

KILLING THE GOOSE AND KEEPING THE GOLDEN NEST EGG

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The forfeiture rule is a common law principle which provides that where a person is criminally responsible for the death of another from whose estate that person will benefit, then the person's interest in that property is forfeited. The forfeiture rule has been modified both by equity and statute. This paper contends that whilst the forfeiture rule is based on an abhorrence of unlawful killing whether it be murder or manslaughter, an inflexible application of the rule will produce unjust results. The underlying policy rationale for the forfeiture rule is that by committing a crime, including slaying a fellow beneficiary, no one can obtain a lawful benefit for themselves and so gain an advancing interest or an additional gift under a will. This policy will only deprive a killer from those benefits which flow from the wrongful act.

This paper argues that statutes allowing judicial discretion in cases of manslaughter based on 'the justice of the case' have both skewed the outcome in favour of the killer and added unnecessary complexity and uncertainty. It is contended that the better view is to abrogate the common law, which applies in all Australian jurisdictions apart from New South Wales (NSW) and the Australian Capital Territory (ACT), by substituting a codified solution (Parliament rather than judges being the appropriate body to balance the public interest with the interests of individuals) which is designed to achieve greater fairness, improve the efficiency of the distribution of justice, provide a comprehensive solution involving other relevant legislation and reflect contemporary values within the Australian community.

It is argued that any changes in this area of the law have complex and far reaching ramifications which not only cannot be accurately assessed on a case by case basis, but also risk leaving the law floundering in a quagmire of uncertainty.

I INTRODUCTION

'If once a man indulges himself in murder, very soon he comes to think little of robbing; and from robbing he comes next to drinking and sabbath-breaking, and from that to incivility and procrastination'.¹

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¹ T de Quincey, *On Murder Considered As One of the Fine Arts* (Blackwood's Edinburgh Magazine, November 1839) 662-663.

The title of this paper is derived from an article written in 1958 by Toohey² in which the author posed the question whether a person can take a benefit arising out of a death caused by his own criminal act and stated that the law had answered with a very emphatic ‘no’, such denial being based on public policy. It is here contended that, regrettably, the answer in 2008 is equivocal particularly in NSW (except for murder) with the outcome turning on highly fact specific circumstances. The starting point in this paper is that there is ‘no blunder in a law which forbids a person to take a benefit from her own wrong’.³ The question to be answered is under what specified circumstances (if any) should the law permit a deviation from the absolute forfeiture rule and by whom should such decisions be made.

Given the prevalence of unlawful killings in domestic settings⁴ in often tragic circumstances, this is no academic point. In such cases, the killer is normally a beneficiary under the victim’s will. This was the situation in such high profile cases as Sef Gonzales⁵ who killed his parents and sister, and Fiona Fitter⁶ who was killed by her husband and son. As recently as 11 August 2008, Michael Clark was sentenced by Kirby J in the NSW Supreme Court to a 24 year non-parole term of imprisonment for murdering his 74 year-old father with his son to secure their share of a \$660 000 inheritance.⁷

Only two Australian jurisdictions, NSW⁸ and the ACT,⁹ have sought to modify the effects of the absolute forfeiture rule by statute. All other Australian jurisdictions rely on the common law. It is argued that the law in Australia in this area should be consistent.

This paper commences with a brief history of the absolute forfeiture rule at common law, followed by a summary of the views of critics of the forfeiture rule who have focused attention on ameliorating the severity of the rule in cases of manslaughter. The next section looks at the history of the forfeiture rule in Australia especially in NSW where judges in the 1980s began to modify the rule until the NSW Court of Appeal reaffirmed the absolute forfeiture rule in 1994. The subsequent section analyses the *Forfeiture Act 1982* in England, as this Act was largely adopted by NSW in 1995, which is then followed by a section on the NSW legislation including critical discussion of the cases decided under that legislation and amendments to the legislation in 2005. The final section covers the New Zealand Law Commission’s draft *Succession (Homicide) Act* in 1997 to codify the homicidal heirs laws which this paper argues is the most appropriate solution to implementing a comprehensive statutory regime for forfeiture as opposed to variations on the *Forfeiture Act 1982* in England which adopts a ‘justice of the case’ approach.

² J L Toohey, ‘Killing the Goose that Lays the Golden Eggs’ (1958) 32 *Australian Law Journal* 14, 14.

³ *Troja v Troja* (1994) 33 NSWLR 269, 296 (Mahoney JA).

⁴ During 2005-06, the majority of female victims Australia wide (66 out of 113 or 58%) were killed as a result of a domestic altercation. M Davies and J Mouzos, ‘Homicide in Australia: 2005-06 National Homicide Monitoring Program Annual Report’ (Research and Public Policy Series No 77, Australian Institute of Criminology, 2007) 17.

⁵ *Gonzales v Clarides* (Unreported, NSWCA, Mason P, Beazley JA, Foster AJA, 18 August 2003).

⁶ *In the Estate of the late Fiona Ellen Fitter and the Forfeiture Act 1995; Public Trustee of New South Wales v Fitter and (3) Ors* (Unreported, NSWSC, Lloyd AJ, 24 November 2005).

⁷ *R v Clark* [No 3] [2008] NSWSC 795 (Unreported, Kirby J, 11 August 2008).

⁸ *Forfeiture Act 1995* (NSW).

⁹ *Forfeiture Act 1991* (ACT).

II HISTORY OF THE FORFEITURE RULE IN THE COMMON LAW

Prior to 1870 the property of a convicted felon was forfeited to the Crown¹⁰ as ‘feudal doctrines of attainder, forfeiture, corruption of blood and escheat operated to forfeit the killer’s interest to the Crown. The *Forfeiture Act 1870* (Imp)¹¹ abolished those doctrines’.¹² As Freiberg and Fox observe ‘[t]his Act provided the model for almost all Australian jurisdictions, which followed the lead of the mother country soon after’.¹³

The forfeiture rule is a principle that prevents a person from benefiting from their wrongful conduct and can be described as a fundamental principle of justice. It would be unconscionable to allow a killer to enjoy an unjust enrichment. It was left to the common law to formulate the principle of public policy that ‘no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person’.¹⁴ This principle applied ‘whether it be a case of murder or by manslaughter’¹⁵ and ‘so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights’.¹⁶

Lord Atkin referred to this principle as ‘the absolute rule’¹⁷ which Hamilton LJ justified on the basis that any distinction between murder and manslaughter:

seems to me either to rely unduly upon legal classification or else to encourage what, I assume, would be very noxious – a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison.¹⁸

Some 80 years after this prescient observation, Meagher JA ruefully noted ‘there have been numerous attempts by high-minded jurists ... to modify the rule’.¹⁹ The effect of the rule is that a killer cannot inherit from his or her victim, the inheritance is forfeited and passes to the next beneficiary.

Such modification has involved two aspects. The first aspect is the scope of the forfeiture rule; that is whether both murder and manslaughter are encompassed by the rule. The second aspect is the operation of the forfeiture rule and whether the benefit flowing to the killer is intercepted before title passes to the killer as heir, devisee or joint tenant or whether a constructive trust is imposed on the killer. The focus of this paper is upon the first aspect. However, as regards the second aspect, it will be argued that treating the killer as having pre-deceased the victim(s) is the preferable solution to adopting a constructive trust approach.

¹⁰ M Cope, *Constructive Trusts* (Law Book Co, 1992) 554.

¹¹ *Forfeitures For Treason and Felony Act 1870* 33 & 34 Vict, c 23.

¹² K Mackie, ‘Manslaughter and Succession’ (1988) 62 *Australian Law Journal* 616, 616.

¹³ A Freiberg and R Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6 *Australian Journal of Legal History* 1, 44.

¹⁴ *Cleaver v Mutual Reserve Fund Association* [1892] 1 QB 147, 156 (Fry LJ).

¹⁵ *Re Callaway* [1956] Ch 559, 562 (Vaisey J).

¹⁶ *Cleaver v Mutual Reserve Fund Association* [1892] 1 QB 147, 158-9 (Fry LJ).

¹⁷ *Beresford v Royal Insurance Co Ltd* [1938] AC 586, 599.

