Project No 34 – Part II

Administration Bonds and Sureties

REPORT

MARCH 1976
The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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TERMS OF REFERENCE

1. The Commission was asked to consider and report on the law relating to administration bonds and sureties.

2. The Commission has also been asked to consider and report on other aspects of the law relating to the administration of deceased estates. The Commission will submit reports on these other aspects in due course.

WORKING PAPER

3. The Commission issued a working paper on 27 June 1975. A copy of the paper is attached as Appendix I. The names of those who commented on the paper are listed in Appendix II.

HISTORICAL BACKGROUND

4. The administration bond in its present form was introduced into the law of England by the Statute of Distribution 1670 (22 and 23 Chas. 11 Ch. 10) with the object of ensuring that the estate of an intestate was distributed to those persons entitled to it. Before the statute, the law relating to intestacy and the administration of an intestate estate was in a chaotic state and there were many legal difficulties in the way of compelling the administrator to distribute the surplus in the estate after payment of debts. In Western Australia, it is still necessary for an administrator to execute a bond despite the fact that a comparable state of law to that which existed in England before 1670 does not exist today in this State.

PRESENT LAW IN WESTERN AUSTRALIA

5. Under the Administration Act 1903, before an administrator can obtain a grant of letters of administration of a deceased estate, he is required to execute an administration bond to Her Majesty the Queen in an amount equal to the gross amount of the estate: ss.26 and 27. The bond must be in accordance with Form 2 of the Non-contentious Probate Rules 1967 (see the Appendix to the working paper), unless otherwise ordered by the Master of the Supreme Court: s.26; Non-contentious Probate Rules 1967, rule 27. However,
(a) No bond is required from the public Trustee or a person obtaining administration to the use or for the benefit of the Crown: s.26(2).

(b) The court may dispense with a bond where the applicant for the grant is a trustee company: s.26(3). The court in fact always dispenses with a bond in these cases.

(c) The court may reduce the amount of the bond in any case: s.27.

The court, however, has no general power to dispense with the bond altogether.

6. Normally the bond must be supported by two persons as sureties: ss.26 and 27; rule 27. However,

(a) The court may dispense with one or both sureties or limit the liability of any surety: s.27. This is commonly done where there are no debts and the applicant for the grant is the sole beneficiary or the other beneficiaries being of full legal capacity consent to dispensing with sureties.

(b) No sureties are required where the estate does not exceed $5,000 and administration is granted to the spouse of the deceased: s.28(1).

(c) It appears that the court can at any time reduce the liability of any surety: s.29.

7. The condition in the prescribed form of bond (see paragraph 5 above and the Appendix to the working paper) is that the intended administrator shall collect, get in, administer and distribute according to law the real and personal property of the deceased and punctually comply with all duties and obligations imposed on him by law in relation to the estate of the deceased. If the administrator breaks a condition of the bond, the court may order its assignment to any person, who may sue upon the bond as trustee for those interested: s.30.

A more complete summary of the provisions of the Administration Act and of the Non-contentious probate Rules relating to administration bonds and sureties is contained in paragraphs 3 to 7 of the working paper.
These requirements of the Act and rules do not apply to executors.

THE LAW ELSEWHERE

Australia and New Zealand

8. The law relating to administration bonds and sureties in the other Australian jurisdictions and New Zealand is basically the same as that applying in this State with some variations in matters of detail. The relevant enactments in those jurisdictions are listed in paragraph 8 of the working paper, and some of their salient features are referred to in paragraph 9 of that paper.

England

9. The law in England was also similar to that applying in this State until it was amended in 1971, following the report of the English Law Commission, *Administration Bonds, Personal Representatives’ Rights of Retainer and Preference and related matters* (Law Com. No. 31, (1970) Cmnd. 4497).

Section 8 of the *Administration of Estates Act 1971* substituted a new s.167 for the former s.167 of the *Supreme Court of Judicature (Consolidation) Act 1925* to give effect to most of the recommendations of that report. Administration bonds have been abolished. In their place the Act provides that one or more sureties may be required in those circumstances specified in the rules, to guarantee any loss arising from the breach by an administrator of his duties and within any limit of liability imposed by the court. The guarantee has effect as if under seal and enures, for the benefit of each of the persons interested in the administration of the estate but no action can be brought upon the guarantee without leave of the High Court. Paragraph 19 below contains a detailed account of the circumstances where sureties are required in England.

DISCUSSION AND RECOMMENDATIONS

Administration bonds

10. The administration bond has three purposes -
(a) it sets out the duties of the administrator;
(b) it affords an aggrieved creditor or beneficiary an additional remedy against a
defaulting administrator;
(c) where there are sureties to the bond, it affords an aggrieved creditor or
beneficiary a remedy against the sureties in the event of default by the
administrator.

11. With respect to the first of these purposes, it is unnecessary to retain the bond in order
to set out the duties of an administrator, particularly as the bond only expresses those duties in
vague and general terms. It would be preferable to set out these duties in statutory form (see
paragraph 15 below).

12. The second purpose of the bond is to afford a remedy against a defaulting
administrator. However, an administrator is liable to a creditor or beneficiary under the
general law for any breach of his duties irrespective of whether there is a bond or not. The
effect of a bond is to render the administrator contractually liable to carry out his duties as
defined in the bond. A bond may therefore have the anomalous result of depriving the court of
its power under s.75 of the *Trustees Act 1962* to relieve an administrator wholly or in part
from personal liability for breach of his duties when he has acted honestly and reasonably and
ought fairly to be excused. If this is correct, it would seem to be an unfair result.

