Victorian Law Reform Commission
Succession Laws Review

Submission in response to the VLRC Consultation Papers 11-16 and Cost Rules Paper

by

State Trustees Limited

17 April 2013

Table of Contents

Abbreviations / Glossary

A&P Act	*Administration and Probate Act* 1958 (Vic.)
Cost Rules Paper	VLRC - "Cost rules in succession proceedings"
Corporations Act	*Corporations Act 2001* (Cth)
CP11	VLRC Consultation Paper 11 – Wills
CP12	VLRC Consultation Paper 12 – Family Provision
CP13	VLRC Consultation Paper 14 – Intestacy
CP14	VLRC Consultation Paper 14 – Executors
CP15	VLRC Consultation Paper 15 – Debts
CP16	VLRC Consultation Paper 16 – Small Estates
G&A Act	*Guardianship and Administration Act 1986* (Vic.)
Instruments Act	*Instruments Act 1958* (Vic.)
National Committee	National Committee for Uniform Succession Laws
PC&PR	Professional Conduct & Practice Rules 2005
Preserved TC Act	The version of the TC Act that continues to apply in respect of State Trustees by reason of s 20A of the ST(SOC) Act. It is the version in force immediately before the commencement of the *Trustee Companies Legislation Amendment Act 2010* (Vic.), which commenced on 11 May 2010.
s (preceding a number, &c.)	Section or subsection of an Act, e.g. "s 21"
SCPUC	Supreme Court Probate Users Committee
State Trustees	State Trustees Limited
ST(SOC) Act	*State Trustees (State Owned Company) Act 1994* (Vic.)
Supreme Court Rules	Supreme Court (Administration and Probate) Rules 2004 (Vic.)
Victoria	The State of Victoria
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission

A. Introduction - State Trustees and Succession Laws

1. State Trustees welcomes the opportunity to provide our submission to this important review. As Victoria's public trustee entity, State Trustees plays a central role in providing will preparation, estate planning, administration and related services to members of the Victorian public, especially those who do not have the resources to obtain those services for themselves.

2. State Trustees has been providing estate planning and administration services for Victorians for over 70 years. It began its existence in 1940 as the Public Trustee for Victoria. It is now a public company under the Corporations Act, having become an authorised trustee company and Victoria's first State owned company in 1994. The State of Victoria, through the Victorian Treasurer, is State Trustees' sole shareholder. Our broad range of services means we are actively engaged with succession laws in a number of ways, and as a result of a number of our roles.

3. In particular, our roles and services related to this submission include:

   (a) preparing wills for members of the public (approximately 2,600 wills annually), providing estate planning and taxation services and advice, and providing safe custody of original wills (currently holding more than 80,000 wills);

   (b) acting as personal representative for deceased individuals, that is: as executor of wills, or administrator under letters of administration, including where authorised by an existing personal representative to act in their stead (more than 1,500 administrations ongoing);

   (c) acting as trustee of testamentary trusts and trusts arising from intestacies;

   (d) as VCAT-appointed administrator, protecting the interests of represented persons in relation to (amongst other things) deceased estates; and

   (e) providing associated legal services, including bringing and defending legal proceedings in relation to family provision, will-maker's capacity, undue influence and other succession-related matters.

4. State Trustees provides community services, including estate - administration and will-making services, under an agreement with the Minister for Community Services,[1] and has a particular legislative status in relation to intestate estates. Pending a grant of administration, intestate deceased estates vest, in a nominal manner, in State Trustees.[2] If no other person is entitled and

[1] Under ss 21-23 of the ST(SOC) Act.

[2] A&P Act, s 19.

capable and ready to take a grant of letters of administration of such an estate, State Trustees may apply to administer the estate.[3]

5. State Trustees welcomes and encourages positive steps to "update" Victoria's succession laws, to improve their fairness, efficiency and efficacy, and to help them to stay aligned with community expectations. Those laws affect fundamentally the way in which we are able to continue to meet the estate planning and administration needs of Victorians.

6. In this submission, State Trustees has provided its responses to the questions in the VLRC's six Consultation Papers, and in the VLRC paper on cost rules in succession proceedings. Where possible, and thematically appropriate, we have grouped together our responses to a number of questions. For convenience, we have also used a number of abbreviations, which are explained in the Abbreviations/Glossary section above.

[3] ST(SOC) Act, s 5.

B. Wills

1. Witnessing wills and undue influence

1.1. Requirements for witnessing a will

Question W1:	Should there be special witnessing provisions in respect of certain will-makers? If so, who should those will-makers be and what should the special witnessing provisions require?
Question W2:	Should witnesses to the execution of a will be required to understand that the document in question is a will?

State Trustees does not support the introduction of special witnessing provisions for a specific class or classes of will-makers, or a requirement that witnesses to a will's execution should be required to understand that the document is a will.

State Trustees is concerned that such measures would not be effective in mitigating the risk that persons lacking testamentary capacity are being led to sign wills, or that will-makers are victims of fraud or undue influence.

Such measures would, however, result in its being generally more difficult to have a valid formal will made, and would lead to unwarranted additional legal costs in the application for probate of many wills, particularly those prepared other than by will-writing professionals. If such requirements were to be imposed, any will that falls short of the new requirements would be the subject of an application pursuant to s 9 of the Wills Act, under which the Court may dispense with the formal execution requirements if satisfied the will-maker intended the document to be his or her will.

In relation to special witnessing provisions, it is difficult to envisage how such a provision could be drafted without its effects being unfairly discriminatory towards a sub-set of the will-making public.

1.2. The witness-beneficiary rule

Question W3:	Should Victoria reintroduce the witness-beneficiary rule in the form recommended by the National Committee for Uniform Succession Laws?

Assuming that any reintroduction of this rule is accompanied by adequate community education, State Trustees would, on balance, not be opposed to Victoria's adopting the National Committee's recommendations on this topic. Even with community education, however, it is still likely that many people, particular those who decide not to obtain assistance from a will-making professional, will innocently and unwittingly fall foul of the rule and be later forced to expend legal costs to remedy their error. Any new rule should obviously only apply to wills made after the commencement of the amending provision, not retrospectively; otherwise

beneficiary witnesses to some existing wills may be unfairly disentitled (where the witnessing was not subject to a previous statutory rule,[4] and the will was otherwise validly made).

1.3. Prevention of undue influence through other changes to the will-making process

Question W4:	Would introducing a professional requirement that solicitors obtain a medical capacity assessment for their clients prior to drafting a will for them be useful in preventing undue influence? (a) If so, in what circumstances should the requirement apply (such as where a will-maker is over a particular age)? (b) If not, what disadvantages would there be in such a requirement?
Question W5:	Would introducing a professional requirement that solicitors must either decline to act or seek independent advice when an existing client asks them to draft a will for another person that would confer significant benefits on the existing client be useful in preventing undue influence?
Question W6:	Should guidelines be provided for professionals who make wills in Victoria dealing with how to minimise the incidence of undue influence on older and vulnerable will-makers? If so, what should those guidelines contain?
Question W7:	In what other ways could the process of preparing a will by a solicitor be improved to protect vulnerable will-makers from undue influence?

