



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 34 - Part III

**Administration Of Deceased Estates
Administration Of Deceased Insolvent
Estates**

WORKING PAPER

APRIL 1977

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

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TERMS OF REFERENCE

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

PREFACE

The above reference was given to the Law Reform Committee as part of a project on trusts and administration of estates. The Law Reform Commission, having taken over the functions of the Law Reform Committee and having completed its first consideration of this matter now issues this working paper. The paper does not necessarily represent the final views of the Commission but is circulated for the purpose of informing the public as to the relevant issues and to stimulate comment.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole, or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 30 June 1977.

Copies of the paper are being sent to the -

Australian Legal Aid Office
Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Commonwealth Bankruptcy Administration Department
Consumer Affairs Bureau
Institute of Chartered Accountants
Institute of Legal Executives
Judges of the District Court
Law School of University of Western Australia
Law Society of Western Australia
Magistrates' Institute
Master of the Supreme Court
Perpetual Executors, Trustees and Agency Company (W.A.) Ltd.
Public Trustee
Solicitor General
State Taxation Department
Under Secretary for Law
West Australian Trustee, Executor and Agency Company Ltd.
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 to 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.

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INTRODUCTION

1. One of the first major tasks confronting a person responsible for the administration of a deceased estate is to obtain details of the assets and liabilities of the estate. If the assets available for payment of debts are insufficient to pay the debts in full, the estate is said to be insolvent. In this situation, the person responsible for the administration (hereafter referred to as the "personal representative"), must have regard to the rules built up at common law, as modified by statute, for the administration of a deceased insolvent estate. These rules direct him on such issues as the assets which are available for the payment of debts, the debts which are payable and the order of priority for payment. If the personal representative fails to abide by these rules, he may be held personally liable for his default. In this case he is said to have committed *devastavit*: that is, he has wasted the assets.

Historical development of the common law and statutory rules for administering deceased insolvent estates

2. The common law rules for administering deceased insolvent estates gave rise to four broad situations in which injustices could occur: see generally Walker and Elgood; *Compendium of the Law Relating to Executors and Administrators* (4th ed. 1905) at 195-217; Holdsworth, *A History of English Law Vol. III* at 585-595; E.I. Sykes, *Payment of Debts by Executors in Queensland* (1955) University of Queensland papers, Vol.I No.3.

3. The first arose out of the rules establishing priorities for payment of debts. At common law, before the nineteenth century, there existed a complex and arbitrary classification of debts into different levels of priority depending on the form they took. For example, judgment debts against the deceased had priority over debts evidenced by contract only, but those contract debts which were made under seal or upon a bond had priority over ordinary or simple contract debts. To complicate matters further, on each level of priority, those creditors who managed to get judgment against the personal representative were entitled to priority over the other creditors on the same level of priority. This classification was not altogether fair to the creditors and it could give rise to an unseemly clamour for payment. The personal representative was forced, either by the creditor obtaining judgment, or threatening to do so, into payment of claims as and when demanded. This meant he had no opportunity to wait until had been made in order to make a general survey of the assets and liabilities of the estate. Consequently he was in danger of committing *devastavit*.

4. The second problem concerned the personal representative's right of preference. This right grew out of the situation just referred to where the personal representative made payments to creditors as and when demand for payment was made. As long as the personal representative did not pay an inferior claim with notice of a claim having priority, he was free to pick and choose which debts should be paid first. If the assets were exhausted during this process, he was entitled to plead *plene administravit* (that is, that he has fully administered the assets) as a defence to any further claim against him for the debts of the deceased. The ability to decide which creditors should be paid first, and the defence of *plene administravit* are the foundation for what is now referred to as the right or doctrine of preference. The inequality of the doctrine, from the creditor's point of view, is illustrated in a situation where, for example, A and B are each owed \$500 from an estate worth \$500. If the personal representative chooses to pay A's debt even though he knows that this will exhaust the estate, then, as long as B's debt has no priority over A's debt of which the personal representative is aware, B has no redress either against the personal representative or against A.

5. The third unsatisfactory feature of the common law was the extension of the doctrine of preference to a debt owed to the personal representative himself over other debts of equal degree of priority. In this situation, the personal representative's right became known as the right of retainer and it entitled him to retain out of the assets of the estate, as against creditors of equal degree, sufficient to pay his own debt. At one time the right may have been justified as an incentive for at least someone to undertake the onerous and difficult task of administering an insolvent deceased estate. With the advent of trustee companies and others who specialise in the administration of deceased estates, generally for remuneration, lack of a willing personal representative does not now present such a problem.

6. The fourth matter concerned the assets available for payment of debts. In some situations, interests in realty were not recognised at common law as assets available for payment of debts.

7. These four injustices resulting from administration according to the common law rules were recognised by the chancery courts. The remedy was to control the administration through the court. This allowed the creditors to have resort to what were called equitable assets, that is, assets such as certain interests in realty, which were not recognised at common law as being available for payment of debts. As far as equitable assets for payment of debts

were concerned, the court could ignore the common law classification of priority and all debts were paid proportionately. The rights of preference and retainer were not permitted out of equitable assets and certain limits were made as to the exercise of these rights in respect of legal assets. This equitable jurisdiction is still vested in the Supreme Court of Western Australia by s.16(1) (d) (i) of the *Supreme Court Act 1935*.

8. The *Administration Act 1903* has removed some of the glaring injustices from the administration of all deceased insolvent estates even where no court order has been obtained. For example, s.10 (1) of the Act provides that the real and personal estate of the deceased are to be assets for the payment of debts, thereby removing the need to distinguish legal from equitable assets. Section 23(1) provides that all creditors of a deceased estate are to stand in equal degree, thereby removing the common law classifications as to priorities. The right of retainer was abolished by s.10(2).

9. A further significant event was the development of the law of bankruptcy to control the situation when a person in his lifetime was in a position where he could not pay his debts as they fell due. The bankruptcy laws were designed to provide full protection for the bankrupt's creditors, yet at the same time, providing the bankrupt with the incentive and the ability to make amends. Obviously a creditor who is owed money by a bankrupt, whether he is dead or alive, should expect to have as much protection. He could possibly expect more as no allowance be made for the financial recovery of the debtor. The parallel was recognised by the bankruptcy laws and provision was made in the *Bankruptcy Acts 1883* and *1890* (UK) for a large number of bankruptcy provisions to apply to the administration of deceased insolvent estates. In Australia, this extension of the bankruptcy law is now found in Part XI of the *Bankruptcy Act 1966* (Cwth).

10. The final step taken in the historical development of the law relating to the administration of deceased insolvent estates in Western Australia was to provide for part of the bankruptcy rules to apply automatically whenever an order of the Supreme Court was obtained for the administration in equity of a deceased insolvent estate. Section 25(1) of the *Supreme Court Act 1935* provides as follows:

"In the administration by the Court of the assets of any person who has died since the commencement of the *Supreme Court Act 1880*, or who hereafter dies, and whose estate has proved or proves to be insufficient for the payment in full of his debts and

liabilities, ...the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person...may come in under the decree or order for the administration of such estate...".

11. The effect of this provision is best explained by Lord Denning M.R. in *Pritchard v Westminster Bank Ltd.* [1969] 1 WLR 547 at 549 where, referring to the English equivalent of s.25, he said:

"The general principle, when there is no insolvency, is that the person who gets in first gets the fruits of his diligence; see per Lord Goddard LJ in *James Bibby Ltd. v Woods & Howard* [1949] 2 KB 449, 455. But it is different when the estate is insolvent. Under the *Administration of Estates Act 1925*, s.34 and schedule 1 thereto it is quite plain that, when an estate is insolvent, the bankruptcy rules apply. This brings in s.33 of the *Bankruptcy Act, 1914*. Subsection (5) shows that the date of death is equivalent to a receiving order; and subsection (7) shows that all debts proved are to be paid *pari passu*.

The result is that at the date of death, a curtain comes down. All debts existing at that date are to be paid *pari passu*. The executors must pay all the creditors equally and rateably. The court will not allow one creditor, however diligent he may be, to get an advantage over the others by getting first in with a garnishee order."

The existing law

12. As a result of this piecemeal development of the law relating to the administration of deceased insolvent estates, it appears that there are now three ways in which such an estate may be administered in this state. The three ways are -

- (a) administration according to the common law as modified by statute;
- (b) administration according to the applicable bankruptcy laws;
- (c) administration pursuant to an order of the Supreme Court.

In the latter case, the administration seems to be governed partly by common law as modified by statute, and partly by the law of bankruptcy.

13. Unfortunately, there are no clear rules governing which procedure will be used in any particular circumstances. This can be an important issue as there are differences in practical

terms between the three methods of administering an insolvent estate. These differences are discussed in Part A of this working paper. It will also be seen that the rules governing the administration in each case are extremely difficult and sometimes obscure.

14. The main concern of the law would seem to have been to ensure that the creditors of the estate receive fair and equitable treatment. However, in pursuit of this goal, the law has developed a series of rules so complex that they can scarcely be understood by a personal representative, even one with legal training. If the personal representative of a deceased insolvent estate does not have the benefit of accurate legal advice in all cases, he runs the risk of making default in the course of administration for which he may be held personally responsible.

15. If the estate concerned has substantial assets and debts, the incentive to seek legal advice may be warranted and the expense justified. However, the same complex law applies to small insolvent estates as well. Although the amount at stake will not be as great, there may be an incentive to seek legal advice in the absence of clear and simple direction from the law. In this case, although the personal representative may need legal advice, the expense may not be justified.

