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Reforming the Forfeiture Rule in Victoria

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Abstract. This paper examines the operation and shortcomings of the common law forfeiture rule in Victoria, Australia, which precludes individuals from inheriting the estate of someone they have unlawfully killed. While the rule is grounded in a strong moral principle—that one should not benefit from their own wrongdoing—it has proven to be rigid and overly simplistic in complex succession cases. The paper contrasts the Victorian approach with that of New South Wales, where the Forfeiture Act 1995 provides courts with statutory discretion to grant relief based on contextual factors such as intent, relationship with the deceased, and mitigating circumstances. Through a comparative analysis of key cases and statutory frameworks, the study argues that Victoria's exclusive reliance on common law is no longer tenable. It contends that introducing a statutory model, akin to the New South Wales regime, would enhance both fairness and clarity in the administration of succession law. The paper concludes that legal reform is necessary for Victoria to respond more justly to morally complex scenarios without abandoning the deterrent effect of the forfeiture rule.

Keywords: Forfeiture Rule, Succession Law, Legal Reform, Comparative Law, Public Policy

1. Introduction

The forfeiture rule, though rooted in a long-standing common law tradition, remains a topic of considerable controversy—especially in the way it is applied. At its core, the rule reflects the deeply held public policy principle that a person should not profit from their own wrongful act[1]. Yet this moral foundation, while compelling, may at times clash with the complexities of human behaviour and the realities of modern succession disputes[2].

In Victoria, the absence of any statutory framework leaves the rule entirely within the bounds of the common law. This creates a system that appears orderly on the surface but, in practice, can be inflexible and opaque. For example, in Re Giles (deceased) and Re Estate of Soukup, courts applied the rule without the guidance of codified standards—even where circumstances were morally complicated[3]. This reliance on precedent might preserve legal continuity, but it arguably limits the courts' ability to achieve just outcomes in difficult cases. The result is a binary approach to culpability, which may serve clarity but not necessarily fairness[4].

By contrast, New South Wales has chosen a different path. The Forfeiture Act 1995 (NSW) provides for discretionary relief in defined situations. It recognises that not all unlawful killings are morally equivalent, and that in some cases, applying the rule without flexibility would

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lead to injustice. Sections 5 and 6 of the Act offer judges a framework to consider factors such as the offender's intent, their relationship with the deceased, and any relevant mitigating circumstances[5]. This statutory clarity arguably empowers courts to assess not just legality, but also moral context.

This divergence has not gone unnoticed. Legal scholars have increasingly drawn attention to the limitations of Victoria's model[2]. Some argue that retaining a purely common law approach no longer reflects the values of a modern legal system. The NSW Law Reform Commission, in its 2003 report, recommended precisely the kind of legislative reform that has since shaped the NSW model[6]. Meanwhile, the Victorian Law Reform Commission has acknowledged these issues but stopped short of proposing reform—perhaps more for political caution than legal merit[7].

This paper will argue that Victoria's current position is untenable. It suggests that adopting a statutory framework—similar to that found in New South Wales—would improve clarity, consistency, and fairness in succession law. It will do so by critically comparing the Victorian and NSW models, assessing case law, and examining the broader legal and policy implications of reform.

2. The common law forfeiture rule in Victoria

Victoria's ongoing reliance on the common law forfeiture rule, without any form of legislative guidance, places courts in a precarious position. On one hand, the rule's moral clarity—that no person should benefit from their own unlawful act—is difficult to challenge[1]. Yet on closer inspection, the rule's rigid application reveals practical and ethical limitations. It seems worth asking whether a doctrine grounded in 19th-century morality can adequately respond to the kinds of succession disputes seen in contemporary Australia[2].

Cases such as Re Giles (deceased) and Re Estate of Soukup illustrate how Victorian courts apply the rule with strict formalism[3]. In Soukup, notably, the rule was enforced despite the absence of a criminal conviction. The court found it sufficient that, on the balance of probabilities, the killer was responsible[8]. This raises a fundamental concern: should the threshold for disinheritance be so easily met, particularly when the defendant's moral culpability is not crystal clear?