¹⁸ *In the Estate of Hall* [1914] P 1, 7.

¹⁹ *Troja v Troja* (1994) 33 NSWLR 269, 299.

III INTELLECTUAL BASIS FOR REFASHIONING OF THE FORFEITURE RULE

There have been critics of the forfeiture rule from its inception to the present day²⁰. The substance of the criticism is that the scope and operation of the forfeiture rule has led to unfairness and inconvenience. In the view of such critics, the forfeiture rule should be modified to better conform to the standards and values of contemporary society. This then poses the question of what philosophical option is available to accommodate a modified forfeiture rule.

Critics like Ames and Toohey have focused on the question as to when the swingeing forfeiture axe comes into operation. In the United States, Ames pointed out:

There are three possible views as to the legal effect of the murder upon the title to the property of the deceased: 1. The legal title does not pass to the murderer as heir or devisee. 2. The legal title passes to the murderer, and he may retain it in spite of his crime. 3. The legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer.²¹

As the second view is clearly untenable, given a person cannot ‘slay his benefactor and thereby take his bounty’²² as an inheritance, Ames focuses his attention on the first and third views. Ames voices his objection to the first view by suggesting ‘[i]n the case of inheritance, surely the court cannot lawfully say that title does not descend, when statute, the supreme law, says that it shall descend’.²³ Ames considered the third view to be the only viable option which in turn was premised on equitable intervention.²⁴

Toohey echoes Ames’s objection to the first view by stating ‘[d]espite this the English courts have been prepared to allow the rule of public policy to prevail even at the expense of clear statute law’.²⁵ Toohey relied upon²⁶ Harvey J in *Re Jane Tucker* who opined ‘[i]t is an extraordinary instance of judge-made law invoking the doctrine of public policy in order to prevent what is felt in a particular case to be an outrage’.²⁷

Toohey notes ‘American courts have found a solution ... through the machinery of a constructive trust ... [s]uch a solution would have met with the approval of Ames’.²⁸ As will be discussed later in this paper, various law reform commissions have recommended that the rules of intestate succession should be applied as if the killer had died immediately before the intestate and that a constructive trust solution is not productive of certainty.

Other critics like Chadwick, Youdan and Dillon have primarily addressed the scope of the forfeiture rule. In the United Kingdom, Chadwick suggested ‘that the [forfeiture]

²⁰ These critics include J L Toohey, J B Ames, J Chadwick, T G Youdan and A Dillon.

²¹ J B Ames, ‘Can a Murderer Acquire Title by his Crime and Keep it?’ in J B Ames (ed), *Lectures on Legal History and Miscellaneous Legal Essays* (1913) 310, 311.

²² *In the Estate of Hall* [1914] P 1, 7.

²³ Ames, above n 21, 312.

²⁴ *Ibid* 314.

²⁵ Toohey, above n 2, 16.

²⁶ *Ibid*.

²⁷ *Re Jane Tucker* (1920) 21 SR NSW 175, 181.

²⁸ Toohey, above n 2, 16.

rule is laid down in a too rigid form'.²⁹ Chadwick examined the forfeiture rule by comparison with some other civil codes³⁰ whereby 'the rule is expressly based on the ground that the claimant is then unworthy to take as beneficiary ... there is a presumption in those cases that the testator would have revoked the bequest to his slayer'.³¹

Youdan widened the criticism by suggesting that '[t]he courts in these cases³² appear to have arrived at their conclusions without considering the usefulness of the broad principles they declare'.³³ Youdan's view is that 'distinctions can be drawn between different types of killing' based on whether a killer has done 'a dangerous act intending harm'.³⁴

Dillon has gone so far as to suggest that the forfeiture rule is a misnomer and is a principle of general law.³⁵ Invoking Dworkin's criticism of legal positivism with its notion that the law consists only of legal rules,³⁶ Dillon argues the principle:

Is all pervading, and is apt to be updated by judges of either jurisdiction [common law or equity] to ensure the principle conforms to contemporary standards and social values. The principle is inextricably linked to notions of unjust enrichment, unconscionability, appropriate behaviour and moral culpability. It is not rigid, but must compete with other principles of the modern age.³⁷

The genesis of the debate over the scope of the forfeiture rule turns on finding a principled and comprehensive solution to cases of manslaughter or where an acquittal to a charge of murder has occurred on the grounds of mental impairment.

IV HISTORY OF THE FORFEITURE RULE IN AUSTRALIA

The *Forfeiture Act 1870* did not apply to Australia by paramount force. Accordingly, almost all Australian jurisdictions passed legislation of their own soon after.³⁸ Whilst the abolition of feudal forfeiture for felony took different and sometimes more tortuous forms,³⁹ by 1891, a year before *Cleaver*⁴⁰ was decided, forfeiture in Australia was a 'tabula rasa' awaiting the common law adoption of a principle of public policy.

²⁹ J Chadwick, 'A Testator's Bounty to his Slayer' (1914) 30 *Law Quarterly Review* 211, 211.

³⁰ German, Italian, Portuguese and Spanish Civil Codes.

³¹ Chadwick, above n 29, 211-12.

³² The cases cited were *Cleaver v Mutual Reserve Fund Association* [1892] 1 QB 147 and *Beresford v Royal Insurance Co Ltd* [1938] AC 586.

³³ T G Youdan, 'Acquisition of Property by Killing' (1973) 89 *Law Quarterly Review* 235, 239.

³⁴ *Ibid* 240.

³⁵ A Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 254.

³⁶ R Dworkin, 'The Model of Rules I' in R Dworkin (ed), *Taking Rights Seriously* (1987) 26, 28.

³⁷ Dillon, above n 35, 254.

³⁸ Freiberg and Fox, above n 13, 44-7. *Forfeitures for Treason and Felony Abolition Act 1873* (WA); *Treason and Felony Forfeiture Act 1874* (SA); *Forfeitures for Treason and Felony Abolition Act 1878* (Vic); *Criminal Law Procedure Act 1881* (Tas); *Criminal Law Amendment Act 1883* (NSW); *Escheat (Procedure and Amendment) Act 1891* (Qld).

³⁹ *Ibid* 44.

⁴⁰ *Cleaver v Mutual Reserve Fund Association* [1892] 1 QB 147.

The key cases that establish the parameters of the absolute forfeiture rule in Australia will be divided into pre and post war periods.

A *Pre War Period*

The leading early Australian case is *Helton v Allen*⁴¹ in 1940. Helton was acquitted of murder but a civil action was then brought by Isabella Allen the mother of the deceased. The jury found that Helton had unlawfully killed the deceased. On the basis of this finding, the court then declared that Helton was not entitled to take under the deceased's will and any right or benefit passed to those person(s) who would have been entitled if there had been a lapse of Helton's interest under the will.⁴²

Helton's appeal was considered by the High Court who accepted that the verdict of unlawful killing could not 'be set aside on the ground that there was no sufficient evidence to support it'.⁴³ The joint judgment went on to consider whether Helton's acquittal on the murder charge was a complete answer to the coming into operation of the forfeiture rule.

[I]t may be said that to retry as a civil issue the guilt of a man who has been acquitted on a criminal inquest is so against policy that a rule drawn from public policy ought not to authorise it. There is, however, no trace of any such conception in the history of the principle that by committing a crime no man could obtain a lawful benefit to himself. To *qualify the rule* in the manner suggested would, we think, amount to *judicial legislation*.⁴⁴ [emphasis added]

The significant issue in *Helton v Allen* has two dimensions. There is the weighty obiter acceptance of the absolute forfeiture rule by the High Court of Australia.⁴⁵ Then there is the *de jure* endorsement in the widest possible form of the rule by upholding a verdict of 'unlawfully killed' in a civil action was sufficient to trigger the forfeiture rule and make the acquittal in the murder trial irrelevant.⁴⁶

The author contends that the better view is that the joint judgment represents unequivocal endorsement of the scope of the absolute forfeiture rule, a view which is supported by Rolfe J who observed '[t]heir Honours did not indicate any proviso to this rule'⁴⁷ and by Mahoney JA who stated that '[t]he legal principle has been affirmed and the application of it to circumstances of the present kind [a wife killed her husband and was convicted of manslaughter] has been approved by the High Court'.⁴⁸ The precedent established in *Helton v Allen* is significant as the following examination of the post war period demonstrates, with judges in NSW seeking to dilute the absolute forfeiture rule.

