$25,000, or \$50,000 if the beneficiaries are certain close family members. The current provision does not have a second 'margin of error' figure as with elections to administer.

### National Committee's recommendations

- 2.95 The submissions received by the National Committee for Uniform Succession Laws suggested that there be a figure 'above which the small estates procedure could not be used initially, and a value above which an estate could not continue to be administered pursuant to the procedure', as with elections to administer.<sup>52</sup> This would provide a margin of error following the initial appraisal of the estate's value.<sup>53</sup>
- 2.96 As to the value of the initial threshold, the figures suggested in Victorian submissions ranged widely,<sup>54</sup> but by general comparison, the current Victorian figures are low. The approach of one submission was to decide what might arguably be termed a standard smaller-scale estate—a vehicle, furniture and a modest amount of savings, for example—and refer to that as a starting point for a reasonable value range.<sup>55</sup>

51 State Trustees Limited, *Annual Report 2010–2011* (2011) 51.

52 National Committee for Uniform Succession Laws, above n 24, 127.

53 See table 1 for comparison of other jurisdictions' figures.

54 See submissions of the Law Institute of Victoria (Submission 19A), suggesting \$25,000 both as an initial and subsequent figure, and of the Victorian Bar (Submission 24), suggesting \$50,000 and \$80,000.

55 In that case, around \$50,000–\$80,000. See National Committee for Uniform Succession Laws, above n 24, 128.



## Questions

- SE16** What should be the value that determines the size of estates that can be administered under a deemed grant?
- SE17** Should there be a second threshold above which an application for a full grant should be made, as with elections to administer? If so, how should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?
- SE18** Should threshold figures for deemed grants refer to the net or gross value of the estate?

### Inclusion of legal practitioners

- 2.97 As with elections to administer, the equivalent deemed grant provision in the Northern Territory allows not only the public trustee, but also a trustee company or a legal practitioner, to administer small estates as if under a grant.<sup>56</sup> This was brought about by an expansion of the definition of professional personal representative, briefly discussed above at [2.72]–[2.74].

### National Committee's recommendations

- 2.98 The inclusion of a deemed grant small estates provision into the model legislation was not recommended by the National Committee for Uniform Succession Laws, as it believed that the changes recommended in relation to elections to administer, including permitting legal practitioners to make elections, and removing the requirement to advertise, were sufficient to provide a simple means of obtaining authority to administer small estates.

## Question

- SE19** Should legal practitioners be permitted to advertise for deemed grants? What benefits might this change produce?

## Procedural safeguards and notice requirements

- 2.99 When seeking to administer a small estate under section 79 of the Administration and Probate Act, State Trustees is required only to advertise its intention to administer.<sup>57</sup> This means that there is no formal application to the Registry, and no requirement to file the will,<sup>58</sup> to file an inventory of the estate, or to search for caveats, deposited wills or prior applications.
- 2.100 As the Registry has no involvement in the section 79 process, deemed grants will not be recorded on the Court's databases. As such, usual searches performed by others to ascertain if representation has been granted will be ineffectual and, while unlikely, could potentially result in a grant being made more than once for the same estate.
- 2.101 As raised above in the context of elections to administer, requiring the publication of a notice of intention on the Supreme Court website, rather than in a newspaper, would increase searchability and create a more cohesive record of who has authority to administer each estate.
- 2.102 From the perspective of State Trustees, it could be said that the simplicity of the current provision allows for a smoother and simpler and therefore less expensive administration process.

## Questions

**SE20** Should deemed grants have more stringent procedural safeguards (for example, a requirement to file wills and inventories, and to search for caveats or prior grants)?

**SE21** Do deemed grants, in their current form, serve a valuable function?

## Informal administration

### Introduction

- 2.103 There is no statutory requirement to obtain a grant of representation after a death.<sup>59</sup> In fact, where both the death of the deceased person and the entitlement of any claimant can be proved by other means, and depending on the type and value of assets held, there may be no real need to obtain a grant.
- 2.104 'Informal administration' is gaining recognition by the legal profession and the legislature, as it makes up a significant proportion of estates administered every year.<sup>60</sup> An informal administrator may be a named executor who has not taken out a grant of probate, an intending administrator, or merely someone who has taken effective control of the estate's dealings. Persons within the third category are historically termed 'executors by their own wrong'—a potentially misleading title, as their role is becoming increasingly legitimate, and enjoys some statutory protections.

