



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 51**

**Unclaimed Money**

**WORKING PAPER**

**OCTOBER 1976**

## **TERMS OF REFERENCE**

The Commission has been requested to consider and report upon the subject of unclaimed money.

## **PREFACE**

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticism on individual issues raised in the working 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 Friday 14 January 1977.

Copies of the paper are being sent to the –

Albany Port Authority  
Aboriginal Affairs Planning Authority  
Associated Banks in W.A.  
Auditor General  
Bunbury Port Authority  
Chief Justice and Judges of the Supreme Court  
Citizens Advice Bureau  
Clough & Son Pty. Ltd.  
Commissioner for Corporate Affairs  
Commissioner of Police  
Consumer Affairs Bureau  
Co-operative Bulk Handling Ltd.  
Department of Local Government  
Esperance Port Authority  
Fremantle Port Authority  
Geraldton Port Authority  
Institute of Chartered Accountants  
Institute of Legal Executives  
Judges of the District Court  
Law School of the University of W.A.  
Law Society of W.A.  
Lotteries Commission  
Magistrates' Institute  
Master of the Supreme Court  
Parliamentary Commissioner for Administrative Investigations  
Port Hedland Port Authority  
Perpetual Executors, Trustees and Agency Company (W.A.) Ltd.  
Public Trustee  
Rural and Industries Bank  
Solicitor General  
State Treasurer  
Totalisator Agency Board  
Trades and Labour Council

Under Secretary for Law

W.A. Museum

West Australian Trustee, Executor and Agency Company Ltd.

Western Mining Corporation 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.

# CONTENTS

	Paragraph
<b>SUMMARY</b>	
<b>INTRODUCTION</b>	1 - 19
Trust money	2 - 4
Money payable pursuant to a contractual obligation	5 - 6
Money lost and found	7
Distinction between trust and non-trust money	8 - 9
Terminology	10 - 13
Legislation dealing with unclaimed trust money	14
Legislation dealing with unclaimed money other than trust money	15
The Unclaimed Moneys Act 1912	16 - 19
<b>PART A - THE UNCLAIMED MONEYS ACT 1912</b>	20 - 96
<b>THE OPERATION OF THE ACT</b>	20 - 34
General	20 - 24
The case of Co-operative Bulk Handling Ltd.	25 - 31
The financial details	32
The exceptions to the Act	33 - 34
<b>HISTORY OF THE ACT</b>	35 - 40
<b>SHOULD THE ACT BE REPEALED?</b>	41 - 46
<b>DISCUSSION OF THE ACT IF IT IS TO BE RETAINED</b>	47 - 96
The holder	48 - 64
(i) <i>Who is a holder of unclaimed money for the purposes of the Unclaimed Moneys Act?</i>	48 - 53
(ii) <i>Should the categories of persons to be regarded as holders be restricted?</i>	54
(iii) <i>Should the categories of persons to be regarded as holders be expanded?</i>	55 - 63
(iv) <i>The definition of holder in other jurisdictions</i>	64
Unclaimed money	65 - 76
(i) <i>What is unclaimed money within the meaning of the Act?</i>	65 - 69
(ii) <i>Should the operation of the Act in relation to unclaimed money be restricted?</i>	70 - 74
(iii) <i>The definition of unclaimed money in other jurisdictions</i>	75
(iv) <i>Trust money</i>	76
The procedure	77 - 93
(i) <i>Length of time unclaimed</i>	77 - 79
(ii) <i>Notice to claimant</i>	80 - 81

(iii) <i>Right to recover unclaimed money</i>	82 - 83
(iv) <i>Interest</i>	84 - 85
(v) <i>Procedure for recovery</i>	86 - 90
(vi) <i>Application of unclaimed money</i>	91 - 93
Voluntary payment of unclaimed money to the Treasurer	94 - 96
<b>PART B - OTHER LEGISLATION IN WESTERN AUSTRALIA DEALING WITH UNCLAIMED MONEY OTHER THAN TRUST MONEY</b>	97 - 102
<b>PART C - THE LAW IN WESTERN AUSTRALIA RELATING TO UNCLAIMED TRUST MONEY</b>	103 - 150
<b>EXISTING LEGISLATION</b>	103 - 105
(i) SHOULD THERE BE PROVISION REQUIRING OR AT LEAST ENABLING ALL PERSONS HOLDING UNCLAIMED TRUST MONEY TO PAY THE MONEY TO THE TREASURER?	106 - 127
Present situation in Western Australia	106 - 115
<i>Payment into Court</i>	109 - 112
<i>Administration by a trustee company</i>	113 - 115
Situation in other jurisdictions	116 - 121
<i>Victoria</i>	117 - 118
<i>Queensland</i>	119
<i>South Australia</i>	120
<i>New Zealand</i>	121
Discussion	122 - 127
(ii) SHOULD ALL UNCLAIMED TRUST MONEY BE AVAILABLE FOR PUBLIC PURPOSES PENDING A CLAIM BY THE BENEFICIARY?	128
(iii) DOES EXISTING LEGISLATION RECOGNISE AND GIVE ADEQUATE PROTECTION TO THE BENEFICIARY'S RIGHTS IN RESPECT OF UNCLAIMED TRUST MONEY?	129 - 150
Length of time unclaimed	129 - 130
Notice to the beneficiary	131 - 134
The beneficiary's right to recover unclaimed trust money from the Treasurer	135 - 139
The beneficiary's right to recover interest on his money from the Treasurer	140 - 144
Procedure for recovery	145 - 146
Indemnity against liability for mistaken payments	147 - 148
Unclaimed money held by trustees which is not payable to a beneficiary	149 - 150

<b>PART D - ISSUES FOR CONSIDERATION</b>	151 - 161
(a) The repeal of the Unclaimed Moneys Act	152 - 157
(b) The revision of the Unclaimed Moneys Act	158 - 159
(c) The consolidation of statutes relating to unclaimed money	160 - 161
<b>APPENDIX I</b>	The Unclaimed Moneys Act 1912
<b>APPENDIX II</b>	Details of unclaimed money paid to the Treasurer during the period 1 January 1974 to 30 June 1976
<b>APPENDIX III</b>	Legislation dealing with unclaimed money in specific circumstances
<b>APPENDIX IV</b>	Analysis of comparable legislation relating to unclaimed money in other jurisdictions
<b>APPENDIX V</b>	Legislation in Western Australia dealing with unclaimed trust money

## SUMMARY

This working paper is concerned with the situation where money is owed by one person to another but no claim for it is made.

Before summarizing the working paper it may be helpful to describe briefly the origin and effect of existing legislation in Western Australia dealing with this problem.

In the absence of statutory intervention, the liability to pay money owed may continue for an indefinite duration. However, there is legislation intervening. First in time was the *Limitation Act 1623* (UK) which became part of the law in Western Australia and is now embodied in the *Limitation Act 1935*. This provided a defence to any claim for money made after a certain time, normally six years, from the date the cause of action in respect of that claim arose. This defence was not available though, to a person who owed the money as a trustee to a beneficiary.

In 1912 the Parliament of Western Australia passed the *Unclaimed Moneys Act*. This Act requires, inter alia, all companies and certain persons (viz: persons carrying on business as traders and acting as agents for any person) in Western Australia to advertise in the *Government Gazette* details of all money of \$10 or more which has been owing to anyone but which has not been claimed for a period of six years. Any such money remaining unclaimed for one year after advertising is paid to the Treasurer. There are penalties for failure to comply.

The Treasurer pays the money he receives from this source each year (which over the past eight years has averaged approximately \$9,500), into a trust fund called the "Unclaimed Moneys Fund". The interest on this money is payable into the "Consolidated Revenue Fund" which is available for use for public purposes. The Government has taken the view that the provisions of the *Audit Act 1904* entitle it to transfer the capital as well as the interest from the Unclaimed Moneys Fund into the Consolidated Revenue Fund. A person who subsequently claims to be entitled to the capital may claim it from the Treasurer at any time.

Similar provisions apply to money held in estates under administration by the Public Trustee, and the two private trustee companies (the West Australian Trustee Company and the

Perpetual Trustees Company) and to public servants receiving money on behalf of others by virtue of their office. The latter situation may arise where the Director of Community Welfare has received wages or maintenance payable to a child under the control of the Department. However, there are important differences in all these provisions. For example, money is payable by the private trustee companies to the Treasurer if it is unclaimed for five years, not six. It is then paid into a trust fund administered by Treasury known as the "Testamentary Trust Fund". The money in this fund earns interest at the rate of three percent but it may be invested in Government securities thereby attracting a higher rate of interest. A beneficiary may recover his money and interest but his right to claim does not last indefinitely. In the case of money paid by the West Australian Trustee Company, the claim must be made within six years from the date payment was made to the Treasurer. In the case of the Perpetual Trustees Company, the beneficiary is allowed twelve years in which to make his claim. While there is no provision expressly providing for capital and interest in the Testamentary Trust Fund to be transferred into the Consolidated Revenue Fund, the Government's view is that the provisions of the *Audit Act* may permit this course so that the money can be used, pending a claim by a beneficiary, for public purposes.

In the case of the Public Trustee, money which is unclaimed for six years is paid directly into the Consolidated Revenue Fund. There is no statutory provision referring to the beneficiary's entitlement to claim the money but in practice and possibly in law the beneficiary would have an unlimited period to make his claim for the capital. The position regarding the beneficiary's right to interest is unclear, although present practice is not to allow interest.

There are also a number of specific statutory provisions both State and Commonwealth relating to the disposition of unclaimed money in special circumstances. They deal for example, with unclaimed money held by wharf authorities (e.g. *Albany Port Authority Act 1926*), unclaimed betting winnings (*Totalisator Agency Board Betting Act 1960*), and unclaimed dividends payable in respect of a bankrupt estate (*Bankruptcy Act 1966* (Cwth)) or a company in liquidation (*Companies Act 1961*). In these cases, provision is made for the money to be paid eventually into the Consolidated Revenue Fund. In other cases legislation provides for the person or body which owes the money to keep it if it is unclaimed for a certain period. This applies for example, to unclaimed money held by some banks (*Banking Act 1959* (Cwth)), a council pound (*Local Government Act 1960*), and by the coal mine workers' pension fund (*Coal Mine Workers (Pensions) Act 1943*).

Against this background to the existing legislation the following is a summary of the working paper.

In the introduction there is a discussion of the different legal relationships out of which a claim for money owed may be made. For example, the claim may be based on contract, trust or in tort as where the owner claims money which has been found. Having regard to the distinction between trust and non-trust money, consideration is also given to the consequences which would occur in the event that no claim is made.	<b>Paragraph reference</b> 1 - 13
This is followed by a summary of legislation dealing with unclaimed money and the division of the subject into three parts as follows.	14 - 19

## **PART A - THE UNCLAIMED MONEYS ACT 1912**

The application of the Act and its financial implications are discussed. Particular consideration is given to the reasons which in 1975 gave rise to the payment of unclaimed money totalling \$71,000 from Co-operative Bulk Handling Ltd. to the Treasury.	20 - 34
A review of the history of the Act reveals that it was passed in order to prevent unclaimed money held in bank accounts from becoming part of the general profits of the bank (e.g. by the deduction of annual bank charges).	35 - 40
As money in bank accounts, (with the exception only of money held on current account with the Rural and Industries Bank) does not fall within the <i>Unclaimed Moneys Act</i> and as there is no explanation or reason for the wider application of the Act it is suggested that the Act should be repealed.	41 - 43

The arguments in favour of repeal are –

- (1) The anomalous nature of the Act when viewed against the policy and effect of the *Limitation Act 1935*.

- (2) The removal of the administrative burden it imposes on companies and firms falling within its provisions.
- (3) The removal of theoretical and practical difficulties in implementing and enforcing the Act.

44

Alternatively if the Act is to be retained the reasons for doing so should be clarified. Several reasons are suggested but none provides a complete explanation, e.g. –

- (1) The Act provides a minor source of revenue but only at the expense of a section of the community selected without reasons.
- (2) The Act gives publicity to money owed to persons who may otherwise be unaware of this fact. This does not, however, explain why the person who owes the money should have to pay it to the Treasurer. It also does not explain why a defence based on the *Limitation Act* should not still apply. Lack of knowledge of the existence of a claim is also a problem which could arise in a much wider range of situations than those which fall within the Act.
- (3) Payment to the Treasurer provides a permanent and secure fund to meet the late claimant's claim. However if the liquidity of the holder were a problem earlier payment to the Treasurer would be expected and again there is no obvious link between any such need and the money owed which presently falls within the operation of the Act.

- (4) The Act may play a useful role in cases where there is no defence available based on the *Limitation Act* because time does not commence to run until a claim has been made. However, this is a problem which would arise in a much narrower range of situations than is covered by the Act, and consequently could be met by more specific legislation.

45

If it is decided to retain the Act the following suggestions are made as to possible amendments having regard to comparative legislation in other jurisdictions.

- (1) With regard to the persons who owe the money –

- (a) The phrase "persons or firms carrying on business as traders and acting as agents or private bankers for any person" is obscure and could give rise to difficulties in practice. It could be replaced by specific reference to the categories of firms and persons to which the Act is intended to apply.

48 - 53

- (b) It is noted that in some jurisdictions only companies fall within the provisions of equivalent legislation. Similar restrictions to the application of the Western Australian Act could be made.

54

- (c) Alternatively, the categories of persons falling within the Act could be expanded to include, for example, not only companies but all firms and unincorporated associations whatever their business. Even persons who find large sums of money could be included. An analogy for the latter proposal exists in the law applicable to money alleged to have been stolen and treasure trove. Money falling within either category is already payable to the Treasurer.

55 - 63

(2) With regard to the unclaimed money –

(a) The Act could be more specific as to the circumstances in which money owed by a company or body falling within the provisions of the Act should be paid to the Treasurer. For example -

(i) Difficulties may arise when the amount owed is not certain.

66

(ii) It is not clear whether the Act is intended to apply to all money owed by a firm or person carrying on business as a trader and acting as an agent for any person, or whether it is intended to be restricted to money owed in the capacity of an agent.

67 - 68

(iii) It is not clear whether the Act is intended to apply only to unclaimed money arising out of a transaction or relationship entered into in Western Australia, or whether it is intended to have wider application.

69

(b) The operation of the Act could be restricted by -

(i) Exempting sums of less than say \$200 from payment to the Treasurer. At present the figure is \$10 but this was fixed in 1912. If publicity were considered to be an important feature of the Act this could still be required for sums of not less than say \$40.

70 - 71

(ii) Excluding, as a matter of policy, money which is distributable as part of a company's profits (e.g. dividends and rebate distributions). Such a measure has recently been adopted in New Zealand.

72 - 73

(iii) Amending the Act so that it applies only to unclaimed distributions from the profits of a company as in the Australian Capital Territory and the Northern Territory. 74

(iv) Excluding unclaimed trust money. Trust money could be treated separately in accordance with proposals suggested in Part C. 76

(3) With regard to the procedure –

(a) The six year period presently allowed for claims, before the money becomes unclaimed for the purposes of the Act, may be more suitable than alternatives such as a time limit based on the expiry of the limitation period, or the expiration of a shorter period (e.g. one year). 77 - 79

(b) Advertising in newspapers as well as, or, in place of, the present notice in the *Government Gazette* may be desirable, and such advertising could be carried out much earlier than it is at present (e.g. after six months or one year from the date a claim for the money could have been made). Provision for further steps to notify claimants of their rights could be considered. 80 - 81

(c) Although inconsistent with the policy and effect of the *Limitation Act*, the claimant should have a continuing claim against the Treasurer. This may, at least, be more desirable than to allow the Treasurer to set up a defence based on lapse of time. 82 - 83

(d) The allowance of interest, particularly on large sums of unclaimed money, could be considered, but may be

regarded as an unnecessary extension to the Act blurring even further the distinction between trust and non-trust money.

84 - 85

(e) There may be a case for providing controls in respect of any decision by the Treasurer as to whether he should or should not admit a claim by a particular claimant. provision for appeals against any decision already made, or, for applications to an independent tribunal to seek directions in difficult or unusual cases, may be desirable. Subject to these provisions, if necessary, the Treasurer could continue to enjoy indemnity against liability for mistaken payments.

86 - 90

(f) Unclaimed money in the hands of the Treasurer could be paid immediately into the Consolidated Revenue Fund so that there can be no doubt that both interest and capital are available for public purposes.

91 - 93

It is noted that in some other jurisdictions, namely Victoria, South Australia and New Zealand, there is provision for voluntary payment of unclaimed money by persons who do not fall within the relevant legislation. The situation might arise where the person owing the money has no desire to defend any claim to it when made, and may have no wish to retain the money in the meantime. Provision could be made for this contingency in Western Australia and there may be no need to wait for the expiration of six years before payment to the Treasurer could be made.

94 - 96

## **PART B - OTHER LEGISLATION IN WESTERN AUSTRALIA DEALING WITH UNCLAIMED MONEY OTHER THAN TRUST MONEY**

There is a brief analysis of the specific statutory provisions both State and Commonwealth dealing with the disposal of unclaimed money in certain situations. Some of these State provisions could perhaps be amalgamated

with the *Unclaimed Moneys Act* but much depends on the policy of the legislation concerned. Such a proposal would also be unsuitable where the legislation allows the body which owes the money to retain it after a specified period. The Commission invites comment.

97 - 102

### **PART C - THE LAW IN WESTERN AUSTRALIA RELATING TO UNCLAIMED TRUST MONEY**

Legislation requiring unclaimed trust money to be paid to the Treasurer provides a useful role. Because there is no time limit to a claim to recover trust money retained by a trustee, the alternative may be for money to remain invested for an indefinite duration. It may therefore seem appropriate to provide for all unclaimed money to be paid to the Treasurer to be used for public purposes but at the same time recognising and giving adequate protection to the rights of beneficiaries.

Existing legislation in Western Australia dealing with unclaimed trust money fails to meet these goals. It only applies to the Public Trustee, the two private trustee companies and public servants receiving money for others by virtue of their office. It is not clear in every case whether the Treasurer may use the money for public purposes, and in some respects it does not recognise and give adequate protection to beneficiaries' rights.

103 - 105

There is no provision requiring or enabling other trustees to pay unclaimed trust money to the Treasurer. At present they may –

- (1) Apply for a Supreme Court order to distribute property belonging to a missing or unknown beneficiary to other beneficiaries. If there are no beneficiaries or next of kin, the property may be escheated to the Crown.

107

- (2) Pay the money into the Supreme Court from where it is paid to the Public Trustee and retained by him indefinitely.

109 - 112

- (3) Arrange for a trustee such as the Public Trustee or the two

private trustee companies to become trustee. In this case payment to the Treasurer could be made pursuant to the specific provisions applicable to unclaimed trust money held by these institutions

113 - 114

In several other jurisdictions, trustees are either compelled or enabled to pay unclaimed trust money direct to the Treasury.

116 - 121

It is suggested that all trustees could be enabled rather than compelled to pay unclaimed trust money direct to the Treasurer as a further alternative to those specified above. Suitable provision could be made for this money (including that held by the Public Trustee, the two private trustee companies and public servants by virtue of their office) in a special section of a revised *Unclaimed Moneys Act* if this Act were to be retained in any form. Otherwise provision could be made in the *Trustees Act*.

122 - 127

It is suggested that pending a claim by a beneficiary, unclaimed trust money held by the Treasurer should be available for use for public purposes. Accordingly any doubt as to whether this can be done in respect of money paid by the private trustee companies should be removed.

128

Finally, with regard to the protection of the beneficiaries' interests, the following suggestions are made.

(1) Trust money could be regarded as unclaimed if no claim is made for six years in every case.

129 - 130

(2) Trustees might be required to insert an advertisement in the newspaper giving publicity to any transfer of trust money to the Treasurer.

131 - 134

(3) There ought to be no time limits imposed on the beneficiaries' right to recover the trust money from the Treasurer.

135 - 139

(4) Interest could be allowed on trust money recovered from the

Treasurer. 140 - 144

(5) The Treasurer could be regarded as a trustee in respect of unclaimed trust money which has been paid to him. Accordingly, his decision whether to pay a beneficiary could be reviewed by the court, but he would be entitled to seek directions from the court in difficult cases. 145 - 146

(6) If the Treasurer were regarded as a trustee he would be liable for a mistaken payment made without seeking directions of the court. 147 - 148

The procedure suitable for unclaimed trust money may only be suitable for trust money payable to a beneficiary. Alternative provisions could apply to trust money owed say to a creditor. 149 - 150

#### **PART D - ISSUES FOR CONSIDERATION**

The Commission outlines the following three broad proposals and summarises the particular issues relevant to each –

- (1) The repeal of *the Unclaimed Moneys Act*.
- (2) The retention of the *Unclaimed Moneys Act* but in a revised form.
- (3) Consolidation of the law by incorporating into the *Unclaimed Moneys Act* a special section for unclaimed trust money. 151-161

## INTRODUCTION

1. There is a variety of circumstances in which a person or a company may come into possession of money which another person has a right to claim. For example, he may hold the money as a trustee, or he may owe the money pursuant to some contractual undertaking, or he may find the money. The capacity in which possession of the money is acquired is important, as upon this depends the rights and obligations of the holder, and of the person entitled to claim the money.

### Trust money

2. There is a fundamental and important distinction between money held by a trustee and other money which a person is entitled to claim. Trust money is in equity the property of the beneficiary. If it is unclaimed, the trustee cannot keep it or use it for his own purposes. He is obliged to retain the money for the beneficiary. In addition, he is subject to strict duties as to the investment and care of the money and he must always act in the best interests of the beneficiary. If the trustee becomes bankrupt, any property he holds on trust for another is excluded from his assets divisible amongst his creditors.<sup>1</sup>

3. There is no limit to the time in which a beneficiary can recover his money from the trustee. Although a trustee is generally entitled to plead lapse of time as a defence pursuant to the provisions of the *Limitation Act 1935*, there is an exception where the claim "...is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use...".<sup>2</sup> The word "trustee" is defined to include express, implied and constructive trustees.<sup>3</sup> However, In *Taylor v Davies*, the Privy Council limited the extension to constructive trustees in the following way -<sup>4</sup>

"The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases

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<sup>1</sup> *Bankruptcy Act 1966* (Cwth), s.116(2)(a).

<sup>2</sup> *Limitation Act 1935*, s.47(1). See also s.25(2) of the *Supreme Court Act 1935*, which removes any limitation period in respect of a claim to recover property held on express trust.

<sup>3</sup> *Limitation Act 1935*, s.47(3).

<sup>4</sup> [1920] AC 636 at 653.

where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction."

4. Consequently the trustee's responsibility to the beneficiary will last until he pays the beneficiary in terms of the trust, or, until that responsibility is transferred to someone else.<sup>5</sup> In exceptional cases, a trustee may be able to defeat a claim by the beneficiary by pleading the equitable doctrine of laches.<sup>6</sup> Being an equitable defence, and therefore within the discretion of the court, it is not possible to define the circumstances where it will succeed. However, it seems that the basis for the defence arises when a beneficiary goes to sleep on his rights and can be said to have either acquiesced in the trustee's continued retention of the trust property, or has allowed a situation to develop where it would be inequitable to require the trustee to return it.<sup>7</sup>

### **Money payable pursuant to a contractual obligation**

5. Money owing pursuant to a contractual obligation is not the property of the claimant. It remains the property of the holder until it has actually been paid to the claimant and the holder may in the meantime use the money in whatever way he wishes. If the holder goes bankrupt before payment is made, there is no money which belongs to the claimant. He is left simply with a claim against the bankrupt estate.

6. Unlike a beneficiary, a person claiming money owing pursuant to the provisions of a contract may have his claim defeated if it is not brought within the time permitted by the *Limitation Act 1935*. For three reasons, policy requires that there must be an end to the period in which claims can be made to recover money in these circumstances. These reasons are -<sup>8</sup>

- "1. that long dormant claims have more of cruelty than justice in them,
2. that a defendant might have lost the evidence to disprove a stale claim, and
3. that persons with good causes of action should pursue them with reasonable diligence."

Consequently, s.38(c)(v) of the *Limitation Act 1935* provides a defence to any claim based on simple contract if the action is not brought within six years from the date the cause of action

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<sup>5</sup> This could occur for example as a result of his death, incapacity or retirement.