13. The third and last purpose of the administration bond is to provide a remedy against
sureties (if there are any) in the event of an administrator's default. If an administrator defaults
in his duties, for example, by fraudulently misappropriating funds, any beneficiary or creditor
who has been injured by the breach may apply to the court which, if satisfied that a condition
of the bond has been broken, may order the assignment of the bond to the aggrieved person
who may sue upon it in his own name. In practice, this occurs only when the aggrieved party
wishes to enforce the bond against a surety. If he alleges maladministration by the
administrator and wishes to sue him, he will normally do so by starting an action against the
administrator based on his liability under the general law and not on his liability under the
bond.
Recommendation to abolish bonds

14. In the light of the foregoing, the Commission has concluded that the only real value of the bond appears to be the provision of a remedy against sureties. The Commission considers that it is possible to provide adequate protection without retaining the artificiality of a bond by means of a guarantee by sureties in appropriate cases. Accordingly, it recommends that administration bonds be abolished.

Specifying duties of personal representatives by statute

15. Whether or not administration bonds are abolished, it would make for clarity if the duties of administrators were specified by statute. This has been done in England. Section 25 of the English Administration of Estates Act 1925, as substituted by s.9 of the Administration of Estates Act 1971, specifies the duties of a personal representative. The section provides -

"The personal representative of a deceased person shall be under a duty to -

(a) collect and get in the real and personal estate of the deceased and administer it according to law;
(b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;
(c) when required to do so by the High Court, deliver up the grant of probate or administration to that court."

In Western Australia, the first of these duties is specifically set out in the administration bond (see paragraph 7 above) and the second is set out in s.43 of the Administration Act. The third of the duties, which could arise, for example, where administration has been granted on the basis of intestacy and a will is later discovered, depends on the inherent powers of the Supreme Court of Western Australia. The Commission is of the opinion that it would make for simplicity and would aid understanding if the Administration Act were amended so as to set out in the one section the duties of personal representatives. In their comments on the working paper both the Master of the Supreme Court and the Public Trustee considered it was desirable to specify in statutory form all the duties of an administrator. The Commission accordingly recommends that the Administration Act be amended by enacting a new section to the same effect as s.25 of the English Administration of Estates Act 1925. The new section
would apply to personal representatives generally whether they be executors or administrators.

**Sureties**

**General**

16. In paragraph 14 above, the Commission recommended that administration bonds be abolished. A more difficult question is to decide whether it is desirable to retain a general requirement of a guarantee by sureties for the due administration of the estate.

There are a number of arguments against retaining sureties. One is that the general requirement that sureties be obtained puts the estate to additional expense which may arise in a number of ways -

(a) Where sureties are required there is the cost of preparing and having executed a separate legal document.

(b) There is expense involved in documentation where it is thought desirable to apply to dispense with sureties.

(c) Where sureties are required and no private sureties can be obtained, it is necessary to obtain the security of an approved insurance company. Applicants are often unable to find private sureties, especially as the sureties must each have net assets at least equal in value to the amount of the liability which they are to assume under the bond. The Master of the Supreme Court has informed the Commission that in 1974 there were 419 grants of administration to applicants other than the Public Trustee and that an insurance company acted as surety in sixty-five of these cases. A survey of approved insurance companies undertaken by the Commission showed that the premium charged varied from 0.1% to 1.125% of the gross value of the estate, depending on the number and status of the beneficiaries, the length of the administration and other matters.
17. Other arguments against sureties are -

(i) An executor is not required to provide any sureties. It is hard to see any logical basis for the distinction in this regard between an executor and an administrator. There seems to be no particular reason why it should be thought necessary to give creditors the protection of sureties when the deceased's personal representative happens to be an administrator when the same protection has not been thought necessary in the case of an executor. Furthermore, as regards beneficiaries, the need for protection may sometimes be less in the case of an intestacy than if there is a will: the administrator would normally be one of the principal beneficiaries but an executor appointed by will might not.

(ii) Applications by a creditor or beneficiary to have the bond assigned to him (see paragraph 7 above) are very rare. The Master of the Supreme Court has informed the Commission that he can only recall one instance in the past fifteen years where such action has been taken.

(iii) In some cases, the protection of a surety is an illusory protection to a beneficiary. The Commission's survey (referred to in (c) of paragraph 16 above), found that some companies which act as surety require an immediate release from adult beneficiaries, thus collecting a premium without being at risk of action by those beneficiaries. At least one company required an indemnity from each adult-beneficiary, thus making each such beneficiary liable to recompense the company in the event of it being obliged to meet a claim by any other beneficiary or creditor of the estate.

18. The Commission considers that the arguments against the requirement of sureties carry considerable weight and is of the opinion that the automatic requirement of sureties in most cases is unjustifiable. On the other hand, the Commission is of the view that it is desirable to retain a power to require sureties in special circumstances. However, if this is to be a practical solution the new law must be framed in such a way that applicants for grants of letters of administration will know where they stand. Any amendments to the present law
would be of little benefit unless one could predict in nearly all cases whether or not sureties would be demanded by the court.

**Details of English law regarding sureties**

19. As mentioned in paragraph 9 above, in England the new s.167 of the *Supreme Court of Judicature (Consolidation) Act 1925* abolished administration bonds but provided that one or more sureties may be required in those circumstances specified in the rules, to guarantee any loss arising from the breach by an administrator of his duties. The English *Non-contentious Probate Rules 1954* were also amended in 1971 so as to specify the circumstances when one or more sureties may be required. Rule 38(1) provides that the Registrar shall not require a guarantee as a condition of granting administration except where it is proposed to grant it -

"(a) by virtue of rule 19(v) or rule 21(4) to a creditor or the personal representative of a creditor or to a person who has no immediate beneficial interest in the estate of the deceased but may have such an interest in the event of an accretion to the estate;

(b) under rule 27 to a person or some of the persons who would, if the person beneficially entitled to the whole of the estate died intestate, be entitled to his estate;

(c) under rule 30 to the attorney of a person entitled to a grant;

(d) under rule 31 for the use and benefit of a minor;

(e) under rule 33 for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his affairs;

(f) to an applicant who appears to the registrar to be resident elsewhere than in the United Kingdom;

or except where the registrar considers that there are special circumstances making it desirable to require a guarantee."

