

# RPA News

## Regulation. Protection. Action.

*News update for all practitioners from the Victorian Legal Services Board + Commissioner*

**Bulletin No. 37**

**Issued November 2017 (updated December 2017)**

### Changes affecting how executors claim commission

Last year our [RPA News email bulletin #28](#) covered the circumstances under which an executor could claim payment of a commission for their work on an estate. Recent legislative amendments have provided further clarity on this issue.

Given the problems the Commissioner sees that involve solicitors either acting for executors, or as an executor, it is timely to highlight to the profession how these changes affect the legislation governing executors.

#### **What has changed?**

On 1 November 2017, the [Administration and Probate and Other Acts Amendments \(Succession and Related Matters\) Act 2017](#) came into force. This amended the [Administration and Probate Act 1958](#), the [Guardianship and Administration Act 1986](#) and the [Powers of Attorney Act 2014](#) in relation to intestacy, executors' commissions and fees, and other matters.

Among the amendments, section 65 of the *Administration and Probate Act 1953* has now been expanded to include further detail of what is expected of executors, administrators and trustees of deceased persons when claiming a commission from an estate.

#### **Claiming payment**

As discussed in RPA News #28, executors do not have an automatic right to claim a commission from an estate. This has not changed. A commission may only be sought if at least one of three pre-requisite conditions is met:

- the will contains a clause granting payment of a commission;
- the Supreme Court of Victoria makes an order for the executor to receive a commission for their 'pains and troubles'; or
- the beneficiaries give the executor their *fully informed consent* for the executor to take a commission.

Where an executor relies on the third condition above, the amendments to s. 65 provide a minimum standard which must be satisfied before a commission may be claimed.

#### **Disclosure is required**

Regardless of whether an executor seeks the beneficiaries' fully informed consent, consent has already been given or a court order is in place, s. 65D now requires executors to provide *each interested beneficiary* with the information listed below as soon as practicable, and in a language or form that is appropriate to each of the beneficiaries:

- (a) the basis on which the executor is to be paid, being either:
  - (i) by a clause in the will;
  - (ii) with the consent of the interested beneficiaries (see s. 65C); or
  - (iii) by an order of the Court made under s. 65;
- (b) how the payment is to be calculated, including whether it is a commission, percentage of the estate's assets or fees; and
- (c) the estimated value of the executor's payment.

Executors *must also* inform the interested beneficiaries of their right to have the executor's claim reviewed by the Court, and of any substantial changes in the value of the executor's estimated payment.

An executor who does not comply with s. 65D is not entitled to claim payment from the estate.

### **Commission or fee**

Under s. 65(1) executors may now also elect to charge fees instead of a commission, providing those fees are less than any entitlement to commission under the will, that any specialist professional skills of the executor are *not* taken into account, and they are distinguished from fees charged for professional services in line with s. 65E.

### **Repaying monies to the estate**

The addition of s. 65A gives the Court the power to order a commission or any fee, cost or disbursement be reduced or repaid to the estate, if it is satisfied that the amount is excessive. Any person or creditor with an interest in the will or estate may make this application, or the Court may take this action of its own motion.

### **Update your knowledge**

I urge all lawyers whose work involves wills and estates to familiarise themselves with these changes at their earliest opportunity. Lawyers who act on behalf of clients who are executors should advise their clients about these requirements, and ensure that beneficiaries are similarly aware, as a failure to do so [may amount to a disciplinary breach](#).

In addition, a lawyer acting as an executor themselves who fails to take executor's commission appropriately may face a serious conduct issue.

### **Russell Daily**

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