Notional Property: A Comparative Survey of the Provisions of the Western Australian and Federal Death Tax Statutes

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NOTIONAL PROPERTY: A COMPARATIVE SURVEY OF THE PROVISIONS OF THE WESTERN AUSTRALIAN AND FEDERAL DEATH TAX STATUTES

A. INTRODUCTION

In two general respects the provisions of the Death Duty Assessment Act 1973 might be regarded as an improvement on those which formerly regulated the collection of death taxes by the Government of Western Australia. First, the abolition of probate duty, settlement duty and succession duty and their replacement with a single mutation or estate duty has made the system considerably more simple and intelligible; second, the provisions which specify the categories of property which will fall within the notional estate of the deceased have many points of similarity with the provisions which serve a similar purpose in the Estate Duty Assessment Act 1914-1973 (Commonwealth). As the scope of the notional estate is of prime importance in estate planning and, as planning under one set of provisions might be expected to be easier than would be the case if the provisions of the two Acts varied considerably, the significance of the second of these advantages should not be discounted.

The provisions are not, however, identical. Those in the State legislation are a little more elaborate and some attempt has been made to foreclose opportunities for tax avoidance which have been exposed by litigation under the Estate Duty Assessment Act. In a number of respects the new provisions form a rather curious package of somewhat uncertain dimensions.

The most fundamental criticism which some of those provisions will inevitably attract is that they reflect to an extent the familiar but nonetheless obnoxious legislative technique which employs language of quite excessive generality in order to preclude the use of a few specific and stereotyped methods of tax avoidance. When this is done only the most benevolent exercise of administrative discretion can prevent the provisions from affecting transactions at which they were seemingly not directed.

Moreover, in a number of respects, the package as a whole does not reveal a coherent philosophy: what might appear, for example, to be clear implications from the wording of some provisions are seemingly inconsistent with the express words of other provisions; and when it is clear that certain transactions will attract taxation others which seem to be indistinguishable in substance do not appear to be affected.

* Paper delivered at the Commercial Law Seminar, University of Western Australia, September 1974.
1 No 80 of 1973 (WA).
2 See eg s 10 (2) (o), discussed infra para I, p 317.
3 See eg para I, infra, p 317.
4 See eg para F, infra, p 310.
Other provisions which by themselves reflect an intelligible purpose have been drafted so badly that, inevitably, they will have only the most arbitrary and haphazard operation.\textsuperscript{5}

In these respects it seems clear that the new legislation will create difficulties both for those responsible for its administration and for those whose professional responsibility it is to provide advice on tax planning.

This paper will attempt to highlight the main points of similarity and contrast in the treatment of notional property in the two statutes and to indicate some of the types of dispositions and transactions which seem not to be affected.

**B. JOINT PROPERTY**

The State and Federal provisions which are directed at property of which the deceased was a joint tenant or joint owner are now virtually identical. In each case the beneficial interest held by the deceased immediately prior to his death will be included within his notional estate.\textsuperscript{6} The value of the deceased's beneficial interest will be determined by dividing the value of the property by the number of joint owners.\textsuperscript{7} It is true that, under the Western Australian statute, property is, as a general rule, to be valued as at the date of the death of the deceased person.\textsuperscript{8} This general rule will, however, bow to a contrary intention and it seems probable that such an intention is to be found in the provision which is directed at joint property. As the value of the beneficial interest which the deceased held immediately prior to his death would, at the date of his death, be nil, the effectiveness of the provision must depend on the exclusion of the normal rule of valuation.

The provisions affect all kinds of joint property and are not confined to interests in land. Where joint bank accounts are concerned it must, however, be determined in the first place that the account creates a true joint ownership and was not, for example, opened merely for the convenience of the deceased.\textsuperscript{9} The balance of a joint account which does not create beneficial joint ownership would fall to be taxed if at all under other provisions of the statutes.\textsuperscript{10}

Where beneficial joint ownership does exist it does not, of course, follow that other provisions might not apply simultaneously with the provisions that are directed at joint property. A person, for example, who, within three years of his death, transfers property into joint ownership with his wife will have made a gift of a beneficial interest the value of which will be recaptured. One half the value of the property would in such a case be brought into the notional estate as a gift within three years of death\textsuperscript{11} and the other half as

\textsuperscript{5} See eg para C, infra, p 303.
\textsuperscript{6} Estate Duty Assessment Act, s 8 (4) (d); Death Duty Assessment Act s 10 (2) (b).
\textsuperscript{7} Fadden v DFCT (1934) 68 CLR 76.
\textsuperscript{8} Death Duty Assessment Act, s 10.
\textsuperscript{9} As eg in Marshal v Crutwell (1875) LR 20 Eq 328.
\textsuperscript{10} If eg the account was opened merely for the convenience of the deceased, the balance would form part of his actual estate under Death Duty Assessment Act, s 10 (1) and under Estate Duty Assessment Act, s 8 (3).
\textsuperscript{11} See para D, infra, p 305.
the value of the beneficial interest of the deceased immediately before his death.

If beneficial joint ownership does exist, the fact that the deceased may have reserved a power to revoke the transfer into joint names would not affect the operation of the provisions which deal specifically with joint ownership and, in particular, would not increase the value of the deceased's beneficial interest immediately prior to his death.\(^{12}\)

C. LIFE ASSURANCE

As a general rule under each statute the proceeds of policies of assurance on the life of the deceased are intended to be taxable according to the extent that premiums were paid by the deceased. The provisions are not identical and, rather curiously, while those in the State legislation were clearly intended to have a more extensive operation than those in the Commonwealth Act, the reverse may be the case in practice.

Under the *Estate Duty Assessment Act* the part of the proceeds which is proportionate to the amount of the premiums paid by the deceased will be included within the notional estate only to the extent that the proceeds are payable to specified relatives of the deceased.\(^{13}\) It has been held, moreover, that this provision does not apply unless the proceeds are payable under the terms of the policy to the relative or relatives as such and not, for example, in the capacity of assignees of the policy for value.\(^{14}\) Similarly if the policy is effected by the relative who is named as the beneficiary of the proceeds, the fact that premiums are paid by the deceased might not attract taxation as the proceeds would be payable to the relative *qua* policy holder and not *qua* relative.

Under the *Death Duty Assessment Act* policies effected by the deceased are distinguished from those effected on his life by any other person and policies assigned by the deceased are dealt with specifically. Nothing turns on the relationship between the deceased and the person who receives the proceeds of the policy.

Where the deceased effected a policy on his life, paid all of the premiums in his life time and assigned the policy within three years of his death, the proceeds of the policy less any amount received by him as consideration for the assignment will be included within his notional estate.\(^{15}\) If, in such a case, the deceased did not pay all the premiums, the amount to be included is calculated by first subtracting the value of any consideration from the amount of the proceeds and then by multiplying the result by a fraction comprising the amount of the premiums paid by the deceased over the total amount of the premiums paid during the existence of the policy.\(^{16}\)

\(^{12}\) Fadden v DFCT, note 7.

