



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 28 – Part I

**Official Attestation of Forms and
Documents**

WORKING PAPER

APRIL 1977

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

The Commissioners are -

Mr. E.G. Freeman, *Chairman*

Mr. N.H. Crago

Mr. D.K. Malcolm.

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Telephone: 25 6022).

PREFACE

Reform of the law in Western Australia

The Law Reform Commission has been asked to consider the tendency towards unnecessary formality in the methods of attesting forms and documents and the practice of affixing signatures to affidavits by means of a rubber stamp in Western Australia.

In February 1973 the Commission issued a preliminary working paper to many State Government departments and instrumentalities dealing with the methods of attestation of forms and documents, the formalities required by those methods and in particular the requirement for information to be provided by a statutory declaration. The Commission having considered the comments on the preliminary working paper and having completed its first consideration of the practice of affixing signatures to affidavits by means of a rubber stamp now issues this working paper. The Commission will in due course submit a report to the Attorney General.

Uniform law

At the second conference of Law Reform Agencies in April, 1975 it was recommended that the Law Reform Commission of Queensland and the Law Reform Commission of Western Australia should work together on a project to study proposals for the reform of the law relating to oaths and statutory declarations, acknowledgements and the like with a view to preparing uniform provisions which could be adopted as a model for the Commonwealth and the States.

This recommendation was again discussed at the third conference of Law Reform Agencies in May 1976. The representatives of the Commissions involved confirmed that they would refer the matter to their Attorneys General.

The proposal has since received the consent of the respective Attorneys General. It is envisaged that an agreed report will in due course be submitted to the respective Attorneys General for consideration by the Standing Committee of Attorneys General.

Accordingly, comments received in response to this working paper will be examined not only with a view to reforming the law in Western Australia, but also in connection with the development of uniform law to apply throughout Australia.

The paper does not necessarily represent the final views of the Commission.

Comments and criticisms (with reasons where appropriate) on individual issues raised in the working paper, on the paper as a whole or any other aspect coming within the terms of reference, and on the question of uniformity, are invited. The Commission requests that they be submitted by 17 June 1977.

Copies of the paper are being sent to the -

Associated Banks in Western Australia
Australian Insurance Association
Australian Society of Accountants (WA)
Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Commissioner for Corporate Affairs
Commonwealth Banking Corporation
Country Shire Councils' Association of Western Australia
Institute of Chartered Accountants in Australia (WA)
Institute of Chartered Secretaries and Administrators
Institute of Legal Executives
Insurance Council of Australia
Insurance Institute of Western Australia
Judges of the District Court
Judges of the Family Court
Law Reform Commission of Queensland
Law School of the University of Western Australia
Law Society of Western Australia
Local Government Association of Western Australia
Magistrates' Institute
Mortgage Brokers Association of Western Australia
Parliamentary Commissioner for Administrative Investigations
Parliamentary Counsel
Perpetual Executors, Trustees and Agency Co. (WA) Ltd.
Rural & Industries Bank of Western Australia
Solicitor General
State Government Departments and Instrumentalities, including those listed in Appendix III
Under Secretary for Law
West Australian Trustee Executor and Agency Co. Ltd.
Western Australian Permanent Building Societies Association
Other Law Reform Commissions and Committees with which this Commission is in
correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

CONTENTS

	Paragraph
TERMS OF REFERENCE	1.1
A. ATTESTATION OF FORMS AND DOCUMENTS	
Comment on terms of reference	2.1
Historical background	2.3
Preliminary working paper	2.10
Law and practice in Western Australia	
<i>Affidavits</i>	
(a) Formalities for taking affidavits	2.11
(b) Persons who may take affidavits	2.12
(c) Section 169 of the <i>Criminal Code</i>	2.13
<i>Statutory declarations</i>	
(a) Formalities for taking statutory declarations under s.106 of <i>Evidence Act 1906</i>	2.14
(b) Section 170 of the <i>Criminal Code</i>	2.17
(c) Variation from prescribed form	2.18
(d) Persons before whom a statutory declaration may be made	2.20
<i>Forms and documents in use by Government departments and instrumentalities</i>	2.22
(a) Affidavits	2.23
(b) Statutory declarations	2.24
(c) Attested statements	2.26
(d) Unattested statements	2.27
<i>Other forms and documents</i>	
(a) <i>Transfer of Land Act 1893</i>	2.28
(b) <i>Wills Act 1970</i>	2.30
(c) <i>Property Law Act 1969</i>	2.31
<i>Corroborative evidence</i>	2.32
<i>Civil liability of attesting witness</i>	2.34
<i>Civil remedy for injury due to a fraudulent misrepresentation</i>	2.36
The position in other jurisdictions	2.39
Proposal for reform	2.41
Summary of commentators' views on proposed law reform	2.42
Commission's tentative views	2.44
B. SIGNING OF AFFIDAVITS BY FIXING A RUBBER STAMP	
Present law and practice	3.1
Discussion	3.6

QUESTIONS FOR DISCUSSION

4.1

APPENDIX I (Sections 105 and 106 of the Western Australian *Evidence Act 1906*)

APPENDIX II (Sections 169, 170 and 171 of the Western Australian *Criminal Code*)

APPENDIX III (Views of Government departments and instrumentalities on the proposal in paragraph 12 of the preliminary working paper for a form of simple unattested declaration)

APPENDIX IV Preliminary working paper

TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on -

- (a) the methods of attestation of forms and documents and the tendency towards unnecessary formality required in those methods, and
- (b) whether the signatures of the deponent and the person before whom an affidavit is taken should be in handwriting.

1.2 Part (a) of the project was given to the Commission as the result of some concern at -

- (i) the large number of applications received from persons seeking appointment as Commissioners for Declarations; and
- (ii) the requirement that signatures to some "minor and unimportant" documents had to be witnessed by persons of special status.

1.3 Part (b) of the project was given to the Commission after it had been suggested by a magistrate that the *Local Court Rules* should be amended to provide that signatures on affidavits must be in the handwriting of the deponent and the person before whom an affidavit is taken and not by affixing a rubber stamp which he considered was open to abuse.

A. ATTESTATION OF FORMS AND DOCUMENTS

Comment on terms of reference

2.1 The range of forms and documents in common usage in Western Australia includes -

- (a) Forms and documents evidencing or acknowledging transactions (e.g. deeds, agreements and transfers of land), and documents evidencing or acknowledging the granting of powers, rights or benefits, whether testamentary or non-testamentary (e.g. powers of attorney, settlements and wills). In the case of a number of these forms and documents the manner of execution, including the manner of attestation (where necessary), is prescribed by statute.¹
- (b) Forms and documents which entail the supply of information to Government departments and instrumentalities, private trading concerns, and individuals, including those forms and documents which may result in, or be incorporated in a contract (e.g. an insurance proposal form), or in the granting of some right or benefit such as a driver's licence, legal aid, or registration as a builder.
- (c) Documents used in court proceedings.

