



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 76 – Part I

**Wills:
Substantial Compliance**

REPORT

NOVEMBER 1985

To: **THE HON J M BERINSON MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on Wills: Substantial Compliance.

J A Thomson
Chairman

19 November 1985

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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Part I: The Existing Law

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked:

"To examine and report on the following matters with respect to the law of wills -

- (a) whether or not it would be desirable to adopt some modification of the requirement of strict compliance with the formalities of the *Wills Act* by the adoption of the doctrine of substantial compliance or otherwise;
- (b) the effect of marriage or divorce on an existing will including, in particular, the wills of persons who subsequently lose the mental capacity to make a new will."

1.2 This report deals only with part (a) of the reference. Part (b), which raises different issues, forms Part II of this project and will be dealt with later.

2. DISCUSSION PAPER

1.3 In November 1984 the Commission issued a discussion paper which was distributed both in Western Australia and elsewhere.¹

3. ASSISTANCE GIVEN TO THE COMMISSION

1.4 The Commission received a number of carefully reasoned written and oral submissions on the issues raised in the discussion paper. The Commission is grateful for the help provided by all those who responded. Their names appear in the appendix to this report.

¹ An advertisement was published in *The West Australian* on 24 November 1984 drawing public attention to the availability of the paper and inviting those interested to comment on it. The paper was also discussed in an article in *Brief*, the journal of the Law Society of Western Australia.

Chapter 2

THE FORMAL REQUIREMENTS

1. HISTORICAL INTRODUCTION¹

2.1 The present law of wills in Western Australia has its origins in English law. A right of free testation, that is, a right to determine the distribution of one's property upon death, had been gradually recognised over the course of time. With this right came an attendant problem of proof. If the desires of the deceased were to be the basis of distribution they needed to be clearly identifiable. With this end in view the law developed formal requirements for the validity of wills.

2.2 The first such requirement was contained in the *Statute of Wills 1540*, which for the first time allowed real property to be devised by will but required that such a devise be made in writing. The *Statute of Frauds 1677*² increased the formal requirements for wills of real property by requiring that such wills be:

"...in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and... attested and subscribed in the presence of the said devisor by three or four credible witnesses... "

The penalty for non-compliance was that the purported disposition was "utterly void". Formalities for the revocation and alteration of wills were also introduced.

2.3 Wills bequeathing personalty were subject to the jurisdiction of the ecclesiastical courts, and were governed by different rules. The ecclesiastical courts permitted oral wills declared in the presence of a sufficient number of witnesses.

The *Statute of Frauds*³ laid down detailed requirements for the validity of oral wills of personalty where the estate was more than 30 pounds in value. The will had to be made during the last sickness of the testator, and had to be proved by the oath of three witnesses.

¹ See generally I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand*, (1983) 20- 23 (hereafter cited as 'Hardingham, Neave and Ford').

² S 5.

³ S 19.

2.4 The difference in rules applying to different classes of property and forms of will gave rise to uncertainty and resulted in a significant volume of litigation. This problem was addressed by the Real Property Commissioners who in their Fourth Report, published in 1833, recommended that the formal requirements for wills of real and personal property should be made uniform. This recommendation was adopted in the *Wills Act 1837*. Section 9 of that Act is the source of the formal requirements of most common law jurisdictions.⁴ It provided that:

"...no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. "

The *Wills Act 1837* was adopted in Western Australia in 1839.⁵

2.5 In 1852 the English *Wills Act Amendment Act* modified the formal requirements as to the place of the testator's signature.⁶ This change was incorporated into the law in Western Australia in 1855.⁷ From this date to the passing of the *Wills Act 1970* the formal requirements in Western Australia remained unaltered.

2.6 The *Wills Act 1970* consolidated and substantially modernized the law of wills. It also further liberalized the requirement as to the position of the testator's signature.⁸ The formal requirements have not been altered since 1970.

⁴ The current statutory equivalents of s 9 of the *Wills Act 1837* in Australia are as follows:
Wills, Probate and Administration Act 1898-1985 (NSW), s 7
Wills Act 1958-1984 (Vic), s 7
Succession Act 1981-1984 (Qld), s 9
Wills Act 1935-1980 (SA), s 8
Wills Act 1970-1985 (WA), s 8
Wills Act 1837 (Eng), s 9, adopted by *Wills Act 1840-1973* (Tas)
Wills Ordinance 1968-1983 (ACT), s 9
Wills Act 1938-1985 (NT), s 8.

⁵ 2 Vic No 1.

⁶ See para 4.7 below.

⁷ 18 Vic No 13.

⁸ S 8(b): see para 2.11 below.

2. THE PRESENT LAW

2.7 Section 8 of the *Wills Act 1970-1985*⁹ provides that a will is not valid unless:

- "(a) it is in writing;
- (b) it is signed by the testator or signed in his name by some other person in his presence and by his direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will;
- (c) the testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time; and
- (d) the witnesses attest and subscribe the will in the presence of the testator but no publication or form of attestation is necessary."

2.8 These requirements are elaborated briefly in the following paragraphs.¹⁰

(a) Writing

2.9 Writing includes not only writing by hand, but also "printing, photography, photocopying, lithography, typewriting and any other modes of representing or reproducing words in visible form".¹¹

(b) Signature by the testator

(i) *Nature of the signature*

2.10 For the purposes of the *Wills Act* a signature includes not only the written name of the testator but also his initials¹² or mark.¹³ The testator's signature will still be his even if he has had his hand guided by another.¹⁴ Of course, the testator must be aware of what is being done

⁹ Hereafter "the Wills Act".

¹⁰ For a fuller exposition see, for example, Hardingham, Neave and Ford, 26-43. The requirements of s 8 do not apply to privileged wills: see para 2.18 below.

¹¹ *Interpretation Act 1984*, s 5.

¹² *In the Estate of Theakston* (1956) 74 WN (NSW) 113.

¹³ *Re Hammon* (1874) 5 AJR 19. This rule covers not only the case of an illiterate testator, but also one too ill or weak to sign his full name. See, however, the facts of *Re Colling* [1972] 3 All ER 729 set out in para 3.5 below. It was held that part of a signature is insufficient where the testator intended to complete it.

¹⁴ *Re White* [1948] 1 DLR 572.

at the time and assent to it.¹⁵ Further, a person may sign for the testator in his presence and at his direction and may affix his own¹⁶ or the testator's name¹⁷ to the will.

(ii) *Position of the signature*

2.11 Formerly, the legislation provided that the testator must sign at the "foot or end" of the will. This requirement frequently caused difficulty and elaborate case law developed in respect of testators who signed in unusual places. In Western Australia the law as to the position of the testator's signature has been substantially liberalized by the provisions of section 8(b) of the *Wills Act* which, as indicated above, only requires that the testator sign in such place on the will that it is apparent on its face that he intended to give effect by the signature to the writing signed as his will.

(c) **Signature or acknowledgement by the testator in the presence of two witnesses**

2.12 The testator need not sign in the presence of witnesses present at the same time providing he acknowledges his signature before both of them together. No particular form of acknowledgement is required; a gesture may in itself be adequate.¹⁸ However, it is essential that the testator should afford the witnesses an opportunity of seeing his signature.¹⁹

(d) **Attestation of witnesses**

(i) *Order and place of signing*

2.13 The witnesses must attest and subscribe the will²⁰ by means of signature in the presence of the testator but not necessarily in each other's presence.²¹ The signing or acknowledgement of his signature by the testator must take place before either witness

¹⁵ *Copeman v Staples and Smith* (1911) 13 GLR 467.

¹⁶ *In the Goods of Clark* (1839) 2 Curt 329, 163 ER 428.

¹⁷ *In the Goods of Bailey* (1838) 1 Curt 914, 163 ER 316.

¹⁸ *In the Goods of Davies* (1850) 2 Rob Eccl 337, 163 ER 1337.

¹⁹ *In the Will of Morgan* [1950] VLR 335.

²⁰ "...to attest and subscribe a will' means to put one's signature or other sufficient identifying mark representing one's name on the will with the intention thereby of attesting that the testator's signature has been made or acknowledged in one's presence": *Re Lucas* [1966] VR 267, 269.

²¹ For example, *Re Hancock* [1971] VR 620.

signs.²² There are no particular requirements as to the position of the witnesses' signatures but the court must be satisfied that they intended to attest the operative signature of the testator and not, for example, to testify to the words of a clause in the will.

(ii) *Attestation clause not necessary for validity*

2.14 The *Wills Act* provides in section 8(d) that "...no publication²³ or form of attestation²⁴ is necessary." It is, however, normal for a proper attestation clause to be included in a professionally drawn will, and will forms contain such a clause. Such a clause will reinforce the presumption of due execution.²⁵

3. THE FUNCTION OF FORMAL REQUIREMENTS²⁶

2.15 The primary function of the formal requirements is the so-called "evidentiary function". Those concerned with the estate of the deceased need to know with some certainty that a propounded will is in fact that of the deceased. They also need to be able to ascertain the expressed desires of the deceased. The requirement as to writing makes the words of the deceased available with a certainty that would not be found with an oral expression, the proof of which is dependent on the memory, lifespan and integrity of those who witnessed it. A written will creates a more permanent form of authentication of the deceased's wishes.

