THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 34 – Part III

Administration of Deceased Insolvent Estates

REPORT

DECEMBER 1978

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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CONTENTS

TERMS OF REFERENCE

To consider and report on the law relating to the administration of estates of persons dying insolvent.

HISTORY OF PROJECT

This project is part of a continuing review of the law relating to trusts and administration of estates which was inherited by this Commission from its predecessor, the Law Reform Committee. Earlier reports issued by the Commission deal with distribution on intestacy (Project No. 34 Part I) and administration bonds and sureties (Project No. 34 Part II).

WORKING PAPER

The Commission issued a working paper on Part III of this project, dealing with administration of deceased insolvent estates, in April 1977. The names of those who commented on the paper are listed in Appendix I and the paper itself is reproduced in the coloured section below as Appendix II.

CHAPTER 1

THE LAW IN WESTERN AUSTRALIA

A. INTRODUCTION

1.1 The number of deceased insolvent estates in Western Australia is comparatively few. In the two years 1974/76 less than 2% of all deceased estates in WA were insolvent. There are three possible ways in which these insolvent estates can be administered. They are -

(a) informal administration out of court;
(b) formal administration under the provisions of the *Bankruptcy Act 1966* (Cth);
(c) administration pursuant to an order of the Supreme Court.

1.2 The way chosen for each insolvent estate usually depends on the discretion of the administrator of the estate (the personal representative), although in some cases it might be dictated by a creditor or beneficiary. There are no clear rules governing the procedure which is to be used in any particular circumstances. Nevertheless, the choice is significant as there are different practical consequences associated with each method. These differences are dealt with in detail in the working paper.[1] Of the three administration procedures, the first (informal administration out of court) seems to create the biggest problems. Surprisingly, in spite of these problems, virtually all deceased insolvent estates in Western Australia are administered informally out of court.[2]

B. CRITICISMS OF THE LAW

Complexity

1.3 The major problem with informal administration out of court is that the law is difficult to ascertain. It is a combination of the common law with Australian statutory modifications.

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1 See Part A, paragraphs 18 to 74. In this report, further references to paragraph numbers are references to the working paper unless otherwise stated.

2 For example, of the eighty deceased insolvent estates recorded in this State in the year to 30 June 1976, seventy-nine were administered informally. The remaining one was administered formally under the *Bankruptcy Act 1966* (Cwth): see paragraphs 20 to 23. There have been no recent cases of administration pursuant to an order of the Supreme Court.

This common law is derived from English authorities and principles which are centuries old.[3] The statutory modifications are located in a variety of enactments.[4] There is no single body of law or text for the guidance of the personal representative.

1.4 A second difficulty relates to the application of the legal rules once ascertained. In some cases the effect of the statutory provisions on the common law is obscure.[5] Some of the statutory provisions are incompatible with each other.[6]

1.5 This complexity must present a potentially formidable task to an inexperienced personal representative. In many cases, a proper administration would necessitate assistance from experts. But this must add further costs to the administration of an estate which is already unable to pay its debts fully.

1.6 The other two alternative administration procedures (formal administration in bankruptcy and administration pursuant to a Supreme Court order) are largely governed by the provisions of the *Bankruptcy Act 1966* (Cwth).[7] In contrast with informal administration, the ascertainment of the bankruptcy law is simple and its application is relatively straightforward. However, both procedures demand a certain degree of formality and accompanying expense, and it is probably for these reasons that they have proved to be unpopular choices. Administration in bankruptcy is only likely to occur where there are large amounts involved and where a creditor makes the necessary application to take advantage of the bankruptcy rules.

No separate provisions for small insolvent estates

1.7 No distinction based on the value of the estate is created for the purpose of the law relating to administration of deceased insolvent estates. The same rules apply whether the extent of the insolvency amounts to hundreds of dollars or hundreds of thousands of dollars.

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3 See paragraphs 2 to 11.

4 See paragraphs 2 to 11, 35 to 41 and 47 to 50.

5 See, for example, paragraph 54.

6 See paragraphs 51 to 52.

7 In the case of formal administration in bankruptcy, s.248 of the *Bankruptcy Act* specifies the provisions which apply to a deceased insolvent estate: see paragraph 25 to 26. In the case of administration pursuant to an order of the Supreme Court, s.25(1) of the *Supreme Court Act 1935* adopts the bankruptcy rules as to the respective rights of secured and unsecured creditors, the debts and liabilities provable and the valuation of annuities and future and contingent liabilities: see paragraphs 27 to 28. This might include the bankruptcy rules as to priority of debts: see paragraph 66.