16. The Commission in this working paper suggests that at least three issues arise as to whether the existing law governing the administration of deceased insolvent estates is satisfactory. These issues are -

- (1) whether there is a need to retain three different ways of administering a deceased insolvent estate;
- (2) whether the personal representative's right of preference should be retained in its present form;
- (3) whether a simpler way of administering small insolvent estates ought to be introduced.

These issues will be discussed in Part C of this working paper following a consideration in Part B of the relevant law in other jurisdictions. A summary of the relevant issues will be found in Part D.

17. A number of statutes are referred to in the working paper. Statutes in other jurisdictions, that is, statutes from other states in Australia, from New Zealand and from the United Kingdom, are cited with their source shown in abbreviated form in parenthesis, for example, *Administration and Probate Act 1958* (Vic). Any reference to a statute with no source shown in parenthesis is to be read as a reference to a Western Australian statute. The only exception is for references to the *Bankruptcy Act 1966* (Cwth). Because references to this statute are so frequent it is cited as the *Bankruptcy Act 1966*.

PART A - ADMINISTRATION OF DECEASED INSOLVENT ESTATES IN WESTERN AUSTRALIA

General

18. In the introduction to this working paper it was pointed out that in Western Australia a deceased insolvent estate may be administered in three ways, that is, out of court, in bankruptcy or pursuant to an order of the Supreme Court. It was also suggested that, depending on the method adopted in each case, the administration procedure may vary. The only matter which remains constant throughout is the personal representative's potential liability should he depart from the appropriate administration procedure. In such a case he may be held personally liable for any loss to the estate. Consequently, the method of administration, and the relevant administration procedure become matters of great concern for the personal representative.

19. In embarking on the administration of a deceased insolvent estate, there are four basic issues which may arise. The personal representative must know -

- (a) what debts are payable;
- (b) what assets are available for payment of debts;
- (c) the order of priority in which debts should be paid;
- (d) the circumstances in which he can plead *plene administravit* as a defence to any claim by unpaid creditors. That is, he must know what limits, if any, are placed on his right to prefer creditors or equal degree: see paragraph 4 above.

The remainder of this part of the working paper will be to a consideration of the three methods of administering a deceased insolvent estate, and the different procedure provided for each method in relation to the four issues above.

The three ways in which a deceased insolvent estate may be administered

Administration out of court

20. Inquiries made by the Commission at the office of the Assistant Commissioner of State Taxation (Probate Duties) reveal the following statistics.

Financial Year	Total number of estates recorded	Total number of insolvent estates	Percentage
1974-1975	6,413	112	1.75%
1975-1976	6,395	80	1.25%

21. The Commission has been advised by the Commonwealth Bankruptcy Administration Department that orders for the administration of deceased insolvent estates in bankruptcy are not very common either in this state or throughout Australia. In fact, during the year from 1 July 1975 to 30 June 1976 there were only thirteen orders made in Australia and only one of these came from Western Australia. These figures are believed to represent the average.

22. The Commission has also made inquiries at the Supreme Court Office and is not aware of any case in recent years where administration pursuant to an order of the Supreme Court has been obtained. This observation is supported by a statement in McDonald Henry and Meek. *Australian Bankruptcy Law and Practice* (4th ed. 1968) at 473 paragraph 1022 that "administration suits are rare in Australia".

23. Consequently, it follows that, with only one or two exceptions where estates are administered in bankruptcy, insolvent deceased estates in Western Australia are administered out of court pursuant to the common law as modified by statute.

Administration in bankruptcy

24. Although Western Australia has its own current bankruptcy legislation containing provision for the administration of insolvent deceased estates (s.114 of the *Bankruptcy Act 1892*), this is now virtually obsolete. Commonwealth legislation (now Part XI of the *Bankruptcy Act 1966*), was introduced on 1 August 1928, which, by virtue of s.109 of the *Commonwealth of Australia Constitution Act 1900*, prevails over state legislation in so far as there may be inconsistencies: see *Australian Pilot* to Volumes 1-5 of Halsbury, *Laws of*

England (3rd ed. 1956) at 163 paragraph 464 and see also Lewis, *Australian Bankruptcy Law* (5th ed. 1967) at 5-6. Consequently, further references in this working paper to provisions in the *Bankruptcy Act* will be references to Commonwealth legislation.

25. In bankruptcy, it is not the personal representative, but the Official Receiver who takes charge of the administration of the deceased estate pending the appointment of a trustee in bankruptcy. A petition under the *Bankruptcy Act* must be presented either by a creditor or creditors with a combined debt of not less than \$500 (s.244), or by the personal representative: s.247. If proceedings have already been commenced for an administration order, a bankruptcy order will only be made by leave of the court (s.244(13)), but the court may direct that the administration proceedings already commenced be transferred into the bankruptcy division of the court's jurisdiction.

26. Once a bankruptcy order has been made, the assets vest in the Official Receiver (s.249), and, in general terms, the procedure thereafter, with some modifications, is as if the deceased were alive but bankrupt, and a sequestration order had been made. The section dealing with the adoption of the bankruptcy rules in the administration of a deceased estate is s.248 and this incorporates the following bankruptcy provisions -

meetings of creditors (ss.64-68);

committee of inspection (ss.70-72);

composition and schemes of arrangement (ss.73-76);

re-direction of postal articles (s.79);

discovery of property (s.81);

proof of debts (ss.82-107);

order of payment of debts (ss.108-114);

property available to creditors and certain protective provisions (ss.117-122, 125-128);

realization of property by trustees (ss.129-130 and 132-139);

distribution of property (ss.140-147);

trustees: appointment, remuneration, accounts, supervision;

vacation of office, and release (ss.157-184).

Administration pursuant to a Supreme Court order

27. Application for an administration order can be made by way of originating summons by any personal representative, creditor, beneficiary or next of kin of the deceased person: *Supreme Court Rules 1971*, Order 58, Rules 2 and 3. The Court is not bound to make an order if questions between parties can be determined without such an order: see Order 58 Rule 5 and *Re Blake* (1885) 29 Ch 913.

28. Once the order has been made, s.25(1) of the *Supreme Court Act 1935* incorporates certain bankruptcy rules, namely the rules as to the respective rights of secured and unsecured creditors, as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities: see paragraph 10 above. Other rules in the *Bankruptcy Act* which do not relate to any of these matters, such as the provisions bringing back (into the estate) assets which were the subject of certain transactions made prior to the bankruptcy, do not seem to have any effect in the administration of an insolvent estate other than in bankruptcy: see Woodman, *Administration of Assets* (1964) at 35. There is some doubt as to whether the bankruptcy rules relating to priority for payment of debts are intended to be adopted by s.25(1). This matter is discussed in more detail later in this working paper: see paragraph 66 below.

29. The result therefore would seem to be that administration pursuant to a Supreme Court order is governed to some extent (depending on the interpretation of s.25(1) of the *Supreme Court Act 1935*) by the law of bankruptcy, but, in all other respects, is subject to the common law as modified by statute and by the administration order itself.

Debts which are payable

Administration out of court

30. Section 63 of the *Trustees Act 1962* (replacing s.46 of the *Administration Act 1903*) allows the personal representative to advertise in the *Government Gazette* and in newspapers, requesting all creditors to submit their claims against the estate within a certain period (being not less than one month) from the date of the advertisement. The newspaper advertisements are to be published in a newspaper circulating in each locality in which, in the opinion of the

personal representative, claims are likely to arise. At the end of the period allowed, the personal representative may administer the estate on the basis that only those claims of which he has received notice are due and owing by the deceased person. If there is no money left for a late claim, the personal representative, provided he did not have notice of the claim at the time of distribution, is not responsible. In these circumstances the only course open to a late claimant would be to seek payment otherwise by following the assets which have been administered: ss.63(2) and 65 of the *Trustees Act*. The extent to which a tracing order, if obtained, could be successfully implemented remains a matter of some doubt.

31. There are no limits to the debts provable, and any sums owing by the deceased at the date of death may be claimed. This includes debts which may be statute-barred unless they have been so declared by a court of competent jurisdiction: *Midgley v Midgley* [1893] 3 Ch 282. Claims for unliquidated sums of money would also be payable, except those arising from causes of action for defamation and seduction: s.4(1) of the *Law Reform (Miscellaneous Provisions) Act 1941*. Enticement of a party to a marriage and damages for adultery were also excepted by s.4(1), but those actions have been abolished by s.120 of the *Family Law Act 1975* (Cwth) as from 5 January 1976.

Administration in bankruptcy

32. Notice reaches creditors first by publication in the *Government Gazette* and newspaper of the making of the order (*Bankruptcy Act 1966*, s.310(4); and rule 89 of the *Bankruptcy Rules 1968*), and then by publication in the same manner of the date fixed for the first meeting of creditors: see rule 92 of the *Bankruptcy Rules*.

33. Section 82(2) of the *Bankruptcy Act* provides that unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy. Debts barred by the *Limitation Act 1935* are also not provable, but time ceases to run against the creditor after the bankruptcy order is made: see McDonald Henry and Meek, *Australian Bankruptcy Law* (4th ed. 1968) at 182 paragraph 370.

Administration pursuant to a Supreme Court order

34. The personal representative will no doubt advertise for creditors pursuant to s.63 of the *Trustees Act 1962* as in the case of administration out of court: see paragraph 30 above. However, with regard to the debts provable, s.25(1) of the *Supreme Court Act 1935* specifically incorporates the bankruptcy rules: for which see paragraph 33 above.