⁴¹ *Helton v Allen* (1940) 63 CLR 691.

⁴² *Ibid* 697 (Starke J).

⁴³ *Ibid* 709 (Dixon, Evatt and McTiernan JJ).

⁴⁴ *Ibid* 710 (Dixon, Evatt and McTiernan JJ).

⁴⁵ *Ibid* 709 (Dixon, Evatt and McTiernan JJ) where the joint judgment approves Hamilton LJ's statement in *In the Estate of Hall* [1914] P 1, 7 'that the principle could only be expressed in the wide form'.

⁴⁶ *Helton v Allen* (1940) 63 CLR 691 was followed in *Rivers v Rivers* (2002) 84 SASR 426.

⁴⁷ *Permanent Trustee Company Ltd v Freedom from Hunger Campaign* (1991) 25 NSW LR 140, 148.

⁴⁸ *Troja v Troja* (1994) 33 NSWLR 269, 294.

B *Post War Period*

Like two lopsided bookends the watershed cases of *Public Trustee v Evans*⁴⁹ in 1985 and *Troja v Troja*⁵⁰ in 1994 stand as the low and high watermarks respectively (depending on one's perspective) for the common law absolute forfeiture rule in post war Australia. *Public Trustee v Evans* ushers in the equitable Trojan horse while *Troja v Troja* closes the ever widening equitable door.

1 *The Equitable Trojan Horse Emerges*

As Peart observes 'the Supreme Court of NSW started to modify the forfeiture rule in the 1980s'.⁵¹ Similarly, Mackie comments that 'the common law position in Australia has developed along different and more flexible lines' [than in England].⁵² Although, as will be discussed in the later section on England, the 1970 case of *Gray v Barr*⁵³ marked a turning point in judicial thinking in England as to the need to distinguish between murder and manslaughter for the purposes of the application of the forfeiture rule, ultimately taking statutory expression in the *Forfeiture Act 1982*.⁵⁴ Possibly, the passage of this Act emboldened judges in NSW.

In *Public Trustee v Evans*,⁵⁵ Young J had to consider whether a woman who had killed her husband to protect herself and her children and was acquitted of manslaughter was debarred from recovery. His Honour commenced his judgment by noting 'the principle [forfeiture] is not in doubt, however its exact ambit is'.⁵⁶ His Honour went on to state that it was open to a judge 'to make the pronouncement if he thinks it appropriate as to the limitation of the rule for his particular age'⁵⁷ and concluded 'that there is no rule of public policy which prevents the widow from inheriting the estate of the deceased'.⁵⁸ Arguably, Young J confined himself to the facts of the case, but the result was in sharp contrast to the common law position in both England and Australia.

It is contended that this decision falls within the provision of a solvent criticised by two members of the High Court.

Judges have no authority to invent legal doctrine that distorts or does not extend or modify legal rules and principles ... It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent' for every social, political or economic problem.⁵⁹

⁴⁹ *Public Trustee v Evans* (1985) 2 NSWLR 188.

⁵⁰ *Troja v Troja* (1994) 33 NSWLR 269.

⁵¹ N Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 8.

⁵² K Mackie, 'The Troja Case – Criminal Law, Succession and Law Reform' (1998) 5 *Canberra Law Review* 177, 185.

⁵³ *Gray v Barr* [1970] 2 QB 626. On appeal: *Gray v Barr* [1971] 2 QB 554.

⁵⁴ *Forfeiture Act 1982* (UK) c 34.

⁵⁵ *Public Trustee v Evans* (1985) 2 NSWLR 188.

⁵⁶ *Ibid* 191.

⁵⁷ *Ibid* 192.

⁵⁸ *Ibid* 193.

⁵⁹ *Breen v Williams* (1995-1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

It is also not the law.⁶⁰ Furthermore, it is argued that Young J was bound by the authority of the High Court in *Helton v Allen*. Immediately following Young J's decision in *Evans*, Powell J trenchantly observed, 'I regret that I am unable to accept that the principle which, until now, has been so consistently applied has retreated to the stage where it is not to be applied in the case of manslaughter at the hands of the beneficiary'.⁶¹

Powell J, unimpressed by further inroads into the forfeiture rule, reiterated his views seven years later in *Bain v Morabito*:⁶²

That a felonious slaying deprived the beneficiary of any benefit from the estate of the victim. From that simple rule there were no exceptions provided by the law. If exceptions were to exist, they would have to be afforded by parliament, not by judges.⁶³

One of those inroads was a decision of Kearney J in *Public Trustee v Fraser*⁶⁴ 'who considered that the forfeiture rule was based on a broader principle of unconscionability'.⁶⁵ '[T]he fundamental question is to determine whether the taking of the benefit by a person through his crime would be unconscionable as representing an unjust enrichment of that person so as to attract the public policy rule'.⁶⁶

The NSW cases of *Evans* and *Fraser* were followed by Coldrey J in the Victorian Supreme Court in *Re Keitley*. 'In one sense it [circumstances of killing and behaviour of offender] permits the court to consider the question of forfeiture in the manner provided for in the English *Forfeiture Act* [1982] in order to achieve justice in each case'.⁶⁷

So in NSW, equity had come full circle in refashioning the forfeiture rule. The circle commenced with a 'solvent' for the particular age then moved through the gamut of unconscionability and finally ended as *de facto* 'judicial legislation'.⁶⁸ Arguably, given Coldrey J's judgment in *Re Keitley*, the same comment could also apply to Victoria, notwithstanding the apparent failure of judges in both jurisdictions to adhere to the rules of precedent given the High Court's decision in *Helton v Allen*.

2 *Troja v Troja: The Common Law Triumphant*

The stage was now set for the NSW Court of Appeal to consider the status of the forfeiture rule in Australia. The case was *Troja v Troja*,⁶⁹ where the wife had shot the husband, had been convicted of manslaughter on the grounds of diminished responsibility and sentenced to eight years imprisonment. The contest was between the wife and the deceased's mother.

⁶⁰ *Troja v Troja* (1994) 33 NSWLR 269, 299 (Meagher JA).

⁶¹ *Kemperle v Public Trustee* (Unreported, NSWSC, Powell J, 20 November 1985) 16.

⁶² *Bain v Morabito* (Unreported, NSWSC, Powell J, 14 August 1992).

⁶³ Quoted in *Troja v Troja* (1994) 33 NSWLR 269, 280-1 (Kirby P).

⁶⁴ *Public Trustee v Fraser* (1987) 9 NSWLR 433.

⁶⁵ Mackie, above n 52, 185.

⁶⁶ *Public Trustee v Fraser* (1987) 9 NSWLR 433, 444 (Kearney J).

⁶⁷ *Re Keitley* [1992] 1 VR 583, 587.

⁶⁸ The nadir of judicial invention was finally achieved by Rolfe J in *Permanent Trustee Company Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140 where his Honour divined a new test of whether the killer intended to benefit.

⁶⁹ *Troja v Troja* (1994) 33 NSWLR 269.

