



**Administration of Estates of
Deceased Persons: Report of the
National Committee for Uniform
Succession Laws to the Standing
Committee of Attorneys General**

Report
Volume 3

Queensland
Law Reform Commission

**Administration of Estates of
Deceased Persons: Report of
the National Committee for
Uniform Succession Laws to the
Standing Committee of
Attorneys General**

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To: The Honourable Cameron Dick MP
Attorney-General and Minister for Industrial Relations

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*.

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¹ Although South Australia does not have a representative on the National Committee, an officer of the South Australian Attorney-General's Department holds a watching brief in relation to the project.

² The National Committee would like to acknowledge the contribution to this project of Mr Peter Hennessy who was, until October 2008, the Executive Director of the New South Wales Law Reform Commission.

Previous publications in this project:

Wills

Issues Paper, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (QLRC MP 10, July 1994, reissued as QLRC WP 46, June 1995; NSWLRC IP 10, February 1996)

Miscellaneous Paper, *Uniform Succession Laws: Wills* (QLRC MP 15, February 1996)

Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills (QLRC MP 29, December 1997; NSWLRC R 85, April 1998)

Report, *The Law of Wills* (QLRC R 52, December 1997)

Supplementary Report, *Wills: The Anti-lapse Rule — Supplementary Report to the Standing Committee of Attorneys General* (QLRC R 61, March 2006)

Family provision

Issues Paper, *Uniform Succession Laws for Australian States and Territories: Family Provision* (QLRC WP 47, June 1995; NSWLRC IP 11, February 1996)

Report to the Standing Committee of Attorneys General on Family Provision (QLRC MP 28, December 1997)

Report, *Uniform succession laws: family provision* (NSWLRC R 110, May 2005)

Supplementary Report, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (QLRC R 58, July 2004)

Intestacy

Issues Paper, *Intestacy* (NSWLRC IP 26, April 2005)

Report, *Uniform succession laws: intestacy* (NSWLRC R 116, April 2007)

Administration of estates

Discussion Paper, *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999, NSWLRC DP 42, October 1999)

Discussion Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (QLRC WP 55, December 2001)

Issues Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (NSWLRC IP 21, May 2002)

Miscellaneous

Miscellaneous Paper, *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (QLRC MP 16, February 1996)

Table of contents

ABBREVIATIONS	xvii
CHAPTER 26	1
THE SURVIVAL OF CAUSES OF ACTION	1
INTRODUCTION	2
EXISTING LEGISLATIVE PROVISIONS	2
Causes of action that survive against the estate of a deceased person	4
Damages recoverable where a cause of action survives against the estate of a deceased person.....	7
Proceedings against beneficiaries	7
DISCUSSION PAPER.....	9
SUBMISSIONS.....	10
THE NATIONAL COMMITTEE'S VIEW	11
Survival of action provisions.....	11
Proceedings against beneficiaries	12
Clarification of section 66(6)	12
Clarification of section 66(7)	14
Clarification of section 66(8)	16
Clarification of section 66(9)	16
RECOMMENDATIONS	17
CHAPTER 27	23
COMMISSION	23
INTRODUCTION	24
THE ALLOWANCE OF COMMISSION BY THE COURT	25
The court's inherent jurisdiction to allow commission	25
Existing legislative provisions.....	27
Australian Capital Territory	27
New South Wales	28
Northern Territory.....	29
Queensland.....	30
South Australia.....	30
Tasmania	31
Victoria	31
Western Australia.....	32
The court's practice in allowing commission.....	33
The court's discretion.....	33
The usual basis for calculating commission	34
The effect of providing professional services where the will does not contain a charging clause	37
The effect of providing professional or non-professional services where the will contains a charging clause	38
Discussion Paper	39
A general provision for allowing commission to personal representatives and trustees	39
Specific matters to be included in the model provision.....	40
Rates of commission.....	40
Submissions	41

A general provision for allowing commission to personal representatives and trustees	41
Specific matters to be included in the model provision.....	41
Rates of commission.....	42
The National Committee's view.....	44
Payment of an amount for services that the court considers appropriate	44
Payment of an amount for services may be allowed periodically or otherwise	45
Unfettered discretion.....	45
No maximum rate to be prescribed.....	46
Express reference to trustees.....	46
Indemnity for non-professional work performed by a legal practitioner.....	47
THE EFFECT OF A SPECIFIC PROVISION IN A WILL FOR COMMISSION OR REMUNERATION	48
Review by the court.....	51
Discussion Paper	53
Submissions	53
The National Committee's view.....	56
PUBLIC TRUSTEES AND TRUSTEE COMPANIES	57
Public trustees.....	57
Review by the court	59
Trustee companies.....	60
Entitlement to commission.....	60
Review by the court	62
Entitlement to commission when administering an estate other than under a grant	63
Discussion Paper	65
Submissions	65
The National Committee's view.....	65
RECOMMENDATIONS	67
CHAPTER 28	71
DEALINGS WITH WILLS.....	71
INTRODUCTION	72
PRODUCTION OF A WILL AND EXAMINATION OF A RELEVANT PERSON	72
Background	72
Power of court to order production of a will and examination of a person.....	73
Right of an entitled person to inspect and obtain a copy of a will	76
Discussion Paper	78
Submissions	79
The National Committee's view.....	79
LIABILITY FOR CONCEALING ETC A WILL	80
Background	80
Fraudulently dealing with a will	81
Provisions in criminal statutes.....	81
New South Wales, Northern Territory, Tasmania, Victoria.....	81
Queensland, Western Australia	82
South Australia	82
Nature of the offence	83
Provisions in administration legislation	83
Discussion Paper	84
Submissions	85
The National Committee's view.....	85
RECOMMENDATIONS	86

CHAPTER 29	87
MECHANISMS TO FACILITATE ADMINISTRATION AND TO MINIMISE THE NEED TO OBTAIN A GRANT.....	87
ELECTIONS TO ADMINISTER.....	89
Existing legislative provisions.....	89
Australian Capital Territory, New South Wales, Queensland, Tasmania, Victoria, Western Australia.....	89
Northern Territory.....	90
Discussion Paper	94
Further call for submissions	94
Retention or abolition of elections to administer	95
Submissions in response to the Discussion Paper and further submissions	95
The National Committee's view	97
Persons entitled to file an election to administer.....	97
Further call for submissions	97
Further submissions.....	97
The National Committee's view	99
Location of provisions dealing with elections to administer	100
Existing legislative provisions	100
Further call for submissions	100
Further submissions.....	100
The National Committee's view	101
The value of the estate.....	101
Existing legislative provisions	101
Further call for submissions	102
Further submissions.....	103
The National Committee's view	105
The value of the estate	105
Existence of a pre-existing entitlement to obtain a grant or, in the case of a public trustee, an order to administer the estate	106
Existing legislative provisions	106
Further call for submissions	108
Further submissions.....	108
The National Committee's view	109
The content of the election to administer	111
Existing legislative provisions	111
The National Committee's view	112
Requirements to give public notice	112
Existing legislative provisions	112
Further call for submissions	113
Further submissions.....	113
The National Committee's view	115
Election to administer the unadministered part of an estate.....	116
Existing legislative provisions	116
Further call for submissions	117
Further submissions.....	118
The National Committee's view	118
ADMINISTRATION OF SMALL ESTATES WITHOUT A GRANT OR THE FILING OF AN ELECTION TO ADMINISTER	120
Existing legislative provisions.....	121
Australian Capital Territory, New South Wales, Queensland, Tasmania, Victoria ...	121
Northern Territory.....	121
Discussion Paper	123

Further call for submissions	123
Inclusion of a small estates provision in the model legislation.....	123
Submissions.....	123
Persons who may administer an estate under the small estates provision	124
Further call for submissions	124
Submissions and further submissions	124
The value of the estate.....	125
Existing legislative provisions	125
Further call for submissions	126
Further submissions.....	127
Existence of a pre-existing entitlement to obtain a grant or, in the case of a public trustee, an order to administer	128
Existing legislative provisions	128
Further call for submissions	129
Further submissions.....	130
Requirements to give public notice	130
Existing legislative provisions	130
Further call for submissions	131
Further submissions.....	131
The National Committee's view.....	133
COSTS	133
Existing legislative provisions.....	133
Further call for submissions	134
Further submissions.....	134
The National Committee's view.....	135
TRANSFER OF REAL PROPERTY	135
Introduction.....	135
Queensland legislative provisions.....	136
Discussion Paper	139
Submissions	139
The National Committee's view.....	142
INFORMAL ADMINISTRATION: ADMINISTERING AN ESTATE WITHOUT A GRANT	142
Introduction.....	142
Historical background.....	145
Existing legislative provisions.....	147
Australian Capital Territory	147
Queensland.....	148
Victoria	150
Other Australian jurisdictions	150
Discussion Paper	151
Submissions	152
Inclusion of a provision dealing with informal administration.....	152
Terminology	154
The National Committee's view.....	155
Retention of the distinction between formal and informal administration	155
The position of persons acting informally	156
RATIFICATION OF ACTS BY PERSONAL REPRESENTATIVE.....	157
Introduction.....	157
Discussion Paper	158
Submissions	158
The National Committee's view.....	158
PAYMENTS BY THIRD PARTIES WITHOUT PRODUCTION OF A GRANT	158
Existing legislative provisions.....	158

South Australia.....	159
Victoria	160
Western Australia.....	162
Discussion Paper	163
Submissions	164
The National Committee's view.....	165
A provision of general application.....	165
The value of the money or personal property paid or transferred	165
The persons to whom the money or personal property may be paid or transferred.....	166
Discharge of liability	166
Enforcement of remedies.....	167
RECOMMENDATIONS	167
CHAPTER 30	175
RESEALING: AN OVERVIEW	175
INTRODUCTION	176
RESEALING OF GRANTS.....	177
THE NEED FOR UNIFORMITY	177
RELATIONSHIP BETWEEN RESEALING PROPOSALS AND PROPOSALS FOR AUTOMATIC RECOGNITION OF AUSTRALIAN GRANTS	179
CHAPTER 31	181
INSTRUMENTS THAT MAY BE RESEALED.....	181
INTRODUCTION	182
GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION	182
The existing law	182
The National Committee's view.....	182
LETTERS OF ADMINISTRATION GRANTED FOR SPECIAL, LIMITED OR TEMPORARY PURPOSES.....	183
The existing law	183
Australian Capital Territory, New South Wales, Northern Territory, Western Australia	183
Queensland, South Australia, Tasmania	183
Victoria	184
Recommendation of the Law Reform Commission of Western Australia	184
Discussion Paper	184
Submissions	184
The National Committee's view.....	185
INSTRUMENTS THAT HAVE A SIMILAR EFFECT TO A GRANT OF PROBATE OR ADMINISTRATION MADE IN THE RESEALING JURISDICTION	185
The existing law	185
Australian Capital Territory, New South Wales, Northern Territory, Tasmania, Western Australia.....	185
Queensland.....	187
South Australia.....	187
Victoria	188
Scottish confirmations.....	189
Commonwealth Secretariat Draft Model Bill	190
Recommendation of the Law Reform Commission of Western Australia	190
Discussion Paper	190
Submissions	190

The National Committee's view.....	191
ORDERS TO ADMINISTER.....	191
Introduction.....	191
Australian Capital Territory, Queensland, South Australia, Western Australia.....	191
New South Wales	193
Effect of an order to administer.....	193
Resealing: the existing law.....	193
Australian Capital Territory, Northern Territory.....	193
Australian States	193
New South Wales, Tasmania, Western Australia.....	194
Queensland	194
South Australia	194
Victoria.....	196
Recommendation of the Law Reform Commission of Western Australia	196
Discussion Paper	196
Submissions	197
The National Committee's view.....	197
RESEALING OF AN EXEMPLIFICATION OF A GRANT OR AN ORDER TO ADMINISTER OR OTHER FORMAL EVIDENCE OF THE INSTRUMENT.....	198
Background	198
The National Committee's view.....	198
ELECTIONS TO ADMINISTER.....	199
Introduction.....	199
Australian Capital Territory, New South Wales, Queensland, Tasmania, Victoria, Western Australia.....	199
Northern Territory.....	200
Resealing: the existing law.....	201
Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Western Australia.....	201
Queensland.....	201
Victoria	202
Recommendation of the Law Reform Commission of Western Australia	202
Discussion Paper	203
Submissions	203
The National Committee's view.....	203
Resealing of elections to administer.....	203
The value of the estate in the jurisdiction in which the election to administer is to be filed	204
The required undertaking.....	205
RECOMMENDATIONS	206
CHAPTER 32	211
COUNTRIES WHOSE GRANTS MAY BE RESEALED	211
INTRODUCTION	212
THE EXISTING LAW.....	212
Australian Capital Territory.....	212
New South Wales, Western Australia	213
Northern Territory.....	214
Queensland	215
South Australia	215
Tasmania.....	217
Victoria	217
COMMONWEALTH SECRETARIAT DRAFT MODEL BILL.....	218

RECOMMENDATION OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA.....	219
DISCUSSION PAPER.....	220
SUBMISSIONS.....	222
THE NATIONAL COMMITTEE'S VIEW	222
RECOMMENDATIONS	223
CHAPTER 33	225
PERSONS WHO MAY APPLY FOR THE RESEALING OF A GRANT	225
EXISTING LEGISLATIVE PROVISIONS	226
Introduction.....	226
Executor or administrator	226
Person authorised by the executor or administrator to apply for the resealing of a grant	226
Executor by representation	227
Australian Capital Territory, Northern Territory.....	227
New South Wales, Tasmania, Victoria	227
Queensland, South Australia, Western Australia.....	228
Executor or administrator by representation constituted under section 44(2) of the <i>Probate and Administration Act 1898</i> (NSW).....	229
Introduction	229
Queensland, South Australia	230
Australian Capital Territory, Northern Territory, Tasmania, Victoria.....	230
Western Australia.....	231
New South Wales	231
The public trustee in whose favour an order to administer is made	232
The trustee company or person who has filed an election to administer.....	232
COMMONWEALTH SECRETARIAT DRAFT MODEL BILL	233
RECOMMENDATION OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA.....	234
DISCUSSION PAPER.....	234
SUBMISSIONS.....	236
THE NATIONAL COMMITTEE'S VIEW	237
Grants of probate and letters of administration.....	237
Executor, administrator or person authorised under power of attorney by the executor or administrator	237
Executor or administrator by representation.....	237
Legal representative of an executor or administrator	239
A person who has the consent of all the beneficiaries	239
A person who is authorised by the court.....	240
Orders to administer.....	241
Elections to administer	241
THE AGE OF THE APPLICANT FOR RESEALING	241
Background	241
The National Committee's view.....	241
RECOMMENDATIONS	242
CHAPTER 34	245
EFFECTS OF RESEALING A GRANT	245
INTRODUCTION	246
SAME FORCE AND EFFECT AS AN ORIGINAL GRANT	246
The existing law	246

Commonwealth Secretariat Draft Model Bill	247
Recommendation of the Law Reform Commission of Western Australia	247
Discussion Paper	247
Submissions	247
The National Committee's view.....	247
ASSIMILATION WITH THE POSITION OF A PERSONAL REPRESENTATIVE.....	248
The existing law	248
The persons on whom the relevant duties and liabilities are imposed	248
Australian Capital Territory, Northern Territory, Tasmania, Victoria.....	248
New South Wales, South Australia, Western Australia	248
Extent of assimilation	249
Australian Capital Territory, New South Wales, Northern Territory, Western Australia	249
South Australia	249
Tasmania, Victoria	249
Commonwealth Secretariat Draft Model Bill	250
Recommendations of the Law Reform Commission of Western Australia	251
Discussion Paper	251
Submissions	252
The National Committee's view.....	252
TRANSFER OF BALANCE OF ESTATE BY ATTORNEY UNDER POWER TO FOREIGN PERSONAL REPRESENTATIVE	252
The existing law	252
Commonwealth Secretariat Draft Model Bill	255
Discussion Paper	256
Submissions	256
The National Committee's view.....	256
RECOMMENDATIONS	257
CHAPTER 35	259
THE RESEALING PROCESS	259
THE REQUIRED DOCUMENTATION	261
The existing law	261
Australian jurisdictions other than the Australian Capital Territory	261
Australian Capital Territory	262
Commonwealth Secretariat Draft Model Bill	262
Recommendation of the Law Reform Commission of Western Australia	263
Discussion Paper	263
Submissions	264
The National Committee's view.....	265
Grants of probate and letters of administration.....	265
Orders to administer	265
Elections to administer.....	266
Testamentary instruments	266
Location of provisions	266
MULTIPLE PERSONAL REPRESENTATIVES	267
The existing law	267
Recommendation of the Law Reform Commission of Western Australia	268
Discussion Paper	268
Submissions	269
The National Committee's view.....	269
Application by, or with the consent of, multiple personal representatives	269

Authorisation of attorney by multiple personal representatives	270
GRANTS OF DOUBLE PROBATE	271
Introduction.....	271
Recommendation of the Law Reform Commission of Western Australia	272
Discussion Paper	272
Submissions	273
The National Committee's view.....	273
Documentation	273
Application by, or with the consent of, the executors under grants of probate and double probate	273
Authorisation of attorney by the executors under grants of probate and double probate	274
SUBSTITUTED EXECUTORS AND ADMINISTRATORS	275
Introduction.....	275
Recommendation of the Law Reform Commission of Western Australia	277
Discussion Paper	277
Submissions	278
The National Committee's view.....	278
Documentation	278
Applicants.....	279
APPLICATION BY A FOREIGN TRUSTEE COMPANY FOR THE RESEALING OF A GRANT	279
The present law.....	279
Eligibility of a foreign trustee company	279
Procedural requirements.....	280
Commonwealth Secretariat Draft Model Bill	281
Discussion Paper	281
Submissions	281
The National Committee's view.....	281
Eligibility of a foreign trustee company	281
Procedural requirements.....	282
THE COURT'S POWER TO RESEAL A GRANT, IMPOSE CONDITIONS AND REVOKE THE RESEALING OF A GRANT.....	282
The existing law	282
Commonwealth Secretariat Draft Model Bill	283
Recommendation of the Law Reform Commission of Western Australia	283
Discussion Paper	283
Submissions	284
The National Committee's view.....	284
NOTIFICATION	284
The existing law	284
Recommendation of the Law Reform Commission of Western Australia	285
Discussion Paper	286
Submissions	286
The National Committee's view.....	287
SUCCESSION DUTY	289
The existing law	289
Commonwealth Secretariat Draft Model Bill	291
Recommendation of the Law Reform Commission of Western Australia	291
Discussion Paper	291
Submissions	291
The National Committee's view.....	292
RECOMMENDATIONS	292

CHAPTER 36	301
CHOICE OF LAW ISSUES: THE PERSON IN WHOSE FAVOUR A GRANT MAY BE MADE OR RESEALED	301
INTRODUCTION	302
ORIGINAL GRANTS	303
Historical background.....	303
The law in Australia.....	305
Introduction	305
Australian jurisdictions other than South Australia	305
South Australia.....	308
Recommendation of the Law Reform Commission of Western Australia	314
Discussion Paper	314
Submissions	315
The National Committee's view.....	316
A provision to reduce the need for separate grants.....	316
Application of the model provision: where the deceased died domiciled outside the jurisdiction	317
The persons to whom a grant may be made	317
Application of the model provision where the deceased has appointed an executor in the jurisdiction to administer the estate in the jurisdiction.....	318
When the court may make a grant in accordance with the law that would have applied if the deceased had died domiciled in the jurisdiction.....	319
Location of provision	319
RESEALING OF GRANTS	319
The law in Australia.....	319
Australian jurisdictions other than South Australia and Tasmania	320
South Australia.....	321
Tasmania	322
The law in England.....	323
Commonwealth Secretariat Draft Model Bill	324
Recommendation of the Law Reform Commission of Western Australia	325
Discussion Paper	326
Submissions	327
The National Committee's view.....	328
Resealing of grants generally	328
Resealing where grant not made in domicile.....	328
Location of provisions	329
RECOMMENDATIONS	329
 CHAPTER 37	 333
AUTOMATIC RECOGNITION OF GRANTS: BACKGROUND	333
INTRODUCTION	334
STATISTICS ON RESEALING.....	335
Number of applications for resealing and origin of original grant.....	335
The cost of resealing.....	336
Time taken.....	337
AUTOMATIC RECOGNITION OF GRANTS IN THE UNITED KINGDOM.....	337
Background	337
Recognition of grants made in that part of the United Kingdom in which the deceased died domiciled.....	338
Abolition of resealing of grants made in another part of the United Kingdom	338
Limited grants.....	339
Procedural matters.....	339

HISTORY OF PROPOSALS FOR THE AUTOMATIC RECOGNITION OF GRANTS IN AUSTRALIA.....	339
The Barwick proposals.....	339
The proposals of the Law Reform Commission of Western Australia	340
The proposals of the Parliamentary Counsel's Committee.....	341
Subsequent consideration of proposals for automatic recognition	341
THE TRANSFER OF SECURITIES UNDER THE <i>CORPORATIONS ACT 2001</i> (CTH)	342
DOMICILE	344
THE NATIONAL COMMITTEE'S VIEW	346
CHAPTER 38	347
THE SCHEME FOR THE AUTOMATIC RECOGNITION OF GRANTS	347
INTRODUCTION	349
WHAT IS MEANT BY THE 'AUTOMATIC RECOGNITION' OF A GRANT THROUGHOUT AUSTRALIA.....	350
The concept of 'recognition' under the United Kingdom scheme	350
The National Committee's view.....	350
THE RANGE OF AUSTRALIAN GRANTS TO WHICH AUTOMATIC RECOGNITION SHOULD BE GIVEN	352
Recommendations of the Law Reform Commission of Western Australia	352
Modification by the Parliamentary Counsel's Committee	353
Discussion Paper	354
Submissions	356
The National Committee's view.....	356
Implementation in two stages	356
Stage one: Recognition of a grant made in the State or Territory in which the deceased died domiciled	359
Stage two: Recognition of a grant made in any State or Territory.....	360
APPLICATION OF THE PROPOSED SCHEME TO ORDERS TO ADMINISTER AND ELECTIONS TO ADMINISTER.....	360
Recommendation of the Law Reform Commission of Western Australia	361
Discussion Paper	361
Submissions	362
The National Committee's view.....	362
Orders to administer	362
Elections to administer.....	362
MATTERS TO BE NOTED ON THE GRANT	363
Recommendation of the Law Reform Commission of Western Australia	363
Discussion Paper	364
Submissions	364
The National Committee's view.....	365
Stage one.....	365
Grants made in the enacting jurisdiction	365
Grants recognised in the enacting jurisdiction.....	366
Implementation of stage two by a State or Territory other than the enacting jurisdiction	366
Stage two	367
Grants made in the enacting jurisdiction	367
Implementation of stage two by all States and Territories.....	367
APPLICATION OF THE PROPOSED SCHEME TO OVERSEAS GRANTS	368
Recommendation of the Law Reform Commission of Western Australia	368
Discussion Paper	368
Submissions	369

The National Committee's view.....	369
RETENTION OF JURISDICTION TO MAKE A GRANT EVEN IF THE DECEASED DIED DOMICILED IN ANOTHER STATE OR TERRITORY	371
THE MAKING OF A LIMITED GRANT IF THE DECEASED DIED DOMICILED IN ANOTHER STATE OR TERRITORY	371
Background	371
Recommendation of the Law Reform Commission of Western Australia	372
Discussion Paper	373
Submissions	374
The National Committee's view.....	375
Stage one.....	375
Limited grant if the deceased died domiciled in another State or Territory or if the court does not make a finding about the deceased's domicile.....	375
Effect of an endorsed interstate grant on a local limited grant, an election to administer or a resealed grant.....	376
No resealing of an Australian grant if the deceased died domiciled in another State or Territory.....	377
Resealing of an Australian grant if the deceased died domiciled overseas	378
Stage two	379
Limited grant if the deceased died domiciled in another State or Territory or if the court does not make a finding about the deceased's domicile.....	379
No resealing of any Australian grants.....	380
Implementation of stage two by all States and Territories.....	380
PROTECTION FOR PERSONAL REPRESENTATIVE WHOSE LIMITED GRANT HAS CEASED TO HAVE EFFECT	381
Background	381
The National Committee's view.....	381
APPLICATION OF THE PROPOSED SCHEME TO GRANTS THAT HAVE BEEN RESEALED IN AN AUSTRALIAN JURISDICTION.....	383
Recommendation of the Law Reform Commission of Western Australia	383
Discussion Paper	383
Submissions	384
The National Committee's view.....	384
STAGE TWO: NOTICE OF INTENTION TO APPLY FOR A GRANT AND OF GRANTS MADE	384
Recommendation of the Law Reform Commission of Western Australia	385
Probate Registrars	385
Discussion Paper	386
Submissions	387
The National Committee's view.....	387
IMPACT OF THE PROPOSED SCHEME FOR THE AUTOMATIC RECOGNITION OF GRANTS ON VARIOUS ASPECTS OF PROBATE PRACTICE	389
Notice of intention to apply for a grant or for the resealing of a grant.....	389
Background.....	389
Discussion Paper	389
Submissions.....	390
The National Committee's view	390
Caveats	391
Background.....	391
Discussion Paper	391
Submissions.....	392
The National Committee's view	393
Administration bonds and sureties.....	394
Background.....	394

Discussion Paper	394
Submissions	394
The National Committee's view	394
Inventories	395
Background	395
Discussion Paper	396
Submissions	397
The National Committee's view	397
Passing of accounts	398
Background	398
Discussion Paper	398
Submissions	399
The National Committee's view	399
Revenue protection	400
Background	400
Discussion Paper	400
Submissions	400
The National Committee's view	400
REVIEW OF THE PROPOSED SCHEME	400
RECOMMENDATIONS	401
CHAPTER 39	411
THE EFFECT OF AUTOMATIC RECOGNITION ON OTHER AREAS OF SUCCESSION LAW	411
INTRODUCTION	412
THE PERSON TO WHOM THE GRANT WILL BE MADE	412
Background	412
Effect of proposed scheme of automatic recognition	413
VALIDITY OF WILLS	414
Background	414
Effect of the proposed scheme of automatic recognition	417
INTESTACY	417
Background	417
Effect of the proposed scheme of automatic recognition	418
FAMILY PROVISION	418
Background	418
Jurisdictional rules	419
Effect of the proposed scheme of automatic recognition	422
ADMINISTRATION OF ESTATES	422
THE NATIONAL COMMITTEE'S VIEW	423
CHAPTER 40	425
MISCELLANEOUS ADMINISTRATION PROVISIONS	425
APPLICATION FOR A GRANT TO BE MADE IN ACCORDANCE WITH COURT RULES	427
Existing legislative provisions	427
New South Wales	427
Other Australian jurisdictions	428
Discussion Paper	428
Submissions	429
The National Committee's view	429
DELAY IN APPLYING FOR A GRANT OR THE RESEALING OF A GRANT	430
Existing provisions in court rules	430

Application for an original grant	430
Application for resealing.....	430
Discussion Papers	431
Submissions	431
The National Committee's view.....	431
APPLICATION BY A NON-RESIDENT EXECUTOR OR ADMINISTRATOR	432
Existing legislative provisions.....	432
Recommendation of the Law Reform Commission of Western Australia	432
Discussion Paper	432
Submissions	433
The National Committee's view.....	433
DEEMED RESIDENCE OF, AND SERVICE ON, A NON-RESIDENT EXECUTOR OR ADMINISTRATOR.....	434
Introduction.....	434
Existing legislative provisions.....	435
Recommendation of the Law Reform Commission of Western Australia	436
Discussion Papers	436
Submissions	437
The National Committee's view.....	438
FINDING AS TO DOMICILE	439
Existing legislative provisions.....	439
Existing provisions in court rules.....	440
Discussion Papers	441
Submissions	443
The National Committee's view.....	445
No requirement for the court to make finding about the deceased's domicile at the time of death	445
No provision dealing with the court's power to require evidence of the deceased's domicile.....	446
RECORD OF GRANT	446
Existing legislative provisions.....	446
Discussion Paper	448
Submissions	448
The National Committee's view.....	448
REGISTRAR'S POWERS	449
Existing legislative provisions.....	449
Queensland.....	449
South Australia.....	449
Tasmania	450
Western Australia.....	450
Discussion Paper	451
Submissions	451
The National Committee's view.....	451
COURT PRACTICE	452
Existing legislative provisions.....	452
Australian Capital Territory, New South Wales, Northern Territory	452
Queensland.....	453
South Australia.....	454
Victoria	456
Western Australia.....	457
Discussion Paper	457
Submissions	457
The National Committee's view.....	458

SERVICE	458
Introduction.....	458
Discussion Paper	459
Submissions	460
The National Committee’s view.....	460
RECOMMENDATIONS	460
APPENDIX 1	463
GLOSSARY.....	463
APPENDIX 2	465
LIST OF RESPONDENTS: ADMINISTRATION OF ESTATES.....	465
APPENDIX 3	467
LIST OF RESPONDENTS: RESEALING AND AUTOMATIC RECOGNITION OF GRANTS.....	467
APPENDIX 4	469
COMMONWEALTH SECRETARIAT DRAFT MODEL BILL	469

Abbreviations

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Chapter 26

The survival of causes of action

INTRODUCTION	2
EXISTING LEGISLATIVE PROVISIONS	2
Causes of action that survive against the estate of a deceased person	4
Damages recoverable where a cause of action survives against the estate of a deceased person.....	7
Proceedings against beneficiaries	7
DISCUSSION PAPER.....	9
SUBMISSIONS.....	10
THE NATIONAL COMMITTEE'S VIEW	11
Survival of action provisions.....	11
Proceedings against beneficiaries	12
RECOMMENDATIONS	17

INTRODUCTION

26.1 At common law, a personal representative ‘could neither sue nor be sued for any tort committed against or by the deceased in his lifetime’.³ This principle was summed up by the Latin maxim *actio personalis moritur cum persona* — a personal action dies with the person.⁴

26.2 In England, this principle was substantially modified by the *Law Reform (Miscellaneous Provisions) Act 1934*, which provides that, subject to certain specified exceptions,⁵ on the death of a person, all causes of action subsisting against or vested in the person survive against or, as the case may be, for the benefit of, the person’s estate.⁶

EXISTING LEGISLATIVE PROVISIONS

26.3 In Australia, all jurisdictions have legislative provisions, based on the *Law Reform (Miscellaneous Provisions) Act 1934* (Eng), that deal with the survival of causes of action.

26.4 In Queensland, Victoria and Tasmania, the relevant provisions are located in the administration legislation of those jurisdictions.⁷

26.5 Section 66 of the *Succession Act 1981* (Qld) provides:

66 Survival of actions

- (1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person’s estate.
- (2) Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought—
 - (a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life; and

³ JG Fleming, *The Law of Torts* (9th ed, 1998) 741. See also *Kirk v Todd* (1882) 21 Ch D 484, 488–9 (Jessel MR).

⁴ *Osborn’s Concise Law Dictionary* (7th ed, 1983) 12. The rule was subject to a number of exceptions, such as ‘actions for breach of contract and ... torts affecting property’: Law Commission (England and Wales), *Proceedings Against Estates*, Report No 19 (1969) [6].

⁵ Section 1(1) of the *Law Reform (Miscellaneous Provisions) Act 1934* (Eng) does not apply to causes of action for defamation. Further s 1(1A) of that Act provides that the right of a person to claim under s 1A of the *Fatal Accidents Act 1976* does not survive for the benefit of the person’s estate.

⁶ *Law Reform (Miscellaneous Provisions) Act 1934* (Eng) s 1.

⁷ *Succession Act 1981* (Qld) s 66; *Administration and Probate Act 1935* (Tas) s 27; *Administration and Probate Act 1958* (Vic) s 29.

- (b) shall not include exemplary damages; and
 - (c) in the case of a breach of promise to marry—shall be limited to damages in respect of such damages as flow from the breach of promise to marry; and
 - (d) where the death has been caused by the act or omission which gives rise to the cause of action—shall be calculated without reference to—
 - (i) loss or gain to the estate consequent upon the death save that a sum in respect of funeral expenses may be included; or
 - (ii) future probable earnings of the deceased had the deceased survived.
- (2A) Despite subsection (2)(a), damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life, may be recovered if—
- (a) the cause of action related to personal injury resulting from a dust-related condition; and
 - (b) the deceased person commenced a proceeding in relation to the cause of action before the deceased person died; and
 - (c) the deceased person died as a result of the dust-related condition or the dust-related condition was a contributing factor to the deceased person's death.
- (2B) To remove any doubt, it is declared that personal injury resulting from a dust-related condition does not include personal injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.
- (3) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against that person before his or her death such cause of action in respect of that act or omission as would have subsisted if that person had died after the damage was suffered.
- (4) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the provisions of the *Supreme Court Act 1995*, part 4 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).
- (5) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.

- (6) An action which survives pursuant to subsection (1) against the estate of a deceased person may be brought against any beneficiary to whom any part of the estate has been distributed as well as against the personal representatives.
- (7) Where an action is brought against a beneficiary to whom a part of the estate has been distributed that beneficiary is entitled to contribution from any beneficiary to whom a distribution has been made, being a beneficiary ranking in equal degree with himself or herself for the payment of the debts of the deceased, and to an indemnity from any beneficiary to whom a distribution has been made, being a beneficiary ranking in lower degree than himself or herself for the payment of the debts of the deceased, and the beneficiary may join any such beneficiary as a party to the action brought against him or her.
- (8) Where an action is brought against a beneficiary (including a beneficiary who has been joined as aforesaid) whether in respect of an action which has survived against the estate or for contribution or indemnity, the beneficiary may plead equitable defences and if the beneficiary has received the distribution made to the beneficiary in good faith and has so altered the beneficiary's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the action, the court may make such order as it thinks fit.
- (9) In no case may a judgment against a beneficiary exceed the amount of the distribution made to the beneficiary.
- (10) In this section—

dust-related condition see the *Civil Liability Act 2003*, schedule 2.

personal injury includes disease.

26.6 In the ACT, New South Wales, the Northern Territory, South Australia and Western Australia, the provisions that deal with the survival of causes of action are not found in the administration legislation of those jurisdictions, but are located in separate legislation.⁸

26.7 The fact that only some jurisdictions include the relevant provisions in their administration legislation raises the issues of whether it is appropriate for provisions dealing with the survival of causes of action to be located in the model legislation and, if so, how those provisions should be framed.

Causes of action that survive against the estate of a deceased person

26.8 The legislative provisions of all Australian jurisdictions provide generally that, on the death of a person, all causes of action subsisting against

⁸

Civil Law (Wrongs) Act 2002 (ACT) ss 15–18; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW); *Law Reform (Miscellaneous Provisions) Act* (NT) ss 5–9; *Survival of Causes of Action Act 1940* (SA); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4.

or vested in the person survive against or, as the case may be, for the benefit of the person's estate.⁹

26.9 In addition, all jurisdictions include a provision to the effect of section 66(3) of the *Succession Act 1981* (Qld),¹⁰ which deals with the situation where the tortfeasor dies at the same time as, or before, the claimant suffers the relevant damage. All provisions ensure that, where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there is taken to have been subsisting against that person before his or her death such cause of action in respect of that act or omission as would have subsisted if that person had died after the damage was suffered.¹¹

26.10 The legislation in all jurisdictions except Tasmania provides for certain specified exceptions to the general principle that, on a person's death, all causes of action subsisting against or vested in the person survive against, or for the benefit of, the person's estate. These exceptions vary as between the jurisdictions, with the most common exceptions being:¹²

- causes of action for defamation;¹³
- causes of action for seduction;¹⁴

⁹ *Civil Law (Wrongs) Act 2002* (ACT) s 15(1); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1); *Law Reform (Miscellaneous Provisions) Act* (NT) s 5(1); *Succession Act 1981* (Qld) s 66(1); *Survival of Causes of Action Act 1940* (SA) s 2(1); *Administration and Probate Act 1935* (Tas) s 27(1); *Administration and Probate Act 1958* (Vic) s 29(1); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(1).

¹⁰ *Succession Act 1981* (Qld) s 66(3) is set out at [26.5] above.

¹¹ *Civil Law (Wrongs) Act 2002* (ACT) s 17; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(4); *Law Reform (Miscellaneous Provisions) Act* (NT) s 8; *Survival of Causes of Action Act 1940* (SA) s 5; *Administration and Probate Act 1935* (Tas) s 27(4); *Administration and Probate Act 1958* (Vic) s 29(4); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(4).

¹² Fleming suggests that the 'common link appears to be injury to dignitary interests, but by identifying torts rather than the nature of the harm, some claims are invidiously excluded from the list (eg false imprisonment and malicious prosecution ...): JG Fleming, *The Law of Torts* (9th ed, 1998) 743, note 242. Fleming also suggests (at 743, note 242) that:

it would have been more sensible to distinguish ... between the wrongdoer's death and the victim's. The first does not mitigate the plaintiff's damages at all and should accordingly be ignored. Only the latter has relevance in so far as most survival legislation ... sets its face against recovery for non-pecuniary loss and should be dealt with from that viewpoint alone.

¹³ *Civil Law (Wrongs) Act 2002* (ACT) s 15(2); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1); *Law Reform (Miscellaneous Provisions) Act* (NT) s 5(2); *Succession Act 1981* (Qld) s 66(1); *Survival of Causes of Action Act 1940* (SA) s 2(2); *Administration and Probate Act 1958* (Vic) s 29(1); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(1).

¹⁴ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1); *Law Reform (Miscellaneous Provisions) Act* (NT) s 5(2); *Succession Act 1981* (Qld) s 66(1); *Administration and Probate Act 1958* (Vic) s 29(1); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(1). Note, however, that the common law action for seduction has been abolished in the ACT, South Australia and Tasmania: see *Civil Law (Wrongs) Act 2002* (ACT) s 210(a); *Civil Liability Act 1936* (SA) s 68(a); *Civil Liability Act 2002* (Tas) s 28E(a).

- causes of action for inducing one spouse to leave or remain apart from the other;¹⁵ and
- claims for damages on the grounds of adultery.¹⁶

26.11 Three jurisdictions have additional provisions that have the potential to shorten the limitation period that would otherwise apply if the tortfeasor had not died.

26.12 The South Australian legislation provides that no proceedings may be maintained in respect of an action in tort that, by virtue of the Act, survives against the estate of a deceased person unless either:

- proceedings in respect of the cause of action were pending against the deceased when the deceased died; or
- the cause of action arose not earlier than six months before the deceased's death and proceedings are taken not later than six months after probate or administration is granted in respect of the deceased's estate.¹⁷

26.13 This provision was based on section 1(3) of the *Law Reform (Miscellaneous Provisions) Act 1934* (Eng), as originally enacted. However, section 1(3) was amended in 1954 to remove the requirement that the tort must have been committed within six months before the alleged tortfeasor died,¹⁸ and was repealed altogether in 1970.¹⁹

26.14 The legislation in the Northern Territory and Tasmania also contains similar provisions, except that the time frames within which the cause of action must have arisen and been instituted are slightly different, and the provisions give the court the power to extend the time within which proceedings may be instituted.²⁰

¹⁵ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1); *Law Reform (Miscellaneous Provisions) Act* (NT) s 5(2); *Administration and Probate Act 1958* (Vic) s 29(1); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(1). Note, however, that the common law action for enticement has been abolished in the ACT, South Australia and Tasmania: see *Civil Law (Wrongs) Act 2002* (ACT) s 210(b); *Civil Liability Act 1936* (SA) s 68(b); *Civil Liability Act 2002* (Tas) s 28E(b). Note also that s 120 of the *Family Law Act 1975* (Cth) provides generally that no action lies for damages for enticement of a party to a marriage.

¹⁶ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1); *Law Reform (Miscellaneous Provisions) Act* (NT) s 5(2); *Administration and Probate Act 1958* (Vic) s 29(1); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(1). Note, however, that s 120 of the *Family Law Act 1975* (Cth) provides generally that no action lies for damages for adultery.

¹⁷ *Survival of Causes of Action Act 1940* (SA) s 4.

¹⁸ *Law Reform (Limitation of Actions) Act 1954* (Eng) s 4.

¹⁹ *Proceedings Against Estates Act 1970* (Eng) s 1. For a discussion of this issue see Law Commission (England and Wales), *Proceedings Against Estates*, Report No 19 (1969).

²⁰ *Law Reform (Miscellaneous Provisions) Act* (NT) s 7; *Administration and Probate Act 1935* (Tas) s 27(5), (6).

Damages recoverable where a cause of action survives against the estate of a deceased person

26.15 The legislation in all jurisdictions prescribes the damages that are recoverable in a proceeding in relation to a cause of action that survives against the estate of a deceased person.²¹ Section 66(2) of the *Succession Act 1981* (Qld) is fairly typical of these provisions in terms of the damages that are generally recoverable when a cause of action survives for the benefit of an estate.²²

26.16 Some jurisdictions, however, provide for the recovery of damages on a more generous basis where the deceased died as a result of a 'dust-related condition',²³ an asbestos-related disease,²⁴ or a latent injury that is attributable to the inhalation of asbestos,²⁵ and proceedings in respect of the cause of action were pending at the time of death.

Proceedings against beneficiaries

26.17 The Queensland provision in respect of the survival of causes of action differs from the other Australian provisions, in that section 66(6)–(9) of the *Succession Act 1981* (Qld) deals with proceedings against beneficiaries.

26.18 Section 66(6) of the *Succession Act 1981* (Qld) provides that a cause of action that survives, pursuant to subsection (1), against the estate of a deceased person may be brought against any beneficiary to whom any part of the estate has been distributed as well as against the personal representatives.

26.19 The inclusion of this provision was recommended by the Queensland Law Reform Commission in its 1978 Report, which explained the need for such a provision in the following terms:²⁶

The personal representative may distribute the estate paying attention to claims of which he has knowledge, and if he has duly advertised and does not know of a claim, he is protected.²⁷ Creditors may pursue beneficiaries to whom distributions have been made but it is not entirely clear whether tort plaintiffs may. (note added)

²¹ *Civil Law (Wrongs) Act 2002* (ACT) s 16; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2); *Law Reform (Miscellaneous Provisions) Act* (NT) s 6; *Succession Act 1981* (Qld) s 66(2); *Survival of Causes of Action Act 1940* (SA) s 3(1); *Administration and Probate Act 1935* (Tas) s 27(3); *Administration and Probate Act 1958* (Vic) s 29(2); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2).

²² *Succession Act 1981* (Qld) s 66(2) is set out at [26.5] above.

²³ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(7), *Dust Diseases Tribunal Act 1989* (NSW) s 12B; *Succession Act 1981* (Qld) s 66(2A), (2B); *Survival of Causes of Action Act 1940* (SA) s 3(2), (3); *Administration and Probate Act 1958* (Vic) s 29(2A).

²⁴ *Civil Law (Wrongs) Act 2002* (ACT) s 16(4).

²⁵ *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2a).

²⁶ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 50.

²⁷ This issue is considered in Chapter 21 of this Report.

26.20 There is no doubt that a creditor may bring an action directly against a beneficiary to whom a distribution has been made. In *Re Diplock*,²⁸ the English Court of Appeal, while not attempting to express an exhaustive formulation of the equity that may be invoked, confirmed that an 'unpaid or underpaid creditor, legatee or next-of-kin' has an equitable claim against the recipient of a distribution from an estate who was overpaid or who was not entitled to any payment.²⁹ It has been observed, however, that the cases have not considered 'whether a person with a claim for unliquidated damages is entitled to the benefit of this equitable remedy'.³⁰

26.21 In recommending the provision that was enacted as section 66(6) of the *Succession Act 1981* (Qld), the Queensland Law Reform Commission also noted that, in several family provision cases, it had been held that the 'estate' out of which provision could be ordered was the estate that remained in the hands of the personal representative, and did not include property that had been distributed to beneficiaries.³¹ The Commission considered that such a construction of the term 'estate' would be undesirable in this context as it would be 'an oblique way of importing a special and, to some extent, capricious limitation period into this branch of the law'.³²

26.22 The Commission therefore recommended 'that it be stated clearly that the surviving cause of action may be brought against beneficiaries as well as against personal representatives'.³³

26.23 Section 66(7) of the *Succession Act 1981* (Qld) provides that, if an action is brought against a beneficiary to whom a distribution has been made, that beneficiary may seek contribution from any other beneficiary to whom a distribution has been made who ranks in equal degree with himself or herself for the payment of debts, and an indemnity from any beneficiary to whom a distribution has been made who ranks in lower degree than himself or herself

28 [1948] Ch 465; aff'd *Ministry of Health v Simpson* [1951] AC 251.

29 *Re Diplock* [1948] Ch 465, 502 (Lord Greene MR). The Court of Appeal held (at 503) that the claim of such a person is subject to the important qualification that, since the wrong payment was attributable to the blunder of the personal representative, the claim of the underpaid person is in the first instance against the personal representative. The direct action against the overpaid or wrongly paid party should be limited to the amount that cannot be recovered from the personal representative.

30 *Melbourn v Stephenson* [2002] NSWCA 403, [12] (Handley JA). Handley JA noted (at [12]) that this question could not have arisen until after the passing of the *Law Reform (Miscellaneous Provisions) Act 1944* (Eng) and its equivalent in other jurisdictions, as 'prior to that legislation a cause of action in tort against the deceased did not survive against his estate'.

31 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 50–1, referring to *Re Lowe* [1964] QWN 37; *Re Donkin* [1966] Qd R 96; *Re McPhail* [1971] VR 534. For the National Committee's recommendations about the property out of which a family provision order should be able to be made see *Family Provision Report* (1997) Chapter 6; *Family Provision Supplementary Report* (2004) Chapter 3.

32 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 51.

33 *Ibid.*

for the payment of debts.³⁴ Further the beneficiary against whom the action is brought may join such a beneficiary as a party to that action.

26.24 In recommending this provision, the Queensland Law Reform Commission noted that the provision expressed 'the normal principles of application of the doctrines of contribution and indemnity'.³⁵ The Commission also considered it desirable for a beneficiary against whom an action is brought to 'be able to bring co-beneficiaries into court so that the matter can be dealt with at one time'.³⁶

26.25 However, the Commission was of the view that the legislation should also contain some limitations regarding the extent of the liability of a beneficiary against whom an action was brought or from whom another beneficiary sought contribution or an indemnity:³⁷

we consider that beneficiaries should only be liable to the extent of the distributions made to them, that they should be able to plead equitable defences (particularly *laches*) and that they should be afforded the defence of change of position which we have already included in s 109(3) of the *Trusts Act 1973* in the case of persons who have received wrongful distributions of trust property and have changed their positions detrimentally ... in reliance on the propriety of the distribution.

26.26 These protections are found in section 66(8) and (9) of the *Succession Act 1981* (Qld). The Commission suggested that the provision of these protections to beneficiaries 'should constitute an added incentive to claimants against estates to come into the open and pursue their claims against the personal representatives promptly'.³⁸

DISCUSSION PAPER

26.27 In the Discussion Paper the National Committee considered whether the model legislation should contain provisions dealing with the survival of causes of action or whether the issue would be better dealt with in separate legislation (as, it noted, is the case in the ACT, New South Wales, the Northern Territory, South Australia and Western Australia).³⁹

26.28 The National Committee expressed the view that a provision to the effect of section 66 of the *Succession Act 1981* (Qld) would be 'a useful

³⁴ See Chapter 17 of this Report for a discussion of the order in which assets are applied towards the payment of debts.

³⁵ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 51.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Administration of Estates Discussion Paper* (1999) QLRC 185; NSWLRC [14.9].

reference point for personal representatives', but that the exceptions would be better placed in separate legislation.⁴⁰

26.29 It therefore proposed that 'a provision to the effect of section 66(1) to (5) of the *Succession Act 1981* (Qld) should be included in the model legislation, but in a more generic form'.⁴¹ It further proposed that the exceptions regarding causes of action that do not survive, which are not uniform between the various jurisdictions, should be set out in separate legislation in each jurisdiction.⁴²

26.30 In relation to actions against beneficiaries, the National Committee sought submissions on whether the model legislation should include provisions to the effect of section 66(6)–(9) of the *Succession Act 1981* (Qld).⁴³

SUBMISSIONS

26.31 The National Committee's proposal to include only a 'generic' form of section 66(1)–(5) of the *Succession Act 1981* (Qld) was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies.⁴⁴

26.32 The Queensland Law Society generally expressed the view that section 66 of the *Succession Act 1981* (Qld) is well drafted, and that the substance of the provision should not be changed.

26.33 An academic expert in succession law commented that the National Committee should not attempt to review the issue of which causes of action should survive against, or for the benefit of, the estate of a deceased person:⁴⁵

I think the question of what sorts of actions may survive is a matter for experts in the law relating to limitation of actions, rather than the law relating to the administration of deceased estates. So, for instance, the question of whether actions for defamation may be brought against the estate of a defamed or defaming deceased person should not perhaps be a matter for the National Committee.

26.34 Only a former ACT Registrar of Probate was of the view that the model legislation should contain the principal provisions dealing with survival of causes

⁴⁰ Ibid, QLRC 185; NSWLRC [14.10].

⁴¹ Ibid, QLRC 185; NSWLRC 266 (Proposal 70).

⁴² Ibid.

⁴³ Ibid, QLRC 186; NSWLRC 267.

⁴⁴ Submissions 1, 8, 11, 14, 15. Although the ACT Law Society expressed support for the National Committee's proposal, it suggested that there seemed to be no point in amending the current ACT legislation: Submission 14.

⁴⁵ Submission 12.

of action. She suggested that ‘all matters touching on deceased estates [should] be contained in one piece of legislation’.⁴⁶

26.35 The submissions that responded to the question about whether the model legislation should include provisions to the effect of section 66(6)–(9) of the *Succession Act 1981* (Qld) considered that the model legislation should include provisions to their effect. This was the view of the Bar Association of Queensland, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁴⁷

26.36 The Bar Association of Queensland, the Trustee Corporations Association of Australia and the ACT Law Society commented that the case law does not deal adequately with the issue of bringing an action against a beneficiary to whom part of an estate has been distributed.⁴⁸

THE NATIONAL COMMITTEE’S VIEW

Survival of action provisions

26.37 Although uniform legislation dealing with the survival of causes of action is a desirable goal, the National Committee does not consider it appropriate for the model administration legislation to include provisions dealing with the issues of which particular causes of action should survive against or for the benefit of an estate, or of the damages that should be recoverable when a cause of action does survive for the benefit of an estate.

26.38 These issues are essentially matters of tort law, rather than administration law, and are more properly located in separate legislation dealing with the survival of specific causes of action, as is the case in most Australian jurisdictions.⁴⁹ Further, the National Committee considers that any review of these issues should be undertaken in the context of a specific review of tort law, rather than in the context of a review of the law in relation to the administration of the estates of deceased persons.

26.39 The model legislation should, however, enshrine the principle found in section 66(1) of the *Succession Act 1981* (Qld) that, on the death of a person, subject to any exceptions contained in the separate legislation dealing with the survival of specific causes of action, all causes of action subsisting against or vested in the person survive against or, as the case may be, for the benefit of,

46 Submission 2.

47 Submissions 1, 6, 7, 8, 12, 14, 15.

48 Submissions 1, 6, 14.

49 See [26.6]–[26.7] above.

the person's estate. A provision in these terms reflects the fact that a cause of action that survives for the benefit of an estate is an asset of the estate, while a cause of action that survives against an estate is a liability of the estate.

26.40 The model legislation should also include provisions to the effect of section 66(3)–(5) of the *Succession Act 1981* (Qld), which are, in effect, companion provisions to section 66(1). In particular, it is important that a provision to the effect of section 66(3) is included to deal with the situation where a person suffers damage *after* the death of the deceased person. In the absence of such a provision, a provision based on section 66(1) would have no application in such a situation.

Proceedings against beneficiaries

26.41 The National Committee is of the view that, subject to the matters mentioned below, the model legislation should include provisions to the effect of section 66(6)–(9) of the *Succession Act 1981* (Qld). Those provisions ensure that, if a cause of action survives against the estate of a deceased person, a proceeding in relation to the cause of action may be brought against a beneficiary to whom a part of the estate has been distributed, and confirm that such a proceeding is not restricted to a claimant who is a creditor, legatee or next of kin of the deceased person.⁵⁰ At the same time, the provisions enable a beneficiary against whom a proceeding is brought to plead a statutory defence of change of position,⁵¹ and ensure that a judgment against a beneficiary may not exceed the amount of the distribution made to the beneficiary.

Clarification of section 66(6)

26.42 The National Committee considers that section 66(6) of the *Succession Act 1981* (Qld) is unclear as to whether, in accordance with the principles espoused in *Re Diplock*,⁵² a person who wishes to bring a proceeding against a beneficiary to whom part of the estate has been distributed must, in the first instance, pursue his or her remedies against the personal representative, or whether the section overrides that aspect of *Re Diplock*.

26.43 In contrast, section 109 of the *Trusts Act 1973* (Qld), which deals with remedies for the wrongful distribution of trust property or of the estate of a deceased person, is quite clear about this issue. Section 109(2) provides:

⁵⁰ See [26.17]–[26.22] above.

⁵¹ See [26.25]–[26.26] above.

⁵² [1948] Ch 465, which is discussed at [26.20] above.

109 Remedies for wrongful distribution of trust property

...

- (2) Except by leave of the court, no person who has suffered loss by reason of the wrongful distribution of trust property or of the estate of a deceased person may enforce any remedy against any person to whom such property or estate has been wrongfully distributed until the person has first exhausted all remedies which may be available to the person against the trustee or personal representative.

26.44 Section 109(2) incorporates the general qualification from *Re Diplock*, but modifies it slightly by enabling the court to grant leave to a person to pursue a beneficiary without having exhausted all remedies against the trustee or personal representative.

26.45 In Chapter 22 of this Report, the National Committee has recommended that, subject to certain modifications, the model legislation should include a provision based on section 109(2) of the *Trusts Act 1973* (Qld). The National Committee has recommended that the model provision should not require a claimant to enforce any remedy against the personal representative before bringing a proceeding against a person to whom part of the estate has been wrongfully distributed. However, the National Committee has recommended in that chapter that, if a proceeding is brought against a person to whom a wrongful distribution has been made, but is not also brought against the personal representative or trustee, the proceeding should require the court's leave.⁵³

26.46 In the National Committee's view, the model provision that is based on section 66(6) of the *Succession Act 1981* (Qld) should be consistent with the approach taken in the model provisions that are generally based on section 109(2) of the *Trusts Act 1973* (Qld). Accordingly, the model legislation should provide that, if a cause of action survives against the estate of a deceased person:

- the claimant may bring a proceeding in relation to the cause of action against any or all of the following:
 - the personal representative of the deceased person's estate;
 - any beneficiary of the estate to whom any part of the estate has been distributed;
- the claimant is not required to exhaust his or her remedies against the personal representative before proceeding against any beneficiary to whom any part of the estate has been distributed;

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See Recommendation 22-2 above.

- the claimant may bring a proceeding, at the same time, against the personal representative and any beneficiary to whom any part of the estate has been distributed, but a proceeding that is brought against a beneficiary to whom a part of the estate has been distributed, and not also against the personal representative, requires the court's leave.

Clarification of section 66(7)

26.47 Section 66(7) of the *Succession Act 1981* (Qld) provides:

- (7) Where an action is brought against a beneficiary to whom a part of the estate has been distributed that beneficiary is entitled to contribution from any beneficiary to whom a distribution has been made, being a beneficiary ranking in equal degree with himself or herself for the payment of the debts of the deceased, and to an indemnity from any beneficiary to whom a distribution has been made, being a beneficiary ranking in lower degree than himself or herself for the payment of the debts of the deceased, and the beneficiary may join any such beneficiary as a party to the action brought against him or her.

26.48 The effect of section 66(7) is that, if a claimant brings a proceeding against a beneficiary in relation to an action that survives against the deceased's estate, the beneficiary is entitled to:

- contribution from any beneficiary to whom a distribution has been made if the beneficiary ranks 'in equal degree with himself or herself for the payment of the debts of the deceased'; and
- an indemnity from any beneficiary to whom a distribution has been made who ranks 'in lower degree than himself or herself for the payment of the debts of the deceased'.

26.49 The National Committee notes that neither section 59(1) of the *Succession Act 1981* (Qld), which sets out the order for the application of assets towards the payment of debts, nor the model provision that is based on section 59(1),⁵⁴ provides for a ranking of beneficiaries; instead, they provide for a ranking of property. The model legislation should therefore clarify what is meant by the fact that a beneficiary ranks in equal degree to, or in lower degree than, another beneficiary for the payment of debts of the deceased's estate.

26.50 The model legislation should provide that:

- a beneficiary ranks in equal degree to another beneficiary if each beneficiary is a beneficiary of property that is in the same class under the provision that gives effect to Recommendation 17-2; and
- a beneficiary (the 'first beneficiary') ranks in lower degree to another beneficiary if, under the provision that gives effect to Recommendation

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See Recommendation 17-2 above and Administration of Estates Bill 2009 cl 502.

17-2, the property of which the first beneficiary is a beneficiary must be used for the payment of debts before the property of which the other beneficiary is a beneficiary.

26.51 It is also possible for a beneficiary to be a beneficiary of property in more than one class — for example, if he or she is a beneficiary of a specific disposition and is also a residuary beneficiary. To address this situation, the model legislation should provide that, if a beneficiary is a beneficiary of property that is in a particular class of property and of other property that is in a different class of property, the beneficiary may be ranked in more than one way against another beneficiary for the purposes of contribution and indemnity.

26.52 Section 66(7) of the *Succession Act 1981* (Qld) provides that a beneficiary against whom a claimant brings a proceeding is entitled, in the relevant circumstances, to contribution and indemnity from any other beneficiary to whom part of the estate has been distributed. However, section 66(7) does not provide that the beneficiary is entitled to contribution and indemnity from the personal representative; nor does it provide that a beneficiary against whom a proceeding is commenced for contribution or indemnity is entitled to contribution or indemnity from another beneficiary to whom part of the estate has also been distributed (or from the personal representative).

26.53 The model legislation should provide that, if a claimant brings a proceeding against a beneficiary, the beneficiary, as well as being entitled to indemnity and contribution from another beneficiary as provided for by section 66(7) of the *Succession Act 1981* (Qld):

- is entitled to contribution and indemnity from the personal representative in the amount and on such terms as the court considers appropriate; and
- may join the personal representative as a party to the proceeding brought against the beneficiary.

26.54 Further, the model legislation should provide that a beneficiary against whom a proceeding for contribution or indemnity is brought (the 'respondent beneficiary'):

- is entitled to:
 - an indemnity from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the respondent beneficiary for the payment of the debts of the estate;
 - contribution from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the respondent beneficiary for the payment of the debts of the estate; and

- contribution and indemnity from the personal representative in the amount and on the terms that the court considers appropriate; and
- may join such a beneficiary or the personal representative as a party to the proceeding that has been brought against him or her.

26.55 This entitlement to contribution and indemnity is not limited to the beneficiary against whom the claimant brings the proceeding or to another beneficiary against whom that beneficiary brings a proceeding for contribution or indemnity, but has a wider application. If a proceeding for contribution or indemnity is brought against any beneficiary to whom part of the estate has been distributed, that beneficiary has the specified entitlement to contribution and indemnity against any other beneficiary to whom part of the estate has been distributed, who in turn has the same entitlement to contribution and indemnity. This proposal is reflected in clause 607(3) of the Administration of Estates Bill 2009, which provides for the re-application, with necessary changes, of clause 607(2).

Clarification of section 66(8)

26.56 Section 66(8) of the *Succession Act 1981* (Qld) provides:

- (8) Where an action is brought against a beneficiary (including a beneficiary who has been joined as aforesaid) whether in respect of an action which has survived against the estate or for contribution or indemnity, the beneficiary may plead equitable defences and if the beneficiary has received the distribution made to the beneficiary in good faith and has so altered the beneficiary's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the action, the court may make such order as it thinks fit.

26.57 The model provision that is based on section 66(8) of the *Succession Act 1981* (Qld) should omit the words 'the beneficiary may plead equitable defences'. Instead, the model legislation should provide separately that the provision that is based on section 66(8) does not limit any other defence available, under an Act or at law or in equity, to the beneficiary to whom the distribution has been made.

Clarification of section 66(9)

26.58 Section 66(9) of the *Succession Act 1981* (Qld) provides:

- (9) In no case may a judgment against a beneficiary exceed the amount of the distribution made to the beneficiary.

26.59 Because of the possibility that a judgment may include an award of interest,⁵⁵ the model legislation should make it clear that, in deciding whether

⁵⁵

See, for example, *Supreme Court Act 1995* (Qld) s 47.

the amount of the judgment is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

RECOMMENDATIONS

Survival of causes of action

26-1 Subject to Recommendation 26-2, the model legislation should include a provision to the effect of section 66(1) of the *Succession Act 1981* (Qld), so that, on the death of a person, subject to the exceptions contained in the separate legislation of the jurisdictions dealing with the survival of specific causes of action, all causes of action subsisting against or vested in the person survive against or, as the case may be, for the benefit of, the person's estate.⁵⁶

See Administration of Estates Bill 2009 cl 600.

26-2 The model provision that gives effect to Recommendation 26-1 should not deal with:⁵⁷

- (a) any exceptions regarding specific causes of action that do not survive the death of a person (presently found in section 66(1) of the *Succession Act 1981* (Qld)); or
- (b) the damages that are recoverable when a cause of action survives for the benefit of an estate (presently found in section 66(2) and (2A) of the *Succession Act 1981* (Qld)).

26-3 The model legislation should include provisions to the effect of section 66(3)–(5) of the *Succession Act 1981* (Qld).⁵⁸

See Administration of Estates Bill 2009 cll 601–603.

Proceedings against personal representative or beneficiary

26-4 The model legislation should include a provision to the general effect of section 66(6) of the *Succession Act 1981* (Qld), except that it should provide that, if a cause of action survives against the estate of a deceased person:⁵⁹

⁵⁶ See [26.37]–[26.39] above.

⁵⁷ Ibid.

⁵⁸ See [26.40] above.

⁵⁹ See [26.41]–[26.46] above.

- (a) the claimant may bring a proceeding in relation to the cause of action against any or all of the following:
 - (i) the personal representative of the deceased person's estate;
 - (ii) any beneficiary of the estate to whom a distribution of the estate has been made;
- (b) the claimant is not required to exhaust all his or her remedies against the personal representative before proceeding against a beneficiary to whom a distribution of the estate has been made; and
- (c) the claimant may bring proceedings against the personal representative and a beneficiary at the same time, but a proceeding that is brought against a beneficiary, and not also against the personal representative, requires the court's leave.

See Administration of Estates Bill 2009 cl 606.

Beneficiary's entitlement to contribution or indemnity

26-5 The model legislation should include a provision to the effect of section 66(7) of the *Succession Act 1981* (Qld), except that the model legislation should also provide that:

- (a) if a proceeding is brought by a claimant against a beneficiary to whom any part of the estate has been distributed, the beneficiary:⁶⁰
 - (i) is entitled to contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate; and
 - (ii) may join the personal representative as a party to the proceeding that has been brought against the beneficiary;

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See [26.52]–[26.53] above.

- (b) if a proceeding is brought against a beneficiary by another beneficiary claiming an indemnity or contribution, the beneficiary against whom the proceeding is brought (the '*respondent beneficiary*'):⁶¹
- (i) is entitled to:
 - (A) an indemnity from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the respondent beneficiary for the payment of the debts of the estate;
 - (B) contribution from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the respondent beneficiary for the payment of the debts of the estate; and
 - (C) contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate; and
 - (ii) may join such a beneficiary or the personal representative as a party to the proceeding that has been brought against the respondent beneficiary.

See Administration of Estates Bill 2009 cl 607.

Ranking of beneficiaries

26-6 The model legislation should provide that, for the purpose of the model provision dealing with contribution and indemnity between beneficiaries:⁶²

- (a) a beneficiary ranks in equal degree to another beneficiary if each beneficiary is a beneficiary of property that is in the same class under the provision that gives effect to Recommendation 17-2;

61 See [26.52], [26.55] above.

62 See [26.41], [26.47]–[26.51] above.

- (b) a beneficiary (the '*first beneficiary*') ranks in lower degree to another beneficiary if, under the provision that gives effect to Recommendation 17-2, the property of which the first beneficiary is a beneficiary must be used for the payment of debts before the property of which the other beneficiary is a beneficiary; and
- (c) if a beneficiary is a beneficiary of property that is in a particular class of property and of other property that is in a different class of property, the beneficiary may be ranked in more than one way against another beneficiary for the purposes of contribution and indemnity.

See Administration of Estates Bill 2009 cl 608.

Defences available to a beneficiary

26-7 The model legislation should include:⁶³

- (a) a provision to the general effect of section 66(8) of the *Succession Act 1981* (Qld), except that the model provision should omit the words 'the beneficiary may plead equitable defences'; and
- (b) a further provision that states that the provision that gives effect to Recommendation 26-7(a) does not limit any other defence available, under an Act or at law or in equity, to the beneficiary to whom the distribution has been made.

See Administration of Estates Bill 2009 cl 609.

Maximum amount of judgment

26-8 The model legislation should include a provision to the general effect of section 66(9) of the *Succession Act 1981* (Qld) and provide that:⁶⁴

- (a) a judgment against a beneficiary must not be more than the amount of the distribution made to the beneficiary; and
- (b) in deciding whether the amount of the judgment is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

⁶³ See [26.41], [26.56]–[26.57] above.

⁶⁴ See [26.41], [26.58]–[26.59] above.

See Administration of Estates Bill 2009 cl 610.

Chapter 27

Commission

INTRODUCTION	24
THE ALLOWANCE OF COMMISSION BY THE COURT	25
The court's inherent jurisdiction to allow commission	25
Existing legislative provisions	27
The court's practice in allowing commission	33
Discussion Paper	39
Submissions	41
The National Committee's view	44
THE EFFECT OF A SPECIFIC PROVISION IN A WILL FOR COMMISSION OR REMUNERATION	48
Review by the court	51
Discussion Paper	53
Submissions	53
The National Committee's view	56
PUBLIC TRUSTEES AND TRUSTEE COMPANIES	57
Public trustees	57
Trustee companies	60
Entitlement to commission when administering an estate other than under a grant	63
Discussion Paper	65
Submissions	65
The National Committee's view	65
RECOMMENDATIONS	67

INTRODUCTION

27.1 The purpose of commission is to compensate a personal representative or trustee for his or her ‘pains and trouble’ in administering an estate — that is, ‘for the responsibility, anxiety and worry involved in the discharge of the [personal representative’s] duties and for the actual work done’.⁶⁵

27.2 There are two main potential sources for the allowance of commission. Commission may be allowed by the court, either in its inherent jurisdiction or under its statutory power, on the application of a personal representative or trustee. The allowance of commission in these circumstances is in the discretion of the court.⁶⁶ Alternatively, an executor or trustee may be entitled to commission in accordance with the terms of the will under which he or she is appointed.⁶⁷

27.3 Some wills also contain a charging clause, under which an executor who is a professional person, such as a solicitor or an accountant, is entitled to charge directly for professional (and sometimes non-professional) services rendered to the estate.⁶⁸

27.4 Public trustees and trustee companies are in a special position in relation to commission. Legislation in all Australian jurisdictions confers an entitlement to commission or other remuneration.⁶⁹

27.5 Depending on the nature of the estate, there can be considerable work in administering an estate — for example, where the assets are difficult to realise,⁷⁰ where the estate includes a business that is carried on by the executors or trustees,⁷¹ where family provision proceedings are instituted against the executor,⁷² or where the will creates a charitable trust that is to last

65 *Luck v Fogarty* (Unreported, Supreme Court of Tasmania, Zeeman J, 22 March 1996) 2.

66 See [27.34]–[27.38] below.

67 See [27.96]–[27.104] below.

68 See [27.49] below for an explanation of the difference between professional and non-professional services in this context.

69 See [27.130]–[27.139], [27.142]–[27.147] below.

70 See *In the Will of Sheppard* [1972] 2 NSWLR 714, where the will gave the executors the power to continue carrying out the residential subdivision of a number of parcels of realty that the testator had commenced before his death.

71 See *Re Craig* (1952) 52 SR (NSW) 265, 266 (Roper J), where the executors and trustees were carrying on a grazing business as part of the estate and *Nissen v Grunden* (1912) 14 CLR 297, where the executors and trustees were authorised under the will to carry on the testator’s oyster saloon business.

72 See *Atkins v Godfrey* [2006] WASC 83, [94] (Le Miere J).

in perpetuity.⁷³

27.6 Where the duties are likely to be onerous, a testator may also wish to encourage an executor to accept the office by providing expressly that commission may be charged at a particular rate or that the executor may charge for professional services.⁷⁴ It has been suggested that the payment of commission is 'conducive to the good administration of estates':⁷⁵

It may be that in times gone by there were more people with the leisure and resources to take on unremunerated trusteeships. However, in contemporary times the payment of executors' remuneration is conducive to the good administration of estates. An executor is more likely to be able to devote the time and resources to the proper administration of an estate if he or she is remunerated for doing so.

27.7 It is important, however, to ensure that estates are not burdened by excessive claims for commission or professional charges.

27.8 This chapter examines:

- the allowance of commission by the court and by the will itself;
- the effect on any claim for commission of a charging clause contained in the will; and
- the entitlement to commission of public trustees and trustee companies.

THE ALLOWANCE OF COMMISSION BY THE COURT

The court's inherent jurisdiction to allow commission

27.9 Historically, the general rule in relation to commission was as follows:⁷⁶

It is an established rule ... that a trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust, or not.

⁷³ See *Estate of Scott; Buckley v Permanent Trustee Co Ltd* (1988) 21 NSWLR 112, where the testator left a large estate on trust to executors and trustees to apply the income in perpetuity for specified charitable purposes, and where the trustees were required each year to select the charities that were to benefit.

⁷⁴ See, for example, *Re Gambling* [1966] SASR 134, which is considered at note 82 below.

⁷⁵ *Atkins v Godfrey* [2006] WASC 83, [17] (Le Miere J).

⁷⁶ *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049, 1049 (Talbot LC).

27.10 There were, however, exceptions to this general principle, and it was always recognised ‘that the Court of Chancery had jurisdiction to allow to executors and trustees remuneration for their pains and trouble, though it was not the practice to exercise it’.⁷⁷

27.11 In Australia, the various Supreme Courts have an inherent jurisdiction to allow commission to an executor, administrator or trustee, as a result of being invested with the equitable jurisdiction of the Court of Chancery.⁷⁸ However, that jurisdiction developed differently from the practice in the United Kingdom,⁷⁹ and, within Australia, the ‘allowance of commission is the rule not the exception’.⁸⁰

27.12 The Supreme Court’s inherent jurisdiction runs concurrently with its statutory jurisdiction to allow commission.⁸¹ The court may, in the exercise of its inherent jurisdiction, approve an agreement for the remuneration of an executor and trustee.⁸² It has also been held that the court may, in the exercise of its inherent jurisdiction, allow commission at a rate higher than the amount allowed by statute in the particular jurisdiction.⁸³

77 *Re Whitehead* [1958] VR 143, 145 (Herring CJ, Dean J).

78 *Nissen v Grunden* (1912) 14 CLR 297, 304–5 (Griffith CJ), 314 (Isaacs J); *Re Gambling* [1966] SASR 134, 136 (Walters AJ); *In the Will of Shannon* [1977] 1 NSWLR 210, 215 (Holland J); *Re the Will of Stratton* [1981] WAR 58; *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J).

79 See *Nissen v Grunden* (1912) 14 CLR 297, 304–5 (Griffith CJ); *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J).

80 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [86.02]. See also *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J). Note, however, that in *Re the Will of Stratton* [1981] WAR 58, although Brinsden J accepted that the Court has the inherent jurisdiction to allow commission, his Honour suggested (at 61–2) that the practice of the Supreme Court of Western Australia in exercising that jurisdiction was probably closer to the English view than was suggested by Griffith CJ in *Nissen v Grunden* (1912) 14 CLR 297.

81 *Re Gambling* [1966] SASR 134, 136 (Walters AJ).

82 *Ibid* 136–7. In *Re Gambling*, a testator with a substantial and complex estate made a will appointing two executors — his adult son and a chartered accountant with detailed knowledge of his business affairs. The testator expressly instructed the solicitor who prepared the will to include a clause to authorise the executor who was the chartered accountant to make his usual professional charges for work done by him as executor. The solicitor inadvertently failed to include the charging clause. The accountant was prepared to accept the executorship only if he was able to charge for his services, and the deceased’s widow and son, who were the only beneficiaries, both wanted him to act. The widow and son, after receiving independent legal advice, entered into an indenture with the accountant in which they agreed that, in consideration of his acceptance of the office of executor, he was to be entitled to be paid his usual professional charges for the work done. The two executors sought court approval of the indenture. The Court considered (at 136) that, as the executors were seeking a prospective allowance for administrative work that was yet to be completed, it was more appropriate for them to invoke the inherent jurisdiction of the Court, rather than apply under s 70 of the *Administration and Probate Act 1919* (SA). The Court (at 138) approved the indenture, but without limiting the Court’s power to review the charges made by the executor for his professional services.

83 *Re the Will of Stratton* [1981] WAR 58, 64 (Brinsden J).

Existing legislative provisions

27.13 As explained above, the Supreme Courts of the Australian States and Territories have an inherent jurisdiction to allow commission. The High Court has observed that:⁸⁴

Ordinarily that jurisdiction could only be exercised in the course of the administration of an estate by the Court, unless by Statute a more summary proceeding were allowed.

27.14 All Australian jurisdictions have long had legislative provisions under which the court may, in summary proceedings, allow commission to an executor, administrator or trustee.⁸⁵ An application for the allowance of commission will usually be supported by an affidavit ‘setting out the details of the “pains and trouble” incurred’.⁸⁶

27.15 When commission is sought, application is usually made as part of the application for the passing of the accounts of the administration of the estate. In most jurisdictions, the court rules provide a mechanism for a personal representative or trustee to give public notice of his or her intention to apply for the passing of accounts and the allowance of commission and for an interested person to be heard on that application.⁸⁷

Australian Capital Territory

27.16 Section 70 of the *Administration and Probate Act 1929* (ACT) provides:⁸⁸

70 Executors etc may be allowed commission

The Supreme Court may allow out of the assets of a deceased person to the person’s executor, administrator or trustee the commission or percentage for his or her services that is just.

⁸⁴ *Nissen v Grunden* (1912) 14 CLR 297, 305 (Griffith CJ).

⁸⁵ See [27.16]–[27.33] below.

⁸⁶ JK de Groot, *Wills, Probate and Administration Practice (Queensland)* (looseleaf) vol 1, [601]. In some Australian jurisdictions, the court rules specifically require an application for commission to be supported by affidavit: see *Supreme Court Rules 1970* (NSW) Pt 78 r 85(1)(a); *Supreme Court Rules* (NT) r 88.80(a); *The Probate Rules 2004* (SA) r 92.01; *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 10.02(a).

⁸⁷ *Court Procedures Rules 2006* (ACT) rr 2749–2754; *Supreme Court Rules 1970* (NSW) Pt 78 rr 75, 76–78; *Supreme Court Rules* (NT) r 88.78; *Uniform Civil Procedure Rules 1999* (Qld) rr 647–649; *The Probate Rules 2004* (SA) rr 92.09, 92.13–92.16. Under the Victorian rules, a person who is a beneficiary or who claims an interest in the estate of a deceased person or who purports to act on behalf of a beneficiary or claimant who is a person under a disability or resident out of the jurisdiction may file a notice requiring that he or she be notified of an application for commission: *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 10.05. Under the Western Australian rules, the requirement to give notice applies to the date fixed for the passing of accounts and is silent in relation to commission: *Non-contentious Probate Rules 1967* (WA) r 37(4)–(8).

⁸⁸ Section 70 of the *Administration and Probate Act 1929* (ACT) was inserted by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 pt 2.1 [2.25], and commenced on 29 September 2006. The previous provision provided that the registrar could not allow commission at a rate that exceeded 5 per cent.

27.17 The court rules provide that an executor or administrator who applies for the allowance of commission out of the estate must file a full and correct account of the administration of the estate. Similarly, if a trustee applies for an order for the allowance of commission out of the income or proceeds of trust property, the trustee must file a full and correct account of the trustee's administration of the trust property.⁸⁹

New South Wales

27.18 Section 86 of the *Probate and Administration Act 1898* (NSW) provides:

86 Executors etc may be allowed commission

- (1) The Court may allow out of the assets of any deceased person to the deceased person's executor, administrator, or trustee for the time being, in passing the accounts relating to the estate of the deceased person, such commission or percentage for the executor's, administrator's or trustee's pains and trouble as is just and reasonable, and subject to such notices (if any) as the Court may direct.
- (2) No such allowance shall be made to any executor, administrator, or trustee who neglects or omits without good reason to pass the accounts relating to the estate of the deceased person pursuant to the rules or an order of the Court.
- (3) Where any executor, administrator or trustee renounces the executor's, administrator's or trustee's right to such commission in respect of any particular year, the executor, administrator or trustee shall be entitled to indemnity out of the said assets for the amount of the executor's, administrator's or trustee's Australian legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale, for non-professional work performed in that year, to an amount not exceeding that which the executor, administrator or trustee would have been in the opinion of the Court allowed by way of such commission for that year had the executor, administrator or trustee not so renounced but had applied therefor.

27.19 Under section 86(1), the court has a general discretion to allow commission out of the 'assets of any deceased person'. It has been said that the provision 'was intended to reverse the English practice in accordance with which the inherent power of the court to allow remuneration was exercised sparingly and only in exceptional circumstances'.⁹⁰

27.20 The reference in section 86(1) to an executor has been held to include an executor by representation; further, it has been held that the reference in that section to a 'trustee' is not limited to a trustee of a trust created by a will, but

⁸⁹ *Court Procedures Rules 2006* (ACT) r 2748(1), (2). This rule is based on r 646(1), (2) of the *Uniform Civil Procedure Rules 1999* (Qld).

⁹⁰ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [86.01].

includes an executor who has become a trustee on the completion of his or her executorial duties.⁹¹

27.21 In general, a personal representative is not entitled to be indemnified out of the estate for the costs of retaining a solicitor to undertake executorial duties of a non-professional nature.⁹² Section 86(3) of the New South Wales legislation, however, enables a personal representative to be indemnified in respect of a solicitor's moderated costs of undertaking non-professional work, provided that the personal representative has renounced any right to commission in that particular year. The amount of the indemnity is not to exceed the amount that, in the opinion of the court, the personal representative or trustee would have been allowed by way of commission if he or she had not renounced and had applied for commission.

Northern Territory

27.22 Section 102 of the *Administration and Probate Act* (NT) provides:

102 Executors, &c., may be allowed commission

- (1) It shall be lawful for the Court to allow out of the assets of a deceased person to his or her executor, administrator or trustee for the time being, in passing his or her accounts, such commission or percentage, not exceeding 5% for his or her pains and trouble as is just and reasonable.
- (2) No such allowance shall be made to an executor, administrator or trustee who neglects or omits, without a special order of the Court, to pass his or her accounts in accordance with section 89.

27.23 Rule 88.81 of the *Supreme Court Rules* (NT) has a similar effect to section 86(3) of the *Probate and Administration Act 1898* (NSW). It provides:

88.81 Renunciation

- (1) Where an executor, administrator or trustee renounces his right to commission in respect of a particular year, he shall be entitled to indemnity out of the assets in the estate for the amount of his legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale, for non-professional work performed in that year, to an amount not exceeding that which the executor, administrator or trustee would have been, in the opinion of the Court, allowed by way of commission for that year had he applied for commission.
- (2) Where an applicant, in accordance with subrule (1), files a renunciation of commission, the accounts shall be allowed in accordance with the indemnity under subrule (1).

91 *In the Will of Sheldon* [1972] 1 NSWLR 196, 201, 203 (Helsham J).

92 *In the Will of Douglas* (1951) 51 SR (NSW) 282, 283 (Roper J). However, Roper J held (at 284) that an executor is entitled to be allowed the costs of employing a solicitor to do non-professional work for the estate where the will includes a provision to that effect.

- (3) A renunciation shall be filed no later than a reasonable time before the hearing of the proceeding.

Queensland

27.24 Section 68 of the *Succession Act 1981* (Qld) provides:

68 Commission

The court may authorise the payment of such remuneration or commission to the personal representative for his or her services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit.

27.25 This provision authorises the payment of remuneration or commission to a personal representative — that is, to an executor (including an executor by representation) or an administrator.⁹³ Where commission is sought by a trustee, application must be made under the *Trusts Act 1973* (Qld).⁹⁴

South Australia

27.26 Section 70 of the *Administration and Probate Act 1919* (SA) provides:

70 Commission may be allowed to executors, administrators or trustees

- (1) The Court may allow to any executor, administrator, or trustee, whether of the estate of a deceased person or otherwise, such commission or other remuneration out of the estate or trust property, and either periodically or otherwise, as is just and reasonable.
- (2) No allowance shall be made to any administrator who neglects—
- (a) to deliver the statement and account required by section 56, as by such section required, or within such reasonable time as is allowed by the Court; or
 - (b) to dispose of any estate with which he is chargeable according to the due course of administration.
- (3) Every administrator so neglecting to dispose of any estate with which he is chargeable shall be charged with interest at the rate of seven dollars per centum per annum for such sum and sums of money as from time to time have been in his hands, whether he has or has not made interest thereof.

⁹³ *Succession Act 1981* (Qld) s 5 (definition of 'personal representative').

⁹⁴ *Trusts Act 1973* (Qld) s 101. As explained at [11.103] in vol 1 of this Report, if an executor or administrator applies for the allowance of commission out of the estate, the executor or administrator must file a full and correct account of the administration of the trust: *Uniform Civil Procedure Rules 1999* (Qld) r 646(1). Similarly, if a trustee applies for an order for the allowance of commission out of the income or proceeds of trust property, the trustee must file a full and correct account of the trustee's administration of the trust property: *Uniform Civil Procedure Rules 1999* (Qld) r 646(2). Rule 656(1) provides that, if the same person is executor and trustee or administrator and trustee, the person may include in the same account a statement of the administration of the property in both capacities, but distinguishing between amounts received and disposed of by the person in each capacity.

Tasmania

27.27 Section 64 of the *Administration and Probate Act 1935* (Tas) provides:

64 Power of Court to make orders for due administration of estate of deceased person

The Court may make all such orders as may be necessary for the due administration of the real and personal estate and effects of any deceased person, and also for the payment out of such real and personal estate and effects to the persons administering the same of any costs, charges, and expenses which may have been lawfully incurred by them, and also such commission or percentage, not exceeding 5 per cent, for their pains and trouble therein as shall be just and reasonable; and if any executor or administrator shall neglect to pass his accounts, or dispose of the real and personal estate and effects of any deceased person, at the time and in the manner directed, it shall be lawful for the Court, on the application of any person aggrieved by such neglect, to order and direct that such executor or administrator shall pay interest at a rate not exceeding 8 per cent per annum for such sums of money as from time to time shall have been in his hands, and the costs occasioned by the application.

27.28 This provision, like the Queensland provision referred to above, enables the court to allow commission to the executor or administrator, but not the trustee, of a deceased person. Under the *Trustee Act 1898* (Tas), however, the court has a broad power to allow a trustee remuneration. Section 58 provides:

58 Remuneration of trustee

In any case in which there is not in the instrument creating the trust, or otherwise, any provision for remunerating a trustee, it shall be lawful for a judge in a summary way to allow such trustee such remuneration as shall be just and reasonable for his pains and trouble in the execution of the trust, and to determine the fund out of which, or the persons by whom, the same shall be paid.

Victoria

27.29 Section 65 of the *Administration and Probate Act 1958* (Vic) provides:

65 Executors' etc commission

It shall be lawful for the Court to allow out of the assets of any deceased person to his executor administrator or trustee for the time being such commission or percentage not exceeding Five per centum for his pains and trouble as is just and reasonable.

In this section **executor** includes the executor of an executor becoming by representation the executor of the original estate.

27.30 It has been suggested that the definition of 'executor' was inserted into the predecessor of this provision to overcome a decision of the Supreme Court

of Victoria to the effect that an executor by representation was not entitled to commission on the passing of his or her accounts.⁹⁵

Western Australia

27.31 The *Administration Act 1903* (WA) does not contain a provision authorising the allowance of commission to a personal representative or trustee. However, section 98 of the *Trustees Act 1962* (WA) provides:

98 Trustees' remuneration

- (1) The Court may, out of the property subject to any trust, allow to any person who is, or has been, a trustee thereof or to that person's personal representative such commission or percentage for that person's services as is just and reasonable.
- (2) The aggregate commission or percentage allowed under subsection (1) shall not exceed 5% of the gross value of the trust property.
- (3) The Court may, from time to time, allow such portion of the aggregate commission or percentage allowable under this section as it thinks fit.
- (4) Where the Court allows a commission or percentage under this section, in any case in which 2 or more persons are or have been trustees, whether acting at the same time or at different times, the Court may, in its discretion, apportion the total amount allowed among the trustees in such manner as it thinks fit, and, in particular, may divide the amount in unequal shares or may make the allowance to one or more of the trustees to the exclusion of the other or others.
- (5) In the absence of a direction to the contrary in the trust instrument, a trustee being a person engaged in any profession or business for whom no benefit or remuneration is provided in the trust instrument is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust, including acts that a trustee not being in any profession or business could have done personally; and, on any application to the Court for commission or percentage under subsection (1), the Court may take into account any charges that have been paid out of the trust property under this subsection.

27.32 Because the *Trustees Act 1962* (WA) defines 'trustee' to include a 'personal representative',⁹⁶ this provision authorises the allowance of commission not only to trustees, but also to executors and administrators.

27.33 As explained later in this chapter, a personal representative may not charge directly for professional services rendered to the estate unless specifically authorised by the will.⁹⁷ Section 98(5) reverses this position by

⁹⁵ *In the Will of Sheldon* [1972] 1 NSWLR 196, 202 (Helsham J).

⁹⁶ *Trustees Act 1962* (WA) s 6(1).

⁹⁷ See [27.47] of this Report.

allowing a trustee (which is defined to include a personal representative) who is engaged in a profession or business to charge for services rendered to the estate, provided the trust instrument does not contain a direction to the contrary. Section 98(5) is in virtually the same terms as section 101(2) of the *Trusts Act 1973* (Qld).

The court's practice in allowing commission

The court's discretion

27.34 Unless a will provides for an executor's commission, 'there is no absolute right to be awarded commission; the court has a discretion to refuse it'.⁹⁸ For example, where a legacy is given to a person in his or her character as executor,⁹⁹ the person cannot usually accept the legacy and also claim commission.¹⁰⁰

That legacy is, by necessary implication, given to him as compensation for his task and, if he accepts it, that precludes the exercise of the discretion to award commission in his favour ...

27.35 Similarly, where a will provides that 'the executor is to receive a particular remuneration for his services as executor, he is restricted to this remuneration, and if he proves the will, the Court will not, in the absence of special circumstances, exercise its jurisdiction to give him different or greater remuneration'.¹⁰¹

27.36 There are also a number of circumstances in which the court may reduce or refuse the commission that would otherwise be allowed.

27.37 For example, where an executor takes advantage of a provision in a will that authorises the executor, instead of acting personally, to engage and pay solicitors to carry out non-professional work, the executor's commission will

⁹⁸ *In the Will of Oddie* [1976] 1 NSWLR 371, 374 (Helsham J). Although an executor may apply to the court for the allowance of commission, he or she has no right to deduct the commission until it has been allowed by the court: *Nissen v Grunden* (1912) 14 CLR 297, 302 (Griffith CJ).

⁹⁹ Not every legacy in favour of an executor will bar the executor from claiming commission. Whether a legacy has that effect depends on the 'intention of the testator as disclosed in the will': *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J). His Honour continued (at 614–15):

It is only if the intention is that the legacy should represent recompense to the executor for his time and trouble that he will not be allowed commission, unless he either rejects the legacy; or it is so inadequate in amount as to be illusory ...

What is for this purpose a sufficient indication of intention has been a source of difficulty. An expression in the will that the legacy is given to the executor as remuneration or 'for his trouble therein' has been held to be sufficient ... as also has a legacy given 'in lieu of commission' ...

¹⁰⁰ *In the Will of Oddie* [1976] 1 NSWLR 371, 374 (Helsham J). Helsham J held (at 374) that it is open to an executor 'to forgo the legacy, to renounce it, and to claim and be allowed commission instead'. However, where the appointment of executor is conditional on the executor accepting the legacy in his or her favour, the executor may not renounce the legacy and claim commission: at 374–5 (Helsham J).

¹⁰¹ *In the Will of Kerrigan* (1935) 35 SR (NSW) 242, 245 (Jordan CJ).

be reduced to take account of the non-professional work undertaken by the solicitors.¹⁰²

27.38 The court may, in the exercise of its discretion, refuse or reduce commission on the basis of the personal representative's conduct in administering an estate:¹⁰³

The court may refuse commission on a number of grounds where there has been some misconduct in the execution of the executor's duties. If the misconduct is serious or amounts to fraud, commission will probably be refused. If the misconduct amounts to an honest or inadvertent breach of duty, commission may still be allowed. Commission may be reduced or, in serious cases, refused where there has been negligence in the carrying out of the executor's duties.

27.39 Commission has been reduced where the personal representative 'failed to exercise the scrutiny over the legal fees that he should have exercised and for his failure to ensure that the estate was finalised' within a reasonable time.¹⁰⁴

The usual basis for calculating commission

27.40 The court's usual practice in relation to commission is to allow a percentage rate of the capital realised, and of the income received by the estate, during the period covered by the accounts.¹⁰⁵ Although a range of rates is allowed, depending on the circumstances of the particular case, the courts have commonly looked for guidance to what is described as the Barr Smith scale.¹⁰⁶ The 'Barr Smith scale' is a reference to a decision of the Full Court of the Supreme Court of South Australia of *Re Barr Smith*,¹⁰⁷ in which the Court

¹⁰² *In the Will of Douglas* (1951) 51 SR (NSW) 282, 285 (Roper J); *In the Will of Oddie* [1976] 1 NSWLR 371, 374 (Helsham J).

¹⁰³ *Atkins v Godfrey* [2006] WASC 83, [19] (Le Miere J).

¹⁰⁴ *Ibid* [77].

¹⁰⁵ Although the courts have the power to award a lump sum, that is usually done only where there is one set of accounts or where the final accounts have been rendered: *Spence v Spence* [2003] NSWSC 1232, [6] (Windeyer J). In that case, Windeyer J explained the rationale for this practice (at [5]):

The practice of the court has nearly always been in estates with continuing accounts to allow commission on a percentage rate on income and on original corpus realizations; it has never been to allow lump sums on continuing accounts. The practice of allowing lump sums has nearly always been an allowance where there will be one set of accounts or where there is a final account. There is I think a particular reason to allow a lump sum where there is a final account because not only must distribution be taken into account, but some attention can then be given to the overall administration over the period of the trust. It would not, for instance, be appropriate to allow some lump sum based on the fact that in a particular year the corpus fund had increased. The reason for that is, firstly, that commission on the corpus at its original value has been allowed; secondly, there might have been inflation in that anyway, and, thirdly, the next accounts might show a diminution in the corpus, and it would not be appropriate to take this into account each year.

¹⁰⁶ *In the Estate of Taylor* [1965] SASR 136; *Chirnside* [1956] VLR 295, 303–4 (Lowe, Gavan Duffy and Dean JJ); *Luck v Fogarty* (Unreported, Supreme Court of Tasmania, Zeeman J, 22 March 1996) 3.

¹⁰⁷ [1920] SALR 380.

proposed differential rates of commission based on the various assets comprising the estate. The Court suggested the following rates, which generally reflect the relative degree of difficulty of realising, or dealing with, the different types of assets:¹⁰⁸

- on special assets got in and realised, such as cash, money in a bank account, money received under a life assurance policy, negotiable instruments, money received from the personal representative or trustee of another estate or fund, or other similar assets — 1.5 per cent on the first \$2000; 1 per cent on amounts between \$2000 and \$200 000; and 0.75 per cent on amounts over \$200 000;
- on other assets got in and realised — 5 per cent on the first \$2000; 2.5 per cent on amounts over \$2000;¹⁰⁹
- on assets that are not realised, but that are transferred *in specie* to the beneficiaries — 1.25 per cent on the first \$20 000; 0.75 per cent on the value in excess of \$20 000;
- on income got in annually — 5 per cent on the first \$2000; 2.5 per cent on amounts over \$2000;¹¹⁰
- in relation to so much of the capital or income that is realised or collected with the assistance of agents or solicitors paid out of the estate, only half of the above rates.

27.41 A commentator on succession practice has suggested that rates of 2.5 per cent on capital and 5 per cent on income are commonly considered appropriate.¹¹¹

27.42 It is important to note, however, that the Barr Smith scale and the range of rates allowed in the various cases are a guide only. As commission is allowed for the personal representative's pains and trouble, 'any sum arrived at by applying a "percentage" approach must be looked at in the light of the work actually done'.¹¹² In *Atkins v Godfrey*,¹¹³ the Supreme Court of Western

108 Ibid. Note that in *Re Barr Smith* the relevant amounts were given in pounds. Those amounts have been converted to dollars, but have not been adjusted to reflect their present day value.

109 In *Luck v Fogarty* (Unreported, Supreme Court of Tasmania, Zeeman J, 22 March 1996) the Court (at 3), following the differential approach set out in *Re Barr Smith* [1965] SASR 136, allowed commission on 'other assets realised' of 5 per cent on the first \$25 000 and 2.5 per cent on the balance.