<sup>6</sup> Section 28 of the *Limitation Act 1935* expressly preserves this defence

<sup>7</sup> See *Hourigan v Trustees Executors and Agency Co. Ltd.* (1934) 51 CLR 619 where a beneficiary's claim against an express trustee was barred by operation of the doctrine.

<sup>8</sup> See Halsbury's *Laws of England* (3rd ed. 1958) Vol. 24 at 181, paragraph 330.

arose. In the case of an action of debt upon any bond or other specialty or upon any recognizance, the period allowed is twenty years.<sup>9</sup> If the defence under the *Limitation Act* is successful the money remains the property of the holder and is freed from the threat of any claim.

### **Money lost and found**

7. Money which is lost is treated in much the same way as money owing pursuant to a contractual obligation. There is a difference in that money lost was at one time in the possession of the claimant and his claim is to recover the equivalent of what he once had. However, the finder, or some other person who in law may be given rights superior to those of the finder, acquires a good title as against all but the true owner. To recover the money, the person who lost it must make a claim for its return. The success of his claim may depend, as it does if made in contract, on whether it is made within the limitation period of six years<sup>10</sup> and payment in full will depend upon the solvency of the holder. If a claim is never made or is made too late, the money remains the property of the holder and continues to be available for his own private use.

### **Distinction between trust and non-trust money**

8. The distinction between money held in trust which is owing to a beneficiary and money which is otherwise owing to a claimant may be difficult to draw in many cases. This is especially so when the word "trust" encompasses implied and constructive trusts. It would be inappropriate, even if it were possible, to attempt to define here the situations where a trust in its broadest sense may arise. The most obvious case is where a trust is created by an express arrangement between the parties. In other situations, a trust may be implied to give effect to the presumed intention of the parties, or it may be imposed in equity as a remedy irrespective of their intentions, actual or presumed, and sometimes even in opposition to those intentions.

9. A trust cannot be defined by giving examples either of what is, or of what is not, a trust situation. However, it is appropriate, in view of subsequent discussion in this working paper, to stress that the relationship between banker and customer in relation to unclaimed deposits, employer and employee in relation to unclaimed wages and company and

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<sup>9</sup> *Limitation Act 1935*, s.38(e).

<sup>10</sup> *Ibid.*, s.38(c)(iv).

shareholder in relation to unclaimed dividends, is a relationship founded in contract and not trust.<sup>11</sup>

## Terminology

10. The Commission has endeavoured to maintain this important distinction between unclaimed trust money and other unclaimed money throughout this working paper. In the case of trust money, the terms "trustee" and "beneficiary" have been adopted to describe the interested parties. It is more difficult to describe the persons interested in other unclaimed money. Although the terms "holder" and "claimant" have been adopted, this is for convenience rather than for their precise meaning as both words are apt to lead to confusion. For example, the word "holder" presupposes that there is an identifiable or specific sum of money ear-marked for the claimant. In fact, there may be no money in a physical sense at all. A person still owes money to his creditors even if his only asset is an interest in land and he has no money as such. The same applies to a person who is bankrupt. The term "holder" is therefore used to describe "the person who owes the money".

11. The word "claimant" presupposes that a claim has been made for the money. If this were the case, money could no longer be accurately described as **unclaimed** money. A more precise expression would be "potential claimant", or "person having a right to claim money", and it is in this sense that the word "claimant" is used.

12. Similarly, to emphasise the legal distinction between unclaimed trust money and other unclaimed money, the Commission has refrained from using expressions such as "the claimant's money", or "money held for or on behalf of the claimant", or "money belonging to the claimant". Whilst it is accurate to speak of trust money as "belonging to the beneficiary" or as "the beneficiary's money" in equity, this is not the case when speaking of other unclaimed money. The claimant of this money has nothing more than a legal right to claim the money. Whether he is entitled to it may in the end depend upon a decision by a court of law.

13. At this stage in the absence of any legislation dealing specifically with unclaimed money, one would expect that unclaimed trust money would have to be retained indefinitely by the trustee, whilst unclaimed money which is not trust money would remain the property

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<sup>11</sup> See generally Halsbury's *Laws of England* (3rd ed. 1958) vol. 24 at 282-283 paragraph 558.

of the holder. If statutory intervention were required, it could provide for some worthwhile use for unclaimed trust money pending the making of a claim. The need for such legislation may be considered to be even more appropriate in cases where there is a good chance that the trust money will never be claimed at all. For example, the money may be held in circumstances where the beneficiary is somewhere overseas, is not expected to return, and there is no known person in communication with him.

### **Legislation dealing with unclaimed trust money**

14. There are several statutes requiring unclaimed trust money to be paid to the Treasurer.<sup>12</sup> However, these statutes do not appear to have been enacted to meet the needs expressed above. The relevant legislation will be discussed more fully in this working paper, but by way of introduction a summary of the possible anomalies arising out of the existing legislation is as follows -

- (a) The legislation does not apply to unclaimed trust money held by all trustees. It applies only to unclaimed trust money held by the Public Trustee and the two private trustee companies (namely the West Australian Trustee Executor and Agency Co. Ltd.<sup>13</sup> and the Perpetual Executors Trustees and Agency Co. (W.A.) Ltd.<sup>14</sup>), and to money held by public servants on behalf of others by virtue of their office. There is no provision *requiring* other trustees to pay unclaimed trust money to the Treasurer. Furthermore there appears to be no satisfactory provision *enabling* other trustees to discharge themselves from their continuing responsibility with regard to unclaimed trust money in any similar way.
- (b) Although the two private trustee companies are required to pay unclaimed trust money to the Treasurer, this money is directed to be paid into a special, trust fund known as "the Testamentary Trust Fund" administered by Treasury. Although the matter is not free from doubt, it seems that the money in this fund

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<sup>12</sup> The *Public Trustee Act 1941*, the *West Australian Trustee Executor and Agency Co. Ltd. Act 1893*, the *Perpetual Executors, Trustees and Agency Co. (W.A.) Ltd. Act 1922* and the *Audit Act 1904*.

<sup>13</sup> Referred to in this working paper as the "West Australian Trustee Co."

<sup>14</sup> Referred to in this working paper as the "Perpetual Trustees Co."

cannot be paid into the Consolidated Revenue Fund and consequently may not be available for use for public purposes.

- (c) In some respects the existing legislation may fail to recognise and give adequate protection to the beneficiary's rights in respect of unclaimed trust money. This may particularly apply to the procedure for disposing of unclaimed trust money, the beneficiary's entitlement to interest on his money and his right to recover his money and interest thereon from the Treasurer.

### **Legislation dealing with unclaimed money other than trust money**

15. There are specific provisions in a number of Acts dealing with unclaimed money payable to the Treasurer in certain situations. For example, there is legislation which enables goods left on wharves, or left with bailees in the course of business for inspection, custody, storage, repair or other treatment, to be sold.<sup>15</sup> In such a case the holder of the goods is entitled to deduct any money owing to him and any surplus from the proceeds of sale, if unclaimed, is payable to the Treasurer. Other categories of unclaimed money which are payable to the Consolidated Revenue Fund include unclaimed betting winnings<sup>16</sup> and unclaimed dividends payable in respect of a bankrupt estate<sup>17</sup> or company in liquidation.<sup>18</sup> In other cases there is legislation entitling the holder to keep unclaimed money. For example, in some cases money held in a bank account if unclaimed for a certain time may be used by the bank concerned for its own purposes.<sup>19</sup> Unclaimed money held by a poundkeeper may become the property of the council,<sup>20</sup> and unclaimed coal mine worker's pensions may become part of the general pension fund.<sup>21</sup> The Commission is not aware of any difficulties or problems arising out of the operation of any of these specific provisions, but invites comment.

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<sup>15</sup> Such legislation exists for major ports in Western Australia. Particulars are set out in Appendix III. See also the *Disposal of Uncollected Goods Act 1970*, s.28 and the *Warehousemen's Liens Act 1952*, s.10.

<sup>16</sup> *Totalisator Agency Board Betting Act 1960*, s.23(3).

<sup>17</sup> *Bankruptcy Act 1966* (Cwth), s.254.

<sup>18</sup> *Companies Act 1961*, s.286.

<sup>19</sup> *Rural and Industries Bank Act 1944*, s.65V, and the *Commonwealth Banks Act 1959* (Cwth), s.53.

<sup>20</sup> *Local Government Act 1960*, s.457.

<sup>21</sup> *Coal Mine Workers (Pensions) Act 1943*, s.20(6).

## **The Unclaimed Moneys Act 1912**

16. The principal legislation dealing with unclaimed money is the *Unclaimed Moneys Act 1912*. This Act requires companies and certain firms in Western Australia to pay all unclaimed money whatsoever to the Treasurer. The Treasurer pays the money into a special trust fund known as the "Unclaimed Moneys Fund". The object of this Act seems to be to keep the money available for the claimant but in the meantime to allow the Treasurer to use the interest on the money for public purposes. The same doubt which surrounds the legality of the use for public purposes of unclaimed trust money paid into the Testamentary Trust Fund by the two private trustee companies<sup>22</sup> arises as to whether capital in the Unclaimed Moneys Fund is available for the same purpose.

17. The *Unclaimed Moneys Act* is surprising not only for its wide application but also because the money which is required to be paid to the Treasurer is not trust money. It may be possible for a company to hold money on trust, in which case, if it is unclaimed, it would presumably be payable to the Treasurer pursuant to the provisions of the *Unclaimed Moneys Act*.<sup>23</sup> However, this would be exceptional. In the last three years at least, the money which has been paid to the Treasurer pursuant to the provisions of the *Unclaimed Moneys Act* has been money owing pursuant to contractual obligations of various kinds. The most common examples have been unclaimed wages and unclaimed share dividends. In short, the *Unclaimed Moneys Act* treats money owing in contract in certain situations as if it were trust money. For example, it negatives the application of the provisions of the *Limitation Act* to this money, and, contrary to what would be normal commercial expectations in the absence of the *Unclaimed Moneys Act*, it deprives the holder of his money, gives it to the Treasurer and allows the claimant an unlimited period in which to make a claim for it.

18. The continued retention of this Act in its present form raises an important question of policy. It is debatable whether there is a need for this legislation today. Even if the object of the Act is accepted for certain categories of unclaimed money, consideration could be given to the possibility of improving the procedure laid down by the Act for the disposition of the unclaimed money which would give better effect to that object.

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<sup>22</sup> See paragraph 14(b) above.

<sup>23</sup> This would not apply to trust money held by the two private trustee companies. These companies are bound by specific legislation already referred to in paragraph 14 above.

19. Because of the relative importance of the *Unclaimed Moneys Act* it is proposed to deal with this legislation separately in Part A of this working paper.

Other legislation dealing with unclaimed money which is not trust money is considered in Part B.

The law relating to unclaimed trust money is examined in Part C.

Part D consists of a short conclusion in which the main issues raised by the working paper are summarised.

## **PART A - THE UNCLAIMED MONEYS ACT 1912**

### **THE OPERATION OF THE ACT**

#### **General**

20. A copy of the Act is attached as Appendix I. In January of each year, companies are required to enter unclaimed money of \$10 or more in a register.<sup>1</sup> "Companies" are defined in the Act as companies incorporated in or carrying on business in Western Australia and include liquidators, banks, life assurance companies, building societies and "every person or firm carrying on business as traders in Western Australia, and acting as agents or private bankers for individuals or companies".<sup>2</sup> "Unclaimed money" is defined as "dividends, bonuses, profits and sums of money whatsoever" which have been unclaimed for a period of six years from the date on which they became payable.<sup>3</sup>

21. Before 15 February in the year of entry in the register, details of the money so held must be advertised in the *Government Gazette*.<sup>4</sup> If no claims are made for one year after advertising, the money is paid to the Treasurer and credited to the Unclaimed Moneys Fund.<sup>5</sup> Interest on the money is paid into the Consolidated Revenue Fund.<sup>6</sup> There is some uncertainty as to what happens to the capital. It is clear from reading the Parliamentary Debates at the time the Act was passed that the intention was for the capital to remain in the Unclaimed Moneys Fund.<sup>7</sup> The claimant was to have an unlimited period in which to make a claim for any money in that fund. However, the Act is ambiguous on this latter point. Section 8 provides that the Treasurer shall pay the money to any person on being satisfied that he is entitled to it. Section 11 provides that money may be recovered by the claimant at any time before it is paid to the Treasurer but not afterwards, any rule of law to the contrary notwithstanding. It is this provision which negatives the operation of the *Limitation Act 1935*. The Government of the day maintained<sup>8</sup> that it was obvious that s.11 was referring to the claimant's right to claim the money from the holder. The Opposition disagreed and suggested that the apparent inconsistency be removed by adding the words "from the

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<sup>1</sup> *Unclaimed Moneys Act 1912*, s.3.

<sup>2</sup> *Ibid.*, s.2.

<sup>3</sup> *Ibid.*, s.2.

<sup>4</sup> *Ibid.*, s.4 (a).

<sup>5</sup> *Ibid.*, s.6(1).

<sup>6</sup> *Ibid.*, s.6(2).

<sup>7</sup> See Hansard *Parliamentary Debates of Western Australia* (1912 No.2) Vol. 43 at 1497.

<sup>8</sup> *Ibid.*, at 1503.

company" after the word "recovered" where it appears in s.11.<sup>9</sup> The suggestion was rejected<sup>10</sup> and the apparent conflict between the two provisions remains.

22. There may be doubt as to whether money in the Unclaimed Moneys Fund is payable after a period of time into the Consolidated Revenue Fund thereby becoming available for use for public purposes. The Parliamentary Debates reveal an intention to retain the money in the Unclaimed Moneys Fund.<sup>11</sup> However, the Government's practice, relying on the provisions in the *Audit Act 1904*, is to pay the money into the Consolidated Revenue Fund after it has remained in the Unclaimed Moneys Fund for six years. While it may be sensible for this money to be put to good use rather than for it to remain idle in a special trust fund, there is doubt as to the legality of this practice.

23. Details of the money advertised pursuant to the provisions of the *Unclaimed Moneys Act* over the last three years are contained in Appendix II. It will be seen that during this period the most common type of unclaimed money was wages. For each employee these usually amount to a sum of less than \$50 but in many cases such amounts accumulate into relatively large sums of money. For example, in 1974 Clough & Son Pty. Ltd. advertised unclaimed wages totalling more than \$2,000, and a similar figure was advertised this year by Western Mining Corporation Ltd. Unclaimed wages usually arise where a casual employee leaves his employment on a day's notice or less, with no forwarding address, and without realising that he is entitled to a final pay. However, the Commission has been advised that many awards now provide that an employer is obliged to pay retrospective pay increases to employees who have since left his employment and it may be expected that this will be a source of a substantial amount of unclaimed money in the future.

24. Unclaimed dividends and distributions from co-operative ventures also predominate. In this case a dividend cheque sent out by the company may be returned marked "address unknown". The company may have no other way of locating the shareholder, and the shareholder, being unaware that a dividend has been declared, may have no reason to make contact again with the company.

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<sup>9</sup> Idem.

<sup>10</sup> Ibid., at 1504.

<sup>11</sup> Ibid., at 1497.

### **The case of Co-operative Bulk Handling Ltd.**

25. The most notable case of unclaimed money in recent years arose in 1975 when Co-operative Bulk Handling Ltd. advertised unclaimed money totalling over \$200,000 in the *Government Gazette*. Some of this money consisted of unpaid wages, but most of it was described as debenture redemptions and rebate distributions. A survey of the history of this matter shows how this considerable sum arose.

26. In order to build up capital, Co-operative Bulk Handling Ltd. levies a toll of 5c per bushel of grain it handles.<sup>12</sup> This toll is payable by the grower and refundable to him in due course in the form of a debenture. These tolls were accumulated, as the company was entitled to do under the *Bulk Handling Act*,<sup>13</sup> for fifteen years from 1943 to 1958. In 1958 debentures were issued for the tolls received during these fifteen years. The issue of these debentures was also governed by the *Bulk Handling Act* and they were redeemable by ballot during the next fifteen years, that is from 1958 to 1973. In fact, the company decided to redeem all debentures within ten years, that is by 1968. When a debenture holder's group came up in the ballot a letter was sent to him asking him to send in his debenture and on receipt of the debenture a cheque would be issued. In many cases the letters were returned to the company - "address unknown". In some cases cheques were sent out but were never cashed. By 1968, when all debentures were to have been repaid, there was a substantial amount left owing to persons who could not be located. As this money appeared to fall within the provisions of the, *Unclaimed Moneys Act* it was retained for six years, that is until 1974, then in March 1975 it was advertised in the *Government Gazette*.

27. The company is still charging tolls and repaying these in the form of debentures but the procedure for repayment has been amended. Tolls are now accumulated over a ten year period rather than fifteen years. Debentures are then issued, but, although they are still redeemable over a ten year period, the ballot system has been replaced, and they are all repaid each year on a pro rata basis. The last series of debentures was issued in 1968 and each year for the period from 1968 to 1978 all debenture holders will have received and will receive 1/10th of the value of their debenture. By keeping constant contact with debenture holders in this way it is hoped that the amount of unclaimed debenture redemptions in the future will be reduced.

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<sup>12</sup> *Bulk Handling Act 1967*, s.31(1).

<sup>13</sup> At that time the *Bulk Handling Act 1935*.

28. Rebate distributions used to arise each year. A grower would be paid a flat rate per bushel for the grain he delivered to co-operative Bulk Handling Ltd. At the end of each year if there was a surplus profit from the sale of grain, this would be distributed to the growers in amounts proportionate to the grain supplied. The company was liable to Commonwealth tax and these payments to growers were deductible for this purpose from the company's income. Two years ago, the company's liability for Commonwealth tax was removed so that the present practice is to retain these profits. The money is now used for building purposes, to help repay company liabilities including its liability to redeem debentures, and to maintain adequate reserves of capital. Consequently there will be a sharp reduction in future unclaimed rebate distributions.

29. Unclaimed wages advertised by Co-operative Bulk Handling Ltd. were, in most, if not all cases, owing to casual employees, many of whom were Aborigines.

30. Although the *Unclaimed Moneys Act* only requires advertising in the *Gazette*,<sup>14</sup> Co-operative Bulk Handling Ltd. desired to ensure that as many as possible of these persons to whom money was owed were paid. It was considered that advertising in the *Gazette* was inadequate by itself for this purpose. Consequently the company informed Members of Parliament in the various districts of the problem and asked them to give publicity to the fact that this money was owed. Every time a person coming from the same district and having a similar name to that of an unpaid debenture holder called at the company's office, that person was asked if he knew the unpaid debenture holder and of his whereabouts. Notices were published in the newspaper drawing attention to the detailed lists of names which appeared in the *Gazette*. The company would have preferred to have been able to publish full details of the names in the newspaper. However, the cost would have been considerable. There is provision in the *Unclaimed Moneys Act* entitling the company to deduct the expenses of advertising in the *Gazette* from unclaimed money<sup>15</sup> but there was, and still is, no provision for any further deductions.

31. As a result of all this publicity, of the \$200,000 which was advertised in March 1975, \$129,000 was paid to claimants, and \$71,000 was paid as unclaimed money to the Treasurer.

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<sup>14</sup> *Unclaimed Moneys Act 1912*, s.4(a).

<sup>15</sup> *Ibid.*, s.6(3).

## **The financial details**

32. As at 7 April 1976 the Treasurer was holding a total of more than \$159,000 in the Unclaimed Moneys Fund. This figure includes the sum received from Co-operative Bulk Handling Ltd. Having regard to the fact that money which has remained in the Fund for six years is in practice paid into the Consolidated Revenue Fund<sup>16</sup> it can be assumed that since 1912, when the *Unclaimed Moneys Act* was passed, the total revenue from unclaimed money has been substantial. From figures published in the *Government Gazette*, the average annual payment to the Unclaimed Moneys Fund for the last eight years has been \$9,696. Figures going back beyond 1967 are difficult to obtain, but the Treasurer has advised that from 1 July 1967 to 30 June 1975 a total of \$77,170 was paid into the Consolidated Revenue Fund. During this same period, \$6,701 was paid out to successful claimants and \$63,714 was transferred into the Consolidated Revenue Fund. The Treasurer also advises that claims are only paid on presentation of proof of entitlement and are usually supported by a letter from a firm verifying entitlement.

## **The exceptions to the Act**

33. The Act specifically does not apply to savings accounts in the Government Savings Bank (now the Rural and Industries Bank of Western Australia) or money payable by the trustee companies or by any company or liquidator of any company or any trustee of a bankrupt's estate.<sup>17</sup> Each of these situations is the subject of specific legislation. In the case of the trustee companies, this legislation is considered together with other provisions relating to unclaimed trust money in Part C of this working paper. The legislation relevant to the remaining situations is set out in Appendix III and is discussed briefly in Part B of this working paper.

34. In addition there are two situations where money which originally fell expressly within the operation of the Act is now the subject of Commonwealth legislation. The first concerns money held in bank accounts other than in the Rural and Industries Bank.<sup>18</sup> The second concerns unclaimed money held by life insurance offices.<sup>19</sup>

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<sup>16</sup> See paragraph 22 above.

<sup>17</sup> *Unclaimed Moneys Act 1912*, s.10.

<sup>18</sup> This is discussed in more detail in paragraph 43 below.

<sup>19</sup> This is now the subject of s.106 of the *Life Insurance Act 1945* (Cwth) - see Appendix III.

## HISTORY OF THE ACT

35. In the introduction to this working paper the distinction between trust money and money owing to a claimant was stressed.<sup>20</sup> It is an understandable policy that unclaimed trust money should be paid to the Treasurer for public purposes pending a claim being made. This is because a trustee is not entitled to use trust money for his own or for any other purposes unless this is authorised by the trust instrument, and because a beneficiary's claim to recover trust money from a trustee is not subject to the time limits imposed by the *Limitation Act 1935*.<sup>21</sup> Consequently, in the absence of legislative provision, unclaimed trust money may be held in trust indefinitely awaiting a claim which may never be made and, in the meantime, accumulating interest and serving no useful purpose.

36. The same considerations do not apply to money other than trust money which is owing to a claimant. In such a case there is a claim for money against a holder but not a claim in respect of a specific or separately identifiable sum. Any such claim for this money is subject to the provisions of the *Limitation Act 1935*.<sup>22</sup> Consequently, if the claim is not made within the appropriate statutory period (normally six years from the date the cause of action arose), the holder has a defence based on lapse of time. In other words, the holder is then freed from any further liability.

37. *The Unclaimed Moneys Act* applies primarily to money other than trust money.<sup>23</sup> Consequently, its provisions produce two anomalous results -<sup>24</sup>

- (a) it deprives the holder of money which would otherwise have been his property freed from further liability for any claims;
- (b) it gives claimants an unlimited period in which to make a successful claim for the money.

38. An examination of the history of the legislation is necessary to understand the reason for this compulsory acquisition of the holder's property and the radical departure from the

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<sup>20</sup> See in particular paragraphs 2 to 6 above.

<sup>21</sup> See paragraph 3 above.

<sup>22</sup> See paragraph 6 above.

<sup>23</sup> See paragraphs 17 and 23 above and Appendix II.

<sup>24</sup> See generally paragraphs 17 and 21 above.

policy underlying the law at that time dealing with the limitation of actions.<sup>25</sup> At the time the legislation was enacted, similar legislation had already been passed in South Australia, Victoria and New Zealand.

The legislation seemed to be designed to achieve four main objectives -

- (a) To give publicity to money held unclaimed in bank accounts so that customers were made aware of the fact that there was money in the bank which they were entitled to claim.
- (b) To provide for unclaimed money to be paid to the Treasurer so that it would not become part of the bank's general profits.
- (c) To give the customer an unlimited period in which to recover his deposit from the Treasurer.
- (d) To provide revenue for the Government.

39. It would seem that the immediate problem which concerned the Government was the ability of banks to take money in customers accounts in circumstances where the customer was unaware that the money was there.<sup>26</sup> It was thought that banks could do this directly by simply pleading lapse of time in any case where the account had not been operated on for six years or more.<sup>27</sup> However, in practice, the problem was not that banks sought to defeat claims in this way. The problem was that a comparable result was achieved more gradually by levying bank charges (one guinea per annum) year after year against a static account until eventually nothing was left.

40. The problem giving rise to the *Unclaimed Moneys Act* appears to have been a relatively narrow one concerning rights to money deposited with banks, and with other institutions or persons receiving and dealing with money, and charging for doing so. Nevertheless, although it does not appear to have received judicial consideration in any reported case, the scope of the Act seems to be much wider than was necessary to meet the

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<sup>25</sup> *Limitation Act 1623*; 21 James I c.13, s.3 (UK).