Notwithstanding the above, rule 38(2) specifies that, except in special circumstances, a guarantee shall not be required where the applicant or one of the applicants is -

(a) a trustee company;

(b) a solicitor holding a current practising certificate;

(c) a servant of the Crown acting in his official capacity;

(d) a nominee of a public department or a local authority.

Rule 38(1) therefore specifies the circumstances in which, save where the applicant (or one of the applicants) is in one of the categories set out in Rule 38(2), a guarantee may be required,
and in addition gives the Registrar a discretion to require a guarantee in other unspecified circumstances. It is to be noted that even in the circumstances specified in paragraphs (a) to (f) of Rule 38(1), it is not mandatory for sureties to be required. The Registrar may still dispense with sureties under the discretion given him under the new s.167 of the Supreme Court of Judicature (Consolidation) Act 1925 (see paragraph 9 above).

Rule 38(5) provides that, unless the Registrar otherwise directs, if it is decided to require a guarantee, it shall be given by two sureties except where the gross value of the estate does not exceed five hundred pounds or the proposed surety is a corporation, in which case one will suffice.

The sureties must be resident in the United Kingdom, and the limit of their liability is the sworn gross amount of the estate.

**Recommendations as to sureties**

**When sureties should normally be required**

20. In paragraph 18 above, the Commission expressed the opinion that the imposition of the requirement of sureties in most cases where there was an administration was unjustifiable, but that any amendments to the present law would be of little benefit unless one could predict in nearly all cases whether or not sureties would be demanded by the court.

Because under the new English provisions applicants for administration would normally be able to predict with certainty whether sureties would be required, the Commission agrees with the English approach.

The Commission therefore recommends that the Administration Act be amended to provide that as a condition of granting administration the Supreme Court may, subject to and in accordance with probate rules, require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any beneficiary or creditor may suffer in consequence of a breach by the administrator of his duties. The Commission also recommends that the new provision should provide that the guarantee shall enure for the benefit of every person interested in the
administration of the estate as if contained in a deed made by the surety or sureties with every such person.

21. The Commission agrees that sureties should be required in the circumstances specified in (c) to (f) of Rule 38(1) of the English Rules (see paragraph 19 above) and recommends accordingly.

However, (a) and (b) of Rule 38(1) should not be adopted in their existing form. The order of entitlement to a grant of administration is different in England from that in Western Australia and the circumstances in which a person who is not a beneficiary can obtain a grant are also different. For the English position, see Rules 19, 21 and 27 of the Non-contentious Probate Rules 1954 (the text of which is set out in Appendix III to this report). For the Western Australian position, see s.25 of the Administration Act (set out in Appendix IV) for the order of entitlement on intestacy, and Tristram & Coote's Probate Practice 15th ed. 90 to 98 for the order of entitlement with the will annexed which depends on rules laid down by the courts.

The Commission considers that instead of (a) and (b) of Rule 38(1) of the English Non-contentious Probate Rules, the appropriate provision in this State would be one which simply specified that sureties would be required (with power to exempt) in those cases where the applicant does not have a beneficial interest in the estate. This, of course, would include a person making an application as a creditor. The Commission recommends accordingly.

22. The Commission recommends that the rules should also provide that the Master may require sureties where -

(a) The grant of administration is limited, for example, ad colligenda bona (limited to administration of specific goods) and ad litem (representing the estate in court proceedings). (This was also the view of the Chief Justice's Law Reform Committee of Victoria: see the report of the subcommittee on Administration Bonds dated 27 May 1971.)

(b) One or more of the beneficiaries are not of full age or capacity.
(c) One or more of the beneficiaries are not resident in Western Australia and they have no agent or attorney in this State.

There would be a significant percentage of intestate estates where a beneficiary is residing outside Western Australia but within the Commonwealth of Australia. The Commission gave consideration to recommending that the requirement should apply only where one or more of the beneficiaries is resident outside the Commonwealth of Australia. However, it decided against this because a beneficiary living in another Australian State or an Australian Territory would normally have more difficulty in protecting and enforcing his rights than a beneficiary who lives in Western Australia. The latter would usually have easier access to the administrator and to a solicitor who practices in Western Australia. In any case, a beneficiary who is residing in another Australian State or Territory could consent to the dispensation of sureties if he wished to do so. If he did so the Master would doubtless take this into account in deciding whether or not to dispense with sureties.

23. The Commission considers that, as in England (see paragraph 19 above), the Master should be given a residual power to require a guarantee for the due performance of the duties of an administrator for cases not falling within the circumstances specified in paragraphs 21 and 22 above. This residual power is a necessary one as the circumstances where it might be reasonable to ask for sureties would defy complete classification.

24. In paragraph 21 of the working paper, the Commission suggested that perhaps sureties should normally be required where the gross value of the estate is very large. However, it may be that a demand for sureties would very often be justified in the case of large estates but perhaps not so often as to justify a general rule that sureties should be required in such cases. If, as has been recommended by the Commission (see paragraph 23 above), there is enacted an equivalent to the English provision which provides that a guarantee can be required "where the registrar considers that there are special circumstances making it desirable to require a guarantee", then in the case of a very large estate, the Master could decide in the light of all the circumstances whether there should be sureties.
Cases where sureties should not be required

25. The Commission recommends that, a provision be inserted in the Western Australian probate rules that except in special circumstances, no guarantee should be required from -

(a) a trustee company; or
(b) a solicitor holding a current practice certificate; (cf. the English position - see paragraph 19 above).

In practice, at present, trustee companies are not required to enter into an administration bond, and consequently are not required to provide sureties (see paragraph 5 above).

The Commission expects that in deciding whether special circumstances exist in the case of a solicitor, the Master would, among other things, have regard to the question of whether the solicitor is one who has been operating a trust account under the Legal Practitioners Act.