2.16 The signature of the deceased serves to link him with the document and indicates his assent to its contents. It characterises the paper as other than a "draft". The signature may also go to the proof of testamentary capacity. The requirement as to witnesses helps to establish

²² "Thus, the testator may not, conformably with the *Wills Act*, sign or acknowledge his signature in the presence of A, procure A's signature, then acknowledge in the presence of A and B before procuring B's signature. In such a case A must re-sign. He cannot simply acknowledge his signature to B": Hardingham, Neave and Ford, 39. *In the Estate of Davies* [1951] 1 All ER 920 was a case where a will was held to be invalid on these grounds. See also *Re Colling* [1972] 3 All ER 729, the facts of which are outlined in para 3.5 below.

²³ That is, the testator need not state to the witnesses that the document is his will.

²⁴ That is, the will need not contain an attestation clause.

²⁵ Rule 15(1) of the *Non-Contentious Probate Rules 1967-1981* provides that where a will contains no attestation clause or where the attestation clause is insufficient the Registrar shall require an affidavit of due execution from one or more of the attesting witnesses or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed. Where such an affidavit cannot be obtained, the Registrar may under rule 15(3) accept evidence on affidavit from such persons as he thinks fit to show that the signature on the will is in the handwriting of the deceased.

²⁶ For a fuller discussion, see J H Langbein, *Substantial Compliance with the Wills Act* (1975) 88 Harvard Law Review 489, 491-498.

authenticity, but of course does not guarantee it. In many cases, the witnesses will be available to give evidence if the will is called into doubt.

2.17 Commentators have identified several other advantages that can be said to spring from the formal requirements, as follows:

- (a) The contemporaneous presence of witnesses also helps to protect against duress or undue influence and to ensure that the execution of the will was free and voluntary. This has been described as "the protective function".
- (b) Compliance with the formalities is said to impress on a testator the serious nature of the transaction and cause him to give the matter due consideration and attention. This has been called "the cautionary function".
- (c) The statutory requirements also tend to standardise both the proof and, to a lesser degree, the form of wills. This facilitates their processing, reduces litigation and makes for a quick and uncomplex execution of the expressed desires of the deceased. This is known as "the channelling function".

4. PRIVILEGED WILLS

2.18 Service personnel on active duty and seamen at sea are allowed to make wills which do not comply with the ordinary formal requirements.²⁷ These "privileged wills" have a long history. The privilege was put on a statutory basis by the *Statute of Frauds 1677*²⁸ and a similar provision was incorporated in the English *Wills Act 1837*.²⁹ Similarly, the wills legislation in all Australian jurisdictions contains provisions on privileged wills.³⁰ These provisions differ somewhat from one jurisdiction to another but the critical feature is that

²⁷ See generally Hardingham, Neave and Ford, ch 4.

²⁸ S 22.

²⁹ S 11.

³⁰ In Western Australia, see *Wills Act* ss 17 to 19. For the legislative provisions in the other Australian jurisdictions, see -

Wills, Probate and Administration Act 1898-1985 (NSW), ss 3 and 10

Wills Act 1958-1984 (Vic), s 10

Succession Act 1981-1984 (Qld), s 16

Wills Act 1936-1980 (SA), s 11

Wills Act 1837 (Eng), s 11, adopted by *Wills Act 1840-1973* (Tas)

Wills Ordinance 1968-1983 (ACT), s 16

Wills Act 1938-1985 (NT), ss 7 and 7A.

Whether or not the privileged will provisions are in need of reconsideration in modern conditions, and whether or not they would remain necessary if the reforms recommended in this report are adopted, are matters outside the scope of this report.

privileged wills are valid whether or not they comply with the ordinary formal requirements. In Western Australia, the *Wills Act* allows service personnel on active duty and seamen "being at sea" to make a privileged will.³¹ Such a person may make a valid will "without any formality, by any form of words, whether written or spoken, if it is clear that he thereby intended to dispose of his property after his death".³²

³¹ *Wills Act*, s 17.

³² *Id.*, s 18.

Chapter 3

THE EFFECT OF THE FORMAL REQUIREMENTS

1. INVALIDITY

3.1 The formalities set out in Section 8 of the *Wills Act* must be strictly complied with in order for a will to be valid. Even a minor and apparently inconsequential departure may render a will invalid despite the fact that there may be no real doubt concerning the dispositive intentions of the deceased.

2. SOME EXAMPLES OF INVALIDITY

3.2 There have been many reported cases in common law jurisdictions where, whether through inadvertence, lack of knowledge or otherwise, a testator has not complied with one or more of the formal requirements and has consequently rendered his will invalid. Some examples follow.

(a) The testator's signature

3.3 A common cause of invalidity is the testator's failure to sign his will. In the Western Australian case of *In re Petchell*,¹ the deceased had given instructions for the preparation of his will which would have left the whole of his estate to his wife with gifts over to his children. At the same time his wife had given instructions for a mirror will to be prepared. When the documents were prepared each party read and approved the contents but, due to an error, signed each other's will instead of their own. On the death of Mr Petchell an application was made for probate of his will but the application was refused as he had not signed it as the legislation required.

(b) The presence of witnesses

3.4 Failure to comply with the requirements as to the presence of witnesses is another cause of invalidity. The Commission was informed by the Principal Registrar of the Western Australian Supreme Court that recently a will was refused probate because the testatrix,

¹ (1945) 46 WALR 62.

having signed her will, on separate occasions asked two acquaintances to witness her signature. Thus the acquaintances were not present at the same time when the testatrix signed or acknowledged her signature. Although the attestation clause was in the usual form indicating that the witnesses were present at the same time, the Principal Registrar required an affidavit as to due execution from the witnesses because there were minor alterations in the document which had not been attested. The affidavits brought to light the truth as to the attestation.²

3.5 Another example arose in the English case of *Re Colling*.³ A testator who was a patient in a hospital asked a nurse and another patient to witness his signature but while he was signing, and before he had completed his signature, the nurse was called away to attend to another patient. The testator nevertheless continued signing and the other witness then signed. When the nurse returned, the testator and the other witness both acknowledged their signatures and the nurse added her signature. It was common ground that the acknowledgement by the testator of his signature after the nurse had returned to the bedside was insufficient to validate the will, since the other witness had already signed. Accordingly, the applicant for probate of the will argued, as the only way remaining to validate the will, that the half-completed signature⁴ was sufficient for the purposes of the *Wills Act*. The court rejected the argument.

3. THE EXTENT OF THE PROBLEM

3.6 The Supreme Court of Western Australia does not keep any statistics as to the number of wills sought to be admitted to probate which were rejected because of failure to comply with the formalities. However, the Commission has been informed by the Principal Registrar of the Court that it is only occasionally that wills are rejected for this reason. His estimate is that about one or two wills are rejected each year, out of about 2,750 wills submitted to probate annually, and that some of these wills are rejected for reasons other than failure to comply with the formalities, for example lack of testamentary capacity.⁵

² The Principal Registrar also drew to the Commission's attention a similar case which had occurred a few years earlier.

³ [1972] 3 All ER 729. See also ch 2 footnote 13.

⁴ That is, that portion of the signature which had been written before the nurse was called away.

⁵ Like the Western Australian figures, the figures disclosed by a survey carried out on behalf of the English Law Reform Committee in 1978 showed that only a small number of wills were rejected. In its *22nd Report, The Making and Revocation of Wills*, (1980) para 2.3 and Annex 2, the Committee stated that a

3.7 Under Rule 13 of the *Non-Contentious Probate Rules 1967-1981* all documents purportedly of a testamentary character are required to be brought into the Probate Registry if alleged to be invalid for any reason other than revocation. The rule operates in the context of an application for administration of an intestate estate or for probate of an earlier valid will and its purpose seems to be to enable the Registrar to confirm that such documents are in fact invalid as wills. The Probate Registry estimates that there are perhaps four or five such documents filed annually.

3.8 It is unlikely that this discloses the full extent of the problem. Some defectively executed wills may not be brought into the Probate Registry, because the existence of Rule 13 may not be known to all executors or their professional advisers. The number of invalid wills is therefore likely to be higher.⁶

3.9 There may be other wills which are "at risk". A will may be admitted to probate which is in fact invalid because of a formal defect not apparent on its face. If the attestation clause is sufficient, and if the Registrar has no reason to doubt the due execution of the will, it will probably be admitted to probate in the ordinary way.⁷ Such a document can be set aside if the true position is later discovered.

3.10 An idea of the true extent of the problem may be gained from the experience in South Australia since the amendment to the *Wills Act* in 1975 modifying the requirement of strict compliance with the formalities.⁸ Since 1975, 39 applications for recognition of formally invalid wills have been made in that State, which has a very similar population to Western Australia.

4. CONSEQUENCES OF FORMAL INVALIDITY

3.11 In most cases the consequence of a will being held invalid is that the deceased dies intestate and the property of the deceased is distributed in accordance with section 14 of the

little less than one quarter of one per cent of wills sought to be admitted to probate (that is, 93 wills out of a total of 40,761) were rejected for failure to comply with the formal requirements.