2.2 The terms of reference are expressed widely and would appear to include a consideration of the formalities required in the case of all the forms and documents referred to in paragraph 2.1 above. In particular the terms of reference appear to involve a consideration of the formalities required for documents used in court proceedings and the formalities for attesting forms and documents such as bills of sale and wills where provision is made by statute for the manner of their execution and attestation. The Commission has interpreted the terms of reference as excluding any consideration of documents used in court proceedings. The Commission may consider the formalities required in the attestation of forms and documents where specific provision is made by statute for the manner of their execution and attestation at a later date. At present, the Commission has confined its attention to a consideration of the formalities required in forms and documents which entail the supply of

¹ For example, deeds - *Property Law Act 1969*, s.9, and wills – *Wills Act 1970*, ss.8-10.

information to State Government departments and instrumentalities in particular. However, the consideration of the use of statutory declarations and the proposal for an unattested statutory declaration,² will have relevance to private trading concerns and individuals who at times use statutory declarations.

Historical background

2.3 The practice of attesting documents finds its historical origins in the rules and practice surrounding the admission of documents in evidence at trials. Until the *Perjury Act of 1562-1563*,³ which created the offence of perjury and provided for the service of process on people to compel their attendance as witnesses, attesting witnesses were in a special position as only they could be compelled to attend as witnesses. The fact that they had allowed themselves to be called in and set down as attesting witnesses was understood to be an assent in advance to a compulsory summons. As part of this system attesting witnesses formally allowed their names to be written on deeds and other documents. The power to summon the attesting witness was important as they could prove the genuineness of the document where that was in doubt.⁴

2.4 After the *Perjury Act* was enacted, although attestation was no longer important as a means of summoning the attesting witnesses, attestation remained important as a means of proving a deed or other document where that was in question. At common law a rule developed, namely, that one of the attesting witnesses must be called.⁵ If they were not called the document could not be proved. There were, however, exceptions where the document could be proved, notwithstanding that the attesting witnesses were not called. Two excuses for not calling an attesting witness were his death or his absence from the jurisdiction of the court.⁶ That rule was later modified so that, in the case of a document not required by law to be attested, the document could be proved by secondary evidence, whether or not attendance

² See paragraphs 2.44 to 2.49 below.

³ 5 Elizabeth 1 c.9.

⁴ See Wigmore, *Evidence* (3rd ed. 1940) Vol. 4 at 573-574. In fact, in the twelfth century, it was not uncommon for the attesting witnesses to sit with the jury when the genuineness of a document was in question: *ibid.*, at 574.

⁵ See *Abbot v Plumbe* (1779) 1 Doug1. 216, 99 ER 141, and *R. v Harringworth* 4 M & S 350, 105 ER 863.

⁶ See Wigmore, *Evidence* (3rd ed. 1940) Vol. 4 at 620-625.

of the attesting witness was possible.⁷ In the case of a document which is required by law to be attested the common law rule was modified in England in 1938.⁸

2.5 Those sections have been enacted as ss.30 and 79A, respectively, of the Western Australian *Evidence Act 1906*. In Western Australia, s.30 of the *Evidence Act 1906* provides that where attestation is not requisite to the validity of a document, the document need not be proved by the attesting witness, but may be proved as if there had been no attesting witness. Section 79A of the *Evidence Act 1906* provides that where attestation is requisite to the validity of a document (other than a will or other testamentary document) the document may be proved as if no witness to the document is alive.

2.6 Where an attesting witness is called as a witness his role appears to be merely to swear that he saw someone sign in a particular name.⁹ The attesting witness need not give evidence as to the actual identity of the signatory.

2.7 Historically, the use of oaths was associated with the development of attestation as a means of proving the genuineness of a document. As an attesting witness could play an important role in the proof of a document, it became common practice to require attestation of many forms and documents by oaths.

2.8 Prior to the *Statutory Declarations Act 1835*¹⁰ it had become increasingly obvious that the oath was, because of its frequent use, not only becoming lightly regarded but causing serious and unnecessary inconvenience in trade and commerce. The Act created a voluntary statutory declaration,¹¹ and substituted the declaration in a number of statutes where oaths were required. That Act also made it unlawful for a justice of the peace or other person to administer any oath, affidavit or solemn affirmation unless it was authorised by statute.¹²

⁷ *Common Law Procedure Act 1854* (17 & 18 Vict. c.125), s.26, which was subsequently repealed and re-enacted by *The Criminal Procedure Act 1865* (28 & 29 Vict. c.18), s.7.

⁸ *Evidence Act 1938* (1 & 2 Geo. 6 c.28), s.3.

⁹ See *Cock v Small* (1871) 5 SASR 44.

¹⁰ 5 & 6 Will. 4 c.62 (UK).

¹¹ *Ibid.*, s.18.

¹² *Ibid.*, s.13.

2.9 Sections 13 and 18 of the United Kingdom *Statutory Declarations Act 1835* were enacted in Western Australia in 1855¹³ and later re-enacted as ss.105 and 106 of the *Evidence Act 1906*.¹⁴

Preliminary working paper

2.10 With the assistance of the Public Service Board of Western Australia the Commission obtained copies of forms and documents in use by many State Government departments and instrumentalities. In February 1973 the Commission issued to those departments and instrumentalities a preliminary working paper dealing with the terms of reference in paragraph 1.1(a) above. A copy of the preliminary working paper is contained in Appendix IV. Appendix III of this working paper contains a list of those State Government departments and instrumentalities who replied to the preliminary working paper, together with their views on the proposal contained in paragraph 12 of the preliminary working paper.

Law and practice in Western Australia

Affidavits

(a) Formalities for taking affidavits

2.11 Section 98A of the *Evidence Act 1906* provides for the manner in which an affidavit may be administered, and includes an oath which may be administered. Instead of an oath, an affirmation may be administered.¹⁵ A person who makes any false statement on affirmation that would amount to perjury if made on the oath commits perjury.¹⁶

(b) Persons who may take affidavits

2.12 The *Supreme Court Act 1935* empowers the Chief Justice to appoint commissioners to take affidavits.¹⁷ An affidavit may be taken by a commissioner appointed under s.175 (there

¹³ An Ordinance for the abolition of unnecessary oaths, and to substitute declarations in lieu thereof: 18 Vict. No.12.

¹⁴ See Appendix I.

¹⁵ *Evidence Act 1906*, s.99.

¹⁶ *Criminal Code*, s.124.

¹⁷ The *Supreme Court Act 1935*, s.175.

are approximately 426 Commissioners for Affidavits), or by a justice of the peace or such other persons as may be prescribed by the *Supreme Court Rules*.¹⁸ Other persons prescribed by the Rules are a judge of the Supreme Court, a District Court judge and the Master of the Supreme Court.¹⁹ The Act also makes provision for the taking of affidavits outside Western Australia.²⁰

(c) Section 169 of the *Criminal Code*

2.13 A person who makes a statement verified by oath or affirmation touching any matter required by law to be on oath which to his knowledge is false in any material particular commits an offence and is liable to imprisonment with hard labour for seven years.²¹ The Commission understands that prosecutions under this section are rare.