Section 26(2) of the Administration Act provides that no bond is required from the Public Trustee. The Commission considers that the effect of this provision should be retained, and accordingly recommends that no guarantee should be required from the Public Trustee. Section 26(2) also provides that no bond shall be required from a person obtaining administration to the use or for the benefit of the Crown. The Commission is unaware of any instance where a grant of administration has been made to such a person. In this State, where the Crown is involved in a deceased estate, for example as a creditor, the Public Trustee applies for administration if no application is made by the spouse or next of kin. However, it seems unwise to repeal the provision merely because of its apparent lack of use and the commission accordingly recommends that the Rules should provide that no guarantee is required from a person obtaining administration to the use or for the benefit of the Crown.

Number of sureties and amount of surety

26. Under Rule 27(1) of the Western Australian Non-contentious Probate Rules, two sureties are required unless the surety is an approved guarantee company or the applicant is a trustee company or where the Master otherwise orders. The Commission is not aware of any
criticism of this provision and recommends that the same principles should apply in those circumstances where a guarantee may be required.

27. At present the surety must be an amount equal to the gross value of the estate (as certified by the administrator for death duty purposes) provided that the court may limit the liability of any surety to such amount as it thinks reasonable. The Commission recommends no change in this provision except that, following the English approach (see Rule 38(5) of the Non-contentious Probate Rules 1954), the Master should be empowered to increase the amount of the surety, as well as to reduce it. This power could be used, for example, when the estate has been shown to be worth more than the administrator originally certified.

28. It is provided in s.28(2) of the Administration Act that where the claim of any creditor of the estate is secured by a mortgage of the deceased's real estate, sureties are only required as to the net value of the estate after deducting the mortgage debt. The Commission recommends that the same principle should apply in those circumstances where a guarantee may be required.

29. The Commission considers that where the sureties are individuals they should be required to justify (i.e. to satisfy the Master that they have net assets which are at least equal in value to the amount of the liability which they are to assume under the bond) unless the Master otherwise orders. The Commission recommends accordingly.

30. In England, even where the Registrar may require a guarantee, he cannot do so without giving the applicant an opportunity of being heard: Rule 5(4) of the English Non-contentious probate Rules 1954. The Commission considers that a similar rule should be adopted in Western Australia and recommends accordingly.

No action without leave

31. The proposed form of guarantee, unlike the administration bond (see paragraph 5 above) could be sued on by a creditor or beneficiary without assignment by the court. The Commission considers that the court's control over actions against the surety should be retained. The Commission agrees with the view taken by the English Law Commission which was that the -
"..need to obtain leave, which may be refused in the court's discretion, fulfils a useful function since it prevents the sureties being harassed by an unreasonable creditor or beneficiary and enables the court, either by refusing leave or imposing conditions, to deal fairly with unusual situations such as that in which the various claims exceed the amount of the [guarantee]." (Report No. 31, paragraph 17).

The Commission accordingly recommends the enactment of a provision to provide that no action may be taken on the guarantee except with the leave of the Supreme Court or of the Master and on such terms as the Court or the Master may direct.

**Insurance companies**

32. In paragraph 23 of the working paper, the Commission said that it may be desirable to prohibit the practice of some approved insurance companies requiring an immediate release from adult beneficiaries when providing the administrator with a surety. See also paragraph 17 above. However, the Commission does not now consider that it is necessary to go so far as to prohibit the practice by statute. If the Commission's recommendations are accepted, the circumstances in which sureties will be required will be fewer than formerly. In those cases where sureties would still be required, the Commission considers that the practice of requiring an immediate release from adult beneficiaries can be adequately controlled by the Master in the exercise of his powers to approve or disapprove of a company as surety.

**Resealed grants of administration**

33. The Commission recommends that the foregoing recommendations should also apply to cases where grants of administration made in any other part of Her Majesty's dominions are resealed by the Supreme Court of Western Australia under s.61 of the *Administration Act*. At present, by virtue of s.62 of that Act, letters of administration will not be resealed unless the administrator or his attorney enters into the same bond as would have been required had the administration been originally granted by the Supreme Court of Western Australia. The Commission recommends that s.62 of the *Administration Act* be repealed and instead a new section be enacted and a new probate rule made to the effect that the Master would be empowered to require a guarantee when the circumstances are such that he would have done so if the application had been for an original Western Australian grant.
34. The second conference of Australian law reform agencies held in Sydney in April 1975 proposed that the law relating to the resealing of grants originally granted outside a particular Australian State or Territory be examined with a view to securing uniformity throughout Australia. If this proposal were implemented, it may be necessary to further amend the law relating to cases where grants are resealed.

Stamp duty

35. At present the stamp duty on an administration bond where the gross value of the estate exceeds $200 is one dollar (see \textit{Stamp Act 1921}, Second Schedule, item headed: Bond for Administration). Where the value of the estate is $200 or less the bond is exempt from stamp duty (ibid). The Commission considers that if the guarantee is to be subject to duty, the rate of stamp duty payable thereon should not be more than the duty payable in regard to the bond. However, the cost to the Government of collecting the nominal duty involved would almost certainly be greater than the revenue obtained. In addition, it is necessary to have the duty impressed on the document by the Commissioner of State Taxation or a person appointed under the \textit{Stamp Act} to cancel duty stamps. If the guarantee were exempt, it would not be necessary for the solicitor for the estate to attend at the office of the Commissioner or of a person appointed under the Act in order to have the duty impressed. This would result in a saving of costs. The Commission recommends that consideration be given to the exemption of the guarantee from stamp duty.
SUMMARY OF RECOMMENDATIONS

36. The Commission recommends that -

(1) administration bonds should be abolished;
   (paragraph 14)

(2) the duties of personal representatives should be specified by statute;
   (paragraph 15)