The Court split 2-1. Kirby P (in the minority) took the view that the absolute rule ‘paid no regard to the virtually infinite variety of circumstances in which a homicide may occur, and the ameliorative circumstances that may sometimes exist.’⁷⁰ His Honour ‘unhesitatingly’ favoured the authority of Young J and Kearney J ‘because I regard it as more conceptually sound and more liable to produce justice in its operation’.⁷¹ Kirby P was effectively pointing out that there may be instances where the inflexible application of the forfeiture rule will operate against public policy by not granting a beneficial interest to the killer.⁷²

The majority, Mahoney and Meagher JJA, favoured the stricter line taken by Powell J. Mahoney JA properly pointed out that Mr Troja was shot to death and ‘he has now no opportunity to live or to explain what he did ... A man or woman cannot be killed because he or she “deserves to be killed”’.⁷³

His Honour saw

nothing *unconscionable* in her not being able to claim, in addition to her own property, the property of her husband ... the present principle is *not* one which depends upon the Chancery jurisdiction. It has quite a different basis.⁷⁴ (Emphasis added)

Meagher JA was even more scathing. His Honour’s short judgment contains some memorable phrases commencing with the ‘principle is fixed in an abhorrence of murder, not a disapproval of greed’, continuing with ‘all felonious killings are contrary to public policy and hence, one would assume, unconscionable’, and ending with the judicial classic of ‘there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles’.⁷⁵

Thus, the NSW Court of Appeal restated the absolute forfeiture rule in *Troja v Troja* in similar terms to the High Court in *Helton v Allen*. Arguably, therefore, all the above cases that had sought to dilute the absolute forfeiture rule had been wrongly decided. In *Rivers v Rivers*⁷⁶ the Full Court of the Supreme Court of South Australia decided a case exactly on point with *Helton v Allen*, as Mrs Rivers who had shot and killed her husband was acquitted of murder and manslaughter. Having noted that the High Court had specifically directed its attention to the aspect of double jeopardy, Duggan J did not think ‘that this court should depart from the decision of the High Court’.⁷⁷

It seems clear, therefore, that the common law of Australia permits no dilution of the absolute forfeiture rule and strict adherence to the standard that any form of culpable homicide prevents the offender gaining a financial benefit. This was the conclusion drawn in NSW after *Troja v Troja* was decided, and with a perceived need to introduce legislation to ameliorate the absolute forfeiture rule, NSW legislators turned to the Forfeiture Act in England which had been in operation for some 13 years. It is now necessary to examine the English legislation as it was essentially adopted by NSW in

⁷⁰ Ibid 282.

⁷¹ Ibid 285.

⁷² Ibid 284.

⁷³ Ibid 289 and 293.

⁷⁴ Ibid 298.

⁷⁵ Ibid 299.

⁷⁶ *Rivers v Rivers* (2002) 84 SASR 426.

⁷⁷ Ibid 442.

the same way as the ACT had imported the English Act in 1991. With the passage of forfeiture legislation in NSW, the situation in 1995 and now is that the common law absolute forfeiture rule applies in all Australian jurisdictions apart from the ACT and NSW. This paper argues that such a situation is unsatisfactory and that a consistent and comprehensive solution is required.

V FORFEITURE ACT ENGLAND 1982

English judges had continued to apply the absolute forfeiture rule,⁷⁸ although several cases were considered to be ‘straws in the wind’⁷⁹ or indeed aberrations which laid the foundation for statutory reform. The most significant of these was *Gray v Barr*.⁸⁰ The case is notable in several ways. The judge at first instance, Lane J, concluded:

The logical test [to be applied in deciding whether a person guilty of manslaughter can recover under a policy of indemnity] is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the Court should not entertain a claim for indemnity.⁸¹

The Court of Appeal approved this test,⁸² and Salmon LJ having observed that ‘public policy is rightly regarded as an unruly steed which should be cautiously ridden’ went on to opine that ‘manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convicts’.⁸³

Thus, as Vinelott J noted in *Re K (dec’d)*, the above dicta ‘support the view that not all cases of manslaughter involve the consequence that the person convicted forfeits all right of inheritance from the person killed’.⁸⁴

*Re Giles*⁸⁵ was decided immediately following *Gray v Barr* and Lane J’s test was not applied or cited. In a case involving manslaughter by reason of diminished responsibility, Pennycuik V-C held that:

Neither the deserving of punishment nor carrying a degree of moral culpability has ever been a necessary ingredient of the crime the perpetrator of which is disqualified from benefiting under the will or intestacy of the person whom he has killed.⁸⁶

The Vice-Chancellor specifically referred⁸⁷ to Hamilton LJ’s ‘noxious’ observation⁸⁸ and that any qualification of the rule ‘can only be done by a higher tribunal’.⁸⁹ One

⁷⁸ *Re Dellow’s Will Trusts* [1964] 1 WLR 451. A wife killed her husband who had suffered a number of strokes and then took her own life. Those claiming through the wife’s estate were held to have no valid claim.

⁷⁹ *Dunbar v Plant* [1997] 4 All ER 289, 310 (Phillips LJ).

⁸⁰ *Gray v Barr* [1970] 2 QB 626. On appeal, *Gray v Barr* [1971] 2 QB 554.

⁸¹ *Gray v Barr* [1970] 2 QB 626, 640.

⁸² Although as Peart, above n 51, 8 observes the *Gray v Barr* test has been applied in several, though not all, subsequent English cases.

⁸³ *Gray v Barr* [1971] 2 QB 554, 581.

⁸⁴ *Re K (dec’d)* [1985] 1 Ch 85, 97.

⁸⁵ *Re Giles* [1972] Ch 544.

⁸⁶ *Ibid* 552.

⁸⁷ *Ibid*.

commentator in reviewing *Re Giles* and seeking the formulation of ‘a satisfactory and workable rule’⁹⁰ considered that ‘it seems necessary to look to Parliament’.⁹¹

A decade after he had decided *Re Giles*, Lane LCJ in *R v National Insurance Commissioner, ex parte Connor*⁹² said:

That in each case it is not the label which the law attaches to the crime which has been committed but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice.

In that case, which gave much impetus to the passing of the *Forfeiture Act 1982*,⁹³ a widow had forfeited her welfare benefit because she was found guilty of her husband’s manslaughter.

England’s Forfeiture Act was a Private Member’s Bill and its adoption was quite unexpected.⁹⁴ Under s 2 of the Act a two step test is involved. Under the first step, the court defers to the forfeiture rule (whatever is its scope).⁹⁵ Only if the unlawful killing⁹⁶ falls within the forfeiture rule does the court move to the second step of considering the statutory provisions in determining whether the justice of the case requires the forfeiture rule to be modified.

For example, in *Re K*⁹⁷ Vinelott J found that a wife’s shooting of her husband to deter a further brutal attack was an intentionally violent act and fell within the *Gray v Barr* test. However, his Honour then exercised his discretion under the Act to modify the rule in the circumstances.

One commentator has properly stated that the Act ‘does nothing to define the scope of the rule which is a condition precedent of the discretion’s exercise’.⁹⁸ Buckley contrasts the decision of Gibson J in *Re H (dec’d)*⁹⁹ with that of Kolbert J in *Jones v Roberts*.¹⁰⁰ In *Re H (dec’d)*, Gibson J held that the test to apply was whether the perpetrator had acted ‘deliberately or intentionally’ following *Gray v Barr* and that in applying the test the court ‘must scrutinise all the circumstances with care’.¹⁰¹

⁸⁸ *In the Estate of Hall* [1914] P 1, 7.

⁸⁹ *Re Giles* [1972] Ch 544, 553.

⁹⁰ G Miller, ‘Slaying a Testator’ (1972) 35 *Modern Law Review* 426, 429.

⁹¹ *Ibid* 430.

⁹² *R v National Insurance Commissioner, ex parte Connor* [1981] QB 758, 765. Lane LCJ appears to share the same perspective as Young J in *Public Trustee v Evans*, whereas Pennycuik V-C is in the same mould as Mahoney and Meagher JJA in *Troja v Troja* (1994) 33 NSWLR 269.

⁹³ P H Kenny, ‘Forfeiture Act 1982’ (1983) 46 *Modern Law Review* 66, 66. In the same way as *Troja v Troja* (1994) 33 NSWLR 269 was the catalyst for the *Forfeiture Act 1995* (NSW).

⁹⁴ S Cretney, ‘The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform’ (1990) 10 *Oxford Journal of Legal Studies* 289, 301.

⁹⁵ A recognition that the common law may change over time.

⁹⁶ ‘Unlawful killing’ is not defined by the Act, but the power to modify the rule excludes convicted murderers: *Forfeiture Act 1982* (UK) s 5.

⁹⁷ *Re K* [1995] 1 Ch 85.

⁹⁸ R A Buckley, ‘Manslaughter and the Forfeiture Rule’ (1995) 111 *Law Quarterly Review* 196, 196. Buckley was considering ‘the true extent of the underlying rule of public policy’ at 196.