Statutory declarations

(a) Formalities for taking statutory declarations under s.106 of *Evidence Act 1906*

2.14 Section 106 of the *Evidence Act 1906* prescribes a form to be used when a voluntary statutory declaration is being made, by virtue of the section. The term "voluntary" distinguishes such declarations from oaths, affirmations and affidavits, which by virtue of s.105 of the *Evidence Act 1906*, may only be administered by a justice or other person where it is authorised by law.²² The form prescribed by s.106 is:

"I, A.B., [*insert place of abode and occupation*], do solemnly and sincerely declare that [*here state the facts*], and I make this solemn declaration by virtue of section one hundred and six of the *Evidence Act, 1906*.

Declared at this day of 19 , before me, C.D., Justice of the Peace [*or as the case may be*]."

¹⁸ Ibid., s.176.

¹⁹ *Supreme Court Rules 1971*, Order 37 rule 10(1).

²⁰ The *Supreme Court Act 1935*, s.177(1), and see also *Supreme Court Rules 1971*, Order 37 rule 11.

²¹ *Criminal Code*, s.169, see Appendix II.

²² See paragraphs 2.8 and 2.9 above.

Although the section prescribes a form to be used, it does not provide a procedure to be followed by the witness and the maker of the statement when a declaration is being made.

2.15 There is therefore, some doubt as to the manner in which a statutory declaration must be made. A document executed in circumstances where the declarant does not attend before the witness does not contain valid statutory declaration.²³ It would appear that there must be some communication between the declarant and the witness, other than the mere submission of the document itself to the witness for witnessing. It appears that the whole of the document, including the statutory form at the end, must be read to the declarant by the witness, unless the declarant advises the witness that he has read it and that he solemnly declares that the matters set forth in the document are true.²⁴ It may be sufficient if the declarant reads over to the witness the form as given in s.106 of the *Evidence Act 1906*, or if the witness reads over that form to the declarant and the witness satisfies himself that the declarant understands the content of the statutory declaration and that the declarant believes the contents to be true.²⁵

2.16 The Commission understands that on occasions statutory declarations are taken without formal communication between the declarant and the witness with no more than the witnessing of a signature. In such cases it appears that the declaration is invalid. In 1970 Court of Petty Sessions case in Western Australia,²⁶ the defendant had gone to the local post-master and asked him to witness his signature, which he duly did. The defendant had not declared the contents to be true, nor had the witness asked him if he declared the contents to be true. The Stipendiary Magistrate, R. Iddison, held that a document executed in those circumstances did not contain a valid statutory declaration.

(b) Section 170 of the *Criminal Code*

2.17 In Western Australia, s.170 of the *Criminal Code*²⁷ provides that a person commits an offence where he, being:

“...permitted or required by law to make a statement or declaration before any person authorised by law to permit it to be made before him, makes a statement or declaration before that person which, in any material particular, is to his knowledge false”.

²³ See *R. v Schultz* (1922) 69 DLR 267.

²⁴ See *R. v Whynot* (1954) 34 Maritime Provinces Reports (Canada) 302.

²⁵ See *R. v Phillips* (1908) 14 BCR 194 and *R. v Nier* (1915) 33 WLR 180.

²⁶ *Myers v Slater and Slater*, Northam Court of Petty Sessions Nos. 1573/70 and 1574/70.

²⁷ See Appendix II.

The Commission understands that prosecutions under this section are rare. Provisions similar to s.170 have received consideration in a number of other jurisdictions. It would appear that the taking of a statutory declaration must be authorised by some statute, regulation or by-law in order to support a prosecution.²⁸ In this respect, it appears that s.106 of the *Evidence Act 1906* permits the taking of a voluntary statutory declaration on any occasion, notwithstanding that it is not authorised or required by some specific enactment.²⁹ It is probable that a statutory declaration made under s.106 which was false in any material particular would involve an offence under s.170 of the *Criminal Code*. If a statutory declaration is required by a regulation or by-law it appears that the regulation or by-law cannot compel a person to make a statutory declaration under pain of fine or imprisonment without the grant of clear authority by Parliament.³⁰ Invalidity of the authorising regulation or by-law might be held to defeat a prosecution for an offence under s.170 of the *Criminal Code*, notwithstanding that the statutory declaration was expressed to be made pursuant to s.106 of the *Evidence Act 1906*.

(c) Variation from prescribed form

2.18 A substantial variation from the form prescribed by s.106 of the *Evidence Act 1906* appears to render the statutory declaration invalid.³¹ If the declaration is invalid there is in law no statutory declaration. Such invalidity is therefore a defence to a charge of making a false declaration.³²

In *R. v Haynes and Haynes* the form prescribed by the statute was:

“And I make this solemn declaration conscientiously believing the same to be true, and by virtue of ‘The *Justices of the Peace Act, 1908*’ ”.

The form of the statutory declaration made, was:

“And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act of Parliament rendering persons making a false declaration punishable for wilful and corrupt perjury”.

²⁸ *R. v Mungovan* (1869) 6 WW & A'B (L) 157 (Vic. Sup. Ct. F. Ct.).

²⁹ See *R. v Haynes and Haynes* (1916) 35 NZLR 407 at 420.

³⁰ *Grech v Bird* (1936) 56 CLR 228.

³¹ However, a form to the same effect as that provided by s.106 will be sufficient and not vitiate the statutory declaration: *Interpretation Act, 1918*, s.25.

³² *R. v Haynes and Haynes* (1916) 35 NZLR 407, *R. v Smith* (1909) 29 NZLR 244.

Consequently the statutory declaration was held to be invalidly made.

In *R. v Smith* the words “...by virtue of ‘The *Justices of the Peace Act, 1908*’ ” in the first form referred to above were omitted. It was held that these words were essential to a valid statutory declaration, and so a conviction for making a false declaration was quashed.

2.19 The rationale for these decisions appears to be that the use of the prescribed form helps “ ...not merely to warn the declarant of the consequences to which he may expose himself, but also to point out to the person asked to take the declaration the authority which justifies him in doing so”.³³

(d) Persons before whom a statutory declaration may be made

2.20 Section 2 of the *Declarations and Attestations Act 1913* provides that where an enactment provides for the making of a statutory declaration before a justice of the peace, or for the witnessing of an instrument by him that function may also be performed by:

- “(i) a town clerk, shire clerk, electoral registrar, postmaster, classified officer in the State or Commonwealth public service, classified State school teacher, or member of the police force; or
- (ii) a commissioner for declarations appointed under this Act; or
- (iii) a member of either House of Parliament of the State or of the Commonwealth; or
- (iv) a commissioner for declarations appointed under the provisions of the *Statutory Declarations Act, 1911- 1944*, of the Commonwealth of Australia; or
- (v) a justice of the peace appointed for any part of The Commonwealth that is outside The State”.