The same concern is echoed in Public Trustee v Hayles, a New South Wales case applying similar reasoning. Although not binding in Victoria, it reflects how the absence of statutory discretion can place undue weight on a single judicial finding. In such a setting, questions of mental illness, provocation, or self-defence often fall into the background[9].

The risks become more pronounced in Troja v Troja, a highly contentious NSW case decided before the state's statutory reform. There, a woman was denied her inheritance even after being acquitted of murder. While the court was legally permitted to act on civil standards of proof, it split deeply on whether doing so was just. Mahoney JA upheld the forfeiture to maintain public morality, whereas Meagher JA dissented, warning that this approach effectively punished an acquitted person[10]. This judicial divide brings into sharp focus the problem with relying solely on common law: it offers no structured space to weigh competing ethical and legal factors.

What is more, Troja v Troja (No 2) reveals that the implications of such a rule extend well beyond the initial judgment[11]. That case highlighted the procedural messiness that can follow, especially when estate administration, costs, and family conflict are left to fester without statutory guidance. Would a Victorian court be better equipped today to prevent this kind of drawn-out litigation? It's difficult to say with confidence.

Legal commentators have long warned that Victoria's approach, while principled in theory, is lacking in procedural and moral nuance. Davis, for example, argues that the common law rule imposes a binary view of guilt that doesn't reflect lived realities[4]. Not every unlawful killing stems

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from greed or malice. Some arise from desperation, trauma, or diminished capacity. Burns similarly observes that Victoria's case law offers little practical direction to judges, families, or lawyers who must navigate these tragic circumstances[12].

To be clear, Victoria's model is not without merit. Its predictability has some appeal. But predictability without justice is a fragile virtue. As family structures become more diverse and personal histories more complex, it may no longer be sufficient to apply a 100-year-old rule without modification[7]. If reform is about balancing certainty with compassion, then Victoria's current regime appears weighted too heavily toward the former—at the expense of the latter.

3. Statutory reform in New South Wales

Unlike Victoria, New South Wales has chosen to take a legislative path to address the limits of the common law forfeiture rule[5]. The Forfeiture Act 1995 (NSW) was introduced after growing concern that applying the rule rigidly could result in unfair outcomes—particularly where the offender's culpability was far from straightforward[6]. One might ask: is it right to treat a woman who kills her long-term abuser the same way as someone who commits murder for gain? The Act suggests not.

Rather than abolish the rule, the legislation preserves its core public policy function—preventing profit from wrongdoing—while allowing for limited judicial discretion in appropriate cases[6]. Under section 5, those affected by the rule can apply to the Supreme Court for relief[5]. But this discretion is far from unstructured. Section 6 requires judges to weigh a range of factors, including the offender's conduct, the deceased's behaviour, the nature of their relationship, and any other relevant circumstances[5]. In that sense, the Act doesn't discard the forfeiture principle—it refines it.

It's worth remembering that this statutory framework wasn't created in a vacuum. The NSW Law Reform Commission had previously warned that the common law rule, as then applied, was too blunt an instrument for the nuanced realities of modern life. It argued that the law needed to accommodate situations where the offender's conduct, while technically unlawful, might not be morally reprehensible in context. The Commission also highlighted a lack of transparency and consistency in existing case law[6]. The legislation that followed attempted to address these concerns head-on.

Judicial decisions since the Act's introduction have provided examples of how the discretion operates in practice. One of the clearest examples is Estate of Sharpe, where the court faced the case of a woman who killed her abusive father. While the rule applied in theory, the court granted relief—emphasising that the applicant's motive was not greed or animus, but prolonged survival under violent conditions. In that case, withholding inheritance would have served neither justice nor public morality[13].