In practice, a large estate which is insolvent is likely to be administered formally in bankruptcy. The extra expense may be justified by the extra protection thereby afforded to creditors. However, as indicated above, informal administration of smaller estates involves a particularly complex area of the law. In these cases extra administration costs may be necessary for the protection of the personal representative, but may be undesirable for the estate as a whole and for the creditors.

1.8 In analogous fields, the law makes a distinction between small and large estates. For example, there are separate rules in bankruptcy for the administration of the affairs of persons who become bankrupt during their lifetime where their debts do not exceed $4,000.[8] The *Administration Act 1903* contains special provisions for the assistance of a personal representative seeking to obtain authority to administer any deceased estate, insolvent or not, where the assets do not exceed $10,000.[9] In each case, the distinction is made to simplify the administration of the small estate.

1.9 Creditors of a small deceased insolvent estate could benefit from a separate simplified administration procedure even if this meant foregoing rights and privileges they might otherwise enjoy. Partial payment of debts could be possible in less time, and administration costs could be reduced.

The personal representative's right of preference

1.10 In Western Australia a personal representative of a deceased insolvent estate being administered informally out of court[10] is not obliged to give equal treatment to creditors. Provided he has paid all claims of which he is aware having higher priority, the personal representative has a right to choose, from amongst the remaining creditors (including himself if he was owed money by the deceased at the date of death), who should receive payment first. Creditors who are not favoured by the personal representative might receive nothing.

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8 Part IX of the *Bankruptcy Act* and see paragraph 98.

9 s.56(1) and see paragraph 109. When the working paper was published the figure was $5,000. It was increased to $10,000, by s.3 of the *Administration Act Amendment Act 1977*.

10 Restrictions on the right of preference are imposed if the estate is administered formally in bankruptcy or under a Supreme Court order: paragraphs 68 to 74.

1.11 This right to prefer creditors of equal degree, known as the right of preference, has some historical justification.[11] It provided an incentive for a creditor to administer the estate if no one else was willing to do so. It also meant that the personal representative could pay debts as they were received. He had no obligation to wait until the expiration of the limitation period for all claims to be received so that he could give them equal treatment. When the estate's assets were depleted, he could plead the defence of *plene administravit* in respect of later claims submitted.

1.12 Neither historical justification has force today. There are experienced trustee companies and the Public Trustee operating in Western Australia who will undertake administration of deceased estates, including those which are insolvent, if so requested. They are given statutory authority to charge fees for the work involved. A more appropriate procedure for the payment of debts is contained in s.63 of the *Trustees Act 1962*.[12] This permits the personal representative to advertise in a newspaper for creditors to submit their claims within a certain period, being not less than one month from the date of the advertisement. The personal representative is not liable if he retains insufficient funds to pay claims which are not lodged within the specified time. This statutory procedure is commonly used in Western Australia and appears to provide an expedient and just solution to the problems created by the right of preference.

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11 Paragraphs 3 to 4.

12 See paragraphs 30 and 93.

CHAPTER 2

THE COMMISSION'S RECOMMENDATIONS

A. SIMPLIFICATION OF THE LAW

The Commission's proposals in the working paper and comments

2.1 In the working paper, the Commission suggested that it was undesirable and unnecessary to retain three separate procedures for the administration of deceased insolvent estates in this State.[1] It suggested that, apart from formal administration in bankruptcy, there should be only one other way in which deceased insolvent estates should be administered. It was suggested that this alternative should reflect administration in bankruptcy, but without the more formal aspects associated with the making of a bankruptcy order.

2.2 In effect, adoption of such a proposal would mean that all deceased insolvent estates in Western Australia would be administered having regard to the bankruptcy rules relating to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and the priorities of debts.[2] Formal administration in bankruptcy under the Commonwealth *Bankruptcy Act* would be available if required, but there would be no administration out of court according to the common law. This is currently the law in New South Wales, Victoria, Tasmania, Australian Capital Territory and the United Kingdom. [3]

2.3 Application of the bankruptcy rules referred to above in every case would have the following advantages -

(a) statutory guidance would be available for a personal representative ;

(b) the law would be simplified and consolidated ;

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1 Paragraphs 81 to 90.
2 Paragraph 116.
3 Paragraph 76.