The reference to “classified officer in the State or Commonwealth public service, classified State school teacher” in s.2(i) appears to refer to persons appointed under the *State Public Service Act 1904*, the *Commonwealth Public Service Act 1922*, and persons appointed as teachers under the *State Education Act 1928*.

³³ Hosking J. in *R. v Haynes and Haynes* (1916) 35 NZLR 407 at 421.

2.21 Section 3 of the *Declarations and Attestations Act 1913* authorises the Attorney General to appoint and revoke the appointment of Commissioners for Declarations. Although precise details of the number of Commissioners are not available, it is estimated that there are approximately ten thousand Commissioners. Under a General Commission of the Peace, which superseded all previous commissions, notified in the *Government Gazette* on 21 July 1975 2,071 persons were appointed justices of the peace.³⁴ In addition, ss.9 and 12 of the *Justices Act 1902* provide that every mayor, or chairman of a road board, every member of the Executive Council, every magistrate or coroner shall be ex officio a justice of the peace.

Forms and documents in use by Government departments and instrumentalities.

2.22 The Commission's enquiries of many State Government departments and instrumentalities³⁵ revealed that there are at least 242 forms and documents in use which require information to be provided. Several methods are prescribed or used for the supply of such information, including oaths and statutory declarations, and are dealt with below.

(a) Affidavits

2.23 Other than in court proceedings affidavits are used in few instances. One such case is the *Associations Incorporation Act 1895*. Under s.5(1) of the Act a memorial in a prescribed form must be filed after incorporation. This memorial must be verified by an affidavit of the person or persons authorised to use the common seal of the corporation. There are also requirements for affidavits of verification in other sections of the Act. In the report of the Western Australian Law Reform Committee (the predecessor of the Law Reform Commission) on the *Associations Incorporation Act 1895*³⁶ it was recommended that verification of documents under the Act be by statutory declaration rather than by affidavit.³⁷ However the Committee, having received this project, indicated that it would consider as part of this project whether statutory declarations are necessary and whether an alternative procedure would be adequate.³⁸

³⁴ There have, however, been further appointments since the General Commission of the Peace.

³⁵ See paragraph 2.10 above.

³⁶ Law Reform Committee (WA), Project No.21, *Report on the Associations Incorporation Act 1895-1969*.

³⁷ *Ibid.*, at 8-9.

³⁸ *Ibid.*, at 9.

(b) Statutory declarations

2.24 In a large number of forms and documents information, such as personal and financial details, is required to be provided by a statutory declaration under s.106 of the *Evidence Act 1906*. This may be as the result of a specific statutory provision,³⁹ or by regulation or rule,⁴⁰ or as a matter of departmental practice, although there is no such requirement in the relevant enactment.⁴¹

2.25 Some enactments⁴² prescribe their own form of declaration and not that provided by s.106 of the *Evidence Act 1906*. If a person makes a statement which is false in any material particular in such a declaration he commits an offence.⁴³ In at least one case provision is made for the witness, not only to satisfy himself as to the identity of the declarant, but also, not to witness the declaration unless he knows the statements contained in the declaration are true, or has satisfied himself, by inquiry from the declarant or otherwise that the statements contained in the declaration are true.⁴⁴

(c) Attested statements

2.26 In some cases all that is required is that the signature of the person providing the information be witnessed.⁴⁵ In such attested documents there is no general provision providing a penalty for making a statement which is false in any material particular. In some cases, however, there is a specific penalty if a person makes a statement which is false in any material particular.⁴⁶

³⁹ See *Local Government Act 1960*, s.111(3) (a).

⁴⁰ See *Physiotherapists Regulations 1951*, Regulation 2 - Form No. 2.

⁴¹ Metropolitan (Perth) Passenger Transport Trust, declaration relating to lost cheques.

⁴² See *Registration of Births, Deaths and Marriages Act 1961*, s.63.

⁴³ *Criminal Code*, s.170.

⁴⁴ *Electoral Act 1907*, s.92(5) (d) (i) and (iii).

⁴⁵ See Forests Department Form FD 601 - return showing the quantity of seed obtained under a Forest Produce Licence and "Application for Vehicle Dealer's Licence by Individual" under *Motor Vehicle Dealers Act 1973*, s.15 (1).

⁴⁶ See *Forests Act 1918*, s.50(j).

(d) Unattested statements

2.27 In some cases all that is required is the unattested signature of the person providing the information.⁴⁷

Other forms and documents

(a) *Transfer of Land Act 1893*

2.28 Section 145 of the *Transfer of Land Act 1893*, which provides for the attestation of documents under the Act, was repealed and re-enacted in 1969⁴⁸ to provide a simplified procedure for the execution of those documents. That section provides that any such document, executed in Australia, may be witnessed before any adult person if the address and occupation of the witness appears on the document.⁴⁹ In the case of documents executed outside Australia, certain restricted qualifications still apply to witnesses.⁵⁰ The Registrar of Titles has power to accept documents for registration or filing, even if the document is not attested or authenticated as provided by the Act, or if the address or occupation of the witness is not added, where the genuineness of the signature of the party thereto is proved to his satisfaction by the statutory declaration of some person well acquainted with the party and with his signature and handwriting.⁵¹

2.29 Prior to the 1969 amendment to the Act, the persons who could witness documents under the Act were restricted to certain classes of persons. For example, a document executed within the limits of Western Australia could only be witnessed by persons such as a practitioner of the Supreme Court, justice of the peace, notary public, commissioner for taking affidavits, commissioner for declarations, a classified officer of the State or Commonwealth, bank manager, clerk of a local court, clerk of petty sessions.

⁴⁷ See Wheat Quota Committee of Western Australia, “1975-76 Season - Application for Registration to Deliver Wheat”.

⁴⁸ *Transfer of Land Act Amendment Act (No.3) 1969*, s.2.

⁴⁹ *Transfer of Land Act 1893*, s.145(1) (a).

⁵⁰ *Ibid.*, s.145 (1) (b) and (c).

⁵¹ *Ibid.*, s.145 (7)

(b) *Wills Act 1970*

2.30 The *Wills Act 1970* requires that a will must be made or acknowledged before at least two witnesses, who must be present at the same time and who must attest and subscribe the will in the presence of the testator.⁵²

(c) *Property Law Act 1969*

2.31 Section 9 of the *Property Law Act 1969* provides that every deed is to be attested by at least one independent person, but no particular form of words is required. Sealing (except by corporations), formal delivery, and indenting are not necessary.