110 See, for example, *Nissen v Grunden* (1912) 14 CLR 297 where the High Court restored the judgment of the trial judge, which included an allowance of commission on income at a rate of 5 per cent. Griffith CJ observed (at 301) that, as a result of the trustee's management of the estate (which included the management of an oyster saloon business), the estate had increased in value from £2200 to £4000 in a two year period.

111 JK de Groot, *Wills, Probate and Administration Practice (Queensland)* (looseleaf) vol 1, [603].

112 Ibid.

113 [2006] WASC 83.

Australia made the following observation about the *Barr Smith* scale:¹¹⁴

The proper approach required by s 98(1) of the [*Trustees Act 1962 (WA)*] is to form an overall assessment of what remuneration is just and reasonable rather than apply the *Barr Smith* scale. Nevertheless, the *Barr Smith* scale is helpful in this case in forming a view as to what remuneration is just and reasonable.

27.43 The Court elaborated on its approach to fixing a rate of commission:¹¹⁵

So as to ensure that the remuneration received by the executor is just and reasonable the court should fix a rate which is a projection of what the court considers, in all the circumstances, to be a proper award.

27.44 The Court held that, because of ‘the additional responsibilities and difficulties’ imposed on the executor by reason of the family provision proceedings instituted by the testator’s de facto partner and the conflict between the testator’s children as to the distribution of some of the assets, it would ordinarily have allowed commission ‘in an amount slightly more than the amount calculated by the application of the *Barr Smith* scale’. However, the commission that would otherwise have been allowed was reduced ‘to take into account the [executor’s] failure to exercise the scrutiny over the legal fees that he should have exercised and for his failure to ensure that the estate was finalised earlier’.¹¹⁶ The Court held that, in all the circumstances, a commission of 0.6 per cent of the gross value of the estate was just and reasonable remuneration for the services provided by the executor.¹¹⁷

27.45 The Supreme Court of New Zealand has long emphasised that, in determining the commission to be allowed, the court must consider the amount of work involved in administering the estate and not simply apply a rate of commission. In *Re the Will of B*,¹¹⁸ Denniston J commented:¹¹⁹

114 Ibid [91] (Le Miere J).

115 Ibid [95]. For a similar approach, see *Re the Estate of Lindsay* [2004] NSWSC 578, [14]–[15] (Campbell J); *Re Estate of Ghidella* [2005] QSC 106, [13]–[15] (Jones J); *Kirkpatrick v Kavulak* [2005] QSC 282, [20]–[21] (McMurdo J).

116 *Atkins v Godfrey* [2006] WASC 83, [94].

117 Ibid [95].

118 (1912) 14 GLR 368.

119 Ibid 368. Denniston J noted that the Court was being asked to approve a sum of £217 for what was described as ‘Transmission of Mortgages’ (being a rate of 1 per cent). Denniston J commented (at 369):

I understand this to be merely obtaining the ordinary devolution of these mortgages to the executors, a merely formal matter, amounting to no more than registering them in the name of the executors, done, I should suppose, by the solicitors, as a matter of course, and requiring no more trouble and imposing no more responsibility on the executors personally than would walking over to the Bank in which the testator had a balance, producing the probate, and requesting a transfer of the balance.

The usual practice of fixing the amount by a varying percentage on the amount received and disbursed is a convenient, but somewhat empirical method, not necessarily to be employed in all cases. ... It is the nature and not the amount of the estate which is the important factor in dealing with the commission for realization.

27.46 In *Re McLean*,¹²⁰ Denniston J expressed a similar view:¹²¹

It follows that the value of the estate is not to be the measure of the remuneration. *Prima facie*, the administration of a large estate will require more time, trouble, and responsibility than a small one. But there are elements to be considered, such as the character of the assets, the condition of the accounts, duties in carrying on a business and suchlike, which may make the administration of a comparatively small estate more onerous than that of the largest estate which has come before the Court.

The effect of providing professional services where the will does not contain a charging clause

27.47 Where the will does not contain a charging clause authorising the executor to charge for professional services rendered to the estate,¹²² there is no basis on which the executor can directly charge for the services provided:¹²³

No executor or trustee, professionally qualified or not, can charge the estate directly with remuneration for work done by him whether the work required professional skill or not.

27.48 However, the courts have held that the statutory power to allow commission is expressed in wide terms, and that it is appropriate for the court to take into account the professional services that a personal representative has rendered to an estate and to allow commission at a higher rate than would otherwise be the case.¹²⁴ In *Re Craig*,¹²⁵ the Supreme Court of New South Wales held:¹²⁶

the Act provides that the Court may allow him commission for his pains and trouble and does not restrict the pains and trouble to those incurred in doing work which is non-professional or work for which he happens not to be professionally qualified.

...

120 (1911) 31 NZLR 139.

121 Ibid 143. Note Denniston J dissented from the other members of the Full Court regarding the quantum of commission to be allowed.

122 Charging clauses are considered at [27.96]–[27.105] below.

123 *Re Craig* (1952) 52 SR (NSW) 265, 268 (Roper J). But see the discussion at [27.31]–[27.33] above of the statutory exception to this principle under the *Trustees Act 1962* (WA).

124 *Re Craig* (1952) 52 SR (NSW) 265, not following *Re Edmonds* [1943] VLR 97. See also *Re Whitehead* [1958] VR 143, which overruled *Re Edmonds* [1943] VLR 97.

125 (1952) 52 SR (NSW) 265.

126 Ibid 267, 268 (Roper J).

It may be said that if a commission is allowed for his pains and trouble that the estate is being charged indirectly for the work; but that is what the Act provides ...

The effect of providing professional or non-professional services where the will contains a charging clause

27.49 It is not uncommon for a will to provide that an executor may charge for the services that he or she renders to the estate. In this context, a distinction is drawn between professional and non-professional costs. Professional costs have been described as those costs that an executor would be entitled to incur and charge against the estate from the use of independent persons, for example, the costs of a solicitor who acts in a conveyance for the estate or the costs of an accountant who undertakes accountancy work in connection with the estate.¹²⁷ In contrast, non-professional work consists of the duties undertaken in the administration of an estate that could adequately be performed by a person not exercising the skills or performing the duties of a professional person.¹²⁸

27.50 There are two main types of charging clauses: first, those that enable the executor or trustee to charge for his or her professional work and, secondly, those that enable the executor or trustee to charge not only for his or her professional work, but also for his or her 'time and trouble' — that is, for non-professional work.¹²⁹

27.51 Where the language in the will is permissive and authorises the executor to charge for professional services, the executor has two options:¹³⁰

the executor may either, pursuant to the authority, make such charges as he considers reasonable and have the amount moderated on the passing of his accounts, or he may, instead, make no charges but apply for commission in the usual way, bringing the nature of the services rendered to the notice of the Court by affidavit.

27.52 Sometimes, an executor who is a professional person, such as a solicitor or an accountant, is authorised by the will to charge for both professional and other services. In those circumstances, the executor may charge for the professional services (moderating the bill before the registrar) and, in respect of the non-professional services, 'may either apply for commission or render a bill for moderation'.¹³¹ If the executor is entitled by the terms of the will to charge for non-professional services and the executor elects

127 *In the Will of Sheppard* [1972] 2 NSWLR 714, 718 (Helsham J).

128 *Ibid.*

129 *Estate of Instone* (Unreported, Supreme Court of New South Wales, Powell J, 23 August 1993) 36.

130 *In the Will of Kerrigan* (1935) 35 SR (NSW) 242, 245 (Jordan CJ).

131 *Ibid.*

to make a charge for those services, that will preclude the executor from claiming commission in respect of those services.¹³²

27.53 Whether a will authorises a professional executor to charge for all work done (that is, both professional and non-professional), or for only the professional work done, is a question of construction.¹³³ However, 'a charging clause will not be construed so as to enable a professional [person] to charge for work which a lay executor or trustee would be bound to do gratuitously unless it be clearly so expressed'.¹³⁴

27.54 As a general rule, the fact that the cost of professional services rendered by an executor or a trustee has been allowed against the estate does 'not afford any reason for reducing or cutting down that which is to be allowed by way of commission for the executor's pains and trouble in performing his duties as executor'.¹³⁵ The fact that an executor is a professional person may nevertheless have an indirect effect on the quantum of commission that is allowed:¹³⁶

[The commission] must be fixed having regard to the pains and trouble of the executor in the administration of the estate with reference to the accounts being passed and the period covered by them. There may be various indirect effects on the quantum of commission by reason of the estate being handled by professional men, such as the fact that their professional skills enable them more quickly and efficiently to carry out the necessary executorial duties, or the fact that the knowledge gained in carrying out professional activities for the estate may reduce the work, hence the pains and trouble, in performance of executorial duties. But the assessment must be made by reference to what has been done by the executor in the performance of his executorial duties and not having regard to what he may have been entitled to receive as a professional man.

Discussion Paper

A general provision for allowing commission to personal representatives and trustees

27.55 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision dealing with the payment of commission. It also proposed that the model provision should deal with the payment of commission not only to personal representatives, but also to

¹³² *In the Will of Sheppard* [1972] 2 NSWLR 714, 719 (Helsham J). However, as explained at [27.48] above, if the executor chooses not to charge for professional services or is not entitled to charge for those services, the quantum of the commission may be increased to reflect the additional work undertaken by the executor.

¹³³ *Ibid.* See also *In the Will of Kerrigan* (1935) 35 SR (NSW) 242, 245 (Jordan CJ); *Sacks v Gridiger* (1990) 22 NSWLR 502, 514–15 (McLelland J).

¹³⁴ *Estate of Instone* (Unreported, Supreme Court of New South Wales, Powell J, 23 August 1993) 37.

¹³⁵ *In the Will of Sheppard* [1972] 2 NSWLR 714, 720 (Helsham J).

¹³⁶ *Ibid* 720.

trustees.¹³⁷ The National Committee considered it important to make express reference to trustees, since personal representatives become trustees on the completion of their executorial duties.¹³⁸

Specific matters to be included in the model provision

27.56 The National Committee proposed that the model legislation should include a provision to the effect of section 86(3) of the *Probate and Administration Act 1898* (NSW),¹³⁹ which provides that an executor, administrator or trustee who renounces the right to commission for a particular year is entitled to an indemnity out of the estate in respect of a legal practitioner's moderated charges for non-professional work performed in that year.¹⁴⁰

27.57 The National Committee also proposed that the model provision should include a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA),¹⁴¹ which precludes an allowance of commission to an 'administrator' who 'neglects to dispose of any estate with which he is chargeable according to the due course of administration'.¹⁴² It also proposed that the model provision, like section 70 of the South Australian Act, should provide that the court may allow commission either 'periodically or otherwise'.¹⁴³

27.58 Apart from these proposals, the National Committee did not suggest a preference for any one of the current legislative provisions dealing with commission.

Rates of commission

27.59 The National Committee sought submissions on whether a maximum rate of commission should be set.¹⁴⁴ It proposed that, if any reference were to be made to specific rates of commission, those rates should be specified in court rules, rather than in the model legislation.¹⁴⁵

137 *Administration of Estates Discussion Paper* (1999) QLRC 85; NSWLRC 123.

138 *Ibid.*, QLRC 84; NSWLRC [8.94].

139 *Probate and Administration Act 1898* (NSW) s 86 is set out at [27.18] above.

140 *Administration of Estates Discussion Paper* (1999) QLRC 85; NSWLRC 124.

141 *Administration and Probate Act 1919* (SA) s 70 is set out at [27.26] above.

142 *Administration of Estates Discussion Paper* (1999) QLRC 85; NSWLRC 124.

143 *Ibid.*

144 *Ibid.* QLRC 86; NSWLRC 124.

145 *Ibid.* QLRC 85; NSWLRC 124.

Submissions

A general provision for allowing commission to personal representatives and trustees

27.60 The National Committee's proposal that the model legislation should include a provision dealing with the payment of commission and that the model provision should authorise the court to allow commission to a trustee received widespread support, with the Bar Association of Queensland, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies all agreeing with the proposal.¹⁴⁶ The support of the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia was, however, expressed to be subject to the qualification that commission for public trustees and trustee companies should remain within the relevant public trustee or trustee company legislation of the individual jurisdictions.¹⁴⁷

27.61 The Public Trustee of South Australia suggested that the model legislation should include a provision to the effect of section 70 of the *Administration and Probate Act 1919* (SA), subject to omitting section 70(2)(b), which refers to the current requirement in that jurisdiction for an administrator to deliver a statement and account of the estate to the public trustee.¹⁴⁸

Specific matters to be included in the model provision

27.62 Almost all the respondents who addressed the issue, agreed that the model legislation should include a provision to the effect of section 86(3) of the *Probate and Administration Act 1898* (NSW).¹⁴⁹ This was the view of the Bar Association of Queensland, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.

27.63 Only the Queensland Law Society disagreed with that proposal. It commented that 'a personal representative should be free to delegate non-professional work'.¹⁵⁰

146 Submissions 1, 6, 7, 8, 11, 12, 14, 15.

147 Submissions 6, 7.

148 Submission 4.

149 Submissions 1, 11, 12, 14, 15.

150 Submission 8. It should be noted that s 86(3) of the *Probate and Administration Act 1898* (NSW) does not prevent a personal representative from delegating; rather, it outlines the circumstances in which the personal representative can properly charge against the estate the cost of delegating that non-professional work.

27.64 The National Committee's proposal that the model legislation should include a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA) received a more divided response.

27.65 It was supported by the Bar Association of Queensland, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁵¹

27.66 However, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, and the New South Wales Council of the Trustee Corporations Association of Australia were opposed to the proposal. They were of the view that it is not always clear who the owners of assets are, and that executors 'should be entitled to be paid when disposing of assets that come to light, regardless of the timing'.¹⁵²

27.67 All the respondents who commented on the proposal that the model legislation should provide that commission may be allowed periodically or otherwise (namely, the Bar Association of Queensland, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies) agreed with the proposal.¹⁵³

Rates of commission

27.68 The ACT Law Society supported the setting of a maximum rate of commission. In its view, this would 'prevent overcharging by trustee companies', and should be 'equivalent to the maximum rate of commission allowed by the Courts on commission applications'.¹⁵⁴ However, as explained below, legislation in all jurisdictions already prescribes a maximum rate of commission for trustee companies.¹⁵⁵

27.69 However, an academic expert in succession law was strongly opposed to setting a maximum rate of commission. In his view, it is important that the court retain a discretion in relation to allowing commission, having regard to the circumstances of the particular case:¹⁵⁶

The concept of a 'rate' of commission is misconceived and should be completely removed from legislation and rules. The only issue is whether the personal representatives' bill for commission — remuneration for work done — is fair or reasonable. Only the court can really decide that. Of course it costs more to administer a difficult estate — for instance one with a foreign element. That would warrant remuneration reflecting the difficulty of that part of the work.

151 Submissions 1, 12, 14, 15.

152 Submissions 6, 7, 20.

153 Submissions 1, 11, 14, 15.

154 Submission 14.

155 See [27.143]–[27.144] below.

156 Submissions 12, 12A.

But to try to encapsulate that within the artificial framework of a rate is obfuscating. Again, the administration of a very large estate may not be more difficult than the administration of a small estate — a large estate might consist only of a simple portfolio of shares and savings accounts, all easily realisable. On the other hand a relatively small estate might be difficult to administer because, perhaps, a dispute existed between the deceased and another person which the personal representative has to resolve. So it is not justifiable to set different rates for different sizes of estates. ...

I would not wish to confine the court to a rigid formula, such as a percentage figure. That is I would continue to give the court a more or less unlimited power to determine how much commission to award and I would rely on the court's extensive experience in awarding such things as costs and commission. The courts sometimes express commission in terms of a rate; but my view is that when they do they have already determined an amount of commission and any rate expressed is merely an extrapolation from that award.

27.70 In particular, this respondent was opposed to setting, as the maximum rate for commission, a rate that is at the high end of the range of rates that is allowed by the court. In his view, if the model legislation is to prescribe a maximum rate of commission, it should set a maximum rate for 'ordinary estates', and allow the court to allow a higher rate of commission where there are 'complicating factors'.¹⁵⁷

27.71 The Public Trustee of New South Wales queried how and by whom the maximum rate would be set, and how often it would be reviewed. He also suggested that it would be necessary to consider whether a maximum rate of commission would properly compensate a personal representative who is administering a complex estate that is of low financial value.¹⁵⁸

27.72 There was widespread support for the proposal that, if reference is to be made to specific rates of commission, it should be in court rules rather than in the model legislation. The proposal was supported by the Bar Association of Queensland, the Public Trustee of Queensland, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law and the ACT and New South Wales Law Societies.¹⁵⁹

27.73 The support of the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia was expressed to be subject to the qualification, however, that the rates of commission chargeable by public trustees and trustee companies

157 Ibid.

158 Submission 11.

159 Submissions 1, 5, 6, 7, 8, 11, 12, 14, 15.

should be dealt with in the specific legislation of the jurisdiction dealing with public trustees and trustee companies.¹⁶⁰

27.74 The academic expert in succession law, although supporting the proposal that any reference to rates of commission should be contained in court rules rather than in the model legislation, reiterated his opposition to the primary issue of whether a maximum rate of commission should be set at all.¹⁶¹

27.75 The Public Trustee of New South Wales suggested that the rules should provide for the review of the rule setting any rate of commission.¹⁶²

The National Committee's view

27.76 In the National Committee's view, the model legislation should include a provision giving the court the power to allow remuneration out of the estate of a deceased person. Subject to the matters considered below, the model provision should generally be based on section 68 of the *Succession Act 1981* (Qld).

Payment of an amount for services that the court considers appropriate

27.77 Under the existing legislative provisions, the court's power to allow remuneration to a personal representative is expressed in a variety of ways.

27.78 The majority of jurisdictions (namely, the ACT, New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia) provide that the court may allow such 'commission or percentage' as the court considers 'just' (ACT) or 'just and reasonable' (New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia).¹⁶³

27.79 The Queensland and South Australian provisions do not include a reference to a 'percentage', but refer instead to 'remuneration' and 'commission'.¹⁶⁴

27.80 The New South Wales, Northern Territory, Tasmanian and Victorian provisions state that such an allowance may be made for the executor's, administrator's or trustee's 'pains and trouble'.¹⁶⁵ The ACT, Queensland and

160 Submissions 6, 7.

161 Submission 12.

162 Submission 11.

163 *Administration and Probate Act 1929* (ACT) s 70; *Probate and Administration Act 1898* (NSW) s 86(1); *Administration and Probate Act* (NT) s 102(1); *Administration and Probate Act 1935* (Tas) s 64; *Administration and Probate Act 1958* (Vic) s 65; *Trustees Act 1962* (WA) s 98(1).

164 *Succession Act 1981* (Qld) s 68 ('such remuneration or commission'); *Administration and Probate Act 1919* (SA) s 70 ('such commission or other remuneration').

165 *Probate and Administration Act 1898* (NSW) s 86(1); *Administration and Probate Act* (NT) s 102(1); *Administration and Probate Act 1935* (Tas) s 64; *Administration and Probate Act 1958* (Vic) s 65.

Western Australian provisions provide instead that such an allowance may be made for the person's 'services'.¹⁶⁶

27.81 In the National Committee's view, the model legislation should provide that the court may authorise the payment to a personal representative or trustee¹⁶⁷ of an amount for his or her services.

27.82 The National Committee has deliberately refrained from using the terms 'commission' and 'percentage'. Although the National Committee acknowledges that the court does not simply apply a given rate of commission to determine the allowance to be made, but must make an overall assessment of the value of the services provided, it is concerned that the model provision should be expressed in terms that best reflect the nature of the assessment undertaken by the court. In its view, the expression 'payment of an amount for services' is a more accurate reflection of the court's approach than the allowance of a commission or a percentage, as the latter terms do not sufficiently emphasise that the court's primary assessment must be of the services provided, rather than of the size of the estate.

27.83 Further, the court's power under the model provision should be to authorise the payment of an amount that it considers 'appropriate'. What is an appropriate amount will obviously depend on both the nature of the services provided by the personal representative, as well as the size of the estate. For example, what is regarded as an appropriate amount in relation to a very large estate may not necessarily be regarded as an appropriate amount where the value of an estate is quite small.

Payment of an amount for services may be allowed periodically or otherwise

27.84 Where an estate is being administered over a long period (for example, where the personal representative is carrying on a business that forms part of the estate), it is appropriate that the personal representative or trustee should be able to claim payment of an amount for his or her services periodically, rather than wait until the estate is fully distributed. Accordingly, the model provision should provide that the court may authorise the payment to be made 'periodically or otherwise'.¹⁶⁸

Unfettered discretion

27.85 As explained earlier in this chapter, the court takes into account the conduct of a personal representative or trustee in deciding what is an appropriate amount in the particular case, and may refuse or reduce the amount if there has been fraud, negligence or other misconduct on the part of the

¹⁶⁶ *Administration and Probate Act 1929 (ACT)* s 70; *Succession Act 1981 (Qld)* s 68; *Trustees Act 1962 (WA)* s 98.

¹⁶⁷ See [27.88]–[27.90] below.

¹⁶⁸ See, for example, s 70(1) of the *Administration and Probate Act 1919 (SA)*.

personal representative or trustee.¹⁶⁹ The National Committee considers that the court's discretion should remain unfettered, and that the model legislation should not single out particular factors that should have the effect of reducing or barring the amount allowed to a personal representative or trustee for his or her services. Accordingly, the model legislation should not include a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA).¹⁷⁰

No maximum rate to be prescribed

27.86 In the National Committee's view, the model legislation should not prescribe a maximum rate of commission. It is concerned that such a rate could be thought to be applicable to estates without complicating factors, rather than being a rate reserved for exceptional cases where the circumstances of the estate warrant such an allowance. Further, in a case where there are significant complicating factors, the setting of a maximum rate could operate to prevent the court from allowing what, in the circumstances, it regards as an appropriate amount.

27.87 Moreover, the reference to a maximum 'rate of commission' would be inconsistent with the National Committee's view, expressed above, that the model provision should avoid any reference to 'commission' and should emphasise that the primary assessment must be of the services provided.

Express reference to trustees

27.88 The National Committee notes that, although section 68 of the *Succession Act 1981* (Qld) empowers the court to allow remuneration or commission to a personal representative, it does not additionally (as the provisions in the ACT, New South Wales, the Northern Territory, South Australia and Victoria do¹⁷¹) empower the court to allow remuneration or commission to a trustee.

27.89 It is not uncommon for a personal representative to become a trustee of the estate, whether as a result of a trust created by the will or because a beneficiary is under a legal disability (such as being a minor). It therefore makes sense for the one provision to empower the court to authorise the payment of an amount to a person in the capacities of both personal representative and trustee. In fact, the National Committee notes that the ACT and Queensland rules both provide expressly that, if the same person is executor and trustee or administrator and trustee, the person may include in the

¹⁶⁹ See [27.38]–[27.39] above.

¹⁷⁰ *Administration and Probate Act 1919* (SA) s 70 is set out at [27.26] above.

¹⁷¹ See [27.16], [27.18], [27.22], [27.26], [27.29] above.

same account a statement of the administration of the property in both capacities.¹⁷²

27.90 The National Committee is therefore of the view that the model provision should enable the court to authorise, out of the estate of a deceased person, the payment to a personal representative or trustee of an amount for his or her services. Because the model provision is to apply to a trustee, 'estate' will need to be defined broadly to include trust property.¹⁷³

Indemnity for non-professional work performed by a legal practitioner

27.91 As explained earlier in this chapter, a personal representative or trustee is not normally entitled to be indemnified out of the estate in respect of the cost of retaining a legal practitioner to undertake executorial duties of a non-professional nature.¹⁷⁴ However, provided that the cost to the estate is no greater than if the personal representative or trustee had undertaken those duties personally and been remunerated for them, the National Committee considers that the personal representative or trustee should be entitled to be indemnified out of the estate assets in respect of those costs. The National Committee is therefore of the view that the model legislation should include a provision to the general effect of section 86(3) of the *Probate and Administration Act 1898* (NSW), appropriately modified for consistency with the National Committee's main recommendation about the payment to personal representatives and trustees of an amount for their services.¹⁷⁵

27.92 The model legislation should provide that, if a personal representative or trustee has renounced the right to remuneration in respect of any particular 12 month period during which the indemnity is claimed,¹⁷⁶ he or she is entitled to be indemnified out of the estate assets in respect of the amount of the charges and disbursements paid, or payable, to an Australian legal practitioner for non-professional work performed in relation to the estate during that 12 month period.

27.93 The model provision should state that the entitlement of the personal representative or trustee is to be the lesser of:

- the amount to which the personal representative or trustee would have been entitled if he or she had undertaken the non-professional work personally and had not renounced the right to payment of an amount for his or her services; and

¹⁷² *Court Procedures Rules 2006* (ACT) r 2759; *Uniform Civil Procedure Rules 1999* (Qld) r 656.

¹⁷³ Note the definition of 'estate' in cl 430 of the Administration of Estates Bill and the explanation of that definition (in relation to cl 413 of the Bill) at note 1181 in vol 2 of this Report.

¹⁷⁴ See [27.21] above.

¹⁷⁵ *Probate and Administration Act 1898* (NSW) s 86 is set out at [27.18] above.

¹⁷⁶ Reference is made to a '12 month period', rather than to a year, because in some jurisdictions 'year' means a calendar year: see *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'year').

- the amount of the legal practitioner's charges and disbursements as moderated in accordance with the relevant professional scale.

27.94 Although this proposal expresses the amount to which the personal representative or trustee is entitled in slightly different terms from section 86 of the *Probate and Administration Act 1898* (NSW), it has the same effect as that provision. The National Committee notes that the second limb of this proposal will need to be adapted if any jurisdiction does not have a relevant professional scale.

27.95 Strictly speaking, this is not a recommendation about the payment of an amount to a personal representative or trustee for his or her services, but about those fees that can properly be charged against an estate. However, because the National Committee's proposal changes the law about what disbursements can properly be charged against an estate, the National Committee considers it appropriate for the provision to be included in the model legislation. Further, because this provision will apply when the personal representative or trustee has renounced the right to payment of an amount for his or her services, the National Committee considers it appropriate for this provision to be located close to the main provision dealing with payment for services of personal representatives and trustees.

THE EFFECT OF A SPECIFIC PROVISION IN A WILL FOR COMMISSION OR REMUNERATION

27.96 Sometimes a will includes a provision under which the executor or trustee is entitled to commission chargeable at a certain rate — a common provision being the rate of commission chargeable by a particular trustee company. Clauses of this nature raise a particular concern where they appear in a will that has been drafted by the executor who is to benefit by the inclusion of the clause. There is conflicting authority about the validity of these types of provisions.

27.97 In *Re Croser*,¹⁷⁷ the Supreme Court of South Australia considered the effect of a provision in a will in the following terms:¹⁷⁸

I DECLARE that my Executor and Trustee may retain from out of my Estate for his services a remuneration equal to that which would be payable to the Public Trustee in the State of South Australia if he was administering the affairs of my Estate.

177 (1973) 6 SASR 420.

178 Ibid 423 (Zelling J).

27.98 The Court considered that a clause in these terms was arguably bad, whether or not it appeared in a will drafted by the executor, and was certainly improper where it was the executor who drafted the will:¹⁷⁹

This Court has the jurisdiction to say what is proper remuneration for an executor and trustee. It is arguable that the clause is bad as an attempted ouster of the jurisdiction of the Court but in any case it is a clearly improper clause in the case of an executor who is drawing the will and on whose advice the testator is acting. There is a clear conflict of interest of interest and duty in such a case and such clauses should certainly not appear in wills drawn in these circumstances, if ever at all.

27.99 In *In the Will of Shannon*,¹⁸⁰ however, the Supreme Court of New South Wales took a different view and declined to follow the decision in *Re Croser*. The clause in question was in following terms:¹⁸¹

My Trustee (who, by definition in the will, includes his executor) shall be entitled to charge and be paid all usual professional and other¹⁸² charges for work or business done or transacted by him or his firm in proving my Will or in execution of or in connection with the trusts hereof and shall be entitled to commission at the same rate as that applicable to the Public Trustee of New South Wales. (note added)

27.100 The Court considered two separate questions: first, whether a provision in these terms was an attempt to oust the court's jurisdiction and, secondly, whether such a provision is always objectionable when it appears in a will that has been drafted by the person who is appointed as the executor under the will.

27.101 In relation to the first of these questions, the Court rejected any suggestion that its jurisdiction to allow commission 'is or ought to be the exclusive source of legal entitlement to executors' remuneration, at least by way of general commission'.¹⁸³ In its view:¹⁸⁴

the true position is that the powers of the Court to allow remuneration to executors, administrators and trustees exists by way of relief against the rule that, generally, executors and others with fiduciary duties may not derive any profit or advantage from their office or position, if not expressly authorized by the trust instrument. In my opinion, the existence of the jurisdiction does not deny validity to a testamentary or trust provision for remuneration of executors,

179 Ibid. However, as the decision concerned the vesting of certain interests given under the will, and not the validity of the clause dealing with the executor's remuneration, the comments are *obiter dictum*.

180 [1977] 1 NSWLR 210.

181 Ibid 211.

182 Counsel for the executor indicated that it was not intended by the reference to 'other charges' that the executor would charge professional fees for other than legal work. The parties therefore agreed that the words 'and other' should be deleted from the grant. As a result, the 'contest between the parties [was] ... confined to the admissibility to probate of the words "and shall be entitled to commission at the same rate as applicable to the Public Trustee of New South Wales": *In the Will of Shannon* [1977] 1 NSWLR 210, 212 (Holland J).

183 *In the Will of Shannon* [1977] 1 NSWLR 210, 214 (Holland J).

184 Ibid 214–15.

administrators or trustees whether the provision is by way of legacy, commission or otherwise.

27.102 The Court considered that there was no distinction between a clause of this kind and a provision giving an executor a legacy or annual or other sum by virtue of that office.¹⁸⁵ For these reasons, the Court held that was no basis for holding that the provision ‘ought to be held invalid ... as an attempt to oust the jurisdiction of the Court or as otherwise offensive to public policy’.¹⁸⁶

27.103 In relation to the second question, the Court accepted that the relationship of ‘adviser and testator ... is one of potential conflict of interest and duty’, but held that ‘the evil in it disappears if the testator is fully informed as to the effect of the proposed clause and consents to it’.¹⁸⁷ In order for the testator to understand fully the effect on his or her estate of such a provision, the solicitor or other adviser must ‘spell out to the testator the operation of such a provision so as to draw his attention to the fact that his estate would, or might, thereby be charged more for administration than if he appointed a lay executor or left it to the Court to fix the remuneration’.¹⁸⁸ In particular, the actual difference between the rates applicable to the public trustee and those generally allowed by the court in relation to capital and income should be specifically drawn to the attention of testators by solicitors proposing a commission clause of the present kind.¹⁸⁹ As the Court was satisfied by the executor’s evidence that this had been done, it held that no objection could be taken to the clause on the ground that the executor had a conflict of interest and duty.¹⁹⁰

185 Ibid 216.

186 Ibid 217.

187 Ibid.

188 Ibid.

189 Ibid 218. The ACT and New South Wales professional rules for legal practitioners address some aspects of these requirements: *Legal Profession (Solicitors) Rules 2007* (ACT) r 9; *Solicitors’ Rules* r 11. The latter rules were made under the *Legal Profession Act 1987* (NSW), but are deemed by the *Legal Profession Act 2004* (NSW) s 737, sch 9 cl 24 to have been made under the 2004 Act.

Rule 9 of the ACT rules, which is virtually identical to its New South Wales counterpart, provides in part:

9 A Practitioner Receiving a Benefit under a Will or other Instrument

9.1 For the purposes of this Rule:

“substantial benefit” means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

9.2 A practitioner who receives instructions from a person to draw a will appointing the practitioner an executor must inform that person in writing before the client signs the will:

- (a) of any entitlement of the practitioner to claim commission;
- (b) of the inclusion in the will of any provision entitling the practitioner, or the practitioner’s firm, to charge professional fees in relation to the administration of the estate; and
- (c) if the practitioner has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.

190 *In the Will of Shannon* [1977] 1 NSWLR 210, 218 (Holland J).

27.104 Moreover, the Court stated that 'it is not possible to say that such clauses are generally bad and inadmissible to probate because of conflict of duty'.¹⁹¹ In its view:¹⁹²

To do so would be to make the presumption that the duty fully to advise the testator and to ensure that he understood and approved the clause would not have been performed. I appreciate the difficulty confronting beneficiaries in satisfying themselves or obtaining evidence that the duty had been performed, but, in my opinion, if proof of the performance of the duty is to become a prerequisite to the admissibility of such clauses to probate, that is a matter for the legislature, as it would be a radical departure from established practice and principle in the obtaining of probate of wills to require such proof before grant. I do not think it is for the Court to introduce such a rule for policy considerations, and certainly not upon an assumption that solicitors generally cannot be relied upon to do their duty to their testator clients.

27.105 In *Re the Will and Estate of McClung*,¹⁹³ the Supreme Court of Victoria was highly critical of the practice of legal practitioners preparing wills that appoint themselves as executors and that include charging clauses:¹⁹⁴

To request inclusion of a charging clause so wide as to enable the solicitor to charge for all executorial functions is not reasonable unless the solicitor ensures that the will provides that such charges may be made in lieu of any entitlement to commission and the full import of the clause is explained to the client.

The solicitor is under a duty to inform the client seeking his services as executor that he would be entitled to make a claim for commission for doing so, as to the maximum rate of commission which could be charged and the possible burden such commission may impose both on the corpus and income of the estate.

Given the very real potential for a conflict arising between the interests of the client and the interests of the solicitor on such an occasion, it would be preferable that solicitors declined to act as executors.

Review by the court

27.106 In New South Wales, section 86A of the *Probate and Administration Act 1898* (NSW) gives the court the express power to reduce the amount of commission that is charged, or is proposed to be charged, to an estate. Section 86A, which is similar to the provisions that apply in some jurisdictions in relation to trustee companies,¹⁹⁵ provides:

191 Ibid.

192 Ibid.

193 [2006] VSC 209.

194 Ibid [34]–[36] (Master Evans).

195 See [27.148]–[27.155] below.

86A Reduction of excessive commission etc

Where the Court is of the opinion that a commission or amount charged or proposed to be charged in respect of any estate, or any part of any such commission or amount, is excessive, the Court may, of its own motion, or on the motion of any person interested in the estate, review the commission, amount or part and may, on that review, notwithstanding any provision contained in a will authorising the charging of the commission, amount or part, reduce that commission, amount or part.

27.107 In *Hughes v Estate of Weedon*,¹⁹⁶ Hodgson J considered the application of this provision to the commission payable under a will that included the following clause:¹⁹⁷

I APPOINT NEIL GRAEME HUGHES to be executor and trustee (hereinafter called my trustee) of this my Will and he being a Solicitor shall be entitled to be paid fees for work done by him or by any firm of which he is a member as if he were not my trustee and shall be entitled to commission in addition for his pains and trouble of acting as executor and trustee hereof without application to the Court at the rate of \$5 per centum of the corpus or gross capital of my estate ...

27.108 The gross value of the estate was approximately \$170 000. The executor's firm charged fees of approximately \$6500, and the commission at 5 per cent amounted to an additional \$8500. The matter was referred to the court by the registrar, who suggested that the rate of commission was excessive.

27.109 Hodgson J rejected the argument made on behalf of the executor that section 86A of the *Probate and Administration Act 1898* (NSW) should have no application, as the provision for commission should be treated as a bequest.¹⁹⁸ In his Honour's view, the will was always subject to the jurisdiction of the Court under section 86A to review the commission payable under it.¹⁹⁹

27.110 In coming to the view that the commission payable under the will was excessive, Hodgson J had regard to the following matters:²⁰⁰

- Although the commission was not of such significance as to bring in the provisions of the solicitor's regulations that were then in force, the fact that the executor had prepared the will detracted from the weight that might otherwise have been given to the testator's apparent wishes. The Court could not therefore give much weight to the executor's evidence that the testator wished to include a provision in these specific terms.

¹⁹⁶ Unreported, Supreme Court of New South Wales, Hodgson J, 16 December 1994.

¹⁹⁷ Ibid 2.

¹⁹⁸ Ibid 5.

¹⁹⁹ Ibid 7.

²⁰⁰ Ibid 7–8.

- Although the executor gave evidence that he explained to the testator that the normal percentage rate for commission was between 2 and 4 per cent, the executor did not explain that that was the usual rate for trustee companies, and that the usual rate allowed on capital for commission to ordinary executors was between 0.5 and 2 per cent.
- Although the amount of time and effort involved in administering the estate was substantial, 'not insubstantial profit costs were obtained by the executor's firm in relation to various aspects of the administration of the estate'.

27.111 Hodgson J reduced the commission to approximately 2.5 per cent of the capital value of the estate, noting that this was slightly above the usual maximum allowed.²⁰¹

Discussion Paper

27.112 In the Discussion Paper, the National Committee expressed a concern about the practice of some solicitors who charge both a commission and professional fees in relation to the administration of estates, describing that conduct as oppressive.²⁰² The issue is not so much a problem where the will provides for the charging of professional fees (and commission is simply allowed by the court), but where the will itself includes a provision setting a rate of commission that is higher than that which the court would be likely to allow in its discretion.

27.113 The National Committee proposed that, where a will contains a provision giving an executor an entitlement to commission, the will must be approved by the court before the executor can rely on the provision in relation to commission. The National Committee further proposed that the court should be able to make such orders as it considers appropriate in the circumstances.²⁰³

Submissions

27.114 The majority of respondents who commented on this issue disagreed with the National Committee's proposal. It was opposed by the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the New South Wales Council of the Trustee Corporations Association of Australia, the Queensland Law Society, Trust Company of Australia Ltd, the Public Trustee of New South Wales, an academic expert in succession law and the New South Wales Law Society.²⁰⁴

201 Ibid 9.

202 *Administration of Estates Discussion Paper* (1999) QLRC 84; NSWLRC [8.93].

203 Ibid, QLRC 85; NSWLRC 123.

204 Submissions 6, 7, 8, 10, 11, 12, 15, 20.

27.115 The Trustee Corporations Association of Australia commented that the proposal ‘usurps the testator’s intentions’ and that a testator may have good reasons for providing a sizeable commission. The Association recommended that the court should have a power to change the level of commission only ‘where it prejudices the administration of the estate’.²⁰⁵

27.116 A similar point was made by Trust Company of Australia Ltd:²⁰⁶

The proposal erodes the Testator's wishes. Any commission clause is subject to negotiation with the testator at the time of the making of the Will and would have been agreed after consideration of the circumstances of the particular estate. The Court should only have a role in cases of dispute.

27.117 This respondent noted that the commission chargeable by public trustees and trustee companies is already regulated by State legislation, and that the courts should not be burdened by a further approval process. It argued that, if the model legislation is to include a provision relating to court approval of commission clauses, the provision should not apply to public trustees or to trustee companies.²⁰⁷

27.118 The Public Trustee of New South Wales and the New South Wales Law Society considered that a testator should be free to stipulate any remuneration for an executor or trustee. Both respondents considered that section 86A of the *Probate and Administration Act 1898* (NSW), which gives the court the power to review and reduce commission and any other amount charged or to be charged in relation to an estate, was to be preferred over a provision requiring court approval in every case.²⁰⁸

27.119 An academic expert in succession law was also of the view that the preferred approach was to give the court the power to review a commission provision contained in a will, rather than to require initial court approval of the provision:²⁰⁹

If [the commission provision] is unduly generous there might be a justifiable reason or an unjustifiable reason for its inclusion. For instance a testator may particularly wish a certain person to act as personal representative for family or private reasons and may wish to ensure that person’s acceptance by offering an attractive commission provision. The court should not be given a jurisdiction to undo the testator’s wish. On the other hand a generous commission provision might conceivably be the consequence of undue influence or pressure. Then the court might wish to scrutinise it and reduce it. The upshot of this is that I would suggest that the Court should be given a general power to review a commission provision contained in a will and to authorise the payment

205 Submission 6.

206 Submission 10.

207 Ibid.

208 Submissions 11, 15.

209 Submission 12.

of such commission as it considers to be reasonable and not out of accordance with the testator's wishes.

27.120 Only the Bar Association of Queensland and the ACT Law Society agreed with the National Committee's proposal.²¹⁰

27.121 The importance of providing some mechanism to deal with this issue was highlighted by the submission of one respondent, who recounted her experience as a beneficiary under a will, drafted by the named executor, that included the following provisions:²¹¹

7. I DECLARE that any Executor or Trustee under this my Will who is a Solicitor shall be entitled to charge and be paid his proper professional fees in respect of all work necessarily performed by him for my estate as a Solicitor including the work which an Executor or Trustee who was not a Solicitor might ordinarily be expected to attend to personally AND I FURTHER DECLARE that such fees shall be payable to such Executor or Trustee under the provisions of the next following clause of this my Will.
8. I FURTHER DECLARE that my Executor and Trustee shall be entitled to retain for his own use commission on the income and corpus of my estate passing through his hands at the same rate as would be payable to Queensland Trustees Limited had the said Company been appointed the Sole Executor and Trustee under this my Will and that my Executor and Trustee shall not be required to file and pass accounts of his administration of my estate in the Supreme Court of Queensland or any other Court to obtain payment of such commission.

27.122 The testator's estate consisted of:

- two parcels of real property with an estimated total value of \$255 000;
- a number of shares and units in property trusts that were realised for a total sum of just over \$350 000;
- bank accounts totalling \$23 000 and a term deposit of \$160 000; and
- a car that was sold for \$2000.

27.123 Although the estate had a value of approximately \$790 000, given the nature of the assets, much of the estate was readily realisable. At the time of making this submission, the parcels of real property were yet to be sold. In respect of those parts of the estate that had been realised, the executor had deducted 'administrative costs' of \$8000 and commission of \$27 000 (charging 5 per cent on most of the capital realised and 6 per cent on income). If the parcels of real property were realised at their estimated value, an additional amount of approximately \$10 000 would be payable by way of commission,

210 Submissions 1, 14.

211 Submission W14.

making the total remuneration under the will for commission and professional fees in the order of \$45 000 for an estate that appeared to be without particular complicating factors.

The National Committee's view

27.124 The National Committee is concerned about the practice of some solicitors who draft wills that give them an entitlement to commission at a much higher rate than they would be likely to be awarded if they applied to the court for payment of an amount for the services rendered to the estate in the capacity of personal representative or trustee. However, despite the National Committee's preliminary recommendation in the Discussion Paper that clauses of this kind should have effect only if they have been approved by the court, the National Committee is now of the view that the model legislation should not require court approval for these clauses in every case, but should instead provide a mechanism for reviewing the amount that is payable under these clauses.

27.125 First, although it may be an undesirable practice for a solicitor to prepare a will under which he or she is to receive a substantial amount for his or her services as executor or trustee, the inclusion of such a clause may well be the result of specific instructions by a testator who is fully informed about the effect of the clause. In that situation, a provision that has the effect of restricting the effect of the relevant clause constitutes a significant limitation on testamentary freedom.

27.126 Secondly, if the model provision simply states that a clause providing for the payment of 'commission' has no effect until approved by the court, it is possible that the model provision might be too narrowly expressed and might not capture the different types of remuneration provisions that are found in wills. On the other hand, if the model provision states that a clause providing 'for any remuneration' has no effect until approved, that would, in the National Committee's view, be too wide in its application, as it would mean that a clause providing for the charging of ordinary professional fees would then require court approval. Moreover, depending on the term that was used, a provision that had the effect that certain clauses would be of no effect unless approved by the court could create uncertainty about which clauses were effective and which were not.

27.127 Thirdly, the establishment of a review mechanism means that only those matters where there is a dispute will come before the court, instead of requiring all such clauses to be approved, whether or not the remuneration payable under them is disputed.

27.128 For these reasons, the National Committee favours the inclusion of a provision to the general effect of section 86A of the *Probate and Administration Act 1898* (NSW). For consistency with the National Committee's earlier recommendation about the allowance of an amount for services generally, the

review provision, although based on section 86A of the *Probate and Administration Act 1898* (NSW), should be modified to refer to an ‘amount’, rather than to ‘commission’.

PUBLIC TRUSTEES AND TRUSTEE COMPANIES

27.129 Legislation in each Australian jurisdiction provides that the public trustee of that jurisdiction²¹² and specified trustee companies²¹³ may be appointed as, and act in the capacity of, executor or administrator of the estate of a deceased person. The legislation also deals with the remuneration to which public trustees and trustee companies are entitled when acting as an executor or administrator.

Public trustees

27.130 In the ACT, the public trustee may charge a fee for a service rendered by it in the administration of an estate, as well as the reasonable expenses incurred by it in rendering the service.²¹⁴ The public trustee is specifically entitled to charge a fee on a percentage basis for administering the estate of a deceased person.²¹⁵ It is also entitled to charge a fee on a percentage basis for collecting income.²¹⁶

27.131 In New South Wales, the public trustee may charge, in respect of its duties, ‘such fees, whether by way of percentage or otherwise,’ as are prescribed by the regulations.²¹⁷ The regulation provides that the public trustee may charge commission on the value of capital realised by the public trustee, on the value of such capital realised by a former trustee as becomes vested in the public trustee, and on the value of property transferred in an unconverted

²¹² *Public Trustee Act 1985* (ACT) ss 13(1)(b), 14–15; *Public Trustee Act 1913* (NSW) ss 12(1)(ii), 18; *Public Trustee Act* (NT) ss 32(1)(a), (b), 33–34; *Public Trustee Act 1978* (Qld) s 27(1); *Public Trustee Act 1995* (SA) s 5(1), (2); *Public Trustee Act 1930* (Tas) s 12(1); *State Trustees (State Owned Company) Act 1994* (Vic) ss 1(b), 4–5, *Trustee Companies Act 1984* (Vic) ss 9, 11; *Public Trustee Act 1941* (WA) ss 7(1), 8.

²¹³ *Trustee Companies Act 1947* (ACT) ss 4–8; *Trustee Companies Act 1964* (NSW) ss 4–6, 8; *Companies (Trustees and Personal Representatives) Act* (NT) ss 14–18; *Trustee Companies Act 1968* (Qld) ss 5–10; *Trustee Companies Act 1988* (SA) s 4; *Trustee Companies Act 1953* (Tas) ss 5, 6, 8–10; *Trustee Companies Act 1984* (Vic) ss 9–11, 16; *Trustee Companies Act 1987* (WA) ss 5–9.

²¹⁴ *Public Trustee Act 1985* (ACT) s 28.

²¹⁵ *Public Trustee Act 1985* (ACT) ss 28, 75, *Attorney General (Fees) Determination 2008* (ACT), Disallowable Instrument DI2008–145, sch item 68. The public trustee may charge a fee based on the gross capital value of the estate (excluding the value of the matrimonial home) according to the following scale: 4.40 per cent of first \$200 000; 3.30 per cent of the next \$200 000; 2.20 per cent of the next \$200 000; 1.10 per cent of the amount greater than \$600 000, with a minimum charge of \$830.

²¹⁶ *Public Trustee Act 1985* (ACT) ss 28, 75, *Attorney General (Fees) Determination 2008* (ACT), Disallowable instrument DI2008–145, sch item 67. The public trustee may charge 5.5 per cent on income that is not subject to an agency charge and 2.75 per cent on income, such as rent, that is subject to an agency charge.

²¹⁷ *Public Trustee Act 1913* (NSW) s 9.

state (that is, in specie) to a beneficiary or next of kin.²¹⁸ The public trustee may also charge commission on the gross amount of income received by the public trustee in respect of an estate²¹⁹ and for locating beneficiaries.²²⁰ These rates apply generally in respect of the public trustee's duties, and are not confined to where the public trustee is administering the estate of a deceased person.

27.132 In the Northern Territory, the public trustee may charge, in respect of an estate under its management or control, such commission, fees, and charges as the Minister, by notice in the *Gazette*, determines.²²¹

27.133 In Queensland, the public trustee may, by notice in the gazette, fix reasonable fees and charges for its services.²²² The fees and charges fixed by the public trustee differ from those that apply in the other Australian jurisdictions in that they are not calculated on a percentage basis of the capital and income of the estate, but are directly related to the nature of the work undertaken. The notice of fees and charges prescribes a given number of 'standard units of effort' for individual activities undertaken in the administration of the estate of a deceased person. It then sets the fee for a particular 'service level', according to the aggregate of the standard units for the various activities.²²³

27.134 In South Australia, the public trustee may charge, in relation to an estate under its control, commission and fees and proper expenses at rates fixed by the regulations or at rates determined by the public trustee subject to the maximum and minimum rates fixed by the regulations.²²⁴

27.135 In Tasmania, the public trustee may charge fees, commission, remuneration, expenses and charges determined by the public trustee, but not

²¹⁸ *Public Trustee Regulation 2008* (NSW) cl 16–18. The rates are 4 per cent on the first \$100 000; 3 per cent on the next \$100 000; 2 per cent on the next \$100 000; and 1 per cent on any amount exceeding \$300 000. The public trustee may impose a minimum charge of \$250.

²¹⁹ *Public Trustee Regulation 2008* (NSW) cl 19. Commission is calculated at the rate of 5.25 per cent, except that, in the case of gross income received by way of rent that is subject to an agency charge for collection, commission is calculated at the rate of 2.5 per cent.

²²⁰ *Public Trustee Regulation 2008* (NSW) cl 21.

²²¹ *Public Trustee Act* (NT) s 74, *The Northern Territory Government Gazette No G 38*, 25 September 2002, 5. Under the Determination of Fees and Commission, the public trustee may charge the following rates of commission on the proceeds of assets realised, on money got in or collected and on the value of unrealised assets transferred in specie: \$150 on the first \$1000; 4 per cent on the next \$199 000; 3 per cent on the next \$200 000; 2 per cent on the next \$200 000; and 1 per cent on any amount exceeding \$600 000. The public trustee may also charge commission on income received: 3 per cent on rent collected by an agent who is employed by and paid by the public trustee; and 6 per cent on all other income received.

²²² *Public Trustee Act 1978* (Qld) s 17.

²²³ Public Trustee (Fees and Charges Notice) (No 1) 2008 cl 7, sch 1, sch 2 pt A, published in *Queensland Government Gazette*, 13 June 2008, 911.

²²⁴ *Public Trustee Act 1995* (SA) s 45(1). See *Public Trustee Regulations 1995* (SA) cl 4, sch 2 items 1, 9. Commission may be charged on assets realised, money collected and the value of property transferred or delivered in kind to a beneficiary at a rate not exceeding 4 per cent on the first \$100 000; 3 per cent on the next \$100 000; 2 per cent on the next \$200 000; and 1 per cent on any amount exceeding \$400 000. Commission on income (other than rent) received by the public trustee must be charged at the rate of 5 per cent and commission on rent must be charged at the rate of 7.5 per cent.

exceeding any maximum fees, commission, remunerations and charges prescribed by the regulations.²²⁵

27.136 In Victoria, State Trustees Limited, as a trustee company, may charge such commission as is fixed from time to time by its directors, but not in any case exceeding the prescribed statutory rates.²²⁶

27.137 In Western Australia, the public trustee may charge such fees as are prescribed, whether by way of percentage or otherwise.²²⁷

27.138 In addition to these fees, public trustees are also entitled to their reasonable expenses.²²⁸

27.139 It has been suggested that public trustees and trustee companies 'have to take the good with the bad'²²⁹ and that it is therefore necessary to fix an arbitrary rate of remuneration for them that can be applied automatically to every case.²³⁰

Review by the court

27.140 The South Australian legislation provides that the court may, if it considers it should do so having regard to the special circumstances of a particular case, fix the commission to be charged at a higher or lower rate than that fixed or allowed under the regulations, or direct that no commission be charged.²³¹ The court may do so on the application of the public trustee or any interested person.²³²

²²⁵ *Public Trustee Act 1930* (Tas) s 11(1). Under the *Public Trustee Regulations 1999* (Tas) reg 8, sch 1, the public trustee may make a charge in respect of the capital of the deceased estate according to the following scale: 4 per cent on the first \$100 000; 3 per cent on the next \$200 000; 2 per cent on the next \$200 000; and 1 per cent on any amount exceeding \$500 000. It may also charge 6 per cent of the gross income received by the public trustee, except where the income is subject to an authorised charge, in which case it may charge 3 per cent.

²²⁶ *State Trustees (State Owned Company) Act 1994* (Vic) s 1(b), *Trustee Companies Act 1984* (Vic) s 21(1): The maximum statutory rate is 5.5 per cent of the gross value of the estate and 6.6 per cent of the income.

²²⁷ *Public Trustee Act 1941* (WA) s 38(1). The public trustee may charge a fee for its services with respect to the estate of a deceased person according to the following scale: on the gross capital value of estates valued at more than \$2000, 4.4 per cent on the first \$200 000, 3.3 per cent on the next \$200 000; 2.2 per cent on the next \$200 000, and 1.1 per cent on any amount exceeding \$600 000: *Public Trustee Regulations 1942* (WA) reg 6, sch 2 cl 1(1)(a). In relation to income derived from sources other than rent, the public trustee may charge 6.6 per cent of the income that is collected by it and 2.75 per cent where the income is collected through an agent who is employed by and paid commission by the public trustee: *Public Trustee Regulations 1942* (WA) reg 6, sch 2 cl 1(1)(b).

²²⁸ *Public Trustee Act 1985* (ACT) s 28(1)(b); *Public Trustee Act 1913* (NSW) s 9(2); *Public Trustee Act* (NT) s 74(3)(b); *Public Trustee Act 1978* (Qld) s 17A(1)(a); *Public Trustee Act 1995* (SA) s 45(1); *State Trustees (State Owned Company) Act 1994* (Vic) s 1(b), *Trustee Companies Act 1984* (Vic) s 21(1); *Public Trustee Act 1930* (Tas) s 11(1); *Public Trustee Act 1941* (WA) s 39.

²²⁹ *Re McLean* (1911) 31 NZLR 139, 144 (Denniston J).

²³⁰ *Ibid* 143–44.

²³¹ *Public Trustee Act 1995* (SA) s 45(5).

²³² *Public Trustee Act 1995* (SA) s 45(5).

27.141 No other Australian jurisdiction provides specifically for the court to review the fees and charges of the public trustee of that jurisdiction.

Trustee companies

Entitlement to commission

27.142 Specific legislative provisions in each Australian jurisdiction regulate the commission and remuneration of trustee companies when they act as personal representative or trustee of the estate of a deceased person.²³³ The provisions have a broad application, and regulate the entitlements of trustee companies when acting in a range of capacities that involve the administration or management of an estate, for example:

- as executor, administrator, trustee, receiver, committee, guardian, liquidator or official liquidator or in any other capacity;²³⁴
- as executor, administrator, trustee or receiver or as committee or manager of an estate under the *Mental Health Act 1958* (NSW) or as guardian of the estate of a minor or in any other capacity;²³⁵
- as trustee, agent, attorney, manager or receiver, as guardian of a child, or as the administrator, committee, guardian or manager of the estate of a person who is unable to manage his or her own affairs.²³⁶

27.143 In New South Wales,²³⁷ the Northern Territory,²³⁸ Queensland,²³⁹ South Australia,²⁴⁰ Tasmania²⁴¹ and Victoria,²⁴² a trustee company may charge commission at a rate fixed by its directors, but not exceeding the maximum

²³³ *Trustee Companies Act 1947* (ACT) ss 18, 18A, 18B; *Trustee Companies Act 1964* (NSW) ss 18, 18A, 18B; *Companies (Trustees and Personal Representatives) Act* (NT) ss 27, 27A; *Trustee Companies Act 1968* (Qld) ss 41, 42, 44, 45; *Trustee Companies Act 1988* (SA) ss 9–11; *Trustee Companies Act 1953* (Tas) ss 18, 18A; *Trustee Companies Act 1984* (Vic) ss 21–24; *Trustee Companies Act 1987* (WA) s 18.

²³⁴ *Trustee Companies Act 1968* (Qld) s 41(1).

²³⁵ *Trustee Companies Act 1964* (NSW) s 18(1).

²³⁶ *Trustee Companies Act 1988* (SA) ss 5, 6, 9(1).

²³⁷ *Trustee Companies Act 1964* (NSW) s 18(1)(c), (6), (6A). The maximum statutory rate is 4.25 per cent of the gross capital value of the estate and 5.25 per cent of the income.

²³⁸ *Companies (Trustees and Personal Representatives) Act* (NT) s 27(1). The maximum statutory rate is 5 per cent of the gross capital value of the estate and 5 per cent of the income.

²³⁹ *Trustee Companies Act 1968* (Qld) s 41(1), (8). The maximum statutory rate is 5 per cent of the gross capital value of the estate and 6 per cent of the income.

²⁴⁰ *Trustee Companies Act 1988* (SA) s 9(1), (2). The maximum statutory rate is 6 per cent of the gross capital value of the estate and 7.5 per cent of the income.

²⁴¹ *Trustee Companies Act 1953* (Tas) s 18(1): The maximum statutory rate is 5 per cent of the capital value of the estate; 5 per cent of the income.

²⁴² *Trustee Companies Act 1984* (Vic) s 21(1): The maximum statutory rate is 5.5 per cent of the gross value of the estate and 6.6 per cent of the income.

statutory rates that are prescribed in respect of the capital value of the estate and the income received by the trustee company on account of the estate.

27.144 In the ACT and Western Australia, the legislation does not prescribe a maximum rate of commission for trustee companies. The ACT legislation provides that a trustee company may charge fees for its services that 'are in accordance with the published scale of fees of the company in force at the time the estate was committed to it'.²⁴³ The Western Australian legislation is in similar terms. A trustee company may charge commission and other charges 'not exceeding those fixed from time to time by the board of directors'.²⁴⁴

27.145 Where a trustee company is authorised by a will or trust instrument to charge a specified rate of commission, the company may do so notwithstanding that the rate is in excess of the rate otherwise permitted by the legislation.²⁴⁵

27.146 Unlike the provisions considered earlier in this chapter under which the court may, in its discretion, allow commission to personal representatives and trustees generally, the provisions that regulate the commission or fees payable to trustee companies confer an entitlement to that remuneration.²⁴⁶

27.147 The commission and fees that may be charged by a trustee company are in addition to any amounts properly expended by the company in the course of the administration and chargeable against the estate.²⁴⁷ Further, the legislation in most jurisdictions provides that a trustee company may charge for other matters, such as the preparation and lodging of returns in connection with assessments of duties or taxes.²⁴⁸

243 *Trustee Companies Act 1947* (ACT) s 18(1).

244 *Trustee Companies Act 1987* (WA) s 18(2).

245 *Trustee Companies Act 1947* (ACT) s 18B(3); *Trustee Companies Act 1964* (NSW) s 18(5) (which refers to the testator's will only and not to any trust instrument); *Companies (Trustees and Personal Representatives) Act* (NT) s 27(12); *Trustee Companies Act 1968* (Qld) s 41(7); *Trustee Companies Act 1988* (SA) s 11(2); *Trustee Companies Act 1953* (Tas) s 18(3); *Trustee Companies Act 1984* (Vic) s 21(8); *Trustee Companies Act 1987* (WA) s 18(4).

246 *Estate of Scott*; *Buckley v Permanent Trustee Co Ltd* (1988) 21 NSWLR 112, 116 (Needham J). See also *Allen v Union-Fidelity Trustee Co of Australia Ltd* (1986) 6 NSWLR 341, 344 (Waddell CJ in Eq). This entitlement is subject to the power of the court in all jurisdictions except Western Australia to review the commission and fees payable to trustee companies: see [27.148]–[27.155] below.

247 *Trustee Companies Act 1947* (ACT) s 18B; *Trustee Companies Act 1964* (NSW) s 18(1); *Companies (Trustees and Personal Representatives) Act* (NT) s 27(1); *Trustee Companies Act 1968* (Qld) s 41(1); *Trustee Companies Act 1988* (SA) s 11(1)(a); *Trustee Companies Act 1953* (Tas) s 18(1); *Trustee Companies Act 1984* (Vic) s 21(1); *Trustee Companies Act 1987* (WA) s 18(5).

248 *Trustee Companies Act 1947* (ACT) s 18A; *Companies (Trustees and Personal Representatives) Act* (NT) s 27(10); *Trustee Companies Act 1968* (Qld) s 45(1)(a)(iii), (iv) (and also under s 45(1)(a) for various other services); *Trustee Companies Act 1988* (SA) s 11(1)(b); *Trustee Companies Act 1984* (Vic) s 24; *Trustee Companies Act 1987* (WA) s 18(8). In New South Wales, a trustee may also charge management fees for particular services: *Trustee Companies Act 1964* (NSW) s 19.

Review by the court

27.148 Under the trustee legislation in all jurisdictions except Western Australia, the court may review the commission (in the ACT, a fee) payable in relation to the administration of an estate. If the court considers that the commission (or the fee) is excessive, the court may reduce the commission (or fee).²⁴⁹ In the ACT and New South Wales, the court may exercise this power on the application of a person interested in the estate or on its own initiative.²⁵⁰ In the Northern Territory, Queensland, South Australia and Victoria, however, the legislation gives the court the power to review and reduce commission only on the application of an interested person.²⁵¹

27.149 It has been suggested that the New South Wales provision, section 18(4) of the *Trustee Companies Act 1964* (NSW), overlaps with section 86A of the *Probate and Administration Act 1898* (NSW), under which the court has a general power to review and reduce the commission charged, or proposed to be charged, in respect of any estate.²⁵²

27.150 In *In the Estate of Cooke*,²⁵³ Legoe AJ commented that it was difficult to see how charges could be said to be excessive when they were authorised under the trustee company legislation.²⁵⁴

27.151 However, the application of the court's power to review the commission charged by a trustee company 'is not limited to cases where the commission charged exceeds the scheduled fee'.²⁵⁵

27.152 In *Allen v Union-Fidelity Trustee Co of Australia Ltd*,²⁵⁶ Waddell CJ in Eq, in reviewing the commission charged by a trustee company acknowledged the role that trustee companies fulfil.²⁵⁷

²⁴⁹ *Trustee Companies Act 1947* (ACT) s 18B(4); *Trustee Companies Act 1964* (NSW) s 18(3); *Companies (Trustees and Personal Representatives) Act* (NT) s 27(7); *Trustee Companies Act 1968* (Qld) s 41(4); *Trustee Companies Act 1988* (SA) s 12; *Trustee Companies Act 1953* (Tas) s 18(5); *Trustee Companies Act 1984* (Vic) s 21(3).

²⁵⁰ *Trustee Companies Act 1947* (ACT) s 18B(4); *Trustee Companies Act 1964* (NSW) s 18(3).

²⁵¹ *Companies (Trustees and Personal Representatives) Act* (NT) s 27(7); *Trustee Companies Act 1968* (Qld) s 41(4); *Trustee Companies Act 1988* (SA) s 12; *Trustee Companies Act 1984* (Vic) s 21(3). See also *In the Estate of Cooke* (Unreported, Supreme Court of South Australia, Legoe AJ, 29 June 1995) 2.

²⁵² RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [86A.01]. *Probate and Administration Act 1898* (NSW) s 86A is set out at [27.106] above.

²⁵³ Unreported, Supreme Court of South Australia, Legoe AJ, 29 June 1995, 2.

²⁵⁴ *Ibid* 2 (Legoe AJ). However, his Honour considered (at 9–12) that, where there were minor beneficiaries, the Court had the power, as part of its inherent jurisdiction, to make a grant subject to the condition that the trustee company not charge commission above a particular rate (in this case, the rate that would have been chargeable by the public trustee).

²⁵⁵ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [86A.01].

²⁵⁶ (1986) 6 NSWLR 341.

²⁵⁷ *Ibid* 343–4.

Trustee companies obviously serve important social purposes in that they provide a choice of bodies which have experience and expertise in the conduct of estates and which are not subject, as ordinary individuals are, to death or inability to act through ill-health, pressure of other business, or otherwise, and which can be accepted as being independent in the event of disputes among beneficiaries. It was no doubt for purposes of these kinds that companies were authorised by statute to be executors and administrators of deceased estates and to carry on other similar kinds of activities.

27.153 Waddell CJ in Eq also acknowledged that, 'because of the organisation which a trustee company must maintain to provide the advantages which it does, its proper remuneration is likely to exceed that appropriate in the case of a private executor'.²⁵⁸ His Honour held, however, that while the defendant's published rates were 'appropriate for the administration of an estate with complicating factors' they were 'too high for this estate which had no such factors except those arising out of the plaintiff's requirements'.²⁵⁹

27.154 In considering whether the commission charged by a trustee company is 'excessive':²⁶⁰

it is necessary ... to have in mind the work which such commission is designed to reward. Just as in the case of a non-corporate trustee, it is the work involved in getting in the assets of the estate and in distributing such of them as require distribution and in holding such of them as require to be held on trust ...

27.155 Where a trustee company has been appointed jointly with individual executors, it is also proper for the court, in determining whether the trustee company's commission is excessive, to have regard to the work that has been done by the individual executors, 'in so far as that work has reduced the work done, or needing to be done, by the trustee company'.²⁶¹

Entitlement to commission when administering an estate other than under a grant

27.156 There are mechanisms, other than appointment as executor or administrator under a grant, by which a public trustee or trustee company may be authorised to administer an estate.

258 Ibid 350.

259 Ibid 349. Waddell CJ in Eq commented (at 349) that it 'would be difficult to think of a large estate which would be more simple to administer'. Although the value of the estate for probate purposes was \$2 746 717, the main assets were a house, which was transferred into the names of the beneficiaries to whom it was devised, and a large portfolio of shares, which was also transferred in specie to the beneficiaries. As a result, it was not necessary for the executor to realise these assets. Other assets that were realised consisted of moneys deposited with banks and financial institutions. The realisation of these assets was 'purely mechanical and involved no judgment and little work in respect of each asset': at 345. The defendant had retained commission out of the estate of just over \$43 000. The Court reduced the commission to \$21 750.

260 *Estate of Scott; Buckley v Permanent Trustee Co Ltd* (1988) 21 NSWLR 112, 117 (Needham J).

261 Ibid.

27.157 The legislation in a number of Australian jurisdictions provides that, in certain circumstances, the court may make an order authorising the public trustee in that jurisdiction to administer the estate of a deceased person. In the ACT, the relevant order is described as an order to collect and administer;²⁶² in New South Wales, Queensland, and Western Australia it is described as an order to administer;²⁶³ and in South Australia it is described as an administration order.²⁶⁴ The effect of the order is that the public trustee is in the same position as if administration²⁶⁵ or probate or letters of administration²⁶⁶ had been granted to it.

27.158 Legislation in each Australian jurisdiction except South Australia also makes provision for certain estates to be administered under a procedure known as an election to administer.

27.159 In the ACT, New South Wales, the Northern Territory, Queensland, Tasmania, Victoria and Western Australia, the legislation provides that, where a person has died leaving property in that jurisdiction, the gross value (in the Northern Territory, the net value) of which does not exceed a prescribed amount and a grant has not already been made to any person, the public trustee (or, in Victoria, State Trustees Limited) may file in the registry an election to administer the estate of the deceased person.²⁶⁷ Generally, the effect of filing an election is that the public trustee or equivalent officer is deemed to be the executor or administrator of the estate.²⁶⁸

27.160 In New South Wales, the Northern Territory, Queensland, Tasmania, Victoria and Western Australia, specified trustee companies are also empowered to file an election to administer the estate of a deceased person.²⁶⁹ Again, the general effect of filing an election is that the trustee company is deemed to be the executor or administrator of the estate.²⁷⁰

27.161 As a result of these various provisions, a public trustee who administers an estate under an order to administer or an order to collect, or a public trustee or trustee company that files an election to administer an estate,

262 *Administration and Probate Act 1929* (ACT) ss 88, 92.

263 *Public Trustee Act 1913* (NSW) s 23; *Public Trustee Act 1978* (Qld) ss 29, 31; *Public Trustee Act 1941* (WA) s 10(1).

264 *Public Trustee Act 1995* (SA) s 9.

265 *Administration and Probate Act 1929* (ACT) s 89; *Public Trustee Act 1995* (SA) s 9(8); *Public Trustee Act 1941* (WA) s 10(3).

266 *Public Trustee Act 1913* (NSW) s 23(2); *Public Trustee Act 1978* (Qld) s 32(1).

267 See [29.2], [29.6]–[29.7] below.

268 See [29.3], [29.10] below.

269 See [29.4], [29.6]–[29.7] below. In the Northern Territory, a legal practitioner may also file an election to administer: see *Administration and Probate Act* (NT) ss 6(1) (definition of ‘professional personal representative’, para (c)), 110B.

270 See [29.5], [29.10] below.

has the same entitlement to commission as if it had been appointed under a grant of probate or letters of administration.

Discussion Paper

27.162 In the Discussion Paper, the National Committee did not make any specific proposals about the commission chargeable by public trustees or trustee companies. However, it sought submissions on how its general proposals about the remuneration of personal representatives and trustees should apply where a public trustee or trustee company administers an estate other than under a grant.²⁷¹

Submissions

27.163 The issue of the remuneration of public trustees and trustee companies was addressed by the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia and the Queensland, ACT and New South Wales Law Societies.²⁷² These respondents were all of the view that the remuneration of public trustees and trustee companies should continue to be the subject of separate, specific legislation, and that public trustees and trustee companies should not be subject to the proposals made earlier in the Discussion Paper about the allowance of commission to executors, administrators and trustees generally.

27.164 The Public Trustee of South Australia and the ACT Law Society both observed that public trustees and trustee companies do not presently need to apply to the court for commission, and considered that this should continue to be the case.²⁷³

27.165 The Public Trustee of New South Wales commented that there was a widely held misconception that the obtaining of a grant of administration was the major task for an administrator in terms of time, effort and skill.²⁷⁴ The Public Trustee of Queensland commented that, whether a public trustee obtains a grant or files an election, the administration work is still the same.²⁷⁵

The National Committee's view

27.166 The statutory fee structure for public trustees and trustee companies, which in most jurisdictions is based on a percentage of the value of the estate

²⁷¹ *Administration of Estates Discussion Paper* (1999) QLRC 86; NSWLRC 124.

²⁷² Submissions 4, 6, 7, 8, 14, 15.

²⁷³ Submissions 4, 14.

²⁷⁴ Submission 11.

²⁷⁵ Submission 5.

and of the income collected on behalf of the estate,²⁷⁶ is generally inconsistent with the National Committee's earlier proposal that the payment of an amount to a personal representative or trustee should be based on the value of the services provided, rather than on the value of the estate.²⁷⁷

27.167 However, the National Committee acknowledges that public trustees and trustee companies, which provide a commercial service, will obviously have higher overheads than an individual who acts as a personal representative or trustee. The National Committee is also conscious that, in many cases, the fee structures provided in legislation for trustee companies do not apply only when they are acting as the personal representative or trustee of the estate of a deceased person, but also apply when they are managing property in a range of other capacities.²⁷⁸ In view of these matters, the National Committee considers that, although there are issues in relation to the fees and charges of public trustees and trustee companies that warrant attention, any examination of the appropriateness of their fees and charges should take place in the context of a specific review of their charges, rather than in the context of this project. The National Committee therefore makes no proposal about the basis on which public trustees and trustee companies should be remunerated.

27.168 However, the National Committee is of the view that, if a public trustee or a trustee company is the personal representative or trustee of the estate of a deceased person, the court should have the same power to review its fees and charges as it would have in relation to any other personal representative or trustee.²⁷⁹

27.169 The National Committee has proposed earlier in this chapter that the model legislation should include a provision, based on section 86A of the *Wills, Probate and Administration Act 1898* (NSW), giving the court the power to review the amount charged or proposed to be charged in relation to the estate of a deceased person despite any provision contained in a will authorising the charging of the remuneration or amount.²⁸⁰ To ensure that it is clear that the court may review and, if necessary, reduce the fees and charges of public trustees and trustee companies charged or proposed to be charged in relation to the administration of the estate of a deceased person, the proviso in the model provision should be extended. It should provide, in accordance with section 86A of the *Probate and Administration Act 1898* (NSW) that the court's power to review may be exercised despite any provision of a will authorising the charging of the amount. In addition, it should provide that the court's power to

276 The exception is the public trustee in Queensland, where the gazetted fees and charges more closely approximate a fee for service: see [27.133] above.

277 See [27.77]–[27.83] above.

278 See [27.142] above.

279 For the court's existing power to review the fees and charges of public trustees and trustee companies see [27.140]–[27.141], [27.148]–[27.155] above.

280 See [27.124]–[27.128] above.

review may be exercised despite any statutory provision authorising the charging of the amount.

RECOMMENDATIONS

The court's power to authorise the payment of an amount to a personal representative or trustee for his or her services

27-1 The model legislation should include a provision, based generally on section 68 of the *Succession Act 1981* (Qld), which provides that:²⁸¹

- (a) the court may authorise, out of the estate of a deceased person, the payment to any personal representative or trustee of the estate such amount for the personal representative's or trustee's services as the court considers appropriate;²⁸²
- (b) the court may attach such conditions to the payment of the amount as it considers appropriate;²⁸³
- (c) the court may authorise the payment of an amount either periodically or otherwise;²⁸⁴ and
- (d) for the purpose of this provision, 'estate of a deceased person' includes property held on trust for a person because of his or her beneficial interest in the deceased person's estate.²⁸⁵

See Administration of Estates Bill 2009 cll 430–431.

27-2 The model provision in relation to the payment of an amount to a personal representative or trustee for his or her services should not include a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA).²⁸⁶

281 *Succession Act 1981* (Qld) s 68 is set out at [27.24] above.

282 See [27.76]–[27.83], [27.86]–[27.89] above.

283 See [27.76] above.

284 See [27.84] above.

285 See [27.90] above.

286 See [27.85] above. *Administration and Probate Act 1919* (SA) s 70 is set out at [27.26] above.

Limited right to indemnity for costs

27-3 The model legislation should include a provision to the general effect of section 86(3) of the *Probate and Administration Act 1898* (NSW) but slightly modified, so that, in the specified circumstances, a personal representative or trustee will be entitled to an indemnity out of the estate in respect of the amount paid or payable to an Australian legal practitioner for his or her charges and disbursements for undertaking executorial duties that are non-professional in nature.²⁸⁷

27-4 The provision that gives effect to Recommendation 27-3 should:²⁸⁸

- (a) apply if a personal representative renounces the right to payment of an amount for his or her services for any particular 12 month period;
- (b) provide that the personal representative or trustee is entitled to an indemnity out of the estate for the charges and disbursements of a legal practitioner engaged by the personal representative to undertake non-professional work during that 12 month period; and
- (c) provide that the amount of the indemnity is to be the lesser of the following amounts:
 - (i) the amount to which the personal representative or trustee would have been entitled as an appropriate amount for his or her services if he or she had undertaken the non-professional work personally and not renounced his or her right to remuneration for the work; and
 - (ii) the amount of the legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale in the jurisdiction.²⁸⁹

See Administration of Estates Bill 2009 cll 430, 433.

²⁸⁷ See [27.91]–[27.92] above. *Probate and Administration Act 1898* (NSW) s 86(3) is set out at [27.18] and considered at [27.21] above.

²⁸⁸ See [27.93]–[27.95] above.

²⁸⁹ This paragraph will need to be adapted if the jurisdiction does not have a relevant professional scale.

The court's power to review the remuneration of personal representatives and trustees

27-5 Subject to the following modifications, the model legislation should include a provision to the effect of section 86A of the *Probate and Administration Act 1898 (NSW)*:²⁹⁰

- (a) for consistency with Recommendation 27-1, the model provision should refer to 'payment of an amount for services', rather than to 'commission';²⁹¹ and
- (b) to ensure that the court may review and, if necessary, reduce the fees and charges of a public trustee or trustee company that acts as the personal representative or trustee of the estate of a deceased person, the model legislation should provide that the court's power to review may be exercised despite:
 - (i) any provision of a will authorising the charging of the amount; or
 - (ii) any statutory provision authorising the amount charged or proposed to be charged.²⁹²

See Administration of Estates Bill 2009 cll 430, 432.

290 *Probate and Administration Act 1898 (NSW)* s 86A is set out at [27.106] above.

291 See [27.124]–[27.128] above.

292 See [27.166]–[27.169] above.

Chapter 28

Dealings with wills

INTRODUCTION	72
PRODUCTION OF A WILL AND EXAMINATION OF A RELEVANT PERSON	72
Background	72
Power of court to order production of a will and examination of a person	73
Right of an entitled person to inspect and obtain a copy of a will	76
Discussion Paper	78
Submissions	79
The National Committee's view	79
LIABILITY FOR CONCEALING ETC A WILL	80
Background	80
Fraudulently dealing with a will	81
Discussion Paper	84
Submissions	85
The National Committee's view	85
RECOMMENDATIONS	86

INTRODUCTION

28.1 When a person dies leaving a will, it is important that the executor is aware of the existence of the will and of its terms.²⁹³

Wherever the title to the estate may formally vest on the death of a testator, the executor needs to know of the will and its contents before he can accept the office and undertake administration of the estate in accordance with the will. Knowledge of the will and its contents by the executor is necessary to make the will effectual.

28.2 In addition, an executor ordinarily needs to have the physical possession of a will in order to apply to the court for probate of the will.

28.3 The provisions of a revoked will can also be important if questions arise about whether a testator had testamentary capacity or was the subject of undue influence.²⁹⁴

28.4 A number of different statutory mechanisms are available to compel the production of testamentary instruments or to ascertain their location. In some jurisdictions, the court has the express statutory power to compel a person to produce testamentary instruments, or to appear in court to answer questions about testamentary instruments. Most jurisdictions also have a provision in their criminal statute that makes the concealment and destruction of a will a criminal offence.

28.5 This chapter examines the various ways in which persons who are affected by a will can gain access to the will, and the liability of persons who conceal a will with an intention to defraud.

PRODUCTION OF A WILL AND EXAMINATION OF A RELEVANT PERSON

Background

28.6 Historically, the ecclesiastical courts of England had the power to compel a person to produce a will in court.²⁹⁵

From the time when the ecclesiastical courts enjoyed exclusive jurisdiction in probate matters, the custodian of a will of a deceased testator has been compellable to produce it to the court.

293 *Hawkins v Clayton* (1988) 164 CLR 539, 552–3 (Brennan J).

294 K Collins, R Phillips and C Sparke, *Wills Probate & Administration Vic* (LexisNexis online service) [5,245.20] (at 20 February 2009).

295 *Hawkins v Clayton* (1988) 164 CLR 539, 550 (Brennan J).

28.7 The first modern statutory enactment of this power was section 26 of the *Court of Probate Act 1857* (Eng).²⁹⁶ Most jurisdictions in Australia now have provisions in their administration legislation under which the court may require a person to produce a will or other testamentary instrument to the court or registry.²⁹⁷

Power of court to order production of a will and examination of a person

28.8 In New South Wales, the Northern Territory, South Australia and Tasmania, the administration legislation provides that the court may:²⁹⁸

- order a person to produce and bring into the registry any testamentary instrument; and
- direct a person to attend court for the purposes of examination.

28.9 Section 150 of the *Probate and Administration Act 1898* (NSW),²⁹⁹ which is similar to the provisions in the Northern Territory, South Australia³⁰⁰ and Tasmania, provides:

150 Order to produce an instrument purporting to be testamentary

- (1) The Court may, on the application of any person, whether any proceedings are or are not pending in the Court with respect to any probate or administration, order any person to produce and bring into the registry any paper or writing, being or purporting to be testamentary, or otherwise material to the matter before the Court, which may be shown to be in the possession or under the control of such person.
- (2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but it appears that there are reasonable grounds for believing that the person has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court or upon interrogatories respecting the same.

²⁹⁶ 20 & 21 Vict c 77. For an example of where this provision was used, see *In the Goods of Shepherd* [1891] P 323.

²⁹⁷ These provisions are in addition to the common law duty of a solicitor holding a will to make the executor aware of the will's existence: *Hawkins v Clayton* (1988) 164 CLR 539, 553, 558 (Brennan J), 580–1 (Deane J), 598 (Gaudron J).

²⁹⁸ *Probate and Administration Act 1898* (NSW) s 150; *Administration and Probate Act* (NT) s 147; *Administration and Probate Act 1919* (SA) s 25; *Administration and Probate Act 1935* (Tas) s 67, sch 3, cl 3. The ACT used to have a similar provision: see *Administration and Probate Act 1929* (ACT) s 124, repealed by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 amdt [2.42].

²⁹⁹ The powers conferred on the court by this section may be exercised by the registrar: *Supreme Court Rules 1970* (NSW) Pt 78 r 5(1)(r). For commentary on equivalent procedures in England see JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [25.187]–[25.198], [27.16]–[27.18].

³⁰⁰ In South Australia, the equivalent provision additionally states that, '[t]he costs of any such proceeding shall be in the discretion of the Court': see *Administration and Probate Act 1919* (SA) s 25(4).

- (3) Such person shall be bound to answer such questions or interrogatories, and (if so ordered) to produce and bring in such paper or writing, and shall be subject to punishment for contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing.

28.10 Although the New South Wales provision is worded widely and states that ‘any person’ may apply, it has been suggested that these words may be limited to persons claiming to have an interest affected by the will:³⁰¹

It would follow ... that a person who claims possible appointment as executor, trustee or guardian, as well as a person claiming possible appointment as beneficiary, would have standing to apply under the section for production of a document purporting to be testamentary. (note omitted)

28.11 Similarly, it has been suggested, in relation to the South Australian provision, that ‘an applicant must have some interest in the document before an order will be made’.³⁰²

28.12 The phrase, any ‘paper or writing ... purporting to be testamentary’ has been held to include a duplicate of a will.³⁰³ A similar expression is used in the provisions that exist in all Australian jurisdictions under which the court may admit to probate a document that purports to embody the testamentary intentions of a deceased person, despite the fact that the document has not been executed in accordance with the formal requirements for the validity of wills.³⁰⁴ It would appear that, for the purposes of section 150 of the *Probate and Administration Act 1898* (NSW), such a document would be considered to be ‘paper or writing ... purporting to be testamentary’.

28.13 The court’s power under the New South Wales, Northern Territory and South Australian provisions is not limited to documents that purport to be testamentary, but extends to documents that are ‘otherwise material to the matter before the court’.³⁰⁵ For example, where it is alleged that a testator lacked testamentary capacity at the time of making the will:³⁰⁶

The discovery not only of testamentary documents, but also of correspondence connected with the making of the will, and of letters written by the testator on matters of business and other matters, may have the strongest possible bearing on the question of the testator’s sanity at the date of the will.

301 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [150.02].

302 DM Haines, *Succession Law in South Australia* (2003) [20.10].

303 *Killican v Parker* (1754) 1 Lee 662; 161 ER 241.

304 *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 1936* (SA) s 12; *Wills Act 2008* (Tas) s 10; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) s 32.

305 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [150.01].

306 *Hunt v Anderson* (1868) LR 1 P & D 476, 480–1 (Sir JP Wilde).

28.14 Although the Tasmanian provision is in substantially the same terms as the provisions in New South Wales, the Northern Territory and South Australia, it has a slightly narrower operation, as it is not expressed to apply to documents of this kind, but applies only to documents that are, or purport to be, testamentary.³⁰⁷

28.15 The court's power to compel the production of the relevant documents exists regardless of whether there are probate proceedings pending in court.³⁰⁸ A solicitor cannot claim professional privilege over a testamentary instrument in his or her possession, and is still subject to this provision.³⁰⁹

28.16 Queensland used to have a provision in similar terms to the Tasmanian provision.³¹⁰ Although that provision was repealed by the *Succession Act 1981* (Qld), the Supreme Court of Queensland has held that the jurisdiction conferred on the court by section 6(1) of the *Succession Act 1981* (Qld) is sufficiently wide to encompass the powers that were previously expressly provided for by section 5 of the *Probate Act 1867* (Qld).³¹¹

28.17 In the ACT, Queensland and Western Australia, the court rules achieve a generally similar result to the statutory provisions discussed above. They provide that the court (in Queensland, the registrar) may issue a subpoena requiring a person to bring a testamentary instrument into the registry and to attend court for examination.³¹² For example, rule 637 of the *Uniform Civil Procedure Rules 1999* (Qld) provides:

637 Subpoenas

- (1) A person may apply to the registrar for a subpoena requiring another person—
 - (a) to bring into the registry or otherwise as the court may direct a will or other testamentary paper; or
 - (b) to attend the court for examination in relation to any matter relevant to a proceeding under this chapter.
- (2) The applicant must serve the subpoena on the person to whom it is directed.

307 See *Administration and Probate Act 1935* (Tas) s 67, sch 3, cl 3. For an example of where this provision was used see *Hoare v Johnson* (Unreported, Supreme Court of Tasmania, Underwood J, 22 May 1998).

308 *Estate of Harding; Harding v Harding* (1987) 10 NSWLR 464.

309 *In the Estate of Harvey* [1907] P 239; *Hawkins v Clayton* (1988) 164 CLR 539, 551 (Brennan J).

310 *Probate Act 1867* (Qld) s 5 (repealed).

311 *Re Bray* [1989] 2 Qd R 398.

312 *Court Procedures Rules 2006* (ACT) r 3111; *Uniform Civil Procedure Rules 1999* (Qld) r 637; *Rules of the Supreme Court 1971* (WA) O 73 r 20.

- (3) An application for the issue of a subpoena requiring a person to bring into the registry, or as directed in the subpoena, a will or other testamentary paper must be supported by an affidavit showing that the will or testamentary paper is believed to be in the person's possession or control and the grounds for the belief.
- (4) If the person against whom the subpoena is issued denies that the will is in the person's possession or control, the person must file in the registry an affidavit to that effect. (note omitted)

28.18 In Victoria there is no statutory provision giving the court a similar power. However, it has been suggested that the court may still have the power to compel the production of testamentary instruments and to direct the examination of a person in relation to such documents:³¹³

In each of the ... jurisdictions in which the court has conferred on it the jurisdictions, powers and authorities of the superior courts in England in relation to probate cases when it was established the court has power to make such orders.

Right of an entitled person to inspect and obtain a copy of a will

28.19 If the person who has control of a will is reluctant to show it to others, this can create problems for persons with an interest in the deceased's estate. The National Committee considered this problem in its Wills Report:³¹⁴

When a will is admitted to probate, it becomes a public document. However, not all wills are brought to court for probate, particularly where the estate is small and not worth the expense involved. Possible beneficiaries and other claimants can be placed in an invidious position if they do not know anything about the contents of the will.

A person who is eligible to apply for family provision may not be able to discover whether the testator has made provision for him or her by will, and so will not be able to begin to consider whether to make a claim. An intestacy beneficiary may need to know whether the will lacks a valid residuary provision. Equally, a creditor may wish to know whether the testator had particular assets. This information may be discoverable to a certain extent from a will.

28.20 In order to remedy this problem, the National Committee recommended a provision in the following terms:³¹⁵

52 Persons entitled to see will

- (1) Any person having the possession or control of a will including a revoked will, or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all

³¹³ DL Bailey and EK Evans, *Discovery and Interrogatories Australia* (LexisNexis online service) [13,180] (at 21 February 2009) referring to the *Constitution Act 1975* (Vic) s 85.

³¹⁴ *Wills Report* (1997) QLRC 109–10; NSWLRC [9.3]–[9.4].

³¹⁵ *Ibid*, QLRC 111–12; NSWLRC 181–2; Draft Wills Bill 1997 cl 52.

of the following persons to inspect and, at their own expense, take copies of it:

- (a) any person named or referred to in it, whether as beneficiary or not,
 - (b) the surviving spouse, any parent or guardian and any issue of the testator,
 - (c) any person who would be entitled to a share of the estate of the testator if the testator had died intestate,
 - (d) any creditor or other person having any claim at law or in equity against the estate of the deceased,
 - (e) any beneficiaries of prior wills of the deceased,
 - (f) a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.
- (2) Any person having the possession or control of a will, including a revoked will, or a copy of any such will and any part of such a will (including a purported will), of a deceased person must produce it in Court if required to do so.

28.21 In New South Wales, the Northern Territory, Queensland, Tasmania and Victoria, there are provisions that give effect (with minor modifications) to the National Committee's recommended provision.³¹⁶ These provisions were introduced:³¹⁷

to ensure that persons with a proper interest can see the contents of a will prior to the will's admission to probate (upon which, it becomes a public document) or in the event that probate is not sought and the estate is administered informally.

28.22 The New South Wales provision, although similar to the National Committee's recommended provision, provides additionally that the following categories of persons are entitled to inspect, and obtain a copy of, a will:³¹⁸

- any person committed with the management of the deceased person's estate under the *Protected Estates Act 1983* (NSW) immediately before the death of the deceased person;
- any attorney under an enduring power of attorney made by the deceased person;
- any person belonging to a class of person prescribed by the regulations.

³¹⁶ *Succession Act 2006* (NSW) s 54; *Wills Act* (NT) s 54; *Succession Act 1981* (Qld) s 33Z; *Wills Act 2008* (Tas) s 63; *Wills Act 1997* (Vic) s 50.

³¹⁷ Explanatory Memorandum, Succession Amendment Bill 2005 (Qld) 21.

³¹⁸ *Succession Act 2006* (NSW) s 54(2)(h)–(j).

28.23 The Queensland provision is also similar to the model provision, but provides expressly that any person who can apply for family provision out of the deceased's estate is entitled to inspect and receive a copy of the will.³¹⁹

28.24 The Victorian provision, although based closely on the model provision, does not provide that a person in possession or control of a will must produce it to the court if required to do so.³²⁰

28.25 Although the provisions do not provide sanctions for a person who fails to comply with the requirement to give access to inspect a will, or a copy of a will, to an entitled person, it has been suggested that there may be a costs penalty if a person has failed to reveal a will.³²¹

28.26 In so far as the New South Wales, Northern Territory and Queensland provisions state that a person must produce a will to the court if required to do so, they overlap with the statutory provisions and rules discussed above.

Discussion Paper

28.27 In the Discussion Paper, the National Committee considered that section 150 of the *Probate and Administration Act 1898* (NSW) has two advantages over the provision recommended in the Wills Report concerning who may see a will:³²²

- section 150(2) provides for the examination of a person in court, or for the person to answer interrogatories; and
- section 150(3) provides that failure to comply with such an order is contempt.

28.28 The National Committee noted that section 150(2) and (3) were used frequently, and therefore proposed that the model legislation should include a provision to enable the court to order the production of testamentary instruments, including provisions to the effect of section 150(2) and (3) of the *Probate and Administration Act 1898* (NSW).³²³ It considered that such a provision would be a further elaboration of the model provision that was to be based on section 6 of the *Succession Act 1981* (Qld).³²⁴

319 *Succession Act 1981* (Qld) s 33Z(4) (meaning of 'entitled person').

320 *Wills Act 1997* (Vic) s 50.

321 K Collins, R Phillips and C Sparke, *Wills Probate & Administration Vic* (LexisNexis online service) [5,245.30] (at 20 February 2009).

322 *Administration of Estates Discussion Paper* (1999) QLRC 271; NSWLRC [19.11].

323 *Ibid*, QLRC 271; NSWLRC 388 (Proposal 99).

324 *Ibid*, QLRC 271; NSWLRC [19.10].

Submissions

28.29 The majority of submissions that addressed these issues agreed with the National Committee's proposal.³²⁵ The New South Wales Law Society commented that:³²⁶

Section 150 of the [*Probate and Administration Act 1898* (NSW)] is regarded as a section of great utility.

28.30 However, the Queensland Law Society suggested that the procedures available under the Queensland rules already dealt with this issue.³²⁷

The ... procedures under the *Uniform Civil Procedure Rules* deal with this. The ... procedures have the advantage of keeping things at Registry level. How much is included in the model legislation might depend on how successful the National Committee is with the draft provision that it has prepared concerning the law of wills and the proposed provision specifying who is entitled to see a copy of a will.

28.31 All the submissions that considered whether the court should have the additional powers to make an order for the examination of a person in court and for a person to answer interrogatories, with contempt orders available to those who fail to comply, agreed with the National Committee's proposal that the model legislation should include provisions to the effect of section 150(2) and (3) of the *Probate and Administration Act 1898* (NSW). This was the view of the Bar Association of Queensland, a former ACT Registrar of Probate, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, the ACT and New South Wales Law Societies and the Law Institute of Victoria.³²⁸

The National Committee's view

28.32 The model legislation should include a provision to the general effect of section 150 of the *Probate and Administration Act 1898* (NSW). A provision in those terms is desirable, as the court's power extends to ordering the production not only of testamentary instruments, but also of any other paper or writing that is material to the matter before the court. The provision also gives the court a specific power to punish for contempt if a person fails to comply with a court order.

28.33 However, whereas section 150 of the *Probate and Administration Act 1898* (NSW) refers to 'any paper or writing, being or purporting to be testamentary, or otherwise material to the matter before the Court', the model

325 Submissions 1, 2, 11, 12, 14, 15, 19.

326 Submission 15.

327 Submission 8. *Uniform Civil Procedure Rules 1999* (Qld) r 637 is set out at [28.17] above.

328 Submissions 1, 2, 8, 11, 12, 14, 15, 19.

provision that is based on that section should substitute the words 'any document' for the words 'any paper or writing'. The National Committee considers that the latter expression is too narrow.

28.34 The model provision should further provide that, if a person is required under that provision to answer interrogatories about a testamentary or other document, the person must answer the interrogatories directly and without evasion or resort to technicality.³²⁹

28.35 The National Committee notes the comment by the Queensland Law Society that it is convenient for the relevant powers to be exercised at the registry level. In the National Committee's view, it is appropriate for the model legislation to confer the relevant powers on the court. Individual jurisdictions can, if they wish, provide in their court rules that those powers may be exercised by the registrar, as is the case in New South Wales.³³⁰

LIABILITY FOR CONCEALING ETC A WILL

Background

28.36 In Australia, most jurisdictions have a statutory provision that makes it a criminal offence to conceal, suppress, destroy or steal a will for a fraudulent purpose. The High Court has commented on the rationale for making the concealment of a will a criminal offence:³³¹

The successful concealment of a deceased testator's will precludes enjoyment of the interests in property created by the will. For that reason, the criminal law has proscribed the concealment of a will for any fraudulent purpose.