(c) the deceased estate would be administered in a manner similar to the way in which it would have been dealt with had the deceased person become insolvent in his lifetime;

(d) subject to what is said below regarding claims for unliquidated sums of money,[4] a fair result for the creditors would be obtained.

2.4 An alternative based on the law in South Australia, Northern Territory and New Zealand would be to permit a personal representative, if he so wished, to administer the estate as if it were declared bankrupt.[5] In the absence of such an election, presumably the estate would be administered informally at common law. If such a course were adopted in this State the situation would remain that a deceased insolvent estate could be administered in three separate ways, depending to a large extent[6] on the personal representative's discretion. In the Commission's view, however, the bankruptcy rules referred to above should apply in every case and should not rest on the discretion of the personal representative. For this reason, the adoption of this alternative is not recommended.

2.5 There was no commentator on the working paper who advocated retention of the procedure for informal administration of deceased insolvent estates at common law. All except one, who did not deal with this issue, supported application of the bankruptcy rules. Two commentators went as far as to suggest formal administration in bankruptcy in every case by the Official Receiver. However, another commentator confirmed the Commission's expressed fear[7] that this, although entirely fair from the creditors point of view, would in many cases involve expense and possibly delay, with little benefit for the creditors.

Practical consequences of the proposals

2.6 If the bankruptcy rules referred to above[8] were applied in the administration of deceased insolvent estates, and if informal administration at common law were no longer permitted, the following practical consequences would result.

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4 See paragraphs 2.8 to 2.9 of this report.
5 Paragraph 77.
6 Creditors and beneficiaries can apply for administration pursuant to a Supreme Court order: see paragraph 27. Creditors can also, in certain circumstances, petition for administration in bankruptcy: see paragraph 25.
7 Paragraph 86.
8 Paragraph 2.2 of this report.

(a) Debts which are payable

2.7 There are no limits to the debts which are payable in informal administration. Debts which are barred by lapse of time and claims for unliquidated sums of money (except for defamation and seduction) are payable.[9] The situation would be different, however, if the bankruptcy rules were adopted. Statute barred debts and claims for unliquidated sums of money other than those arising out of contract, promise or breach of trust would not be payable.[10] Thus, if an uninsured person negligently caused damage to the property of another and subsequently died leaving an insolvent estate, the owner of that property would have no claim against the estate if it were administered pursuant to the bankruptcy rules.

2.8 The Commission agrees with the rule rejecting statute barred debts, but considers that claims for unliquidated sums of money should not also be excluded. If a person becomes bankrupt during his lifetime he is, on his discharge, released only from his liability for debts which were provable in bankruptcy.[11] He would therefore remain liable for non-provable debts such as a claim for damages caused by his negligence. The situation is different where the claim is against a deceased insolvent estate administered in bankruptcy. In this case the exclusion of the claimant is permanent.

2.9 There does not appear to be any justification for such a harsh result, which depends fortuitously on whether judgment was signed before the date of death .In the Commission's view, a person with a claim for an unliquidated sum of money should be entitled to prove his claim against the estate and share in the distribution of the insolvent estate with other creditors.[12] It is beyond the Commission's powers to recommend changes in this respect to the Commonwealth *Bankruptcy Act* where an order for administration in bankruptcy is obtained. But, for the purposes of State legislation incorporating the bankruptcy rules into the

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9 Paragraph 31.

10 Paragraph 33.

11 *Bankruptcy Act 1966* (Cwth), s.153.

12 It is noted that claims for unliquidated sums of money are admitted in New Zealand, even against the estate of a person who is insolvent during his lifetime. Section 87 of the *Insolvency Act 1967* (NZ) provides that "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the time of his adjudication....shall be debts provable in bankruptcy".

administration of deceased insolvent estates, it would seem to be desirable to admit claims for unliquidated sums of money other than those for defamation and seduction.[13]

(b) Assets available for payment of debts

2.10 The proposal to apply bankruptcy rules to the administration of deceased insolvent estates would have no effect on the assets available for payment of debts. If a formal order for bankruptcy administration were made, this would incorporate the bankruptcy provisions swelling the available assets by setting aside certain transactions preceding the order and limiting the protection otherwise given to assets such as life insurance moneys.[14] However, the Commission's proposal does not include such provisions in the administration of an estate outside formal bankruptcy.[15]

(c) Order of priority

2.11 At present, where a deceased insolvent estate is administered informally at common law, the order of priority for payment of debts is as follows -[16]

(a) costs, charges or expenses incurred in the administration of the estate;

(b) certain unpaid tax owing under the *Income Tax Assessment Act 1936* (Cwth);

(c) funeral and testamentary expenses;

(d) Crown debts;

(e) ordinary unsecured creditors.