Corroborative evidence

2.32 Section 171 of the *Criminal Code*⁵³ provides that a person cannot be convicted under ss.169 or 170 of the Code upon the uncorroborated testimony of one witness. It appears that the requirement for corroboration in respect of these offences is an historical anomaly. In ecclesiastical law there could be no conviction for the offence of perjury if the testimony of only one witness was offered as proof of his guilt as there would only be one oath against another.⁵⁴ The report of the Law Reform Commission of British Columbia refers to a modern rationale for requiring corroborative evidence, that is, that corroborative evidence is directed at protecting witnesses from false charges at the hands of those against whom their testimony is directed.⁵⁵ However, as the Law Reform Commission of British Columbia points out, statements such as those dealt with by ss.169 and 170 of the Code are not sworn or made by a person in judicial proceedings.⁵⁶ Consequently, the Commission recommended that corroboration should not be required to sustain a conviction under a penalty provision proposed by the Commission for “extra-judicial” false statements.⁵⁷

2.33 The Commission would appreciate comments on whether or not s.171 of the *Criminal Code* should be repealed.

⁵² *Wills Act 1970*, s.8(c) and (d).

⁵³ See Appendix II.

⁵⁴ See Law Reform commission of British Columbia, *Extra-Judicial Use of Sworn Statements*, at 30-31.

⁵⁵ *Ibid.*, at 31.

⁵⁶ *Ibid.*, at 31.

⁵⁷ *Ibid.*, at 32.

Civil liability of attesting witness

2.34 It appears that an attesting witness will only incur personal liability if his actions in witnessing a signature are such as to amount to deceit, that is, of knowingly making a false statement of fact.⁵⁸

2.35 As an attesting witness is merely the instrument for the proof of a fact, namely that he saw someone sign in a particular name,⁵⁹ an attesting witness may only be personally liable where he attests a signature which was not made or acknowledged before him. However, even in that circumstance, the facts may not be sufficient to amount to deceit, as a fraudulent misrepresentation is actionable only if it was made with the intention that the plaintiff would rely on the representation, and that the plaintiff did in fact rely on it.

Civil remedy for injury due to a fraudulent misrepresentation

2.36 It appears that a party who acts in reliance on a fraudulent statement in a statutory declaration may have an action in deceit or contract against the declarant. A third party may have an action in negligence or contract against a person who acts in reliance on a fraudulent statement, or in deceit for injurious falsehood, against the declarant.

2.37 The State Electricity Commission, now the State Energy Commission, in its comments on the preliminary working paper pointed out that it uses statutory declarations to obtain instructions and to identify the declarant and his capacity (e.g. attorney or personal representative) in the case of transfers or transmissions of Inscribed Stock or Debentures. The Commission considered that it was of little relevance that criminal proceedings could be brought against a person for falsely declaring his identity or capacity because, if the Commission, acting in good faith, gave effect to the instructions and caused loss to the persons entitled to such Inscribed Stock or Debentures, it would be open to an action for negligence.⁶⁰ It suggested that some consideration be given to the protection of persons acting in reliance on declarations, and that in particular some provision be enacted to allow for the

⁵⁸ See Fleming, *The Law of Torts*, (4th ed. 1971) at 553-563.

⁵⁹ See *Cock v Small* (1871) 5 SASR 44.

⁶⁰ It may well be that this problem could be overcome if an appropriate provision was contained in the conditions of issue of Inscribed Stock or Debentures.

“...voiding of transactions made in reliance of fraudulent declarations to some degree so as to allow restitutio so long as innocent holders in due course are not involved”.

2.38 The Commission would appreciate comments on whether some protection ought to be given to persons acting in reliance on statutory declarations.

The position in other jurisdictions

2.39 All other Australian jurisdictions and New Zealand have provisions for statutory declarations similar to that in force in Western Australia. However, the form prescribed varies from jurisdiction to jurisdiction. The law governing the making of a statutory declaration is the law in force at the place in which the declaration is made. It is quite common for departments in Western Australia to accept statutory declarations made in other jurisdictions. If a statutory declaration using the form prescribed in Western Australia is made in another jurisdiction, the declaration may be invalid. Even the use of general wording such as the form used in the statutory declaration involved in the case of *R. v Haynes and Haynes*⁶¹ may result in the statutory declaration being invalid.

2.40 In Western Australia the fact that a declaration is not duly made or is not in a form prescribed may provide a defence to a charge of making a false statement in a declaration.⁶² However, in South Australia it is not a defence to a charge of making a false statement in a declaration that the declaration was not duly made or in the form prescribed, so long as the court is satisfied that the declarant knew that he was required to declare his belief in the truth of the declaration.⁶³ No other State has this provision. The Commission would appreciate comments on whether or not this provision should be adopted in Western Australia.

Proposal for reform

2.41 In its preliminary working paper the Commission discussed the cases for and against requiring information to be provided by statutory declaration.⁶⁴ The Commission expressed the tentative opinion that in a substantial number of forms and documents used by

⁶¹ See paragraph 2.18 above.

⁶² See paragraphs 2.15 to 2.18 above.

⁶³ *Oaths Act 1936* (SA), s.27(2).

⁶⁴ Preliminary working paper, paragraphs 8-10.

Government departments and instrumentalities, the requirement that information be provided by attested declaration, whether under s.106 of the *Evidence Act 1906* or any other statute, was unnecessary.⁶⁵ The Commission suggested, in the interest of convenience and uniformity, that a simple unattested declaration would suffice. The form suggested was:

“I make this statement knowing that I am liable in case of falsehood in it, to [whatever the punishment prescribed by statute may be]”.⁶⁶

However, it was not intended that s.106 of the *Evidence Act 1906* should be repealed.⁶⁷

Summary of commentators’ views on proposed law reform

2.42 The majority of Government departments and instrumentalities who commented were in favour of the proposal for reform. However, some commentators were opposed to the proposal or expressed reservations about the proposal for the following reasons -

- (a) In many cases forms were prescribed by statute or regulation, and consequently it would be necessary to amend the statute or regulation to change the form.
- (b) The solemnity accompanying the sworn declaration tends to increase the likelihood of truthfulness, and this was particularly desirable for certain types of forms, for example where there was a claim for monetary payment.
- (c) Some statutes or regulations already require declarations to be made in a prescribed form before specified witnesses and with a specific penalty for any false statement therein.⁶⁸ The departments concerned did not wish any change in these declarations.

⁶⁵ Ibid., paragraph 11.

⁶⁶ Ibid., paragraph 12.

⁶⁷ Ibid., paragraph 14.

⁶⁸ For example, declarations pursuant to the *Electoral Act 1907*, and the *Registration of Births, Deaths and Marriages Act 1961*.

- (d) In some cases it was said to be desirable to have a witness who could satisfy himself as to the identity of the declarant and that the declarant understood the contents of the declaration.
- (e) In a few cases, a common attested form was in use throughout Australia.⁶⁹

2.43 Some commentators were not in favour of any extension of the range of persons who could attest declarations. The Taxi Control Board expressed the view that their declarations should only be attested by a justice of the peace in accordance with the Justices' Manual.⁷⁰

Commission's tentative views

2.44 Having considered the comments received to date the Commission still holds the tentative view that in many cases the use of attested declarations, whether under s.106 of the *Evidence Act 1906* or any other statute, is unnecessary.