28.37 In most jurisdictions, the provision is found in the criminal statute of the jurisdiction. In Victoria, there is also a relevant provision in the administration legislation.

28.38 The various provisions are considered below.

329

This requirement is based on r 232(3) of the *Uniform Civil Procedure Rules 1999* (Qld), which provides that an answer to an interrogatory 'must be given directly and without evasion or resort to technicality'. The *Uniform Civil Procedure Rules 2005* (NSW) r 22.3(2)(b) also provides that a statement of answers to interrogatories must answer the substance of each interrogatory 'without evasion'. See also the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 30.06(1).

330

See, for example, note 299 above regarding the exercise of these powers in New South Wales by the registrar.

331

Hawkins v Clayton (1988) 164 CLR 539, 551 (Brennan J).

Fraudulently dealing with a will

Provisions in criminal statutes

28.39 In most jurisdictions, the criminal statute of the jurisdiction makes it an offence to conceal a testamentary instrument with intent to defraud.

New South Wales, Northern Territory, Tasmania, Victoria

28.40 The provisions in New South Wales, the Northern Territory, Tasmania and Victoria are expressed in broad terms. Generally, they make it a criminal offence for a person to destroy or conceal the whole or any part of a testamentary instrument with intent to defraud.

28.41 The New South Wales criminal provision is based on a provision from the *Larceny Act 1861* (Eng).³³² New South Wales is the only jurisdiction that includes stealing a will as an offence under its provision.³³³ Section 135 of the *Crimes Act 1900* (NSW) provides:

135 Stealing, destroying etc wills or codicils

Whoever steals, or, for any fraudulent purpose destroys, cancels, obliterates, or conceals, the whole or any part of any will, codicil, or other testamentary instrument, either during the life or the testator, or after the testator's death, or whether the same relates to real, or personal estate, or to both, shall be liable to imprisonment for seven years.

28.42 In the Northern Territory, section 235(1) of the Criminal Code (NT) provides:

235 Suppression, &c., of documents

(1) Any person who, with intent to defraud, destroys, defaces or conceals any document that is evidence of title to land or estate in land, or any valuable security, will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court of justice or any government department, is guilty of a crime and is liable to imprisonment for 7 years.

28.43 In Tasmania, section 236 of the Criminal Code (Tas) provides:

236 Unlawfully dealing with wills and documents of title

Any person who retains, conceals, cancels, or destroys the whole or any part of any will or other testamentary instrument (whether the testator is living or dead), or of any document which is evidence of title to any property, or of any

332 24 & 25 Vict c 96 s 29.

333 Stealing of a testamentary instrument is an offence under the general provisions of the criminal statutes in all jurisdictions. In the Northern Territory, Queensland and Western Australia, special provision is made in relation to the penalty for stealing a testamentary instrument: Criminal Code (NT) s 210; Criminal Code (Qld) s 398; Criminal Code (WA) s 378.

encumbrance over or dealing with any land, with intent to defraud, is guilty of a crime.

28.44 In Victoria, section 86 of the *Crimes Act 1958* (Vic) provides:

86 Suppression etc of documents

- (1) A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court of justice or any government department is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

Queensland, Western Australia

28.45 In Queensland, section 399 of the Criminal Code (Qld) provides:

399 Fraudulent concealment of particular documents

A person who, with intent to defraud, conceals the whole or part of—

- (a) a register or record kept by lawful authority; or
- (b) a document recording title to property; or
- (c) a testamentary instrument (whether the testator is living or dead);

commits a crime.

Maximum penalty—

- (a) if the offence is committed in relation to a document recording title to property—3 years imprisonment; or
- (b) otherwise—14 years imprisonment.

28.46 In Western Australia, section 380 of the Criminal Code (WA) provides:

380 Concealing wills

Any person who, with intent to defraud, conceals any testamentary instrument, whether the testator is living or dead, is guilty of a crime, and is liable to imprisonment for 14 years.

South Australia

28.47 Until 2002, South Australia had a provision in similar terms to section 135 of the *Crimes Act 1900* (NSW).³³⁴

³³⁴

See *Criminal Law Consolidation Act 1935* (SA) s 145, which was repealed by the *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA) s 4. Section 145 and other repealed provisions dealing with larceny and similar offences were considered to be 'antiquated and inadequate for modern conditions' and were replaced by a general offence of theft: see South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2002 (MJ Atkinson, Attorney-General).

Nature of the offence

28.48 These provisions apply where the concealing, destruction or other relevant act is done 'with intent to defraud', 'for a fraudulent purpose' or 'dishonestly, with a view to gain for himself or another or with intent to cause loss to another'. The High Court, in considering the meaning of the phrase 'intent to defraud' has said that the 'crucial characteristic of an intention to defraud is not the economic loss which may or may not result ... but the element of dishonesty'.³³⁵

28.49 The Supreme Court of South Australia has also considered the concept of defrauding under section 234 of the *Criminal Law Consolidation Act 1935* (SA):³³⁶

The essential notion of defrauding is dishonestly depriving some person of money or property, or depriving him of, or prejudicially affecting him in relation to, some lawful right, interest, opportunity or advantage which he possesses.

Provisions in administration legislation

28.50 Unlike the other Australian jurisdictions, Victoria has an additional provision in its administration legislation under which 'both criminal and civil penalties are prescribed'.³³⁷ The provision makes concealment of a will a criminal offence, but also creates a statutory cause of action by providing that a person who fraudulently deals with a will is liable in damages to a person who sustains any loss as a result of the concealment. Section 66 of the *Administration and Probate Act 1958* (Vic) provides:³³⁸

66 Concealment of will a misdemeanour

- (1) Every person who retains or conceals or endeavours to retain or conceal any will or codicil or aids or abets any person in such retention or concealment with intent to defraud any person interested under such will or codicil, shall be guilty of an indictable offence; and shall be liable to a fine of not more than 100 penalty units or to imprisonment for a term of not more than two years or to both fine and imprisonment; and shall also be liable to a proceeding for damages at the suit of the persons defrauded or those claiming under them for any loss sustained by them or any of them in consequence of such retention or concealment.
- (2) No prosecution for any such offence shall be commenced without the sanction of a law officer; and no such sanction shall be given unless such previous notice of the application for leave to prosecute as the law

³³⁵ *Balcombe v De Simoni* (1972) 126 CLR 576, 588 (McTiernan J). See also at 593–4 (Gibbs J).

³³⁶ *The Queen v Kastatovic* (1985) 42 SASR 59, 62 (King CJ). The *Criminal Law Consolidation Act 1935* (SA) s 234 was repealed by the *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA) s 8.

³³⁷ RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 123.

³³⁸ The predecessor to this provision first appeared in s 1 of the *Intestate's Real Estate Act 1864* (Vic).

officer directs has been given to the person for whose prosecution such sanction is sought. (emphasis added)

28.51 The ACT, the Northern Territory and Tasmania also have provisions in their administration legislation that create a statutory cause of action where a will is stolen, destroyed, cancelled, obliterated or concealed.

28.52 Section 127 of the *Administration and Probate Act 1929* (ACT), which is virtually identical to section 152 of the *Administration and Probate Act* (NT), provides:

127 Person fraudulently disposing of will liable for damages

If a person suffers damage as a result of the stealing of a will or a part of a will, or as a result of the fraudulent destroying, cancelling, obliterating or concealing of a will or a part of a will, the person may recover damages in relation to the damage by action in a court of competent jurisdiction from the person who stole, destroyed, cancelled, obliterated or concealed the will or part.

28.53 A similar cause of action is created by section 65 of the *Administration and Probate Act 1935* (Tas):

65 Concealment, &c., of will actionable

If any person retains, or conceals, or is privy to the retention or concealment of, a will with intent to defraud any person, the person defrauded and any person claiming under him, shall have an action for damages against such first-mentioned person for any loss sustained by reason of such retention of concealment.

Discussion Paper

28.54 In the Discussion Paper, the National Committee noted that it had generally adopted the view that statutory provisions are most appropriately placed in the principal legislation covering the subject matter to which they relate. For that reason, it proposed that the model legislation should not include a provision making it a criminal offence to conceal, steal or 'edit' a will. Such a provision should be left to each jurisdiction's criminal laws.³³⁹

28.55 However, the National Committee proposed that the model legislation should include a provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT), which provides that a person who suffers damage as a result of the stealing of, or fraudulent dealing with, a will may recover damages from the person who stole, or fraudulently dealt with, the will.³⁴⁰

³³⁹ *Administration of Estates Discussion Paper* (1999) QLRC 271–2; NSWLRC 389 (Proposal 101).

³⁴⁰ *Ibid.*, QLRC 271; NSWLRC 389 (Proposal 100).

Submissions

28.56 The National Committee's proposal that the model legislation should not include a criminal offence relating to the concealment, stealing or editing of a will was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, the ACT and New South Wales Law Societies and the Law Institute of Victoria.³⁴¹

28.57 However, a former ACT Registrar of Probate disagreed with the National Committee's proposal, and favoured the inclusion of such a provision. In her view, as the offence related to the administration of an estate, it was appropriate that it should be contained in the model legislation.³⁴²

28.58 There was widespread support for the proposal that the model legislation should include a provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT).³⁴³ This proposal was supported by the Bar Association of Queensland, a former ACT Registrar of Probate, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, the ACT Law Society and the Law Institute of Victoria.

28.59 The New South Wales Law Society, however, considered that the National Committee's proposals to include a provision creating a statutory cause of action, but to omit a provision dealing with the criminal offence, were inconsistent.³⁴⁴

These appear to be somewhat inconsistent. If Proposal 100 is adopted giving a private right of damages for statutory breach, it would be advisable to include the criminal sanction in the same legislation so that there is a certainty as to the total effect of the fraudulent etc concealment of a will.

The National Committee's view

28.60 Given that the stealing of a will is a criminal offence in all Australian jurisdictions, and that the criminal statutes of most Australian jurisdictions make it a specific criminal offence for a person to conceal a will, it is not necessary for the model legislation to include provisions creating or duplicating these offences. Moreover, the National Committee is of the view that provisions creating criminal offences are more appropriately located in the criminal statutes of the various jurisdictions.

28.61 However, the National Committee is of the view that a provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT), which

341 Submissions 1, 8, 11, 12, 14, 15, 19.

342 Submission 2.

343 Submissions 1, 2, 8, 11, 12, 14, 19.

344 Submission 15.

creates a statutory cause of action for a person who suffers damage as a result of the stealing or concealment of a will, would be a useful addition to the model legislation. The model provision should contain a note that refers to the relevant statutory provisions that deal with the criminal offences of stealing and concealing, or interfering with, a will.

RECOMMENDATIONS

Production of testamentary documents

28-1 The model legislation should include a provision to the effect of section 150 of the *Probate and Administration Act 1898* (NSW), except that the model provision should:

- (a) refer to ‘any document’, rather than to ‘any paper or writing’; and
- (b) provide that, if a person is required under the provision to answer interrogatories about a testamentary or other document, the person must answer the interrogatories directly and without evasion or resort to technicality.³⁴⁵

See Administration of Estates Bill 2009 cl 613.

Concealment of a will

28-2 The model legislation should not include a provision making it an offence for a person to steal or conceal a will.³⁴⁶

28-3 The model legislation should include a provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT), which should include a note that refers to the statutory provisions of the jurisdiction that deal with the criminal offences of stealing and concealing, or interfering with, a will.³⁴⁷

See Administration of Estates Bill 2009 cl 614.

³⁴⁵ See [28.32]–[28.35] above.

³⁴⁶ See [28.60] above.

³⁴⁷ See [28.61] above.

Chapter 29

Mechanisms to facilitate administration and to minimise the need to obtain a grant

ELECTIONS TO ADMINISTER.....	89
Existing legislative provisions.....	89
Discussion Paper	94
Further call for submissions	94
Retention or abolition of elections to administer	95
Persons entitled to file an election to administer.....	97
Location of provisions dealing with elections to administer	100
The value of the estate.....	101
Existence of a pre-existing entitlement to obtain a grant or, in the case of a public trustee, an order to administer the estate	106
The content of the election to administer	111
Requirements to give public notice	112
Election to administer the unadministered part of an estate.....	116
ADMINISTRATION OF SMALL ESTATES WITHOUT A GRANT OR THE FILING OF AN ELECTION TO ADMINISTER	120
Existing legislative provisions.....	121
Discussion Paper	123
Further call for submissions	123
Inclusion of a small estates provision in the model legislation.....	123
Persons who may administer an estate under the small estates provision	124
The value of the estate.....	125
Existence of a pre-existing entitlement to obtain a grant or, in the case of a public trustee, an order to administer	128
Requirements to give public notice	130
The National Committee's view.....	133
COSTS	133
Existing legislative provisions.....	133
Further call for submissions	134
Further submissions.....	134
The National Committee's view.....	135
TRANSFER OF REAL PROPERTY	135
Introduction.....	135
Queensland legislative provisions.....	136
Discussion Paper	139
Submissions	139
The National Committee's view.....	142
INFORMAL ADMINISTRATION: ADMINISTERING AN ESTATE WITHOUT A GRANT	142
Introduction.....	142
Historical background.....	145
Existing legislative provisions.....	147
Discussion Paper	151
Submissions	152
The National Committee's view.....	155

RATIFICATION OF ACTS BY PERSONAL REPRESENTATIVE.....	157
Introduction.....	157
Discussion Paper	158
Submissions	158
The National Committee's view.....	158
PAYMENTS BY THIRD PARTIES WITHOUT PRODUCTION OF A GRANT	158
Existing legislative provisions.....	158
Discussion Paper	163
Submissions	164
The National Committee's view.....	165
RECOMMENDATIONS	167

ELECTIONS TO ADMINISTER

Existing legislative provisions

29.1 The legislation in all Australian jurisdictions except South Australia makes provision, in specified circumstances, for estates under a prescribed value to be administered under a procedure known as an election to administer. This procedure involves the filing of a notice with certain particulars in the court registry. Because the party who files the election is generally taken to be the executor or administrator of the estate,³⁴⁸ he or she has full authority to administer the estate. He or she will also have the same protections as a personal representative who administers an estate under a grant. For example, if the party who files the election distributes the estate according to the terms of a will and it is subsequently discovered that there was a later will under which different beneficiaries were entitled, the party who filed the election has the same protection as a personal representative who distributes an estate according to the terms of a will that had been admitted to probate.³⁴⁹ The filing of an election to administer therefore provides a simplified and slightly cheaper method for obtaining the necessary authority to administer an estate.³⁵⁰

Australian Capital Territory, New South Wales, Queensland, Tasmania, Victoria, Western Australia

29.2 In the ACT, New South Wales, Queensland, Tasmania, Victoria and Western Australia, the legislation provides that, if a person has died leaving property in that jurisdiction, the gross value of which, as estimated by the public trustee, does not exceed a prescribed amount,³⁵¹ and a grant has not already been made to any person, the public trustee (or, in Victoria, State Trustees Limited³⁵²) may file in the registry an election to administer the estate of the

348 See [29.3], [29.10] below.

349 See Chapter 25 of this Report, which deals with the effect of the revocation of a grant.

350 The procedure is simpler in that it does not require the preparation of the usual documentation that would accompany an application for a grant. Further, there is generally either no fee for filing an election to administer or a lower fee than that which applies for filing an application for a grant:

- ACT No fee is charged
- New South Wales \$634 if the gross value of the estate is more than \$50 000; no fee is charged if the gross value of the estate is less than \$50 000
- Northern Territory No fee is charged
- Queensland \$82
- Tasmania No fee is charged
- Victoria \$169.10
- Western Australia \$49.40 if there is a will (*Supreme Court (Fees) regulations 2002 (WA)* sch 3 item 2); otherwise no fee is charged.

351 See [29.50] below.

352 State Trustees Limited is a State owned company and a trustee company under the *Trustee Companies Act 1984* (Vic). It is the Victorian equivalent of the public trustee: see *State Trustees (State Owned Company) Act 1994* (Vic).

deceased person.³⁵³

29.3 Generally, the effect of filing an election to administer is that the public trustee (or, in Victoria, State Trustees Limited) is deemed to be the executor or administrator of the estate.³⁵⁴

29.4 In New South Wales, Queensland, Tasmania, Victoria and Western Australia, certain trustee companies are also empowered to file an election to administer the estate of a deceased person.³⁵⁵ The circumstances in which a trustee company may file an election to administer are similar to the circumstances in which the public trustee in these jurisdictions may do so.

29.5 Generally, the effect of filing an election to administer is that the trustee company is deemed to be the executor or administrator of the estate.³⁵⁶

Northern Territory

29.6 In the Northern Territory, until July 2002, only the public trustee could file an election to administer the estate of a deceased person.³⁵⁷ However, since 1 July 2002, it has been possible for an election to administer to be filed not only by the public trustee, but also by a trustee company and, significantly, by a legal practitioner. No other Australian jurisdiction provides for the filing of an election to administer by a legal practitioner.

29.7 Sections 110B and 110C of the *Administration and Probate Act* (NT) provide:

110B Election to administer small estate

- (1) A professional personal representative need not apply for representation of the estate of a deceased person but may instead file in the Court an election to administer the estate if—

³⁵³ *Administration and Probate Act 1929* (ACT) s 87C(1); *Public Trustee Act 1913* (NSW) s 18A(1), (2); *Public Trustee Act 1978* (Qld) s 30(1); *Public Trustee Act 1930* (Tas) s 20(1); *Trustee Companies Act 1984* (Vic) ss 4(1) (definition of 'trustee company'), 6, 11A(1), sch 2 (reference to State Trustees Limited); *Public Trustee Act 1941* (WA) s 14(1).

³⁵⁴ *Public Trustee Act 1913* (NSW) s 18A(3); *Public Trustee Act 1978* (Qld) s 33(1); *Public Trustee Act 1930* (Tas) s 20(2); *Trustee Companies Act 1984* (Vic) s 11A(3); *Public Trustee Act 1941* (WA) s 14(2). In the ACT, the public trustee has the functions that he or she would have had if the court had granted an order to collect and administer: *Administration and Probate Act 1929* (ACT) s 87C(4). Section 89(1) of that Act provides that, if the public trustee is granted an order to collect and administer the estate of a deceased person, he or she has the functions in relation to the estate as if administration had been granted to the public trustee.

³⁵⁵ *Trustee Companies Act 1964* (NSW) s 15A; *Trustee Companies Act 1968* (Qld) ss 12(1), 13(1); *Trustee Companies Act 1953* (Tas) s 10A(1); *Trustee Companies Act 1984* (Vic) s 11A(1); *Trustee Companies Act 1987* (WA) s 10(1).

³⁵⁶ *Trustee Companies Act 1964* (NSW) s 15A; *Trustee Companies Act 1968* (Qld) ss 12(2), 13(2); *Trustee Companies Act 1953* (Tas) s 10A(3); *Trustee Companies Act 1984* (Vic) s 11A(3); *Trustee Companies Act 1987* (WA) s 10(2).

³⁵⁷ *Public Trustee Act* (NT) ss 53–56 (repealed).

- (a) the professional personal representative estimates that the net value of the property in the Territory at the time of filing the election does not exceed the prescribed amount; and
 - (b) no other person in the Territory has been granted representation of the estate.
- (2) An election is to be in writing, setting out the following matters:
 - (a) the name, address, occupation and date of death of the deceased person;
 - (b) details of the property of the deceased person;
 - (c) whether the deceased person died testate or intestate;
 - (d) if the deceased person died testate — a statement that after making proper inquiries the professional personal representative believes that the document annexed to the election is the testator's last will or an exemplification of the last will and that the will has been executed in accordance with the law governing the execution of that will.
- (3) On the filing of an election, the professional personal representative is—
 - (a) if the deceased person died testate — taken to be the executor of the will or the holder of letters of administration with the will annexed; or
 - (b) if the deceased person died intestate — taken to be the holder of letters of administration of the estate of that person,as if a grant of representation had been made to the professional personal representative.
- (4) A professional personal representative who files an election must comply with any advertising requirements that are prescribed or that are specified in the *Supreme Court Rules*.
- (5) If after filing an election the professional personal representative discovers that the net value of the property in the Territory exceeds the amount referred to in subsection (1)(a), he or she must—
 - (a) file in the Court a memorandum stating the value of the property; and
 - (b) apply for a grant of representation.
- (6) If no amount is prescribed by regulation for the purposes of subsection (1)(a), the prescribed amount is \$85 000.

110C Election in respect of part administered estate

- (1) A professional personal representative need not apply for letters of administration de bonis non but may instead file in the Court an election to administer the unadministered part of the estate of a deceased person if—
 - (a) representation of the estate has been granted in the Territory and the person last granted representation has, because of his or her death or other incapacity, left part of the estate unadministered;
 - (b) the professional personal representative estimates that the net value of the property in the Territory left unadministered at the time of filing the election does not exceed the prescribed amount; and
 - (c) no other person in the Territory has been granted letters of administration de bonis non since the death or incapacity of the last administrator.
- (2) An election is to be in writing, setting out details of the following matters:
 - (a) the last grant of representation;
 - (b) the death or other incapacity of the last administrator;
 - (b) the property in the Territory left unadministered.
- (3) On the filing of an election, the professional personal representative is taken to be the administrator of the part of the estate left unadministered as if he or she had been granted letters of administration de bonis non.
- (4) If after filing an election the professional personal representative discovers that the value of the property to be administered exceeds the amount referred to in subsection (1)(b), he or she must—
 - (a) file in the Court a memorandum stating the value of the property; and
 - (b) apply for a grant of administration de bonis non.
- (5) A statement in an election giving details of the death or other incapacity of the last administrator is, in the absence of evidence to the contrary, to be accepted by all courts, employees and persons, whether acting under an Act or not, as sufficient evidence of that fact without further proof.
- (6) If no amount is prescribed by regulation for the purposes of subsection (1)(b), the prescribed amount is \$85 000.

29.8 The term ‘professional personal representative’ is defined in the legislation to mean:³⁵⁸

- (a) the Public Trustee;
- (b) a trustee company within the meaning of the *Companies (Trustees and Personal Representatives) Act*, or
- (c) a legal practitioner;

29.9 These provisions were enacted ‘to implement reforms identified as a consequence of the National Competition Policy Review of the *Public Trustee Act*’.³⁵⁹ In the second reading speech for the Administration and Probate Amendment Bill (NT) and the Public Trustee Amendment Bill (NT), the then Minister for Justice and Attorney-General commented:³⁶⁰

The review team identified a number of provisions of the *Public Trustee Act* that are anti-competitive. In the main, these are provisions operating so as to provide the Public Trustee with minor cost advantages over competitors when administering small estates. These provisions include those that permit the Public Trustee to administer estates of small value without the need to obtain the approval of the Supreme Court. ... The review team recommended that most of these operational advantages be retained but that they be extended so as to apply to other professional personal representatives. The government accepts these recommendations.

Consequently, the bills provide for a repeal of numerous sections of the *Public Trustee Act* and the re-enactment of the provisions in the *Administration and Probate Act*. These provisions as rewritten will mean that all professional personal representatives will operate on a level playing field in respect of the administration of estates and trusts. For the purpose of the *Administration and Probate Act*, a professional personal representative will be a person who is one or the other of the following: (1) the Public Trustee; (2) a corporation approved under the *Companies (Trustees and Personal Representatives) Act*, or (3) a legal practitioner. This definition describes the current group of persons who can lawfully administer estates for the payment of a fee.

29.10 Under the Northern Territory legislation, a professional personal representative may file an election to administer if the professional personal representative estimates that the net value of the estate does not exceed the prescribed amount³⁶¹ and no other person has been granted representation in respect of the estate.³⁶² On the filing of an election to administer, the

358 *Administration and Probate Act* (NT) s 6(1).

359 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2001 (Peter Toyne, Minister for Justice and Attorney-General)
<<http://notes.nt.gov.au/lant/hansard/hansard9.nsf/WebbySubject/AA97D42A26C8893469256B3D000EB7AF?opendocument>> at 21 February 2009.

360 Ibid.

361 *Administration and Probate Act* (NT) s 110B(1)(a). Note, the legislative provisions in the other Australian jurisdictions refer to the gross value of the estate: see [29.48] below.

362 *Administration and Probate Act* (NT) s 110B(1)(b).

professional personal representative is taken to be the executor of the will of the deceased person or the administrator of the estate of the deceased person, as the case may be.³⁶³

Discussion Paper

29.11 In the Discussion Paper, the National Committee expressed the preliminary view that elections to administer should be abolished. It suggested that, '[i]f an estate cannot be effectively administered informally, a grant, with its inherent protections and safeguards ... should be sought'.³⁶⁴ The National Committee did not, however, make a proposal about elections to administer. Instead, it sought submissions on:³⁶⁵

- what problems, if any, have been experienced with elections to administer; and
- what the justifications are for retaining elections to administer.

29.12 At the time the Discussion Paper was published, only public trustees and, in some jurisdictions, trustee companies could file an election to administer as an alternative to obtaining a grant. As the relevant provisions were generally located in the primary legislation governing the entity to which they applied³⁶⁶ — namely, in the public trustee legislation or the trustee company legislation of the particular jurisdiction³⁶⁷ — the National Committee did not specifically seek submissions on whether the model legislation should include a provision dealing with elections or, if such a provision were to be included, the form that the model provision should take.

Further call for submissions

29.13 In light of the legislative developments in the Northern Territory, the National Committee wrote to all the individuals and organisations who had made submissions to the Discussion Paper, to the public trustees, bar associations and law societies in all Australian jurisdictions, and to the peak representative body for trustee companies in Australia, outlining these developments and seeking further submissions on:

- whether elections to administer should be retained or abolished;

³⁶³ *Administration and Probate Act* (NT) s 110B(3).

³⁶⁴ *Administration of Estates Discussion Paper* (1999) QLRC 164; NSWLRC [11.11].

³⁶⁵ *Ibid*, QLRC 164; NSWLRC [11.12].

³⁶⁶ The exception was the ACT where the relevant provision, which applies only to the public trustee, was (and still is) located in s 87C of the *Administration and Probate Act 1929* (ACT).

³⁶⁷ That approach was consistent with the National Committee's general policy that provisions should be located in the principal legislation dealing with the particular subject matter.

- who should be able to file an election to administer;
- whether the model legislation should include provisions dealing with elections to administer; and
- if so, the form that those provisions should take.

29.14 The submissions originally received in response to the Discussion Paper, together with the further submissions received, are considered below in relation to the particular issues on which the National Committee sought further input.

Retention or abolition of elections to administer

Submissions in response to the Discussion Paper and further submissions

29.15 The Public Trustee of Queensland commented that he was not aware of any problems with the elections procedure in Queensland.³⁶⁸ Similar views were expressed by the Public Trustee of New South Wales and by the New South Wales Law Society.³⁶⁹ The ACT Law Society commented that it was not aware of any problems in relation to elections, except that the presence of real property in estates very often meant that the procedure was not available as the value of the estate exceeded the maximum statutory value for the procedure.³⁷⁰

29.16 Several respondents to the Discussion Paper expressed the view that elections to administer are a useful way to obtain the necessary authority to administer estates of relatively low value.

29.17 The Public Trustee of Queensland noted that it was a quicker and cheaper way of obtaining the necessary authority to administer an estate.³⁷¹

29.18 The ACT Law Society expressed a similar view. It observed that the ACT Public Trustee regularly uses elections for small estates, and stated that trust officers regard elections 'as simpler (fewer affidavits) and cheaper (by at least the \$503 filing fee) than applying for a grant'.³⁷²

29.19 The New South Wales Law Society stated that it had been advised by that jurisdiction's public trustee that in many cases the process allows solicitors to refer to the public trustee estates that need administration to complete small

368 Submission 5.

369 Submissions 11, 15.

370 Submission 14. At the time this submission was made, the maximum statutory value was \$100 000.

371 Submission 5.

372 Submission 14.

compensation claims where solicitors have had difficulty in obtaining a person to give continuing instructions.³⁷³

29.20 The Public Trustee of New South Wales and the New South Wales Law Society suggested that it was inconsistent for the National Committee in the Discussion Paper to seek to facilitate informal administration, which has no particular safeguards, but not elections filed by corporations that 'have skill and experience and need to perform well in a competitive environment'.³⁷⁴ The New South Wales Law Society cited as reasons for retaining the elections process that it:³⁷⁵

- affords a quick and easy method of obtaining the authority to administer low value estates; and
- provides a choice for people with low value estates to appoint the public trustee or a trustee company to administer their estates without running the risk of informal administration.

29.21 However, the Bar Association of Queensland stated that the comments of the probate registrars that were referred to in the Discussion Paper caused it some concern. The Bar Association suggested that, if an estate cannot be effectively administered informally, a grant should be required.³⁷⁶

29.22 The majority of the further submissions received expressly supported the retention of elections to administer. This was the view of the Trustee Corporations Association of Australia, the Public Trustee of New South Wales, an academic expert in succession law,³⁷⁷ the Law Institute of Victoria, the Law Society of Tasmania, the Public Trustee of Western Australia and the Victorian Bar.³⁷⁸

29.23 The Trustee Corporations Association of Australia commented that:³⁷⁹

Using elections to deal with relatively small estates is seen as providing community benefits in terms of offering cost savings to families and time savings for the Court.

373 Submission 15.

374 Submissions 11, 15.

375 Submission 15.

376 Submission 1.

377 This respondent expressed some reservations about elections to administer in his original submission in response to the Discussion Paper. However, in light of the developments in the Northern Territory, he was satisfied that elections to administer should be retained: Submissions 12, 12B.

378 Submissions 6B, 11A, 12B, 19A, 21, 23, 24.

379 Submission 6B.

29.24 Similar reasons in support of elections to administer were given by the Public Trustee of New South Wales, the Law Institute of Victoria, the Public Trustee of Western Australia and the Victorian Bar.³⁸⁰

The National Committee's view

29.25 Elections to administer provide a cheaper and more convenient method for the party filing the election to obtain the necessary authority to administer an estate having a relatively low value. For such an estate, the availability of the procedure avoids the greater cost to the estate that would be incurred if it were necessary for an application to be made for a grant of probate or letters of administration.

29.26 The National Committee is therefore of the view that elections to administer should be retained.

Persons entitled to file an election to administer

Further call for submissions

29.27 The National Committee sought further submissions on whether, if elections to administer are retained, an election to administer should be able to be filed by:

- the public trustee;
- a trustee company;
- a legal practitioner; or
- anyone else.

Further submissions

29.28 The majority of the submissions that addressed this issue were of the view that a public trustee, a trustee company, and a legal practitioner should be entitled to file an election to administer. This view was expressed by the Public Trustee of New South Wales, an academic expert in succession law, the Law Institute of Victoria, the Law Society of Tasmania, State Trustees Limited and the Victorian Bar.³⁸¹

29.29 The Public Trustee of New South Wales and State Trustees Limited based their support for the inclusion of legal practitioners on the basis of 'competitive neutrality'.³⁸²

380 Submissions 11A, 19A, 23, 24.

381 Submissions 11A, 12B, 19A, 21, 22, 24.

382 Submissions 11A, 22.

29.30 However, the Public Trustee of New South Wales commented that, if the authority to file an election is extended to legal practitioners, they should be ‘sufficiently skilled and experienced in succession law’.³⁸³

29.31 The Law Institute of Victoria expressed a similar view. It considered that ‘the administration of an estate should be undertaken by an entity or person with appropriate qualifications or knowledge’ of issues such as whether the will is a valid testamentary document, the interpretation of the terms of the will, and the intestacy rules. On this basis, it considered that public trustees and trustee companies should be entitled to file an election to administer.³⁸⁴ The Law Institute of Victoria observed, however, that:³⁸⁵

very few trustee companies are prepared to administer small estates. In practice, this restricts the availability of the option to file an election to administer to the public trustee. In order to ensure that this alternative method of administering a small estate is more readily available, the LIV considers that legal practitioners should also be entitled to file elections to administer.

29.32 Only two respondents who addressed this issue were of the view that a legal practitioner should not be entitled to file an election.³⁸⁶

29.33 The Public Trustee of Western Australia commented:³⁸⁷

The present legislation (Public Trustee and Trustee Companies are able to file for an election) is adequate as it is considered unlikely Solicitors would wish to administer these smaller type estates.

29.34 The Queensland Law Society considered that ‘there is no need to change the existing system in Queensland as it relates to elections to administer estates’, noting that Queensland has a simple and streamlined procedure for obtaining grants of probate and administration.³⁸⁸

29.35 The Trustee Corporations Association of Australia noted that there were differing views among its members about whether legal practitioners should be able to file an election. It observed, however, that:³⁸⁹

Having regard to the need for appropriate expertise and resources, there is a clear case for Public Trustees and trustee companies being able to carry out those functions.

383 Submission 11A.

384 Submission 19A.

385 Ibid.

386 Submissions 8A, 23.

387 Submission 23.

388 Submission 8A.

389 Submission 6B.

Such entities take on personal liability for the proper performance of their responsibilities and also have the important attribute of perpetuity.

29.36 All the submissions were unanimous in their view that an individual should not be able to file an election to administer. That view was expressed by the Trustee Corporations Association of Australia, the Public Trustee of New South Wales, an academic expert in succession law, the Law Society of Tasmania, State Trustees Limited, the Public Trustee of Western Australia and the Victorian Bar.³⁹⁰

29.37 In support of this view, State Trustees Limited commented that, because the filing of an election to administer is not subject to the scrutiny of the court, there would be a greater risk to beneficiaries if an election could be filed by an individual.³⁹¹

The most vulnerable beneficiaries are sometimes those who take bequests under a small estate. There is greater scope for loss to be caused to intended beneficiaries where the application for a grant of representation is not subject to the court's scrutiny. Where a trustee company or a legal practitioner has caused loss or disappointment to a beneficiary they can make good the loss through their professional indemnity insurance. In contrast a beneficiary may not be able to recover from an individual administrator in terms of enforcement of an order where the executor has little or no assets.

The National Committee's view

29.38 In the National Committee's view, it should be possible, as it is under section 110B of the *Administration and Probate Act* (NT), for an election to administer to be filed by a public trustee, a trustee company or a legal practitioner. Although two of the submissions expressed some reservations about making the procedure available to legal practitioners unless they are sufficiently skilled and experienced, the National Committee is of the view that legal practitioners have the necessary expertise and should be placed on the same footing as public trustees and trustee companies.

29.39 The model legislation should generally follow the Northern Territory legislation, except that it should provide that an election to administer may be filed, in the relevant circumstances, by a 'professional administrator', rather than by a 'professional personal representative'. The model legislation should define 'professional administrator' to mean:

- the public trustee of the jurisdiction;
- a trustee company within the meaning of the relevant State or Territory trustee company legislation; or
- a legal practitioner.

390 Submissions 6B, 11A, 12B, 21, 22, 23, 24.

391 Submission 22.

Location of provisions dealing with elections to administer

Existing legislative provisions

29.40 In most Australian jurisdictions, the provisions dealing with elections to administer are located in the public trustee and trustee company legislation of the particular jurisdiction.³⁹² However, in the Northern Territory, where the relevant provisions apply not only to the public trustee and trustee companies, but also to legal practitioners, the relevant provisions are located in the *Administration and Probate Act* (NT).³⁹³

Further call for submissions

29.41 In its further call for submissions, the National Committee sought submissions on whether the relevant provisions be located in:

- the model administration legislation;
- the public trustee legislation of the jurisdiction;
- the trustee company legislation of the jurisdiction; or
- other legislation (specifying which).

Further submissions

29.42 The inclusion in the model legislation of provisions dealing with elections to administer was supported by the majority of the respondents who addressed this issue — namely, an academic expert in succession law, the Law Institute of Victoria, the Public Trustee of Western Australia and the Victorian Bar.³⁹⁴ The Law Institute of Victoria suggested that this would make the provisions easy to locate.³⁹⁵

29.43 The views of the Public Trustee of New South Wales and State Trustees Limited about the proper location of the provisions depended upon whether legal practitioners would be able to file an election.

29.44 The Public Trustee of New South Wales suggested that, if elections were not extended to legal practitioners, the current approach of including the provisions in the public trustee and trustee company legislation was preferable. However, he considered that, if elections were extended to legal practitioners, the provisions should be included in the model legislation. In addition, for

392 See notes 353 and 355 above.

393 *Administration and Probate Act* (NT) ss 110B, 110C.

394 Submissions 12B, 19A, 23, 24.

395 Submission 19A.

reasons of clarity, specific provisions should also be retained in the public trustee and trustee company legislation.³⁹⁶

29.45 State Trustees Limited was of the view that, if a legal practitioner is to be able to file an election, the relevant provisions should be located in the model legislation. However, it considered that, if only public trustees and trustee companies are to be able to file an election, the relevant provisions should appear in the trustee company legislation of the jurisdiction.³⁹⁷

29.46 The Law Society of Tasmania considered that the relevant provisions should be located in the model legislation, as well as in the public trustee legislation and trustee company legislation of the jurisdiction.³⁹⁸

The National Committee's view

29.47 In light of the National Committee's decision that it should be possible for an election to administer to be filed by a public trustee, a trustee company and a legal practitioner, the relevant provisions should be located in the model legislation. The model provisions should deal with the filing of elections by all three categories of persons, and should not be duplicated in individual jurisdictions' public trustee or trustee company legislation. Subject to the matters considered below, the model provisions should generally be based on section 110B of the *Administration and Probate Act* (NT).

The value of the estate

Existing legislative provisions

29.48 All jurisdictions that have legislative provisions dealing with elections to administer provide that an election may be filed if, in the opinion of the person filing the election, the value of the estate does not exceed a prescribed amount. In jurisdictions other than the Northern Territory, the relevant amount is the gross value of the estate; in the Northern Territory, it is the net value.³⁹⁹

29.49 The various legislative provisions also deal with the situation where it later appears that the gross value (or, in the Northern Territory, the net value) of the estate exceeds that prescribed amount (or, in some jurisdictions, a second,

396 Submission 11A.

397 Submission 22.

398 Submission 21.

399 *Administration and Probate Act 1929* (ACT) s 87C(1)(b); *Public Trustee Act 1913* (NSW) s 18A(1), (2), (3A)(a), *Public Trustee Regulation 2008* (NSW) cl 35(1); *Trustee Companies Act 1964* (NSW) s 15A; *Administration and Probate Act* (NT) ss 110B(1)(a), (6), 110C(1)(b), (6); *Public Trustee Act 1978* (Qld) s 30(1), (2); *Trustee Companies Act 1968* (Qld) ss 12(1), 13(1); *Public Trustee Act 1930* (Tas) s 20(1), *Public Trustee Regulations 1999* (Tas) reg 9A(1); *Trustee Companies Act 1953* (Tas) s 10A(1)(c), *Trustee Companies Regulations 2006* (Tas) reg 4(1); *Trustee Companies Act 1984* (Vic) s 11A(4); *Public Trustee Act 1941* (WA) s 14(1), (6); *Trustee Companies Act 1987* (WA) s 10(1), *Trustee Companies Regulations 1988* (WA) reg 4.

slightly higher amount).⁴⁰⁰ In most cases, the legislation provides that, in this situation, the public trustee (or, where relevant, the trustee company or legal practitioner) must file a memorandum or notice stating that fact (or, in the Northern Territory, stating the value of the property), and must proceed in the ordinary manner to obtain a grant (or, in some jurisdictions, an order to administer).⁴⁰¹

29.50 In some jurisdictions, the relevant amounts are prescribed by the legislation itself, while in others they are prescribed by regulation. The relevant amounts are:

Jurisdiction	Maximum value of property, as estimated by party filing election to administer ⁴⁰²		Value above which a grant or order to administer must be sought ⁴⁰³	
ACT	PT	\$150 000	PT	\$150 000
NSW	PT/TC	\$100 000	PT/TC	\$120 000
NT	PT/TC/LP	\$85 000	PT/TC/LP	\$85 000
QLD	PT	\$150 000	PT	\$180 000
	TC	\$100 000	TC	\$120 000
TAS	PT/TC	\$60 000	PT/TC	\$65 000
VIC	TC (including State Trustees)	\$50 000	TC (including State Trustees)	\$60 000
WA	PT ⁴⁰⁴ /TC	\$50 000	PT/TC	\$50 000

Further call for submissions

29.51 In its further call for submissions, the National Committee sought submissions on:

400 *Administration and Probate Act 1929* (ACT) s 87C(8); *Public Trustee Act 1913* (NSW) s 18A(5), *Public Trustee Regulation 2008* (NSW) cl 35(2); *Trustee Companies Act 1964* (NSW) s 15A; *Administration and Probate Act* (NT) ss 110B(5), 110C(4); *Public Trustee Act 1978* (Qld) s 33(2); *Trustee Companies Act 1968* (Qld) ss 12(7), 13(4); *Public Trustee Act 1930* (Tas) s 20(4), *Public Trustee Regulations 1999* (Tas) reg 9A(2); *Trustee Companies Act 1953* (Tas) s 10A(6)(a), *Trustee Companies Regulations 2006* (Tas) reg 4(2); *Trustee Companies Act 1984* (Vic) s 11A(10); *Public Trustee Act 1941* (WA) s 14(4); *Trustee Companies Act 1987* (WA) s 10(3), *Trustee Companies Regulations 1988* (WA) reg 4.

401 *Administration and Probate Act 1929* (ACT) s 87C(8); *Public Trustee Act 1913* (NSW) s 18A(5); *Trustee Companies Act 1964* (NSW) s 15A; *Administration and Probate Act* (NT) ss 110B(5), 110C(4); *Public Trustee Act 1978* (Qld) s 33(2); *Trustee Companies Act 1968* (Qld) ss 12(7), 13(4); *Public Trustee Act 1930* (Tas) s 20(4); *Trustee Companies Act 1953* (Tas) s 10A(6); *Trustee Companies Act 1984* (Vic) s 11A(10); *Public Trustee Act 1941* (WA) s 14(4); *Trustee Companies Act 1987* (WA) s 10(3). In the ACT, the election is taken to have been revoked: *Administration and Probate Act 1929* (ACT) s 87C(9).

402 See note 399 above. 'PT' denotes public trustee, 'TC' denotes trustee company, and 'LP' denotes legal practitioner. In jurisdictions other than the Northern Territory, this is a reference to the gross value of the estate; in the Northern Territory this is a reference to the net value of the estate: see [29.48] above.

403 See note 400 above.

404 However, if a grant has previously been made in relation to the estate and the personal representative died leaving part of the estate unadministered, the public trustee may file an election to administer the unadministered estate, but only if the gross value of that part of the estate does not exceed \$10 000: *Public Trustee Act 1941* (WA) s 10(4). See [29.101]–[29.119] below in relation to the filing of an election to administer the unadministered part of an estate.

- whether the model legislation should prescribe:
 - the maximum value of an estate for filing an election; and
 - the value above which the person who filed the election can no longer administer the estate pursuant to the election, but must seek either a grant or, where applicable, an order to administer; or
- whether those amounts should be prescribed by regulation.

29.52 The National Committee also sought submissions on what those values should be if they are prescribed by the model legislation, rather than by regulation.

Further submissions

29.53 The submissions that addressed the issue of maximum values were of the view that there should be a value above which the elections procedure could not be used initially, and a value above which an estate could not continue to be administered pursuant to an election.⁴⁰⁵

29.54 However, the submissions that addressed this issue were divided about whether the relevant maximum values should be prescribed by the model legislation or by regulation.

29.55 Four respondents — the Public Trustee of New South Wales, an academic expert in succession law, the Public Trustee of Western Australia and the Victorian Bar — all favoured prescribing the relevant maximum values by regulation.⁴⁰⁶ The Public Trustee of New South Wales based this view on the argument that:⁴⁰⁷

Prescribed amounts are reviewed and revised from time to time and a regulation is easier to amend and update than a statute.

29.56 However, the Law Institute of Victoria and the Law Society of Tasmania were of the view that the relevant amounts should not be prescribed by regulation, but should instead be prescribed in the model legislation.⁴⁰⁸ The Law Institute of Victoria considered that regulations are generally not as accessible as legislation. It also thought it was 'unlikely that the prescribed values would change regularly, which lends weight to the suggestion that they be specified in the model provisions rather than by regulation'.⁴⁰⁹

405 Submissions 11A, 12B, 19A, 21, 22, 23, 24.

406 Submissions 11A, 12B, 23, 24.

407 Submission 11A.

408 Submissions 19A, 21.

409 Submission 19A.

29.57 State Trustees Limited was also opposed to prescribing the relevant amounts by regulation. However, it was also of the view that the model legislation should not prescribe an actual amount. Instead, it favoured the inclusion in the model legislation of a formula so that the relevant amounts would remain up to date.⁴¹⁰

We believe that the Commission should avoid prescribing an amount in legislation. The amounts relevant in this context will inevitably vary and as a result require amending legislation taking up time in Parliament's otherwise busy programme. For these reasons we believe that a formula approach is preferable and that a formula ought to be devised by the Commission that enables jurisdictions to administer small estates appropriately while maintaining its relevancy over time.

29.58 A similar approach was raised by the Public Trustee of New South Wales. Although he was of the view that the relevant amounts should be prescribed by regulation, he suggested that, if the amounts were to be prescribed by legislation, the adoption of a formula was favoured over the prescribing of an actual amount.⁴¹¹

Prescribing the amounts in the legislation is not supported. However if this is adopted the amounts could be described by way of an appropriate formula, perhaps even adopting CPI increases. In view of real estate generally exceeding election limits, CPI may be the most appropriate measure.

29.59 The Law Institute of Victoria commented on how the value of the estate ought to be calculated.⁴¹²

In calculating the value of the estate to determine whether it exceeds the maximum value of an estate for filing an election, the LIV suggests that all assets of the estate wherever situate should be considered rather than only the assets in the state of election. The LIV considers that enabling substantial estates in one state to deal with small assets in another state should be considered as part of the recognition of interstate grants. For example, if the estate is subject to a family provision claim then the size and nature of the estate will need to be considered.

The LIV also submits that in calculating the value of the estate, the gross value of the estate should be considered. This means that the value of the assets of the estate would be calculated without offsetting the effect of any liabilities.

29.60 Several respondents commented on the relevant maximum amounts for filing an election. An academic expert in succession law suggested a figure of \$160 000.⁴¹³ The Law Institute of Victoria and the Public Trustee of Western

410 Submission 22.

411 Submission 11A.

412 Submission 19A.

413 Submission 12B.

Australia both suggested a figure of \$100 000.⁴¹⁴ The Victorian Bar suggested a figure of \$85 000.⁴¹⁵

29.61 The Law Society of Tasmania was the only respondent to suggest two different maximum values. It suggested that an election could be filed where the party filing the election estimated that the value of the estate did not exceed \$100 000. However, it should be necessary to obtain a grant if it subsequently appeared that the value of the estate exceeded that amount by \$50 000 (that is, if the value of the estate was \$150 000 or more).⁴¹⁶

The National Committee's view

The value of the estate

29.62 The model legislation should prescribe the amount that the estate must not, in the opinion of the professional administrator,⁴¹⁷ exceed in order for an election to be filed. The prescribed amount should, initially, be a net value of \$100 000.

29.63 The National Committee is conscious of the submissions that raised concerns about the inclusion in the model legislation of a specific amount on the basis that such an amount is unlikely to be reviewed on a regular basis and, as a result, is liable to become outdated. The National Committee therefore proposes that the prescribed amount for the filing of an election to administer should be indexed to annual increases in the consumer price index. This will ensure that this amount retains its current value without the need for regular amendment of the legislation.

29.64 The National Committee notes that, with the exception of the Northern Territory, the relevant values in those Australian jurisdictions that provide for the filing of an election to administer are gross values. The National Committee does not, however, consider it desirable, in this context, to refer to the gross value, as the gross value of an estate may not necessarily reflect its real value.⁴¹⁸ Where an asset in an estate is subject to a large debt (for example, a home that is subject to a large mortgage), the estate, although having a high gross value, may actually have a relatively small net value. As the purpose of the elections procedure is to facilitate the cost-effective administration of estates having a relatively small value, the National Committee considers it more appropriate to use a net value for this purpose.

414 Submissions 19A, 23.

415 Submission 24.

416 Submission 21.

417 See the discussion of the term 'professional administrator' at [29.39] above.

418 Of course, if an estate is not subject to any liabilities, its gross and net values will be the same. Accordingly, a change from a gross value to a net value does not necessarily reflect an increase in the value of estates that may be administered by way of an election to administer.

29.65 The model legislation should also prescribe an amount above which the professional administrator can no longer administer the estate pursuant to this procedure, but must obtain formal authority to administer the estate. This provision should be based generally on section 110B of the *Administration and Probate Act* (NT), except that it should not refer to a specific amount. Instead, it should provide that if, after filing an election to administer, a professional administrator discovers that the net value of the property in the jurisdiction is more than 150 per cent of the prescribed amount, he or she must:

- file in the court a memorandum stating the value of the property; and
- apply for a grant or, where applicable, an order to administer.

29.66 For both these amounts, the reference to the net value of the estate is a reference to the net value of the estate in the jurisdiction in which the election to administer is filed. As the filing of an election to administer does not give the professional administrator the authority to administer property that the deceased may have owned in another jurisdiction, the net value should not be affected by the value of property in other jurisdictions.

Existence of a pre-existing entitlement to obtain a grant or, in the case of a public trustee, an order to administer the estate

Existing legislative provisions

29.67 In addition to the requirement that the value of the estate does not exceed a prescribed amount, the legislation in most jurisdictions specifies, as requirements for the filing of an election, that:⁴¹⁹

- the deceased left property in the jurisdiction in question; and
- no other person in the jurisdiction has been granted probate or administration of the estate.

29.68 Further, most jurisdictions require that the relevant person filing the election has a pre-existing basis on which to administer the estate:

- in the case of the public trustee — that the public trustee would be entitled to obtain a grant in relation to the deceased person's estate⁴²⁰ or

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Administration and Probate Act 1929 (ACT) s 87C(1)(a), (c); *Public Trustee Act 1913* (NSW) s 18A(1), (2); *Trustee Companies Act 1964* (NSW) s 15A; *Administration and Probate Act* (NT) s 110B(1); *Public Trustee Act 1978* (Qld) s 30(1); *Trustee Companies Act 1968* (Qld) s 12(1); *Public Trustee Act 1930* (Tas) s 20(1); *Trustee Companies Act 1953* (Tas) s 10A(1)(a) (although it does not refer expressly to the fact that no other person has been granted probate or administration of the estate); *Trustee Companies Act 1984* (Vic) s 11A(1)(a), (2)(a) (there is no express requirement that there is property in Victoria, but s 11A(5)(c) provides that an election cannot be filed 'unless there is attached an inventory of the estate'); *Public Trustee Act 1941* (WA) s 14(1); *Trustee Companies Act 1987* (WA) s 10(1).

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Public Trustee Act 1913 (NSW) s 18A(1), (2); *Public Trustee Act 1930* (Tas) s 20(1); *Trustee Companies Act 1984* (Vic) ss 6, 11A(1)(b), (2)(b), sch 2 (reference to State Trustees Limited).

an order to administer the deceased person's estate,⁴²¹ or

- in the case of a trustee company — that the trustee company would be entitled to obtain a grant in relation to the deceased person's estate.⁴²²

29.69 This means, for example, that if a trustee company is named as executor of the will of a deceased person and, in the opinion of the trustee company, the value of the estate in the jurisdiction does not exceed the prescribed amount, the trustee company may, instead of obtaining a grant of probate, file an election to administer the particular estate.

29.70 This would also be the case with respect to public trustees. In addition, however, public trustees are commonly permitted by legislation to obtain a grant or an order to administer in a range of situations where they have not been named as executor of the will of a deceased person. This is usually in situations where no-one has applied for a grant or where the estate is at some risk of wasting. Provisions of this kind recognise the public trustee's role as an administrator of last resort. By referring to the public trustee's entitlement to obtain a grant or an order to administer, the provisions dealing with elections enable the public trustee, in those circumstances where he or she would have the legislative authority to obtain a grant or an order to administer, to use the alternative procedure of filing an election to administer.

29.71 The Northern Territory legislation is framed in slightly different terms. Section 110B(1) of the *Administration and Probate Act* (NT) simply provides:

110B Election to administer small estate

- (1) A professional personal representative need not apply for representation of the estate of a deceased person but may instead file in the Court an election to administer the estate if—
- (a) the professional personal representative estimates that the net value of the property in the Territory at the time of filing the election does not exceed the prescribed amount; and
 - (b) no other person in the Territory has been granted representation of the estate.

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Administration and Probate Act 1929 (ACT) s 87C(1)(d) (which refers to an order to collect and administer); *Public Trustee Act 1978* (Qld) s 30(1); *Public Trustee Act 1941* (WA) s 14(1). The legislation in these jurisdictions provides that the court may grant the public trustee an order to administer the estate of a deceased person in a number of situations where there is no-one to apply for a grant or the estate is liable to waste: *Administration and Probate Act 1929* (ACT) s 88; *Public Trustee Act 1978* (Qld) s 29; *Public Trustee Act 1941* (WA) s 10. An order to administer has effect as if a grant had been made to the public trustee: *Administration and Probate Act 1929* (ACT) s 89; *Public Trustee Act 1978* (Qld) s 32; *Public Trustee Act 1941* (WA) s 10(3).

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Trustee Companies Act 1964 (NSW) s 15A; *Trustee Companies Act 1968* (Qld) s 12(1); *Trustee Companies Act 1953* (Tas) s 10A(1)(b); *Trustee Companies Act 1984* (Vic) s 11A(1)(b), (2)(b); *Trustee Companies Act 1987* (WA) s 10(1).

29.72 Because the section refers to the filing of an election as an alternative to applying for representation, it also appears necessary for the professional personal representative to have a pre-existing entitlement to seek a grant, whether because he or she is named in the deceased's will as executor or because of the operation of another statutory provision.

Further call for submissions

29.73 In its further call for submissions, the National Committee sought submissions on whether the model provision dealing with elections should provide that an election may be filed by the relevant person only if that person would otherwise be entitled to obtain a grant or an order to administer the deceased person's estate.

Further submissions

29.74 The submissions that addressed this issue were fairly evenly divided as to whether a public trustee, trustee company or legal practitioner should be able to file an election to administer only if it would otherwise be entitled to obtain a grant or, where relevant, an order to administer.

29.75 The Public Trustee of New South Wales, an academic expert in succession law and the Law Society of Tasmania were of the view that a party should be able to file an election to administer only if it would otherwise be entitled to obtain a grant or an order to administer.⁴²³ The Public Trustee of New South Wales also referred to the importance of the provisions under which it may obtain a grant even though it is not named as executor of a will.⁴²⁴

In addition the current provisions relating to the Public Trustee should remain. This means that in addition to being able to file an election where named as executor the Public Trustee should also be able to file an election in intestacy matters where no person has taken out letters of administration and where the Public Trustee is entitled to take out letters of administration because of the consent of the court or by those entitled to take out administration.

It is important to retain these provisions. There are many executors and next of kin who do not wish to be involved in administering estates no matter what the process and prefer to renounce in favour of the Public Trustee. There are also situations where next of kin cannot be found and/or no one has taken out administration of an estate.

29.76 However, the Law Institute of Victoria and the Public Trustee of Western Australia were of the view that the model legislation should not require that the person is otherwise entitled to obtain a grant or an order to administer.⁴²⁵

423 Submissions 11A, 12B, 21.

424 Submission 11A.

425 Submissions 19A, 23.

29.77 The Law Institute of Victoria commented.⁴²⁶

If the relevant person wishing to file an election must be entitled to obtain a grant or order to administer the estate then it is likely that the number of persons able to file an election will be significantly less. This will limit the scope of application of the model administration legislation in respect of elections to administer.

The LIV notes that the public trustee in Victoria can be authorised to obtain a grant or an order to administer in circumstances where the public trustee might not have been named as executor of the will. On this basis, the LIV submits that the model provisions should provide that the person entitled to obtain a grant or order to administer the estate can authorise a professional personal representative (namely, the public trustee, a trustee company or a legal practitioner) to file an election to administer.

29.78 State Trustees Limited, although expressing support for the requirement of a pre-existing entitlement to administer the estate, was nevertheless of the view that a legal practitioner should be able to file an election if he or she were authorised by the named executor or by a person entitled to apply for a grant.⁴²⁷

Legal practitioners cannot ordinarily administer an estate unless they are specifically named in the Will as the executor. In contrast, State Trustees and trustee companies in Victoria can apply for a grant of representation where the named executor or the person entitled to apply for a grant of letters of administration authorises the trustee company to apply for and obtain a grant of representation. ...

State Trustees believes that in the interest of competitive neutrality, if legal practitioners were entitled to elect to administer an estate, it should also be possible for the named executor or person entitled to apply for a grant of representation to authorise a legal practitioner to elect to administer an estate, provided the estate is under the maximum value limit. This would require additional provision in the model administration legislation such as appears in sections 10 and 11 of the Victorian *Trustee Companies Act 1984*.⁴²⁸ (note added)

29.79 The Victorian Bar expressed a similar view. It commented that 'the legislation should require that the legal practitioner is one who acts for a person who has a pre-existing basis on which to administer an estate'.⁴²⁹

The National Committee's view

29.80 The filing of an election to administer is intended to be a simpler and less expensive means of obtaining the necessary authority to administer an estate. As an alternative to obtaining a grant, the National Committee is of the

426 Submission 19A.

427 Submission 22.

428 These provisions are considered at [6.6], [6.8], [6.20] in vol 1 of this Report.

429 Submission 24.

view that the procedure should be available only if the public trustee, trustee company or legal practitioner would otherwise be entitled to obtain a grant or, in the case of the public trustee, an order to administer. This requirement should therefore be expressly included in the model provision dealing with elections to administer.

29.81 The National Committee notes the comments made by the Public Trustee of New South Wales about the importance of the various statutory provisions under which it is entitled to obtain a grant, even though it has not been appointed as executor of a will. The reference in the National Committee's proposal to an entitlement to obtain a grant or an order to administer is not restricted to those situations where the public trustee, trustee company or legal practitioner is named as executor of a will, but is sufficiently wide to apply to those situations where:

- the public trustee has a statutory entitlement to apply for a grant or an order to administer;⁴³⁰
- the trustee company has been authorised to apply for a grant of probate or letters of administration by a person who is entitled to apply for such a grant;⁴³¹
- the legal practitioner has been authorised, under a power of attorney given by the person entitled to a grant of probate or letters of administration, to apply for such a grant.⁴³²

29.82 The National Committee notes that section 110B of the *Administration and Probate Act* (NT) applies if no other person in the Territory has been granted representation of the deceased person's estate.⁴³³ The model legislation should include a similar provision. However, because of the recommendations in Chapter 38 of this Report about the automatic recognition of certain grants, the application of the provisions based on section 110B of the *Administration and Probate Act* (NT) should require, additionally, that no interstate grant has been made of the deceased person's estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3.

430 See [31.40]–[31.43] below for an explanation of orders to administer.

431 See *Trustee Companies Act 1947* (ACT) ss 5(1)(b), 6(1)(b)(i), 7(1)(b), 8(1)(b); *Trustee Companies Act 1964* (NSW) ss 5, 6(1)(b); *Companies (Trustees and Personal Representatives) Act* (NT) ss 15(a), 16, 17, 19(1); *Trustee Companies Act 1968* (Qld) ss 6(1)(a), (b), (d), 7(1)(b); *Trustee Companies Act 1988* (SA) s 4(1), (3); *Trustee Companies Act 1953* (Tas) ss 8, 9, 10(1); *Trustee Companies Act 1984* (Vic) ss 10(1)(a), 11(1)(b); *Trustee Companies Act 1987* (WA) ss 6(1)(b), 7(1)(b), 8(1)(b).

432 See [4.240]–[4.244] in vol 1 of this Report.

433 *Administration and Probate Act* (NT) s 110B(1)(b).

The content of the election to administer

Existing legislative provisions

29.83 Section 110B(2) of the *Administration and Probate Act* (NT) provides that an election to administer must be in writing and must set out the following matters:

- (a) the name, address, occupation and date of death of the deceased person;
- (b) details of the property of the deceased person;
- (c) whether the deceased person died testate or intestate;
- (d) if the deceased person died testate — a statement that after making proper inquiries the professional personal representative believes that the document annexed to the election is the testator's last will or an exemplification of the last will and that the will has been executed in accordance with the law governing the execution of that will. (emphasis added)

29.84 An exemplification is a document, made under the seal of a court, that 'contains an exact copy of the will (if any), and a copy of the grant'.⁴³⁴

29.85 Similar provisions are found in the legislation of most other Australian jurisdictions.⁴³⁵ However, most of these provisions refer to the testator's last will, and do not also refer to an exemplification of the testator's last will. Only the *Trustee Companies Act 1968* (Qld), the *Public Trustee Act 1930* (Tas) and the *Trustee Companies Act 1953* (Tas) include a reference to an exemplification of the testator's last will.⁴³⁶ For example, section 12(4) of the *Trustee Companies Act 1968* (Qld) provides:

12 Power of trustee companies to elect to administer small estates without grant of administration

...

- (4) The election shall contain in every case where the deceased died intestate a statement to that effect, and in every case where the deceased died testate a statement that after due inquiries the trustee company believes that the document annexed to the election is the testator's last will (or an exemplification thereof where administration has been granted out of Queensland) and that the will has been validly

⁴³⁴ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [21.37].

⁴³⁵ *Administration and Probate Act 1929* (ACT) s 87C(2)–(3); *Public Trustee Act 1913* (NSW) s 18A(1), (2); *Trustee Companies Act 1968* (Qld) s 12(3), (4); *Public Trustee Act 1930* (Tas) s 20(1); *Trustee Companies Act 1953* (Tas) s 10A(1), (2)(a); *Trustee Companies Act 1984* (Vic) s 11A(2), *Trustee Companies Regulations 2006* (Vic) reg 6(2), sch Form 2 para 3; *Public Trustee Act 1941* (WA) s 14(1); *Trustee Companies Act 1987* (WA) s 10(1) (although neither of the Western Australian provisions refers to the deceased's will).

⁴³⁶ *Trustee Companies Act 1968* (Qld) s 12(4); *Public Trustee Act 1930* (Tas) s 20(1)(d); *Trustee Companies Act 1953* (Tas) s 10A(2)(a).

executed according to the law governing the execution of wills.
(emphasis added)

The National Committee's view

29.86 Although an exemplification of a grant of probate or of letters of administration with the will annexed reproduces a copy of the deceased's will, the term 'exemplification' is usually used in relation to a grant, rather than in relation to a will as such. The National Committee therefore considered whether, to the extent that the model provisions dealing with elections to administer are to be based on section 110B of the *Administration and Probate Act* (NT), the provision that is based on section 110B(2)(d) should refer to an exemplification of a grant that contains a copy of the testator's last will, rather than to an exemplification of the will itself.

29.87 However, in the interests of further simplifying the procedure for elections to administer, the National Committee has instead decided that the provision that is based on section 110B(2)(d) of the *Administration and Probate Act* (NT) should refer to a document that is the testator's last will or a certified copy of the testator's last will.

Requirements to give public notice

Existing legislative provisions

29.88 In the ACT, New South Wales, Tasmania and Western Australia, public notice of the filing of an election to administer must be given after the election has been filed. In the ACT, the public trustee must give notice in a newspaper published and circulating in the ACT.⁴³⁷ In New South Wales, the public trustee or trustee company must publish a notice in a newspaper. If the deceased resided in New South Wales at the time of his or her death, the notice must be published in a newspaper circulating in the district where the deceased resided. In any other case, the notice must be published in a 'Sydney daily newspaper'.⁴³⁸ In Tasmania, the public trustee or trustee company filing an election must publish a notice in the *Gazette*.⁴³⁹ In Western Australia, the public trustee is also required to publish a notice in the *Gazette*.⁴⁴⁰ In all four jurisdictions, the published notice is conclusive evidence that the public trustee (or the trustee company, as the case may be) is entitled to administer the estate.⁴⁴¹

437 *Administration and Probate Act 1929* (ACT) s 87C(5).

438 *Public Trustee Act 1913* (NSW) s 18A(4); *Trustee Companies Act 1964* (NSW) s 15A.

439 *Public Trustee Act 1930* (Tas) s 20(3); *Trustee Companies Act 1953* (Tas) s 10A(4).

440 *Public Trustee Act 1941* (WA) s 14(3).

441 *Administration and Probate Act 1929* (ACT) s 87C(5); *Public Trustee Act 1913* (NSW) s 18A(4); *Trustee Companies Act 1964* (NSW) s 15A; *Public Trustee Act 1930* (Tas) s 20(3); *Trustee Companies Act 1953* (Tas) s 10A(5); *Public Trustee Act 1941* (WA) s 14(3).

29.89 In the Northern Territory, the legislation requires a professional personal representative to comply with any advertising requirements that are prescribed or that are specified in the *Supreme Court Rules* (NT).⁴⁴² However, no advertising requirements have been prescribed and none are specified in the Rules.

29.90 In Queensland, there is no requirement for the public trustee to give public notice of the filing of an election to administer.⁴⁴³ However, if a trustee company files an election, notice of the election must be advertised 'once in the gazette in a form approved by the person who for the time being holds the office of the registrar'.⁴⁴⁴

29.91 In Victoria, advertising requirements apply both before and after the filing of an election. An election cannot be filed 'until the expiry of 14 days after the publication in a daily newspaper circulating generally throughout Victoria of a notice of intention to file the election'.⁴⁴⁵ There is also a requirement for a trustee company, within one month of filing an election, to publish notice of the election in a daily newspaper circulating generally throughout Victoria.⁴⁴⁶ The notice is conclusive evidence that the trustee company is entitled to administer the estate.⁴⁴⁷

Further call for submissions

29.92 In its further call for submissions, the National Committee sought submissions on what, if any, requirements there should be for:

- the person proposing to file an election to administer to give public notice or his or her intention to do so; or
- the person who has filed an election to administer to give public notice of that fact.

Further submissions

29.93 The Public Trustee of New South Wales was of the view that there should be a requirement to publish a notice, either before an election is filed or after an election is filed.⁴⁴⁸

442 *Administration and Probate Act* (NT) s 110B(4).

443 See *Public Trustee Act 1978* (Qld) ss 30, 33.

444 *Trustee Companies Act 1968* (Qld) ss 12(8), 13(5).

445 *Trustee Companies Act 1984* (Vic) s 11A(5)(b).

446 *Trustee Companies Act 1984* (Vic) s 11A(6).

447 *Trustee Companies Act 1984* (Vic) s 11A(7).

448 Submission 11A.

29.94 The Law Institute of Victoria, the Law Society of Tasmania, State Trustees Limited and the Public Trustee of Western Australia were all of the view that a person proposing to file an election to administer should be required to give public notice of his or her intention to do so.⁴⁴⁹ The Law Society of Tasmania noted that this ‘would be the same as the provisions for publishing a Notice of Intention to Apply for Letters of Administration’. It observed that this would change the current Tasmanian provisions, which require a trustee company to publish a public notice after, rather than before, the election has been filed.⁴⁵⁰

29.95 The Law Institute of Victoria and State Trustees Limited were both of the view that a person who has filed an election to administer should not be required to give public notice of that fact.⁴⁵¹ Such a requirement would ‘impose an additional expense upon the small estate which is being administered’⁴⁵² and ‘merely duplicates the process for no apparent gain’.⁴⁵³

29.96 However, the Victorian Bar was of the view that the notice requirements currently found in section 11A of the *Trustee Companies Act 1984* (Vic), which require notices to be given both before and after the filing of an election to administer,⁴⁵⁴ should be retained. It stated:⁴⁵⁵

It is essential that the existing provisions in the Victorian legislation for giving public notice remain: see s 11A(5)(b) of the *Trustee Companies Act 1984* ... This requirement [of giving public notice by a person who has filed an election] should be retained as there is a distinction between giving notice of intention to file an election, and having filed the election. Ordinarily, the grant of administration is an order of the Court, whereas under the election procedure, the authority to act emanates from the filing of the election. Hence, some public recognition of the election being made is necessary so that the personal representative then has the protection of acting under the election.

29.97 The Public Trustee of New South Wales suggested that any required notice should be published in a major daily newspaper or a newspaper published and circulating in the local area where the deceased resided.⁴⁵⁶ The Law Institute of Victoria was of a similar view. It suggested that the required notice should be given in a daily newspaper circulating generally in the jurisdiction.⁴⁵⁷ The Public Trustee of Western Australia suggested that notice

449 Submissions 19A, 21, 22, 23.

450 Submission 21.

451 Submissions 19A, 22.

452 Submission 19A.

453 Submission 22.

454 See [29.91] above.

455 Submission 24.

456 Submission 11A.

457 Submission 19A.

should be given by way of an advertisement appearing in a local newspaper with State-wide circulation.⁴⁵⁸

29.98 An academic expert in succession law generally favoured the inclusion of a requirement to give public notice, but acknowledged the difficulty in framing the relevant requirement.⁴⁵⁹

Since the estates we are talking about are small and since creditors these days may be anywhere there is not much point in requiring advertisements in The Gazette or even, if the deceased is in the country, the capital city of the State. I would suggest the daily newspaper that is published in the shire in which the deceased had a permanent residence. The permanent residence is noted as such by shire councils for differentiating rating purposes.

The National Committee's view

29.99 As mentioned earlier in this chapter, the purpose of elections to administer is to provide a simpler and cheaper means of obtaining the requisite authority to administer an estate having a relatively small value. The National Committee notes that only one jurisdiction (Victoria) has a requirement to give public notice before filing an election to administer.⁴⁶⁰ Although a number of Australian jurisdictions require public notice to be given after an election to administer has been filed, the basis for that requirement seems to be primarily concerned with proof of the public trustee's or trustee company's entitlement to administer the estate.⁴⁶¹ Although an election to administer is simply filed in the court registry and, unlike a grant, is not an order issued under the seal of the court, it should nevertheless be possible for the party who has filed the election to obtain an authenticated copy of the document filed in order to prove his or her authority.

29.100 Given the relatively small value of the estates to which this procedure will apply, the National Committee is of the view that the cost involved in giving public notice of intention to file an election to administer, or of the fact that an election to administer has been filed, is not justified. Accordingly, the model legislation should not impose on a professional administrator any requirement to give public notice of his or her intention to file an election to administer or of the fact that an election to administer has been filed. The model legislation should not include a provision to the effect of section 110B(4) of the *Administration and Probate Act* (NT).

458 Submission 23.

459 Submission 12B.

460 See [29.91] above.

461 See [29.88] above.

Election to administer the unadministered part of an estate

29.101 Where a last surviving, or sole, executor or administrator⁴⁶² dies leaving part of the estate unadministered, it may be necessary for an application to be made for a grant of letters of administration *de bonis non* (of the unadministered estate).⁴⁶³

29.102 Letters of administration *de bonis non* may also be granted where a last surviving, or sole, executor or administrator loses capacity, and part of the estate remains unadministered. In those circumstances, the court's practice is to make a grant that is expressed to be limited during the incapacity of the executor or administrator to whom the original grant was made.⁴⁶⁴

Existing legislative provisions

29.103 In New South Wales and Queensland, the legislation enables the public trustee⁴⁶⁵ and a trustee company⁴⁶⁶ to file an election to administer if:

- a grant has been made in respect of the estate of a deceased person, and the person to whom the grant was made has died, leaving part of the estate unadministered;
- the value of the unadministered estate within the jurisdiction does not, in the opinion of the party filing the election, exceed the prescribed amount;⁴⁶⁷ and
- since the death of the last executor or administrator, no person has obtained letters of administration *de bonis non* of the unadministered estate.

29.104 In Western Australia, the public trustee may file an election to administer in these circumstances.⁴⁶⁸

29.105 In the Northern Territory, a professional personal representative (that is, the public trustee, a trustee company or a legal practitioner) may also file an

⁴⁶² Where the executor or administrator is one of two or more executors or administrators, the office of executor or administrator devolves to the surviving executors or administrators.

⁴⁶³ This would not be necessary if the executor of a deceased executor obtained probate of the deceased executor's will and was willing to administer the original estate as an executor by representation. The National Committee's recommendations about the transmission of the office of personal representative are set out in Chapter 7 of this Report.

⁴⁶⁴ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [17.65]; RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [40D.14]; DM Haines, *Succession Law in South Australia* (2003) [19.11].

⁴⁶⁵ *Public Trustee Act 1913* (NSW) s 18A(3A)(a); *Public Trustee Act 1978* (Qld) s 30(2).

⁴⁶⁶ *Trustee Companies Act 1964* (NSW) s 15A; *Trustee Companies Act 1968* (Qld) s 13(1).

⁴⁶⁷ See [29.50] above in relation to the prescribed amounts for this purpose.

⁴⁶⁸ *Public Trustee Act 1941* (WA) s 10(4).

election to administer in these circumstances.⁴⁶⁹ In addition, the Northern Territory legislation enables a professional personal representative to file an election to administer where part of the estate is left unadministered by reason of the incapacity of the person to whom a grant has been made.⁴⁷⁰

29.106 In New South Wales, the public trustee and a trustee company may file an election to administer only if, in addition to other specified matters, the public trustee or the trustee company would be entitled to obtain letters of administration *de bonis non* of the partly administered estate.⁴⁷¹ Similarly, in Queensland and Western Australia, the public trustee may file an election to administer a partly administered estate only if the public trustee would be entitled to obtain an order to administer the estate.⁴⁷²

29.107 Although there is no express requirement to that effect in section 110C of the *Administration and Probate Act* (NT), it nevertheless appears that the filing of an election to administer in these circumstances is an alternative to applying for a grant of administration *de bonis non*,⁴⁷³ which presupposes an entitlement to apply for such a grant.

Further call for submissions

29.108 In its further call for submissions, the National Committee sought submissions on whether the model legislation should enable an election to administer to be filed where:

- a grant has been made in respect of the estate of a deceased person, but the person to whom the grant was made has died, leaving part of the estate unadministered; and
- the value of the unadministered estate does not, in the opinion of the party filing the election, exceed a prescribed amount; and
- since the death of the last executor or administrator, no person has obtained a grant of the original estate.

29.109 The National Committee also sought submissions on whether, if the model legislation were to enable an election to administer to be filed in those circumstances, it should be a requirement that the party filing the election would otherwise be entitled to obtain either a grant of the unadministered part of the estate or an order to administer that part of the estate.

469 *Administration and Probate Act* (NT) s 110C(1).

470 *Administration and Probate Act* (NT) s 110C(1).

471 *Public Trustee Act 1913* (NSW) s 18A(3A)(a); *Trustee Companies Act 1964* (NSW) s 15A.

472 *Public Trustee Act 1978* (Qld) s 30(2); *Public Trustee Act 1941* (WA) s 10(4).

473 See *Administration and Probate Act* (NT) s 110C(1).

Further submissions

29.110 There was general support in the submissions for enabling an election to administer to be filed where:

- a grant has been made in respect of the estate of a deceased person, but the person to whom the grant was made has died, leaving part of the estate unadministered; and
- the value of the unadministered estate does not, in the opinion of the party filing the election, exceed a prescribed amount; and
- since the death of the last executor or administrator, no person has obtained a grant of the original estate.

29.111 This approach was favoured by the Public Trustee of New South Wales, an academic expert in succession law, the Law Institute of Victoria, the Law Society of Tasmania, State Trustees Limited and the Victorian Bar.⁴⁷⁴

29.112 Of these respondents, the Public Trustee of New South Wales, the academic expert in succession law, the Law Institute of Victoria, the Law Society of Tasmania and State Trustees Limited were also of the view that the legislation should require that the party filing the election would otherwise be entitled to obtain either a grant of the unadministered part of the estate or an order to administer that part of the estate.⁴⁷⁵

29.113 The Public Trustee of Western Australia was the only respondent who was of the view that it should not be possible to file an election to administer in respect of the unadministered part of an estate.⁴⁷⁶

The National Committee's view

29.114 In the National Committee's view, the ability to file an election to administer part of an estate that has been left unadministered as a result of the death or incapacity of the personal representative is particularly desirable, as the estate that remains to be administered may be very small. It therefore provides a means to avoid the costs of obtaining a grant of administration *de bonis non* (of the unadministered estate).

29.115 The model legislation should therefore include provisions, based generally on section 110C of the *Administration and Probate Act* (NT), to enable a professional administrator to file an election to administer the unadministered part of an estate if:

474 Submissions 11A, 12B, 19A, 21, 22, 24.

475 Submissions 11A, 12B, 21, 22, 24.

476 Submission 23.

- a grant has been made in respect of the estate of a deceased person, and the person to whom the grant was made has died, leaving part of the estate unadministered; and
- the net value of the unadministered estate does not, in the opinion of the professional administrator, exceed the prescribed amount (initially \$100 000, but indexed to annual increases in the consumer price index);⁴⁷⁷
- since the death of the last executor or administrator, no person has obtained a grant of the unadministered part of the estate and no interstate grant has been made of the deceased person's estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3;⁴⁷⁸ and
- the professional administrator would otherwise be entitled to obtain a grant of the unadministered part of the estate or, where applicable, an order to administer that part of the estate.⁴⁷⁹

29.116 In addition, the model legislation should enable a professional administrator to file an election to administer the unadministered part of an estate if:

- a grant has been made in respect of the estate of a deceased person, and part of the estate has been left unadministered because of the incapacity of the executor or administrator;
- the net value of the unadministered estate does not, in the opinion of the professional administrator, exceed the prescribed amount (initially \$100 000, but indexed to annual increases in the consumer price index);
- since the incapacity of the executor or administrator, no person has obtained a grant of the unadministered part of the estate and no interstate grant has been made of the deceased person's estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3;⁴⁸⁰ and
- the professional administrator would otherwise be entitled to obtain a grant of the unadministered part of the estate or, where applicable, an order to administer that part of the estate.

477 See [29.62]–[29.64] above.

478 See [29.82] above.

479 See [29.80]–[29.81] above.

480 See [29.82] above.

29.117 Although a provision in these terms is generally consistent with section 110C of the *Administration and Probate Act* (NT), the model provision should make a slight departure from section 110C(3) of that Act. That provision has the effect that the person filing the election is taken to be the administrator of the estate left unadministered as if he or she had been granted letters of administration *de bonis non*. For consistency with the court's practice in granting letters of administration *de bonis non* in this situation,⁴⁸¹ the model provision should provide expressly that, if an election to administer part of an unadministered estate is filed because of the incapacity of the personal representative to whom the grant was made, the professional administrator filing the election is taken to be the administrator of the unadministered part of the estate as if he or she had been granted letters of administration of the unadministered estate during the incapacity of the personal representative.

29.118 For consistency with the views expressed earlier in this chapter, the model legislation should also provide that if, after filing the election to administer, the professional administrator discovers that the net value of the property to be administered is more than 150 per cent of the prescribed amount, the professional administrator must:

- file in the court a memorandum stating the value of the property; and
- apply for a grant or, where applicable, an order to administer.⁴⁸²

29.119 Further, the model legislation should not impose on a professional administrator any requirement to give public notice of his or her intention to file an election to administer the unadministered part of an estate or of the fact that an election to administer such an estate has been filed.⁴⁸³

ADMINISTRATION OF SMALL ESTATES WITHOUT A GRANT OR THE FILING OF AN ELECTION TO ADMINISTER

29.120 This section of the chapter deals with those legislative provisions that enable certain 'small estates' to be administered, as if under a grant, even though a grant has not been obtained and an election to administer has not been filed.

29.121 The National Committee is not reviewing the legislative provisions found in a number of jurisdictions that deal with the registrar's obligation to provide assistance to certain persons who apply for a grant of a 'small

481 See [29.102] above.

482 See [29.65] above.

483 See [29.99]–[29.100] above.

estate'.⁴⁸⁴ Provisions of that kind are not a matter for uniform legislation. Whether an individual jurisdiction decides to provide that service will ultimately depend on its own level of resourcing.

Existing legislative provisions

Australian Capital Territory, New South Wales, Queensland, Tasmania, Victoria

29.122 In the ACT, New South Wales, Queensland, Tasmania and Victoria, the legislation provides that, in certain circumstances, the public trustee (or, in Victoria, State Trustees Limited) may administer the estate of a deceased person as if a grant of probate or administration had been made in favour of the public trustee.⁴⁸⁵

Northern Territory

29.123 In the Northern Territory, until July 2002, only the public trustee could administer the estate of a deceased person under the legislative provision dealing with small estates.⁴⁸⁶ However, since 1 July 2002, the *Administration and Probate Act* (NT) has enabled a larger range of persons to administer an estate under the small estates provision. Section 110A of that Act now enables a small estate to be administered, as if under a grant, by the public trustee, a trustee company or a legal practitioner.

29.124 No other Australian jurisdiction enables a trustee company or a legal practitioner to administer the estate of a deceased person under this kind of provision.

29.125 Section 110A of the *Administration and Probate Act* (NT) provides:

110A Administration of small estate without representation or election

- (1) A professional personal representative⁴⁸⁷ need not apply for representation of the estate of a deceased person but may instead administer the estate under this section if—
- (a) the professional personal representative estimates that the net value of the property in the Territory does not exceed the prescribed amount; and

⁴⁸⁴ See *Probate and Administration Act 1898* (NSW) ss 101–106; *Administration and Probate Act* (NT) ss 106–110; *Administration and Probate Act 1958* (Vic) ss 71–78; *Administration Act 1903* (WA) ss 55–60. For a discussion of the Western Australian provisions, see Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) 18–20. The similar provisions in the ACT (*Administration and Probate Act 1929* (ACT) ss 75–79) were recently omitted by the *Justice and Community Safety Legislation Amendment Act 2008* (ACT) s 3, sch 1 pt 1.1 amdt [1.9].

⁴⁸⁵ *Administration and Probate Act 1929* (ACT) s 87B; *Public Trustee Act 1913* (NSW) s 34A; *Public Trustee Act 1978* (Qld) s 35; *Public Trustee Act 1930* (Tas) s 20A; *Administration and Probate Act 1958* (Vic) ss 3(1) (definition of 'small estate'), 71(1), 79.

⁴⁸⁶ *Public Trustee Act* (NT) s 35 (repealed).

⁴⁸⁷ See [29.8] above.

- (b) no application has been made for a grant of representation of the estate.
- (2) A professional personal representative is entitled to administer an estate under this section only after he or she has given public notice of his or her intention to do so.
- (3) The notice given under subsection (2) is to be by advertisement in a newspaper published in the Territory and is to contain the prescribed information.
- (4) A professional personal representative who administers an estate under this section is—
 - (a) if the deceased person died testate — taken to be the executor of the will or the holder of letters of administration with the will annexed; or
 - (b) if the deceased person died intestate — taken to be the holder of letters of administration of the estate of that person,as if a grant of representation had been made to the professional personal representative.
- (5) If after giving notice under subsection (2) the professional personal representative discovers that the net value of the property in the Territory exceeds the amount referred to in subsection (1)(a) but the net value of the property in the Territory does not exceed the amount referred to in section 110B(1)(a), he or she—
 - (a) must file in the Court a memorandum stating the value of the property; and
 - (b) may continue to administer the estate under this section.
- (6) If after giving notice under subsection (2) the professional personal representative discovers that the net value of the property in the Territory exceeds the amount referred to in section 110B(1)(a), he or she must—
 - (a) file in the Court a memorandum stating the value of the property; and
 - (b) apply for a grant of representation.
- (7) If a professional personal representative who is administering or has administered an estate in pursuance of this section is in possession or comes into possession of a will of the deceased person, he or she must deposit it with the Registrar.
- (8) If no amount is prescribed by regulation for the purposes of subsection (1)(a), the prescribed amount is \$20 000. (note added)

29.126 This provision was inserted as part of the same package of reforms that were intended to remove anti-competitive provisions from the *Public*

Trustee Act (NT) and to create a 'level playing field' for all professional personal representatives.⁴⁸⁸

Discussion Paper

29.127 In the Discussion Paper, the National Committee sought submissions on whether the model legislation or public trustee legislation should include a provision to enable the public trustee (or statutory equivalent) to administer a small estate without having to file an election to administer or apply for a grant.⁴⁸⁹

29.128 At the time the Discussion Paper was released, only public trustees were permitted to administer estates under these provisions. Accordingly, the National Committee did not seek submissions on the broader issues of whether the provisions should be extended to trustee companies and legal practitioners or, if a provision dealing with small estates were included in the model legislation, the form that the model provision should take.

Further call for submissions

29.129 In light of the legislative developments in the Northern Territory, the National Committee wrote to all the individuals and organisations who had made submissions to the Discussion Paper, to the public trustees, bar associations and law societies in all Australian jurisdictions, and to the peak representative body for trustee companies in Australia, outlining these developments and seeking further submissions on:

- who should be able to administer an estate under any small estates provision; and
- the form that any small estates provision should take.

Inclusion of a small estates provision in the model legislation

Submissions

29.130 The Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia, in their original submissions to the Discussion Paper, both suggested that the model legislation should include a provision dealing with the administration of small estates without having to file an election to administer or apply for a grant.⁴⁹⁰

488 See [29.9] above.

489 *Administration of Estates Discussion Paper* (1999) QLRC 165; NSWLRC 236.

490 Submissions 6, 7.

29.131 The Public Trustee of Queensland, in his submission to the Discussion Paper, also supported the inclusion in the model legislation of such a provision. However, he suggested that, if the procedure were to be confined to public trustees, it would be more appropriate for the provision to be contained in the public trustee legislation of the particular jurisdiction.⁴⁹¹

Persons who may administer an estate under the small estates provision

Further call for submissions

29.132 In its further call for submissions, the National Committee sought submissions on whether, if a provision dealing with the administration of small estates were included in the model legislation, that provision should apply to:

- the public trustee;
- a trustee company;
- a legal practitioner; or
- anyone else.

Submissions and further submissions

29.133 In their original submission in response to the Discussion Paper, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia both suggested that the administration of an estate under the small estates provision should not be confined to public trustees.⁴⁹²

29.134 This view was also expressed in the majority of the submissions received in response to the National Committee's further call for submissions. The Public Trustee of New South Wales, the Law Institute of Victoria, the Law Society of Tasmania, State Trustees Limited, the Public Trustee of Western Australia and the Victorian Bar all expressed the view that the small estates provision should apply to the public trustee, trustee companies and legal practitioners.⁴⁹³

29.135 An academic expert in succession law also agreed that the small estates provision should apply to the public trustee, trustee companies and legal practitioners.⁴⁹⁴ In addition, however, he suggested that an individual who

491 Submission 5.

492 Submissions 6, 7.

493 Submissions 11A, 19A, 21, 22, 23, 24.

494 Submission 12B.

was the sole beneficiary of an estate should be able to use the small estates provision to administer the estate.⁴⁹⁵

In the case of an intestate the spouse or, if there is no surviving spouse, an only (?) child, should be able to apply. These are persons who would be entitled to the whole of the estate anyway and should be allowed to administer it at as low a cost as possible.

The value of the estate

Existing legislative provisions

29.136 All jurisdictions that have a provision of this kind provide that the small estates provision applies if, in the opinion of the relevant person, the value of the estate does not exceed a prescribed amount.⁴⁹⁶

29.137 In the ACT, New South Wales, the Northern Territory and Tasmania, this is a reference to the 'net' value of the estate.⁴⁹⁷

29.138 In Queensland, the legislation refers to:⁴⁹⁸

the value of the assets of the estate of a deceased person coming into the hands or under the control of the public trustee in respect of which estate the public trustee would be entitled to file an election does not, apart from the value of any interest in land, exceed \$75000 ... (emphasis added)

29.139 In Victoria, the legislation does not refer to a gross or net amount, but simply refers to:⁴⁹⁹

property not exceeding \$25 000 or (if the only person or persons entitled to take the property of the deceased person under the will or to share in the distribution of the surplus of the estate of such person is or are the children only or the partner only or the partner and children only or the sole surviving parent of such person) not exceeding \$50 000 in value ...

29.140 In the Northern Territory, the legislation provides that, if the professional personal representative later discovers that the net value of the property in the Territory exceeds the amount for administering an estate under the small estates provision, but does not exceed the amount for filing an election to administer, he or she must file in court a memorandum stating the

495 Ibid.

496 *Administration and Probate Act 1929* (ACT) s 87B(1)(a); *Public Trustee Act 1913* (NSW) s 34A(1), *Public Trustee Regulation 2008* (NSW) cl 35(3); *Administration and Probate Act* (NT) s 110A(1)(a), (8); *Public Trustee Act 1978* (Qld) s 35; *Public Trustee Act 1930* (Tas) s 20A(1), *Public Trustee Regulations 1999* (Tas) reg 9A(3); *Administration and Probate Act 1958* (Vic) ss 3(1) (definition of 'small estate'), 71(1), 79(1)(a). The relevant amounts are set out at [29.142] below.

497 *Administration and Probate Act 1929* (ACT) s 87B(1)(a); *Public Trustee Act 1913* (NSW) s 34A(1); *Administration and Probate Act* (NT) s 110A(1)(a); *Public Trustee Act 1930* (Tas) s 20A(1).

498 *Public Trustee Act 1978* (Qld) s 35.

499 *Administration and Probate Act 1958* (Vic) s 71(1).

value of the property, but may still continue to administer the estate under that provision.⁵⁰⁰ However, if the professional personal representative discovers that the net value of the property in the Territory exceeds the amount for filing an election to administer, he or she must file in court a memorandum stating the value of the property, and must apply for a grant.⁵⁰¹

29.141 In Tasmania, the legislation provides that, if the public trustee later discovers that the net value of the estate exceeds the prescribed amount, the public trustee must discontinue his or her administration of the estate under that provision.⁵⁰²

29.142 In some jurisdictions, the relevant amounts are prescribed by the legislation itself, while in others the amounts are prescribed by regulation. Those amounts are set out in the following table:

Jurisdiction	Maximum value of property for administering under small estate provisions ⁵⁰³	Value above which administration under small estates provision must be discontinued ⁵⁰⁴
ACT	PT \$30 000	–
NSW	PT \$20 000	–
NT	PT, TC, LP \$20 000	\$85 000
QLD	PT \$75 000 (excluding the value of any interest in land) ⁵⁰⁵	–
TAS	PT \$20 000	\$25 000
VIC	State Trustees \$25 000 or \$50 000 (depending on the circumstances)	–

Further call for submissions

29.143 In its further call for submissions, the National Committee sought submissions on whether:

- the model legislation should prescribe:
 - the maximum value of an estate that can be administered under the small estate provision; and

⁵⁰⁰ *Administration and Probate Act* (NT) s 110A(5).

⁵⁰¹ *Administration and Probate Act* (NT) s 110A(6).

⁵⁰² *Public Trustee Act 1930* (Tas) s 20A(5). Section 20A(5) further provides that the public trustee may proceed, in respect of the estate, as provided for by other provisions of the Act. That would include the provisions dealing with the filing of an election to administer.

⁵⁰³ See note 496 above.

⁵⁰⁴ See notes 501 and 502 above.

⁵⁰⁵ Section 30 of the *Public Trustee Act 1978* (Qld), which prescribes the maximum value of property for filing an election to administer, does not contain a similar exclusion.

- the value above which the person who is administering the estate can no longer administer the estate pursuant to the small estate provision, but must seek a grant or an order to administer or file an election to administer; or
- those amounts should be prescribed by regulation.

29.144 The National Committee also sought submissions on what those values should be if they are prescribed by the model legislation, rather than by regulation.

Further submissions

29.145 The submissions that addressed the issue of maximum values were of the view that there should be a value above which the small estates procedure could not be used initially, and a value above which an estate could not continue to be administered pursuant to that procedure. This was the view of the Public Trustee of New South Wales, an academic expert in succession law, the Law Institute of Victoria, the Law Society of Tasmania, State Trustees Limited, the Public Trustee of Western Australia and the Victorian Bar.⁵⁰⁶

29.146 However, the submissions that addressed this issue were divided as to whether the relevant maximum values should be prescribed by the model legislation or by regulation.

29.147 Three respondents — the Public Trustee of New South Wales, the Public Trustee of Western Australia and the Victorian Bar — all favoured prescribing the relevant maximum values by regulation.⁵⁰⁷

29.148 However, an academic expert in succession law, the Law Institute of Victoria and the Law Society of Tasmania were of the view that the relevant amounts should not be prescribed by regulation, but should instead be set out in the model legislation.⁵⁰⁸ The Law Institute of Victoria repeated the comments made by it in relation to elections to administer that regulations are generally not as accessible as legislation, and that these prescribed values were unlikely to change regularly.⁵⁰⁹

29.149 Consistent with its view in relation to the provisions dealing with elections to administer, State Trustees Limited favoured the inclusion in the model legislation, not of an actual amount, but of a formula so that the relevant amounts would remain up to date.⁵¹⁰

506 Submissions 11A, 12B, 19A, 21, 22, 23, 24.

507 Submissions 11A, 23, 24.

508 Submissions 12B, 19A, 21.

509 Submission 19A. See [29.56] above.

510 Submission 22. See [29.57] above.

29.150 Several respondents commented on the relevant maximum amounts for administering an estate under the small estates provision, ranging from \$20 000 up to \$80 000.

29.151 The Law Society of Tasmania suggested that the estate must be under \$20 000 and that a grant must be obtained if it is later discovered that the value of the estate exceeds \$25 000.⁵¹¹

29.152 The Public Trustee of New South Wales suggested a maximum value of \$20 000,⁵¹² while the Law Institute of Victoria suggested a maximum value of \$25 000.⁵¹³

29.153 The Victorian Bar suggested that the estate must be under \$50 000 and that a grant must be obtained if it is later discovered that the value of the estate exceeds \$85 000.⁵¹⁴

29.154 An academic expert in succession law suggested that the appropriate range for the small estates provision was something in the order of \$50 000 to perhaps \$80 000. It was suggested that this would cover a motor vehicle, furniture and some money in a savings account.⁵¹⁵

Existence of a pre-existing entitlement to obtain a grant or, in the case of a public trustee, an order to administer

Existing legislative provisions

29.155 As explained above, most of the statutory provisions that deal solely with the public trustee's or a trustee company's right to file an election to administer include, as a prerequisite for the filing of an election, that the public trustee is entitled to obtain either a grant or an order to administer the estate and that the trustee company is entitled to obtain a grant.⁵¹⁶ However, the provisions dealing with the administration of small estates do not take a uniform approach in relation to this issue.