2.12 The rights of secured creditors are limited by the provisions of the *Income Tax Assessment Act 1936* (Cwth)[17] and also by other State and Commonwealth legislation creating

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13 The exclusion of claims for defamation and seduction is to maintain the policy of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA). It is noted, however, that the Commonwealth Law Reform Commission, in its project on defamation law reform, proposes to allow defamation claims against a deceased estate - The Law Reform Commission, *Defamation and Publication Privacy – A Draft Uniform Bill*, Discussion Paper No. 3, clause 38(1).

14 Paragraphs 43 to 45.

15 The Commission's proposal is to incorporate bankruptcy rules which relate to proof of debts and rights of creditors, and do not include the bankruptcy rules relating to assets available for payment of debts: see paragraph 2.2 of this report.

16 Paragraphs 47 to 59.

statutory charges.[18] Otherwise they are entitled to prove against the general estate for the whole of the debt, and then realise the security to meet any deficit.[19]

2.13 If the bankruptcy rules relating to priority of payment of debts were incorporated in the administration, the order would be as follows -[20]

(a) costs, charges or expenses incurred in the administration of the estate;

(b) certain unpaid tax owing under the *Income Tax Assessment Act 1936* (Cwth);

(c) funeral and testamentary expenses ;

(d) other debts given priority by the *Bankruptcy Act* in the following order -
  (i) employees' wages up to $600;
  (ii) workers' compensation payments up to $2,000;
  (iii) employees' long service, annual or other leave entitlements;
  (iv) payments for articled clerks and apprentices;
  (v) tax, not exceeding one year's assessment, that given priority in (b) above;
  (vi) other unsecured debts subject to a made by a meeting of creditors;

(e) deferred debts.

2.14 The rights of secured creditors are not affected by the provisions of the *Bankruptcy Act*[21] and this applies to statutory charges.[22] The bankruptcy provisions, however, introduce a more equitable procedure than that at common law relating to proof of debts by secured creditors. This procedure, involving an election by the creditor,[23] ensures that a secured

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17 Paragraph 48

18 Paragraph 50.

19 Paragraph 49.

20 Paragraphs 60 to 65.

21 *Bankruptcy Act 1966* (Cwth), s.58(5).

22 On further research, it appears that the view expressed in paragraph 62, that statutory charges would have no effect in administration in bankruptcy, cannot be supported. The expression "secured creditor" is defined in s.5 of the *Bankruptcy Act* and includes a person or body holding a statutory charge, for example, for unpaid water rates: see Sykes, *The Law of Securities* (3rd ed. 1978) at 724-725 and McDonald Henry& Meek, *Australian Bankruptcy Law and Practice* (5th ed. 1977) at 8-9.

23 Paragraph 61.

creditor receives no greater benefit than unsecured creditors in respect of that part of his debt which exceeds the value of his security.

2.15 In the Commission's view, subject to the comments above relating to claims for unliquidated sums of money,[24] all of these practical consequences flowing from the proposal to abolish informal administration at common law, would be desirable.

Crown and statutory priorities

2.16 A question arises as to the retention of priority for Crown debts. If an estate is administered formally in bankruptcy the Crown is bound in right of Commonwealth and in right of any State by the bankruptcy provisions regulating priorities.[25] In effect, Crown priority is removed. The situation is different, however, if the bankruptcy rules are incorporated in the administration of a deceased insolvent estate by virtue of a statutory provision which does not bind the Crown. If, for example, it were provided in the *Administration Act 1903*[26] that the bankruptcy rules as to priorities were to apply to the administration of any deceased insolvent estate, the Crown might not be bound by such provision and might retain its priority.[27] Unfortunately the position is not free from doubt.[28]

2.17 One commentator made the following remarks regarding Crown Priority:

> "....the preference given to the Crown or any government or semi-government department or instrumentality....appears to be completely inequitable.
>
> In many cases it has been the payment of charges such as Income Tax, rates and the like which has contributed to the bankruptcy by depriving the businessman of working capital. The person or firm which has helped to carry the business by providing services or goods etc., and thereby helping the community and creating employment, is now further penalised by having the Crown paid out in full before being entitled to any part of the Estate.

