13. Accounting for benefits received

- Benefits received before death
- Testamentary benefits
- Superannuation assets

13.1 This chapter looks at whether the amount available to beneficiaries ought to be reduced where they have already received a benefit from the intestate.

13.2 When an intestate benefits someone either before and/or upon death and that person is also entitled to a share of the intestate estate, some jurisdictions provide that the benefit must be taken into account in determining his or her entitlement. That is, the value of any benefit he or she receives is deducted from the share that the recipient is entitled to on intestacy. The principal reason for such arrangements is to ensure that intestate estates are divided equitably.

13.3 There are essentially two categories of provisions:

- those that deal with gifts made by the intestate during his or her lifetime;
- in the case of a partial intestacy, those where the intestate has made provision for someone in his or her will.

Five jurisdictions make such provisions. However, Queensland, WA and NSW make no provision to account for benefits received on or before the death of an intestate.

BENEFITS RECEIVED BEFORE DEATH

13.4 Each jurisdiction that requires an account be made of benefits given by an intestate before his or her death does so in different ways.

Origin of the rules

13.5 The rules that require a person to account for benefits received from an intestate before death originated in the Statute of Distributions. The Statute originally provided that settlements and advancements conferred by the intestate upon his children in his lifetime were to be taken into account in determining their (or their issue's) portion upon intestacy.[1] The rule, which is sometimes referred to as "the doctrine of hotchpot", was narrow in scope, applying only to children of the male intestate and applied only in cases of total intestacy.[2]

1. 22 & 23 Charles II c 10 s 5.
2. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 59; I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in*

13.6 The rule essentially covered two types of benefits:

- marriage settlements whereby property was settled upon children upon marriage; and
- advancements which were usually intended to set up children in their chosen profession or business.

The rule did not apply to casual payments or gifts made to children.[3]

13.7 Hotchpot has been abolished in NSW, Queensland and WA.[4]

Current provisions

13.8 All jurisdictions that have retained a version of this rule have altered it in some way. Victoria and Tasmania are closest to the rule established by the Statute of Distributions.

- **Victoria** - requires a child of the intestate (or his or her representative) to account for property settled on or advanced to him or her;[5] the value most likely to be taken at the date of the gift.[6]
- **Tasmania** - requires a child of the intestate to account for property settled on or advanced to him or her, subject to a contrary intention; the value to be taken at the death of the intestate.[7]
- **ACT** - requires a child of the intestate to account for any money or property given to him or her, subject to a contrary intention, provided the value of the gift is greater than $10,000 and it was given no more than five years before the intestate's death; the value to be taken at the intestate's death.[8]

Australia and New Zealand. (2nd ed, Law Book Company, Sydney, 1989) at 432-440.

3. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 59.
4. *Wills, Probate and Administration (Amendment) Act 1977* (NSW); *Succession Acts Amendment Act 1968* (Qld); *Administration Act Amendment Act 1976* (WA) s 3. Hotchpot has also been abolished in England: *Law Reform (Succession) Act 1995* (Eng).
5. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(i).
6. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand.* (2nd ed, Law Book Company, Sydney, 1989) at 434-435.
7. *Administration and Probate Act 1935* (Tas) s 46(1)(c).
8. *Administration and Probate Act 1929* (ACT) s 49BA(1).

- **NT** - requires any person entitled on intestacy (other than a surviving spouse or partner) to account for any money or property given for the "benefit of" him or her or his or her otherwise "unentitled" spouse or partner (subject to contrary intention), provided the value of the gift is greater than $1,000 and it was given no more than five years before the intestate's death; the value to be taken at the intestate's death.[9]
- **SA** - requires any person entitled on intestacy (other than a surviving spouse or partner) to account for any money or property given for his or her "benefit" (subject to contrary intention), provided the value of the gift is greater than $1,000 and it was given no more than five years before the intestate's death; the value to be taken at the date of the gift.[10]

Arguments for and against

13.9 A general argument in favour of such provisions is that they are based upon equitable principles and seek to achieve equality between beneficiaries.[11] While advancements to children, such as those given by way of marriage settlement, are not common in contemporary society, there may still be merit in a requirement which, "does not interfere with planned inequality, but, in the case of issue at least, …rejects accidental inequality in favour of that degree of equality produced by hotchpot."[12]