State Trustees does not recommend the introduction of a professional requirement as outlined in Question W4. Such a requirement appears contrary to the common law assumption that every person has the legal capacity to make their own decisions. Creating a circumstance where a specific age triggers such a requirement would perpetuate stereotypes that the mental capacity of all older persons should be questioned and that age should necessarily be equated with disability.

Instead, State Trustees would recommend continuing education of all will-making professionals to create clearer guidelines and encourage stronger work practices. Such guidelines may be similar in nature and content to the publication entitled *When a Client's Capacity Is in Doubt*, published by the Law Society of New South Wales.

1.4. Determining whether a will reflects the will-maker's true intentions

Question W8:	Are any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable will-makers?
Question W9:	Are any changes to the law relating to knowledge and approval and suspicious circumstances necessary to improve protection for older and vulnerable will-makers?

[4] Wills executed before 20 July 1998 remain subject to the applicable beneficiary-witness rule in place at the time: see, for example, s 99AB of the A&P Act.

Question W10:	Are any changes to the law concerning fraud or forgery necessary to improve protection for older and vulnerable will-makers?
Question W11:	Should the equitable doctrine of undue influence for lifetime transactions be applied to wills?
Question W12:	Are there changes that could usefully be made to the doctrine of undue influence as it currently operates in the probate context?

In regard to Questions W8-W11, State Trustees does not believe that any changes to the law are necessary in these areas. We acknowledge that vulnerable members of the community need to be protected, but age or relationship should not give rise to a presumption of undue influence.

State Trustees agrees with the suggested redefinition of undue influence as outlined at paragraph 2.80 of CP11.

2. Statutory wills

2.1. Determining the intentions of the incapacitated person

Question W13:	Should Victoria adopt the National Committee's recommended guiding principle for authorising a statutory will or retain the current principle?

State Trustees supports retention of the current Victorian principle.

The wording of the National Committee's guiding principles appear, on the face of it, to give the court the power to approve virtually any will, as the range of wills that a person "might" have made if they had capacity is, theoretically, endless.

In our view, the current Victorian principle provides more certainty as to the Court's ability to deal with cases where the person has never had testamentary capacity, and also states more clearly the criteria against which the Court is required to assess the will.

2.2. Involvement of the incapacitated person in the hearing

Question W14:	Should the provisions of the Wills Act 1997 (Vic.) concerning statutory wills specify that the court may order separate representation for the incapacitated person (rather than stating that the incapacitated person is entitled to appear on the application)?

State Trustees supports the retention of the incapacitated person's entitlement to appear, as well as inclusion of a power to order separate representation for the person in appropriate cases (as is available in NSW and the ACT). We believe the legislation should clarify, however, that, where the incapacitated person does not choose to appear or is unable to express their wishes, a VCAT-appointed administrator may, prima facie, elect to represent the person's interests in the application (and, in so doing, is not required to be appointed as litigation guardian for that purpose), other than in cases where the administrator's interests are in conflict with those of the incapacitated person.

2.3. Accessibility of the statutory will process

Question W15:	How can the statutory will procedure be made more accessible? In particular, would any of the following reforms be desirable? (a) Remove reference to the two-stage application process for statutory wills from the Wills Act 1997 (Vic.). (b) Have applications for statutory wills heard in the Guardianship List of the Victorian Civil and Administrative Tribunal rather than in the Supreme Court. (c) Encourage judges to decide unopposed statutory will applications on the papers without a hearing in open court.
Question W16:	Are any other changes desirable to the statutory will provisions of the Wills Act 1997 (Vic.)?

State Trustees does not consider that any significant changes are required to the existing statutory will procedures. Of the three reforms proposed in Question W15, we do not support option (b). In our view, VCAT does not currently have sufficient expertise or experience in succession law to determine such matters.

2.4. Determining who pays for the application

Question W17:	Should the Wills Act 1997 (Vic.) include costs provisions specific to statutory will applications? If so, what should the costs provisions provide? Should the legislation distinguish between interested and disinterested applicants?

State Trustees supports the Court's retaining its discretion in respect of costs, and believes the principles that have been developed are generally fair, as they permit the Court to take into account the prospective benefit (if any) of the applicant, as well as the current and likely future circumstances of the incapacitated person and their estate. In this context, it does not appear necessary to include specific cost provisions.

3. Ademption

3.1. The ademption rule

Question W18:	Should the ademption rule be changed to one based on the will-maker's intentions? If so, in what way? For example: (a) Should the Wills Act 1997 (Vic.) provide a presumption against ademption? (b) Should the Wills Act 1997 (Vic.) provide a presumption in favour of ademption that would allow a beneficiary of a specific gift to present evidence that the will-maker would not have intended ademption?
Question W19:	What effect (if any) would changing the ademption rule to one based on the will-maker's intentions have on: (a) the cost and time involved in administering an estate? (b) the fairness of the outcome?

On balance, State Trustees considers that the law of ademption should be retained as is, other than in relation to substitute decision makers (see our responses to Questions W20 – W22 below).

State Trustees does not support a presumption against ademption, as we believe it would be administratively unworkable.

It may be possible to provide for a presumption in favour of ademption, and permit a beneficiary of a specific gift that is later disposed of to present evidence that the will-maker would not have intended ademption, but we believe such an approach would only be administratively viable if there were a mandatory minimum value that the gift could be demonstrated to have had (say, $10,000). If such an option were to proceed, great care would need to be taken in designing the mechanics of the provision to ensure that potential additional administrative costs and delays, and the burden on executors, were kept to a minimum.

Anecdotally, it is likely that cases where ademption results in an outcome that was not intended by the will-maker arise more often than those in which the will-maker did intend ademption to occur. A will-maker, when disposing of a particular asset, may not turn their mind to the fact that the asset has been specifically gifted in their will, particularly if the will was made many years before and has not been reviewed since. Also, in State Trustees' experience, the concept of ademption is generally not well understood: an uninformed will-maker may, upon disposing of or ceasing to own a specifically gifted asset, see no pressing need to amend that aspect of their will, even though they still want an equivalent benefit to pass to the beneficiary. They may wrongly believe the law will, somehow, give effect to that intention. These types of scenarios arise even where the asset in question is of significant value, such as real estate.

A presumption against ademption would, however, create considerable and unreasonably burdens for the estate administration process. For example, some will-makers include in their will (with good intention, but often in the face of professional advice to the contrary) a multitude of specific gifts of personal chattels — for example, jewellery, items of furniture, antique crockery or cutlery, books, etc. — which may individually be of minimal or indeterminate value. It would create an administrative nightmare for the executor if, for any such items that could not be located, there was a presumption against ademption: Would the nature of the item itself be sufficient to rebut the presumption, or would other evidence be required? Would it fall to the residuary beneficiary or beneficiaries, or to the executor, to attempt to rebut the presumption? If non-ademption were upheld, how would the items then be valued? What if there were no evidence of a sale, or a sale price? Even in cases where the items were of insufficient value to warrant litigation, one can easily imagine situations where the administration could become bogged down in controversies over intentions and/or notional valuations, with consequential implications for the legal and other costs borne by the estate.