⁹⁹ *Re H (dec’d)* [1990] 1 FLR 441.

¹⁰⁰ *Jones v Roberts* [1995] 2 FLR 422.

¹⁰¹ *Re H (dec’d)* [1990] 1 FLR 441, 447.

The circumstances were that ‘a devoted husband had stabbed his wife while suffering from hallucinations caused by an idiosyncratic reaction to a drug which he had been prescribed for a psychotic depressive illness’.¹⁰²

His Honour found that the husband was not precluded from taking by the forfeiture rule but would have modified the rule under the Act in any event. By contrast, in *Jones v Roberts* where the son battered his parents to death while suffering from paranoid schizophrenia, Kolbert J refused to follow *Re H (dec’d)* and applied the forfeiture rule.

This prompted the following comment from the New Zealand Law Commission: ‘there seems to be profound disagreement among English judges as to how the statute is to be applied, in part because no clear principle dictates how “wrongful” a wrongful killing must be before the bar on profiting should apply’.¹⁰³

Commentators appear to be divided on the merits of the Act. Mackie approves the majority approach of the English Court of Appeal in *Dunbar v Plant*.¹⁰⁴

As Phillips LJ stated in that case¹⁰⁵ the Forfeiture Act has given the court a greater degree of flexibility than could have been achieved by judicial modification of the forfeiture rule, and the appropriate course where the application of the rule appears to conflict with the ends of justice is to exercise the powers given by the legislation.¹⁰⁶

Less favourably, Atiyah has observed that ‘the 1982 Act only nibbles at one corner of the principle’.¹⁰⁷ Peart agrees: ‘the Act [s 2(4)] does no more than confer a power to modify the forfeiture rule when it is found to be applicable and only then in relation to certain property interests’.¹⁰⁸

The Forfeiture Act has been in operation for over 25 years. Whilst the English Law Commission has not been asked to review the workings of the Act itself, the Commission has recently published a report¹⁰⁹ examining the relationship between forfeiture and the intestacy rules with reference to the difficulties highlighted in the case of *Re DWS (dec’d)*.¹¹⁰

In that case, RS was convicted of murdering his parents, neither of whom left a will. At the time of the murders, RS had a two-year old son who subsequently claimed to be entitled to his grandparents’ estates by virtue of s 47(1)(i) of the *Administration of Estates Act 1925* (UK). To succeed under this section the court would have been required to treat RS as having predeceased the plaintiff’s grandfather. This, in giving the section its plain meaning, the court declined to do.¹¹¹

¹⁰² Buckley, above n 98, 197.

¹⁰³ New Zealand Law Commission, *Succession Law: Homicidal Heirs*, Report No 38 (1997) 5.

¹⁰⁴ *Dunbar v Plant* [1997] 4 All ER 289.

¹⁰⁵ *Ibid*, 311.

¹⁰⁶ Mackie, above n 52, 196.

¹⁰⁷ P S Atiyah, ‘Common Law and Statute Law’ (1985) 48 *Modern Law Review* 1, 28.

¹⁰⁸ Peart, above n 51, 24.

¹⁰⁹ England and Wales Law Commission, *The Forfeiture Rule and the Law of Succession*, Report No 295 (2005).

¹¹⁰ *Re DWS (dec’d)* [2001] 1 AER 97.

¹¹¹ R Kerridge, ‘Visiting the Sins of the Fathers on their Children’ (2001) 117 *Law Quarterly Review* 371, 374-5.

The England and Wales Law Commission considered the outcome in *Re DWS (dec'd)* to be unsatisfactory because it was unjust to penalise the grandson for the crime of his parent; it was more likely that the deceased would have wished to benefit their grandchild than the other relatives; and the result contradicted the general policy of the intestacy legislation which is to prefer descendants to siblings and other relatives.¹¹²

The England and Wales Law Commission proposed the solution that in situations where a person forfeits the right to inherit by killing an intestate, the rules of intestate succession should be applied as if the killer had died immediately before the intestate.¹¹³

Significantly, the National Committee for Uniform Succession Laws with all States and Territories has very recently endorsed the England and Wales Law Commission position that 'where the forfeiture rule prevents a person from sharing in the intestate estate ... that person should be deemed to have died before the intestate'.¹¹⁴ The National Committee, having noted that the English position was consistent with recommendations made by the New Zealand Law Commission in 1997, went on to conclude that 'the option of extending constructive trusts to these situations would not be productive of certainty, which is one of the aims of the proposed intestacy rules'.¹¹⁵

It is contended the above two Law Reform Commission recommendations that the statutory rules of intestate succession should be applied as if the killer had died immediately before the intestate and the consequent rejection of the constructive trust doctrine, allied with the lack of judicial agreement on how to apply the Forfeiture Act, all lend weight to the codified solution recommended by the New Zealand Law Commission.¹¹⁶

As will be argued in the next two sections, the real difficulty with the English Forfeiture Act (and the equivalent NSW legislation which is modelled on the English Act) lies in its partial coverage. This is vividly illustrated by the case of *Re DWS (dec'd)* where legislation based on 'the justice of the case' failed a two year old child because the applicant's father was excluded under the first step of the two step test. In order to avoid uncertainty for executors of estates, a comprehensive solution across Australia is required if the absolute forfeiture rule is not to be imposed or individual judicial discretion exercised. This requires specific consideration of forfeiture in other relevant legislation such as the respective Succession Acts in all jurisdictions.

VI FORFEITURE ACTS IN AUSTRALIA

Two jurisdictions in Australia, ACT and NSW, have enacted Forfeiture Acts which are in substance similar to the English Act. It is contended that the uncritical adoption of an 'off the shelf' legislative solution from a foreign jurisdiction where there was already demonstrated significant judicial inconsistencies in interpretation of the legislation was a serious error of political judgment. The ACT introduced a Forfeiture Act in 1991¹¹⁷

¹¹² See England and Wales Law Commission, above n 109, 1.8.

¹¹³ *Ibid* 3.33.

¹¹⁴ Law Reform Commission of New South Wales, *Uniform Succession Laws: Intestacy*, Report No 116 (2007) 12.46.

¹¹⁵ *Ibid* 12.45.

¹¹⁶ New Zealand Law Commission, above n 103, 13.

¹¹⁷ *Forfeiture Act 1991* (ACT).

but there has not been any reported application of the legislation. Of more practical significance for the purposes of this paper is the *Forfeiture Act 1995* (NSW)¹¹⁸ introduced in NSW following the Court of Appeal's decision in *Troja v Troja* where the test was described as 'ruinously strict'.¹¹⁹ In addition, the Tasmania Law Reform Commission recommended in 2004 that 'a Tasmanian Forfeiture Act should be primarily based upon the NSW legislation'.¹²⁰

During the second reading speech the NSW Attorney-General stated the object of the bill

is to allow the courts to modify the operation of the rule of public policy called the forfeiture rule [noting that] ... the operation of the rule may be unduly harsh in some cases of unlawful killing because the rule may operate regardless of the killer's motive or degree of moral guilt.¹²¹

Nowhere in the second reading speech is there any reference to other legislation such as the *Family Provision Act 1982* (NSW), illustrating the Forfeiture Act's narrow focus as opposed to a code's legislative schemata.

The justification for the proposed legislation in NSW was said to be the recognition that 'there are varying degrees of moral culpability in unlawful killings and legislation is necessary to give judges sufficient discretion to make orders in deserving cases in the interests of justice'.¹²²

The Attorney-General specifically identified examples¹²³ of cases where it was envisaged that the proposed legislation might operate to mitigate the effect of the rule as battered woman syndrome, a suicide pact, involuntary homicide or causing death by culpable driving. By giving these examples, the Attorney-General was effectively following a path of legislative handball to the judiciary by substituting judicial policy for legislative policy.

By contrast, Gummow J in *Roxborough*,¹²⁴ motivated by the desire to ensure Parliament is the appropriate body to determine complex policy questions, did not support the view that judicial legislation could be utilised as a panacea for the ills of society.¹²⁵

A more pragmatic reason for caution lies in the fact that under the broad brush of 'determining whether justice requires the effect of the rule to be modified',¹²⁶ judges differ in the weight they apply to material matters. For example, in coming to entirely different conclusions in *Dunbar v Plant*, Mummery LJ felt the wishes of Mr Dunbar's

¹¹⁸ *Forfeiture Act 1995* (NSW).