Assets available for payment of debts

Administration out of court

35. Section 10(1) of the *Administration Act 1903* provides that:

"The real as well as the personal estate of every deceased person shall be assets in the hands of the executor to whom probate has been granted, or administrator, for the payment of all duties and fees and of the debts of the deceased in the ordinary course of administration".

However, certain assets receive statutory protection from liability for payment of debts. These are -

- (a) life insurance money;
- (b) superannuation benefits.

(a) Life insurance money

36. Section 92(2) of the *Life Insurance Act 1945* (Cwth) gives absolute protection to the proceeds of life insurance effected by the deceased on his own life, from liability for payment of the debts of the deceased insured, except to the extent that the deceased has by contract, or, by express direction in his will, provided otherwise. Although expressed to be subject to the *Bankruptcy Act 1966* (where limits are imposed on the protection of life insurance money - see paragraph 42(e) below), this Act does not apply to administration out of court.

37. Doubts have been expressed as to the constitutional validity of these provisions of the *Life Insurance Act* (Cwth). This doubt is expressed on the grounds that the legislation does not deal primarily with life insurance, but with the property rights of third persons: see per Fullagar J. in *Insurance Commissioner v Associated Dominions Assurance Soc. Pty. Ltd.*

(1953) 89 CLR 78 at 85 and see also Woodman, *op. cit.* at 16-18. As far as the Commission is aware, this doubt remains unresolved.

38. Western Australia has its own legislation relating to life insurance business. Section 33 of the *Life Assurance Companies Act 1889* gives protection to the proceeds of life insurance policies effected by the deceased on his own life. However, this protection given by state legislation is limited in cases where the deceased has died within three years from the date on which he took out the policy. It is therefore inconsistent with the wider Commonwealth provisions and would be rendered invalid by s.109 of the Commonwealth of Australia *Constitution Act 1900* or, more specifically, by s.8 of the *Life Insurance Act 1945* (Cwth). Woodman, (*op. cit.* at 16-19) discusses the possibility of state legislation in New South Wales (s.4 of the *Life, Fire and Marine Insurance Act 1902* (NSW)) surviving the Commonwealth legislation, but his argument is based on the proposition that the New South Wales legislation grants wider protection. For example, it applies to policies effected by the deceased on lives in which he is interested other than his own, and it also regulates insurance business carried out by the New South Wales Government Insurance Office which is specifically excepted from the Commonwealth legislation. Neither of these situations arises in Western Australia.

39. The protection given to life insurance money does not mean that it is unavailable for payment of any debt arising in administration of the estate. In *Re McCallum* (1907) 7 SR (NSW) 523 it was pointed out that the protection only applies to the debts of the deceased. Funeral and administration expenses are debts owing by the personal representative for which he has a right of recovery from the estate. For this purpose, life insurance money has no immunity. Furthermore, the *Life Insurance Act 1945* (Cwth) does not bind the Crown. Adopting the reasoning in *Attorney General v Curator of Intestate Estates* [1907] AC 519, it follows that the protection given to life insurance money does not apply to debts owing to the Crown.

40. In cases where life insurance money is available for payment of funeral and testamentary expenses and debts owing to the Crown, the protected and unprotected assets should be marshalled for payment of debts: see Woodman, *op. cit.* at 14-15. Consequently, where a debt of \$500 is owing to the Crown by an estate where life insurance money totals \$1,000 and the rest of the estate totals \$4,000, payment would comprise \$100 from insurance

money and \$400 from the balance of the estate. In other words, payment of the debt is made proportionately from the protected, and unprotected assets.

(b) Superannuation benefits

41. In the case of superannuation benefits, the protection is subject to certain rights given to judgment creditors. Section 87 of the *Superannuation and Family Benefits Act 1938* contains a proviso that no protection given shall prevent the making of an order in the nature of a garnishee against any instalment of pension payable. Thus a judgment creditor can obtain a court order requiring the trustee of a superannuation fund to pay direct to him any pension due to a judgment debtor. Section 143A of the *Superannuation Act 1922* (Cwth) contains an elaborate provision allowing an unpaid judgment creditor to serve a copy of the judgment on the Superannuation Board together with a statutory declaration of the amount remaining owing under the judgment. The Board, after giving notice to the judgment debtor, may pay pension money to the judgment creditor in satisfaction of the judgment debt. Payments are not to be made from a pension instalment payable in respect of a child, nor are they to exceed half of a pension instalment.

Administration in bankruptcy

42. The property available to the trustee for payment of debts is referred to in bankruptcy as the divisible property. This is defined in s.249 of the *Bankruptcy Act* and comprises all of the deceased's property forming part of his estate at the date of the bankruptcy order and all property acquired since. However, the effect of s.249(6) is to exclude -

- (a) property held by the deceased in trust for another;
- (b) necessary wearing apparel and household effects;
- (c) tools of trade, professional instruments or books up to a total value of \$500;
- (d) any damages or compensation for personal injury to the deceased or to his family;
- (e) proceeds of any life insurance provided the policy has been in force for a sufficient period prior to death: two years in case of life policies, five years case of endowment or annuity policies.

43. The *Bankruptcy Act* contains several well known provisions designed to swell the assets of the bankrupt's estate for the purpose of meeting his debts and s.248 incorporates many of these provisions into the administration in bankruptcy of a deceased estate. The most notable exception is the relation back provisions in the Act: ss.115-116. McDonald Henry and Meek, *Australian Bankruptcy Law* (4th ed. 1968) at 480 paragraph 1032 make the point that "...because there are no acts of bankruptcy in relation to a petition under Part XI there is no relation back of an administration order made under this Part".

44. On the other hand, Lewis, *Australian Bankruptcy Law* (5th ed. 1967) points out (at 177) that there is a type of relation back if the personal representative wrongly disposes of property after the date of death. In this case, the personal representative may be personally liable to the trustee: *Re Mageed Rasheed* (1933) 7 ABC 82 at 93. If he has acted in good faith and before the bankruptcy order has been served upon him, he qualifies for the specific protection in s.252(2). However, beneficiaries receiving property before the debts are paid will be required to refund the money to the trustee in bankruptcy.

45. Although the relation back provisions are not adopted, s.248 incorporates the following bankruptcy provisions relating to the swelling of assets -

- (a) negating execution by judgment creditors against assets of the estate after presentation of a petition (ss.118 and 248 (2)(a));
- (b) setting aside voluntary settlements (s.120);
- (c) setting aside conveyances (s.121);
- (d) setting aside fraudulent preferences which are made after presentation of a petition (ss.122 and 248(2) (c));
- (e) preventing enforcement of any remedy by any creditor after an order has been made (s.249(3));
- (f) requiring a life policy to have been in existence for two years at least, before it is made unavailable for payment of debts: ss.116(2) and 249(6) (a) (ii) .

Administration pursuant to a Supreme Court Order

Section 25 of the *Supreme Court Act* makes no specific reference to the bankruptcy rules defining the divisible property of the deceased. It would seem therefore that the assets

available for payment of in the case of administration pursuant to an administration order coincide with the assets which are available in the case of administration out of court: see paragraphs 35-41; above. This view is supported by Woodman, *op. cit.* at 35 and *Re Leng* [1895-1899] All ER Rep. 1210 at 1212.

The order of priority for payment of debts

Administration out of court

47. Section 23(1) of the *Administration Act 1903* provides that all creditors shall be treated as standing in equal degree. This means that an unsatisfied judgment debt or a specialty debt owing upon any bond or other instrument under seal no longer have special priority: see also paragraphs 3 and 8 above. However, there does not seem to be anything to prevent a judgment creditor from improving his chances of obtaining payment by utilising normal execution processes: cf. *Pritchard v Westminster Bank Ltd.* [1969] 1 WLR 547, which outlines the position in England and see paragraph 11 above. The equality given to all creditors by s.23(1) of the *Administration Act 1903* is not absolute. There are a number of exceptions where debts are given certain priority at common law and by statute. In order of priority these are -

- (a) debts having special statutory priority;
- (b) secured debts - including debts which by virtue of statutory provision constitute a charge against part or the whole of the assets of the estate;
- (c) funeral and testamentary expenses;
- (d) Crown debts.

Each broad category will be considered in turn, and in addition, the question whether any debts are to be deferred.

(a) Debts with special statutory

48. The only debts falling into this category consist of unpaid commonwealth income tax. Sections 221P and 221YU of the *Income Tax Assessment Act 1936* (Cwth) provide that certain unpaid tax shall be paid by the trustee to the Commissioner and such payment shall

have priority over all other debts whether preferred secured or unsecured. The only exception is for costs, charges or expenses of administering a bankrupt estate.

(b) Secured debts

49. Secured debts are recognised as having priority by s.23(2) of the *Administration Act*. Security for debts would not normally be available for payment of funeral and testamentary expenses (see paragraphs 53-57 below) and they also retain their priority over ordinary as opposed to secured Crown debts: *Re John Wiper Ltd. (In Liq.)* (1972) 5 SASR 360 at 345 per Bray C.J. who dissented but not on this point; see also paragraph 58 below. Of course, to the extent to which the security is deficient in meeting payment of the debt, the creditor ranks equally with all other unsecured creditors. However, on the authority of *Mason v Bogg* (1837) 2 My & Cr 443; 40 ER 709, it would seem that the secured creditor can prove against the deceased's general estate for the whole of his debt and then realise his security to meet any deficit in the repayment thereof.