⁶ Similarly, it is thought that the true number of invalid wills in England could be higher than disclosed by the survey mentioned in the previous footnote, since there may have been some defectively executed wills which were never submitted to probate and were therefore not counted in the survey: see J B Clark, *Darning the Law of Succession - The Wills Provisions of the Administration of Justice Act 1982*, (1984) 37 *Current Legal Problems* 115.

⁷ See generally the *Non-Contentious Probate Rules 1967-1981*.

⁸ As to which, see para 5.7 below.

Administration Act 1903-1985.⁹ However, sometimes this will not be so. There may be an earlier valid will which the deceased intended to revoke by the later will. If the later will is invalid the purported revocation of the earlier will is invalid also. The earlier will accordingly stands, unless it has been independently revoked by some other action of the testator.¹⁰

3.12 Both in cases of intestacy and in cases where the earlier will survives, the resulting distribution will in many cases be different from that desired by the testator. However, this may not always be so. The distribution on intestacy, or under an earlier will, may be similar to that provided for in the invalid will.

3.13 The consequences of an invalid will are not confined to those of a legal nature. A testator's family may find it distressing for his wishes to be ignored because of what they may perceive is a mere technicality. Moreover, besides financial loss to potential beneficiaries, additional legal expense may be incurred, for example, because the invalidity is disputed in legal proceedings, or because the administration of the estate involves more work than if the will had been valid, or as respects resulting applications under the *Inheritance (Family and Dependents Provision) Act 1972*.¹¹ It is probable that cases of formal invalidity would most often occur where it could least be afforded, that is in the home-made wills of small estates.

⁹ This section provides for the distribution of the estate among the surviving spouse and issue of the deceased. If there are no such persons the estate is distributed to other specified relatives. If there are no such relatives the estate is escheated to the Crown.

¹⁰ See *Wills Act*, s 15, quoted in para 8.8 below.

¹¹ This Act empowers the court to order that further provision be made out of the estate of a deceased person in favour of specified members of the deceased's family in certain circumstances. The Act not only applies where the deceased left a valid will but also where the deceased died intestate: s 6. Of course, a finding that a will is invalid because of a defect of formal execution may in some cases avoid the need for an application under this Act, for example where the will makes no provision for the deceased's family. Conversely, a finding that a will is valid may sometimes result in such an application.

Chapter 4

RELAXATION OF THE FORMAL REQUIREMENTS

1. INTRODUCTION

4.1 The courts, exercising their interpretative role, have sometimes shown a willingness in effect to relax the formal requirements of the *Wills Act*.¹ In some jurisdictions, legislation has been enacted to alter the formalities themselves.²

4.2 A more recent approach has been to enact legislation which would allow less than full compliance with the formal requirements in certain situations. Such legislation is dealt with in Part II of this report. This legislation varies in the degree of compliance that is required. Some enactments demand "substantial compliance" whilst others confer a more general power to dispense with the formalities.

4.3 Professor J H Langbein, in a leading article entitled 'Substantial Compliance with the Wills Act',³ suggested that the courts in the United States should themselves adopt and apply a substantial compliance doctrine, similar to that which is in fact employed by them in other areas of the law. He suggested that:⁴

"The substantial compliance doctrine would permit the proponents in cases of defective execution to prove what they are now entitled to presume from due execution - the existence of testamentary intent and the fulfilment of the Wills Act purposes."

So far, this suggestion appears only to have been adopted in one case.⁵

2. BY JUDICIAL CONSTRUCTION

4.4 The various formal requirements have been the subject of a large volume of litigation in a number of jurisdictions. The courts on the one hand have felt themselves constrained to require literal compliance, and on the other have been disposed to follow the unambiguous

¹ See s 2 of this chapter.

² See s 3 of this chapter.

³ (1975) 88 Harvard Law Review 489.

⁴ Id, 513.

⁵ *Kajut's Will* (1981) 2 Pa Fiduc 2d 197 (Pennsylvania Orphans' Court): see R V Wellman, L W Waggoner and O L Browder, *Palmer's Cases and Materials on Trusts and Succession*, (4th ed 1983) 154-156.

intention of testators where possible. These opposing forces have vied with each other for ascendancy and produced what one author has described ⁶ as:

"...the undignified spectacle of the courts indulging in schizophrenia, sometimes bending backwards to save a will despite apparent formal defect, and sometimes standing firm on trivial and highly technical defects."

Another author has said that the rule of strict compliance produces results of unexampled harshness when it is enforced, and frequently leads courts to dishonesty and caprice when it is not.⁷

4.5 An example of a will being struck down for a minor technical defect is afforded by *Re Colling*,⁸ in which Ungood-Thomas J said that he reached the conclusion that the will was invalid "with the greatest regret", and only because he felt "... compelled to do so despite its so clearly defeating the intention of the testator".⁹

3. BY LEGISLATION

4.6 In a number of jurisdictions, amending legislation has been enacted to modify the formal requirements in order to meet some of the difficulties exposed by the case law.

4.7 A large number of wills failed for non-compliance with the requirement of section 9 of the English *Wills Act 1837* that the testator's signature be situated "at the foot or end" of the will. The courts had given a strict interpretation to this phrase. In 1852 the English *Wills Act Amendment Act* was passed as an attempt to remedy this situation. It provided that a will would be valid:

⁶ A R Mellows, *Law of Succession*, (4th ed 1983) 51.

⁷ J H Langbein, *Crumbling of the Wills Act: Australians Point the Way*, (1979) 65 *American Bar Association Journal* 1192, 1193.

⁸ [1972] 3 All ER 729, para 3.5 above.

⁹ On the other hand the extent to which courts have been prepared to go to save a will is exemplified in the old case of *Casson v Dade* (1781) 1 Bro CC 99, 28 ER 1010, in which the deceased had gone to her solicitor's office to sign her will. Having signed the document she went outside to sit in her carriage having found the office hot. The witnesses signed her will whilst she was in the carriage and out of her view. At the very moment when the witnesses were signing the horses backed so that a line of sight through the carriage and office windows was created. Thus, if she had wished to do so, she could have seen the witnesses signing. The attestation was held to be within the requirement that the witnesses attest "in the presence of the... deviser" as required by the *Statute of Frauds*: see para 2.2 above.

"...if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.
..."

The provision went on to list a number of commonly occurring situations as to the placing of the signature and declared that in such cases the will was not rendered invalid. This amendment was adopted in all Australian jurisdictions.¹⁰ It was adopted in Western Australia in 1855.¹¹

4.8 The requirement as to the position of the testator's signature was further relaxed in Western Australia by section 8(b) of the *Wills Act 1970* which requires that the testator sign:

"...in such place on the will so that it is apparent on the face of the will that [he] intended to give effect by the signature to the writing signed as his will."

Other Australian jurisdictions retain the earlier requirements.

4.9 In 1982 England also relaxed its formal requirements as to the position of the testator's signature,¹² following a report of the Law Reform Committee.¹³ As in Western Australia, it is now no longer necessary to comply with the old rule. The sole requirement in this respect is that it must appear that the testator intended his signature to validate the will.

4.10 The new law in England also provides that a witness may validly acknowledge his signature in the presence of the testator, thus solving the problem raised in *Re Colling*.¹⁴

4.11 The Law Reform Committee recommended against the enactment of any provision of the substantial compliance or dispensing power type. The argument of the Committee is dealt with below.¹⁵

¹⁰ *Wills, Probate and Administration Act 1898-1985* (NSW), s 8
Wills Act 1958-1984 (Vic), s 8
Succession Act 1981-1984 (Qld), s 10
Wills Act 1936-1980 (SA), s 9
Wills Act 1852-1934 (Tas), s 1
Wills Ordinance 1968-1983 (ACT), s 10
Wills Act 1938-1985 (NT), s 9.

¹¹ 18 Vic No 13.

¹² *Administration of Justice Act 1982* (Eng), s 17, inserting a new s 9 in the *Wills Act 1837* (Eng) in place of that quoted in para 2.4 above.

¹³ (Eng) Law Reform Committee, *22nd Report, Making and Revocation of Wills*, (1980).

¹⁴ [1972] 3 All ER 729, para 3.5 above.

4.12 The Victorian Chief Justice's Law Reform Committee also recommended against any such provision, for the reason given by the English Committee.¹⁶ Instead, it endorsed the English Committee's recommendation for the relaxation of the formal requirements.

4.13 As one of the Commentators on the discussion paper suggested, it would be possible for the Commission to recommend a further relaxation of the formal requirements imposed by the *Wills Act*. It could, for example, suggest the adoption of the English amendment referred to in paragraph 4.10 above, so dealing with the problem raised in *Re Colling*.¹⁷ However, this issue is not likely to arise very often. The formal requirements serve important purposes,¹⁸ and are not excessively rigorous. Invalidity usually comes about through ignorance of the precise nature of the formalities,¹⁹ or through inadvertent error in attempting to comply with them. In the Commission's opinion, reform should not proceed in the direction of a further relaxation of the formal requirements, but should instead attempt to minimise the consequences of non-compliance in appropriate cases.

¹⁵ See paras 7.18 to 7.20 below. At the time of this report, only one case, *In the Estate of Graham* (1978) 20 SASR 198 (see para 6.3 below) had been decided under the *Wills Act 1936-1980* (SA), s 12(2), which creates a dispensing power: see para 5.7 below. The Committee may thus have been premature in its view.