\(^{13}\) Estate Duty Assessment Act, s 8 (4) (f).


\(^{15}\) Death Duty Assessment Act, s 10 (2) (e).

\(^{16}\) Ibid.
Even though the policy was assigned more than three years from the deceased’s death its proceeds might still be included within his notional property. Here it appears that the draftsman intended that the proceeds would escape taxation only if all the premiums paid in the three years prior to the deceased’s death were paid by a person other than the deceased. It would appear, however, that the drafting was not sufficiently exact and the words of the relevant provision\(^\text{17}\) in its present form appear to support the following propositions:

(a) If the deceased effected a policy on his own life and paid all the premiums then the proceeds will be included within his notional property whether they are payable to a nominee or to a person claiming under an assignment made at any time by the deceased;

(b) If the deceased effected a policy on his own life and did not provide all of the premiums paid within the three years prior to his death, the part of the proceeds proportionate to the fraction of the premiums paid by the deceased within the three year period will be included within his notional property irrespective of any assignment made outside the three year period;

(c) If the deceased paid all of the premiums within the three year period but did not provide all of the premiums paid prior to the commencement of the three year period, no part of the proceeds can be included within his notional property under this provision irrespective of whether the policy was assigned more than three years prior to his death.

The third proposition is obviously anomalous. If, for example, the deceased has paid every premium except the last annual premium prior to his death, two thirds of the proceeds will be included within his estate. If, however, he has provided all of the premiums except one which was paid outside the three year period by some other person, the entire proceeds will escape taxation.

There are other anomalies in the way in which the provisions are framed. Where an assignment has been made within three years of death the proportion of the proceeds to be recaptured is represented by the proportion of the premiums paid by the deceased over the entire period during which the policy was in existence; where, however, the assignment was made more than three years from death, the relevant proportion is that which the amount of premiums paid by the deceased within the three year period bears to the total amount of premiums paid during that period. Thus if £20,000 is payable under the policy, if ten annual premiums have been paid and if the deceased has paid only the last premium, the amount to be included within his notional property will be $2,000 or $6,666.67 according to whether the policy was assigned inside or outside the three year period.

Policies effected on the deceased’s life by a person other than the deceased are dealt with in a similar fashion to those effected by the deceased and not assigned within the three year period.\(^\text{18}\) Thus if the deceased has paid all the premiums, the entire amount will be included in his notional property. If he

\(^{17}\) Ibid, s 10 (2) (l).

\(^{18}\) Ibid, s 10 (2) (m).
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has provided only some of the premiums paid within three years of his death the part of the proceeds proportionate to the proportion of the premiums paid by him during that period will be included. If however he has paid all the premiums within the three year period but someone else has paid a part of one or more of the premiums outside the period it appears that the proceeds escape taxation.

As the operation of both the State and Federal provisions is predicated upon the payment of premiums by the deceased, the taxation of life assurance proceeds under the statutes can easily be avoided. If all the premiums are paid by the nominee or assignee or by a trustee in whom the policies are vested, the proceeds would not form part of the deceased's notional estate unless the money used to pay the premiums was obtained from the deceased subject to an enforceable obligation to use it for that purpose.

D. GIFTS INTER VIVOS

Each statute provides for the recapture of the subject-matter of a gift inter vivos if the gift was made within three years of the donor's death. As neither statute attaches tax consequences to gifts made outside the three year period, it is not necessary to ask whether the deceased was excluded from the subject-matter of the gift within the three year period or whether he obtained any benefit from the property in that period. The crucial question is simply whether the gift was complete in equity prior to the commencement of the period.

The most important difference between the State and Commonwealth provisions which are directed at gifts inter vivos relates to the time at which the subject-matter of the gift is to be valued. Under the Death Duty Assessment Act the relevant value is that of the property at the time at which the gift was made. Under the Estate Duty Assessment Act the actual property which by virtue of the gift has passed from the deceased must be valued as of the date of the deceased's death. While the continued existence of the property at the death of the deceased is not necessary for the purposes of the State legislation, the position is probably otherwise under the Commonwealth Act. In neither case is it material to ask whether the donee continued to own the property until the death of the deceased.

The Western Australian Act stipulates that the situs of the property at the death of the deceased is not relevant unless the property consists of foreign immovables. The effect of the stipulation is not clear. Each of the categories of notional property under the statute is qualified by the words of 10(1) which restrict the operation of the Act to property situate in Western Australia and to foreign personality if the deceased was domiciled in Western Australia at the time of his death. If, therefore, a person makes a gift of foreign personality

19 See Barclay's Bank v Attorney-General [1944] AC 372.
20 Estate Duty Assessment Act, s 8 (4) (a); Death Duty Assessment Act s 10 (2) (a).
21 Death Duty Assessment Act, s 10 (2) (a).
22 Gale v FCT (1960) 102 CLR 1.
23 Ibid at 21-22 per Kitto J.
24 Death Duty Assessment Act, s 10 (2) (a).
at a time when he was domiciled in Western Australia and subsequently dies elsewhere, it does not appear that the gift will be recaptured.

Each statute contains a definition of the term "gift inter vivos". The definitions are not identical but in most respects do not appear to differ significantly. The Commonwealth Act, however, excludes dispositions made before and in consideration of marriage and dispositions made, for valuable consideration, in favour of bona fide purchasers who are not related to the deceased by blood, marriage or adoption. In the case last mentioned inadequacy of consideration appears to be irrelevant. Dispositions in favour of relatives will not be treated as gifts if they were made for valuable consideration which exceeds three-quarters of the value of the property. Where the consideration did not exceed that amount there will be a gift to the extent of the difference between the value of the property and the value of the consideration. The Death Duty Assessment Act, on the other hand, contains no exception for dispositions in consideration of marriage or those which were made pursuant to a marriage contract and deems a disposition for less than adequate consideration in money or money's worth to be a gift inter vivos to the extent of the inadequacy.

In each case settlements are excluded from the concept of a gift. In the Commonwealth Act this is accomplished by words which restrict the definition to trusts and dispositions to take effect in the lifetime of the donor, while, in the State Act, settlements are expressly excepted.

Where, in his lifetime, the deceased had disclaimed or released a debt or other right it is difficult to see how it can be said that property passed from him by a gift inter vivos for the purposes of the Commonwealth legislation. It would appear, a fortiori, that a person who allows a debt to become unenforceable does not thereby make a gift inter vivos. The Commissioner's difficulty in such cases would not arise merely from the words of the definition but also from the requirement that property must pass from the deceased. Neither a disclaimer, a release nor the operation of statutes of limitations would appear to satisfy this requirement.