The statutory model's usefulness is further demonstrated in Re Settree Estates[14]. Here, the court considered the case of a woman with severe mental illness who killed her de facto partner during a psychotic episode. Relief was granted in part, allowing her to retain a portion of the estate. The judgment carefully considered medical evidence, the deceased's conduct, and the statutory factors[14]. Burns has observed that this sort of tailored outcome would not be possible under a rigid common law rule[12]. She argues the Act gives courts "a means to reconcile law with human experience."

Some may still worry that this flexibility could invite inconsistency or undermine deterrence. But Davis suggests that the structured nature of the discretion reduces this risk[4]. The court does not act on sympathy alone—it applies a legislative test. And relief is not automatic; it is only granted where justice clearly demands it.

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Viewed this way, the Forfeiture Act 1995 (NSW) provides more than just fairness—it offers coherence. It allows courts to distinguish between killers with genuine moral blameworthiness and those whose actions are tragic but understandable. It's hard to see how such distinction would weaken the forfeiture rule; if anything, it strengthens its credibility.

4. Comparative critique and the case for reform in Victoria

The forfeiture rule rests on a powerful moral proposition: that no one should benefit from their own wrongful act. However, how that principle is operationalised varies significantly across jurisdictions, and those differences have material effects on justice. In Victoria, the rule is still administered exclusively through the common law[2]. Although this may appear stable on the surface, the absence of legislative guidance has led to decisions that, arguably, lack flexibility and transparency. In contrast, New South Wales has embraced a statutory model that incorporates moral nuance while retaining the rule's deterrent value[5]. A close comparison of these two systems reveals why Victoria's position has become increasingly difficult to defend.

Under the Victorian model, courts apply the rule through a binary test: either the rule applies or it does not. There is no room for partial relief or context-sensitive adjustment. This approach is exemplified in Re Giles (deceased) and Re Estate of Soukup, where forfeiture was enforced even though the offender's motivations and state of mind were not fully explored[3]. In Soukup, there was no criminal conviction, but the rule was imposed solely on the basis of civil standard findings[8]. The result? A person may be excluded from inheritance not because they were criminally culpable, but simply because the court, on balance, believed they were more likely than not to have caused the death. From a policy standpoint, this may seem defensible; from a justice perspective, it raises concern.

This lack of discretion becomes especially problematic in morally complex cases. Consider, for example, situations involving long-term abuse, mental illness, or self-defence. The Victorian courts are not equipped to take these factors into account meaningfully. As Davis observes, the common law model compels courts to impose "a single moral conclusion on factually and emotionally diverse circumstances[4]." The law, in this form, may function consistently, but it does not function humanely.

New South Wales, by contrast, has implemented a more adaptable framework. The Forfeiture Act 1995 (NSW) gives courts statutory discretion to grant relief in appropriate cases. Sections 5 and 6 of the Act outline a structured process for doing so, allowing judges to weigh relevant factors such as provocation, diminished responsibility, the deceased's conduct, and any other considerations deemed significant[5]. This model shifts the focus from strict liability to a more holistic assessment of culpability.

Judicial application of this discretion shows how meaningful the difference can be. In Estate of Sharpe, a woman who killed her abusive father was permitted to inherit under the Act[13]. The court recognised that although the act was technically unlawful, the prolonged violence she had endured made strict forfeiture morally inappropriate[13]. A Victorian court, under current law, would have had no power to reach this conclusion—even if the facts were identical.

A similarly compelling example is found in Re Settree Estates, where the offender killed her partner during a psychotic episode[14]. Under the NSW framework, the court granted partial relief, considering medical evidence and the absence of malicious intent[14]. As Burns notes, the court in Settree was able to "recognise the complexity of culpability without abandoning the policy rationale of the rule[12]." That kind of calibrated response is impossible under Victoria's all-or-nothing common law model.