<sup>26</sup> Hansard *Parliamentary Debates of Western Australia* (1912 No.2) Vol. 43 at 1498.

<sup>27</sup> The Government's fear that the banks could have pleaded the provisions of the *Limitation Act* if they had wished to do so may have been unfounded. In *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 it was pointed out that the limitation period does not begin to run until the customer has made a demand for his money. See also *Bank of New South Wales Savings Bank Ltd. v Fremantle Auto Centre Pty. Ltd.* [1973] WAR 161 where it was held, in respect of a savings bank account, that there was no debt due and owing by the bank in terms of its contract until a completed withdrawal form and passbook were presented to the bank.

particular problem requiring remedy. For example, the Act applies to money owed by all companies whatever their business, and "money" is not confined to money deposited with a holder. The Parliamentary Debates disclose no reason for this extended application of the Act.

## **SHOULD THE ACT BE REPEALED?**

41. It has already been seen that the *Unclaimed Moneys Act* applies to unclaimed money in a wide variety of circumstances.<sup>28</sup> Its usual application is to unclaimed wages or dividends owed by a company, but in theory there is no end to the occasions when the Act might apply. The *Unclaimed Moneys Act* seems to ride roughshod through the policy and effect of the law relating to the limitation of actions<sup>29</sup> and yet there is no reference in the Act to this law, and very little consideration is given to this matter in the Parliamentary Debates.<sup>30</sup>

42. The Act was considered to be necessary to govern the disposal of unclaimed money held by banks and other institutions carrying on a similar<sup>31</sup> business.<sup>32</sup> However, the Act applies to *all* money owed by inter alia *all companies* and *all persons or firms carrying on business as traders and acting as agents for any individual*.<sup>33</sup> No reason is given in the debates for this considerable extension of the Act.

43. What is more, with one exception,<sup>34</sup> it seems that despite the original intention of the legislature, unclaimed money deposited in banks is not subject to the provisions of the *Unclaimed Moneys Act*. Unclaimed money deposited on current account with trading banks is now the subject of s.69 of the *Banking Act 1959* (Cwth). Unclaimed money held in a savings account with the Rural and Industries Bank and with the Commonwealth Bank is disposed of in accordance with s.65V of the *Rural and Industries Bank Act 1944* and s.53 of

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<sup>28</sup> See paragraphs 17 and 23 above and Appendix II.

<sup>29</sup> See paragraphs 17 and 37 above.

<sup>30</sup> The only member to mention the inconsistency with the Statute of Limitations was the Honourable Mr. L. Moss. In Hansard's *Parliamentary Debates of Western Australia* (1912 No.2) Vol. 43 at 1171, he pointed out that the Bill was in effect repealing the Statute of Limitations and said he would not give his vote to that. However his argument was directed only towards the retrospective nature of the Bill. As long as the Bill was made prospective he saw no objection to the Bill as being inconsistent with the Statute of Limitations.

<sup>31</sup> Similar in the sense that they are receiving money from a customer and making some charge for services rendered in respect of that money.

<sup>32</sup> Paragraphs 38 to 40 above.

<sup>33</sup> *Unclaimed Moneys Act 1912*, s.2.

<sup>34</sup> Money held on current account with the Rural and Industries Bank.

the *Commonwealth Banks Act 1959* (Cwth) respectively.<sup>35</sup> Unclaimed money held in savings accounts with other banks such as the National Bank Savings Bank and the Australia and New Zealand Savings Bank Ltd. are not regarded as being subject to any statutory provisions, including the *Unclaimed Moneys Act*. In practice, only small amounts remain unclaimed in savings accounts and these are held for an unlimited period awaiting demand withdrawal. For ease of administration the individual accounts are consolidated.

44. Against this background, the question must be asked whether the *Unclaimed Moneys Act* as such should remain a part of our law? The following arguments may be advanced in favour of its repeal.

- (i) The Act produces anomalous results. For instance -
  - (a) It gives a certain privileged group of creditors a double advantage over other creditors. It compels the debtor to advertise to remind creditors of their right to claim. Then it gives those creditors an unlimited period in which to make a claim that cannot be defended on the ground of lapse of time.
  - (b) It compels companies and certain firms to forfeit their property to the Treasurer simply because it was never claimed by another who had a right to do so. As between the Treasurer and a company it can be argued with some strength that the shareholders have a better legal and moral right to the unclaimed profits of a company.
- (ii) It is difficult, and may even be impossible to determine in some cases what money is within the scope of the Act. To illustrate the problem, consider the application of the Act in the following situations where a plumber has completed work for a company pursuant to the terms of a contract -
  - (a) *Where the work is completed satisfactorily and the company pays the plumber's account by cheque which is never presented.* In this case the Act does not apply and the company retains the money. Although the

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<sup>35</sup> See Appendix III for a more detailed account of the operation and effect of these specific provisions.

company owes the money to the plumber, it was in fact claimed. It may be true that the plumber was never paid, but the Act applies to money owed which is unclaimed, not unpaid.

- (b) *Where the plumber completes the work satisfactorily but never renders an account for payment.* This is a case where the Act applies, but in the absence of a claim how much should the company pay to the Treasurer? If the work was done for a fixed price, it might be argued that the company should pay this amount to the Treasurer. If there is no fixed price, the company may have to assess the approximate amount of its liability to the plumber for the purposes of its balance sheet, but is it really the intention of the Act that this approximate amount should, after six years, be paid to the Treasurer?
- (c) *Where the plumber completes the work but allegedly in an unsatisfactory manner. He sends in his account but settlement is not reached within six years.* During this time the claim will appear as a contingent liability in the balance sheet but as in (a) this is not a case where the Act applies as the money has in fact been claimed.
- (d) *Where the plumber completes the work allegedly in an unsatisfactory manner and does not send in an account.* The question of whether or not the company owes money to the plumber and if so the amount owed may depend on arbitration or litigation. If the plumber does not make a claim, no determination will be obtained. The Commission understands that in this situation no entry is made in the company's balance sheet until a claim is in fact made. However, the solution, as far as the application of the *Unclaimed Moneys Act* is concerned, is not so simple.

From a practical point of view the answer may be to restrict the application of the Act to sums of money which are certain, and to situations where the holder has decided to make payment, even in the absence of a claim. However, even if this course were adopted there could still be difficulties. It would mean that holders could avoid the Act by alleging uncertainty in respect of any money owed which is not

claimed. In the absence of a claimant, no one would ever know whether the company's allegations were well founded.

- (iii) It creates a complex administrative procedure adding further to the costs of the company or firm concerned and the work of the auditor.
- (iv) It is difficult to enforce. The Treasurer is given the power to inspect the books of any company or firm within the scope of the Act,<sup>36</sup> but he has neither the staff nor the information necessary in order to take such action. Any failure to comply with the Act would be noticed by auditors, but in this respect they are not acting for the Treasury.

45. The following arguments could be advanced in favour of retention of the Act, but it will be seen that all of these fall short of providing justification for the Act in its present form.

- (i) The Act provides a minor source of revenue.

However, in this respect the result is a discriminatory appropriation of the property of the holder. There does not appear to be any reason for the discrimination. Also, the benefit is only obtained at the expense of uncertainty, considerable expense and procedural difficulty.

- (ii) It can be argued that the Act provides a useful service in requiring publicity to be given to claims which can be made against companies and certain firms. The need for publicity arises in cases where the person who has a claim to the money may be unaware of his right to make such a claim. For example, the shareholder is often unaware that a dividend has been declared, and if he has not kept in touch with the company he may not find out until it is too late. The same applies to unclaimed wages. The employee may not realise that he has outstanding wages owing to him. This is likely to be more common in the case of casual employees who may leave at a moment's notice, and may be completely unaware of their rights to wages in these circumstances. One may

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<sup>36</sup> *Unclaimed Moneys Act 1912*, s.7.

surmise that lack of knowledge will also be a problem in the case of retrospective wage increases payable to employees who have meanwhile left their employment.<sup>37</sup> In these cases, sympathy lies with the claimant. It may be questioned why the holder should be able to make use of the defence provided by the *Limitation Act* and obtain such a windfall at the claimant's expense. On the other hand, even if the giving of publicity to certain claims is considered to be desirable, this does not explain why the money should be payable to the Treasurer. The more logical solution would be to provide a specific exception in the *Limitation Act* itself. For example, it could be provided that publicity by the holder ought to be a prerequisite before lapse of time can be pleaded as a defence to a claim in circumstances where the claimant could not reasonably be expected to know that he had such a claim. This publicity could take the form of advertising in newspapers. Furthermore, there would be no need to wait for six years before this publicity was to be given.<sup>38</sup>

In the case of unclaimed wages, the workers' chances of receiving payment may be improved if unions played an active role in this field. It has been suggested that employers should give details of unclaimed wages to the appropriate union within say three months after the amount became payable. On the other hand a special case for unclaimed wages may be unnecessary. There is nothing to prevent unions from seeking the relevant information now, and, if all unclaimed money were to be advertised as suggested, this would be an appropriate source of information upon which the unions could act.

Furthermore, if publicity is the justification for the Act, further anomalies result. For example, why should a person who is owed wages by a company enjoy such generous treatment as opposed to a person employed by the Government, or by some private individual or firm which does not happen to be carrying on business as a trader and acting as agents or as private bankers for any individual?

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<sup>37</sup> See paragraph 23 above

<sup>38</sup> The question of advertising is discussed in more detail in paragraphs 71 and 80 below.

- (iii) It provides a permanent fund from which the late claimant can be paid irrespective of the continued liquidity or existence of the holder.

However, it is one thing to give a claimant an unlimited period in which to claim. To take it further and, at the expense of the holder, provide a Government fund to meet subsequent claims, may be considered to be an unnecessary and over protective measure. The argument in favour of such a fund to prevent difficulties arising out of a subsequent insolvency of the holder also loses some of its force when it is realised that the holder must remain liquid for a total of seven years from the date the money was first owed to the claimant before it is paid to the Treasurer. Furthermore, as with the argument based on publicity, there is no obvious reason why such a privilege should be enjoyed only by persons owed money falling within the operation of the Act.

- (iv) In some cases, the operation of the law relating to the limitation of actions does not provide a very satisfactory solution for the holder. For example, if the limitation period does not commence until demand is made,<sup>39</sup> it may be inconvenient for the holder to have to wait indefinitely for that demand.

On the other hand, this is a problem which could be met by specific legislation such as the present legislation relating to money held in current account with banks other than the Rural and Industries Bank.<sup>40</sup> It may be argued that the problem does not justify statutory intervention where the *Limitation Act* does provide a satisfactory solution.

46. The Commission would be pleased to receive comment on the basic issue whether the *Unclaimed Moneys Act* should be repealed.

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<sup>39</sup> This would apply to money held on a current account with the Rural and Industries Bank and it may also apply to unclaimed savings bank deposits - see above at 36 n.2 and see also paragraph 43 above.

<sup>40</sup> See paragraph 43 above and Appendix III.

## DISCUSSION OF THE ACT IF IT IS TO BE RETAINED

47. If the *Unclaimed Moneys Act* is to remain in force, consideration must be given to the suitability of its existing provisions. In the end this will depend on the reasons for retaining the Act. However there are several matters relating to the present scope of the Act, its interpretation and the procedure thereby laid down for disposing of unclaimed money which appear to be unsatisfactory whatever may be the overall objective of the Act. It is therefore considered to be desirable to comment on these matters at this stage. These problems or difficulties will be considered under the following heads -

### **The holder**

- (i) *Who is a holder of unclaimed money for the purposes of the Unclaimed Moneys Act?*
- (ii) *Should the categories of persons to be regarded as holders be restricted?*
- (iii) *Should the categories of persons to be regarded as holders be expanded?*
- (iv) *The definition of holder in other jurisdictions*

### **Unclaimed money**

- (i) *What is unclaimed money within the meaning of the Act?*
- (ii) *Should the operation of the Act in relation to unclaimed money be restricted?*
- (iii) *The definition of unclaimed money in other jurisdictions*
- (iv) *Trust money*

### **The procedure**

- (i) *Length of time unclaimed*
- (ii) *Notice to claimant*
- (iii) *Right to recover unclaimed money*
- (iv) *Interest*
- (v) *Procedure for recovery*
- (vi) *Application of unclaimed money*

## Voluntary payment of unclaimed money to the Treasurer

### The holder

- (i) *Who is a holder of unclaimed money for the purposes of the Unclaimed Moneys Act?*

48. The Act applies, inter alia, to "every person or firm carrying on business as traders in Western Australia, and acting as agents or private bankers for individuals or companies".<sup>41</sup> The phrase does not appear to have been judicially considered in any reported case. The conjunctive "and" means that not all persons or firms in business are within the Act; only those who also act as agents or private bankers for any person. Conversely, the Act does not apply to all persons or firms who act as agents; only to those who are also acting as traders.

49. The word "trader" played an important role in early English legislation dealing with bankruptcy. Only "traders" could be made bankrupt. For this purpose the word was given a wide definition. It meant persons who lived by buying and selling.<sup>42</sup> This definition was later extended by enumerating the various persons regarded as "traders" in the First Schedule to the *Bankruptcy Act 1869* (UK).<sup>43</sup> Whether this has any relevance to the meaning of "trader" for the purposes of the *Unclaimed Moneys Act* is a matter for conjecture.

50. Today the meaning of the phrase "person or firm carrying on business as traders ... and acting as agents or private bankers for individuals..." is difficult and obscure. For example, it may be accurate to speak of real estate agents as agents for the vendor of land, but is it accurate to regard them as traders? Similarly when they are renting premises and

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<sup>41</sup> *Unclaimed Moneys Act 1912*, s.2.

<sup>42</sup> 1 Jac 1 c.15, s.1.

<sup>43</sup> 32 and 33 Vict. c.71. The Schedule refers to –

"Alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee houses, lime-burners, livery stablekeepers, market gardeners, millers, packers, printers, sharebrokers, shipowners, shipwrights, stockbrokers, stockjobbers, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, persons insuring ships or their freight against perils of the sea, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and persons who, either for themselves or as agents or factor for others seek their living by buying and selling or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities; but a farmer, grazier, common labourer, or workman for hire shall not, nor shall a member of any partnership, association, or company which cannot be adjudged bankrupt under this Act, be deemed as such a trader for the purposes of this Act."

acting as agents for landlords, is it accurate to regard them as traders in rental accommodation? Mortgage brokers act as agents for the parties to the mortgage, but are they traders? On the other hand it may be accurate to speak of motor vehicle dealers as traders, but are they acting as agents?<sup>44</sup>

51. The situation in other jurisdictions is considered in detail later in this working paper.<sup>45</sup> New South Wales, Tasmania and Queensland have adopted the same phrase in legislation dealing with unclaimed money,<sup>46</sup> but there was an important amendment to the Queensland legislation in 1945.<sup>47</sup> As a result of this amendment, the Queensland legislation now applies, inter alia, to "persons or firms carrying on business as traders within Queensland *including* all such persons or firms who or which act as attorneys, agents or private bankers for individuals, firms or companies." The Parliamentary Debates<sup>48</sup> do not explain why this amendment was thought to be necessary.

52. The Victorian Act applies, inter alia, to "an unincorporated body of persons ... associated together for the purpose of carrying on business."<sup>49</sup> The New Zealand Act is much more specific in this respect. It specifies the categories of firms which are to be included. For example, it applies to money lenders and borrowers, auctioneers, real estate agents, sharebrokers, accountants and motor vehicle dealers.<sup>50</sup>

53. If the Western Australian provision defining who is to be regarded as a holder of unclaimed money is to be amended, consideration could be given to the desirability of defining specifically the categories of persons and firms which are to fall within the scope of the Act as in New Zealand. The provisions in Victoria although certain may be regarded as being too wide. The Queensland provision as amended still retains the troublesome word "trader".

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<sup>44</sup> The correct answer may be that they are sometimes acting as agents, and sometimes acting in their own right. This raises the further difficulty as to whether the Act is intended to apply in such a case to all money owed by the dealer, or just the money he owes while acting as agent. This is considered further in paragraph 67 below.

<sup>45</sup> See paragraph 64 below and Part B of Appendix IV.

<sup>46</sup> *Unclaimed Moneys Act 1917* (NSW), s.2; *Unclaimed Moneys Act 1918* (Tas), s.2; *Public Curator Act 1915* (Qld), s.108.

<sup>47</sup> *Public Curator Acts Amendment Act 1945*, s.43.

<sup>48</sup> *Queensland Parliamentary Debates* (1945-46), vol. 186 at 1875.

<sup>49</sup> *Unclaimed Moneys Act 1962* (Vic), s.9(1).

<sup>50</sup> *Unclaimed Money Act 1971* (NZ), s.5(1)

(ii) *Should the categories of persons to be regarded as holders be restricted?*

54. Although legislation comparable to the Western Australian *Unclaimed Moneys Act* exists in all other jurisdictions in Australia and in New Zealand, it applies to a variety of persons, institutions, firms and companies.<sup>51</sup> No consistent pattern emerges. Each jurisdiction has adopted its own policy as to the range of persons to be brought within the relevant Acts but it is interesting to note that the legislation in South Australia, the Australian Capital Territory and the Northern Territory applies only to companies and their liquidators.<sup>52</sup> Such a move may be considered appropriate for Western Australia. It would at least render the Act more certain. Alternatively the definition of holder may be made less extensive and more certain if the categories of persons or firms who are to fall within the scope of the Act are specifically mentioned as suggested in paragraph 53 above.

(iii) *Should the categories of persons to be regarded as holders be expanded?*

55. Just as the definition of "holder" in some jurisdictions is more restricted than that in Western Australia, in other jurisdictions the definition is wider. For example the Victorian legislation applies to all unincorporated bodies of persons associated together for the purpose of carrying on business in that state.<sup>53</sup> The Queensland legislation applies to all persons or firms carrying on business as traders within Queensland.<sup>54</sup> It may therefore be argued that similar extensions ought to be made in the Western Australian Act.

56. A novel suggestion might be that the Act should apply to persons who have found money. The suggestion is made on the basis that this is another situation where a person is in possession of money which another has a right to claim. Money lost and found is not at present payable to the Treasurer. At common law the finder of the money, or in some cases his employer, or the owner of the property in which the money was found, is given proprietary rights over the money in the sense that unless the person who lost the money successfully claims for its recovery within the limitation period, the money is retained by the holder for his own use.<sup>55</sup>

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<sup>51</sup> See paragraph 64 below and Part B of Appendix IV.

<sup>52</sup> *Unclaimed Moneys Act 1891* (SA), s.2; *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT) ss.3(1) and 4(1); and 1963 (NT), ss.5(1) and 6(1) .

<sup>53</sup> *Unclaimed Moneys Act 1962* (Vic), s.9(1).

<sup>54</sup> *Public Curator Act 1915* (Qld), s.108.

<sup>55</sup> See generally Crossley Vaine's *Personal Property* (5th ed. 1973) at 419-426.

57. The finder, or other person entitled to the money, although not obliged to take any steps to locate the owner or advertise the find, must be wary of a criminal conviction for theft by finding.<sup>56</sup> In order to avoid the possibility of a prosecution for such an offence, reasonable steps must be taken to locate the owner. Proper advertising may be regarded as reasonable, but normal practice is to hand the money in to the police. The police retain the money for three months and then return it if unclaimed to the person who paid it in. The police do not purport to be giving good title to the money to the person they return it to, and in fact require an indemnity against liability to pay the money to any other person. The effect of the action by the police is no more than to protect the person paying in the money from a criminal prosecution.

58. In many respects, money lost and found bears a similarity to money falling within the provisions of the *Unclaimed Moneys Act*. It constitutes unclaimed money held, payable to someone else if a claim is made within the limitation period. It may be appropriate therefore, while considering the scope of the *Unclaimed Moneys Act*, to consider whether it should apply to money lost and found. In the hands of the holder, money found constitutes an equal if not greater windfall than, say, unclaimed wages, dividends and rebate distributions. It could be said that the finder of the money has a less substantial legal or moral right to retain the money than the holder of unclaimed money since money lost was at one stage actually in the possession of the owner and his action is to recover the equivalent of what was his. The claimant of what is at present regarded as unclaimed money under the Act is merely claiming to establish that money is owing to him.

59. At first, the prospect of altering the law relating to money lost and found may seem out of context in this working paper, but it is interesting to note that in two analogous situations the Treasurer is in fact given rights to the money.

60. The first situation arises where money "charged [by the police] to be stolen or unlawfully obtained" is handed in to the police.<sup>57</sup> Any person who has in his possession money which may be reasonably suspected of having been stolen and who cannot give a satisfactory account of how he came by it commits an offence.<sup>58</sup> Therefore a person

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<sup>56</sup> *Criminal Code* 1913, s.371(5).

<sup>57</sup> *Police Act* 1892, s.74.

<sup>58</sup> *Ibid.*, s.69.

possessing money in these circumstances ought to hand it in to the police. A justice may make an order that the money be paid by the police to the party who appears to be the rightful owner.<sup>59</sup> Otherwise, if no claim is made within six months, the police shall, within twelve months, pay the money to the Treasurer for public use.<sup>60</sup> The Treasurer seems to have an inherent power to pay money *ex gratia* to any person who can show that he has had money stolen, but who has not been able to identify the money in the hands of the police. To prevent fraudulent claims against Treasury, this power is exercised cautiously and, in practice, only on the recommendation of a senior member of the Police Department.

61. The second situation, and a somewhat unusual one based on common law, where lost money does not belong to the finder but may pass to the Treasurer, arises when the finder finds "treasure trove". The reason for this peculiar exception to the common law rights of the finder to keep the money is explained as follows -<sup>61</sup>

"Treasure Trove is where any gold or silver in coin plate or bullion is found concealed in a house or in the earth or other private place, the owner thereof being unknown, in which case the Treasure belongs to the King or his grantee having the franchise of Treasure Trove; but if he that laid it be known or discovered afterwards, the owner and not the King is entitled to it; this prerogative right only applying in the absence of an owner to claim the property. If the owner, instead of hiding the Treasure casually lost it, or purposely parted with it in such a manner that it is evident he intended to abandon the property altogether ... the first finder is entitled to the property ... and the King's prerogative does not in this respect obtain. So that it is the hiding and not the abandonment of the property that entitled the King to it."

62. The *Maritime Archaeology Act 1973*, which vests relics from certain shipwrecks in the museum on behalf of the Crown, is designed to preserve items of historic interest and is not intended to protect the interest of the owner of the relics, or to provide any form of revenue for the State. Accordingly the Act does not appear to be directly relevant to this discussion.

63. The Commission invites comment generally on the matters raised in connection with money lost and found.

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<sup>59</sup> Ibid., s.74.

<sup>60</sup> Ibid., s.75.

<sup>61</sup> Chitty, *Prerogative* at 152.

(iv) *The definition of holder in other jurisdictions*

64. The definitions of a holder in the *Unclaimed Moneys Acts* of Western Australia and New South Wales are virtually identical.<sup>62</sup> The Victorian Act applies to companies, boards dealing with the marketing of primary products, the Australian Barley Board, Victorian Inland Meat Authority, building societies, industrial and provident societies, co-operative societies, such corporations or societies declared by order of the Governor-in-Council and unincorporated bodies of persons associated together for the purpose of carrying on business.<sup>63</sup> The South Australian, Australian Capital Territory and Northern Territory legislation applies mainly to companies and their liquidators.<sup>64</sup> The Tasmanian Act applies to companies, liquidators, banks, life insurance companies, persons or firms in business as traders and acting as agents or private bankers for individuals and any person conducting or controlling any lottery.<sup>65</sup> The Queensland definition of company includes receivers, building societies, co-operative societies, primary producers' co-operative associations, Southern Electric Authority of Queensland and any other public authority of the State of Queensland, Queensland Trustees Ltd., the Union Trustee Company of Australia Ltd. , persons or firms carrying on business as traders within Queensland including all such persons or firms who or which act as attorneys, agents or private bankers for individuals, firms or companies and such other organisations as the Governor may declare.<sup>66</sup> The New Zealand Act applies to companies, liquidators, receivers, banks, building societies, money lenders and borrowers, insurance companies, auctioneers, real estate agents, sharebrokers, accountants and motor vehicle dealers.<sup>67</sup>

**Unclaimed money**(i) *What is unclaimed money within the meaning of the Act?*

65. The Act applies to all sums of money whatsoever owed by a holder and unclaimed for six years.<sup>68</sup> The only exception is for sums of less than \$10.<sup>69</sup> It was thought that the

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<sup>62</sup> *Unclaimed Moneys Act 1912*, s.2; *Unclaimed Moneys Act 1917* (NSW), s.2.