50. In addition, there are statutory provisions creating charges either generally over the entire assets of the estate or more particularly over specific assets. Examples of such statutory provisions are -

- (a) Section 34 of the *Estate Duty Assessment Act 1914* (Cwth) which provides that estate duty is a first charge against an estate and that there shall be no disposition of the estate without the duty having first been paid or a clearance obtained from the Commissioner. The penalty is personal liability for the duty.
- (b) Section 33(3) of the *Death Duty Assessment Act 1973* which provides that death duty is a charge on an estate except as against a bona fide purchaser, transferee or mortgagee. Section 35(2) requires the administrator to pay death duty in priority to all other debts other than funeral or testamentary
- (c) Section 45(1) of the *Land Tax Assessment Act 1976* subject to a limited exception for a bona fide purchaser, provides that land tax is a first charge on the land taxed in priority to all other encumbrances.

- (d) Section 109 of the *Metropolitan Water Supply Sewerage and Drainage Act 1909* which provides that rates, water accounts and other charges payable under the Act constitute a charge and have priority to every security or claim against the estate (real and personal) of the person liable to pay them.
- (e) Section 560 of the *Local Government Act 1960* which provides that rates and costs of proceedings for the recovery thereof are a first charge on the land rated after rates and taxes due to the Crown or any agency of the Crown in right of the state and after mortgages to the Commissioners of the Rural and Industries Bank.
- (f) Section 24 of the *Workers' Compensation Act 1912* which provides that compensation or damages to which a worker is entitled are a charge on the employer's estate or interest in the mine, factory or premises and the land whereon they are situated.

51. There may be difficulties in some cases in determining priority as between these statutory charges. For example, where the deceased owes both water rates (see paragraph 50(d) above) and local government rates (see paragraph 50(e) above) in respect of the same piece of land, it is not clear whether one is intended to have priority over the other, or whether they are intended to share the same degree of priority and should be paid *pari passu*. The position could become even more complex if there were an outstanding worker's compensation claim chargeable against the same piece of land: see paragraph 50(f) above. If it were a contest between the Water Board or the Shire or the employee and the Crown (see paragraph 50(a), (b) and (c) above), presumably Crown prerogative would apply and give priority to the debts owed to the Crown: see paragraph 58 below.

52. Difficulties in determining priorities also arise when it is a question of Commonwealth versus state priority. Provided the Commonwealth and state do not compete with each other for priority the solution is not so difficult. The claims of the Crown in right of Commonwealth and in right of state rank equally and they are paid *pari passu*: *Re Union Theatres Ltd.* (1933) 35 WALR 89. The difficulties only arise when the Commonwealth and the state endeavour to favour their own priority by statute, one at the expense of the other. The circumstances in which, and the extent to which, the *Constitution* permits this has been considered on a number

of occasions and more recently in *Re John Wiper Ltd. (In Liq.)* (1972) 5 SASR 360. The Commission is of the view that further consideration of these constitutional difficulties is beyond the scope of this working paper.

(c) Funeral and testamentary expenses

53. Funeral and testamentary expenses have always been regarded at common law as having priority: *R. v Wade* (1818) 5 Price 621 at 627; 146 ER 713 at 715; *Sanders v Sanders* (1914) 15 SR (NSW) 21. They also take priority over ordinary Crown debts: see paragraph 58 below; see also E.I. Sykes, *Payment of Debts by Executors in Queensland* (1955) University of Queensland papers vol. 1 No. 3 at 12, and Woodman, *op. cit.* at 36 referring to *Attorney General v Jackson* [1932] AC 365 at 371.

54. Although not supported by any reported decision, it is presumed that s.23(1) of the *Administration Act 1903* has not altered this rule. Section 23(1) is generally regarded as being concerned only with the removal of the common law order as to priority of debts: see for example Woodman, *op. cit.* at 8 and 40 and paragraphs 3 and 8 above. Equivalent legislation in other jurisdictions refers specifically to the equalisation of specialty and simple contract debts: see Appendix I and in particular s.36 (1) of the *Administration and Probate Act 1958* (Vic); s.59(1) of the *Administration and Probate Act 1919* (SA); *Specialty and Simple Contract Debts Equalisation Act 1871* (Qld); *Hinde Palmer's Act 1868* (UK) and s.33 of the *Administration Act 1969* (NZ). Section 23(1) of the *Administration Act 1903* differs only in it is wide enough to remove other common law priorities as well, such as the priority of judgment debts. That funeral and testamentary expenses still retain their priority is recognised by s.35(2) of the *Death Duty Assessment Act 1973*: see paragraph 50 (b) above.

55. Furthermore, the priority of funeral and testamentary expenses is based on the proposition that these are debts incurred by the personal representative and that he is entitled to be indemnified out of the estate for his liability. Consequently, persons who are owed funeral and testamentary expenses are not creditors of the deceased person within the meaning of s.23(1) of the *Administration Act*.

56. The personal representative's right to indemnity from the estate in respect of funeral expenses is limited to reasonable expenses, and it has been held that if the deceased dies

insolvent, only what is strictly necessary to bury the deceased will be regarded as reasonable. However, there is some flexibility in this rule to take account of the fact that the funeral arrangements are usually made before the solvency or otherwise of the estate can be determined: *Stag v Punter* (1744) 3 Atk 119; 26 ER 872. Testamentary expenses include the fees, commission, remuneration and other charges payable to a trustee in respect of the administration of an estate: see s.107 of the *Trustees Act 1962*.

57. Testamentary expenses would also include the cost of arranging for the sale of property unless it was specifically devised (*Re Wilson* [1967] Ch 53 at 65), but there may be difficulties where the executor is not selling, but is purporting to carry on a business: *Vacuum Oil Co. Pty. Ltd. v Wiltshire* (1945) 72 CLR 319. The suggestion arising from this case is that, where the personal representative is carrying on a business, his creditors may only have access to estate funds for payment of their accounts, if the personal representative was acting within his powers and where existing creditors actively and affirmatively assent to the carrying on of the business.

(d) Crown debts

58. By virtue of the Royal prerogative, the Crown takes priority over other creditors of equal degree and there is a fundamental rule, that this right shall not be held to have been taken away by statute unless the Act binds the Crown either expressly or by necessary implication: *Re Henley & Co.* (1878) 9 Ch D 469 per Cotton L.J. at 482. The Crown is not bound by the provisions of the *Administration Act*, and its priority therefore remains intact.

(e) Deferred debts

59. At one time voluntary bonds which were not assigned for value and promissory notes without consideration were deferred to simple contract debts: see Walker and Elgood, *A Compendium of the Law Relating to Executors and Administrators* (4th ed. 1905) at 202. This would not seem to be the case now. Section 23(1) of the *Administration Act* removes the common law order of priority of payment of debts, the only exception being for priorities created by statute, secured debts, funeral and testamentary expenses and debts owed to the Crown as discussed above.

Administration in bankruptcy

(a) Debts with special statutory priority

60. The provision in the *Bankruptcy Act* dealing with the priority of debts (s.109) is expressed to be subject to ss.221P and 221YU of the *Income Tax Assessment Act 1936* (Cwth).

(b) Secured debts

61. The position of secured creditors in bankruptcy is contained in ss. 90-91 of the *Bankruptcy Act*. These provisions require the secured creditor to choose one of the following courses -

- (i) release his security and prove in bankruptcy for the entire claim;
- (ii) realize his security and prove in bankruptcy for the balance of the debt, if any, unpaid;
- (iii) present a figure to the trustee in bankruptcy value of the security and prove for the balance of the debt over and above that figure.

In the latter case the trustee can redeem the security by paying the valuation figure to the creditor or he can challenge the accuracy of the valuation.

62. The securities created by statute applicable to administration out of court (see paragraph 50 above) are inconsistent with the *Bankruptcy Act* and consequently would not apply to administration in bankruptcy.

(c) Other priorities generally, including funeral and testamentary expenses and Crown debts

63. All priorities in cases bankruptcy are set out in s.109, and as the Crown is bound by the *Bankruptcy Act* (s.8) it loses its common law prerogative right of priority. However, as Woodman points out (op. cit. at 11) the Crown is bound only in right of the Commonwealth or in right of a state. In any other capacity e.g. as representing Great Britain or any other dominion, the crown would retain its priority.

64. A summary of the order for priority provided by s.109 is as follows -

petitioning creditors' expenses and costs;
trustee in bankruptcy's expenses and remuneration;
funeral and testamentary expenses;
employees' wages up to \$600;
workers' compensation payments up to \$2,000;
employees' long service annual or other leave entitlements; payments for articulated clerks and apprentices;
tax, not exceeding one year's assessment, apart from that payable pursuant to ss.221P and 221YU of the *Income Tax Assessment Act 1936* (Cwth), which has earlier priority (see paragraph 60 above);
any debts given priority by the meeting of creditors.

(d) Deferred debts

65. Certain debts are deferred to the claims of ordinary unsecured creditors. Section 111 defers a loan by a spouse to the estate. This seems to have rendered obsolete the provisions of s.3 of the *Married Women's Property Act 1892*. Section 112 defers, even further, interest owing on any debt over and above eight percent. Section 120(4) defers even further, any claim made on the basis of a contract or covenant made on marriage to pay property to be acquired in the future to the spouse and/or children.