13.10 The above arguments are generally supported by an implied intention on the part of the intestate. However, it has been suggested that this is not always the case that, for example, parents intend to achieve an equality of benefits among their children.[13] Indeed, if the deceased did not intend to achieve equality, any version of the rule might defeat their intentions to benefit one person more than another, especially if the burden of proving a contrary intention lies with the

9. *Administration and Probate Act 1969* (NT) s 68(3).
10. *Administration and Probate Act 1919* (SA) s 72K(1). This provision was based substantially on recommendations in Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9.
11. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 40. See also Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9; K McQueenie, *Consultation*.
12. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 441.
13. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 440.

people who will benefit from the intestate estate.[14] On the other hand, it has been argued that some people would wish to have large gifts taken into account in the distribution of their estates and that these should be provided for.[15]

13.11 However, it can always be argued that any parent who intends to advance his or her child and who intends that the advancement be taken into account in the distribution of his or her estate should simply make a will to give effect to these intentions.[16] Such provisions are reported to occur in some instances.[17] In one consultation, it was suggested that in rare cases where the personal representatives take settlements and advancements into account, it is generally "very hurtful" and "counterproductive".[18]

13.12 It can also be argued that the purpose of intestacy provisions is to distribute the property of the intestate and not to remedy any unequal treatment of beneficiaries during the intestate's lifetime.[19]

13.13 There are many difficulties involved in applying the doctrine of hotchpot in both its traditional and modified forms. These difficulties will ultimately outweigh any equality that could arguably be achieved. It has been observed that the jurisdictions that have abolished the doctrine have done so on the basis that it is "more productive of difficulty than justice".[20] The Law Commission of England and Wales has commented on the particular difficulties that hotchpot may present for lay people who have had no previous experience in administering estates.[21]

13.14 The traditional form of hotchpot, despite its long existence, is far from being certain in its application. There was certainly difficulty

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14. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 47.
15. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 167-168.
16. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 61. See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 167.
17. Registry, Supreme Court of Tasmania, *Consultation*.
18. Tasmania, Office of the Public Trustee, *Consultation*.
19. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38-39.
20. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand.* (2nd ed, Law Book Company, Sydney, 1989) at 440. See also, eg, NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.
21. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 47.

in defining "advancement"[22] and uncertainty concerning the date of valuation of the benefits conferred.[23] A time limit has been a necessary addition in some jurisdictions since the details of gifts may become "sketchy" over longer periods.[24]

13.15 The more traditional forms of hotchpot are also anachronistic. Marriage settlements and advancements to children are not common in modern society. The contemporary intestate, who will have given a gift upon the marriage or setting up for life of a child, will most likely die at a considerable age. Any gift made upon the marriage or setting up for life of a child will have been made many years before any of the time periods provided by some of the relevant statutes.[25] Any attempts to overcome some of these concerns by extending the application of the provisions to cover other benefits and gifts may unnecessarily complicate the administration of estates where such gifts and benefits may have to be ascertained and valued. The Queensland Law Reform Commission opposed any modern extensions to the doctrine of hotchpot, observing that:

> it would be unprecedented to confer upon an administrator the investigatory powers which would be necessary to establish the facts and strike an account.[26]

Even on a shortened time frame of, say, five years, it may be difficult to investigate any relevant gifts and to obtain valuations for them.[27] This will unnecessarily complicate the administration of some estates. The difficulty will outweigh any "justice" that may be achieved through equality of benefit.

13.16 Finally, it can be argued that family provision is always available for children (and maybe others) who feel that an unjustified inequitable distribution has resulted.[28]

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22. The Law Reform Committee of SA observed that the cases were "numerous and some of them irreconcilable": Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9.
23. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand.* (2nd ed, Law Book Company, Sydney, 1989) at 440.
24. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 18.
25. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60
26. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 53.
27. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60.
28. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 61.

Law reform developments

13.17 There are essentially two streams of law reform relating to the area of hotchpot. One approach has been to conclude that the hotchpot provisions should be repealed; the other has been to modify the provisions to make them more appropriate to a modern setting.