In the Death Duty Assessment Act it is provided that the release, discharge, surrender, forfeiture or abandonment of any debt, contract, chose in action, power, estate or interest in property shall be deemed to be a gift inter vivos subject to the limitations contained in the general definition. This provision is probably effective to cover the disclaimed of a right and, unless it requires a positive act on the behalf of the deceased, it may be effective to deal with the case of a right which becomes unenforceable through the effluxion of time.

The circumstances and the extent to which the exercise or release of a power can be regarded as a gift inter vivos will be considered below.

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25 Estate Duty Assessment Act, s 3; Death Duty Assessment Act, s 5 (1).
26 A release operates by way of the extinguishment of an interest and a disclaimer by way of avoidance so that, for most purposes, a disclaimed interest is treated as though it had never vested in the person who disclaimed.
27 Death Duty Assessment Act, s 5 (2).
28 See para F, infra, p 810.
E. SETTLEMENTS MADE BY THE DECEASED

The Commonwealth legislation contains three provisions which are directed specifically at settlements made by the deceased. Two of these are very similar to provisions in the *Death Duty Assessment Act* but that statute contains other provisions which may extend to such settlements.

The term "settlement" is defined in each statute but, although the definitions are similar in their terms, there are at least two significant respects in which they might differ.

In the first place there is a possible difference in the treatment of trusts or dispositions under which interests, which have already vested in interest fall into possession on the death of the deceased or some other person. Under the Commonwealth legislation it is clear that the vesting of interests in possession in such circumstances will be sufficient to bring the trust or disposition within the definition of a settlement. Under the provisions of the *Administration Act 1903 (WA)* it was, however, held that the fact that an interest vested or would vest in possession on the death of a person was, by itself, insufficient. The matter must await further judicial consideration but, despite the incorporation of the old definition into the *Death Duty Assessment Act*, the substantial correspondence between the provisions of that Act and those of the *Estate Duty Assessment Act* must introduce sufficient doubt as to make it unwise to rely upon the decisions under the earlier Western Australian legislation.

The second possible point of contrast arises from the extension of the definition in the State legislation to trusts or dispositions which "may take effect" upon or after the death of the deceased or some other person. In contrast the Commonwealth Act refers only to trusts or dispositions "to take effect" on the death of any person. It seems unlikely that any significance should be attached to this distinction. The words in the *Death Duty Assessment Act* probably do no more than ensure that a disposition that will take effect upon the death of some person if and only if some contingency is satisfied is within the definition. As it appears that such a disposition would be a settlement within the meaning of the *Estate Duty Assessment Act*, the insertion of the additional words in the State legislation may reflect merely an excess of caution on the part of the draftsman. For the purposes of either statute it would seem that the crucial question is whether, in any possible circumstances, the death of a person, or the termination of some period ascertainable by reference to his death, will necessarily cause new interests to

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29 Rosenthal v Rosenthal (1910) 11 CLR 87; Elder's Trustee and Executor Co Ltd v FCT (Morphett) (1966) 118 CLR 331. On the concept of a settlement see Ford, note 14, op cit 68-76.


31 See Kent v Commissioner of Stamp Duties (1961) 106 CLR 366.
arise or existing interests to vest in interest or, at least under the Commonwealth legislation, in possession.\(^{32}\)

A trust or disposition under which all interests are vested both in interest and in possession from its inception would not be a settlement and nor would one under which vesting can occur only at the end of a fixed term or on some event other than the termination of a period measured by reference to the death of some person.\(^{33}\)

If a settlement has been created it may be important for the purposes of either act to determine whether the deceased or some other person was its maker. Suppose, for example, A transfers a nominal amount to trustees on trusts which fall within the statutory definition and B subsequently contributes an amount to the trust. In such a situation A has certainly made a settlement and the only question is whether B's contribution should be regarded as effecting a further settlement. Despite any possible analogy with the decision of Menzies J in *Truesdale v Federal Commissioner of Taxation*,\(^{34}\) the better view is probably that B has made a disposition containing trusts to take effect on the death of the appropriate person. He has certainly made a disposition and one which is not in favour of the trustee beneficially. It was a disposition on the trusts set out in the original instrument and only the grossest pedantry could justify a distinction between a disposition on trusts to take effect on death and a disposition containing trusts to take effect on death. There are some judicial *dicta* which support the suggestion that the reasoning in *Truesdale* is not applicable.\(^{35}\)

(a) *Settlements made within three years of death*

The Commonwealth Act recaptures property which has passed from the deceased by a settlement made within three years of his death.\(^{36}\) It is, therefore, the property which was originally settled by the deceased which will be included in his notional estate at its value at the date of death. Whether that property continues to form part of the corpus of the trust at the date of death is not material. Nor is it necessary that the settlement should continue to be in existence at that date although, if the property itself has ceased to exist, there can probably be no recapture.\(^{37}\)

Under the State legislation it is the property which is the subject-matter of the settlement which has to be valued at the date of death and it is provided that such property shall be deemed to include the proceeds of the sale of the original property, all investments for the time being representing any such property and all property which has in any manner been substituted for

\(^{32}\) Cf Falkiner v Commissioner of Stamp Duties [1973] 1 All ER 598 at 603 per Lord Simon; D G Hill *Trusts to Take Effect after Death* (1971) 1 Aust Tax Rev 10.


\(^{34}\) (1970) 44 ALJR 296.


\(^{36}\) Estate Duty Assessment Act, s 8 (4) (a).

\(^{37}\) Cf Gale v FCT, note 22, 102 CLR at 21-22 per Kitto J.
property originally the subject-matter of the settlement.\textsuperscript{38} It should be noted that this provision does not necessarily require the inclusion of the value of the entire corpus of the settlement made by the deceased within three years of his death. It is only the property which was originally settled by the deceased or property into which such property has been converted that is recaptured. So, for example, if the deceased contributed only a nominal amount to the settlement and someone else contributed the bulk of the corpus, only property which can be regarded as representing the deceased's original contribution will be recaptured. Similarly if the trustees of the settlement receive a bonus issue of shares it is difficult to see how such shares could be regarded as representing or as substituted for the original subject-matter of the settlement.

If the settlement was made for valuable consideration the amount of the consideration may be deducted from the amount which would otherwise be recaptured under the State legislation.\textsuperscript{39} As the appropriate date for the valuation of the settled property is the date of death,\textsuperscript{40} the fact that the settlement may have been made originally for full and adequate consideration will not preclude the recapture of any subsequent increase in the value of the property in the settlement.

The Commonwealth legislation does not expressly attach any significance to the possibility that the settlement may have been made for value. The question has received some consideration in the High Court but cannot be regarded as settled.\textsuperscript{41}

(b) Settlements with reserved life interests

The State and Commonwealth statutes contain very similar provisions directed at settlements which were made by the deceased and under which he reserved an interest of any kind for his life.\textsuperscript{42} It appears that the interests to which the provisions refer are confined to beneficial life interests.