Administration pursuant to a Supreme Court order

(a) Priority of debts

66. Although priority of debts is not mentioned specifically in s.25(1) of the *Supreme Court Act 1935*, it has been held in cases dealing with legislation worded in identical terms, that the words "the respective rights of secured and unsecured creditors" incorporate the bankruptcy rules as to priority for payment of debts: see *Re Whitaker* [1901] Ch 9 as applied by Pennycuik J. in *Re Theo Garvin Ltd.* [1969] 1 Ch 624 at 656. In Queensland also it has been decided that the bankruptcy rules as to priority are intended to be adopted: *Re Moat* (1897) 8 QLJ 42. If this construction were to be accepted in Western Australia, it would mean that the order of priority would be as in an administration in bankruptcy; see paragraphs 60-65

above. However, as the *Supreme Court Act* does not bind the Crown, it would appear that debts owed to the Crown would retain their priority: Woodman, *op. cit.* at 36. However, a *quaere* is raised in Hewitt, *Administration and Probate* (2nd ed. 1971), at 41, while discussing similar legislation in Victoria (s.39(1) of the *Administration and Probate Act 1958* (Vic)), as to whether the Crown is bound by necessary implication.

(b) Deferred debts

67. A wife's loan to her deceased husband was considered in *Re Leng* [1895-1899] All ER Rep 1210, and it was held that the English equivalent of s.25(1) of the *Supreme Court Act 1935* (viz: s.34(1) and Part I of the First Schedule to the *Administration of Estates Act 1925* (UK)), incorporated the law of bankruptcy with regard to deferred debts. Consequently, loans by a spouse to an estate, interest over and above eight percent owing on any debt and a claim arising out of a contract or covenant made on marriage to make future payments to a spouse and/or children are deferred; see paragraph 65 above.

The personal representative's right of preference

Administration out of court

68. At common law, the personal representative was in a position where he paid debts as and when demanded: see paragraph 3 above. In doing so, he had to bear in mind the order of priorities established at common law. If he paid a debt when he had notice of an outstanding debt having priority, and the estate turned out to be insolvent, he would be personally liable for his *devastavit* to those creditors who ought to have been paid in priority: *Lyttleton v Cross* 3 B & C 317; 107 ER 751. If he did not have notice, then, provided a reasonable period had lapsed since the date of death, no such liability would arise: *Re Fludyer* [1898] 2 Ch 562.

69. Adherence to the order of priorities was, and still is, the only requirement imposed on the personal representative in paying debts. Of course he is now confronted with an amended order: see paragraphs 47-59 above. He is not obliged to pay creditors on the same level of priority equally and proportionately. He is allowed to choose between them which should be paid first.

This choice may be made as many times as he wishes and for any reason. For example, a choice may be made because the creditor is first in, or because he is personally known to the personal representative. A choice can be made even when the personal representative knows that there will be insufficient assets in the estate to pay all debts. If or when the assets of the estate are exhausted in meeting payments to chosen creditors, the personal representative can plead the defence of *plene administravit* to any further claim from creditors of the same degree, or of a higher degree of priority if he had no notice of such a claim.

70. This process whereby the personal representative can choose when to pay creditors, backed by the defence of *plene administravit*, is really the root of the doctrine of preference: see Holdsworth, *A History of English Law*, Vol. III at 586-587 and see also paragraphs 3-4 above. In practical terms, when it is known that the estate will be insolvent, it amounts to a right to decide which creditors are to receive payment in full, and which are to receive nothing.

71. It may seem that the right of preference is inconsistent with s.23(1) of the *Administration Act*. Section 23(1) provides that all creditors "...shall be treated as standing in equal degree, and be paid accordingly out of the assets. ..". However, it will be recalled (see paragraph 54 above) that s.23(1) is generally regarded as being concerned with the removal of the common law priorities amongst unsecured creditors. The Commission has not discovered any occasion where it has been argued that s.23(1) was also intended to remove the personal representative's right of preference.

Administration in bankruptcy

72. Before a bankruptcy order is made, there are no limits to the personal representative's right of preference. He may prefer as many creditors of the same degree as he wishes, and there is no requirement that he should act in good faith in doing so. However, if he exercises his right after the date the petition is presented but before the order, and the right is not exercised in the course of business and in good faith, the preference is liable to be set aside: ss.122 and 248(2) (c) of the *Bankruptcy Act*.

73. After the bankruptcy order is made, all debts of the same rank must be paid proportionately: s.108 of the *Bankruptcy Act*.

Administration pursuant to a Supreme Court order

74. An order of the Court precluded the further exercise of the right of preference on the principle that equity requires equality *Mitchelson v Piper* (1836) 8 Sim 64; 59 ER 26. Furthermore, if creditors have received a preferred partial payment (e.g. if they have been paid 75c in the \$1) before the order is made, they cannot get more until everyone else catches up. However, nothing can be done by the creditor to prevent or restrict the right of preference before the Court order is made unless a receiver is appointed, and this will not be done, on the sole ground of preventing the exercise of the right, but only to prevent a wasting of the assets: *Re Wells* (1890) 45 Ch D 569, and see *Harris v Harris* (1887) 35 WR 710 at 711 where Chitty J. said "that is the law and it is a curious state of things, and I do not say that I approve of it". The right of preference subsists even though an administration order is pending: *Re Radcliffe* (1887) 7 Ch D 733.

PART B – SITUATION IN OTHER JURISDICTIONS

75. A table of the relevant legislation in other jurisdictions is contained in Appendix I. Two significant factors emerge.

76. The first concerns the different ways of administering a deceased insolvent estate. It will be recalled that in Western Australia there are three ways; administration out of court according to the common law, administration in bankruptcy and administration pursuant to a Supreme Court order. In New South Wales, Victoria, Tasmania, Australian Capital Territory and England there are only two ways in which a deceased insolvent estate can be administered. If a bankruptcy order is obtained, it is administered formally in bankruptcy; if no bankruptcy order is obtained, there is provision nevertheless incorporating the bankruptcy rules as to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and the priority of debts and liabilities. In other words, in these jurisdictions, the estate is either administered formally in bankruptcy, or it is administered as if in Western Australia an administration order had been made by the Supreme Court. There is no administration according to the common law as modified by Statute.

77. In South Australia, the Northern Territory and New Zealand, it would seem that a deceased insolvent estate could still be administered according to the common law but there are provisions enabling the personal representative to administer the estate as if an administration order had been made. In South Australia and the Northern Territory he can do so by filing a declaration of insolvency with the Registrar of Probates. In New Zealand it is simply *lawful* for the personal representative to apply the estate in accordance with the priorities that would be applicable if the estate were being administered in bankruptcy.

78. The second significant factor concerns the personal representative's right of preference. This would seem to exist in all Australian states although only Tasmania goes so far as to give statutory recognition to the right. However, in New Zealand the right of preference has been restricted to a payment made in good faith where an order for the administration of the estate : in bankruptcy has subsequently been obtained: *Re Brooks* [1942] NZLR 543.

79. In England the rights of preference and retainer have been considered by the English Law Commission. In its Report (No. 31, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters 1970* (Cmnd. 4497 at 5 paragraphs 7-9)), the Commission recommended the abolition of both rights. However, it advocated that if a personal representative who, in good faith, and at a time when he has no reason to believe that the estate is insolvent, pays any debt, including his own debt, (except where he is administering the estate solely by reason of his being a creditor), he ought not to be liable to account to another creditor of the same degree if it subsequently appears that the estate is insolvent. The Law Commission's recommendations have since been adopted. Section 10(1) of the *Administration of Estates Act 1971* (UK) abolishes the rights of preference and retainer, while s.10(2) reflects the personal representative's limited right to pay creditors, including himself, in good faith.

PART C - DISCUSSION

80. In the introduction to this working paper it was suggested (see paragraph 16 above) that from the foregoing analysis of the law in this state and in other comparable jurisdictions, three issues would arise. These issues are -

- (a) whether there is a need to retain three ways of administering a deceased insolvent estate;
- (b) whether the personal representative's right of preference should be retained in its present form;
- (c) whether a simpler way of administering small insolvent estates ought to be implemented.

Each issue will be discussed in turn.

(a) Whether there is a need to retain three ways of administering a deceased insolvent estate

81. The analysis in Part A of this working paper of the rules applicable to the administration of deceased insolvent estates in Western Australia illustrates the complexity surrounding this subject. Much of the difficulty, it would seem, results from the historical development of the law and the retention of the three different ways of administering the estate: see paragraphs 12-14 above.

82. In practical terms this complexity can lead to several undesirable consequences, such as uncertainty, both for the personal representative and for the creditor. This uncertainty leaves the personal representative with two choices. He can either seek legal advice or proceed without knowing precisely the relevant law. A request for legal advice can mean further costs both for the estate and for the creditor. It is ironic that an estate already unable to meet its liabilities should have to incur further liabilities to determine how it should be administered. To increase what may already be a substantial loss by having to add legal costs will also be an unwelcome proposition for the creditor. Furthermore, the uncertainty will deter prompt and efficient administration of the estate.

83. On the other hand, if the personal representative and the creditor proceed without knowing precisely the relevant law, the personal representative may subsequently face an action for *devastavit*, and the creditor may lose the protection given to him by the law. The creditor may also be disadvantaged by another creditor who makes use of the complexity of the law to his own advantage.

84. For these reasons it is suggested that the situation could be re-assessed with a view to the provision of a simple procedure to govern the administration of all deceased insolvent estates.

85. In this respect it may be argued that the bankruptcy rules from time to time represent the most equitable method of arranging for the payment of creditors if the debtor becomes bankrupt during his lifetime and that the same rules should apply in every case where a person is insolvent when he dies: see Lewis, *Australian Bankruptcy Law* (5th ed. 1967) at 173. If this argument were accepted, the following proposals could be implemented

- (i) Adopting the bankruptcy rules contained from time to time in Part XI of the *Bankruptcy Act 1966* in their entirety in every case where a person dies insolvent. This would include the rules whereby assets disposed of in certain antecedent transactions are to be brought back into the estate.
- (ii) Adopting some of the bankruptcy rules in Part XI of the *Bankruptcy Act 1966* in all cases.
- (iii) Allowing the personal representative to administer the estate in accordance with some or all of the bankruptcy rules, in Part XI of the *Bankruptcy Act 1966* if he so wishes.