(3) the Administration Act should be amended to provide that the Supreme Court
    may, subject to and in accordance with probate rules, require one or more
    sureties to guarantee the due administration of the estate;
    (paragraph 20)

(4) the Non-contentious Probate Rules should be amended to provide that no
    guarantee will be required except where -

   (a) it is proposed to grant administration -
       (i) to a person who does not have a beneficial interest in the estate;
       (ii) to the attorney of a person entitled to a grant;
       (iii) for the use and benefit of a minor;
       (iv) for the use and benefit of a person who is by reason of mental or
            physical incapacity incapable of managing his affairs;
       (v) to an applicant who appears to the Master to be resident
           elsewhere than in Western Australia; or

   (b) it is proposed to grant administration -
       (i) in a limited way e.g. ad colligenda bona or ad litem;
       (ii) where one or more of the beneficiaries are not of full age or
            capacity;
       (iii) where one or more of the beneficiaries are not resident in
            Western Australia and they have no agent or attorney in this
            state; or

   (c) except where the Master considers that there are special circumstances
       making it desirable to require a guarantee;

      (paragraphs 21 to 23)
(5) except in special circumstances, no guarantee should be required from -
   (a) a trustee company; or
   (b) a solicitor holding a current practice certificate;

(6) no sureties should be required from the Public Trustee or a person obtaining
    administration to the use or for the benefit of the Crown;

(7) where it is required, the guarantee should be by two sureties unless the surety
    is a company approved by the court or the applicant is a trustee company or
    where the Master otherwise orders;

(8) where it is required, the guarantee should be to an amount equal to the gross
    value of the estate or such reduced or increased amount as the Master orders;

(9) where a guarantee is required and the claim of any creditor of the estate is
    secured by a mortgage of the deceased's real estate, the guarantee should only
    be to an amount equal to the net value of the estate after deducting the
    mortgage debt;

(10) where the sureties are individuals, they should, unless the Master otherwise
    orders, be required to satisfy the Master that they have net assets at least equal
    to the liability involved;

(11) the decision to require a guarantee should only be made after the applicant has
    had an opportunity of being heard;

(12) no action should be able to be taken on sureties except with the leave of the
    Supreme Court or of the Master and on such terms as the Court or the Master
    may direct;
(13) the foregoing recommendations should also apply where grants of administration made in other parts of Her Majesty's dominions are resealed by the Supreme Court of Western Australia under s.61 of the Administration Act;

(paragraph 33)

(14) in the case of a reseal of letters of administration, the Master should be empowered to require a guarantee when the circumstances are such that he would have done so if the application had been for an original Western Australian grant;

(paragraph 33)

(15) consideration be given to the exemption of the guarantee from stamp duty.

(paragraph 35)

(Signed) DAVID K. MALCOLM Chairman

ERIC FREEMAN Member

R.W. HARDING Member

16 March 1976
INTRODUCTION

The Law Reform Commission has been asked to consider and report on the law relating to administration bonds.

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

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 8 September 1975.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Institute of Legal Executives
Judges of the District Court
Law School of the University of W.A.
Law Society of W.A.
Magistrates’ Institute
Perpetual Executors, Trustees and Agency Co. (W.A.) Limited
Solicitor General
Under Secretary for Law
West Australian Trustee Executor and Agency Co. Ltd.
Law Reform Commissions and Committees with which this Commission is in correspondence

The Commission may add to this list.

A notice has been placed in The West Australian inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.
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TERMS OF REFERENCE

1. "To consider and report on the law relating to administration bonds and sureties".

The Commission has also been asked to consider and report on other aspects of the law relating to the administration of deceased estates. The Commission will issue working papers on these other aspects in due course.

HISTORICAL BACKGROUND

2. Before 1857, jurisdiction in England to grant letters of administration was vested in the Ecclesiastical Courts.

Before the Statute of Distribution 1670 (22 and 23 Chas. II Ch. 10), the law in regard to intestacy and the administration of an intestate estate was in a state of chaos. Administrators were appointed by the Ordinary (the bishop). However, the Ordinary could not supervise the administrator and there was no effective control over him. The administrator was answerable for the debts of the deceased, but, before the Statute, there was nothing to compel him to distribute the surplus after payment of debts. This resulted in serious abuses.

The Statute of Distribution defined the rights of the persons entitled to take on an intestacy and obliged the administrator to distribute in accordance with its provisions. It expressly provided that upon the granting of administration, the Ordinary was to take a bond from the administrator with two or more sureties. The condition of the bond was in a form which is similar to that still in use in Western Australia.

The administration bond was introduced at a time when the law relating to intestacy and the administration of an intestate estate was in a chaotic state and it was introduced with the object of ensuring that the estate was distributed to those persons entitled to it.

In Western Australia, it is still necessary for an administrator to execute a bond despite the fact that a comparable state of law to that which existed in England before 1670 does not exist today in this State.
PRESENT LAW IN WESTERN AUSTRALIA

3. Before an administrator can obtain a grant of Letters of Administration of a deceased estate, he is required to execute an administration bond to Her Majesty the Queen in an amount equal to the gross amount of the estate (Administration Act 1903, s.26). The bond must be in accordance with Form 2 of the Non-contentious Probate Rules 1967 (see Appendix), unless otherwise ordered by the Master of the Supreme Court (5.26, Non-contentious Probate Rules 1967, rule 27). Normally the bond must be supported by two persons as sureties (ss.26 and 27, rule 27). These requirements do not apply to an executor, and they are subject to the following qualifications -

(a) No bond is required from the Public Trustee or a person obtaining administration to the use or for the benefit of the Crown (s.26(2)).

(b) The court may dispense with a bond where the applicant for the grant is a trustee company (s.26(3)). (The Perpetual Executors, Trustees and Agency Company (W.A.) Limited and the West Australian Trustee Executor and Agency company Limited are the only trustee companies in Western Australia, and the Court in fact always dispenses with a bond where the applicant is one of these companies.)