13.18 Queensland was the first Australian jurisdiction to repeal the hotchpot provisions in 1968.[29] The Law Reform Commission of Western Australia concluded against hotchpot in 1973.[30] The QLRC endorsed this approach in its 1993 report.[31] The hotchpot provisions were repealed in NSW in 1977. At the time, it was said that the repeal showed a "determination to remove anomalies, anachronisms, relics, remnants and vestiges of outmoded and outdated statutory and common law".[32] The abolition of hotchpot in Queensland, NSW and WA has apparently not resulted in any substantial injustice.

13.19 The ACT was the first Australian jurisdiction to modernise hotchpot. It introduced a provision in 1967 which extended to all gifts to the intestate's children above $1000 and given within five years of the intestate's death.[33] This was followed in 1969 by a similar provision in the NT.[34] In 1974, the Law Reform Committee of South Australia proposed a modified version of hotchpot that took into account all potential beneficiaries on intestacy, in addition to setting time and monetary limits.[35] This proposal was substantially adopted in 1975.[36] The Law Reform Commission of Tasmania recommended a scheme similar to the SA model in 1985[37] but its proposals have not been implemented.

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29. *Succession Acts Amendment Act 1968* (Qld).
30. Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 36-39.
31. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60-61.
32. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.
33. *Administration and Probate Act 1929* (ACT) s 49B, introduced by *Administration and Probate Ordinance 1967* (ACT).
34. *Administration and Probate Act 1969* (NT) s 68(3).
35. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 9.
36. *Administration and Probate Act Amendment Act (No 2) 1975* (SA) s 10.
37. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 18.

13.20 A similar pattern may be observed in overseas jurisdictions. New Zealand abolished its hotchpot provisions in 1944[38] as a result of the deliberations of the NZ Law Revision Committee.[39] The Law Commission of England and Wales and the Law Reform Commission of British Columbia have both recommended the repeal of their hotchpot provisions.[40] The English Parliament repealed the hotchpot rules in 1995.[41]

13.21 However, others have opted to retain the doctrine in some form. The Alberta Law Reform Institute recommended the retention of the doctrine in its traditional form with only one variation so that grandchildren of the intestate should not have to account for advancements received by their parents.[42] The Manitoba Law Reform Commission recognised that most people intended that gifts should not be advancements and so recommended that the provisions should only operate where the intestate or the child had stated either orally or in writing that the gift was an advancement.[43] This was adopted by the legislature, which went further than the Law Reform Commission's recommendations[44] by extending the provisions to cover gifts to any prospective heirs under intestacy legislation.[45]

Submissions and consultations

13.22 Most submissions and consultations supported the abolition of hotchpot provisions in those jurisdictions that still have them and resisted their reintroduction in jurisdictions that have abolished them.

38. *Administration Amendment Act 1944* (NZ) s 12(2). The Statute of Distributions provision relating to hotchpot applied in NZ before 1 January 1945: J D Willis and J H Carrad, *Garrow's Law of Wills and Administration and Succession on Intestacy* (2nd edition revised, Butterworths, Auckland, 1949) at 620.
39. NZ, *Parliamentary Debates (Hansard)* House of Representatives, 23 November 1944 at 289.
40. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 47; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 38-39.
41. *Law Reform (Succession) Act 1995* (Eng) s 1.
42. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 167-171.
43. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 50-51.
44. See Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 52.
45. See *Intestate Succession Act* CCSM c I85 s 8. The Manitoba Law Reform Commission has since recommended that the declaration may be made at any time before or after the gift was made: Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 67.

13.23 Submissions generally did not support any version of the doctrine of hotchpot,[46] mostly on the grounds of unnecessary complexity.[47]

13.24 In one consultation, it was suggested that in most cases executors will choose to ignore the provisions because of their complexity and the fact that they will cause division among the surviving family. However, it was felt that there was a real problem with abolishing the provisions because there are cases where, in justice, an account ought to be made.[48]

National Committee's conclusion

13.25 The arguments in favour of even a modified form of hotchpot are, at best, equivocal. The Committee considers that the difficulties posed by any system that seeks to take account of benefits given before the intestate's death outweigh any perceived benefits of equality.

13.26 There is, therefore, a good case for simplifying the administration of intestate estates by not including such provisions in any uniform national legislation. There is nothing to prevent the surviving members from agreeing to a different distribution if the justice of the case requires it.