57 State Trustees must be otherwise entitled to apply for a grant: *Administration and Probate Act 1958* (Vic) s 79.

58 While not required by the legislation, filing the will had been the practice of State Trustees until recently. See letter from Michael Halpin, Registrar of Probates, to David Jones, Acting Chair of the Commission (3 July 2012).

59 Although the Supreme Court has power to summon named executors who fail to seek a grant within six weeks of death to show cause: *Administration and Probate Act 1958* (Vic) s 15.

60 In Victoria in 2010, there were 35,764 registered deaths. For the financial year 2010–11, the Supreme Court made 17,979 grants. This means that for this period, there were 17,785 deaths for which there was no grant of representation, and the Supreme Court only made grants in relation to approximately 50 per cent of all registered deaths.

- 2.105 Informal administration is assisted by the right of survivorship—the passing of jointly-held assets<sup>61</sup>—and the practice of banks and others with control over low-value assets of the estate to transfer them without a grant.<sup>62</sup>
- 2.106 However, informal administration has the potential to pose particular difficulties in the administration of estates, as an informal administrator does not have the same legal status and authority to deal with assets as a representative under a full grant. Financial institutions or other holders of funds may be reluctant to deal with such a person, as they could potentially expose themselves to liability where payments are made incorrectly.
- 2.107 Given there is no central source of information regarding informally administered estates, it is difficult to be certain about exactly how and why decisions are made in this context.
- 2.108 The questions in this section are designed to provide the Commission with a better understanding of the practical use of existing laws, as well as the likely impact of any potential changes. They also seek to canvass opinion on the desirability of encouraging formal or informal administration, and the appropriate balance and interplay between the two.
- 2.109 This section deals with two major aspects of informal administration:
- which assets can be released informally by third parties, and under what conditions
  - the legal position of persons who choose to administer the estate without a grant, or deal with estate assets before obtaining a grant.
- 2.110 Depending on the types of assets involved, *any* estate may be informally administered in whole or in part. The informal processes available are particularly significant for smaller estates, as less valuable assets are easier to deal with informally. Further, the simplification of process and the avoidance of fees and charges associated with formal grants are clearly beneficial to smaller estates and their beneficiaries.

### Current law and practice

- 2.111 Generally speaking, where a death certificate can be produced, an executor will often be allowed to deal with smaller assets on the basis of the authority conferred by their appointment in the will.<sup>63</sup> This practice reflects a pragmatic approach to the release of assets to which the deceased person was clearly entitled. It also recognises that there may be a significant amount of time between death and any grant of representation, and that there may be a need to deal with the estate's assets during this time.
- 2.112 It is common practice for banks to allow funeral expenses to be paid directly from a deceased person's bank account before a grant of representation. Banks may also allow closure of accounts without a grant of representation.<sup>64</sup> Certain types of property require formal signed instruments to effect a transfer of title, such as land and shares.<sup>65</sup> In estates that include this sort of property, a grant will almost always be required, as title will need to be conclusively proven through production of a grant of representation.
- 2.113 It is, however, common for the major piece of real estate in smaller estates, the family home, to pass by survivorship to the surviving partner. A grant is therefore not needed in order to deal with that particular piece of property, or indeed any other property owned jointly. In simpler estates, this may well remove the primary reason for seeking a grant of representation, and provide an incentive to administer remaining property informally.

61 The survivor will apply under the *Transfer of Land Act 1958* (Vic) s 50 to become sole registered proprietor.

62 See discussion in Thomson Reuters, *Lawyers Practice Manual (Vic)* (at 1 May 2012) 13 Wills and Estates Administration, 'Small estates and where no grant is required' [13.3.201].

