

Administration of Assets of the Solvent Estates of Deceased Persons in

Terms of Reference

The Commission was asked to consider and report on the administration of the assets of the solvent estates of deceased persons with regard to the payment of debts and legacies. This reference was part of a general reference to review the law of trusts and the administration of estates given to the Committee in 1972 and adopted by the Commission upon its inception.¹

Background of Reference

The law relating to the administration of estates of deceased persons in Western Australia is largely contained in the *Administration Act 1903 (WA)*. The rules contained within the Act that govern the order in which assets are to be applied to the testator's debts are widely recognised as being archaic, overly technical and obscure. Upon receiving the general reference in 1972, the Commission identified this as an area requiring reform.

Nature and Extent of Consultation

Due to the technical nature of the subject matter the Commission did not issue a discussion paper for general circulation. However, a draft version of the report was distributed to government and other agencies concerned with the administration of estates, the Law Society of Western Australia and selected firms of solicitors for their comments. Responses were received from the Public Trustee, WA Trustees, Perpetual Trustees, the Probate Registrar, the Conveyancing Committee of the Law Society and a number of solicitors. All commentators expressed approval of the Commission's proposals. The Commission delivered its final report on the subject in June 1988.²

Recommendations

The Commission examined the systems of law operating in England, New Zealand, and Australian state jurisdictions and concluded that the Queensland statute³ should serve as a model for Western Australia, subject to several modifications. Specifically, the Commission recommended that:

- The law embodied in s 5 (as to the definition of "property"), ss 29, 55, and 59-61 of the *Queensland Succession Act 1981* be enacted as part of the *Administration Act 1903 (WA)*, subject to the following additional recommendations.
- The legislation should provide that the interests of general legatees and of beneficiaries of charged but exonerated property abate rateably, so changing the rule in *Lutkins v Leigh*.⁴
- *Donationes mortis causa* should not be capable of being applied in payment of the debts of the donor.
- The uncertainty concerning the effect of s 29 of the Queensland Act should be resolved by redrafting it as suggested in paragraph 5.18 of the final report.
- Section 59(2) of the Queensland Act should be clarified by redrafting it as suggested in para 4.38 of the final report.
- The phrase "general legacies" should be used instead of "pecuniary legacies".
- Locke King's Act (in Western Australia, s 28 of the *Wills Act 1970*) should be reformed so as to provide

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.

2 Law Reform Commission of Western Australia, *Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Project No 34(VII) (1988).

3 *Succession Act 1981 (Qld)*.

4 (1734) 25 ER 658.

the Payment of Debts and Legacies

that the creation of a trust or charge for the payment of debts ousts the Act unless the will provides to the contrary, but that Class 1 assets should be first applied in the payment of unsecured debts.

A comprehensive outline of the recommendations may be found at pages 43–48 of the Commission's final report.

Legislative or Other Action Undertaken

In 1993, partly as a result of the failure of the Standing Committee of Attorneys-General to adopt the recommendations from the report on *Recognition of Interstate and Foreign Grants of Probate and Administration*⁵, the Queensland Law Reform Commission (QLRC) was asked to make recommendations designed to unify the laws in all Australian states and territories relating to succession on death. The Uniform Succession Law Project Committee, which was established to further the work of the QLRC, presently has representatives from every jurisdiction except Western Australia.⁶ In June 1999, the Project Committee issued a discussion paper, which addressed succession law reform generally.⁷ The proposals were also considered in the Commission's 1990 report⁸ on the *Administration Act 1903*, which recommended that the reforms be adopted.

Currency of Recommendations

The recommendations remain current, but are now contingent upon the findings and proposals of the Uniform Succession Law Project Committee.

Action Required

Legislative action will be required to amend the *Administration Act 1903* (WA) in order to implement the recommendations. However, the Commission's more recent report on the *Administration Act 1903* proposed that the Act be repealed and replaced, incorporating suggested reforms.

Priority — Low

This area of law is currently the subject of discussions aimed at unifying the law in all Australian jurisdictions. Whilst the issues that the recommendations address remain, uniform law is undoubtedly preferable. In this regard, the progress of the Uniform Succession Law Project Committee should be monitored and its ultimate recommendations considered.

5 Law Reform Commission of Western Australia, *Report on Recognition of Interstate and Foreign Grants of Probate and Administration*, Project No 34(IV) (1984).

6 The Commission's Executive Officer Dr Peter Handford represented Western Australia from 1995 to 1997 until the government of the day withdrew its support for the project.

7 Queensland Law Reform Commission, *National Committee for Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper MP 37 (1999).

8 Law Reform Commission of Western Australia, *Report on the Administration Act 1903*, Project No 88 (1990).