



Victorian  
Law Reform  
Commission

# Succession Laws

CONSULTATION PAPER | **DEBTS**





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### Succession Laws consultation papers

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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 36 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 36.

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 adeemed and when it will be protected from ademption

### **Family provision**

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

### **Intestacy**

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



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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><i>Bona vacantia</i></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> .
<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 relative</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 executor is available for some reason. It confers upon a court-appointed administrator 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 executor 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).

<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>

<sup>2</sup> Victorian Registry of Births Deaths and Marriages, *Fast Facts* (3 January 2012) <<http://www.bdm.vic.gov.au/utility/about+us/fast+facts/>>.

<sup>3</sup> 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).

<sup>4</sup> For a full description of the types of property that may be disposed of by will, see the *Wills Act 1997* (Vic) s 4.

<sup>5</sup> *Superannuation Industry Supervision Act 1993* (Cth) s 59(1A).

<sup>6</sup> 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.

<sup>7</sup> Wm 4 & 1 Vict, c 26.

<sup>8</sup> 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).

<sup>9</sup> *Wills Statute 1864* (Vic); *Wills Act 1890* (Vic); *Wills Act 1915* (Vic); *Wills Act 1928* (Vic); *Wills Act 1958* (Vic).

<sup>10</sup> 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.

<sup>11</sup> The report was not published.

<sup>12</sup> Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) xiii.

<sup>13</sup> 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.

<sup>14</sup> Law Reform Committee, above n 12.

<sup>15</sup> National Committee for Uniform Succession Laws, above n 13.

<sup>16</sup> 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.

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

<sup>18</sup> 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.

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

<sup>20</sup> *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 consultation paper concerns the way in which personal representatives are required to deploy assets of the estate towards the payment of estate debts. The current regime is found in the second schedule to the Administration and Probate Act. Section 39(2) of the Act in effect incorporates the schedule into the Act.

1.32 Schedule 2 provides as follows:

### **PART I—RULES AS TO PAYMENT OF DEBTS WHERE THE ESTATE IS NOT SOLVENT**

1. The funeral, testamentary, and administration expenses have priority.
2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under any law of the Commonwealth relating to bankruptcy with respect to the assets of persons adjudged bankrupt.

### **PART II—ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT**

1. Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.
2. Property of the deceased specifically appropriated or devised or bequeathed or directed to be sold (either by a specific or general description), for the payment of debts.
3. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
4. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
5. The fund, if any, retained to meet pecuniary legacies.
6. Property specifically devised or bequeathed, rateably accordingly to value.
7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.
8. The following provisions shall also apply:
  - (a) The order of application may be varied by the will of the deceased.
  - (b) This part of this Schedule does not affect the liability of any property to answer any duty by Statute imposed thereon in exoneration of other assets.

## 2. Use of estate assets for debt payment

### Introduction

- 2.1 Before the assets of the estate can be distributed to beneficiaries under a will or upon intestacy, the personal representative must settle outstanding debts.
- 2.2 In Victoria, the payment of estate debts is governed by part I, division 5 of the *Administration and Probate Act 1958* (Vic). This division sets out:
  - the powers of the personal representative to deal with the estate's assets
  - which assets are available to pay debts
  - which debts are to be paid and when, and
  - which assets will ultimately bear the debt.
- 2.3 If the estate has sufficient assets to pay all debts, it is solvent. The Act sets out the order in which estate assets should be applied in the payment of debts where an estate is solvent (section 39(2)). This ordering affects the beneficiaries' ultimate entitlements.
- 2.4 If the estate does not have sufficient assets to pay all debts, it is insolvent. The Act prescribes how the estate is to be applied in the payment of creditors where it is insolvent (section 39(1)).
- 2.5 The specific rules as to the order of payment and application of assets in satisfaction of debts are contained in schedule 2 of the Act.
- 2.6 The Commission's terms of reference direct it to review and report on:
  - 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.<sup>1</sup>
- 2.7 One of the identified purposes of the terms of reference is to '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'.<sup>2</sup> This is of particular relevance to the topic of estate debts, as a number of the National Committee's recommendations, if adopted in Victoria, could significantly simplify and update the law in this area.

- 2.8 The National Committee for Uniform Succession Laws 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 deal with 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>3</sup>
- 2.9 This paper will provide an overview of the current law in Victoria and review potential areas of reform in light of the recommendations of the National Committee.<sup>4</sup>

## Debts of the estate

- 2.10 It is a fundamental duty of the personal representative to pay out of the estate the deceased person's debts and liabilities, including funeral, testamentary and administrative expenses.<sup>5</sup> Power to sell estate assets is conferred on the personal representative for this purpose.<sup>6</sup>
- 2.11 It is generally in the beneficiaries' interests to have a quick distribution of their entitlements. However, the personal representative must take care not to make final distribution to the beneficiaries before the extent of the debts and liabilities of the estate is known. A personal representative who distributes the estate before settling or fully ascertaining the extent of debts may be personally liable to the estate's creditors, where the remaining estate proves insufficient to meet their claims in full.
- 2.12 To ensure that debts are identified, the personal representative advertises the forthcoming distribution of the estate, and may require potential creditors to provide particulars of any relevant claims. The personal representative may specify a time limit—of not less than two months—for these claims to be submitted, and thereafter distribute on the basis of claims of which there is notice.<sup>7</sup>
- 2.13 Where the legal personal representative assesses a claim as justified, they may pay the debt. Where it does not appear to be justified, the legal personal representative may serve a notice requiring the claimant to institute proceedings to support the claim. If proceedings are not instituted, the personal representative can seek to have the debt disregarded by order of the Court three months after serving the notice.<sup>8</sup>

## Funeral, testamentary and administration expenses

- 2.14 Funeral and administration<sup>9</sup> expenses are payable out of the deceased person's estate, and take priority, in most cases, over the payment of other debts of the estate.<sup>10</sup>

3 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).

4 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).

5 *Administration and Probate Act 1958* (Vic) sch 2 pt I cl 1.

6 *Ibid* ss 44–5.

7 *Trustee Act 1958* (Vic) s 33.

8 Rather than effectively barring the claim under s 30(3)(b), the Court may also order that the three month period be extended, make orders enabling the distribution of the estate without regard to the potential claim, or impose such conditions or give such directions as seem just: *Administration and Probate Act 1958* (Vic) ss 30(3)(a), (c)–(d).

9 Testamentary expenses and administrative expenses have been held to be synonymous: *Re Taylor's Estate & Will Trusts* [1969] 2 Ch 245, 254.

10 *In Estate of Dean* (1885) 11 VLR 761, 764 (Molesworth ACJ). *Administration and Probate Act 1958* (Vic) sch 2 pt I cl 1, in relation to insolvent estates.