2.45 The Commission considers that, in the interests of convenience and uniformity, provision should be made for an unattested statutory declaration. This would be achieved by the implementation of a general provision similar to that of s.106 of the *Evidence Act 1906* providing a form to be used when such a declaration was being made. Such an approach would also require the implementation of a provision similar to ss.169 and 170 of the *Criminal Code* providing a penalty for making a false statement with regard to any material particular in an unattested statutory declaration. The Commission understands that the form of unattested declaration on the Commonwealth income tax return has been used over a considerable period of time and has not presented difficulty during prosecutions for making false statements in returns. That declaration reads:

"I, the person making this return, declare that -

...

- (b) the facts shown therein are true and correct in every detail and disclose a full and complete statement of the total income derived by me from all sources both in and out of Australia during the year [1 July 1975 to 30 June 1976]".

⁶⁹ For example, State Shipping Service -"Application for Payment of Sick Leave"- which is prescribed by The Waterside Workers' Award 1960, clause 51(ii).

⁷⁰ See preliminary working paper, paragraph 10(b).

The following warning is contained in the return alongside the above declaration: "The income tax law provides severe penalties for false statements in returns".

2.46 The Commission having reviewed the form suggested in the preliminary working paper and the comments received now considers that a more suitable form of unattested statutory declaration may be as follows:

"I, A.B. [*insert; address and occupation*] make this declaration by virtue of the [*statutory provision authorising unattested statutory declaration to be inserted*]. I conscientiously believe and declare that the statements contained therein are true and correct in every material particular.

I acknowledge that it is an offence under the [*statutory provision creating offence to be inserted*] to make a statement in this declaration which is false in any material particular.

Declared at... this... day of... 19...

Signature of person making declaration".

The Commission considers that such a form would assist in bringing to the attention of persons making such declarations that they are not merely signing their names to a statement, but that they are laying themselves open to a criminal charge, if any material statement in their declaration is untrue.

2.47 It is the Commission's tentative view that the use of an unattested statutory declaration of the sort suggested should not be restricted to circumstances where it is authorised or required by law and, as with s.106 of the *Evidence Act 1906*, it should be open to use by private individuals and trading concerns, for example, in support of an insurance claim.

2.48 The Commission still holds the tentative view that s.106 of the *Evidence Act 1906* should not be repealed, as some Government departments and instrumentalities, private individuals or trading concerns could require an attested statutory declaration for some purposes. However, in order to achieve uniformity between Government departments and instrumentalities a Government direction could be sent to each department and instrumentality requiring the department or instrumentality to adopt the simple unattested statutory declaration in place of an attested statutory declaration or affidavit, unless there was some compelling reason for not doing so.

2.49 It is also the Commission's tentative view that ss.105 and 106 of the *Evidence Act 1906* and the *Declarations and Attestations Act 1913* should be consolidated and, if provision is made for an unattested voluntary statutory declaration, that such a provision should be incorporated in the same Act.

B. SIGNING OF AFFIDAVITS BY FIXING A RUBBER STAMP

Present law and practice

3.1 In the Supreme Court of Western Australia and in the District Court of Western Australia⁷¹ affidavits must be signed on each page by the deponent and by the person before whom the affidavit is sworn and that person must also complete and sign the jurat.⁷² Where the deponent is blind or illiterate, he may make a signature or mark.⁷³

3.2 There is no express provision in the rules made pursuant to the *Local Courts Act 1904* similar to Order 37 rule 2(5) of the *Supreme Court Rules 1971*. However, Order 37 rule 2(5) may apply to local courts as s.35 of the *Local Courts Act 1904* provides:

"The several rules of law enacted and declared by the *Supreme Court Act, 1935-1950*, shall be in force and receive effect in Local Courts, so far as the matters to which such rules relate shall be respectively cognisable by such courts".

3.3 The Commission understands that affidavits signed by means of a rubber stamp by the person before whom an affidavit is taken are accepted in local courts, but not affidavits signed by the deponent by means of a rubber stamp. The Master of the Supreme Court has advised the Commission that in his experience no affidavit signed by means of a rubber stamp, either by the deponent or the person before whom an affidavit has been sworn, has been presented to the Supreme Court. If an affidavit so signed was presented, the question whether or not it was in the form prescribed by Order 37 would then have to be determined by the Court. The Commission also understands that the matter has not arisen for consideration in the District Court.

3.4 The Supreme Court requires, by a practice direction,⁷⁴ that the signature of the person before whom an affidavit is taken be elucidated by means of a rubber stamp or by the name of the person being printed below the signature, unless the signature of that person is plainly legible. The Commission understands that the District Court has adopted this practice direction.

⁷¹ The *Supreme Court Rules 1971* apply to the *District Court: District Court of Western Australia Act 1969*, s.87.

⁷² *Supreme Court Rules 1971*, Order 37 rule 2(5).

⁷³ *Ibid.*, Order 37 rule 4(1) (c).

⁷⁴ Supreme Court practice direction, 5 July 1971.

3.5 It has been held in the following cases that, where a statute requires a signature, it is sufficient if the person signs by affixing a facsimile of his signature -

- (i) an electoral notice;⁷⁵
- (ii) an order of a judge;⁷⁶
- (iii) postal vote endorsement;⁷⁷
- (iv) a solicitor's account;⁷⁸
- (v) a will;⁷⁹ and
- (vi) a summons.⁸⁰

The Commission is not aware of any similar decision with respect to affidavits.

Discussion

3.6 The person before whom an affidavit is sworn appears to have a number of functions apart from providing proof of the identity of the person swearing the affidavit. As only certain appointed and authorised persons may take affidavits, formality and solemnity are added to the occasion of the swearing of an affidavit. Although there is no express obligation, another function appears to be to ensure that the deponent understands the contents of the document, and appreciates the nature and consequences of swearing an affidavit. A further function appears to be to ensure that the deponent is acting freely and voluntarily and is not under undue influence or coercion.

3.7 Although an affidavit is an important document it may be argued that the practice of "signing" affidavits by means of a rubber stamp or other facsimile should be permitted as it is a convenient practice for the deponent and for the person before whom an affidavit is taken; there being no special significance in a handwritten signature so long as it is possible to prove who affixed the rubber stamp. On the other hand, to allow the use of a rubber stamp or other facsimile may increase the possibility of abuse. A rubber stamp or other facsimile, if stolen,

⁷⁵ *Bennett v Brumfitt* (1867) 3 LRCP 28.

⁷⁶ *Blades v Lawrence* (1874) 9 LRQB 374.

⁷⁷ *Taplin v Hegney* (1947) 50 WALR 4.

⁷⁸ *Goodman v J. Eban Ltd.* [1954] 1 All ER 763.

⁷⁹ *Jenkins v Gaisford and Thring* 3 Sw & Tr 93; 164 ER 1208.

⁸⁰ *Hinton Demolitions Pty. Ltd. v Young* (1973) 6 SASR 129.

lost, or lent by the person whose signature is reproduced to another person could be affixed to an affidavit without the person whose signature is reproduced actually swearing the affidavit, or taking the affidavit of a deponent, as the case may be.