29.156 In the ACT, New South Wales and Tasmania, there is no requirement that the public trustee would otherwise be entitled to obtain a grant or an order to administer in respect of the estate. The only requirement is that the public trustee is satisfied that the value of the estate does not exceed a prescribed

511 Submission 21.
 512 Submission 11A.
 513 Submission 19A.
 514 Submission 24.
 515 Submission 12B.
 516 See [29.68] above.

amount and that an application has not been made for a grant.⁵¹⁷ This is in contrast to the provisions in these jurisdictions dealing with elections to administer, where there is an express requirement that the public trustee is entitled to apply for an order to collect and administer the estate of the person (ACT), for a grant (New South Wales), or for administration (Tasmania).⁵¹⁸

29.157 This suggests that, in these jurisdictions, the public trustee's power to administer a small estate under the relevant provision is not limited by whether it would be entitled, under any other provision, to apply for a grant or an order to administer or to file an election.

29.158 In the Northern Territory, it appears that administration under section 110A of the *Administration and Probate Act* (NT) is an alternative to applying for a grant.⁵¹⁹ This presupposes some pre-existing basis on which the professional personal representative would be entitled to apply for a grant.

29.159 In Queensland and Victoria, the small estates provisions include the respective requirements that, in Queensland, the public trustee would be entitled to file an election⁵²⁰ and, in Victoria, State Trustees Limited could, under specified provisions, apply for a grant or file an election.⁵²¹

Further call for submissions

29.160 In its further call for submissions, the National Committee sought submissions on whether a relevant person should be able to administer an estate under the model provision dealing with small estates only if he or she would otherwise be entitled to do any one or more of the following:

- apply for a grant in relation to the estate;
- apply for an order to administer the estate; or
- file an election to administer the estate.

517 *Administration and Probate Act 1929* (ACT) s 87B(1); *Public Trustee Act 1913* (NSW) s 34A(1); *Public Trustee Act 1930* (Tas) s 20A(1), (2)(a). In Tasmania, the public trustee must also be satisfied that no trustee company has filed an election to administer the estate.

518 See notes 420 and 421 above.

519 *Administration and Probate Act* (NT) s 110A(1) provides:

110A Administration of small estate without representation or election

- (1) A professional personal representative need not apply for representation of the estate of a deceased person but may instead administer the estate under this section ... (emphasis added)

520 *Public Trustee Act 1978* (Qld) s 35.

521 *Administration and Probate Act 1958* (Vic) s 79(1)(b).

Further submissions

29.161 The majority of respondents who addressed this issue were of the view that a relevant person should be able to administer an estate under a small estates provision only if he or she would otherwise be entitled to do any one or more of the following:

- apply for a grant in relation to the estate;
- apply for an order to administer the estate; or
- file an election to administer the estate.

29.162 This was the view expressed by the Public Trustee of New South Wales, an academic expert in succession law, the Law Society of Tasmania, State Trustees Limited and the Victorian Bar.⁵²²

29.163 However, the Law Institute of Victoria did not consider that a person should be required to establish one of these matters. It referred to its submission on this issue in relation to elections to administer, and appeared to suggest that a person otherwise entitled to administer the estate should be able to authorise a legal practitioner to administer an estate under the small estates provision.⁵²³

Requirements to give public notice

Existing legislative provisions

29.164 Most of the provisions dealing with the administration of small estates without obtaining a grant or filing an election to administer require public notice of some kind to be given.

29.165 In the ACT, the public trustee must not administer an estate under the small estates provision 'unless notice of intention to do so has been given by advertisement or otherwise, in the way and form the public trustee considers appropriate'.⁵²⁴

29.166 In New South Wales, the public trustee must give 'such notice by advertisement or otherwise as the Public Trustee may deem appropriate'.⁵²⁵

29.167 In the Northern Territory, a professional personal representative may administer an estate under the small estates provision only after he or she has given public notice of his or her intention to do so by way of an advertisement

522 Submissions 11A, 12B, 21, 22, 24.

523 Submission 19A.

524 *Administration and Probate Act 1929* (ACT) s 87B(4).

525 *Public Trustee Act 1913* (NSW) s 34A(1).

published in a newspaper published in the Territory. The advertisement must contain the prescribed information.⁵²⁶

29.168 Similarly, in Victoria, State Trustees Limited must give a notice of intention to administer the estate in a daily newspaper circulating generally throughout Victoria.⁵²⁷

29.169 In Tasmania, the public trustee must, before proceeding to administer the estate, give such notice as he or she considers sufficient, by advertisement or otherwise, of his or her intention to deal with the estate of the deceased person.⁵²⁸

29.170 In Queensland, however, there are no advertising requirements.⁵²⁹

Further call for submissions

29.171 In its further call for submissions, the National Committee sought submissions on what, if any, requirements there should be for a person proposing to administer an estate under the small estates provision to give public notice of his or her intention to do so.

Further submissions

29.172 All the respondents who addressed this issue were of the view that a person who proposed to administer an estate pursuant to the small estates provision should be required to give public notice of his or her intention to do so. This was the view of the Public Trustee of New South Wales, the Law Institute of Victoria, the Law Society of Tasmania, State Trustees Limited, the Public Trustee of Western Australia and the Victorian Bar.⁵³⁰ The only qualification to this requirement was suggested by the Public Trustee of Western Australia, who was of the view that the model legislation should require public notice to be given only if the value of the estate exceeded \$1000.⁵³¹

29.173 The Public Trustee of New South Wales and State Trustees Limited both suggested that the giving of such a notice afforded a degree of protection to persons interested in the estate.⁵³²

526 *Administration and Probate Act* (NT) s 110A(2), (3). See *Administration and Probate Regulations* (NT) reg 2B.

527 *Administration and Probate Act 1958* (Vic) s 79(2).

528 *Public Trustee Act 1930* (Tas) s 20A(2)(b).

529 *Public Trustee Act 1978* (Qld) s 35.

530 Submissions 11A, 19A, 21, 22, 23, 24.

531 Submission 23.

532 Submissions 11A, 22.

29.174 The Public Trustee of New South Wales commented:⁵³³

The notice provides details of the deceased's name, suburb and occupation, date of death and that the Public Trustee will deal with the estate assets without a formal grant. Also that any claim must be notified to the Public Trustee within one month from publication of the notice.

Anything less than this would not provide any protection to creditors or claimants such as those who are eligible people under the *Family Provision Act*.

29.175 State Trustees Limited expressed a similar view:⁵³⁴

State Trustees believes that it is important that the public is always given notice of an intention to administer an estate unless the estate is to be administered informally. Where interested parties are on notice that an application for a grant of representation is to be made it provides them with an opportunity, if they wish to do so, to challenge the application for a grant of representation. This is relevant to cases where there is an allegation of undue influence on the deceased at the time of the making of the Will or issues concerning the testamentary capacity of the deceased at the time of the making of the Will. State Trustees believes that the procedure outlined by section 79 of the Victorian *Administration and Probate Act 1958* provides adequate notice to the public of an intention to apply for a grant of representation and a suitable model of legislative provision for the Commission's purposes.

29.176 The submissions generally favoured an advertisement in a newspaper. The Law Institute of Victoria suggested a 'daily newspaper circulating generally in the jurisdiction'.⁵³⁵ State Trustees Limited and the Victorian Bar both favoured the current Victorian requirement for notice to be given in a daily newspaper circulating generally throughout Victoria.⁵³⁶ The Public Trustee of Western Australia suggested a 'local newspaper with state wide circulation'.⁵³⁷

29.177 The Law Society of Tasmania considered that there should be a requirement to advertise in a local newspaper published where the deceased resided prior to death.⁵³⁸

29.178 The Public Trustee of New South Wales favoured the current practice of that office, which is:⁵³⁹

to put an advertisement in a statewide daily newspaper or newspaper circulating in the deceased's locality or where appropriate a notice goes on the notice board in the local court house.

533 Submission 11A.

534 Submission 22.

535 Submission 19A.

536 Submissions 22, 24.

537 Submission 23.

538 Submission 21.

539 Submission 11A.

The National Committee's view

29.179 The National Committee was initially attracted to the inclusion in the model legislation of a provision to the effect of section 110A of the *Administration and Probate Act* (NT) to facilitate the administration of small estates without obtaining a grant or filing an election to administer. However, in this chapter, the National Committee has already made recommendations that will enlarge the range of persons who may file an election to administer,⁵⁴⁰ increase the number of estates that will be capable of being administered under an election to administer,⁵⁴¹ and simplify the process for filing an election to administer.⁵⁴²

29.180 In view of these recommendations, the National Committee does not consider it necessary to include a specific provision to enable small estates to be administered without obtaining a grant or filing an election to administer. The model provisions dealing with elections to administer provide a simple means for a professional administrator to obtain the required authority to administer a small estate, and have the advantage that it will be possible to ascertain, by a search conducted in the court registry, whether a particular estate is being administered under an election to administer.

COSTS

Existing legislative provisions

29.181 Section 110D of the *Administration and Probate Act* (NT), which was introduced as part of the same package of reforms that introduced sections 110A–110C of that Act, deals with the fees chargeable by a professional personal representative who administers an estate under section 110A (administration of small estates without a grant or an election to administer) or under sections 110B or 110C (elections to administer).

29.182 Section 110D of the *Administration and Probate Act* (NT) provides:

110D Fee chargeable for acting under this Division

- (1) A professional personal representative who administers an estate under this Division may charge a fee in respect of that administration.
- (2) The Regulations may prescribe the maximum fee that a professional personal representative may charge under this section.

540 See [29.38]–[29.39] above.

541 See [29.62]–[29.63] above where the National Committee has proposed that a professional administrator may file an election to administer if he or she estimates that the net value of the estate does not exceed the prescribed amount (which is to be the amount of \$100 000, subject to annual increases in the consumer price index).

542 See, for example, the proposal at [29.99]–[29.100] above to the effect that a professional administrator should not be required to give public notice of the filing of an election to administer.

- (3) If no maximum fee is prescribed for the purposes of this section, a professional personal representative may charge a fee not exceeding the amount that the Public Trustee was entitled to charge according to the scale of commission and fees prescribed under section 74(5) of the *Public Trustee Act* as in force immediately before the commencement of this section.

29.183 The maximum fee prescribed for section 110D(2) is currently \$1500.⁵⁴³

29.184 In contrast, the provisions in the New South Wales and Tasmanian public trustee legislation:⁵⁴⁴

- confirm that the public trustee is entitled to the same commission (in Tasmania, the same ‘fees, commissions, charges, and remuneration’) as if the estate had been administered under a grant; and
- provide that such commission and other charges are a first charge on the estate.

Further call for submissions

29.185 In its further call for submissions, the National Committee sought submissions on whether, if the model legislation includes provisions dealing with elections to administer or small estates, it should also include a provision to the effect of section 110D of the *Administration and Probate Act* (NT).

Further submissions

29.186 The inclusion in the model legislation of a provision to the effect of section 110D of the *Administration and Probate Act* (NT) was supported by an academic expert in succession law, the Law Institute of Victoria, the Law Society of Tasmania and the Victorian Bar.⁵⁴⁵ The Law Institute of Victoria based its support on the fact that ‘legal practitioners have no comparable fees for this type of work’.⁵⁴⁶

29.187 Although the Victorian Bar supported the inclusion of a provision to the effect of section 110D of the *Administration and Probate Act* (NT), it suggested that consideration should be given to allowing the court to exceed the prescribed amount for costs in ‘special circumstances’, noting that:⁵⁴⁷

It should not be assumed that, just because an estate is small, it is easier to administer.

543 *Administration and Probate Regulations* (NT) reg 2C.

544 *Public Trustee Act 1913* (NSW) s 34A(2); *Public Trustee Act 1930* (Tas) s 20A(3).

545 Submissions 12B, 19A, 21, 24.

546 Submission 19A.

547 Submission 24.

29.188 It was also of the view that the amount of costs should be prescribed by regulation.⁵⁴⁸

29.189 Two respondents were opposed to the inclusion of a provision to the effect of section 110D of the *Administration and Probate Act* (NT).

29.190 The Public Trustee of New South Wales stated that the ‘same commission/fees that apply to other estates should apply to small estates’.⁵⁴⁹

29.191 The Public Trustee of Western Australia was of the view that a maximum fee should not be prescribed by regulation. Instead, he preferred the approach in section 110D(3) of the Northern Territory provision, which applies if no maximum fee is prescribed by regulation.⁵⁵⁰ In those circumstances, a professional personal representative may charge an amount that does not exceed the amount chargeable under the scale of commission and fees prescribed under the *Public Trustee Act* (NT).

The National Committee’s view

29.192 In the National Committee’s view, section 110D of the *Administration and Probate Act* (NT) provides a useful cap on costs where an estate is being administered by way of an election to administer. The model legislation should therefore include a provision to the effect of section 110D of the *Administration and Probate Act* (NT). However, the model provision should omit the words ‘as in force immediately before the commencement of this section’. The National Committee does not consider it appropriate to fix the maximum fee at a point in time.

29.193 Finally, the model provision will need to be adapted in any jurisdiction that does not provide, in its public trustee legislation, for a scale of commission and fees for the administration of the estate of a deceased person.⁵⁵¹

TRANSFER OF REAL PROPERTY

Introduction

29.194 Depending on the property comprising the estate of a deceased person, it may be possible for the estate to be administered without the need to obtain a grant. However, where the estate includes real property, informal

548 Ibid.

549 Submission 11A.

550 Submission 23.

551 See, for example, [27.133] above for a discussion of the basis on which the Public Trustee of Queensland may charge for the administration of the estate of a deceased person.

administration will not usually be possible.⁵⁵² This is because, in all Australian jurisdictions except Queensland, real property cannot be transferred without the production of a grant of probate or letters of administration (or in some jurisdictions, an order to administer or an election to administer), thereby establishing the personal representative's title to the real property.⁵⁵³

Queensland legislative provisions

29.195 In Queensland, the *Land Title Act 1994* (Qld) takes a different approach. Sections 111 and 112 of that Act facilitate the transfer of real property that forms part of the estate of a deceased person even though a grant has not been made or resealed in Queensland.⁵⁵⁴

29.196 Section 111 of the *Land Title Act 1994* (Qld) deals with the registration of a lot in the name of a person as personal representative of a deceased registered proprietor. It provides:

111 Registering personal representative

- (1) A person may lodge an application to be registered as personal representative for a registered proprietor of a lot or an interest in a lot who has died.
- (2) The registrar may register the lot or the interest in the lot in the name of the person as personal representative only if—
 - (a) if the person has obtained a grant of representation, or the resealing of a grant of representation, in Queensland—the grant or resealing, or an office copy of the grant or resealing issued by the Supreme Court, is deposited; or
 - (b) if paragraph (a) does not apply and the registered proprietor died without a will—
 - (i) letters of administration of the deceased person's estate have not been granted in Queensland within 6 months after the death; and
 - (ii) the gross value of the deceased person's Queensland estate at the date of death was no more than the amount prescribed by regulation or, if no amount is prescribed, \$300000; and

⁵⁵² Informal administration, or administration without a grant, is considered at [29.222]–[29.282] below.

⁵⁵³ *Land Titles Act 1925* (ACT) s 135; *Real Property Act 1900* (NSW) s 93; *Land Title Act* (NT) s 129; *Real Property Act 1886* (SA) ss 175, 176; *Land Titles Act 1980* (Tas) s 99; *Transfer of Land Act 1958* (Vic) s 49; *Transfer of Land Act 1893* (WA) s 187.

⁵⁵⁴ The predecessors of ss 111 and 112 of the *Land Title Act 1994* (Qld) were ss 32 and 32A of the *Real Property Act 1877* (Qld).

- (iii) the registrar is of the opinion that the person would succeed in an application for a grant of representation; or
- (c) if paragraph (a) does not apply and the registered proprietor died leaving a will—
 - (i) the person is or is entitled to be the deceased's personal representative; or
 - (ii) the registrar considers the person would succeed in an application for a grant of representation.
- (3) A person registered under this section without a grant of representation has the same rights, powers and liabilities as if a grant of representation had been made to the person.
- (4) The validity of an act done or payment made in good faith by a person registered under this section is not affected by a later grant of representation.
- (5) If the grantee of a grant of representation is different from the person registered under subsection (2), the person registered must—
 - (a) account to the grantee for all property of the deceased person controlled by the person before the grant; and
 - (b) take all action necessary to divest from the person and vest in the grantee all property of the deceased person remaining under the person's control.

29.197 If a deceased registered proprietor left a will, the registrar may register a lot in a person's name as personal representative if the person is entitled to be the deceased's personal representative, or the registrar considers the person would succeed in an application for a grant of representation.⁵⁵⁵ Where the deceased left a will, there is no restriction in terms of the value of the deceased's estate.

29.198 If a registered proprietor died intestate, it is still possible for the registrar to register a person as personal representative, provided that:⁵⁵⁶

- more than six months have elapsed since the deceased's death and, in that time, letters of administration have not been granted in Queensland in relation to the deceased's estate; and
- the gross value of the deceased person's Queensland estate at the date of death did not exceed \$300 000;⁵⁵⁷ and

⁵⁵⁵ *Land Title Act 1994* (Qld) s 111(2)(c).

⁵⁵⁶ *Land Title Act 1994* (Qld) s 111(2)(b).

⁵⁵⁷ *Land Title Act 1994* (Qld) s 111(2)(b)(ii). The *Land Title Regulation 2005* (Qld) does not prescribe any amount for the purposes of this provision.

- the registrar is of the opinion that the person would succeed in an application for a grant of representation.

29.199 Section 112 of the *Land Title Act 1994* (Qld) deals with the registration of a lot directly in the name of a beneficiary under a will. It provides:

112 Registering beneficiary

- (1) A person who is beneficially entitled under a will to a lot or an interest in a lot of a deceased registered proprietor may apply to the registrar to be registered as proprietor of the lot.
- (2) However, the registrar may register the person only if—
 - (a) written consent is given by—
 - (i) the person who is or is entitled to be the deceased's personal representative; or
 - (ii) a person who, in the registrar's opinion, would succeed in an application for a grant of representation; and
 - (b) the person satisfies the registrar that the person is beneficially entitled to the lot.

29.200 Section 112 avoids the registration costs that would be incurred if it were necessary for real property to be registered first in the name of the personal representative, and then transferred into the name of the beneficiary.

29.201 Before the introduction of the *Succession Act 1981* (Qld), real property that was devised by will did not vest in the deceased's personal representative, but vested directly in the devisee.⁵⁵⁸ By enabling the registrar, in specified circumstances, to register real property directly in the name of a beneficiary under a will, section 112 of the *Land Title Act 1994* (Qld) is, to a large extent, consistent with the former law in relation to vesting. However, direct vesting in a beneficiary, as occurred under the former law, had the potential to cause difficulties where the real property was needed to pay the debts and liabilities of the estate.⁵⁵⁹ Because section 112 requires the consent of the person who is, or who is entitled to be, the deceased's personal representative, or who in the opinion of the registrar would succeed in an application for a grant, those problems do not arise as a result of section 112.

29.202 Section 45 of the *Succession Act 1981* (Qld), which deals with the vesting of property on the death of a person (and also on the making of a grant),⁵⁶⁰ complements sections 111 and 112 of the *Land Title Act 1994* (Qld). Section 45(7) provides:

⁵⁵⁸ See WA Lee, *Manual of Queensland Succession Law* (1st ed, 1975) §5(b)(i).

⁵⁵⁹ See Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 29–30.

⁵⁶⁰ The vesting of property is considered in Chapter 10 of this Report.

45 Devolution of property on death

...

- (7) Nothing in this section affects the operation of an Act providing for the registration or recording of any person as entitled to any estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person.

Discussion Paper

29.203 In the Discussion Paper, the National Committee observed that the registrars of probate were generally of the view that the Queensland position was anomalous in allowing real property to be transferred without the production of a grant. However, the National Committee also noted that the Queensland system had been in operation for many years without any apparent difficulties.⁵⁶¹

29.204 The National Committee therefore sought submissions on the following issues:⁵⁶²

- whether it should be possible, in some circumstances, to transfer real property without producing a grant;
- if so, what restrictions, if any, should be imposed; and
- whether, if such a mechanism is considered desirable, it would be more appropriate for it to be located in administration legislation or in real property legislation.

Submissions

29.205 The submissions that addressed these issues were fairly evenly divided on whether it should be possible, in some circumstances, for real property to be transferred without the production of a grant.

29.206 The Department of Natural Resources, which is responsible for the registration of real property in Queensland, supported the retention of the Queensland provisions. It commented on the existing Queensland approach:⁵⁶³

I think it important that the Committee is aware that the practice of allowing real property to be transferred without the production of a grant has been followed in Queensland for decades, that registration is effected by or under the supervision of experienced legal officers, and during that lengthy period a substantial body of practices and procedures have been developed. ...

561 *Administration of Estates Discussion Paper* (1999) QLRC 158; NSWLRC [10.49].

562 *Ibid*, QLRC 158; NSWLRC 225.

563 Submission 9.

The practice is only anomalous (the view formed by the Registrars of Probate ...), because it has not been adopted by any of the other states.

29.207 The Department was of the view that, provided the proper level of supervision is maintained, sections 111 and 112 of the *Land Title Act 1994* (Qld) should be retained. It was suggested that the provisions produce 'considerable savings in time and cost in administering estates in Queensland'.⁵⁶⁴

29.208 The Bar Association of Queensland, the Public Trustee of Queensland and the Queensland Law Society were also of the view that it should be possible, in certain circumstances, to transfer real property without the production of a grant.⁵⁶⁵ The Public Trustee of Queensland considered that the absence in the provisions of a requirement to produce a grant promoted informal administration. He considered that the Queensland procedure had worked well for many years, and that, if it were changed by requiring the production of a grant, it would generally increase the cost of administration.⁵⁶⁶

29.209 The Trustee Corporations Association of Australia acknowledged the benefits of allowing real property to be transferred without the production of a grant.⁵⁶⁷

Most financial institutions allow assets of a smaller nature to be dealt with without probate. This can be a very cost effective way for executors to deal with small estates. From time to time executors are forced to deal with small value (mostly rural) real estate where the costs of obtaining probate, plus conveyancing costs, make the whole exercise very expensive in comparison to the value of the asset in question.

29.210 However, this respondent was of the view that the transfer of real property without a grant should occur only in very limited circumstances. It was of the view that there was some value in adopting provisions to the effect of sections 111 and 112 of the *Land Title Act 1994* (Qld), but considered that the provisions should apply only if the value of the real property was below a certain threshold. It suggested that \$150 000 would be an appropriate figure.⁵⁶⁸

29.211 On the other hand, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law

564 Ibid.

565 Submissions 1, 5, 8. Note, however, that in its further submission concerning elections to administer, the Queensland Law Society suggested that 'it may be an opportune time for grants of representation to be required for all Titles Office dealings instead of the present informal system': Submission 8A.

566 Submission 5.

567 Submission 6.

568 Ibid.

Societies commented that real property should not be transferred without the production of a grant.⁵⁶⁹

29.212 The ACT Law Society expressed the view that it was a 'dangerous approach' not to require a will to be proved. It also queried why the Titles Office should duplicate a function that is already performed by the courts.⁵⁷⁰

29.213 The New South Wales Law Society was of the view that the Queensland approach was not desirable and that a grant should be required for the transfer of real property. It expressed concern that the transfer to a beneficiary could be used to avoid legitimate claims,⁵⁷¹ although, as explained above, registration in the name of a beneficiary can occur only with the consent of the personal representative (or the person entitled to be the personal representative).

29.214 The academic expert who opposed the transfer of real property without the production of a grant was primarily concerned with the interests of uniformity.⁵⁷²

Although I supported the accepted and beneficial practice that had obtained in Queensland, when I was working on the Queensland *Succession Act*, in the context of uniform legislation throughout Australia I feel bound to change my mind. ... The Queensland system is anomalous and one cannot expect other jurisdictions to follow it.

29.215 If, however, real property were to be transferred in the absence of a grant, he considered that it should be restricted to the situation where the applicant for transfer was entitled to the whole of the estate of the deceased.⁵⁷³

29.216 The Bar Association of Queensland considered that the provisions facilitating the registration of real property without the production of a grant should be located in the model legislation, rather than in legislation dealing with real property.⁵⁷⁴ Although the New South Wales Law Society was opposed to the transfer of real property without the production of a grant, it was of the view that, if such a practice were to be considered, the provisions should be located in the model legislation.⁵⁷⁵

569 Submissions 11, 12, 14, 15.

570 Submission 14.

571 Submission 15.

572 Submission 12.

573 Ibid.

574 Submission 1.

575 Submission 15.

29.217 However, the Queensland Law Society, the Public Trustee of New South Wales and the ACT Law Society were of the view that provisions of this kind were more appropriately located in real property legislation.⁵⁷⁶ The ACT Law Society suggested that '[l]egal logic would more likely place such provisions in real property legislation'.⁵⁷⁷ It suggested, however, that it may be convenient to include the provisions in both real property and administration legislation or to include the provision in one and a cross-reference to the provisions in the other.⁵⁷⁸

29.218 The academic expert in succession law who opposed the adoption of the Queensland provisions on the grounds of uniformity suggested that it would be anomalous to include provisions to their effect in the model legislation.⁵⁷⁹

The National Committee's view

29.219 Sections 111 and 112 of the *Land Title Act 1994* (Qld) provide an extremely important role in Queensland in facilitating the administration of estates without the need to obtain a grant. However, as those provisions are concerned specifically with the transfer and registration of interests in real property, their proper location is in legislation dealing with real property.

29.220 Accordingly, the model legislation should not include provisions to the effect of sections 111 and 112 of the *Land Title Act 1994* (Qld).

29.221 However, given the utility of the Queensland provisions, the National Committee recommends that the other Australian jurisdictions consider implementing provisions to the effect of sections 111 and 112 of the *Land Title Act 1994* (Qld).

INFORMAL ADMINISTRATION: ADMINISTERING AN ESTATE WITHOUT A GRANT

Introduction

29.222 A person who is 'not lawfully appointed executor or administrator and without title to a grant may by reason of his own intrusion upon the affairs of the deceased be treated for some purposes as having assumed the executorship. Such an intermeddler is called a tort executor or an executor *de son tort* (ie of his own wrong)'.⁵⁸⁰ The term is said to imply 'a wrongful intermeddling with the

576 Submissions 8, 11, 14.

577 Submission 14.

578 Ibid.

579 Submission 12.

580 JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [8–16]. The expression 'executor *de son tort*' is used whether the deceased person died testate or intestate: at [8–16].

assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise'.⁵⁸¹

29.223 The concept of the executor *de son tort* developed at a time when 'some hundreds of authorities' (such as bishops, archbishops and abbots) were entitled to grant probate.⁵⁸² In these circumstances:⁵⁸³

the right to act as executor was not something easily determinable, and the doctrine was introduced to ameliorate the position of those dealing with persons acting as though they were executors.

29.224 Accordingly, if an executor *de son tort* discharges a debt owing by the deceased to a creditor, the payment cannot later be recovered by the rightful personal representative:⁵⁸⁴

creditors are not bound to seek farther than him who acts as executor; therefore if an executor *de son tort* pays £100 of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor.

29.225 It will also be a defence to an action by a creditor that the executor *de son tort* has administered the assets in due course of the law and that the assets have been applied in payment of a debt having a higher priority.⁵⁸⁵

29.226 The liability of an executor *de son tort* is limited to the property that has come into his or her hands.⁵⁸⁶ Further, payments properly made by the executor *de son tort* in due course of administration will bind the rightful executor and may be raised in mitigation in a claim made by the rightful personal representative against the executor *de son tort*.⁵⁸⁷

29.227 Although the expression 'executor *de son tort*' has been used 'for an executor named in the will who intermeddles before probate',⁵⁸⁸ that 'usage can

581 *Peters v Leeder* (1878) 47 LJQB 573, 574 (Lush J).

582 FC Hutley, 'The Executor De Son Tort in the Law of New South Wales' (1952) 25 *Australian Law Journal* 716, 716. Because, in New South Wales, title to property vests in an executor or administrator only when a grant is made (see *Probate and Administration Act 1898* (NSW) s 44), Hutley is of the view that '[e]very executor has a discoverable title' and that the practical reason for recognising the concept of the executor *de son tort* no longer exists in New South Wales: see at 717.

583 FC Hutley, 'The Executor De Son Tort in the Law of New South Wales' (1952) 25 *Australian Law Journal* 716, 716.

584 *Parker v Kett* (1701) 1 Ld Raym 658, 661; 91 ER 1338, 1340 (Holt CJ).

585 *Oxenham v Clapp* (1831) 2 B & Ad 309; 109 ER 1158.

586 *Yardley v Arnold* (1842) Car & M 434, 438; 174 ER 577, 579 (Parke B); *Cootte v Whittington* (1973) LR 16 Eq 534, 547 (Malins VC).

587 *Fyson v Chambers* (1842) 9 M & W 460, 468–9; 152 ER 195, 198 (Lord Abinger CB); *Thomson v Harding* (1853) 2 El & Bl 630, 640; 118 ER 904, 907 (Lord Campbell CJ). However, the Court did not go so far as to say that every payment from the assets of the deceased would be valid: see at 907.

588 JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [8-16], citing *Webster v Webster* (1804) 10 Ves Jun 93; 32 ER 778.

clearly be criticised on the ground that such intermeddling, though it precludes renunciation, is not in itself unlawful'.⁵⁸⁹ In *Sykes v Sykes*,⁵⁹⁰ Montague Smith J stated:⁵⁹¹

Some confusion has arisen from its having been said, in one case [*Webster v Webster* 10 Ves Jun 93], that the executor who has intermeddled with the goods before probate can be sued as an executor de son tort; he can, no doubt, be sued on account of his so intermeddling, which amounts to an election to act as executor, and prevents his saying that he is not such; but he is rather an executor by estoppel than an executor de son tort, and is certainly not a wrongdoer.

29.228 Regardless of whether an executor acting without a grant of probate is classified as an executor *de son tort*, it is clear that an executor acting without a grant is, like an executor *de son tort*, liable only to the extent of what he or she has received on behalf of the testator's estate.⁵⁹² This differs from the liability of a personal representative appointed under a grant who can be required to account on the basis of wilful default — that is, for what he or she has received and for what he or she ought to have received.⁵⁹³

29.229 The concept of the executor *de son tort* has been criticised as being anomalous, and being inconsistent with a 'general object of modern property law', which 'is to make titles to property cognoscible'.⁵⁹⁴ However, it has been suggested that that view does not give sufficient weight to the practical reality that many estates are administered informally.⁵⁹⁵

It is respectfully submitted that the learned author is wrong, and that his argument is undermined by the fact that many estates are properly and fully administered without a grant — ie, technically, by an executor de son tort or an intermeddler. This means that the institution, and the powers and protections that it gives, are necessary to the legal system.

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Ibid.

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(1870) LR 5 CP 113.

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Ibid 118. See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [40.16], where the authors suggest that, if the person who intermeddles is the person who would be entitled to a grant of probate, 'it seems better to call her or him an intermeddler rather than an executor de son tort'.

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Lowry v Fulton (1839) 9 Sim 104, 123; 59 ER 298, 305 (Shadwell VC); *In the Will of Lyndon* [1960] VR 112, 115 (Pape J).

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AR Mellows, *The Law of Succession* (4th ed, 1983) 338.

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FC Hutley, 'The Executor De Son Tort in the Law of New South Wales' (1952) 25 *Australian Law Journal* 716, 716.

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RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [40.17] note 75.

29.230 Informal administration is most likely to be possible where the estate is relatively small in value (perhaps because the main asset owned by the deceased was property owned as joint tenants with another person or persons⁵⁹⁶) or does not include real property⁵⁹⁷ or shares.

29.231 In some cases, informal administration is facilitated by legislative provisions that relate to specific types of payments.⁵⁹⁸ It can also be facilitated by the policies of some financial institutions under which payments under a particular amount will be made without the production of a grant (although the financial institution will sometimes require an indemnity to be given).

Historical background

29.232 In England, legislation was passed in 1601 to deal with a fraudulent practice that had developed whereby letters of administration were obtained by 'a man of straw, who at once handed over the assets as arranged', with the result that the intestate's creditors were left unpaid.⁵⁹⁹ Statute 43 Elizabeth I chapter 8 (*An Act against fraudulent Administration of Intestates' Goods*) provided:

Forasmuch as it is often put in Ure, to the defrauding of Creditors, that such Persons as are to have the Administration of the Goods of others dying Intestate committed unto them, if they require it, will not accept the same, but suffer or procure the Administration to be granted to some Stranger of mean Estate, and not of Kin to the Intestate, from whom themselves or others by their Means do take Deeds of Gifts and Authorities by Letter of Attorney, whereby they obtain the State of the Intestate into their Hands, and yet stand not subject to pay any Debts owing by the same Intestate, and so the Creditors for lack of Knowledge of the Place of Habitation of the Administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of Ability in him to satisfy of his own Goods the Value of that he hath conveyed away of the Intestate's Goods, or released of his Debts by way of Wasting, the Creditors cannot have or recover their just and due Debts:

II. Be it enacted by the Authority of this present Parliament, That every Person and Persons that hereafter shall obtain, receive and have any Goods or Debts of any Person dying Intestate, or a Release or other Discharge of any Debt or Duty that belonged to the Intestate, upon any Fraud, as is aforesaid, or without such valuable Consideration as shall amount to the Value of the same Goods or Debts, or near thereabouts, (except it be in or towards Satisfaction of some

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In this situation, the deceased's interest in the property accrues to the surviving joint tenant or tenants and does not, at any time, form part of the deceased's estate.

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But see the Queensland provisions discussed at [29.195]–[29.200] above, which enable real property to be transferred in particular situations without the obtaining of a grant.

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See, for example, ss 211 and 212 of the *Life Insurance Act 1995* (Cth). In the specified circumstances, those provisions enable amounts of up to \$50 000 to be paid under a life insurance policy or life insurance policies, without requiring the production of a grant of probate or letters of administration. A life insurance company that makes a payment in accordance with those provisions is discharged from all further liability in respect of the money payable under the policy or policies. See also the statutory provisions discussed at [29.289]–[29.304] below, which apply in relation to different types of payments that may be made without production of a grant.

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Sir W Holdsworth, *A History of English Law* (5th ed, 1942) vol III, 557.

just and principal Debt, of the Value of the same Goods or Debts to him owing by the Intestate at the Time of his Decease) shall be charged and chargeable as Executor of his own Wrong; (2) and so far only as all such Goods and Debts coming to his Hands, or whereof he is released or discharged by such Administrator, will satisfy, deducting nevertheless to and for himself Allowance of all just, due and principal Debts upon good Consideration, without Fraud, owing to him by the Intestate at the Time of his Decease, and of all other Payments made by him, which lawful Executors or Administrators may and ought to have and pay by the Laws and Statutes of this Realm.

29.233 That statute remained in force until it was repealed by the *Administration of Estates Act 1925 (UK)*,⁶⁰⁰ and replaced by section 28 of that Act. Section 28 provides:

28 Liability of person fraudulently obtaining or retaining estate of deceased

If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any real or personal estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the real and personal estate received or coming to his hands, or the debt or liability released, after deducting—

- (a) any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and
- (b) any payment made by him which might properly be made by a personal representative.

29.234 This section has a much broader application than the statute that it replaced. As the authors of *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* observe:⁶⁰¹

The Elizabethan statute which this section replaces applied only where the next-of-kin procured a grant of administration to 'some stranger of mean estate' as his agent or attorney, in order to take the property free from the deceased's liabilities. Otherwise, the concept of an *executor de son tort* arose under the common law rather than under statute. The present section, however, is wide enough to cover all cases in which liability could in practice arise: it might, therefore, be difficult to contend that there survives a concurrent and independent liability at common law. (notes omitted)

29.235 Under section 28 of the *Administration of Estates Act 1925 (UK)*, a person who obtains, receives or holds property of a deceased person in defraud of creditors, or without valuable consideration, is liable to account for that property 'after deducting any debt properly due to him from the deceased at the

⁶⁰⁰ *Administration of Estates Act 1925 (UK)* s 56, sch 2.

⁶⁰¹ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [8–18].

time of his death, and any payment made by him which might properly be made by a personal representative'.⁶⁰² Accordingly:⁶⁰³

where the executor de son tort uses the assets of the deceased's estate to pay debts and liabilities, the creditors will be properly paid, and will not be liable to refund the sums received. Likewise, the executor de son tort receives credit for those payments. It follows that where the executor de son tort applies all the deceased's assets in the discharge, in proper order, of the debts, he will not be liable beyond the scope of those assets.

Existing legislative provisions

29.236 Three Australian jurisdictions — the ACT, Queensland and Victoria — have a section in their administration legislation that addresses the extent of the liability of a person who deals with estate property. Despite the differences in the section titles of these provisions, the three provisions are otherwise expressed in similar terms.

Australian Capital Territory

29.237 Section 74A of the *Administration and Probate Act 1929* (ACT) provides:

74A Fraudulently obtaining or keeping property

A person—

(a) who—

- (i) by obtaining, receiving or holding any real or personal property forming part of the estate of a deceased person; or
- (ii) by effecting the release of a debt or liability due to the estate of a deceased person;

defrauds any creditor of the estate of the deceased person; or

(b) who, without full valuable consideration—

- (i) obtains, receives or holds any real or personal property forming part of the estate of a deceased person; or
- (ii) effects the release of a debt or liability due to the estate of a deceased person;

is liable and chargeable as an executor in his or her own wrong to the extent of the real and personal property forming part of the estate of the deceased person that the person receives, or that comes into his or her hands, less—

⁶⁰² AR Mellows, *The Law of Succession* (4th ed, 1983) 337.

⁶⁰³ Ibid.

- (c) the amount of any debt incurred for valuable consideration and without fraud that was due to the person from the deceased person at the time of his or her death; and

the amount of any payment made by the person that might have been properly made by the personal representative of the deceased person.

29.238 This section was previously located in the *Imperial Acts (Substituted Provisions) Act 1986 (ACT)*.⁶⁰⁴ Its enactment gave effect to the recommendation made by the ACT Law Reform Commission in its 1973 Report on Imperial Acts in force in the ACT that the Imperial statute 43 Elizabeth I chapter 8 (1601) should be repealed and replaced with a provision in terms of section 28 of the *Administration of Estates Act 1925 (UK)*.⁶⁰⁵

29.239 The ACT Commission noted that, when the New South Wales Law Reform Commission considered the application of Imperial Acts in that jurisdiction, it concluded that the Imperial statute 43 Elizabeth I chapter 8 was unnecessary and recommended its repeal without the substitution of any modern provision.⁶⁰⁶ However, the ACT Commission disagreed with that view, noting that modern forms of the Imperial statute had been enacted in Victoria and the United Kingdom.⁶⁰⁷

29.240 The ACT Law Reform Commission considered that, if the application of the 1601 Act in the ACT were repealed without the substitution of a modern provision, 'the law would be less clear and easy to discover than if it is expressed in a compendious modern form'.⁶⁰⁸

Queensland

29.241 Section 54(1) of the *Succession Act 1981 (Qld)* provides:

54 Protection of persons acting informally

- (1) Where any person, not being a person to whom a grant is made, obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration, or effects the release of any debt or liability due to the estate of the deceased, the person shall be charged as executor in the person's own wrong to the extent of the estate received or coming into the person's hands, or the debt or liability released, after deducting any payment

⁶⁰⁴ *Imperial Acts (Substituted Provisions) Act 1986 (ACT)* sch 2 pt 8.

⁶⁰⁵ Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory and Supplementary Report* (1973) 15.

⁶⁰⁶ Ibid, referring to New South Wales Law Reform Commission, *Application of Imperial Acts*, Report No 4 (1967) 92. The Queensland Law Reform Commission also recommended the repeal of the 1601 Act without the substitution of another provision: see Queensland Law Reform Commission, *An Examination of the Imperial Statutes in Force in Queensland*, Report No 31 (1981) Annexure A.

⁶⁰⁷ Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory and Supplementary Report* (1973) 15.

⁶⁰⁸ Ibid.

made by the person which might properly be made by a personal representative to whom a grant is made.

29.242 The section applies not only to a person who administers an estate without any authority, but also to an executor appointed by will who administers an estate without obtaining a grant of probate.⁶⁰⁹

29.243 When the Queensland Law Reform Commission considered this issue in its 1978 Report, it referred to the desirability of protecting persons who act in the administration of an estate without a grant:⁶¹⁰

Since 1601 (43 Eliz c 8)⁶¹¹ provision has been made to protect persons who act informally, but properly, in the administration of a deceased estate. In these days, when some time may elapse between the death and the grant of probate or letters of administration, protection for those who act in the meantime is essential, whether the person to be protected is an executor, intending administrator, or even an executor *de son tort*. Provided such person does what a duly constituted personal representative should properly do the estate will not be harmed. (note added)

29.244 The Commission explained the scope of the protection afforded by the proposed provision:⁶¹²

It is to be noted that this provision only protects those into whose hands a part of the deceased's estate actually comes. A person who incurs expense in relation to a deceased estate is not given by this section any right of recourse as such.

29.245 The Commission noted that the proposed provision 'follows the Victorian precedent which originates in s 28 of the English *Administration of Estates Act of 1925*.⁶¹³ However, the Commission preferred the wording of section 33(1) of the *Administration and Probate Act 1958* (Vic) to that of section 28 of the *Administration of Estates Act 1925* (UK) 'because it does not retain a right of preference or retainer in the informal executor, as the English provision does'.⁶¹⁴

609 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.100].

610 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37.

611 The statute 43 Eliz I c 8 (1601) is set out at [29.232] above.

612 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37.

613 *Ibid.* Note, however, that the original Victorian provision was enacted in 1922, some three years before the *Administration of Estates Act 1925* (UK) was passed: see note 615 below.

614 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37. In that Report, the Commission recommended (at 40–1) that a personal representative's rights of retainer and preference be abolished, subject to certain limited exceptions. The National Committee has made similar recommendations in this Report: see [16.161], [16.180]–[16.182] and Recommendations 16-9 and 16-10 in vol 2 of this Report.

Victoria

29.246 In Victoria, section 33(1) of the *Administration and Probate Act 1958* (Vic) provides:

33 Liability of person fraudulently obtaining or retaining estate of deceased

- (1) If any person, to the defrauding of creditors or without full valuable consideration, obtains receives or holds the estate or any part of the estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the estate received or coming to his hands, or the debt or liability released, after deducting any payment made by him which might properly be made by a personal representative.

29.247 The previous Victorian provision, section 28 of the *Administration of Estates Act 1928* (Vic),⁶¹⁵ was virtually identical to section 28 of the *Administration of Estates Act 1925* (UK).⁶¹⁶ It was amended in 1933 to omit what is paragraph (a) of the English provision,⁶¹⁷ and was enacted as section 33(1) of the *Administration and Probate Act 1958* (Vic) without that paragraph.

Other Australian jurisdictions

29.248 Although the administration legislation of the Northern Territory, South Australia and Western Australia does not include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld), it seems that the statute 43 Elizabeth I chapter 8 (1601) applies as an Imperial statute in those jurisdictions.⁶¹⁸

29.249 The Law Reform Commission of Western Australia considered the position of a person administering an estate informally in its 1990 Report on the *Administration Act 1903* (WA). It noted that, in limited circumstances, the Imperial statute of 1601 may apply in Western Australia, and observed that, for the most part, 'the law in this State governing the rights and liabilities of persons acting informally is the case law dealing with the executor *de son tort* and with executors themselves prior to their obtaining a grant of probate'.⁶¹⁹ The Western Australian Commission considered this to be unsatisfactory, and

⁶¹⁵ The original Victorian provision was introduced in 1922: see *Imperial Acts Application Act 1922* (Vic) s 17.

⁶¹⁶ *Administration of Estates Act 1925* (UK) s 28 is set out at [29.233] above.

⁶¹⁷ *Statute Law Revision Act 1933* (Vic) s 2, sch.

⁶¹⁸ The statute 43 Eliz I ch 8 (1601) continued in force in England until its repeal by the *Administration of Estates Act 1925* (UK) s 56, sch 2. It therefore became part of the law of South Australia and Western Australia when those States were settled, respectively, on 28 December 1836 and 1 June 1829: see *Acts Interpretation Act 1915* (SA) s 4A; *Interpretation Act 1984* (WA) s 73. It would appear that it also became part of the law of the Northern Territory when the Territory was annexed to South Australia: see *Sources of the Law Act* (NT) ss 2, 3.

⁶¹⁹ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.7].

recommended that the legislation in that jurisdiction should be amended to include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld).⁶²⁰

The Commission believes that persons acting informally should be entitled to know where they stand, and that the situation should be the subject of express provision in the *Administration Act*. Legislation on this matter already exists in Queensland. ... The Commission recommends that the provision [*Succession Act 1981* (Qld) section 54(1)] be incorporated into the *Administration Act*.

29.250 When the Law Reform Committee of South Australia considered the application of Imperial statutes in that jurisdiction, it noted that Imperial statute 43 Elizabeth I chapter 8 still applied in South Australia. It recommended that the statute should be repealed, and that 'an equivalent section in modern English' should be included in the *Administration and Probate Act 1919* (SA).⁶²¹

29.251 The statute 43 Elizabeth I chapter 8 (1601) has been repealed in New South Wales⁶²² and appears to have been impliedly repealed in Tasmania.⁶²³

Discussion Paper

29.252 In the Discussion Paper, the National Committee acknowledged that, in all jurisdictions, a significant number of estates are administered informally — that is, without a grant. It noted that this practice is facilitated by factors such as the joint ownership of property and the willingness of some financial organisations, such as banks, to release funds up to a specified amount without requiring the production of a grant of probate or letters of administration. The National Committee also observed that section 54(1) of the *Succession Act 1981* (Qld) protects only those informal administrators who act properly.⁶²⁴

29.253 The National Committee considered that.⁶²⁵

given the acknowledged high ... incidence of informal administration in all jurisdictions, it would be unrealistic for the model legislation simply to ignore the extent to which informal administration was presently occurring, and that to exclude it from the legislation would give the impression that a matter of considerable significance had been overlooked.

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Ibid [4.8].

621

Law Reform Committee of South Australia, *Inherited Imperial Statute Law in This State Relating to the Topics of Property, Trusts, Uses, Equity and Wills*, Report No 54 (1980) 12.

622

Imperial Acts Application Act 1969 (NSW) s 8(1).

623

Administration and Probate Act 1935 (Tas) s 2(2).

624

Administration of Estates Discussion Paper (1999) QLRC 151; NSWLRC [10.25].

625

Ibid, QLRC 151–2; NSWLRC [10.27].

29.254 The National Committee noted that section 54(1) of the *Succession Act 1981* (Qld) did not change the law, but was declaratory of it,⁶²⁶ and considered that the inclusion of a provision to that effect would make the law more accessible to non-lawyers than leaving the protection of informal administrators to case law.⁶²⁷

29.255 The National Committee therefore proposed that the model legislation should include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld).⁶²⁸

29.256 The National Committee also sought submissions on what terminology could be used instead of the expressions ‘executor *de son tort*’ and ‘executor in the person’s own wrong’ (the latter expression being used in section 54(1)).⁶²⁹

Submissions

Inclusion of a provision dealing with informal administration

29.257 The National Committee’s proposal to include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld) was supported by the Bar Association of Queensland, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁶³⁰

29.258 A former ACT Registrar of Probate also appeared to support the inclusion of a provision to this effect, although she considered that any provision should be supported by a mandatory requirement to give public notice of intended distribution.⁶³¹

In the ACT, except where real property is involved, informal administration is a common practice. It is therefore unrealistic to ignore the extent to which informal administration occurs. The person administering the estate is not at present given any formal recognition or protection. Some mechanism for supervision and control of informal administration is adequately achieved if advertising of notice of intended distribution is mandatory.

29.259 However, one respondent favoured a more far-reaching approach in relation to the issue of informal administration. He referred to the practical problem that it is sometimes necessary to obtain a grant because third parties

626 Ibid QLRC 151; NSWLRC [10.25].

627 Ibid, QLRC 152; NSWLRC [10.28].

628 Ibid QLRC 153; NSWLRC 218 (Proposal 64).

629 Ibid, QLRC 153; NSWLRC 219.

630 Submissions 1, 8, 12, 14, 15.

631 Submission 2. Distribution after notice is considered in Chapter 21 of this Report. The National Committee has not recommended a mandatory requirement to give public notice of intended distribution for either persons appointed under a grant or informal administrators. However, it has recommended that informal administrators be permitted to give such a notice: see [21.182]–[21.183] and Recommendation 21-2 in vol 2 of this Report. This is not presently possible in all Australian jurisdictions.

are reluctant 'to deal with a person who does not have any official right to the asset',⁶³² and was of the view that:⁶³³

It is a matter of particular concern that the current legislation forces what could be a satisfactory informal administration down the official path solely because the administrator cannot obtain an asset.

29.260 This respondent considered that there should be no distinction between formal and informal administrators.⁶³⁴

It is proposed that the current law be radically re-designed so that the transfer of property on the death of a person is primarily a private matter between those entitled by law to that property. It would only be in the exceptional case that government would become involved through its agencies. This would be where there is a circumstance justifying government intervention, typically, some uncertainty or a dispute.

... Informal administrations should be the central feature of the legislation. There would be no formal administrations.

29.261 It was further suggested that:⁶³⁵

All estate administrators and third parties dealing with estate administrators should have the same statutory protections. The preferred treatment of official estate administrations as against informal estate administrations would disappear.

29.262 This protection would be achieved by extending the protection given by section 63 of the *Administration and Probate Act 1929 (ACT)*⁶³⁶ to a person making a payment or transfer in good faith to another person who is administering the estate of a deceased person.⁶³⁷ The following scheme was suggested:⁶³⁸

632 Submission 13.

633 Submission 13A.

634 Ibid.

635 Ibid.

636 *Administration and Probate Act 1929 (ACT)* s 63 provides:

63 Persons etc making payments on probate granted for estate of deceased person to be indemnified

All persons making or permitting to be made any payment or transfer, in good faith, on any probate or administration or order granted in relation to the estate of any deceased person under this Act must be indemnified and protected in so doing, despite any defect or circumstance of any kind affecting the validity of the probate or administration or order not then known to those persons.

See [25.68] in vol 2 of this Report where the corresponding provisions in the Australian jurisdictions are considered.

637 Submission 13.

638 Submission 13A.

The level of protection should be that currently given to an executor with probate who gives notice to interested persons of an intention to distribute the estate, and that given to a third party holding estate property who pays or transfers the property to an executor with probate.

... Notice by way of an advertisement in a local newspaper should be abandoned as the general rule. It is not helpful and merely benefits local newspapers. It is a cost and delays administration. Appropriate notice to persons reasonably likely to be interested in the distribution is all that should be required.

... A payment or transfer to a person claiming to be the administrator of an estate, based on proof of death, a copy of any will, a statutory declaration of the apparent administrator and proof of identity of the apparent administrator is all that need be required.

29.263 It was proposed that the Supreme Court would retain ‘the normal role of resolver of disputes, but [have] no greater administrative role than it currently has in relation to trusts’.⁶³⁹ The result of this proposal is that:⁶⁴⁰

- (1) all estate administrations would be private;
- (2) estate administrations would be cheaper and take less time;
- (3) the cost to government of supervising estate administrations would be reduced.

Terminology

29.264 Several respondents commented on the terminology that should be used in the model provision to describe the liability of a person to whom that provision is to apply.⁶⁴¹

29.265 The Trustee Corporations Association of Australia was of the view that the term ‘executor *de son tort*’ is well established and should be used in the model legislation.⁶⁴²

29.266 However, the other respondents who commented on this issue suggested various expressions that might be used in preference to either ‘executor *de son tort*’ or ‘executor in the person’s own wrong’.

29.267 The Bar Association of Queensland commented that an appropriate term is a ‘representative without a grant’, and that section 54(1) could be

639 Ibid.

640 Ibid.

641 As explained above, s 54(1) of the *Succession Act 1981* (Qld) provides that the relevant person is to ‘be charged as executor in the person’s own wrong to the extent of the estate received or coming into the person’s hands ...’ (emphasis added).

642 Submission 6.

amended to provide that:⁶⁴³

that person shall be deemed representative without a grant to the extent of the estate.

29.268 The ACT Law Society expressed a similar view.⁶⁴⁴

The use of the French term will be confusing to a lay person. Defining executor *de son tort* does not add to the meaning of the section. We would suggest the section use the following wording: ‘... the person is liable as the informal personal representative to the extent’.

29.269 The Queensland Law Society also favoured a reference to ‘a person acting informally’,⁶⁴⁵ while the New South Wales Law Society preferred the term ‘an unauthorised administrator’ or ‘an administrator without authority’.⁶⁴⁶

29.270 An academic expert in succession law noted that the expression ‘executor *de son tort*’ is not used in section 54 of the *Succession Act 1981* (Qld). He considered, however, that it was not necessary to retain the current reference to a person being ‘charged as executor in the person’s own wrong’:⁶⁴⁷

The phrase executor *de son tort* does not appear in s 54. As for ‘in the person’s own wrong’, which does, I suggest that it simply be omitted. It is obsolete.

The National Committee’s view

Retention of the distinction between formal and informal administration

29.271 The National Committee notes that one respondent suggested that the model legislation should abolish the distinction between formal and informal administration.

29.272 The provisions recommended in this chapter will facilitate the administration of small estates and minimise the need to obtain a grant. However, these provisions will not be suitable for the administration of all estates. In larger estates, or estates where there may be an issue about the validity of a will or the entitlement of the person seeking to administer the estate to do so, the provisions recommended elsewhere in this Report (for example, the provisions dealing with the effect of revocation on acts done under a grant) provide certainty for the personal representative, beneficiaries and third parties dealing with the personal representative.

643 Submission 1.

644 Submission 14.

645 Submission 8.

646 Submission 15.

647 Submission 12.

29.273 Accordingly, the National Committee is of the view that the model legislation should retain the current distinction between formal and informal administration.

The position of persons acting informally

29.274 In the National Committee's view, the model legislation should include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld). That provision, which has corresponding provisions in the ACT and Victoria, clarifies the extent to which a person administering an estate without the authority of a grant is liable to account for estate assets.

29.275 However, the model provision should be framed to avoid the reference to an 'executor in the person's own wrong', which presently appears in section 54(1) of the *Succession Act 1981* (Qld). Although that expression (which is also used in the current English, ACT and Victorian provisions⁶⁴⁸) is preferable to 'executor *de son tort*', the National Committee considers that it is possible for the model provision to be drafted in a way that is more accessible to users of the legislation, but that retains the current meaning of section 54(1) of the Queensland legislation. In this respect, the National Committee agrees with the respondents who favoured an alternative to that expression.

29.276 Section 54(1) of the *Succession Act 1981* (Qld) is concerned with the liability of a person without a grant who nevertheless 'obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration, or effects the release of any debt or liability due to the estate of the deceased'. It provides that such a person is to be 'charged as executor in the person's own wrong' to the extent stated in the provision, which effectively limits the person's liability in that capacity to the assets received by the person or the debts released, after deducting any payments that might properly have been made by a personal representative to whom a grant is made.

29.277 As explained earlier in this chapter, the distinguishing feature of the liability of an executor *de son tort* is that the person's liability to account is limited to what he or she has received, and an executor *de son tort* cannot be required to account on the basis of wilful default.⁶⁴⁹

29.278 If the model provision omits the reference to a person being 'charged as executor in the person's own wrong', it is important that the provision still makes it clear, by some other expression, that it is the person's liability to account for estate assets that is the subject of the provision. The National Committee is concerned that, if the model provision simply provides that the

648 *Administration of Estates Act 1925* (UK) s 28; *Administration and Probate Act 1929* (ACT) s 74A(b); *Administration and Probate Act 1958* (Vic) s 33(1).

649 See [29.228] above.

person is liable to the prescribed extent, it may have the effect of limiting other ways in which the person could potentially be liable.

29.279 The National Committee is therefore of the view that the model provision should provide that a person to whom the section applies is liable to account for estate assets to the extent of the estate obtained, received or held by the person, or the debt released by the person. The model provision should also provide that the person's liability is reduced to the extent of any payment made by the person that might properly be made by a personal representative to whom a grant is made.

29.280 The National Committee notes that, despite the similarity in terms of the existing provisions, the section heading for section 54 of the *Succession Act 1981* (Qld) is described in terms of protection, while section 33 of the *Administration and Probate Act 1958* (Vic) refers to the person's liability, and section 74A of the *Administration and Probate Act 1929* (ACT) refers to the fraudulent obtaining or keeping of property.

29.281 Although all three provisions deal with the liability of a person who obtains, receives or holds any estate property, they also prescribe the limits of the person's liability — namely, that the person is liable only to the extent of assets that come into the person's hands or the debts released and that deductions may be made for payments that might properly have been made by the personal representative. In that sense, the provisions also provide a degree of protection for the person.

29.282 In recognition of these two aspects of the model provision, the section heading for the provision should be 'Persons acting informally'.

RATIFICATION OF ACTS BY PERSONAL REPRESENTATIVE

Introduction

29.283 The *Succession Act 1981* (Qld) contains a provision dealing with the ratification by a personal representative of acts done on behalf of the estate by another person. Section 54(3) provides:

54 Protection of persons acting informally

...

- (3) A personal representative may ratify and adopt any act done on behalf of the estate by another if the act was one which the personal representative might properly have done himself or herself.

29.284 No other Australian jurisdiction has an equivalent provision.

29.285 However, the Law Reform Commission of Western Australia has recommended that the *Administration Act 1903* (WA) should be amended to

include a provision to the effect of section 54(3) of the *Succession Act 1981* (Qld).⁶⁵⁰

Discussion Paper

29.286 In the Discussion Paper, the National Committee expressed the view that a personal representative should be able to ratify an act done by a person acting without a grant if the act was otherwise done properly.⁶⁵¹ It therefore proposed that the model legislation should include a provision to the effect of section 54(3) of the *Succession Act 1981* (Qld).⁶⁵²

Submissions

29.287 The National Committee's proposal to include a provision to the effect of section 54(3) of the *Succession Act 1981* (Qld) was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁶⁵³

The National Committee's view

29.288 The model legislation should include a provision to the effect of section 54(3) of the *Succession Act 1981* (Qld), so that it is clear that a personal representative may ratify an act done by another person on behalf of the estate, provided the act is one that the personal representative might properly have done.

PAYMENTS BY THIRD PARTIES WITHOUT PRODUCTION OF A GRANT

Existing legislative provisions

29.289 As noted earlier in this chapter, some financial institutions have a policy of making payments under a particular amount without the production of a grant, although they will sometimes require an indemnity to be given by the payee.⁶⁵⁴

29.290 The administration legislation in South Australia, Victoria and Western Australia includes provisions to facilitate the payment of particular amounts that

⁶⁵⁰ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.10].

⁶⁵¹ *Administration of Estates Discussion Paper* (1999) QLRC 156; NSWLRC [10.43].

⁶⁵² *Ibid*, QLRC 156; NSWLRC 222 (Proposal 66).

⁶⁵³ Submissions 1, 8, 11, 12, 14, 15.

⁶⁵⁴ See [29.231] above.

may be owing to a deceased estate. These provisions give certain persons (employers, Government hospitals and banks) statutory protection in respect of specified payments, even though the person to whom the payment is made is not acting under the authority of a grant of probate or letters of administration.

29.291 The protection given by these provisions avoids the need for the employer, hospital or bank to require an indemnity from the person to whom the payment is made. However, the current provisions are fairly limited in their operation by reason of the categories of persons to whom the provisions apply, the specific nature of the permitted payments, and the small monetary values prescribed by the provisions.

South Australia

29.292 In South Australia, section 71 of the *Administration and Probate Act 1919* (SA) provides:

71 Payment without production of probate or letters of administration

- (1) Where a Government employee dies and immediately before his death a sum not exceeding two thousand dollars was owing to him by the Government or by a person or authority representing the Government the Treasurer may in his discretion direct that such sum shall be paid to the surviving spouse or domestic partner of the deceased or to any other person to whom the Treasurer deems it just to pay it, or that such sum shall be divided among any of such persons.
- (1a) Where a patient in a Government hospital dies and immediately before his death money or other property (not exceeding in amount or value two thousand dollars) was held on his behalf by the hospital, the Treasurer may, in his discretion, direct that the money or property be paid or delivered to the surviving spouse or domestic partner of the deceased, or to any other person who is, in the opinion of the Treasurer, entitled to it, or that the money or property be divided among any such persons.
- (2) The Treasurer may refuse to give a direction under this section unless such indemnities or undertakings as he thinks necessary are given.
- (3) A person shall not have a claim against the Crown, the Treasurer, or any other person representing the Crown in respect of the payment of money or the delivery of property pursuant to this section; but nothing in this section shall relieve a person receiving money paid or property delivered under this section from any liability to account for or apply that money or property in accordance with law.
- (4) In this section—

Government employee means a person employed in the service of the Crown whose remuneration is paid out of money under the control of the Treasurer;

Government hospital means an institution declared by the Treasurer by notice in the Gazette to be a Government hospital for the purposes of this section.

29.293 This provision is quite limited in its operation. Section 71(1) applies where a Government employee has died, and the employee, immediately before his or her death, was owed a sum not exceeding \$2000. Section 71(1a) applies where a patient in a Government hospital dies and, immediately before the patient's death, the hospital held money or other property not exceeding \$2000 in value on his or her behalf.

29.294 In these circumstances, the Treasurer may direct that the money be paid, or the property be delivered, to the surviving spouse or domestic partner of the deceased, or to any other person who is, in the opinion of the Treasurer, entitled to it, or that the money or property be divided among any such persons.

29.295 The South Australian legislation also enables banks to pay out small amounts without the production of a grant, and to receive a valid discharge in respect of those payments. Section 72 of the *Administration and Probate Act 1919* (SA) provides:

72 Payment by ADI⁶⁵⁵ of sums not exceeding \$2 000

- (1) Whenever on the death of an ordinary customer or depositor the moneys standing to his credit on the books of any ADI do not exceed two thousand dollars, and probate of his will or letters of administration of his estate is or are not produced to the manager of the ADI within three months after the death of the customer or depositor, the manager of such ADI may pay such money to the spouse or domestic partner of such customer or depositor without any proof other than the death of such customer or depositor and the identity of the spouse or domestic partner as the case may be.
- (2) Every payment so made shall be valid, and be an effectual release to the ADI against all claims and demands on account thereof.
- (3) The next of kin, legatees, executors, or administrators of the deceased customer or depositor shall have all such remedies against the persons to whom such moneys were paid as they would have had against the ADI if such payment had not been made by the ADI as aforesaid. (note added)

29.296 This provision applies only if the amount standing to the credit of the deceased does not exceed \$2000.

Victoria

29.297 Section 32 of the *Administration and Probate Act 1958* (Vic) also deals with payments by employers of amounts owed to the estate of an employee

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Acts Interpretation Act 1915 (SA) s 4(1) defines 'ADI' to mean 'an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cwth)'.

who has died. It has a broader operation than section 71(1) of the *Administration and Probate Act 1919* (SA), as it is not restricted to payments made by government employers, but applies to employers generally. However, it still contains a significant restriction in that it applies only if the payment does not exceed \$12 500 and the employer is satisfied that the net value of the deceased's estate does not exceed \$25 000.

29.298 Section 32 provides:

32 Payment or transfer by employer of moneys etc held on account of deceased employee

(1) Where—

- (a) an employee has died (whether before or after the commencement of this Act) and his employer holds moneys or other personal property on account of the employee; and
- (b) the employer is satisfied by statutory declaration that the value of the estate of the employee after payment of debts and testamentary expenses (if any) will not exceed \$25 000—

the employer may, without requiring the production of probate or letters of administration, pay or transfer, to the surviving partner of the deceased employee or child of the deceased employee or of the deceased employee's partner or to any other person appearing to be entitled to the property of the deceased employee, such moneys or personal property to an amount not exceeding in the aggregate \$12 500.

- (2) A receipt signed by any person above the age of sixteen years to whom money or property is paid or transferred by an employer in the bona fide exercise of the powers conferred by this section shall be a complete discharge to the employer of all liability in respect of moneys or property so paid or transferred.
- (3) Nothing in this section shall prejudice or affect any right or remedy of any person entitled under the will of the deceased employee or under the law relating to the disposition of estates of deceased persons to recover any money or property paid or transferred from the person to whom it was paid or transferred by the employer under the powers conferred by this section.

29.299 Commentators on the Victorian legislation are of the view that, because this provision refers to an 'employer', it is unlikely that it would apply to the trustees of a superannuation fund.⁶⁵⁶

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K Collins, R Phillips and C Sparke, *Wills Probate & Administration Vic* (LexisNexis online service) [s 32.5] (at 20 February 2009).

Western Australia

29.300 The administration legislation in Western Australia, like that in South Australia, enables a bank, in certain situations, to receive a valid discharge when it pays out a small amount that stands to the credit of a deceased person.

29.301 Section 139 of the *Administration Act 1903 (WA)* provides:

139 Deposits not exceeding prescribed amount in any ADI may be paid to widow or next of kin without probate or administration

(1) On the death of any person leaving a sum of money not exceeding the amount of \$1 200, or such other amount as may for the time being be declared by proclamation, standing to his credit in any ADI if no probate or administration is produced to that ADI within one month of the death of the deceased person, and no notice in writing of any will and of intention to prove it or of an intention to apply for administration is given to the ADI within that period, the ADI may apply that sum of money—

- (a) in payment of the funeral expenses of the deceased person, or in reimbursing any person who has paid those expenses, and in payment of the balance, if any, to any person who appears to the satisfaction of the manager of the ADI to be the widower, widow, parent or child of the deceased person or a person who was living as a de facto partner of the deceased person immediately before the deceased person's death; or
- (b) in payment to such other persons or for such other purposes as may be declared and authorised by proclamation from time to time,

and payment of that sum of money accordingly shall be a valid discharge to the ADI against the claims of any other person whomsoever.

(2) In subsection (1)—

“ADI” means authorised deposit-taking institution as defined in section 5 of the *Banking Act 1959* of the Commonwealth.

29.302 Under section 139(1), the maximum amount that may presently be paid is \$6000.⁶⁵⁷ That amount was set in 1983.⁶⁵⁸ The Law Reform Commission of Western Australia and, more recently, the Probate Rules Committee of Western Australia have recommended that this amount be increased to \$15 000 to allow for inflation.⁶⁵⁹

657 Western Australia, *Government Gazette*, No 100 of 1983, 30 December 1983, 5015.

658 Ibid.

659 Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.21]; Probate Rules Committee (WA), *Final Report on the Revision of the Non-contentious Probate Rules 1967 of WA*, 10 June 2002 (9.2).

29.303 Commentators on the Western Australian provision have suggested that section 139 should be amended to apply to payments by credit unions.⁶⁶⁰

29.304 In its 1990 Report on the *Administration Act 1903* (WA), the Law Reform Commission of Western Australia observed that section 139 of that Act could apply to an estate that has funds deposited in more than one bank, and that a 'small estate for purposes of section 139 might have a total value of tens of thousands of dollars represented by several small deposits'.⁶⁶¹ The Commission noted that one commentator on its draft Report had argued that there should be 'an upper limit applied to the total value of funds falling within section 139', on the basis that the 'system established by section 139 could be open to abuse'.⁶⁶² However, the Western Australian Commission rejected this approach.⁶⁶³

A difficulty with the suggestion is that whenever application was made under section 139 to a financial institution for the release of money standing to the credit of the deceased in that institution it would be necessary to satisfy the institution that all money left by the deceased in that and any other institution did not exceed the upper limit. Although this could be done by a statutory declaration made by the applicant, a statutory declaration would be required in every case in which it was sought to have funds released under section 139, even though in fact they might be the only funds left by the deceased. The Commission doubts whether the additional work involved in such a case can be justified and has decided not to adopt the suggestion.

Discussion Paper

29.305 In the Discussion Paper, the National Committee commented that provisions of this kind could be a useful adjunct to the informal administration of estates, but suggested that the present monetary limits found in these provisions might detract from their usefulness.⁶⁶⁴

29.306 The National Committee considered that 'it would be more appropriate for provisions of this kind to be located in the legislation to which they directly relate, rather than be included in the model legislation'.⁶⁶⁵ It therefore proposed that the model legislation should not include provisions to the effect of section 71(1) of the *Administration and Probate Act 1919* (SA) or section 32 of the *Administration and Probate Act 1958* (Vic). It suggested instead that individual

⁶⁶⁰ JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [1855.10] (at 21 February 2009). See also Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.22].

⁶⁶¹ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.23].

⁶⁶² Ibid.

⁶⁶³ Ibid.

⁶⁶⁴ *Administration of Estates Discussion Paper* (1999) QLRC 160; NSWLRC [10.56].

⁶⁶⁵ Ibid, QLRC 160; NSWLRC [10.57].

jurisdictions that consider these provisions to be desirable should include them in the substantive legislation to which they relate.⁶⁶⁶

Submissions

29.307 The National Committee's proposal not to include provisions authorising particular types of payments was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales and the ACT Law Society.⁶⁶⁷ The Public Trustee of New South Wales commented that any legislation to authorise such payments should ensure that the payer acts with due care.⁶⁶⁸

29.308 The Trustee Corporations Association of Australia, however, disagreed with the National Committee's proposal. In its view, the model legislation 'should make specific provision for certain outstanding wage payments owing to employees, to be made by employers to appropriate persons, without requiring the production of probate or letters of administration'.⁶⁶⁹

29.309 The New South Wales Law Society, although not directly addressing the National Committee's proposal, suggested that, if the South Australian and Victorian provisions were adopted, they should refer to a figure not exceeding a 'prescribed amount'. It was suggested that this would allow the relevant amounts to reflect current economic conditions.⁶⁷⁰

29.310 An academic expert in succession law suggested a slightly different approach. Although he was of the view that the specific provisions discussed above should not be included in the model legislation, he suggested that consideration should be given to the inclusion of a more general provision.⁶⁷¹

perhaps there might be a general provision allowing debtors of small amounts, say less than \$500, to pay a surviving spouse or a child of the deceased. The debtor would be indemnified and the payee would be accountable for what he or she has received. This is perhaps implicit in our acceptance of informal actions. Perhaps it should be made explicit — ie in s 54(1) by the addition of words such as 'and the release is effective for any person making a payment in discharge of a debt (of less than \$???) in good faith'.

29.311 The New South Wales Law Society also suggested that the model legislation might include a provision of general application.⁶⁷²

666 Ibid, QLRC 160; NSWLRC 228 (Proposal 67).

667 Submissions 1, 8, 11, 14.

668 Submission 11.

669 Submission 6.

670 Submission 15.

671 Submission 12.

672 Submission 15.

an ambit provision might be made in substantive legislation allowing for payment by an employer, the trustee of a superannuation or pension fund, an authorised financial institution, a trustee company, a legal practitioner or other body, company or person holding funds to which the deceased person or his/her estate is entitled, up to a prescribed amount, without the need for production of a formal grant of Probate or Administration.

29.312 As noted earlier in this chapter, another respondent was of the view that any third party who made a payment to a person administering an estate should have the same protection as if that payment had been made to a person appointed under a grant.⁶⁷³

The National Committee's view

A provision of general application

29.313 In the National Committee's view, the specific nature of the provisions considered above significantly reduces their potential to facilitate the informal administration of small estates. The National Committee therefore favours a provision of general application, rather than one that applies only to particular categories of persons who are holding money or other personal property of a deceased person. As the proposed provision is to apply generally, it is appropriate for it to be included in the model legislation.

29.314 Subject to the matters set out below, the model provision should broadly follow the structure of section 32 of the *Administration and Probate Act 1958* (Vic), which affords protection in respect of certain payments and transfers made in good faith to specified persons. However, unlike the Victorian provision, the model provision should not be restricted to payments and transfers made by the employer of a deceased person.

The value of the money or personal property paid or transferred

29.315 With the exception of the Victorian provision, the amounts that may be paid under the provisions discussed above are very small (\$2000 in South Australia and \$6000 in Western Australia). The National Committee considers that these amounts are now too small and that the model provision should apply if a person holds money or other personal property not exceeding \$15 000 in value.

29.316 By framing the model provision in terms of the maximum value of the amount held by the person, rather than the size of the individual permitted payment, it will not be possible for a person who holds a large sum of money, or property having a large value, to pay or transfer that money or property by making a series of payments. If, however, several different persons individually hold money or personal property having a value not exceeding \$15 000 (such as money deposited with several different banks), it will be possible for each of

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See [29.259]–[29.263] above.

those persons to pay the money or transfer the personal property without requiring the production of a grant.

29.317 Although section 32 of the *Administration and Probate Act 1958 (Vic)* applies only if the net value of the estate does not exceed \$25 000, the National Committee is of the view that the application of the model provision should not be further restricted by reference to the total value of the estate. In its view, the restriction proposed above is sufficient. By omitting the restriction found in the Victorian provision, it is not necessary to require the person making the payment or transferring the personal property to be satisfied that the value of the estate does not exceed a particular amount.

29.318 The inclusion of the model provision will not prevent a person who holds money or personal property of a deceased person from making a payment, or transferring property, that exceeds the amount of \$15 000. However, if a person makes a payment or transfers property exceeding that amount, the person will not be discharged from his or her liability to the estate in respect of the money or property.

The persons to whom the money or personal property may be paid or transferred

29.319 The model provision should follow section 32(1) of the *Administration and Probate Act 1958 (Vic)* and provide that the money or personal property may be paid or transferred to:

- a surviving spouse of the deceased (which is defined in the model legislation to include a person who was in a 'domestic partnership' with the deceased);
- a child of the deceased; or
- any other person who appears to be entitled to the money or personal property (which would include, for example, a person named as executor in a will that had not been admitted to probate).

29.320 If the person making the payment or transferring the property does so otherwise than in accordance with the model provision (for example, by making a payment or transferring property to a person other than those specified in the model provision), his or her liability to the estate in respect of the money or property will not be discharged.

Discharge of liability

29.321 Although it would obviously be prudent for the person making the payment or transfer to obtain a receipt from the person to whom the payment or transfer is made, the National Committee is of the view that it should be the payment or transfer itself that discharges the liability of the person making the payment or transfer.

29.322 However, the model provision should not afford protection to the person making the payment or transfer if the person to whom the payment or transfer is made would not be capable of giving a valid discharge. Accordingly, any payment or transfer under the model provision must be made to a person with full legal capacity.

29.323 In these respects, the model provision differs from section 32(2) of the *Administration and Probate Act 1958* (Vic), which permits a person above the age of 16 to give a valid receipt and is silent as to the effect of any legal disability other than age.

Enforcement of remedies

29.324 Section 32(3) of the *Administration and Probate Act 1958* (Vic) provides that the section does not prejudice or affect any right or remedy of any person entitled under the deceased's will or under the law relating to the disposition of estates of deceased persons (which would include the relevant intestacy rules) to recover any money or property paid or transferred from the person to whom it was paid or transferred under the powers conferred by that section. The model provision should include a provision to that effect. In addition, the model legislation should provide that it does not affect the right of a person who has a claim to, or against, the deceased person's estate to enforce a remedy for the person's claim against a person to whom any money or property was paid or transferred under the powers conferred by the model provision.

RECOMMENDATIONS

Election to administer a small estate

29-1 The model legislation should include provisions to the general effect of section 110B of the *Administration and Probate Act* (NT),⁶⁷⁴ except that:

- (a) the model provisions should refer to a 'professional administrator', rather than to a 'professional personal representative',⁶⁷⁵

⁶⁷⁴ See [29.25]–[29.26], [29.47] above.

⁶⁷⁵ See [29.39] above.

- (b) in addition to the requirement that no grant has been made in the jurisdiction of the deceased person's estate, the model legislation should also require that no interstate grant has been made of the deceased person's estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3;⁶⁷⁶
- (c) the provision that is based generally on section 110B(1) of the *Administration and Probate Act* (NT) should be expressed to apply where the professional administrator would otherwise be entitled to apply for a grant or, in the case of the public trustee, an order to administer;⁶⁷⁷
- (d) the provision that is based on section 110B(1)(a) of the *Administration and Probate Act* (NT) should not refer to a specific amount, but should refer instead to the net amount of \$100 000, indexed to annual increases in the consumer price index (the '*prescribed amount*');⁶⁷⁸
- (e) the provision that is based on section 110B(2)(d) of the *Administration and Probate Act* (NT) should not refer to 'the testator's last will or an exemplification of the last will', but should refer instead to 'the testator's last will or a certified copy of the testator's last will';⁶⁷⁹
- (f) the model legislation should not require a professional administrator who files an election to administer to give public notice of that fact, and should therefore not include a provision to the effect of section 110B(4) of the *Administration and Probate Act* (NT);⁶⁸⁰
- (g) the provision that is based on section 110B(5) of the *Administration and Probate Act* (NT):⁶⁸¹
 - (i) should not refer to a specific amount, but should refer instead to an amount that is more than 150 per cent of the prescribed amount; and

676 See [29.82] above.

677 See [29.80]–[29.81] above.

678 See [29.62]–[29.63], [29.66] above.

679 See [29.86]–[29.87] above.

680 See [29.99]–[29.100] above.

681 See [29.65] above.

(iii) should provide, in the provision based on section 110B(5)(b), that the professional administrator must apply for a grant or, where applicable, an order to administer; and

(h) the model legislation should not include a provision to the effect of section 110B(6) of the *Administration and Probate Act (NT)*.⁶⁸²

See Administration of Estates Bill 2009 cll 325–329.

29-2 The model legislation should include provisions to the general effect of section 110C of the *Administration and Probate Act (NT)*,⁶⁸³ except that:

(a) the model provisions should refer to a ‘professional administrator’, rather than to a ‘professional personal representative’;

(b) in addition to the requirement that no grant has been made in the jurisdiction of the deceased person’s unadministered estate, the model legislation should also require that no interstate grant has been made of the deceased person’s unadministered estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3;⁶⁸⁴

(c) the provision that is based generally on section 110C(1) of the *Administration and Probate Act (NT)* should be expressed to apply where the professional administrator would otherwise be entitled to apply for a grant or, in the case of the public trustee, an order to administer;⁶⁸⁵

682 See [29.62]–[29.63] above.

683 See [29.114]–[29.116] above.

684 See [29.115]–[29.116] above.

685 See [29.114]–[29.116] above.

- (d) the provision that is based on section 110C(1)(b) of the *Administration and Probate Act* (NT) should not refer to a specific amount, but should refer instead to the amount of \$100 000, indexed to annual increases in the consumer price index (the '*prescribed amount*');⁶⁸⁶
- (e) the provision that is based on section 110C(3) of the *Administration and Probate Act* (NT) should deal only with the effect of the filing of an election to administer on the death of the person to whom representation of the estate was last granted;⁶⁸⁷
- (f) the model legislation should provide additionally that, on the filing of an election to administer because of the incapacity of the person to whom representation of the estate was last granted, the professional administrator is taken to be the administrator of the part of the estate left unadministered as if he or she had been granted letters of administration of the unadministered estate during the incapacity of the person to whom representation was last granted;⁶⁸⁸
- (g) the provision that is based on section 110C(4) of the *Administration and Probate Act* (NT):⁶⁸⁹
 - (i) should not refer to a specific amount, but should refer instead to an amount that is more than 150 per cent of the prescribed amount; and
 - (iii) should provide, in the provision based on section 110C(4)(b), that the professional administrator must apply for a grant of the unadministered estate or, where applicable, an order to administer; and
- (h) the model legislation should not include a provision to the effect of section 110C(6) of the *Administration and Probate Act* (NT).⁶⁹⁰

See Administration of Estates Bill 2009 cll 325, 330–333.

686

Ibid.

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See [29.117] above.

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Ibid.

689

See [29.118] above.

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See [29.115]–[29.116], [29.118] above.

29-3 The model legislation should define ‘*professional administrator*’ to mean:⁶⁹¹

- (a) the public trustee;
- (b) a trustee company within the meaning of the [*insert name of legislation in jurisdiction*]; or
- (c) a legal practitioner.

See Administration of Estates Bill 2009 sch 3 dictionary (definition of ‘professional administrator’).

Administration of small estates without a grant or the filing of an election to administer

29-4 It is unnecessary for the model legislation to include a provision for the administration of small estates without a grant or the filing of an election to administer.⁶⁹²

Costs of administering an estate under the authority of an election to administer

29-5 The model legislation should include a provision to the effect of section 110D of the *Administration and Probate Act (NT)*, except that the model provision should omit the words ‘as in force immediately before the commencement of this section’, which appear in section 110D(3) of that Act.⁶⁹³

See Administration of Estates Bill 2009 cl 334.

Transfer of real property

29-6 Individual jurisdictions should consider implementing provisions to the effect of sections 111 and 112 of the *Land Title Act 1994 (Qld)*.⁶⁹⁴

Liability and protection of persons acting informally

29-7 The model legislation should include a provision to the effect of section 54(1) of the *Succession Act 1981 (Qld)*, except that:⁶⁹⁵

⁶⁹¹ See [29.38]–[29.39] above.

⁶⁹² See [29.179]–[29.180] above.

⁶⁹³ See [29.192]–[29.193] above.

⁶⁹⁴ See [29.219]–[29.221] above.

⁶⁹⁵ See [29.274]–[29.282] above.

- (a) the provision should provide that the relevant person 'is liable to account for estate assets' to the extent prescribed by section 54(1), instead of providing that the person is to be 'charged as executor in the person's own wrong'; and
- (b) the title of the section should be 'Persons acting informally'.

See Administration of Estates Bill 2009 cl 435.

Ratification of acts by personal representative

29-8 The model legislation should include a provision to the effect of section 54(3) of the *Succession Act 1981 (Qld)*.⁶⁹⁶

See Administration of Estates Bill 2009 cl 411.

Payments by third parties without production of a grant

29-9 The model legislation should provide that, if any person holds money or personal property on account of a deceased person not exceeding \$15 000 in value, the person may, without requiring production of probate or letters of administration, pay the money or transfer the property to any of the following persons who has full legal capacity:⁶⁹⁷

- (a) the surviving spouse of the deceased person (which is to be defined to include a person who was in a 'domestic partnership' with the deceased person);
- (b) a child of the deceased person; or
- (c) any other person appearing to be entitled to the property of the deceased person.

29-10 The model legislation should provide that, if a person in good faith exercises the power conferred by the provision that gives effect to Recommendation 29-9, the payment or transfer is a complete discharge to the person of all liability in respect of the money or property so paid or transferred.⁶⁹⁸

696 See [29.288] above.

697 See [29.313]–[29.320] above.

698 See [29.321]–[29.323] above.

29-11 The model legislation should provide that nothing in the provision that gives effect to Recommendations 29-9 and 29-10 is to affect the right of any person who has an entitlement to, or against, the deceased person's estate to enforce a remedy for the person's claim against a person to whom a payment or transfer has been made under the powers conferred by that provision.⁶⁹⁹

See Administration of Estates Bill 2009 cl 434.

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See [29.324] above.

Chapter 30

Resealing: an overview

INTRODUCTION	176
RESEALING OF GRANTS	177
THE NEED FOR UNIFORMITY	177
RELATIONSHIP BETWEEN RESEALING PROPOSALS AND PROPOSALS FOR AUTOMATIC RECOGNITION OF AUSTRALIAN GRANTS	179

INTRODUCTION

30.1 When a person dies, his or her estate must be administered according to law. In particular, the person's assets must be collected, the person's debts and liabilities must be paid, and any remaining assets must be distributed to those persons who are entitled under the deceased's will or under the relevant intestacy rules. Many people die leaving assets not only in the State or Territory in which they have their permanent home, but also in another State or Territory, or in another country. In addition to leaving assets in another jurisdiction, people sometimes die leaving claims by or against them (actual or potential) in another jurisdiction.

30.2 As a general rule, a grant of probate or letters of administration does not have effect outside the jurisdiction in which it was made.⁷⁰⁰ Consequently, the fact that a personal representative has been appointed under a grant made in one jurisdiction does not of its own force:

- give the personal representative any authority to deal with the estate of the deceased in another jurisdiction;⁷⁰¹
- confer on the personal representative a right to claim a payment to which the deceased was entitled in another jurisdiction;⁷⁰² or
- allow the personal representative to sue⁷⁰³ or be sued⁷⁰⁴ on behalf of the

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In *Re Butler* [1969] QWN 48, Matthews J held (at 107) that s 118 of the *Australian Constitution* did not have the effect that a grant of letters of administration made by the Supreme Court of Queensland would be effective to give a right of action, in New South Wales, against an administrator appointed under the Queensland grant:

No doubt, if the occasion arose in a relevant sense, a court in New South Wales would give full faith and credit to an administrator ad litem in Queensland for the purposes of a suit in this State but, however widely one construes the section, I do not think it could be so applied as to give in a State, right of action against one who did not legally exist in that State.

However, in view of s 118 of the *Australian Constitution* and s 185 of the *Evidence Act 1995* (Cth), a court of an Australian State or Territory will be reluctant to exercise its discretion to refuse an application for the resealing of a grant made elsewhere in Australia: see *The Estate of Natrass* (Unreported, Supreme Court of New South Wales, Powell J, 29 October 1992). Section 185 of the *Evidence Act 1995* (Cth) (Faith and credit to be given to documents properly authenticated) replaced s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth).

For a discussion of the exceptions to the principle that a grant does not have effect outside the jurisdiction in which it is made, see Sir L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 2, [26–037]–[26–038].

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Blackwood v The Queen (1882) 8 App Cas 82, 92 (PC); *The New York Breweries Co, Ltd v The Attorney-General* [1899] AC 62.

702

Arnot v Chapman (1884) 5 LR (NSW) Eq 66; *Re Ricketson* (1917) 17 SR (NSW) 233.

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Finnegan v Cementation Co Ltd [1953] 1 QB 688.

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Electronic Industries Imports Pty Ltd v Public Curator of the State of Queensland [1960] VR 10; *Cash v The Nominal Defendant* (1969) 90 WN (Pt 1) (NSW) 77, 78 (Brereton J); *Boyd v Leslie* [1964] VR 728; *Degazon v Barclays Bank International Ltd* [1988] 1 FTLR 17; *Re the Estate of Webb* (Unreported, Supreme Court of South Australia, Mohr J, 2 August 1991).

estate in another jurisdiction.⁷⁰⁵

30.3 Consequently, it may be necessary for a personal representative to obtain a grant in each jurisdiction in which the deceased left assets.

30.4 These rules govern not only the effect within Australia of a grant made overseas, but may also govern the effect within an Australian State or Territory of a grant made in another State or Territory.

RESEALING OF GRANTS

30.5 Legislation in each Australian State and Territory enables grants made in other Australian jurisdictions or in certain foreign countries to be 'resealed' in the jurisdiction in question.⁷⁰⁶ Once a grant has been resealed in a particular jurisdiction — that is, certified by the competent probate authority in that jurisdiction — the grant is as effective as if it were an original grant obtained in that jurisdiction.⁷⁰⁷ This overcomes the need for the personal representative appointed under the interstate or foreign grant to obtain an original grant in the jurisdiction.

THE NEED FOR UNIFORMITY

30.6 The resealing provisions in the Australian States and Territories — like the English provisions on which they were based⁷⁰⁸ — provide that a grant, once resealed, is as effective as if it were an original grant made in that

⁷⁰⁵ In some circumstances, a person (including a personal representative appointed in another jurisdiction) who intermeddles with the estate in a particular jurisdiction may become liable to suit in that jurisdiction as an 'executor de son tort' (executor of his own wrong). This may occur where, for example, the person deals with the assets in the jurisdiction without taking out a local grant (*Cash v The Nominal Defendant* (1969) 90 WN (Pt 1) (NSW) 77, 79 (Brereton J)); transfers assets to a foreign executor who has not taken out a local grant (*The New York Breweries Co, Ltd v The Attorney-General* [1899] AC 62; *Inland Revenue Commissioners v Stype Investments (Jersey) Ltd* [1982] 1 Ch 456); or, when sued on behalf of the estate, raises defences that would usually be raised only by a true personal representative (*Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240, 248 (Aylesworth, Gibson and Morden JJA)). The liability of an executor de son tort is generally limited to assets that have come into his or her hands in the jurisdiction in which the proceedings are brought: see *Cash v The Nominal Defendant* (1969) 90 WN (Pt 1) (NSW) 77, 81 (Brereton J); *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240, 249–50 (Aylesworth, Gibson and Morden JJA).

⁷⁰⁶ *Administration and Probate Act 1929* (ACT) ss 79A–80C; *Probate and Administration Act 1898* (NSW) ss 107–110; *Administration and Probate Act* (NT) ss 111–114; *British Probates Act 1898* (Qld); *Administration and Probate Act 1919* (SA) ss 17–20; *Administration and Probate Act 1935* (Tas) ss 47A–53; *Administration and Probate Act 1958* (Vic) ss 80–88; *Administration Act 1903* (WA) ss 61–62.

⁷⁰⁷ See Chapter 34 below.

⁷⁰⁸ Legislation enabling the resealing of grants was first enacted in England in the late 1850s: see *Probates and Letters of Administration Act (Ireland) 1957* (Eng) ss 94, 95; *Confirmation of Executors (Scotland) Act 1858* (Eng) ss 12–14. As a result of these Acts, a grant made in one part of the United Kingdom could be resealed in another part of the United Kingdom. In those circumstances, the resealed grant was effective as if it had been made in that part of the United Kingdom.

Later legislation extended the principle of resealing to grants made in countries outside the United Kingdom, both within the Commonwealth and elsewhere: *Colonial Probates Act 1892* (UK); *Foreign Jurisdiction Act 1890* (UK) s 5, sch 1; *Foreign Jurisdiction Act 1913* (UK); *Colonial Probates (Protected States and Mandated Territories) Act 1927* (UK). For a discussion of these Acts see *Halsbury's Laws of England* (4th ed) vol 17(2), [245].

jurisdiction.⁷⁰⁹ There are, however, differences as to quite a few matters, including:

- the instruments that may be resealed;⁷¹⁰
- the countries whose grants may be resealed;⁷¹¹
- the persons who may apply for the resealing of a grant;⁷¹² and
- the extent to which the position of a person acting under a resealed grant is assimilated to that of a personal representative appointed under an original grant made in the resealing jurisdiction;⁷¹³ and
- the jurisdictional requirements for the resealing of a grant.⁷¹⁴

30.7 If the law in relation to resealing could be made uniform, it would simplify the task of a personal representative who was administering an estate that had assets located in more than one Australian jurisdiction.

30.8 Chapters 31 to 35 of this Report deal with various aspects of the resealing of grants.

30.9 In developing its recommendations in relation to resealing, the National Committee has given particular consideration to the earlier work of the Law Reform Commission of Western Australia, which culminated in that Commission's 1984 Report on the recognition of interstate and foreign grants.⁷¹⁵ Where relevant, the National Committee has also referred to the comments made by the State and Territory Probate Registrars when they considered the proposals contained in the Western Australian Commission's Report at a conference held in 1990.⁷¹⁶

30.10 The National Committee has also given particular consideration to the model resealing legislation developed on behalf of the Commonwealth

709 See Chapter 34 below.

710 See Chapter 31 below.

711 See Chapter 32 below.

712 See Chapter 33 below.

713 See Chapter 34 below.

714 See [3.47]–[3.61] in vol 1 of this Report.

715 See Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984).

716 See *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished).

Secretariat between 1975 and 1980 in an attempt to harmonise the laws in relation to the resealing of grants within the Commonwealth of Nations.⁷¹⁷

RELATIONSHIP BETWEEN RESEALING PROPOSALS AND PROPOSALS FOR AUTOMATIC RECOGNITION OF AUSTRALIAN GRANTS

30.11 In Chapter 38 of this Report, the National Committee has set out its proposals for a scheme for the automatic recognition of certain Australian grants. The National Committee has recommended that the scheme be implemented in two stages.

30.12 Under stage one, a grant made in the Australian jurisdiction in which the deceased person died domiciled is to be effective, without the need for resealing, as if it were a grant originally made in the enacting jurisdiction (being a jurisdiction that adopts the proposed scheme). When stage one is implemented, the resealing of Australian grants will effectively be limited to those grants where the deceased died domiciled overseas. This is because the National Committee has recommended that the automatic recognition afforded by stage one of its proposed scheme to a grant made in the Australian jurisdiction in which the deceased died domiciled obviates the need to provide for the resealing of grants made in relation to the wills or estates of people who have died domiciled in an Australian State or Territory.⁷¹⁸ If a deceased person has died domiciled in an Australian State or Territory, it will always be possible for a grant to be made that will be effective throughout Australia.

30.13 Under stage two, a grant made in *any* Australian jurisdiction will be effective without the need for resealing. The National Committee has therefore proposed that, when stage two is implemented, the resealing of grants will be restricted to grants made overseas.⁷¹⁹

30.14 Where the National Committee's proposals for the automatic recognition of certain Australian grants will affect the proposals in relation to

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A preliminary report on grants of probate and administration, prepared by Professors JD McClean and KW Patchett, was considered by the Commonwealth Law Ministers at Lagos, Nigeria, in 1975 and a further report by the same authors was considered by the Commonwealth Law Ministers at Winnipeg, Canada, in 1977: see Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Basseterre, St Kitts, 24–28 April 1978*, v (Introductory Note). A draft model Bill prepared by Professors McClean and Patchett was considered at a series of regional meetings involving Ministers and law officers of Commonwealth nations and territories held at Basseterre, St Kitts in 1978, Apia, Western Samoa in 1979 and Nairobi, Kenya in 1980: see Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held in Nairobi, Kenya 9–14 January 1980*, v (General Introductory Note).