¹⁶ Victorian Chief Justice's Law Reform Committee, *Report on Execution of Wills*, (1984).

¹⁷ [1972] 3 All ER 729.

¹⁸ See paras 2.15 to 2.17 above.

¹⁹ This is sometimes so in the case of a home-drawn will.

Part II: Legislation Modifying the Requirement of Strict Compliance With the Formal Requirements

Chapter 5

INTRODUCTION

1. GENERAL

5.1 It has been suggested that the primary function of the formal requirements is to make available evidence of the testamentary intentions of the deceased.¹ If a court strikes down a will for a formal defect in the face of clear evidence that it does in fact express the deceased's intentions, then the formal requirements are defeating the major purpose which they were designed to protect. Compliance with the formalities affords a presumption against fraud, lack of capacity, and so on. Unless there is evidence to the contrary, the court simply relies on the document and does not enquire further. But absence of compliance merely means that this presumption is no longer available, not that the will is necessarily tainted. Yet a court is not permitted to enquire further and must reject the document irrespective of what actual evidence is available.

5.2 Several jurisdictions have enacted legislation to enable the court to validate a will which would otherwise be rejected because of non-compliance with the formal requirements. The term "substantial compliance" has been generally used to describe this range of legislative provisions but in a number of cases the provisions go further than substantial compliance proper. The provisions can thus be categorised into those requiring substantial compliance in the strict sense and those which confer a more general dispensing power.

2. SUBSTANTIAL COMPLIANCE PROPER

5.3 This approach has been adopted by Queensland, following a report of the Queensland Law Reform Commission.² Section 9(a) of the Queensland *Succession Act 1981-1984* provides that:

¹ Paras 2.15 and 2.16 above.

² Queensland Law Reform Commission, *Report on the Law relating to Succession*, (No 22, 1978).

"[T]he Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator;..."

This provision simply allows a second, less rigorous, test to be applied where the primary requirements have been breached.

5.4 To date there have only been two reported decisions under section 9(a). In addition the Commission has been advised of two unreported decisions. These are discussed in chapter 6.³ In three of the four cases the application was rejected.

3. GENERAL DISPENSING POWER

5.5 Other provisions go beyond a substantial compliance approach and give courts power to dispense with all or any of the required formalities.

(a) Israel

5.6 In 1965 Israel enacted a comprehensive code of succession law which prescribes certain formalities and also enacts a rule to deal with instances where those formalities are not complied with. Section 25 of the *Succession Law 1965* provides that the court may grant probate notwithstanding any defect as to those requirements "[w]here the court has no doubt as to the genuineness of [the] will".

(b) South Australia

5.7 The first example of legislation conferring a general dispensing power to be enacted in Australia was introduced in South Australia in 1975. It followed a report of the Law Reform Committee of that State.⁴ Section 12(2) of the *Wills Act 1936-1980*⁵ provides that:

"A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon

³ See paras 6.6 to 6.8 and 6.16 below.

⁴ South Australian Law Reform Committee, *Report relating to the Reform of the Law on Intestacy and Wills*, (No 28, 1974).

⁵ Inserted by *Wills Act Amendment Act (No 2) 1975* (SA), s 9.

application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."

5.8 The Supreme Court of South Australia thus has power to dispense with the need to comply with the formalities where it is satisfied that the deceased intended the propounded document to constitute his will. "Substantial compliance" with the formalities is not required.

5.9 39 applications have so far ⁶ been made pursuant to this provision. They fall into the following categories:

(i)	Will not signed by testator	4
(ii)	Testator's signature unwitnessed	7
(iii)	Will not signed or acknowledged in the presence of two witnesses being present at the same time	15
(iv)	Alterations and additions	8
(v)	Will not signed at "foot or end"	<u>5</u>
		<u>39</u>

The cases discussed in the next chapter are examples of the first three categories. The fourth category is discussed in chapter 8.⁷ The fifth is not directly relevant in Western Australia.⁸

(c) Northern Territory

5.10 An identical provision to that of South Australia has now been adopted in the Northern Territory,⁹ following a report by the Northern Territory Law Reform Committee.¹⁰

(d) Manitoba

5.11 In 1983, the Canadian province of Manitoba also introduced legislation¹¹ giving a court power to dispense with the need to comply with the formalities, in the following terms:

⁶ That is, from January 1976 to November 1985.

⁷ See para 8.5 below.

⁸ Since such cases would be valid as a result of the *Wills Act* (WA) s 8(b), (see paras 2.11 and 4.8 above). There is no equivalent provision in South Australia.

⁹ *Wills Act 1968-1985* (NT), s 12(2), inserted by *Wills Amendment Act 1984* (NT), s 5.

¹⁰ Northern Territory Law Reform Committee, *Report relating to the Attestation of Wills by Interested Witnesses and Due Execution of Wills*, (No 2, 1979).

"Where, upon application, if the court is satisfied that a document or any writing on a document embodies

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be."

5.12 This provision is modelled on the South Australian provision, but specifically covers alteration and revocation as well as the making of wills, and imposes the ordinary civil standard of proof, that is, on the balance of probabilities, rather than the higher standard of proof beyond reasonable doubt, normally employed in criminal cases.¹²

4. SUGGESTED PROVISIONS IN OTHER JURISDICTIONS

(a) Tasmania

5.13 The Tasmanian Law Reform Commission has recommended¹³ the enactment of a provision empowering the court

"...to declare an otherwise defectively executed will to be valid, if it can be shown that the defects are inconsequential and do not detract from the overall purpose of the *Wills Act*; and that the testator had at least attempted to comply with those formalities."

5.14 This recommendation amounts to the endorsement of a "substantial compliance" provision. No such legislation has yet been enacted in Tasmania.

¹¹ *Wills Act 1983* (Manitoba), s 23.

¹² The Manitoba legislation implemented the recommendations of the Manitoba Law Reform Commission in its *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, (No 43, 1980), except that it did not adopt the Manitoba Commission's suggestion that the reference in the South Australian provision to the court being "satisfied" be replaced by wording requiring it to be "proved" that the deceased intended the document to constitute his will.

¹³ Tasmanian Law Reform Commission, *Report on Reform in the Law of Wills*, (No 35, 1983) 10.

(b) British Columbia

5.15 The British Columbia Law Reform Commission recommended¹⁴ that a provision be added to the *Wills Act* of that Province to the effect that, notwithstanding that a document did not comply with the required formalities, it should be valid as a will if -

- (a) it is in writing;
- (b) it is signed by the testator; and
- (c) the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

5.16 This is generally similar to the South Australian provision, except that it specifically requires the testator's signature and adopts the ordinary civil standard of proof. The recommendation has not to date been implemented.

(c) New South Wales

5.17 The New South Wales Law Reform Commission has a reference on the execution and revocation of wills, and is expected to report shortly. One of the matters being considered is the possible adoption of a dispensing power.

¹⁴ British Columbia Law Reform Commission, *Report on The Making and Revocation of Wills*, (No 52, 1981) 54.

Chapter 6

ANALYSIS OF THE SOUTH AUSTRALIAN AND QUEENSLAND PROVISIONS

1. INTRODUCTION

6.1 The South Australian provision ¹ is the leading Australian example of a dispensing power in operation and contrasts with the rather different Queensland provision ² which requires substantial compliance with the *Wills Act* formalities. The brief analysis of the cases given below shows the way in which the South Australian and Queensland provisions are being applied by the courts in those jurisdictions. It deals separately with those cases where:

- (a) the testator did not make or acknowledge his signature in the joint presence of the witnesses;
- (b) the will was not witnessed;
- (c) the testator failed to sign the will.

There have also been cases in South Australia which relate to the formal requirements as to alterations and additions to the will. These are set out in chapter 8.³

2. PRESENCE OF WITNESSES

(a) South Australia

6.2 In the three South Australian cases which follow probate was granted notwithstanding that the testator failed to make or acknowledge his signature in the joint presence of the witnesses, as section 8 of the South Australian *Wills Act 1936-1980* requires.

¹ *Wills Act 1936-1980* (SA), s 12(2), quoted in para 5.7 above.

² *Succession Act 1981-1984* (Qld), s 9(a), quoted in para 5.3 above.

³ See para 8.5 below.

* *In the Estate of Graham*⁴

6.3 The will was signed by the testatrix and by two witnesses. However, the testatrix did not sign or acknowledge the will in the presence of the witnesses. Instead, having signed the will, the testatrix handed it to a relative and asked him to "get it witnessed". The relative took the will to two neighbours who knew the testatrix, and they both signed as witnesses. Jacobs J held on the evidence that there was "not the slightest doubt that the deceased intended the document to constitute her will" and accordingly ordered that the will be admitted to probate.

* *In the Estate of Kolodnicky*⁵

6.4 The testator, having signed the will, took it to two persons located in different parts of the town, who each signed their names as attesting witnesses. Legoe J held that there was no doubt that the deceased intended the document to be his will. Accordingly he ordered that it be admitted to probate.