<sup>63</sup> *Unclaimed Moneys Act 1962* (Vic), s.9(1).

<sup>64</sup> *Unclaimed Moneys Act 1891* (SA), s.2; *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), ss.3(1) and 4(1); and 1963 (NT), ss.5(1) and 6(1).

<sup>65</sup> *Unclaimed Moneys Act 1918* (Tas), s.2.

<sup>66</sup> *Public Curator Act 1915* (Qld), s.108.

<sup>67</sup> *Unclaimed Money Act 1971* (NZ), s.5(1).

<sup>68</sup> *Unclaimed Moneys Act 1912*, s.2.

administrative expense did not warrant the application of the Act to small sums. The Minister for Works said during the debate on the Bill in 1912 -<sup>70</sup>

"Such sums would remain the property of the banks, or, rather, would remain with the banks. The position in regard to such sums would remain unaltered. The owner could claim them within a certain period, after which they would become the property of the banks. As a result of a conference between the Treasurer and the banks it had been determined that it would not pay to make the Bill apply to sums of less than [\$10]."

66. Several difficulties arise in determining what money falls within the scope of the legislation. One of these difficulties has already been discussed.<sup>71</sup> The problem in that case was to determine whether a holder was obliged to pay money to the Treasurer where the amount which was owed to the claimant was uncertain. This uncertainty may arise simply because the claimant has not submitted his claim for the money, or because the holder disputes his liability to pay the full amount which would have been payable if a claim were made. The logical and practical difficulties raised by this problem seemed to suggest that there may be a defect in the Act which could not be overcome. This explains why this matter was considered along with the other arguments in favour of repealing the Act.

67. The Act refers to money held by persons or firms in business as traders and acting as agents or as private bankers for any individual.<sup>72</sup> It is not clear however whether the Act applies to all money which is unclaimed and which is owed by that person, or whether it applies only to money which he owes as agent or as a private banker. For example, assuming that a sharebroker is a holder within the scope of the Act, does the Act apply only to unclaimed money which he owes to a client for whom he is acting as agent, or does it apply also to unclaimed money which he owes say to a plumber who carried out work on his business premises, or on his home?

68. Presumably the intention is that the Act should apply, in this situation, only to the money which is owed to the sharebroker's client. If so, the Act should be more specific. A guide may be obtained from New Zealand legislation, which refers specifically in this situation to "money held on behalf of clients".<sup>73</sup> Similar restrictions are imposed on the

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<sup>69</sup> *Unclaimed Moneys Act 1912*, s.3(1).

<sup>70</sup> Hansard, *Parliamentary Debates of Western Australia* (1912 No.2) Vol. 43 at 2055.

<sup>71</sup> See paragraph 44(ii) above.

<sup>72</sup> *Unclaimed Moneys Act 1912*, s.2.

<sup>73</sup> *Unclaimed Money Act 1971* (NZ), s.5(1)(i).

definition of unclaimed money within the New Zealand Act held by the other categories of firms and institutions specifically mentioned.<sup>74</sup>

69. The Act is not restricted to unclaimed money in Western Australia. It is therefore arguable that a company branch office in Western Australia may be required to pay to the Treasurer, money, falling within the definition of unclaimed money, held by the company's head office in some other state or country. This is unlikely to have been the intention of the Act but once again the position should be clarified. The point is dealt with in the South Australian and the New Zealand legislation. In South Australia the money must arise out of any dealing within that State.<sup>75</sup> The New Zealand Act applies to money situated in New Zealand.<sup>76</sup> Any more extended operation of the Act may raise constitutional and conflict of laws problems.

(ii) *Should the operation of the Act in relation to unclaimed money be restricted?*

70. One simple way of restricting the operation of the Act is to extend the current exemption for sums \$10 or less to sums not exceeding say \$200. Such a step would be justifiable in terms of inflation since 1912 even though other jurisdictions have not kept up. In South Australia the figure is \$10.<sup>77</sup> In Tasmania it is \$6,<sup>78</sup> in Queensland it is \$4,<sup>79</sup> and in the New Zealand re-enactment in 1971 it is \$20.<sup>80</sup> There is no exception made for small amounts in New South Wales, Australian Capital Territory or the Northern Territory. In Victoria, although amounts of less than \$10 do not have to be advertised,<sup>81</sup> they must nevertheless be paid to the receiver of revenue.<sup>82</sup>

71. It may, however, be argued that there are two separate issues when the question of the definition of small amounts arises, depending on whether it arises in the context of the relationship between the holder and the claimant or holder and Treasurer. It might be argued that, while sums of less than \$200 could be retained by the holder and should not have to be paid to the Treasurer, it would be inequitable to allow holders to retain such sums without

<sup>74</sup> Ibid., s.5(1) and see paragraph 75 below.

<sup>75</sup> *Unclaimed Moneys Act 1891 (SA)*, s.2.

<sup>76</sup> *Unclaimed Money Act 1971 (NZ)*, s.2.

<sup>77</sup> *Unclaimed Moneys Act 1891 (SA)*, s.3.

<sup>78</sup> *Unclaimed Moneys Act 1918 (Tas)*, s.3(1).

<sup>79</sup> *Public Curator Act 1915 (Qld)*, s.110(1).

<sup>80</sup> *Unclaimed Money Act 1971 (NZ)*, s.4(1)(i).

<sup>81</sup> *Unclaimed Moneys Act 1962 (Vic)*, s.11(1).

<sup>82</sup> Ibid., s.12 (1)(b).

advertising. Nevertheless, advertising costs and the administrative burden on holders are factors which suggest that sums of money should exceed a minimum figure before advertising is warranted. This figure could be set at say \$40. In effect, this would mean that holders could keep sums of unclaimed money of less than \$40 without advertising. Advertising would be required for sums of \$40 or more, but unless they were subsequently claimed or exceeded \$200, they could be retained by the holder.<sup>83</sup>

72. There may also be policy grounds for restricting the money to which the Act applies. At present the definition is wide. It applies to all sums whatsoever which are owing by the holder.<sup>84</sup> In New Zealand it was decided in 1971 to exclude specifically the following -<sup>85</sup>

unclaimed dividends (not being dividends payable by a mutual association in relation to money deposited with the association);

unclaimed rebates payable by a mutual association other than a life insurance association (not being rebates payable in relation to money deposited);

unclaimed benefits payable from any pension or superannuation fund.

In these cases, the Minister for Finance thought it would be "proper...that any benefit to be derived other than by the lawful owner from money not claimed should accrue to the group within which the money arises".<sup>86</sup> The restriction is one of policy. There is no legal reason for distinguishing unclaimed dividends, or unclaimed pensions from any other sums which may be owing in contract.<sup>87</sup>

73. The effect of the New Zealand legislation is to favour the interests of the claimant when considering rights to unclaimed deposits, wages and trade debts but to favour the interests of the holder when considering rights to unclaimed distributions from profits. The rationale is that a person who deposits money for safe-keeping or otherwise, and persons who have earned money by carrying out their obligations under a contract should have the

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<sup>83</sup> The question of advertising is considered further in paragraph 80 below.

<sup>84</sup> *Unclaimed Moneys Act 1912*, s.2.

<sup>85</sup> *Unclaimed Money Act 1971* (NZ), s.4(2).

<sup>86</sup> Hansard, *Parliamentary Debates of New Zealand* (1971) Vol. 372 at 1192.

<sup>87</sup> This point was made by Dr. A.M. Findlay for the Opposition - see Hansard's *Parliamentary Debates of New Zealand* (1971) Vol. 374 at 2752-2753.

protection of legislation such as the *Unclaimed Moneys Act*. In cases where the money is distributable from the profits of the holder, and is unclaimed, it should accrue and become distributable as part of future profits to all persons entitled. The New Zealand approach would seem to have some merit, and consideration might be given to the possibility of placing similar restrictions on the scope of the Act in this State.

74. On the other hand, in the Australian Capital Territory and the Northern Territory, the legislation applies only to unclaimed "deposits with or securities of the company and dividends, bonuses and profits payable to a member of the company".<sup>88</sup> Unclaimed trade debts and wages appear to fall outside the scope of the Act and consequently would remain the property of the holder.

(iii) *The definition of unclaimed money in other jurisdictions*

75. The definitions of money held which is subject to unclaimed money legislation in other jurisdictions vary slightly from the definition in Western Australia. Only Queensland has a similar definition.<sup>89</sup> The Victorian Act specifically includes salaries and wages and allows only twelve months for claims to be made.<sup>90</sup> In New South Wales and Tasmania, the money is unclaimed if its recovery is "barred by operation of law".<sup>91</sup> In South Australia the Act applies only to money arising "out of any dealing had within [that State] by any owner or person with the company".<sup>92</sup> In the Australian Capital Territory and the Northern Territory the legislation applies to money in respect of deposits with or securities of the company and dividends, bonuses and profits "payable to a member of the company" the recovery whereof is barred by operation of law.<sup>93</sup> This would seem to exclude such items as unclaimed wages. New Zealand legislation is much more specific.<sup>94</sup> For example, money lenders or borrowers are accountable under the Act for money borrowed; auctioneers for the proceeds of any auction sale; real estate agents for money held in trust account; sharebrokers and auctioneers for money held on behalf of clients and motor vehicle dealers for money held on behalf of any person for whom they have acted as agents. In all cases the money must be situated in

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<sup>88</sup> *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.6(1); and 1963 (NT), s.8(1).

<sup>89</sup> *Public Curator Act 1915* (Qld), s.108.

<sup>90</sup> *Unclaimed Moneys Act 1962* (Vic), ss.9(1) and 12(1).

<sup>91</sup> *Unclaimed Moneys Act 1917* (NSW), s.2; *Unclaimed Moneys Act 1918* (Tas), s.2.

<sup>92</sup> *Unclaimed Moneys Act 1891* (SA), s.2.

<sup>93</sup> *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.6(1); and 1963 (NT), s.8(1).

<sup>94</sup> *Unclaimed Money Act 1971* (NZ), s.5.

New Zealand.<sup>95</sup> The New Zealand legislation specifically excludes dividends (not being dividends payable by a mutual association in relation to money deposited with the association), rebates payable by a mutual association other than an insurance association (not being rebates payable in relation to money deposited) and benefits payable from any pension or superannuation fund.<sup>96</sup>

(iv) *Trust money*

76. A question arises as to the application of the *Unclaimed Moneys Act* to trust money. Although the Act applies principally to money which is not trust money, it could also be construed to apply to trust money. Consequently, if a holder were in the position of trustee, unclaimed trust money could fall within the scope of the *Unclaimed Moneys Act*. Having regard to the distinction between trust money and money owing pursuant to contract,<sup>97</sup> it may be preferable for unclaimed trust money to be dealt with as suggested in Part C hereunder. Likewise, as suggested below,<sup>98</sup> money owed by trustees to claimants, as opposed to beneficiaries, ought to be treated as non-trust money, and ought to be dealt with in accordance with the procedure which now follows.

## **The procedure**

(i) *Length of time unclaimed*

77. In Western Australia unclaimed money is not paid to the Treasurer until at least seven years after the money first became due and payable to a claimant.<sup>99</sup> On the other hand, in Victoria, money not less than \$10 is payable into the Unclaimed Moneys Fund maintained by Treasury after it has been due and payable for twenty-four months.<sup>100</sup> There it remains for a further six years and it is then transferred into the Consolidated Revenue Fund.<sup>101</sup> Thus in Western Australia the holder enjoys the use of the money if unclaimed for seven years, while

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<sup>95</sup> Ibid., s.2.

<sup>96</sup> Ibid., s.4(2).

<sup>97</sup> See paragraphs 2 to 6 above.

<sup>98</sup> See paragraphs 149 to 150 below.

<sup>99</sup> Six years prior to advertising, then one year after advertising - *Unclaimed Moneys Act 1912*, ss.2 and 6(1).

<sup>100</sup> Twelve months prior to advertising and twelve months after advertising - *Unclaimed Moneys Act 1962* (Vic), ss.9(1) and 12(1)(a). Sums of less than \$10 are paid to the Unclaimed Moneys Fund without advertising and consequently are payable to the fund in less than twenty-four months - s.12(1) (b).

<sup>101</sup> Ibid., s.12(2).

in Victoria, the holder is only entitled to use the money for two years. It may be considered that early payment to the Treasurer is a further and unjustifiable interference with the rights of the holder in the absence of the *Unclaimed Moneys Act*. It also means that the money is paid to the Treasurer long before the limitation period for any claim by the claimant has expired. Consequently, the law in Victoria involves an even greater departure from normal commercial practice, based on the law relating to the limitation of actions,<sup>102</sup> than the present *Unclaimed Moneys Act* in Western Australia.

78. In New South Wales, Tasmania, Australian Capital Territory and the Northern Territory, reference is made to money the recovery of which is barred by operation of law.<sup>103</sup> In most cases this will be six years from the date the money became owing. In some cases the limitation period does not begin to run until demand has been made for the money.<sup>104</sup> This problem has been met in the Australian Capital Territory and the Northern Territory by providing that the limitation period in these cases is to be computed as if demand had been made on the first day possible.<sup>105</sup> However, there may be further complications arising out of any attempt to adopt the limitation period in order to determine when money is to be regarded as unclaimed. For example, the six year period may be extended where the person who is entitled to claim is not of full age or is insane,<sup>106</sup> where the holder is beyond the seas,<sup>107</sup> and where the holder makes part payment or acknowledges liability.<sup>108</sup> Such factors may cause doubt as to when the money owed falls within the provisions of the *Unclaimed Moneys Act*.

79. It may be considered to be more desirable in the interest of certainty to retain the fixed six year period presently provided for in Western Australian legislation. South Australia, Queensland and to a large extent New Zealand have all adopted six years from the date the money was first owed as the qualifying period.<sup>109</sup>

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<sup>102</sup> See paragraphs 6, 17 and 37 above.

<sup>103</sup> *Unclaimed Moneys Act 1917* (NSW), s.2; *Unclaimed Moneys Act 1918* (Tas), s.2; *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.6; and 1963 (NT), s.8.

<sup>104</sup> This would apply for example to money held in bank accounts - see at 36 n.2 and also paragraph 45(iv) above.

<sup>105</sup> *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.6(2); and 1963 (NT), s.8(2).

<sup>106</sup> *Limitation Act 1935*, s.40.

<sup>107</sup> *Ibid.*, s.41.

<sup>108</sup> *Ibid.*, s.44.

<sup>109</sup> *Unclaimed Moneys Act 1891* (SA), s.2; *Public Curator Act 1915* (Qld), s.108; *Unclaimed Money Act 1971* (NZ), s.4(1).

(ii) *Notice to Claimant*

80. Unclaimed money of \$10 or more is advertised at the end of the six year period awaiting claims, once in the *Government Gazette*.<sup>110</sup> There is a considerable variation in the form of the advertisement. In some cases it has been noticed that the names of the persons entitled to the money appear in neither alphabetical, nor chronological order. The Commission invites consideration of the following suggestions -

- (a) That notices in the *Gazette* have limited effect because of its restricted circulation and readership. This was mentioned during the debate on the Bill in 1912, and it was suggested that advertising in the newspaper would be more effective.<sup>111</sup> The proposal was rejected at the time because the *Gazette* was the official medium for notices of this kind affecting person's rights and because newspaper advertising was not guaranteed to be noticed by the claimant - he might be out of the State.<sup>112</sup> The Commission suggests that today, advertising in the newspaper is a more effective method of informing persons that they are entitled to claim money. Advertising in the newspaper could be required, either in addition to, or, as a substitute for advertising in the *Gazette*.
- (b) That advertising in the newspaper should be consolidated if possible. One, or preferably, two block advertisements each year (say at the end of March and September), of all unclaimed money held in Western Australia, would more likely be noticed by the claimant or someone acquainted with him than a large number of small advertisements scattered throughout the year.
- (c) That the advertisements should set out the full names of the persons entitled to the money in alphabetical order, and the amount held. Bearing in mind the need to keep down costs, it is debatable whether further particulars, such as the last known address and details as to the nature of the money, are required.

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<sup>110</sup> *Unclaimed Moneys Act 1912*, s.4(a).

<sup>111</sup> *Hansard Parliamentary Debates of Western Australia* (1912 No.2) vol. 43 at 1502.

<sup>112</sup> *Idem*.

- (d) That advertising should be carried out much earlier than it is at present.<sup>113</sup> In many cases, money may be unclaimed because of the lapse of time between the date it became payable and the date it is eventually advertised. In Victoria the money is advertised in the Gazette in March after it has been unclaimed for twelve months.<sup>114</sup> The holder may object that to advertise for creditors to submit claims during the running of the limitation period is over-protective. It may result in a loss of use of money claimed as a result of the advertisement which might otherwise have been available to him for six years. On the other hand, if the object of the Act is partly to inform claimants of their rights, early advertising would be desirable. Also, in some cases, there may be an administrative advantage to the holder if he can get rid of unclaimed money as early as possible.

If advertising is to be carried out before the expiry of six years from the date the money becomes owing, the question arises as to whether further advertising is needed at the end of this period to inform claimants that the money is going to be paid to the Treasurer. This may appear to impose a substantial administrative burden on the holder. However, if sums of \$200 or more only are to be payable to the Treasurer, as has been suggested,<sup>115</sup> this administrative burden would be substantially reduced.

- (e) That holders should take further steps to notify persons entitled to claim the money. For example, they could be required to send a letter to the claimant's last known address as is the case in New Zealand in lieu of advertising.<sup>116</sup> The holder could also be required to complete a statutory declaration to the effect that he has taken all reasonable steps to locate the claimant such as checking telephone directories, electoral rolls and making enquiries of those who might be expected to have knowledge of the whereabouts of the claimant. Reference has already been made to the suggestion that in the case of unclaimed wages, notice should be given to the appropriate trade unions.<sup>117</sup>

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<sup>113</sup> See also paragraph 45(ii) above. For advertising of small amounts without payment to the Treasurer see paragraph 71 above.

<sup>114</sup> *Unclaimed Moneys Act 1962* (Vic), s.11.

<sup>115</sup> See paragraph 70 above.

<sup>116</sup> *Unclaimed Money Act 1971* (NZ), s.7.

<sup>117</sup> See paragraph 45(ii) above.

At the same time it is important to keep the administration of the Act simple and to keep to a minimum the administrative costs and responsibility borne by the holder. Nevertheless, some holders may wish to take these extra measures to locate claimants, and it may therefore be appropriate to encourage this by allowing them to deduct from unclaimed money not only the cost of advertising but also a charge for taking reasonable steps to locate the claimant by other means.

81. In all jurisdictions except New Zealand, unclaimed money is entered in a register and the contents of the register are advertised in the *Government Gazette* for each jurisdiction.<sup>118</sup>

(iii) *Right to recover unclaimed money*

82. Although his claim against the holder may be statute-barred, the claimant, subject to the ambiguity created by s.11 already discussed,<sup>119</sup> seems to have a continuing right to claim the money from the Treasurer. It might be considered to be more logical and consistent if the Treasurer could plead lapse of time in defence to any claims made. On the other hand, this would reveal the measure as a form of compulsory acquisition from the holder. Although this may be its effect, the legislation seemed to have been designed more towards protecting the interests of certain claimants by giving publicity to their claims and by giving them an unlimited period to claim the money from the Treasurer.<sup>120</sup> It would be contrary to this object of the Act if the Treasurer were to be permitted to plead the provisions of the *Limitation Act*. The ambiguity caused by s.11 should therefore be removed.

83. In all jurisdictions the claimant is given a right, unlimited by time, to claim the money from the Treasurer, or the Public Curator in Queensland or the Commissioner of Inland Revenue in New Zealand.<sup>121</sup>

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<sup>118</sup> *Unclaimed Moneys Act 1962* (Vic), s.11(1) and (3); *Unclaimed Moneys Act 1917* (NSW), ss.3 and 4; *Unclaimed Moneys Act 1891* (SA), ss.3 and 4; *Public Curator Act 1915* (Qld), s.110(1); *Unclaimed Moneys Act 1918* (Tas), ss.3(1) and 4; *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), ss.7 and 8; and 1963 (NT), ss.9 and 10.

<sup>119</sup> See paragraph 21 above.

<sup>120</sup> See paragraph 38 above.

<sup>121</sup> *Unclaimed Moneys Act 1962* (Vic), s.14(1); *Unclaimed Moneys Act 1917* (NSW), s.9; *Unclaimed Moneys Act 1891* (SA), s.8; *Public Curator Act 1915* (Qld), s.111(1); *Unclaimed Moneys Act 1918* (Tas), s.8; *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.13; and 1963 (NT), s.15; *Unclaimed Money Act 1971* (NZ), s.11(1).

(iv) *Interest*

84. At present, interest earned on unclaimed money held in the Unclaimed Moneys Fund is payable to the Consolidated Revenue Fund.<sup>122</sup> It might be argued that, if a successful claim is made by a claimant, he should be entitled to receive interest on the money, particularly where the sum concerned is a large sum. However, unclaimed money other than trust money does not belong to the claimant.<sup>123</sup> To give the claimant a right to recover interest on the money from the Treasurer would be to regard this money as the property of the claimant as soon as it is paid to the Treasurer. Such an extension of the Act may be considered to be undesirable and unnecessary. It would create the anomalous situation where the claimant would simply have a right of action against the holder of unclaimed money, but as soon as it is paid to the Treasurer, it would become the claimant's money earning interest on his behalf.

85. The claimant is not given any express right to recover interest on the money in any other jurisdiction, and in Tasmania and New Zealand it is expressly provided that a successful claimant shall not receive interest.<sup>124</sup> The same result is implicit in Queensland where interest on unclaimed money is payable into the Consolidated Revenue Fund.<sup>125</sup>

(v) *Procedure for recovery*

86. At present, the Act imposes a mandatory duty upon the Treasurer to pay unclaimed money to the claimant, but only when he, the Treasurer, is satisfied that the claimant is entitled to it.<sup>126</sup> It is practical and expedient that the Treasurer should make the decision to pay or not to pay. In most cases the only issue will be one of identification. A question of law will seldom arise. However, it might be argued that in deciding whether or not to pay a claimant, the Treasurer is acting as a judge in his own cause. In so far as the Treasurer is obliged to make a decision affecting the legal rights of private individuals, it is possible that a writ of mandamus could be issued against the Treasurer, compelling him to give proper

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<sup>122</sup> *Unclaimed Moneys Act 1912*, s.6(2).

<sup>123</sup> See paragraphs 2 to 6 and 12 above.

<sup>124</sup> *Unclaimed Moneys Act 1918* (Tas), s.8; *Unclaimed Money Act 1971* (NZ), s.11(5).

<sup>125</sup> *Public Curator Act 1915* (Qld), s.24.

<sup>126</sup> *Unclaimed Moneys Act 1912*, s.8.

consideration to the claim.<sup>127</sup> But even if this were the case, the ultimate decision to pay or not to pay still rests with the Treasurer. It is doubtful in view of s.14(3) of the *Parliamentary Commissioner Act 1971*,<sup>128</sup> whether the Ombudsman would be entitled to investigate the matter on behalf of the claimant.

87. A possible solution and a novel one throughout Australia and New Zealand, would be to provide for a right of appeal to an independent tribunal against the Treasurer's decision. The advantages of such a procedure must, however, be weighed against the advantages to be gained from keeping this legislation as simple as possible, and free from complex administrative structures. Furthermore, the Commission understands that there have been no difficulties in practice with regard to the payment of claims by the Treasurer.

88. Another cause for complaint by a person claiming to be entitled to unclaimed money may arise when two or more persons claim to be entitled to the same money. The Treasurer may be able to seek relief by way of interpleader on the basis that he is "under liability...for any debt or money".<sup>129</sup> But, under the *Unclaimed Moneys Act*, it seems that the Treasurer could also choose to pay one of the claimants whom he was satisfied, however unreasonably, was the owner, and he would thenceforth not be responsible for any further payment.<sup>130</sup> The situation is rarely likely to occur in practice but it might be thought appropriate to require the Treasurer to seek a court order when he has notice of two or more claims for the same sum of money. This could be achieved by limiting his indemnity against further liability in such circumstances, so that he is only indemnified when he has sought and acted on a court order.