They are concerned with the retention of life interests of any kind and not with the retention for life of interest of any kind. Thus, in \textit{Maslin},\textsuperscript{43} where the deceased had transferred policies on trust for his wife with a proviso that if she predeceased him the proceeds were to be payable to his estate, it was held, on his death in her lifetime, that his contingent absolute interest was not an interest within the meaning of the provision in the \textit{Estate Duty Assessment Act}. If, however, the interest is a life interest in the strict sense the fact that it never vests will not prevent the operation of the provision.\textsuperscript{44}

If the deceased was, until his death, a member of a class of income beneficiaries under discretionary trusts, he would possibly be held to have retained

\textsuperscript{38} \textit{Death Duty Assessment Act}, s 10 (4).
\textsuperscript{39} Ibid, s 10 (5).
\textsuperscript{40} Ibid, s 47.
\textsuperscript{41} See Simpson v DFCT (1958) 32 ALJR 292 at 294 per Kitto J; (1960) 33 ALJR 506 at 508-9 (FC).
\textsuperscript{42} \textit{Estate Duty Assessment Act}, s 8 (4) (c); \textit{Death Duty Assessment Act}, s 10 (2) (g).
\textsuperscript{43} Union Trustee Co Ltd v FCT (Maslin) (1941) 65 CLR 29.
\textsuperscript{44} Craig v FCT (1945) 70 CLR 441; and see Thomson v FCT (1949) 80 CLR 344 where it was suggested that a power of revocation could be regarded as an interest for life for the purposes of s 8 (4) (c).
a life interest in a sufficient sense. By itself this would not necessarily attract recapture of the subject-matter of the trusts. The retention of a possibility of obtaining income under discretionary trusts would not in itself convert a trust into a settlement. Discretionary trusts established by the deceased for a fixed term can therefore escape taxation notwithstanding the inclusion of the deceased within the class of income beneficiaries. If, however, under a trust created for a fixed term, the deceased was entitled to all or to fixed amounts of income until his death, the trust would probably qualify as a settlement for the purpose of the provision.

Under each statute the property which is the subject-matter of the settlement must be valued as at the date of death. In neither case is a method provided for identifying the property which is to be valued. The most likely result may be that it is the original subject-matter of the settlement, and not accretions to it, any proceeds of its sale or any securities purchased with such proceeds, which must be valued at the date of death but the question must await judicial determination.

Under the State Act any consideration received for the making of the settlement must be deducted from the value of the subject-matter. Whether this can be done under the Commonwealth legislation and whether such legislation has any effect on settlements made for full consideration has not been determined.

Each provision stipulates that a surrender of the deceased's interest will not prevent the inclusion of the subject-matter of the settlement in his notional estate unless the interest was surrendered more than three years from death. A surrender made within the three year period for full consideration will not affect the operation of the provisions. If, however, the settlement has ceased to exist at the date of the deceased's death, it is probable that the provisions can have no application.

F. POWERS IN TRUSTS

Many estate planning schemes have as one of their elements the separation of the control of property from its ownership and the use of discretionary powers in trusts is one of the most obvious methods by which this can be accomplished. Each of the statutes give some attention to such powers with the relevant provisions of the State legislation being rather more elaborate and their scope more difficult to estimate.

As a general rule, the reservation or creation of administrative powers as distinct from powers which may effect beneficial enjoyment will not attract taxation.

45 Attorney-General v Heywood (1887) 19 QBD 326; Attorney-General v Farrell [1931] 1 KB 81; Gartside v IRC [1968] AC 553 at 612 per Lord Reid and at 620-1 per Lord Wilberforce.
46 Cf Gale v FCT, note 22. It should be noted that Death Duty Assessment Act, s 10 (4) does not apply to such settlements.
47 Death Duty Assessment Act, s 10 (5).
48 See Simpson v DFCT, note 42.
49 Ibid.
50 Elder's Trustee & Executor Co Ltd v FCT (1966) 118 CLR 331 at 338; Case D 35 (1972) 72 ATC 35.
(a) *The creation of powers*

The State legislation contains a rather curious provision which may bring into the notional estate property which is subject to a power of appointment created by the deceased.\(^5^1\) This will occur if the power was created within three years of the deceased’s death or, where it was created outside the three year period, if the power was not exercised more than three years before the death and the deceased received income from the property within the three year period. As the legislation does not, as a general rule, treat the deceased’s receipt of income from property of which he has disposed as a factor which justifies the inclusion of the property within the notional estate, the recapture of property subject to powers created more than three years from death is somewhat anomalous. Moreover, the effect of the provision in this situation is by no means innocuous. The corpus of a discretionary trust which was created by the deceased many years before his death might, for example, be recaptured if, within three years of the death, any amount of income was distributed to the deceased. The fact that the trust was not a settlement would not be material.

The provision does not distinguish between general, special and hybrid powers and there seems no reason of policy which would confine its operation to general powers. As it refers to powers which the deceased has given it may not affect powers retained by the deceased in a non-fiduciary capacity.

The Commonwealth statute does not refer expressly to the creation of powers and it would appear that, by itself, creation of a power will not attract taxation. The implications of the Act’s silence in this respect may be quite startling. If, on his deathbed, the deceased gives his wife a power of appointment over his property and that power is not exercised before his death, it is difficult to see how the Commissioner could rebut an argument that the value of the property in the deceased’s actual estate had been reduced to zero. If, however, the power was exercised prior to the deceased’s death or if someone other than the deceased was entitled in default of appointment, then, in either case, it might be argued that the deceased had made a gift within three years of death. In the first case the exercise of the power might be regarded as the completion of a disposition made by the deceased and in the second case property would have passed from the deceased by the creation of the gift in default.

(b) *Powers held by the deceased*

The fact that the deceased held a power of appointment which lapsed on his death would not appear to attract taxation under the Commonwealth Act whether the power was general, special or hybrid. Nor, without more, would the retention of such a power convert a trust into a settlement.\(^5^2\) Although under the Western Australian legislation, the position may be the same, the question is complicated by the existence of a provision of potentially far-reaching scope. The effect of this provision will be considered below.\(^5^3\)

\(^5^1\) Death Duty Assessment Act, s 10 (2) (c).
\(^5^2\) Commissioner of Stamp Duties v Sprague (1959) 101 CLR 184.
\(^5^3\) See para I, infra, p 317.
(c) Powers exercised inter vivos

Each statute contains within its definition of a gift *inter vivos* and that of a settlement a reference to an "appointment under power". If, therefore, a power of appointment was exercised by the deceased within three years of his death there is the possibility that the property affected by the exercise of the power would be recaptured. Under the Commonwealth Act, however, only property which passed from the deceased by the exercise of the power could be subject to recapture under the provision which is concerned with gifts *inter vivos*. Strictly, only if the deceased was entitled in default of appointment could the exercise of the power cause property to pass from him. Even in that situation it has been suggested that his interest in default of appointment and, therefore, the amount to be included in his notional estate would have no more than a nominal value. This may be too optimistic a conclusion. If the power was a general power and the deceased was entitled in default of appointment, it is possible that his position would be regarded as sufficiently close to that of an absolute owner of the property to justify a conclusion that the property passed from him at its full value. Even if he was not entitled in default of appointment, the substantial similarity between general powers and ownership might justify the same conclusion. If the deceased created a power, whether general, special or hybrid, it is possible that the exercise of the power might be regarded as the completion of a gift made by the deceased. This could be so whether the deceased or some other person was the donee of the power.