86. The first proposal advocates administration in bankruptcy in all cases. There is no precedent for such a provision in other jurisdictions. It has the advantage of being entirely fair from the creditor's point of view and saves him the trouble of presenting a petition for a bankruptcy order. It also means that there would be only one way of administering a deceased insolvent estate. However, it creates a degree of formality which may be unnecessary in a

large number of estates, particularly smaller estates where there is not likely to be any substantial gain from the creditor's point of view in investigating antecedent transactions. The formality will add to the expense of administering the estate and delay.

87. The second alternative is the one which has been adopted in New South Wales, Victoria, Tasmania, Australian Capital Territory and England. In these jurisdictions, the bankruptcy rules as to the respective rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and the priority of debts and liabilities have been adopted. If such a measure were to be introduced in Western Australia, suitable provision could be made in the *Administration Act 1903* and s.25(1) of the *Supreme Court Act 1935* could be repealed.

88. As a result there would be two ways of administering a deceased insolvent estate, namely informal administration incorporating some, but not all, of the bankruptcy rules in Part XI of the *Bankruptcy Act 1966*, and formal administration in bankruptcy. The latter would incorporate all of the rules in Part XI including the provisions setting aside certain antecedent transactions made by the deceased (see paragraphs 43-45 above) and the restrictions on the protection afforded to life insurance money from liability for payment of debts: see paragraph 42(e) above. Formal administration in bankruptcy would be sought only in cases where it would result in substantial benefit to the creditors.

89. The third alternative is the one apparently adopted in South Australia, the Northern Territory and in New Zealand. This provides the personal representative with a discretion to pay debts in accordance with the bankruptcy rules if he so wishes. However, it means that unless the personal representative decides to administer according to the bankruptcy rules, the common law as modified by statute will apply. Consequently, depending on the personal representative's discretion, the three different ways of administering a deceased insolvent estate and the resulting complexity could continue.

90. The Commission invites comment generally on the ways in which a deceased insolvent estate may be administered at present in Western Australia and whether the law governing this situation is considered to be satisfactory. The Commission also invites comment as to the manner in which the law may be improved if improvement is considered to be desirable.

(b) Whether the personal representative's right of preference should be retained in its present form

91. At present in Western Australia, the personal representative appears to have an unrestricted right to prefer creditors of equal degree. He can pay creditors at any time with immunity from liability to subsequent creditors of the same degree of priority whether he knows the estate is insolvent or not: see paragraphs 68-71 above. The only means of restricting the right of preference is for the creditor to obtain an administration order (see paragraph 74 above) or to present a petition for an order under Part XI of the *Bankruptcy Act*: see paragraph 72 above. In the latter case, the presentation of the petition does not prevent the making of further preferences, it only enables the setting aside of preferences except those which are shown to have been made in the ordinary course of business and in good faith. Once the bankruptcy order has been made, all creditors must be paid proportionately: see paragraph 73 above.

92. Originally, the right of preference might have played a useful role when a late claim was made against the estate and there was no money left to pay it. Provided the late claim was not one on a higher level of priority, the personal representative could claim that he had preferred the creditors of whose claims he was aware and, when there was no money left in the estate, he could plead *plene administravit* in defence. In the absence of a right of preference, the late claimant could have argued that the personal representative was obliged to wait until all claims had been received before payment of any claim could be made. This would not be conducive towards a speedy administration.

93. In England, and subsequently in Western Australia, a specific and more suitable statutory procedure was provided to encourage speedy administration and to protect the personal representative from liability for late claims. This procedure, based on advertising for creditors, first appeared in *Lord St. Leonard's Act 1859* (UK), s.29, and in England is now found in the *Trustee Act 1925* (UK), s.27. It was first enacted in this State by s.46 of the *Administration Act 1903* and now appears in s.63 of the *Trustees Act 1962*. Advertising pursuant to this section (see paragraph 30 above) is a more appropriate procedure for paying debts because the creditor is thereby informed of the death of his debtor, of the steps he is required to take and of the consequences of his failure to take them. The personal representative is given protection against liability for claims which have not been made within the period allowed in the advertisement (at least one month), whether these claims have

priority or not. There is also statutory protection providing for an honest personal representative, who has acted reasonably, to be excused from personal liability for any loss caused by his maladministration: s.75 of the *Trustees Act 1962*. However, it is doubtful whether relief under s.75 would be granted where no attempt has been made to advertise for creditors in compliance with s.63: *Re Lazarus* (1940) 11 ABC 249 at 255-256.

94. Equity and a sense of fairness suggest that all creditors on the same level of priority ought to be treated equally. It could be argued that there is no reason now why the personal representative should not be compelled to advertise in every case pursuant to s.63 of the *Trustees Act*, wait until the prescribed period has expired before making payment to any creditor, and then, at the expiration of the prescribed period, pay all creditors who have submitted claims rateably and proportionately. In other words, there may be no need to allow the personal representative to make preferential payments to certain creditors. Whether or not he believes that there is going to be sufficient funds in the estate to meet all debts, if he does make a preferential payment, the result is equally unfair from the unpaid creditor's point of view if the estate is in fact insolvent. Consequently, there would seem to be a strong case for abolishing the right of preference.

95. The abolition of the right of preference was recently recommended by the English Law Commission in 1970 (see paragraph 79 above), and implemented in s.10(1) of the *Administration of Estates Act 1971* (UK). However, the Commission took the view that in some cases there may be a good reason for allowing payment to certain creditors before the period allowed in the statutory advertisement has expired. In particular it cited the case of preserving good relations with a tradesman upon whom the deceased's family rely for prompt personal service. To meet this situation it was recommended that if the personal representative, acting reasonably and in good faith and with no reason to believe that the estate is insolvent, pays a creditor, he should not be liable to creditors of the same degree of priority for such payment should the estate subsequently turn out to be insolvent. This recommendation was adopted and enacted in s.10(2) of the *Administration of Estates Act 1971* (UK).

96. The Commission invites comment generally on the personal representative's right of preference. If the right were to be abolished, the Commission would particularly welcome comment as to whether delays between the date of death and the payment of claims warrant a

provision in Western Australia such as that in s.10(2) of the *Administration of Estates Act 1971* (UK).

(c) Whether a simpler way of administering small insolvent estates ought to be implemented

97. A single procedure to apply to all deceased insolvent estates has advantages in that all creditors would be treated alike in all cases and there would be no variation in the administration procedure. However, it may be argued that there ought to be two procedures; one to govern large insolvent estates where there are considerable sums at stake, and a simpler one to govern small insolvencies, particularly when non-professional personal representatives are involved. Such an argument may be founded on the proposition that the main aim in administering a small insolvent estate is to complete the administration quickly, and with a minimum of expense. Where there is little at stake, an elaborate procedure designed mainly to protect the interests of creditors, perhaps at the expense of a simple and inexpensive administration procedure, may seem inappropriate. Also, administration by a non-professional personal representative should be encouraged, whereas existing complexity in the law may tend to discourage this.

98. It will be noted from the survey of the law in Western Australia (see Part A), and in other jurisdictions (see Part B and Appendix I), that, at present, no provision expressly requires account to be taken of the size of the estate in determining what administration procedure ought to be adopted. However, it is reasonable to suspect that the size of the estate, or the amount at stake, will have a bearing on the way the creditors will react, and, indirectly, will determine whether the estate is to be administered out of court, pursuant to a Supreme Court order or in bankruptcy. There is a simplified procedure provided in Part IX of the *Bankruptcy Act 1966* for live bankruptcies where the debts do not exceed \$4,000: ss.185-186. The advantage of this procedure is that it removes the necessity for a formal meeting of creditors. However, these provisions are not incorporated into the bankruptcy procedure for administering deceased insolvent estates: see s.248 of the *Bankruptcy Act* and paragraph 26 above.

99. An alternative procedure for small deceased insolvent estates raises two questions -

- (i) what is a small deceased insolvent estate?
- (ii) what should the alternative procedure be?

(i) *The definition of a small estate*

100. The bases for the definition of a small estate

- (a) the value of the assets available for payment of debts;
- (b) the value of the debts;
- (c) a combination of the value of the assets and debts;
- (d) the extent of the insolvency.

101. The fourth basis is the only one which is obviously unsuitable. An estate with assets of \$100,000 and debts of \$102,000 should not be classified as a small estate simply because the total extent of the insolvency does not exceed a certain figure, say \$4,000. It is unrealistic to regard such an estate as small. Furthermore, as the amounts owed are obviously substantial, this would not be a suitable case for a quick, simple and inexpensive administration. There is a lot at stake and the rights of the creditors should be fully recognised.

102. The *Bankruptcy Act 1966* defines a small bankruptcy as one where the liabilities do not exceed \$4,000: s.185. However, any requirement that the total debts should not exceed a certain figure, say \$4,000 (as in bases (b) and (c)) may be considered to be too restrictive. For example, if an estate has assets totalling \$3,000 and debts totalling \$60,000, even though potentially there is a lot at stake, the fact is that there is little to go around. This is a case where the estate could still perhaps be administered simply, and with a minimum of expense and delay.