As a result of these meetings, Professors McClean and Patchett prepared a revised version of the draft model bill, which was considered at the meeting of Commonwealth Law Ministers in Barbados in 1980: see Commonwealth Secretariat, *Meeting of Commonwealth Law Ministers, Barbados, 28 April–2 May, 1980* Appendix B (Draft Model Bill entitled Grants of Administration (Resealing) Act, 198–, Revised 1 February 1980). The Draft Bill included in that Report is reproduced in Appendix 4 to this Report.

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See [38.121]–[38.123] and Recommendation 38-9 below.

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See Recommendations 38-15 and 38-21(b) below.

resembling set out in the following chapters, specific consideration is given to the relationship between the two sets of proposals.

Chapter 31

Instruments that may be resealed

INTRODUCTION	182
GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION	182
The existing law	182
The National Committee's view.....	182
LETTERS OF ADMINISTRATION GRANTED FOR SPECIAL, LIMITED OR TEMPORARY PURPOSES.....	183
The existing law	183
Recommendation of the Law Reform Commission of Western Australia	184
Discussion Paper	184
Submissions	184
The National Committee's view.....	185
INSTRUMENTS THAT HAVE A SIMILAR EFFECT TO A GRANT OF PROBATE OR ADMINISTRATION MADE IN THE RESEALING JURISDICTION	185
The existing law	185
Commonwealth Secretariat Draft Model Bill	190
Recommendation of the Law Reform Commission of Western Australia	190
Discussion Paper	190
Submissions	190
The National Committee's view.....	191
ORDERS TO ADMINISTER.....	191
Introduction.....	191
Resealing: the existing law.....	193
Recommendation of the Law Reform Commission of Western Australia	196
Discussion Paper	196
Submissions	197
The National Committee's view.....	197
RESEALING OF AN EXEMPLIFICATION OF A GRANT OR AN ORDER TO ADMINISTER OR OTHER FORMAL EVIDENCE OF THE INSTRUMENT	198
Background	198
The National Committee's view.....	198
ELECTIONS TO ADMINISTER.....	199
Introduction.....	199
Resealing: the existing law.....	201
Recommendation of the Law Reform Commission of Western Australia	202
Discussion Paper	203
Submissions	203
The National Committee's view.....	203
RECOMMENDATIONS	206

INTRODUCTION

31.1 In this chapter, the National Committee examines which instruments may presently be resealed, and considers, in particular, whether the model legislation should provide for the resealing of:

- instruments that, in the jurisdiction in which they are issued, have a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction;
- orders to administer; and
- elections to administer.

GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION

The existing law

31.2 The legislation in all Australian jurisdictions provides for the resealing of grants of probate and letters of administration.⁷²⁰ The power to reseal a grant of probate includes the power to reseal a grant of double probate, which is simply a further grant of probate that runs concurrently with the original grant of probate.⁷²¹

The National Committee's view

31.3 The model legislation should provide that a grant of probate or letters of administration may be resealed.

31.4 Where there has been a grant of double probate, the model legislation should ensure that, for the purpose of the resealing provisions, the grant consists of the original grant and any further grant that runs concurrently with it. This will ensure that neither the original grant of probate, nor the grant of double probate, may be resealed without the resealing of the other grant.⁷²²

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Administration and Probate Act 1929 (ACT) s 80(2); Probate and Administration Act 1898 (NSW) s 107(1); Administration and Probate Act (NT) s 111(1); British Probates Act 1898 (Qld) s 4(1); Administration and Probate Act 1919 (SA) s 17; Administration and Probate Act 1935 (Tas) s 48(2); Administration and Probate Act 1958 (Vic) s 81(2); Administration Act 1903 (WA) s 61(1).

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See [35.46] below and, generally, the discussion of grants of double probate in Chapter 35 of this Report.

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Note that the practice of some courts, when making a grant of double probate, is to require the original grant to be brought into the registry, so that it can be bound as a single document with the grant of double probate: see note 1072 below. In a practical sense, this also avoids the risk of having one instrument resealed without the other.

LETTERS OF ADMINISTRATION GRANTED FOR SPECIAL, LIMITED OR TEMPORARY PURPOSES

The existing law

31.5 Letters of administration may be limited in several different ways: they may be limited ‘in respect of the time for which they are granted, or as to the property to which they extend, or as to the purposes for which they are granted’.⁷²³ When a limited grant is resealed, the limitation imposed in the jurisdiction in which the grant was originally made operates in the resealing jurisdiction.⁷²⁴

31.6 Although all jurisdictions provide for the resealing of letters of administration granted for special, limited or temporary purposes, there are differences between the jurisdictions in relation to the circumstances in which such grants may be resealed.

Australian Capital Territory, New South Wales, Northern Territory, Western Australia

31.7 In the ACT, New South Wales, the Northern Territory and Western Australia, the term ‘administration’ is defined in the legislation to include all letters of administration of the estate of a deceased person whether granted for general, special or limited purposes.⁷²⁵ Consequently, the provisions in these jurisdictions that provide for the resealing of letters of administration⁷²⁶ enable grants made for special or limited purposes to be resealed.

Queensland, South Australia, Tasmania

31.8 In Queensland, South Australia and Tasmania,⁷²⁷ limited grants of administration are also capable of being resealed, although restrictions apply. The rules in these jurisdictions provide that ‘special, limited or temporary grants’ may not be resealed except by order of a judge or, in South Australia, the registrar.⁷²⁸

723 AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [8.240]. For a discussion of the various types of limited grants see [4.210]–[4.271] in vol 1 of this Report.

724 *Re Bedford* [1902] QWN 63.

725 *Administration and Probate Act 1929* (ACT) s 2, dictionary; *Probate and Administration Act 1898* (NSW) s 3; *Administration and Probate Act* (NT) s 6(1); *Administration Act 1903* (WA) s 3.

726 See note 720 above.

727 In South Australia and Tasmania, the legislation also defines the term ‘administration’ to mean all letters of administration of deceased persons, whether granted for general, special or limited purposes: *Administration and Probate Act 1919* (SA) s 4; *Administration and Probate Act 1935* (Tas) s 3(1).

728 *Uniform Civil Procedure Rules 1999* (Qld) r 619; *The Probate Rules 2004* (SA) r 50.08; *Probate Rules 1936* (Tas) r 53.

Victoria

31.9 In Victoria, the definition of 'letters of administration' that applies for the purpose of the resealing provisions of the *Administration and Probate Act 1958* (Vic) is silent as to whether the term includes grants made for special or limited purposes.⁷²⁹ However, it would appear that, in the absence of any legislative restriction, special and limited grants may be resealed.⁷³⁰

Recommendation of the Law Reform Commission of Western Australia

31.10 The Law Reform Commission of Western Australia recommended that it should be possible for all grants of probate and administration, including grants made for special, limited or temporary purposes, to be resealed.⁷³¹

Discussion Paper

31.11 The preliminary view expressed in the Discussion Paper was that the recommendation made by the Western Australian Commission should be adopted, and that the relevant provision should be located in the model legislation.⁷³²

Submissions

31.12 The submissions received from the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia all agreed with the preliminary view that all grants of probate and administration, including grants made for special, limited and temporary purposes, should be capable of being resealed.⁷³³

31.13 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales and the Trustee Corporations Association of Australia also expressly endorsed the preliminary view that a provision to this effect should be located in the model legislation, rather than in court rules.⁷³⁴

729 *Administration and Probate Act 1958* (Vic) s 80. Although the term 'administration' is defined in s 5(1) of the Act to mean 'letters of administration whether general special or limited', that definition applies only to Part I of the Act. The resealing of foreign grants is dealt with in Part III of the Act.

730 See *In the Goods of Smith* [1904] P 114 where a limited grant, made by the Supreme Court of St Vincent, was resealed under the *Colonial Probates Act 1892* (UK).

731 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (7).

732 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 94. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.35].

733 Submissions R1, R2, R4, R5, R6.

734 Submissions R1, R2, R6.

The National Committee's view

31.14 The model legislation should provide that all letters of administration, including letters of administration granted for special, limited or temporary purposes, may be resealed.

31.15 In some jurisdictions, special, limited and temporary grants may not presently be resealed except by order of a judge or registrar.⁷³⁵ In the view of the National Committee, such a requirement is unnecessary. The procedure for the resealing of special, limited and temporary grants should be the same as for general grants. However, it is not necessary for the model legislation to provide expressly that a special, limited or temporary grant *may* be resealed without the order of a judge or registrar. Instead, those jurisdictions that have a court rule requiring the order of a judge or registrar should repeal that rule, so that there is no restriction on the operation of the model provision that will otherwise enable a grant of probate or letters of administration (including a grant made for a special, limited or temporary purpose) to be resealed.

INSTRUMENTS THAT HAVE A SIMILAR EFFECT TO A GRANT OF PROBATE OR ADMINISTRATION MADE IN THE RESEALING JURISDICTION

The existing law

31.16 As explained above, the legislation in all Australian States and Territories provides for the resealing of grants of probate and letters of administration. The extent to which any other type of instrument may be resealed in a particular jurisdiction depends on the definitions of 'probate' and 'administration' in that jurisdiction and on whether the legislation is otherwise expressed in terms that are sufficiently broad to apply to an instrument that has a similar effect to a grant of probate or letters of administration.

Australian Capital Territory, New South Wales, Northern Territory, Tasmania, Western Australia

31.17 The legislation in the ACT, New South Wales, the Northern Territory, Tasmania and Western Australia defines the terms 'probate' and 'administration' in almost identical terms.⁷³⁶ The New South Wales definitions are typical:⁷³⁷

735 See [31.8] above.

736 *Administration and Probate Act 1929* (ACT) s 2, dictionary; *Probate and Administration Act 1898* (NSW) s 3; *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act 1935* (Tas) s 3(1) (which refers to the opinion of a judge); *Administration Act 1903* (WA) s 3.

737 *Probate and Administration Act 1898* (NSW) s 3.

Administration includes all letters of administration of the real and personal estate and effects of deceased persons whether with or without the will annexed, and whether granted for general, special, or limited purposes, also exemplification of letters of administration or such other formal evidence of the letters of administration purporting to be under the seal of a Court of competent jurisdiction as is in the opinion of the Court deemed sufficient.

Probate includes 'exemplification of probate' or any other formal document purporting to be under the seal of a court of competent jurisdiction which, in the opinion of the Court, is deemed sufficient. (emphasis added)

31.18 Where a grant of probate or administration has been made in a foreign jurisdiction, these definitions clearly allow the resealing of an instrument other than the actual grant of probate or letters of administration — such as an exemplification of probate or administration⁷³⁸ or some other formal instrument, made under seal, that the court considers to be sufficient evidence of such a grant.

31.19 However, there is some ambiguity as to whether these definitions allow for resealing where the court in the foreign jurisdiction has not made a grant of probate or administration, as such, but has issued an instrument that has a similar effect to a grant of probate or administration.

31.20 Because the definition of 'administration' refers to an 'exemplification of letters of administration or such other formal evidence of letters of administration ... as is ... deemed sufficient', it would appear that resealing is possible only where letters of administration have been granted by the foreign court. In contrast, the definition of 'probate' refers to an 'exemplification of probate' or 'other formal document ... which ... is deemed sufficient'. It is arguable that this definition enables an instrument to be resealed if it has the effect of a grant of probate. In *Re Wilson*,⁷³⁹ a majority of the Full Court of the Supreme Court of South Australia took this view in relation to the similar South Australian definition of 'probate'. The Court held that an instrument that was not a grant of probate, but which had a generally similar effect, was sufficient to amount to a grant of probate and could therefore be resealed.⁷⁴⁰

738 An exemplification is a document, made under the seal of a court, which 'contains an exact copy of the will (if any), and a copy of the grant': JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [21.37]. See the discussion in Chapter 35 below of the documents that must be produced to the court for the purpose of resealing.

739 [1920] SALR 48.

740 Ibid 53, (Murray CJ, with whom Buchanan J agreed). See the discussion of this decision at [31.31]–[31.32] below.

Queensland

31.21 The Queensland resealing legislation defines ‘probate’ and ‘letters of administration’ in broad terms that are clearly directed towards the effect of the instrument in question:⁷⁴¹

probate and letters of administration include confirmation in Scotland, and any instrument having in any part of Her Majesty’s dominions the same effect which under the law of Queensland is given to probate and letters of administration respectively.

South Australia

31.22 In South Australia, the legislation enables an instrument to be resealed if it ‘corresponds’ to a grant of probate or letters of administration made in South Australia. The legislation provides for the resealing of any ‘probate or administration granted by a foreign court’,⁷⁴² which is defined as follows:⁷⁴³

19 As to foreign probate or administration

(1) In section 17—

probate or administration granted by a foreign Court means any document as to which the Registrar is satisfied that it was issued out of a court of competent jurisdiction in a foreign country other than an Australasian State,⁷⁴⁴ or the United Kingdom, and that in such country it corresponds to a probate of a will or to an administration in this State. (note added)

31.23 In order to satisfy himself or herself as to the effect of the relevant instrument, the registrar may accept a certificate from a consul or consular agent of the foreign country or such other evidence as appears to the registrar sufficient.⁷⁴⁵

31.24 For the purpose of the resealing provisions, the South Australian legislation defines ‘probate’ and ‘administration’ in similar terms to the

⁷⁴¹ *British Probates Act 1898* (Qld) s 2. This definition is virtually identical to the definition of ‘probate’ and ‘letters of administration’ in s 6 of the *Colonial Probates Act 1892* (UK).

⁷⁴² *Administration and Probate Act 1919* (SA) s 17.

⁷⁴³ *Administration and Probate Act 1919* (SA) s 19(1).

⁷⁴⁴ *Administration and Probate Act 1919* (SA) s 20 defines ‘Australasian States’ as follows:

Australasian States means all the States of the Commonwealth of Australia other than the State of South Australia, and includes the Dominion of New Zealand and the colony of Fiji, and any other British colonies or possessions in Australasia now existing or hereafter to be created, which the Governor may from time to time by proclamation declare to be Australasian States within the meaning of section 17;

⁷⁴⁵ *Administration and Probate Act 1919* (SA) s 19(2).

definitions that apply under the legislation in the ACT, New South Wales, the Northern Territory, Tasmania and Western Australia:⁷⁴⁶

administration includes **exemplification of letters of administration**, or such other formal evidence of letters of administration purporting to be under the seal of a court of competent jurisdiction as, in the opinion of the Registrar, is sufficient;

probate includes **exemplification of probate**, or any other formal document purporting to be under the seal of a court of competent jurisdiction, which, in the opinion of the Registrar, is sufficient.

Victoria

31.25 The Victorian legislation provides for the resealing of ‘probate’ and ‘administration’ granted by a court of competent jurisdiction in the United Kingdom or in any of the Australasian States.⁷⁴⁷

31.26 For the purpose of the resealing provisions, the terms ‘letters of administration’ and ‘probate’ are defined in the following terms:⁷⁴⁸

letters of administration includes exemplification of letters of administration;

probate includes exemplification of probate;

31.27 In addition, if the relevant instrument is issued by a court of competent jurisdiction in a country proclaimed under section 88 of the *Administration and Probate Act 1958* (Vic), the court may reseal:⁷⁴⁹

- probate of the will or administration of the estate of any deceased person; or
- a grant or order appointing a person executor of the will or giving a person authority to administer the estate of any deceased person.

31.28 The reference in the latter category to an ‘order ... giving a person authority to administer the estate of any deceased person’ enables an instrument issued by a court in another jurisdiction to be resealed if it has the same effect as a grant of probate or letters of administration.

⁷⁴⁶ *Administration and Probate Act 1919* (SA) s 20. The South Australian definition of ‘probate’ refers, however, to the opinion of the registrar, rather than to the opinion of the court.

⁷⁴⁷ *Administration and Probate Act 1958* (Vic) s 81(1). See the discussion of the term ‘Australasian States’ at [32.30] below.

⁷⁴⁸ *Administration and Probate Act 1958* (Vic) s 80.

⁷⁴⁹ *Administration and Probate Act 1958* (Vic) s 81(1).

Scottish confirmations

31.29 A confirmation is the Scottish equivalent of a grant of probate or administration.⁷⁵⁰

31.30 The legislation in the ACT, the Northern Territory, Queensland and Victoria specifically provides that a reference to probate or administration is to be read as including a reference to a Scottish confirmation.⁷⁵¹

31.31 In the other Australian jurisdictions, although there are no express statutory provisions, Scottish confirmations have nevertheless been resealed.⁷⁵² In *Re Wilson*,⁷⁵³ an application was made to the Supreme Court of South Australia for the resealing of a confirmation issued under seal by a Sheriff Court in Scotland. The instrument confirmed a nomination of executors contained in a trust disposition and settlement made by the deceased. Murray CJ considered that the instrument in question differed in several respects from either a grant of probate or administration:⁷⁵⁴

The document which has been produced differs from a probate as understood in this State in that it does not contain a copy of the testator's will, and does not aver that the testator's will was proved in the Court from which it was issued. On the other hand, it differs from letters of administration in that it confers the right to administer upon executors nominated by the testator in his will.

31.32 Nevertheless, a majority of the Court held that, having regard to the definitions of 'probate' and 'administration' contained in the South Australian legislation, the instrument could, upon certain conditions being satisfied, be resealed.⁷⁵⁵

The definitions give the Registrar jurisdiction to decide whether the document presented is sufficient to constitute a probate or administration ... He has intimated that if a sealed copy of the Trust Disposition and Settlement which is referred to in the document be obtained from the Court by which it was issued, and deposited in the Registry, he will hold that the document is sufficient as a probate. I do not think any fault can be found with that decision.

⁷⁵⁰ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [28–02], note 2.

⁷⁵¹ *Administration and Probate Act 1929* (ACT) s 79B(b); *Administration and Probate Act* (NT) s 114(b); *British Probates Act 1898* (Qld) s 2; *Administration and Probate Act 1958* (Vic) s 87.

⁷⁵² *Dykes v Archer* (1906) 2 Tas LR 1; *Re Wilson* [1920] SALR 48.

⁷⁵³ [1920] SALR 48.

⁷⁵⁴ *Ibid* 53.

⁷⁵⁵ *Ibid* 53 (Murray CJ, with whom Buchanan J agreed). Poole J (at 54) doubted whether the Scottish confirmation sufficiently amounted to a probate.

Commonwealth Secretariat Draft Model Bill

31.33 The Commonwealth Secretariat Draft Model Bill provided for the resealing of a 'grant of administration',⁷⁵⁶ which was defined to mean:⁷⁵⁷

a probate or letters of administration or any instrument having, within the jurisdiction where it was made, the effect of appointing or authorising a person ... to collect and administer any part of the estate of a deceased person and otherwise having in that jurisdiction an effect equivalent to that given, under the law of _____, to a probate or letters of administration.

Recommendation of the Law Reform Commission of Western Australia

31.34 The Law Reform Commission of Western Australia endorsed the definition of 'grant of administration' contained in the Commonwealth Secretariat Draft Model Bill, and recommended that instruments that have a similar effect to a grant of probate or administration should be capable of being resealed.⁷⁵⁸

Discussion Paper

31.35 The preliminary view expressed in the Discussion Paper was that the recommendation made by the Western Australian Commission should be adopted. It was noted that the inclusion in the model legislation of a provision enabling instruments that have a similar effect to a grant of probate or administration to be resealed would be broad enough to facilitate the resealing of Scottish confirmations, without singling them out for special mention.⁷⁵⁹

Submissions

31.36 The submissions received from the former Principal Registrar of the Supreme Court of Queensland, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia all supported the preliminary view that instruments having a similar effect to a grant of probate or administration should be capable of being resealed.⁷⁶⁰ The Victorian Bar and the New South Wales Bar Association also commented that special provision need not be made for Scottish confirmations.⁷⁶¹

756 Commonwealth Secretariat Draft Model Bill cl 3(1).

757 Commonwealth Secretariat Draft Model Bill cl 2(1).

758 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.27].

759 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 99. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.43].

760 Submissions R1, R4, R5, R6.

761 Submissions R4, R5.

31.37 The former Principal Registrar of the Supreme Court of Queensland and the Trustee Corporations Association of Australia expressly endorsed the preliminary view that the relevant provision should be included in the model legislation.⁷⁶²

The National Committee's view

31.38 The model legislation should enable an instrument to be resealed if, in the country in which it was issued, it has an effect similar to a grant of probate or letters of administration made in the resealing jurisdiction. In this respect, the National Committee favours the approach adopted in the Commonwealth Secretariat Draft Model Bill. As explained above, the Commonwealth Secretariat Draft Model Bill provided for the resealing of a 'grant of administration', which was defined to include an instrument having such an effect.⁷⁶³

31.39 If the model legislation includes a definition of 'foreign grant of representation' in similar terms to the definition of 'grant of administration' contained in the Commonwealth Secretariat Draft Model Bill, it will not be necessary for the model legislation to provide expressly for the resealing of a Scottish confirmation.

ORDERS TO ADMINISTER

Introduction

31.40 Legislation in a number of Australian jurisdictions provides that, in certain circumstances, the court may make an order authorising the public trustee in that jurisdiction to administer the estate of a deceased person.⁷⁶⁴ In the ACT, the relevant order is described as an order to collect and administer, in New South Wales, Queensland, and Western Australia it is described as an order to administer, and in South Australia it is described as an administration order. For convenience, this discussion uses the term 'order to administer' when referring collectively to orders of this kind.

Australian Capital Territory, Queensland, South Australia, Western Australia

31.41 There are some differences between the jurisdictions as to the circumstances in which a public trustee may apply for an order to administer. However, in general, the legislation in the ACT, Queensland, South Australia and Western Australia provides that a public trustee may apply for an order to

⁷⁶² Submissions R1, R6.

⁷⁶³ See [31.33] above.

⁷⁶⁴ *Administration and Probate Act 1929* (ACT) ss 88, 92; *Public Trustee Act 1913* (NSW) s 23; *Public Trustee Act 1978* (Qld) ss 29, 31; *Public Trustee Act 1995* (SA) s 9; *Public Trustee Act 1941* (WA) s 10(1).

administer in respect of the estate of a person who died leaving property in that jurisdiction if:

- the deceased died intestate (Queensland)⁷⁶⁵ or the deceased died intestate, but there is no spouse or next of kin resident in the jurisdiction who is willing and capable of acting in the administration of the estate (ACT, South Australia and Western Australia);⁷⁶⁶
- the deceased left a will, but there is no executor resident in the jurisdiction who is willing and capable of acting;⁷⁶⁷
- the deceased left a will, but the named executors have renounced (ACT, Queensland and Western Australia);⁷⁶⁸
- probate or administration has been granted to a person who desires to retire from the office of executor or administrator (South Australia);⁷⁶⁹
- the deceased left a will appointing the public trustee as executor (ACT and Queensland);⁷⁷⁰
- no application for probate or administration is made, or probate or administration is not obtained, within a specified time after the death of the deceased;⁷⁷¹
- the estate is liable to waste or is of a perishable nature and the executor (Queensland), or the executor, spouse or next of kin (ACT, South Australia and Western Australia), is absent from the locality of the estate, is not known or has not been found;⁷⁷²
- a grant has been made and part of the estate is unadministered and it is for the benefit of any person interested in the estate that the estate be administered by the public trustee (Queensland)⁷⁷³ or part of the estate, already partly administered, is unadministered owing to the death,

⁷⁶⁵ *Public Trustee Act 1978* (Qld) s 29(1)(a).

⁷⁶⁶ *Administration and Probate Act 1929* (ACT) s 88(1)(a); *Public Trustee Act 1995* (SA) s 9(1)(b); *Public Trustee Act 1941* (WA) s 10(1)(ab).

⁷⁶⁷ *Administration and Probate Act 1929* (ACT) s 88(1)(a); *Public Trustee Act 1978* (Qld) s 29(1)(b)(iii), (iv); *Public Trustee Act 1995* (SA) s 9(1)(c); *Public Trustee Act 1941* (WA) s 10(1)(a).

⁷⁶⁸ *Administration and Probate Act 1929* (ACT) s 88(1)(b); *Public Trustee Act 1978* (Qld) s 29(1)(b)(ii); *Public Trustee Act 1941* (WA) s 10(1)(b).

⁷⁶⁹ *Public Trustee Act 1995* (SA) s 9(1)(f).

⁷⁷⁰ *Administration and Probate Act 1929* (ACT) s 88(1)(h); *Public Trustee Act 1978* (Qld) s 29(1)(b)(i).

⁷⁷¹ *Administration and Probate Act 1929* (ACT) s 88(1)(c); *Public Trustee Act 1978* (Qld) s 29(1)(b)(v); *Public Trustee Act 1995* (SA) s 9(1)(d), (e); *Public Trustee Act 1941* (WA) s 10(1)(c).

⁷⁷² *Administration and Probate Act 1929* (ACT) s 88(1)(e), (f); *Public Trustee Act 1978* (Qld) s 29(1)(b)(vi); *Public Trustee Act 1995* (SA) s 9(1)(g); *Public Trustee Act 1941* (WA) s 10(1)(e), (f).

⁷⁷³ *Public Trustee Act 1978* (Qld) s 31(1).

incapacity, insolvency, disappearance or absence from the jurisdiction of the executor or administrator (South Australia).⁷⁷⁴

New South Wales

31.42 In New South Wales, the circumstances in which the public trustee may be appointed under an order to administer are more limited. The *Public Trustee Act 1913* (NSW) provides that the public trustee may be appointed under an order to administer if 'it is made to appear to the Court that there is reasonable ground to suppose that any person has died either in or out of the jurisdiction of the Court intestate, leaving property within such jurisdiction'.⁷⁷⁵ Similar provisions are found in the administration legislation of the ACT and in the public trustee legislation of South Australia and Western Australia.⁷⁷⁶

Effect of an order to administer

31.43 In all jurisdictions that provide for the making of an order to administer, the effect of the order is that the public trustee is in the same position as if administration⁷⁷⁷ or probate or letters of administration⁷⁷⁸ had been granted to the public trustee.

Resealing: the existing law

Australian Capital Territory, Northern Territory

31.44 The legislation in the ACT and in the Northern Territory provides expressly that an order to collect and administer may be resealed.⁷⁷⁹

Australian States

31.45 The legislation in the Australian States does not make express provision for the resealing of an order to administer made in another State or Territory or in another country. Consequently, whether an order to administer may be resealed in an Australian State will depend on the interpretation of the definitions of 'probate' and 'administration' discussed above⁷⁸⁰ and on whether the legislation is otherwise expressed in terms that are sufficiently broad to apply to an order to administer.

⁷⁷⁴ *Public Trustee Act 1995* (SA) s 9(1)(i).

⁷⁷⁵ *Public Trustee Act 1913* (NSW) s 23(1).

⁷⁷⁶ *Administration and Probate Act 1929* (ACT) s 92(1); *Public Trustee Act 1995* (SA) s 9(2); *Public Trustee Act 1941* (WA) s 10(1).

⁷⁷⁷ *Administration and Probate Act 1929* (ACT) s 89; *Public Trustee Act 1995* (SA) s 9(8); *Public Trustee Act 1941* (WA) s 10(3).

⁷⁷⁸ *Public Trustee Act 1913* (NSW) s 23(2); *Public Trustee Act 1978* (Qld) s 32(1).

⁷⁷⁹ *Administration and Probate Act 1929* (ACT) s 80(1), (2); *Administration and Probate Act* (NT) s 111(1).

⁷⁸⁰ See [31.16]–[31.28] above.

New South Wales, Tasmania, Western Australia

31.46 Although an order to administer has a similar effect to a grant of probate or administration, there is, as noted earlier, some ambiguity as to whether the definitions of ‘probate’ and ‘administration’ contained in the legislation in New South Wales, Tasmania and Western Australia are sufficient to enable the resealing of an instrument that has a similar effect to a grant of probate or administration.⁷⁸¹

Queensland

31.47 In Queensland, the definition of the terms ‘probate’ and ‘letters of administration’ refers to an instrument having the same effect as is given under Queensland law to probate and letters of administration.⁷⁸² This definition is arguably broad enough to enable the resealing of an order to administer.⁷⁸³

South Australia

31.48 In *In the Estate of Horvath*,⁷⁸⁴ Debelle J of the Supreme Court of South Australia held that section 17 of the *Administration and Probate Act 1919* (SA) enables the court to reseal an order to administer. In that case, the deceased died domiciled in South Australia, but had a small amount of property in New Zealand. The deceased’s son and daughter, who were the beneficiaries under her will, asked the New Zealand Public Trust to administer the deceased’s estate in New Zealand, where the Public Trust obtained an order to administer. The Public Trust then applied in South Australia for the resealing of the order to administer with the will annexed that had been made by the High Court of New Zealand.

31.49 Debelle J held that section 17 is expressed in wide terms:⁷⁸⁵

Section 17 is expressed in wide terms. It operates “when any probate or administration granted by any court of competent jurisdiction” is produced to and a copy deposited with the Registrar. The use of the word “any” in the expression “any probate or administration” signifies that s 17 is expressed to operate as widely as possible. The word “any” is a word which ordinarily excludes limitation or qualification and should be given as wide a construction as possible: *Victorian Chamber of Manufactures v The Commonwealth* (1943) 67 CLR 335 at 346 and at 340, 344. Depending on its context, the word “any” has such a wide import that it is capable of meaning “all”: *Isle of Wight Railway*

781 See [31.19]–[31.20] above. Note, however, the decision in *In the Estate of Horvath* [2007] SASC 200 (Debelle J), referred to at [31.48]–[31.52] below.

782 See [31.21] above.

783 As noted at note 741 above, the Queensland definition of ‘probate’ and ‘letters of administration’ is virtually identical to the definition contained in s 6 of the *Colonial Probates Act 1892* (UK). In England and Wales, the practice is to reseal orders to administer made in favour of the Public Trustee of New Zealand and the Public Trustee of Queensland: Registrar’s Direction (Consolidated Direction), 20 November 1972.

784 [2007] SASC 200.

785 *Ibid* [10].

Co v Tahourdin (1883) 25 Ch D 320 at 332. It is, therefore, intended to apply to any kind of probate or administration in whatever form granted by a court of competent jurisdiction.

31.50 His Honour held that a grant of administration may be made in two forms: (1) a grant of letters of administration, whether with or without the will annexed, and whether granted for general, special or limited purposes; and (2) an administration order.⁷⁸⁶

31.51 Debelle J further held that the word 'granted' in section 17 of the *Administration and Probate Act 1919* (SA) does not qualify the meaning of 'administration' so as to prevent an order to administer from being an instrument that can be resealed:⁷⁸⁷

Given that the purposes of s 17 include, as a matter of comity between jurisdictions, that the grant of probate or administration is to be resealed by the Registrar of Probates in a timely manner without undue expense to the estate, the meaning of administration in s 17 includes both letters of administration and administration orders. The fact that the word "granted" is used in s 17 does not qualify the meaning of "administration" so as to exclude an administration order. While letters of administration are granted ... in the ordinary exercise of the testamentary causes jurisdiction and an administration order is made by the court, the word "granted" applies both to a grant of letters of administration and to the grant by the court of an order of administration.

31.52 Although Debelle J held that the order to administer made in favour of the New Zealand Public Trust could be resealed, his Honour nevertheless suggested that the *Administration and Probate Act 1919* (SA) should be amended to ensure that it expressly authorises the resealing of an order to administer:⁷⁸⁸

In order to make assurance doubly sure, it would be desirable if the *Administration and Probate Act* were amended to include a provision which expressly authorises the Registrar to reseat an administration order. There is more than one simple means of doing so. One would be to add at the end of the definition of "administration" in s 20 the following "and includes an order of a court granting administration of a deceased estate to a person named in that order".

31.53 As explained earlier in this chapter, the *Administration and Probate Act 1919* (SA) also provides for the resealing of certain documents that correspond to 'a probate of a will or to an administration' in that jurisdiction.⁷⁸⁹ However, resealing on that basis is limited to documents made 'in a foreign country other than an Australasian State⁷⁹⁰ or the United Kingdom'. Because New Zealand

786 Ibid [11].

787 Ibid [12].

788 Ibid [16].

789 See [31.22] above.

790 See the discussion of this term at note 744 above.

falls within the definition of 'Australasian State', the order to administer in *In the Estate of Horvath* could not be resealed on the basis of corresponding to a probate or administration in South Australia.

Victoria

31.54 Although section 81(1) of the Victorian legislation is quite broad and provides for the resealing of an 'order ... giving a person authority to administer the estate of any deceased person',⁷⁹¹ the resealing of such an order is possible only if the order was made in a country proclaimed under section 88 of the legislation. As section 88 precludes a proclamation from being made in respect of the 'Australasian States',⁷⁹² or the United Kingdom,⁷⁹³ the reference in section 81(1) to an order of this kind would not extend the resealing power to an order to administer made by the court of an Australian State or Territory, the United Kingdom or any of the countries included in the definition of 'Australasian States'.

31.55 The National Committee notes that, in *In the Estate of Williams*,⁷⁹⁴ the Supreme Court of Victoria held that an order to administer made in favour of the Public Trustee of Tasmania could be resealed in Victoria. However, that decision was primarily concerned with the discretionary nature of the power to reseat and whether, given that the Victorian Curator of Intestate Estates was willing to administer the estate, the Court should reseat the order to administer that had been made in Tasmania. The Court did not address the basis on which the Tasmanian order to administer was an instrument capable of being resealed in Victoria.

Recommendation of the Law Reform Commission of Western Australia

31.56 The Law Reform Commission of Western Australia recommended that it should be possible for an order to administer made in favour of a public trustee or other person or body to be resealed, provided that it was certified that the order was still in force.⁷⁹⁵

Discussion Paper

31.57 In the Discussion Paper, reference was made to the general proposal that the model legislation should enable the resealing of instruments that, in the

⁷⁹¹ See [31.28] above.

⁷⁹² See the definition of this term at [32.29] below.

⁷⁹³ Section 88 of the *Administration and Probate Act 1958* (Vic) enables the Governor in Council by proclamation to declare certain countries, other than an Australasian State or the United Kingdom, to be a country to which Part III of the Act, which deals with the recognition of foreign grants, applies.

⁷⁹⁴ [1914] VLR 417.

⁷⁹⁵ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (9).

jurisdiction in which they were issued, have a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction. In the light of that proposal, it was not considered necessary to make specific provision for the resealing of orders to administer.⁷⁹⁶

Submissions

31.58 The submissions received from the former Principal Registrar of the Supreme Court of Queensland, the Victorian Bar and the New South Wales Bar Association all expressed the view that an order to administer made in favour of a public trustee or similar officer should be capable of being resealed.⁷⁹⁷ The Victorian Bar and the New South Wales Bar Association both endorsed the preliminary view expressed in the Discussion Paper that it was not necessary to make specific provision for the resealing of orders to administer.⁷⁹⁸

The National Committee's view

31.59 In the National Committee's view, it should be possible for an order to administer made in favour of a public trustee or similar officer to be resealed under the model legislation.

31.60 Earlier in this chapter, it has been proposed that the model legislation should provide for the resealing of a 'foreign grant of representation', which should be defined to include an instrument having, in the country in which it was issued, an effect similar to a grant of probate or letters of administration made in the resealing jurisdiction.⁷⁹⁹ That definition is sufficiently broad to enable an order to administer to be resealed.

31.61 The National Committee initially favoured making express provision in the model legislation for the resealing of orders to administer, in order to avoid any uncertainty about whether they may be resealed. However, given the different terminology used within Australia to describe orders of this kind,⁸⁰⁰ it is of the view that an express provision is not desirable, and that the preferred approach is for orders to administer to be covered by the definition of 'foreign grant of representation' referred to above.

⁷⁹⁶ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 106. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.53].

⁷⁹⁷ Submissions R1, R4, R5.

⁷⁹⁸ Submissions R4, R5.

⁷⁹⁹ See [31.38] above.

⁸⁰⁰ See [31.40] above.

RESEALING OF AN EXEMPLIFICATION OF A GRANT OR AN ORDER TO ADMINISTER OR OTHER FORMAL EVIDENCE OF THE INSTRUMENT

Background

31.62 In this Chapter, the National Committee has recommended that the following instruments should be able to be resealed:

- grants of probate and letters of administration (including grants made for a special, limited or temporary purpose);
- an instrument that has a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction; and
- an order to administer.

31.63 It may not be feasible for the person appointed under the grant, instrument or order to administer made in the foreign jurisdiction to send the original grant, instrument or order to the resealing jurisdiction in order to have the original document resealed in that jurisdiction. He or she may need to retain the original in the jurisdiction in which it was made in order to administer the deceased's estate in that jurisdiction — for example, to produce to banks to establish title to the deceased's property. It may also be that the person appointed under the grant, instrument or order needs to have it resealed in more than one jurisdiction.

31.64 To deal with this situation, the legislation in most jurisdictions defines 'administration' and 'probate' to include an exemplification of the instrument or such other formal evidence of the instrument purporting to be under the seal of a court of competent jurisdiction as the court (or, in some jurisdictions, the registrar) considers sufficient.⁸⁰¹

The National Committee's view

31.65 Because the original instrument may not always be able to be produced to the resealing court, the model legislation should provide that the court may reseal an exemplification⁸⁰² of:

- a grant of probate or letters of administration;
- an instrument having a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction; or
- an order to administer.

801 See [31.17]–[31.20], [31.24], [31.26] above.

802 See note 738 above.

31.66 The model legislation should also provide that such other formal evidence of the grant, instrument or order, as is prescribed under the rules, may be resealed.

31.67 Where there has been a grant of double (or further) probate, the issue of the resealing of exemplifications is slightly more complicated, as there may be separate exemplifications of the individual grants, an exemplification of one or more, but not all of the grants, or an exemplification that contains copies of both the grants (or, where more than two grants of probate have been made, all the grants). For this reason, the National Committee has made a separate recommendation in this Report about the specific requirements for resealing exemplifications where there has been a grant of double probate.⁸⁰³

ELECTIONS TO ADMINISTER

Introduction

31.68 As explained in Chapter 29 of this Report, the legislation in all Australian jurisdictions except South Australia makes provision, in specified circumstances, for estates under a prescribed value to be administered under a procedure known as an election to administer.⁸⁰⁴ Elections to administer are intended to provide a convenient mechanism for administering estates having a relatively low value. Although the party who files an election is generally taken to be the executor or administrator of the estate under a grant of probate or administration, the process does not involve the making of an order under seal by the court.

Australian Capital Territory, New South Wales, Queensland, Tasmania, Victoria, Western Australia

31.69 In the ACT, New South Wales, Queensland, Tasmania, Victoria and Western Australia, the legislation provides that, if a person has died leaving property in that jurisdiction, the gross value of which does not exceed a prescribed amount and a grant has not already been made to any person, the public trustee (or, in Victoria, State Trustees Limited⁸⁰⁵) may file in the registry an election to administer the estate of the deceased person.⁸⁰⁶ Generally, the

803 See Recommendation 35-19 below.

804 For a detailed consideration of elections to administer see [29.1]–[29.119] above.

805 In Victoria, the equivalent body to the public trustee in other jurisdictions is State Trustees Limited, which is a State owned company and a trustee company under the *Trustee Companies Act 1984* (Vic): see *State Trustees (State Owned Company) Act 1994* (Vic). References in this discussion to the public trustee are intended to include State Trustees Limited.

806 See [29.2] above.

effect of filing an election is that the public trustee is deemed to be the executor or administrator of the estate.⁸⁰⁷

31.70 The legislation in these jurisdictions provides that if, after the public trustee has filed an election, it appears that the gross amount of the estate exceeds a specified amount, the public trustee must file a notice in the registry certifying that the value of the estate exceeds that amount. In those circumstances, the public trustee must proceed in the ordinary manner to obtain a grant or, in some jurisdictions, an order to administer.⁸⁰⁸

31.71 In New South Wales, Queensland, Tasmania, Victoria and Western Australia, the legislation also enables authorised trustee companies, in similar circumstances, to file an election to administer the estate of a deceased person.⁸⁰⁹ Generally, the effect of filing an election is that the trustee company is deemed to be the executor or administrator of the estate.⁸¹⁰ The legislation also has a similar effect where it is found, after a trustee company has filed an election, that the gross value of the estate exceeds a prescribed amount.⁸¹¹

Northern Territory

31.72 The Northern Territory legislation also provides for the administration of certain estates by the filing of an election to administer.⁸¹² However, as explained in Chapter 29 of this Report, the legislation differs from the legislation in the jurisdictions discussed above by providing that an election to administer may be filed, in the specified circumstances, by ‘a professional personal representative’⁸¹³ — that is, by the public trustee, a trustee company or a legal practitioner.⁸¹⁴

31.73 An election to administer may be filed if the professional personal representative estimates that the net value of the estate does not exceed a prescribed amount and no other person has been granted representation in respect of the estate.⁸¹⁵ On the filing of an election to administer, the professional personal representative is taken to be the executor or administrator, as the case may be, of the deceased person.⁸¹⁶

807 See [29.3] above.

808 See [29.48]–[29.50] above.

809 See [29.4] above.

810 See [29.5] above.

811 See [29.48]–[29.50] above.

812 *Administration and Probate Act* (NT) ss 110B, 110C.

813 *Administration and Probate Act* (NT) ss 110B(1), 110C(1).

814 *Administration and Probate Act* (NT) s 6(1) (definition of ‘professional personal representative’).

815 *Administration and Probate Act* (NT) ss 110B(1), 110C(1)(b), (c).

816 *Administration and Probate Act* (NT) ss 110B(3), 110C(3).

31.74 If the professional personal representative subsequently becomes aware that the net value of the estate exceeds the prescribed amount, he or she must file in the court a memorandum stating the value of the property and apply for a grant of representation.⁸¹⁷

Resealing: the existing law

31.75 No Australian jurisdiction provides expressly for the resealing of an election to administer filed in another Australian jurisdiction or in another country. Consequently, whether an election to administer may be resealed in an Australian State or Territory will depend on the interpretation of the definitions of 'probate' and 'administration' in these jurisdictions and on whether the legislation is otherwise expressed in terms that are sufficiently broad to apply to an election to administer.

Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Western Australia

31.76 In the ACT, New South Wales, the Northern Territory, South Australia, Tasmania and Western Australia, the definitions of 'administration' and 'probate' refer to a document 'purporting to be under the seal of a court of competent jurisdiction'.⁸¹⁸ As an election to administer is merely filed in the registry, and is not issued by the court under seal, it is not possible in these jurisdictions for an election to administer to be resealed.

Queensland

31.77 In Queensland, the terms 'probate' and 'administration' are defined to include any instrument having in any part of Her Majesty's dominions the same effect as a grant of probate or letters of administration in Queensland.⁸¹⁹ It is therefore arguable that an election to administer is capable of being resealed. As noted previously, these definitions are virtually identical to those found in the

817 *Administration and Probate Act* (NT) ss 110B(5), 110C(4).

818 *Administration and Probate Act* 1929 (ACT) s 2, dictionary; *Probate and Administration Act* 1898 (NSW) s 3; *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act* 1919 (SA) s 20; *Administration and Probate Act* 1935 (Tas) s 3(1); *Administration Act* 1903 (WA) s 3.

819 See [31.21] above.

Colonial Probates Act 1892 (UK), under which certain elections to administer are, in practice, resealed.⁸²⁰

Victoria

31.78 In Victoria, the legislation provides for the resealing of an ‘order ... giving a person authority to administer the estate of any deceased person’,⁸²¹ provided the order is made in a country proclaimed under section 88 of the legislation. However, although an election to administer gives the person who files it authority to administer the relevant estate, it does not constitute an order. Consequently, it would appear that an election to administer may not be resealed in Victoria.

Recommendation of the Law Reform Commission of Western Australia

31.79 The Law Reform Commission of Western Australia recommended that, upon an appropriate undertaking being provided, it should be possible for an election to administer made in favour of a public trustee or curator or other person or body to be resealed:⁸²²

It should be possible to reseat elections ... made in favour of a Public Trustee or Curator, or any other person or body, on an undertaking being given that the election ... is still in force and ... that in the event of further estate being discovered in the place of election which would place the estate beyond the statutory limit for the election procedure, no further step will be taken in the administration of the estate in the jurisdiction in which resealing is being sought without obtaining a further grant of representation in the place of election.

31.80 It observed that elections to administer were occasionally resealed in England,⁸²³ and modelled the requirements for the proposed undertaking on the

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In England and Wales, the practice is to reseat elections to administer made by the Public Trustee of New Zealand and by the Public Trustee of Queensland: Registrar’s Direction (Consolidated Direction), 20 November 1972. The Public Trustee must certify that the election is still in force, and undertake that, in the event of further estate being discovered in the jurisdiction in which the election was filed that would result in the value of the estate exceeding the prescribed value for the election procedure, the Public Trustee ‘will not act further in the administration of the estate in England and Wales without obtaining further representation there’: JI Winegarten, R D’Costa and T Synak, *Tristram and Coote’s Probate Practice* (30th ed, 2006) [18.87], referring to Registrar’s Direction, 24 March 1958 and [18.89], referring to Registrar’s Direction, 18 June 1979. In relation to elections to administer made by the Public Trustees in Victoria, Western Australia and Tasmania, the court may require evidence, in the particular case, that the election qualifies as a grant that may be resealed: JI Winegarten, R D’Costa and T Synak, *Tristram and Coote’s Probate Practice* (30th ed, 2006) [18.90], referring to Registrar’s Direction, 20 November 1972.

A similar practice also applies in England and Wales to the resealing of an election to administer made by a trustee company in a country to which the *Colonial Probates Act 1892* (UK) applies: Practice Direction (Resealing: Elections to Administer) 2 March 1982, (1982) 126 *Solicitors Journal* 176. For a discussion of the relevant requirements, see *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 105.

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Administration and Probate Act 1958 (Vic) s 81(1). See [31.25]–[31.28] above.

822

Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (9). See also at [3.28]–[3.30].

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Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.29].

English practice.⁸²⁴

Discussion Paper

31.81 In the Discussion Paper,⁸²⁵ the National Committee noted that, when the Probate Registrars considered this issue at their 1990 conference, they were unanimously of the view that, as elections to administer were not issued under the seal of a court, they should not be able to be resealed.⁸²⁶

31.82 The preliminary view expressed in the Discussion Paper endorsed the Probate Registrars' view that only documents issued under seal should be capable of being resealed.⁸²⁷

Submissions

31.83 The majority of the submissions that addressed this issue were of the view that elections to administer should not be capable of being resealed.⁸²⁸

31.84 Only the Victorian Bar expressed a contrary view, commenting that, by definition, the estates in which an election to administer had been filed would be small estates. It suggested that, if elections to administer could not be resealed, it would impose on small estates the cost of obtaining a formal grant of representation when the 'home' jurisdiction did not require this.⁸²⁹

The National Committee's view

Resealing of elections to administer

31.85 In Chapter 29 of this Report, the National Committee has recommended the inclusion in the model legislation of provisions dealing with the filing of an election to administer. Further, the legislation of some other countries also makes provision for the filing of an election to administer.⁸³⁰ As a result, it has been necessary for the National Committee to decide whether the model legislation should make provision for the resealing of elections to administer.

824 The English practice is considered at note 820 above.

825 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 105–6.

826 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 7.

827 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 106. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.53].

828 Submissions R1, R2, R5, R6.

829 Submission R4.

830 For example, the legislation in New Zealand makes provision for estates under a certain value to be administered on the filing of an election to administer by the public trustee: *Public Trust Act 2001* (NZ) s 93.

31.86 The National Committee is conscious that all but one of the respondents who addressed this issue were opposed to enabling an election to administer to be resealed. However, as the Victorian Bar emphasised in its submission, it is important to contain the costs involved in administering small estates. If an election to administer cannot be resealed, it may be necessary for an application to be made for an original grant if the estate is to be administered formally.⁸³¹ The National Committee is therefore of the view that, subject to the following qualifications, the model legislation should provide that an election to administer filed in another jurisdiction should be capable of being resealed so as to be operative within the resealing jurisdiction.⁸³²

31.87 As explained earlier, an election to administer takes effect by being filed in the court; it does not involve the court issuing an order under seal that can be sent to another jurisdiction to be resealed. Accordingly, the model legislation should provide that the court may reseat a copy of an election to administer, provided it is certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.

The value of the estate in the jurisdiction in which the election to administer is to be filed

31.88 The rationale for enabling an election to administer to be resealed is to minimise the costs involved in administering a small estate. For that reason, it should not be possible for an election to administer to be resealed if the value of the estate in the resealing jurisdiction exceeds the amount for filing an election to administer in that jurisdiction.

31.89 Accordingly, the model legislation should provide that the court may reseat an election to administer only if the applicant for resealing estimates that the net value of the estate in the resealing jurisdiction at the time of making the application is not more than the maximum amount for filing an election to administer in the resealing jurisdiction.⁸³³

31.90 The model legislation should also deal with the situation where the person who obtained the resealing of the election to administer later discovers that the value of the estate in the resealing jurisdiction exceeds the amount in the resealing jurisdiction for administering an estate under an election to administer. The model provision should be consistent with the provision recommended in Chapter 29 in relation to elections to administer.⁸³⁴

831 Note, however, that a simpler and cheaper alternative, in the case of an estate having a small value, may be for a professional administrator to file an election to administer the estate. Elections to administer are considered in Chapter 29 of this Report.

832 See also Recommendations 35-16 and 35-17 below in relation to the documentation that must be filed when an application is made for the resealing of an election to administer.

833 This is consistent with Recommendations 29-1(d) and 29-2(d) above.

834 This is consistent with Recommendation 29-1(g) and 29-2(g).

31.91 Accordingly, the model legislation should provide that if, after the election to administer is resealed, the person who applied for the resealing discovers that the net value of the estate in the resealing jurisdiction is more than 150 per cent of the maximum amount for filing an election to administer in the resealing jurisdiction, the person must:

- file a memorandum in the Supreme Court stating the value of the estate in the resealing jurisdiction; and
- apply for a grant of probate or letters of administration (or an order to administer).

The required undertaking

31.92 As explained previously, in each jurisdiction that makes provision for estates to be administered on the filing of an election to administer, the election procedure is restricted to estates where the value of the assets does not exceed a prescribed amount. Consequently, if an election to administer is to be capable of being resealed under the model legislation, the issue arises as to the effect on a person's authority to administer the estate in the resealing jurisdiction if, as a result of the discovery of further assets in the jurisdiction in which the election was filed, the person who filed the election is no longer entitled to administer the estate in that jurisdiction.

31.93 In the National Committee's view, a person who applies for the resealing of an election to administer should be required to give an undertaking that, in the event of further assets being discovered in the jurisdiction in which the election was filed that would place the value of the estate in that jurisdiction above the statutory limit for the election procedure in that jurisdiction, no further step will be taken in the administration of the estate in the resealing jurisdiction without obtaining a grant in the jurisdiction in which the election was filed.

31.94 The National Committee is further of the view that the requirement that an applicant for resealing must give an undertaking in these terms should be contained in the model legislation, rather than in court rules. The National Committee is concerned that, if the requirement is not included in the model legislation, jurisdictions might amend their legislation to make provision for the resealing of elections to administer without also amending their court rules to require such an undertaking to be given.

RECOMMENDATIONS

Grants of probate and letters of administration (including letters of administration granted for special, limited or temporary purposes)

31-1 The model legislation should provide that the court may reseal:

- (a) grants of probate and letters of administration, including letters of administration made for special, limited or temporary purposes,⁸³⁵
- (b) where there is an original grant of probate and a further grant of probate that runs concurrently with the original grant — the original grant of probate and any further grant of probate that runs concurrently with it;⁸³⁶ and
- (b) an exemplification of a grant of probate or letters of administration or such other formal evidence of a grant of probate or letters of administration as is prescribed under the rules.⁸³⁷

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a), (b) (e), (f), (g)), ‘letters of administration’).

31-2 The resealing of a special, limited or temporary grant should not require the order of a judge or registrar. Those jurisdictions that provide, in their court rules, that a special, limited or temporary grant may not be resealed except by order of a judge or registrar should repeal that particular rule.⁸³⁸

835 See [31.3], [31.14]–[31.15] above.

836 See [31.4] above.

837 See [31.65]–[31.66] above. Note, however, the National Committee’s separate recommendation about the resealing of exemplifications where a grant of double probate has been made: see Recommendation 35-19 below.

838 See [31.15] above.

Other instruments**31-3 The model legislation should:**

- (a) define 'foreign grant of representation' in terms similar to the definition of 'grant of administration' in the Commonwealth Secretariat Draft Model Bill, and enable an instrument to be resealed if, in the country in which it was issued, it has an effect similar to a grant of probate or administration made in the resealing jurisdiction; and⁸³⁹
- (b) provide that an exemplification of such an instrument or such other formal evidence of the instrument as is prescribed under the rules may be resealed.⁸⁴⁰

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition of 'foreign grant of representation' (paras (c), (e), (g))).

31-4 The model legislation need not provide expressly for the resealing of a Scottish confirmation.⁸⁴¹

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition of 'foreign grant of representation' (para (c))).

Orders to administer**31-5 The model legislation should enable the following instruments to be resealed:**

- (a) an order to administer made in favour of a public trustee (or the statutory equivalent),⁸⁴² and
- (b) an exemplification of such an order to administer or such other formal evidence of an order to administer as is prescribed under the rules.⁸⁴³

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition of 'foreign grant of representation' (paras (c), (e), (g))).

839 See [31.38] above.

840 See [31.65]–[31.66] above.

841 See [31.39] above.

842 See [31.59]–[31.61] above.

843 See [31.65]–[31.66] above.

Elections to administer

31-6 The model legislation should provide that, if an election to administer has been filed in another jurisdiction, the court may reseal a copy of the election to administer, provided it is certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.⁸⁴⁴

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition 'foreign grant of representation' (para (d))).

31-7 The model legislation should provide that an election to administer may be resealed only if the person who applies for the resealing:

- (a) estimates that the net value of the estate in the resealing jurisdiction at the time of making the application is not more than the maximum amount for filing an election to administer in the resealing jurisdiction;⁸⁴⁵ and
- (b) gives an undertaking that, in the event of further assets being discovered in the jurisdiction in which the election was filed that would place the estate beyond the statutory limit for the election procedure in that jurisdiction, no further step will be taken in the administration of the estate in the resealing jurisdiction without obtaining a grant in the jurisdiction in which the election was filed.⁸⁴⁶

See Administration of Estates Bill 2009 cl 355.

844 See [31.85]–[31.87] above.

845 See [31.88]–[31.89] above.

846 See [31.92]–[31.94] above.

31-8 The model legislation should provide that if, after the election to administer is resealed, the person who applied for the resealing discovers that the net value of the estate in the resealing jurisdiction is more than 150 per cent of the maximum amount for filing an election to administer in the resealing jurisdiction, the person must:

- (a) file a memorandum in the Supreme Court stating the value of the estate in the resealing jurisdiction; and
- (b) apply for a grant of probate or letters of administration (or an order to administer).⁸⁴⁷

See Administration of Estates Bill 2009 cl 356.

Chapter 32

Countries whose grants may be resealed

INTRODUCTION	212
THE EXISTING LAW	212
Australian Capital Territory.....	212
New South Wales, Western Australia	213
Northern Territory	214
Queensland	215
South Australia	215
Tasmania.....	217
Victoria	217
COMMONWEALTH SECRETARIAT DRAFT MODEL BILL	218
RECOMMENDATION OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA.	219
DISCUSSION PAPER.....	220
SUBMISSIONS.....	222
THE NATIONAL COMMITTEE'S VIEW	222
RECOMMENDATIONS	223

INTRODUCTION

32.1 There is presently considerable diversity among the Australian jurisdictions as to the countries whose grants may be resealed. In addition, there are important differences in the means by which the legislation in the various jurisdictions prescribes the countries whose grants may be resealed.

32.2 Some jurisdictions set out a list of countries (whether in the legislation itself or in subordinate legislation) whose grants may be resealed. However, these lists have the potential to become out of date if they are not regularly reviewed.

32.3 An alternative approach involves the use of general expressions such as 'Commonwealth country' or 'any portion of Her Majesty's dominions', rather than specifying particular countries. Yet this approach may not be any more satisfactory, since political developments can affect the original intentions of the drafter as to the countries intended to be included by those general expressions.

THE EXISTING LAW

Australian Capital Territory

32.4 The legislation in the ACT provides for the resealing of a grant made by 'a court of competent jurisdiction in a reciprocating jurisdiction'.⁸⁴⁸ The term 'reciprocating jurisdiction' is defined to mean:⁸⁴⁹

- (a) a State; or
- (b) a Commonwealth country; or
- (c) a country, or part of a country, prescribed by regulation.

32.5 However, the term 'Commonwealth country' is not defined in the legislation, and there appears to be some doubt about its meaning. It has been pointed out that it does not mean the same as 'Member of the Commonwealth'.⁸⁵⁰

it would be convenient if this expression could be adopted as the correct geographical counterpart of the political term 'Member of the Commonwealth,' but it cannot, without a definition, convey that meaning. To be a 'country' a territory need not be independent; and as the 'Commonwealth' ... includes dependent countries they are Commonwealth countries. In short, 'Commonwealth country' can have only its obvious meaning, *ie* a country within the Commonwealth.

848 *Administration and Probate Act 1929* (ACT) s 80(1).

849 *Administration and Probate Act 1929* (ACT) s 80(4).

850 K Roberts-Wray, *Commonwealth and Colonial Law* (1966) 16.

It is, however, questionable whether a dependent *territory* is necessarily a Commonwealth *country*. Any independent state, however small, must be a country; and such places as Nigeria and Kenya must always have been countries. But it is not without reason that the expression ‘countries and territories’ has sometimes been used. One extreme example will serve to illustrate the problem: is Pitcairn Island, with an area of two square miles and a population of approximately 130, a country? Probably not, but it would require ingenuity and boldness to attempt to draw a line, the location of which might, of course, be affected by the context. (emphasis in original; note omitted)

32.6 As noted above, the term ‘reciprocating jurisdiction’ also includes ‘a country ... prescribed by regulation’. The reason for the introduction of that definition,⁸⁵¹ was to overcome the restrictions inherent in the previous reference to a ‘Commonwealth country’ and to provide greater flexibility in relation to the countries whose grants may be resealed:⁸⁵²

The *Administration and Probate Act 1929* presently allows for grants of probate sealed and issued by a Court of another State or Territory of Australia, or of a Commonwealth country, to be resealed in the ACT. The amendment will overcome the difficulty created when Hong Kong returned to Chinese rule on 1 July 1997, thereby ceasing to be a member of the Commonwealth, and will also allow for other jurisdictions to be added as necessary.

32.7 To date, however, no regulations have been made prescribing any countries for this purpose.

New South Wales, Western Australia

32.8 New South Wales and Western Australia are the only Australian jurisdictions that use the same legislative technique to prescribe the countries whose grants may be resealed. In each case, the legislation provides for the resealing of a grant made by a court of competent jurisdiction ‘in any portion of Her Majesty’s dominions’.⁸⁵³

32.9 According to *Halsbury’s Laws of England*, ‘the term “Her Majesty’s dominions” signifies the independent or dependent territories under the sovereignty of the Crown’, but does not ordinarily include protectorates or protected states.⁸⁵⁴

32.10 Consequently, the term ‘Her Majesty’s dominions’ would include, in addition to the other States and Territories of Australia, those independent members of the Commonwealth of Nations that still recognise the Queen as Head of State and, presumably, the associated states and dependencies of

851 *Administration and Probate Act 1929* (ACT) s 80 was substituted by the *Justice and Community Safety Legislation Amendment Act 2003* (ACT) s 10.

852 Explanatory Memorandum, *Justice and Community Safety Legislation Amendment Bill 2002* (No 2) (ACT) 2.

853 *Probate and Administration Act 1898* (NSW) s 107(1); *Administration Act 1903* (WA) s 61(1).

854 *Halsbury’s Laws of England* (4th ed) vol 6, [803]. See also the discussion of the term in K Roberts-Wray, *Commonwealth and Colonial Law* (1966) 23.

those countries.⁸⁵⁵ However it would not include those members of the Commonwealth that have their own sovereign,⁸⁵⁶ or those that have adopted republican status.⁸⁵⁷

32.11 The reference in the New South Wales and Western Australian legislation to ‘Her Majesty’s dominions’ makes the legislation vulnerable to political change. If a country ceases to recognise the Queen as Head of State, it is no longer part of Her Majesty’s dominions, even though there may not have been any change to its legal system that would affect the desirability or otherwise of resealing grants made in that country.

Northern Territory

32.12 The Northern Territory has arguably the simplest legislative formula of all the Australian jurisdictions. The legislation provides for the resealing of a grant made by a court of competent jurisdiction in ‘a relevant country’.⁸⁵⁸ The term ‘relevant country’ is defined to mean:⁸⁵⁹

- (a) a State or another Territory of the Commonwealth of Australia;
- (b) a country that is prescribed; or
- (c) where a part of a country is prescribed — that part of the country.

32.13 An extensive list of countries has been prescribed for this purpose.⁸⁶⁰

32.14 Under the Northern Territory legislation, it is possible for countries to be prescribed on the basis of the similarity of their administration and probate laws to those in the Northern Territory. However, the Northern Territory approach still relies on the ability of the relevant authorities to draw up a list of appropriate countries and to keep it up to date.

855 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) notes 656, 657.

856 See *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) note 658.

857 See *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) note 659.

858 *Administration and Probate Act* (NT) s 111.

859 *Administration and Probate Act* (NT) s 6(1).

860 The following countries are prescribed under reg 2AA and sch 2 of the *Administration and Probate Regulations* (NT) for the purposes of the definition of ‘relevant country’ in s 6 of the *Administration and Probate Act* (NT): Antigua and Barbuda, The Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Canada, Cyprus, Dominica, Fiji, The Gambia, Ghana, Grenada, Guyana, Hong Kong Special Administrative Region, India, Ireland, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, St Kitts and Nevis, St Lucia, St Vincent, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom (including The Channel Islands), Vanuatu, Western Samoa, Zambia and Zimbabwe.

Queensland

32.15 In Queensland, the *British Probates Act 1898* (Qld) provides for the resealing of a grant made by 'a court of probate in a part of Her Majesty's dominions to which this Act applies'.⁸⁶¹ Whether the Act is to apply to grants made in a particular country is determined on the basis of reciprocity. The Governor in Council may, by regulation, declare that the Act is to apply to a part of Her Majesty's dominions. However, such a declaration may be made only if the Governor in Council is satisfied that the legislature of that part of Her Majesty's dominions has made adequate provision for the recognition of grants made by the Supreme Court of Queensland.⁸⁶²

32.16 The legislation presently applies to grants made in the other Australian States, the ACT, the Northern Territory, the Territories of Christmas Island, Cocos (Keeling) Islands and Norfolk Island, New Zealand and the United Kingdom of Great Britain and Northern Ireland.⁸⁶³

32.17 Because the Queensland legislation applies only to grants made in countries prescribed by regulation, it avoids the uncertainty that results from the use of the phrase 'Her Majesty's dominions' in the legislation in New South Wales and Western Australia.⁸⁶⁴ However, as a result of this restriction, grants that would be capable of being resealed in most other Australian States and Territories, such as grants made in most provinces of Canada, cannot be resealed in Queensland.

32.18 The Queensland legislation also enables the resealing of a grant made by 'a British court in a foreign country'.⁸⁶⁵ The Law Reform Commission of Western Australia suggested in its Report that this provision applied at a time when certain British courts were empowered, usually under treaty arrangements, to exercise jurisdiction in such circumstances. The Western Australian Commission considered the provision to be a historical curiosity.⁸⁶⁶

South Australia

32.19 The South Australian legislation provides for the resealing of 'any probate or administration granted by any Court of competent jurisdiction in any

861 *British Probates Act 1898* (Qld) s 4(1).

862 *British Probates Act 1898* (Qld) s 3.

863 *British Probates Regulation 2008* (Qld) s 3, sch.

864 See [32.8]–[32.11] above.

865 *British Probates Act 1898* (Qld) s 5. The expression 'British court in a foreign country' is defined in s 2 of the Act to mean 'any British court having jurisdiction out of Her Majesty's dominions'. These provisions are based on ss 3 and 6 of the *Colonial Probates Act 1892* (UK).

866 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [4.6] note 1.

of the Australasian States or in the United Kingdom, or any probate or administration granted by a foreign Court'.⁸⁶⁷

32.20 Section 19(1) of the *Administration and Probate Act 1919* (SA) defines 'probate or administration granted by a foreign Court' in the following terms:

probate or administration granted by a foreign Court means any document as to which the Registrar is satisfied that it was issued out of a court of competent jurisdiction in a foreign country other than an Australasian State, or the United Kingdom, and that in such country it corresponds to a probate of a will or to an administration in this State.

32.21 Section 20 defines the 'Australasian States' and 'United Kingdom' as follows:

Australasian States means all the States of the Commonwealth of Australia other than the State of South Australia, and includes the Dominion of New Zealand and the colony of Fiji, and any other British colonies or possessions in Australasia now existing or hereafter to be created, which the Governor may from time to time by proclamation declare to be Australasian States within the meaning of section 17;

United Kingdom means Great Britain and Ireland and includes the Channel Islands.

32.22 The reference to a grant made by a foreign court gives the provision a broad application. Further, the definition of 'United Kingdom' enables the Supreme Court of South Australia to reseal grants made not only in Great Britain and Northern Ireland, but also those made in the Republic of Ireland⁸⁶⁸ and the Channel Islands.⁸⁶⁹

32.23 However, the definition of 'Australasian States' is ambiguous in several respects. It does not expressly include the ACT or the Northern Territory, although grants made in these jurisdictions are in practice resealed in South Australia.⁸⁷⁰ Further, the meaning of the expressions 'British colonies or possessions' and 'Australasia' is unclear. For example, it is uncertain whether all Australian and New Zealand dependencies are intended to be included, although this is not presently a problem as no jurisdictions have been proclaimed as 'Australasian States' under this provision.

⁸⁶⁷ *Administration and Probate Act 1919* (SA) s 17.

⁸⁶⁸ The only other Australian jurisdiction that provides for the resealing of a grant made in the Republic of Ireland is the Northern Territory: see [32.13] above.

⁸⁶⁹ Although citizens of the Channel Islands are British citizens, the Channel Islands do not form part of the United Kingdom: *Halsbury's Laws of England* (4th ed) vol 6, [838]. Consequently, a reference to a grant made by a court of competent jurisdiction in the United Kingdom would not, unless expressly provided, include a grant made by a court of competent jurisdiction in the Channel Islands.

⁸⁷⁰ Letter to the Queensland Law Reform Commission from the South Australian Registrar of Probates, 26 October 2001.

32.24 The South Australian legislation contains outdated references to countries. The term 'Dominion' is no longer used in relation to New Zealand and Fiji is no longer a colony.⁸⁷¹

Tasmania

32.25 In Tasmania, the *Administration and Probate Act 1935* (Tas) provides for the resealing of a grant made by 'any court of competent jurisdiction in a State or Territory of the Commonwealth or a reciprocating country'.⁸⁷² The legislation provides the following definition of 'reciprocating country':⁸⁷³

In this Part references to a reciprocating country shall be construed as references to the United Kingdom, the Dominion of New Zealand, Fiji, or, subject to the terms of any proclamation made under section 53, to any other country declared under that section to be a country to which this Part applies; and for the purposes of this Part

"country" includes any territory or other jurisdiction.

32.26 Section 53(1) of the legislation provides that the Governor, on being satisfied that the laws of any country make adequate provision for the recognition in that country of a grant made by the Supreme Court of Tasmania, may, by proclamation, declare that Part VI of the Act (which deals with the resealing of foreign grants) is to apply to that country.

32.27 Proclamations have been made under that section with respect to Northern Rhodesia (now Zambia),⁸⁷⁴ the Territory of Papua and New Guinea,⁸⁷⁵ the Province of Ontario in the Dominion of Canada⁸⁷⁶ and the Colony of Sarawak (now part of Malaysia).⁸⁷⁷

Victoria

32.28 The Victorian legislation provides for the resealing of a grant made by:⁸⁷⁸

any court of competent jurisdiction in the United Kingdom or in any of the Australasian States or ... a court of competent jurisdiction in a country specified in a proclamation in force under section eighty-eight.

871 Fiji gained independence in 1970: *Halsbury's Laws of England* (4th ed) vol 6, [852].

872 *Administration and Probate Act 1935* (Tas) s 48(1).

873 *Administration and Probate Act 1935* (Tas) s 47A(2).

874 *Tasmanian Government Gazette*, No 10179, 14 July 1936, 1911.

875 *Tasmanian Government Gazette*, No 12679, 10 September 1953, 2723.

876 SR No 117 of 1954, notified in the *Tasmanian Government Gazette* on 15 September 1954.

877 SR No 151 of 1957, notified in the *Tasmanian Government Gazette* on 27 November 1957.

878 *Administration and Probate Act 1958* (Vic) s 81(1).

32.29 The terms 'Australasian States' and 'United Kingdom' are defined as follows:⁸⁷⁹

Australasian States includes all the States of the Commonwealth of Australia other than Victoria, and includes also the Northern Territory, the Dominion of New Zealand, the Colony of Fiji, and any other British colony or possession in Australasia now existing or hereafter to be created which the Governor in Council may declare to be an Australasian State within the meaning of this Part;

United Kingdom includes the Channel Islands.⁸⁸⁰ (note added)

32.30 The definition of 'Australasian States' gives rise to the same difficulties that are discussed above in relation to the definition of that term in the South Australian legislation.⁸⁸¹ The ACT is the only jurisdiction that has been declared to be an Australasian State.⁸⁸²

32.31 Section 88 of the Victorian legislation provides that the Governor in Council, on being satisfied that a grant of probate or letters of administration made by a court of competent jurisdiction in a country other than an Australasian State or the United Kingdom, or a grant or order issued by such a court, corresponds to a grant of probate or letters of administration issued by the Supreme Court of Victoria, may by proclamation declare that Part III of the Act (which deals with the resealing of foreign grants) is to apply to that country.

32.32 The current proclamation, which was made in 1973, lists Gibraltar, Guyana, Hong Kong, Kenya, Malaysia, Papua New Guinea, Singapore and the Canadian provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Saskatchewan.⁸⁸³ The return of Hong Kong to Chinese rule has not so far resulted in the revocation of the proclamation in respect of Hong Kong.

COMMONWEALTH SECRETARIAT DRAFT MODEL BILL

32.33 The Commonwealth Secretariat Draft Model Bill simply provided for the resealing of:⁸⁸⁴

879 *Administration and Probate Act 1958* (Vic) s 80.

880 See note 869 above in relation to the status of the Channel Islands.

881 See [32.20], [32.23] above.

882 Victoria, *Government Gazette*, No 74, 16 May 1934, 1. That proclamation was made under Part III of the *Administration and Probate Act 1928* (Vic), rather than under the present Act, but see *Interpretation of Legislation Act 1984* (Vic) ss 16, 38 (definition of 'subordinate instrument').

883 Victoria, *Government Gazette*, No 117, 19 December 1973, 4040.

884 Commonwealth Secretariat Draft Model Bill cl 3(1). The Commonwealth Secretariat Draft Model Bill is reproduced in Appendix 3 to this Report.

a grant of probate or letters of administration of the estate of any deceased person ... made by a court in any part of the Commonwealth⁸⁸⁵ or in any other country. (note added)

32.34 It did not prescribe, or make provision for the prescription of, a list of countries whose grants could be resealed. Instead, the issue of whether a 'grant' from a particular country could be resealed turned on whether the instrument in question fell within the definition of 'grant of administration' contained in the draft model bill. That term was defined as follows:⁸⁸⁶

'grant of administration' means a probate or letters of administration or any instrument having, within the jurisdiction where it was made, the effect of appointing or authorising a person (in this Act referred to as 'the grantee') to collect and administer any part of the estate of a deceased person and otherwise having in that jurisdiction an effect equivalent to that given, under the law of _____, to a probate or letters of administration.

32.35 This approach is similar to that which applies under the South Australian legislation. As noted previously, the legislation in that jurisdiction provides that a grant made by a foreign court may be resealed if the registrar is satisfied that, in the country in which the grant was made, it corresponds to a grant of probate or administration in South Australia.⁸⁸⁷

RECOMMENDATION OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

32.36 The Law Reform Commission of Western Australia favoured the approach adopted in the Commonwealth Secretariat Draft Model Bill:⁸⁸⁸

In the Commission's view it is desirable to allow the resealing of grants made in countries outside the Commonwealth, in appropriate cases, such as those in which the legal system of the country in question is based on common law principles. However, it is not desirable to adopt an approach involving the drawing up of a list of countries which has to be amended from time to time by Order in Council. With such an approach, there might be difficulty in ensuring that the lists in the various Australian States and Territories remained uniform.

885

The Commonwealth Secretariat Draft Model Bill did not include a definition of the expression 'any part of the Commonwealth'. Clause 3 was drafted on the assumption that there was 'in other legislation a general definition of "Commonwealth" in which the non-independent jurisdictions, for which fully-independent Members have responsibility' were included: Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Apia, Western Samoa 18–23 April 1979* (1979) Appendix 1, 67, explanatory notes to cl 3(1). It was suggested (*ibid*) that, if such a definition did not exist, it would be necessary to include the following definition:

'any part of the Commonwealth' means any independent sovereign member of the Commonwealth for the time being and includes any territory for whose international relations any such member is responsible.

886

Commonwealth Secretariat Draft Model Bill cl 2(1).

887

See [32.20] above for the definition of 'probate or administration granted by a foreign Court' that is contained in s 19(1) of the *Administration and Probate Act 1919* (SA).

888

Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [4.21].

32.37 Consequently, that Commission recommended that the proposed scheme for resealing should:⁸⁸⁹

- provide for the resealing of a grant made by a court of competent jurisdiction in any part of the Commonwealth of Nations or in any other country;
- include a definition of 'grant of probate or administration' based on the definition of 'grant of administration' contained in the Commonwealth Secretariat Draft Model Bill;⁸⁹⁰ and
- define 'any part of the Commonwealth' to mean 'any independent sovereign member of the Commonwealth of Nations for the time being and including any territory for whose international relations any such member is responsible'.⁸⁹¹

32.38 The Law Reform Commission of Western Australia observed that, under this proposal, it would be the duty of the registrar of the Supreme Court in the resealing jurisdiction to decide whether the instrument the subject of the resealing application was issued by a court of competent jurisdiction in the country in question, and whether the instrument was sufficiently similar in effect to a grant made by the Supreme Court of the resealing jurisdiction to satisfy the statutory definition of 'grant of probate or administration'.⁸⁹²

DISCUSSION PAPER

32.39 The Discussion Paper on the recognition of interstate and foreign grants did not express a preliminary view about the overall approach that should be taken in relation to the issue of prescribing the countries whose grants should be capable of being resealed. Obviously, it was suggested that each Australian jurisdiction should be able to reseat grants made by a court of competent jurisdiction in another Australian State or Territory.⁸⁹³ However, in relation to grants made in foreign countries, a preference was not expressed for one particular approach. Instead, it was suggested that there were two principal alternatives for prescribing the countries whose grants should be capable of being resealed. The model legislation could provide for the resealing of grants made by a court of competent jurisdiction:⁸⁹⁴

889 Ibid [11.2] Recommendation (20).

890 See [32.34] above.

891 See note 885 above.

892 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [4.23].

893 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 161.

894 Ibid. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [6.6].

- in any part of the Commonwealth of Nations or any other country; or
- in any country gazetted from time to time by the Commonwealth Minister for Foreign Affairs.

32.40 The first alternative was based on the approach taken in the Commonwealth Secretariat Draft Model Bill, the adoption of which was subsequently recommended by the Law Reform Commission of Western Australia. That approach would make it unnecessary to have an official list of countries or to keep such a list up to date. It would rely on the courts to determine whether instruments issued by the courts of particular countries were sufficiently similar to Australian grants of probate and administration to be resealed. Over time, a body of precedent would develop concerning the instruments that could be resealed. It was acknowledged in the Discussion Paper that there was, however, no certainty that the courts of all Australian jurisdictions would make the same decision in relation to instruments issued in any particular country.⁸⁹⁵

32.41 The second alternative was based on the proposal made in 1990 by the Probate Registrars that:⁸⁹⁶

All Australian States and Territories should by uniform legislation allow the resealing of a grant of probate or administration made by a court of competent jurisdiction in any country gazetted from time to time by the Minister for Foreign Affairs.

32.42 Although this proposal would require regular review of the list of gazetted countries, it would at least ensure that the countries recognised for this purpose by the Australian States and Territories remained uniform. However, for this proposal to be viable, it would be necessary for Commonwealth legislation to be passed to confer on the Minister for Foreign Affairs the power to proclaim certain countries for this purpose. In the Discussion Paper, it was acknowledged that the Commonwealth Parliament does not have the power under section 51 of the *Australian Constitution* to make laws with respect to administration and probate matters.⁸⁹⁷ It was suggested that it might be possible for Commonwealth legislation to be supported by the external affairs power.⁸⁹⁸ Alternatively, it was suggested that the States could make a referral

895 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 161. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [6.7].

896 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 10.

897 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 161.

898 See *Australian Constitution* s 51(xxix).

of the necessary power to the Commonwealth Parliament for the purposes of section 51(xxxvii) of the Constitution.⁸⁹⁹

SUBMISSIONS

32.43 All the submissions that commented on this issue were of the view that it should be possible to reseal a grant made by a court of competent jurisdiction in any country from time to time gazetted by the Commonwealth Minister for Foreign Affairs. This was the view of the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Queensland Law Society, the New South Wales Bar Association and the Trustee Corporations Association of Australia.⁹⁰⁰ The Public Trustee of New South Wales commented that, although this approach would require the cooperation of the Commonwealth, it was preferred for reasons of certainty.⁹⁰¹

THE NATIONAL COMMITTEE'S VIEW

32.44 Subject to the qualification recommended in Chapter 38 of this Report in the context of the proposed scheme for the automatic recognition of certain Australian grants, the model legislation should provide expressly that the court may reseal a grant made in another Australian State or Territory.⁹⁰²

32.45 In relation to the resealing of grants made by an overseas court, the National Committee considers it essential for there to be certainty in relation to the countries whose grants may be resealed. In its view, a prescribed list of countries whose grants may be resealed affords greater certainty than merely providing in the model legislation for the resealing of instruments that, in the country in which they are issued, have a similar effect to a grant of probate or administration made in the resealing jurisdiction. In this regard, the National Committee notes that, in Western Australia, the Probate Rules Committee has considered this issue and favoured the listing of countries whose grants may be resealed.⁹⁰³ The National Committee also notes that all the submissions that addressed this issue were in favour of a prescribed list of countries.

899 Section 51 of the *Australian Constitution* provides that the Parliament of the Commonwealth has the power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law: ...

900 Submissions R1, R2, R3, R5, R6.

901 Submission R2.

902 See note 904 below.

903 Probate Rules Committee (WA), *Revision of the Non-contentious Probate Rules 1967 of Western Australia*, Final Report (2002) [9.3].

32.46 However, the National Committee does not consider it practical for the list to be prescribed by the Commonwealth Minister for Foreign Affairs or, indeed, by any other Commonwealth Minister, such as the Attorney-General. Although, as between those jurisdictions that adopted the model provision, this approach would ensure uniformity in relation to the countries whose grants may be resealed, this approach would not be viable unless Commonwealth legislation were first passed to confer on the relevant Commonwealth Minister the power to prescribe such a list.

32.47 Further, the National Committee is conscious that, unless it is regularly reviewed, a list of the countries whose grants may be resealed is liable to become out of date. In particular, it is possible that a country that is referred to in the prescribed list may subsequently become known by a different name.

32.48 Accordingly, the National Committee is of the view that the model legislation should provide for the resealing of a grant made by:

- the Supreme Court of another State or Territory; and
- a court of competent jurisdiction in either:
 - a country or part of a country that is prescribed by regulation; or
 - any other country or a part of any other country, provided that, in that country or in that part of that country, the grant that is sought to be resealed has a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction.

RECOMMENDATIONS

32-1 Subject to Recommendation 38-9, the model legislation should provide that the court may reseat a grant made by the Supreme Court of another Australian State or Territory.⁹⁰⁴

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a)–(d)), ‘interstate jurisdiction’).

904

See [32.44] above. Note that Recommendation 38-9 provides that the court may not reseat a grant made in an Australian State or Territory unless the deceased died domiciled overseas. Note also that, when stage two of the proposed scheme for the automatic recognition of Australian grants is implemented, the provision giving effect to Recommendation 38-9 will be repealed, as resealing will no longer be necessary in order for a grant made in one Australian jurisdiction to be effective in another Australian jurisdiction.

32-2 The model legislation should provide for the resealing of a grant made by a court of competent jurisdiction in either:

- (a) a country or part of a country that is prescribed by regulation; or
- (b) any other country or a part of any other country, provided that, in that country or in that part of that country, the grant that is sought to be resealed has a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction.⁹⁰⁵

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definitions of 'foreign grant of representation' (paras (a)–(d)), 'overseas jurisdiction').

905

See [32.45]–[32.48] above.

Chapter 33

Persons who may apply for the resealing of a grant

EXISTING LEGISLATIVE PROVISIONS	226
Introduction.....	226
Executor or administrator	226
Person authorised by the executor or administrator to apply for the resealing of a grant	226
Executor by representation	227
Executor or administrator by representation constituted under section 44(2) of the <i>Probate and Administration Act 1898</i> (NSW).....	229
The public trustee in whose favour an order to administer is made	232
The trustee company or person who has filed an election to administer.....	232
COMMONWEALTH SECRETARIAT DRAFT MODEL BILL	233
RECOMMENDATION OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA.....	234
DISCUSSION PAPER.....	234
SUBMISSIONS.....	236
THE NATIONAL COMMITTEE'S VIEW	237
Grants of probate and letters of administration.....	237
Orders to administer.....	241
Elections to administer	241
THE AGE OF THE APPLICANT FOR RESEALING	241
Background	241
The National Committee's view.....	241
RECOMMENDATIONS	242

EXISTING LEGISLATIVE PROVISIONS

Introduction

33.1 This chapter examines the different categories of people who may presently apply for the resealing of a grant in the various Australian jurisdictions, as well as the position of persons who have filed an election to administer. The categories considered are:

- the executor or administrator;
- a person authorised by the executor or administrator to apply for the resealing of a grant;
- an executor by representation;
- an executor or administrator by representation under section 44(2) of the *Probate and Administration Act 1898* (NSW);
- the public trustee in whose favour an order to administer has been made; and
- the public trustee, trustee company or legal practitioner who has filed an election to administer.

Executor or administrator

33.2 In all Australian jurisdictions, an application for the resealing of a grant of probate or letters of administration may be made by the executor named in the grant of probate or by the administrator named in the letters of administration.⁹⁰⁶

Person authorised by the executor or administrator to apply for the resealing of a grant

33.3 In the Australian jurisdictions other than Queensland an application for the resealing of a grant may be made by a person authorised by the executor or administrator, under a power of attorney given by the executor or administrator,⁹⁰⁷ to make the application.⁹⁰⁸

⁹⁰⁶ *Administration and Probate Act 1929* (ACT) s 80(2), (3)(a)(i), (b)(i); *Probate and Administration Act 1898* (NSW) s 107(1); *Administration and Probate Act* (NT) s 111(1)(a)(i), (b)(i); *Uniform Civil Procedure Rules 1999* (Qld) r 616; *The Probate Rules 2004* (SA) r 50.01(a); *Administration and Probate Act 1935* (Tas) s 48(1)(a); *Administration and Probate Act 1958* (Vic) s 81(1)(a); *Administration Act 1903* (WA) s 61(1).

⁹⁰⁷ The instrument conferring the power must either expressly or impliedly authorise the attorney to apply for the resealing of the grant: *Re Johnson* (1888) 14 VLR 218; *In the Will of Hewitt* (1898) 23 VLR 499; *Re Shannon* [1915] VLR 64; *Re Rodger* [1917] QWN 44; *In the Will of Fairer* [1927] VLR 580.

33.4 In South Australia, the rules also provide that an application for the resealing of a grant may be made by 'a practitioner authorised in writing to apply on behalf of the executor or administrator'.⁹⁰⁹

33.5 In Queensland, the rules simply provide that an application for the resealing of a grant may be made by a person lawfully authorised for that purpose by the executor or administrator.⁹¹⁰ Although, the relevant authority is not expressly required to be conferred on the applicant by power of attorney, it is nevertheless the practice in Queensland to require the relevant authority to be conferred in that form.⁹¹¹

Executor by representation

33.6 As explained in Chapter 7 of this Report, the legislation in a number of Australian jurisdictions provides expressly for the transmission of the office of executor upon the death of a last surviving, or sole, proving, executor.⁹¹² In these jurisdictions, an executor who obtains a grant of probate of the will of the deceased executor becomes the executor by representation of any will of which the deceased executor had obtained a grant of probate.

33.7 Obviously, an executor by representation is not the executor named in the original grant. Accordingly, whether such a person may apply for the resealing of the grant made in favour of the deceased executor turns on the construction of the legislation in the individual jurisdiction.

Australian Capital Territory, Northern Territory

33.8 The legislation in the ACT and the Northern Territory provides expressly that an executor by representation may apply for the resealing of a grant.⁹¹³

New South Wales, Tasmania, Victoria

33.9 In New South Wales, Tasmania and Victoria, the legislation defines 'executor', for the purpose of the resealing provisions, to include an executor by

908 *Administration and Probate Act 1929* (ACT) s 80(2), (3)(a)(ii), (b)(ii); *Probate and Administration Act 1898* (NSW) s 107(1); *Administration and Probate Act* (NT) s 111(1)(a)(ii), (b)(ii); *The Probate Rules 2004* (SA) r 50.01(b); *Administration and Probate Act 1935* (Tas) s 48(1)(b); *Administration and Probate Act 1958* (Vic) s 81(1)(b); *Administration Act 1903* (WA) s 61(1).

909 *The Probate Rules 2004* (SA) r 50.01(c).

910 *Uniform Civil Procedure Rules 1999* (Qld) r 616.

911 Advice to the Queensland Law Reform Commission from the then Principal Registrar of the Supreme Court of Queensland, 31 July 2003.

912 See [7.4]–[7.5] in vol 1 of this Report.

913 *Administration and Probate Act 1929* (ACT) s 80(2), (3)(a)(iii); *Administration and Probate Act* (NT) s 111(1)(a)(iii).

representation.⁹¹⁴ Consequently, although the legislation provides that an application for resealing may be made by the executor named in the grant of probate,⁹¹⁵ it is clear that, if the executor named in the grant has died, an application for resealing may be made by the executor by representation.⁹¹⁶

Queensland, South Australia, Western Australia

33.10 In Queensland, South Australia and Western Australia, there are no express statutory provisions enabling an application for resealing to be made by an executor by representation.

33.11 It has been held, in relation to the South Australian legislation, that an executor by representation may apply for the resealing of a grant.⁹¹⁷ That would also appear to be the position in Queensland, where the rules provide that an application may be made by 'the executor'⁹¹⁸ without imposing any further limitation that the executor must be the executor named in the original grant.

33.12 However, it does not appear that an executor by representation can apply for the resealing of a grant of probate in Western Australia. The legislation in that State provides that an application for the resealing of a grant of probate may be made 'by any person being the executor ... therein named'.⁹¹⁹ Those words do not appear to extend to an executor by representation, who is not the executor named in the grant of probate, but is the executor of the deceased executor.⁹²⁰

914 *Probate and Administration Act 1898* (NSW) s 107(4); *Administration and Probate Act 1935* (Tas) s 47A(1); *Administration and Probate Act 1958* (Vic) s 80 (definition of 'executor or administrator therein named').

915 *Probate and Administration Act 1898* (NSW) s 107(1); *Administration and Probate Act 1935* (Tas) s 48(1)(a); *Administration and Probate Act 1958* (Vic) s 81(1)(a).

916 This definition of 'executor' also has the effect of enabling an application for the resealing of a grant to be made by a person authorised to that effect under a power of attorney given by an executor by representation.

917 *Drummond v The Registrar of Probates (South Australia)* (1918) 25 CLR 318. The application in that case was made under s 26(1) of the *Administration and Probate Act 1891* (SA). That provision, like the current provision (s 17 of the *Administration and Probate Act 1919* (SA)), did not specify who could apply for the resealing of a grant, although it provided that, on resealing, 'every executor or administrator thereunder' should have certain specified rights and duties. The relevant rule at the time, like r 50.01 of *The Probate Rules 2004* (SA), permitted the application to be made by 'the executor'. See the discussion of this decision in G Weir, 'Resealing by Representative of Executor or Administrator' (1939) 13 *Australian Law Journal* 102, 103.

918 *Uniform Civil Procedure Rules 1999* (Qld) r 616.

919 *Administration Act 1903* (WA) s 61(1).

920 See *In the Will of Hill* [1921] VLR 140, which was decided before the legislation in Victoria was amended to allow an application to be made by an executor by representation. The Court refused an application for resealing made by an executor by representation. Irvine CJ acknowledged (at 142–3) that there was 'a serious omission in the Act' but one that he could not rectify:

To do so would be, in effect, to import into the explicit words of this section a provision that the person named should, in addition to the person named, include the executor of such person, if he or she has since died; ...

Executor or administrator by representation constituted under section 44(2) of the *Probate and Administration Act 1898* (NSW)

Introduction

33.13 In limited circumstances, the New South Wales legislation has extended the doctrine of executorship by representation. Section 44(2) of the *Probate and Administration Act 1898* (NSW) provides:

44 Real and personal estate to vest in executor or administrator

...

- (2) Upon the grant, to the Public Trustee or a trustee company, of probate of the will or administration of the estate of a person dying after the commencement of the *Wills, Probate and Administration (Trustee Companies) Amendment Act 1985*, the Public Trustee or the trustee company, as the case may be, shall be:
- (a) the executor, by representation, of any will of which the person had been granted probate, and
 - (b) the administrator, by representation, of any estate of which the person had been granted administration.

33.14 As explained in Chapter 7, this section does more than create the concept of a chain of administration. It has the effect that, regardless of whether the grant to the Public Trustee or the trustee company is one of probate or administration, the Public Trustee or the trustee company, as the case may be, will become the executor by representation of any will of which the deceased person had been granted probate, as well as the administrator by representation of any estate of which the deceased person had been granted administration. As a result, it is possible for the office of administrator to be transmitted to an administrator, for the office of executor to be transmitted to an administrator, and for the office of administrator to be transmitted to an executor.⁹²¹

33.15 No Australian State or Territory provides expressly that, if the Public Trustee of New South Wales or a trustee company is constituted as an executor or administrator by representation under section 44(2) of the *Probate and Administration Act 1898* (NSW), the Public Trustee or trustee company may apply in that State or Territory for the resealing of the grant made in favour of the deceased executor or administrator. Whether the Public Trustee of New South Wales or a trustee company may make such an application turns on the construction of the legislation in the individual jurisdiction.

⁹²¹

See [7.15]–[7.16] in vol 1 of this Report. The background to, and scope of, the New South Wales provision are discussed at [7.17]–[7.20] in vol 1 of this Report.

Queensland, South Australia

33.16 The rules in Queensland and South Australia provide that an application for the resealing of a grant may be made by ‘the executor or administrator’, without imposing any further limitation that the executor or administrator who makes the application must be the executor or administrator named in the original grant.⁹²² It seems therefore that, if the Public Trustee of New South Wales or a trustee company was an executor or administrator by representation by virtue of section 44(2) of the *Probate and Administration Act 1898* (NSW), the Public Trustee or trustee company could apply in Queensland and South Australia for the resealing of the grant made in favour of the deceased executor or administrator.

Australian Capital Territory, Northern Territory, Tasmania, Victoria

33.17 Although the legislation in the ACT, the Northern Territory, Tasmania and Victoria enables an application for the resealing of a grant of probate to be made by an executor by representation,⁹²³ the issue of whether the Public Trustee of New South Wales or a trustee company may apply for the resealing of the original grant of probate on the basis of being, by virtue of section 44(2) of the *Probate and Administration Act 1898* (NSW), the executor by representation is more complex.

33.18 In the ACT and the Northern Territory, the legislation provides that, in the case of a probate of a will, an application for resealing may be made by ‘the executor, by representation, of the will’.⁹²⁴ It would appear that this would include the Public Trustee of New South Wales or a trustee company that is, by virtue of section 44(2) of the *Probate and Administration Act 1898* (NSW), an executor by representation.

33.19 In Tasmania and Victoria, however, the legislation is expressed slightly differently, and provides that an application for the resealing of probate of a will or letters of administration of the estate of a deceased person may be made by ‘the executor or administrator therein named’.⁹²⁵ For the purposes of the resealing provisions, this expression is defined to include ‘the executor of an executor becoming, by representation, the executor of the original estate’.⁹²⁶ This would include the Public Trustee of New South Wales or a trustee

922 *Uniform Civil Procedure Rules 1999* (Qld) r 616; *The Probate Rules 2004* (SA) r 50.01(a). See *Drummond v The Registrar of Probates (South Australia)* (1918) 25 CLR 318, which is discussed at note 917 above. Although that decision concerned an application by an executor by representation, the same reasoning would apply where an administrator by representation, constituted under the New South Wales legislation, applied in Queensland or South Australia for the resealing of letters of administration made in favour of a deceased administrator.

923 See [33.8]–[33.9] above.

924 *Administration and Probate Act 1929* (ACT) s 80(2), (3)(a)(iii); *Administration and Probate Act* (NT) s 111(1)(a)(iii).