3.8 The Commission would appreciate comments on whether or not the deponent or the person before whom an affidavit is taken should be permitted to sign the affidavit by means of a rubber stamp. Whichever view is taken, the Commission would also welcome comments on whether or not the rules of the Supreme Court and the rules made pursuant to the Local Courts Act require amendment in order to give effect to that view.

QUESTIONS FOR DISCUSSION

4.1 The Commission would welcome comments (with reasons where appropriate) on any matter arising out of this paper, and in particular on the following -

- (a) Should provision be made for an unattested statutory declaration?
(paragraphs 2.44 to 2.46)
- (b) If so, should a general penalty provision similar to ss.169 and 170 of the *Criminal Code* be implemented?
(paragraph 2.45)
- (c) Should the use of an unattested declaration be restricted to occasions on which its use is authorised or required, or should its use be open to private individuals and trading concerns?
(paragraph 2.47)
- (d) If provision should be made for an unattested declaration what form should it take?
(paragraphs 2.45 and 2.46)
- (e) Should s.27(2) of the *Oaths Act 1936* (SA) be adopted in Western Australia?
(paragraph 2.40)
- (f) Should protection be given to persons acting in reliance on statutory declarations?
(paragraphs 2.36 to 2.38)
- (g) Should s.171 of the *Criminal Code* be repealed?
(paragraphs 2.32 and 2.33)
- (h) Should the "signing" of affidavits for use in court by means of a rubber stamp or other facsimile be permitted in the case of -
 - (a) a deponent;
 - (b) a person before whom an affidavit is taken?(paragraphs 3.6 and 3.7)

- (i) Do the rules of the Supreme Court and the rules made pursuant to the *Local Courts Act* require amendment in order to give effect to the view taken with regard to paragraph 4.1(h) above?

(paragraph 3.8)
- (j) Should the proposals referred to in this paper be the subject of uniform legislation to be adopted by the Commonwealth and States?

APPENDIX I

Sections 105 and 106 of the Western Australian *Evidence Act 1906*.

105. Subject to the provisions of section one hundred and six A, it is unlawful for any justice of the peace or other person to administer, or cause or allow to be administered or to receive or cause or allow to be received, any oath, affirmation in lieu of oath, or affidavit touching any matter or thing whereof such justice or other person has not jurisdiction or cognisance by some law in force for the time being:

But nothing herein contained shall be construed to extend to any oath, affirmation, or affidavit before any justice of the peace or other person in any matter or thing touching any legal proceeding, or any proceeding before either House of the Parliament, or any committee thereof, nor to any oath, affirmation, or affidavit which may be required by any Act of the Parliament of the Commonwealth, or of any State, nor to any oath, affirmation, or affidavit which may be required by the laws of any part of her Majesty's dominions or any foreign country to give validity to instruments in writing designed to be used there.

106. It shall be lawful for any justice of the peace or other person by law authorised to administer an oath to take and receive the declaration of any person voluntarily making the same before him in the following form, namely -

I, A.B., [*insert place of abode and occupation*], do solemnly and sincerely declare that [*here state the facts*], and I make this solemn declaration by virtue of section one hundred and six of the *Evidence Act, 1906*.

Declared at this day of 19 ,
before me, C.D., Justice of the Peace [*or as the case may be*].

APPENDIX II

Sections 169, 170 and 171 of the Western Australian *Criminal Code*.

169. Any person who, on any occasion on which a person making a statement touching any matter is required by law to make it on oath or under some sanction which may by law be substituted for an oath, or is required to verify it by solemn declaration or affirmation, makes a statement touching such matter which, in any material particular, is to his knowledge false, and verifies it on oath or under such other sanction or by solemn declaration or affirmation, is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

The offender cannot be arrested without warrant.

170. Any person who, on any occasion on which he is permitted or required by law to make a statement or declaration before any person authorised by law to permit it to be made before him, makes a statement or declaration before that person which, in any material particular, is to his knowledge false, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

171. A person cannot be convicted of any of the offences defined in the two last preceding sections upon the uncorroborated testimony of one witness.

APPENDIX III

VIEWS OF GOVERNMENT DEPARTMENTS AND INSTRUMENTALITIES ON THE PROPOSAL IN PARAGRAPH 12 OF THE PRELIMINARY WORKING PAPER FOR A FORM OF SIMPLE UNATTESTED DECLARATION

“I make this statement knowing that I am liable in case of falsehood in it, to [whatever the punishment prescribed by the statute may be].”

Department or Instrumentality	Agree/Disagree	Comment
Builders Registration Board of Western Australia	Agree	
Coal Mine Workers' Pensions Tribunal	Agree	Except for an “Application for Pension” form which is the only document of proof of acquittance for future monetary benefits.
Corporate Affairs Office		Provision is made in the <i>Companies Act</i> for some unattested declarations but in other cases statutory declarations are necessary. If amendment is to be made in this area, the Act would need to be changed and it would be desirable to refer it to the other State participating in the Interstate Corporate Affairs Agreement. There is no objection to easing the formality in signing of documents under the <i>Associations Incorporation Act</i> .
Department of Agriculture	Agree	Except for Phylloxera Declaration form under <i>Plant Diseases Act</i> . This needs to be witnessed as people could make the declaration without being aware of what disease this is or whether it exists in the area.
Department for Community Welfare	Disagree	Although agree in principle with aim of simplifying procedures for attesting documents, the department's forms should be signed in the presence of an educated person as most people who come to the department are illiterate or find

difficulty in reading, others are foreigners. It is desirable that the form should be signed in the presence of someone who can ensure that the person signing the form has read it, or at least has understood its contents. Forms could be witnessed by a wider range of persons than presently authorised. Would like to see a duty imposed on the witness to ensure that the person signing understands the contents of the form.

The suggestion should enable overall simplification of such forms.

Department of Industrial
Development

Department of Labour & Industry
(Factories and Shops Branch)

Disagree

Department of Labour & Industry
(Inspection of Machinery Branch)

Agree

Department of Lands and Surveys

Agree

Except for a declaration - "Application for land to Land Board".

Department of Local Government

Disagree

Witnessing is necessary to ensure that absent votes are correctly made and that fictitious applications are not made in local government elections.

Department of Mines

Agree

With two exceptions - a "Life Declarations Benefits" form under the *Miners Phthisis Compensation Act*, and a declaration with regard to identity for monetary benefits under the *Mine Workers Relief Act*.

Education Department

Agree

Except for the Teacher's Certificate of Health, the suggestion is to be adopted by the Department.