By contrast, a presumption in favour of ademption would place the onus clearly on the disappointed beneficiary to put forward evidence in rebuttal. Ideally, to prevent delays to the administration, the mechanics of any such provision (timelines for

bringing a claim, etc.) should be as rigorous as apply to creditors generally, or even more so.

A statement in the will to the effect that, in the event that the specifically gifted asset does not form part of the estate upon the will-maker's death, the specific gift should be adeemed, should be conclusive evidence of the will-maker's intention.

It would not be appropriate to apply retrospectively a change to the law relating to presumptions against (or for) ademption. If any such change is made, it should only apply to wills or codicils made after commencement of the relevant amending provision. Otherwise, a will-maker who has made specific gifts in full knowledge of the application of the law as it stands may have their intended testamentary dispositions undermined, something they may be unable to remedy if they no longer have testamentary capacity. (Different considerations apply in respect of anti-ademption provisions — such as s 53 of the G&A Act — that apply where the decision to dispose of the devised asset is made by someone other than the will-maker.)

3.2. Acts by administrators appointed to the Victorian Civil and Administrative Tribunal

Question W20:	Have you experienced any difficulties with the operation of section 53 of the Guardianship and Administration Act 1986 (Vic.)?

State Trustees believes section 53 is essentially sound, and in many ways elegant, but it should be clarified in the areas of: (1) treatment of the interest on, or growth in the capital value of, the moneys or other property arising from the disposition; (2) the investment, and record and account keeping, obligations of the administrator.

Treatment of interest / capital growth

In State Trustees' view, the income and/or growth on the proceeds of sale should not be included in the interest that passes to the ultimate beneficiary.

It is not clear whether this is intended to be the case under s 53. Views differ as to whether any interest on, or growth in value of, any (unapplied) money or property arising from the administrator's disposition (e.g. the proceeds of sale of a house) goes to the beneficiary of the otherwise adeemed gift or forms part of the rest of the estate. In State Trustees' view the provision should only "salvage" the beneficiary's interest, not include the fruit of its subsequent investment (whether by way of income or growth). In other words, the interest preserved should be an interest in an amount equal to the actual sum received by the administrator, less any amount of that sum as has been applied by the administrator.

"Separate record and account"

The meaning of the obligation to keep a "separate record and account" is not clear. In State Trustees' view, it should mean no more than that the administrator keeps a record and account of the transactions the administrator carries out as administrator.

The administrator may not know what "interests" exist in the represented person's assets: they may not know of the contents of, or of the existence of, the represented person's will, or may be aware only of an out-of-date will. This obligation should be solely to record and keep an account of the relevant transactions (sale price, amount received, etc.). On its face, the obligation to keep a separate account does not include keeping the funds in a separate account (e.g. a separate bank account), as this could negatively impact on the person's financial affairs while they are alive. The logical position is that "separate" in this context means separate from the administrator's personal accounts and those of other persons. This is borne out by the genesis of the provision in s 50A of the PT Act 1958, which did not impose a duty to keep a separate record and account specific to adeemed gifts. It was not necessary to do so, because the Public Trustee was under a general obligation to keep "a separate account" of each estate. Sub-section 59(1) of the PT Act provided as follows:

> The Public Trustee shall—
>
> (a) make or cause to be made alphabetical inventories or lists of all the estates and trust properties under his [*sic*] management or control; and
>
> (b) keep a separate account of all his [*sic*] receipts payments and dealings in every such estate.

By contrast, other than under s 53(3), no express account- or record-keeping obligation is imposed on an administrator under the G&A Act.[5] Given that it is not possible for an administrator to know with certainty which dispositions will result in the preservation of interests under s 53, and which will not, the account- and record-keeping obligation of the administrator should be to keep "a separate record and account" of all such dispositions, by keeping a record of all the transactions (or, as s 59 of the PT Act put it, all "receipts, payments and dealings") in which the administrator engages with respect to the represented person's estate. (This is what an administrator is under a general law duty to do in any case; and is what the examination of the administrator's accounts under s 58 of the G&A Act is intended to confirm is being done.) If the interest preserved (salvaged) under the anti-ademption provision is the net amount received — less any part of it that has been applied — the record and account of the amount received will be sufficient to determine the beneficiary's entitlement (subject to any adjustments as between multiple beneficiaries of adeemed gifts).

If it is convenient, and consistent with the represented person's best interests, for the administrator to keep in a separate account (or sub-account) the proceeds of what appears to be a specifically gifted asset, the administrator may do so, but should not be obliged to do so.

[5] VCAT may order that an administrator's accounts be examined: G&A Act, s 58. As a fiduciary, an administrator is most likely to be held to be under a general-law duty to keep proper accounts.

1.1. Acts by persons holding an enduring power of attorney

Question W21:	Should an exception to the ademption rule be included in legislation for actions of persons holding an enduring power of attorney, as well as administrators? If so: (a) Should a beneficiary of an otherwise adeemed gift be entitled to: --the same interest they would have had in the property if it had not been sold (section 53 of the Guardianship and Administration Act 1986 (Vic.)), or -- an order to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage (South Australia and New South Wales), or --an appropriate order for compensation from the estate (Queensland)? (b) Should the exception apply to any actions by the donee of the power, or only those actions taken after the donor of the power has lost capacity? (c) In the present context, what special accounting obligations should the donee of the power of attorney have in relation to proceeds of the transaction?

We support inclusion in legislation of an equivalent of s 53 of the G&A Act to cover dispositions made by attorneys acting under enduring power of attorney.

The accounting obligations that should apply would depend upon the nature of the interest that is being preserved. Again, in our view, the amount preserved should be the unapplied value of the disposition to which the preservation of interest applies, and not, for example, any additional growth in value of, or income received on, the amount (see our comments above in relation to question W20 above). If this were to be the case, there would not be any need to amend the accounting obligations of the attorney. An attorney under enduring power of attorney must "keep and preserve accurate records and accounts of all dealings and transactions" made under the power: Instruments Act, s 125D. These would be available to the personal representative of the estate upon the donor's death: the personal representative would then be in a position to reconstruct what amount (or item of property) represents the preserved "interest" to which the beneficiary is entitled. It is not appropriate to impose special accounting obligations in circumstances where the attorney cannot know for certain what the donor's testamentary dispositions will ultimately be.

On balance, the anti-ademption provision in such cases should apply to all transactions performed by the attorney, other than, say, those performed in accordance with an express and contemporaneous written direction by the donor in relation to the disposal of the asset. In such a case, there is evidence that the attorney is not the "decision-maker" in relation to the disposition, but merely carrying out the decision made by the donor; such a transaction should be subject to the standard rules relating to ademption.