925 *Administration and Probate Act 1935* (Tas) s 48(1)(a); *Administration and Probate Act 1958* (Vic) s 81(1)(a).

926 *Administration and Probate Act 1935* (Tas) s 47A(1); *Administration and Probate Act 1958* (Vic) s 80.

company where it obtained probate of the will of a deceased executor who had previously obtained probate of the will of a deceased person. However, it seems that, if the Public Trustee of New South Wales or a trustee company was appointed as administrator of the estate of a deceased executor, it could not apply for the resealing of the original grant of probate, even though, under section 44(2) of the *Probate and Administration Act 1898* (NSW), the Public Trustee or the trustee company would be regarded, in New South Wales, as the executor by representation of the head estate.

33.20 In the ACT and the Northern Territory, the legislation provides that, in the case of administration of an estate, an application for resealing may be made by ‘the administrator to whom the administration was granted’.⁹²⁷ Similarly, the legislation in Tasmania and Victoria provides that, in the case of letters of administration, an application for resealing may be made by ‘the administrator therein named’.⁹²⁸ Even though the Public Trustee of New South Wales or a trustee company may in New South Wales be an administrator by representation under section 44(2) of the *Probate and Administration Act 1898* (NSW), the Public Trustee or the trustee company, as the case may be, is not the administrator named in the original grant. Consequently, it is not possible for the Public Trustee or the trustee company to apply for the resealing of the original letters of administration.⁹²⁹

Western Australia

33.21 The legislation in Western Australia simply provides that an application for the resealing of any probate or administration may be made by ‘the executor or administrator therein named’.⁹³⁰ As a result, it is not possible for the Public Trustee of New South Wales or a trustee company that is an executor or administrator by representation by virtue of section 44(2) of the *Probate and Administration Act 1898* (NSW) to apply in Western Australia for the resealing of the grant made in favour of the deceased executor or administrator.

New South Wales

33.22 If another jurisdiction enacted a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW), it would seem that the public trustee or a trustee company that was an executor by representation under that provision could apply to have the original grant of probate resealed in New South Wales. The New South Wales resealing provision provides that an application for the resealing of a grant of probate may be made by ‘the executor

⁹²⁷ *Administration and Probate Act 1929* (ACT) s 80(2), (3)(b)(i); *Administration and Probate Act* (NT) s 111(1)(b)(i).

⁹²⁸ *Administration and Probate Act 1935* (Tas) s 48(1)(a); *Administration and Probate Act 1958* (Vic) s 81(1)(a).

⁹²⁹ See *In the Will of Hill* [1921] VLR 140, which is discussed at note 920 above. Although that decision concerned an application by an executor by representation, the same reasoning would apply to an application made in these jurisdictions by an administrator by representation.

⁹³⁰ *Administration Act 1903* (WA) s 61(1). See *In the Will of Hill* [1921] VLR 140, which is discussed at note 920 above.

... therein named'.⁹³¹ It further provides that 'the word executor shall be deemed to include executor by representation'.⁹³² Because this definition does not include a specific reference to 'the executor of an executor',⁹³³ it is arguable that a public trustee or trustee company that was, under a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW), an executor by representation could apply for the resealing of the original grant of probate, even if the public trustee or trustee company was an executor by representation by virtue of having been appointed as administrator of the estate of a deceased executor.

33.23 For the reasons outlined above in relation to the legislation in the ACT, the Northern Territory, Tasmania and Victoria,⁹³⁴ it would not be possible for a person who was an administrator by representation under a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW) to apply to have the original letters of administration resealed in New South Wales.

The public trustee in whose favour an order to administer is made

33.24 The legislation in the ACT and the Northern Territory provides expressly that, in the case of an order to collect and administer an estate,⁹³⁵ the public trustee to whom the order was granted may apply to have the order resealed.⁹³⁶

33.25 As explained in Chapter 31, in all jurisdictions that provide for the making of an order to administer, the effect of the order is that the public trustee is in the same position as if probate or letters of administration had been granted to the public trustee.⁹³⁷ Consequently, in those States in which an order to administer is capable of being resealed,⁹³⁸ the application for resealing may also be made by the public trustee in whose favour the order was made.

The trustee company or person who has filed an election to administer

33.26 The legislation in the various Australian jurisdictions does not include, among the persons who may apply for the resealing of a grant, the public

931 *Probate and Administration Act 1898* (NSW) s 107(1).

932 *Probate and Administration Act 1898* (NSW) s 107(4).

933 This expression is used in the legislation in Tasmania and Victoria: see [33.19] above.

934 See [33.20] above.

935 See the explanation of orders to administer and orders to collect and administer at [31.40]–[31.43] above.

936 *Administration and Probate Act 1929* (ACT) s 80(3)(c); *Administration and Probate Act* (NT) s 111(1)(c).

937 See [31.43] above.

938 Whether an order to administer may be resealed in a particular Australian State depends on the interpretation of the definitions of the terms 'probate' and 'administration' in the legislation of that State, and on whether the legislation is otherwise expressed in terms that are sufficiently broad to apply to an order to administer. This issue is considered at [31.45]–[31.55] above.

trustee (or statutory equivalent) or other person who has filed an election to administer or a trustee company that has filed an election to administer. As explained in Chapter 31 of this Report, an election to administer is not generally an instrument capable of being resealed in the Australian States and Territories.⁹³⁹

33.27 However, as the National Committee has recommended in Chapter 31 that an election to administer should be capable of being resealed, it is necessary to consider the range of persons who should be able to apply for the resealing of such an instrument. As explained in Chapter 29, although the legislation in most jurisdictions provides for an election to administer to be filed by the public trustee (in Victoria, by State Trustees Limited) or by a trustee company, in the Northern Territory, the legislation provides that an election to administer may also be filed by a legal practitioner.⁹⁴⁰

COMMONWEALTH SECRETARIAT DRAFT MODEL BILL

33.28 The Commonwealth Secretariat Draft Model Bill provided that an application for the resealing of a grant could be made by:⁹⁴¹

- (a) a personal representative⁹⁴² or the grantee, as the case may be; or
- (b) a person authorised by power of attorney given by any such personal representative or grantee; or
- (c) a legal practitioner registered in _____ acting on behalf of any such personal representative or grantee or of a person referred to in paragraph (b). (note added)

33.29 Although paragraph (c) of this clause permitted an application for resealing to be made by a legal practitioner acting on behalf of a personal representative or grantee, or on behalf of a person authorised under power of attorney to apply for the resealing, the provision of the draft model bill that dealt with the effects of resealing did not assimilate the position of a legal practitioner who obtained the resealing of a grant with that of a personal representative who was originally appointed in the resealing jurisdiction.⁹⁴³

939 See [31.75]–[31.78] above.

940 See [29.6] above.

941 Commonwealth Secretariat Draft Model Bill cl 3(2).

942 The term 'personal representative' was defined in cl 2(1) of the Commonwealth Secretariat Draft Model Bill to mean 'the executor, original or by representation, or administrator for the time being, of a deceased person and includes any public official or any corporation named in the probate or letters of administration as executor or administrator as the case may be'.

943 See the discussion of cl 6(2) of the Commonwealth Secretariat Draft Model Bill at [34.22] below. Where an application for resealing was made by a legal practitioner, cl 6(2) imposed the duties and liabilities of a personal representative on the person on whose behalf the legal practitioner made the application — that is, on the personal representative or grantee or on the person authorised by power of attorney, given by the personal representative or grantee, to make the application.

RECOMMENDATION OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

33.30 The Law Reform Commission of Western Australia referred in its Report to the differences between the States and Territories in relation to the persons who may apply for the resealing of a grant and recommended that:⁹⁴⁴

It should be possible for a grant to be resealed in favour of—

- (a) the executor or administrator named in the grant;
- (b) the legal representative of such executor or administrator;
- (c) a person appointed under a power of attorney by such executor or administrator;
- (d) the executor of an executor;
- (e) a public officer, such as a Public Trustee or a Curator, or a trust company, authorised to administer an estate in another State or Territory but not under present law capable of applying for an original grant in the resealing jurisdiction.

33.31 The Western Australian Commission stated that its recommendations were consistent with the provisions of the Commonwealth Secretariat Draft Model Bill.⁹⁴⁵

DISCUSSION PAPER

33.32 In the Discussion Paper, it was proposed that the model legislation should enable the following persons to apply for the resealing of a grant of probate of a will:⁹⁴⁶

- the executor named in the grant of probate;
- the executor by representation, provided that person is recognised as the executor by representation in the jurisdiction in which probate was granted, and probate of the will of every deceased executor in the chain

⁹⁴⁴ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (4).

⁹⁴⁵ *Ibid* [3.23] note 1.

⁹⁴⁶ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 77. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.9].

of representation has been granted or resealed in the resealing jurisdiction,⁹⁴⁷

- a person appointed under a power of attorney and authorised to apply for the resealing of the grant by the executor named in the grant or by the executor by representation.

33.33 Similarly, it was proposed that the model legislation should enable the following persons to apply for the resealing of letters of administration of the estate of a deceased person:⁹⁴⁸

- the administrator named in the grant of letters of administration;
- the administrator by representation,⁹⁴⁹ provided that person is recognised as the administrator by representation in the jurisdiction in which administration was granted, and administration of the deceased administrator's estate has been granted or resealed in the resealing jurisdiction by his or her administrator;
- a person appointed under a power of attorney and authorised to apply for the resealing of the grant by the administrator named in the grant or by the administrator by representation.

33.34 These proposals did not include, as a person eligible to apply for the resealing of a grant of probate or letters of administration, the legal representative of the executor or administrator, as recommended by the Law Reform Commission of Western Australia and as provided for in the Commonwealth Secretariat Draft Model Bill.⁹⁵⁰ It was not considered appropriate for the legal representative of the executor or administrator to be an applicant for resealing unless it was intended that he or she should, on the resealing of the grant, be placed in the position of a personal representative under an original grant.⁹⁵¹ It was observed, however, that the exclusion of the

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In 1990, the Probate Registrars considered the recommendation by the Law Reform Commission of Western Australia that an application for resealing may be made by 'the executor of an executor'. They expressed the view that it was essential that probate of the will of the deceased executor should have been granted or resealed in the resealing jurisdiction: *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 3–4. This proviso was consistent with that view, but recognised that there may be more than one deceased executor in the chain.

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Recognition of Interstate and Foreign Grants Discussion Paper (2001) 78. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.9].

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The office of administrator by representation is recognised in a limited form in New South Wales: see [33.13]–[33.14] above.

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Recognition of Interstate and Foreign Grants Discussion Paper (2001) 78; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.11]. This was also the view expressed by the Probate Registrars at their 1990 conference: *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) at 3–4.

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It was not proposed in the Discussion Paper that, on the resealing of a grant, the legal representative of the executor, administrator or attorney who applied for the resealing should be subject to the duties or liabilities of a personal representative: see *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 126, 128.

legal representative of an executor or administrator from the list of eligible persons would not prevent a legal representative from making such an application if he or she were authorised under a power of attorney given by the executor or administrator for that purpose.⁹⁵²

33.35 It was further proposed in the Discussion Paper that, if an order to administer had been made in favour of a public trustee or similar officer, the model legislation should allow the public trustee or similar officer to apply for the resealing of such an order.⁹⁵³

33.36 No preliminary view was expressed about who should be able to apply for the resealing of an election to administer.⁹⁵⁴ However, submissions were sought on whether, if the model legislation enabled an election to administer to be resealed, the application should be able to be made by the public trustee (or statutory equivalent) who filed the election or by the trustee company that filed the election.⁹⁵⁵

SUBMISSIONS

33.37 The submissions that addressed the issue of the persons who should be able to apply for the resealing of a grant generally endorsed the preliminary views expressed in the Discussion Paper.⁹⁵⁶

33.38 The New South Wales Bar Association also suggested that consideration should be given to enabling the following additional categories of persons to apply for the resealing of a grant:⁹⁵⁷

- such other persons who have received the written consent of all beneficiaries named in the will or entitled on intestacy, such consent to be evidenced by affidavit; and
- such other person as is authorised by the court.

33.39 Only one respondent commented on the issue of whether an application for resealing should be able to be made by a person who was authorised in writing to make the application by the executor or administrator, or

952 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 78.

953 *Ibid*; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.10].

954 See *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 78; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.9].

955 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 106–7. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 58.

956 Submissions R1, R2, R5, R6. The Victorian Bar agreed with the preliminary view in so far as it concerned the persons who should be able to apply for the resealing of a grant of probate or letters of administration, but did not comment on the proposal that the model legislation should provide that a public trustee or similar officer may apply for the resealing of an order to administer: Submission R4.

957 Submission R5.

whether the requisite authority must always be given by power of attorney.⁹⁵⁸ The former Principal Registrar of the Supreme Court of Queensland was of the view that the requisite authorisation should be required to be given under a power of attorney.⁹⁵⁹

THE NATIONAL COMMITTEE'S VIEW

Grants of probate and letters of administration

Executor, administrator or person authorised under power of attorney by the executor or administrator

33.40 In the National Committee's view, the model legislation should provide that an application for the resealing of a grant of probate or letters of administration may be made by:

- the executor named in the grant of probate;
- the administrator named in the letters of administration; or
- a person authorised for that purpose under a power of attorney given by the executor or administrator.

33.41 The National Committee favours a requirement that any authorisation by an executor or administrator of a person to apply for the resealing of a grant be given under a power of attorney, rather than simply in writing. As noted previously, the legislation in most Australian jurisdictions requires that such an authority be given by power of attorney, and this is also the practice in Queensland.⁹⁶⁰ Further, the National Committee considers that the formalities involved in the execution of a power of attorney are desirable, given that, on the resealing of a grant, the person authorised under the power of attorney to make the application becomes, in effect, the personal representative of the estate of the deceased person within the resealing jurisdiction.⁹⁶¹

Executor or administrator by representation

33.42 In Chapter 7 of this Report, the National Committee has recommended that the model legislation should recognise the offices of both an executor by representation and an administrator by representation. It is therefore important to ensure that the model provisions that prescribe the persons who may apply

958 As explained at [33.5] above, the Queensland rules do not require the requisite authority to be given under a power of attorney. This is also the position in England and Wales: see *Non-Contentious Probate Rules 1987* (UK) r 39(1).

959 Submission R1. See [33.5] above in relation to the Queensland practice.

960 See [33.3]–[33.5] above.

961 See [34.11]–[34.21] below.

for the resealing of a grant recognise this extension to the doctrine of the transmission of the office of personal representative.

33.43 In the Discussion Paper, the National Committee proposed, as the first requirement for an application for resealing by an executor or administrator by representation, that the applicant is recognised as the executor or administrator by representation of the will or estate of the deceased person in the jurisdiction in which the grant was made. The National Committee now considers that such a requirement would be too restrictive. This can be seen in the following scenario.

33.44 Suppose a testator (T) dies domiciled in New Zealand, leaving property in New Zealand and New South Wales. T's executor, his sister (E), who lives in New South Wales, obtains a grant of probate of T's will in New Zealand. However, E dies intestate before applying to have the New Zealand grant of probate resealed in New South Wales. E's daughter (A) obtains letters of administration of her mother's estate in New South Wales. A also wishes to apply in New South Wales for the resealing of the New Zealand grant of probate under which her mother was appointed as T's executor.

33.45 Under the preliminary proposal in the Discussion Paper, for A to be able to apply for the resealing of that grant, she must first establish that she is recognised as T's executor by representation in New Zealand — the jurisdiction in which the grant was made. However, New Zealand law does not recognise A as the executor by representation of T's will, as she holds letters of administration of her mother's estate, rather than a grant of probate.⁹⁶²

33.46 Further, even if the New Zealand legislation included provisions dealing with executors and administrators by representation in identical terms to those recommended in Chapter 7 of this Report, A would still not be recognised in New Zealand as T's executor by representation unless she was also appointed as her mother's administrator under a New Zealand grant or had the New South Wales grant of her mother's estate resealed in New Zealand.

33.47 The National Committee also proposed in the Discussion Paper, as the second requirement for an application for resealing by an executor or administrator by representation, that every grant in the chain of representation has been granted or resealed in the resealing jurisdiction. Upon further consideration, the National Committee is of the view that the reference to the 'chain of representation' is slightly ambiguous. In the above scenario, A has a grant of E's estate in New South Wales, but until the New Zealand grant is resealed in New South Wales, there is no chain of representation between T and E.

33.48 The National Committee is therefore of the view that these preliminary proposals should be modified. The model legislation should instead provide

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See *Administration Act 1969* (NZ) s 13, which is in similar terms to s 47 of the *Succession Act 1981* (Qld).

that, if the last surviving, or sole, executor or administrator under a grant of probate or letters of administration dies, a person who is:

- granted probate of the will, or letters of administration of the estate, of the deceased personal representative in the resealing jurisdiction; or
- recognised in the resealing jurisdiction as the executor or administrator by representation of the will or estate of the deceased personal representative;

may apply for the resealing of the grant under which the deceased personal representative was appointed.

33.49 In the above scenario, as A has been granted letters of administration of E's estate, she may apply for the resealing of the grant of probate of T's will, having satisfied the first limb of this proposal. As the resealing of that grant does not give A any authority to administer T's estate in New Zealand, it should be irrelevant whether A would be recognised as T's executor by representation in New Zealand.

Legal representative of an executor or administrator

33.50 The National Committee endorses the preliminary view expressed in the Discussion Paper that the model legislation should not enable an application for the resealing of a grant to be made by the legal representative of an executor or administrator. Unless the legal representative is authorised for that purpose under a power of attorney given by the executor or administrator, the National Committee considers it inappropriate for the legal representative to be the applicant for resealing.

A person who has the consent of all the beneficiaries

33.51 The National Committee has given consideration to the suggestion made by the New South Wales Bar Association that an application for resealing should be able to be made by such other persons who have received the written consent of all beneficiaries named in the will or entitled on intestacy.⁹⁶³

33.52 In the National Committee's view, the model legislation should not enable an application for the resealing of a grant to be made by a person who simply has the written consent of all the beneficiaries named in the will or entitled on intestacy. If such a person is routinely entitled to apply for the resealing of a grant, it could create a situation where there is a contest between, on the one hand, the personal representative under the original grant and, on the other, the beneficiaries, as to who is entitled to make the application and, ultimately, to administer the estate of the deceased person within the resealing jurisdiction.

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See [33.38] above.

A person who is authorised by the court

33.53 The National Committee has also given consideration to the further suggestion made by the New South Wales Bar Association that an application for resealing should be able to be made by a person who is authorised for that purpose by the court.⁹⁶⁴

33.54 The National Committee recognises that, in some situations, it may be desirable to enable an application for the resealing of a grant to be made by a person who does not fall within any of the categories discussed above. For example, if the executor or administrator under the grant has died, there might be no-one who would be entitled to apply to have the grant resealed. Moreover, if the estate in the jurisdiction in which the grant was made has been administered, there may have been no need for an administrator *de bonis non* to be appointed in that jurisdiction.⁹⁶⁵ If there is no person who is entitled to apply for the resealing of the grant, it will usually be necessary for an application to be made in the resealing jurisdiction for an original grant of letters of administration.

33.55 The National Committee does not consider it desirable to prescribe the circumstances in which a person other than the executor or administrator, or a person authorised for that purpose by the executor or administrator, should be authorised by the court to apply for the resealing of a grant of probate or letters of administration. In the National Committee's view, the model legislation should provide that the court may, if it is of the opinion that there are special circumstances that warrant the making of the order, authorise such other person as it considers appropriate to apply for the resealing of a grant of probate or letters of administration.

33.56 The National Committee does not envisage that it would be common for a person to seek the court's authorisation to apply for the resealing of a grant. Given the costs involved in making the necessary application to the court, it might be cheaper simply to make a common form application for an original grant.⁹⁶⁶ However, there could be circumstances where it would be more convenient and less expensive to apply for leave to make an application for the resealing of an original grant than to seek an original grant in the resealing jurisdiction. For example, if the original grant was made on the presumption of death, the ability to apply for the resealing of the grant would avoid the need to prove afresh the matters necessary to satisfy the court that the deceased should be presumed to have died.

964

Ibid.

965

A grant of letters of administration *de bonis non* is made to enable the grantee to complete the administration of a partly unadministered estate: AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.230].

966

See the explanation of common form grants at [2.17]–[2.18] in vol 1 of this Report.

Orders to administer

33.57 As the model legislation enables an order to administer to be resealed,⁹⁶⁷ it should also enable an application for the resealing of an order to administer to be made by the public trustee (or statutory equivalent) in whose favour the order to administer was made.

Elections to administer

33.58 As the model legislation provides that an election to administer may be resealed,⁹⁶⁸ it should also provide that an application for the resealing of an election to administer may be made by:

- the person (including the public trustee) who filed the election to administer; or
- the trustee company that filed the election to administer.

THE AGE OF THE APPLICANT FOR RESEALING

Background

33.59 In Chapter 4 of this Report, the National Committee has recommended that the court may grant probate or letters of administration to an individual only if the individual is an adult.⁹⁶⁹ The purpose of that provision is to highlight a threshold requirement for eligibility for appointment as an executor or administrator.

The National Committee's view

33.60 In the National Committee's view, the model legislation should also provide that, if the applicant for the resealing of a grant is an individual, the applicant must be an adult. This will make it clear that a person who would not, by reason of age, be eligible to obtain an original grant in the jurisdiction, may not apply for the resealing of a grant.

967 See [31.59]–[31.61] and Recommendation 31-5 above.

968 See [31.85]–[31.87] and Recommendation 31-6 above.

969 See [4.274]–[4.275] and Recommendation 4-18 in vol 1 of this Report.

RECOMMENDATIONS

Resealing by the executor or administrator or person authorised by the executor or administrator under a power of attorney

33-1 The model legislation should provide that an application for the resealing of a grant of probate or letters of administration may be made by:

- (a) the executor named in the grant of probate;
- (b) the administrator named in the letters of administration; or
- (c) a person authorised for that purpose under a power of attorney given by the executor or administrator.⁹⁷⁰

See Administration of Estates Bill 2009 cll 358(1), 359(1), sch 3 dictionary (definition of 'holder' (para (b))).

Resealing by the executor or administrator by representation

33-2 The model legislation should provide that, if the last surviving, or sole, executor or administrator under a grant of probate or letters of administration has died, a person who is:

- (a) granted probate of the will, or letters of administration of the estate, of the deceased personal representative in the resealing jurisdiction; or
- (b) recognised in the resealing jurisdiction as the executor or administrator by representation of the will or estate of the deceased personal representative;

may apply for the resealing of the grant under which the deceased personal representative was appointed.⁹⁷¹

See Administration of Estates Bill 2009 cl 358(5)–(6).

970 See [33.40]–[33.41] above.

971 See [33.42]–[33.49] above.

Resealing by such other person as the court considers appropriate

33-3 The model legislation should provide that the court may, if it is of the opinion that there are special circumstances that warrant the making of the order, authorise such other person as it considers appropriate to apply for the resealing of a grant of probate or letters of administration.⁹⁷²

See Administration of Estates Bill 2009 cl 361.

Resealing by the person in whose favour an order to administer is made

33-4 The model legislation should enable an application for the resealing of an order to administer to be made by the public trustee (or statutory equivalent) in whose favour the order to administer was made.⁹⁷³

See Administration of Estates Bill 2009 cl 358(1), sch 3 dictionary (definitions of 'foreign grant of representation' (para (c)), 'holder' (para (b))).

Resealing by the person who filed an election to administer

33-5 The model legislation should provide that an application for the resealing of an election to administer may be made by:

- (a) the person (including the public trustee) who filed the election to administer; or
- (b) the trustee company that filed the election to administer.⁹⁷⁴

See Administration of Estates Bill 2009 cl 358(1), sch 3 dictionary (definitions of 'foreign grant of representation' (para (d)), 'holder' (para (b))).

Age of the applicant for resealing

33-6 The model legislation should provide that, if the applicant for the resealing of a grant is an individual, the applicant must be an adult.⁹⁷⁵

See Administration of Estates Bill 2009 cl 357(2).

972 See [33.53]–[33.56] above.

973 See [33.57] above.

974 See [33.58] above.

975 See [33.59]–[33.60] above.

Chapter 34

Effects of resealing a grant

INTRODUCTION	246
SAME FORCE AND EFFECT AS AN ORIGINAL GRANT	246
The existing law	246
Commonwealth Secretariat Draft Model Bill	247
Recommendation of the Law Reform Commission of Western Australia	247
Discussion Paper	247
Submissions	247
The National Committee's view.....	247
ASSIMILATION WITH THE POSITION OF A PERSONAL REPRESENTATIVE.....	248
The existing law	248
Commonwealth Secretariat Draft Model Bill	250
Recommendations of the Law Reform Commission of Western Australia	251
Discussion Paper	251
Submissions	252
The National Committee's view.....	252
TRANSFER OF BALANCE OF ESTATE BY ATTORNEY UNDER POWER TO FOREIGN PERSONAL REPRESENTATIVE	252
The existing law	252
Commonwealth Secretariat Draft Model Bill	255
Discussion Paper	256
Submissions	256
The National Committee's view.....	256
RECOMMENDATIONS	257

INTRODUCTION

34.1 The legislation in all Australian jurisdictions deals with the effects of resealing a grant of probate or letters of administration made in another jurisdiction. The differences between the jurisdictions and proposals made for reform are considered below.

SAME FORCE AND EFFECT AS AN ORIGINAL GRANT

The existing law

34.2 The legislation in all Australian jurisdictions provides that a grant, when resealed, has the same effect⁹⁷⁶ or the like force and effect and the same operation within the resealing jurisdiction⁹⁷⁷ as if it had been originally granted by the Supreme Court of that jurisdiction.

34.3 The effect of resealing 'is simply to put the administrator under it in the same position as if he were an original administrator'.⁹⁷⁸ It is generally accepted that the resealing of a grant operates to vest in the executor or administrator under the original grant the real and personal estate of the deceased in the resealing jurisdiction.⁹⁷⁹

34.4 In *Holmes v Permanent Trustee Company of New South Wales Limited*,⁹⁸⁰ the High Court held that the resealing of a grant in the Northern Territory was sufficient to enable the Supreme Court of the Northern Territory to hear an application for family provision.⁹⁸¹ It was not necessary for an executor to be appointed under an original grant because:⁹⁸²

The resealing operates as an original grant when it takes place. ... The resealing has the same operation as a grant for all purposes, as much for the purpose of sec 5 of the *Testator's Family Maintenance Ordinance 1929* as for any other purpose.

976 *Administration and Probate Act 1929* (ACT) s 80C(1)(a).

977 *Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act* (NT) s 111(4)(a); *British Probates Act 1898* (Qld) s 4(1); *Administration and Probate Act 1919* (SA) s 17; *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(2); *Administration Act 1903* (WA) s 61(2).

978 *Re Ralston* [1906] VLR 689, 693 (Cussen J).

979 *Public Trustee of New Zealand v Smith* (1925) 42 WN (NSW) 30, where Harvey J declined to follow *Re Heathcote* [1903] St R Qd 57. For a discussion of *Re Heathcote* [1903] St R Qd 57 and of the present legislative position in Queensland in relation to the vesting of real estate on the resealing of a grant, see *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) note 553.

980 (1932) 47 CLR 113.

981 *Ibid* 118–19 (Rich J, with whom Evatt and McTiernan JJ agreed).

982 *Ibid*.

Commonwealth Secretariat Draft Model Bill

34.5 The Commonwealth Secretariat Draft Model Bill included a similar provision to those found in all Australian jurisdictions. Clause 6(1) provided that, when a grant of administration was resealed, it was to have like force and effect and the same operation in the resealing jurisdiction as if it had been granted by the Supreme Court of that jurisdiction.

Recommendation of the Law Reform Commission of Western Australia

34.6 The Law Reform Commission of Western Australia recommended that the uniform resealing rules of procedure should provide that a grant, when resealed, has the same force, effect and operation as if it had been originally granted by the resealing court.⁹⁸³

Discussion Paper

34.7 The preliminary view expressed in the Discussion Paper was that the model legislation should provide that a grant, when resealed, has the same force, effect and operation as if it had been originally granted by the resealing court.⁹⁸⁴

Submissions

34.8 All the submissions that commented on this issue agreed with the preliminary view expressed in the Discussion Paper. This was the view of the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia.⁹⁸⁵

The National Committee's view

34.9 The purpose of enabling a grant to be resealed in a particular jurisdiction is to provide an alternative to having to apply for an original grant in that jurisdiction. The National Committee is therefore of the view that the model legislation should provide that a grant, when resealed, has the same force, effect and operation within the resealing jurisdiction as if it had been originally granted by the Supreme Court of that jurisdiction.

34.10 Further, to ensure that the court has the same jurisdiction in relation to the resealed grant as it would have in relation to a grant made originally by the

983 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.53], [11.1] Recommendation (17).

984 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 122. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.75].

985 Submissions R1, R2, R4, R5, R6.

court, the model legislation should also provide that, on the resealing of a grant, its force, effect and operation within the resealing jurisdiction is subject to the jurisdiction of the resealing court.⁹⁸⁶

ASSIMILATION WITH THE POSITION OF A PERSONAL REPRESENTATIVE

34.11 In all jurisdictions except Queensland, the legislation, to varying degrees, assimilates the position of the personal representative acting under a resealed grant (or, in some jurisdictions, the person who applied for the resealing of the grant) with that of a personal representative appointed under an original grant in the resealing jurisdiction.

34.12 The main differences between the legislative provisions concern the range of persons on whom the various duties, liabilities and rights are imposed or conferred, and the extent to which assimilation is achieved.

The existing law

The persons on whom the relevant duties and liabilities are imposed

Australian Capital Territory, Northern Territory, Tasmania, Victoria

34.13 In the ACT, the Northern Territory, Tasmania and Victoria, the duties and liabilities are imposed on the person who applied for the resealing of the grant.⁹⁸⁷ Consequently, depending on who made the application for resealing,⁹⁸⁸ the person who will be entitled to act as the personal representative upon the resealing of a grant will be the executor or administrator under the foreign grant, or the person appointed under a power of attorney by the executor or administrator to make the application.

New South Wales, South Australia, Western Australia

34.14 In New South Wales, South Australia and Western Australia, the duties and liabilities of a personal representative are expressed to apply only to the executor or administrator appointed under the foreign grant.⁹⁸⁹ The legislation does not refer to the duties or liabilities of a person authorised by the executor or administrator to apply for the resealing of the grant, notwithstanding that such

986 The court's jurisdiction is considered in Chapter 3 of this Report.

987 *Administration and Probate Act 1929* (ACT) s 80C(1)(b); *Administration and Probate Act* (NT) s 111(4)(b); *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(3). In the ACT and the Northern Territory, there are equivalent provisions dealing with the duties and liabilities of a person who applies for the resealing of an order to collect and administer: *Administration and Probate Act 1929* (ACT) s 80C(2); *Administration and Probate Act* (NT) s 111(5).

988 See the discussion of persons who may apply for the resealing of a grant in Chapter 33 of this Report.

989 *Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act 1919* (SA) s 17; *Administration Act 1903* (WA) s 61(2).

a person is entitled in each of these jurisdictions to apply for the resealing of a grant.⁹⁹⁰

Extent of assimilation

Australian Capital Territory, New South Wales, Northern Territory, Western Australia

34.15 The legislation in the ACT, New South Wales, the Northern Territory and Western Australia is expressed in similar terms. In each case, the legislation provides that, on the resealing of a grant, the person who applied for the resealing of the grant (or in New South Wales and Western Australia, the executor⁹⁹¹ or administrator under the grant) is to exercise the same functions⁹⁹² or perform the same duties,⁹⁹³ and is to be subject to the same liabilities, as if probate or administration had been originally granted by the court.⁹⁹⁴

South Australia

34.16 The legislation in South Australia is framed in broader terms than the provisions discussed above. It imposes on an executor or administrator who obtains the resealing of a grant the same duties and liabilities as if probate or administration had been originally granted by the court. However, it also confers on such a person the rights and powers of a personal representative.⁹⁹⁵

Tasmania, Victoria

34.17 The legislation in Tasmania and Victoria is expressed in the broadest terms of all the Australian jurisdictions.

34.18 In both jurisdictions, the legislation imposes on a person who obtains the resealing of a grant the same duties, liabilities and obligations as if probate or administration had been originally granted by the court, and confers on such a person the rights of a personal representative.⁹⁹⁶

34.19 In addition, the legislation in these jurisdictions provides that, on the resealing of a grant of probate or letters of administration, the executor or administrator, or the person authorised to act by power of attorney given by the executor or administrator, as the case may be, is deemed to be for every

990 See [33.3] above.

991 Under the New South Wales legislation, this includes an executor by representation. See [33.9] above.

992 *Administration and Probate Act 1929* (ACT) s 80C(1)(b).

993 *Administration and Probate Act 1898* (NSW) s 107(2); *Administration and Probate Act* (NT) s 111(4)(b); *Administration Act 1903* (WA) s 61(2).

994 *Administration and Probate Act 1929* (ACT) s 80C(1)(b); *Administration and Probate Act 1898* (NSW) s 107(2); *Administration and Probate Act* (NT) s 111(4)(b); *Administration Act 1903* (WA) s 61(2).

995 *Administration and Probate Act 1919* (SA) s 17.

996 *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(3).

purpose the executor or administrator of the estate of the deceased person within the resealing jurisdiction.⁹⁹⁷

34.20 The combined effect of conferring on the person who obtains the resealing of a grant the rights of a personal representative and deeming that person to be, for all purposes, the personal representative of the deceased person within the resealing jurisdiction, has a significant effect on the position of a person who is authorised by power of attorney to apply for the resealing of a grant. If a grant is resealed on the application of such a person, the attorney does not simply become the agent of the foreign executor or administrator, but is placed in the position of an original personal representative in the resealing jurisdiction.

34.21 Consequently, if the attorney dies after obtaining the resealing of the grant, but before completing the administration of the estate, the office of executor will devolve to his or her executor.⁹⁹⁸ In addition, an attorney will be allowed a commission on the passing of the accounts⁹⁹⁹ and, unless permitted by legislation to do otherwise,¹⁰⁰⁰ must personally see to the distribution of the estate in the resealing jurisdiction.¹⁰⁰¹

Commonwealth Secretariat Draft Model Bill

34.22 The Commonwealth Secretariat Draft Model Bill provided that, on the resealing of a grant, the person who made the application or on whose behalf the application was made (whether the personal representative or grantee, or person authorised by power of attorney given by the personal representative or grantee to apply for the resealing) was to perform the same duties and be subject to the same liabilities as if he or she were the personal representative under probate or letters of administration granted by the court.¹⁰⁰²

34.23 Although the Commonwealth Secretariat Draft Model Bill did not expressly confer on such a person the rights of a personal representative, it did provide that, after resealing, the personal representative or grantee, or the duly

997 *Administration and Probate Act 1935 (Tas)* s 52; *Administration and Probate Act 1958 (Vic)* s 85.

998 *Re Watmough* [1913] VLR 435. This decision concerned the effect of ss 40 and 44 of the *Administration and Probate Act 1890 (Vic)*, which were the predecessors of ss 81(3) and 85 of the *Administration and Probate Act 1958 (Vic)*.

999 In *Re Welch* (1894) 16 ALT 95, the Supreme Court of Victoria held that, on the basis of ss 40 and 44 of the *Administration and Probate Act 1890 (Vic)*, a person authorised under power of attorney to apply in Victoria for the resealing of an English grant of probate was to be allowed a commission on passing his accounts, notwithstanding that, in the will, the testator gave a legacy to each of his English executors 'for the trouble they would have as such executors and trustees'.

1000 See the discussion of s 86 of the *Administration and Probate Act 1958 (Vic)* at [34.33]–[34.39] below.

1001 *Permezel v Hollingworth* [1905] VLR 321. That decision is considered at [34.33] below.

1002 Commonwealth Secretariat Draft Model Bill cl 6(2). Consequently, although cl 3(2)(c) provided that an application for the resealing of a grant could be made by the legal practitioner of the personal representative or grantee or of a person authorised by power of attorney given by either of those persons (see [33.28]–[33.29] above), the effect of cl 6(2) was that a legal practitioner who made such an application would not, on resealing, become subject to the duties and liabilities of a personal representative.

authorised person who made the application for resealing, as the case may be, was to 'be deemed to be, for all purposes, the personal representative of the deceased person in respect of such of his estate' as was within the resealing jurisdiction.¹⁰⁰³

Recommendations of the Law Reform Commission of Western Australia

34.24 The Law Reform Commission of Western Australia recommended that 'all persons named in the grant, or authorised by power of attorney,' should be entitled to act as personal representatives on the resealing of a grant.¹⁰⁰⁴

34.25 It also recommended that the uniform resealing code should expressly define the 'powers and duties' of persons who obtained the resealing of a grant, 'including the powers and duties of such persons appointed under a power of attorney'.¹⁰⁰⁵

Discussion Paper

34.26 The preliminary view expressed in the Discussion Paper was that the model legislation should provide, as did the Commonwealth Secretariat Draft Model Bill, that the person who obtained the resealing of a grant¹⁰⁰⁶ should perform the same duties and be subject to the same liabilities as if he or she were a personal representative under a probate or letters of administration granted by the court, and should confer on such a person the rights and powers of a personal representative.¹⁰⁰⁷

34.27 In addition, it was proposed that, on the resealing of a grant, an applicant for resealing should be deemed for all purposes to be the personal representative of the estate of the deceased person within the resealing jurisdiction.¹⁰⁰⁸

1003 Commonwealth Secretariat Draft Model Bill cl 6(2).

1004 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (6)(a). As noted at [34.14] above, although the legislation in some jurisdictions, including Western Australia, provides that a person authorised under a power of attorney given by the executor or administrator may apply for the resealing of a grant, it does not provide that, on resealing, such a person is to perform the duties, or be subject to the liabilities, of a personal representative.

1005 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (18).

1006 See Chapter 33 of this Report for the National Committee's recommendation about the persons who may apply for the resealing of a grant.

1007 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 128. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.78], [5.79].

1008 *Ibid* 130. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.82].

Submissions

34.28 All the submissions that commented on this issue agreed that, on the resealing of a grant, the applicant for resealing should:¹⁰⁰⁹

- perform the same duties, be subject to the same liabilities, and have the same rights and powers as a personal representative under an original grant made in the resealing jurisdiction; and
- be deemed, for all purposes, to be the personal representative of the estate of the deceased person within the resealing jurisdiction.

34.29 The Principal Registrar of the Supreme Court of Queensland and the Public Trustee of New South Wales also endorsed the preliminary view that provisions to this effect should be contained in the model legislation.¹⁰¹⁰

The National Committee's view

34.30 The National Committee considers that, if a grant is resealed, the person who applied for the grant should, in all respects, be placed in the position of a personal representative appointed under an original grant made in the resealing jurisdiction. The National Committee is therefore of the view that the model legislation should follow the resealing provisions in the Tasmanian and Victorian legislation and provide that, on the resealing of a grant, the person who made the application for resealing:

- is to have the same rights and powers, perform the same duties, and be subject to the same liabilities as if he or she were the personal representative under a grant of probate or letters of administration made by the resealing court; and
- is to be taken, for all purposes, to be the personal representative of the deceased in respect of his or her estate within the resealing jurisdiction.

TRANSFER OF BALANCE OF ESTATE BY ATTORNEY UNDER POWER TO FOREIGN PERSONAL REPRESENTATIVE

The existing law

34.31 In Chapter 14 of this Report, the National Committee noted that, ordinarily, an attorney-administrator¹⁰¹¹ for a foreign principal may be justified in

1009 Submissions R1, R2, R4, R5.

1010 Submissions R1, R2.

1011 An attorney-administrator is a person who is granted letters of administration for the use and benefit of a foreign principal, having been authorised to apply for the grant under a power of attorney given by the foreign principal.

paying the balance of the estate (after payment of the administration expenses and local debts of which he or she has notice) to the foreign principal, and in those circumstances can receive a valid discharge from the foreign principal. This rule applies where the foreign principal has been appointed under a grant in the jurisdiction in which the deceased was domiciled at the time of death or, if that jurisdiction does not provide for executors and administrators, the foreign principal is nevertheless the person charged by the laws of that jurisdiction with the duties and functions that, under our legal system, are imposed on executors and administrators.¹⁰¹²

34.32 As a result of the National Committee's proposal about the effects of resealing, a person who is authorised, under a power of attorney given by the executor or administrator named in the grant, to apply for the resealing of the grant, is not simply in the position of an attorney-administrator when the grant is resealed. Instead, he or she is deemed for all purposes to be the personal representative of the deceased within that jurisdiction. Consequently, in the absence of a provision allowing a different course, the attorney will ordinarily be required to distribute the estate to the persons beneficially entitled and will not have the option of paying the balance of the estate to the foreign principal.¹⁰¹³

34.33 However, section 86 of the *Administration and Probate Act 1958* (Vic) creates an exception to this requirement. A provision in those terms was first enacted in Victoria in 1907,¹⁰¹⁴ as a result of the decision in *Permezel v Hollingworth*.¹⁰¹⁵ In that case, Madden CJ held that an attorney who obtained the resealing of a grant in Victoria was not a mere agent of the donor, but was deemed for every purpose to be the administrator of the estate within the jurisdiction of the Supreme Court of Victoria. Accordingly, the attorney was not able to transfer the proceeds of sale of the personalty or convey the realty to the foreign personal representative, but was bound to distribute the Victorian property to the persons beneficially entitled under the deceased's will.

34.34 Section 86 of the *Administration and Probate Act 1958* (Vic) provides:

86 Administrator under power of attorney

Notwithstanding anything contained in this Act a person duly authorized by power of attorney under the provisions of this Part who—

- (a) has obtained the seal of the Court to any probate or letters of administration or grant or order;

¹⁰¹² See [14.60]–[14.61] in vol 1 of this Report.

¹⁰¹³ *Permezel v Hollingworth* [1905] VLR 321.

¹⁰¹⁴ *Administration and Probate Act 1907* (Vic) s 4, which amended the *Administration and Probate Act 1890* (Vic).

¹⁰¹⁵ [1905] VLR 321.

- (c) has satisfied or provided for the debts and claims of all persons resident in Victoria of whose debts or claims he has had notice (whether before or after notice given by him as required by the *Trustee Act 1958*)—

may pay over or transfer to or as directed by the executor or administrator of the estate in the country in which the deceased was domiciled at the date of his death or to or as directed by the donor of the power of attorney the balance of the estate without seeing to the application thereof and without incurring any liability in regard to such payment or transfer and shall duly account to such executor or administrator or donor (as the case may require) for his administration.

34.35 This provision enables an attorney who has satisfied, or provided for, the ‘debts and claims’ of persons resident in Victoria of whose claims he or she has notice, to pay or transfer the balance of the estate to, or as directed by:

- the executor or administrator of the estate in the country in which the deceased was domiciled at the date of his or her death; or
- the donor of the power of attorney.

34.36 An attorney who acts in accordance with this provision is not personally required to see to the distribution of the assets in the resealing jurisdiction. Moreover, the attorney is protected from liability in respect of a payment or transfer made in accordance with the provision.

34.37 In the usual case, the donor of the power of attorney will be the person who has obtained a grant in the jurisdiction in which the deceased died domiciled and who wishes to have that grant resealed in another jurisdiction. In that situation, section 86 of the *Administration and Probate Act 1958* (Vic) is generally consistent with the law regarding the circumstances in which an attorney-administrator may pay the balance of an estate to his or her foreign principal, or to a third party at the direction of the foreign principal, and be discharged from further liability.¹⁰¹⁶

34.38 However, section 86 contemplates that the donor of the power of attorney and the executor or administrator who obtained a grant in the jurisdiction in which the deceased died domiciled may not be the same person. Where that occurs, section 86 has a different effect from the law in relation to attorney-administrators:

- First, as there is no requirement that the executor of the estate in the country in which the deceased died domiciled has obtained a grant of probate, the section permits an attorney to pay the balance of the estate to an executor who has not obtained a grant of probate.

¹⁰¹⁶

See [14.60]–[14.65] in vol 1 of this Report.

- Secondly, there is no requirement that the donor of the power of attorney obtained the relevant grant in the jurisdiction in which the deceased died domiciled.¹⁰¹⁷ Accordingly, the section permits the attorney to pay the balance of the estate to a principal who has not necessarily obtained a grant in the jurisdiction in which the deceased died domiciled.
- Thirdly, if the attorney pays the balance of the estate to the executor or administrator in the deceased's domicile, the attorney is effectively making the payment to a person who is not his or her principal (the principal being the donor of the power of attorney).¹⁰¹⁸

34.39 A commentator on the Victorian legislation has observed that the 'section raises some questions which have not been the subject of judicial decision',¹⁰¹⁹ namely:¹⁰²⁰

Does the word 'claims' include the claims of beneficiaries such as the widow's preferential right under s 50 in the case of intestacy, or the claims of relatives for maintenance under Part IV? The term may be used synonymously with 'debts' so as to embrace claims for damages and no more. ... It is thought that if the attorney has notice of the existence in Victoria of a widow or any of the next of kin of an intestate or of a beneficiary under the will of the deceased, he cannot safely disregard their claims. The safe course would be to serve notice on such persons under s 30 of the Act,¹⁰²¹ and follow the procedure there set out before paying over the balance. (note added)

34.40 No other Australian jurisdiction has an equivalent provision to section 86 of the *Administration and Probate Act 1958* (Vic).

Commonwealth Secretariat Draft Model Bill

34.41 The Commonwealth Secretariat Draft Model Bill included a provision that was similar to section 86 of the *Administration and Probate Act 1958* (Vic). Clause 7 provided:

7. Duties of person authorised by personal representative, etc

- (1) A person duly authorised under section 3(2)(b) who is deemed to be a personal representative by virtue of section 6(2) shall, after satisfying or providing for the debts or claims due from the estate of all persons residing in _____ or of whose debts or claims he has had notice, pay over or transfer the balance of the estate in _____ to the personal representative named in the grant or the grantee, as the case

¹⁰¹⁷ See [14.60]–[14.62] in vol 1 of this Report.

¹⁰¹⁸ RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 138.

¹⁰¹⁹ Ibid.

¹⁰²⁰ Ibid.

¹⁰²¹ *Administration and Probate Act 1958* (Vic) s 30 deals with the barring of claims and is set out at [22.72] in vol 2 of this Report.

may be or as such personal representative or grantee may, by power of attorney, direct.

- (2) Any such person referred to in subsection (1) shall duly account to the personal representative or grantee, as the case may be, for his administration of the estate in _____.

34.42 This provision differed from the Victorian provision in two respects. It was expressed in mandatory terms, with the result that an attorney to whom the provision applied would be required in every case to pay over or transfer the balance of the estate to the foreign personal representative. Further, it did not expressly provide that an attorney who paid or transferred the balance of the estate in accordance with the provision did not incur any liability in relation to that payment or transfer.

Discussion Paper

34.43 The preliminary view expressed in the Discussion Paper was that the model legislation should include a provision to the effect of section 86 of the *Administration and Probate Act 1958 (Vic)*.¹⁰²²

Submissions

34.44 All the submissions that commented on this issue agreed with the preliminary view expressed in the Discussion Paper. This was the view of the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia.¹⁰²³

The National Committee's view

34.45 Earlier in this chapter, the National Committee has expressed the view that, on the resealing of a grant, the person who made the application is, for all purposes, to be taken to be the personal representative of the deceased in respect of his or her estate within the resealing jurisdiction.¹⁰²⁴ If the person who applies for the resealing of a grant is the attorney of the executor or administrator, the attorney will be required, in the absence of a provision allowing a different course, to see to the distribution of the estate in the resealing jurisdiction.¹⁰²⁵

¹⁰²² *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 132. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.84].

¹⁰²³ Submissions R1, R2, R4, R5, R6.

¹⁰²⁴ See [34.30] above.

¹⁰²⁵ See [34.20]–[34.21] above.

34.46 In some circumstances, it may be more convenient to have the estate distributed by the personal representative who is undertaking the principal administration, rather than by the attorney who applied for the resealing of the grant, whose administration is only ancillary to the principal administration. The National Committee is therefore of the view that a provision to the general effect of section 86 of the *Administration and Probate Act 1958* (Vic) should be included in the model legislation. However, while the model provision should enable the attorney to pay over or transfer the balance of the estate to, or as directed by, the donor of the power of attorney, it should not permit the attorney to pay over or transfer the balance of the estate to, or as directed by, the executor or administrator of the estate in the jurisdiction in which the deceased was domiciled at the date of death if that person is not also the donor of the power of attorney.

34.47 The inclusion of a provision in these terms will still provide the flexibility of enabling an attorney who does not wish to see to the distribution of the estate personally to pay over or transfer the balance of the estate to the donor of the power of attorney. It will also provide that an attorney who makes a payment or transfer in these circumstances is protected from liability in respect of that payment or transfer. However, the model provision will ensure that the relevant protection is given only if the principal-attorney relationship exists and the principal has been appointed under a grant that is capable of being resealed.

RECOMMENDATIONS

34-1 The model legislation should provide that a grant, when resealed, has the same force, effect and operation within the resealing jurisdiction as if it had been originally granted by the Supreme Court of that jurisdiction.¹⁰²⁶

See Administration of Estates Bill 2009 cl 364(1).

34-2 The model legislation should provide that, on the resealing of a grant:

- (a) the person who made the application for resealing:**
 - (i) is to have the same rights and powers, perform the same duties, and be subject to the same liabilities as if he or she were the personal representative under a grant of probate or letters of administration made by the resealing court; and**

¹⁰²⁶

See [34.9] above.

- (ii) is to be taken, for all purposes, to be the personal representative of the deceased in respect of his or her estate within the resealing jurisdiction; and
- (b) the force, effect and operation of the grant in the resealing jurisdiction is subject to the jurisdiction of the resealing court.¹⁰²⁷

See Administration of Estates Bill 2009 cl 364(2).

34-3 The model legislation should include a provision to the general effect of section 86 of the *Administration and Probate Act 1958* (Vic), except that it should only permit the attorney to pay over or transfer the balance of the estate to, or as directed by, the donor of the power of attorney.¹⁰²⁸

See Administration of Estates Bill 2009 cl 365.

1027 See [34.10], [34.30] above.

1028 See [34.45]–[34.47] above.

Chapter 35

The resealing process

THE REQUIRED DOCUMENTATION	261
The existing law	261
Commonwealth Secretariat Draft Model Bill	262
Recommendation of the Law Reform Commission of Western Australia	263
Discussion Paper	263
Submissions	264
The National Committee's view	265
MULTIPLE PERSONAL REPRESENTATIVES	267
The existing law	267
Recommendation of the Law Reform Commission of Western Australia	268
Discussion Paper	268
Submissions	269
The National Committee's view	269
GRANTS OF DOUBLE PROBATE	271
Introduction	271
Recommendation of the Law Reform Commission of Western Australia	272
Discussion Paper	272
Submissions	273
The National Committee's view	273
SUBSTITUTED EXECUTORS AND ADMINISTRATORS	275
Introduction	275
Recommendation of the Law Reform Commission of Western Australia	277
Discussion Paper	277
Submissions	278
The National Committee's view	278
APPLICATION BY A FOREIGN TRUSTEE COMPANY FOR THE RESEALING OF A GRANT	279
The present law	279
Commonwealth Secretariat Draft Model Bill	281
Discussion Paper	281
Submissions	281
The National Committee's view	281
THE COURT'S POWER TO RESEAL A GRANT, IMPOSE CONDITIONS AND REVOKE THE RESEALING OF A GRANT	282
The existing law	282
Commonwealth Secretariat Draft Model Bill	283
Recommendation of the Law Reform Commission of Western Australia	283
Discussion Paper	283
Submissions	284
The National Committee's view	284
NOTIFICATION	284
The existing law	284
Recommendation of the Law Reform Commission of Western Australia	285
Discussion Paper	286
Submissions	286

The National Committee's view.....	287
SUCCESSION DUTY.....	289
The existing law	289
Commonwealth Secretariat Draft Model Bill	291
Recommendation of the Law Reform Commission of Western Australia.....	291
Discussion Paper	291
Submissions	291
The National Committee's view.....	292
RECOMMENDATIONS	292

THE REQUIRED DOCUMENTATION

The existing law

Australian jurisdictions other than the Australian Capital Territory

35.1 In all Australian jurisdictions other than the ACT, the legislation provides that an applicant for resealing must:¹⁰²⁹

- produce the grant of probate or letters of administration to either the registrar or the Supreme Court; and
- deposit a copy of the grant of probate or letters of administration with either the registrar or the Supreme Court.

35.2 It is not necessary, however, for the original grant to be produced. In the jurisdictions other than Queensland, the terms 'probate' and 'administration' are defined, respectively, to include an exemplification¹⁰³⁰ of probate and an exemplification of letters of administration.¹⁰³¹ In Queensland, although the legislation is expressed in slightly different terms, it has a similar effect. The section dealing with resealing provides that, for the purposes of that section:¹⁰³²

a duplicate of any probate or letters of administration sealed with the seal of the court granting the same, or a copy thereof certified as correct by or under the authority of the court granting the same, shall have the same effect as the original.

35.3 The rules in some of these jurisdictions contain additional provisions about the production and depositing of testamentary papers.

35.4 In Queensland, the rules provide that:¹⁰³³

1029 *Probate and Administration Act 1898* (NSW) s 107(1); *Administration and Probate Act* (NT) s 111(1), which refers to the production and depositing of an order to collect and administer; *British Probates Act 1898* (Qld) s 4(1); *Administration and Probate Act 1919* (SA) s 17; *Administration and Probate Act 1935* (Tas) s 48(1); *Administration and Probate Act 1958* (Vic) s 81(1); *Administration Act 1903* (WA) s 61(1). In the jurisdictions other than Queensland, the relevant documents must be produced to, and deposited with, the registrar. In Queensland, they must be produced to, and deposited with, the Supreme Court.

1030 An exemplification is an official copy of a document made under the seal of a court which 'contains an exact copy of the will (if any), and a copy of the grant': JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [21.37].

1031 *Probate and Administration Act 1898* (NSW) s 3; *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act 1919* (SA) s 20; *Administration and Probate Act 1935* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 80; *Administration Act 1903* (WA) s 3. The various definitions of 'probate' and 'administration' are discussed in detail at [31.17]–[31.26] above.

1032 *British Probates Act 1898* (Qld) s 4(4). The rules also provide that an 'exemplification, office copy or other reproduction of the foreign grant' may be resealed, provided it 'bears the rubber, embossed or other seal of the court': *Uniform Civil Procedure Rules 1999* (Qld) r 618(3). Case law had earlier confirmed that an exemplification of probate or administration could be resealed under s 4 of the *British Probates Act 1898* (Qld): *Re Manson* [1908] QWN 8; *Re Levi* [1908] QWN 30; *Re Rubin* [1921] QWN 25.

1033 *Uniform Civil Procedure Rules 1999* (Qld) r 618(1).

The foreign grant or copy of the grant of probate, or administration with the will, to be resealed, and the copy to be filed in the registry, must include copies of all testamentary papers admitted to probate.

35.5 There is a similarly worded provision in the Tasmanian rules.¹⁰³⁴

35.6 The South Australian rules refer additionally to the certification of the testamentary papers:¹⁰³⁵

The grant lodged for re-sealing must include a copy of any testamentary papers to which the grant relates or must be accompanied by a copy of such papers certified as correct by or under the authority of the Court by which the grant was made.

35.7 In Western Australia, the rules provide that the grant lodged for resealing must include:¹⁰³⁶

an authentic copy of the will and codicil (if any) to which the grant relates, or shall be accompanied by a copy thereof certified as correct by or under the authority of the Court by which the grant was made.

Australian Capital Territory

35.8 In the ACT, the requirements for an application for resealing are now contained wholly in the *Court Procedures Rules 2006 (ACT)*. An application for resealing must be made by originating application¹⁰³⁷ and must be accompanied by:¹⁰³⁸

- (a) a draft of the reseal sought, in duplicate, with a copy of the grant of probate or administration, or order to collect and administer, sought to be resealed attached; and
- (b) a copy of the grant or order mentioned in paragraph (a) sealed, or certified, by the court that made it; and
- (c) a supporting affidavit; and
- (d) an affidavit of search; and
- (e) anything else required under a territory law. (notes omitted)

Commonwealth Secretariat Draft Model Bill

35.9 The Commonwealth Secretariat Draft Model Bill provided that an applicant for resealing must produce to the registrar the grant of administration

¹⁰³⁴ *Probate Rules 1936 (Tas)* r 51.

¹⁰³⁵ *The Probate Rules 2004 (SA)* r 50.07.

¹⁰³⁶ *Non-contentious Probate Rules 1967 (WA)* r 43(1).

¹⁰³⁷ *Court Procedures Rules 2006 (ACT)* r 3020(1).

¹⁰³⁸ *Court Procedures Rules 2006 (ACT)* r 3020(2).

or an exemplification or duplicate of the grant sealed by the court that made the grant, or a copy of any of those documents, certified as a correct copy by or under the authority of that court.¹⁰³⁹ If that document did not include a copy of the will, the applicant was also required to produce a copy of the will, verified by or under the authority of the court of original grant.¹⁰⁴⁰

Recommendation of the Law Reform Commission of Western Australia

35.10 The Law Reform Commission of Western Australia, in what was essentially a compendious statement of the requirements of the existing law, recommended that it should be possible for a grant to be resealed on production:¹⁰⁴¹

either of the grant of probate or administration or of an exemplification or duplicate thereof, providing it is sealed with the seal of the granting court, or a copy of any of the foregoing certified as a correct copy by or under the authority of a court. (notes omitted)

35.11 At their 1990 conference, the Probate Registrars agreed with this recommendation, subject to the qualification that a copy of the grant, exemplification or duplicate should be certified as such under seal.¹⁰⁴²

Discussion Paper

35.12 In the Discussion Paper, it was proposed that, subject to two modifications, the recommendation of the Law Reform Commission of Western Australia should be adopted. The two modifications concerned the situation where a copy of the grant, or of an exemplification of the grant, was produced. It was proposed that the copy should, as suggested by the Probate Registrars, be certified as such under seal. Further, as required by the Commonwealth Secretariat Draft Model Bill, the copy should be certified by the granting court.¹⁰⁴³

35.13 The preliminary view was, therefore, that an applicant for resealing should be required to:

- produce to the registrar:

1039 Commonwealth Secretariat Draft Model Bill cl 3(4)(a).

1040 Commonwealth Secretariat Draft Model Bill cl 3(4)(b). Clause 3(4)(c) and (d) also required the production of an affidavit stating that an advertisement had been duly published and, where the applicant was a person authorised to apply under a power of attorney, the production of the power and an affidavit stating that the power had not been revoked.

1041 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.33]. See also [11.1] Recommendation (11).

1042 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 7.

1043 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 114–15. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.65].

- the grant of probate or letters of administration; or
 - an exemplification or duplicate of the grant of probate or letters of administration, provided it is sealed with the seal of the granting court; or
 - a copy of the grant of probate or letters of administration, or exemplification or duplicate of either, provided it is certified under seal as a correct copy by or under the authority of the granting court; and
- deposit with the registrar a copy of the grant of probate or letters of administration.

35.14 It was observed in the Discussion Paper that these requirements are presently set out in legislation, and that they operate as conditions that must be satisfied before the court may exercise its discretion to reseal a grant. Consequently, it was proposed that they should appear in the model legislation.¹⁰⁴⁴

35.15 It was further proposed that there should be a uniform provision requiring the applicant to produce a copy of the will (if there is one), if this is not already included in the documentation required as a precondition for resealing.¹⁰⁴⁵ As such a provision is found in the rules of a number of jurisdictions, it was suggested that this provision should be set out in court rules.¹⁰⁴⁶

Submissions

35.16 All the respondents who commented on this issue agreed with the preliminary view expressed in the Discussion Paper about the documents that must be produced to, and deposited with, the registrar.¹⁰⁴⁷

35.17 The former Principal Registrar of the Supreme Court of Queensland and the Public Trustee of New South Wales also agreed with the preliminary view that the provisions about the production and depositing of the grant should be located in the model legislation, and that the provision about testamentary papers should be located in court rules.¹⁰⁴⁸ The Trustee Corporations

1044 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 115.

1045 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 115; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.65].

1046 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 115.

1047 Submissions R1, R2, R4, R5, R6.

1048 Submissions R1, R2.

Association of Australia, however, was of the view that all these provisions should be located in court rules.¹⁰⁴⁹

The National Committee's view

Grants of probate and letters of administration

35.18 The National Committee endorses the preliminary view that was expressed in the Discussion Paper. In the National Committee's view, an applicant for the resealing of a grant of probate or letters of administration should be required to produce to the registrar:

- the grant of probate or letters of administration; or
- an exemplification of the grant of probate or letters of administration; or
- a duplicate of the grant of probate or letters of administration, provided it is sealed by the granting court; or
- a copy of the grant of probate or letters of administration, or of the exemplification or duplicate of the grant, provided it is certified under seal as a correct copy by or under the authority of the granting court.

35.19 In addition, the applicant should be required to deposit with the registrar a copy of the grant of probate or letters of administration.

Orders to administer

35.20 The Discussion Paper did not include specific proposals in relation to the documentation required for the resealing of an order to administer. In the National Committee's view, the requirements for the resealing of an order to administer should, as far as possible, be consistent with the requirements for the resealing of a grant of probate or letters of administration.

35.21 An applicant for the resealing of an order to administer should therefore be required to produce to the registrar:

- the order to administer; or
- a duplicate of the order to administer, provided it is sealed by the court that issued the order; or
- a copy of the order to administer, or of the duplicate of the order, provided it is certified under seal as a correct copy by or under the authority of the court that issued the order.

1049

Submission R6.

35.22 In addition, an applicant for the resealing of an order to administer should be required to deposit with the registrar a copy of the order to administer.

Elections to administer

35.23 The Discussion Paper did not include specific proposals in relation to the documentation required for the resealing of an election to administer. In the National Committee's view, the requirements for the resealing of an election to administer should, as far as possible, be consistent with the requirements for the resealing of a grant of probate or letters of administration.

35.24 As explained previously in this Report, legislation in most Australian jurisdictions provides that, in certain circumstances, the public trustee or a trustee company may file an election to administer an estate.¹⁰⁵⁰ Although the effect of filing an election is that the party who filed it is deemed to be the executor or administrator of the estate, an election to administer differs from an order to administer in that it is not an order of the court issued under seal. Nevertheless, it may be possible for the court in which an election to administer has been filed to provide, on request, a copy of the election, stamped with the seal of the court, that is certified to be a correct copy of the election to administer that was filed in that court.¹⁰⁵¹

35.25 The National Committee is therefore of the view that an applicant for the resealing of an election to administer should be required to produce to the registrar a copy of the election to administer, provided it is certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.

35.26 In addition, an applicant for the resealing of an election to administer should be required to deposit with the registrar a copy of the election to administer.

Testamentary instruments

35.27 An applicant for resealing should be required to produce to the registrar a copy of the will (if there is one), if this is not included in the documentation referred to above.

Location of provisions

35.28 The National Committee notes that, in the Discussion Paper, it was proposed that the provision dealing with the production and depositing of the grant should be located in the model legislation, while the provision dealing with

¹⁰⁵⁰ See [29.1]–[29.8] above. As noted at [29.6] above, legislation in the Northern Territory also enables an election to administer to be filed by a legal practitioner.

¹⁰⁵¹ See, for example, the *Uniform Civil Procedure Rules 1999* (Qld) r 980 (Copies of documents).

the production of any testamentary instruments should be located in court rules. Those proposals generally reflected the present location of these provisions.

35.29 The National Committee is of the view, however, that all the provisions dealing with the production and depositing of documents for an application for resealing should be located in the one place. On balance, the National Committee is of the view that, as these provisions relate to the manner in which an application for resealing is to be made, they should be contained in court rules, rather than in the model legislation. The National Committee notes that, in the ACT, these matters are now addressed in the rules.¹⁰⁵²

MULTIPLE PERSONAL REPRESENTATIVES

The existing law

35.30 Where the grant that is the subject of the resealing application was made in favour of two or more executors or administrators, the question arises as to whether the application for resealing must be made by all the executors or administrators appointed under the grant, or whether it may be made by only some of them.

35.31 Generally, if a grant has been made in favour of two or more persons, the application for resealing must be made by all the persons so appointed.¹⁰⁵³ In *In the Will of Rofe*,¹⁰⁵⁴ one of three executors appointed under a grant of probate made in New South Wales applied to have the grant resealed in Victoria. The other two executors refused to apply for resealing in Victoria on the grounds of expense. The Supreme Court of Victoria refused the application for resealing, observing that the effect of resealing the grant 'would be to put upon these other executors, who are not parties to this application, certain duties and liabilities as executors in Victoria'.¹⁰⁵⁵

35.32 There are, however, exceptions to the general rule that an application for resealing must be made by all the personal representatives appointed under the original grant. In *In the Will of Rofe*,¹⁰⁵⁶ the Court acknowledged that, if one

1052 See [35.8] above.

1053 *In the Will of Rofe* (1904) 29 VLR 681.

1054 (1904) 29 VLR 681.

1055 Ibid 682. Instead, the Court (at 682–3) granted probate to the applicant, reserving leave to the other executors to apply at a later stage for what would be a grant of double probate (see [35.46] below). The effect of the grant was that only the applicant became the personal representative of the estate in Victoria and subject to the duties and liabilities of a personal representative. The effects of resealing are considered in Chapter 34 of this Report.

1056 (1904) 29 VLR 681.

of two executors died and an application for resealing were made by the surviving executor, it would not decline to reseal the grant.¹⁰⁵⁷

35.33 Grants have been resealed on the application of only one of the executors appointed under the original grant in circumstances where the other executor had been discharged and therefore no longer held office,¹⁰⁵⁸ and also where the application for resealing was made with the consent of the other executors.¹⁰⁵⁹

35.34 The South Australian rules reflect the last of these exceptions. Rule 50.01(a) of *The Probate Rules 2004* (SA) provides:

Re-sealing of grants under section 17 of the Act

50.01 Application for the re-sealing of a grant under section 17 of the Act may be made either in person or through a practitioner—

- (a) by the executor or administrator, or by one of the executors or administrators with the consent by affidavit of the co-executors or co-administrators to whom the grant was made, or

...

35.35 No other jurisdiction has an express provision dealing with this situation.

Recommendation of the Law Reform Commission of Western Australia

35.36 The Law Reform Commission of Western Australia recommended that it should be made clear that ‘a grant made to several personal representatives may be resealed upon the application of only one or some of them’.¹⁰⁶⁰

35.37 The Probate Registrars agreed with this recommendation, provided that the consent of the other personal representatives had been obtained.¹⁰⁶¹

Discussion Paper

35.38 The preliminary view expressed in the Discussion Paper was that a provision should be inserted in the rules allowing a grant made to several

1057 Ibid 682 (A’Beckett J).

1058 *Re Vivian* (1901) 23 ALT 37. See the discussion of this case at note 1087 below.

1059 *Re Benn* [1905] QWN 30. See also JI Winegarten, R D’Costa and T Synak, *Tristram and Coote’s Probate Practice* (30th ed, 2006) [18.95], where it is stated that ‘[w]here a ... grant has been made to more than one person, it cannot be resealed on the application of one of the grantees without the authority of the others’.

1060 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.25](b), [11.1] Recommendation (6)(b).

1061 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 5.

personal representatives to be resealed on the application of only one or some of them, provided the consent of the other personal representatives has been obtained, and is evidenced by affidavit.¹⁰⁶²

Submissions

35.39 All the respondents who addressed this issue agreed that, if several personal representatives have been appointed under a grant, an application for the resealing of that grant should be able to be made by one or only some of them, provided the consent of the other personal representatives has been obtained, and is evidenced by affidavit.¹⁰⁶³

35.40 The Public Trustee of New South Wales and the Trustee Corporations Association of Australia both considered that the relevant provision should be located in the model legislation, rather than in court rules, as was proposed in the Discussion Paper.¹⁰⁶⁴ The former Principal Registrar of the Supreme Court of Queensland was of the view that it did not matter whether the relevant provision was located in the model legislation or in court rules.¹⁰⁶⁵

The National Committee's view

Application by, or with the consent of, multiple personal representatives

35.41 It should generally be necessary for an application for resealing to be made by all the personal representatives appointed under the grant that is the subject of the application. However, the law recognises an exception to this principle where the application is made with the consent of the other personal representatives.¹⁰⁶⁶ In the National Committee's view, a provision giving effect to this exception should be adopted. The model legislation should therefore enable an application for resealing to be made by one or more of the executors or administrators appointed under a grant, provided the other executors or administrators consent to the making of the application and their consent is evidenced by affidavit.

35.42 It is also desirable to deal expressly with the situation where one or more of the executors or administrators named in the grant have died or lost capacity since the grant was made. In that situation, the simplest approach is for the model legislation to provide for the application for resealing to be made by one or more of the surviving executors or administrators who have capacity, provided the consent of the other surviving executors or administrators who

¹⁰⁶² *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 81. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.14].

¹⁰⁶³ Submissions R1, R2, R4, R5, R6.

¹⁰⁶⁴ Submissions R2, R6.

¹⁰⁶⁵ Submission R1.

¹⁰⁶⁶ See [35.33] above.

have capacity has been obtained, and is evidenced by affidavit. This approach avoids the need to determine whether an attorney under an enduring power of attorney, executed by one of the executors or administrators before he or she lost capacity, may apply for the resealing of the grant jointly with the other executors or administrators who still have capacity.¹⁰⁶⁷

35.43 The National Committee notes that the South Australian provision dealing with applications where there is more than one executor or administrator is located in that jurisdiction's court rules. However, the National Committee considers that these proposals constitute important exceptions to the usual requirements for an application for resealing, and should therefore be located in the model legislation.

Authorisation of attorney by multiple personal representatives

35.44 Earlier in this Report, the National Committee has recommended that an application for the resealing of a grant may be made by a person authorised for that purpose under a power of attorney given by the executor or administrator.¹⁰⁶⁸ If more than one executor or administrator is appointed under the grant, the model legislation should require the attorney to be authorised by each executor or administrator.

35.45 The model legislation should also provide for the situation where one or more of the executors or administrators have died or lost capacity since the grant was made. In that situation, the model legislation should require the attorney to be authorised by each surviving executor or administrator who has capacity. The National Committee considers this to be the simplest approach while there is at least one executor or administrator who has the capacity to authorise an attorney to apply for the resealing of the grant. Although an executor or administrator who has lost capacity may have previously executed an enduring power of attorney under which he or she appointed an attorney, that attorney may not be a person whom the other executors or administrators who have capacity wish to appoint to make the application.

1067

Because of the National Committee's recommendations in Chapter 38 about the automatic recognition of certain grants made within Australia, resealing will largely be restricted to grants made overseas. The proposal that the application for resealing be made by the surviving executors or administrators who have capacity avoids the need to consider whether an enduring power of attorney of any executor or administrator who has lost capacity (which will, in most cases, have been made overseas) is recognised under the powers of attorney legislation of the resealing jurisdiction.

1068

See Recommendation 33-1(c) above. In this situation, it is not the case that the executor or administrator lacks the capacity to apply for the resealing of the grant personally. The usual reason for appointing an attorney to make the application is that the executor or administrator resides outside the resealing jurisdiction, and it is convenient to appoint an attorney who resides in the resealing jurisdiction.

GRANTS OF DOUBLE PROBATE

Introduction

35.46 As explained in Chapter 4 of this Report, where a number of executors are named in a will, a grant of probate may be made to one or more of those executors, reserving leave to the other or others who have not renounced to apply for probate in the future.¹⁰⁶⁹ Where an executor to whom leave was reserved subsequently applies for a grant of probate, the grant obtained is called a grant of 'double probate'.¹⁰⁷⁰ A grant of double probate 'runs concurrently with the first grant if any of the first grantees are still living'.¹⁰⁷¹

35.47 Where a grant of double probate has been made, two issues arise for consideration:

- who should be able to apply for resealing; and
- which instrument or instruments should be resealed.¹⁰⁷²

35.48 No Australian jurisdiction has an express provision dealing with this situation.

35.49 In England, the practice in relation to resealing where a grant of double probate has been made is that:¹⁰⁷³

An exemplification which contains copies of a probate and a double probate may be resealed, provided that the application is at the instance of all parties. ... If a probate and double probate are brought in together, both may be resealed. (note omitted)

1069 See [4.3]–[4.7] and Recommendation 4-1 in vol 1 of this Report.

1070 JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.122].

1071 Ibid.

1072 In New South Wales, the court's practice when making a grant of double probate 'is to require the original probate to be brought into the Registry, to bind the original probate up with the newly made grant of double probate, and to issue that document in its bound form': *Gould v Gould* [2005] NSWSC 914, [6] (Campbell J), referring to RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 765. The same practice is followed in Western Australia: see JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [12.435.5] (at 21 February 2009). In *Gould v Gould* [2005] NSWSC 914, Campbell J described the purpose of this practice at [6]:

The objective of that way of proceeding is to make sure that, thenceforth, any person who asks to see the original of the grant of probate will be presented with a document which accurately states the then position concerning the grant of representation which has been made in the estate.

1073 JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [18.102].

Recommendation of the Law Reform Commission of Western Australia

35.50 The Law Reform Commission of Western Australia recommended that it should be made clear that ‘a grant to one executor may be resealed after an original grant has been made to another executor’.¹⁰⁷⁴

35.51 At their 1990 conference, the Probate Registrars agreed with this recommendation, provided the consent of the other executors was obtained.¹⁰⁷⁵

Discussion Paper

35.52 The preliminary view expressed in the Discussion Paper was that, if a grant of double probate has been made, it should be possible for the court to reseat:

- the grant of probate (or an exemplification of the grant of probate) and the grant of double probate (or an exemplification of the grant of double probate), provided both instruments are deposited together in the court; or
- an exemplification that contains copies of the grant of probate and the grant of double probate.¹⁰⁷⁶

35.53 It was further proposed that an application for the resealing of grants of probate and double probate, or of an exemplification of grants of probate and double probate, should be able to be made by:

- the executor under the grant of probate and the executor under the grant of double probate;
- the executor under the grant of probate or the executor under the grant of double probate, provided the consent of the executor under the other grant has been obtained, and is evidenced by affidavit; or
- if more than one executor has been appointed under the grant of probate or the grant of double probate, one or more of the executors under the grant of probate or the grant of double probate, provided the consent of all executors under both grants has been obtained, and is evidenced by affidavit.¹⁰⁷⁷

1074 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.25](c).

1075 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 6.

1076 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 83. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.18].

1077 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 83–4. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.19].

Submissions

35.54 The former Principal Registrar of the Supreme Court of Queensland, the Victorian Bar and the New South Wales Bar Association agreed with the preliminary view expressed in the Discussion Paper in relation to applications for resealing where a grant of double probate has been made.¹⁰⁷⁸ The Trustee Corporations Association of Australia also agreed with the preliminary view in relation to the persons who should be able to apply in these circumstances, but did not comment on the instruments that should be capable of being resealed.¹⁰⁷⁹

35.55 None of these respondents expressed any preference for whether the relevant provision should be located in the model legislation or in court rules.

The National Committee's view

Documentation

35.56 In the National Committee's view, all jurisdictions should adopt a provision to the effect that, if a grant of double probate has been made in respect of a will, the seal of the court may be affixed to:

- an exemplification that contains copies of the grant of probate and the grant of double probate; or
- the grant of probate (or an exemplification of the grant of probate) and the grant of double probate (or an exemplification of the grant of double probate), provided both instruments are deposited together in the court.

35.57 As this issue is primarily concerned with the procedural aspects of resealing, the National Committee considers that it would be appropriate for this provision to be located in court rules, rather than in the model legislation.

Application by, or with the consent of, the executors under grants of probate and double probate

35.58 In the National Committee's view, all jurisdictions should ensure that, if a grant of probate and a grant of double probate have been made in relation to a will, an application for resealing may be made by:

- all the executors under the grant of probate and the grant of double probate; or

1078 Submissions R1, R4, R5.

1079 Submission R6.

- one or more of the executors under the grant of probate and the grant of double probate, provided the consent of all the other executors under both grants has been obtained, and is evidenced by affidavit.

35.59 In the model legislation, the provision that deals with applications for resealing by multiple personal representatives has been framed so as to apply to applications by the holders of a grant of probate and a grant of double probate.

35.60 The model legislation should also deal expressly with two situations in which it will not be possible for all the executors to make, or to consent to the making of, the resealing application.

35.61 The first situation arises where one or more of the executors under either the grant of probate, or the grant of double probate, have died or lost capacity. In those circumstances, the model legislation should enable an application for resealing to be made by:

- all the surviving executors under the grant of probate and the grant of double probate who have capacity; or
- one or more of the surviving executors under the grant of probate and the grant of double probate who have capacity, provided the consent of all the other surviving executors under both grants who have capacity has been obtained, and is evidenced by affidavit.

35.62 The second situation arises where all the executors under both grants have died. The model provision should therefore ensure that, if a grant of probate and a grant of double probate have been made in a foreign jurisdiction in relation to the will of a deceased person and the last surviving executor under the grants has died (the *deceased holder*), a person who is either of the following may apply for the resealing of the foreign grants:

- a person who is granted probate of the will, or letters of administration of the estate, of the deceased holder in the resealing jurisdiction; or
- a person who is recognised in the resealing jurisdiction as the executor or administrator by representation of the will or estate of the deceased holder.

Authorisation of attorney by the executors under grants of probate and double probate

35.63 In this Report, the National Committee has recommended that an application for the resealing of a grant may be made by a person authorised for that purpose under a power of attorney given by the executor or administrator.¹⁰⁸⁰ The National Committee has further recommended that, if

¹⁰⁸⁰ See Recommendation 33-1(c) above.

two or more executors or administrators are the holders of a grant, an application for the resealing of the grant may be made by a person authorised for that purpose under a power of attorney given by all the executors or administrators.¹⁰⁸¹ It is consistent with that approach that, where a grant of probate and a grant of double probate have been made in relation to a will, an application for the resealing of the grants may be made by an attorney authorised for that purpose by all the executors under both the grant of probate and the grant of double probate.

35.64 If it is not possible for the attorney to be authorised by all the executors under both grants for the reason that one or more of the executors have died or lost capacity, the model legislation should require the attorney to be authorised by each surviving executor under the grant of probate and under the grant of double probate who has capacity. This is also consistent with the National Committee's earlier approach in relation to the authorisation of an attorney where there are multiple personal representatives under a grant.¹⁰⁸²

SUBSTITUTED EXECUTORS AND ADMINISTRATORS

Introduction

35.65 In some Australian and overseas jurisdictions, a court may substitute an executor or administrator for an executor or administrator named in an original grant.

35.66 For example, the legislation in the ACT, the Northern Territory and Victoria enables the court to discharge or remove an executor or administrator to whom a grant has been made if the executor or administrator remains out of the jurisdiction for more than two years, desires to be discharged from his or her office, or refuses, or is unfit, to act in the office, or is incapable of acting.¹⁰⁸³ The legislation provides that, in these circumstances, the court may order the appointment of 'someone else' (in the ACT), 'some proper person' (in the Northern Territory) or 'some proper person or a trustee company' (in Victoria) as administrator in place of the executor or administrator who has been discharged or removed, and may make all necessary orders for vesting the estate in the new administrator as the court thinks fit.¹⁰⁸⁴ If the executor or administrator who has been discharged or removed was a last surviving, or sole, executor or

1081 See [35.44] above and Recommendation 35-1(c) below.

1082 See [35.45] above.

1083 *Administration and Probate Act 1929* (ACT) s 32(2); *Administration and Probate Act* (NT) s 41(1); *Administration and Probate Act 1958* (Vic) s 34(1). In other jurisdictions, such as New South Wales and Queensland, the practice in these circumstances is to remove the executor or administrator by revoking the original grant. For a discussion of the two approaches, see [25.1]–[25.28] in vol 2 of this Report.

1084 *Administration and Probate Act 1929* (ACT) s 32(3)–(4); *Administration and Probate Act* (NT) s 41(1) (except that no reference is made to a trustee company); *Administration and Probate Act 1958* (Vic) s 34(1).

administrator, it will be necessary for the court to appoint a substitute administrator.

35.67 Similar legislation exists in New Zealand and in England, except that, in these jurisdictions, an executor (and not simply an administrator) may be substituted for an executor who is removed.¹⁰⁸⁵

35.68 The effect of the various provisions is that the original grant remains on foot, but, by a separate order of the court, an executor or administrator is substituted for some or all of those named in the original grant.¹⁰⁸⁶

35.69 Because an executor or administrator so appointed is not named in the original grant, the question arises as to whether an application for the resealing of the original grant can be made by an executor or administrator who has been appointed in substitution for the executor or administrator named in the original grant.¹⁰⁸⁷

35.70 No Australian jurisdiction has an express provision to deal with the situation where a court has appointed a substitute personal representative to replace a personal representative who has been discharged and an application is subsequently made for the resealing of the grant.

35.71 The Supreme Court of Victoria considered this issue in *Re Bell*.¹⁰⁸⁸ In that case, the Supreme Court of New Zealand had discharged the four executors originally appointed under a grant of probate and had appointed a New Zealand trustee company as sole executor in their place. The attorney of the trustee company then applied to have an exemplification of the New Zealand grant resealed in Victoria. The registrar, having a doubt as to whether the trustee company was 'the executor ... therein named' within the meaning of the relevant provision, referred the matter to the Court. The Court held that the order substituting the trustee company should be considered as an addition to, or a variation of, the original probate and should be read as part of the probate.¹⁰⁸⁹ On that basis, the Court held that the applicant could apply for the resealing of the probate, and directed that both the exemplification of probate and the order by which the trustee company was substituted for the named executors should be resealed.

1085 *Administration Act 1969* (NZ) ss 2 (definitions of 'administration' and 'administrator'), 21; *Administration of Justice Act 1985* (UK) s 50.

1086 In Victoria, if the court orders the appointment of a substitute administrator under s 34 of the *Administration and Probate Act 1958* (Vic), a 'copy of such an order shall be attached to the grant of representation and reference to the making of the order and its nature shall be indorsed on the grant': *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 6.09(3).

1087 In *Re Vivian* (1901) 23 ALT 37, where an application for the resealing of a grant was made by one of the two original executors to whom probate was granted in New Zealand — the second executor having been discharged — the Court resealed the original grant, but not the further order by which another executor was substituted for the discharged executor. In that case, however, the substitute executor was not an applicant with the original executor.

1088 [1929] VLR 53.

1089 *Ibid* 55 (Lowe J).

35.72 The Victorian practice would appear to differ from that adopted in England, where the practice is not to reseal the two separate instruments, but only an exemplification containing copies of the original grant and the further order.¹⁰⁹⁰

Where a grant which has not been resealed in England and Wales is produced together with a separate order of the colonial court adding a grantee, it cannot be resealed. But where an exemplification is produced, combining under one seal copies of the grant and an order by which a grantee is added, it may be resealed.

Recommendation of the Law Reform Commission of Western Australia

35.73 The Law Reform Commission of Western Australia recommended that it should be made clear that 'a grant may be resealed in favour of an executor appointed by the court of original grant in substitution for the executor to whom a grant was originally made by that court'.¹⁰⁹¹

Discussion Paper

35.74 The preliminary view expressed in the Discussion Paper was that, if an order has been made substituting an executor or administrator for an executor or administrator named in an original grant, it should be possible to reseal:

- an exemplification that contains copies of the grant and the order by which an executor or administrator is substituted; or
- the grant and the order, or exemplifications of either or both, provided both instruments are deposited together in the court.¹⁰⁹²

35.75 It was further suggested that, in these circumstances, an application for resealing should be able to be made by:

- where there is no continuing executor or administrator — the substitute executor or administrator;
- where there is a continuing executor or administrator — the continuing executor or administrator and the substitute executor or administrator; or
- where there is more than one continuing executor or administrator or more than one substitute executor or administrator — one or more of the continuing or substitute executors or administrators, provided the consent of all continuing executors or administrators and all substitute

¹⁰⁹⁰ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [18.101].

¹⁰⁹¹ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.25](d).

¹⁰⁹² *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 87. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.23].

executors or administrators has been obtained, and is evidenced by affidavit.¹⁰⁹³

35.76 Submissions were sought on whether the relevant provisions should be located in the court rules, rather than in the model legislation.¹⁰⁹⁴

Submissions

35.77 The former Principal Registrar of the Supreme Court of Queensland, the Victorian Bar and the New South Wales Bar Association agreed with the preliminary view expressed in the Discussion Paper in relation to applications for resealing where there has been a substitution of executors or administrators appointed under the original grant.¹⁰⁹⁵ The Trustee Corporations Association of Australia also agreed with the preliminary view in relation to the persons who should be able to apply in these circumstances, but did not comment on the instruments that should actually be resealed.¹⁰⁹⁶

35.78 None of these respondents expressed any preference for whether the relevant provision should be located in the model legislation or in court rules.

The National Committee's view

Documentation

35.79 In the National Committee's view, all jurisdictions should adopt a provision to the effect that, if an order has been made removing an executor or administrator or substituting an executor or administrator for an executor or administrator who has been removed, the seal of the court may be affixed to:

- an exemplification that contains copies of the grant and the order by which the executor or administrator is removed and, if applicable, another executor or administrator is substituted; or
- the grant and the order, or exemplifications of either or both, provided both instruments are deposited together in the court.

35.80 As this issue is primarily concerned with the procedural aspects of resealing, the National Committee considers that it would be appropriate for this provision to be located in court rules, rather than in the model legislation.

¹⁰⁹³ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 87. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.24].

¹⁰⁹⁴ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 88.

¹⁰⁹⁵ Submissions R1, R4, R5.

¹⁰⁹⁶ Submission R6.

Applicants

35.81 In the National Committee's view, the model legislation should ensure that, if an order has been made removing an executor or administrator or substituting an executor or administrator for an executor or administrator who has been removed, an application for resealing may be made by:

- the executor or administrator who holds office under the grant when the application is made; or
- if more than one executor or administrator holds office under the grant when the application is made — one or more of the executors or administrators, provided the other executors or administrators consent to the making of the application and their consent is evidenced by affidavit.

35.82 In the model legislation, the provision that deals with applications for resealing has been framed so as to apply to the persons who are authorised to collect and administer the deceased's estate in the foreign jurisdiction in which the foreign grant of representation has been made. As a result, a substituted personal representative may apply for the resealing of the foreign grant, but a personal representative who has been removed and who is no longer authorised to collect and administer the deceased's estate is not a 'holder' of the foreign grant for the purpose of the resealing provisions.

APPLICATION BY A FOREIGN TRUSTEE COMPANY FOR THE RESEALING OF A GRANT

The present law

Eligibility of a foreign trustee company

35.83 Legislation in each Australian State and Territory enables certain specified trustee companies to be appointed as executors or administrators in the jurisdiction in question.¹⁰⁹⁷ The fact that a trustee company may be so authorised under the legislation of one jurisdiction does not enable that company to be appointed as an executor or administrator under a grant in another jurisdiction.¹⁰⁹⁸

¹⁰⁹⁷

See *Trustee Companies Act 1947* (ACT) ss 4–8; *Trustee Companies Act 1964* (NSW) ss 4–6; *Companies (Trustees and Personal Representatives) Act* (NT) ss 14–17; *Trustee Companies Act 1968* (Qld) ss 5–9; *Trustee Companies Act 1988* (SA) s 4; *Trustee Companies Act 1953* (Tas) ss 5, 6, 8–10; *Trustee Companies Act 1984* (Vic) ss 9–11; *Trustee Companies Act 1987* (WA) ss 5–9.

¹⁰⁹⁸

In *In the Will of Finn* (1908) 8 SR (NSW) 32, Street J refused to grant probate to a trustee company that was incorporated under South Australian law. His Honour commented (at 33), in relation to the South Australian legislation under which the trustee company was incorporated and given its powers:

These Acts of the South Australian Legislature can have no extra-territorial effect, and, prima facie at least, therefore, the Company, in applying to this Court, stands in exactly the same position as any other corporation aggregate not clothed with legislative authority to obtain probate in this suit.

35.84 This raises the question of whether the court should be able to reseal a grant made in favour of a trustee company if the trustee company is not one in whose favour the court could make an original grant.

35.85 In Queensland and New South Wales, it has been held that a grant made in favour of a foreign trustee company may be resealed, even though the trustee company in question was not one to which an original grant could have been made in the particular jurisdiction.¹⁰⁹⁹ In *Re Galletly*,¹¹⁰⁰ the Full Court of the Supreme Court of Queensland held:¹¹⁰¹

We think that the better view of the operation of the *British Probates Act* is that full effect should be given to the grant by the other British Court, whether the grant is made to a person or company capable of taking a grant under our law or not.

Procedural requirements

35.86 Generally the courts have required the application to be made by the trustee company's duly constituted attorney, rather than by the trustee company itself, so that the attorney can swear the affidavit in support of the application.¹¹⁰²

35.87 The South Australian rules deal specifically with this requirement and provide that, if a trustee company is the executor, administrator or attorney, application for the resealing of the grant may be made by an authorised officer of the trustee company. Rule 50.01(d) of *The Probate Rules 2004* (SA) provides:

Re-sealing of grants under section 17 of the Act

50.01 Application for the re-sealing of a grant under section 17 of the Act may be made either in person or through a practitioner—

...

or, in the case of a trust corporation being the executor, administrator, or attorney—

- (d) by an officer of such corporation who must depose in the oath to his or her authority to make the application and such officer must lodge with the application a certified copy of the resolution of the board of directors of such corporation authorising such officer to make the application for the re-sealing of the grant:

¹⁰⁹⁹ *Re Galletly* (1900) 10 QLJ 74; *In the Will of Thornley* (1903) 4 SR (NSW) 246. In *Re Bertram* [1904] St R Qd 42, the Supreme Court of Queensland refused to reseal a grant of probate made by the Supreme Court of Victoria in favour of a trustee company incorporated in Victoria. However, the application was refused on the basis that, under the legislation by which the trustee company was incorporated, it did not have the power to apply for the resealing of a grant of probate.

¹¹⁰⁰ *Re Galletly* (1900) 10 QLJ 74.

¹¹⁰¹ *Ibid* (Griffith CJ, Cooper and Real JJ).

¹¹⁰² *Re Galletly* (1900) 10 QLJ 74; *Re Sutherland* [1936] QWN 20.

Provided that it shall not be necessary to lodge a certified copy of the resolution if the officer through whom the application is made is included in a list of persons authorised to make such applications filed in the Registry by the trust corporation.

Commonwealth Secretariat Draft Model Bill

35.88 The term ‘personal representative’ was defined in the Commonwealth Secretariat Draft Model Bill to include ‘any corporation named in the probate or letters of administration as executor or administrator’.¹¹⁰³ However, the draft model bill did not include any additional provisions dealing with the manner in which a trustee company should apply for the resealing of a grant.

Discussion Paper

35.89 The preliminary view expressed in the Discussion Paper was that a model rule based on the South Australian rule should be adopted, as it states the precise procedure to be adopted when a trustee company applies for the resealing of a grant.¹¹⁰⁴

Submissions

35.90 The Victorian Bar and the New South Wales Bar Association both agreed that a model rule based on the South Australian rule should be adopted to deal with applications made on behalf of trustee companies.¹¹⁰⁵ The Trustee Corporations Association of Australia was also of the view that such a provision should be adopted, although it considered that the relevant provision should be contained in the model legislation.¹¹⁰⁶

35.91 The former Principal Registrar of the Supreme Court of Queensland, however, was opposed to the adoption of a provision based on the South Australian rule.¹¹⁰⁷ In his view, the issue of how an application for resealing is made by a trustee company should be left to each jurisdiction.

The National Committee’s view

Eligibility of a foreign trustee company

35.92 The National Committee is of the view that, in the interests of certainty, it is desirable for the model legislation to provide expressly that, if a trustee

¹¹⁰³ Commonwealth Secretariat Draft Model Bill cl 2(1).

¹¹⁰⁴ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 90. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.28].

¹¹⁰⁵ Submissions R4, R5.

¹¹⁰⁶ Submission R6.

¹¹⁰⁷ Submission R1.

company is the executor or administrator under a grant or is authorised, by a power of attorney given by an executor or administrator, to apply for the resealing of a grant, the grant may be resealed, even though the trustee company is not one to which the court could, under the laws of the resealing jurisdiction, grant probate or letters of administration. The decision to locate this provision in the model legislation, rather than in court rules, is based on the fact that the proposal concerns the fundamental question of a trustee company's eligibility to apply for resealing.

Procedural requirements

35.93 The National Committee has considered whether the model legislation should include a provision to the effect of rule 50.01(d) of *The Probate Rules 2004* (SA). Although that rule is useful in setting out the procedure to be followed by a trustee company when applying for the resealing of a grant, its content deals solely with the manner in which the authority of the attorney is to be established. For that reason, the National Committee does not consider it appropriate for the model legislation to include such a provision. However, individual jurisdictions may wish to consider whether a provision to that effect, setting out the procedure to be followed when a trustee company applies for the resealing of a grant, is suitable for inclusion in their court rules.

THE COURT'S POWER TO RESEAL A GRANT, IMPOSE CONDITIONS AND REVOKE THE RESEALING OF A GRANT

The existing law

35.94 The core provision of the resealing legislation, which is essentially the same in all jurisdictions, allows the court (or registrar) to reseat a grant if the various requirements discussed in this Report¹¹⁰⁸ have been satisfied.¹¹⁰⁹

35.95 In jurisdictions other than Tasmania and Victoria, the legislation provides that the grant 'may' be resealed. It is clear that the court has a discretion whether or not to reseat the grant, even though the various requirements are satisfied.¹¹¹⁰

35.96 In Tasmania and Victoria, the legislation provides that, on satisfaction of the specified conditions, the grant 'shall' be resealed. Despite the terms in

¹¹⁰⁸ For example, it is necessary that a grant of probate or administration or similar order (see Chapter 31) has been made by a court of competent jurisdiction in a recognised country (see Chapter 32), and that specified documents have been produced to, and deposited with, the court (see [35.1]–[35.8] above).