¹¹⁹ Dillon, above n 35.

¹²⁰ Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 18. The recommendations of the report are yet to be enacted.

¹²¹ New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Hon JW Shaw). This reflects the views of Kirby P who was in dissent in *Troja v Troja* (1994) 33 NSWLR 269.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Roxborough v Rothmans of Pall Mall* 208 CLR 516.

¹²⁵ *Ibid* 544.

¹²⁶ *Forfeiture Act 1995* (NSW) s 5(3).

family ‘should be given weight’¹²⁷ while Phillips LJ described the assets as an ‘unwelcome windfall ... in no way derived from Mr Dunbar’s family’.¹²⁸

While the *Forfeiture Act 1995* (NSW) does have some differences with its English and ACT counterparts, the NSW Act still suffers from the common flaw identified by the New Zealand Law Commission. Namely, there are no guidelines beyond ‘the justice of the case’ and no clear principle dictates how ‘wrongful’ a wrongful killing must be before the bar on profiting applies.¹²⁹

Section 10 of the *Forfeiture Act 1995* (NSW) requires a five year review to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The NSW Attorney-General’s Department undertook this review which was tabled in the Legislative Council on 9 May 2002.¹³⁰

The Attorney-General’s 2001 review was a perfunctory 12 pages mostly consisting of extracts from the second reading speech, sections of the *Forfeiture Act*, and submissions from relevant agencies many of whom had experienced no dealings with the *Forfeiture Act 1995* (NSW). The review concluded that ‘generally the submissions support the continued operation of the Act in its current form ... the policy objectives of the Act remain valid and are being served by the operation of the Act as it currently stands’.¹³¹ The review noted that there had only been two recorded decisions in the Supreme Court under the Act.¹³²

In *R v R*¹³³ a 13 year old boy killed his mother and sister. He was convicted of manslaughter on grounds of diminished responsibility and sentenced to 10 years penal servitude. He was a beneficiary under his mother’s will. There was evidence of abuse by his father contributing to the boy’s abnormality of mind. As the application was supported by his half-brother and his maternal grandmother, the court allowed the boy to take under the will. The case is unusual because the relatives did not oppose the applicant.

This was not the situation in the second reported case. In *Lenaghan-Britton v Taylor*¹³⁴ the plaintiff killed her grandmother and then with her husband took steps to make it appear that the deceased had been killed by an intruder by giving false accounts. Eight months after the killing the pair for the first time admitted involvement, and the Crown subsequently accepted a plea of manslaughter on the grounds of diminished responsibility. The plaintiff was sentenced to 11 years penal servitude. One might have thought this was ‘very near to murder’.¹³⁵

¹²⁷ *Dunbar v Plant* [1997] 4 All ER 289, 302.

¹²⁸ *Ibid* 313.

¹²⁹ New Zealand Law Commission, above n 103, 5.

¹³⁰ New South Wales Attorney General’s Department, *Report on the Review of the Forfeiture Act 1995* (2001).

¹³¹ *Ibid* 12.

¹³² *Ibid* 7. *R v R* (1998) 72 ALJ 357; *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 565.

¹³³ *R v R* (1998) 72 ALJ 357.

¹³⁴ *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 565.

¹³⁵ *Gray v Barr* [1971] 2 QB 554, 581 (Salmon LJ).

However, Hodgson CJ in equity whilst acknowledging ‘this was a crime of extreme seriousness’ and ‘the attempt to cover up the crime was deliberate and serious’, nevertheless found for the plaintiff because ‘there was no premeditation ... the plaintiff had no intention to profit by the crime ... [and there would be] at most a very short acceleration of an entitlement under the deceased’s will’.¹³⁶

Peart has delivered a telling critique of his Honour’s judgment calling it ‘rather surprising’ and a ‘very liberal application of the court’s power’, rightly pointing out that some of the factors relied upon were of ‘questionable relevance’ (profit motive) and ‘quite improper’ (deceased’s impending death from cancer).¹³⁷ Peart sums up by observing ‘the plaintiff’s conduct after the killing militated against leniency, as the criminal sentence suggests’.¹³⁸

The Attorney-General’s Departmental review was more benign, despite Hodgson CJ admitting ‘[t]his was a most serious crime, far removed from the sort of cases which the legislature had in mind, having regard to the second reading speech’.¹³⁹ His Honour’s opinion that modification of the forfeiture rule would not ‘provide any incentive to any other person to act similarly, nor would it outrage the community’¹⁴⁰ was uncritically accepted by the review.¹⁴¹ The review was content to conclude ‘there does not appear to have been any adverse media coverage of either of these two decisions’.¹⁴²

To focus solely on two narrow cases whilst ignoring any other type of circumstance such as spouse killings seems extraordinary. The review neither troubled itself to investigate nor considered other criteria it could have used.

As Mackie points out spouse killings are statistically significant:

In a major New South Wales study in 1985, Wallace¹⁴³ found that between 1968 and 1981, 25 percent of all killings in that State were spouse killings ... Similarly a Queensland Police Department survey¹⁴⁴ covering homicides in that State between 1982 and 1987 found that 22 per cent of murders were spouse killings.¹⁴⁵

More recently, between 2005 and 2006, there were 350 homicide victims in Australia of whom 140 (40%) were categorised as either ‘Intimates’ or ‘Family’ as opposed to ‘Friends/Acquaintances’ or ‘Stranger’ or ‘Other’ under the overall heading of ‘Relationship between victim and offender’.¹⁴⁶ ‘Australians are most likely to be killed by someone they know. Male intimate partners pose the greatest risk to females,

¹³⁶ *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 565, 571.

¹³⁷ Peart, above n 51, 27.

¹³⁸ *Ibid.*

¹³⁹ *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 565, 571.

¹⁴⁰ *Ibid.* 572.

¹⁴¹ New South Wales Attorney General’s Department, above n 130, 7.

¹⁴² *Ibid.*

¹⁴³ A Wallace, *Homicide: The Social Reality* (Research Study No 5, Bureau of Crime Statistics and Research, 1986).

¹⁴⁴ R Condie, ‘Domestic Homicide’ in Report of Queensland Domestic Violence Task Force, *Beyond These Walls* (1988) Appendix D.

¹⁴⁵ Mackie, above n 52, 178.

¹⁴⁶ See: Toohey, above n 2, 67.

whereas males are most likely to meet their death at the hands of a friend or acquaintance'.¹⁴⁷

As will be discussed in the final section, the New Zealand Law Commission considered the incidence of domestic killings and the need to spare estates (often of only modest value) the considerable expense of legal proceedings strengthened the argument for a codified solution.¹⁴⁸

Since the tabling of the review there has been four further unreported cases in NSW, namely *Straede v Eastwood*; *Gonzales v Claridades*; *Batey v Potts*; and *In the Estate of the Late Fiona Ellen Fitter*.¹⁴⁹ In *Straede v Eastwood* the plaintiff's wife was killed in a car accident and the plaintiff pleaded guilty to dangerous driving causing death. He was sentenced to one year's periodic detention.

Straede v Eastwood is interesting as it points to aspects overlooked by the review. Firstly, in stark contrast to *R v R*, this was a case of hostile relatives seeking to take pecuniary advantage of a tragic accident. Secondly, in a speculative action devoid of merit the defendant's costs in opposing the application were met by the estate, which fully illustrates the point made by the New Zealand Law Commission.

Thirdly, the defendant claimed that s 5(3)(a) of the *Forfeiture Act 1995* (NSW) (which requires the court to consider the conduct of the defendant) encompassed immoral conduct. Palmer J found that the plaintiff's conduct in a *menage a trois* had no bearing whatsoever upon how the deceased came to die and upon the plaintiff's role in her death,¹⁵⁰ but the case does underline the dangers in an adversarial system of open ended language in a statute.¹⁵¹

Fourthly, his Honour in rejecting the needs of other beneficiaries as a criterion to oppose a modification order, pointed out, 'the *Forfeiture Act* cannot be regarded as an opportunity for the Court to make the same sort of adjustment amongst objects of a testator's bounty as it might do in an application under the *Family Provision Act*'.¹⁵²

The need to specifically incorporate statutory linkages to other relevant legislation is one of the strengths of a code solution.