89. In other jurisdictions, any claim to unclaimed money is made to the Treasurer, or the Public Curator in Queensland or the Commissioner of Inland Revenue in New Zealand.<sup>131</sup> The Treasurer, Public Curator or Commissioner of Inland Revenue, as the case may be, makes the decision whether he is satisfied that the claimant is entitled to the money. The only additional formality is in Queensland where the consent of the Minister is required

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<sup>127</sup> Although the Crown and its servants are generally regarded as being immune from the writ when acting on Crown business, this is not so when the Crown is acting upon business affecting private legal rights - de Smith *Judicial Review of Administrative Action* (2nd ed. 1968) at 575-576.

<sup>128</sup> Section 14(3) provides as follows -  
"This section does not authorise or require the Commissioner [Ombudsman] to investigate under this Act any decision made by Cabinet or by a Minister of the Crown or question the merits of any such decision."

<sup>129</sup> *Rules of the Supreme Court*, Order 17(1)(a)(iii).

<sup>130</sup> *Unclaimed Moneys Act 1912*, s.9.

<sup>131</sup> See above at 65 n.2.

before payment is to be made out of unclaimed money.<sup>132</sup> There is no right of appeal from the decision to pay or not to pay in any jurisdiction.

90. With the exception of New South Wales, Australian Capital Territory and the Northern Territory, the Treasurer, the Public Curator and the Commissioner of Inland Revenue are indemnified against any liability for mistaken payments.<sup>133</sup> In the Australian Capital Territory and the Northern Territory, the legislation is silent on the point. In New South Wales it is expressly provided that the Treasurer shall not be indemnified against liability for mistaken payments.<sup>134</sup>

(vi) *Application of unclaimed money*

91. At present, unclaimed money paid to the Treasurer must be paid into the Unclaimed Moneys Fund. It would seem that apart from interest arising on the money, the unclaimed money must remain indefinitely in this fund and cannot be appropriated into the Consolidated Revenue Fund for public purposes.<sup>135</sup> The Commission considers this to be an undesirable situation and suggests that suitable legislation should be passed to allow unclaimed money to be paid direct into the Consolidated Revenue Fund.

92. In all jurisdictions except South Australia, unclaimed money which remains unclaimed for twelve months after it has been advertised in the *Government Gazette* (or in New Zealand after a letter has been sent to the claimant's last known address) is paid to an official receiver. In Victoria it is paid to the receiver of revenue,<sup>136</sup> in New South Wales, Tasmania, Australian Capital Territory and the Northern Territory it is paid to the Treasurer,<sup>137</sup> in Queensland it is paid to the Public Curator<sup>138</sup> and in New Zealand it is paid to the Commissioner of Inland Revenue.<sup>139</sup> In South Australia the money is paid to the Treasurer but only if it remains unclaimed for two years following advertising.<sup>140</sup>

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<sup>132</sup> *Public Curator Act 1915* (Qld), s.111(1).

<sup>133</sup> *Unclaimed Moneys Act 1962* (Vic), s.14(2); *Unclaimed Moneys Act 1891* (SA), s.9; *Public Curator Act 1915* (Qld), s.111(2); *Unclaimed Moneys Act 1918* (Tas), s.9; *Unclaimed Money Act 1971* (NZ), s.11(4).

<sup>134</sup> *Unclaimed Moneys Act 1917* (NSW), s.10.

<sup>135</sup> *Unclaimed Moneys Act 1912*, s.6(2), but see paragraphs 16 and 22 above.

<sup>136</sup> *Unclaimed Moneys Act 1962* (Vic), s.12(1).

<sup>137</sup> *Unclaimed Moneys Act 1917* (NSW), s.6; *Unclaimed Moneys Act 1918* (Tas), s.6; *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.10; and 1963 (NT), s.12.

<sup>138</sup> *Public Curator Act 1915* (Qld), s.110(2).

<sup>139</sup> *Unclaimed Money Act 1971* (NZ), s.8.

<sup>140</sup> *Unclaimed Money Act 1891* (SA), s.6(1).

93. With the exception of Victoria and Queensland, the money is available immediately for use for public purposes.<sup>141</sup> In Victoria, it is first held by the receiver of revenue in the Unclaimed Moneys Fund for six years before it is paid into the Consolidated Revenue Fund.<sup>142</sup> In Queensland, (as in Western Australia, the Government's practice based on the Audit Act aside), the money is held in an Unclaimed Moneys Fund with interest only being payable into the Consolidated Revenue Fund.<sup>143</sup>

### **Voluntary payment of unclaimed money to the Treasurer**

94. The *Unclaimed Moneys Act* imposes mandatory requirements upon those falling within its scope to pay unclaimed money to the Treasurer.<sup>144</sup> Those who do not fall within the provisions of the Act may, if they wish, plead lapse of time as a defence to a claim for any money which is owed if the claim is not brought within the period prescribed in the *Limitation Act 1935*.<sup>145</sup> It is possible to imagine situations where holders not falling within the requirements of the Act may nevertheless recognise that persons to whom money is owed have a legal and moral right to receive that money even though no claim has been made for it.<sup>146</sup> The holder may have no intention of availing himself of any defence provided in the Limitation Act if and when a claim is made even though he is free to do so. In this situation there may be a case for making provision enabling these holders to avail themselves of the procedure in the *Unclaimed Moneys Act*. This would enable the holder to pay unclaimed money to the Treasurer as if he were required by the Act to do so. The effect would be to remove the contingent liability from the holder's books, yet at the same time, keeping open the claimant's right to claim the money.

95. If voluntary payments to the Treasurer were permitted, the question would arise as to whether this procedure should be made available to the holder before the limitation period has expired. If the holder has no wish to reject any claim made out of time, and, if he has no wish to retain the money, there seems to be little point in requiring him to wait until the

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<sup>141</sup> *Unclaimed Moneys Act 1917* (NSW), s.6(1); *Unclaimed Moneys Act 1891* (SA), s.6(1); *Unclaimed Moneys Act 1918* (Tas), s.6(2); *Companies (Unclaimed Assets and Moneys) Ordinance 1950* (ACT), s.10(3); and 1963 (NT), s.12(3); *Unclaimed Money Act 1971* (NZ), s.8(3).

<sup>142</sup> *Unclaimed Moneys Act 1962* (Vic), s.12(2).

<sup>143</sup> *Public Curator Act 1915* (Qld), s.24.

<sup>144</sup> *Unclaimed Moneys Act 1912*, s.6(1).

<sup>145</sup> See paragraphs 6 and 35 to 36 above.

<sup>146</sup> Perhaps a common example would be where the sums held do not have to be paid to the Treasurer because they do not exceed the required amount. At present the required amount is \$10 but it was suggested in paragraph 70 above that this figure could be substantially increased, say to \$200.

money has been owing for six years before he is permitted to discharge himself from liability by choosing to pay the money to the Treasurer. It is different when the Act requires the holder to pay the money to the Treasurer. In this situation there is an interference with the rights of the holder and the tendency of the legislation in all jurisdictions except Victoria<sup>147</sup> is to temper that interference by at least allowing the holder to retain his property until the limitation period has expired.

96. It is a question of policy whether the Government ought to provide such a voluntary custodial service for persons who owe money which they do not wish to retain. The Commission notes that there is enabling legislation setting up such a service in Victoria, South Australia and New Zealand.<sup>148</sup> It is also noted that the voluntary holder in Victoria and in South Australia is able to pay the money to the Treasurer if it is unclaimed for just twelve months or more. The Commission would therefore welcome comments as to whether there is a need in Western Australia for such a voluntary scheme and if so, as to the form it should take.

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<sup>147</sup> See paragraphs 75 and 77 above. In Victoria, it is possible for unclaimed moneys to be paid to the receiver of revenue twenty four months after it was first owed - *Unclaimed Moneys Act 1962* (Vic), ss.9(1) and 12(1) .

<sup>148</sup> *Unclaimed Moneys Act 1962* (Vic), s.15; *Unclaimed Moneys Act 1891* (SA), s.7a; *Unclaimed Money Act 1971* (NZ), s.5(2). For fuller particulars see Part C of Appendix IV.

## **PART B - OTHER LEGISLATION IN WESTERN AUSTRALIA**

### **DEALING WITH UNCLAIMED MONEY**

#### **OTHER THAN TRUST MONEY**

97. There are a number of other Acts containing express provisions dealing with the disposal of unclaimed money in certain cases. Various statutory provisions are listed in Appendix III. There may also be other Acts with similar provisions which may be added. To take examples, there is legislation dealing with unclaimed money in bank accounts,<sup>1</sup> unclaimed dividends declared in bankruptcy,<sup>2</sup> unclaimed lottery prizes<sup>3</sup> and betting winnings.<sup>4</sup> There is also legislation dealing with the analogous problem of the disposal of proceeds of sale of unclaimed goods.<sup>5</sup>

98. In some cases the legislation provides for unclaimed money to be paid to the Treasurer. For example, goods left on wharves, or left with bailees in the course of business for inspection, custody, storage, repair or other treatment may be sold after suitable precautions have been taken to let the owner know what is happening. From the proceeds of sale the bailee or port authority as the case may be, is entitled to deduct any money owing to him or it and the surplus, if any, is payable to the Treasurer on behalf of the owner.<sup>6</sup> Other unclaimed money payable to the Treasurer includes unclaimed betting winnings<sup>7</sup> and unclaimed dividends payable in respect of a bankrupt estate or company in liquidation.<sup>8</sup> There is also Commonwealth legislation providing for unclaimed money held by life insurance companies and unclaimed deposits in trading bank accounts to be paid into the Commonwealth Consolidated Revenue Fund.<sup>9</sup> According to figures released by the Commonwealth Treasurer and published in *The West Australian* on 1 July 1976, \$850,000 passed to the Federal Government during the preceding year.

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<sup>1</sup> *Rural and Industries Bank Act 1944*, s.65V; *Banking Act 1959* (Cwth), s.69; *Commonwealth Banks Act 1959* (Cwth), s.53.

<sup>2</sup> *Bankruptcy Act 1966* (Cwth), s.254 and see also *Companies Act 1961*, s.286 dealing with unclaimed assets in the hands of a company liquidator.

<sup>3</sup> *Lotteries Regulations 1967*, Reg. 9.

<sup>4</sup> *Totalisator Agency Board Betting Act 1960*, 5.23(3).

<sup>5</sup> *Albany Port Authority Act 1926*, s.27; *Bunbury Port Authority Act 1909*, s.27; *Fremantle Port Authority Act 1902*, s.29 etc. - see Appendix 111. See also the *Disposal of Uncollected Goods Act 1970*, s.28 and the *Warehousemens Liens Act 1952*, s.10.

<sup>6</sup> *Ibid.*

<sup>7</sup> See n.4 above.

<sup>8</sup> See n.2 above.

<sup>9</sup> *Life Insurance Act 1945* (Cwth), s.106; *Banking Act 1959* (Cwth), s.69.

99. In other cases, the State and Commonwealth legislation entitles the holder to keep unclaimed money. For example, unclaimed pensions payable under the *Coal Mine Workers (Pensions) Act 1943* become part of the pension fund,<sup>10</sup> unclaimed money in the hands of a pound-keeper becomes the property of the council,<sup>11</sup> interest on customer's unclaimed deposits in the Rural and Industries Bank savings division belongs to the bank,<sup>12</sup> unclaimed deposits in the Commonwealth Savings Bank may be retained by the bank<sup>13</sup> and unclaimed lottery prizes are returned to the Lotteries Commission.<sup>14</sup>

100. The Commission suggests that there may be a case for arguing that this specific legislation dealing with unclaimed money could be brought into line with the general provisions contained in the *Unclaimed Moneys Act*. In the case of money which is payable to the Treasurer pursuant to specific legislation, it could even be argued that the specific provisions should be replaced by a suitable extension to the *Unclaimed Moneys Act*.

101. On the other hand, it may be argued that the existing specific provisions reflect the underlying policy of the Acts concerned and any amendment may involve changes in policy rather than changes in administration and procedure. For example, if a bailee wishes to make use of the *Disposal of Uncollected Goods Act 1970* and sell goods left with him for repair or custody, he must comply with certain formalities in the Act including requirements as to the giving of notice to the owner of the goods.<sup>15</sup> If any surplus remains unclaimed from the proceeds of sale after the bailee has deducted money owing to him, it may create an undue burden on the bailee to expect him then to comply with all the formalities laid down in the *Unclaimed Moneys Act*. If betting winnings are unclaimed for seven months they are paid to the Treasurer into the Consolidated Revenue Fund. The winner then has no enforceable claim.<sup>16</sup> To bring this money into the realm of the *Unclaimed Moneys Act* may be thought to create a climate which is too favourable to the successful punter. In some cases it may also be thought to be unsuitable for small amounts of unclaimed money to be retained by the holder.<sup>17</sup>

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<sup>10</sup> s.20(6).

<sup>11</sup> *Local Government Act 1960*, s.457.

<sup>12</sup> *Rural and Industries Bank Act 1944*, s.65V.

<sup>13</sup> *Commonwealth Banks Act 1959* (Cwth), s.53.

<sup>14</sup> *Lotteries Regulations 1967*, Reg. 9.

<sup>15</sup> ss. 9 and 12.

<sup>16</sup> *Totalisator Agency Board Betting Act 1960*, s.23(3).

<sup>17</sup> See paragraph 70 above.

102. At present the Commission is not aware of any particular problems or difficulties arising out of the operation of any of these specific provisions, but it would welcome comment as to whether any changes are considered to be desirable.

## **PART C - THE LAW IN WESTERN AUSTRALIA**

### **RELATING TO UNCLAIMED TRUST MONEY**

#### **EXISTING LEGISLATION**

103. Statutory provisions dealing specifically with the question of unclaimed trust money may be found only in the *Public Trustee Act 1941*,<sup>1</sup> the private trustee company Acts<sup>2</sup> and the *Audit Act 1904*.<sup>3</sup> There are several differences in the procedure prescribed by these provisions<sup>4</sup> but in all cases unclaimed trust money is required to be paid to the Treasurer. There are penalties for default in the case of the private trustee companies.<sup>5</sup>

104. Legislation providing for unclaimed trust money to be paid to the Treasurer can be reconciled with the policy and effect of the *Limitation Act*. A trustee cannot set up a defence under that Act against a claim for trust money retained by him.<sup>6</sup> Consequently, trustees (other than the Public Trustee, the private trustee companies and public servants receiving money by virtue of their office), in the absence of legislation dealing with unclaimed trust money, may find that they are required to retain unclaimed trust money for an indefinite period, awaiting a claim which may never be made. In the meantime the money would be invested but it could not be used for any other purpose unless this was specified in the trust.

105. It may therefore seem appropriate to provide for all unclaimed trust money to be paid to the Treasurer for use for public purposes pending a claim by a beneficiary entitled to it. Any such legislation should however, recognise and protect the beneficiary's rights. This gives rise to the following questions relating to the adequacy of the existing legislation.<sup>7</sup>

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<sup>1</sup> s.45 applies to "money ... in the hands of the Public Trustee to the credit of any trust or estate under administration by him for a term of six years ..." where the Public Trustee after advertising has no information or knowledge of the existence of any person entitled in distribution.

<sup>2</sup> *West Australian Trustee Executor and Agency Co. Ltd. Act 1893*, ss.22-23 and the *Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. Act 1922*, ss.22-23 apply (in both cases) to "all moneys which form part of any estate of which at any time the Company shall be executor, administrator, trustee, receiver, committee, trustee in bankruptcy or guardian and which moneys shall remain unclaimed by the person entitled to the same for a period of five years...".

<sup>3</sup> ss.26-29 apply to money paid to the Treasurer pursuant to any Act or to any public servant for or on account or for the use and benefit of any other person which is unclaimed for six years. This would apply, for example, to wages or maintenance received by the Director of Community Welfare which are payable to a child under the control of the Department.

<sup>4</sup> See Appendix V and paragraphs 128 to 148 below.

<sup>5</sup> s.22 in both Acts. The penalty is \$10 for every day of default.

<sup>6</sup> *Limitation Act 1935*, s.47(1) and see paragraphs 2 to 4 above.

<sup>7</sup> These are the questions referred to in the introduction to this working paper: see paragraph 14 above.

- (i) Should there be provision requiring or at least enabling all persons holding unclaimed trust money to pay the money to the Treasurer?
- (ii) Should all unclaimed trust money be available for public purposes pending a claim by the beneficiary?
- (iii) Does existing legislation recognise and give adequate protection to the beneficiary's rights in respect of unclaimed trust money?

Each of these questions will be considered in turn.

**(i) SHOULD THERE BE PROVISION REQUIRING OR AT LEAST ENABLING ALL PERSONS HOLDING UNCLAIMED TRUSTMONEY TO PAY THE MONEY TO THE TREASURER?**

**Present situation in Western Australia**

106. There are numerous occasions when persons may be holding unclaimed trust money. For example, persons acting for friends or members of the family deceased or otherwise, guardians, accountants and company directors may find themselves in this position. The law of trusts requires these persons to retain trust money separate from their own money, and the obligation to retain the money for the beneficiary may last indefinitely.<sup>8</sup> The same considerations apply to solicitors. Section 34 of the *Legal Practitioners Act 1893* requires solicitors to keep trust money received by them or their clerks, partners etc. in the course of legal practice,<sup>9</sup> in a trust account. Real estate agents too are required to keep money received on behalf of clients in a trust account,<sup>10</sup> but their position is complicated in that they may also fall within the provisions of the *Unclaimed Moneys Act*.<sup>11</sup>

107. Where the money forms part of an estate which is undisposed of and where there are no known next of kin the money may be escheated to the crown.<sup>12</sup> Section 66 of the *Trustees Act 1962* may also be relevant where the trust property is unclaimed because the beneficiary entitled to it is unknown, or cannot be found or it is not known whether he is dead or alive.

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<sup>8</sup> See paragraphs 3 to 4, and 35 above.

<sup>9</sup> s.34(3).

<sup>10</sup> *Land Agents Act 1921*, s.8(1) (b).

<sup>11</sup> See paragraphs 48 to 50 above and see also paragraph 76 above.

<sup>12</sup> See the *Escheat Procedure Act 1940* for the appropriate procedure.

In such a case, the trustee is able<sup>13</sup> to apply to the Supreme Court for authority to distribute the estate as if the missing beneficiary were dead and his share had lapsed.<sup>14</sup>

108. Apart from these two procedures, there seems to be only two other courses open for persons holding unclaimed trust money to bring an end to their continuing responsibility. They may pay the money into court, or they may arrange for administration by the Public Trustee or by one of the private trustee companies. For reasons which will now be discussed, neither course appears to be suitable.

### *Payment into Court*

109. Section 99 of the *Trustees Act 1962* permits a trustee<sup>15</sup> to pay *any* trust money into the Supreme Court. Emphasis has been added to the word "any" as the provision is not confined to *unclaimed* trust money, nor indeed does the provision seem particularly appropriate for disposing of unclaimed trust money. The provision seems to be wide enough to allow money to be paid into the Court one day after it has become distributable to the beneficiary. There may have been extensive advertising or no advertising carried out by the trustee. The Master is given no specific instructions in the *Trustees Act* as to how he should deal with the money. He is given no instructions as to how long it should be kept, whether it should be invested and whether he is expected to carry out any advertising for the beneficiary. This is understandable as none of these requirements, which may be suitable in any provision for disposition of unclaimed trust money, is particularly appropriate to the Master's office.

110. Once the money has been paid into court it may be paid either to the Treasurer or to the Public Trustee.<sup>16</sup> The Master's practice is to pay money in the nature of unclaimed money to the Public Trustee pursuant to s.37 of the *Public Trustee Act*. In most cases the sums concerned are small, that is under \$100, and come from deceased estates. The Public Trustee invests the money in the common fund and it earns interest at the current rate of 10.25%.

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<sup>13</sup> *Trustees Act 1962*, s.66(12) makes it clear that the procedure is enabling not compelling.

<sup>14</sup> This procedure may not be available to the Public Trustee and the private trustee companies. They are bound by their own mandatory provisions relating to unclaimed money and these may be regarded as inconsistent with, and as expressing a contrary intention to, the general power given to trustees by s.66: see s.5(3) (b) of the *Trustees Act 1962*.

<sup>15</sup> Defined in s.6 to include an express, implied or constructive trustee.

<sup>16</sup> See the Third Schedule to the *Supreme Court Rules*.

111. The Public Trustee takes the view that these sums are not held "to the credit of any trust or estate under administration by him".<sup>17</sup> Consequently, the money is not regarded as being payable to the Treasurer as unclaimed money in the hands of the Public Trustee pursuant to s.45 of the *Public Trustee Act*.<sup>18</sup> Instead, the money is held indefinitely awaiting further instruction from the Master. As a result, some of this money has been held for over thirty years, and during that time, with accumulations of interest, has been enlarged to quite considerable sums. The present total of unclaimed money received by the Public Trustee from the Master exceeds \$148,000.

112. The procedure for payment into court under s.99 of the *Trustees Act* seems to be designed for the situation where a temporary safe repository is required for trust money while changes are being made to the administration of the trust. It would be suitable, for example, when a trustee seeks retirement or is being discharged and a new trustee is awaiting appointment. The Commission takes the view that the existing use of s.99 of the *Trustees Act* involving the Master of the Supreme Court is not suited for the more permanent disposition of unclaimed trust money and that another solution is required.

#### *Administration by a trustee company*

113. The Public Trustee and the two private trustee companies have statutory measures requiring them to dispose of unclaimed trust money to the Treasurer.<sup>19</sup> It might therefore be argued that other trustees holding unclaimed trust money could dispose of it simply by paying it to one of the trustee companies. However, authority would be needed to make such a payment. The only way it could be done at present would be to arrange for the Public Trustee or one of the private trustee companies to be trustee. This presents itself as an unnecessarily cumbersome and expensive procedure. Moreover, it may mean that the trustee company would then be required to retain the money for the full statutory period<sup>20</sup> before payment to the Treasurer could be made.<sup>21</sup> In other words, the trustee company may be

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<sup>17</sup> *Public Trustee Act 1941*, s.45.

<sup>18</sup> See paragraph 103 above and Appendix V.

<sup>19</sup> *Ibid.*

<sup>20</sup> Six years in the case of the Public Trustee (*Public Trustee Act 1941*, s.45), five years in the case of the private trustee companies (*West Australian Trustee Co. Act 1893*, s.22; *Perpetual Trustees Co. Act 1922*, s.22).

<sup>21</sup> This may be arguable. The provisions in the *Public Trustee Act* and in the private trustee company Acts are mandatory. It is not clear whether a trustee company could make earlier payment to the Treasurer if it wished to do so.

unable to take into account the length of time during which the money has remained unclaimed in the hands of the original trustee.

114. The Public Trustee also has power to administer real or personal property belonging to persons who are absent from the State without an agent or attorney, persons who are unknown, persons who are known but not their whereabouts or where it is not known whether they are dead or alive.<sup>22</sup> However, this procedure requires a court order made on the Public Trustee's application. The Commission has been advised that this procedure is intended to be used, and is in fact used by the Public Trustee, to assist someone who is inconvenienced because he has some interest in property belonging to a missing person. If some document has to be signed to recognise or give effect to some dealing affecting the interest in the property and the owner is missing, then the procedure enables the Public Trustee to assist. For example, the Public Trustee has used the procedure to sign a discharge of mortgage on behalf of a missing mortgagee when the mortgagor sought to repay his loan. It seems that the procedure is not suitable for the purpose of using the Public Trustee as an intermediary through whom unclaimed money can be transferred to the Treasurer.

115. The Commission suggests that there is a need for trustees, (apart from the Public Trustee, the two private trustee companies and public servants in certain cases) to have some procedure whereby they can discharge themselves from continuing responsibility for unclaimed trust money. It also suggests, for the reasons outlined above, that existing procedures in Western Australia are inadequate for the purpose. It therefore proposes to consider the situation in other jurisdictions to see if the problem has arisen there, and if so, to see what remedial measures have been enacted.

### **Situation in other jurisdictions**

116. It seems that the problem faced by trustees has been experienced in Victoria, South Australia, Queensland and New Zealand.<sup>23</sup> The following is a summary of the relevant provisions.<sup>24</sup>

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<sup>22</sup> *Public Trustee Act 1941*, s.37A.

