# Victorian Law Reform Commission
# Forfeiture Rule Review

## Submission in response to the
## March 2014
## Consultation Paper

## by

## State Trustees Limited
## 5 May 2014

# Table of Contents

# Abbreviations / Glossary

The abbreviated terms below are in **bold font** when first appearing in the submission:

| | |
|---|---|
| A&P Act | *Administration & Probate Act 1958* (Vic) |
| Charter | *Charter of Human Rights and Responsibilities Act 2006* (Vic) |
| Consultation Paper | VLRC Consultation Paper: *The Forfeiture Rule*, March 2014 |
| G&A Act | *Guardianship and Administration Act 1986* (Vic) |
| NZ Act | *Succession (Homicide) Act 2007* (NZ) |
| Part IV | Part IV of the A&P Act (dealing with claims for provision, or better provision, from a deceased estate) |
| State Trustees | State Trustees Limited |
| Succession Laws Report | VLRC Succession Laws Report, August 2013 |
| VCAT | Victorian Civil and Administrative Tribunal |
| VLRC | Victorian Law Reform Commission |

# A. Introduction

1. **State Trustees** welcomes the opportunity to provide this submission in response to the **Consultation Paper**.

2. State Trustees has had experience of the application of the forfeiture rule from both "sides", so to speak. As personal representative for deceased estates (that is, executor of the deceased's will, or, where there is no will, administrator under letters of administration) we administer in the order of 1,100 estates per year. We also administer financial and property matters for in the order of 9,000 persons with a disability, where **VCAT** has appointed us under an administration order pursuant to Part 5 of the **G&A Act**. In this context, the scope and application of the rule can become an issue for us wherever, prima facie, a person (including, potentially, a person for whom State Trustees acts as administrator) is both a beneficiary of the deceased's estate and has unlawfully caused the deceased's death.

3. An application to the court may be warranted where, due to the mental impairment and/or diminished responsibility of the represented person at the time of the death, the outcome of a strict application of the rule would be unjust in all the circumstances. As well as having been the plaintiff in the case of Soukup,[1] State Trustees has on at least one occasion successfully applied to the court on behalf of a represented person whose conduct had resulted in the death of a person from whom the represented person would (but for the unlawful killing) have been entitled to inherit.

4. As the Consultation Paper notes, the application of the forfeiture rule is, thankfully, not something that arises often. Nevertheless, in its current form, the rule does have the potential to result in uncertain and/or unjust outcomes, and there is therefore scope to improve this area of the law in a manner consistent with good public policy and other relevant considerations (such as the application of the **Charter**).

5. We are pleased to outline in this submission our thoughts on a preferred way forward for reform in this area. We have attempted to cover the issues in an overall-summary form, rather than by responding separately to each individual question in the Consultation Paper.

6. We have included further background information about State Trustees in the Appendix.

[1] *In the Estate of Soukup*, (1997) 97 A Crim R 103.

# B. Preferred approach to reform of the common law rule

## 1. Codification of the rule in modified form

It appears that Victorian courts have been hesitant to further develop the common law rule since the case of Soukup (cited above), although we are aware that a further forfeiture case is currently being heard before the Supreme Court.

To create greater clarity, consistency and fairness, we believe it would be appropriate, on balance, for Parliament to legislate to codify the common law rule in a modified form.

This approach would improve clarity for personal representatives administering deceased estates and for other parties dealing, in relevant cases, with the consequences of the death of the owner of property by unlawful killing. We consider the **NZ Act** provides a useful starting point for such codification.

The codified rule should be expressed to apply to all types of financial or property benefits that may otherwise be obtained by the killer by reason of the death of the deceased, including benefits by way or survivorship, acceleration of a gift over, or superannuation entitlement. (In this regard, given this breadth of scope, it may be inappropriate that any new provisions be included in the A&P Act; consideration may need to be given to including it elsewhere, or as stand-alone legislation.)

Where the codified rule is to apply, the killer should be treated, prima facie, as having predeceased the deceased.

Whilst setting the default outcomes for given types of cases, such codification should also include scope for applications to the court, in appropriate circumstances and within specified timeframes, to apply, or modify the application of, forfeiture in the particular case (including whether the killer should be treated as having predeceased the deceased).

We believe it would be appropriate, under any statutory codification, for the following to apply as a default position (i.e. subject to any court ruling upon application in a given case), namely that:

(a) forfeiture **does not** apply in the case of:

  (i) a negligent act or omission;

  (ii) infanticide; or

  (iii) death in pursuance of a suicide pact, or assisted suicide.

(b) subject to the preceding, forfeiture **does** apply in all other cases where a person is convicted of murder or manslaughter.