103. Consequently, a definition based on the value of the assets available for payment of debts may be considered the most appropriate. The figure of \$4,000 is suggested as it is in line with the figure adopted in the *Bankruptcy Act 1966* in order to define small live bankruptcies. It may be considered to be desirable, so that a continued correlation with live bankruptcies can be maintained, to adopt the figure used in the *Bankruptcy Act* from time to time. On the other hand, inflation since 1966 may warrant a higher figure, and the correlation with the *Bankruptcy Act* is not complete as the deciding factor in that Act is the extent of the liabilities, not the value of the assets.

(ii) *The alternative procedure for administering small deceased insolvent estates*

104. Where the assets of the insolvent estate do not exceed say \$4,000, difficulties relating to the order of priority for payment of debts are not often going to arise. Nevertheless, at present, there is always a chance that they will, and the cautious personal representative must therefore be aware of the complexities.

105. One solution would be to remove these complexities in the case of small bankruptcies. Of course, Commonwealth legislation such as ss.221P and 221YU of the *Income Tax Assessment Act 1936* (Cwth) could not be affected, but as far as state legislation and the common law are concerned, the existing rules governing priorities in the case of administration out of court could be excluded in the case of small insolvent estates.

106. If the bankruptcy rules governing the respective rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and the priority of debts and liabilities were incorporated by state legislation into the administration of all deceased insolvent estates, as discussed above (see paragraphs 87-88), some of the complexity which exists at present would be removed. Nevertheless, it may still be argued that the bankruptcy rules themselves are unnecessarily complex for small estates and could be excluded.

107. Once the complexities have been removed, the question then arises as to the way in which simple administration of a small deceased insolvent estate should be carried out. One suggestion would be for the personal representative to pay funeral expenses and secured creditors, then, after providing for administration expenses, advertise in the normal manner for creditors to submit any claims against the estate within one month from the publication of the notice: s.63 of the *Trustees Act 1962*. At the expiration of that month, the personal representative could simply pay what remained in the estate to those creditors who have submitted claims, rateably and proportionately to the amount originally owed by the estate.

108. It would always be open for a creditor or creditors with debts exceeding \$500 to frustrate the simple administration by petitioning for a bankruptcy order, but it is doubted whether there would be any practical advantage in doing so in many cases. Furthermore, the

availability of such a procedure is a useful safeguard for the creditor should he suspect that the assets could, through the *Bankruptcy Act 1966*, be increased to exceed \$4,000.

109. Whether or not existing complexities relating to priorities and other matters in administration other than in bankruptcy are to be retained, a further alternative is to make provision enabling the non-professional personal representative to obtain gratuitous guidance from a public officer or authority with expertise in the field. There is a similar provision in s.56(1) of the *Administration Act 1903*. This provision entitles the personal representative of any estate, solvent or insolvent, with assets not exceeding \$5,000, to approach the Master of the Supreme Court for the information and the forms necessary to obtain a grant of administration. This information and the forms are to be provided free of charge. In relation to the administration of small deceased insolvent estates, the result would be the provision of a free advisory service for non-professional personal representatives. Such advice would obviously benefit the personal representative by giving him greater confidence in his position, it would encourage administration by non-professional personal representatives such as members of the deceased's family, and the creditors would benefit from an efficient and less expensive administration.

110. The Australian Law Reform Commission has recently working paper on its project No. 6, *Consumers in Debt*. The paper discusses the need for informal schemes for the payment of debts by small consumer debtors. A suggested definition of a small consumer debtor is one who has debts not exceeding \$9,000-\$10,000: see paragraph 31. The point is made that the formal bankruptcy provisions, including the procedure under Part X for the debtor to arrange composition with his creditors, were enacted in a period when there were different community attitudes towards granting consumer credit: see paragraphs 1-3. The formal bankruptcy provisions are more suited today to a business or to a bankruptcy where substantial sums are involved and this proposition is supported by the costs involved: see paragraph 13.

111. Where a small consumer debtor is to enter into the informal scheme as proposed by the Australian Law Reform Commission, it is suggested that he should be given assistance in drawing up a statement of affairs to initiate that scheme: see paragraph 19. The working paper mentions (in paragraph 49) that many experienced debt counsellors had emphasised that debt repayment problems should be dealt with, so far as possible, at the local community level in

less formidable surroundings. This also helps to identify people in need of advice and enables action to be taken before large sums by way of costs are run up by creditors pursuing legal remedies. The person or body to assist in the administration of the proposed procedure is discussed as follows:

50. "**Community Groups and Organisations**. There are numerous organisations at a community level which might co-operate in the administration of schemes. Counselling services and credit unions which already provide money management for debtors, which arrange for extensions of time on their behalf, and which, in many cases, distribute payments to the creditors concerned, are the most obvious. There can be little doubt, however, that, valuable as the work of these bodies may be, there are simply not enough of them. Fortunately, State governments in South Australia and Victoria have formally recognised the need which exists and have established debt counselling facilities in limited areas, while further expansion is expected. Many other local and governmental bodies might also be able to assist. These include the Australian Legal Aid Office and State legal aid bodies, courts dealing with debt recovery, citizens advice bureaux, marriage guidance counselling centres and welfare and unemployment services.
51. **State Debt Recovery Courts**. Some of these bodies might have the expertise necessary for following the procedures until final operation or rejection of a scheme, yet lack facilities for handling payments. This might well be the case, for example, in relation to State Courts dealing with debt recovery. In New Zealand debt recovery Courts are authorised in limited circumstances to make summary instalment orders against insolvent debtors which operate in favour of creditors in general and which may even involve a composition by way of compromise (*Insolvency Act, 1967*). A supervisor may be appointed for each such debtor, but the Court itself is not directly involved in supervision of the scheme or the receipt of payments. Officials attached to State Courts might be willing to operate the procedures outlined in this Working Paper. Pamphlets describing the procedures and explaining how they may be utilised might be distributed with State judgment enforcement documents, as, for example, an unsatisfied judgment summons or warrant of execution. Should a body lack facilities of the type necessary for handling money and making payments to creditors, it should refer the debtor on to the Official Receiver or to an appropriate community body willing and able to accept responsibility for these matters.
52. Community bodies which possess the requisite knowledge and experience should be encouraged to perform precisely the same tasks as the Registrar and Official Receiver in respect of the proposed schemes. They should assist in initiating proposals, contact creditors, certify that a scheme has come into operation, receive payments and distribute these to creditors. One main variation is envisaged: the outside body should be required to notify the Registrar when a proposal has been made and when a scheme has come into operation. A copy of the scheme, on an approved form, should be sent in respect of each such scheme. This should be done for two reasons: to facilitate the supply of information to creditors concerning those who, being solvent, use schemes of the type proposed; and to ensure that the Registrar may exercise some supervision over the handling by outside bodies of the schemes proposed, and that he obtain information concerning the extent of their use".

112. If an advisory service were to be provided in Western Australia in respect of the administration of small deceased insolvent estates, consideration could be given to the possibility of linking this service with similar services set up by Commonwealth authorities relating to small bankrupt estates.

113. In Western Australia, consideration could be given also to the possibility of arranging an advisory service through the Public Trustee or through the proposed Legal Aid Commission. However, the Public Trustee, although he has expertise in this field, is directly concerned with the administration of these estates himself. This places him in a different position from that occupied by the Master of the Supreme Court for example in giving advice in relation to the matters concerning the grant of administration of small estates. The Legal Aid Commission would not be faced by such opposing interests, but giving advice in respect of deceased insolvent estates would amount to an extension of the normal role of legal aid bodies, namely the giving of advice to indigent persons.

114. The Commission invites comment generally on the need for special provision relating to the administration of small deceased insolvent estates. If such a need is thought to exist, the Commission would welcome comment as to the specific suggestions referred to above (viz: the provision of a simple administration procedure or the establishment of an advisory service for non-professional personal representatives), and any other ways in which it is considered that the need may be met. It would also welcome comment as to the definition of what ought to constitute a small deceased insolvent estate.

PART D - SUMMARY OF ISSUES

Ways of administering insolvent deceased estates

115. Having regard to the important but complex differences in the various existing methods of administration, is it desirable to retain the present law whereby a deceased insolvent estate may be administered in three different ways?

Possible alternative

116. Replace administration out of court and administration pursuant to a Supreme Court order (*Supreme Court Act 1935*, s.25 (1)) by an administration procedure incorporating the bankruptcy rules as to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and the priority of debts. Suitable provision along these lines could be made in the *Administration Act 1903* and this procedure could apply to all deceased insolvent estates with the exception of those subject to a formal bankruptcy order, and possibly small estates: see paragraphs 81-90 above and, in respect of small estates, paragraph 120 (b) below.

Personal representative's right of preference

111. Should the personal representative retain any right to prefer creditors of equal degree of priority?

Possible alternative

118. (a) Abolish the right of preference. The only protection then given to the personal representative against claims by unpaid creditors would be s.63 of the *Trustees Act 1962*. Provided he has advertised in the stipulated manner, the personal representative need only pay those claims which have been submitted to him within the period stipulated: see paragraphs 91-94 above.

(b) Abolish the right of preference but allow the personal representative to give priority to certain creditors including himself as long as he does so in good

faith and at a time when there is no reason to believe that the estate is insolvent: see paragraph 95 above.

Simplified administration of small deceased insolvent estates

119. Should there be a simpler and less expensive procedure for administering small deceased insolvent estates? If so, what is to be regarded as a small deceased insolvent estate and what procedure ought to be adopted?