The provisions of the State legislation do not require expressly that property should have passed from the deceased. It is likely, therefore, that the exercise of a general power by the deceased will be regarded as a gift or a settlement made by him. It is suggested, however, that the exercise of a special power could only give rise to recapture if the power was also created by the deceased. Only in such circumstances could the exercise of the power be regarded as the completion of a disposition made by the deceased.

(d) Testamentary exercise of powers of appointment

If, in his will, the deceased exercised a general power of appointment, the property affected by the power will be included within his actual property for the purposes of the Commonwealth legislation57 and within his notional property for the purposes of the *Death Duty Assessment Act*.58

It is possible that any power of appointment which could have been exercised in the deceased's favour will be treated as a general power within the meaning of the relevant provisions whether or not the power was exercisable

54 Estate Duty Assessment Act, s 3; Death Duty Assessment Act, s 5 (1).
55 See Attorney-General v Charlton (1877) 2 Ex D 398 at 412 per James LJ; Charlton v Attorney-General (1879) 4 App Cas 427 at 446 per Lord Selborne.
56 Cf Commissioner of Stamp Duties v Sprague, note 52, at 194 per Dixon CJ: Re Dowie's Will Trusts [1949] 1 All ER 968 at 970-1 per Rookmohr J.
57 Estate Duty Assessment Act, s 8 (3).
58 Death Duty Assessment Act, s 10 (2) (i).
by deed or will or by will alone.\textsuperscript{59} Powers which require for their effective exercise the consent of another person are probably not to be regarded as general powers for the purposes of these provisions.\textsuperscript{60} Whether unrestricted powers to appropriate or encroach upon the capital of a trust are to be regarded as general powers or appointment is likely to be of little practical importance as such powers are rarely exercised by will.

(e) \textit{The release or lapse of powers of appointment}

The Commonwealth Act does not refer to the release or lapse of powers of appointment held by the deceased and it does not appear that estate duty will be attracted by virtue of such an act or event. The state legislation, however, deems the release, discharge, surrender, forfeiture or abandonment of any power to be a gift \textit{inter vivos} in the circumstances and to the extent mentioned in the general definition of that term.\textsuperscript{61} It seems likely that the policy behind the provision would not extend beyond treating the release of a power as a gift in circumstances where its exercise would have been a gift. On this basis it is suggested that while the release of a general power will constitute a gift \textit{inter vivos} equal in value to that of the property subject to the power, the release of a special power will be a gift only if the power was created by the deceased.

G. INTERESTS SURRENDERED BY THE DECEASED

Each statute contains a provision directed at interests surrendered by the deceased within three years of his death.\textsuperscript{62} That in the Commonwealth legislation is confined to interests comprised in settlements made by persons other than the deceased and it would appear also to be restricted to the surrender of life interests.\textsuperscript{63} The amount to be included in the notional estate is the aggregate of amounts which would have been received by the deceased during the remainder of his lifetime if he had not surrendered the interest. Once again no reference is made to the possibility that full consideration may have been received for the surrender of the interest. In policy it is difficult to see why there should be any recapture in such a case.

The provision in the State legislation is not confined to interests in settlements or to life interests. It applies to any interest of the deceased person in any life estate, determinable life estate or any lease for life or for a term. The identity of the person who created the interest is of no significance. As is the case with the provision in the Commonwealth legislation, the amount to be included in the notional estate is not the value of the interest computed actuarially as at the date of the surrender. The method of computing the amount to be included is not, however, precisely the same as in the

\textsuperscript{59} Platt v Routh (1841) 49 ER 100 at 109 per Lord Langdale MR; Re Penrose [1933] Ch 793 at 807 per Luxmoore J; Thompson v Commissioner of Stamp Duties (1968) 68 SR (NSW) 305 at 312 per Walsh JA, affirmed [1969] 1 AC 320. But see Re Alex Russell [1968] VR 285 at 302-9 per McInerney J.

\textsuperscript{60} Commissioner of Estate and Succession Duties v Bowring [1962] AC 171.

\textsuperscript{61} Death Duty Assessment Act, s 5 (2).

\textsuperscript{62} Estate Duty Assessment Act, s 8 (4) (b); Death Duty Assessment Act, s 10 (2) (h).

\textsuperscript{63} Cf Maslin, note 43.
Estate Duty Assessment Act. Whereas, for the purposes of the latter provision, it appears that hindsight is to be used in order to determine the amounts which the deceased would have received during the remainder of his life, 64 under the State legislation the initial question is whether the surrender was made for adequate consideration. Presumably, for this purpose, actuarial calculations will be relevant in order to determine the capital value of the interest. If the surrender was not made for adequate consideration, it is then necessary to determine the amount which, at the date of the surrender, the deceased might reasonably have expected to receive. Although actuarial assistance may be required for this purpose, it should be noted that at this stage the enquiry is not directed at the capital value of the interest at the date of the surrender but rather at the aggregate of all amounts which the deceased might have expected to receive. Any consideration in money or money’s worth received for the surrender must be deducted.

H. ACCRUAL OF BENEFICIAL INTERESTS

The value of beneficial interests which, on the death of the deceased, accrue to some other person will, in certain circumstances, be included within the notional estate for the purposes of each of the statutes. There is, however, considerable variation in the terms and scope of the provisions.

Under the Commonwealth legislation the beneficial interest must have been held by the deceased at the date of his death and must then have passed or accrued to some other person by virtue of a settlement or agreement made by the deceased. 65

The provision would recapture property the subject-matter of a donatio mortis causa 66 and would apply to a settlement made by the deceased at any time under which property was held on trust for him with a gift over to some other person if that person survived the deceased. Whereas, however, the vesting of a contingent interest in such a case would cause a beneficial interest to accrue, it appears that no accrual would occur when an interest which was vested liable to be divested became absolutely vested on the death of the deceased. 67

Where on the deceased’s death his beneficial interest in fee simple passed or accrued to another person, the provision would appear to require the inclusion in the deceased’s notional estate of the full value of an absolute interest in the property without any allowance for the effect that the death would have on the value of the deceased’s interest. If, however, the deceased held merely a life interest it has been suggested that on the termination of the interest no beneficial interest would pass or accrue. 68

The provision can apply to agreements for the sale of property on or after the death of the deceased provided that the interest of the purchaser was

64 See Craig v FCT (1945) 70 CLR 441 at 452 per Dixon J.
65 Estate Duty Assessment Act, s 8 (4) (e).
66 Mathie v McDonald (1916) 16 SR (NSW) 446.
67 Maslin, note 43.
68 Trustees Executors & Agency Co Ltd v FCT (1944) 69 CLR 270 at 297 per Williams J and at 288 per Starke J; Ford, note 14, op cit 231.
not vested in the deceased's lifetime.\textsuperscript{69} If, however, under a partnership deed the surviving partners have an option to purchase the deceased's interest in the partnership, it was held by the Privy Council in \textit{Thomas}\textsuperscript{70} that the deceased's entire interest in the partnership will be included in his actual estate and the existence of the option is relevant only to the question of valuation.