- 2.15 Administration expenses are the costs incurred by a personal representative in proper performance of their duties in administering the deceased estate.<sup>11</sup> They include the costs of:
- obtaining probate or letters of administration<sup>12</sup>
  - obtaining legal advice on administration or distribution<sup>13</sup>
  - collecting and preserving the assets<sup>14</sup>
  - ascertaining the deceased person's debts and liabilities,<sup>15</sup> and
  - defending a family provision application.<sup>16</sup>

### Assets available for debt payment

- 2.16 The general rule is that all of the assets of the deceased person within the jurisdiction are available for the payment of debts.<sup>17</sup> This includes both real estate (real property) and personal property of the deceased person, in contrast to the former position in which real estate was afforded some protection from creditors.<sup>18</sup> All Australian jurisdictions now include both real and personal property in the categories of assets that can be used to pay debts.<sup>19</sup>
- 2.17 There are also a number of types of asset that will not generally be available for debt payment, including life insurance<sup>20</sup> and superannuation.<sup>21</sup> Also, under the *Bankruptcy Act 1966* (Cth), claims for damages or compensation relating to personal injuries are not available to creditors.<sup>22</sup>
- 2.18 Where someone dies without a will (dies intestate) the shared home of the deceased person may also be unavailable to creditors. Section 37A of the Administration and Probate Act confers the right on a surviving partner to elect to acquire the deceased person's share of the home.<sup>23</sup>
- 2.19 The operation of this provision will not technically affect the size of the estate for payment of debts. Where the value of the interest is more than the value of the surviving partner's entitlement on intestacy, the surviving partner must pay the difference into the estate, that is, 'buy in'.<sup>24</sup>
- 2.20 The availability of any asset is limited to the deceased person's *beneficial interest* in it—property held on trust for others will not form part of the estate for debt payment purposes.<sup>25</sup>

11 *Sharp v Lush* (1879) 10 Ch D 468.

12 *Trustees, Executors & Agency Co Ltd v Thorpe* (1900) 26 VLR 99.

13 *Sharp v Lush* (1879) 10 Ch D 468, 470 (Jessel MR).

14 *Re Taylor's Estate & Will Trusts* [1969] 2 Ch 245. This excludes property which is the subject of specific gifts, as it is generally the case that beneficiaries will be liable for these costs, unless specifically provided for otherwise by the will maker. See *Re Rooke*; *Jeans v Gatehouse* [1933] Ch 970.

15 See, for example, *Re Hall-Dare* [1916] 1 Ch 272.

16 *Re Lowe* [2000] NSWSC 1180, 5 (23 November 2000) (Young J).

17 For a discussion of the competing laws which may govern assets outside the jurisdiction, see *Re Fitzpatrick* [1952] Ch 86 and Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 734.

18 Real estate was brought under the control of executors and administrators by the *Administration Act 1872* (Vic). See discussion in Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 733.

19 *Administration and Probate Act 1929* (ACT) ss 41(1), 41A(1); *Probate and Administration Act 1898* (NSW) ss 46(1), 46A(1); *Administration and Probate Act* (NT) ss 54(1), 55(1); *Succession Act 1981* (Qld) s 56; *Administration and Probate Act 1919* (SA) s 46(2); *Administration and Probate Act 1935* (Tas) s 32(1); *Administration Act 1903* (WA) s 10(1).

20 *Life Insurance Act 1995* (Cth) s 205(1)(a): a policy payable to a deceased person's estate cannot be used for payment of that person's debts, even where the debt arises by court order. However, the proceeds of the policy can be brought into the estate for debt payment if designated by the will-maker for this purpose: s 205(1)(b).

21 Superannuation does not automatically form part of the estate, and death benefit payments from superannuation funds that are below 'the reasonable benefit limits' are not available to creditors: *Bankruptcy Act 1966* (Cth) ss 249(6)–(8).

22 *Bankruptcy Act 1966* (Cth) s 116(2)(g).

23 *Administration and Probate Act 1958* (Vic) s 37A. This section only applies to estates where the deceased died after the commencement of the section, on 1 January 1995. The section was amended by the *Administration and Probate (Amendment) Act 1994* (Vic).

24 *Administration and Probate Act 1958* (Vic) s 37A(7).

25 *Ibid* s 37. See also: *Bankruptcy Act 1966* (Cth) s 116(2)(a).

## Possible family provision claims

- 2.21 As well as claims by creditors, personal representatives may become aware of potential family provision claims under part IV of the Administration and Probate Act. Such potential claims must be brought within six months of the date of the grant of representation,<sup>26</sup> although the court may extend this period.<sup>27</sup>
- 2.22 The broad eligibility provisions for family provision claims in Victoria<sup>28</sup> mean that even where no specific claim is identified, it is considered proper for a legal personal representative to wait until the expiration of the six-month period before distributing the estate.<sup>29</sup>
- 2.23 Notice of a possible family provision claim will not disturb or delay the payment of debts, as any family provision order will operate as either a codicil to the will,<sup>30</sup> or a variation of the statutory distribution on intestacy.<sup>31</sup> It is for the existing beneficiaries, and not the creditors, to bear the burden of such an order.<sup>32</sup>
- 2.24 The designation of assets to pay the debts of an estate is designed to achieve fairness between the beneficiaries of that estate. The burden of estate debts is to be borne by the estate in a way that is fair as between the different ‘categories’ of beneficiary.
- 2.25 At the end of the day, the size of the net estate is not affected by this exercise, but the magnitude of benefits received by different beneficiaries under the will may be affected. Applicants for family provision seek provision out of the net estate, and therefore the manner in which assets are designated to pay debts will not affect them.

## Solvent estates

- 2.26 The payment of debts in solvent deceased estates is governed by section 39(2) of the Administration and Probate Act, which provides:
- Where the estate of a deceased person is solvent his real and personal estate shall subject to the Rules of Court and the provisions hereinafter contained as to charges on property of the deceased and to the provisions (if any) contained in his will be applicable towards the discharge of the funeral testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Part II of the Second Schedule to this Act.
- 2.27 The second schedule to the Act sets out the order of debt payment. Part I, relating to insolvent estates, deals with the *priority of debts*—that is, the order in which debts will be paid. Part II, relating to solvent estates, deals with the *order of application* of the available assets—that is, to what extent particular assets will actually bear the burden of a debt.
- 2.28 A solvent estate has sufficient assets to pay all debts, liabilities, funeral, testamentary and administrative expenses in full.<sup>33</sup> After debts are paid, the balance of the estate is paid to beneficiaries under the will or in accordance with the rules of intestacy.
- 2.29 When paying debts, the personal representative may use any of the available assets in the estate,<sup>34</sup> and to that end will most likely choose the most readily available or saleable assets first. This ensures that creditors are paid quickly.

26 *Administration and Probate Act 1958* (Vic) s 99.

27 *Ibid.*

28 *Ibid* s 91.