Recommendation 43

There should be no provisions that take account of benefits given during the intestate's lifetime.

See Intestacy Bill 2006 **cl 41(a)**.

TESTAMENTARY BENEFITS

13.27 In the case of a partial intestacy, some jurisdictions specify classes of people who are generally required to account for any testamentary gifts they have received. The result is that their

46. J North, *Submission* at 5; Probate Committee, Law Society of SA, *Consultation*; K Mackie, *Consultation*. But see R Walker, *Consultation*; Law Society of Tasmania, *Submission* at 15.
47. Public Trustee NSW, *Submission* at 14; *Sydney Consultation 2*; *Sydney Consultation 1*; WA, Succession Law Implementation Committee, *Consultation*; Trustee Corporations Association of Australia, *Submission* at 20; *Melbourne Consultation*; Registry, Supreme Court of Tasmania, *Consultation*.
48. K McQueenie, *Consultation*. See also R Walker, *Consultation*; Law Society of Tasmania, *Submission* at 15.

entitlement under the intestacy will be reduced by the value of the testamentary gift.[49]

13.28 The provisions cover different classes in different jurisdictions:

- ACT and Tasmania: surviving spouses or partners only;[50]
- Victoria: issue only;[51]
- NT: surviving spouses or partners and children of the intestate;[52]
- SA: all persons entitled to a share of the intestate estate, so long as the gift exceeds $1,000.[53]

Such provisions have been a relatively new development in intestacy law. The reasons for them would appear to differ depending upon who must account, whether it is the spouse of the intestate or other beneficiaries, in particular, the issue of the intestate.

13.29 It has been suggested that accounting for testamentary benefits is necessary in the case of the surviving spouse or partner so that he or she is prevented from gaining a double legacy (under both the will and the intestacy) at the expense of the issue of the intestate.[54]

13.30 It can also be said that such provisions became more generally necessary when hotchpot was extended to gifts or advancements made to beneficiaries under a partial intestacy. Originally, the doctrine of hotchpot did not apply to partial intestacies. The courts of equity were said to have been concerned "that the application of the doctrine to partial intestacies would lead to inequality, not equality".[55] In the case of partial intestacy, the doctrine did not allow testamentary gifts to be taken into account, so that there might be unequal treatment of children based on whether they had received testamentary gifts or

49. *Administration and Probate Act 1929* (ACT) s 49D(3); *Administration and Probate Act 1919* (SA) s 72K(1)(b); *Administration and Probate Act 1935* (Tas) s 44(4), s 47(a); *Administration and Probate Act 1958* (Vic) s 53(a); *Administration and Probate Act 1969* (NT) s 70(3) and (4).
50. *Administration and Probate Act 1929* (ACT) s 49D(3); *Administration and Probate Act 1935* (Tas) s 44(4), s 47(a).
51. *Administration and Probate Act 1958* (Vic) s 53(a).
52. *Administration and Probate Act 1969* (NT) s 70(3) and (4).
53. *Administration and Probate Act 1919* (SA) s 72K(1)(b).
54. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 25.
55. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 171.

advancements.[56] Change has been brought about in some jurisdictions because it was seen as unfair that a person who received a gift or advancement during the intestate's lifetime should have to account for it but a person who benefited under the intestate's will should not have to make an account. This reason does not apply to provisions relating to the spouse or partner, since all jurisdictions that have retained a form of hotchpot have exempted spouses or partners, presumably on the grounds that there may be difficulty in separating out gifts from the normal incidents of emotional and financial interdependence. There may be:

> an untold number of substantial gifts given by one spouse to the other during their time together, and in many cases it might be difficult to determine what is a gift and what is the result of a combined contribution by both spouses.[57]

Law reform developments

13.31 It would seem that NZ, having abolished hotchpot, has nevertheless retained accounting for testamentary benefits in the case of surviving spouses.[58]

13.32 In 1983, the Law Reform Commission of British Columbia concluded that there was no reason to introduce a system that required a surviving spouse to account for testamentary benefits received in the event of a partial intestacy.[59] On the other hand, in 1985, the Manitoba Law Reform Commission saw no reason to change its provisions requiring surviving spouses to account for testamentary gifts.[60]