¹¹⁰⁹ *Administration and Probate Act 1929* (ACT) s 80(1), (2); *Probate and Administration Act 1898* (NSW) s 107(1); *Administration and Probate Act* (NT) s 111(1); *British Probates Act 1898* (Qld) s 4(1); *Administration and Probate Act 1919* (SA) s 17; *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(2); *Administration Act 1903* (WA) s 61(1).

¹¹¹⁰ *Re MacNeil* (1901) 1 SR (NSW) B & P 20, 24 (Walker J); *Public Trustee of New Zealand v Smith* (1925) 42 WN (NSW) 30, 31 (Harvey J); *In the Will of Lambe* [1972] 2 NSWLR 273, 279 (Helsham J).

which the legislation is expressed, it has been held that the court still has a discretion whether or not to reseal the grant.¹¹¹¹

Commonwealth Secretariat Draft Model Bill

35.97 The Commonwealth Secretariat Draft Model Bill provided that the registrar may, if satisfied as to certain specified matters, cause the grant to be resealed.¹¹¹²

Recommendation of the Law Reform Commission of Western Australia

35.98 The Law Reform Commission of Western Australia recommended that the proposed uniform laws 'should specifically state that the court of the jurisdiction in which resealing is sought has a residual discretion to refuse resealing'.¹¹¹³ It referred to various grounds on which the court might decline to reseal a grant, notwithstanding compliance with the formal requirements for resealing:¹¹¹⁴

A cardinal feature of the present law of resealing is that the jurisdiction in which it is sought to reseal a grant of probate or administration made elsewhere has a discretion as to whether or not to permit resealing. This allows it, for example, to consider questions as to the validity of any will, as to the capacity of the applicant to act according to the law of the resealing jurisdiction, and as to whether to reseal the grant would be contrary to public policy. It may well be that, in the circumstances, a court in the jurisdiction in which resealing is being requested would not have issued an original grant. (notes omitted)

Discussion Paper

35.99 In the Discussion Paper, it was suggested that it is important to make it clear that the court has a discretion in relation to resealing. The preliminary view expressed was that the model legislation should provide that, if the specified conditions are satisfied, the court may reseal a grant.¹¹¹⁵

¹¹¹¹ *In the Will of Buckley* (1889) 15 VLR 820; *In the Estate of Williams* [1914] VLR 417; *Re Carlton* [1924] VLR 237, 242–3 (Cussen ACJ, Schutt J and Weigall AJ). Note, however, that in *Drummond v The Registrar of Probates (South Australia)* (1918) 25 CLR 318, 321 Isaacs J held that the word 'shall' in the then equivalent provision in the South Australian legislation (*Administration and Probate Act 1891* (SA) s 26(1)) was mandatory. The current South Australian provision (*Administration and Probate Act 1919* (SA) s 17) provides that, when the formal provisions have been complied with, the 'probate or administration may be sealed with the seal of the Supreme Court' (emphasis added). See also *Re Willcox* [1925] NZLR 525, where the Supreme Court of New Zealand held that the registrar had no discretion in relation to resealing.

¹¹¹² Commonwealth Secretariat Draft Model Bill cl 5(1).

¹¹¹³ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (3).

¹¹¹⁴ *Ibid* [3.22].

¹¹¹⁵ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 117. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.67].

Submissions

35.100 All the respondents who commented on this issue agreed with the preliminary view expressed in the Discussion Paper. This was the view of the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia.¹¹¹⁶

The National Committee's view

35.101 The National Committee is of the view that the provision in the model legislation that confers on the court the power to reseal a grant should be expressed in terms that the court 'may' reseal a grant to emphasise the discretionary nature of the court's power. The model legislation should also provide that the court may reseal a grant subject to any conditions it considers appropriate.

35.102 Additionally, the model legislation should provide that, without limiting the jurisdiction of the resealing court in relation to a resealed grant, the court may revoke the resealing of a grant or change or add to the conditions to which the resealing is subject.

NOTIFICATION

The existing law

35.103 If a grant that has been resealed is later revoked by the court from which it was originally issued, the resealing court may in turn revoke its resealing of that grant:¹¹¹⁷

the whole basis for invoking the jurisdiction of this Court [to reseal the foreign grant] is the existence of a grant of probate by a Court of competent jurisdiction, and when the basis of the order goes I am of opinion that it is within the competence of this Court to revoke its own order.

35.104 It is therefore important to ensure that a court to which an application for resealing is made can be satisfied that the grant in question has not been revoked or altered. Similarly, it is important that there is a mechanism by which a court that has resealed a grant will become aware if the grant is subsequently revoked or altered by the court that originally issued it.

1116 Submissions R1, R2, R4, R5, R6.

1117 *Re Hall* [1930] VLR 309, 310 (Lowe J).

35.105 In Queensland, South Australia and Tasmania, the respective rules provide that, if a grant is resealed in that jurisdiction, notice of the resealing must be given to the court that originally issued the grant.¹¹¹⁸

35.106 Although there are no requirements to this effect in the Western Australian rules, it is nevertheless the practice in that jurisdiction for notification to be given to the court that has made an original grant when that grant is resealed in Western Australia.¹¹¹⁹

35.107 In Queensland, the rules also provide that, if the registrar believes that a Queensland grant that has been revoked or altered has been resealed by a court outside Queensland, the registrar must send to the other court notice of the revocation of, or alteration in, the grant.¹¹²⁰

35.108 The South Australian rules provide that, if notice has been received in the registry of the resealing of a South Australian grant, notice of any amendment or revocation of the grant must be sent by the registrar to the court by which it was resealed.¹¹²¹ A similar rule applies in Tasmania.¹¹²²

Recommendation of the Law Reform Commission of Western Australia

35.109 The Law Reform Commission of Western Australia recommended that the uniform resealing rules should include a provision:¹¹²³

that notice of the resealing should be given by the resealing court to the court of original grant; and that the court of original grant, having been informed of resealing, should notify the resealing court of any revocation or alteration of the original grant.

35.110 When the Probate Registrars considered this issue at their 1990 conference, they suggested a slight qualification to the Western Australian Commission's recommendation. It was their view that the resealing court should notify the granting court of the application for resealing at the time the application was made, rather than after the grant had been resealed, as this would enable notice of any revocation or alteration of the original grant to be conveyed to the resealing court before it resealed the grant in question.¹¹²⁴

¹¹¹⁸ *Uniform Civil Procedure Rules 1999* (Qld) r 620; *The Probate Rules 2004* (SA) r 50.09; *Probate Rules 1936* (Tas) r 54.

¹¹¹⁹ Letter from the Registrar of the Supreme Court of Western Australia to the Queensland Law Reform Commission, 12 November 2001.

¹¹²⁰ *Uniform Civil Procedure Rules 1999* (Qld) r 641.

¹¹²¹ *The Probate Rules 2004* (SA) r 50.10.

¹¹²² *Probate Rules 1936* (Tas) r 55.

¹¹²³ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (19).

¹¹²⁴ *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 9–10.

Discussion Paper

35.111 The preliminary view expressed in the Discussion Paper was that the recommendation of the Law Reform Commission of Western Australia, with the change suggested by the Probate Registrars, should be adopted.¹¹²⁵

35.112 The Discussion Paper also raised another matter that may be relevant to the issue of notification. As an alternative to resealing, the Discussion Paper examined the possibility of a scheme under which grants made by the Australian jurisdiction in which the deceased died domiciled would be effective throughout Australia without having to be resealed.¹¹²⁶ In that context, consideration was given to the possibility of establishing a national register of grants.¹¹²⁷ In relation to resealing, the observation was made in the Discussion Paper that, if such a register were established, it could also serve to inform all Australian jurisdictions of grants that had been resealed in another State or Territory, of revocations and alterations of original grants, and of caveats lodged.¹¹²⁸

Submissions

35.113 Five respondents addressed the issue of notification in relation to resealing.¹¹²⁹ Of these, the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales and the Trustee Corporations Association of Australia agreed that court rules should provide that:¹¹³⁰

- if an application is made to the court for the resealing of a grant, the court must give notice of that application to the court that made the grant that is the subject of that application; and
- if the court is informed that an application has been made for the resealing of a grant that it has made, the court must notify the resealing court of any revocation or alteration of the original grant.

1125 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 142. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.98].

1126 See *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) ch 4. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) ch 4. The automatic recognition of Australian grants is considered in Chapters 37–39 of this Report.

1127 See *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 49–51. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.34]–[4.37].

1128 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 142. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.99].

1129 Submissions R1, R2, R4, R5, R6.

1130 Submissions R1, R2, R6.

35.114 The New South Wales Bar Association did not comment directly on the notification requirements, but suggested that:¹¹³¹

The evidence in support of the application for resealing should include an affidavit in which there is a reference to the fact that the Grant of Probate or Letters of Administration has not been revoked or altered.

35.115 The submissions expressed a range of views about the desirability of establishing a national database of grants.

35.116 The Public Trustee of New South Wales expressed the view that the 'cost and problems of obtaining cooperation for a national database would be difficult to resolve'.¹¹³²

35.117 The former Principal Registrar of the Supreme Court of Queensland suggested that the establishment of such a database was not necessary, as it is proposed to make all Queensland grants available through the Court's website in the coming years.¹¹³³

35.118 In contrast, the Victorian Bar and the Trustee Corporations Association of Australia expressed support for a national database of grants.¹¹³⁴ The Victorian Bar commented:¹¹³⁵

A national database, provided it is kept up to date, would obviate the need for formal notification. The resealing Court need only interrogate the database in order to find out whether there has been any revocation or alteration of the original grant.

35.119 The Queensland Law Society also supported a national database, commenting:¹¹³⁶

The Committee also favours a nationwide database of grants, reseals and caveats. The difficulty may be who runs and maintains it and bears the costs. There are other examples of central national registries in other areas.

The National Committee's view

35.120 The National Committee recognises the importance in any resealing scheme of guarding against the possibility that the court may inadvertently reseal a grant that has already been revoked or altered by the court of original grant. Similarly, it recognises the importance of ensuring that there is a

1131 Submission R5.

1132 Submission R2.

1133 Submission R1. This issue is considered further at [38.155]–[38.174] below.

1134 Submissions R4, R6. Note, however, that the Trustee Corporations Association of Australia also supported the adoption of the notification provisions that were proposed in the Discussion Paper: see [35.113] above.

1135 Submission R4.

1136 Submission R3.

mechanism by which a court that has resealed a grant can be made aware if the grant is subsequently revoked or altered by the court of original grant.

35.121 As noted above, when the Probate Registrars considered this issue in 1990, they supported a requirement that the resealing court must notify the court of original grant when an application for resealing was filed, rather than a requirement that the resealing court must notify the court of original grant after a grant had been resealed. Although the former requirement would give the court of original grant the opportunity to notify the resealing court, prior to resealing, about whether it had revoked or altered the original grant, the National Committee is concerned that it could result in delays in dealing with applications for resealing. Obviously, for this requirement to be effective in alerting the resealing court as to any revocation or alteration of the original grant, it would be necessary for the resealing court to allow the court of original grant, in particular, one located in an overseas jurisdiction, a reasonable period of time in which to respond. Further, the effectiveness of this requirement would depend on the cooperation of the court of original grant, which may not be under any obligation to provide relevant information to the resealing court.

35.122 For these reasons, the National Committee does not favour the approach suggested by the Probate Registrars. Instead, the National Committee considers it more appropriate for the resealing court to be satisfied, on the basis of the material filed in support of the application for resealing, that the grant that is the subject of the application has not been revoked or altered by the court of original grant. Accordingly, the National Committee is of the view that a person who applies for the resealing of a grant should be required to depose to the fact that the grant in respect of which resealing is sought has not been revoked or altered by the court of original grant.

35.123 Although the primary means by which the court is to be satisfied that the grant has not been revoked or altered will be the affidavit filed by the applicant for resealing, the National Committee still sees merit in requiring the resealing court, once it has resealed a grant, to notify the court of original grant of that fact. It is only if the court of original grant is aware that a grant issued by it has been resealed in a particular jurisdiction that it can notify the resealing court if it subsequently revokes or alters the grant.

35.124 As a corollary to this requirement, the National Committee is of the view that, if a court of original grant is notified by another court that that court has resealed a grant made by the court of original grant, the court of original grant must notify the resealing court if it has revoked or altered the grant in question, or if it subsequently revokes or alters that grant.

35.125 In the National Committee's view, the provisions in relation to notification form an integral part of the resealing scheme. Consequently, the National Committee is of the view that these provisions should be contained in the model legislation, rather than in court rules.

35.126 The National Committee notes that there was some support expressed in the submissions for the establishment of a national database recording all grants made or resealed in Australia, and all caveats lodged against the making or resealing of a grant. That issue is considered in Chapter 38 of this Report, where the National Committee has recommended that it is not necessary, for the purpose of the proposed scheme for the automatic recognition of Australian grants, to establish such a database.

SUCCESSION DUTY

The existing law

35.127 In New South Wales and the Northern Territory, the legislation provides that the seal of the court shall not be affixed until such succession¹¹³⁷ and other duties have been paid as would have been payable if the probate or administration had originally been granted by the court.¹¹³⁸ In Queensland, the legislation provides that:¹¹³⁹

no probate or letters of administration shall be sealed under this section until there has been filed in the Supreme Court a certificate under the hand of the Commissioner of State Revenue appointed under the *Taxation Administration Act 2001* to the effect that adequate security has been given for payment of all probate and succession duty in respect of so much (if any) of the estate as is liable to duty in Queensland.

35.128 The purpose of these provisions was to facilitate the collection of various duties by making the resealing of a grant conditional on the payment of such duties as would have been payable if application had been made for an original grant.

35.129 However, between 1976 and 1983, the Commonwealth Government, the Australian States and the Northern Territory passed legislation abolishing the payment of various duties relating to the estates of deceased persons.¹¹⁴⁰

¹¹³⁷ The term 'succession duty' is used in this chapter to refer to the different types of duties that were levied by the various jurisdictions in respect of the estates of deceased persons. For a discussion of probate duty and legacy duty, see *Blackwood v The Queen* (1882) 8 App Cas 82, 90–1 (PC).

¹¹³⁸ *Probate and Administration Act 1898* (NSW) s 108(1) (probate, stamp and other duties); *Administration and Probate Act* (NT) s 113(1) (succession duties and other duties and fees but not including estate duty).

The ACT and South Australia used to have similar provisions. However, s 18(2) of the *Administration and Probate Act 1919* (SA), which referred to 'all probate and other duties (if any)', was repealed and replaced by a new provision by the *Administration and Probate (Administration Guarantees) Amendment Act 2003* (SA) s 4. Section 82(1) of the *Administration and Probate Act 1929* (ACT), which referred to 'probate, stamp, and any other duties (excluding estate duty)', was repealed by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 pt 2.1 item [2.32].

¹¹³⁹ *British Probates Act 1898* (Qld) s 4(2).

¹¹⁴⁰ Duty was abolished on the estates of persons dying on or after the following dates:

Commonwealth estate duty:	1 Jul 1979	<i>Estate Duty Assessment Amendment Act 1978</i> (Cth) s 4
New South Wales death duty:	31 Dec 1981	<i>Stamp Duties (Further Amendment) Act 1980</i> (NSW) s 4, sch 1 items (4), (5)
Northern Territory succession duty:	1 Jul 1978	<i>Succession Duties Repeal Ordinance 1978</i> (NT) s 3

In each case, however, the legislation applied in respect of the estate of a person who died after a specified date.¹¹⁴¹ The legislation did not of itself extinguish the liability to duty of an estate of a person who died before the relevant date.

35.130 In South Australia, the legislation under which succession duty is levied on certain estates is still in force.¹¹⁴² Although the equivalent provisions under the Commonwealth,¹¹⁴³ New South Wales,¹¹⁴⁴ Northern Territory,¹¹⁴⁵ Queensland¹¹⁴⁶ and Tasmanian¹¹⁴⁷ legislation have now been repealed, the estate of a person who died before the relevant date is still liable to succession duty.¹¹⁴⁸

35.131 Victoria and Western Australia are the only jurisdictions in which legislation has been passed not only to repeal the Acts under which succession duty was levied, but also to extinguish any existing liability in respect of the payment of succession duty.¹¹⁴⁹

35.132 Consequently, it is possible that, in a number of Australian jurisdictions, there could be unadministered estates that will be subject to the payment of succession duty when they are eventually administered. For example, where a testator leaves a life interest in the family home to a beneficiary, it is not

Queensland succession duty:	1 Jan 1977	<i>Succession and Gift Duties Abolition Act 1976</i> (Qld) s 4
South Australian succession duty:	1 Jan 1980	<i>Succession Duties Act Amendment Act 1979</i> (SA) s 2
Tasmanian estate duties:	1 Oct 1982	<i>Deceased Persons' Estates Duties Amendment Act 1982</i> (Tas) s 4
Victorian probate duty:	1 Jan 1984	<i>Probate Duty Act 1981</i> (Vic) s 3
Western Australian death duty:	1 Jan 1980	<i>Death Duty Assessment Act Amendment Act 1978</i> (WA) s 3.

Death duties were never levied in the ACT: see *Halsbury's Laws of Australia*, 395 Succession, '4 Administration of Estates' [4390] (at 17 October 2003).

1141

See note 1140 above.

1142

See *Succession Duties Act 1929* (SA). The Act is expressed not to apply to, or in relation to, property derived from a deceased person who dies on or after 1 January 1980 or the administrator of the estate of any such deceased person: *Succession Duties Act 1929* (SA) s 4E.

1143

Statute Stocktake Act 1999 (Cth) s 3, sch 1 (repeal of the *Estate Duty Assessment Act 1914* (Cth)); *Acts Interpretation Act 1901* (Cth) s 8.

1144

Stamp Duties (Amendment) Act 1991 (NSW) s 3, sch 3 item (11) (repeal of Part 4 of the *Stamp Duties Act 1920* (NSW)), sch 5 item (20).

1145

Succession Duties Repeal Ordinance 1978 (NT) ss 3 (*Succession Duties Act 1893* (SA) to cease to apply as a law of the Territory), 4.

1146

Statute Law Revision Act 1995 (Qld) s 5(1), (3), (4), sch 6 (repeal of the *Succession Duties Act 1892* (Qld) and certain related Acts) sch 9, sch 10 s 3.

1147

Deceased Persons' Estates Duties Amendment Act 1982 (Tas) ss 3, 10; SR 48 of 1997 (Proclamation under the *Deceased Persons' Estates Duties Amendment Act 1982*); *Acts Interpretation Act 1931* (Tas) s 16(1)(c).

1148

In New South Wales, the Northern Territory and Queensland, this is the result of express provisions in the repealing legislation that preserve a liability to duty existing before the date from which duty was abolished: see notes 1144, 1145, 1146 above. In Tasmania, this is the result of a provision in the interpretation legislation that provides that, in the absence of a contrary intention, the repeal of an Act does not affect a liability that accrued or was incurred before the repeal of that Act: see note 1147 above.

1149

State Taxation Acts (Miscellaneous Amendments) Act 2000 (Vic) s 4; *Statutes (Repeals and Minor Amendments) Act 1997* (WA) s 5.

uncommon for the testator's estate to be administered only after the life tenant has died and the family home is about to be sold. Against this background, the question arises as to whether the model legislation should include a provision to the effect that a grant may not be resealed until such succession duty has been paid as would have been payable if the grant had originally been made by the resealing court.

Commonwealth Secretariat Draft Model Bill

35.133 Under the Commonwealth Secretariat Draft Model Bill the registrar's power to reseal a grant was conditional upon the registrar's being satisfied, among other things, that such succession duty, if any, has been paid as would have been payable if the grant had been made by the resealing court.¹¹⁵⁰

Recommendation of the Law Reform Commission of Western Australia

35.134 The Law Reform Commission of Western Australia expressed the view that the abolition of succession duty throughout Australia made it unnecessary to include a provision making resealing conditional on the payment of succession duty.¹¹⁵¹

Discussion Paper

35.135 In the Discussion Paper, it was proposed that, as succession duty may still be payable in respect of estates in five Australian jurisdictions, the model legislation should contain a provision to the effect of clause 5(1)(a) of the Commonwealth Secretariat Draft Model Bill.¹¹⁵² Under this approach, the model legislation would provide that, before resealing a grant, the registrar must be satisfied that any succession duty has been paid as would be payable if the grant had been made by that court.

Submissions

35.136 Only two respondents, the Victorian Bar and the New South Wales Bar Association, agreed with the preliminary view expressed in the Discussion Paper.¹¹⁵³

¹¹⁵⁰ Commonwealth Secretariat Draft Model Bill cl 5(1)(a).

¹¹⁵¹ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.42]. The Western Australian Commission acknowledged (at [7.38]) that succession duty would still be payable in some cases, 'few in number, where the deceased died before the cut-off date for duty stipulated in the various statutory provisions'.

¹¹⁵² *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 148. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.107].

¹¹⁵³ Submissions R4, R5.

35.137 The other respondents who addressed this issue — the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales and the Trustee Corporations Association of Australia — were of the view that the model legislation should not include a provision dealing with the payment of succession duty.¹¹⁵⁴ The Public Trustee of New South Wales expressed the view that such a provision was difficult to justify ‘in light of the miniscule number of estates attracting succession duty’.¹¹⁵⁵

The National Committee’s view

35.138 Although the legislation in some Australian jurisdictions still includes a provision to facilitate the collection of succession duty,¹¹⁵⁶ the National Committee is of the view that such a provision should not be included in the model legislation. As explained above, succession duty is potentially payable in only some Australian jurisdictions, and the number of estates that may be affected by such a liability is both very small and diminishing.¹¹⁵⁷

35.139 If an individual jurisdiction wishes to retain its provision regarding the payment of succession duty, that is a matter for it. However, the National Committee is persuaded by the submissions received in relation to this issue that the model legislation should not include a provision that will be relevant in only some jurisdictions and only then in rare circumstances.

RECOMMENDATIONS

35.140 The National Committee makes the following recommendations about provisions that should be contained in the model legislation:

Multiple personal representatives

35-1 The model legislation should provide that, if two or more executors or administrators are the holders of a grant, an application for the resealing of the grant may be made by:

- (a) all the executors or administrators under the grant; or**

¹¹⁵⁴ Submissions R1, R2, R6.

¹¹⁵⁵ Submission R2.

¹¹⁵⁶ See [35.127] above.

¹¹⁵⁷ See [35.129]–[35.131] above.

- (b) one or more of the executors or administrators, provided that the other executors or administrators consent to the making of the application and their consent is evidenced by affidavit; or
- (c) a person authorised for that purpose under a power of attorney given by all the executors or administrators; or
- (d) if one or more of the executors or administrators have died or lost capacity:
 - (i) all the surviving executors or administrators who have capacity;
 - (ii) one or more of the surviving executors or administrators who have capacity, provided the consent of the other remaining executors or administrators who have capacity has been obtained, and is evidenced by affidavit; or
 - (iii) a person authorised for that purpose under a power of attorney given by all the surviving executors or administrators who have capacity.¹¹⁵⁸

See Administration of Estates Bill 2009 cll 358(2)–(4), 359(2)–(3), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a), (c), (d)), ‘holder’ (para (b))).

Grants of double probate

35-2 The model legislation should ensure that, if a grant of double probate has been made in relation to a will, an application for resealing of the grants of probate may be made by:¹¹⁵⁹

- (a) all the executors under the grant of probate and the grant of double probate;
- (b) one or more of the executors under the grant of probate and the grant of double probate, provided the consent of all the other executors under both grants has been obtained, and is evidenced by affidavit; or

¹¹⁵⁸ See [35.41]–[35.45] above.

¹¹⁵⁹ See [35.58]–[35.61], [35.63]–[35.64] above.

- (c) a person authorised for that purpose by all the executors under the grant of probate and all the executors under the grant of double probate;
- (d) if one or more of the executors under the grant of probate, or the grant of double probate, have died or lost capacity:
 - (i) all the surviving executors under the grant of probate and the grant of double probate who have capacity;
 - (ii) one or more of the surviving executors under the grant of probate and the grant of double probate who have capacity, provided the consent of all the other surviving executors under both grants who have capacity has been obtained, and is evidenced by affidavit; or
 - (iii) a person authorised for that purpose under a power of attorney given by all the surviving executors under the grant of probate and the grant of double probate who have capacity.

See Administration of Estates Bill 2009 cl 358(2)–(4), 359(2)–(3), sch 3 dictionary (definitions of ‘foreign grant of representation’ (para (b)), ‘holder’ (para (b))).

35-3 The model legislation should provide that, if a grant of probate and a grant of double probate have been made in a foreign jurisdiction in relation to the will of a deceased person and the last surviving executor under the grants has died (the ‘*deceased holder*’), a person who is either of the following may apply for the resealing of the grants of probate:

- (a) a person who is granted probate of the will, or letters of administration of the estate, of the deceased holder in the resealing jurisdiction; or
- (b) a person who is recognised in the resealing jurisdiction as the executor or administrator by representation of the will or estate of the deceased holder.¹¹⁶⁰

1160

See [35.62]–[35.62] above.

See Administration of Estates Bill 2009 cl 358(5)–(6), sch 3 dictionary (definitions of ‘foreign grant of representation’ (para (b)), ‘holder’ (para (b))).

Substituted executors and administrators

35-4 The model legislation should ensure that, if an order has been made removing an executor or administrator or substituting an executor or administrator for an executor or administrator who has been removed, an application for resealing may be made by:

- (a) the executor or administrator who holds office under the grant when the application is made; or
- (b) if more than one executor or administrator holds office under the grant when the application is made — one or more of the executors or administrators, provided the other executors or administrators consent to the making of the application and their consent is evidenced by affidavit.¹¹⁶¹

See Administration of Estates Bill 2009 cl 358(1)–(3), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a)–(c)), ‘holder’ (para (b))).

Application by a trustee company

35-5 The model legislation should include a provision that:

- (a) applies if a trustee company:
 - (i) is the executor or administrator under a grant; or
 - (ii) is authorised, by a power of attorney given by an executor or administrator, to apply for the resealing of a grant; and
- (b) provides that the grant may be resealed, even though the trustee company is not one to which the court could, under the laws of the resealing jurisdiction, grant probate or letters of administration.¹¹⁶²

¹¹⁶¹ See [35.81]–[35.82] above.

¹¹⁶² See [35.92] above.

See Administration of Estates Bill 2009 cl 360.

35-6 The model legislation should not include a provision based on rule 50.01(d) of *The Probate Rules 2004* (SA), although individual jurisdictions may wish to consider whether a provision to that effect, setting out the procedure to be followed when a trustee company applies for the resealing of a grant, is suitable for inclusion in their court rules.¹¹⁶³

The court's power to reseal a grant, impose conditions and revoke the resealing of a grant

35-7 The model legislation should include a provision that:¹¹⁶⁴

- (a) in conferring on the court the power to reseal a grant, provides that the court 'may' reseal a grant, including subject to any conditions; and
- (b) provides that, without limiting the court's jurisdiction in relation to a resealed grant under the provision that gives effect to Recommendation 34-2, the court may revoke the resealing of a grant or change or add to the conditions to which the resealing is subject.

See Administration of Estates Bill 2009 cl 353(1), 362.

Notification

35-8 The model legislation should provide that a person who applies for the resealing of a grant must depose to the fact that the grant in respect of which resealing is sought has not been revoked or altered by the court that issued the grant.¹¹⁶⁵

See Administration of Estates Bill 2009 cl 357(3).

35-9 The model legislation should provide that, if the court reseals a grant, it must notify the court of the jurisdiction in which the grant was issued that the grant has been resealed.¹¹⁶⁶

1163 See [35.93] above.

1164 See [35.101]–[35.102] above.

1165 See [35.120]–[35.122] above.

1166 See [35.123]–[35.125] above.

See Administration of Estates Bill 2009 cl 363(1).

35-10 The model legislation should provide that, if the court is notified by the court of another jurisdiction that that court has resealed a grant issued in this jurisdiction, the court must notify the resealing court if it:

- (a) has revoked or altered the grant; or
- (b) subsequently revokes or alters the grant.¹¹⁶⁷

See Administration of Estates Bill 2009 cl 363(2).

Succession duty

35-11 The model legislation should not include a provision to the effect that a grant may not be resealed unless the registrar is satisfied that such succession duty, if any, has been paid as would have been payable if the grant had been made by that court.¹¹⁶⁸

35.141 The National Committee makes the following further recommendations about provisions that should be included in the court rules of the various jurisdictions:

Grants of probate and letters of administration

35-12 Court rules should provide that an applicant for the resealing of a grant of probate or letters of administration must produce to the registrar:

- (a) the grant of probate or letters of administration; or
- (b) an exemplification of the grant of probate or letters of administration; or
- (c) a duplicate of the grant of probate or letters of administration, provided it is sealed by the granting court; or

1167 *Ibid.*

1168 See [35.138]–[35.139] above.

- (d) a copy of the grant of probate or letters of administration, or of the exemplification or duplicate of the grant, provided it is certified under seal as a correct copy by or under the authority of the granting court.¹¹⁶⁹

35-13 Court rules should provide that an applicant for the resealing of a grant of probate or letters of administration must deposit with the registrar a copy of the grant of probate or letters of administration.¹¹⁷⁰

Orders to administer

35-14 Court rules should provide that an applicant for the resealing of an order to administer must produce to the registrar:

- (a) the order to administer; or
- (b) a duplicate of the order to administer, provided it is sealed by the court that issued the order; or
- (c) a copy of the order to administer, or of the duplicate of the order, provided it is certified under seal as a correct copy by or under the authority of the court that issued the order.¹¹⁷¹

35-15 Court rules should provide that an applicant for the resealing of an order to administer must deposit with the registrar a copy of the order to administer.¹¹⁷²

Elections to administer

35-16 Court rules should provide that an applicant for the resealing of an election to administer must produce to the registrar a copy of the election to administer, provided it is certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.¹¹⁷³

¹¹⁶⁹ See [35.18], [35.28] above.

¹¹⁷⁰ See [35.19], [35.28] above.

¹¹⁷¹ See [35.20]–[35.21], [35.28] above.

¹¹⁷² See [35.20], [35.22], [35.28] above.

¹¹⁷³ See [35.23]–[35.25], [35.28] above.

35-17 Court rules should provide that an applicant for the resealing of an election to administer must deposit with the registrar a copy of the election to administer.¹¹⁷⁴

Testamentary instruments

35-18 Court rules should provide that an applicant for resealing must produce to the registrar a copy of the will (if there is one), if this is not included in the documentation referred to above.¹¹⁷⁵

Grants of double probate

35-19 Court rules should provide that, where a grant of double probate has been made of a will, the seal of the court may be affixed to:

- (a) an exemplification that contains copies of the grant of probate and the grant of double probate; or
- (b) the grant of probate (or an exemplification of the grant of probate) and the grant of double probate (or an exemplification of the grant of double probate), provided both instruments are deposited together in the court.¹¹⁷⁶

Substituted executors and administrators

35-20 Court rules should provide that, if an order has been made removing an executor or administrator or substituting an executor or administrator for an executor or administrator who has been removed, the seal of the court may be affixed to:

- (a) an exemplification that contains copies of the grant and the order by which the executor or administrator is substituted; or
- (b) the grant and the order, or exemplifications of either or both, provided both instruments are deposited together in the court.¹¹⁷⁷

1174 See [35.23], [35.26] above.

1175 See [35.27] above.

1176 See [35.56]–[35.57] above.

1177 See [35.79]–[35.80] above.

Chapter 36

Choice of law issues: The person in whose favour a grant may be made or resealed

INTRODUCTION	302
ORIGINAL GRANTS	303
Historical background.....	303
The law in Australia.....	305
Recommendation of the Law Reform Commission of Western Australia	314
Discussion Paper	314
Submissions	315
The National Committee's view.....	316
Location of provision	319
RESEALING OF GRANTS.....	319
The law in Australia.....	319
The law in England.....	323
Commonwealth Secretariat Draft Model Bill	324
Recommendation of the Law Reform Commission of Western Australia	325
Discussion Paper	326
Submissions	327
The National Committee's view.....	328
Location of provisions	329
RECOMMENDATIONS	329

INTRODUCTION

36.1 As a general rule, when an application for probate of a will or for letters of administration is made in the jurisdiction in which the deceased person was domiciled at the time of death,¹¹⁷⁸ the court simply makes the grant to the person entitled to be appointed as executor or administrator according to the law of that jurisdiction.¹¹⁷⁹ However, if the deceased died domiciled in another jurisdiction, the court must decide whether the appointment of an executor or administrator should be made according to the law of the jurisdiction in which the grant is sought or the law of the jurisdiction in which the deceased died domiciled.

36.2 Similar issues arise when an application is made for the resealing of a grant made in another jurisdiction. It is rare for the deceased to have died domiciled in the jurisdiction in which the application for resealing is made.¹¹⁸⁰ In most cases, the grant that is the subject of the resealing application will have been made in the jurisdiction in which the deceased died domiciled.¹¹⁸¹ Less commonly, the grant will have been made in a jurisdiction other than that in which the deceased died domiciled.¹¹⁸² In either situation, the court must decide what law is to govern the application for resealing.

36.3 This chapter examines the choice of law rules¹¹⁸³ that govern the issue of who may be appointed as an executor or administrator when the deceased has died domiciled in another jurisdiction. It also examines the application of those rules to the issue of whether a grant made in favour of a particular person may be resealed.

36.4 Because a grant of probate or letters of administration with the will annexed, or the resealing of such an instrument, raises issues about the validity

1178 Within Australia the law in relation to domicile is uniform: see [37.43] below.

1179 For a discussion of the order of priority for letters of administration, see Chapter 5 of this Report.

1180 See, however, *Re Miller (Deceased)* (1915) 34 NZLR 239 where the deceased, who was domiciled in New Zealand, died in Ireland while visiting relatives. Letters of administration were obtained in Ireland and were subsequently resealed in New Zealand on the application of the attorney appointed by the Irish administrator. The Supreme Court of New Zealand imposed conditions in respect of the remission of assets outside New Zealand. See also *In the Estate of Horvath* [2007] SASC 200 (Debelle J), where the Supreme Court of South Australia resealed an order to administer made in New Zealand in relation to the estate of a person who died domiciled in South Australia.

1181 In this situation, the administration in the domicile is regarded as the principal administration, while the administration in the resealing jurisdiction is regarded as the ancillary administration: Sir L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 2, [26–010].

1182 See, for example, *In the Will of Lambe* (1972) 2 NSWLR 273, which is discussed at note 1257 below.

1183 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 527 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), where the majority judgment noted that the expression 'choice of law rules' is preferable to the expression 'conflict of laws', endorsing the view of Dr JHC Morris that 'the term "choice of law" correctly indicates the existence of the possibility of the application of one or other system of law to the facts of the case under consideration'. It was considered that '[i]n the Australian federation, the term "conflict" is better used to identify inconsistency between laws, the inconsistency leading, to the extent of the inconsistency, to the invalidity of one law'.

of the will in question, this chapter also outlines the choice of law rules that govern the validity of wills.

ORIGINAL GRANTS

Historical background

36.5 In England, the practice of the Prerogative Court,¹¹⁸⁴ when making an original grant in circumstances where the deceased died domiciled outside England, was to follow the grant made in the jurisdiction in which the deceased died domiciled, where that could be done.¹¹⁸⁵ The established practice of the Prerogative Court continued to be followed by the Court of Probate¹¹⁸⁶ and, later, by the Probate, Divorce and Admiralty Division of the High Court of Justice.¹¹⁸⁷

36.6 It was not necessary that a grant had actually been made in the jurisdiction in which the deceased died domiciled. If a grant had not been made in that jurisdiction, a grant was normally made to the person who would be entitled to a grant under the law of the domicile.¹¹⁸⁸

36.7 If the law of the domicile did not recognise executors and administrators as understood by the common law, the court followed the law of the domicile as closely as it could, and appointed the person whose function was to administer the estate under the law of the domicile.¹¹⁸⁹ It was not necessary that the court of the domicile should actually have made a 'grant' to the applicant; it was enough that the applicant had been entrusted with the

1184 The Prerogative Court was a particular type of ecclesiastical court. It was established for the trial of testamentary causes where the deceased left movable property within two different dioceses: Sir W Blackstone, *Commentaries on the Laws of England* (1809) vol III, 64, 65–6.

1185 *In the Goods of the Countess da Cunha* (1828) 1 Hagg Ecc 237; 162 ER 570; *Viesca v D'Aramburu* (1839) 2 Curt 277; 163 ER 411. See also the discussion of these cases in *In the Goods of Earl* (1867) LR 1 P & D 450, 452 (Sir JP Wilde). If the personal representative appointed by the court of the domicile died without completing the administration of the estate, letters of administration were granted to the person to whom the court of the domicile had made a grant of administration with the will annexed of the unadministered estate (*In the Goods of Hill* (1870) LR 2 P & D 89) or the nearest equivalent to such a grant.

1186 *In the Goods of Earl* (1867) LR 1 P & D 450.

1187 See *In the Goods of Briesemann* [1894] P 260; *In the Goods of Von Linden* [1896] P 148; *In the Goods of Meatyard* [1903] P 125; *In the Estate of Humphries* [1934] P 78; *In the Goods of Kaufman* [1952] P 325.

1188 *In the Goods of Whitelegg* [1899] P 267. See, however, *In the Goods of Rogerson* (1840) 2 Curt 656; 163 ER 540, where the Court suggested that, if a grant had not already been made in the deceased's domicile in favour of his brother, it would have hesitated whether to follow the law of the domicile and grant administration to the deceased's brother in preference to the deceased's widow.

1189 *In the Goods of Meatyard* [1903] P 125. This case is discussed in more detail at [36.34] below.

administration by that court, or was the person who was entitled to administer the estate in the domicile.¹¹⁹⁰

36.8 The cases that considered the practice to be followed in making a grant where the deceased died domiciled outside England expressed the relevant principle without reference to whether the estate within England consisted of, or included, immovable property.¹¹⁹¹ Before the *Land Transfer Act 1897* (UK) was passed, immovable property did not vest in a person's personal representative, so the question did not arise as to whether a different rule should apply if the estate included immovable property. It is not entirely clear from the cases that were decided after that Act came into force whether the same practice was followed if the estate included immovable property.¹¹⁹²

36.9 English commentators on the conflict of laws suggest, however, that the English Courts would give effect to the law of the domicile even where the estate in England included immovable property.¹¹⁹³

36.10 In England, the court rules now deal expressly with the issue of the person in whose favour a grant may be made.¹¹⁹⁴

1190 *In the Goods of Kaufman* [1952] P 325, 331 (Lord Merriman P). However, where the powers of the person entrusted with the administration of the estate in the domicile fell short of those of an executor according to English law, the practice of the court was to appoint the person as an administrator, rather than as an executor: *In the Goods of Briesemann* [1894] P 260; *In the Goods of Kaufman* [1952] P 325.

1191 See, for example, the cases referred to at notes 1185–1187 above.

1192 In several cases where the courts approved the practice of giving effect to the law of the domicile, the judgments do not specify whether the estate within England actually included any immovable property: see *In the Goods of Meatyard* [1903] P 125; *In the Estate of Humphries* [1934] P 78; *In the Goods of Kaufman* [1952] P 325.

On the other hand, in *In the Estate of Cocquerel* [1918] P 4, the deceased died domiciled in France, leaving movable and immovable property in England and France. He left a will, made in English form in England, that disposed of his property without regard to the fixed portions to which his children might be entitled under French law. The executor appointed by the English will sought probate of the will in England. The Court made the grant, even though it was not an appointment that would have been made in France. The reasons given for granting probate to the executor named in the English will, instead of granting letters of administration with the will annexed to the person entitled to administer the deceased's estate in France were that the will was made in proper English form and that, because a grant had not yet been made in the domicile, the case was distinguishable from *In the Goods of Meatyard* [1903] P 125. The fact that the estate in England included immovable property was not given as a reason for not making the grant to the person who would have been entitled to administer the estate under French law. Note, however, that in *In the Goods of Kaufman* [1952] P 325 Lord Merriman P expressed the view (at 331) that it was irrelevant to the court's practice that an applicant for a grant was 'not actually clothed with the authority of the foreign court' if he or she was 'entitled by the law of the domicile to the administration'.

1193 JJ Fawcett and JM Carruthers, *Cheshire, North and Fawcett: Private International Law* (14th ed, 2008) 1257. The authors cite *In the Goods of Meatyard* [1903] P 125 as authority for this proposition. However, as explained at note 1192 above, it is not clear from that decision whether the deceased's estate in England included any immovable property.

1194 See *Non-Contentious Probate Rules 1987* (UK) r 30, which is set out at note 1233 below.

The law in Australia

Introduction

36.11 Although this chapter is concerned primarily with the issue of the person in whose favour a grant may be made, it should be noted that, in all Australian jurisdictions, the court will grant probate of a will or letters of administration with the will annexed only if the will is valid.¹¹⁹⁵ Two different types of validity are relevant for this purpose: first, formal validity, which concerns the manner in which a will is executed and, secondly, essential validity, which concerns issues such as whether a will is freely and voluntarily made, and is unaffected by undue influence.

36.12 At common law, the formal validity of a will in relation to movable property is governed by the law of the jurisdiction in which the deceased died domiciled,¹¹⁹⁶ while the formal validity of a will in relation to immovable property is governed by the *lex situs* — the law of the jurisdiction in which the property is situated.¹¹⁹⁷ These common law rules have been supplemented in all Australian jurisdictions by legislative provisions that significantly extend the bases on which the formal validity of a will may be upheld.¹¹⁹⁸

36.13 At common law, the essential validity of a will in relation to movable property is governed by the law of the jurisdiction in which the deceased died domiciled, while the essential validity of a will in relation to immovable property is governed by the law of the jurisdiction in which the property is situated.¹¹⁹⁹

Australian jurisdictions other than South Australia

36.14 In the Australian jurisdictions other than South Australia (where the issue is partly governed by *The Probate Rules 2004* (SA)), the test for determining who may be appointed under a grant depends on whether the estate consists entirely of movable property, or whether it consists of, or includes, immovable property.

36.15 The principles that determine who may be appointed as personal representative, and the effect of a grant in terms of confirming a will's validity were considered by the High Court in *Lewis v Balshaw*.¹²⁰⁰ In that case, the

1195 *Lewis v Balshaw* (1935) 54 CLR 188.

1196 *In the Will of Lambe* (1972) 2 NSWLR 273.

1197 PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 682.

1198 *Wills Act 1968* (ACT) ss 15A–15F, 15H; *Succession Act 2006* (NSW) ss 47–50; *Wills Act* (NT) ss 45–48; *Succession Act 1981* (Qld) ss 5 (definitions of 'country', 'internal law'), 33T–33W; *Wills Act 1936* (SA) ss 25A–25C; *Wills Act 2008* (Tas) ss 4 (definition of 'internal law'), 60–62; *Wills Act 1997* (Vic) ss 17–19; *Wills Act 1970* (WA) ss 4 (definitions of 'country', 'internal law'), 20–21. These provisions are discussed at [39.13]–[39.14] below.

1199 PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 688.

1200 (1935) 54 CLR 188.

testator died domiciled in England, leaving movable and immovable property in New South Wales. The executor named in the English will obtained a grant of probate in common form¹²⁰¹ in England, and subsequently appointed an attorney to apply in New South Wales for letters of administration with the will annexed. A caveat was lodged against the making of the grant. The caveator alleged that the testator lacked capacity to make a will and that the execution of the will was procured by undue influence.¹²⁰² This issue had not been raised in the English proceedings. The question for the High Court was whether it should give effect to the law of the deceased's domicile by simply accepting the validity of the will that had been admitted to probate in England and making a grant to the attorney appointed by the executor under the English grant, or whether these issues should be decided by the Court on their merits.

36.16 The High Court observed that, where the estate of a deceased person within the jurisdiction in which the grant is sought consists of movable property, 'effect is given to the law of the domicil and the grant is made to the person entitled under that law'.¹²⁰³ If a person has already been constituted as administrator of the deceased's movable property in the jurisdiction in which the deceased died domiciled, whether as an executor or an administrator or under some other description, the court will usually, without further investigation of the person's title, make a grant to the person who has been recognised as the administrator in the domicile.¹²⁰⁴

36.17 The rule that the court should give effect to the law of the domicile has been described as 'a rule of convenience and expediency, and not an absolute right'.¹²⁰⁵ The rule may be displaced 'if the necessity or convenience of administration of the estate requires it'.¹²⁰⁶ The law recognises certain exceptional cases in which it would not be proper to follow the law of the domicile in this respect. For example, the court will not appoint a person as

1201 A grant of probate or letters of administration in common form is made where the validity of the will is not contested by any interested parties. See AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [1.30].

1202 (1935) 54 CLR 188, 194, 196 (Starke J).

1203 *Ibid* 193 (Rich, Dixon, Evatt and McTiernan JJ).

1204 *Ibid*.

1205 *Ibid* 197 (Starke J).

1206 *Bath v British & Malayan Trustees Ltd* [1969] 2 NSW 114, 120 (Helsham J). In that case, the testator died domiciled in Singapore. Competing claims for a grant in New South Wales were made by the attorney of the trustee company that had been appointed executor in Singapore and by the testator's son, who was one of the two principal residuary beneficiaries. In order to obtain the grant in Singapore, the trustee company had been required to give an undertaking to remit all New South Wales assets to Singapore to satisfy the duty that was payable on the estate to revenue authorities in Singapore. Helsham J observed (at 117) that the attorney of the Singapore executor was prima facie entitled to a grant in New South Wales. However, his Honour considered that, if such a grant were made, the beneficiaries would be successful in an administration suit to have the estate brought under the control of the court, and to restrain the executor from remitting assets to Singapore for distribution according to the law of the deceased's last domicile. Helsham J therefore declined to grant probate to the attorney of the foreign executor, and instead granted letters of administration to the testator's son. His Honour (at 121) considered this to be the simplest and most convenient way of 'enabling the beneficiaries to have the benefit of the assets here to the exclusion of the revenue authorities of a foreign State'.

personal representative if the person is disqualified under the law of the forum, or if there is some other special reason against recognising that person.¹²⁰⁷

36.18 The High Court observed in *Lewis v Balshaw*¹²⁰⁸ that, when a will is admitted to probate, it does more than constitute a person as an administrator of the deceased's estate. The grant of probate also establishes the will as an instrument that disposes of property:¹²⁰⁹

A general grant of probate means that the immovables vest in the executor and must be administered according to the disposition of the will ... Thus, to follow the grant of the Court of the domicile makes the title to immovables, both beneficial and legal, depend upon a determination of that Court founded on its own law. Yet no forum but the forum situs and no law but the lex situs can govern the title to land.

36.19 Consequently, the Court held that, where the estate of the deceased consisted of, or included, immovable property, the court should not simply follow the grant made in the domicile:¹²¹⁰

the validity of the will as a disposition of immovables and as a title to administer them must be determined independently of the English grant. It follows that the caveator's objections to the grant of probate should be heard and determined upon the merits.

36.20 Accordingly, where the estate within the jurisdiction consists of or includes immovable property, the court will not simply follow the grant made in the domicile, but must decide for itself, according to the law of the particular jurisdiction, questions concerning a person's entitlement to be appointed as an executor or administrator and the validity of any will.

36.21 In *Lewis v Balshaw*,¹²¹¹ the High Court countenanced the possibility that, if the Court found that the will was invalid in so far as it purported to dispose of the deceased's immovable property, it may be that the Court would 'grant administration with the will annexed, limited to movables, and by that means give effect to the dispositions governed by the law of the domicile'.¹²¹²

36.22 Where a person dies leaving movable and immovable property in a jurisdiction in which the person was not domiciled, this could result in the

¹²⁰⁷ *Lewis v Balshaw* (1935) 54 CLR 188, 193 (Rich, Dixon, Evatt and McTiernan JJ). Accordingly, the court will not make a grant to a minor: *In the Goods of HRH the Duchess d'Orléans* (1859) 1 Sw & Tr 253; 164 ER 716; *In the Goods of Meatyard* [1903] P 125, 129–30 (Jeune P).

¹²⁰⁸ (1935) 54 CLR 188.

¹²⁰⁹ *Ibid* 195 (Rich, Dixon, Evatt and McTiernan JJ). The same reasoning would also apply to a grant of letters of administration with the will annexed.

¹²¹⁰ *Ibid*.

¹²¹¹ (1935) 54 CLR 188.

¹²¹² *Ibid* 195. Starke J expressed a similar view (at 198). It is implicit in these comments that the Court rejected the argument made on behalf of the attorney appointed by the English executor that the Court does not have jurisdiction to 'split' the probate: see (1935) 54 CLR 188, 192 (Rich, Dixon, Evatt and McTiernan JJ).

making of separate grants to different persons. If, for example, the person appointed under letters of administration in the domicile is not entitled to letters of administration in the second jurisdiction, the court will endeavour to give effect to the law of the domicile by granting letters of administration to the administrator appointed in the domicile, limited to the deceased's movable property. In order to enable the immovable property within the jurisdiction to be administered, it will be necessary for the court to grant letters of administration, limited to the deceased's immovable property within the jurisdiction, to the person entitled to a grant according to the law of the jurisdiction.

36.23 The choice of law rules that govern the making of a grant are consistent with the rules that govern other aspects of the law of succession, such as the formal and essential validity of a will and succession to property,¹²¹³ where matters affecting movable property are governed by the law of the jurisdiction in which the deceased died domiciled, while matters affecting immovable property are governed by the law of the jurisdiction in which the property is situated. However, as previously mentioned, the common law choice of law rules in relation to the formal validity of a will have been supplemented in all Australian jurisdictions by legislative provisions that significantly extend the bases on which the formal validity of a will may be upheld.¹²¹⁴ This raises the issue of whether it may also be appropriate to extend the range of persons to whom a grant may be made.

South Australia

36.24 Where the deceased died domiciled in an Australian State or Territory, the making of an original grant is governed by the principles stated in *Lewis v Balshaw*.¹²¹⁵

36.25 However, *The Probate Rules 2004* (SA) contain a specific rule that stipulates the various persons to whom a grant may be made, in a non-contentious matter,¹²¹⁶ where the deceased died domiciled overseas. Rule 40.1 of *The Probate Rules 2004* (SA),¹²¹⁷ which has been based on rule 29 of the *Non-Contentious Probate Rules 1954* (UK),¹²¹⁸ provides:

1213 Ibid 193 (Rich, Dixon, Evatt and McTiernan JJ), 197–8 (Starke J).

1214 See [36.12] above.

1215 (1935) 54 CLR 188.

1216 A non-contentious matter is one where there the making of the grant is not opposed.

1217 Rule 40.01 appears in Part II of *The Probate Rules 2004* (SA), which sets out the rules relating to non-contentious probate matters.

1218 Rule 29 of the *Non-Contentious Probate Rules 1954* (UK) (repealed) provided:

29 Grants where deceased died domiciled outside England

Where the deceased died domiciled outside England, a registrar may order that a grant do issue—

- (a) to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled,

Grants where the deceased died domiciled outside a State or Territory of the Commonwealth of Australia

40.01 Where the deceased died domiciled outside a State or Territory of the Commonwealth of Australia, the Registrar may order (except where the deceased has appointed executors in the State of South Australia to administer the estate in this State) that a grant do issue—¹²¹⁹

- (a) to the person entrusted with the administration of the estate by the Court having jurisdiction at the place where the deceased died domiciled;
- (b) to the person entitled to administer the estate by the law of the place where the deceased died domiciled;
- (c) if there is no such person as is mentioned in paragraph (a) or (b) of this Rule or if in the opinion of the Registrar the circumstances so require, to such person as the Registrar may direct:

Provided that without any such order as aforesaid—

- (1) probate of any will which is admissible to proof may be granted—
 - (i) if the will is in the English language, to the executor named in the will;

- (b) to the person entitled to administer the estate by the law of the place where the deceased died domiciled,
- (c) if there is no such person as mentioned in paragraph (a) or (b) of this Rule or if in the opinion of the registrar the circumstances so require, to such person as the registrar may direct,
- (d) if a grant is required to be made to, or if the registrar in his discretion considers that a grant should be made to, no less than two administrators, to such person as the registrar may direct jointly with any such person as is mentioned in paragraph (a) or (b) of this rule or with any other person:

Provided that without any such order as aforesaid—

- (a) probate of any will which is admissible to proof may be granted—
 - (i) if the will is in the English or Welsh language, to the executor named therein;
 - (ii) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will, to that person;
- (b) where the whole of the estate in England consists of immovable property, a grant limited thereto may be made in accordance with the law which would have been applicable if the deceased had died domiciled in England.

The current English rule, r 30 of the *Non-Contentious Probate Rules 1987* (UK), which is set out at note 1233 below, is expressed in slightly different terms from r 29 of the 1954 Rules.

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In England, an application for an order that a grant issue to a person under r 30(a) or (b) of the *Non-Contentious Probate Rules 1987* (UK) will commonly be made simultaneously with the application for the grant, with all the documents being lodged together at the relevant probate registry. However, an application for an order that a grant issue to a person under r 30(c) will usually be made prior to the application for the grant. Once the registrar's order has issued, the documentation in support of the grant, including the registrar's order, are lodged in the usual way. JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [12.127]–[12.131].

- (ii) if the will describes the duties of a named person in terms sufficient to constitute such person executor according to the tenor of the will, to that person;
- (2) where the whole of the estate in the State of South Australia consists of immovable property, a grant limited to such property may be made in accordance with the law which would have been applicable if the deceased had died domiciled in the State of South Australia. (note added)

36.26 Because rule 40.01 of *The Probate Rules 2004* (SA) applies in respect of non-contentious matters, it does not prescribe any priority as between the different persons in whose favour a grant may be made. The rule does not change the law that governs the formal or essential validity of a will, or enable a will that is invalid to be admitted to probate.

36.27 The effect of rule 40.01 is that, except where the deceased has appointed executors in South Australia to administer the estate in that jurisdiction, the registrar may make an order giving effect to the law of the deceased's domicile, not only where the estate consists entirely of movable property, but also where it consists of, or includes, immovable property.

36.28 The registrar may do this by ordering that a grant issue:¹²²⁰

- under paragraph (a) — to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled; or
- under paragraph (b) — to the person entitled to administer the estate by the law of the place where the deceased died domiciled.

36.29 It has been suggested in relation to the paragraph of the previous English rule¹²²¹ on which paragraph (b) of rule 40.01 has been based that it did not enable a grant to be made to a person in this capacity if the deceased died domiciled in a country in which a grant was necessary to enable the deceased's estate to be administered.¹²²²

36.30 Paragraphs (a) and (b) of rule 40.01 are most likely to be invoked where the person who has been entrusted with the administration of the deceased's estate in the jurisdiction in which the deceased died domiciled, or

¹²²⁰ *The Probate Rules 2004* (SA) r 40.01(a), (b). Note, however, that the registrar has a general discretion to make a grant to such person as the circumstances may require: *The Probate Rules 2004* (SA) r 40.01(c).

¹²²¹ *Non-Contentious Probate Rules 1954* (UK) r 29(b).

¹²²² JEN Russell and others (eds), *Tristram and Coote's Probate Practice* (22nd ed, 1964) 118, referring to 'most parts of the British Commonwealth, the United States of America, and certain other countries'. The authors note (at 118) that, where the deceased died domiciled in a country where a grant is required, a grant may be made to the person entrusted with the administration by the court of the domicile, and that, if no grant has been taken out in that country, a discretionary order could be made under r 29(c) if the circumstances justified it.

Note that r 30(1)(b) of the *Non-Contentious Probate Rules 1987* (UK) refers instead to 'the person beneficially entitled to the estate by the law of the place where the deceased died domiciled'.

who is entitled by the law of that jurisdiction to administer the deceased's estate, is not a person who would be entitled to a grant of letters of administration in South Australia if the deceased had died domiciled in that State.

36.31 For example, suppose a person who was regarded as the deceased's de facto partner in the jurisdiction in which the deceased died domiciled is granted letters of administration in that jurisdiction. The person then applies for letters of administration in South Australia, even though he or she does not qualify as the 'domestic partner' of the deceased, having cohabited with the deceased for only two years.¹²²³ Even though the estate in South Australia includes immovable property, and the applicant would not ordinarily be entitled to a grant if the deceased had died domiciled in South Australia, the registrar may nevertheless order that letters of administration issue to the person on the basis that he or she is the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled. The rule enables a grant to be made with respect to the whole estate.

36.32 Further, where a person dies domiciled overseas and a person has been entrusted with the administration of the deceased's estate, or is entitled to administer the deceased's estate, in that jurisdiction, and the deceased leaves a will dealing with South Australian immovable property (but not appointing executors in South Australia to administer it), the registrar may order that a grant issue to the person who is entrusted with the administration of the deceased's estate, or who is entitled to administer the deceased's estate, in the jurisdiction in which the deceased died domiciled. In this situation, the relevant grant would be a grant of letters of administration with the will annexed.¹²²⁴ Again, the rule enables a grant to be made with respect to the whole estate.

36.33 Rule 40.01 also specifies two grounds on which a grant may be made without a specific order of the registrar. First, where a will is admissible to proof in South Australia (that is, where a will is formally valid),¹²²⁵ probate may be granted to the executor named in the will (where the will is in English)¹²²⁶ or to

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In South Australia, the spouse or domestic partner of a deceased person has the highest priority to apply for letters of administration on intestacy: *The Probate Rules 2004* (SA) r 32.01(i). However, to qualify as the domestic partner of the deceased person, the person must have cohabited with the deceased person continuously for three years immediately preceding the deceased person's death or for an aggregate of three of the four years immediately preceding the deceased person's death, or must be the parent of a child of whom the deceased was the other parent: *Family Relationships Act 1975* (SA) ss 11, 11A.

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It would be extremely rare for the situation to arise where a will that had been admitted to probate in the jurisdiction in which the deceased died domiciled would not be formally valid in South Australia, as a will is treated as properly executed in South Australia if its execution conformed to the internal law of the jurisdiction in which the deceased died domiciled: *Wills Act 1936* (SA) s 25B. In the rare event that the will was not admissible to probate in South Australia, the registrar could nevertheless order that letters of administration issue to the person who had been appointed executor by the court having jurisdiction at the place where the deceased died domiciled — that is, to the foreign executor.

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See Sir L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 2, [26–009]. Formal validity of a will is discussed at [36.12] above.

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The Probate Rules 2004 (SA) r 40.01, proviso (1)(i).

the person who is the executor according to the tenor of the will (regardless of the language in which the will is made).¹²²⁷ Secondly, where the estate in South Australia consists entirely of immovable property, the court may make a grant, limited to the immovable property in South Australia, in accordance with the law that would have applied if the deceased had died domiciled in South Australia.¹²²⁸

36.34 Because rule 40.01 does not enable the registrar to make a grant to a person described in paragraphs (a), (b) or (c) of the rule if the deceased appointed executors in South Australia to administer the estate in that jurisdiction, and because the rule enables a grant to be made to the executor named in a will made in the English language, it avoids the situation that occurred in *Re Meatyard*,¹²²⁹ at least in a non-contentious application for a grant.¹²³⁰ In that case, the testator died domiciled in Belgium. He had made a will in England that was admissible under English law disposing of all his property in the United Kingdom, as well as a will in Belgium disposing of all his property in that country. The Court refused to grant probate of the English will to the executors named in that will on the ground that a Belgian court had entrusted receivers with the administration of the deceased's estate in Belgium. The Court followed the grant made in the domicile and granted letters of administration, with the English and Belgian wills annexed, to the persons who had been appointed receivers by the Belgian court.

36.35 If that fact situation arose for consideration in South Australia (but with a will appointing executors in South Australia to administer the estate in that jurisdiction), paragraph (1)(i) of the proviso to rule 40.01 of *The Probate Rules 2004* (SA) would enable the court to grant probate to the South Australian executors, notwithstanding that other persons had been entrusted with the administration of the deceased's estate in the foreign jurisdiction in which the deceased died domiciled.

36.36 Although rule 40.01 expressly enables the court to give effect to the grant made in the domicile, even though the estate in South Australia includes immovable property, it does not expressly enable the court to make a grant to a

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The Probate Rules 2004 (SA) r 40.01, proviso (1)(ii). An executor according to the tenor of the will is a person who is not named expressly in the will as executor, even though it is clear from the terms of the will that the testator intended the person to perform all or some of the duties of an executor (for example, by directing the person to pay debts and funeral expenses); see *Grant v Leslie* (1819) 3 Phill Ecc 116; 161 ER 1274, 1275 (Sir J Nicholl):

Why is any person allowed to be an executor according to the tenor? Because it is the intention of the testator that he shall take the management of his property after his death.

... if the deceased intended to join this person in the management, the Court is to join him in the probate.

See also JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [4.19]–[4.23].

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The Probate Rules 2004 (SA) r 40.01, proviso (2). This is important, as it may be that no application is made by a person who would be entitled to seek a grant under paragraph (a) or (b).

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[1903] P 125.

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See JEN Russell and others (eds), *Tristram and Coote's Probate Practice* (22nd ed, 1964) 116.

person in accordance with South Australian law if the estate within South Australia consists of immovable property and some movable property.¹²³¹

36.37 In this respect, rule 40.01 of *The Probate Rules 2004 (SA)* follows rule 29 of the *Non-Contentious Probate Rules 1954 (UK)*.¹²³² However, the current English rules provide that, where the 'whole or substantially the whole' of the estate in England and Wales consists of immovable property, a grant of the whole estate may be made according to the law that would have applied if the deceased had died domiciled in England and Wales.¹²³³

1231 It may, however, be possible for a discretionary grant to be made to such a person under r 40.01(c) of *The Probate Rules 2004 (SA)*.

1232 *Non-Contentious Probate Rules 1954 (UK)* r 29 is set out at note 1218 above.

1233 *Non-Contentious Probate Rules 1987 (UK)* r 30(3)(b). Rule 30 provides:

30 Grants where deceased died domiciled outside England and Wales

- (1) Subject to paragraph (3) below, where the deceased died domiciled outside England and Wales, a district judge or registrar may order that a grant, limited in such way as the district judge or registrar may direct, do issue to any of the following persons—
- (a) to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled; or
 - (b) where there is no person so entrusted, to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled or, if there is more than one person so entitled, to such of them as the district judge or registrar may direct; or
 - (c) if in the opinion of the district judge or registrar the circumstances so require, to such person as the district judge or registrar may direct.
- (2) A grant made under paragraph (1)(a) or (b) above may be issued jointly with such person as the district judge or registrar may direct if the grant is required to be made to not less than two administrators.
- (3) Without any order made under paragraph (1) above—
- (a) probate of any will which is admissible to proof may be granted—
 - (i) if the will is in the English or Welsh language, to the executor named therein; or
 - (ii) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will, to that person; or
 - (b) where the whole or substantially the whole of the estate in England and Wales consists of immovable property, a grant in respect of the whole estate may be made in accordance with the law which would have been applicable if the deceased had died domiciled in England and Wales. (emphasis added)

Rule 30(1)(b) also differs from r 29 of the *Non-Contentious Probate Rules 1954 (UK)* in that it enables a grant to be made to the person 'beneficially entitled to the estate by the law of the place where the deceased died domiciled'. In contrast, r 29(b) of the 1954 Rules provided that a grant could be made to 'the person entitled to administer the estate by the law of the place where the deceased died domiciled'.

Note also that the court has a discretion under s 116(1) of the *Supreme Court Act 1981 (UK)* to appoint as administrator someone other than the person who, but for that section, would in accordance with probate rules have been entitled to the grant. See *Inland Revenue Commissioners v Stype Investments (Jersey) Ltd* [1982] 1 Ch 456, 476–7 (Templeman, Watkins and Fox LJ). That decision concerned s 162(1) of the *Supreme Court of Judicature (Consolidation) Act 1925 (UK)*, which was the predecessor of the current provision.

Recommendation of the Law Reform Commission of Western Australia

36.38 In its Report on the recognition of interstate and foreign grants, the Law Reform Commission of Western Australia concluded that:¹²³⁴

the rule in *Lewis v Balshaw* is logical and operates satisfactorily, being based on the general principle that matters relating to immovable property are referred to the *lex situs*.

36.39 It therefore recommended that no change should be made to the existing law in relation to the making of original grants or the resealing of grants, and that rule 29 of the *Non-Contentious Probate Rules 1954* (UK) should not be adopted as a uniform provision in Australia.¹²³⁵

36.40 However, the Law Reform Commission of Western Australia was in favour of the adoption of uniform rules giving express guidance as to the persons in whose favour a grant may be made or resealed when the deceased had died domiciled outside the jurisdiction in question.¹²³⁶ It recommended that these rules:¹²³⁷

should set out the effect of the present law, and would therefore state separately the position where the estate consisted of movables only, and the position where the estate consisted of or included immovables.

Discussion Paper

36.41 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee observed that the Probate Registrars, at their conference in 1990, unanimously disagreed with the recommendation of the Law Reform Commission of Western Australia that rule 29 of the *Non-Contentious Probate Rules 1954* (UK) should not be adopted in Australia.¹²³⁸ The Probate Registrars supported the adoption of a provision based on the then current South Australian rule, which was expressed in the same terms as rule 40.01 of *The Probate Rules 2004* (SA). In their view:¹²³⁹

¹²³⁴ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [9.41].

¹²³⁵ *Ibid* [11.5] Recommendation (34).

¹²³⁶ *Ibid* [11.5] Recommendation (35).

¹²³⁷ *Ibid*.

¹²³⁸ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 192. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [8.21].

¹²³⁹ *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 19.

Rule 29 of the UK Probate Rules is already embodied in the South Australian Probate Rules, Rule 38.¹²⁴⁰ All the Registrars agree that the South Australian Rule 38 is the preferred form of the Rule and favour its adoption in all Australian jurisdictions. (note added)

36.42 The National Committee observed, however, that, although the Probate Registrars had supported the adoption of the South Australian rule on the basis that it mirrored rule 29 of the *Non-Contentious Probate Rules 1954* (UK), there are some differences between the South Australian rule and the current English rule, rule 30 of the *Non-Contentious Probate Rules 1987* (UK).

36.43 The English rule applies to any case where the deceased died domiciled outside England and Wales, and so would cover cases where the deceased died domiciled in Scotland or Northern Ireland.¹²⁴¹ The South Australian rule, as noted previously, has no application if the deceased died domiciled in another Australian State or Territory. Further, because the South Australian rule is based on the former English rule, which is expressed in slightly different terms from the current English rule, the South Australian rule differs from the current English rule in those same respects.¹²⁴²

36.44 The preliminary view expressed in the Discussion Paper was that a uniform provision should be adopted to specify the persons to whom a grant may be made where the deceased has died domiciled outside the State or Territory in which the grant is sought. It was suggested that the rule should be based on rule 30 of the *Non-Contentious Probate Rules 1987* (UK), rather than on the South Australian rule, to the extent that they differ.¹²⁴³

Submissions

36.45 Four respondents commented on the person to whom an original grant should be able to be made when the deceased has died domiciled in another jurisdiction.

36.46 The Victorian Bar and the New South Wales Bar Association both supported the adoption of a provision to the effect of the current English rule

1240 *Rules of the Supreme Court (Administration and Probate Act) 1984* (SA) r 38. Like r 40.01 of *The Probate Rules 2004* (SA), r 38 also applied only where the deceased died domiciled outside Australia.

1241 Under the system of automatic recognition now in force in the United Kingdom, there is no provision for the court in one part of the United Kingdom to reseal a grant made in another part. However, it is still possible for an application to be made in a part of the United Kingdom, other than that in which the deceased died domiciled, for an original grant limited to the assets in that jurisdiction: see [37.18]–[37.19] below. This would be necessary only if a grant had not already been made in that part of the United Kingdom in which the deceased died domiciled.

1242 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 193. See [36.36]–[36.37] above in relation to the relevant differences.

1243 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 193. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [8.22].

that deals with the situation where the deceased died domiciled outside England.¹²⁴⁴

36.47 The Public Trustee of New South Wales supported the adoption of a provision to the effect that a court should normally make a grant to the person entitled under the law of the jurisdiction in which the deceased died domiciled, even where the estate consists entirely of immovables.¹²⁴⁵

36.48 The former Principal Registrar of the Supreme Court of Queensland, however, was of the view that there should be no change to the existing law.¹²⁴⁶

The National Committee's view

A provision to reduce the need for separate grants

36.49 As explained previously, where the estate within the jurisdiction in which a grant is sought consists of both movable and immovable property, and the deceased has died domiciled in another jurisdiction, the effect of the existing choice of law rules may sometimes make it necessary for the court to make two limited grants to different personal representatives — one in relation to the movable property and one in relation to immovable property.¹²⁴⁷

36.50 The National Committee considers it undesirable that, in some situations, it may not be possible, in a non-contentious matter, to make a grant with respect to the whole of the estate within the jurisdiction, or at least to make grants that place the administration of the estate in the hands of the one person.

36.51 Subject to the additional matters discussed below, jurisdictions should adopt a provision based generally on a combination of rule 40.01 of *The Probate Rules 2004* (SA) and rule 30 of the *Non-Contentious Probate Rules 1987* (UK). However, the relevant power should be conferred on the Supreme Court, rather than on the registrar, as is the case under the South Australian rules. Individual jurisdictions can then determine how to allocate responsibilities between their judges, registrars and masters (if any).

36.52 Further, the model provision should be expressed not to limit the Supreme Court's power, under the model provision that is based on section 6(3) of the *Succession Act 1981* (Qld), to make a grant to any person the Supreme Court considers appropriate.

1244 Submissions R4, R5.

1245 Submission R2.

1246 Submission R1.

1247 See [36.21]–[36.22] above.

Application of the model provision: where the deceased died domiciled outside the jurisdiction

36.53 The model provision should apply where the deceased has died domiciled outside the enacting jurisdiction, whether in another Australian jurisdiction or overseas. This represents a departure from rule 40.01 of *The Probate Rules 2004* (SA), which applies only where the deceased has died domiciled overseas. In the National Committee's view, it is undesirable that different principles should apply, depending on whether the deceased died domiciled in another Australian jurisdiction or overseas.

The persons to whom a grant may be made

36.54 The model provision should include a provision to the general effect of rule 40.01(a) of *The Probate Rules 2004* (SA) and rule 30(1)(a) of the *Non-Contentious Probate Rules 1987* (UK). That provision should enable the Supreme Court, even though the estate includes immovable property, to order that a grant of the entire estate be made to the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled. In circumstances where there is no opposition to the making of a grant, the National Committee considers it appropriate that it should be possible for such a grant to be made.

36.55 Further, as an alternative to ordering that a grant be made to the person entrusted to administer the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled, the Supreme Court should be able to order that a grant be made to the person entitled to administer the estate by the law of the place where the deceased died domiciled. This is the position under rule 40.01(b) of *The Probate Rules 2004* (SA). The National Committee notes that the current English rule does not contain this alternative. Instead, it enables the registrar to order, in these circumstances, that a grant issue to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled.¹²⁴⁸ The National Committee is not satisfied that there is any advantage to the English rule that would justify a departure from the South Australian rule in this respect.

36.56 The National Committee considers, however, that it is desirable to clarify an aspect of the South Australian rule. As noted earlier, it has been suggested, in relation to rule 29 of the *Non-Contentious Probate Rules 1954* (UK), which is the rule on which rule 40.01 of the South Australian rules is based, that a grant could not be made to a person under rule 29(b) — that is, on the basis that the person is 'entitled to administer the estate by the law of the place where the deceased died domiciled' — if the deceased died domiciled in a country in which a grant was required to enable the deceased's estate to be

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Non-Contentious Probate Rules 1987 (UK) r 30(1)(b), which is set out at note 1233 above.

administered (although the registrar may have been able to order that a grant be made to such a person under rule 29(c)).¹²⁴⁹

36.57 In the National Committee's view, it is desirable to avoid any uncertainty as to the scope of paragraph (b). The model provision should therefore also provide expressly that, if the deceased has died domiciled outside the jurisdiction, the Supreme Court may order that a grant issue to a person in whose favour the court having jurisdiction at the place where the deceased died domiciled could entrust the administration of the deceased's estate. Such a change is consistent with the principle that effect is ordinarily to be given to the law of the domicile.¹²⁵⁰

36.58 The model provision should also follow rule 40.01(c) of *The Probate Rules 2004* (SA) and rule 30(1)(c) of the *Non-Contentious Probate Rules 1987* (UK), and provide that, if there is no such person as mentioned in the earlier paragraphs or if the Supreme Court is of the opinion that the circumstances require it, the court may order that a grant issue to such person as it may direct.

Application of the model provision where the deceased has appointed an executor in the jurisdiction to administer the estate in the jurisdiction

36.59 Although rule 40.01 of *The Probate Rules 2004* (SA) generally makes it possible for the court to give effect to the law of the deceased's domicile, even where the estate includes immovable property, the rule nevertheless contains an important limitation on the application of that rule. It provides that the options of making a grant to the person entrusted to administer the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled, or to the person entitled to administer the estate by the law of the place where the deceased died domiciled, apply except where the deceased has appointed executors in South Australia to administer the estate in that jurisdiction.¹²⁵¹

36.60 In the National Committee's view, the limitation found in the South Australian rule ensures that effect is given to the intentions of a testator, and should be included in the model provision. However, that limitation should apply only if the executor appointed in the jurisdiction has legal capacity and is willing to act. If the executor so appointed does not have legal capacity or is not willing to act, the fact that the testator appointed an executor in the jurisdiction should not prevent the Supreme Court from ordering that a grant issue to a person under the provisions proposed above.

1249 See [36.29] above.

1250 In this respect, see [36.5]–[36.6] above and the reference at note 1192 above to *In the Goods of Kaufman* [1952] P 325.

1251 See the discussion of this exception at [36.34]–[36.35] above.

When the court may make a grant in accordance with the law that would have applied if the deceased had died domiciled in the jurisdiction

36.61 As already noted, there is a difference between the South Australian and English rules in relation to the circumstances in which a grant may be made to a person in whose favour the court could have made a grant if the deceased had died domiciled in that jurisdiction. In South Australia, a grant may be made on that basis only if the whole estate in South Australia consists of immovable property.¹²⁵² In England and Wales, a grant may be made on that basis if the whole or substantially the whole of the estate in England and Wales consists of immovable property.¹²⁵³

36.62 In this respect, the National Committee considers that the model provision should follow the English rule, rather than the South Australian rule. Although the model provision will enable the court to give effect to the law of the domicile, the National Committee is of the view that, in a non-contentious matter, if the whole or substantially the whole of the estate within the jurisdiction consists of immovable property, it should be possible for a grant in respect of the whole estate to be made in accordance with the law that would have applied if the deceased had died domiciled in that jurisdiction. The presence of some movable property should not prevent the court from doing so.

Location of provision

36.63 In contentious probate proceedings, it is clear that the usual rules in relation to the appointment of a personal representative may be displaced, and the court may make such grant as the ‘necessity or convenience’ of administering the estate requires.¹²⁵⁴ However, as the model provision proposed above will, in most jurisdictions, alter the usual principles that govern who may be appointed as a personal representative in a non-contentious matter, the National Committee is of the view that the provision should be located in the model legislation, rather than in the court rules of the jurisdictions.

RESEALING OF GRANTS

The law in Australia

36.64 In exercising their discretion to reseal a grant, Australian courts generally apply the same principles as those that govern the making of an original grant.¹²⁵⁵ Accordingly, in the absence of a provision to the contrary, the courts will generally reseal a grant that is made to a person to whom, having

1252 *The Probate Rules 2004 (SA)* r 40.01, proviso (2).

1253 *Non-Contentious Probate Rules 1987 (UK)* r 30(3)(b).

1254 *Bath v British & Malayan Trustees Ltd* [1969] 2 NSW 114, 120 (Helsham J).

1255 *Re Carlton* [1924] VLR 237. See the discussion of this case at [3.53]–[3.55] in vol 1 of this Report.

regard to the relevant choice of law rules, the courts would have made an original grant.

36.65 Sometimes, an application may be made for the resealing of a grant that was made not in the jurisdiction in which the deceased died domiciled, but in some other jurisdiction. In South Australia and Tasmania, specific rules apply where an application is made for the resealing of a grant that was made in a jurisdiction other than that in which the deceased died domiciled.

36.66 The application of the choice of law rules to the resealing of grants and the specific provisions that apply in South Australia and Tasmania are discussed below.

36.67 As with the making of an original grant,¹²⁵⁶ a grant of probate or letters of administration with the will annexed may not be resealed if the will is invalid.¹²⁵⁷ In those circumstances, an application must be made for letters of administration as on intestacy.

Australian jurisdictions other than South Australia and Tasmania

36.68 As explained earlier, where the estate of a deceased person consists entirely of movable property, the court, in making a grant, will endeavour to give effect to the law of the domicile.¹²⁵⁸ Consequently, if the grant that is the subject of the application for resealing was made in the jurisdiction in which the deceased died domiciled, the court may reseal the grant, because to do so will give effect to the law of the domicile.

36.69 Sometimes, however, an application may be made for the resealing of a grant that was made in a jurisdiction other than that in which the deceased died domiciled. Even though the grant has not been made in the jurisdiction in which the deceased died domiciled, it may nevertheless be the case that the person appointed under the grant is a person to whom the court of the domicile could have made an original grant. Where an application is made for the resealing of such a grant, the court may reseal the grant, because to do so will

¹²⁵⁶ See [36.11]–[36.13] above.

¹²⁵⁷ *In the Will of Lambe* [1972] 2 NSWLR 273. In that case, an application was made in New South Wales for the resealing of letters of administration with the will annexed that had been granted by the Supreme Court of Victoria. The deceased was an Australian national who died domiciled in Portugal, leaving movable property in Victoria, New South Wales and the ACT. Although the will would have been properly executed if the deceased had died domiciled in New South Wales, the will was not formally valid according to Portuguese law (Portugal being the deceased's domicile), under which formal validity was to be determined according to the law where the will was made (in this case Argentina). It had been possible for a grant to be made in Victoria, as the will was taken to be formally valid under Victorian provisions dealing with the formal validity of foreign wills. Under these provisions, which implemented the Hague Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, a will was taken to be have been properly executed if its execution conformed to the internal law of any of various specified places, including a country of which the deceased was a national at the time of executing the will or at the time of death (*Wills Act 1958* (Vic) s 20B, see now *Wills Act 1997* (Vic) s 17(1)(c)). At the time, New South Wales had not yet adopted the statutory reforms in relation to the formal validity of foreign wills. According to its choice of law rules, the will was not formally valid as its validity had not been established according to the law of the deceased's domicile at the time of death. Consequently, the New South Wales Supreme Court refused to reseal the Victorian grant.

¹²⁵⁸ See [36.16] above.

still give effect to the law of the domicile. It would seem though, that if the grant in respect of which resealing is sought was made in favour of a person to whom the court of the domicile could not have made a grant, the court will not normally reseal the grant, as resealing, in these circumstances, will not give effect to the law of the domicile.

36.70 Where the estate in which resealing is sought consists of, or includes, immovable property, different principles apply. In this situation, the resealing court will not simply follow the grant made in the domicile, but must decide for itself, according to the law of the resealing jurisdiction, any questions concerning the applicant's entitlement to the resealing or the validity of any will.

South Australia

36.71 As explained earlier, in South Australia, the principles that govern the issue of the person to whom an original grant may be made in a non-contentious application depend on whether the deceased died domiciled in Australia or overseas.¹²⁵⁹ This will also be the position when the court is exercising its discretion to reseal a grant.¹²⁶⁰

36.72 Where the deceased died domiciled in an Australian State or Territory, the making of an original grant is governed by the principles stated in *Lewis v Balshaw*.¹²⁶¹ Consequently, where the estate in South Australia consists entirely of movable property, the court may reseal a grant that was made in the Australian jurisdiction in which the deceased died domiciled or in some other jurisdiction, provided, in the latter case, that the grant was made in favour of a person to whom the court of the Australian jurisdiction in which the deceased died domiciled could have made an original grant. However, where the estate in South Australia consists of, or includes, immovable property, the court will not simply follow the grant made in the domicile, but must decide for itself, according to the law of South Australia, any questions concerning the applicant's entitlement to the resealing or the validity of any will.

36.73 Where the deceased died domiciled overseas, rule 40.01 of *The Probate Rules 2004* (SA) governs the making of an original grant. Consequently, it would appear that, where the deceased died domiciled overseas, the court may reseal a grant that was made to a person in whose favour the court could have made an original grant under rule 40.01.

36.74 These principles are subject to a qualification that applies if the grant that is the subject of the resealing application was made in a jurisdiction other

¹²⁵⁹ See [36.24]–[36.25] above.

¹²⁶⁰ In exercising its discretion to reseal a grant, the court will generally apply the same principles as those that govern the making of an original grant: *Re Carlton* [1924] VLR 237.

¹²⁶¹ (1935) 54 CLR 188. See the discussion of this case at [36.15]–[36.21] above.

than that in which the deceased died domiciled. Rule 50.06 of *The Probate Rules 2004* (SA) provides:¹²⁶²

Re-sealing of grants under section 17 of the Act

...

50.06 If the deceased was not at the date of death domiciled within the jurisdiction of the Court from which the grant issued, the seal shall not be affixed except by order of the Registrar.

Tasmania

36.75 In Tasmania, different principles govern the resealing of grants, depending on whether the grant that is the subject of the resealing application was made in the jurisdiction in which the deceased died domiciled or in some other jurisdiction.

36.76 Where the grant was made in the jurisdiction in which the deceased died domiciled, the court will reseal a grant that was made in favour of a person to whom the court, having regard to the principles stated in *Lewis v Balshaw*,¹²⁶³ would make an original grant. Consequently, where the estate in Tasmania consists entirely of movable property, the court may reseal a grant that was made in the jurisdiction in which the deceased died domiciled. However, where the estate in Tasmania consists of, or includes, immovable property, the court will not simply follow the grant made in the domicile, but must decide for itself, according to the law of Tasmania, any questions concerning the applicant's entitlement to the resealing or the validity of any will.

36.77 The *Probate Rules 1936* (Tas) impose a restriction on resealing where the grant that is the subject of the application was made in a jurisdiction other than that in which the deceased died domiciled. Rule 50 provides:¹²⁶⁴

50 Seal not to be affixed in certain cases

If it should appear that the deceased was not at the time of death domiciled within the jurisdiction of the court from which the grant issued, the seal shall not be affixed unless the grant is such as would have been made by the Supreme Court of this State.

1262

Unlike r 40.01 of *Probate Rules 2004* (SA), which applies only where 'the deceased died domiciled outside a State or Territory of the Commonwealth of Australia', r 50.06 applies regardless of whether the deceased died in another Australian State or Territory or overseas. For a discussion of r 50.06, see *In the Estate of Horvath* [2007] SASC 200 (Debelle J).

1263

(1935) 54 CLR 188.

1264

South Australia used to have a rule in similar terms: *Rules of the Supreme Court under the Administration and Probate Act 1919* (SA) r 87. However, that rule was replaced in 1984 by r 48(9) of the *Rules of the Supreme Court (Administration and Probate Act) 1984* (SA), which was expressed in almost identical terms to the present rule, r 50.06 of *The Probate Rules 2004* (SA). The present rule is set out at [36.74] above. Queensland also used to have a similar rule to the Tasmanian rule: *Rules of the Supreme Court* (Qld) O 71 r 73 (repealed). The *Uniform Civil Procedure Rules 1999* (Qld), which came into effect on 1 July 1999, do not include a rule to that effect. See *Re Prendergast* [1902] QWN 78 in relation to the effect of the former Queensland rule.

36.78 Where the estate in Tasmania consists of, or includes, immovable property, rule 50 has little effect on the resealing of grants, because, in these circumstances, the court must, in any event, decide for itself, according to the law of Tasmania, questions arising in relation to a person's entitlement to a grant and the validity of any will,¹²⁶⁵ and will ordinarily reseal a grant only if it is one that the court would itself make.

36.79 However, where the estate in Tasmania consists entirely of movable property, rule 50 restricts the range of grants that can be resealed, compared with the position in the other Australian jurisdictions. Even though a grant has not been made in the jurisdiction in which the deceased died domiciled, it is still possible for the grant to have been made to a person in whose favour the court of the deceased's domicile would make an original grant. In the other Australian jurisdictions, such a grant may be resealed.¹²⁶⁶ However, the effect of rule 50 is that, if the deceased was not domiciled in the jurisdiction in which the grant was made, and the grant is not one that the Supreme Court of Tasmania would itself have made, the court will not reseal the grant, even though it might be one that the court of the deceased's domicile would have made.

The law in England

36.80 The *Non-Contentious Probate Rules 1987* (UK) contain a provision dealing with the resealing of grants. Rule 39(3) provides:

Except by leave of a district judge or registrar, no grant shall be resealed unless it was made to such a person as is mentioned in sub-paragraph (a) or (b) of paragraph (1) of rule 30 or to a person to whom a grant could be made under sub-paragraph (a) of paragraph (3) of that rule.¹²⁶⁷

36.81 Consequently, a grant may be resealed, without the leave of a judge or registrar, if it was made:

- to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled, even though the grant is not one that would be made in England;¹²⁶⁸
- where no such person has been entrusted — to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled;¹²⁶⁹ or

1265 *Lewis v Balshaw* (1935) 54 CLR 188.

1266 See [36.69], [36.72] above.

1267 Rule 30 of the *Non-Contentious Probate Rules 1987* (UK) is set out at note 1233 above.

1268 JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [18.48].

- in the case of a will that is admissible in England and Wales — to the executor named in the will (where the will is in English or Welsh) or to the executor according to the tenor of the will (regardless of the language in which the will is made).¹²⁷⁰

36.82 Rule 39(3) applies regardless of whether the estate in England and Wales consists of movable property or includes immovable property. It does not prevent a grant from being resealed if it was made to a person other than those specified. However, a grant may be resealed in those circumstances only with the leave of a district judge or registrar.

Commonwealth Secretariat Draft Model Bill

36.83 The Commonwealth Secretariat Draft Model Bill for the resealing of grants included a restriction on resealing where the grant that was sought to be resealed was made in a jurisdiction other than that in which the deceased died domiciled. Clause 5(3) provided:

Where it appears that a deceased person was not, at the time of his death, domiciled within the jurisdiction of the court by which the grant was made, probate or letters of administration in respect of his estate may not be resealed, unless the grant is such as the Supreme Court would have had jurisdiction to make.

36.84 It appears that the draft provision was an attempt ‘to bring the resealing provisions into line with the jurisdictional principles applying to the making of original grants’.¹²⁷¹ A Report of the deliberations leading to the model bill gave the following explanation for the draft provision:¹²⁷²

Common law normally requires that the deceased person be connected in matters of succession with a jurisdiction by domicile there at the time of his death. This is reflected in the subclause which, as the normal rule, prohibits recognition of grants made without the domicile connection. Yet the common law courts will themselves *make* an original grant, where domicile is lacking, upon other grounds such as the presence in their jurisdiction of part of the estate. This subclause, therefore, takes the logical position of permitting the receiving state to recognise a grant made elsewhere, although the domicile

1269 This provision will be relevant where the grant that is the subject of the resealing application is made in a jurisdiction other than that in which the deceased died domiciled: see JI Winegarten, R D’Costa and T Synak, *Tristram and Coote’s Probate Practice* (30th ed, 2006) [18.49].

1270 This provision will be relevant where the grant that is the subject of the resealing application is made in a jurisdiction other than that in which the deceased died domiciled: see JI Winegarten, R D’Costa and T Synak, *Tristram and Coote’s Probate Practice* (30th ed, 2006) [18.51]. If the grant was made in the deceased’s domicile, the grant would be resealed on the basis that the executor was a person mentioned in r 30(1)(a) — that is, a person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled.

1271 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [9.46]. The jurisdictional requirements for the making of original grants are considered in Chapter 3 of this Report.

1272 Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Apia, Western Samoa, 18–23 April 1979* (1979) 68 (Appendix 1, Explanatory Notes to cl 5(3)).

factor was absent, if in similar circumstances the local courts would have had jurisdiction to make an original grant. (emphasis in original)

36.85 The nature of the restriction imposed by clause 5(3) of the Commonwealth Secretariat Draft Model Bill differed from the restriction imposed by rule 50 of the *Probate Rules 1936* (Tas). Whereas the Tasmanian rule permits the resealing of a grant that is not made in the deceased's domicile only if it is one that 'would have been made' by the Supreme Court of Tasmania, clause 5(3) of the Commonwealth Secretariat Draft Model Bill would not enable a grant to be resealed unless the grant was one that the resealing court 'would have had jurisdiction to make'.

36.86 As explained in Chapter 3 of this Report, in some Australian States, the court has jurisdiction to make an original grant only if the deceased left property in the jurisdiction.¹²⁷³ The adoption of clause 5(3) by those jurisdictions would appear to have the effect that, if an application were made for the resealing of a grant that had been made in a jurisdiction in which the deceased did not die domiciled and in which the deceased did not leave property, the grant could not be resealed, because the grant would not be one that the resealing court would have had jurisdiction to make. However, if the deceased left property in the jurisdiction in which the grant was made, the fact that the deceased did not die domiciled in that jurisdiction would not seem to be a bar to the resealing of the grant.

36.87 Although clause 5(3) of the Commonwealth Secretariat Draft Model Bill would not be as restrictive in its operation as rule 50 of the *Probate Rules 1936* (Tas), its adoption in those Australian jurisdictions that found the court's jurisdiction to make a grant on the presence of property within the jurisdiction would have the potential to limit the range of grants that may be resealed in those jurisdictions.¹²⁷⁴

Recommendation of the Law Reform Commission of Western Australia

36.88 The Law Reform Commission of Western Australia did not favour the imposition of any additional restrictions where an application was made for the resealing of a grant that was made in a jurisdiction other than that in which the deceased died domiciled. It recommended that the Australian jurisdictions should not adopt a provision to the effect of clause 5(3) of the Commonwealth Secretariat Draft Model Bill. It also recommended that the Tasmanian rule that imposes restrictions on the resealing of a grant that is not made in the deceased's domicile¹²⁷⁵ and the then Queensland rule that was to the same

1273 See [3.28]–[3.29] in vol 1 of this Report, referring to the jurisdictional requirements in New South Wales, South Australia, Tasmania, Victoria and Western Australia.

1274 Note, however, that in Chapter 3 of this Report, the National Committee has recommended that the court should have jurisdiction to reseat a grant even though the deceased did not leave property within the resealing jurisdiction: see Recommendation 3-2.

1275 *Probate Rules 1936* (Tas) r 50, which is discussed at [36.77]–[36.79] above.

effect¹²⁷⁶ should be modified with a view to achieving uniform rules in relation to resealing.¹²⁷⁷

Discussion Paper

36.89 The preliminary view expressed in the Discussion Paper was that, if rule 30 of the *Non-Contentious Probate Rules 1987* (UK) is adopted in relation to original grants, the related rule dealing with the resealing of grants — rule 39(3) — should also be adopted.¹²⁷⁸

36.90 In relation to an application for the resealing of a grant made in a jurisdiction other than that in which the deceased died domiciled, it was observed that the effect of rule 50 of the *Probate Rules 1936* (Tas)¹²⁷⁹ is that a grant cannot be resealed unless it is one that the resealing court would have made. It was suggested that this defensive view is inconsistent with modern notions of conflict of laws, under which each legal system should give effect to rules of other systems to the extent that it is proper to do so, rather than imposing restrictive rules that prevent the recognition of the rules of other systems unless they are exactly like its own.¹²⁸⁰

36.91 It was noted that the Probate Registrars, when considering this issue at their 1990 conference, unanimously agreed that all jurisdictions should adopt the South Australian provision.¹²⁸¹

36.92 The preliminary view expressed in the Discussion Paper was that the Tasmanian provision should not be adopted in the model legislation, and that the South Australian provision was to be preferred, as it does not expressly preclude the recognition of particular foreign grants, but simply adds an extra mechanism for ensuring that proper consideration is given to the matter. However, it was queried whether even the South Australian provision is necessary, given that the court has an overriding discretion not to reseat a grant.¹²⁸²

¹²⁷⁶ *Rules of the Supreme Court 1900* (Qld) O 71 r 73 (repealed). The *Uniform Civil Procedure Rules 1999* (Qld), which came into force on 1 July 1999, do not include a rule to that effect.

¹²⁷⁷ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [9.51], [9.52], [11.5] Recommendation (36).

¹²⁷⁸ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 193.

¹²⁷⁹ This rule is set out at [36.77] above.

¹²⁸⁰ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 201.

¹²⁸¹ *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 23, referring to r 48(9) of the *Rules of the Supreme Court (Administration and Probate Act) 1984* (SA), which has since been replaced by r 50.06 of *The Probate Rules 2004* (SA). Rule 50.06 is set out at [36.74] above.

¹²⁸² *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 201. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [9.8]. The court's discretion in relation to resealing is considered at [35.94]–[35.101] above.

Submissions

36.93 Two respondents commented on the principles that should govern the question of whether a grant made in favour of a particular person should be able to be resealed.

36.94 The Public Trustee of New South Wales supported the adoption of a provision to the effect that a court should be able to reseal a grant if it was made to the person entitled to administer the estate under the law of the jurisdiction in which the deceased died domiciled, even where the estate consists entirely of immovables.¹²⁸³

36.95 However, the former Principal Registrar of the Supreme Court of Queensland was of the view that there should be no change to the existing law.¹²⁸⁴

36.96 Several respondents commented on whether any restrictions should apply when an application is made for the resealing of a grant that was made in a jurisdiction other than that in which the deceased died domiciled.