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24 See paragraphs 2.8 to 2.9 of this report.
25 Paragraph 63.
26 Which does not bind the Crown.
27 A similar situation arises in respect of administration pursuant to a Supreme Court order: paragraph 66.
28 The Crown might be bound by necessary implication, see paragraph 66.

> This is most obvious where there is a completely insolvent Estate of a deceased who has unencumbered assets in another jurisdiction and the Estate has to pay death duties in the jurisdiction in priority to all other creditors ". [29]

2.18 The Commission notes that similar sentiments have been expressed in a recent report on priority of Crown debts by the Senate Standing Committee on Constitutional and Legal Affairs. That Committee for these, and for other reasons, recommended abolition of Crown priority, including the special priority conferred on certain unpaid income tax by ss.221p and 221yu of the *Income Tax Assessment Act 1936* (Cwth).[30]

2.19 The Commission considers that it would be inappropriate in this report to make any recommendation as to any variation of the priority which is given to the Crown, or other priorities conferred by State legislation. It considers, however, that existing doubts[31] as to whether the Crown is bound by legislation prescribing priority for payment of debts should be removed.

The Commission's recommendations

2.20 **The Commission recommends that there should be a provision inserted in the *Administration Act 1903* providing that, (with the exception of the rule excluding claims for unliquidated sums of money), the bankruptcy rules as to**

- **(a) the respective rights of secured and unsecured creditors,**
- **(b) debts and liabilities provable,**
- **(c) the valuation of annuities and future and contingent liabilities ,**
- **(d) the order for payment of debts**

should apply to the administration of all deceased insolvent estates in Western Australia. It also recommends that the legislation should specify whether or not the prescribed order for payment of debts should bind the Crown. Section 25(1) of the *Supreme Court*

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29 On this point, see Nygh, *Conflict of Laws in Australia*, (3rd ed. 1976) at 470-471 and *Permanent Trustee Co. (Canberra) Ltd. v Finlayson* (1968) 122 CLR 338 for an illustration of the rule that administration is governed by the law in the State where administration is taken out.

30 Report from the Senate Standing Committee on Constitutional and Legal Affairs, *Priority of Crown Debts 1978* at 42 and 57.

31 See paragraph 2.16 of this report.

Act 1935 could be consequentially repealed.[32] It might also be appropriate to repeal s.3 of the *Married Women's Property Act 1892* which now appears to be obsolete.[33]

B. SEPARATE PROVISIONS FOR SMALL DECEASED INSOLVENT ESTATES

The Commission's proposals in the working paper and comments

2.21 The Commission put forward two main suggestions regarding the administration of small deceased insolvent estates. One was to consider implementing an administration procedure for such estates which was separate from bankruptcy administration.[34] The other was to consider the provision of an administration advisory service for inexperienced personal representatives of these estates.[35] It was suggested that a small estate for both these purposes could be defined as one where the assets available for payment of debts did not exceed a certain figure, being at least $4,000.[36]

Separate administration

2.22 With regard to the proposal for a separate administration procedure for small insolvent deceased estates, the Commission realised that this would, in effect, mean a return to the situation where insolvent deceased estates could be administered in three alternative ways. Nevertheless, it suggested that this might be considered to be justifiable if the view were taken that the bankruptcy provisions were too complex and therefore unsuitable for small estates.[37] The Commission had in mind a simple procedure whereby a personal representative could administer the estate by advertising for claims pursuant to s.63 of the *Trustees Act 1962*. Then, at the expiration of the appropriate period, the personal representative could distribute available funds to creditors who submitted claims, ignoring priorities except those created by Commonwealth legislation.[38] It was hoped that such a simple procedure would enable a relative of the deceased person to administer the estate expediently and with a minimum of

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32 Although the section includes provisions relating to the winding up of companies, these now appear to be unnecessary having regard to s.291(2) of the *Companies Act 1961*.
33 Paragraph 65.
34 Paragraphs 104 to 108.
35 Paragraphs 109 to 113.
36 Paragraphs 100 to 103.
37 Paragraph 106.
38 Paragraph 120(b).

expense. Formal administration in bankruptcy would remain as an alternative administration procedure at the petition of any creditor who had debts exceeding $500.