1.2. Access to a person's will for anti-ademption purposes

Question W22:	Should a person acting under an enduring power of attorney be able to access a person's will in the same way as an administrator? If so, should access depend upon proof of the will-maker's lack of capacity?

An administrator does not have a right to access a represented person's will as of right, unless it is already in the administrator's possession. State Trustees supports administrators and attorneys having the power to apply to VCAT for the ability to access a will: however, it is important that VCAT retain a discretion as to whether the contents of the will should be revealed to the administrator or attorney. An administrator or attorney with a potential interest in the estate, and knowledge of specific gifts in the will, may take steps as administrator/attorney that would benefit themselves. VCAT should be in a position to determine what, if any, details from the will it is appropriate to disclose.

There should also be legislative authorisation to permit the holder of a will, or a document that appears to be a will, to directly advise the will-maker's administrator or attorney whether any specific gifts are made in the will and, if so, in respect of which assets. On balance, the authorisation should not extend to advising the identity of the beneficiaries of the gifts; however, that ought to be something that VCAT should be able to authorise, upon application.

C. Family Provision

1. Factors affecting settlement of family provision claims

Question FP1:	What factors affect a decision to settle a family provision application rather than proceeding to court hearing?

Factors that affect decisions to settle an application include the degree of animosity between parties; the financial needs and wishes of the various parties; and whether these are likely to change in the short- or long-term; the nature and value of the estate, and the commercial realities of the costs that would be incurred in proceeding to trial.

2. Time limits and extension of time

Question FP2:	Is the current period within which an application for family provision can be made in Victoria (six months from the grant of representation): (a) satisfactory? (b) too short? (c) too long?

State Trustees finds the current application period to be too long in many cases: in the majority of cases where an application occurs, the likelihood of that application being made is known to the personal representative from an early stage in the estate administration. In such cases, the existence of the six-month period often results in the proceedings being initiated (and therefore resolved) at a later juncture than could have been the case. The prospective applicant's legal practitioners know that the personal representative will not (for fear of being held personally liable) make any major distribution prior to the expiry of the period or any extended period that may be triggered by the giving of notice under ss 99A(3)-(4). Even where the claim is relatively straightforward, it is not uncommon for the application to be made very close to the period's expiry date.

Shortening the period would potentially disadvantage legitimate applicants who, through no fault of their own, either do not become aware at a sufficiently early point in time (or at all) that the deceased has died, or do not know that they are entitled to make an application. This risk particularly applies to persons whose disability impairs their ability to manage their own affairs. Such persons may be dependent on the attentiveness, knowledge and initiative of third parties (carers, substitute decision-makers, etc.) to protect their interests, and may therefore be more vulnerable to missing out due to the period's expiring and the estate's being distributed before a notice of claim is able to be given. In its capacity as VCAT-appointed administrator, State Trustees is aware of numerous instances where a represented person for whom State Trustees was acting, and who would have been entitled to bring a family-provision claim in relation to an estate (generally that of a deceased parent), has missed out on receiving better, or any, provision from the

estate because State Trustees was not notified of the parent or other relative's death before the six-month period had expired and the estate had been distributed.

The need to protect the interests of such vulnerable potential claimants must of course be weighed against the desirability of expeditious, efficient and certain administration. On balance, this leads us to prefer retention of the current timeframe, so long as appropriate amendments are made to the criteria for applications so that speculative, marginal claims are more likely to be deterred. Such amendments may permit personal representatives to make distributions with greater confidence before the expiry of the application period.[6] State Trustees' views as to the criteria for family provision applications are detailed in our responses to Questions FP11-FP16 below.

3. Opportunistic claims

Question FP3:	To what extent does the current law allow applicants to make family provision claims that are opportunistic or non-genuine?
Question FP4:	Does section 97(7) of the *Administration and Probate Act 1958* (Vic.), which permits the court to order an unsuccessful applicant to pay their own costs and the costs of the defendant personal representative, deter opportunistic applicants from making family provision claims?
Question FP5:	Does the power of the court to summarily dismiss claims deter opportunistic applicants from making family provision claims?

In regard to Question FP3, State Trustees has on many occasions experienced circumstances where a person brings what appears to be an unmeritorious claim, which is nevertheless settled with a payment to the claimant (colloquially referred to as '"go-away" money') to prevent the incurring of further legal costs to the estate. In State Trustees' view there are currently few tangible disincentives to the bringing of such claims.

To State Trustees' knowledge, s 97(7) of the Administration and Probate Act 1958 (Vic.) is rarely applied by the Court. State Trustees does not believe the court's power to summarily dismiss claims has deterred opportunistic applicants.

4. Excessive costs

Question FP6:	Are costs orders in family provision cases impacting unfairly on estates?

In State Trustees' view, it is likely that cost orders are impacting unfairly on estates. Legal costs 'default' to the estate in the majority of instances. Claimants and their legal advisers are well aware of this, and know that it brings pressure to bear on the personal representative and the beneficiaries to agree to settle the

[6] For example, the personal representative may be more readily satisfied that it is safe to distribute after obtaining a notification under s 99A(2) of the A&P Act from one or more identified potential claimants, rather than waiting for the six months to expire.

claim prior to trial to prevent further erosion of the estate funds that will be available for distribution.

5. Transactions during the deceased person's lifetime that reduce the size of their estate

Question FP7:	To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?
Question FP8:	Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

In estates of average size, State Trustees does not consider it likely that people have intentionally sought to frustrate the operation of family provision laws, even if their actions may have that effect. Arrangements that reduce or minimise the value of a person's estate are generally put in place for other legitimate reasons, such as tax minimisation, asset protection, protective and special disability trusts, and other sound estate planning purposes. State Trustees is aware that some individuals' motivation is to put assets beyond the reach of a family provision claim, but this is not currently a common phenomenon in our experience. In State Trustees' view, the issue is of insufficient prevalence or severity to warrant the introduction of notional estate provisions in Victoria.

6. Reviewing the purpose of the family provision laws

Question FP9:	Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent on the state?
Question FP10:	Are there wider purposes or aims that family provision laws should seek to achieve?

In State Trustees' view, family provision laws are now generally expected to fulfil purposes slightly broader than protecting dependants and preventing dependence on the state.

One such purpose might be characterised as ameliorating disproportionate unjustness in the deceased's testamentary arrangements for their estate. Australians enjoy relative freedom of testation. Anecdotally this is a cherished "right". It is very common for a will client to be deeply affronted upon being told that the law permits a challenge to the contents of the will that they are in the process of setting in place. That same client may then have a very different view when asked what they think should happen if they were to be, or had been, left out of both their parents' wills. Even if they are sanguine about that scenario, they tend to acknowledge that it makes public policy sense to protect the deceased's dependants from unnecessary hardship, and prevent their becoming unnecessarily dependent on the state. But a further dimension is that in cases where the usual distribution of the estate would result in an outcome that is disproportionately "unjust" in the context, many people expect the law to be able to go some way to remedying this, irrespective of whether dependence on the deceased or on the

state is a factor. The deceased after all, is no longer in need of their estate, and it is by no means certain that the distribution that would, but for family provision, have occurred is the one the deceased actually intended.