29 *Re Jones* [1978] VR 272, *Re Gough* (1973) 55 5 ASR 559. See discussion in John Kaufman, Stewart McNab and David Were, *Probate Practice Manual* (Leo Cussen Institute for Continuing Legal Education, 2006) ch 16.

30 *Administration and Probate Act 1958* (Vic) s 97(4)(a).

31 *Ibid* s 97(4)(b).

32 *Ibid* s 97(2). Under this provision, prima facie the burden is borne by existing beneficiaries proportionately. There is also a proviso to this provision that deals with the situation where one piece of property is given to separate beneficiaries successively (that is, to one beneficiary for life and another thereafter). In this scenario, the two separate interests in the property are not to be treated separately for the purposes of meeting a successful family provision claim, but charged against the property as a whole.

33 *Re Leng* [1895] 1 Ch 652, 658.

34 See discussion of *Re Tong*; *Hilton v Bradbury* [1931] 1 Ch 202, 212 in *Joyce v Cam* [2004] NSWSC 621, 48 (28 July 2004).

- 2.30 In some estates, payment of the debts may cut into benefits that have been given under the will. However, this should not be permitted to unfairly prejudice those beneficiaries from whose promised benefits the debts are most easily paid.
- 2.31 In *Re Tong*,<sup>35</sup> discussing the equivalent United Kingdom provision, Justice Romer was of the opinion that:
- nothing in the Act was intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose; and [the provision] really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the [will-maker's] estate.
- 2.32 To ensure that the burden of the debts is not borne arbitrarily by those whose benefits are more easily realised, the personal representative must reconcile the debt payments to the assets of the estate to determine which assets should be applied and in what order, and whose entitlements should be reduced accordingly. Under this system, a gift to a beneficiary that was initially used to pay debts can be reinstated in full or in part.
- 2.33 This process of marshalling<sup>36</sup>—determining which gifted assets should bear the burden of the debts—is done according to an order of application. The order of application sets out types or classes of asset, in the order in which they are to be drawn upon.
- 2.34 The personal representative applies the assets in the first class to pay the debts, and will only move to the second and subsequent classes if and when the prior class is exhausted. If all classes are exhausted before debts are paid in full, the estate is insolvent, and the beneficiaries will not receive their benefits.

### The Victorian order of application in solvent estates

- 2.35 The current Victorian order of application is set out in part II of schedule 2 of the Administration and Probate Act. The debts must be paid out of each class of property in turn until fully discharged.
- 2.36 The classes of asset in order of application are as follows:
1. Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.
  2. Property of the deceased specifically appropriated or devised or bequeathed or directed to be sold (either by a specific or general description), for the payment of debts.
  3. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
  4. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
  5. The fund, if any, retained to meet pecuniary legacies.
  6. Property specifically devised or bequeathed, rateably accordingly to value.
  7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

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36

[1931] 1 Ch 202, 212.

An equitable doctrine applied in the administration of deceased estates by which those estate assets remaining after the payment of debts are adjusted prior to distribution to ensure the distribution among the beneficiaries entitled accords with the order established under the will, statute or at law: Peter Butt and Peter Nygh (eds), *Butterworths Australian Legal Dictionary* (Butterworths, 1997).

## Development of the order of application

2.37 The common law order contained eight classes of asset.<sup>37</sup> A statutory list, with seven classes of asset, was introduced in the United Kingdom by the *Administration of Estates Act 1925* (UK).<sup>38</sup> This was adopted in Australian jurisdictions, except Western Australia and South Australia, where the common law order was retained. In most jurisdictions, the order is contained in a schedule to the head Act, and is expressed to operate subject to variation by the will of the deceased person.<sup>39</sup>

2.38 The orders of application in the Australian Capital Territory, New South Wales, the Northern Territory and Tasmania still closely resemble the United Kingdom order of application. They are largely the same but for minor differences in expression.<sup>40</sup>

The current United Kingdom order is as follows:

1. Assets undisposed of by will, subject to retaining out of those assets a fund sufficient to meet any pecuniary legacies.
2. Assets not specifically disposed of by will, but included (either by a specific or general description) in a residuary gift, subject to retaining out of those assets a fund sufficient to meet any pecuniary legacies not provided for from the assets undisposed of by the will.
3. Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts.
4. Assets charged with or disposed of by will (either by a specific or general description) subject to a charge for the payment of debts.
5. The fund (if any) retained to meet pecuniary legacies.
6. Assets specifically disposed of by will, rateably according to value.
7. Assets appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

2.39 This order can be varied by contrary intention of the will maker.<sup>41</sup>

## Property set aside for payment of debts

2.40 The most important difference between the Victorian order and those of other jurisdictions arises from changes to the order of application made by the *Statute Law Revision Act 1933* (Vic).<sup>42</sup>

2.41 The common law order, the United Kingdom order of application, and all Australian variations except the Queensland order, place property undisposed of by will, and property the subject of a residuary disposition, ahead of property specifically set aside for the payment of debts.

2.42 In contrast, property specifically set aside for the payment of debts makes up the second and third classes in Victoria, not the third and fourth, as in most jurisdictions. This means that property specifically set aside for the payment of debts is 'promoted' to the second and third classes, and will be drawn upon earlier than in other jurisdictions.

37 See discussion and summary in *Calcino v Fletcher* [1969] Qd R 8, 23.

38 *Administration of Estates Act 1925* (UK) c 23, sch 1 pt II. See discussion in Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 758.

39 See, eg, *Administration and Probate Act 1958* (Vic) sch 2 pt II cl 8(a). See also s 39(2).

40 *Administration and Probate Act 1929* (ACT) sch 4 pt 4.1; *Probate and Administration Act 1898* (NSW) sch 3 pt 1; *Administration and Probate Act 1935* (Tas) sch II pt II; *Administration and Probate Act 1969* (NT) ss 57–8.

41 *Administration of Estates Act 1925* (UK) c 23 sch 1 pt II cl 8.