2.23 Two commentators supported a simplified procedure for the administration of small deceased insolvent estates. As to the definition of such an estate, one suggestion was that it could be defined as one where the assets available for payment of debts did not exceed $20,000.

It was pointed out that even this figure would be exceeded in most cases where the deceased owned his own home. The other commentator suggested a figure of $10,000. Apart from a suggestion that in these cases it would be desirable for small creditors, that is creditors who were owed less than $100, to receive priority, there was no comment as to how a small deceased insolvent estate should be administered.

2.24 Two commentators, on the other hand, did not favour the proposal. One took the view that the bankruptcy provisions were fair and reasonable and that any permitted departure based on the size of the estate would be arbitrary and could give rise to unfair results. The other suggested that there was no evidence of any need for a separate administration procedure and that such a need would be unlikely having regard to the relatively small number of deceased insolvent estates arising in this State.

Advisory service

2.25 The Commission's second proposal, that there should be an advisory service for inexperienced personal representatives of small deceased insolvent estates, was intended, like the first proposal, to enable expedient and inexpensive administration of the estate by a relative of the deceased. However, although the same goal was shared by the two proposals, they were considered to be independent. In the Commission's view, the personal representative and the creditors could benefit from an advisory service irrespective of whether a separate administration procedure were implemented for small deceased insolvent estates.[39]

2.26 A similar recommendation was made by the Commonwealth Law Reform Commission in respect of the administration of estates of persons who become insolvent

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39 Paragraph 109.

during their lifetime. In its report, the Commonwealth Law Reform Commission recommended that a regular payment of debts programme should be implemented under the authority of the Department of Business and Consumer Affairs.[40] Unless a majority (in number and amount) of creditors objected, this programme would be available to non-business persons who were insolvent and whose debts (excluding home mortgage) did not exceed $15,000.[41] The introduction of "debt counsellors", trained and licensed by the Department, was also recommended to give expert debt counselling to the debtor.[42] The Commonwealth Law Reform Commission noted that there was much to be said for analogous provisions to apply to deceased insolvent estates.[43]

2.27 In its working paper, this Commission suggested that if debt counselling services by trained and licensed debt counsellors were available, as proposed by the Commonwealth Law Reform Commission, it might be desirable for these persons also to be able to give advice relating to the administration of deceased insolvent estates.[44] Alternative advisory bodies suggested by the Commission were community counselling services, credit unions, The Legal Aid Commission, courts dealing with debt recovery, The Citizens Advice Bureau and the Public Trustee.[45]

2.28 Four commentators agreed with the proposal in principle although one doubted whether there was any need for such advice in practice having regard to the small number of deceased insolvent estates in Western Australia. One commentator opposed the suggestion on the basis that it duplicated legal aid services. Two commentators who agreed with the proposal considered that the Commonwealth Bankruptcy Division should be involved, giving advice through debt counsellors. The only other commentator to consider the implementation of the proposal favoured the use of the Legal Aid Commission.

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40 The Law Reform Commission, *Insolvency : The Regular Payment of Debts*, Report No.6, Chapter 2.
41 Ibid., at 21 paragraph 46 and at 32-33 paragraphs 69-71.
42 Ibid., chapter 3.
43 Ibid., at 80, paragraph 167.
44 Paragraph 112.
45 Paragraph 120.

The Commission's recommendations

Separate administration

2.29 Having given the matter further consideration, the Commission shares the view of those commentators who suggested that it would be undesirable to introduce a separate administration procedure for small deceased insolvent estates.[46] In reaching this conclusion the Commission has been influenced by the following factors -

(a) the application of bankruptcy provisions to the administration of all deceased insolvent estates as recommended above will result in a considerable simplification of the law;

(b) the introduction of alternative administration procedures is likely to complicate the law and, in a large number of cases, may not give rise to significant practical changes;

(c) the bankruptcy provisions are fair and reasonable, and in cases where their application would be significant (for example, where a certain creditor is given a priority which might be denied outside bankruptcy) the interests of justice might be better served if they were applied.