## 2. Application to vary the operation of the default rule

Factors that it should be open to the court to consider in cases where an application is brought to apply, or modify or overturn the applicaton of, forfeiture should include:

(a) moral culpability;

(b) diminished responsibility;

(c) lack of intent;

(d) the impact on the killer, persons who might claim through the killer, and persons who stand to inherit instead of the killer; and

(e) the probable intention of the deceased.

This approach would mean that an application could still be brought to apply forfeiture in a given case notwithstanding the person has not been charged, or been found not guilty of homicide, whether by reason of mental impairment or otherwise.

The time limit for bringing an application should be the same as for a **Part IV** application (currently within six months of the grant of representation), with an ability to extend the period in appropriate cases.

Where criminal proceedings against an alleged killer are still on foot, or are yet to formally commence, the court should have power to make relevant orders in respect of property affected by the death of the deceased pending completion of the criminal justice process.

## 3. Other applications

Where circumstances change (e.g. where a conviction is later overturned), a personal representative or other owner, or a person claiming as, or through, a disentitled beneficiary, should be entitled to bring a proceeding to reclaim a benefit that either should have been forfeited but wasn't, or should not have been forfeited but was.

The claim should be able to be brought against the person who received the benefit; however, it should also be open to the court to rule that repayment of the distribution would not be just in all the circumstances.

In our view, a limitation-of-actions provision of 6 years from the date of death would be appropriate for such applications, with the ability of courts to grant an extension.

A personal representative or other owner acting in good faith should have protections akin to those under s 31 of the A&P Act (indemnification and protection where a distribution is made in good faith) where dealings with property could be affected by subsequent civil proceedings.

# C. Other issues

## 1. Continued application of Part IV

In our view, Part IV should continue to apply, notwithstanding the application of a codified forfeiture rule. The fact that an applicant was an unlawful killer of the deceased would be considered in the weighing of the merits of the Part IV claim (as is currently the case).

Any application in relation to forfeiture should be able to be dealt with in the same proceeding as the Part IV application.

## 2. Costs

In forfeiture proceedings costs should be able to be awarded against litigants in an equivalent manner to that contemplated under the VLRC's recommendations in relation to Part IV applications in the **Succession Laws Report** (Chapter 6).

## 3. Co-ordination of reforms with other matters affecting inheritance

Any reforms in this area should be co-ordinated with those being considered in the area broadly referred to as "anti-ademption", i.e. where account is taken of the effect of transactions carried out by an administrator appointed under Part 5 or 5A the G&A Act, or by an attorney under enduring power of attorney (financial).

In relation to dispositions made by an administrator, the current provision is s 53 of the G&A Act. In relation to enduring powers of attorney, see *Mulhall v Kelly* [2006] VSC 407 (3 November 2006), and Simpson v Cunning [2011] VSC 466 (22 September 2011). This area was examined by the VLRC in both the Guardianship Laws Report (January 2012) and the subsequent Succession Laws Report.

# D. Conclusion

We trust the views expressed in this submission are of assistance.

Whilst we have not gone into great detail in this submission on the rationales for and against the various reform options, we consider these are very well covered in the Consultation Paper.

We would welcome the opportunity to discuss our views in greater detail with the Commission. In this regard, please direct any queries to Alistair Craig, Senior Corporate Lawyer, [redacted].

# E. Appendix 1

## Further Background to State Trustees

State Trustees is in its 75th year of providing estate planning and administration services for Victorians. Having begun its existence in 1940 as the Public Trustee for Victoria, State Trustees became an authorised trustee company, and Victoria's first State owned company, in 1994. We provide Community Services under an agreement with the Victorian Minister for Community Affairs, and the State of Victoria is our sole shareholder.

State Trustees provides a range of services, including administration, estate management and trustee services, to individuals, charities, and government and corporate entities:

1. As a provider of deceased estate services, we administer in the order of 1,100 deceased estates every year. Through our services for will and power of attorney preparation, estate planning and taxation, we advise people on appropriate estate planning arrangements or to meet particular immediate needs.

2. We act under appointment by VCAT as administrator in respect of the financial and property matters of approximately 9,000 represented persons. VCAT has also engaged us to examine the accounts of private administrators. We act for members of the public as their appointed attorney under enduring powers of attorney (financial): currently in the order of 650 Victorians have State Trustees, as appointed attorney, actively looking after their affairs.

3. As well as being an authorised trustee company, State Trustees holds an Australian Financial Services Licence (AFSL) covering the range of financial services and products the organisation provides, in particular, the provision of financial product advice to retail clients and the operation of five common funds that are retail managed investments schemes (registered under Chapter 5C of the Corporations Act).