63 Ibid [13.3.201].

64 Leo Cussen Centre for Law, 'Estates – Probate and Administration Practice' (Course Notes, Leo Cussen Institute, 2012) 6.5.1. See also, eg, National Australia Bank, *Helping you with a deceased estate* (2008) <[http://www.nab.com.au/vgnmedia/download/helping\\_you\\_with\\_a\\_deceased\\_estate.pdf](http://www.nab.com.au/vgnmedia/download/helping_you_with_a_deceased_estate.pdf)>.

65 *Transfer of Land Act 1958* (Vic) s 49. Note the provisions in Queensland allow for transfer of property in limited circumstances, discussed below at [2.128]–[2.130].

## Issues

### Payments by third parties without a grant of representation

- 2.114 While it is technically possible for a third party who holds an estate asset to transfer it to someone informally administering the estate, there is an inherent risk in doing so. Should the third party (for example a bank) release the assets to an informal administrator, it may face difficulties where a grant of representation is later made to another person.
- 2.115 Accordingly, the bank or other third party would require evidence from the person requesting transfer of the asset that the request is legitimately made, and that the 'representative' requester is entitled. Where the evidence is less than a full grant of representation, the bank or third party will want to limit its exposure to risk by requiring the production of other evidence of entitlement.
- 2.116 An executor or administrator acting under a grant of representation is able to give a discharge, while someone administering informally is generally not able to do so.<sup>66</sup> A submission to the National Committee for Uniform Succession Laws said that 'it [is] a matter of particular concern that the current legislation forces what could be a satisfactory informal administration down the official path solely because the administrator cannot obtain an asset'.<sup>67</sup>
- 2.117 To allow for greater ease of informal administration, some jurisdictions, including Victoria, have enacted statutory provisions affording a proper discharge in limited circumstances. It is important to note that these provisions relate to money to which the deceased person was clearly entitled, not to the informal transfer of assets generally.
- 2.118 Section 32 of the Administration and Probate Act allows an employer to transfer wages that are owed to a deceased employee, without a grant of representation, to the partner or child of the employee, or to another person entitled to the wages. This provision only operates where the net estate does not exceed \$25,000, and is limited to wages not exceeding \$12,500.<sup>68</sup>
- 2.119 Sub-section two of that provision provides that a receipt from the informal administrator will constitute a discharge of liability:
- (2) A receipt signed by any person above the age of sixteen years to whom money or property is paid or transferred by an employer in the bona fide exercise of the powers conferred by this section shall be a complete discharge to the employer of all liability in respect of moneys or property so paid or transferred.
- 2.120 The equivalent provision in South Australia extends to money of deceased patients held by public hospitals, but is limited to sums under \$2000. South Australia and Western Australia also have specific provisions allowing banks to be discharged from liability for the payment of smaller amounts, being those under \$2000 and \$50,000 respectively.<sup>69</sup>
- 2.121 Section 211 of the *Life Insurance Act 1995* (Cth) provides that:
- Where one or more policies are payable to the personal representative of the deceased, the money may be paid to certain relatives or a person who satisfies the company that they are entitled to the property of the deceased.

<sup>66</sup> Although the personal representative could potentially provide an indemnity in their personal capacity.

<sup>67</sup> National Committee for Uniform Succession Laws, above n 24, 153.

<sup>68</sup> *Administration and Probate Act 1958* (Vic) s 32. This includes other property held by the employer.

<sup>69</sup> *Administration and Probate Act 1919* (SA) ss 71–2; *Administration Act 1903* (WA) s 139(1). The legislation provides for a base of \$1200, or any such other amount as declared by proclamation: See Western Australia, *Western Australian Government Gazette*, No 15, 6 February 2009, 243.

### National Committee's recommendations

2.122 Although the Victorian provision assists employers in making informal payments, others who hold assets cannot use section 32 of the Administration and Probate Act and do not get the benefit of the protection it provides.

2.123 The National Committee for Uniform Succession Laws recommended that a broader provision of more general application was desirable, but based the model provision on section 32. The National Committee rejected any arbitrary limitation on the categories of persons who might take advantage of the protections afforded by the provision, and recommended that *anyone* holding money or personal property of the deceased person should be able to receive an indemnity upon its release.