Although the reasoning in the decision is based on the propositions that the existence of the option did not prevent the deceased's entire interest in the partnership assets from vesting in his executors as part of his actual estate and that inclusion in the actual estate precludes inclusion as part of the notional estate, it does not follow that the provision can have no effect on options to purchase property of the deceased. Where the option is conferred in the terms of a partnership deed it can be regarded as part of the definition of the deceased's interest.\textsuperscript{71} It does not subtract or remove any part of his beneficial interest so that that part passes or accrues to the surviving partner. If, however, the option had been given by the deceased to a stranger, the effect of the option would have been that the interest of the partner which would have been included in his notional estate "could not include any more in respect of the partnership than his share shorn of the equitable interest vested in the optionees".\textsuperscript{72} In such a case part of the deceased's beneficial interest could pass or accrue to the optionee. Whether it would do so would still appear to depend upon whether the granting of the option conferred an equitable interest which was contingent in the deceased's lifetime. If it was vested prior to the death, it would appear that nothing could pass or accrue.\textsuperscript{73}

Although on its face the provision in the \textit{Death Duty Assessment Act} is of more extensive scope, it presents valuation difficulties which may limit its effectiveness in some situations. It includes within the deceased's notional property any annuity or other interest purchased or provided by the deceased or his employer or by any person acting in concert with the deceased or his employer to the extent that a benefical interest accrues or arises upon or after the deceased's death. The first and, perhaps, the most important question posed by the provision concerns the scope of the words "annuity or other interest". Under similar provisions in other jurisdictions interests under life assurance policies,\textsuperscript{74} accident insurance policies,\textsuperscript{75} and trusts\textsuperscript{76} have been re-captured. It is, however, possible to argue for a more restricted interpretation based on the context in which the provision appears in the Western Australian statute. As the Act contains provisions directed specifically at life policies and settlements it may be that the general reference to "any . . . other interest" will not extend the situations in which proceeds of life assurance and interests under settlements will be included within the deceased's notional property.

\textsuperscript{69} The proviso would seem to be required by the decision in Maslin, note 43.
\textsuperscript{70} Perpetual Executors & Trustees Association of Australia Ltd v FCT (No 1) (Thomas) (1954) 88 CLR 434.
\textsuperscript{71} Ibid, (No 2) (1955) 94 CLR 1 at 15 per Dixon CJ.
\textsuperscript{72} Ibid, at 27 per Kitto J.
\textsuperscript{73} Maslin, note 43.
\textsuperscript{74} Westminster Bank Ltd v IRC [1958] AC 210.
\textsuperscript{75} Cathels v Commissioner of Stamp Duties (1962) 62 SR (NSW) 455; cf Shaw v Minister of National Revenue (1971) 71 Dominion Tax Cases 5041 (Canada).
\textsuperscript{76} Adamson v Attorney-General [1933] AC 257; Parker v Lord Advocate [1960] AC 608.
Arguably, for example, the express inclusion of property the subject-matter of a settlement made within three years of death should be regarded as precluding the recapture of beneficial interests which accrue under settlements made outside the three year period.

For the purposes of similar provisions in force in other jurisdictions it has been held that a beneficial interest would arise or accrue when a contingent interest vests but, somewhat curiously, not when an interest which is vested defeasibly becomes indefeasible. In many situations the distinction between the two types of interest depends merely on the form of words selected by the draftsman of the particular instrument.

In principle, it seems that the concept of an interest arising or accruing requires the existence of an enforceable right in the recipient of the benefit. This has been held to be so for the purpose of a similar provision in force in the United Kingdom but there is a more recent suggestion to the contrary in a decision under the Stamp Duties Act 1920-1956 (NSW).

Conversely, where, on the death of the deceased, there is an increase in the value of an enforceable interest which had vested previously, it seems unlikely that a beneficial interest would be held to arise or accrue.

In order to value the extent to which a beneficial interest accrues it would seem to be required to deduct the value of the beneficial interest immediately before anything accrued from its value immediately after an accrual. Where the beneficial interest consisted of an enforceable right this may present difficulties for the Commissioner. If, for example, a contingent right vested on the death of the deceased, it is arguable that its value immediately prior to vesting must take into account the reduced life expectancy of the deceased.

If this is so and the value is not to be calculated purely on an actuarial basis, the amount to be included in the deceased's notional property would be insignificant. Even if valuation is to be accomplished on the basis of actuarial tables in a case where a beneficial interest accrued on the death of the deceased, this could not be done where the interest was to vest and, therefore, to accrue at the expiration of some stipulated period subsequent to the deceased's death. It would appear, in other words, that the use of a thirty day survivorship period of some similar period can deprive the provision of any practical effect. In some other jurisdictions attempts have been made to remove this defect in the provisions.

77 Parker v Lord Advocate, note 76.
78 Commissioner of Stamp Duties v Bradhurst (1950) 81 CLR 199; cf Re Kilpatrick's Policies Trusts [1966] Ch 730.
79 Re Miller's Agreement [1947] Ch 615; Re J Bibby & Sons Ltd Pension Trust Deed [1952] 2 All ER 483.
80 Cathels v Commissioner of Stamp Duties, note 75.
81 D'Avigdor-Goldsmid v IRC [1953] AC 347; but see Grubb v FCT (1948) 79 CLR 412.
82 Adamson v Attorney-General, see note 76; Wayne v Commissioner of Stamp Duties (1966) 85 WN (Pt 1) (NSW) 301; Re Kilpatrick's Policies Trusts [1966] Ch 730.
83 See Wayne v Commissioner of Stamp Duties, note 82, Adamson v Attorney-General, note 76.
84 See Re Kilpatrick's Policies Trusts, note 78.
85 See eg Probate Duty Act 1962-1973 (Vic), s 7 (5) (d).
Although no express reference is made to the possibility that the beneficiary may have provided consideration for the benefit he receives, it is possible that it will be held that the provision does not contemplate the provision of interests by the deceased in concert with the beneficiary. If the consideration was not adequate it might be held that to the extent of the inadequacy the beneficial interest was provided solely by the deceased.