In practice, a person's testamentary arrangements can be capricious and unjust in their outcomes for a variety of reasons. It is relatively easy nowadays to make a will 'on a whim', increasing the risk that its contents may be skewed by spite, folly or sheer thoughtlessness. Even a will made wisely and justly, and with good intentions, at a given point in time, may ultimately have disproportionately unjust results. The person who keeps their will completely 'up-to-date' is the exception, rather than the rule; and even that person may lose testamentary capacity such that they can no longer update their will. There may, for example be an unforseen change in their constellation of relationships that would normally have caused them to change their will, such as a child or grandchild experiencing a misfortune or indeed a windfall.

There are human rights concerns in having a person's testamentary intentions protected and respected,[7] but in a context where the deceased is no longer able to give direct evidence of their intentions, it is appropriate that the law permits a court to consider what might reasonably be expected to have been done by a "wise and just testator".

At the same time the notion of "dependency" on the state is no longer clear cut: beneficiaries of inter-generational wealth transfer are less likely to be entitled to welfare benefits (by way of pensions, subsidies, benefits and allowances) from the state, thereby reducing their "burden on the taxpayer". It might be argued that there is merit in such transfers being made relatively fairly amongst the deceased's nearest so as to reduce their overall burden on the state.

From State Trustees perspective, the outcomes arrived at by the Courts under the current provisions are not the problem. The problem lies in the delays, costs and frustrations arising particularly from less than meritorious claims that settle before trial.

7. Limiting eligibility to make a family provision application

Question FP11:	Should Victoria implement the National Committee's proposed approach to eligibility to apply for family provision?
Question FP12:	Should Victoria limit eligibility to make a family provision application in the same way that New South Wales has?
Question FP13:	If Victoria were to adopt the New South Wales approach: (a) Are the categories recognised in New South Wales sufficient or should others be included? (b) Should applications by certain categories of applicant be further limited? If so: What should the nature of such further limitation be?

[7] Nicholson v Knaggs [2009] VSC 64 (27 February 2009)

	For example, should the limitation be a requirement to show 'factors warranting the making of the application', as in New South Wales, or some other test, such as 'exceptional circumstances' or 'special circumstances'? To which categories of applicant should the additional limitation apply?
Question FP14:	Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to have been dependent on the deceased person? If so, should 'dependence' be limited to financial dependence?
Question FP15:	Would including a dependence requirement encourage dependence on the deceased person during their lifetime, in order to benefit after their death?
Question FP16:	Should Victoria retain its current 'responsibility' criterion for eligibility to make a family provision application, but require applicants to demonstrate financial need?

State Trustees' view is that the New South Wales approach to family provision has much to recommend it,

State Trustees also broadly supports the approach proposed by the National Committee, with the following exceptions:

- A child should be automatically entitled to make a claim rather than require the court to consider a list of statutory factors.
- The definition of child should include step- and foster-children. (It is noted that many such individuals seeking to make a claim under the National Committee's recommended approach may be able to do so under the definition of 'a person to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life'.)
- A person in a registered caring relationship with the deceased person should be automatically entitled to apply for family provision.

Implementing a modified version of the National Committee's recommended approach moves toward a more uniform approach in family provision. It would also go some way to clarifying the criteria for applications, thereby helping to minimise the incidence of unwarranted claims. In addition, it decreases discrepancies in the treatment of adult children as between the National Committee's recommended approach and the current approach of New South Wales.

State Trustees considers that some refreshing of the 'responsibility' and 'dependence' criteria may be required, but would not recommend that dependence is limited to financial dependence. There may be instances, for example, where non-financial dependence during life may have financial implications.

State Trustees does not believe that the introduction of modified dependence requirements would be likely to alter a potential claimant's behaviour during the deceased's lifetime so as to maximise the likelihood of a successful claim.

State Trustees' view is that, while the National Committee's proposed categories for eligibility have much to offer, the flexible list of eligible applicants in New South Wales' legislation provide a reasonably comprehensive description of the classes of people who ought to be able to apply. As no state has as yet adopted the National

Committee's recommended model, moving to a New-South-Wales-style approach would create greater consistency between jurisdictions.

As noted above in respect of the National Committee's proposed approach, State Trustees' view is that the first group of eligible claimants recognised in New South Wales should be broadened to include step- and foster-children, as well as a person in a registered caring relationship with the deceased.

8. Amending costs rules and principles

Question FP17:	Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?
Question FP18:	Should one of the following costs rules apply, as a starting point, when an applicant is unsuccessful in family provision proceedings? (a) 'Loser pays, costs follow the event'—that is, both parties' costs are borne by the unsuccessful applicant as in other civil proceedings. (b) 'No order as to costs'—the applicant bears the burden of their own costs.

On the basis that future legislation should better delineate who may make a claim and thus reduce the likelihood of vexatious or unjust claims, State Trustees does not consider that the presumptions and rules in Questions FP17 and FP18 necessarily need to be introduced at this stage. However, if after a period of time it is found that new delineations are not resulting in more appropriate cost outcomes, this issue should be revisited. (In this regard, it would be appropriate for there to be funding for the Court to maintain accessible statistics around family provision outcomes and cost orders.)

Question FP19:	Are family provision proceedings generally less costly in the County Court than in the Supreme Court?
Question FP20:	What measures are working well to reduce costs in family provision proceedings in the County Court and the Supreme Court?
Question FP21:	Are there any additional measures that would assist in reducing costs in family provision proceedings?

State Trustees has generally found proceedings in the County Court to be less costly than those in the Supreme Court, but variances have not been significant. Measures to reduce costs further could include no requirement of attendance at directions hearings in the Supreme Court, court-ordered mediations and fast-tracking processes by the court.

Cost Rules Paper Question	How, if at all, could the general application of costs rules in succession proceedings be improved?

In State Trustees' view, and subject to our comments above, the cost rules generally work well. We do not believe there is a current need for legislative reform in this area.

D. Intestacy

1. Defining and setting a limit on next of kin, survivorship, Entitlements of the deceased person's partner or partners

Question I1:	Should Victoria set a limit on next of kin at children of the deceased person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?
Question I2:	Should Victoria introduce a survivorship requirement of 30 days, for consistency with the National Committee's recommended approach, the law in New South Wales and Tasmania and the position under the Wills Act 1997 (Vic.)?
Question I3:	Should Victoria increase the partner's statutory legacy to $350,000, adjusted to reflect changes in the Consumer Price Index, as proposed by the National Committee?
Question I4:	Should Victoria increase the partner's share of the remainder of the estate from one third to one half, as proposed by the National Committee?

State Trustees agrees with all the National Committee's recommendations on these points.

Question I5:	Where the deceased person is survived by multiple partners, but no children (or other issue) who are entitled to a share on intestacy, should Victoria adopt provisions, recommended by the National Committee, which allow the estate to be distributed: (a) by a distribution agreement, or (b) by a distribution order, or (c) equally between the parties?
Question I6:	Where the deceased person is survived by multiple partners and children (or other issue) who are entitled to a share on intestacy, should both partners be entitled to their own statutory legacy, as well as a share of the remainder?