2.124 Accordingly, the recommendation provides as follows:

**Protection for limited payments made without production of a grant of representation<sup>70</sup>**

- (1) [If] a person holds money or personal property for a deceased person of not more than \$15,000 in value, [...]
- (2) the person may, without requiring production of a grant of representation, pay the money or transfer the property to any of the following persons having full legal capacity—
  - a) the surviving spouse [or domestic partner] of the deceased person;
  - b) a child of the deceased person; or
  - c) another person who appears to be entitled to the money or personal property.<sup>71</sup>
- (3) A payment of money or transfer of personal property under subsection (2), if made in good faith, is a complete discharge to the person of all liability for the money and personal property.

2.125 The \$15,000 limit reflected the National Committee's view that most jurisdictions' limits—around the \$5000 mark— were far too low.<sup>72</sup> Another difference between the existing provisions and the National Committee's proposal is that the model provision provides a cap on the *amount held* by each person, rather than the maximum payment that can be paid out, as is the case under the Victorian section. This change avoids much larger sums being paid out in a number of smaller instalments. It also means that these informal procedures are available to all estates, and are not necessarily limited to small estates.

2.126 The model provision would remove the current stipulation that the payer must be satisfied that the total estate did not exceed a specified limit, such as the \$25,000 limit in the Victorian provision. The National Committee was of the opinion that the value of the money actually held by the payer is a sufficient limitation, and that the payer should not need to ascertain the estate's value.

2.127 Importantly, the National Committee noted that neither the draft provision nor the existing provision prevents anyone from making payments of any amount to informal administrators. Anyone transferring more than the amount set out will not be able to obtain a discharge of liability under the section.

<sup>70</sup> National Committee for Uniform Succession Laws, above n 24, 83.

<sup>71</sup> Which would include a person named as executor in a will that had not been admitted to probate. See discussion in National Committee for Uniform Succession Laws, above n 24, 166.

<sup>72</sup> Note that at the time of the National Committee's report, the Western Australian limit was \$6000. See discussion in National Committee for Uniform Succession Laws, above n 24, 165.

## Question

**SE22** Should section 32 of the *Administration and Probate Act 1958 (Vic)* be expanded to a provision of more general application, in line with the recommendation of the National Committee?

### Transfer of real property

- 2.128 In Queensland, it is possible to transfer land without a grant of representation where certain conditions are fulfilled and the Registrar of Titles believes that the person seeking the transfer would be entitled to be the estate's personal representative.
- 2.129 Section 111 of the *Land Titles Act 1994 (Qld)* provides that land may be registered in the name of a person as personal representative where there is a grant of representation, but also where:
- if there is no will: the estate is under \$300,000,<sup>73</sup> six months have passed since death, there has been no grant made, and the Registrar is of the opinion that the person would succeed in an application for a grant
  - if there is a will: the person is entitled to a grant, or the Registrar considers they would succeed in an application for a grant.
- 2.130 Further, under section 112 of the same Act, land can be transferred directly to a beneficiary who is entitled to it where the personal representative<sup>74</sup> consents to the transfer. This has the potential to save the expense and trouble of transferring to a personal representative and then to the beneficiary, and the consent requirement avoids difficulties where the land is required, before distribution, to pay debts of the estate.

### National Committee's recommendations

- 2.131 The National Committee for Uniform Succession Laws recommended that other jurisdictions consider implementing provisions to the effect of the Queensland scheme, but considered it more appropriate to include such provisions in the relevant legislation dealing with real property. It was therefore not included in the model administration of estates bill.<sup>75</sup>
- 2.132 Submissions from Queensland sources noted that these provisions have worked without controversy in Queensland for some time, and noted that these transfers are 'effected ... under the supervision of experienced legal officers'.<sup>76</sup> They also noted considerable savings in costs and time as a result of this system.
- 2.133 Other submissions were in favour of a limited version subject to a lower value for eligible estates. Those submissions against the proposal raised concerns that the determinations of the Registrar of Titles would be duplicating a function of the courts. The fact that Queensland is the only jurisdiction that has such a provision was also seen as problematic for the pursuit of uniformity, a key goal of the National Committee's work.<sup>77</sup>

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Or other figure prescribed by regulation: *Land Titles Act 1994 (Qld)* s 111(2)(b)(ii).  
Or the person the Registrar considers would be successful in an application to be the personal representative.  
National Committee for Uniform Succession Laws, above n 24, 142.  
Ibid 139 (submission 9).  
Ibid 141 (submissions 6, 14, 12).