I. ACCRUAL OF BENEFITS

The Western Australian legislation contains two provisions directed at benefits which accrue to any person on or after the death of the deceased. The first of these applies where, under a non-testamentary disposition, some person had an interest determinable by the death of the deceased or at any period ascertainable by reference to his death. Where this condition is satisfied the increase of benefit accruing to any person by the determination of the interest is to be included within the deceased's notional property. The provision would seem to apply whether the deceased or some other person made the disposition and whether the deceased or some other person held the interest which determined upon or after the deceased's death.

The main difficulties in the interpretation of the provision relate to the meaning of the word "benefit" and the method by which a value is to be placed on an increase of benefit.

Under a similar but not identical provision in force in the United Kingdom, the word "benefit" has been construed as referring only to beneficial interests in property. As the Western Australian legislation appears to assume that all property of the deceased, whether actual or notional, has a situs it would be tempting to conclude that the local provision should be given a similarly restricted interpretation. On this basis the principles which determine the circumstances in which a beneficial interest can be said to accrue and the appropriate method of valuation would presumably be similar to those which were discussed under the previous heading.

It is possible, however, that the provision applies to all increases in the value of an interest and is not confined to situations in which the death produces some change in the quality of the interest. Even on this basis the provision will give rise to the same valuation difficulties as that which is directed at annuities and other interests provided by the deceased.

The other provision which refers to the accrual of benefits was borrowed from the Probate Duty Act of Victoria for the purpose of preventing tax avoidance in situations where, at the time of his death, the deceased was the governing director of a private company. If, as has been sometimes suggested, the provision was intended to do no more than this, the draftsman's use of

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86 Death Duty Assessment Act, s 10 (2) (k).
87 See Re Ralli's Settlements [1966] AC 483 at 511 per Lord Upjohn.
88 Death Duty Assessment Act, s 10 (2) (o).
90 Such suggestions are in direct conflict with statements by government spokesman in both the Legislative Assembly and the Legislative Council—Parl Debs (WA): November 21, 1973 p 5901 (Mr T D Evans in the Legislative Assembly) and November 29, 1973 p 5584 (Hon J Dolan in the Legislative Council).
the Victorian model must be described as unfortunate and misguided. Unless the provision is to be given a much narrower construction than its words would normally bear, it will make redundant many of the other provisions which have been discussed above and strike at many transactions which would hardly seem to call for taxation.

The provision includes within the deceased's notional property the value of any benefit which accrues directly or indirectly to any person or the amount payable to any person on or after the death of the deceased. The only additional requirements are that the benefit should accrue or the amount be payable: (a) by the operation of or pursuant to any agreement entered into by the deceased person; (b) by the operation of or pursuant to any disposition made by the deceased person; or (c) by the operation of or pursuant to the memorandum, articles, or rules of any body, corporate or unincorporate, association, scheme, fund or plan in which the deceased was a member or participant. It is provided expressly that the benefit or payment need not be enforceable and that the person benefiting need not be ascertained on the death of the deceased.

It is quite clear that only a most unusual approach to statutory interpretation could confine this provision to benefits which accrue on the death of a governing director.

Some legislative recognition of the potential scope of the paragraph may be seen in the fact that it was thought necessary to provide expressly that benefits and amounts payable under any bona fide superannuation or pension plan were to be excluded from its operation.

Construed literally the provision is quite inconsistent with what appear to be clear implications from other paragraphs which bring property into the notional estate. If the extension of rights and powers attached to a governing director's share in a private company gives rise to a benefit it would seem to follow that the lapse of a power of appointment or a power of revocation on the death of the deceased must similarly produce a benefit to those persons whose interests were capable of being defeated by the exercise of the power.91 Again, it seems to be implicit in the provisions directed at settlements that only those made within three years of death are to attract recapture as long as the settlor did not reserve an interest of any kind for his life. It is, however, difficult to see why a benefit would not accrue on or after the deceased's death under any settlement which contains trusts to take effect on the deceased's death whether or not that settlement was made within the three year period.

The provision will obviously present great difficulties for the courts if the Commissioner attempts to apply it in cases of the kind mentioned and, although it is possible to argue that its general words should be restricted by reference to the clear implications contained in the more specific provisions of the Act, its existence introduces a further element of uncertainty into estate planning.

Could the provision be employed to recapture part of the value of property transferred on discretionary trusts which are to continue for a fixed period

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91 See Ford, note 14, op cit p 257.
which is not determinable or ascertainable by reference to the deceased’s
death? Although on one reading of the provision the decisive question is simply
whether a benefit in fact accrues at a time which coincides with or is sub-
sequent to the death of the deceased, it would seem likely that it would be
required that, under the terms of the trust, here must be some causal con-
nection between the death of the deceased or the expiration of a period
ascertainable by reference to his death and the payment of an amount or the
accrual of a benefit. If this is correct and if caution is observed in drafting,
the use of discretionary trusts which are created for a fixed term should not
be affected by the provision.

Where, under the memorandum or articles of association of a private com-
pany, some change in the rights attached to shares of the deceased occurs on
his death, the provision is designed to recapture the benefit which accrues
to other shareholders. Although it has been suggested that the provision was
intended to apply only to situations in which the exercise of a governing
director’s powers might have been used by him to regain the ownership of
property vested in the company, no such restriction is imported by the words
used by the draftsman.

The real difficulty with the application of the paragraph to benefits which
accrue by virtue of changes in rights attached to company shares will be one
of valuation. The difficulty may have been enhanced rather than alleviated
by the draftsman’s attempt to provide a solution.

As a general rule the extent to which benefits accrue to a person must pre-
sumably be determined by deducting the value of his property immediately
before the accrual from its value immediately thereafter. Although on particu-
lar facts this calculation may give rise to differences of opinion and judgment,
it will involve the type of enquiry which can be resolved with the aid of
expert testimony.

The particular solution, which it seems will apply in the main to governing
director companies, is confined to cases where, immediately before his death,
the deceased and some other person each held an interest in an incorporated
or unincorporated body and at that time the rights attaching to the deceased’s
interest in that body were different from those of the other person. In such
a case the benefit which accrues to the latter is to be calculated by subtracting
from the actual value of his interests in the body immediately after the
deceased’s death “the least value that those interests could have had imme-
diately before the death of the deceased person if the deceased person had
then exercised the rights attaching or existing in relation to his interests in
that body to the greatest possible disadvantage of that other person . . .”.
As this method of computing value is predicated upon the legal ability which the
deceased possessed to exercise his powers so as to diminish the value of the
other person’s property, it will necessarily introduce into the valuation process
questions of law which will have to be decided on the basis of facts which,
ex hypothesi, will not have occurred. Where the special valuation provision
refers to interests of the deceased and some other person in a company or
unincorporated body, such references do not extend to interests in companies
whose shares or other securities are listed on a public stock exchange. It should,
perhaps, be emphasised that the fact that the conditions for the application of this provision may not be satisfied does not preclude the application of the general paragraph which brings into the notional estate benefits which accrue or amounts which are payable on or after the death of the deceased. It is expressly provided that the terms of the special valuation provision are not to detract from the generality or operation of the general provision. However neither provision applies to life assurance proceeds payable to a surviving partner or shareholder in a company pursuant to an agreement made for the purpose of facilitating the purchase of the shares of a deceased partner or shareholder. Nor do they apply in relation to the estate of any person who dies before the first of January 1975.