State Trustees is not aware of circumstances where Victoria's existing legislation on these matters has created unjust or inappropriate outcomes, and as such does not recommend any change to the prescribed proportions. That said, cases of multiple partners occur only rarely, and where they do are as likely to be resolved via a Part IV application as under the intestacy provisions provided by the A&P Act.

State Trustees would not recommend that multiple partners should be entitled to their own statutory legacy, as this would effectively reduce the residue of the estate to nil in medium-sized estates, unless the value of such legacies were to be adjusted downwards in such cases.

2. The partner's right to elect to acquire an interest in certain property, entitlements of the deceased person's children or issue, and *per stirpes* or *per capita* distribution

Question I7:	Should the right of the deceased person's partner to elect to acquire an interest in the shared home be extended to other property in the estate, as proposed by the National Committee?

Question I8:	Should Victoria adopt the approach to entitlements of the deceased person's children on intestacy recommended by the National Committee?
Question I9:	Should Victoria: (a) retain per capita distribution and extend its operation so that it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are deceased, or (b) abolish per capita distribution and apply per stirpes distribution in all cases?

State Trustees supports all the National Committee's proposals on the above points.

3. Taking benefits into account

Question I10:	Should Victoria abolish the hotchpot rule, as recommended by the National Committee?
Question I11:	Alternatively, should Victoria retain and amend its hotchpot provision: (a) to replace references to advancement and settlement with more modern, simplified terminology? (b) to extend it beyond the deceased person's children and their representatives? If hotchpot were extended beyond children of the deceased person, should it apply to the deceased person's partner and/or all next of kin?
Question I12	If Victoria were to abolish the requirement to take benefits received during the deceased person's life into account (hotchpot), should it also abolish the requirement to take into account benefits received under a will on partial intestacy?
Question I13	If hotchpot is retained and extended beyond children of the deceased person, should the current requirement to take into account benefits received under the deceased person's will on partial intestacy also be extended beyond children of the deceased person?

State Trustees recommends the abolition of hotchpot, to align with the position that applies to testate estates. State Trustees also agrees with the National Committee's recommendation that there is no need for a rule taking into account benefits received under a will on partial intestacy.

4. Indigenous intestate estates

Question I14:	Are any statistics available about intestacy of Indigenous people in Victoria?
Question I15:	Are more flexible provisions needed in Victoria for the distribution of Indigenous intestate estates? If so, what form should those provisions take?

State Trustees does not have any statistics available regarding Indigenous intestate estates. Whilst State Trustees and has no firm view on the need for flexible provisions for such estates, we note that cultural matters would be capable of being taken into account in any family provision claim in respect of the estate of an Indigenous intestate.

E. Executors

1. Court review of costs and commission charged by executors

Question E1:	Should the Supreme Court have the power to review amounts charged by executors? If so— (a) should the scope of the power be limited to commission, or should it extend to disbursements, fees and any other amounts? (b) should the Court be able to conduct a review on its own initiative or should it be able to do so only on the application of a person interested in the estate? (c) should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the Professional Conduct and Practice Rules 2005? (d) should there be a time limit within which an application for review should be made? (e) should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success? (f) should the Court be required in normal circumstances to order the executor to pay the costs of the application if the amount is reduced by more than 10 per cent? (g) (g) should the same provisions apply to review of amounts charged by administrators, individual trustees and State Trustees?

State Trustees supports the Supreme Court's having the power to review the remuneration received, and other amounts charged, by professional executors. As the VLRC has noted, the commission charged by State Trustees and licensed trustee companies for acting as (among other things) executor or trustee is already subject to court review and potential reduction.

We note the draft section 65A considered by the SCPUC (set out at paragraph 2.83 of CP14) would extend to a review of disbursements incurred by professional and non-professional executors. Such a provision could result in punitive outcomes where disbursements incurred in good faith are unable to be recouped from the estate. This in turn could (further) deter the acceptance of the role of executor. State Trustees would therefore strongly caution against extending the review power to disbursements, unless there were an express presumption that disbursements ought to be recoverable from the estate.

Similarly, in our view, an application should be able to be made by a creditor or a person interested in the estate, but should not be open to being made by the Court on its own motion as provided in s 601TEA(4). We note that neither the SCPUC nor the LIV proposals suggest an "own motion" power. In our view, the introduction of s 601TEA, as with much of Chapter 5D, occurred in haste, and without adequate consultation or consideration of the full consequences.

However, an exemption ought not to apply solely on the basis that the will-maker was advised to seek independent advice. In our experience, the public generally and, in some cases, members of the legal profession themselves, are not generally aware of the conventional rates of remuneration for acting as executor. A client is likely to simply trust that their solicitor has "got it right" or that there is no likelihood of obtaining a better deal elsewhere. An exemption should however apply to all professional executors, if they fulfil steps equivalent to those under

Rule 10 of the PC&PR, modified by reference to the observations of Habersberger J in Szmulewicz,[8] or if the will-maker has in fact obtained independent legal advice.

We agree that three months after notification of the commission is an appropriate deadline for bringing an application.

On balance, we believe the Court should be able to order costs against the applicant where the application is frivolous, vexatious, or has no prospect of success. However, we do not consider the court should order the executor to pay the costs of the application where the amount is reduced by more than 10%. If such a threshold is to be set, in our view it should be set at the higher rate of 15% (which this is the normal situation where a solicitor's fees are taxed) and in such a case be within the discretion of the Court, given there is little clear judicial guidance as to what will be held to be excessive in a given fact situation.

We do not consider a new provision should apply to State Trustees or licensed trustee companies as this would involve a duplication of the regulatory provisions that current apply. By reason of s 20A of the ST(SOC) Act, State Trustees remains subject to s 21(3) of the Preserved TC Act, as set out at CP14 at paragraph 2.74, under which the Supreme Court may review and reduce any excessive commission. The equivalent of this provision in respect of licensed trustee companies (s 601TEA of the Corporations Act, as set out at paragraph 2.90 of CP14). It should be borne in mind that State Trustees and licensed trustees companies are subject to stringent regulatory regimes relating to (amongst other things) accounts, reporting, court-ordered audits, loan/borrowing restrictions, conflicts of interest, share control, and financial requirements. If such a new provision is to extend to State Trustees, we refer to our comments above.