## Question

**SE23** Should it be possible to transfer real property without a formal grant, as in Queensland? If so, in what circumstances?

### Position of informal administrators

- 2.134 The increasing number of estates being satisfactorily administered *without* a grant is serving to change the status of informal administrator from ‘wrong-doer’<sup>78</sup> to a functional and important part of the administration of estates.<sup>79</sup> However, the protections available to those acting under a grant are significantly more comprehensive than those available to informal administrators.
- 2.135 Those acting under a formal grant of representation are afforded legislative protections, including a general protection for acts done ‘in good faith’ under a grant,<sup>80</sup> and a specific protection that allows representatives to advertise their intention to distribute the estate, and thus limit claims that can be brought against the estate.<sup>81</sup>
- 2.136 Informal actors are, however, protected only to the extent that they *correctly* administer the estate. They are otherwise liable to be sued by any of the rightful personal representatives, creditors or beneficiaries for any property received by them or any loss to the estate arising from their actions.<sup>82</sup> This situation might typically arise where a later will is discovered after the estate has been informally distributed, or where the debts of the estate were not fully satisfied before distribution.<sup>83</sup>
- 2.137 Although it is clear that there may be logical and pragmatic reasons for an informal administrator to deal with estate assets, this can be problematic. For example, where an informal administrator seeks to pay debts of the estate by releasing funds from the estate to a creditor, an executor or administrator under a later grant of representation cannot recover that money from the creditor. The creditor is not required to enquire about the authority of the person purporting to act as the representative of the estate.<sup>84</sup>
- 2.138 Victoria is one of the few jurisdictions in which the legislation clearly deals with liability and protection of informal administrators. Section 33(1) of the Administration and Probate Act provides:

#### **33 Liability of person fraudulently obtaining or retaining estate of deceased**

- (1) If any person, to the defrauding of creditors or without full valuable consideration, obtains receives or holds the estate or any part of the estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the estate received or coming to his hands, or the debt or liability released, after deducting any payment made by him which might properly be made by a personal representative.

78 At common law, an informal administrator is termed the *executor de son tort*—an executor ‘by their own wrong’. Interference with administration of an estate without a grant of representations is termed ‘intermeddling’.

79 See generally the discussion of recognition of the role in National Committee for Uniform Succession Laws, above n 24, 149.

80 *Administration and Probate Act 1958* (Vic) s 31.

81 See *Trustee Act 1958* (Vic) s 33.

82 *Administration and Probate Act 1958* (Vic) s 33(1); *Carmichael v Carmichael* (1846) 41 ER 880. See also Peter Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (Butterworths, 2nd ed, 1998), definition of ‘executor de son tort’.

83 National Committee for Uniform Succession Laws, above n 45, 147.

84 *Parker v Kett* (1701) 91 All ER 133 (Lord Holt).

- 2.139 The effect of this provision is to clarify the extent to which a person acting without a grant is liable to account for the estate assets that they have dealt with. It makes clear that they are effectively protected when they make payments which *would have been* legitimate had they had a grant of representation. As such, this provision provides significant protection to informal administrators.
- 2.140 The Australian Capital Territory and Queensland each has a provision that is substantively similar. However much these and the Victorian provision are alike in content, their titles are substantially different, potentially obscuring the purpose of the provisions:
- ‘Fraudulently obtaining or keeping property’ (Australian Capital Territory)
  - ‘Protection of persons acting informally’ (Queensland)
  - ‘Liability of person fraudulently obtaining or retaining estate of deceased’ (Victoria).
- 2.141 In Victoria, the heading does not form part of the Act.<sup>85</sup>