<sup>23</sup> *Unclaimed Moneys Act 1962* (Vic), s.13A; *Legal Profession Practice Act 1958* (Vic), s.40A; *Unclaimed Moneys Act 1891* (SA), s.7a; *Trust Accounts Act 1973* (Qld), s.33; *Trustee Act 1956* (NZ), ss.77 to 79; *Law Practitioners Act 1955* (NZ) s.72.

<sup>24</sup> For fuller details see Part C of Appendix IV.

### *Victoria*

117. By an amendment to the *Unclaimed Moneys Act 1962* made in 1973, trustees, defined as -

“... any executor, administrator, trustee, receiver, committee or guardian, and includes the Public Trustee and any trustee company ...”

are required to pay trust money unclaimed for six years to the receiver of revenue. The receiver of revenue pays the money into the Unclaimed Moneys Fund. From there in a further six years it is transferred to the Consolidated Revenue Fund.<sup>25</sup>

118. Solicitors were empowered to pay money held unclaimed in a trust account to the receiver of revenue as unclaimed money subject thereafter to the provisions of the *Unclaimed Moneys Act*.<sup>26</sup> In 1973, however, such a payment became compulsory.<sup>27</sup>

### *Queensland*

119. Section 33 of the *Trust Accounts Act 1973* requires any solicitor, conveyancer or public accountant and every person who is a trustee under any other Act or law or rule of law to make a return of unclaimed trust money to the Under Secretary for Justice if it is unclaimed for twelve months. The Under Secretary may direct that the money be paid to the Public Curator. If so, the money is paid into the Unclaimed Moneys Fund and interest is payable into the Consolidated Revenue Fund.

### *South Australia*

120. There does not appear to be any provision requiring trustees to pay unclaimed trust money to the Treasurer.<sup>28</sup> However, there is an enabling provision in the *Unclaimed Moneys Act 1891* which allows persons other than companies<sup>29</sup> to pay unclaimed money to the

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<sup>25</sup> *Unclaimed Moneys Act 1962* (Vic), s.13A.

<sup>26</sup> *Legal Profession Practice Act 1958* (Vic), s.40A.

<sup>27</sup> *Unclaimed Moneys Act 1973* (Vic), s.3(2) (a).

<sup>28</sup> Sections 116 to 117 of the *Administration and Probate Act 1919* (SA) apply only to unclaimed money held by the Public Trustee.

<sup>29</sup> Companies are **required** to pay unclaimed money to the Treasurer by *Unclaimed Moneys Act 1891*, s.6(1)

Treasurer if they so wish.<sup>30</sup> The power arises where the money has been held for one year or more without any claims made and where the owner cannot be found. Any such payment must be accompanied by a statutory declaration setting forth the details of the money, the circumstances whereby the holder came into possession of it and stating that the owner cannot be found. Presumably, a trustee could avail himself of this power in respect of any unclaimed trust money which he holds.

### *New Zealand*

121. There is express provision for unclaimed trust money held by trustees to be paid to the Treasury.<sup>31</sup> The expression "trustee" includes not only express trustees and trustee corporations but also implied and constructive trustees.<sup>32</sup> There is express provision relating to solicitors. They may pay unclaimed money in a trust account to the Commissioner of Inland Revenue if the owner cannot be found.<sup>33</sup> There is also a provision in the *Unclaimed Money Act* entitling any person not required to pay unclaimed money to the Commissioner of Inland Revenue to make such payment if he so wishes.<sup>34</sup> It is interesting to note that all of these provisions in New Zealand, unlike their counterparts in Victoria and Queensland,<sup>35</sup> are enabling and not compulsory.

### **Discussion**

122. In the interest of consolidating the law and in providing uniformity there is a case for arguing that the question of disposing of unclaimed trust money held by the Public Trustee, the two private trustee companies, public servants and any other trustee, express, implied or constructive, should be dealt with in one comprehensive enactment. Existing statutory provisions governing these bodies could then be repealed. As in Victoria,<sup>36</sup> the legislation relating to unclaimed trust money could be made a part of the *Unclaimed Moneys Act* if this Act is to be retained in Western Australia.<sup>37</sup> The result would be one Act dealing with all types of unclaimed money.

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<sup>30</sup> *Unclaimed Moneys Act 1891 (SA)*, s.7a.

<sup>31</sup> *Trustee Act 1956 (NZ)*, s.77.

<sup>32</sup> *Ibid.*, s.2.

<sup>33</sup> *Law Practitioners Act 1955 (NZ)*, s.72.

<sup>34</sup> *Unclaimed Money Act 1971 (NZ)*, s.5(2).

<sup>35</sup> See paragraphs 117 to 119 above.

<sup>36</sup> See the *Unclaimed Moneys Act 1962 (Vic)*, s.13A and paragraph 117 above.

<sup>37</sup> See paragraphs 41 to 46 above.

123. Existing legislation applicable to unclaimed trust money held by the Public Trustee, the private trustee companies and public servants contains mandatory provisions. The Victorian and Queensland Acts are also mandatory.<sup>38</sup> In New Zealand, the provisions applicable to unclaimed trust money are enabling provisions.<sup>39</sup> The justification for mandatory provisions lies in the fact that there is a benefit to society if trustees are compelled to pay unclaimed trust money to the Treasury for public purposes.

124. On the other hand, mandatory provisions may have the effect of compelling a trustee to do something which he may not wish to do. He may be quite content to retain control of the money and keep it invested for the beneficiary knowing that there is a good chance that some day he will appear and recover his money. The trustee may have wide experience in the field of investment. Consequently, it may be in the beneficiary's best interests for the money to remain with the trustee rather than for it to be paid to the Treasurer. After all, it is the beneficiary's money even though he has not made any claim for it.

125. Incorporating legislation dealing with unclaimed trust money into the *Unclaimed Moneys Act* would not necessarily mean adoption of the same procedures applicable to non-trust money.<sup>40</sup> There is a fundamental difference between the rights and obligations of persons associated with trust money on the one hand, and non-trust money owing to a claimant on the other.<sup>41</sup> Provisions which may be acceptable in the case of non-trust money may be quite unsuitable for unclaimed trust money. For example, it could be argued that -

- (i) Trustees ought not to be entitled to retain even small amounts of unclaimed trust money.<sup>42</sup>
- (ii) Although it might be appropriate for unclaimed money which is not trust money to be advertised once, prior to being paid to the Treasurer,<sup>43</sup> or possibly earlier,<sup>44</sup> this may be unsuitable in the case of trust money.<sup>45</sup>

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<sup>38</sup> See paragraphs 117 to 119 above.

<sup>39</sup> See paragraph 121 above.

<sup>40</sup> See paragraphs 77 to 93 above.

<sup>41</sup> The difference is discussed in the introduction to this working paper. See particularly paragraphs 2 to 6 above.

<sup>42</sup> At present, sums of less than \$10 are apparently not required to be paid by the holder to the Treasurer under the *Unclaimed Moneys Act*, s.6(1). This figure could be substantially increased - see paragraph 70 above.

- (iii) Interest should be allowed on unclaimed trust money.<sup>46</sup>

126. If the law relating to the disposal of unclaimed trust money were to be consolidated in one enactment, perhaps as an extension to the *Unclaimed Moneys Act*, the opportunity ought to be taken to remove some of the anomalies and weaknesses in the existing legislation relating to unclaimed trust money discussed hereunder.<sup>47</sup>

127. The Commission would welcome comment on the desirability of consolidating the law relating to the disposal of unclaimed trust money perhaps by way of an extension to the *Unclaimed Moneys Act*, and as to whether any provision made should be mandatory or enabling.

**(ii) SHOULD ALL UNCLAIMED TRUST MONEY BE AVAILABLE FOR PUBLIC PURPOSES PENDING A CLAIM BY THE BENEFICIARY?**

128. In the case of unclaimed trust money payable to the Treasurer by the two private trustee companies, the money is paid into the Testamentary Trust Fund.<sup>48</sup> In practice the Treasurer is transferring money from this fund into the Consolidated Revenue Fund, relying for this purpose on the provisions of the *Audit Act 1904*. The same doubt as to the legality of this practice arises as it does in connection with the transfer of money from the Unclaimed Moneys Fund established under the *Unclaimed Moneys Act*.<sup>49</sup> It would be practical for the capital to be put to some worthwhile use whilst the beneficiary's claim is pending. Unclaimed trust money paid to the Treasurer by the Public Trustee and unclaimed trust money held by the Treasurer in general trust (as opposed to specific trust funds such as the Testamentary Trust Fund and the Unclaimed Moneys Fund), is clearly available for public

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<sup>43</sup> *Unclaimed Moneys Act 1912*, s.4(a) .

<sup>44</sup> See paragraph 80(d) above.

<sup>45</sup> The steps expected of the trustee in endeavouring to locate a beneficiary are discussed below in paragraphs 131 to 134.

<sup>46</sup> At present interest on unclaimed money paid to the Treasurer under the *Unclaimed Moneys Act* is paid into the Consolidated Revenue Fund - s.6(2) .It was suggested in paragraphs 84 and 85 above that to allow interest on a successful claim against the Treasurer would be an unwarranted and undesirable extension of the Act. The question of allowing interest on claims to recover unclaimed trust money is discussed below in paragraphs 140 to 144.

<sup>47</sup> Paragraphs 128 to 150.

<sup>48</sup> *West Australian Trustee Co. Act 1893*, s.22; *Perpetual Trustees Co. Act 1922*, s.22.

<sup>49</sup> See paragraphs 14(b), 22 and 91 above.

purposes.<sup>50</sup> Accordingly, it is suggested that the legality of transfers from the Testamentary Trust Fund into the Consolidated Revenue Fund should be put beyond doubt.

**(iii) DOES EXISTING LEGISLATION RECOGNISE AND GIVE ADEQUATE PROTECTION TO THE BENEFICIARY'S RIGHTS IN RESPECT OF UNCLAIMED TRUST MONEY?**

**Length of time unclaimed**

129. In the case of the Public Trustee, money held on trust becomes unclaimed money after six years from the date it first became distributable.<sup>51</sup> In the case of the private trustee companies, the money is payable to the Treasurer as unclaimed money after five years.<sup>52</sup> There is no apparent reason for this difference, and, in the interest of consistency, it is suggested that a common period of say six years in every case could be adopted.

130. In comparable legislation in other jurisdictions dealing with unclaimed money held by trustee companies, the period adopted is either five or six years. There is no consistent pattern.<sup>53</sup> There is further variation when the unclaimed money is held by solicitors, and other trustees. In Victoria, money held in a solicitor's trust account is payable to the receiver of revenue if the owner simply cannot be found.<sup>54</sup> In Queensland, details of money received by a solicitor, conveyancer, public accountant or any trustee, in the course of such person's practice or in circumstances requiring him to account and which is unclaimed for twelve months, must be given to the Under Secretary for Justice. He may direct payments to the Public curator.<sup>55</sup>

**Notice to the beneficiary**

131. Trustees, as part of their fiduciary duties would be expected to take reasonable steps, having regard to the amount involved and the known circumstances of the beneficiary

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<sup>50</sup> *Public Trustee Act 1941*, s.45; *Audit Act 1904*, s.29(1).

<sup>51</sup> *Public Trustee Act 1941*, s.45.

<sup>52</sup> *West Australian Trustee Co. Act 1893*, s.22; *Perpetual Trustees Co. Act 1922*, s.22.

<sup>53</sup> See Part A of Appendix IV.

<sup>54</sup> *Legal Profession Practice Act 1958* (Vic), s.40A.

<sup>55</sup> *Trust Accounts Act 1973* (Qld), s.33.

concerned, to notify him of any money which is held on his behalf. The costs of these inquiries may be deducted as an administration expense.<sup>56</sup>

132. The Public Trustee is required by statute to advertise for the beneficiary before unclaimed money is paid to the Treasurer. He is required to advertise at least twice at intervals of fourteen days in a newspaper circulated in Perth, at any time it would seem during the six year period in which the money is held awaiting claims.<sup>57</sup> The statutory notices required of the Public Trustee do not take the place of his fiduciary duty to take reasonable steps to locate the beneficiary. They are intended only as a final advice that the money is being transferred to the Treasurer. However, in spite of the steps taken during the course of administration to locate beneficiaries, the Public Trustee has found that claims to the money have been made in response to these statutory notices, and some of these have been successful. Consideration could, therefore, be given to the possibility of adding similar advertising requirements in the case of unclaimed money held by other trustees including the private trustee companies and perhaps, money received by public servants by virtue of their office.

133. As an extra measure, the Public Trustee is entitled to pay the money to the Treasurer only when he has "no information or knowledge of the existence of any person entitled in distribution or claiming so to be".<sup>58</sup> Although this may be the practice in the case of the private trustees and public servants, it might be considered desirable to express the duty in clear terms in a statute.

134. In other jurisdictions, with the exception of Queensland, there is no statutory provision requiring any advertising of unclaimed trust money or adverting to the trustee's obligations in endeavouring to locate the beneficiaries.<sup>59</sup> In Queensland, unclaimed trust money held by the Queensland Trustees Ltd. and the Union Trustee Co. of Australia Ltd. must be advertised in the *Gazette*.<sup>60</sup> With the Public Curator's consent, sums of less than \$4 do not have to be advertised.<sup>61</sup> In the case of money payable to the Public Curator by other

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<sup>56</sup> *Trustees Act 1962*, s.108.

<sup>57</sup> *Public Trustee Act 1941*, s.45.

<sup>58</sup> *Ibid.*

<sup>59</sup> See Part A of Appendix IV.

<sup>60</sup> *Public Curator Act 1915* (Qld), s.110(1).

<sup>61</sup> *Ibid.*

trustees under the Queensland Trust Accounts Act 1973,<sup>62</sup> there is a reference to the Public Curator's duty to use every endeavour without delay to ascertain the beneficiaries.<sup>63</sup>

### **The beneficiary's right to recover unclaimed trust money from the Treasurer**

135. Once payment to the Treasurer has been made by the trustee, the question arises as to the beneficiary's rights to recover the money. This right is given express recognition in the case of money which was held by the private trustee companies.<sup>64</sup> In the case of money paid to the Treasurer pursuant to the provisions of the *Audit Act 1904*, the beneficiary's right to claim is implicit. Section 29(2) provides that "no person shall be entitled to receive any [unclaimed money held in 'the Trust Fund'] which shall have remained unclaimed for six years". After six years, the money is payable into the Consolidated Revenue Fund. The provision would appear to envisage the beneficiary's right to claim his money within the six year period before it is paid into the Consolidated Revenue Fund. The provisions applicable to the Public Trustee<sup>65</sup> are silent as to the beneficiary's rights to recover the money. In practice, however, claims are made to the Public Trustee and he makes application to the Treasurer to recover the amount payable to the beneficiary.

136. It is surprising to note the time limit which is imposed on the beneficiary's right to recover unclaimed money under the *Audit Act* although the possibility of injustice is reduced by a proviso to s.29 which gives the Governor authority to approve payment to a late claimant.<sup>66</sup> However, claims to recover money paid to the Treasurer by the two private trustee companies are subjected to even more onerous restrictions as to time; more onerous because there is no express authority given to the Treasurer or any other person to approve a claim made out of time.<sup>67</sup> It is also noted that in the case of money paid by the West Australian Trustee Co., the beneficiary is given six years in which to claim, whereas he is given twelve years if the money was paid to the Treasurer by the Perpetual Trustees Co. The Public Trustee, being unfettered by any express statutory provision, takes the view that there is no time limit for the making of a claim by a beneficiary to recover trust money which he has paid to the Treasurer.

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<sup>62</sup> See paragraph 119 above.

<sup>63</sup> *Trust Accounts Act 1973* (Qld), s.33(8).

<sup>64</sup> *West Australian Trustee Co. Act 1893*, s.23; *Perpetual Trustees Co. Act 1922*, s.23.

<sup>65</sup> *Public Trustee Act 1941*, s.45.

<sup>66</sup> *Audit Act 1904*, s.29(3)

<sup>67</sup> *West Australian Trustee Co. Act 1893*, s.23; *Perpetual Trustees Co. Act 1922*, s.23.

137. The Commission sees this state of affairs as unsatisfactory. The reason for the time difference adopted by the two private trustee companies is difficult to understand. When the Perpetual Trustee's Bill was before the legislative Assembly in 1923 the time limit was consistent with the earlier provisions in the *West Australian Trustee Co. Act* with regard to the beneficiary's right to recover his money. However, the Hon. W.C. Angwin objected to any time restriction being placed on the beneficiary's rights.<sup>68</sup> As it transpired, this clause was the last holding up the passage of the Bill. After modifying his original objection and suggesting that twelve years should be substituted for six, the debate ended in the following way -<sup>69</sup>

**"Hon. W.C. Angwin:** If the clause remains with provision for six years, there is no power for a rightful owner to apply to the Court for the money after that period has elapsed.

**The Premier:** If you don't say another word we will make it twelve years."

138. The Commission considers that it is inconsistent with general principles of law relating to the rights and obligations of persons associated with trust money to impose any time restrictions on a beneficiary's rights to recover trust money.<sup>70</sup> Indeed the situation creates a curious contrast with the effect of the *Unclaimed Moneys Act* on non-trust money. The latter, for debatable reasons,<sup>71</sup> removes a defence based on lapse of time which would normally be available to the holder. The private trustee company Acts and the Audit Act create defences based on lapse of time where none existed before. No reason for this statutory restriction on the beneficiary's rights has been expressed and it is difficult to think of one. In practice, it would be surprising if the Treasurer ever made use of the provisions to defeat a genuine claim by a beneficiary.

139. The situation in other jurisdictions is set out in Part A of Appendix IV. Only Tasmania adopts any similar restrictions. In that State, claims must be made within ten years of payment into the Consolidated Revenue Fund.<sup>72</sup>

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<sup>68</sup> Hansard, *Parliamentary Debates of Western Australia* (1922-23 No.2) Vol. 67 at 2977.

<sup>69</sup> Ibid., at 2978.

<sup>70</sup> See paragraphs 2 to 4 above.

<sup>71</sup> See paragraphs 35 to 46 above.

<sup>72</sup> *Public Trust Office Act 1930* (Tas), s.36A; *Trustee Companies Act 1953* (Tas), s.35(6)(b).

### **The beneficiary's right to recover interest on his money from the Treasurer**

140. Money paid by the private trustee companies to the Treasurer may be invested in Government debentures or stock.<sup>73</sup> Until this is done, interest is earned on the money at the rate of three percent. All interest belongs to the beneficiary.

141. The *Public Trustee Act* and to some extent the *Audit Act*,<sup>74</sup> are silent on the question of entitlement to interest. Although the practice is not to allow interest on money recovered by beneficiaries, it might be argued that, as a trustee, the Treasurer is bound by the law of trusts, and, in the absence of express provision, is obliged to allow interest.<sup>75</sup> In this respect, it is relevant to note that in an analogous provision in New Zealand,<sup>76</sup> there is express provision that neither the Crown nor the Secretary to the Treasurer shall have duties and responsibilities of a trustee, and, if a subsequent claim is made by a beneficiary, no interest shall be payable by the Crown or by the Secretary to the Treasurer.<sup>77</sup> The implication is, that, in the absence of express provision, the Crown may be regarded as having all the duties and obligations of a trustee.

142. In other jurisdictions there is express provision in most cases that interest is not allowed on unclaimed trust money after it has been paid to the Treasurer.<sup>78</sup> Only New South Wales and Tasmania have provisions whereby the beneficiary can recover interest.<sup>79</sup> Victoria like Western Australia is silent on the point.

143. It is therefore suggested that the beneficiary's entitlement to interest in all cases should be clarified. The beneficiary's entitlement to interest is really a question of policy. However, it would be consistent with the beneficiary's proprietary rights to trust money to allow interest. For example, even if the trust money is paid to an innocent volunteer, the beneficiary, if able to trace his proprietary interest into a special investment, may be entitled

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<sup>73</sup> *West Australian Trustee Co. Act 1893*, s.22; *Perpetual Trustees Co. Act 1922*, s.22.

<sup>74</sup> In this respect the *Audit Act* seems to be incomplete. Section 29(3) seems to provide that a late claim i.e. one brought after payment into the Consolidated Revenue Fund, can only be made on approval by the Governor and then **without** interest. There is no provision dealing with claims made earlier against "the Trust Fund".

<sup>75</sup> See *Cann v Cann* (1884) 51 LT 770.

<sup>76</sup> *Trustee Act 1956* (NZ), s.77. This section gives a trustee power to pay trust money to the Crown and obtain a discharge from further liability.

<sup>77</sup> *Ibid.*, s.78(7).

<sup>78</sup> See Part A of Appendix IV.

<sup>79</sup> *Trustee Companies Act 1964* (NSW), s.26(6); *Trustee Companies Act 1953* (Tas), s. 35 (5).

to recover interest.<sup>80</sup> To allow interest would also go part of the way towards avoiding the long term effects of inflation on the beneficiary's entitlement. It should also be remembered that the Treasurer has had the use of the money as a windfall for the period of time it has been unclaimed, and, in many cases, the trust money may never be claimed at all.

144. It may be argued that for practical reasons, interest should only be allowed on larger sums, say \$100 or more. On the other hand, no such distinction exists in trustee law, and no such distinction is found in legislation in other jurisdictions.

### **Procedure for recovery**

145. There are differing procedural requirements for recovery of the money by the beneficiary. Money paid to the Treasurer by the Public Trustee is in practice repayable on a decision made by the Public Trustee. In the case of the private trustee companies, a Supreme Court order is required.<sup>81</sup> A claim against the Treasurer under the *Audit Act*, if brought out of time,<sup>82</sup> requires the approval of the Governor.<sup>83</sup>

146. The need for a court order in every case seems to be unnecessary and creates additional expense and delay, particularly where there is no issue of law involved. To allow the decision to be made by the Treasurer or Governor may not be adequate when questions of law are involved. However, there are sound practical reasons for the decision to be made in the first instance by the Treasurer. He is, after all, in charge of the money. In practice he would check with the trustee from whom he received payment to verify the beneficiary's claim. If there was any doubt or difficulty, and if he can correctly be regarded as a trustee,<sup>84</sup> he could seek directions from the court.<sup>85</sup> If the Treasurer refuses to pay, the beneficiary could simply claim for execution of the trust as he would in any other case where a trustee refuses to distribute.

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<sup>80</sup> *Re Diplock's Estate* [1948] Ch 465 at 517 and 557.

<sup>81</sup> *West Australian Trustee Co. Act* (1893), s.22; *Perpetual Trustees Co. Act* (1922), s.22.

<sup>82</sup> That is, after payment to the Consolidated Revenue Fund. The Act is silent as to the position where a claim is made against the Trust Fund held by Treasury - see at 91 n.4.

<sup>83</sup> *Audit Act 1904*, s.29(3).

<sup>84</sup> See paragraph 141 above.

<sup>85</sup> *Trustees Act 1962*, s.92.

### **Indemnity against liability for mistaken payments**

147. The question of providing the Treasurer with an indemnity against liability for mistaken payments also arises. At present there is no specific provision on the point but where the Treasurer pays out pursuant to a court order<sup>86</sup> it would be difficult for the true beneficiary to later persuade the same court to order payment to him. The question of indemnity is once again a policy question, and is not given uniform treatment in other jurisdictions.<sup>87</sup>

148. If a trustee makes a mistaken distribution, regardless of whether the mistake is one of fact or law, he is liable to repay both principal and, as a general rule, interest, to the beneficiary who ought to have received the money.<sup>88</sup> A cautious trustee will therefore, in cases where there is any doubt, seek directions from the court before making payment.<sup>89</sup> He is specifically excused from liability while carrying out the directions of the court.<sup>90</sup> The trustee may also be excused liability where he has acted honestly and reasonably and ought to be excused for omitting to obtain directions from the court.<sup>91</sup> The Commission therefore invites comment as to whether the Treasurer should be granted total immunity from liability for a mistaken payment, or, whether he should be treated in this respect as a trustee.

### **Unclaimed money held by trustees which is not payable to a beneficiary**

149. The comments made in this part of the working paper regarding the disposal of unclaimed trust money are intended to apply only to trust money which is owed to a beneficiary. A trustee may also find that the estate of which he is trustee owes money to a creditor. If the creditor makes no claim for the money, and the trustee has advertised in the newspaper for creditors to submit their claims, the trustee is entitled to dispose of the estate as if the liability does not exist.<sup>92</sup> However, if there is a claim which has been admitted, but which for some reason is never paid, the question arises as to the correct procedure for disposing of the money. The trustee cannot keep it, and to ignore the claim and distribute the money to the beneficiaries may result in his personal liability.