Additional matter: Trustee company remuneration - better alignment of Part IV of the Preserved TC Act with Part 5D.3 of the Corporations Act

The question as to what can be charged by a professional executor also raises the issue of the current non-alignment of the commission provisions applicable to State Trustees (under Part IV of the Preserved TC Act) and the equivalent provisions applicable to licensed trustee companies under Part 5D.3 of the Corporations Act. As a preliminary point, it is unsatisfactory, and unhelpful to members of the general public, that one must search out (by reference to a section in the ST(SOC) Act) an ostensibly repealed part of the TC Act to find the legislative basis on which State Trustees is entitled to charge commission. Another issue is that the deregulation in relation to remuneration for estates work (other than in respect of charitable-trust estates) that occurred in relation to licensed trustee companies was not replicated in the provisions that continue to apply to State Trustees, thus creating an "unlevel playing field" within the industry. Whilst we believe there remain some technical issues with the Ch 5D provisions that should **not** be replicated in State legislation, it would seem appropriate that State Trustees' commission provisions be more closely aligned to those applicable to licensed trustee companies — which

[8] *Szmulewicz* v *Recht* [2011] VSC 368 910 August 2011)[43]

would clarify, for example, the ability of State Trustees to charge for executorial services on an hourly basis — and that all provisions under the Preserved TC Act that apply to State Trustees be restated in current (and therefore readily accessible) legislation.

Additional matter: Non-professional personal representatives engaging professional trustee organisations

A further related topic is the ability of non-professional personal representatives to engage professional organisations (other than law practices) to assist in the performance of the estate administration work. Many non-professional executors wish to obtain State Trustees' help without having to authorise us to completely take over their role as personal representative. It can be problematic, however, for State Trustees to undertake such work, as of right, without encountering ambiguities in relation to the application of various regulatory provisions, particularly those in the Legal Profession Act 2004. The authorisation to prepare wills and provide related services under s 20A of the TC Act may not be considered sufficiently broad to extend to such "executor assist" activities.

We note the equivalent exemptions from the legal profession provisions in some other jurisdictions are far more broadly couched: see, for example, s 13(2)(l)(i)-(ii) of the Legal Profession Act 2007 (Tas.), which exempts work performed by the Public Trustee and trustees companies "in the course of preparing a will or carrying out any other activities involving the administration of trusts, the estates of living or deceased persons, or the affairs of living persons". A 2009 report to the Victorian Attorney-General on Government Lawyers recommended amongst other things that the ST(SOC) Act be amended to make it clear that a legal officer employed by State Trustees is able to act for third parties if directed to do so by his or her employer.[9] This recommendation, which would clarify the ability of State Trustees to assist non-professional executors, is yet to be incorporated in legislation.

Given (a) this recommendation, (b) the many decades of experience in professional estate administration that State Trustees and licensed trustee companies bring to bear, (c) the clear demand from "lay" personal representatives for competitive services in this area, and (d) the ready availability of such services in other jurisdictions, it is our submission that such a reform is both desirable and long overdue.

We submit that the above "additional matters" fall within the scope of the VLRC's reference in that they relate to means of improving efficiency and/or reducing costs in succession law matters.

[9] Lynch, J (Crown Counsel) and Campbell S, (Consultant), Regulation of Government Lawyers: report to the Attorney-General 2009, Dept of Justice, Recommendation 7, at pp 30-31. (The recommendation also relates to Workcover and the Transport Accident Commission.) The full report is available at: http://www.justice.vic.gov.au/home/the+justice+system/legal+profession/regulation+of+lawyers+-+report

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

Question E2:	Should legal practitioner executors be required to instruct another law practice to act in relation to an estate?
Question E3:	How could existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor be improved? Should a will that appoints a legal practitioner executor have to be witnessed by an independent witness?
Question E4:	Should rule 10 of the *Professional Conduct and Practice Rules 2005* be incorporated into the *Wills Act 1997* (Vic.)?
Question E5:	Should legal practitioner executors be required to disclose to beneficiaries the basis on which they charge the estate for their executorial and legal work? If so, should the requirement be set out in legislation or in professional rules?
Question E6:	Should the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission be set out in legislation?
Question E7:	Should legal practitioner executors be entitled to charge an hourly rate for executorial services, rather than being able to claim a percentage of the estate or its income for commission? Should Victoria adopt the model provision proposed by the National Committee for Uniform Succession Laws?

State Trustees does not support the introduction of special witnessing provisions for wills that appoint a legal practitioner executor. A provision as to a modified, generic, Rule-10 requirement (see above) ought to be only be legislated as a prerequisite to an exemption from an "excessive" commission application, and should otherwise remain within the PC&PRs. Legal practitioners should be required to disclose to beneficiaries the basis upon which they charge the estate for executorial and legal work, in order that beneficiaries are in a position ultimately to assess whether the commission or charges are excessive. We note that State Trustees and licensed trustees are subject to separate statutory disclosure regimes in respect of their remuneration.

As stated, any measures that permit exemption from review or reduction should extend to other professional executors that prepare wills, such as licensed trustee companies[10] and State Trustees. A generic form of Rule 10 with modification could be incorporated either in the Wills Act or the A&P Act, together with the exemption from review where it is able to be demonstrated that the measures have been complied with.

[10] We note, however, it may be constitutionally problematic for State legislation to restrict the powers granted to the court under s 601TEA of the Corporations Act.

F. Debts

1. Solvent estate

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?
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?

State Trustees supports the National Committee's proposal to simplify the order of application of assets, and that assets within each class should be applied rateably in the payment of debts.

2. Charged or mortgaged property

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

State Trustees has not encountered any difficulties with the operation of s 40. The provision does have the potential to create unfair outcomes. For example, a will-maker (either out of ignorance, or having receiving inappropriate advice) may fail to express, or adequately to express, "a contrary or other intention", and this in turn may result in an inequitable net distribution of the estate. However, in our view the omission of s 40 would more frequently result in an outcome that the will-maker did not intend.

In relation to the expression of a contrary intention, we agree with the National Committee that it is problematic to define "contrary intention" in statute, and that it is better left to the court to determine whether such intention appears in the will, as is the case under s 45(3) of the Wills Act (in relation to the statutory deeming of a gift over of distributions to more distant issue of a will-maker's deceased issue).

We also agree with the National Committee that expressions of contrary intention should only be by will. The current class of documents includes "deed or other document". An executor distributing on the basis that the will-maker has not signified, in *any* document, such a "contrary intention", is doing so even though it is not possible definitively to prove that no such document exists.

3. Insolvent estates

Question D6:	How could the two current schemes of administration – Part I of the second schedule to the Administration & Probate Act 1958 and the Bankruptcy Act 1966 (Cth) – operate more efficiently and effectively?
Question D7:	Should the *Administration and Probate Act 1958* (Vic.) define 'insolvent'?
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?
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'?

State Trustees has no specific suggestions as to ways to improve the efficiency and effectiveness of the two current schemes of administration for insolvent estates. In relation to questions D7-D9, State Trustees agrees with the National Committee's recommendations.

G. Small Estates

1. Definition of a small estate

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

State Trustees recommends that the thresholds for a small estate should be raised. In State Trustees' experience, estates up to $100,000 rarely involve administrative complexity, being less likely to include real estate or be subject to family provision claims that would create imposts upon the beneficiaries or administrator. Accordingly, it would be reasonable to extend to them the existing processes that facilitate uncomplicated grants of representation and simple and direct transfers of assets.