(c) The court may reduce the amount of the bond, or in place of the bond accept the security of an approved company or guarantee society (s.27). (The Commission understands that application is never made to the court for the security of a company or a guarantee society to be accepted in place of a bond. In practice the bond is always given by the administrator himself, but sometimes the surety to the bond is a company.)

(d) The court may dispense with one or both sureties or limit the liability of any surety (s.27). (This is commonly done where the applicant for the grant is the sole beneficiary and there are no debts or where the other beneficiaries being of full legal capacity consent to dispensing with sureties.)
(e) No sureties are required where the estate does not exceed a gross value of $5,000 and administration is granted to the husband or widow of the deceased (s.28(1)).

(f) Where the claim of any creditor of the estate is secured by a mortgage of the deceased's real estate, sureties are only required as to the net value of the estate after deducting the mortgage debt (s.28(2)).

4. The court may order an administrator to execute a further or additional bond in such sum, with or without sureties, as the court may direct, or may order the liability of any surety to be reduced (s.29). However, the court has no general power to dispense with the bond altogether.

5. The form of the bond (see paragraph 3 above and Appendix) in effect restates the existing obligations of an administrator to collect, get in, administer and distribute the estate of the deceased according to law. If the administrator breaks a condition of the bond, the court may order its assignment to any person, who may sue upon the bond in his own name (s.30).

6. In every case where sureties are required, they must justify to the Master that their assets are sufficient to satisfy the amount of the bond (rule 27(3)).

7. Upon the application of a surety, if the estate is being or is in danger of being wasted or the surety prejudiced by the act or default of the administrator or if any surety desires to be relieved of further liability, the court may grant such relief as it thinks fit (s.31).

THE LAW IN OTHER JURISDICTIONS

Australia and New Zealand

8. The law relating to administration bonds in the other States of Australia, in the Australian Capital Territory and in New Zealand is basically the same as that applying in this State with some variations in matters of detail -

New South Wales: *Wills, Probate and Administration Act 1898*, ss.64-68.
Victoria: *Administration and Probate Act 1958*, ss.50(3), 57.
Queensland: *Probate Act 1867*, ss.36-38.
South Australia: *Administration and Probate Act 1919*, ss.31-33, 57, 58, 66 and 91.
Tasmania: *Administration and Probate Act 1935*, s.25.
Australian Capital Territory: *Administration and Probate Ordinance 1929*, ss.14, 17, 18, 18A and 19.
New Zealand: *Administration Act 1969*, ss.15 and 16.

9. In New South Wales, Queensland, South Australia and New Zealand the court has a statutory power to dispense with an administration bond and thus with sureties. In Tasmania and the Australian Capital Territory the requirement of a bond is mandatory, but sureties may be dispensed with. In Victoria the registrar may dispense with sureties in the case of estates sworn under $1,000 and in the case of estates over $1,000 may, in place of a bond with two sureties, accept a bond from a trust company, approved insurance company or guarantee society.

In the majority of jurisdictions the amount of the bond is the gross sworn value of the estate. However in Queensland the penalty is double the amount under which the estate is sworn (unless the amount is reduced by the Court) while in New Zealand the bond is limited to a maximum of $20,000.

In the Australian Capital Territory the law requires the surety to be an insurance company.

**England**

10. The law in England was also similar to that applying in this State until it was amended in 1971, following the report of the English Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters* (Law Com. No. 31, (1970) Cmnd, 4497).

Section 8 of the *Administration of Estates Act 1971* substituted a new s.167 for the former s.167 of the *Supreme Court of Judicature (Consolidation) Act 1925* to give effect to most of the recommendations of that report. Administration bonds have been abolished. In their place the Act provides that one or more sureties may be required in those circumstances specified in
the rules, to guarantee any loss arising from the breach by an administrator of his duties and within any limit of liability imposed by the court. The guarantee has effect as if under seal and made for the benefit of each of the persons interested in the administration of the estate, and no action can be brought upon the guarantee without leave of the High Court.

11. The English Non-contentious Probate Rules 1954 were also amended in 1971. Rule 38 specifies that no guarantee is required as a condition of granting administration except where it is proposed to grant it to -

(a) a creditor or his personal representative or to a person who has no immediate beneficial interest in the estate but who may have such an interest in the event of an accretion to the estate;

(b) a person or some of the persons who would, if the person beneficially entitled to the whole of the estate died intestate, be entitled to his estate;

(c) the attorney of a person entitled to a grant;

(d) an applicant for the use and benefit of a minor;

(e) an applicant for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his affairs;

(f) an applicant resident out of the United Kingdom;

(g) any other applicant where the registrar considers there are special circumstances making it desirable to require a guarantee.

Notwithstanding the above, rule 38(2) specifies that except in special circumstances, no guarantee is required from a trust corporation, a solicitor holding a current practising certificate, a servant of the Crown in his official capacity or a nominee of a public department or local authority.
Rule 38(5) provides that unless the Registrar otherwise directs, if it is decided to require a guarantee, it shall be given by two sureties except where the gross value of the estate does not exceed five hundred pounds or the proposed surety is a corporation, in which case one will suffice.

The sureties must be resident in the United Kingdom and the limit of their liability is the sworn gross amount of the estate.

PROPOSALS FOR REFORM

12. The Chief Justice's Law Reform Committee of Victoria, in the report of a subcommittee on Administration Bonds dated 27 May 1971, agreed with the recommendation of the 31st Report of the English Law Commission (see paragraph 10 above) in proposing that administration bonds be abolished, and that sureties should be required in the circumstances specified in the English report. It suggested that sureties should also be required in applications for letters of administration *ad colligenda bona* (limited to the administration of specific goods) and *ad litem* (pending court proceedings) and possibly for certain other limited forms of grants. The report of the Statute Law Revision Committee of Victoria upon Administration Bonds dated 30 September 1974 accepts the recommendations of the Chief Justice's Law Reform Committee and recommends that the judges consider making Court Rules to specify the circumstances in which sureties should be required.