J. DIMINUTION OF VALUE

The Western Australian Act contains a provision which is designed to recapture the amount by which the value of a deceased person's property was diminished by any act or omission of the deceased or by the operation of any agreement, obligation or transaction entered into prior to his death. The provision is curiously worded and, although it is confined to property which the deceased owned at the date of his death or within three years prior to that date, it is not clear that it does not extend to decreases in the value of such property which were effected outside the three year period or on death.

As the provision applies only where the total value of some other person's property has been increased by virtue of the act, omission, agreement, obligation or transaction, it is possible it would apply only where that other person previously owned the property which thereby increased in value. If, for example, the deceased failed to exercise his right to subscribe for company shares and by virtue of this omission the value of his shareholding was diminished, it would not follow that the value of any pre-existing property of any other person would be enhanced. Similarly, in a Gorton-type situation where, as a result of a resolution of a company in extraordinary general meeting, the deceased's common shares are converted into shares with limited rights, the provision would arguably not apply unless it could be shown that an increase occurred in the value of some existing identifiable property of another person.

The provision does not apply if the decrease in the value of the deceased's property occurred in the course of a bona fide commercial transaction in which he received adequate consideration in money or money's worth. If such consideration consisted of a covenant or promise that had not been performed by the date of the deceased's death, the onus of proving its adequacy is placed upon the deceased's personal representatives or other persons liable to pay duty. The provision will also have no effect on acts, omissions, obligations, agreements or transactions which occur or are entered into prior to the first of January 1975 if the deceased's personal representatives or any other person

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92 Death Duty Assessment Act, s 10 (2) (p).
93 See Gorton v FCT (1965) 113 CLR 604.
who is liable to pay duty can establish that the purpose of the act, omission,
obligation or transaction was to avoid or mitigate the effect of the provision
which recaptures benefits which accrue on or after the death of the deceased.

K. MISCELLANEOUS

There are two other provisions of the State legislation which should be
mentioned although they do not call for any extensive discussion. The first
brings property the subject-matter of a donatio mortis causa into the notional
estate;94 the second recaptures property transferred by the deceased within
three years of his death in consideration of the payment of periodical amounts
to him or to his nominee or to both of them.95 As the latter provision applies
only if the deceased had an intention to evade duty it is presumably restricted
to sham or colourable transactions.96 Where it applies the aggregate of the
periodical payments made prior to the deceased's death are to be deducted
from the value of the property at the time of the disposition. The provision
was inserted to block a method by which a person with a short life expectancy
could, without payment of duty, pass property through an assurance company
to persons whom he intended to benefit. In substance the method involved
the purchase of a life annuity for an amount far in excess of its capital value
calculated according to the purchaser's actual life expectancy. More or less
contemporaneously with the purchase of the annuity the persons intended to
benefit would effect or take an assignment of a policy of assurance on the
life of the annuitant and the proceeds payable under the policy would be
substantially the same as the purchase price of the annuity. As originally drafted,
the provision was not confined to transactions entered into with an intention
of evading duty. The insertion of that requirement has limited substantially
the scope of the provision and there must be at least some doubt as to its
effectiveness even in the situation for which it was designed.

L. TAX EVASION

In perhaps its most perplexing and indeterminately drafted provision the
State legislation attempts to cast a wide net in the direction of non-testamen-
tary dispositions which were made with the intention of evading the payment
of duty. Property the subject-matter of such dispositions is deemed to be
comprised in his estate.97 Although the concept of tax evasion is normally
confined to fraudulent or at least colourable transactions,98 it is expressly
stipulated that the provision applies "to any transaction carried out with the
intent referred to . . . and is not limited in its operation to sham or colour-
able transactions."

Only a court can supply the answers to the many questions to which this
provision gives rise. Is the concept of a non-colourable intention to evade duty
synonymous with an intention to avoid duty? Does the reference to intention
refer to the sole purpose, the dominant purpose or any one of a number of

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94 Death Duty Assessment Act, s 10 (2) (j).
95 Ibid., s 10 (2) (d).
96 See Simms v Registrar of Probates [1900] AC 323; In re Lightly (1932) 34 WALR 81.
97 Death Duty Assessment Act, s 63.
98 Simms and Lightly, note 96.
purposes to be accomplished by the disposition? Is that purpose to be discovered purely by an examination of the terms of the disposition and the circumstances in which it was made or must the enquiry be directed at the actual state of mind of the disponer?

As it would seem unlikely that the provision was intended to operate as a separate charging provision of equal status to the provisions which include specific dispositions within the notional property of a deceased person, its general operation may be confined to cases which fall within the policy but not the terms of one or more of the specific provisions. Whether or not this is correct, the Commissioner is not permitted to make an assessment under the provision unless he first obtains from the court a declaration that the disposition was made with the requisite intention. In view of the obscurity and indeterminateness of the provision it might be no easy task to obtain such a declaration unless the disposition was made by the deceased so as to take effect upon his death. Such a disposition will be deemed to have been made with the intent to evade duty\textsuperscript{99} and, unless it is possible to read some restriction into the provision, it must follow that, despite parliamentary statements to the contrary, there is one class of settlements which will be recaptured whether or not they were made within three years of the deceased's death and whether or not the deceased reserved an interest for the period of his life. If the draftsman intended to recapture property comprised in all settlements made by the deceased so as to take effect on his death, the selection of the tax evasion provision to accomplish this purpose was very curious indeed.

M. CONCLUSION

There are obvious risks inherent in any attempt to forecast the likely course of interpretation of a new taxing statute. It is to be hoped that some of the comments, predictions and criticisms of the \textit{Death Duty Assessment Act} which have been made above will prove to be unfounded. In general terms, most of the problems posed by the notional property provisions of the legislation arise not so much from the terms of specific paragraphs, considered in isolation, but rather from the inconsistencies revealed when the untidy package is considered as a whole. Those practitioners who hold the view that the terms of taxing Acts have less significance than the attitudes of those whose task it is to administer the legislation may not be overly concerned with the textual difficulties. Those who, perhaps naively, believe that taxpayers should not be forced to rely on departmental discretion but should be able to arrange their affairs on the basis of rules which are consistent and intelligible will regret the inability of the legislature to produce a more satisfactorily coherent set of provisions.\textsuperscript{100}

\textsc{Maurice C Cullity*}

\textsuperscript{99} Death Duty Assessment Act, s63 (2).
\textsuperscript{100} In writing this paper I have been greatly assisted by Professor H A J Ford's lucid and perceptive commentary on the state and federal law in force in Victoria and New South Wales, note 14.

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