13.33 In some jurisdictions that retain a version of hotchpot, provisions to account for testamentary benefits are not necessary because they have not extended hotchpot to partial intestacies. For example, in Alberta, the Law Reform Institute considered that the existing law was "adequate" and there was no need to extend the

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56. See *Maiden v Maxwell* (1920) 21 SR (NSW) 16 at 23; and I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Co, Sydney, 1989) at 433-434.
57. Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 17.
58. *Administration Act 1969* (NZ) s 79(2).
59. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 44-45.
60. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 26.

doctrine of hotchpot to partial intestacies.[61] A similar conclusion was reached in Manitoba.[62]

13.34 In England and Wales, spouses were required to account for testamentary benefits in calculating the statutory legacy, and issue were also required to bring any testamentary benefits into account in determining their entitlement.[63] The Law Commission of England and Wales recommended the abolition of such provisions in 1989.[64] This was achieved in 1995.[65] Queensland, NSW and WA make no such provisions. The Law Reform Commission of WA recommended against the introduction of such provisions in 1973.[66]

Arguments for and against

13.35 The main argument in favour of such provisions is that they achieve a form of equality among persons entitled on intestacy where some of them are also beneficiaries under the will.

13.36 In jurisdictions which have retained hotchpot in respect of both total and partial intestacies, there is a reasonable argument for also achieving equality between those who have received a benefit before the death of the intestate and those who receive benefits under the will. For example, in NSW, it was argued that, rather than abolish hotchpot, the doctrine should be extended to include testamentary gifts.[67]

13.37 In the absence of hotchpot provisions, there is, at least, a reasonable argument for the retention of a form of accounting in relation to spouses, on the basis of preventing the spouse from receiving a double portion.[68] However, there are a number of arguments against such a proposal. First, if such a proposal is

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61. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 171.
62. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 49, where it has been argued that in cases of partial intestacy the intestate's "wishes respecting *inter vivos* transfers will most often be embodied in his/her will; to require an accounting of them may well upset the deceased's estate plan".
63. *Administration of Estates Act 1925* (Eng) s 49(1).
64. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 55.
65. *Law Reform (Succession) Act 1995* (Eng) s 5.
66. Law Reform Commission of WA, *Distribution on Intestacy* (Project 34, Part 1, Report, 1973) at 11.
67. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 40.
68. See para 13.29 above.

advanced, it could equally be argued that the spouse ought to account for gifts received during the intestate's lifetime or even for jointly held property.[69] Secondly, it can be argued that intestacy rules ought not to be used as a means of limiting the surviving spouse's entitlement and that the provisions should be treated as providing for a minimum rather than a maximum benefit.[70]

13.38 It is entirely possible that accounting for testamentary gifts may defeat the intention of the deceased in making specific dispositions in the will, that is, that particular people should receive something in addition to their other entitlements.[71]

13.39 It has also been suggested that, for the most part, in the case of partial intestacies, the people who receive specific bequests under wills are not likely to be those who are entitled to take on intestacy. That is, the testator usually intends the residue to go to the people who are entitled to take on intestacy, but it is the residue that usually fails in a partial intestacy - often because people use standard will forms, list specific bequests and then forget to deal with the residue.[72]

13.40 The provisions also add to the complexity and difficulty of an administration. Their abolition would greatly simplify the administration of estates.[73]

13.41 The fact that Queensland, NSW and WA make no such provisions has apparently not resulted in any substantial injustice in those States.

Submissions and consultations

13.42 Submissions generally did not support taking account of testamentary gifts.[74] Some opposed it on the grounds of unnecessary

69. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 52. Notwithstanding the argument that requiring a spouse to account for testamentary gifts is quite different to requiring a spouse to account for gifts given in the intestate's lifetime: see Law Reform Commission of Tasmania, *Succession Rights on Intestacy* (Report 43, 1985) at 18.
70. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 53.
71. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 55. See also Law Reform Commission of WA, *Distribution on Intestacy* (Project 34, Part 1, Report, 1973) at 11; Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 61; W V Windeyer, *Submission* at 1.
72. *Sydney Consultation 1.*
73. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 55.

complexity.[75] Another opposed it, arguing that "the deceased must be presumed to have known about the potential intestacy".[76]

13.43 One submission opposed making provision but conceded that there might "well be differing points of view on this question".[77]

National Committee's conclusion

13.44 The main reason for making intestacy beneficiaries (other than spouses or partners) account for benefits received under the intestate's will, is to achieve some form of equality with intestacy beneficiaries who have received benefits before the intestate's death. The abolition of the doctrine of hotchpot recommended above largely eliminates the need for these other provisions, at least in relation to beneficiaries other than surviving spouses or partners.