¹⁴⁷ Ibid 3.

¹⁴⁸ New Zealand Law Commission, above n 103, 2-3.

¹⁴⁹ *Straede v Eastwood* (Unreported, Supreme Court of New South Wales, Palmer J, 2 April 2003); *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003); *Batey & Anor v Potts & Ors* (Unreported, Supreme Court of New South Wales, Gzell J, 13 July 2004); *In the Estate of the late Fiona Ellen Fitter and the Forfeiture Act 1995*; *Public Trustee of New South Wales v Fitter and (3) Ors* (Unreported, Supreme Court of New South Wales, Lloyd AJ, 24 November 2005).

¹⁵⁰ *Straede v Eastwood* (Unreported, Supreme Court of New South Wales, Palmer J, 2 April 2003) 13.

¹⁵¹ Palmer J considered s 5(3)(a) and s 5(3)(d) of the *Forfeiture Act 1995* (NSW). The latter section reads: 'such other matters as appear to the court to be material.'

¹⁵² *Straede v Eastwood* (Unreported, Supreme Court of New South Wales, Palmer J, 2 April 2003) 15-16.

Straede v Eastwood also highlights the fact that the Attorney-General's review did not consider the adequacy of the definition of 'unlawful killing' in s 3 of the NSW Act. This is disappointing in light of the New Zealand Law Commission's 1997 recommendation (some two years after the NSW legislation was first enacted and some four years before the Attorney-General's review) to exclude inter alia a killing caused by a negligent act or in pursuance of a suicide pact.¹⁵³ This paper contends that cases like *Straede v Eastwood* should not have come to court.

In *Gonzales v Claridades*¹⁵⁴ the appellant, who was charged¹⁵⁵ with the murder of his parents and sister, appealed against Campbell J's refusal to order that the executrix of the estate (the respondent) pay him sufficient money from his father's estate to enable him to fund his defence in the committal proceedings. The NSW Court of Appeal dismissed the appeal since the administration of the estate was incomplete and therefore the appellant had no present right in law or equity to the property which it comprised.¹⁵⁶ Mason P held that nothing in the Forfeiture Act 'presently applies'.¹⁵⁷

In 2005, some significant amendments were made to the *Forfeiture Act* by the *Confiscation of Proceeds of Crime Amendment Act*.¹⁵⁸ The *Forfeiture Act* now also provides for 'forfeiture application orders' in addition to 'forfeiture modification orders'. The first test of the operation of a forfeiture application order occurred in the case of *In the Estate of the late Fiona Ellen Fitter*.¹⁵⁹

In 2001, Fiona Fitter was killed when she was attacked with a knife by her husband and her son. The attackers were charged with murder but found not guilty by reason of mental illness. The Public Trustee as administrator of the intestate estate of Fiona Fitter sought a ruling from the Supreme Court as to whether the Forfeiture Rule applied¹⁶⁰ whilst the deceased's sister (Ann Robb) made a 'forfeiture application order' under s 11(1).¹⁶¹ The Court (Lloyd AJ) upheld Ms Robb's cross claim for a forfeiture application order thereby preventing Fiona Fitter's attackers from sharing in the deceased's estate.¹⁶²

Thus, the *Forfeiture Act 1995* (NSW) now provides for competing mechanisms under s 5(1) and s 11(1) to determine who may benefit from the deceased's estate. Such a contest does nothing to clarify the law for administrators of estates where the application of the Forfeiture Rule is relevant. It is contended that this contest can be

¹⁵³ New Zealand Law Commission, above n 103, 22.

¹⁵⁴ *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003).

¹⁵⁵ Sef Gonzales was subsequently convicted of the triple murder.

¹⁵⁶ *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003) [19], Mason P gave the leading judgment (with whom Beazley JA and Foster AJA agreed) and relied on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694.

¹⁵⁷ *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003) [46].

¹⁵⁸ *Confiscation of Proceeds of Crime Amendment Act 2005* (NSW).

¹⁵⁹ *In the Estate of the late Fiona Ellen Fitter and the Forfeiture Act 1995; Public Trustee of New South Wales v Fitter and (3) Ors* (Unreported, Supreme Court of New South Wales, Lloyd AJ, 24 November 2005).

¹⁶⁰ *Ibid* [3].

¹⁶¹ *Ibid* [46].

¹⁶² *Ibid* [57].

avoided under a code solution and is further evidence as to why the NSW legislation is flawed. It also reinforces the position taken in this paper that the Attorney-General's 2001 review of the Forfeiture Act in NSW was a cursory one, and failed to anticipate competing interests such as those in *Fitter* which should have been adequately signalled by earlier cases such as *Helton v Allen* and *Rivers v Rivers*.

VII NEW ZEALAND'S CODIFIED SOLUTION

The New Zealand Law Commission¹⁶³ recommended a draft *Succession (Homicide) Act* in 1997 to codify¹⁶⁴ the homicidal heir laws in one plain language statute, which expressly abrogates the common law but has yet to be adopted by the legislature. As such it differs markedly from the English and Australian statutes, being 'an attempt to provide a comprehensive piece of legislation dealing with all issues'.¹⁶⁵

The Commission considered the discretionary system under the English and Australian statutes but was unimpressed because there were no guidelines beyond 'the justice of the case'.

Ultimately the question whether a particular class of killing is sufficiently abhorrent to attract the application of the bar on profits is one of policy, rather than one of legal technique. For that reason it should be settled clearly and completely by Parliament.¹⁶⁶

The Commission's objective was 'a statute that in most cases would enable administrators and trustees to carry out their functions *without the need for recourse to court proceedings*' (emphasis added).¹⁶⁷

The Commission instanced the case of *Re Pechar*¹⁶⁸ which involved a triple slaying, six different interests separately represented and a judgment delivered four years after the killings. In *Re Lenjes*¹⁶⁹ a similar period elapsed between the killing and the judgment.¹⁷⁰

The Commission drew attention to the high incidence of homicidal heir cases. The Commission noted that 'from 1982 to 1992 the number of culpable homicides and attempted homicides almost doubled, from 53 to 103,¹⁷¹ and about half¹⁷² of these occurred in a domestic setting'.¹⁷³ The Commission further commented that the domestic setting figure 'is comparable with overseas studies'.¹⁷⁴

¹⁶³ New Zealand Law Commission, above n 103.

¹⁶⁴ Section 4(1) of the draft *Succession (Homicide) Act 1997* (NZ) states: 'This Act has effect as a code in place of the rules of law, equity and public policy that preclude a killer from receiving, becoming entitled to, or claiming interests in property as a result of the death of the victim.'

¹⁶⁵ Peart, above n 51, 28.

¹⁶⁶ New Zealand Law Commission, above n 103, 5.

¹⁶⁷ *Ibid* 3-4.

¹⁶⁸ *Re Pechar* [1969] NZLR 575.

¹⁶⁹ *Re Lenjes* [1990] 3 NZLR 193.

¹⁷⁰ New Zealand Law Commission, above n 103, 2.

¹⁷¹ Department of Justice, *Conviction and Sentencing of Offenders in New Zealand 1983-1992* (1993) table 2.5, 28.

¹⁷² A Gray, 'Family Violence – A Background Paper' (1989) *Gray Matter Research Ltd*.

¹⁷³ New Zealand Law Commission, above n 103, 2-3.

¹⁷⁴ *Ibid*. The Commission quoted from reports published for the United States, England and Wales, and Australia.