42 Amending the order of application in the then *Administration and Probate Act 1928* (Vic) sch 2 pt II.



- 2.43 This difference is supposed to better reflect the will-maker's intentions by recognising that they intended to pay debts out of the property set aside for that purpose, before resorting to property the subject of a residuary gift or otherwise undisposed of.
- 2.44 The Victorian order has been recognised in other jurisdictions, and by the courts, as an improvement on the traditional orders, as it 'gives primacy, and ... logical order, to a [will-maker's] expressions of intention'.<sup>43</sup>
- 2.45 Early commentary on the operation of the United Kingdom order of application highlights a difficulty with it, namely that when a will-maker sets aside property for payment of debts, this could be construed as an intention to vary the order of application, despite the fact that this 'designated' property is included in the order itself:

The very factor which would bring an asset into Class 3 or 4—namely, an appropriation for payment of debts or a charge for the payment of debts—[is] itself a 'provision' in the will, which would appear from the words of the section to take the assets in question altogether outside of the schedule.<sup>44</sup>

### The will-maker's contrary intention

- 2.46 The statutory order of application of assets can be varied by expression of contrary intention in the will. This is set out both in section 39 of the Act, which incorporates the order of application subject to the provisions in the deceased person's will, and also by clause 8(a) of part II of the schedule, which provides that the order of application may be varied by the will of the deceased person.<sup>45</sup>
- 2.47 What is sufficient to constitute a direction to displace the order of application depends on a number of factors, including the terms of the will read as a whole, whether the will-maker drafted their own will, the nature of the estate assets and the will-maker's relationship with each of the beneficiaries.<sup>46</sup> The wording of any express statement of contrary intention is also closely considered.<sup>47</sup>
- 2.48 Contrary intention has proved a difficult area for the courts. As indicated, a will-maker's decision to set aside property for payment of debts could be construed as an intention to vary the statutory order. However, this designated property is included in the order itself, as assets in categories two and three (in Victoria) could only exist if there were a clause in the will putting them into those categories. This causes a tension between the will and the schedule.
- 2.49 Not only does the Victorian order of application (as explained above) give higher priority to property specifically set aside for the payment of debts than those of other jurisdictions, but Victorian case law has acknowledged the tension created by the position in the order of this category of property.

<sup>43</sup> Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies: Report*, Project No 34 Part VII (1988) 30. See also *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, 39 (Dixon J) and Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 41.

<sup>44</sup> *Fuller v Fuller* (1936) 36 SR (NSW) 600 (Maughan AJ).

<sup>45</sup> *Administration and Probate Act 1958* (Vic) s 39, sch 2 pt II cl 8(a).

<sup>46</sup> *Re Rodgers (dec'd)* [2001] 1 Qd R 542.

<sup>47</sup> See *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, 44.

- 2.50 In *Re Williams*,<sup>48</sup> Justice Dean took the approach, pursuant to section 39(2) of the Act, that the will must be interpreted first to see if there is room for the statutory order to operate at all. If the order is displaced then the question of how it operates simply does not arise:
- It seems to me more useful to refer to sec 34(2)<sup>49</sup> which makes the Schedule apply 'subject to the provisions of the will'. This requires that the will be first construed in order to discover its meaning and effect, and if [the] testator has dealt with the incidence of debts etc then there is no need to refer to the Schedule at all... It is not necessary to attempt to solve the conundrum which has hitherto remained unsolved of what words can answer the description of our present para (2) and (3)<sup>50</sup> and not override or vary the Schedule order.
- 2.51 Simply stated, the difficulty with including such categories—two and three in Victoria—is that the words necessary to bring assets within them seem quite sufficient to constitute an intention to vary the order of application within section 39(2).
- 2.52 However, this approach does not resolve the significant ambiguity in the current statutory order of application. Given that most personal representatives marshalling assets will not be legal professionals, it is desirable that the legislation governing debt payment be clear and relatively simple to follow.

## National Committee's recommendations

### Queensland reforms

- 2.53 Significant reform in Queensland has overcome this conflict in an arguably neater fashion than was achieved by the Supreme Court in *Williams*. The Queensland order, based on the common law, was re-drafted following the 1978 report of the Queensland Law Reform Commission (QLRC) into succession law.<sup>51</sup>
- 2.54 The QLRC was of the opinion that even the statutory version of the common law order in the *Administration of Estates Act 1925* (UK) was 'far from satisfactory in a number of respects... [and] productive of much litigation'. For this reason, the QLRC sought to re-design the Queensland scheme.
- 2.55 The most significant change brought to the Queensland order by the *Succession Act 1981* (Qld) was that property specifically set aside for the payment of debts became the *first class of asset* to be drawn upon. The QLRC took the view that 'where a will maker specifically [leaves] property to pay debts ... he means what he says';<sup>52</sup> that property should be used to pay debts first.
- 2.56 This change in order effectively removes the need to determine whether the setting aside of property to pay debts will oust the order, as any such property will be drawn on first.
- 2.57 The reforms also considered the necessity for each separate category, and reduced the number from seven to four.

48 [1950] ALR 751, 757 (Dean J).

49 Equivalent to s 39(2) of the *Administration and Probate Act 1958* (Vic).

50 Under the current Act, these clauses represent property specifically appropriated to be sold for the payment of debts, or that is subject to a charge for such payment: *Administration and Probate Act 1958* (Vic) sch 2 pt II cls 2–3.

51 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 39.

52 Ibid 41.

### National Committee's model order of application

- 2.58 The National Committee for Uniform Succession Laws concluded that an order of application based on the Queensland reforms may 'lead to greater certainty in relation to the application of assets' and may also 'reduce opportunities for litigation'.<sup>53</sup>
- 2.59 Accordingly, the National Committee recommended reducing the number of categories of asset available for payment of debts and applying property specifically designated by the will-maker for the payment of debts first. As discussed above, this places greater weight on the will-maker's intention and avoids difficulties in interpreting potential expressions of contrary intention.<sup>54</sup>
- 2.60 A number of the other issues that arise from the Victorian order are addressed by the National Committee's model order, which provides:
1. Property specifically appropriated or given by will (either by a specific or general description) for the payment of debts; and property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts.
  2. Property comprising the residuary estate of the deceased person and property in relation to which a disposition in the deceased's will operates as the exercise of a general power of appointment.
  3. Property specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on property given or appointed.
- 2.61 The National Committee proposed including the order of application within the text of the primary legislation, rather than in a schedule to it.
- 2.62 The most significant changes effected by the model order are listed below:
- Assets that are not disposed of by will are included in the residuary estate (as in Queensland).
  - Assets that make up the residuary estate are applied to the payment of debts before assets the subject of specific gifts (as in Victoria).
  - The two classes comprising property appropriated for payment of debts and property charged with payment of debts are combined into one class of asset.
  - Property the subject of a general power of appointment is subsumed into class two (where enlivened as part of a residuary gift) and three (where specifically appointed by will).

### Inclusion of undisposed of assets in residuary estate

- 2.63 The National Committee for Uniform Succession Laws decided that the definition of residuary estate could be greatly simplified. It determined that there was no need to distinguish between property in the deceased person's estate that is *not effectively disposed of* by the will and that which is *not specifically given* by the deceased person's will, but is included in a residuary disposition. The National Committee recommended that the Queensland definition of residuary estate,<sup>55</sup> which effectively merges gifted residuary property and assets the subject of partial intestacy for the purposes of debt payment, be included in the model provision.<sup>56</sup>

53 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 2*, Queensland Law Reform Commission Report No 65 (2009) 100.

54 'The shorter the list of classes of assets, the easier it should be to understand the effect of a direction contained in a will to pay debts': *ibid.*

55 *Succession Act 1981* (Qld) s 55.