Possible alternatives

120. (a) A small deceased insolvent estate could be defined as one where the liabilities exceed the assets and where the assets do not exceed a certain sum. This sum could be \$4,000, (the figure chosen in the *Bankruptcy Act 1966* as the maximum extent of the liabilities in order to qualify as a small bankrupt estate) or the amount relevant to the definition of a small bankrupt estate as fixed in the *Bankruptcy Act* from time to time, or it could be a sum greater than \$4,000 having regard to inflation since 1966: see paragraphs 100-103 above.
- (b) The appropriate procedure could be to allow the personal representative to ignore complexities such as creditors priorities, statutory or at common law, except those created by Commonwealth legislation, and simply divide the assets rateably and proportionately among those creditors who have submitted claims in response to the statutory advertisement under s.63 of the *Trustees Act 1962*: see paragraphs 104-108 above.
- (c) An advisory service could be established to give advice as to the procedure for administering a small deceased insolvent estate. Such advice could be given by community counselling services, credit unions, Australian Legal Aid office, State legal aid bodies, courts dealing with debt recovery, citizens advice bureaux, or the Public Trustee: see paragraphs 109-113 above.

Appendix I
Comparative table of legislative provisions relating to the administration of deceased insolvent estates.

State or country and principal legislation.	Western Australia Administration Act 1903	New South Wales Wills Probate and Administration Act 1898.	Victoria Administration and Probate Act 1958
Real and personal estate to be assets for payment of debts.	s.10	s.46 (1). s.46A (1) also includes property subject to a general power of appointment.	s.37 (refers also to legal and equitable assets and to payment of specialty and simple contract debts and without prejudice to incumbrances).
Creditors to be treated as standing in equal degree and to be paid accordingly from legal and equitable assets but not to prejudice or affect any security.	s.23 (also not to affect protection given to life insurance money)	s.82 (identical to Western Australian provision).	s.36 (1) refers specifically to removal of priority for specialty debts. s.36 (2) removes priority for debts of record (judgement debts).
Administration in bankruptcy.	Part XI of the Bankruptcy Act 1966, (Cwth).	Part XI of the Bankruptcy Act 1966, (Cwth).	Part XI of the Bankruptcy Act 1966, (Cwth).
Outside formal administration in bankruptcy, priority is given to funeral, testamentary and administration expenses and the bankruptcy rules as to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and as to priorities of debts to apply in every case.	-	s.46C (1) and Part I of Third Schedule.	s.39 (1) and Part I of Second Schedule.
Bankruptcy rules applicable in other cases.	s.25 of Supreme Court Act, 1935 in the case of administration pursuant to a Supreme Court order, but no specific reference to rules as to priorities of debts.	-	-
Retainer	Abolished s.10 (2).	Abolished s.82 (2)	Abolished s36 (3).
Preference	No provision.	No provision.	No provision.
Miscellaneous notes	-	-	-

State or country and principal legislation.	South Australia Administration and Probate Act 1919	Tasmania Administration and Probate Act, 1935	Queensland The Succession Acts, 1867-1943
Real and personal estate to be assets for payment of debts.	s.46 (2) land shall be assets for payment of debts. s51 (1) gives personal representatives the same power to sell real estate to pay debts as he has in respect of personal estate.	s.32 (identical to Victorian provision above).	ss. 75-82 deal with rights of creditors to be paid out of real estate belonging to the deceased in certain cases.
Creditors to be treated as standing in equal degree and to be paid accordingly from legal and equitable assets but not to prejudice or affect any security.	s.59 (identical to s.36 (1) of Victorian provision above). s.62 (II) refers to removal of priority for judgment debts in cases of administration pursuant to: – (1) s.60; (2) s.85; (3) an order of the Supreme Court.	-	Specialty and Simple Contract Debts Equalisation Act, 1871 (identical to s.36 (1) of the Victorian provision above).
Administration in bankruptcy.	Part XI of the Bankruptcy Act 1966, (Cwth).	Part XI of the Bankruptcy Act 1966, (Cwth).	Part XI of the Bankruptcy Act 1966, (Cwth).
Outside formal administration in bankruptcy, priority is given to funeral, testamentary and administration expenses and the bankruptcy rules as to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and as to priorities of debts to apply in every case.	-	s.34 (1) and Part I of Second Schedule.	-
Bankruptcy rules applicable in other cases.	s.61 (identical to Western Australian provision but applies to administration - (1) by Public Trustee pursuant to s.71 (I) (2) by a personal representative pursuant to s.60; (3) pursuant to an order of the	-	s.51 of the Judicature Act 1876 (identical to Western Australian provision above. Although rules as to priority are not specifically mentioned their application was confirmed in <i>Re Moat</i> (1897) 8 QLJ 42).

	Supreme Court).		
State or country and principal legislation.	South Australia (cont.)	Tasmania (cont.)	Queensland (cont.)
Retainer	Abolished in cases where the estate is being administered – <ol style="list-style-type: none"> (1) pursuant to a Supreme Court order; (2) by the Public Trustee for the benefit of creditors where a person is believed to be dead (s.85); (3) under s.60 	Can be exercised in respect of all assets but only for debts owing to personal representative in his own right s.34.	No provision.
Preference	No provision.	Expressly recognised s.34.	No Provision.
Miscellaneous notes	s.79 (I) gives the Public Trustee the right to administer any deceased insolvent estate. s.60 gives any personal representative a right to file a declaration of insolvency with the registrar of probates. s.85 gives the Public Trustee the power to administer an estate for the benefit of creditors where a person is believed to be dead.	-	Specialty creditors still have priority in respect of payments from realty belonging to a deceased trader within the meaning of bankruptcy law.

State or country and principal legislation.	Australian Capital Territory Administration and Probate Ordinance, 1929.	Northern Territory Administration and Probate Act, 1891 (SA) as amended by Administration and Probate Ordinance 1928 (NT).	England Administration of Estates Act, 1925.
Real and personal estate to be assets for payment of debts.	ss.41 and 41A (identical to New South Wales provisions above).	s.64 (1) (identical to s.46 (2) of South Australian provision above). s.79 (1) (identical to s.51 (1) of South Australian provision above).	s.32 (identical to Victorian provision above).
Creditors to be treated as standing in equal degree and to be paid accordingly from legal and equitable assets but not to prejudice or affect any security.	s.55 (identical to Western Australian provision above).	s.74 (identical to s.36 (1) of Victorian provision above). s.78 (II) (identical to s.62 (II) of South Australian provision above).	Hinde Palmers Act, 1868 (32 and 33 Vic. C.46). Identical to s.36 (1) of Victorian provision above and has not been interpreted as interfering with priorities other than the priority of specialty debts, for instance the rule of priority for judgment debts – see E.I. Sykes, <i>Payment of Debts by Executors in Queensland (1955)</i> University of Queensland papers Vol. 1 No. 3 at p.11.
Administration in bankruptcy.	Part XI of the Bankruptcy Act 1966, (Cwth).	Part XI of the Bankruptcy Act 1966, (Cwth).	Part II of the Bankruptcy Act 1914.
Outside formal administration in bankruptcy, priority is given to funeral, testamentary and administration expenses and the bankruptcy rules as to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and as to priorities of debts to apply in every case.	s.41C and Part II of Fourth Schedule.	-	s.34 (1) and Part I of First Schedule.

State or country and principal legislation.	Australian Capital Territory (cont.)	Northern Territory (cont.)	England (cont.)
Bankruptcy rules applicable in other cases.	-	s.77 (identical to Western Australian provision above but applies to – (1) Administration by Public Trustee under s.48 (I); (2) Administration pursuant to s.76).	-
Retainer	Abolished s.55 (2).	Abolished by s.78 (I) in cases where the estate is being administered – (1) by the Supreme Court; (2) under s.50; (3) under s.76.	Abolished by s.10 of the Administration of Estates Act 1971 but a personal representative other than one who is administering solely by reason of being a creditor can pay his own debt provided the payment is made in good faith and at a time when there is no reason to believe that the estate is insolvent.
Preference	No provision.	No provision.	Abolished by s.10 of the Administration of Estates Act 1971 but any personal representative is excused liability for payments made to any creditor in good faith and at a time when there is no reason to believe that the estate is insolvent.
Miscellaneous notes	-	s.48 (I) is identical to s.79 (I) of South Australian provision above. s.76 is identical to s.60 of South Australian provision above. s.50 is identical to s.85 of South Australian provision above.	Hinde Palmer’s Act has been repealed as from 1925 and replaced by ss.33 and 34 of the Administration of Estates Act, 1925.

State or country and principal legislation.	New Zealand Administration Act 1969.		
Real and personal estate to be assets for payment of debts.	s.26		
Creditors to be treated as standing in equal degree and to be paid accordingly from legal and equitable assets but not to prejudice or affect any security.	s.33 (identical to s.36 (1) of Victorian provision above).		
Administration in bankruptcy.	Part XVII of the Insolvency Act 1967.		
Outside formal administration in bankruptcy, priority is given to funeral, testamentary and administration expenses and the bankruptcy rules as to the rights of secured and unsecured creditors, the debts and liabilities provable, the valuation of annuities and future and contingent liabilities and as to priorities of debts to apply in every case.	-		
Bankruptcy rules applicable in other cases.	s.31 makes it lawful for a personal representative to apply an insolvent estate in accordance with bankruptcy law as to priorities. s.32 insolvent estates administered pursuant to a Supreme Court order are to be administered under Part XVII of the Insolvency Act, 1967.		
Retainer	Abolished s.40.		
Preference	No provision.		
Miscellaneous notes	-		