* *In the Estate of Dale*⁶

6.5 This case differed from the two previous cases, in that the deceased signed the will in the presence of one witness, who then signed as witness. The deceased then took the will to another witness who insisted that the deceased sign again, which he did. The second witness then signed the document. Bollen J held that there was no doubt that the deceased intended the document to constitute his will. Accordingly he ordered that it be admitted to probate.

(b) Queensland

* *Re McIlroy*⁷

6.6 This was the first case to be decided under the Queensland legislation. There was a difference of opinion between the witnesses as to whether or not the testatrix signed the will in their joint presence. McPherson J held that it was unnecessary to resolve this dispute, since

⁴ (1978) 20 SASR 198.

⁵ (1981) 27 SASR 374.

⁶ (1983) 32 SASR 215.

⁷ Unreported (No E375 of 1984).

even assuming that only one witness had been present at the time of signature, the formal requirements of the *Wills Act* had been substantially complied with. In doing so, he followed the South Australian case of *In the Estate of Graham*.⁸

* *Re Grosert* ⁹

6.7 The testator by a home-made will left his estate to his wife. It appears from the judgment that the testator did not sign or acknowledge his signature in the joint presence of the witnesses. The affidavit of one witness indicated that she did not know the identity of the other subscribing witness or when and where he attested the will. Vasta J said: ¹⁰

"In those circumstances, there has been a lack of compliance with what I would regard as a most important provision of the section. It is difficult therefore to say that in those circumstances, there has been substantial compliance with the formalities prescribed by the section. It is true that there can be no doubt that the instrument expresses the testamentary intention of the testator, but the view I take is that unless there is substantial compliance, the satisfaction in the court of the testator's testamentary intention becomes irrelevant."

* *Re Johnston* ¹¹

6.8 In this, another case involving a home-made will, probate was again refused. The testatrix did not sign or acknowledge her signature in the presence of either of the attesting witnesses and those witnesses were never together at the same time. What happened was that the testatrix asked her neighbour to witness her will, which she did. However, it appears that the testatrix had not signed the document herself at that stage. The testatrix later signed the will, and subsequently got another person to witness her signature, without disclosing that the document was her will. Thomas J said: ¹²

"The alteration to the law effected by s 9 was obviously to enable the rigid attitudes that had been developed by the courts to be departed from. It would be unfortunate if courts, by a series of decisions, returned to the old rigid attitudes, and I would expect a liberal approach be taken in applying the 'substantial compliance' provisions."

⁸ (1978) 20 SASR 198. See para 6.3 above.

⁹ [1985] 1 Qd R 513.

¹⁰ Id, 515.

¹¹ [1985] 1 Qd R 516.

¹² Id, 518.

However, he went on to say:¹³

"There must of course be a limit on what can amount to substantial compliance. The execution of a will is rightly regarded as an important occasion, and 'protective, cautionary and evidentiary benefits' are recognized to attach to the retention of some procedure that formalizes the occasion."

He contrasted the South Australian provision, which does not require substantial compliance with the formalities, with the Queensland legislation, and concluded that the South Australian decisions would not necessarily be of assistance in cases calling for the application of the Queensland provision, which he said "requires a slightly different approach".¹⁴ In the end, he declined to grant probate of the will.

3. TESTATOR'S SIGNATURE UNWITNESSED

(a) South Australia

6.9 In South Australia, wills have been admitted to probate under section 12(2) although the testator's signature has not been witnessed.

* *In the Estate of Crocker*¹⁵

6.10 This case was unusual in that it concerned what was intended to be a privileged will. The testator in 1941, while a member of the RAAF, made and signed a will on a form supplied by the Air Force. The will was not witnessed. The testator died in 1981. Matheson J held that the testator had not in fact been entitled to make a privileged will under the legislation then in force. He nevertheless admitted the will to probate pursuant to section 12(2) as, on the proved facts, there was no doubt that the testator intended the document to constitute his will.

¹³ Ibid.

¹⁴ Id, 519.

¹⁵ (1982) 30 SASR 321.

* *In the Estate of Clayton*¹⁶

6.11 The testator made his will in his own handwriting on a printed will form, and signed it. The printed attestation clause at the end of the will was not completed and the will was not witnessed. There was evidence of statements by the testator (who was not well-educated) indicating that he considered he had made a valid will. It appears that he intended, having signed the will, to have his signature witnessed, but was unaware of the requirements that the testator should make or acknowledge his signature in the joint presence of the witnesses, and that the witnesses should sign in the presence of the testator. However Mitchell J was satisfied that there could be no reasonable doubt that the testator intended the document to constitute his will, and admitted it to probate.

* *In the Estate of Kelly*¹⁷

6.12 A medical practitioner (who was also a legal practitioner) in 1977 signed a will which also bore the signature of two witnesses. However, it subsequently appeared that the will had not been duly executed as the testator had not signed or acknowledged his signature in the joint presence of the witnesses. Between the date of that will and the practitioner's death in 1981 he prepared several further testamentary documents none of which were duly executed. Shortly before his death he handed a note book to a woman employed by him on office work, telling her to use the book for notes. The note book remained in her possession until after his death when it was found to contain two sheets in the practitioner's handwriting, beginning "My last will and testament", and signed and dated by the practitioner with the words added: "Written as I have considerable cardiac pain and irregularity at time". This document provided for the appointment of two executors and contained a number of bequests. The signature was not witnessed. Sangster J held that, on the evidence presented, there was no reasonable doubt that the testator intended the two sheets of paper in the notebook to constitute his will and accordingly ordered that the sheets be admitted to probate. The case was taken on appeal by the person who was appointed executrix under the will signed in 1977. The Full Court unanimously upheld the order of Sangster J.

6.13 This case shows that the South Australian provision is not confined to cases where the testator failed to comply with one of the required formalities through inadvertence or lack of

¹⁶ (1982) 31 SASR 153.

¹⁷ (1983) 32 SASR 413; (1983) 34 SASR 370 (Full Court).

knowledge. The provision also applies where a testator urgently wishes to make a testamentary disposition in circumstances where witnesses are not available. The South Australian Law Reform Committee had such circumstances in mind in recommending the enactment of a dispensing power.¹⁸

* *In the Estate of Smith*¹⁹

6.14 This case is similar in a number of respects to Clayton's case.²⁰ The testatrix (aged 87) made her will in her own handwriting on a printed will form, and signed and dated it. However, it was never witnessed, although the testatrix had some years earlier made a will which was executed in accordance with the formal requirements. After executing the later document, the testatrix told a relation she had made her will. She kept the document with her important papers and took it to hospital with her. Bollen J held that there was no reasonable doubt that the testatrix intended the document to be her will, and admitted it to probate.

* *In the Estate of Lynch*²¹

6.15 In the latest case, it has been held that section 12(2) may be used to validate an informal re-execution of a revoked will. The testatrix, following the death of her first husband, made a will which was executed in accordance with the formal requirements. Some years later she remarried. She did not realise that this had the effect of revoking her will.²² She thought, however, that it was necessary to alter her will by inserting her new surname, and she signed the will again in her new name, but this signature was not witnessed. A revoked will may be revived by re-executing it in accordance with the usual requirements.²³ Matheson J held that, although these had not been satisfied, there was no doubt that the deceased intended the document to constitute her will, and that under section 12(2) the signature could be regarded as an informal re-execution. He therefore admitted the will to probate.

¹⁸ South Australian Law Reform Committee, *Report relating to the Reform of the Law of Intestacy and Wills*, (No 28, 1974) 11. The Full Court in *Kelly's case* emphasised that it is sufficient if the required testamentary intention exists only at the time of writing the document and that it is irrelevant whether the testator later forgot that he had written it, as seems to have been the position in this case: (1983) 34 SASR 370, 382-383 per Zelling J, 391-392 per Bollen J.

¹⁹ (1985) 38 SASR 30.

²⁰ (1982) 31 SASR 153, para 6.11 above.

²¹ Unreported (No 63 of 1985).

²² *Wills Act 1936-1980* (SA), s 22(a); cf *Wills Act* (WA), s 15(a), quoted in para 8.8 below.

²³ *Wills Act 1936-1980* (SA), s 25(1); cf *Wills Act* (WA), s 16(1).

(b) Queensland

6.16 It seems very likely that in Queensland unwitnessed wills will not be regarded as "executed in substantial compliance with the formalities prescribed" by the Act. *In Re Henderson*²⁴ Macrossan J held that a will attested by only one witness instead of the two required by the Act was not executed in substantial compliance with the formalities.

4. WILL NOT SIGNED BY TESTATOR

(a) South Australia

6.17 South Australian cases have held that section 12(2) can apply even in cases in which the will was not signed by the testator.

* *In the Estate of Blakely*²⁵

6.18 The deceased and his wife had instructed a solicitor to prepare mirror wills for both of them. These were drafted, read and approved by the parties but due to a mistake in the solicitor's office the husband signed the wife's will and the wife the husband's. The husband died before the error was discovered and probate was sought for his will notwithstanding that it had been signed by his wife. White J ordered that the will be admitted to probate. He regarded earlier statements on the need for a testator to execute the document for section 12(2) to operate²⁶ as obiter and indicated that in an appropriate case no signature was necessary. He said:²⁷

"The brake against a flood of fraudulent or unmeritorious applications is the very high standard of proof required by s 12(2)."