56 National Committee for Uniform Succession Laws, *ibid.* n 53, 151.

- 2.64 This expansion also took into account the view of the QLRC that a beneficiary on intestacy should not have to bear debts before a residuary beneficiary, as those taking benefits on intestacy were likely to be more closely related to the deceased person than those taking a residuary benefit.<sup>57</sup>
- 2.65 The National Committee was also of the opinion that where the deceased person dies intestate, 'residuary estate' should mean the entire estate, leaving only one class of asset from which to pay debts.<sup>58</sup>

#### Application of residuary estate before specific gifts

- 2.66 The National Committee for Uniform Succession Laws, in its 1999 discussion paper, noted that historically there had been a preference that debts be paid out of residuary assets before those specifically given. This reflects the desirability of protecting recipients of specific gifts from creditors' claims, where possible.<sup>59</sup>

#### Application of property set aside for the payment of debts first

- 2.67 All orders of application allow for displacement of the order of application by contrary intention, while retaining a specific category of property set aside by the will-maker for the payment of debts.
- 2.68 The assets in class one, under the National Committee model, are brought into that class by the will. Placing the primary burden for payment of debts on the property found in class one gives primacy to the will-maker's express intention to pay debts from that source, thereby avoiding the question of interpretation of contrary intention which arises under the Victorian legislation:

The Committee lent support to its recommendations by looking to a 'substantial body' of case law [that] held that funds specifically designated by the [will-maker's] directions should be the primary fund for debt payment.<sup>60</sup>

#### Combination of property *appropriated* and property *charged* for debt payment

- 2.69 Class one effectively merges the categories, separate in all other jurisdictions, of property specifically appropriated, devised or bequeathed for the payment of debts, and property *charged* with payment of debts.
- 2.70 The National Committee's reasoning was based on the observation that it is difficult to speculate about the order in which a will-maker would have intended debts to be paid out of a fund specifically set aside for debt payment, and assets specifically charged for this purpose. The National Committee accepted that it would be sensible to treat these as one category.

<sup>57</sup> Queensland Law Reform Commission, above n 51, 40.

<sup>58</sup> National Committee for Uniform Succession Laws, above n 53, 105.

<sup>59</sup> National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons*, Queensland Law Reform Commission Discussion Paper MP37 (1999).

<sup>60</sup> See generally National Committee for Uniform Succession Laws, above n 53, 106, including discussion of *Re Littlewood* [1931] 1 Ch 443; *Re James* [1947] Ch 256; *Re Williams* [1950] ALR 751, 757 (Dean J); *Permanent Trustee Co of NSW Ltd v Temple* (1956) 57 SR (NSW) 301, 305 (Hardie J).

### General powers of appointment

- 2.71 The National Committee noted that where a general power of appointment is exercised by the making of a residuary gift, the property subject to that power would bear debts along with other property constituting the residuary estate (class two of the National Committee model).
- 2.72 Property subject to a general power of appointment that is specifically appointed to a beneficiary will fall into class three with all other specifically given property.
- 2.73 The National Committee was of the view that this approach was a significant improvement to the law in many jurisdictions. The Victorian order currently gives final priority to property appointed by will under a general power, placing it in class seven, after property specifically given.<sup>61</sup>

### Option for reform

- 2.74 The issues presented by the Victorian order of application are, for the most part, addressed by the National Committee's proposed model. The Commission's preliminary view is that the current order of application in Victoria should be changed in line with the proposal of the National Committee.

### Question

- D1** Should the current Victorian order of application of assets for payment of debts in solvent estates be simplified according to the National Committee proposal?

### Minor amendments

#### Expansion of rateability

- 2.75 The principle of rateability is that if assets within a class are to bear debts, they should bear them proportionately according to their respective values. For example, if property A, valued at \$60,000, and property B, valued at \$30,000, are the only assets within a class, a debt of \$30,000 would be split to reflect their proportional values: property A would bear \$20,000, and property B would bear \$10,000.
- 2.76 In Victoria, the principle of rateability is expressly included in the order of application to apply to classes six (property specifically devised or bequeathed) and seven (property appointed by will under a general power of appointment), but rateability is not mentioned in other classes.<sup>62</sup>
- 2.77 The National Committee for Uniform Succession Laws considered that the principle of rateability probably applies to all categories, and that the limited references in the legislation 'merely restate the law'. The National Committee recommended that a provision be included in the model legislation stating that property in each class should be applied rateably in the payment of debts. This position was supported by all of the submissions that addressed the issue.<sup>63</sup>

<sup>61</sup> National Committee for Uniform Succession Laws, above n 53, 110–13.

<sup>62</sup> *Administration and Probate Act 1958* (Vic) s 39, sch 2 pt II cls 6–7.

<sup>63</sup> National Committee for Uniform Succession Laws, above n 53, 118–19.

## Question

- D2** Should a provision be introduced into the *Administration and Probate Act 1958* (Vic) that specifies that all assets are to be applied rateably?

### Charged or mortgaged property

#### Current law

- 2.78 Although most debts will be applied to assets according to the order of application discussed above, section 40 of the *Administration and Probate Act* sets out an exception in relation to property mortgaged or subject to a charge. Section 40 is the modern equivalent of Locke King's Act.<sup>64</sup>
- 2.79 An asset that is charged with the payment of a debt—typically real estate subject to a mortgage, or to a lien for unpaid purchase money—will bear that debt, and entitled beneficiaries will take the asset subject to the debt. If more than one beneficiary is entitled to the asset, they will bear the debt in proportion to their share.<sup>65</sup>
- 2.80 The rule reflects the principle that when a will-maker charges property with a debt payment, 'all [they] actually own is the value of the property minus [the value of the debt]'.<sup>66</sup> When the property is given by will, the debt remains attached to the property, providing a clear and simple method of payment of secured creditors. However, the will-maker can prevent the operation of this rule by expressing a contrary intention.<sup>67</sup>
- 2.81 The practical effect for beneficiaries is that the secured debt will not be pooled with other debts and paid by assets in accordance with the order of application in schedule 2 of the Act. Although beneficiaries are able to refuse any gift, they may not separate a whole gift, even if a charge or mortgage applies to only a small part of it. A gift must be claimed or refused in its entirety.<sup>68</sup>

#### Rights of creditors

- 2.82 The operation of section 40 is concerned only with adjusting rights among the beneficiaries, and has no effect on the rights of the creditor or person entitled to the charge.<sup>69</sup> If the deceased person was personally liable to the creditor for the charge, the creditor may be able to recover the debt from the other assets of the estate. These would then be marshalled to ensure that the burden of the charge still falls on the property charged, and that other beneficiaries' entitlements are not affected.
- 2.83 If the operation of the presumption in section 40 is ousted by the establishment of a fund specifically set aside to bear the debt, and that fund is not sufficient to cover the debt, the creditor will retain a security over the property, and the property will bear the burden of payment of the shortfall.<sup>70</sup>

64 So named after the instigator of the original UK legislation from which the rule was derived: the *Real Estate Charges Act 1854* (UK). The current UK legislation is the *Administration of Estates Act 1925* (UK) c 23, s 35.