More recent statistics on family violence in New Zealand paint a similarly depressing picture. Between 2000 and 2004, a total of 121 people were murdered in family violence related incidents, of whom 56 were women and 39 were children under 17 years of age. For the calendar year 2005, the total recorded murder offences coded as family violence was 29 out of 61 (47.5%).¹⁷⁵

The Commission's approach can be illustrated in a number of ways. Firstly, the Commission adopts as a definition of homicide: 'the killing of a human being by another, directly or indirectly, by any means whatsoever.'¹⁷⁶ The Commission then recommends¹⁷⁷ the exclusion of negligent killings, assisted suicides,¹⁷⁸ suicide pacts¹⁷⁹ and infanticide.¹⁸⁰ Hence, the Commission avoids both the distinction between murder and manslaughter adopted by the English and Australian Acts as well as any attempt to sort 'felonious killings into conscionable and unconscionable piles'.¹⁸¹

More importantly, aside from the above exclusions, any killer falling within the *Gray v Barr* test (deliberate and intentional) would be barred from taking. The lack of discretion is said to be 'a serious weakness'¹⁸² ignoring the cases that prompted the Forfeiture Acts 'where the killers' moral culpability was so low that applying the forfeiture rule was seen as an injustice'.¹⁸³ However, the Commission's view is that the vexed question of exemptions involves complex policy considerations more properly dealt with by Parliament than by judges.

Mr Justice PW Young is critical of this approach claiming 'it was disappointing to see that the Commission sidestepped the social issues involved and merely said that these were policy matters to be dealt with by Parliament'.¹⁸⁴ With respect, the better view is that these are matters for Parliament whose role is to weigh community interests against the individual interest instead of being left in the hands of the judiciary to decide based on an undefined criterion of the interests of justice.

Secondly, in keeping with the Commission's objective of enabling administrators and trustees to act without recourse to the courts:

A conviction of culpable homicide or an acquittal on the grounds of insanity is conclusive evidence that the accused either is or is not a killer [as defined by the draft Act]. Otherwise an acquittal will not prevent interested parties re-litigating that issue in civil proceedings.¹⁸⁵

Thirdly, where homicidal heirs rules apply under the draft Act, the killer may not be a beneficiary under the will of a victim or have an entitlement on a victim's intestacy:

¹⁷⁵ Family Violence Clearinghouse, *Family Violence Statistics Fact Sheet* (2007) <www.nzfvc.org.nz> at 11 September 2008.

¹⁷⁶ *Crimes Act 1961* (NZ) s 158.

¹⁷⁷ New Zealand Law Commission, above n 103, 23.

¹⁷⁸ *Crimes Act 1961* (NZ) s 179.

¹⁷⁹ *Crimes Act 1961* (NZ) s 180(3).

¹⁸⁰ *Crimes Act 1961* (NZ) s 178.

¹⁸¹ *Troja v Troja* (1994) 33 NSWLR 269, 299 (Meagher JA).

¹⁸² Peart, above n 51, 30.

¹⁸³ *Ibid.*

¹⁸⁴ Mr Justice PW Young, 'Current Issues' (1997) 71 *Australian Law Journal* 659.

¹⁸⁵ New Zealand Law Commission, above n 103, 11.

Section 7 provides that the property the killer is barred from taking is to be dealt with as if the killer had predeceased the victim. This provision would avoid the results arrived at in *Davis v Worthington*¹⁸⁶ and *Re Lentjes*,¹⁸⁷ which may be thought odd and unsatisfactory. In these cases ‘gift over’ conditional on the death of the killer failed when the court interpreted the will literally, because the killer, although debarred by the rule from taking, had not in fact died.¹⁸⁸

The Tasmania Law Reform Institute ultimately came to the same conclusion on this point as the New Zealand Law Reform Commission in recommending that ‘where the Forfeiture Rule is applied the estate shall be distributed as if the killer had predeceased the deceased’.¹⁸⁹

As Peart acknowledges, the New Zealand Law Reform Commission’s solution not only solves the problem in *Re DWS*¹⁹⁰ but also ‘overcomes the difficulties identified by Professor Ames¹⁹¹ over one hundred years ago by providing the statutory exception currently lacking in the Wills Act and the Administration Act’.¹⁹²

Finally, the Commission seeks to create a legislative schemata whereby other existing relevant legislation is dovetailed into the draft Act to ensure consistency and fairness. For example, a killer is not entitled to apply under the *Family Protection Act 1955* (NZ) for provision out of the estate of the victim.¹⁹³ Similarly, a killer who has a valid claim against the estate of a victim under the *Matrimonial Property Act 1963* (NZ) is not deprived of a benefit that exists independently of the killing. As the Commission quaintly puts it ‘the killer’s pre-killing rights are preserved’.¹⁹⁴

Again, s 12 allows an interested person to lodge a caveat under s 137 of the *Land Transfer Act 1952* (NZ) against transmission by survivorship of the estates or interests in land held as joint tenants by victim and killer.¹⁹⁵

In sum, it is contended that the Commission’s umbrella codified solution successfully covers the field. If adopted this would be Parliament’s solution being the best placed body to balance community with individual interests and is far from being ‘a blunt instrument’.¹⁹⁶

¹⁸⁶ *Davis v Worthington* [1978] WAR 144.

¹⁸⁷ *Re Lentjes* [1990] 3 NZLR 193.

¹⁸⁸ New Zealand Law Commission, above n 103, 11. This mirrors the position taken by Napier J in *Re Barrowcliff* [1927] SASR 147, 151.

¹⁸⁹ See: Tasmania Law Reform Institute, above n 120, 22.

¹⁹⁰ *Re DWS (dec’d)* [2001] 1 AER 97.

¹⁹¹ Ames, above n 21.

¹⁹² Peart, above n 51, 32. By contrast, the court in applying the constructive trust approach to wills ‘makes the murderer hold the estate on trust for the person *it thinks appropriate*’ [emphasis added]. *Public Trustee v Hayles* (1993) 33 NSWLR 154, 171 (Young J).

¹⁹³ New Zealand Law Commission, above n 103, 28-9. This is consistent with the position in England. See: *Re Royse* [1985] Ch 22.

¹⁹⁴ New Zealand Law Commission, above n 103, 31. This is consistent with the Australian cases of *Homsy v Yassa and Yassa*; *the Public Trustee* (1993) 17 Fam LR 299; and *Troja v Troja* (1994) 33 NSWLR 269, 298 (Mahoney JA), 300 (Meagher JA).

¹⁹⁵ New Zealand Law Commission above n 103, 35.

¹⁹⁶ Peart, above n 51, 30.

VIII CONCLUSION

In an area of law littered with legal complexity and abounding with complex policy issues, there are essentially three options with any forfeiture rule: (a) the common law; (b) a forfeiture act giving broad judicial discretion; and (c) a code.

Advocates of broad judicial discretion should bear in mind that public policy ‘is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law’.¹⁹⁷

This paper has sought to demonstrate that there is only one viable option. For the reasons outlined, this option is very similar to the New Zealand Law Commission’s draft Act or code solution. The author contends that a code is the most appropriate method to deliver the proper objective of a forfeiture rule which is to ensure that, contrary to the title of this paper, the victim’s bounty is received by a hand ‘ever so chaste’.¹⁹⁸

In defining ‘chaste’ the author subscribes to the standard first set in *Cleaver* and reiterated 102 years later by the majority in *Troja v Troja*: ‘[t]o prevent a criminal killer from taking directly the estate of her victim does not appear to me to involve departure from the dictates of justice ... an abhorrence of the notion that one may profit from killing another, an odium occisionis’.¹⁹⁹

A code, passed by Parliament, can determine, given a manslaughter conviction can be very close to an accident or a shade below murder, under what circumstances society is prepared to amend the absolute forfeiture rule. Given the high incidence of domestic killings in Australia and the variety of circumstances under which such killings occur, it is highly desirable that a comprehensive solution be adopted.

¹⁹⁷ *Richardson v Mellish* (1824) 2 Bing 229, 252 (Burrough J).

¹⁹⁸ TK Earnshaw and PJ Pace, ‘Let The Hand Receiving It Be Ever So Chaste’ (1974) 37 *Modern Law Review*, 481, 481 quoting Lord Commissioner Wilmot in *Bridgeman v Green* (1757) Wilm 58, 65.

¹⁹⁹ *Troja v Troja* (1994) 33 NSWLR 269, 298 (Mahoney JA), 299 (Meagher JA).