2.30 **The Commission therefore recommends that there should be no separate administration procedure for the administration of small deceased insolvent estates.**

Advisory service

2.31 The Commission considers that it would be desirable in principle to provide an advisory service for an inexperienced personal representative who wishes to administer a small deceased insolvent estate. Under existing legislation a personal representative of a small estate can obtain advice from the Master of the Supreme Court as to how he may obtain authority to administer the estate.[47] It seems reasonable that he should also be able to obtain advice from some source as to the way in which the estate should be administered if it is

46 See paragraph 2.24 of this report.
47 See paragraph 109.

insolvent. The criticism that it would duplicate legal aid services presupposes that legal aid is already available to a personal representative in these circumstances and this appears to be unlikely.[48]

2.32 As to the definition of a small deceased insolvent estate, several possibilities have been suggested, ranging from an estate with assets from $4,000 to over $20,000. In the Commission's view, a personal representative's ability to obtain administration advice could be co-extensive with his existing ability to obtain advice from the Master of the Supreme Court in relation to his application for authority to administer the estate. This would enable continuity of advice from the outset to the conclusion of the administration. At present, the master's duty to give advice applies to estates with assets not exceeding $10,000. This figure was fixed recently[49] and would be an appropriate figure to adopt for the purposes of any extension to advisory services for a personal representative.

2.33 A practical difficulty arises, however, as to the availability of a suitably qualified person or body to give the advice suggested. Ideally the qualifications would be experience in both insolvency and administration law. The Commission does not expect the proposal to impose a heavy work load[50] and it envisages that there should be statutory protection from liability for advice given in good faith. Nevertheless, there does not appear to be any clearly suitable person or body to fill the role.

2.34 It might be tempting to suggest that the provision of administration advice could become an extension of the role of the Master of the Supreme Court. This, however, would not be an appropriate function of his office even if he had the extra staff with the necessary expertise to enable him to perform it. The Master, in giving advice at present to a personal representative, is acting as a judicial officer on a matter falling within the jurisdiction of the Supreme Court. He is not acting as an advocate giving legal advice as such, and it would not be desirable to require him to perform such a service.

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48 See paragraph 2.37 of this report.

49 *Administration Act Amendment Act 1977*, s.3.

50 On average, there are only approximately one hundred insolvent deceased estates per annum in this State, and advice would not be needed for them all. Some may not qualify because of their size. Of those which did qualify, some might be administered formally in bankruptcy and it is expected that in many cases, for some other reason, such as a lack of concern by the personal representative, advice would not be sought.

2.35 There was some support for the Commission's suggestion that the advice could be given by debt counsellors to be established under the Commonwealth Law Reform Commission's proposals in relation to live insolvencies, but this Commission sees problems in this regard. These are -

(a) there is no indication at present as to when the Commonwealth Law Reform Commission's proposals will be adopted or, for that matter, whether they will be adopted at all;

(b) practical difficulties may arise if a Commonwealth Department, such as the Department of Business and Consumer Affairs, were to become involved in matters falling outside Commonwealth powers;

(c) the personal representative may encounter problems relating particularly to administration of deceased estates, and debt counsellors may have insufficient training or experience in this area.

2.36 Because the advice needed is likely to be of a legal rather than practical nature, it might be considered more appropriate for it to be given by persons with expertise in this area of the law. It might therefore be argued that the advice should be given by persons employed by the Public Trustee or by the Legal Aid Commission. The Public Trustee, however, has competing interests. Furthermore, the task of giving gratuitous advice for the benefit of creditors of an estate not under his administration would necessitate an extension of his existing services, and could require a corresponding increase in his resources.

2.37 With regard to legal aid, although the deceased himself when he was alive might have qualified for legal aid, different considerations apply to his personal representative. In considering an application for legal aid, the Committee's discretion is governed by the matters referred to in s.37 of the *Legal Aid Commission Act 1976*. These include matters such as the applicant's financial circumstances, and whether the expenditure of legal aid funds is justified by the benefit or gain to the applicant. In the case of an application by the personal representative of a deceased insolvent estate, the Committee's decision no doubt would be influenced by the fact that the only persons to gain materially would be the creditors.

Consequently, the application would tend to be given a very low priority when viewed against demands on legal aid funds by persons with a more obvious need for legal advice.