13. The Law Reform Committee of South Australia in its twenty-second report *Relating to Administration Bonds and to Rights of Retained and Preference of Personal Representatives of Deceased Persons* (1972) recommended that the court should have a discretionary power to require a bond and sureties in proper cases and not as a matter of course. Sureties were only to be required in those cases specified in the English Law commission's report (see paragraph 10 above). Bonds should be enforceable by any interested party without assignment. In addition the report suggested that the Public Trustee should be given statutory powers to deal with defaulting administrators.

14. The Law Society of Western Australia has proposed that consideration should be given to amending the *Administration Act* (W.A.) to delete all requirements for administration
bonds and to require sureties only in those circumstances in which sureties are required in England (see paragraph 11 above).

DISCUSSION

15. The purposes of the administration bond are to afford an aggrieved creditor or beneficiary a remedy against a defaulting administrator, and also a remedy against sureties (if there are any) in the event of the administrator's default (see the English Law Reform Commission Report No. 31 paragraph 6). The remedy provided by the bond to an aggrieved creditor or beneficiary against a defaulting administrator is additional to remedies available to the creditor and the beneficiary under the general law. The administrator is, of course, liable under the general law to a creditor for the amount of any debt due to him. An administrator is also liable under the general law to a beneficiary for the amount of loss caused to that beneficiary by reason of any failure to carry out his duties.

16. It seems unnecessary to retain the bond for the purpose of repeating the duties of an administrator, particularly as the bond only expresses those duties in vague and general terms (see the English Law Commission Report No. 31, paragraph 10). However, for reasons of clarity there may be some advantages in specifying these duties by statute. This has been done in England. Section 25 of the English Administration of Estates Act 1925, as substituted by s.9 of the Administration of Estates Act 1971, specifies the duties of a personal representative as being to -

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

(c) when required to do so by the High Court, deliver up the grant of probate or administration to that court.
17. In the Commission's view, it would also appear unnecessary to provide by means of a bond an additional remedy against a defaulting administrator. An administrator remains liable for any breach of his duties irrespective of whether there is a bond or not. The bond may have the anomalous result of depriving a trustee of the protection he would otherwise obtain pursuant to s.75 of the W.A. *Trustees Act 1962* where he has acted honestly and reasonably and ought fairly to be excused for any breach of trust (see the English Law Commission Report No. 31, paragraph 12). The Commission is not, however, aware of any instance in Western Australia where this issue has had to be decided by the court.

18. The only real value of the bond would therefore appear to be the provision of a remedy against any sureties. The arguments against retaining sureties are -

(a) It puts the estate to additional expense. Where sureties are required and no private sureties can be obtained, it is necessary to obtain the security of an approved insurance company. The Master of the Supreme Court of Western Australia has informed the Commission that in 1974 an insurance company acted as surety in 65 estates. A survey of all approved insurance companies undertaken by the Commission showed that the premium charged varied from between 0.1% to 1.125% of the sworn value of the estate depending on the number and status of the beneficiaries, the length of the administration and other matters. Some companies also require an immediate release from adult beneficiaries, thus collecting a premium without being at risk of action by those beneficiaries. At least one company also requires an indemnity from such beneficiaries. There is also expense involved in the additional documentation where a bond and/or sureties are required or where it is thought necessary to apply to dispense with the bond and/or sureties.

(b) Executors have never been required to give a bond, with or without sureties (see the English Law Commission Report No. 31, paragraph 13), and there would seem to be little justification for requiring administrators to do so.
TENTATIVE RECOMMENDATIONS

19. The Commission considers that the following are possible alternatives to the present law, and invites comments on them -

(a) to abolish bonds and sureties in all cases,

(b) to abolish bonds but to give the court power to require sureties whenever it considers them desirable,

(c) to abolish bonds but to specify in detail certain circumstances when sureties will be required and certain circumstances when they will not be required, as well as giving the court power to require sureties whenever it considers them desirable (as is the case in England) or to dispense with sureties in certain cases (see paragraph 21).

20. The Commission tentatively favour the third of these alternatives for reasons of predictability. It would at the same time, leave the court free to require sureties where the special circumstances warranted them.

21. If the alternative in paragraph 19(c) above is to be preferred, then apart from those specific cases where sureties are now required in England (see paragraph 11 above) it could be argued that sureties should also be required, with power to the court to dispense, in the following cases -

(a) certain limited grants of administration, for example, a grant *ad litem* (W.A. *Administration Act*, s.35), or a grant *ad colligenda bona*;

(b) where one or more of the beneficiaries are not of full legal capacity,

(c) where one or more of the beneficiaries are not resident in Western Australia and they have no agent or attorney in this State;

(d) where the gross sworn value of the estate is very large.
22. If bonds are to be abolished but sureties retained, the Commission suggests the enactment of a provision that no action be taken on sureties without the approval of the court. The view taken by the English Law Commission was that the -

"...need to obtain leave, which may be refused in the court's discretion, fulfils a useful function since it prevents the sureties being harassed by an unreasonable creditor or beneficiary and enables the court, either by refusing leave or imposing conditions, to deal fairly with unusual situations such as that in which the various claims exceed the amount of the bond" (Report No. 31, paragraph 17).

A provision that no action be taken on sureties without the approval of the court would, in effect, amount to a continuation of the present position in that the court must order the assignment of a bond before any person may take action upon it (see paragraph 5 above).