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<sup>86</sup> As is the case where the money has been paid by the private trustee companies.

<sup>87</sup> See Part A of Appendix IV

<sup>88</sup> *Re Hulkes* (1886) 33 Ch D 552.

<sup>89</sup> *Trustees Act 1962*; s.92.

<sup>90</sup> *Ibid.*, s.95.

<sup>91</sup> *Ibid.*, s.75 and see *Underhill's Law of Trusts and Trustees* (12th ed 1970) at 646 to 649, Art.94.

<sup>92</sup> *Trustees Act 1962*, s.63(1).

150. Section 64 of the *Trustees Act 1962* provides a procedure whereby the trustee may force the claimant to pursue his claim. Apart from this, however, the alternatives would seem to be for the trustee to either retain the money for the requisite limitation period then distribute it to the beneficiaries, or pay it to the Treasurer. If the latter is considered to be the more appropriate, the difference between trust money owed to a beneficiary and other money owed to a claimant would be maintained if the trustee were required to pay the money to the Treasurer under the provisions of the *Unclaimed Moneys Act*. Although strictly speaking it is unpaid rather than unclaimed money, it could be treated as unclaimed money in this special situation where the trustee is not entitled to keep the money if it remains unpaid.

## PART D - ISSUES FOR CONSIDERATION

151. The Commission is of the view that the law relating to unclaimed money, whether it be unclaimed trust money owing to a beneficiary, or other money owing to a claimant, is unsatisfactory in this State. It suggests that consideration could be given to three broad proposals. These are outlined below together with a summary of the particular issues which could arise as a result of their adoption.

### (a) The repeal of the Unclaimed Moneys Act

152. The first and the simplest proposal is to repeal the *Unclaimed Moneys Act*. This would mean a return to the position where a claim to money owed would be barred by lapse of time under the *Limitation Act*.

153. If this course were adopted, specific provisions mandatory or enabling could be made to deal with cases where the law relating to the limitation of actions does not provide a satisfactory result. This could apply in the following cases -

- (i) Where demand has to be made for the money before the limitation period begins (see paragraph 45(iv)).
- (ii) Where the holder has a defence available under the *Limitation Act* but is unwilling to raise it (see paragraphs 94 to 96).
- (iii) Where the claimant may be unaware of his right to claim (see paragraph 45(ii)).
- (iv) Where the unclaimed money is trust money (see paragraphs 104 to 105).

154. In (i) and (ii) the solution may be to allow the holder to pay the money to the Treasurer if he wishes to do so to relieve himself of what he may consider to be an administrative burden.

155. In (iii) the solution may be to require persons holding money in these circumstances to take steps to notify claimants of their rights.

156. If this measure were accepted the following issues arise -

- (1) Is advertising in local newspapers sufficient or should further steps be required where practicable such as giving notice to unions? (see paragraphs 45(ii) and 80) .
- (2) Should advertising be carried out at an early stage, say within one year of the money becoming owing? (see paragraphs 45(ii) and 80(d)) .
- (3) Should advertising be required in all cases or only in cases of money exceeding a certain sum, say \$40? (see paragraph 71) .

157. With regard to trust money, (iv), several issues arise as to the adequacy of existing legislation.

- (1) Is legislation necessary or desirable to provide for unclaimed trust money owing to beneficiaries and held by trustees generally (including the Public Trustee, the private trustee companies and public servants) to be paid to the Treasurer? (see paragraphs 105 to 122).
- (2) Should this legislation be mandatory or enabling? (see paragraphs 123 to 124).
- (3) Should unclaimed trust money be paid into the Consolidated Revenue Fund and be available for public purposes? (see paragraph 128).
- (4) For what length of time should trust money be held by a trustee before it is payable to the Treasurer as unclaimed trust money? (see paragraphs 129 to 130).

- (5) Is there a need to impose statutory provision as to the steps to be taken by trustees to locate beneficiaries entitled to unclaimed trust money? (see paragraphs 131 to 134).
- (6) Should the beneficiary be entitled to recover unclaimed trust money to which he is entitled from the Treasurer at any time? (see paragraphs 135 to 139).
- (7) Are the beneficiary's rights to interest on unclaimed trust money being adequately recognised in all cases? (see paragraphs 140 to 144) .
- (8) Who should make the decision as to whether the beneficiary is entitled to payment? (see paragraphs 145 to 146).
- (9) If the Treasurer is to make the decision in each case should he be given statutory indemnity from further liability in the event that his decision is mistaken? (see paragraphs 147 to 148).
- (10) Should a distinction be drawn as to the manner of disposing of unclaimed money owed by a trustee to a claimant as opposed to a beneficiary? (see paragraphs 149 to 150).

**(b) The revision of the Unclaimed Moneys Act**

158. The alternative is to retain the *Unclaimed Moneys Act* but in a revised form. The revision is needed to specify more clearly the true object of the Act, to remove anomalies, clarify its scope and generally to improve and bring up to date the procedure thereby provided for the disposal of unclaimed money.

159. In this case the following questions arise -

- (1) For what purpose should there be legislation dealing with unclaimed money which is not trust money? (see paragraph 45).

- (2) Who should be required to pay unclaimed money to the Treasurer? (see paragraphs 48 to 64). In particular should the Act apply to -
  - (a) Companies and specified categories of firms and persons? (see paragraphs 48 to 53).
  - (b) Companies and their liquidators only? (see paragraph 54).
  - (c) All companies and all firms or persons carrying on business? (see paragraph 55).
  - (d) Persons who find money in addition to companies and/or firms or persons carrying on business? (see paragraphs 56 to 63).
  
- (3) What should be regarded as unclaimed money for the purposes of the legislation? In particular should the legislation apply to -
  - (a) Sums which are or may be owing but the amounts whereof are uncertain or unknown? (see paragraphs 44(ii) and 66).
  - (b) Sums which are owing by a company or person but which are not owed in the course of that company's or person's business? (see paragraphs 67 to 68).
  - (c) Sums which are owed outside Western Australia? (see paragraph 69) .
  - (d) Small sums of unclaimed money, and what is to be the definition of small amount for the purpose of determining whether -
    - (i) small amounts should be payable to the Treasurer?
    - (ii) the holder should be required to advertise rights to claim small amounts before they can be retained by him? (see paragraphs 65 and 70 to 71).

- (e) Unclaimed distributions from profits such as dividends, and rebate distributions? (see paragraphs 72 to 73).
  - (f) Unclaimed trust money owed by companies etc.? (see paragraph 76).
- (4) For what length of time should the money remain in the hands of the holder before it is payable to the Treasurer as unclaimed money? (see paragraphs 77 to 79).
- (5) What requirements should be imposed on holders to give notice of the right to claim money which they owe? In particular -
- (a) Should advertising in a newspaper be required (see paragraph 80(a)) and if so, when and in what form? (see paragraph 80(b), (c) and (d)) Should such advertising be required in addition to or in substitution for advertising in the *Government Gazette*? (see paragraph 80(d)).
  - (b) Should further steps be required of the holder to notify the claimant of his rights? (see paragraph 80(e)).
- (6) Should claimants have a right to recover unclaimed money after it has been paid to the Treasurer? (see paragraphs 82 to 83).
- (7) Should interest be allowed on money recovered from the Treasurer? (see paragraphs 84 to 85).
- (8) Should the claimant have any right of appeal from any decision by the Treasurer to pay or not to pay? (see paragraphs 86 to 87).
- (9) What limits if any ought to be imposed on the Treasurer's indemnity against liability for mistaken payments? (see paragraph 88 to 90).

- (10) Should unclaimed money paid to the Treasurer be paid into the Consolidated Revenue Fund? (see paragraphs 91 to 93).
- (11) Should there be legislation enabling those persons not required to pay unclaimed money to the Treasurer, to do so if they wish? (see paragraphs 94 to 96).

**(c) The consolidation of statutes relating to unclaimed money**

160. The third proposal is to consider the consolidation of the law relating to unclaimed money. If the *Unclaimed Moneys Act* were to be retained, the opportunity could be taken while revising it, if necessary, to accommodate the law relating to unclaimed trust money, including perhaps existing legislation applicable to trust money held by the Public Trustee, the private trustee companies and by public servants under the *Audit Act* provisions. It may be appropriate to provide a different procedure for the disposition of unclaimed trust money having regard to the distinction between trust money owed to a beneficiary, and money (including trust money) owed to claimants (see paragraphs 2 to 6 and 125). Some of the existing statutory provisions applicable to non-trust money in specific situations might also be amalgamated into a revised edition of the *Unclaimed Moneys Act* (see paragraphs 97 to 102).

161. If, however, the *Unclaimed Moneys Act* were to be repealed, suitable provision (either mandatory or enabling - see paragraphs 123 to 124), applicable to unclaimed trust money, could be made in the *Trustees Act 1962*. Such a provision could no doubt be made subject to any other legislation dealing with unclaimed trust money in specific instances such as the *Public Trustee Act*, the private trustee company Acts and the *Audit Act*.

## APPENDIX I

### THE UNCLAIMED MONEYS ACT 1912

Approved for reprint 24th March, 1958

#### WESTERN AUSTRALIA

#### UNCLAIMED MONEYS

No. 34 of 1912.

[As amended by Acts No.2 of 1924,<sup>1</sup>; and No. 8 of 1947,<sup>2</sup>; and reprinted pursuant to the Amendments Incorporation Act, 1938.]

AN ACT to provide for giving publicity to information relating to Unclaimed Funds and for other purposes.

[Assented to 10th October 1912.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:-

- Short title.No.34 of 1912,s.1 amended by No.8 of 1947, s.2.
1. This Act may be cited as the *Unclaimed Moneys Act*, 1912-1947.
- Interpretation s.2 amended by No.2 of 1924, s.2, and No.8 of 1947, s.3. Vic. No. 2051, s.2.
2. In this Act, unless the context otherwise requires -
- "Company" means -
- (a) Every company which, having for its object the acquisition of gain, is registered or incorporated in Western Australia under any Act relating to companies; and

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<sup>1</sup> Assented to 3rd October, 1924.

<sup>2</sup> Assented to 10th October, 1947.

(b) Every company which, having for its object the acquisition of gain, and carrying on business in Western Australia, is registered or incorporated elsewhere than in Western Australia; and includes

(c) Every banking or life assurance company or association, howsoever or wheresoever registered or incorporated, carrying on business within Western Australia.

[N.Z. 1898,  
No. 201, s.2.]

(d) Every person or firm carrying on business, as traders in Western Australia, and acting as agents or private bankers for individuals or companies.

(e) The liquidator of any company.

[Original para.  
(f) omitted by  
No.2 of 1924,  
s.2; New para.  
(f) added by  
No.8 of 1947,  
s.3.]

(f) A society registered under the *Building Societies Act, 1920* (No.20 of 1920), as amended by the *Building Societies Act Amendment Act, 1921* (No. 16 of 1921).

"Owner" means the person entitled to any unclaimed moneys, and includes his executors, administrators, or assigns, or his or their lawful attorney or agent in Western Australia.

"Public Officer" means any person employed by the Government of Western Australia.

"Treasurer" means the Colonial Treasurer of Western Australia.

[Cf. N.Z. 1908,  
No.201, s.2;  
Vict. No.2051,  
s.2.]

"Unclaimed moneys" means all principal and interest money, and all dividends, bonuses, profits, and sums of money whatsoever, which have been owing to any person (notwithstanding that the recovery thereof may be barred by lapse of time) since the first day of January, One thousand nine hundred and six, and not before, or which shall at any time after the commencement of this

Act become owing to any person and which, on the commencement of this Act or at any time thereafter, have been payable by the company for a period of six years or upwards after the time when the same became payable, or when payment thereof might have been demanded or enforced, and in respect whereof no claim has, for a period of six years, been made by the owner, or any person lawfully claiming under him, against the company.

Register of unclaimed moneys to be kept. [Vic. No 2051, s.3. Schedule 1. Cf. N.Z., 1908, No. 201, s.3.]

3. (1) It shall be the duty of every company, in the month of January in each year, to enter all unclaimed moneys of not less than five pounds in any one account in a register to be made up to the thirty-first day of December last preceding and by such company at its head or principal office in Western Australia, in the form set forth in the first schedule to this Act, and with the particulars therein specified.

(2) From and after the last day of January in each year such register shall be open to the inspection of all persons at such head or principal office, during the hours within which the company transacts its ordinary business, on payment of a fee of one shilling.

Register to be published and declaration filed. Schedule 2. [See Vic. No.2051 s.4.]

4. Every company shall, before the fifteenth day of February in each year –

(a) publish a copy of such register in the *Government Gazette*; and

(b) file at the Treasury in Perth a statutory declaration made by an officer of the company, in the form set forth in the second schedule to this Act.

Penalty for neglect in keeping register, etc. [Vic. No. 2051,s.5.]

5. Any company which fails to keep such register, or to publish such copy, or file such declaration or which refuses inspection of the register, shall be liable to a penalty not exceeding two pounds for every day during which such default or refusal continues.

Unclaimed moneys to be paid to the Treasurer.  
[Vic. No. 2051, s.6. Cf. N.Z. 1908, No. 201, s.6.]

6. (1) All unclaimed moneys which shall not have been paid by the company to the owner thereof within one year after the publication of such notice in the *Government Gazette* shall be paid by the company to the Treasurer to be placed to the credit of a fund to be called the "Unclaimed Moneys Fund," and the company shall thereafter be relieved from all further liability in respect of the moneys so paid.

(2) The Governor may direct that the whole or part of the moneys paid to the credit of the said fund shall be invested in the purchase of Government debentures or stock, and the interest arising from such investment shall be paid into the consolidated revenue.

(3) The company may deduct out of all unclaimed moneys payable by the company to the Treasurer, or to any claimant, the expenses paid by the company in the publication of the register.

[See Vic. No.2051, s.7.]

(4) If a company fails to pay any unclaimed money to the Treasurer as required by this section, such money shall be deemed a debt due to the Crown, and be recoverable accordingly, and the company shall, in addition, be liable to a penalty not exceeding two pounds for every day during which such default continues.

Treasurer may examine accounts, etc.  
[Vic. No. 2051, s.8.]

7. The Treasurer may at any time after any publication of the register as aforesaid, examine the register, and any of the accounts relating to the unclaimed moneys in such register referred to, and may for that purpose require the production before him, or before such public officer as he may appoint, of any book, vouchers or documents referring to such moneys; and if any error shall be found in any register or the copy thereof as published, he may direct the register, or the copy thereof as published, or both of them, to be amended.

Treasurer may pay lawful claimant.

8. If any claimant shall make any demand against the Treasurer for any money paid to him under this Act, the Treasurer, upon being satisfied that the claimant is the owner of the money demanded by him, shall order

[Vic.No. 2051, s.9. Cf. N.Z. 1908, No. 201, s.8.] that the claimant is the owner of the money demanded by him, shall order and direct payment thereof to be made to him.

Provided that the claimant shall not be entitled to any interest arising from the investment of such money by the Treasurer.

Treasurer not responsible for payments in certain cases. [Vic.No. 2051, s.10.]

9. Where any unclaimed moneys paid to any claimant are afterwards claimed by any other person, the Treasurer shall not be responsible for the payment of the same, but such person may have recourse against the claimant to whom the Treasurer has paid the unclaimed moneys.

Act not to apply to certain unclaimed moneys. No.34 of 1912,s.10, amended by No.2 of 1924, s.2. [Vic.No. 2051, s.11.]

10. This Act shall not apply to the accounts in the Government Savings Bank, nor to any unclaimed moneys which any trustee company is required by law to pay to the Treasurer, nor to any unclaimed moneys which any company, or the liquidator of any company, or any trustee of any bankrupt estate, is required by law to pay into His Majesty's Treasury.

Effect of entry in register and its publication. [Vic.No. 2051,s.12.]

11. Any rights of the owner in respect of such in moneys which may exist at the time of such entry in the register, and the publication of the register as aforesaid, shall not be prejudiced or affected by such entry or publication, and such moneys may be recovered by such owner at any time before the same shall be paid to the Treasurer under section six, but not afterwards, any rule of law to the contrary notwithstanding.

Repeal.

12. Sections thirty-two and thirty-three of the *Government Savings Bank Act, 1906*, are repealed.<sup>3</sup>

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<sup>3</sup> The *Unclaimed Moneys Act Amendment Act, 1924* (Act No.2 of 1924), s.2(3) provides as follows:- "(3) sections thirty-two and thirty-three of the *Government Savings Bank Act, 1906*, are re-enacted, and shall have effect as if those sections had not been repealed by section twelve of the principal Act." See also Acts No. 13 of 1926 and No.26 of 1931.

**FIRST SCHEDULE.**

Section 3.

.....Company (or Bank, etc.)

Register of unclaimed money held by the .....

(here insert name of Company.)

Name and last known address of owner on books	Total amount due to owner	Description of unclaimed money	Date of last claim
	£   s   d		
James Murray, Hay Street, Perth	350 0 0	First dividend on 600 shares in the Electric Light Company, Limited	27 <sup>th</sup> April, 1906
Thomas Hutt, of Hannan Street, Kalgoorlie	437 0 0	Deposit, of balance of account in the Bank of Australasia ( <i>or such other particulars as may be sufficient description of money</i> )	26 <sup>th</sup> Nov 1906

**SECOND SCHEDULE.**

Section 4.

**The Unclaimed Moneys Act, 1912.**

I [*insert name, address, and occupation*] do solemnly and sincerely declare

1. That I am officer of [*insert name of company*] hereinafter referred to as the said company.
2. That in accordance with the provisions of "The *Unclaimed Moneys Act, 1912*," the said company has duly entered all unclaimed moneys in the

register kept by the said company at its head or principal office in Western Australia.

3. That a copy of the said register was published in the *Government Gazette* on the            day of            , 19    .
  
4. That the said register correctly and completely sets forth particulars of all unclaimed moneys, within the meaning of the said Act, of the said company of not less than £5 in any one account.

And I make this solemn declaration by virtue of Section 106 of the *Evidence Act, 1906*.

Declared at this            day of            19    , before me.

C. D.,  
Justice of the Peace.

**APPENDIX II****Details of unclaimed money paid to the Treasurer during the period 1 January 1974 to 30 June 1976**

Name of Holder	Details	1974	1975	1976
		\$	\$	\$
Aetna Life of Australia & N.Z. Ltd. Western Australia	?	23.00		
Albany super-phosphate Co. Pty. Ltd.	wages			16.93
Alcoa of Australia (WA) Ltd.	wages	13.34	26.52	
A.P.A. Life Assurance Ltd.	refund of premium			17.64
Associated Products & Distribution Pty. Ltd.	unpresented cheque			13.83
Australian Guarantee Corpn. Ltd.	cheque recd. no claim made		49.98	
Bechtel Pacific Corpn. Ltd.	wages		251.66	
Boans Ltd.	? interest on debentures & refunds on shares	24.00		123.75
B.P. Refinery Kwinana Pty. Ltd.	wages		117.20	
B.P. Australia Ltd.	wages refund of credit		57.96	21.54
Boulder Mines Ltd.	wages	254.86	94.17	122.13
Central Norseman Gold Corpn. N.L.	wages			140.19

Challenger Mining Group Ltd.	dividend of Dec.1968	317.00		
	dividend of Dec. 1969		21.60	
Chamberlain Holdings Ltd.	dividend	264.00	49.06	175.48
Chamberlain John Deere Pty.Ltd.	wages	389.31		106.48
Clough & Son Pty.Ltd.	wages (no order alphabetical, chronological or otherwise)	2167.85		
Cockburn Cement Ltd.	dividends			114.65
Co-operative Bulk Handling Ltd.	debenture redemptions Ltd. rebate distributions and wages	204,899.87		3921.05
Cresco Fertilisers Pty. Ltd.	wages			28.53
CSBP and Farmers Ltd.	wages	100.67	150.43	291.72
Elder Smith Goldsborough Mort Ltd.	unrepresented cheques	63.50	103.22	386.20
	skin & hide proceeds for persons unknown	235.52	5380.46	3384.81
	various cash for persons unknown		454.61	246.50
	wages		235.88	283.88
Esperance Fertilisers Pty. Ltd.	wages	39.77	34.89	
Fremantle Gas & Coke Co. Ltd.	dividend			13.08

Hammersley Iron Pty. Ltd.	wages	558.28	337.99	444.50
Hawker Siddeley Building Supplies Pty. Ltd.	wages	110.54	342.64	488.15
Hill 50 Gold Mine No Liability	wages (under \$10 total \$277.70) (under \$10 total 322,82) (under \$10 total \$204.30)	305.10	377.90	243.50
Hunts Canning Co. Pty. Ltd.	wages		54.87	
Kalgoorlie Lake View Pty. Ltd.	wages			319.86
Lake View and Star Ltd.	wages	500.23		
Len Hearn Furnishings Pty. Ltd.	overpayment of account	20.00		
McIlwarith's Transport Pty. Ltd.	wages		87.72	
Mercantile Stevedores (WA) as managing agents for Port Hedland Watersiders' Consolidated Pay Office	wages		650.66	121.39
Mobil Oil Australia Ltd. WA	refund of credit	220.58		294.22
	drum returns		243.24	50.56
	wages			24.88
Mt. Newman Mining Co. Pty. Ltd	wages			540.83
Passiona Bottling Co. (Perth) Ltd.	dividend		20.00	12.00

Perpetual Executors Trustees and Agency Co. (WA) Ltd.	refund balance of tenants' deposits	490.77	670.93	1299.23
Perth Building Society	investment shares	1509.00	2379.00	2358.44
Ready Lime Putty Pty. Ltd.	wages			24.48
	unpresented cheque			191.65
Robert Olivier & Co.	balance held after completion of sale of houses			159.26
Shell Company of Australia Ltd.	claim for damages			41.25
	wages			66.47
	refund credit balance			80.40
Swan Brewery Co. Ltd.	dividends	109.50	50.91	67.37
Swan Portland Cement Ltd.	wages	38.21		55.81
The R & I Bank	current accounts	568.54	787.59	157.23
	unidentified deposits		649.90	404.26
Thiess Bros. Pty. Ltd.	wages (Mt. Hart Station)		187.98	177.68
Tomlinson Steel Ltd.	wages	65.20	13.57	
	dividends	150.00	65.00	
Vickers Hoskins Pty. Ltd.	wages	115.00		
W.A. Sandalwood Co. Ltd.	dividend	113.00	28.58	36.00
Westralian Farmers Co-op Ltd.	dividend	739.66	1299.92	1184.35

Westralian Farmers Super- phosphates Ltd.	dividend	121.95	675.75	138.16
Westralian Sands Ltd	June '67 dividend	630.00		
	Oct '67 dividend	630.00		
	Nov '68 dividend		707.16	
Western Collieries Ltd.	dividend	24.00		
Western Mining Corp. Ltd.	wages	93.31	998.38	2341.42
Wigmores Ltd.	overpayment of parts account			24.04
	balance of ship owners advance funds			443.86

### APPENDIX III

#### Legislation dealing with unclaimed money in specific circumstances

Albany Port Authority Act 1926

s.27: Goods left on a wharf to be sold and the proceeds paid to the owner, but in the meantime to be paid to the Treasurer.

Identical provisions appear in legislation governing other Port Authorities in Western Australia, viz: *Bunbury Port Authority Act 1909*, s.27; *Fremantle Port Authority Act 1902*, s.29; *Esperance Port Authority Act 1968*, s.29; *Port Hedland Port Authority Act 1970*, s.28; *Geraldton Port Authority Act 1968*,s.29.

Banking Act 1959 (Cwth)

s.69: Applies to money held by a trading bank, viz: the Banks of Adelaide, China, New South Wales, New Zealand and Queensland, the Commercial Bank of Australia Ltd., the Commercial Banking Co. of Sydney Ltd., the National Bank of Australasia Ltd., the Banque Nationale de Paris, the Australian and New Zealand Banking Group Ltd., the Commonwealth Development Bank and the Australian Resources Development Bank Ltd.

Money held the recovery of which is barred by lapse of time including money which has not been operated upon by way of deposit or withdrawal for a period of seven years, is paid to the Commonwealth, credited to a Trust Fund and after the expiry of six years is transferred into the Consolidated Revenue Fund. Amounts of \$20 or more are advertised in the *Gazette* before transfer to Consolidated Revenue.