65 *Administration and Probate Act 1958* (Vic) s 40(1).

66 Queensland Law Reform Commission, above n 51, 44.

67 *Administration and Probate Act 1958* (Vic) s 40(1).

68 *Re Baron Kensington* [1902] 1 Ch 203.

69 *Administration and Probate Act 1958* (Vic) s 40(3).

70 *Re Fegan* [1928] Ch 45.

## Issues

### Harsh operation

- 2.84 Where a debt is raised on property for a purpose related to that property, it is easy to assume that the will-maker intended to pass the property less, or subject to, the associated debt. However, where a debt is raised for a purpose unrelated to that property, the will-maker may not necessarily have intended to pass that debt on when giving the property under their will.
- 2.85 A 1989 review of the operation of Locke King's Act in British Columbia observed that the presumption can operate quite harshly, and does not always reflect the will-maker's intention. It was argued that it is inappropriate to apply the rule strictly in a modern financial context, where debts are often charged on property in order to fund totally unrelated ventures, such as a mortgage charged on a family home in order to finance a small business.<sup>71</sup>
- 2.86 Based on this reasoning, in its 1999 discussion paper, the National Committee for Uniform Succession Laws considered limiting the operation of the rule to situations where the debt is 'wholly or in part referable to the purchase, preservation, maintenance or improvement of the asset' in question.<sup>72</sup>
- 2.87 However, the National Committee went on to decide that such a modification was not a useful one, as it assumed that the will-maker would only intend to pass the directly referable part of the debt on to the beneficiary. The National Committee thought it best to avoid making assumptions about a will-maker's intention. It decided that although the modification to the rule might better reflect the will-maker's intention in some circumstances, it was just as likely to bring about arbitrary results.<sup>73</sup>
- 2.88 Further, the National Committee noted that such a modification would require an administrator to understand how any funds raised against property had actually been spent during the will-maker's life. The potential complexity of such an enquiry, possibly 'greatly hinder[ing] the non-litigious distribution of ... estates',<sup>74</sup> as well as the simplicity of the existing rule, contributed to the National Committee's view that the traditional formulation of the rule should be retained.<sup>75</sup>

### Utility of the rule

- 2.89 The Northern Territory is the only jurisdiction without a form of this rule. The rule was discontinued when the South Australian Act containing it ceased to operate in the Territory.<sup>76</sup>
- 2.90 The National Committee for Uniform Succession Laws recommended that the Northern Territory not reintroduce the rule, as in the 40-odd years since its discontinuance, there do not appear to have been difficulties.
- 2.91 However, the National Committee included a provision to the effect of section 40 in the model legislation, as it 'provides a settled rule' for the payment of a debt charged on specific property. The National Committee noted that, were the provision abolished, some wills drafted in reliance on the provision before its abolition may be unfairly affected.<sup>77</sup>

71 Law Reform Commission of British Columbia, *Wills and Changed Circumstances*, Report No 102 (1989).

72 National Committee for Uniform Succession Laws, above n 59, 229.

73 Ibid 230.

74 Ibid. However, note that the British Columbia inquiry raised this issue, and was of the opinion that it would be a 'modest price to pay' to better reflect the [will-maker's] intentions': Law Reform Commission of British Columbia, above n 71, 46.

75 National Committee for Uniform Succession Laws, above n 53, 137.

76 The *Administration and Probate Act 1891* (SA) was repealed by the *Administration and Probate Ordinance 1969* (NT).

77 National Committee for Uniform Succession Laws, above n 53, 132.



## Question

**D3** Are there any significant difficulties with the operation of section 40 of the *Administration and Probate Act 1958* (Vic)?

If so:

- (a) should the provision be abolished as in the Northern Territory?
- (b) should the provision be modified to require a sufficient connection between the debt and the property upon which it is charged?

### The will-maker's contrary intention

- 2.92 A sufficient contrary intention will be shown where the will either:
- specifies that the beneficiary is to take the asset free of the debt, or
  - identifies the alternative assets from which the particular debt is to be paid.<sup>78</sup>
- 2.93 The Administration and Probate Act sets out what will *not* be sufficient to express a contrary intention, stipulating that a 'general direction' for debts to be paid from the will-maker's personal or residuary estate or both, or a charge of debts over these, will not displace the rule, and charged property will continue to bear its own debt.<sup>79</sup>
- 2.94 The process of construing the will to determine whether the will-maker has expressed a contrary intention was described in *McPhie v Mackay*.<sup>80</sup>
- 2.95 Firstly, the will is construed as a whole to determine what provision, if any, was made for the payment of debts. If the wording of that provision falls within the description of a 'general direction' to pay debts, the operation of Locke King's Act will not be displaced. In this case, the decision-maker must search for further indications in the will of intention 'expressly or by necessary implication' in relation to the specific debt.
- 2.96 The words which are relied upon as showing a contrary intention 'must specifically refer to the manner in which the charge has to be borne after ... death *and as between the parties entitled under his will*'.<sup>81</sup> It is not enough for the will-maker to have referred to the payment of the debt, they must also have referred to the distribution of the burden as between beneficiaries.<sup>82</sup> Sufficiently clear contrary intention may cause the debt to be paid out of assets in the order of application under part II of schedule 2 of the Administration and Probate Act, or as otherwise indicated.

<sup>78</sup> *Re Fegan* [1928] 1 Ch 45.

<sup>79</sup> *Administration and Probate Act 1958* (Vic) ss 40(2)(a)–(b). See also *Re Tong* [1931] 1 Ch 202; *Fisher v Fisher* [1948] VLR 8: 'a gift of residue subject to the payment thereof of the above legacies and all my just debts funeral and testamentary expenses, probate duty and estate duty charges ... and all other charges' was insufficient to displace the debt attaching at death to a parcel of land specifically devised.

<sup>80</sup> [1975] 2 NSWLR 369.

<sup>81</sup> As noted in an editorial note to *Re Wakefield* [1943] 2 All ER 29, affirmed in *Versteeg v Versteeg* [2008] WASC142 16 July 2008 (emphasis added).

<sup>82</sup> See also discussion in R A Sundberg, *Griffiths Probate Law and Practice* (Lawbook Co, 3rd ed, 1983) 73–4.



- 2.97 The National Committee for Uniform Succession Laws sought submissions on whether model legislation should indicate what *will* be sufficient to express contrary intention, as well as what will not. In its final recommendation on the topic, the National Committee was of the opinion that it would be impractical to have such a stipulation in the model provisions, echoing arguments that the interpretative function involved in searching for a contrary intention in a will is a matter for the courts to decide on a case-by-case basis.<sup>83</sup>

## Question

- D4** Should section 40 of the *Administration and Probate Act 1958* (Vic) set out what will be, as well as what will not be, sufficient to constitute contrary intention?