²⁴ Unreported (No E860 of 1985). The Commission understands that an appeal to the Full Court is likely.

²⁵ (1983) 32 SASR 473. This case is very similar on its facts to the Western Australian case of *In Re Petchell* (1945) 46 WALR 62, mentioned in para 3.3 above.

²⁶ *In the Estate of Graham* (1978) 20 SASR 198, 205, *Baumanis v Praulin* (1980) 25 SASR 423, 425 and *In the Estate of Kurmis* (1981) 26 SASR 449, 453; see also *In the Estate of Radziszewski* (1982) 29 SASR 256, 258-259.

²⁷ (1983) 32 SASR 473, 479.

* *In the Estate of Williams*²⁸

6.19 In this case, the view of the court in *Blakely's case* that section 12(2) is capable of applying to cases where the testator's signature was not witnessed was upheld by the Full Court of South Australia.²⁹ The testatrix and her husband, who were about to depart on a lengthy trip, already had professionally prepared wills but considered them to be out of date. They each wrote out a further will in their own handwriting and invited neighbours in as witnesses. Although the husband signed his will and the witnesses signed both wills, it was only after the death of the wife that it was realised that she had not signed her will. The Full Court held that the testator's signature was merely one of the formalities required by section 8 of the South Australian *Wills Act* for valid execution and that consequently section 12(2) of that Act was applicable to cases where this formality was not complied with. Accordingly, since on the proved facts there was no reasonable doubt that the wife had intended the document to be her will, the court ordered that it be admitted to probate.

* *In the Estate of Hollis*³⁰

6.20 The testator signed the first three pages of his will, but did not sign on the fourth page, at the "foot or end". The witnesses signed on all four pages. Matheson J held that there was no reasonable doubt that the testator intended the document to be his will, and admitted it to probate.

(b) Queensland

6.21 No analogous cases have yet been adjudicated upon in Queensland. However, it would seem unlikely that the Queensland provision would permit a grant of probate in cases where the testator did not sign the will. A document not signed by the testator would no doubt be held not to have been "executed in substantial compliance with the formalities prescribed" by the Act.

²⁸ (1984) 36 SASR 423.

²⁹ The case came before the Full Court on a reference by the judge of first instance.

³⁰ (1984) 37 SASR 27.

Chapter 7

THE COMMISSION'S RECOMMENDATION

1. RECOMMENDATION

7.1 The Commission has given detailed consideration to the legislation in force in other jurisdictions and the case law illustrating the operation and effect of that legislation. It has also studied the arguments in the literature and the law reform commission reports from other jurisdictions. It has carefully considered the detailed comments which it received on the discussion paper, and has discussed the issue with a number of experts in the field, including probate registrars, practitioners and academic lawyers.

7.2 The Commission has concluded that the introduction of some modification of the requirement of strict compliance with the formalities of the *Wills Act* is justified, and that such modification should not be limited to cases where there is substantial compliance, but should confer on the court a power to dispense with all or any of the formalities. It is persuaded that the South Australian provision is the most suitable model for legislation in Western Australia. It therefore **recommends** that the *Wills Act* should be amended so as to incorporate a provision based on section 12(2) of the South Australian *Wills Act 1936-1980*, to the effect that a document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by the Act, be deemed to be a will if the Supreme Court is satisfied that there can be no reasonable doubt¹ that the deceased intended the document to constitute his will.

2. REASONS FOR THE RECOMMENDATION

7.3 In making the above recommendation the Commission has been persuaded by the weight of a number of arguments in its favour, and by the fact that such a provision received the support of a majority of those who commented on the discussion paper, including many with considerable experience in this field. The Commission has considered a number of arguments that have been raised against such a reform, but does not find any of them sufficiently convincing to persuade it that reform is not justified.

¹ See paras 8.1 to 8.3 below for the Commission's reasons for recommending the adoption of this standard of proof.

(a) Arguments in favour of the proposed reform*(i) The modification of the requirement of strict compliance*

7.4 In the Commission's view, the case for the introduction of some modification of the requirement of strict compliance with the *Wills Act* formalities is clear. Whereas at present the testator's intentions may often be frustrated by the failure to comply with the formal requirements, the proposed reform will allow the court to give effect to the testator's intentions. It has already been pointed out that the primary purpose of the *Wills Act* formalities is to provide evidence of the testator's intentions,² but the formalities should be regarded as evidentiary only. It has been pointed out that:³

"There is something inherently fair about an approach which says that formalities are important but they are a tool and not a sword. If the result has been achieved without the tool, then the tool becomes unimportant."

7.5 Apart from the question of the deceased's intentions, the position of potential beneficiaries should also be considered. A nominated beneficiary has a legitimate expectation to take according to the tenor of the will. That expectation will be frustrated if probate is refused because the will does not comply with the formal requirements. The reform proposed will fulfil the beneficiary's expectations if it is established that the will represented the intentions of the deceased testator.

(ii) The adoption of the South Australian model

7.6 The Commission has carefully considered the contrasting reforms in South Australia and Queensland, and the variations on those models that have been proposed or enacted elsewhere. As stated in paragraph 7.2 above it has concluded that the South Australian provision is the most appropriate model for Western Australia to adopt. Its reasons are as follows.

7.7 First, the South Australian provision gives the court power to save wills in cases in which, in the opinion of the Commission, justice requires that effect should be given to the

² See paras 2.15 and 2.16 above.

³ See C I Nelson and R C Stark, *Formalities and Formalism: A Critical Look at the Execution of Wills*, (1979) 6 *Pepperdine Law Review* 331, 332.

testator's intentions, and in which, under the present law, the court is prevented from so doing. The Queensland provision is much narrower than the South Australian provision. It requires "substantial compliance" with the formalities, a test in any case of uncertain application. It appears that the Queensland courts are adopting a fairly strict interpretation of the provision, and consequently not admitting informal wills to probate in cases where no harm would be done in admitting them. The South Australian provision has given rise to no such limitation.

7.8 The Commission also favours the South Australian provision because, in view of the case law that has accumulated over the ten years that it has been in operation, the uncertainty that might otherwise attend the adoption of a new statutory provision will not be present. Lawyers and other persons dealing with wills will be able with confidence to rely on the South Australian precedents. In contrast, there is still much uncertainty surrounding the meaning of "substantial compliance" in the Queensland provision and the precedents are fewer in number and are not always helpful.

(b) Commentators' views

7.9 The Commission's recommendation in favour of the adoption of the South Australian provision received the support of a majority of those who commented on the discussion paper.

7.10 The discussion paper first asked for general comment on whether some form of modification of the requirement of strict compliance should be enacted in Western Australia. The great majority of commentators favoured some change in the law to overcome the problem. In the minority were several lawyers practising in the probate area and registrars from the Supreme Courts of Western Australia and Tasmania. However, the Registrar of Probates of South Australia supported the reform in that State, concluding that "section 12(2) has been a useful and practically applicable remedy".⁴

7.11 The discussion paper then asked which of the various provisions enacted or proposed in other jurisdictions should be used as a model. The majority of commentators favoured the adoption of a provision based on the South Australian legislation,⁵ rather than the more

⁴ South Australian Registrar of Probates (Mr A Faunce-de Laune), letter to the Commission dated 22 January 1985.

⁵ Although some had reservations as to the standard of proof applied, as to which see paras 8.1 to 8.3 below.

restricted Queensland provision. Among the supporters of the South Australian provision were a number of academic lawyers, including Mr W A Lee, who had earlier been involved in the drafting of the Queensland provision,⁶ Professor J H Langbein, whose writings on the issue have had much influence in Australia,⁷ and two of the authors of the leading Australian text book on the law of wills.⁸ The Council of the Law Society of Western Australia by a narrow majority preferred the South Australian alternative,⁹ and this would seem to reflect the majority view of those members of the profession in Western Australia who made submissions. As noted in the previous paragraph, the Registrar of Probates of South Australia also supported the South Australian reform.

7.12 The Public Trustee of Western Australia and the Honourable I G Medcalf QC MLC, a former Attorney General, preferred the Queensland model, and West Australian Trustees Limited preferred the approach recommended by the Tasmanian Law Reform Commission, which is very similar to the Queensland provision.¹⁰ One commentator, Associate Professor A G Lang, was in favour of the British Columbia Law Reform Commission proposal,¹¹ which differs from the South Australian provision in excluding an unsigned will from the scope of its dispensing power and in adopting the civil standard of proof.¹²

⁶ Mr Lee pointed out that although the Queensland provision was enacted in 1981 it had been drafted prior to the enactment of the South Australian provision in 1975: letter to the Commission dated 5 December 1984.