A claim to recover can be made at any time through the bank which originally held the deposit, the Treasurer refunding the money for that purpose.

Bankruptcy Act 1966 (Cwth)

s.254: Dividends unclaimed for six months or more and money proposed not to be paid to any person is paid into the Consolidated Revenue Fund. A person claiming to be entitled can recover from the Treasurer at any

time but must first obtain a court order.

Coal Mine  
Workers  
(Pensions) Act  
1943

s.20(6): Any refunds or pensions unclaimed within six years become part of the fund.

Companies Act  
1961

ss.185(9) and (10) : Deal with money derived from the transfer of shares of minority shareholders in a take-over arrangement and provide for such money as remains unclaimed for two years to be paid to the Treasurer within ten years as money falling within the *Unclaimed Moneys Act*.

s.286: Unclaimed assets in the hands of a liquidator to be paid to Commissioner for Corporate Affairs. He holds the money in account for six years and it is then paid to the Consolidated Revenue. A claimant can recover the amount of his claim at any time from the Commissioner and any person can appeal to the court if dissatisfied by the Commissioner's decision in this respect.

s.364: Shares belonging to persons whose whereabouts after reasonable diligence are unknown for at least ten years may be advertised in the newspaper, and after a further month may be transferred to the Commissioner for Corporate Affairs. The Commissioner shall sell them and deal with the proceeds as if they were money to which the *Unclaimed Moneys Act* applied.

Commonwealth  
Banks Act 1959  
(Cwth)

s.53: Money in a deposit account with the Commonwealth Savings Bank shall, if not operated upon for seven years and the passbook has not been presented to the bank (unless the account is in the name of an infant) , be transferred to the Depositor's Unclaimed Fund and ceases to bear interest. Details are advertised in the *Gazette* within six months of transfer to the fund.

Claims to recover the money can be made within ten years of the transfer to the fund but thereafter the money becomes the property of the bank. However, the bank may allow payment of a late claim if satisfied that special reasons for the payment exist.

Disposal of Uncollected Goods Act 1970	s.28: If goods are sold and there is an excess over and above the amount required to pay the holder's charges, such excess is recoverable by the owner. If he does not claim it within 28 days it is paid to the Treasurer. The owner may make a claim through the Treasurer at any time for a return of the money.
Escheat (Procedure) Act 1940	Under this Act property of deceased persons both real and personal may be escheated to the Crown.
Life Insurance Act 1945 (Cwth)	s.106: Applies to money which is payable by a life insurance company pursuant to a policy in circumstances where the time allowed for proceedings to recover it has expired or, in the case of endowment policies, where seven years has expired since maturity. This money is payable to the Commonwealth Treasurer. The Treasurer advertises in the <i>Gazette</i> sums of not less than \$20. A claimant may subsequently recover the money from the Treasurer via the insurance company which originally held the money.
Local Government Act 1960	s. 457: Unclaimed money held by the public pound keeper after thirty-five days is paid to the Council into a Trust Fund. After two years in the Trust Fund it is paid to the Municipal Fund and becomes the property of the Council.
Lotteries Regulations Act 1967	Regulation 9: The right to recover unclaimed prizes extinguishes after seven years and prize money falls into the Commission's Revenue. Regulation 13: The Commission may make provision for unclaimed private lottery prizes.
Rural and Industries Bank Act 1944	s.65V: Depositors' unclaimed money (defined as a savings account not operated on for seven years and passbook not produced) to be paid to the Depositors' Unclaimed Fund. The money is available for lending by the bank and any interest becomes part of the general profit of the Savings Bank Division of the bank.  If the Commissioners are of opinion that any person is entitled to the money, it shall be paid, without interest for the period it remained in the fund, to that person.
Totalizator Agency Board Betting Act 1960	s.23(3) : Bets unpaid after seven months are paid to the Treasurer into the Consolidated Revenue Fund. Thereafter, the owner has no

enforceable claim.

Warehousemen's  
Liens Act 1952

s.10: Surplus money after disposition of goods is paid to the Treasurer who shall pay it into the Public Account. A claimant has six years in which to make a claim for the money.

## APPENDIX IV

### Analysis of comparable legislation relating to unclaimed in other jurisdictions

#### A. UNCLAIMED TRUST MONEY REQUIRED TO BE PAID TO THE TREASURER

Legislation	Definition	Procedure for disposal	Recovery by owner
<b>VICTORIA</b>			
<i>Unclaimed Moneys Act 1962</i> (s.13A as inserted in 1973 Amendment)	Trust property held by any trustee (defined as executor, administrator, trustee, receiver, committee or guardian and includes the Public Trustee and any trustee company) and unclaimed for six years.	Money and income paid to receiver of revenue into Unclaimed Moneys Fund. The Registrar of unclaimed moneys may extend the period for payment into the Fund. After six years money in the Fund is paid to Consolidated Fund.	At any time upon the Treasurer being satisfied that the claimant is the owner. Indemnity to Treasurer for mistaken payments (s.14).
<i>Legal Profession Practice Act 1958</i> (s.40A as amended by Unclaimed Moneys Act 1973 (s.3))	Money held in solicitor's trust account where owner after due inquiry cannot be found.	Shall be paid to receiver of revenue and falls within provisions of <i>Unclaimed Moneys Act 1962</i> .	As above.
<b>NEW SOUTH WALES</b>			
<i>Public Trustee Act 1913</i> (s.53)	Money in intestate estate administered by Public Trustee lying for six years and non	Paid to Treasury into a special trust account. Available to acquire land	At any time on proof to the satisfaction of the Public Trustee

	information as to beneficiaries.	and building and carry out repairs for the purposes of the Public Trust Office (s.53A).	(s.53(1)A(a)) or by order of the court (s.53(2)) but without interest (s.53(1)A(b)).
<i>Trustee Companies Act 1964</i> (ss.26-27)	Money forming part of an estate unclaimed for five years (s.26(1)).	Paid with interest to Treasurer into Testamentary and Trust Fund (s.26(1)) and available for investment in Government securities (s.26(4)). Interest earned is kept in separate account (s.26(5)) and shall be allowed on balances at credit of the account of any estate in the Testamentary and Trust Fund (s.26(6)).	On a court order at any time (ss.26(7) and 27).
<b>SOUTH AUSTRALIA</b>			
<i>Administration and Probate Act 1919</i> (ss.116-117)	Money held by the Public Trustee to the credit of an intestate estate and money not exceeding \$1000 held in any other estate (in both cases excluding money held for persons not sui juris) which is unclaimed for six years (s.116(1)).	Paid to the Treasurer for public revenue (s.116(1)).	On a court order (s.117(1)) or on the Public Trustee's certificate (s.117(4)), at any time but without interest for the time it is held by the Treasurer (s.117(3)).
<b>QUEENSLAND</b>			
<i>Public Curator Act 1915</i> (ss.108-111)	(a) Money and interest held by the Public Curator to the credit of any estate or trust under administration by him and unclaimed for six years (s.109).	(a) Transferred to Unclaimed Moneys Fund (s.109) and invested in Government securities, the interest payable to Consolidated Revenue Fund (s.24).	At any time from Unclaimed Moneys Fund if Public Curator is satisfied that claimant is the owner and with the consent of Minister (s.111(1)). Indemnity to Public Curator against liability for later claim (s.111(2)).
	(b) Money held unclaimed for six years by the Queensland Trustees	(b) Entered in register and advertised in <i>Gazette</i> (unless	

	Ltd. and Union Trustee Co. of Australia Ltd (s.108(vi)).	under \$4 and Public Curator dispenses with advertising s.110(1)). Then after one year paid into Unclaimed Moneys Fund as above less advertising expenses (s.110(2)).	
<i>Trust Accounts Act 1973 (s.33)</i>	Money held by a trustee (defined as any solicitor, conveyancer or public accountant engaged in the practice of his profession and every person who is a trustee under any other Act or law or rule of law) which is received in the course of such practice upon trust or upon terms requiring him to account (s.33(10)) and which is unclaimed for one year (s.33(1)) in circumstances where the beneficiary or his whereabouts are not known, or it is not known whether he is dead or alive or who his executors are (s.33(2)).	Return to be made each year on 30 September to Under Secretary for Justice (s.33(1)) and he may require the money to be paid to Public Curator (s.33(5)) and falls within the <i>Public Curator's Act</i> and he shall without delay use every endeavour to ascertain the beneficiaries (s.33(8)). The trustee is entitled to deduct costs as approved by the Public Curator (s.33(9)).	As above.
<b>TASMANIA</b>			
<i>Public Trust Office Act 1930 (s.36A as inserted by 1967 Amendment)</i>	Money forming part of an estate and unclaimed for five years.	May be paid into Common Fund but after six years shall be paid to the Treasurer to the credit of Consolidated Revenue.	By Supreme Court order only once aid into Common Fund and no later than ten years after payment into Consolidated Revenue.
<i>Trustee Companies Act 1953 (ss.32-37)</i>	Money forming part of an estate and unclaimed for five years (s.32(1)).	Shall be paid to Public Trustee (s.32(1)) to form part of his common fund (s.32(4)). Interest is compounded quarterly (s.32(6)) after six years paid to Treasurer to the credit of Consolidated Revenue (s.37).	By Supreme Court order only once paid to Common Fund (ss.32(5) and 35). Court can order interest to be paid to claimant even on money paid to the Treasurer (s.35(5)) but claim must be made within ten years of payment into Consolidated Revenue

			(s.35(6)(b)).
<b>ACT</b>			
<i>Trustee Companies Ordinance 1947</i> (ss. 28-29)	Money in an estate and unclaimed for five years (s.28(1)).	Paid to Attorney General into Testamentary and Trust Fund which is a trust account within the meaning of the Audit Act 1901 (s.28).	At any time by order of the courts (s.29(1)(a) and (b)) but without interest from the time of payment to the Attorney General (s.29(1)(c)).
<i>Administration and Probate Ordinance 1929</i> (ss.108-109 as inserted by 1965 amendment)	Money held by the Curator of Estates of Deceased Persons for six years with no knowledge of the existence or address of a person entitled to claim or share in distribution (s.108 (2)).	Paid to Treasurer on or before 31 January each year (s.108(1)) and goes into Consolidated Revenue (s.108(7)).	At any time if Treasurer is satisfied that the claimant is entitled to the money (s.109(1)) and also by order of the court (s.109(2)) but without interest from the time paid to the Treasurer (s.109(4)).
<b>NORTHERN TERRITORY</b>			
<i>Administration and Probate Ordinance 1928</i>		As in South Australia	
<b>NEW ZEALAND</b>		No mandatory provisions	

#### **B. OTHER MONEY REQUIRED TO BE PAID TO THE TREASURER**

<b>VICTORIA</b>			
<i>Unclaimed Moneys Act 1962</i>	(1) Money or security paid into court to be subject to a court order and no claim for fifteen years, plus an extension for persons known to be	Money and interest paid into Consolidated Revenue (s.6).	At any time by order of the court (s.8) but without interest from the date paid into Consolidated Revenue (s.8(2)).

	<p>suffering a legal incapacity (s.6).</p> <p>(2) Principal and interest, dividends, bonuses, profits, salaries and wages and all sums of money whatsoever (s.9(1)) unclaimed for twelve months (s.12(1)) held by companies within the meaning of the Companies Act 1961 including any Board within the meaning of the <i>Marketing of Primary Products Act 1958</i>, the Australian Barley Board, Victorian Inland Meat Authority, building societies, societies under the <i>Industrial and Provident Societies Act 1958</i>, the <i>Co-operation Act 1958</i> and the <i>Co-operative Housing Societies Act 1958</i> and any other society declared by the Governor and any unincorporated body of persons associated together for the purpose of carrying on business (s.9(1)).</p>	<p>Each year before March details entered in a register (s.11(1)) and sums of not less than \$10 advertised in the <i>Gazette</i> (s.11(3)). Advertised money unclaimed for further twelve months (s.12(1)(a)) is paid less advertising costs (s.12(3)) to the receiver of revenue. Unadvertised money is paid to the receiver within twelve months of the entry in the register (s.12(1)(b)).</p> <p>All money is paid into Unclaimed Moneys Fund (s.12(1)) and after six years transferred to Consolidated Revenue (s.12(2)).</p>	<p>At any time upon the Treasurer being satisfied that the claimant is the owner (s.14(1)). Treasurer is indemnified against liability for mistaken payments (s.14(2)).</p>
<b>NEW SOUTH WALES</b>			
<i>Unclaimed Moneys Act (1917)</i>	<p>Principal and interest, dividends, bonuses, profits and sums of money whatever the recovery of which is barred by operation of law (s.2) held by companies incorporated or carrying on business in New South Wales including every bank,</p>	<p>Details of unclaimed money held in an account not operated on for six years entered in alphabetical order in a register (s.3) and published in <i>Gazette</i> (s.4). After one year paid to Colonial Treasurer for public revenue (s.6).</p>	<p>At any time upon proving his ownership to the Treasurer (s.9). The Treasurer is not indemnified against liability for mistaken payments (s.10).</p>

	except the Commonwealth Bank of Australia and the Government Savings Bank of New South Wales), life assurance company or association, the liquidator of any company and every person or firm carrying on business as traders in New South Wales and acting as agents , trade assignees or private bankers for individuals or companies (s.2).		
<b>SOUTH AUSTRALIA</b>			
<i>Unclaimed Moneys Act 1891</i>	Principal and interest, dividends, bonuses, profits and sums of money whatever unclaimed for six years and arising out of any dealing had within South Australia with any company and with the exception of the Bank of South Australia, includes every bank and life assurance company and the liquidator of a company (s.2).	Amounts exceeding \$10 entered in a register (s.3) and published in <i>Gazette</i> (s.4). After two years, paid, less advertising costs (s.6(2)), to the Treasurer for the use of public revenue (s.6(1)).	At any time upon Treasurer being satisfied that the claimant is the true owner (s.8). Indemnity against Treasurer’s liability for mistaken payments (s.9).
<b>QUEENSLAND</b>			
<i>Public Curator Act 1915</i>	Principal and interest and all dividends, bonuses, profits and sums of money whatever unclaimed for six years and held by any company including a receiver, building societies, co-operative societies, primary producers co-operative associations, Southern Electric Authority and any other public authority of Queensland, Queensland Trustees Ltd., Union Trustee Co. of Australia Ltd.,	Entered in register and, unless the amount does not exceed \$4 and the Public Curator has dispensed with advertising, the contents are advertised in the <i>Gazette</i> (s.110(1)). After one year paid to Public Curator into Unclaimed Moneys Fund less advertising expenses (s.110(2)). Money in this fund may be invested in Government securities and interest is	At any time upon Public Curator being satisfied that the claimant is the owner and with the approval of the Minister (s.111(1)). Indemnity against further liability of Public Curator for mistaken payments (s.111(2)).

	persons or firms carrying on business as traders in Queensland (including all such persons or firms acting as attorneys, agents or private bankers for individuals, firms or companies), and other as the Governor may appoint (s.108).	paid to the Consolidated Revenue Fund (s.24).	
<b>TASMANIA</b>			
<i>Unclaimed Moneys Act 1918</i>	Principal interest, dividends, bonuses, profits and sums of money whatsoever the recovery of which is barred by operation of law and held by every company, banking or life assurance company or association except the Commonwealth Bank of Australia, every person or firm carrying on business as traders and acting as agents or private bankers for individuals or companies, every liquidator and any person conducting or controlling lotteries (s.2).	Amounts not less than \$6 entered in alphabetical register (s.3(1)) and published in <i>Gazette</i> (s.4). One year later paid to Treasurer for use of Consolidated Revenue less advertising costs (s.6).	At any time upon Treasurer being satisfied that claimant is the owner but without interest (s.8). Indemnity to Treasurer against liability for mistaken payments (s.9).
<b>ACT &amp; NT</b>			
<i>Companies (Unclaimed Assets and Moneys) Ordinances 1950 (ACT) and 1963 (NT)</i>	<p>(1) Dividends or money in the hands of a liquidator, unclaimed for six months or remaining after final distribution (s.4 ACT; s.6 NT).</p> <p>(2) Deposits with, securities of any company and dividends, bonuses, profits or other money payable to a member of the company or co-operative society, the recovery whereof being barred by operation</p>	<p>Paid to Treasurer into Consolidated Revenue Fund (s.4 ACT; s.6 NT).</p> <p>Entered in alphabetical register (s.7 ACT; s.9 NT) copy sent to Treasurer and he arranges publication in the <i>Gazette</i> (s.8 ACT; s.10 NT). One year later paid by Treasurer to Consolidated Revenue Fund (s.10</p>	<p>At any time on Supreme Court order, or where Treasurer is otherwise satisfied that claimant is entitled (s.5 ACT s.7 NT).</p> <p>At any time if Treasurer is satisfied the person is entitled (s.13 ACT; s.15 NT).</p>

	of law (s.6 ACT; s.8 NT).	ACT; s.12 NT).	
<b>NEW ZEALAND</b>			
<i>Unclaimed Money Act 1971</i>	<p>Money situated in New Zealand (s.2) in the following circumstances –</p> <p>Interest bearing deposit for a fixed term – unclaimed for six years following expiry of term</p> <p>Interest bearing deposit for no fixed term – unclaimed for twenty-five years.</p> <p>Non interest bearing deposit in savings bank – no operation on account for twenty-five years.</p> <p>Non interest bearing deposit in any other case – no operation on account for six years.</p> <p>Life insurance money – unclaimed for six years from date of maturity etc.</p> <p>Life insurance money – unclaimed for six years (s.4(1)).</p> <p>But in every case excluding –</p> <p>(a) sums of less than \$20 (s.4(1)(i));</p> <p>(b) dividends (other than those payable by a mutual association in relation to money deposited with</p>	<p>Entered in alphabetical register (s.6(1)) and letter sent by 30 June each year to owners of money at their last known address (s.7).</p> <p>One year later paid to the Commission of Inland Revenue into the Consolidated Revenue Account (s.8).</p>	<p>At any time upon Commissioner’s satisfaction that the claimant is the owner (s.11(1)) but without interest (s.11(5)). Indemnity against Commissioner’s liability for mistaken payments (s.11(4)).</p>

	<p>(c) the association); rebates payable by a mutual association whether incorporated or not (other than arising from a deposit with the association);</p> <p>(d) benefits payable from any pension or superannuation fund (s.4(2)) and which is held by any company bank, building society, money lender or borrower in respect of money borrowed, insurance office, auctioneer in respect of any balance of an auction sale, real estate agent in respect of money held in a trust account, sharebroker in respect of money held on behalf of clients, accountant in respect of clients' money and motor vehicle dealers in respect of money held on behalf of any person for whom the dealer has acted as agent (s.5).</p>		
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**C. PROVISIONS ENABLING DISPOSAL OF UNCLAIMED MONEY**

<b>VICTORIA</b>			
<i>Unclaimed Moneys Act 1962</i> (s.15)	All unclaimed money held by any other person.	May be paid to the Treasurer as if the holder was required to do so under the Act.	At any time upon the Treasurer being satisfied that the claimant is the owner (s.14(1)). Treasurer is indemnified against liability for mistaken payments (s.14(2)).

<b>SOUTH AUSTRALIA</b>			
<i>Unclaimed Moneys Act 1891</i> (s.7a as inserted in 1962 amendment)	Any person not being a company having money unclaimed for one year.	May be paid to Treasurer for public revenue accompanied by a declaration setting forth details of the money, the circumstances in which it came into the holder's possession and stating that the owner cannot be found.	At any time upon Treasurer being satisfied that the claimant is the true owner (s.8). Indemnity against Treasurer's liability for mistaken payments (s.9).
<b>NEW ZEALAND</b>			
<i>Trustee Act 1956</i> (ss.77-79)	Money belonging to a trust and held by trustees (s.77), extended to include implied and constructive trustees (s.2).	An affidavit describing the instrument creating the trust and details of the beneficiaries is filed in court and the money paid to the Crown to be placed in a deposit account administered by Treasury (s.77(1)). The Secretary to the Treasury may require trustees to give information as to the steps taken to notify the beneficiaries (s.77(8)). Each year the Secretary to the Treasury publishes details in the <i>Gazette</i> (s.78(1)) until after six years the money is transferred to Consolidated Revenue (s.78(4)).	At any time at the order of the court (ss.78(3) and 79) but may be paid by the Secretary to the Treasury to the person entitled on his establishing a claim thereto, or to the person from whom the money was received to be held again on trust if that person wishes (s.78(3)). The Treasury may deduct costs reasonably incurred (s.78(3)) and no interest is payable whilst the money has been held by the Crown (s.78(7)). Indemnity to the Crown and Secretary to the Treasury against liability for subsequent claims (s.78(8)).
<i>Unclaimed Money Act 1971</i> (s.5(2))	Any unclaimed money held by any person, firm, body or institution not required under the Act to pay the money to the Commissioner of Inland Revenue.	May elect to pay the money under the Act as if required to do so.	At any time upon Commissioner's satisfaction that the claimant is the owner (s.11(1)) but without interest (s.11(5)). Indemnity against Commissioner's liability for mistaken

			payments (s.11(4)).
<i>Law Practitioners Act 1955 (s.72)</i>	Money held in solicitor's trust account, the owner of which cannot be found.	May be paid to Commissioner of Inland Revenue and shall be deemed to be money paid under the provisions of the <i>Unclaimed Money Act</i> .	As above.
N.S.W., QLD., TAS., A.C.T. and N.T.		No enabling provisions.	

## APPENDIX V

### Legislation in Western Australia dealing with unclaimed trust money

#### Public Trustee Act 1941, s.45

<b>Scope</b>	Money in the hands of the Public Trustee to the credit of any trust or estate under administration by him.
<b>Length of time unclaimed</b>	Six years.
<b>Procedure</b>	The Public Trustee must advertise details of unclaimed money at least twice at intervals of fourteen days in a newspaper circulated in Perth in practice at the end of the six year period awaiting claims. Then on or before 31 March each year if the Public Trustee has no information or knowledge of the existence of any person entitled or claiming to be entitled, unclaimed money is to be paid to the Treasury for public service. With the consent of the Minister, the Public Trustee may retain in any estate such amount as he considers likely to be required to answer payment to be made out of such estate.

#### The West Australian Trustee Executor and Agency Co. Ltd. Act 1893, ss22 and 23

<b>Scope</b>	Money forming part of an estate of which the Company is executor, administrator, trustee, receiver, committee, trustee in bankruptcy or guardian.
<b>Length of time unclaimed</b>	Five years.
<b>Procedure</b>	After five years awaiting claims, the money is paid into the Testamentary Trust Fund administered by Treasury. Such sums shall bear interest at the rate of three percent but the Treasurer may invest in Government debentures or stock.  The beneficiary may by order of the Supreme Court on an application made within six years from the date of payment into the

Testamentary Trust Fund, recover his money plus the interest earned.  
No person can make application to the Court after the expiry of the six year period, but time does not run against an infant, feme covert, a person of unsound mind or while a person is beyond seas.

**The Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. Act 1922, ss.22 & 23**

**Scope** Money forming part of an estate of which the company is executor, administrator or trustee.

**Length of time unclaimed** Five years.

**Procedure** After five years awaiting claims, the money is paid into the Testamentary Trust Fund administered by the Treasury and shall be invested in Government debentures and stock.

The procedure whereby the beneficiary can recover his money and interest is identical to that laid down in the *West Australian Trustee Executor and Agency Co. Ltd. Act*, except that a period of twelve years is permitted for recovery with the same exceptions for persons under a disability.

**The Audit Act 1904, ss.26 -29**

**Scope** (a) Money payable to the Treasurer pursuant to any act and falling into the hands of a public servant by virtue of his office service or employment for or on account or for the use and benefit of any other person.

(b) Other money paid to a public servant by virtue of his office service or employment for or on account or for the use and benefit of any other person.

**Length of time unclaimed** (a) Six years

(b) Six years and three months.

**Procedure** (a) Money is paid into the Trust Fund, as directed by the Treasurer.

- (b) Money is paid into a bank account, interest being payable to the Consolidated Revenue Fund, but before the expiry of three months shall be paid into the Trust Fund.

All money remaining in the Trust Fund as shall be unclaimed for six years is transferred to the Consolidated Revenue Fund.

No person is then entitled to recover the money if unclaimed for six years but time does not run against a person while he is an infant or of unsound mind. The Governor has authority to order payment without interest at any time to a person establishing a claim to the money.