### Location of contrary intention

- 2.98 In Victoria, a contrary intention may be shown by ‘will, deed or other document’.<sup>84</sup> This is the case in most other Australian jurisdictions, except the Australian Capital Territory and Queensland, where the legislation requires that contrary intention be shown by will only.<sup>85</sup>
- 2.99 Allowing what is essentially a testamentary intention to be found outside a will is arguably controversial. The Law Reform Commission of Western Australia argued in their 1988 report that the wider scope presented problems of proof, and potentially of fraud:<sup>86</sup>
- There seems to be no good reason why such an expression of what is essentially a testamentary intention should remain outside the normal rules relating to the form in which testamentary wishes must be expressed.
- 2.100 The National Committee for Uniform Succession Laws recommended that contrary intention should only be manifested by will. This recommendation was made having regard to the earlier recommendation of the National Committee for a general dispensing power and a broader interpretation provision for wills.<sup>87</sup>

## Question

- D5** In the context of section 40 of the *Administration and Probate Act 1958* (Vic), should an expression of contrary intention be by will only?

<sup>83</sup> National Committee for Uniform Succession Laws, above n 53, 144–5.

<sup>84</sup> *Administration and Probate Act 1958* (Vic) s 40(1).

<sup>85</sup> *Civil Law (Property) Act 2006* (ACT) s 500(2); *Succession Act 1981* (Qld) s 61(1).

<sup>86</sup> Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies: Report*, Project No 34 Part VII (1988).

<sup>87</sup> Queensland Law Reform Commission, *The Law of Wills*, Report 52 (1997) 15.

## Insolvent estates

- 2.101 An insolvent estate does not have sufficient assets to repay all debts and expenses in full. Whether an estate is insolvent is a question of fact, having regard to debts payable and the size of the estate.

### Current law

- 2.102 Section 39 of the Administration and Probate Act directs that insolvent estates be administered according to the rules set out in part 1 of the second schedule to the Act.
- 2.103 Part I of the schedule provides that, subject to funeral, testamentary and administration expenses having priority, Commonwealth bankruptcy law applies:
- the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under any law of the Commonwealth relating to bankruptcy with respect to the assets of persons adjudged bankrupt.
- 2.104 Although insolvent deceased estates are not automatically bankrupt, the practical effect of the above section is to apply the scheme designed for bankruptcy in cases of insolvent deceased estates.

### Bankruptcy Act 1966 (Cth)

- 2.105 A creditor or the personal representative of the estate may file a petition for bankruptcy under the *Bankruptcy Act 1966* (Cth).<sup>88</sup> Where a bankruptcy order has been obtained, the estate will be administered in bankruptcy—that is, under the provisions of and subject to the rules of the Bankruptcy Act.
- 2.106 Other eligibility provisions must also be met under this section,<sup>89</sup> and the granting of the order is at the court's discretion.
- 2.107 Importantly, the Bankruptcy Act contains some 'anti-avoidance' provisions that may have the effect of bringing property disposed of during the deceased person's lifetime back into the estate.<sup>90</sup>

88 *Bankruptcy Act 1966* (Cth) ss 244(1), 247(1). A creditor must be owed a debt of not less than \$5000 in order to file a creditor's petition. The term 'personal representative' in this context has been held to apply not only to the legal personal representative, but to anyone who is, in fact, administering the estate: *Re Estate of Madden* (1969) 13 FLR 1, 2.

89 For example, the debt or debts of the creditor presenting the petition must be for a liquidated sum and must be payable immediately or at a certain future time. *Bankruptcy Act 1966* (Cth) s 244(6)(a). There must also be a 'relevant Australian' connection established with the deceased: s 244(6)(b).

90 Including s 120(1) and qualifying provisions in ss 120(3)(b) and 121. These provisions are applicable to the administration of deceased estates: *Bankruptcy Act 1966* (Cth) s 248(1).

2.108 As a starting point, all debts of the estate rank equally under the Bankruptcy Act, and are to be paid proportionately where the estate is insolvent. As the Bankruptcy Act binds the Crown,<sup>91</sup> the general common law priority given to federal and state debts is abolished. However, there are some debts to which priority has been given by other Commonwealth statutes,<sup>92</sup> making the effective order of priority of payment as follows:<sup>93</sup>

- the expenses of the administration of the estate under the Bankruptcy Act
- certain outstanding child support payments<sup>94</sup>
- certain outstanding income tax liabilities<sup>95</sup>
- in the case of an administration of an estate under part XI that occurs within two months after a personal insolvency agreement or a composition or scheme of arrangement has been set aside or terminated—the liabilities, commitments, expenses or remuneration referred to in section 114 of the Bankruptcy Act
- proper funeral and testamentary expenses.<sup>96</sup>

### Schedule 2 of the Administration and Probate Act

2.109 Where there is no particular advantage to administering the insolvent estate under the Bankruptcy Act, or the conditions for filing a creditor's petition have not been met, the insolvent estate will probably be administered under part I of the second schedule to the Administration and Probate Act.

2.110 In these cases, funeral, testamentary and administration expenses take first priority. For debts beyond these, priority is determined by certain rules set out in the Bankruptcy Act and imported into the Administration and Probate Act, including:<sup>97</sup>

- the respective rights of secured and unsecured creditors
- the debts and liabilities provable
- the valuation of annuities and future and contingent liabilities, and
- the priorities of debts and liabilities.

The rules applicable from the Bankruptcy Act are expressed in the Administration and Probate Act as those 'in force for the time being',<sup>98</sup> as opposed to those in force 'at the death of the deceased', which is the case in a number of other Australian jurisdictions.<sup>99</sup>

2.111 As regards creditor priority, the Administration and Probate Act abolishes the common law right of personal representatives to favour some creditors over others,<sup>100</sup> stating that creditors with unsecured debts will 'stand in equal degree'.<sup>101</sup> Moreover, a personal representative may not prefer any debts they themselves are owed by the estate simply by virtue of their role as representative.<sup>102</sup>

91 *Bankruptcy Act 1966* (Cth) s 8.

92 Section 109(1A) of the *Bankruptcy Act 1966* (Cth) provides that the otherwise stipulated priorities (in s 109(1)) are to have effect subject to s 50 of the *Child Support (Registration and Collection) Act 1988* (Cth) and a number of sections of the *Income Tax Assessment Act 1936* (Cth).

93 Section 109(1A) of the *Bankruptcy Act 1966* (Cth) modifies the otherwise stipulated priorities in s 109(1).

94 Being those payable to the Child Support Registrar under s 50 of the *Child Support (Registration and Collection) Act 1988* (Cth). This debt is given priority over all debts other than relevant income tax payments (see effective order of payment, above at [2.108]), and the administration costs in bankruptcy.