⁷ Professor Langbein in his article *Substantial Compliance with the Wills Act*, (1975) 88 Harvard Law Review 489 suggested that the substantial compliance doctrine should be applied by the courts. For his comments on the Australian legislation, see *Crumbling of the Wills Act: Australians Point the Way*, (1979) 65 American Bar Association Journal 1192 and *Defects of Form in the Execution of Wills: Australian and other experience with the Substantial Compliance Doctrine*, a paper given to the American Bar Association in Sydney in 1980. In his earlier correspondence with the Commission, he retained a preference for the Queensland approach, on the basis that it would solve practically all the difficult cases, without permitting unlimited judicial discretion: see letters to the Commission dated 2 May 1983 and 29 November 1984. More recently, however, especially in the light of the developments in the South Australian case law, he has expressed an altered view in favour of the South Australian provision. subject to reservations about the standard of proof. In a letter to the Commission dated 13 June 1985, he said:

"I think that the substantial compliance standard is the only possible one for judicial action unaided by statute; but that the better solution when legislative reform is possible is to avoid imposing the new formality that inheres in the substantial compliance test (ie, was the testator's conduct close enough?)."

⁸ Dr I J Hardingham and Emeritus Professor H A J Ford.

⁹ Although the Conveyancing Committee of the Law Society preferred not to introduce any modification of the requirement of strict compliance.

¹⁰ See para 5.13 above.

¹¹ See also A G Lang, *Formality v Intention - Wills in an Australian Supermarket*, (1985) 15 Melbourne University Law Review 82.

¹² See paras 5.15 and 5.16 above.

(c) Rejection of arguments against the proposed reform

7.13 A number of arguments against the introduction of a dispensing power along South Australian lines, or indeed of a more restricted modification of the requirement of strict compliance with the *Wills Act* formalities, have been put forward during the past few years. They have been discussed in the literature and in the various law reform commission reports. Some of them were referred to by those commentators who did not favour reform. The Commission has carefully considered these arguments but finds them unconvincing.

(i) Encouragement of carelessness by testators

7.14 It has been suggested that allowing wills not complying with the formal requirements to be admitted to probate would encourage testators to think that there was no need to comply with the formal requirements.

7.15 In the Commission's view such fears are groundless. It is likely that the vast majority of testators will continue to have their wills professionally prepared. If solicitors, and others who prepare wills, such as trustee companies, knowingly permitted a will to be completed other than in accordance with the strict formal requirements in reliance on a remedial provision, they would breach both professional and contractual standards and could be civilly liable for such conduct.¹³ Some testators who do not seek professional assistance may, through ignorance, not observe the *Wills Act* formalities. It is in such cases that the proposed dispensing power will have its main effect. Very few would-be testators would deliberately ignore the formal requirements, trusting in the Supreme Court to be satisfied beyond reasonable doubt of their intention.

7.16 The Manitoba Law Reform Commission addressed the argument that the introduction of a general dispensing power would encourage carelessness.¹⁴ It said:

"It is submitted that this argument is flawed. The provision... is a remedial provision. It will be used only at final stages to save a will which is defectively executed, ...The doctrine is not applicable at initial stages of execution. Reliance on it at that stage

¹³ See G M Bates, *Liability of Solicitors for Negligence to Beneficiaries Under a Will* (1985) 59 Australian Law Journal 327.

¹⁴ Manitoba Law Reform Commission, *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, (No 43, 1980) 19-20.

would mean subjecting an estate to needless litigation. A remedial provision should not discourage or in any way affect the use of formalities."

7.17 The South Australian dispensing power has now been in operation for ten years, and Israel has had such a provision for double that length of time. The experience of these jurisdictions does not suggest any noticeable increase in carelessness by testators.¹⁵ As a commentator from the British Columbia Law Reform Commission pointed out, a certain amount of carelessness can exist even in a formal execution system.¹⁶ There is no evidence that the proposed reform is likely to cause an increase in the number of careless testators.

(ii) *Increase in litigation*

7.18 The English Law Reform Committee was one of the first law reform bodies to comment on the South Australian legislation. It said:¹⁷

"While the idea of a dispensing power has attractions, most of us were more impressed by the argument against it, namely that by making it less certain whether or not an informally executed will is capable of being admitted to probate, it could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong. Recent legislation in South Australia allows the courts just such a discretion...We think that to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that a general dispensing power should not be introduced into our law of succession."

7.19 Similar fears had been voiced by some commentators in Australia.¹⁸ In the Commission's view these fears are groundless.¹⁹ The fears expressed by the English Law Reform Committee have not been borne out by events. The dispensing power has now been in operation in South Australia for a decade, and there is sufficient objective evidence on the volume of litigation for the Registrar of Probates of that State to conclude:²⁰

¹⁵ For Israel, see British Columbia Law Reform Commission, *Report on the Making and Revocation of Wills*, (No 52, 1981) 44-46.

¹⁶ F W Hansford, in a letter to the Commission dated 17 January 1985.

¹⁷ (Eng) Law Reform Committee, *22nd Report. The Making and Revocation of Wills* (1980) para 2.5.

¹⁸ See S N L Palk, *Informal Wills: From Soldiers to Citizens*, (1976) 5 Adelaide Law Review 382; W F Ormiston QC, *Formalities and Wills: A Plea for Caution*, a paper given to the American Bar Association in Sydney in 1980.

¹⁹ See also Manitoba Law Reform Commission, *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, (No 43, 1980) 20-21; British Columbia Law Reform Commission, *Report on the Making and Revocation of Wills*, (No 52, 1981) 48-49.

²⁰ South Australian Registrar of Probates (Mr A Faunce-de Laune), in a letter to the Commission dated 22 January 1985. As pointed out in para 3.13 above, the adoption of a dispensing power may in some cases avoid litigation. Costs and inconvenience are always a deterrent to frivolous or vexatious litigation.

"The section has not opened the floodgates to admit proof of informal testamentary documents much as they might have been proved prior to 1837."

7.20 The evidence from Israel, which has had a dispensing power since 1965, is similar.²¹

(iii) *Fraud or error*

7.21 Some commentators suggested that adoption of some modification of the requirement of strict compliance - especially the South Australian provision, which permits probate to be granted of a will which does not meet any of the required formalities, even where the testator made no attempt to meet those formalities - may lead to applications for probate in respect of fraudulent or superseded documents or documents which the testator never intended as testamentary. It is of course possible for this to happen under the present requirement. It is to avoid any such problems that the South Australian provision requires the court to be satisfied beyond reasonable doubt that the document was intended by the testator as his will.

²¹ See footnote 15 above.

Chapter 8

PARTICULAR MATTERS

1. STANDARD OF PROOF

8.1 In the previous chapter the Commission recommended that Western Australia should adopt a provision based on section 12(2) of the South Australian *Wills Act 1936-1980*. This provision requires that the court must be satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

8.2 The South Australian provision thus adopts the standard of proof used in criminal cases, rather than the more normal civil standard of proof on a balance of probabilities. A number of commentators criticized the adoption of the criminal standard. The Law Reform Commissions of Manitoba and British Columbia had earlier recommended legislative provisions incorporating the civil standard,¹ a recommendation accepted by the Manitoba statute.² The Manitoba Commission, for example, argued that the civil standard should be adopted to maintain consistency with the standard employed in other areas of probate law.³

8.3 While the Commission recognizes the merit of the Manitoba Commission's argument, it has concluded that the higher standard of proof found in the South Australian provision should be retained. As White J said in *In the Estate of Blakely*:⁴

"The brake against a flood of fraudulent or unmeritorious applications is the very high standard of proof required by s 12(2)."

The higher standard is also likely to discourage any lowering of standards of care in the execution of wills, and to operate as a psychological barrier to courts being unduly easily persuaded. In addition, adopting a different standard of proof from that in the South

¹ Manitoba Law Reform Commission, *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, (No 43, 1980) 28; British Columbia Law Reform Commission, *Report on the Making and Revocation of Wills*, (No 52, 1981) 53.

² *Wills Act 1983* (Manitoba), s 23, quoted in para 5.11 above.

³ The civil standard enables the court to have regard to the seriousness of an allegation, the inherent unlikelihood of an occurrence, or the gravity of consequences flowing from a particular finding, all considerations affecting the answer to the question whether an issue has been proved to the reasonable satisfaction of a tribunal: *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 per Dixon J.

⁴ (1983) 32 SASR 473, 479.

Australian legislation is likely to create uncertainty as to the relevance in Western Australia of the South Australian precedents.

2. ALTERATIONS

8.4 Section 10 of the *Wills Act* governs the alteration of wills and provides:

"(1) Subject to subsection (2) of this section, unless an alteration made to a will after its execution is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect except to invalidate words or meanings that it renders no longer apparent.

(2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, ... are or is made -

- (a) in the margin or in some other part of the will opposite or near the alteration; or
- (b) at the foot or end of, or opposite to, a memorandum referring to the alteration and written in some part of the will.

(3) In this section 'apparent' means legible by the unaided eye or with the help of a magnifying lens but not otherwise."

8.5 In South Australia it has been held that section 12(2) is applicable to alterations. In *In the Estate of Standley*⁵ the testatrix had made alterations to the clause of her will appointing an executor. She initialled the alteration and had a witness do likewise. It was held that s 12(2) was applicable not only to a whole document but also to a part only of a document, such as an alteration, provided that the part in question came within the general ambit of that section. The document was admitted to probate. A similar view was taken in *In the Estate of Possingham*,⁶ where the testator initialled the changes and signed the will afresh, without attestation.⁷

⁵ (1982) 29 SASR 490.

⁶ (1983) 32 SASR 227.