#### **National Committee’s recommendations**

- 2.142 Given that the National Committee for Uniform Succession Laws was concerned to recognise the extent of informal administration, and that the chapter in which it discusses its recommendations on this topic is headed ‘Mechanisms to facilitate administration and minimise the need to obtain a grant’,<sup>86</sup> it is clear that the National Committee was generally working towards, rather than against, the protection and general support of informal administrators.
- 2.143 The National Committee recommended a model provision that reads almost identically to the Victorian provision, section 33(1).<sup>87</sup> As noted above, the Victorian section is headed ‘Liability of person fraudulently obtaining or retaining estate of deceased’, and sets out the liability an unauthorised person is exposed to in informally administering an estate.
- 2.144 The National Committee noted, however, that this section also outlines limits to liability, and legitimises payments ‘which might properly be made by a [legal] personal representative’. The National Committee recommended that the model section be headed ‘persons acting informally’, to reframe the focus of the provision and to recognise the increasingly common role played by informal administrators.
- 2.145 The model provision is also drafted with much simpler terminology and more accessible layout, important in a section that sets out to define for informal administrators, who may not have legal training, the limits of their liability:<sup>88</sup>

#### **Persons acting informally**

- (1) This section applies if a person who does not hold a grant of representation of a deceased person’s estate—
  - (a) obtains, receives or holds the estate other than for full and valuable consideration;  
or
  - (b) effects the release of any debt payable to the estate.
- (2) The person is liable to account for estate assets to the extent of—
  - (a) the estate obtained, received or held by the person; or
  - (b) the debt released.

85 Section 33 of the *Administration and Probate Act 1958* (Vic) came into force prior to 1 January 2001 and this heading does not form part of the Act: *Interpretation of Legislation Act 1984* (Vic) s 36(2A).

86 National Committee for Uniform Succession Laws, above n 2, ch 29.

87 National Committee for Uniform Succession Laws, above n 2, Administration of Estates Bill 2009 (Qld) cl 435.

88 *Ibid.*



- (3) However, the person's liability is reduced to the extent of any payment made by the person that might properly be made by a personal representative to whom a grant of representation of the estate is made.

## Questions

- SE24** Should section 33 of the *Administration and Probate Act 1958 (Vic)* be amended in line with the recommendation of the National Committee?
- SE25** Should the Victorian provision be modified to limit an informal administrator's liability not only in relation to payments made, but also in relation to any other act that might properly have been done by a personal representative to whom a grant has been made?
- SE26** How else could the role of informal administrators be better clarified?

### Administration by statutory declaration

- 2.146 It has been suggested to the Commission that a regime based on a statutory declaration may be an appropriate alternative to full grants of representation in respect of small estates. This proposal acknowledges a lack of clarity and definition regarding the role of those administering estates informally, and the risks taken by those releasing funds to informal administrators. It is also a potential time- and cost-saving mechanism for those dealing with small and less complex estates.
- 2.147 A declaration would require a named executor to annex a copy of the will, if applicable, as well as a death certificate and an inventory of the assets of the estate. The declaration would be a pro-forma document, through which the person making the declaration (declarant) would confirm:
- their belief that the estate is under a certain value
  - their standing to administer the estate, including appointment as executor, position as sole beneficiary, and so on
  - their belief that the will attached is the last will of the deceased person
  - that they have complied with any public notice requirements.
- 2.148 Compliance with these requirements would confer on the declarant legal authority to deal with the assets of the estate. Benefits of such a scheme would include the following:
- The process would be a cheap and potentially quite simple way for a declarant to acquire authority to deal with the assets of the deceased person, particularly in uncomplicated or low-value estates, in comparison to the process of seeking a formal grant.
  - Those releasing funds to or generally dealing with the declarant would be able to grant indemnities as if there were a full grant of representation. Compared with completely informal administration, the legitimacy conferred by such a scheme would provide increased confidence for the party releasing funds, and a level of certainty for the declarant.