Forests Department

Agree

Fremantle Hospital

Agree

Fremantle Port Authority	Agree	
Karrakatta Cemetery Board		Considers that attestation before any adult person would suffice with regard to its only form involving a statutory declaration.
King Edward Memorial Hospital for Women	Agree	
Licensing Court of Western Australia	Agree	
Lotteries Commission	Disagree	But, would give consideration to the Commission's recommendations.
Main Roads Department	Agree	
Metropolitan (Perth) Passenger Transport Trust	Agree	
Nurses Board of Western Australia		Board is considering simplifying "Application for Registration" form and the statutory declaration requirement could possibly be eliminated.
Painters Registration Board	Agree	
Physiotherapists Registration Board of Western Australia	Agree	But sees no justification for changing its present forms.
Princess Margaret Hospital for Children	Agree	
Public Trust Office	Agree	Endorsement should include specific reference to penalty.
Public Works Department		A form of attestation similar to that used on Income Tax Returns would suffice.

Registrar General's Office	Disagree	
Rural Reconstruction Authority	Agree	
Sheriff's Office Supreme Court	Agree	
State Electoral Department	Disagree	
State Energy Commission	Agree	
State Government Insurance Office	Disagree	
State Shipping Service	Agree	But one form is required under a federal award and could only be amended if the federal authority saw fit.
State Taxation Department	Agree	Department is, in fact, eliminating the use of statutory declarations when the occasion arises.
The Architects' Board of Western Australia	Agree	Section 15 of the <i>Architects Act</i> specifies that statements made on the application must be verified by statutory declaration.
The Optometrists Registration Board	Agree	
The Superannuation Board	Agree	
The Treasury	Agree	
Trade Associations Registration Office	Agree	
Western Australian Government Railways	Agree	Agree in principle with the objects of the preliminary working paper.

Western Australian Institute of
Technology Agree

Western Australian Taxi Control
Board Disagree

Wheat Quota Committee of Western
Australia

In a non-quota year (as the present one is) the information supplied to the Committee is supplied by a form with an unattested signature. If quotas are reintroduced the position of attestation and the need for a statutory declaration will be reconsidered.

APPENDIX IV

WESTERN AUSTRALIA

LAW REFORM COMMISSION

PROJECT NO. 28

ATTESTATION OF FORMS AND DOCUMENTS

PRELIMINARY WORKING PAPER

TERMS OF REFERENCE

1. The Commission has been asked to consider and report on the methods of attestation of forms and documents and the tendency towards unnecessary formality required in those methods.
2. The project was given to the Commission as the result of some concern which had been expressed -
 - (a) at the large number of applications received from persons seeking appointments as Commissioners for Declarations; and
 - (b) at the requirement that signatures to some "minor and unimportant" documents had to be witnessed by persons of special status.

PRESENT PRACTICE

3. As a preliminary step the Commission, with the co-operation of Government departments and statutory bodies, obtained copies of the forms and documents in use by them which require attestation.
4. There are no less than 242 of these which require information to be provided by persons and several methods are prescribed by which the information has to be provided.
5. A large number of enactments require information to be provided by statutory declaration, that is by declaration made under s.106 of the *Evidence Act*. In addition several departments and bodies require statutory declarations as a matter of practice although there is no requirement in the relevant enactment.
6. Some enactments (for example, the *Registration of Births, Deaths and Marriages Act*, s.63) prescribe both their own form of declaration and the authorised persons before whom the declaration may be made.
7. In a number of cases all that is required is that the signature of the person providing the information be witnessed. Some forms require no more than an unwitnessed signature.

COMMISSION'S PROVISIONAL VIEWS

8. The case in favour of requiring information to be provided by statutory declaration presumably rests on the expectation that a declarant is less likely to lie if a statutory declaration is required because there is a degree of formality involved, that is, because he has to make the declaration formally before a person expressly authorised by statute to take it, and he cannot but be aware that if he makes a false statement in a statutory declaration he is committing an offence (and see *Criminal Code*, ss. 169, 170).

9. The case against requiring information in forms and documents to be provided by statutory declaration stems primarily from the inconvenience of having to find a justice of the peace or other authorised witness (see paragraph 2 above).

10. In addition it is arguable for the following reasons that the case in favour of statutory declarations is not as strong as it may at first sight appear.

- (a) A statutory declaration to be valid must be made before a justice of the peace or other authorised person. The range of authorised persons is wide and includes commissioners for affidavits, commissioners for declarations, town clerks, postmasters, classified public servants, school teachers, members of Parliament and members of the police force (see *Evidence Act*, s.106; *Declarations and Attestations Act*, s.2). In some instances persons in other classes are also specifically authorised (see e.g. *Local Government Act*, ss.111(3) and 113, and note paragraph 6 above). Persons making declarations are less likely to be impressed by the formality of the occasion when such a wide range of persons is authorised to attest declarations. At the same time, in spite of the wide range of authorised persons, inconvenience is apparently sometimes caused.
- (b) Regarding the making of a statutory declaration, the *Handbook for the Guidance of Commissioners for Declarations* (2nd ed. 1968) at p.3 states that the witness should ascertain the identity of the declarant, that the declarant understands the document, that he is of sound mind, and that he signs it voluntarily. The *Justices' Manual* at p.128 states that the manner of taking a

declaration is similar to that of administering an oath, except that the declarant is asked to repeat - "I solemnly and sincerely declare that this is my true name and handwriting and that the contents of my declaration are true".

- (c) Enquiries made by the Commission indicate that it is a not uncommon practice for there to be no verbal communication between the declarant and the attesting witness relating to the making of the declaration. In other words, that it becomes the witnessing of a signature or even merely the signing of the document by the two persons separately, and in a 1970 Petty Sessions case (*Myers v. Slater*, Northam Court of Petty Sessions) the magistrate held that a document executed in such circumstances did not contain a valid statutory declaration.
- (d) It would seem therefore that in many cases not only is the formality which is expected to stimulate truth missing, but the declaration itself may be invalid.
- (e) Even when formal procedures are properly followed it may be doubtful whether persons who are prepared to tell lies to obtain benefits for themselves would be deterred by the minimal formality that is required.
- (f) Moreover persons who tell lies to obtain material benefits will generally know that they are committing offences even though the falsehoods are not contained in statutory declarations.

11. The Commission is tentatively of opinion that in a substantial number of the forms and documents used by Government departments and statutory bodies the requirement that information be provided by attested declaration, whether under s.106 of the *Evidence Act* or any other statute, is unnecessary.

12. In the interests of convenience and uniformity the Commission suggests that a simple unattested declaration more or less in the following form would suffice in most cases -

“I make this statement knowing that I am liable in case of falsehood in it, to [whatever the punishment prescribed by the statute may be].”

13. The form of an unattested declaration on the Commonwealth income tax return seems to have served admirably over a considerable period of time.

14. If the tentative suggestion is to be implemented, it will of course be necessary to amend a number of statutes but it is certainly not intended to interfere with s.106 of the *Evidence Act* and the obtaining of information in the form of a statutory declaration will still be possible.

15. This preliminary working paper is being circulated only to the departments and bodies from whom copies of forms and documents were obtained. The Commission would welcome comments and criticisms. In particular the Commission would like to know of cases in which it is considered that the Commission's suggestion is inappropriate and that some other form of declaration would be necessary or desirable.