2.38 Other bodies mentioned in the working paper, namely community counselling services, credit unions, courts dealing with debt recovery and the Citizens Advice Bureau, appear also to be unsuitable. Either they lack the necessary expertise, or the giving of such advice falls outside their normal fields of operation.

2.39 **Therefore, unless appropriate extensions are made to the role of the Public Trustee or the Legal Aid Commission, the Commission, for practical reasons, does not recommend the introduction of a procedure for giving gratuitous advice to persons administering small deceased insolvent estates. It recommends, however, that the matter should be reviewed if a debt counselling scheme, operated by debt counsellors with suitable training, is introduced in this State pursuant to the Commonwealth Law Reform Commission's recommendations.**

C. THE PERSONAL REPRESENTATIVE'S RIGHT OF PREFERENCE

The Commission's Proposals in the working paper and comments

2.40 The Commission's suggestion in its working paper was that the personal representative's right of preference was no longer needed in light of the procedure provided by s.63 of the *Trustees Act 1962*, and that continuation of the right could give rise to injustice. Consequently, it suggested that the right be abolished.[51] Alternatively, it asked for comments as to whether it should be retained in a restricted form to enable a personal representative, in good faith, to pay certain debts before the statutory period for all claims to be submitted had expired, provided he did so at a time when he had no reason to believe that the estate would be insolvent.[52]

2.41 Of those commentators who considered this question, all agreed that the personal representative's right of preference should be replaced by the more restricted protection referred to above. One commentator, with considerable experience in this area of the law, said:

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51 Paragraphs 92 to 94.

52 Paragraphs 95 to 96.

> "There are many occasions in our experience when it becomes desirable in the interests of an estate or of its beneficiaries for a claim to be paid, in the very early stages, and prior to the expiry of the s.63 Statutory Notices (sometimes prior to the issue of the Grant of Probate). In a recent case where it appeared through all our preliminary enquiries that we were dealing with a straight-forward administration, a substantial claim producing insolvency was lodged with us just before the expiry date of the notices. Circumstances of this nature make the recommendation ...understandable and in the interests of competent administration."

The Commission endorses these comments.

The Commission's recommendation

2.42 **The Commission recommends that the personal representative's right of preference be abolished, but that a statutory defence should be provided to enable him to pay any debt, including his own (except where he is administering the estate solely by reason of his being a creditor), as long as he does so in good faith and at a time when he has no reason to believe that the estate is insolvent.** Appropriate amendments giving effect to this proposal should be made in the *Administration Act 1903*.[53]

[53] Section 10 of the *Administration of Estates Act 1971* (UK) can be referred to as a suitable precedent.

CHAPTER 3

SUMMARY OF RECOMMENDATIONS

3.1 The Commission recommends that -

(a) With the exception of the rule excluding claims for unliquidated sums of money, the bankruptcy rules as to the respective rights of secured and unsecured creditors, debts and liabilities provable, the valuation of annuities and future and contingent liabilities and as to the order for payment of debts should apply to the administration of all deceased insolvent estates in Western Australia.

(paragraph 2.20)

(b) It should be made clear whether or not the Crown is to be bound by statutory provisions governing the order of payment of debts.

(paragraph 2.20)

(c) A separate administration procedure for small deceased insolvent estates should not be introduced.

(paragraph 2.30)

(d) Unless extensions are made to the services of the Public Trustee or of the Legal Aid Commission there should be no procedure introduced at this stage for giving gratuitous advice to personal representatives of small deceased insolvent estates as to the administration of the estate. The matter should be reviewed, however, if debt counsellors, with suitable training, operating under the Department of Consumer Affairs, are introduced in this State pursuant to recommendations of the Commonwealth Law Reform Commission.

(paragraph 2.39)

(e) A personal representative should no longer have a right of preference, but should be given statutory protection if he pays any debt, including his own (unless he is administering the estate by virtue of his being a creditor) in good faith and at a time when he has no reason to believe that the estate is insolvent.

(paragraph 2.42)

(Signed) Neville H. Crago
Chairman

Eric Freeman
Member

David K. Malcolm
Member

19 December 1978

APPENDIX I

Commentators on the working paper -

Acting Public Trustee
Institute of Chartered Accountants in Australia, Western Australian Branch
Institute of Legal Executives (Western Australia) Inc.
Perpetual Trustees W.A. Ltd.
State Taxation Department
Western Australian Trustee Executor and Agency Company Ltd.