23. If bonds are not abolished in all cases, then there would seem to be a good argument for abolishing bonds and sureties in those cases where the applicant for a grant is also the sole beneficiary and the unsecured debts of the estate do not exceed a specified percentage of the difference between the value of secured debts of the estate and the amount of the gross value of the estate, (say 20%). It may also be desirable to prohibit the practice of approved insurance companies requiring an immediate release from adult beneficiaries when providing the administrator with a surety (see paragraph 18(a) above).
WORKING PAPER APPENDIX
ADMINISTRATION BOND

By this bond we are jointly and severally bound to Her Majesty the Queen her heirs and successors, in the sum of dollars for the payment of which we bind ourselves and each of us and our executors and administrators.

Dated the day of , 19 .

The condition of this bond is that if the abovenamed the intended administrator of the estate of late of shall collect, get in, administer and distribute according to law the real and personal property of the said deceased and punctually comply with all duties and obligations imposed on him by law in relation to the estate of the said deceased, then this bond shall be void and of no effect; but otherwise it shall remain in full force and effect.
APPENDIX II OF REPORT

List of those who commented on the working paper

Burton, R.H., S.M.
Consumer Protection Bureau
The Institute of Legal Executives (Western Australia) Inc.
Master of the Supreme Court
Public Trustee
The West Australian Trustee Executor and Agency Co. Ltd.
APPENDIX III OF REPORT

Rule 19 of the English Non-contentious Probate Rules

"19. Where the deceased died on or after January 1, 1926, the person or persons entitled to a grant of probate or administration with the will annexed shall be determined in accordance with the following order of priority, namely:-

(i) The executor;
(ii) Any residuary legatee or devisee holding in trust for any other person;
(iii) Any residuary legatee or devisee for life;
(iv) The ultimate residuary legatee or devisee or, where the residue is not wholly disposed of by the will, any person entitled to share in the residue not so disposed of (including the Treasury Solicitor when claiming bona vacantia on behalf of the Crown) or, subject to paragraph (3) of rule 25, the personal representative of any such person:
Provided that where the residue is not in terms wholly disposed of, the registrar may, if he is satisfied that the testator has nevertheless disposed of the whole or substantially the whole of the estate as ascertained at the time of the application for the grant, allow a grant to be made (subject however to rule 37) to any legatee or devisee entitled to, or to a share in, the estate so disposed of, without regard to the persons entitled to share in any residue not disposed of by the will;
(v) Any specific legatee or devisee or any creditor or, subject to paragraph (3) of rule 25, the personal representative of any such person or, where the estate is not wholly disposed of by will, any person who, notwithstanding that the amount of the estate is such that he has no immediate beneficial interest therein, may have a beneficial interest in the event of an accretion thereto;
(vi) Any legatee or devisee, whether residuary or specific, entitled on the happening of any contingency, or any person having no interest under the will of the deceased who would have been entitled to a grant if the deceased had died wholly intestate."

Rule 21 of the English Non-contentious Probate Rules

"21. (1) Where the deceased died on or after January 1, 1926, wholly intestate, the persons having a beneficial interest in the estate shall be entitled to a grant of administration in the following order of priority, namely:-

(i) The surviving spouse;
(ii) The children of the deceased, or the issue of any such child who has died during the lifetime of the deceased;
(iii) The father or mother of the deceased;
(iv) Brothers and sisters of the whole blood, or the issue of any deceased brother or sister of the whole blood who has died.
(2) If no person in any of the classes mentioned in sub-paragraphs (ii) to (iv) of the last foregoing paragraph has survived the deceased, then, in the case of -

(a) a person who died before January 1, 1953, wholly intestate, or
(b) a person dying on or after January 1, 1953, wholly intestate without leaving a surviving spouse,

the persons, hereinafter described shall, if they have a beneficial interest in the estate, be entitled to a grant in the following order of priority, namely:-

(i) Brothers and sisters of the half blood, or the issue of any deceased brother or sister of the half blood who has died;
(ii) Grandparents;
(iii) Uncles and aunts of the whole blood, or the issue of any deceased uncle or aunt of the whole blood who has died;
(iv) Uncles and aunts of the half blood, or the issue of any deceased uncle or aunt of the half blood who has died.

(3) In default of any person having a beneficial interest in the estate, the Treasury Solicitor shall be entitled to a grant if he claims *bona vacantia* on behalf of the Crown.

(4) If all persons entitled to a grant under the foregoing provisions of this rule have been cleared off, a grant may be made to a creditor of the deceased or to any person who, notwithstanding that he has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion thereto.

(5) Subject to paragraph (3) of rule 25, the personal representative of a person in any of the classes mentioned in paragraphs (1) and (2) of this rule or the personal representative of a creditor shall have the same right to a grant as the person whom he represents:

Provided that the persons mentioned in sub-paragraphs (ii) to (iv) of paragraph (1) and in paragraph (2) of this rule shall be preferred to the personal representative of a spouse who has died without taking a beneficial interest in the whole estate of the deceased as ascertained at the time of the application for the grant.

(5A) The provisions of the *Adoption Act 1958* shall apply in determining the entitlement to a grant as they apply to the devolution of property on intestacy.

(6) In this rule references to children of the deceased include references to his illegitimate and legitimated children, and 'father or mother of the deceased' shall be construed accordingly.

**Rule 27 of the English Non-contentious Probate Rules**

"27. When the beneficial interest in the whole estate of the deceased is vested absolutely in a person who has renounced his right to a grant and has consented to administration being granted to the person or persons who would be entitled to his estate if he himself had died intestate, administration may be granted to such person or one or more (not exceeding four) of such persons; provided that a surviving spouse shall not be regarded as a person in whom the estate has vested absolutely unless he would be entitled to the whole of the estate, whatever its value may be."
"25. The Court may grant administration of the estate of a person dying intestate to the following persons (separately or conjointly) being of the full age of eighteen years, that is to say to -

(a) the husband or wife of the deceased or one or more of the next of kin: or

(b) any other person, whether a creditor or not, if there be no such person entitled as aforesaid resident within the jurisdiction and fit to be so entrusted, or if the person entitled as aforesaid fails, when duly cited, to appear and apply for administration."