95 Being amounts payable under s 221YU of the *Income Tax Assessment Act 1936* (Cth).

96 See discussion above at [2.14].

97 *Administration and Probate Act 1958* (Vic) sch 2 pt I cl 2.

98 *Ibid.*

99 The equivalent provisions of the Australian Capital Territory, New South Wales, Northern Territory, Tasmanian and Western Australian Acts.

100 See *Lyttleton v Cross* (1824) 107 ER 751, *Re Samson*; *Robbins v Alexander* [1906] 2 Ch 584, 593 (Buckley J).

101 *Administration and Probate Act 1958* (Vic) s 36(1).

102 *Ibid* s 36(3).

- 2.112 Although the system in Victoria is much the same as that of the other states and territories, the Commission needs to consider whether there are ways to simplify and clarify its operation.

## Question

- D6** How could the two current schemes of administration— part I of the second schedule to the *Administration and Probate Act 1958* (Vic) and the *Bankruptcy Act 1966* (Cth)—operate more efficiently and effectively?

## Minor amendments

### ‘Insolvent’ to be expressly defined in a deceased estates context

- 2.113 The Victorian legislation does not define insolvent; section 39 of the Administration and Probate Act instead refers to estates that are ‘not solvent’.<sup>103</sup>
- 2.114 The National Committee for Uniform Succession Laws recommended that the Administration and Probate Act should specifically define insolvent in the context of administration of estates. The National Committee’s model provision applies to estates ‘insufficient for the payment in full of the debts and liabilities of the deceased’, as in the legislation of the Northern Territory and Australian Capital Territory.<sup>104</sup>

## Question

- D7** Should the *Administration and Probate Act 1958* (Vic) define ‘insolvent’?

## Crown debts

- 2.115 At common law, the Crown would generally have priority over other creditors for payment of debts. This could have an effect on the effective order of priority of creditors in payment of debts of insolvent estates.
- 2.116 The Bankruptcy Act provides that all debts rank equally unless otherwise specified in the Act.<sup>105</sup> As the Act is expressed to bind the Crown,<sup>106</sup> the common law priority of Crown debts is therefore not applicable for estates administered under this scheme.<sup>107</sup>
- 2.117 However, although section 36(1) states that creditors ‘stand in equal degree’,<sup>108</sup> it is not clear whether the Administration and Probate Act is intended to bind the Crown.
- 2.118 In the context of a broader view that priorities for payment under administration under the administration and probate legislation should be assimilated with those under the Bankruptcy Act, the National Committee for Uniform Succession Laws recommended that the model provision expressly bind the Crown not only in right of the relevant jurisdiction, but also the Crown in all of its other capacities.

<sup>103</sup> Ibid s 39.

<sup>104</sup> *Administration and Probate Act 1929* (ACT) s 41C(2); *Administration and Probate Act* (NT) s 57(2).

<sup>105</sup> *Bankruptcy Act 1966* (Cth) s 108.

<sup>106</sup> Ibid s 8.

<sup>107</sup> National Committee for Uniform Succession Laws, above n 53, 67–72.

<sup>108</sup> Ibid 70.

## Question

- D8** Should the *Administration and Probate Act 1958* (Vic) be expressed to bind the Crown, or alternatively, should there be express abolition of the priority of Crown debts?

### Adaptation of Bankruptcy Act provisions

- 2.119 As the Bankruptcy Act is Commonwealth legislation, it is not within the Commission's terms of reference to review its operation. However, a change in how the relevant imported rules are referred to in the Administration and Probate Act could provide more certainty and clarity to those seeking to understand their application to the administration of insolvent estates.
- 2.120 Part I of the second schedule to the Administration and Probate Act imports the relevant laws of bankruptcy that apply to 'the assets of a person adjudged bankrupt'. The National Committee for Uniform Succession Laws recommended that the model legislation instead refer to the relevant bankruptcy rules that apply 'to the administration of estates of deceased persons in bankruptcy'.<sup>109</sup>
- 2.121 This change, while appearing minor, would mean that references to particular matters in bankruptcy are read as having a meaning specifically relating to the administration of deceased estates. Terminology that is strictly irrelevant, such as 'person adjudged bankrupt', and 'sequestration order', are replaced by their equivalent terms relating to administration of estates, and as substituting terms that are relevant for the administration of deceased estates. These are set out in section 248(3) of the Bankruptcy Act.<sup>110</sup>

### Rules of bankruptcy 'in force for the time being'

- 2.122 The Victorian provision governing the importation of the relevant rules of bankruptcy refers to the rules in force 'for the time being'. The National Committee for Uniform Succession Laws suggested an approach calculated to achieve more certainty and recommended, in line with a number of Australian jurisdictions, a reference to the relevant rules in force at the time of death of the deceased person.<sup>111</sup>

## Question

- D9** Should clause 2 of part I of the second schedule to the *Administration and Probate Act 1958* (Vic) be amended to import the rules of bankruptcy in force 'at the time of death'?

<sup>109</sup> Ibid 62.

<sup>110</sup> For example, 'a reference to a bankrupt shall be read as a reference to a deceased person in respect of whose estate an order for administration under this Part has been made and as including a reference to the estate of that deceased person': *Bankruptcy Act 1966* (Cth) s 248(3)(e).

<sup>111</sup> National Committee for Uniform Succession Laws, above n 53, 59.

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# Questions

## Solvent estates

- D1 Should the current Victorian order of application of assets for payment of debts in solvent estates be simplified according to the National Committee proposal?
- D2 Should a provision be introduced into the *Administration and Probate Act 1958* (Vic) that specifies that all assets are to be applied rateably?

## Charged or mortgaged property

- D3 Are there any significant difficulties with the operation of section 40 of the *Administration and Probate Act 1958* (Vic)?  
If so:
  - (a) should the provision be abolished as in the Northern Territory?
  - (b) should the provision be modified to require a sufficient connection between the debt and the property upon which it is charged?
- D4 Should section 40 of the *Administration and Probate Act 1958* (Vic) set out what will be, as well as what will not be, sufficient to constitute contrary intention?
- D5 In the context of section 40 of the *Administration and Probate Act 1958* (Vic), should expression of contrary intention be by will only?

## Insolvent estates

- D6 How could the two current schemes of administration— part I of the second schedule to the *Administration and Probate Act 1958* (Vic) and the *Bankruptcy Act 1966* (Cth)— operate more efficiently and effectively?
- D7 Should the *Administration and Probate Act 1958* (Vic) define ‘insolvent’?
- D8 Should the *Administration and Probate Act 1958* (Vic) be expressed to bind the Crown, or alternatively, should there be express abolition of the priority of Crown debts?
- D9 Should clause 2 of part I of the second schedule to the *Administration and Probate Act 1958* (Vic) be amended to import the rules of bankruptcy in force ‘at the time of death’?



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