13.45 Separate consideration needs to be given to the issue of reducing a surviving spouse or partner's statutory legacy by any amounts received under a partially intestate will. In this respect, it should be noted that New Zealand has made provision for taking testamentary benefits to spouses into account without having made provision for either testamentary gifts to other potential beneficiaries or for hotchpot.

13.46 The most important point to bear in mind is that there will be very few circumstances where a surviving spouse or partner will receive anything close to a double portion. First, the need for a statutory legacy will now only arise in circumstances where some of the surviving children are not also children of the surviving spouse or partner. Secondly, in cases where the will is valid as to specific bequests but fails as to the residue, it is unlikely that the surviving spouse will be especially advantaged, unless he or she receives a substantial specific bequest. Thirdly, in cases where the will is valid as to the residue but fails in relation to specific bequests, the surviving spouse is, again, unlikely to be especially advantaged. In such cases, it should also be noted that the National Committee's Wills Report, if

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74. W V Windeyer, *Submission* at 1; *Sydney Consultation 2*; *Sydney Consultation 1*; Trustee Corporations Association of Australia, *Submission* at 21; J North, *Submission* at 5; Public Trustee NSW, *Submission* at 15; *Melbourne Consultation*; K Mackie, *Consultation*; Law Society of Tasmania, *Submission* at 15.
75. *Sydney Consultation 2*; *Sydney Consultation 1*; Trustee Corporations Association of Australia, *Submission* at 21.
76. J North, *Submission* at 5.
77. Public Trustee NSW, *Submission* at 15.

implemented, will reduce the incidence of partial intestacies for failure to include a substitutionary clause.[78]

13.47 The only situations where a surviving spouse or partner is likely to receive substantially more than might be considered fair would be where the testate and intestate parts of the estate are both substantial, and the survivor is also substantially benefited from the testate portion of the estate. The National Committee considers that there is little to be gained by including a complex and time-consuming provision to cover a very narrow range of potential circumstances where a survivor might receive more than the minimum he or she would otherwise be entitled to.

13.48 In general, the National Committee considers that the arguments in favour of any system of accounting for testamentary benefits are, at best, equivocal. The Committee considers that the potential complexity outweighs any perceived benefits of equality among intestacy beneficiaries.

13.49 There is, therefore, a good case for simplifying the administration of intestate estates by not including such provisions in any uniform national legislation.

Recommendation 44

> There should be no provisions that account for benefits received under the intestate's will.

See Intestacy Bill 2006 **cl 41(b)**.

SUPERANNUATION ASSETS

13.50 It has been suggested that, if schemes that take account of gifts are to continue to be part of the law of intestacy, some account should be taken of superannuation assets. A lot more is now locked up in superannuation funds and these assets are distributed on death at the discretion of the superannuation trustees. This may, for example, change the balance in the division between the surviving partner and issue. It was put in consultations that the resulting inequity in distribution to people who may be entitled on intestacy could be dealt

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78. NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) para 6.64-6.96. See *Wills Act 2000* (NT) s 40; *Wills Act 1997* (Vic) s 45; *Succession Act 1981* (Qld) s 33N; *Succession Actl 2006* (NSW) s 41.

with in much the same way as hotchpot.[79] However, there was no support for actually implementing such a scheme.

13.51 In 1993, the Queensland Law Reform Commission responded to similar proposals by noting that some superannuation lump sums are paid into the estate rather than to the spouse and that "any general requirement to account would be difficult to police and would produce anomalies".[80]

13.52 The National Committee rejects any such proposals on the same grounds as those on which it rejects making provision for gifts received by intestacy beneficiaries before or after death.

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79. *Sydney Consultation 2*.
80. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 52.