- 2.149 Notice requirements could align with existing stipulations, perhaps involving an advertisement on the Supreme Court website or in a newspaper. This would allow potential creditors or other claimants to be made aware of the death and administration, and to prepare and make relevant claims.
- 2.150 Further safeguards could include:
- requiring the declarant to provide written notice to any known potential claimants or beneficiaries
  - requiring filing of declarations with the Supreme Court Probate Registry
  - retaining severe penalties for anyone knowingly making a false declaration under these provisions.
- 2.151 Administration by statutory declaration could achieve similar aims to a provision of general application for release of money, discussed above at [2.124]–[2.127].

## Questions

**SE27** Would a process of administration by statutory declaration be a worthwhile addition to the mechanisms designed to facilitate the administration of small estates?

**SE28** Are there further safeguards that would be necessary or desirable if this proposal were implemented?

# Questions

## Definition of a small estate

- SE1** Should the current figures in the *Administration and Probate Act 1958* (Vic) determining what is a small estate be raised? If so, what should they be raised to, and how should they be determined?
- SE2** In determining what is a 'small estate':
- (a) should the dual threshold of values, based on the identity of the beneficiaries, be retained?
  - (b) should the value be set by the *Administration and Probate Act 1958* (Vic), or be moved to subordinate legislation?
- SE3** Is there a better way to define which estates should have access to the simpler processes relating to small estates? For example, by reference to certain asset profiles?

## Assistance in obtaining a grant of representation

- SE4** Should the Supreme Court Probate Registry retain responsibility for providing assistance in obtaining grants of representation in relation to small estates?
- SE5** Could formal assistance through the Supreme Court Probate Registry be replaced by the provision of clearer, more comprehensive, court-generated information?
- SE6** Would the introduction of a sliding fee scale, perhaps with a nil fee for grants of representation for small estates, encourage people to seek grants of representation in small estates?

## Elections to administer

- SE7** What should be the value that determines the size of estates that can be administered under an election to administer?
- SE8** Should the second threshold, above which an application for a full grant must be made, be retained? How should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?

- SE9** Should the threshold figures for elections to administer refer to the net or gross value of the estate?
- SE10** Should legal practitioners be permitted to file elections to administer? What would be the advantages of such a change?
- SE11** Should elections to administer require the filing party to file the will with the Court?
- SE12** Should advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website?
- SE13** Should notice requirements in relation to an election to administer be abandoned altogether?
- SE14** Should elections to administer be subject to stricter procedural safeguards? Are there other improvements that could be made?
- SE15** Do elections to administer, in their current form, serve a valuable function for small estates? If not, should elections to administer be abolished?

## **Deemed grants**

- SE16** What should be the value that determines the size of estates that can be administered under a deemed grant?
- SE17** Should there be a second threshold above which an application for a full grant should be made, as with elections to administer? If so, how should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?
- SE18** Should threshold figures for deemed grants refer to the net or gross value of the estate?
- SE19** Should legal practitioners be permitted to advertise for deemed grants? What benefits might this change produce?
- SE20** Should deemed grants have more stringent procedural safeguards (for example, a requirement to file wills and inventories, and to search for caveats or prior grants)?
- SE21** Do deemed grants, in their current form, serve a valuable function?

## Informal administration

- SE22** Should section 32 of the *Administration and Probate Act 1958* (Vic) be expanded to a provision of more general application, in line with the recommendation of the National Committee?
- SE23** Should it be possible to transfer real property without a formal grant, as in Queensland? If so, in what circumstances?
- SE24** Should section 33 of the *Administration and Probate Act 1958* (Vic) be amended in line with the recommendation of the National Committee?
- SE25** Should the Victorian provision be modified to limit an informal administrator's liability not only in relation to payments made, but also in relation to any other act that might properly have been done by a personal representative to whom a grant has been made?
- SE26** How else could the role of informal administrators be better clarified?
- SE27** Would a process of administration by statutory declaration be a worthwhile addition to the mechanisms designed to facilitate the administration of small estates?
- SE28** Are there further safeguards that would be necessary or desirable if this proposal were implemented?





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