⁷ In the earlier case of *In the Estate of Kurmis* (1981) 26 SASR 449, Sangster J had refused to admit an unsigned and unwitnessed alteration to probate. In *In the Estate of Standley* (1982) 29 SASR 490, 494, Legoe J distinguished this case on the ground that the alteration was neither signed nor initialled.

8.6 In Manitoba the Act specifically covers alterations,⁸ following the recommendation of the Manitoba Law Reform Commission.⁹ The British Columbia Law Reform Commission has also recommended that the legislation should include alterations.¹⁰

8.7 All commentators who were in favour of reform felt that it should extend to encompass alterations not made in conformity with the formal requirements. The Commission agrees, and **recommends** accordingly.

3. REVOCATION AND REVIVAL

8.8 The law as to the revocation of wills is set out in Part V of the *Wills Act*. The main provision, section 15, provides:

" A will or a part of a will is revoked only by -

- (a) marriage, subject to section 14 of this Act;
- (b) a later will executed in manner provided by this Act that expressly or impliedly revokes the earlier will;
- (c) a writing declaring an intention to revoke it that is executed in the manner in which a will is required by this Act to be executed; or
- (d) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it."

Attempts at revocation which do not comply with these requirements are invalid. In *Cheese v Lovejoy*,¹¹ for example, it was held that to cross out certain provisions in the will, write on the back "All these are revoked" and throw the will in a heap of waste paper, was insufficient to revoke it.

8.9 The question arises whether a dispensing power should apply to purported revocations of the kind mentioned in paragraphs (b) and (c) of section 15. If a dispensing power is available to allow an informally executed will to be admitted to probate then that power must

⁸ *Wills Act 1983* (Manitoba), s 23, quoted in para 5.11 above. In *Re Pouliot* [1984] 5 WWR 765 this provision was applied to admit an informal alteration to probate.

⁹ Manitoba Law Reform Commission, *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, (No 43, 1980) 29.

¹⁰ British Columbia Law Reform Commission, *The Making and Revocation of Wills*, (No 52, 1981) 65.

¹¹ (1877) 2 PD 251.

extend to any revocation of former testamentary documents contained in that will. It would therefore seem to be inconsistent not to allow a documentary revocation not to be effective simply because it is not followed by a disposition or dispositions. In practice, the most frequently used method of revocation is by another will or codicil. Documentary revocations of the type contemplated by paragraph (c) of section 15 would appear to be rare and, unlike wills, are generally not filed with the court.

8.10 Although the South Australian provision makes no specific reference to the question of revocation it is clear that the provision would at least cover revocation by another will or codicil.¹²

8.11 The Law Reform Commissions of Manitoba and British Columbia both recommended that the dispensing power should expressly extend to revocations not made in accordance with the formal requirements,¹³ and the Manitoba Act so provides.¹⁴

8.12 Commentators generally favoured the extension of the dispensing power to revocations of the types covered by paragraphs (b) and (c) of section 15.¹⁵ The Commission **recommends** accordingly.

8.13 A will or any part of a will that has been in any manner revoked can be revived by re-execution, or by a later will showing an intention to revive the will or part.¹⁶ In either case, the formal requirements specified by section 8 must be complied with. *In the Estate of Lynch*¹⁷ shows that in South Australia, under the dispensing power, a revoked will may be admitted to probate even though re-executed informally, if the court is satisfied beyond reasonable doubt that the deceased intended it to constitute his will. The Manitoba statute expressly applies to informal revival.¹⁸ The Commission therefore **recommends** that the dispensing power be extended to the revival by re-execution of a revoked will or part of a will.

¹² See *In the Estate of Kelly* (1983) 34 SASR 370, 381-382, where Zelling J specifically adverts to the matter.

¹³ Manitoba Law Reform Commission, *Report on "The Wills Act" and the Doctrine of Substantial Compliance*, (No 43, 1980) 29; British Columbia Law Reform Commission, *Report on The Making and Revocation of Wills*, (No 52, 1981) 69.

¹⁴ *Wills Act 1983* (Manitoba), s 23, quoted in para 5.11 above.

¹⁵ The Hon I G Medcalf QC, who advocated the adoption of a substantial compliance provision extending to revocation, limited his support to revocations effected by will or codicil.

¹⁶ *Wills Act*, s 16(1).

¹⁷ Unreported (No 63 of 1985), discussed in para 6.15 above.

¹⁸ *Wills Act 1983* (Manitoba), s 23, quoted in para 5.11 above.

4. TRANSITIONAL

8.14 In the Commission's opinion, it is important to limit the application of the proposed dispensing power to cases where the testator dies after the proposed provisions come into force. It would be unwise to prejudice executors and beneficiaries who have acted in reliance on the assumption that a will not executed in full compliance with the formalities required by the present law is of no effect, or to open up the possibility of obtaining probate of a later informal document where probate of an earlier formal will has already been granted. All those who commented on this aspect of the problem agreed. The Commission therefore **recommends** that the proposed legislative provision take effect only in relation to the wills of persons who die after its commencement, whether or not the will is made before that date.

5. PROCEDURE

8.15 In South Australia, applications for admission to proof of documents in whole or in part under section 12(2) are either contentious (that is, disputed) or non-contentious. (Of the first 39 applications referred to earlier ¹⁹ only 4 were contentious.) In contentious matters the admissibility of the document to proof is determined in a probate action under Order 29 of the *Supreme Court Rules*. The procedure in non-contentious matters is governed by Rule 61 of the *Rules of the Supreme Court (Administration and Probate Act) 1984* which provides that:

"An application under section 12(2) of the *Wills Act, 1936*, for an order admitting to proof a document purporting to embody the testamentary intentions of a deceased person

- (a) where the gross value of the estate wherever situated does not exceed \$10,000, may be made to the Registrar by originating summons and shall be supported by an affidavit setting out the grounds of the application, together with the consents in writing to the application given by all persons who may be prejudiced by the admission of the document to proof:

Provided that if a person who may be prejudiced by the application is not sui juris or cannot be ascertained or found, or if the Registrar is satisfied that in the circumstances it is just and expedient to do so, the Registrar may nevertheless dispense with such consent;

- (b) where the gross value of the estate wherever situated exceeds \$10,000 may be made to the Court on motion."

¹⁹ See para 5.9 above.

8.16 The Commission **recommends** that provisions similar in substance should be incorporated in the *Non-Contentious Probate Rules 1967-1981*.²⁰

²⁰ The fixing of the appropriate monetary limit governing applications which may be determined by the Registrar is of course a matter for the Judges of the Supreme Court, who by the *Supreme Court Act 1935-1984*, s 167(1)(1) are given power to make rules regulating non-contentious probate business.

Chapter 9

SUMMARY OF RECOMMENDATIONS

9.1 The Commission recommends that -

(1) *The Wills Act 1970-1985 be amended so as to incorporate a provision based on section 12(2) of the South Australian Wills Act 1936-1980, to the effect that a document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by the Act, be deemed to be a will if the Supreme Court is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.*

(paragraphs 7.1 and 7.2. 8.1 to 8.3)

(2) *This provision also apply to -*

(i) *alterations to a will-*

(paragraphs 8.4 to 8.7)

(ii) *revocation of a will or a part of a will by the means specified in parts (b) and (c) of section 15 of the Act.*

(paragraphs 8.8 to 8.12)

(iii) *revival by re-execution of a revoked will or part of a will;*

(paragraph 8.13)

(3) *This provision take effect only in relation to the estates of persons dying after its coming into effect, whether or not the will is made before that date;*

(paragraph 8.14)

(4) *In respect of non-contentious proceedings. procedural rules similar in substance to Rule 61 of the South Australian Rules of the Supreme Court (Administration and Probate Act) 1984 be incorporated in the Non-Contentious Probate Rules 1967-1981.*

(paragraphs 8.15 and 8.16)

J A Thomson
Chairman

H H Jackson
Member

P W Johnston
Member

C W Ogilvie
Member

Daryl R Williams
Member

19 November 1985

Appendix

COMMENTATORS ON THE DISCUSSION PAPER

Dr G M Bates, Senior Lecturer in Law, University of Tasmania
Country Women's Association of Western Australia (Inc)
Crown Law Department, Western Australia
Department of Justice, New Zealand
Deputy Registrar, Supreme Court of Tasmania
Executor Trustee and Agency Company of South Australia Limited
Emeritus Professor H A J Ford, University of Melbourne
Mr F W Hansford, British Columbia Law Reform Commission
Dr I J Hardingham, Reader in Law, University of Melbourne
Messrs Keall Brinsden, Barristers and Solicitors
Associate Professor A G Lang, Macquarie University
Professor J H Langbein, University of Chicago
Law Society of Western Australia
Mr W A Lee, Reader in Law, University of Queensland
Messrs Lohrmann Tindal and Guthrie, Barristers and Solicitors
Hon Mr Justice McPherson, Supreme Court of Queensland
Hon I G Medcalf QC, MLC, former Attorney General of Western Australia
Messrs Northmore, Hale, Davy and Leake, Barristers and Solicitors
Principal Registrar, Supreme Court of Western Australia
Public Trustee of Western Australia
Registrar of Probates, Supreme Court of South Australia
Mr B G Tennant
West Australian Trustees Limited