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The differences also emerge in the judicial experience itself. In Troja v Troja, a woman who had been acquitted of murder was nonetheless denied inheritance under the common law forfeiture rule. The judges were sharply divided: Mahoney JA supported forfeiture to uphold public morality, while Meagher JA dissented, warning that such outcomes undermine trust in the justice system[10]. This division underscores a troubling reality—without statutory discretion, judges must choose between rigid justice and improvised exceptions, with no clear guidance either way.

Procedural consequences follow. Troja v Troja (No 2) demonstrated that litigation under the common law rule can spiral into lengthy, adversarial disputes[11]. In that case, uncertainty about how the rule should operate led to delays in estate administration and additional costs for all involved. Victoria's system offers no procedural safety net for such situations. The rule operates absolutely, and consequences—however disproportionate—must be absorbed by the parties.

Opponents of statutory reform sometimes argue that discretion threatens consistency. But this concern overlooks two key points. First, consistency in form is not the same as consistency in fairness. Second, as Davis and Burns both point out, discretion structured by legislative factors provides more—not less—predictability. The NSW model mandates transparency: courts must publish reasons for granting or denying relief, referencing explicit statutory factors. That is far more transparent than ad hoc judicial rationalisation under common law.

Another concern is deterrence. If relief is available, does that weaken the rule's moral force? Arguably not. The NSW Law Reform Commission, in advocating for the Act, recognised that deterrence is not compromised when relief is tightly controlled and justified[6]. What the Act does is prevent the rule from being applied in cases where doing so would be unjust. Deterrence must remain a goal—but not at the expense of compassion and proportionality.

Victoria's own Law Reform Commission has acknowledged the limitations of the current model. However, it declined to recommend statutory change, perhaps due to institutional caution. Yet as succession law continues to intersect with issues of mental health, domestic violence, and partial culpability, reform seems not only justified, but inevitable[7].

In the end, the comparison is clear. The NSW model does not abandon the forfeiture rule—it refines it. It respects public policy while allowing judges to take context seriously. Victoria's model, by contrast, is becoming harder to defend with each morally complex case it confronts. The rule's strength lies not in how strictly it can be applied, but in how fairly it can be administered. A statutory framework is not a compromise—it is an evolution.

5. Conclusion

The forfeiture rule stands as one of the clearest moral principles in succession law: those who cause the death of another should not inherit from them. However, this paper has argued that in Victoria, the administration of this rule under the common law has become overly rigid, lacking the necessary tools to respond to morally complex circumstances. The result is a system that often forces binary outcomes onto situations that demand nuance.

Through a comparative analysis with New South Wales, this paper has shown that statutory reform need not weaken the forfeiture rule. On the contrary, by embedding judicial discretion within a defined legislative framework—as seen in the Forfeiture Act 1995 (NSW)—the law can be made more responsive, proportionate, and ultimately just. NSW's approach allows courts to preserve the rule's moral purpose while avoiding unjust outcomes in exceptional cases.

Victoria's current model is not without virtues. Its consistency and simplicity have advantages in terms of predictability. Yet these virtues must be balanced against the need for flexibility—especially in cases involving mental illness, coercion, or prolonged abuse. Without statutory

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discretion, Victorian courts remain constrained in their ability to tailor outcomes to reflect the complexity of human behaviour and moral culpability.

This issue is no longer hypothetical. The case law—both in Victoria and NSW—demonstrates how different frameworks lead to meaningfully different outcomes. These differences affect not only claimants and beneficiaries, but also public perceptions of fairness and legitimacy within the legal system. If the rule is to retain its moral authority, it must be applied with a measure of compassion and sensitivity to context.

Victoria has an opportunity to reform. By adopting a model similar to that in New South Wales, it can bring greater clarity, transparency, and moral coherence to the operation of the forfeiture rule. Such reform would not dilute the rule's strength; it would enhance its capacity to achieve justice—not just in theory, but in the lives of those it affects.

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