State Trustees recommends that the estate's dollar value is the most appropriate method of defining small estates. Depending on the scope of the asset profile in question, an estate may move in and out of a small estate's definition as information is gathered. State Trustees considers it to be more likely that the estate's approximate value is known (or at least, whether it is above or below $100,000) rather than the assets of which it is composed.

State Trustees has no view upon the continuation of dual thresholds. The threshold creates a delineation, if an overly simplistic one, between various levels of risk. The law appropriately identifies that risks to an estate's administration may increase as the beneficiaries become more distant from the deceased. However, the likely impact of that risk is low in comparison with other aspects of the estate, such as the validity of the will or complexities of asset management. If dual thresholds are maintained, State Trustees' recommendation would be an effective doubling of the threshold, to $50,000 and $100,000.

State Trustees sees some merit in the threshold values of small estates being set in subordinate legislation (for ease of updating in the future).

2. Assistance in obtaining a grant of representation

Question SE4:	Should the Supreme Court Probate Registry retain responsibility for providing assistance in obtaining grants of representation in relation to small estates?

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

State Trustees does not oppose the Probate Registry's retaining this responsibility. Such assistance provides a method for members of the public to administer small-value estates in an easy-to-understand and cost-effective manner, without having to seek assistance from a trustee company or legal practitioner. The declining use of this assistance indicates that community education may be required to explain this role.

State Trustees does not have a view as to whether the Court or Registry is the most appropriate body to provide this information.

State Trustees does not consider that the introduction of sliding fee scales would necessarily encourage administration of small estates. The raising of value thresholds and continuing community education are, to our mind, likely to provide the necessary encouragement.

3. Elections to administer

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

State Trustees submits that elections to administer should be extended to estates up to $100,000. If State Trustees' position above is adopted, this would provide a degree of consistency between the definition of a small estate and of those eligible for an election to administer.

In practice, a second threshold provides a useful device for administrators when an estate's value increases above initial expectations. A percentile figure of 50% (extending the election range up to $150,000) would be reasonable on administrative grounds, remain in line with the actual values of election-equivalents in other jurisdictions, and meet the recommendations of the National Committee.

For consistency and ease of use, State Trustees proposes that threshold figures for elections to administer should refer to the gross value of the estate. In addition, this use of gross rather than net values of estates should be consistent for thresholds in small-value estates.

While this runs contrary to National Committee recommendations, the extent of debt in an estate may both significantly decrease the value of the estate whilst

complicating the administration. As elections to administer have reduced levels of oversight in comparison to a full grant, the use of net values may lead to reduced oversight on estates with higher risk.

As stated, State Trustees sees some merit in the values of the relevant thresholds being set in subordinate legislation.

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

State Trustees maintains its stance that allowing legal practitioners to file elections would be advantageous and promote a 'level playing field'. State Trustees supports the National Committee's recommendation that, should legal practitioners be able to file elections, the supporting legislation should be moved to the A&P Act (although, as noted, the rates could be set in subordinate legislation).

Question SE11:	Should elections to administer require the filing party to file the will with the Court?
Question SE12:	Should advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website?
Question SE13:	Should notice requirements in relation to an election to administer be abandoned altogether?
Question SE14:	Should elections to administer be subject to stricter procedural safeguards? Are there other improvements that could be made?

State Trustees has no objection to the recommendation that the will be filed with an election to administer. Similarly, State Trustees agrees that further procedural safeguards may be required, particularly if both the number of estates eligible for elections and the number of parties eligible to file an election are likely to increase. However, State Trustees recommends that any safeguards should be suitably streamlined and clear to ensure that the process to administer via election does not become overly onerous.

State Trustees supports moving election advertising to the Supreme Court website, and has no view on the removal of notice requirements in relation to an election to administer.

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

On the basis of State Trustees' recommendations that the thresholds for elections are increased (as per the responses to Questions SE7and SE8) and legal practitioners are permitted to file elections (SE10), we hold the view that elections to administer will provide an important middle ground between deemed grants and full grants, and should be retained.

4. Deemed grants

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

State Trustees recommends that estates administered under a deemed grant should be matched to those defined as small estates. As per the response to Question SE1, above, this would equate to $100,000.

For simplicity, deemed grants should have thresholds, and these thresholds should refer to the estate's gross value. See responses to SE8 and SE9, above.

Question SE19:	Should legal practitioners be permitted to advertise for deemed grants? What benefits might this change produce?
Question SE20:	Should deemed grants have more stringent procedural safeguards (for example, a requirement to file wills and inventories, and to search for caveats or prior grants)?
Question SE21:	Do deemed grants, in their current form, serve a valuable function?

As a principle, State Trustees is in favour of a 'level playing field', and does not oppose legal practitioners' having access to the deemed grant process. Allowing legal practitioners to file elections to administer and advertise for deemed grants would create greater flexibility for the Victorian public as to who can administer smaller value estates in a cost-effective and efficient manner.

State Trustees does note, however, that the influx of new players may create risk of maladministration, and the procedural safeguards that may be put in place to mitigate risks from the entrance of new players could offset benefits to the estate, administrator and beneficiaries that the current process allows for. In essence, the deemed grant process may become equivalent to the election process.

On balance, then, a more considered response may be to first allow legal practitioners access to the election process and delay any broadening of legislation relating to deemed grants. This provides the Victorian public with significantly greater options than currently exist, whilst minimising risk and maintaining the integrity of the current deemed grant process.

5. Informal administration

Question SE22:	Should section 32 of the Administration and Probate Act 1958 (Vic.) be expanded to a provision of more general application, in line with the recommendation of the National Committee?
Question SE23:	Should it be possible to transfer real property without a formal grant, as in Queensland? If so, in what circumstances?

Question SE24:	Should section 33 of the Administration and Probate Act 1958 (Vic.) be amended in line with the recommendation of the National Committee?

State Trustees supports the recommendations of the National Committee in the above areas, although we note that the risk of maladministration of estate funds may increase if the law encourages informal administration to occur where other, viable, methods of administration exist.

We strongly oppose the proposal that real property be able to be transferred without a grant. The substantially increased risk of maladministration in such circumstances would be too high to justify such a change, notwithstanding the evidence gathered from Queensland's experience to date

Question SE25:	Should the Victorian provision be modified to limit an informal administrator's liability not only in relation to payments made, but also in relation to any other act that might properly have been done by a personal representative to whom a grant has been made?
Question SE26:	How else could the role of informal administrators be better clarified?

State Trustees has no firm view on modification or clarification of the role of informal administrators.

Question SE27:	Would a process of administration by statutory declaration be a worthwhile addition to the mechanisms designed to facilitate the administration of small estates?
Question SE28:	Are there further safeguards that would be necessary or desirable if this proposal were implemented?

State Trustees does not support this proposal, as the safeguards necessary to reduce risk would effectively make administration by statutory declaration at least as onerous as the existing options.

Considering the range of other opportunities open to those wishing to administer a small estate — from informal administration and Court-assisted small estate administration, through to deemed grants and elections to administer — State Trustees is of the belief that there are sufficient options open that fulfil this need.