36.97 None of these respondents supported the adoption of a provision to the effect of rule 50 of the *Probate Rules 1936 (Tas)*.¹²⁸⁵

36.98 However, the former Principal Registrar of the Supreme Court of Queensland and the Public Trustee of New South Wales¹²⁸⁶ supported the adoption of a provision to the effect of rule 50.06 of *The Probate Rules 2004 (SA)*,¹²⁸⁷ so that, if the deceased did not die domiciled in the jurisdiction in which the grant was made, the grant may not be resealed except by order of the registrar.

36.99 The New South Wales Bar Association also agreed with the preliminary view expressed in the Discussion Paper that the South Australian provision was to be preferred to the Tasmanian provision.¹²⁸⁸

36.100 The Victorian Bar expressed the view that a provision to the effect of the South Australian rule was unnecessary.¹²⁸⁹

1283 Submission R2.

1284 Submission R1.

1285 Submissions R1, R2, R4, R5.

1286 Submissions R1, R2.

1287 This provision is set out at [36.74] above.

1288 Submission R5.

1289 Submission R4.

The National Committee's view

Resealing of grants generally

36.101 In view of the proposal for the model legislation to include a provision specifying the persons to whom a grant may be made where the deceased has died domiciled outside the jurisdiction, the National Committee considers that the model legislation should also include a provision to deal with the issue of whether a grant made in favour of a particular person may be resealed. This is the position in England, where rule 39(3) of the *Non-Contentious Probate Rules 1987* (UK) operates as a corollary to rule 30 of those rules.¹²⁹⁰

36.102 The model provision should generally be based on rule 39(3) of the English rules, except that the relevant power should be conferred on the Supreme Court, rather than on a judge or the registrar, leaving it to individual jurisdictions to determine how to allocate responsibilities between their judges, registrars and masters (if any). Further, the model provision should be modified slightly to ensure consistency with the provision proposed earlier in relation to original grants, where the National Committee has made a slight departure from paragraph (b) of rule 30(1) of the *Non-Contentious Probate Rules 1987* (UK).¹²⁹¹

36.103 Consequently, the model provision should be expressed to provide that, unless the Supreme Court orders otherwise, a grant may be resealed only if it was made:

- to the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled;
- to the person entitled to administer the deceased's estate by the law of the place where the deceased died domiciled;
- to a person to whom the court having jurisdiction at the place where the deceased died domiciled could entrust the administration of the deceased's estate; or
- in the case of a will that is admissible to proof in the enacting jurisdiction — to the executor named in the will or to the executor according to the tenor of the will.

Resealing where grant not made in domicile

36.104 In all but the first of the four situations mentioned in paragraph [36.103], the grant that is the subject of the application for resealing will have been made

¹²⁹⁰ Rules 30 and 39(3) of the *Non-Contentious Probate Rules 1987* (UK) are set out, respectively, at note 1233 and [36.80] above.

¹²⁹¹ See [36.56]–[36.57] above.

in a jurisdiction other than that in which the deceased died domiciled. The National Committee has given consideration to whether any restrictions should apply in respect of the resealing of such grants.

36.105 As discussed earlier in this chapter, both the South Australian and the Tasmanian rules contain provisions that apply in these circumstances.¹²⁹²

36.106 In the National Committee's view, the Tasmanian provision is too restrictive,¹²⁹³ and should not be adopted.

36.107 The National Committee has considered whether a provision based on rule 50.06 of *The Probate Rules 2004 (SA)*¹²⁹⁴ would be a useful adjunct to the proposed resealing scheme, particularly given that the model legislation will enable grants from a larger range of countries to be resealed than is presently the case. As explained earlier, the effect of rule 50.06 is to require the order of the registrar before a grant made in a jurisdiction other than that in which the deceased died domiciled may be resealed. However, as the model provision confers the relevant power on the Supreme Court (rather than on the registrar) and provides that, unless the Court orders otherwise, only grants made to certain persons may be resealed, it is not appropriate for the model legislation to require an order of the registrar before a grant may, in a particular case, be resealed.

Location of provisions

36.108 For consistency with the provision recommended earlier in relation to original grants, the National Committee is of the view that the model provision proposed above should be contained in the model legislation, rather than in court rules.

RECOMMENDATIONS

Original grants

36-1 The model legislation should include a provision based generally on rule 40.01 of *The Probate Rules 2004 (SA)* and rule 30 of the *Non-Contentious Probate Rules 1987 (UK)*, except that:

¹²⁹² *The Probate Rules 2004 (SA)* r 50.06; *Probate Rules 1936 (Tas)* r 50. These rules are set out at [36.74], [36.77] above.

¹²⁹³ See [36.77]–[36.79] above.

¹²⁹⁴ See *In the Estate of Horvath* [2007] SASC 200 (Debelle J), where an application was made for the resealing in South Australia of an order to administer made in New Zealand in relation to the estate of a person who died domiciled in South Australia. The registrar sought directions from the Court on the factors to which he should have regard before making the order that the seal of the court be affixed to the order to administer.

- (a) the model provision should confer the relevant powers on the Supreme Court; and
- (b) the model provision should be expressed not to limit the provision that is based on section 6(3) of the *Succession Act 1981* (Qld).¹²⁹⁵

See Administration of Estates Bill 2009 cl 352.

36-2 The model provision should apply if the deceased died domiciled outside the enacting jurisdiction.¹²⁹⁶

See Administration of Estates Bill 2009 cl 352(1).

36-3 The model provision should provide that the Supreme Court may make a grant to:

- (a) the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled;
- (b) the person entitled to administer the estate by the law of the place where the deceased died domiciled;
- (c) a person to whom the court having jurisdiction at the place where the deceased died domiciled could entrust the administration of the deceased's estate; or
- (d) if there is no such person as mentioned in paragraph (a), (b) or (c) or, if in the opinion of the Supreme Court the circumstances so require — to such person as the court may direct.¹²⁹⁷

See Administration of Estates Bill 2009 cl 352(4).

36-4 The model provision should provide that the options of making an appointment to the persons mentioned in Recommendation 36-3 do not apply if:

- (a) the deceased has appointed an executor in the enacting jurisdiction to administer the estate in that jurisdiction; and

¹²⁹⁵ See [36.49]–[36.52] above.

¹²⁹⁶ See [36.53] above.

¹²⁹⁷ See [36.54]–[36.58] above.

- (b) the executor has legal capacity and is willing to administer the estate.¹²⁹⁸

See Administration of Estates Bill 2009 cl 352(5).

- 36-5 The model provision should provide that, if the whole or substantially the whole of the estate in the enacting jurisdiction consists of immovable property, a grant in respect of the whole estate may be made in accordance with the law that would have applied if the deceased had died domiciled in the enacting jurisdiction.¹²⁹⁹

See Administration of Estates Bill 2009 cl 352(6)(b).

Resealing of grants

- 36-6 The model legislation should include a provision based generally on rule 39(3) of the *Non-Contentious Probate Rules 1987* (UK), except that the model provision:

- (a) should provide that the relevant power is conferred on the Supreme Court; and
- (b) should be generally consistent with the provision proposed in Recommendation 36-3 above, which applies to an application for a grant where the deceased died domiciled outside the jurisdiction.¹³⁰⁰

- 36-7 The model provision should provide that, unless the Supreme Court orders otherwise, a grant may be resealed only if it was made to:

- (a) the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled;
- (b) the person entitled to administer the estate by the law of the place where the deceased died domiciled; or
- (c) a person to whom the court having jurisdiction at the place where the deceased died domiciled could entrust the administration of the deceased's estate;

1298 See [36.59]–[36.60] above.

1299 See [36.61]–[36.62] above.

1300 See [36.101]–[36.103] above.

(d) in the case of a grant of probate of a will that is admissible to proof — to the executor named in the will or to the executor according to the tenor of the will.¹³⁰¹

See Administration of Estates Bill 2009 cl 354.

1301

See [36.103] above.

Chapter 37

Automatic recognition of grants: background

INTRODUCTION	334
STATISTICS ON RESEALING.....	335
Number of applications for resealing and origin of original grant.....	335
The cost of resealing.....	336
Time taken.....	337
AUTOMATIC RECOGNITION OF GRANTS IN THE UNITED KINGDOM.....	337
Background	337
Recognition of grants made in that part of the United Kingdom in which the deceased died domiciled.....	338
Abolition of resealing of grants made in another part of the United Kingdom	338
Limited grants.....	339
Procedural matters.....	339
HISTORY OF PROPOSALS FOR THE AUTOMATIC RECOGNITION OF GRANTS IN AUSTRALIA.....	339
The Barwick proposals.....	339
The proposals of the Law Reform Commission of Western Australia	340
The proposals of the Parliamentary Counsel's Committee.....	341
Subsequent consideration of proposals for automatic recognition	341
THE TRANSFER OF SECURITIES UNDER THE <i>CORPORATIONS ACT 2001</i> (CTH)	342
DOMICILE	344
THE NATIONAL COMMITTEE'S VIEW	346

INTRODUCTION

37.1 It is not uncommon for people in Australia to own property in more than one State or Territory. Where a grant has already been obtained in one State or Territory, the personal representative under that grant (or a person appointed by the personal representative under a power of attorney) may apply to have that grant resealed in any other Australian jurisdiction in which authority to administer the deceased person's estate is required.¹³⁰²

37.2 There is a fundamental issue, however, as to whether the resealing in one Australian jurisdiction of a grant made in another Australian jurisdiction remains the best way of obtaining the necessary authority to administer an estate that consists of property situated in more than one Australian jurisdiction.

37.3 Over thirty years ago, a legislative system was introduced in the United Kingdom under which a grant made in one part of the United Kingdom is effective throughout the whole of the United Kingdom.¹³⁰³ Similar schemes have also been proposed for Australia on a number of occasions.¹³⁰⁴

37.4 In this chapter, the National Committee considers whether, as an alternative to resealing, the model legislation should provide for the automatic recognition within Australia of grants made by an Australian court. In examining this issue, consideration is given to:

- the legislative framework for the automatic recognition of grants that applies in the United Kingdom; and
- previous proposals for the automatic recognition of grants in Australia (including, in particular, the proposals made by the Law Reform Commission of Western Australia).

37.5 In relation to the transfer of shares and other interests in companies, automatic recognition of grants is already operative within Australia under the *Corporations Act 2001* (Cth). The effect of the relevant provisions is outlined in this chapter.¹³⁰⁵

37.6 Finally, because the United Kingdom legislation and the proposals made by the Law Reform Commission of Western Australia both entail a determination of the domicile of the deceased person at the time of death, this chapter also examines briefly the law in relation to domicile.¹³⁰⁶

1302 The resealing of grants is considered in Chapters 30–35 of this Report.

1303 See [37.13]–[37.21] below.

1304 See [37.22]–[37.30] below.

1305 See [37.33]–[37.39] below.

1306 See [37.40]–[37.46] below.

STATISTICS ON RESEALING

Number of applications for resealing and origin of original grant

37.7 The National Committee has sought details from the Probate Registrars of the annual figures available in each jurisdiction for applications for original grants and for the resealing of grants for the year 2007. The information provided is set out in Table 1.

Table 1: Number of applications for grants and reseals in 2007¹³⁰⁷

Jurisdiction	2007	
	Grants	Reseals
ACT	608	27
New South Wales	23,784	303
Northern Territory	212	11
Queensland	7,125	197
South Australia	5,095	28
Tasmania	2,053	42
Victoria	16,552	108
Western Australia	5,437	32
Total	60,866	748

37.8 The figures provided by the Probate Registrars indicate that applications for resealing represented just over one per cent of the total number of applications for original grants.

37.9 The National Committee also asked the Probate Registrars to estimate the proportion of all applications for resealing that related to grants made overseas. The information provided is set out in Table 2.

Table 2: Percentage of applications for resealing that are estimated to relate to a grant made overseas

Jurisdiction	Estimate
ACT	'Definitely in the minority'
New South Wales	Approximately 10 per cent
Northern Territory	None during 2007
Queensland	A minority
South Australia	Information not available
Tasmania	Approximately 5 per cent

¹³⁰⁷

For New South Wales, the Northern Territory, Victoria and Western Australia, the figures are for the 2007 calendar year. The Victorian figures represent the number of grants made and resealed, rather than the number of applications filed. For the ACT, Queensland and Tasmania, the figures are for the 2007–08 financial year. For South Australia, the figures are for the 12 month period to 29 September 2007.

Victoria	Anecdotally, more than half; mostly from the United Kingdom and New Zealand
Western Australia	Up to 1/3 of the total

The cost of resealing

37.10 The making of an application for the resealing of a grant involves the payment of court filing fees. These fees, which vary considerably, are set out in Table 3.

Table 3: Fees payable for filing an application for the resealing of a grant

Jurisdiction	Fees	
ACT ¹³⁰⁸	All estates	\$678
New South Wales ¹³⁰⁹	Gross value of estate:	
	less than \$50 000	Nil
	\$50 000 to less than \$250 000	\$634
	\$250 000 to less than \$500 000	\$800
	\$500 000 to less than \$1 000 000	\$1 206
	\$1 000 000 and above	\$1 605
Northern Territory ¹³¹⁰	If fee is payable by a body corporate	\$1 200
	Otherwise	\$900
Queensland ¹³¹¹	All estates	\$509
South Australia ¹³¹²	All estates	\$651
Tasmania ¹³¹³	Gross value of estate:	
	less than \$50 000	\$100
	\$50 000 to less than \$100 000	\$250
	\$100 000 and above	\$400
Victoria ¹³¹⁴	Gross value of estate:	
	less than \$1000	\$99.90
	\$1000 and above	\$255.40
Western Australia ¹³¹⁵	Gross value of estate:	
	\$10 000 or less	\$153.50
	more than \$10 000, up to \$100 000	\$307
	more than \$100 000	\$615

1308 *Attorney General (Fees) Determination 2008* item 202, Disallowable instrument DI2008–145, made under the *Court Procedures Act 2004* (ACT) s 13.

1309 *Civil Procedure Regulation 2005* (NSW) cl 4, sch 1 pt 1, item 4.

1310 *Supreme Court Regulations* (NT) reg 4(1), sch pt 2, item 1 (Fees payable for all other proceedings in the Supreme Court); *Revenue Units Regulations* (NT) reg 2. In addition, a \$4 file search fee is imposed.

1311 *Uniform Civil Procedure (Fees) Regulation 1999* (Qld) s 3(1), sch 1, item 2(b).

1312 *Supreme Court Regulations 2005* (SA) reg 6(1), sch 2, item 1(b).

1313 *Probate Rules 1936* (Tas) r 94, appendix, pt 1, item 1.

1314 *Supreme Court (Fees) Regulations 2001* (Vic) reg 6, sch 2 pt 2, item 2.1(a); *Monetary Units Act 2004* (Vic) ss 4, 5, 7; Notice under s 6 of the *Monetary Units Act 2004* (Vic), published in *Victoria Government Gazette*, No S 66, 14 March 2008.

1315 *Supreme Court (Fees) Regulations 2002* (WA) reg 4(1), sch 3, item 1.

37.11 The cost of resealing is not limited to these court fees. If, as is likely, a personal representative engages a lawyer to act on behalf of the estate in the resealing jurisdiction, the estate will also have to pay the lawyer's fees. In addition, the legislation in most Australian jurisdictions requires an applicant for resealing to publish a notice advising of his or her intention to apply for the resealing of a grant.¹³¹⁶ As a result, costs are likely to be incurred in respect of advertising fees.

Time taken

37.12 The National Committee asked the Probate Registrars to provide information about the time taken to reseal a grant of probate or letters of administration. The information provided, which is set out in Table 4, shows that in most jurisdictions the process does not normally take more than five working days, provided that no complications occur.

Table 4: Usual time taken to reseal a grant

Jurisdiction	Number of days
ACT	not more than 7 days
New South Wales	2 days
Northern Territory	1–2 days
Queensland	7–10 business days
South Australia	22 days
Tasmania	approximately 2 weeks
Victoria	4.5 days
Western Australia	3 weeks

AUTOMATIC RECOGNITION OF GRANTS IN THE UNITED KINGDOM

Background

37.13 In the United Kingdom, the issue of the reciprocal recognition of grants between parts of the United Kingdom was referred to a Working Party consisting of probate officials and solicitors under the chairmanship of a registrar of the Principal Probate Registry.¹³¹⁷ The Working Party was asked to consider whether resealing still served any useful purpose. It concluded that there was no longer any need to require a grant made in one part of the United Kingdom to be resealed in another, and that the advantages of resealing could

¹³¹⁶ See [8.27]–[8.31] in vol 1 of this Report.

¹³¹⁷ United Kingdom, *Parliamentary Debates*, House of Lords, Fifth Series, vol 316, 16 March 1971, col 421 (Lord Simon of Glaisdale).

be preserved in other ways.¹³¹⁸ The Working Party's recommendations were implemented by the *Administration of Estates Act 1971* (UK).

37.14 It has been suggested that the *Administration of Estates Act 1971* (UK) saves work for solicitors and the staff of probate registries and saves the expense involved in obtaining grants of administration.¹³¹⁹

Recognition of grants made in that part of the United Kingdom in which the deceased died domiciled

37.15 The *Administration of Estates Act 1971* (UK) provides that, if a person dies domiciled in England and Wales, a grant of probate of the deceased's will or letters of administration of the deceased's estate (or any part of it) made by the High Court in England and Wales and noting the deceased's domicile shall, without being resealed, be treated, for the purposes of the law of Northern Ireland, as if it had originally been made by the High Court in Northern Ireland¹³²⁰ and, for the purposes of the law of Scotland, as if it were a confirmation made by the appropriate officer of the Scottish courts.¹³²¹

37.16 There are similar provisions dealing with the automatic recognition of:

- Northern Irish grants in England and Wales¹³²² and in Scotland;¹³²³ and
- Scottish confirmations in England and Wales¹³²⁴ and in Northern Ireland.¹³²⁵

Abolition of resealing of grants made in another part of the United Kingdom

37.17 The provisions dealing with the recognition of grants made in another part of the United Kingdom apply to grants issued both before and after the commencement of the *Administration of Estates Act 1971* (UK).¹³²⁶ Consequently, even if the relevant grant was made many years before the commencement of that Act, it will have force throughout the United Kingdom.

1318 Ibid.

1319 S Cretney, 'Administration of Estates Act 1971' (1971) 115 *The Solicitors' Journal* 762.

1320 *Administration of Estates Act 1971* (UK) s 2(1).

1321 *Administration of Estates Act 1971* (UK) s 3(1)(a). A confirmation is the Scottish equivalent of a grant of probate or letters of administration.

1322 *Administration of Estates Act 1971* (UK) s 1(4).

1323 *Administration of Estates Act 1971* (UK) s 3(1)(b).

1324 *Administration of Estates Act 1971* (UK) s 1(1).

1325 *Administration of Estates Act 1971* (UK) s 2(2).

1326 *Administration of Estates Act 1971* (UK) ss 1(6), 2(5), 3(2). The Act commenced on 1 January 1972: s 14(2).

37.18 The *Administration of Estates Act 1971* (UK) repealed the provisions then in force under which a grant made in one part of the United Kingdom could be resealed in another part of the United Kingdom.¹³²⁷ Consequently, since the commencement of the relevant provisions, it has not been possible to apply for the resealing of a grant made in another part of the United Kingdom.

Limited grants

37.19 The *Administration of Estates Act 1971* (UK) does not prevent a grant from being sought in a part of the United Kingdom in which the deceased did not die domiciled. However, in that situation, the practice of the courts is to make a grant that is specifically limited to the deceased's estate in the place of grant, and that operates only until a grant is made in the place of domicile.¹³²⁸ The purpose of the latter limitation is 'to avoid the possibility of dual representation'.¹³²⁹

Procedural matters

37.20 The *Non-Contentious Probate Rules 1987* (UK) require an applicant for a grant to state where the deceased died domiciled, unless otherwise directed by a district judge or registrar.¹³³⁰

37.21 Probate fees are assessed on the net value of the deceased's estate in England and Wales, Scotland and Northern Ireland,¹³³¹ whereas, under the former system, the value of the estate in each part of the United Kingdom would have been assessed separately when application was made for a grant in that part.

HISTORY OF PROPOSALS FOR THE AUTOMATIC RECOGNITION OF GRANTS IN AUSTRALIA

The Barwick proposals

37.22 The Report published by the Law Reform Commission of Western Australia on the recognition of interstate and foreign grants records that in 1963 and 1964, as a result of 'dissatisfaction with the system of resealing', a proposal

¹³²⁷ See *Administration of Estates Act 1971* (UK) s 12, sch 2, which repealed the *Supreme Court of Judicature (Consolidation) Act 1925* (UK) ss 168, 169. The latter provisions had replaced the original resealing provisions contained in the *Probates and Letters of Administration Act (Ireland) 1857* (Eng) and the *Confirmation of Executors (Scotland) Act 1858* (Eng). See note 708 above for a discussion of the original resealing provisions.

¹³²⁸ Practice Direction (Probate Grants: Sureties) [1971] 1 WLR 1790. See also JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [12.23].

¹³²⁹ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [12.23].

¹³³⁰ *Non-Contentious Probate Rules 1987* (UK) r 8.

¹³³¹ Practice Direction (Probate Grants: Sureties) [1971] 1 WLR 1790.

was put forward for a scheme under which a grant of probate or administration 'made in one Australian jurisdiction would be automatically recognised throughout Australia'.¹³³² The proposal was inspired by the introduction of section 95(3) of the uniform *Companies Act 1961*, which performed a similar function to section 1071B(9) of the *Corporations Act 2001* (Cth).¹³³³ The proposal was referred by the Law Institute of Victoria to the Law Council of Australia, which referred it to the Standing Committee of Attorneys General ('SCAG') and to the then Commonwealth Attorney General, Sir Garfield Barwick.¹³³⁴

37.23 Sir Garfield Barwick subsequently put forward preliminary guidelines to the Law Council of Australia as a basis for discussion. It was proposed that:¹³³⁵

when an application was made either for an original grant or for resealing in an Australian State or Territory, and the applicant sought recognition of the grant or reseal in another State or Territory, he should request such recognition in making his original application for the grant or resealing. The Registrar would then file copies of such request in the courts where recognition was sought and would notify such courts of any further orders made in relation thereto. Upon receipt, the request would be sealed by the recognising court and one copy would be retained in the recognising court's registry.

37.24 Draft legislation was then prepared in Victoria under the direction of SCAG.¹³³⁶ However, the draft legislation departed from the Attorney General's proposal to the Law Council of Australia.¹³³⁷

It ... suggested not recognition but simplified resealing of grants made by Australian courts, where the granting court was the court of the deceased's domicile and the deceased left property in the resealing jurisdiction. Provision was however made for objection to resealing. The provisions were intended to be simpler than those applicable to foreign or overseas grants in that, for example, no advertisement was required.

37.25 No uniform legislation was enacted as a result of the proposal.¹³³⁸

The proposals of the Law Reform Commission of Western Australia

37.26 In the 1970s, the Law Reform Commission of Western Australia was asked to review the law relating to the recognition of interstate and foreign

1332 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [6.1].

1333 Section 1071B(9) of the *Corporations Act 2001* (Cth) is discussed at [37.33]–[37.39] below.

1334 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [6.1].

1335 Ibid [6.3]. See also at [6.4] for a discussion of the reaction to these guidelines.

1336 Ibid [6.5].

1337 Ibid. See also at [6.6] for a discussion of the reaction to the draft legislation.

1338 Ibid [6.7].

grants of probate and letters of administration. In its final Report, it recommended the adoption of a scheme of automatic recognition similar to that in operation in the United Kingdom.¹³³⁹

37.27 The major recommendations were that:¹³⁴⁰

- A grant made by the court of the Australian State or Territory in which a deceased person died domiciled should be automatically recognised, without being resealed, as effective in every other Australian State or Territory.
- Grants made by the court of an Australian State or Territory in which the deceased was not domiciled at the time of death, and all grants made by courts outside Australia, should not be recognised within Australia, but should, as at present, be effective in a particular State or Territory only when resealed in that jurisdiction.

37.28 These recommendations are considered in more detail in Chapter 38 of this Report.

The proposals of the Parliamentary Counsel's Committee

37.29 The Report of the Law Reform Commission of Western Australia was tabled at a meeting of SCAG in 1985. Following that meeting, a number of SCAG Officers' Papers were prepared, and a Committee of Parliamentary Counsel commenced drafting a uniform code of procedure in relation to resealing and the automatic recognition of certain grants.

37.30 However, the Parliamentary Counsel's Committee did not agree with the approach taken by the Law Reform Commission of Western Australia in relation to automatic recognition. It proposed instead that *all* grants made by the court of an Australian State or Territory should receive automatic recognition throughout Australia, regardless of whether the deceased had died domiciled in the jurisdiction in which the grant was made.¹³⁴¹

Subsequent consideration of proposals for automatic recognition

37.31 At a conference of Probate Registrars held in May 1990, the Probate Registrars rejected the revised scheme as completely unacceptable, and expressed a preference for the original scheme proposed by the Law Reform Commission of Western Australia. However, the Probate Registrars were of the view that it was not necessary to implement any scheme of automatic

¹³³⁹ See Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984).

¹³⁴⁰ Ibid [11.3] Recommendations (21), (22).

¹³⁴¹ *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 9–10.

recognition, and that the existing scheme of resealing would be satisfactory once uniform procedural rules had been adopted.¹³⁴²

37.32 No further steps were taken to implement the recommendations of the Law Reform Commission of Western Australia.

THE TRANSFER OF SECURITIES UNDER THE *CORPORATIONS ACT 2001* (CTH)

37.33 Section 1071B of the *Corporations Act 2001* (Cth) regulates the transfer by the personal representative of a deceased person of any securities¹³⁴³ registered in the name of the deceased person. The section distinguishes between a transfer made by a personal representative who is a 'local representative' and a transfer made by a personal representative who is not a 'local representative'.¹³⁴⁴

37.34 A personal representative is a 'local representative' if he or she 'is duly constituted as a personal representative under the law of the State or Territory in which the security is situated'.¹³⁴⁵ The Act provides that, if the personal representative is a local representative, a transfer executed by the personal representative is as valid as if the personal representative had been the holder of the security at the time when the instrument was executed.¹³⁴⁶

37.35 Section 1071B(9) of the *Corporations Act 2001* (Cth) provides a mechanism for the transfer of a security by a personal representative who is not a local representative — that is, by a personal representative whose appointment is under a grant made in a jurisdiction other than that in which the security is situated. Section 1071B(9) provides:

If:

- (a) the personal representative is not a local representative; and
- (b) the representative:
 - (i) executes an instrument of transfer of the security to the representative or to another person; and
 - (ii) delivers the instrument to the company; and

¹³⁴² Ibid 13.

¹³⁴³ *Corporations Act 2001* (Cth) s 1071A(1) provides that s 1071B applies to the following securities:

- (a) share in a company;
- (b) debentures of a company;
- (c) interests in a registered scheme.

¹³⁴⁴ *Corporations Act 2001* (Cth) s 1071B(6).

¹³⁴⁵ *Corporations Act 2001* (Cth) s 1071B(7). A security is situated where the relevant register is kept: s 1070A(4).

¹³⁴⁶ *Corporations Act 2001* (Cth) s 1071B(8).

- (iii) delivers to the company with the instrument a statement in writing made by the representative to the effect that, to the best of the representative's knowledge, information and belief, no grant of representation of the estate of the deceased holder has been applied for or made in the State or Territory in which the security is located and no application for such a grant will be made; and
- (c) the statement is made within 3 months immediately before the date on which the statement is delivered to the company;

the company must (subject to subsection (10))¹³⁴⁷ register the transfer and pay to the representative any dividends or other money accrued in respect of the security up to the time when the instrument was executed. (note added)

37.36 Section 1071B(13) provides that, notwithstanding anything in a company's constitution, or in a deed relating to debentures, the production to a company of a document that is, under the law of a State or Territory, sufficient evidence of probate of the will, or letters of administration of the estate, of a deceased person having been granted to the personal representative of a deceased person must be accepted by the company as sufficient evidence of the grant. As a result, it would be sufficient for a personal representative to produce an exemplification of a grant instead of the original grant.¹³⁴⁸

37.37 A transfer or payment made under section 1071B(9) and a receipt or acknowledgment of such a payment is, for all purposes, as valid and effectual as if the personal representative were a local representative.¹³⁴⁹ An application by a personal representative for registration as the holder of a security in place of the deceased person is deemed to be an instrument of transfer effecting a transfer of the security to the personal representative.¹³⁵⁰

37.38 The mechanism provided in section 1071B(9) of the *Corporations Act 2001* (Cth) avoids the need for a personal representative who is not a local representative to have the grant under which he or she has been appointed resealed in the State or Territory in which the security is situated in order to deal with those assets.

37.39 Section 1071B(9) would appear to apply not only to a person who is constituted as a personal representative under the law of another Australian

¹³⁴⁷ *Corporations Act 2001* (Cth) s 1071B(10) provides that s 1071B(9) does not operate to require the company to do anything it would not have been required to do if the personal representative were a local representative.

¹³⁴⁸ See the explanation of exemplifications at note 738 above.

¹³⁴⁹ *Corporations Act 2001* (Cth) s 1071B(11).

¹³⁵⁰ *Corporations Act 2001* (Cth) s 1071B(12).

State or Territory, but also to a person who is constituted as a personal representative under the law of another country.¹³⁵¹

DOMICILE

37.40 As mentioned earlier in this chapter, the concept of domicile plays a central role in the legislative scheme that applies in the United Kingdom in relation to the automatic recognition of grants, and in the similar scheme proposed by the Law Reform Commission of Western Australia for operation within Australia.

37.41 A person's domicile operates as a connecting factor between that person and a particular legal system. Domicile plays an important role in administration and succession law because the choice of law rules provide that many issues that arise in these areas of the law — for example, succession to movable property — are to be determined according to the law of the jurisdiction in which the deceased died domiciled.¹³⁵²

37.42 Every person has a domicile at every stage of his or her life and no person may have more than one domicile for the same purpose.¹³⁵³

37.43 In Australia, the question of a person's domicile was, until the late 1970s, largely determined by the common law.¹³⁵⁴ However, during the following few years, *Domicile Acts* were passed by each of the States, the Northern Territory and the Commonwealth.¹³⁵⁵ Because these Acts were passed in virtually identical terms,¹³⁵⁶ the law relating to domicile is uniform

¹³⁵¹ In this respect, s 1071B(9) of the *Corporations Act 2001* (Cth) has a broader application than its predecessor under the *Corporations Law*. Whereas s 1071B(9) of the *Corporations Act 2001* (Cth) simply refers to a personal representative who is 'not a local representative', s 1091(4) of the *Corporations Law* referred to a personal representative who was constituted as such under a law of 'another jurisdiction'. 'Jurisdiction' was defined in s 9 of the *Corporations Law* to mean 'a State or the Capital Territory' and 'State' was defined in s 9 to include the Northern Territory, with the result that s 1091(4) was limited in its application to a personal representative constituted under the law of an Australian State or Territory.

¹³⁵² These issues are considered in Chapters 36 and 39 of this Report.

¹³⁵³ PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.4]. Note, however, that s 39(3) of the *Family Law Act 1975* (Cth) simply requires that a person 'is domiciled in Australia'. It is therefore possible for a person to have both a domicile in a State or Territory as well as a 'federal domicile' for the purpose of the *Family Law Act 1975* (Cth).

¹³⁵⁴ The common law rules in relation to an ex-nuptial child's domicile of origin had already been affected in most jurisdictions by status of children legislation: see PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.10].

¹³⁵⁵ See *Domicile Act 1982* (Cth) (which applies to the ACT, the Jervis Bay Territory and declared external territories); *Domicile Act 1979* (NSW); *Domicile Act* (NT); *Domicile Act 1981* (Qld); *Domicile Act 1980* (SA); *Domicile Act 1980* (Tas); *Domicile Act 1978* (Vic); *Domicile Act 1981* (WA).

¹³⁵⁶ With the exception of the Northern Territory Act, these Acts apply where a person's domicile has to be determined as at a date on or after 1 July 1982: *Domicile Act 1982* (Cth) s 5(2); *Domicile Act 1979* (NSW) s 4(2); *Domicile Act 1981* (Qld) s 4(2); *Domicile Act 1980* (SA) s 4(2); *Domicile Act 1980* (Tas) s 4(2); *Domicile Act 1978* (Vic) s 4(2); *Domicile Act 1981* (WA) s 4. The Northern Territory Act commenced on 21 September 1979 and applies where a person's domicile has to be determined as at, or after, that date: *Domicile Act* (NT) s 4(2).

throughout Australia.¹³⁵⁷ Although the *Domicile Acts* did not abrogate the common law in relation to domicile, they did modify it in a number of important respects.¹³⁵⁸

37.44 There are three types of domicile:¹³⁵⁹

- domicile of origin, which each person has at birth, by force of law;
- domicile of dependence, which is the domicile of a person, such as a child, whose domicile is determined by reference to the domicile of another person, such as a parent;¹³⁶⁰ and
- domicile of choice, which is the domicile acquired by a person with capacity 'as the result of a voluntary choice of a new place of residence'.¹³⁶¹

37.45 The domicile that a person has at any given time continues until the person acquires a different domicile.¹³⁶² Under the *Domicile Acts*, a person is capable of having an independent domicile — that is, of acquiring a domicile of choice — if the person has attained the age of 18 years or is, or has at any time been, married.¹³⁶³

37.46 To acquire a domicile of choice, a person must have, at the same time, both a lawful physical presence in a country¹³⁶⁴ and an actual intention to make his or her home indefinitely in that country.¹³⁶⁵

1357 For convenience, reference will be made in the following discussion to the relevant provisions of the *Domicile Act 1982* (Cth).

1358 PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.1]. For example, s 6 of the *Domicile Act 1982* (Cth) abolished the common law rule whereby a married woman had at all times the domicile of her husband. See also notes 1362 and 1438 below in relation to the abolition of the common law rule of revival of the domicile of origin.

1359 PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.9].

1360 See the *Domicile Act 1982* (Cth) s 9, which deals with the domicile of children who live with only one of their parents and the domicile of adopted children.

1361 PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.9].

1362 *Domicile Act 1982* (Cth) s 7. This provision abolished the common law rule that a person's domicile of origin was revived if a person abandoned his or her domicile of choice without acquiring a new one, even though the person might have no intention of returning to his or her country of origin: see PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.11].

1363 *Domicile Act 1982* (Cth) s 8.

1364 *Puttick v Attorney-General* [1980] Fam 1. See also PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [13.18].

1365 *Domicile Act 1982* (Cth) s 10.

THE NATIONAL COMMITTEE'S VIEW

37.47 Although the number of applications made annually for the resealing of grants made in other Australian jurisdictions is not large,¹³⁶⁶ the National Committee considers that, to the greatest extent possible, the model legislation should endeavour to simplify, and reduce the expense involved in, the administration of estates. The National Committee is not satisfied that, within Australia, it should be necessary for a grant made in one Australian jurisdiction to be resealed in another Australian jurisdiction in order to be effective in that jurisdiction.

37.48 The National Committee therefore supports, in principle, the concept of a scheme for the automatic recognition of grants made by an Australian court.

37.49 Chapter 38 sets out the National Committee's preferred model for a scheme of automatic recognition, while Chapter 39 examines the effect that the proposed scheme will have on other areas of succession law.

1366

See [37.7] above.

Chapter 38

The scheme for the automatic recognition of grants

INTRODUCTION	349
WHAT IS MEANT BY THE 'AUTOMATIC RECOGNITION' OF A GRANT THROUGHOUT AUSTRALIA.....	350
The concept of 'recognition' under the United Kingdom scheme	350
The National Committee's view.....	350
THE RANGE OF AUSTRALIAN GRANTS TO WHICH AUTOMATIC RECOGNITION SHOULD BE GIVEN	352
Recommendations of the Law Reform Commission of Western Australia	352
Modification by the Parliamentary Counsel's Committee	353
Discussion Paper	354
Submissions	356
The National Committee's view.....	356
APPLICATION OF THE PROPOSED SCHEME TO ORDERS TO ADMINISTER AND ELECTIONS TO ADMINISTER.....	360
Recommendation of the Law Reform Commission of Western Australia	361
Discussion Paper	361
Submissions	362
The National Committee's view.....	362
MATTERS TO BE NOTED ON THE GRANT	363
Recommendation of the Law Reform Commission of Western Australia	363
Discussion Paper	364
Submissions	364
The National Committee's view.....	365
APPLICATION OF THE PROPOSED SCHEME TO OVERSEAS GRANTS	368
Recommendation of the Law Reform Commission of Western Australia	368
Discussion Paper	368
Submissions	369
The National Committee's view.....	369
RETENTION OF JURISDICTION TO MAKE A GRANT EVEN IF THE DECEASED DIED DOMICILED IN ANOTHER STATE OR TERRITORY	371
THE MAKING OF A LIMITED GRANT IF THE DECEASED DIED DOMICILED IN ANOTHER STATE OR TERRITORY	371
Background	371
Recommendation of the Law Reform Commission of Western Australia	372
Discussion Paper	373
Submissions	374
The National Committee's view.....	375
PROTECTION FOR PERSONAL REPRESENTATIVE WHOSE LIMITED GRANT HAS CEASED TO HAVE EFFECT.....	381
Background	381
The National Committee's view.....	381
APPLICATION OF THE PROPOSED SCHEME TO GRANTS THAT HAVE BEEN RESEALED IN AN AUSTRALIAN JURISDICTION.....	383
Recommendation of the Law Reform Commission of Western Australia	383

Discussion Paper	383
Submissions	384
The National Committee's view.....	384
STAGE TWO: NOTICE OF INTENTION TO APPLY FOR A GRANT AND OF GRANTS MADE	384
Recommendation of the Law Reform Commission of Western Australia	385
Probate Registrars	385
Discussion Paper	386
Submissions	387
The National Committee's view.....	387
IMPACT OF THE PROPOSED SCHEME FOR THE AUTOMATIC RECOGNITION OF GRANTS ON VARIOUS ASPECTS OF PROBATE PRACTICE	389
Notice of intention to apply for a grant or for the resealing of a grant.....	389
Caveats	391
Administration bonds and sureties.....	394
Inventories.....	395
Passing of accounts	398
Revenue protection	400
REVIEW OF THE PROPOSED SCHEME	400
RECOMMENDATIONS	401

INTRODUCTION

38.1 In Chapter 37 of this Report, the National Committee has expressed its support, in principle, for a scheme that gives automatic recognition to grants made by an Australian court. This chapter sets out the National Committee's proposals for this scheme.

38.2 In developing this scheme, the National Committee has given consideration to the following issues:

- what is meant by the 'automatic recognition' of a grant throughout Australia;
- whether the proposed scheme for the automatic recognition of grants should apply only to grants made in the Australian jurisdiction in which the deceased died domiciled or, alternatively, whether grants made in any Australian jurisdiction should be recognised, regardless of whether the deceased died domiciled in the particular jurisdiction in which the grant was made;
- whether the proposed scheme should apply to orders to administer and elections to administer;
- whether the proposed scheme should apply to grants made in an overseas country or part of an overseas country;
- if the proposed scheme applies only to grants made in the Australian jurisdiction in which the deceased died domiciled, whether:
 - it should continue to be possible to obtain a grant in a particular Australian jurisdiction if the deceased died domiciled in another Australian jurisdiction;
 - a grant made in an Australian jurisdiction other than that in which the deceased died domiciled should be limited to operate only until a grant is made in the jurisdiction in which the deceased died domiciled;
 - a grant made in an Australian jurisdiction other than that in which the deceased died domiciled should be able to be resealed in another Australian jurisdiction;
 - a grant made in an Australian jurisdiction in respect of the estate of a person who died domiciled overseas should be able to be resealed in another Australian jurisdiction; and
- whether a system of automatic recognition should be implemented only if a reliable system exists, or can reasonably be established, for ascertaining whether a grant has been sought or made in respect of a

particular estate, in order to avoid the situation where more than one grant is operative either throughout Australia or in a particular jurisdiction.

WHAT IS MEANT BY THE 'AUTOMATIC RECOGNITION' OF A GRANT THROUGHOUT AUSTRALIA

38.3 The purpose of the 'automatic recognition' of a grant is, obviously, to avoid the need for a grant made in one Australian jurisdiction to be resealed in another Australian jurisdiction in order to be effective in that jurisdiction. The issue arises, however, as to what is meant by the 'recognition' of a grant throughout Australia and how that can be achieved, given that succession law is governed by the laws of the individual States and Territories.

The concept of 'recognition' under the United Kingdom scheme

38.4 Under the scheme that applies in the United Kingdom, the framework of the legislation is to provide that, without being resealed, a grant¹³⁶⁷ made in one part of the United Kingdom is to be treated for the purposes of the law of another part of the United Kingdom as if it had been originally made by the High Court in that part. For example, section 2(1) of the *Administration of Estates Act 1971* (UK) provides:

2 Recognition in Northern Ireland of English grants of representation and Scottish confirmations

- (1) Where a person dies domiciled in England and Wales a grant of probate of his will or letters of administration in respect of his estate (or any part of it) made by the High Court in England and Wales and noting his domicile there shall, without being resealed, be treated for the purposes of the law of Northern Ireland as if it had been originally made by the High Court in Northern Ireland.

38.5 The effect of this section is that, for the purposes of the law of Northern Ireland, a person appointed under a grant made by the High Court of England and Wales is treated as if he or she were appointed under a grant made by the High Court in Northern Ireland. As a result, the person is authorised to administer the deceased's property in Northern Ireland, and has all the rights, duties, powers and liabilities of a personal representative who was originally appointed by the High Court in Northern Ireland.

The National Committee's view

38.6 In the National Committee's view, the model legislation should generally follow the United Kingdom legislation in relation to the effect of automatic recognition of a grant.

¹³⁶⁷

As explained at [37.15] above, the scheme in the United Kingdom applies only in respect of a grant, noting the domicile of the deceased, that was issued in that part of the United Kingdom in which the deceased died domiciled.

38.7 However, the United Kingdom provisions will require some modification to be suitable for adoption in Australia. Within Australia, succession law is governed by the law of the individual States and Territories. No individual jurisdiction can, by the force of its own legislation, provide that a grant made in that jurisdiction is to be recognised throughout Australia — that is, by all the other States and Territories. An individual State or Territory (for convenience, described in this chapter as ‘the enacting jurisdiction’) can only legislate that it will recognise a grant made in another State or Territory as if it were a grant made in the enacting jurisdiction.

38.8 The model legislation should therefore provide that, subject to the matters proposed later in this chapter, a grant made in a State or Territory other than the enacting jurisdiction is to have the same force, effect and operation in the enacting jurisdiction as if it had been originally granted by the Supreme Court of the enacting jurisdiction.

38.9 By being drafted in this way, the model provision reflects the fact that the relevant enacting jurisdiction cannot legislate to make its own grants ‘effective throughout Australia’. The grants made in the enacting jurisdiction will be recognised ‘throughout Australia’ only when all the other States and Territories legislate to recognise the grants of that jurisdiction. In this sense, a reference to a scheme of automatic recognition under which grants made in an Australian jurisdiction are effective ‘throughout Australia’ is a reference to the outcome that will be achieved when each State and Territory, as part of a cooperative scheme, enacts legislation to recognise the grants (or particular grants) of all other States and Territories.

38.10 The National Committee notes that its proposal about the effect of recognition differs slightly from its earlier proposals in this Report about the effect of resealing. In Chapter 34, the National Committee has recommended that the model legislation should provide that a grant, when resealed, has the same force, effect and operation within the resealing jurisdiction as if it had been originally granted by the Supreme Court of that jurisdiction.¹³⁶⁸ In addition, the National Committee has recommended that the model legislation should provide that, on the resealing of a grant, the person who made the application for resealing:¹³⁶⁹

- is to have the same rights and powers, perform the same duties, and be subject to the same liabilities, as if he or she were the personal representative under a grant of probate or letters of administration made by the resealing court; and
- is, for all purposes, to be taken to be the personal representative of the deceased in respect of his or her estate within the resealing jurisdiction.

1368 See Recommendation 34-1 above.

1369 See Recommendation 34-2 above.

38.11 These more detailed provisions are required in the context of resealing, as an application for the resealing of a grant will often be made by a person who has been appointed, under a power of attorney given by the personal representative, to make the application, rather than by the actual personal representative who is named in the grant that is the subject of the resealing application. It is therefore necessary to ensure that, on the resealing of a grant, the person who made the application is for all purposes the personal representative within the resealing jurisdiction. However, these further provisions are not required in the context of automatic recognition, as recognition will be given to the very grant under which the personal representative has been appointed.

THE RANGE OF AUSTRALIAN GRANTS TO WHICH AUTOMATIC RECOGNITION SHOULD BE GIVEN

Recommendations of the Law Reform Commission of Western Australia

38.12 The primary recommendation made by the Law Reform Commission of Western Australia in relation to the automatic recognition of grants was that:¹³⁷⁰

The Australian States and Territories should by uniform legislation adopt a scheme whereby a grant of probate or administration made by the court of the Australian State or Territory in which the deceased died domiciled would be automatically recognised, without being resealed, as effective in every other Australian State or Territory.

38.13 It further recommended that a grant of probate or letters of administration made by the court of an Australian State or Territory other than that in which the deceased died domiciled should not be automatically recognised within Australia.¹³⁷¹

38.14 The Western Australian Commission noted that, in this respect, its recommendations were consistent with the legislation that applies in the United Kingdom.¹³⁷²

38.15 The Western Australian Commission stated that it was important that there should be as little confusion as possible. In its view, its proposals would avoid inconsistency and duplication of grants.¹³⁷³ The Commission's primary concern was to develop a system based on certainty that would avoid the jurisdictional disputes that would be likely to arise if automatic recognition were

¹³⁷⁰ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.3] Recommendation (21). See also the discussion of that recommendation at [7.1]–[7.4] of the Western Australian Commission's Report.

¹³⁷¹ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.5], [11.3] Recommendation (22).

¹³⁷² *Ibid* [7.1].

¹³⁷³ *Ibid* [9.54].

extended to grants based on other connecting factors, such as permanent residence or the existence of assets within the jurisdiction.¹³⁷⁴ In the Commission's view:¹³⁷⁵

In the vast majority of cases, the deceased's permanent residence and most of his assets will be within the jurisdiction in which he has his domicile.

38.16 Under the Western Australian Commission's proposals, where a person died domiciled in an Australian State or Territory, there would be only one jurisdiction within Australia that would be capable of making a grant that would be automatically recognised throughout Australia — namely, the State or Territory in which the person was domiciled at the time of death. Because the law relating to domicile is uniform throughout Australia,¹³⁷⁶ the same principles would be applied to determine a person's domicile, irrespective of the State or Territory in which that issue arose for consideration.

Modification by the Parliamentary Counsel's Committee

38.17 As noted in Chapter 37 of this Report, the Parliamentary Counsel's Committee did not agree with the Western Australian Commission's approach to automatic recognition.¹³⁷⁷ That Committee could 'see no reason why there should not be automatic recognition throughout Australia of any grant made by an Australian State or Territory Court'.¹³⁷⁸

38.18 To avoid the situation where more than one grant might be made that would be effective throughout Australia, the Parliamentary Counsel's Committee recommended that the court to which an application was made for a grant should have the power to decline to make the grant if it appeared that another court was the more appropriate forum.¹³⁷⁹

38.19 However, the real risk of recognising all Australian grants is not that the court in one Australian jurisdiction might make a grant when the court in another Australian jurisdiction would be a more appropriate forum, but that the court in one Australian jurisdiction might make a grant in ignorance of the fact that the court in another Australian jurisdiction had already made a grant, with the result

1374 Ibid [9.55].

1375 Ibid.

1376 See [37.43] above.

1377 See [37.29]–[37.30] above.

1378 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 13, referring to the *Report of the Parliamentary Counsel's Committee* (6 September 1989) [4] and s 73 of draft bill no 10.

1379 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 14, referring to the *Report of the Parliamentary Counsel's Committee* (6 September 1989) [5]. However, the Report of the Conference of Probate Registrars does not record whether the *Report of the Parliamentary Counsel's Committee* considered what factors would support the view that another court was the more appropriate forum.

that there would be two grants in force, each of which would be recognised in every other Australian jurisdiction.

Discussion Paper

38.20 In the Discussion Paper on the recognition of interstate and foreign grants, it was acknowledged that the proposals made by the Law Reform Commission of Western Australia and the modifications made by the Parliamentary Counsel's Committee both had their respective advantages.

38.21 The principal advantage of the scheme proposed by the Law Reform Commission of Western Australia was that there would be only one grant that would be entitled to automatic recognition throughout Australia, as a person has only one domicile at any given time.¹³⁸⁰ The National Committee noted that, if any other basis were used for automatic recognition, the possibility could arise where there could be two or more grants that were entitled to automatic recognition throughout Australia.¹³⁸¹

38.22 It was also observed that the Western Australian Commission's proposals avoided the need for additional provisions to deal with the court's power to decline to make a grant where it appeared that another court was a more appropriate forum, as proposed by the Parliamentary Counsel's Committee.¹³⁸²

38.23 On the other hand, the National Committee recognised that the modifications proposed by the Parliamentary Counsel's Committee had the advantage that it would never be necessary for an application to be made for the resealing of a grant made in an Australian State or Territory, as such a grant would automatically be effective in every State and Territory.¹³⁸³

38.24 A further advantage of the modifications proposed by the Parliamentary Counsel's Committee was that, at least in theory, it would be unnecessary for a deceased person's domicile to be identified when a grant was made.¹³⁸⁴ It was noted, however, that if a court were to have the power to decline to make a grant if it appeared that the court of another jurisdiction would be a more appropriate forum for the application, it might nevertheless be necessary, in

1380 See *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 39.

1381 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 39. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.6].

1382 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 39.

1383 *Ibid* 40. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.10].

1384 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 39. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.9].

order to decide that issue, for the court to require evidence about the deceased's domicile.¹³⁸⁵

38.25 Although the advantages of both schemes were recognised, the preliminary view expressed in the Discussion Paper¹³⁸⁶ favoured the scheme proposed by the Law Reform Commission of Western Australia. The decisive factor in coming to this view was that, if every Australian grant were to be effective throughout Australia, there would be a risk that two or more grants might be made in relation to the one estate, possibly to different personal representatives, in which case there could be competing grants, each of which would confer the authority to deal with the same property. It was suggested that the only way to avoid this problem might be to have a register of grants that would have to be searched each time a grant was to be made to ensure that a grant had not already been made in another State or Territory.¹³⁸⁷

38.26 The National Committee acknowledged that, under the scheme proposed by the Law Reform Commission of Western Australia, although there could never be two or more grants that were entitled to automatic recognition throughout Australia, it would still be possible for there to be two grants that were operative within a particular jurisdiction. This situation could arise if a grant were made in the jurisdiction in which the deceased died domiciled (which would be effective throughout Australia), as well as in another Australian jurisdiction. However, it was considered that, under the Western Australian Commission's proposed scheme, the risk that this situation might occur could, to a large extent, be avoided, and would usually require only that a search be made in the jurisdiction in which the deceased died domiciled to ascertain that a grant had not already been made in that jurisdiction.¹³⁸⁸

38.27 It was therefore proposed that, if a scheme of automatic recognition were to be adopted, automatic recognition should be given only to a grant made by the court of the Australian jurisdiction in which the deceased died domiciled, and not to any other Australian grant.¹³⁸⁹

1385 Ibid 40.

1386 The preliminary views expressed in the Discussion Paper were suggested by Professor Peter Handford, who assisted in the preparation of the Discussion Paper. Those views were included to facilitate debate, but did not necessarily represent the views of the National Committee, which had not at that time adopted a preliminary position in relation to some of the issues.

1387 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 40.

1388 Ibid. Where a deceased person had maintained residences in two jurisdictions, there could be a dispute as to the domicile of the deceased at the time of death. Although that situation is not likely to arise very often, in such a case the court could require searches to be conducted in both jurisdictions.

1389 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 41. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.16].

Submissions

38.28 The submissions received in relation to this issue were divided as to the extent to which a grant made in one Australian jurisdiction should be automatically recognised in another Australian jurisdiction.

38.29 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar and the New South Wales Bar Association supported the preliminary view that the automatic recognition of Australian grants should be restricted to grants made in the jurisdiction in which the deceased had been domiciled at the time of death.¹³⁹⁰

38.30 On the other hand, the Queensland Law Society was of the view that automatic recognition should be given to the grants made by the court of any Australian jurisdiction, regardless of whether the deceased died domiciled in the jurisdiction in which the grant was made. It commented:¹³⁹¹

It is difficult to see how and why domicile is relevant in proving a will in the jurisdiction to provide legal standing for the applicant and to collect assets in the name of the deceased. The importance of domicile may have been relevant at some time where there were State, or foreign, death duties. Surely, the Supreme Courts of each State have a sufficient level of common form and solemn form proof of wills.

38.31 The Trustee Corporations Association of Australia was also of the view that automatic recognition should not depend on whether the grant in question was made in the jurisdiction in which the deceased died domiciled.¹³⁹² In the Association's view, a scheme that recognised only those grants made in the Australian jurisdiction in which the deceased died domiciled would add 'an extra level of unnecessary complexity'. It also suggested that the preliminary proposal was 'at odds with the drive to uniformity of succession laws' and that 'with genuine uniformity, domicile would seem irrelevant'.¹³⁹³

The National Committee's view

Implementation in two stages

38.32 The National Committee has considered whether the proposed scheme for automatic recognition should provide for the enacting jurisdiction to recognise grants made in any other Australian jurisdiction or for recognition only of grants made in the Australian jurisdiction in which the deceased died domiciled.

1390 Submissions R1, R2, R4, R5.

1391 Submission R3.

1392 Submission R6.

1393 Ibid.

38.33 The obvious attraction of recognising any Australian grant, regardless of whether the deceased died domiciled in the jurisdiction in which the grant was made, is the simplicity of the scheme. Under such a scheme there would be no need to determine, for the purposes of recognising an interstate grant, the jurisdiction in which the deceased died domiciled.¹³⁹⁴ Further, it would avoid the need for the National Committee's proposed scheme to address the issue of whether a grant made by the court of an Australian jurisdiction should be able to be resealed if the deceased did not die domiciled in that jurisdiction.¹³⁹⁵

38.34 The National Committee is therefore of the view that the ultimate goal of its scheme for automatic recognition should be the recognition of all Australian grants, regardless of the jurisdiction in which the deceased died domiciled.

38.35 However, the development of a scheme for automatic recognition raises a real issue about how it would affect people with an interest in an estate — whether they be beneficiaries, creditors, or persons who consider that they have an entitlement to a grant themselves.

38.36 Earlier in this Report, the National Committee has proposed that the court's jurisdiction to make a grant should not be founded on the presence of property within the jurisdiction.¹³⁹⁶ Ordinarily, this would not create a problem, as a grant obtained in a jurisdiction in which the deceased did not leave any property would, like any other grant, be effective only in the jurisdiction in which it was obtained. For example, if a person wanted to administer the property that a deceased person left in Western Australia, it would not assist the person to obtain a grant in Queensland.

38.37 In the context of automatic recognition, however, the ability to apply for a grant in a jurisdiction in which the deceased did not leave property creates the opportunity for a grant to be sought in a jurisdiction with which the deceased had no connection, not necessarily for any proper purpose, but simply because the fact that a grant is being sought in that jurisdiction is less likely to come to the attention of people who might oppose the making of the grant than if it is sought in the jurisdiction in which the deceased died domiciled.

38.38 Although the automatic recognition scheme will greatly simplify the administration of the estates of people who die leaving property in more than one State or Territory, the National Committee is concerned that its proposals should not adversely affect the interests of people having a proper interest in the estate of a deceased person. To ensure that this does not occur, it will be

¹³⁹⁴ However, it may still be necessary for other purposes, such as succession to movable property, to determine the jurisdiction in which the deceased died domiciled: see [39.24] below.

¹³⁹⁵ This issue is considered at [38.121]–[38.127] below.

¹³⁹⁶ See Recommendation 3-1 in vol 1 of this Report. At [3.33]–[3.37] in vol 1 of this Report, the National Committee has outlined some of the circumstances in which it might be desirable to be able to obtain a grant in a particular jurisdiction, even though the deceased did not leave any property within that jurisdiction.

necessary for several key technological enhancements to be put in place in all State and Territory probate registries before it is possible to implement the wider scheme under which a grant made in any State or Territory will be recognised in the enacting jurisdiction, regardless of whether the grant was made in the State or Territory in which the deceased died domiciled.

38.39 First, it will be necessary to have a system in place under which the fact that a person intends to apply for a grant in a particular jurisdiction can be readily ascertained from the Supreme Court website in that jurisdiction. The National Committee notes that the Supreme Court of Victoria now provides for notice of intention to apply for a grant to be given in this way.¹³⁹⁷ This means of giving notice should ultimately replace the requirement that applies in most Australian jurisdictions for an applicant for a grant to give public notice of his or her intention to apply for the grant in a newspaper or other publication in that jurisdiction. A searchable electronic facility of this kind is a necessary requirement of the proposed scheme because a person who is monitoring whether someone intends to apply for a grant of a particular estate will not necessarily know in which jurisdiction application will be made for the grant, and it would be unduly onerous to expect the person to monitor, in every Australian jurisdiction, all the publications in which notice of intention to apply for a grant could potentially be advertised.

38.40 Secondly, it will be necessary to have a system in place under which it can be ascertained whether a grant has been made in a particular Australian jurisdiction. This will ensure that a grant is not made in one jurisdiction when a grant has already been made in another jurisdiction in relation to the same estate.

38.41 Thirdly, a person who wishes to oppose the making, or resealing, of a grant in a particular jurisdiction may at present file a caveat in that jurisdiction against the making, or resealing, of the grant. Under a scheme of automatic recognition of all Australian grants, a caveat filed in one Australian jurisdiction will need to have effect as if it had been filed in every Australian jurisdiction. It will therefore be necessary to have a system in place under which the court in one Australian jurisdiction, before making a grant in relation to the estate of a deceased person, can conduct a search to ensure that a caveat has not been filed in another Australian jurisdiction against the making of a grant in relation to that person's estate. In the absence of such a facility, a person who wished to oppose the making of the grant would need to file a caveat in every Australian jurisdiction, as he or she could not necessarily anticipate the jurisdiction in which the application for the grant would be made.

38.42 As explained above, the National Committee is of the view that the ultimate goal should be the automatic recognition of all Australian grants (and not just those Australian grants made in the jurisdiction in which the deceased was domiciled at the time of death). However, the National Committee is aware

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See [8.10]–[8.16] in vol 1 of this Report.

that, although some probate registries have already made advances towards putting in place the type of facilities required to support a scheme for the recognition of all Australian grants, it may be some time before all Australian jurisdictions have the required technology in place.

38.43 In the meantime, many of the benefits of automatic recognition can nevertheless be achieved by the adoption of the more limited scheme originally proposed by the Law Reform Commission of Western Australia — that is, a scheme in which recognition is given to a grant made in the Australian jurisdiction in which the deceased died domiciled.¹³⁹⁸ In the National Committee's view, the benefits of such a scheme need not be deferred pending the adoption by all Australian probate registries of the facilities required to support the wider scheme of automatic recognition.

38.44 The National Committee therefore proposes that a scheme for the automatic recognition of grants made by the Supreme Court of an Australian State or Territory be implemented in two stages.

Stage one: Recognition of a grant made in the State or Territory in which the deceased died domiciled

38.45 The model legislation, in giving effect to stage one of the scheme, should provide that, if a person dies domiciled in a State or Territory other than the enacting jurisdiction, a grant made by the Supreme Court of that State or Territory (the 'interstate grant') has the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction.

38.46 Further, to ensure that the Supreme Court of the enacting jurisdiction has the same jurisdiction in relation to the interstate grant as it would have in relation to a grant made originally by it, the model legislation should also provide that the force, effect and operation of the interstate grant within the enacting jurisdiction is subject to the jurisdiction of the Supreme Court of the enacting jurisdiction.¹³⁹⁹

38.47 The National Committee acknowledges that it will be necessary for evidence of the deceased's domicile at the time of death to be included in the material supporting the application for a grant. However, the National Committee does not consider this to be an unreasonable requirement given the benefits that the implementation of the first stage of this scheme will provide.

1398 The National Committee expects that the majority of grants presently made in relation to the estates of persons who have died domiciled in an Australian State or Territory are made in the particular jurisdiction in which the deceased died domiciled and would, therefore, be entitled to recognition under this more limited scheme.

1399 The Supreme Court's jurisdiction in relation to grants is considered in Chapter 3 of this Report.

Stage two: Recognition of a grant made in any State or Territory

38.48 When stage two of the automatic recognition scheme is implemented, the model legislation should be amended to provide that a grant made by the Supreme Court of a State or Territory other than the enacting jurisdiction has the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction.

38.49 Because recognition will be given to a grant made in any State or Territory, the model legislation should be amended to omit the provision dealing with the effectiveness in the enacting jurisdiction of a grant made in the State or Territory in which the deceased died domiciled that is endorsed to that effect.

38.50 The National Committee agrees with the suggestion made by the Parliamentary Counsel's Committee, in the context of a scheme recognising all grants made in any Australian jurisdiction, that the court of the enacting jurisdiction should be able to decline to make a grant if it appears that another State or Territory would be the more appropriate forum.¹⁴⁰⁰ In the National Committee's view, it will be necessary for the court to have an express power to decline to make a grant on this ground. Although the making of a grant is discretionary, if an application for a grant were properly made, the National Committee doubts whether, in the absence of an express power, the court could simply decline to deal with the application, or would have any basis on which to exercise its discretion against making the grant.¹⁴⁰¹

38.51 The National Committee therefore proposes that, when stage two is implemented, the model legislation should be amended to include a provision giving the Supreme Court of the enacting jurisdiction the express power to decline to make a grant if it appears to the court that it is in the interests of justice that the application for a grant is made to the Supreme Court of another State or Territory.

APPLICATION OF THE PROPOSED SCHEME TO ORDERS TO ADMINISTER AND ELECTIONS TO ADMINISTER

38.52 Legislation in some Australian jurisdictions provides that, in certain circumstances, the public trustee in that jurisdiction may apply for an order authorising that officer to administer the estate of a deceased person.¹⁴⁰² An order to administer confers on the public trustee the same powers, rights and obligations as a grant of administration.¹⁴⁰³ The circumstances in which an

1400 See [38.18] above.

1401 In Chapter 3 of this Report, the National Committee has recommended that the jurisdiction of the court should not be founded on the presence of property within the jurisdiction: see Recommendation 3-1. Consequently, the absence of property within the jurisdiction would not afford a reason to decline to make a grant.

1402 See [31.40]–[31.43] above for a discussion of orders to administer.

1403 See [31.43] above.

order to administer may be sought vary from jurisdiction to jurisdiction, but in general cover situations where there is no proper person available or willing to administer the estate.¹⁴⁰⁴

38.53 In most Australian jurisdictions, there are further provisions under which, in cases involving estates under a prescribed value, the public trustee or a trustee company may file an election to administer the estate without the need to obtain a grant of probate or letters of administration.¹⁴⁰⁵ Generally, the effect of filing an election to administer is that the public trustee or trustee company is deemed to be the executor or administrator of the estate.¹⁴⁰⁶

38.54 An order to administer, like a grant of probate, is made under seal and involves the making of an order by a court of competent jurisdiction. However, an election to administer is simply filed in the court and does not involve any order of the court.¹⁴⁰⁷

Recommendation of the Law Reform Commission of Western Australia

38.55 The Law Reform Commission of Western Australia recommended that automatic recognition should be given not only to grants made by the court of the Australian jurisdiction in which the deceased died domiciled, but also to orders to administer and elections to administer that were granted by any such court.¹⁴⁰⁸ This recommendation was consistent with the Commission's recommendation, in the context of resealing, that orders to administer and elections to administer should be capable of being resealed.¹⁴⁰⁹

Discussion Paper

38.56 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee noted that an order to administer involves the making of an order by a court, whereas an election to administer does not involve court scrutiny. It was therefore proposed that automatic recognition should be given to orders to administer, but not to elections to administer.¹⁴¹⁰

1404 See [31.41]–[31.42] above.

1405 See [29.1]–[29.119] above for a detailed examination of elections to administer.

1406 See [29.3], [29.5] above.

1407 In Chapter 29 of this Report the National Committee has recommended that an election to administer should be able to be filed by the public trustee, a trustee company or a legal practitioner: see Recommendation 29-3 above.

1408 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.3] Recommendation (25). See also at [7.23].

1409 The resealing of orders to administer and elections to administer is considered in Chapter 31 of this Report.

1410 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 48–9. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.31]–[4.33].

Submissions

38.57 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales and the New South Wales Bar Association were all of the view that automatic recognition should be given to an order to administer made in the Australian jurisdiction in which the deceased died domiciled, but not to an election to administer filed in that jurisdiction.¹⁴¹¹

38.58 The Victorian Bar expressed the view that automatic recognition should be given to both an order to administer made in the jurisdiction of domicile, as well as to an election to administer filed in the jurisdiction of domicile. It made the following comment in relation to elections to administer:¹⁴¹²

We would prefer automatic recognition to extend to elections to administer filed by public trustees; these will, by definition, be quite small estates, and since it will be the public trustee in the state of domicile which makes the election it is likely that the assets in other states will be of even lesser value. To withhold automatic recognition of the election will therefore require that a small estate cope with the cost of obtaining a formal grant of representation, where the home state did not require this.

38.59 The Trustee Corporations Association of Australia did not address the issue of orders to administer, but commented that automatic recognition should be given to an election to administer made by a trustee company.¹⁴¹³

The National Committee's view

Orders to administer

38.60 As an order to administer has a very similar effect to a grant, and is made under seal by a court, the National Committee is of the view that the proposed scheme for the automatic recognition of grants should not be limited to the recognition of grants of probate and letters of administration, but should also apply to orders to administer.

Elections to administer

38.61 Earlier in this Report, the National Committee has recommended that an election to administer should be capable of being resealed.¹⁴¹⁴ However, it has also made other recommendations that are intended to operate as safeguards in relation to the resealing of an election to administer.

1411 Submissions R1, R2, R5.

1412 Submission R4. This was consistent with the view expressed by the Victorian Bar that elections to administer should be capable of being resealed: see [31.84] above.

1413 Submission R6.

1414 See Recommendation 31-6 above.

38.62 First, an applicant for the resealing of an election to administer must give an undertaking not to proceed further with the administration of the estate in the resealing jurisdiction in the event of further assets being discovered in the jurisdiction in which the election was filed that would place the value of the estate above the statutory limit for the election procedure in that jurisdiction.¹⁴¹⁵

38.63 Secondly, an applicant for the resealing of an election to administer must produce to the registrar a copy of the election to administer that was certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.¹⁴¹⁶ That recommendation is intended to ensure the authenticity of the document that is to be resealed, given that an election to administer is not an instrument issued by a court under seal.

38.64 The very nature of the proposed scheme for automatic recognition means that there will be no opportunity for the application of these safeguards. For this reason, the National Committee is of the view that the proposed scheme for the automatic recognition of grants should not apply to elections to administer.

MATTERS TO BE NOTED ON THE GRANT¹⁴¹⁷

Recommendation of the Law Reform Commission of Western Australia

38.65 The Law Reform Commission of Western Australia recommended that, when a grant is made by the court of the Australian jurisdiction in which the deceased died domiciled, the deceased's domicile should be noted on the grant.¹⁴¹⁸ This recommendation was based on the similar requirement under the United Kingdom scheme of automatic recognition, where, for example, a grant made by the High Court in England and Wales that notes that the deceased was domiciled in that particular part of the United Kingdom is effective as if originally made by the High Court in other parts of the United Kingdom.¹⁴¹⁹ The notation of the deceased's domicile on the grant serves the purpose of clearly identifying the grant as one made by the court of the deceased's domicile and that is, therefore, effective in other parts of the United Kingdom.

1415 See Recommendation 31-7(b) above.

1416 See Recommendation 35-16 above.

1417 A reference to a 'grant' in this context includes an order to administer: see [38.60] above.

1418 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.20], [11.3] Recommendation (24).

1419 See [38.4]–[38.5] above.

38.66 Following a suggestion made to the Western Australian Commission by a commentator on its Working Paper,¹⁴²⁰ that Commission also recommended that, when a grant is made by the court of the deceased's domicile and that fact is noted on the grant, a short statement in simple language should be added, setting out the effect of the grant — namely, that it is effective in each other Australian State and Territory without any need for resealing.¹⁴²¹

38.67 The Law Reform Commission of Western Australia also recommended that the same procedure should apply if a grant is resealed in the Australian jurisdiction in which the deceased died domiciled.¹⁴²²

Discussion Paper

38.68 In the Discussion Paper on the recognition of interstate and foreign grants, the preliminary view was that both of the recommendations made by the Law Reform Commission of Western Australia about matters to be noted on grants should be adopted.¹⁴²³ It was acknowledged, however, that in so far as those recommendations applied to grants that were resealed in the Australian jurisdiction in which the deceased died domiciled — as distinct from original grants made in that jurisdiction — the recommendations were dependent on the acceptance of that Commission's further recommendation that, if a grant made elsewhere is resealed in the Australian jurisdiction in which the deceased died domiciled, the resealed grant should also be automatically recognised in the other Australian jurisdictions.¹⁴²⁴

Submissions

38.69 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar and the New South Wales Bar Association were all of the view that, when a grant is made by the court of the Australian jurisdiction in which the deceased died domiciled, the grant should:¹⁴²⁵

- note the deceased's domicile; and

¹⁴²⁰ This suggestion was made by Mr WA (Tony) Lee, as noted in Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.21] note 2. Mr Lee is a former member of the Queensland Law Reform Commission and of the National Committee, and has also acted as a consultant to the Queensland Law Reform Commission on the Uniform Succession Laws Project.

¹⁴²¹ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.21].

¹⁴²² *Ibid* [7.21], [11.3] Recommendation (24). The issue of whether the proposed scheme should apply to a grant resealed in the Australian jurisdiction in which the deceased died domiciled is considered at [38.147]–[38.154] below.

¹⁴²³ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 47. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.25]–[4.27].

¹⁴²⁴ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 47.

¹⁴²⁵ Submissions R1, R2, R4, R5.

- contain a short statement in simple form to the effect that the grant is effective in every other Australian jurisdiction.

38.70 These respondents were also of the view that similar statements should be endorsed on a grant that is resealed by the court of the Australian jurisdiction in which the deceased died domiciled.¹⁴²⁶

38.71 The Trustee Corporations Association of Australia, which favoured the recognition of all Australian grants, rather than just those made in the jurisdiction in which the deceased died domiciled,¹⁴²⁷ did not comment on the preliminary view that the deceased's domicile should be noted on the grant. However, this respondent supported the preliminary view that the grant should contain a short statement regarding the effect of automatic recognition.¹⁴²⁸

The National Committee's view

Stage one

Grants made in the enacting jurisdiction

38.72 Because stage one of the automatic recognition scheme involves the recognition of grants made in the Australian jurisdiction in which the deceased died domiciled, the noting of the deceased's domicile on the grant is essential in order for the grant to be identified in the other Australian jurisdictions as a grant that will be effective in those jurisdictions without needing to be resealed.

38.73 The model legislation should therefore provide that if, in making a grant¹⁴²⁹ of a deceased person's estate, the Supreme Court of the enacting jurisdiction is satisfied that the deceased died domiciled in the enacting jurisdiction, the grant must be endorsed to that effect.

38.74 In addition, the grant should be endorsed with a short statement regarding the effect of automatic recognition. Once all Australian jurisdictions have enacted legislation implementing stage one of the proposed scheme, the required statement should be to the effect that the grant is effective in every other Australian jurisdiction without the need for resealing. In the meantime, however, the relevant statement should specify the particular jurisdictions in which the grant is effective without being resealed (being those jurisdictions that have, at that time, enacted legislation to implement stage one of the proposed scheme). The particular jurisdictions in which grants are effective will obviously change as more jurisdictions enact the National Committee's proposals. Accordingly, the requirement for the grant to contain a statement specifying the

1426 Ibid.

1427 See [38.31] above.

1428 Submission R6.

1429 For the purpose of the proposed automatic recognition scheme, 'grant' includes an order to administer: see [38.60] above and Recommendation 38-4 below.

jurisdictions in which the grant is effective should be contained in court rules, rather than in the model legislation, as the rules can be more easily amended to refer to additional jurisdictions as they progressively implement the National Committee's proposals.

Grants recognised in the enacting jurisdiction

38.75 Earlier in this chapter, the National Committee has proposed that, if a person dies domiciled in a State or Territory other than the enacting jurisdiction, a grant made by the Supreme Court of that other State or Territory is to have the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction.¹⁴³⁰ The model legislation should therefore provide that recognition will be given to those grants that are endorsed by the court making the grant to the effect that the deceased died domiciled in the particular State or Territory in which the grant was made.

38.76 As a further safeguard, the model legislation should provide that the provision that deals with the recognition of an endorsed interstate grant does not apply if the Supreme Court of the enacting jurisdiction has itself made a grant of the deceased person's estate endorsed to the effect that the deceased died domiciled in the enacting jurisdiction. This proposal guards against the possibility that the courts of two jurisdictions both make grants endorsed to the effect that the deceased died domiciled in the particular jurisdiction.¹⁴³¹

Implementation of stage two by a State or Territory other than the enacting jurisdiction

38.77 Once a State or Territory other than the enacting jurisdiction implements stage two of the proposed scheme, the court rules of the enacting jurisdiction should be amended to provide that every grant made in the enacting jurisdiction (and not just those made in relation to the estate of a person who died domiciled in the enacting jurisdiction) is to contain a statement specifying the particular States and Territories in which the grant is effective without the need for resealing. This amendment should be made even if the enacting jurisdiction has not yet implemented stage two of the proposed scheme.

38.78 Depending on whether the other States and Territories have implemented stage one or two of the proposed scheme, the court rules may need to prescribe separate statements for:

- a grant made in relation to the estate of a person who died domiciled in the enacting jurisdiction and noting the deceased's domicile on the grant (which will be effective in those States and Territories that have

1430 See [38.45] above and Recommendation 38-3(b) below.

1431 As explained in Chapter 37 of this Report, the law of domicile is uniform throughout Australia. Accordingly, the risk of this occurring is remote.

implemented either stage one or stage two of the proposed scheme); and

- a grant made in relation to the estate of a person who did not die domiciled in the enacting jurisdiction (which will be effective only in those States and Territories that have implemented stage two of the proposed scheme).

Stage two

Grants made in the enacting jurisdiction

38.79 The National Committee is conscious that not all Australian jurisdictions will necessarily implement stage two of the proposed scheme at the same time. When the enacting jurisdiction implements stage two, some States and Territories may only have implemented stage one of the proposed scheme. It is therefore important to ensure that, when the enacting jurisdiction implements stage two of the proposed scheme, grants made by the Supreme Court of the enacting jurisdiction in relation to the estates of persons who died domiciled in that jurisdiction still meet the requirements of those States and Territories that have, at that time, only implemented stage one of the proposed scheme.

38.80 Consequently, the model legislation should continue to provide that, if the Supreme Court of the enacting jurisdiction makes a grant in relation to the estate of a person who died domiciled in the enacting jurisdiction, the grant is to be endorsed to the effect that the deceased died domiciled in the enacting jurisdiction.

38.81 For the same reason, the court rules should continue to provide that, if the Supreme Court of the enacting jurisdiction makes a grant in relation to the estate of a person who died domiciled in the enacting jurisdiction, the grant must contain a statement specifying the States and Territories in which it is effective.

Implementation of stage two by all States and Territories

38.82 When all States and Territories have implemented stage two of the proposed scheme, the model legislation can be amended to omit the requirement that a grant made in the enacting jurisdiction in relation to the estate of a person who died domiciled in that jurisdiction is to be endorsed to that effect, as the effectiveness of the grant in the other States and Territories will no longer depend on evidence that the deceased died domiciled in the enacting jurisdiction.

38.83 Further, the court rules should be amended simply to provide that a grant made by the Supreme Court of the enacting jurisdiction is to be endorsed with a note stating that the grant is effective in every other State and Territory without the need for resealing.

APPLICATION OF THE PROPOSED SCHEME TO OVERSEAS GRANTS

Recommendation of the Law Reform Commission of Western Australia

38.84 The Law Reform Commission of Western Australia recommended that a grant made by a court outside Australia should not be automatically recognised in Australia, regardless of whether the deceased died domiciled in the jurisdiction in which the grant was made.¹⁴³² It proposed that such a grant should, as at present, be recognised as effective in a particular State or Territory only when resealed by the Supreme Court of that State or Territory.¹⁴³³

38.85 The Western Australian Commission observed that, in the course of developing model resealing legislation for the Commonwealth of Nations, the Commonwealth Secretariat had come to the conclusion that:¹⁴³⁴

automatic recognition without judicial intervention was not appropriate as between independent countries. Resealing provided safeguards that, between independent countries, were important. It allowed local claimants to object that the personal representative was not validly appointed; ...

Discussion Paper

38.86 In the Discussion Paper on the recognition of interstate and foreign grants, it was suggested that automatic recognition was suitable only for jurisdictions within a federation, such as Australia, where there was substantial similarity between the succession laws of the various jurisdictions. The National Committee observed that, although at present there are some differences of detail between the laws that apply in the Australian States and Territories, there is consistency in relation to the basic principles that operate in these jurisdictions in relation to matters such as:

- what property passes under a will or on intestacy;
- how executors and administrators are appointed; and
- the fact that freedom of testation is subject to family provision legislation.¹⁴³⁵

38.87 It was noted that this was not necessarily the case in relation to

1432 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.6], [11.3] Recommendation (22).

1433 Ibid [7.9], [11.3] Recommendation (22).

1434 Ibid [7.10]. See Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held at Basseterre, St Kitts, 24–28 April 1978* (1978) 18.

1435 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 42–3. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.19].

overseas jurisdictions.¹⁴³⁶ Even in a country with a common law legal system, such as England, there are a number of areas where there are significant differences from the law that applies in the Australian States and Territories, for example, in relation to the admissibility to probate of informal wills¹⁴³⁷ and the interpretation of the concept of domicile.¹⁴³⁸

38.88 The preliminary view expressed in the Discussion Paper was therefore that automatic recognition should not be given to any overseas grants.¹⁴³⁹

Submissions

38.89 There was widespread support for the preliminary view that automatic recognition should not be given to grants made overseas, and that such grants should, as at present, be effective only when resealed in a particular State or Territory. The preliminary view was supported by the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia.¹⁴⁴⁰

The National Committee's view

38.90 In the National Committee's view, the proposed scheme for the automatic recognition of grants should not apply to any overseas grants. This is consistent with the recommendation made by the Law Reform Commission of Western Australia.

38.91 The National Committee notes that the Western Australian Commission gave particular consideration to whether New Zealand should be included in the proposed scheme, although it ultimately decided against its inclusion for the following reasons:¹⁴⁴¹

1436 Ibid.

1437 In England, for example, there is no provision to the effect that, if a will does not satisfy the formal requirements for execution, it may be admitted to probate if the court is satisfied that it represents the testamentary intentions of the deceased: CH Sherrin and others (eds), *Williams on Wills: The Law of Wills* (1995) vol 1, 109. All Australian jurisdictions have a provision to this general effect: see [39.16] and note 1625 below.

1438 Australian and English law have different rules about domicile in particular cases. In Australia, where the law of domicile is uniform, a person has the capacity to acquire a domicile of choice at 18 or earlier if the person is, or has been, married: see [37.45] above. In England, however, a person may acquire a domicile of choice at 16 or earlier if the person marries before attaining that age: *Domicile and Matrimonial Proceedings Act 1973* (UK) s 3. Further, in Australia the domicile of origin, once lost, never revives, and a domicile of choice is not lost until another is acquired (see [37.45] and note 1362 above). In England, however, if a domicile of choice is abandoned and no other domicile is acquired, the domicile of origin revives: *Udny v Udny* (1869) LR 1 Sc & Div 441, 454–5 (Lord Chelmsford).

1439 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 44. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.21].

1440 Submissions R1, R2, R4, R5, R6.

1441 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.8].

- differences in the law as between Australia and New Zealand, such as the rules governing domicile and the formal validity of wills;
- problems in protecting the New Zealand collection of death and succession duties;¹⁴⁴² and
- the argument that other countries should then be included, which could complicate the operation of the scheme.

38.92 Although the National Committee is of the view that the proposed scheme should not apply to grants made by courts overseas,¹⁴⁴³ it considers that, once the proposed scheme has been implemented, it would be desirable to revisit the issue of whether it should be extended to apply to grants made by the Supreme Court of New Zealand.

38.93 In this respect, the National Committee acknowledges that Australia has historically had close legal ties with New Zealand, which could be considered to justify treating New Zealand grants differently from grants made in other countries. For example, the New Zealand Attorney-General is a member of the Standing Committee of Attorneys General.

38.94 There is also some precedent for the inclusion of provisions to deal with New Zealand grants, with some Commonwealth and State Acts treating judgments or orders of New Zealand courts differently from those of other countries:

- judgments made by a New Zealand court are given differential treatment under the *Foreign Judgments Act 1991* (Cth);¹⁴⁴⁴ and
- the domestic violence legislation of most Australian jurisdictions provides for the registration and enforcement of an order made under the corresponding New Zealand legislation.¹⁴⁴⁵

1442 Estate duty under the *Estate and Gift Duties Act 1968* (NZ) is no longer payable in respect of the estate of a person who dies on or after 17 December 1992: *Estate Duty Abolition Act 1993* (NZ) s 3.

1443 The National Committee notes that this proposal may be subject to the ability of the Commonwealth of Australia to enter into treaties for the reciprocal recognition of grants.

1444 See *Foreign Judgments Act 1991* (Cth) ss 5(8)(d), 7(2)(a)(xi), (3)(a)(vi).

1445 *Domestic Violence and Protection Orders Act 2008* (ACT) ss 102 (definition of 'recognised order'), 103–105; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 94–97; *Domestic and Family Violence Act 2007* (NT) ss 4 (definitions of 'corresponding law', 'external order'), 92–97; *Domestic and Family Violence Protection Act 1989* (Qld) ss 40–44, sch dictionary (definition of 'interstate order'); *Summary Procedure Act 1921* (SA) ss 4 (definition of 'foreign restraining order'), 99H; *Summary Procedure (Restraining Orders) Regulations 2006* (SA) reg 5; *Justices Act 1959* (Tas) ss 106A(1) (definition of 'external restraint order'), 106B(1), 106GA–106GC; *Family Violence Protection Act 2008* (Vic) ss 4 (definitions of 'corresponding New Zealand order', 'corresponding New Zealand law'), 184–186; *Restraining Orders Act 1997* (WA) ss 3 (definitions of 'corresponding law', 'foreign restraining order'), 79A–79D.

RETENTION OF JURISDICTION TO MAKE A GRANT EVEN IF THE DECEASED DIED DOMICILED IN ANOTHER STATE OR TERRITORY

38.95 Because a grant made in the Australian jurisdiction in which the deceased died domiciled will, under the first stage of the proposed scheme, be recognised without needing to be resealed, it is anticipated that, if a deceased person has died domiciled in an Australian State or Territory, the grant will ordinarily be sought in that jurisdiction. The advantage of doing so is that, if assets are subsequently discovered in another State or Territory, there will be no need to obtain further authority to administer the assets in that jurisdiction.

38.96 However, the National Committee does not make any proposal to restrict the court's jurisdiction in relation to granting probate and letters of administration to the estates of those persons who died domiciled in the particular State or Territory. Where the only property to be administered is situated in an Australian State or Territory other than that in which the deceased died domiciled, it is not uncommon for a grant to be sought in the jurisdiction in which the property is situated, rather than in the State or Territory in which the deceased died domiciled. The court's jurisdiction to make a grant in these circumstances should remain unrestricted.

38.97 This is consistent with the position in the United Kingdom, where a grant may still be obtained in a part of the United Kingdom other than the part in which the deceased died domiciled.

38.98 Moreover, the court needs to retain the jurisdiction to make a grant in relation to the estate of a person who did not die domiciled in the jurisdiction in order to deal with the estates of persons who died domiciled overseas leaving property in Australia. It would seem anomalous to restrict the jurisdiction of the court so that, if a person died leaving property in the enacting jurisdiction, the Supreme Court of the enacting jurisdiction could make a grant of the deceased person's estate if the deceased died domiciled overseas, but not if the deceased died domiciled in another State or Territory.

THE MAKING OF A LIMITED GRANT IF THE DECEASED DIED DOMICILED IN ANOTHER STATE OR TERRITORY

Background

38.99 As noted earlier, it is still possible for a grant to be made in a part of the United Kingdom in which the deceased did not die domiciled. However, it is no longer possible to have such a grant resealed in another part of the United Kingdom.¹⁴⁴⁶ When a grant is made in these circumstances, it is the court's

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See [37.18]–[37.19] above.

practice to make a grant limited in two respects:¹⁴⁴⁷

- The grant is limited to the deceased's estate in the place of grant.
- To avoid the possibility of dual grants, the grant is also limited to operate until a grant is made in the place of domicile.

38.100 The first of the two limitations seems to be declaratory of the general law in relation to the effect of a grant — namely, that a grant does not give the personal representative power to deal with assets outside the jurisdiction in which the grant is made.

38.101 It is the second limitation that is significant. As it will still be possible under the National Committee's proposed scheme to apply for a grant in a State or Territory other than that in which the deceased died domiciled,¹⁴⁴⁸ there is an issue as to whether a grant that is made in these circumstances should be a limited grant, as is the case in the United Kingdom, or whether it should be unlimited in nature and capable of being resealed in another State or Territory.

38.102 If a grant were initially made in a State or Territory other than that in which the deceased died domiciled, and it later became apparent that it would be necessary to administer property in another Australian jurisdiction, the personal representative would have two options, if resealing of the first grant were not possible. He or she could apply for a grant in the jurisdiction in which the deceased died domiciled (as such a grant would then be effective throughout Australia). Alternatively, the personal representative could apply for a grant in the jurisdiction in which authority to administer the estate was required (assuming that this jurisdiction was not the same as the jurisdiction in which the deceased died domiciled). In either case, it would be necessary for the personal representative to apply for a second original grant.

Recommendation of the Law Reform Commission of Western Australia

38.103 The Law Reform Commission of Western Australia recommended that 'it should remain possible for Australian grants other than those made by the court of the deceased's domicile to be resealed'.¹⁴⁴⁹

38.104 This recommendation was a departure from the legislation in the United Kingdom on which the Western Australian Commission had generally based its recommendations for automatic recognition. The Commission expressed the view that 'in Australia resealing would operate more satisfactorily than a system

¹⁴⁴⁷ Practice Direction (Probate Grants: Sureties) [1971] 1 WLR 1790. See also JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [12.23].

¹⁴⁴⁸ See [38.95]–[38.98] above.

¹⁴⁴⁹ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.17].

of limited grants'.¹⁴⁵⁰ It pointed out that it 'is common practice for persons living close to some State borders to use professional advisers and appoint executors resident in an adjacent State'.¹⁴⁵¹ It suggested that this was particularly the case with persons domiciled in New South Wales who live close to the South Australian border,¹⁴⁵² such as Broken Hill residents, who are often advised by solicitors and trustee companies in Adelaide and appoint them as executors.¹⁴⁵³

38.105 The Law Reform Commission of Western Australia explained how, at present, a personal representative may obtain a grant in the place where the will has been made and the executor resides (South Australia in the above example), and then apply to have the grant resealed in the State where the assets are situated (New South Wales). This may involve the appointment of an attorney in New South Wales, but solicitors and trustee companies have regular agents or related companies for this purpose.¹⁴⁵⁴

38.106 The Law Reform Commission of Western Australia acknowledged that, under a scheme of automatic recognition, it would of course be possible in such a case to obtain an original grant in New South Wales (as the jurisdiction in which the deceased died domiciled) that would be effective, without being resealed, in every other Australian jurisdiction. However, it observed that, if resealing within Australia were to be abolished, the personal representative would usually have to obtain a grant in the domicile, whether or not he or she obtained a grant in any other jurisdiction.¹⁴⁵⁵

38.107 The Law Reform Commission of Western Australia considered that, in the above situation, it might be more convenient to retain the system whereby the personal representative is able to obtain a grant in the jurisdiction in which he or she resides and then apply to have the grant resealed in the jurisdiction in which the deceased died domiciled. It noted that this advantage would be lost if resealing were abolished in relation to grants made by the court of an Australian State or Territory.¹⁴⁵⁶

Discussion Paper

38.108 In the Discussion Paper on the recognition of interstate and foreign grants, it was suggested that, if automatic recognition were introduced for

1450 Ibid [7.14].

1451 Ibid [7.15].

1452 Ibid.

1453 Similarly, persons resident in northern New South Wales may use Brisbane executors, and persons resident near the ACT may use Canberra executors: Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.15].

1454 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.15].

1455 Ibid [7.16].

1456 Ibid.

Australian grants made in the deceased's domicile, it was likely that, in the ordinary course, application would be made for a grant in the jurisdiction in which the deceased died domiciled and there would rarely be any need to apply for the resealing of a grant made in another Australian State or Territory.¹⁴⁵⁷

38.109 In those cases where a grant was initially obtained in a State or Territory other than that in which the deceased died domiciled, the retention of resealing for Australian grants would mean that, if it subsequently became necessary to administer the estate of the deceased in another State or Territory, the grant could be resealed in the jurisdiction in question, and it would not be necessary to apply for a second original grant.¹⁴⁵⁸

38.110 Consequently, the preliminary view expressed in the Discussion Paper was that it should continue to be possible to have an Australian grant resealed in another State or Territory.¹⁴⁵⁹

Submissions

38.111 The Victorian Bar and the New South Wales Bar Association both agreed with the preliminary view expressed in the Discussion Paper.¹⁴⁶⁰

38.112 However, the former Principal Registrar of the Supreme Court of Queensland and the Public Trustee of New South Wales favoured the approach that applies in the United Kingdom.¹⁴⁶¹ Both respondents were of the view that, if automatic recognition were restricted to Australian grants made in the jurisdiction in which the deceased died domiciled, it should not be possible for a grant made in another Australian jurisdiction to be resealed. Instead, any grant made in an Australian jurisdiction in which the deceased did not die domiciled should be limited to operate only until a grant was made in the Australian jurisdiction in which the deceased died domiciled.¹⁴⁶² The Public Trustee of New South Wales suggested that this approach would avoid having multiple grants in force at the one time.¹⁴⁶³

38.113 Although the Trustee Corporations Association of Australia was of the view that all Australian grants should be effective throughout Australia,¹⁴⁶⁴ the Association suggested that resealing of Australian grants might be required 'for

1457 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 41.

1458 *Ibid.*

1459 *Ibid.* See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.17].

1460 Submissions R4, R5.

1461 Submissions R1, R2.

1462 *Ibid.*

1463 Submission R2.

1464 See [38.31] above.

unusual circumstances', referring to grants made for special, limited or temporary purposes.¹⁴⁶⁵

The National Committee's view

Stage one

Limited grant if the deceased died domiciled in another State or Territory or if the court does not make a finding about the deceased's domicile

38.114 In the National Committee's view, it is important that the proposed scheme avoids the possibility that there could be two grants that are both effective in the enacting jurisdiction. Accordingly, the model legislation should ensure that if, in making a grant of a deceased person's estate, the Supreme Court of the enacting jurisdiction:

- is satisfied that the deceased died domiciled in another State or Territory,¹⁴⁶⁶ or
- does not make a finding about where the deceased died domiciled;¹⁴⁶⁷

it must make a limited grant that operates only until a grant is made in the State or Territory in which the deceased died domiciled.¹⁴⁶⁸ To indicate the limited nature of the grant, the model legislation should provide that, if the Supreme Court of the enacting jurisdiction makes a grant in either of these circumstances, it must endorse the grant to the effect that it ceases to have effect if a grant of the deceased's estate is subsequently made in another State or Territory and is endorsed by the court making it to the effect that the deceased died domiciled in that State or Territory.

38.115 This approach is consistent with the scheme that applies in the United Kingdom, but is a departure from the scheme proposed by the Law Reform Commission of Western Australia. The attraction of the United Kingdom practice of making a limited grant if the deceased did not die domiciled in the part of the United Kingdom in which the grant is made, is that the situation does not arise where there are two grants that are both operative in the one jurisdiction at the same time.

1465 Submission R6.

1466 In this situation, it is possible that an application for a grant will later be made in the State or Territory in which the deceased died domiciled. That grant, if endorsed to the effect that the deceased died domiciled in that jurisdiction, will be effective in all States and Territories that have implemented stage one of the proposed scheme.

1467 In this situation, it is possible that, although the Supreme Court does not make a finding about where the deceased died domiciled, the deceased did in fact die domiciled in another State or Territory, and that an application for a grant will later be made in the other State or Territory. That grant, if endorsed to the effect that the deceased died domiciled in that jurisdiction, will be effective in all States and Territories that have implemented stage one of the proposed scheme.

1468 It is not necessary for the grant to be limited to property in the particular jurisdiction, as that is a limitation inherent in any grant.

38.116 Under the National Committee's proposed scheme, a grant made in the State or Territory in which the deceased died domiciled will take effect in the enacting jurisdiction as if it had been originally granted by the Supreme Court of the enacting jurisdiction. Accordingly, once a grant is made that is effective in all States and Territories that have enacted stage one of the proposed scheme, it will have the effect of vesting in the personal representative the real and personal property of the deceased in all those jurisdictions. If the model legislation did not provide for the grant made in the enacting jurisdiction to cease when a grant is made in the jurisdiction in which the deceased died domiciled, the question would arise as to the relationship between the two grants — that is, whether the subsequent grant in the domicile vested *all* property in the personal representative appointed under it, or whether it vested all property other than that which had previously vested in the personal representative appointed under the grant made in the enacting jurisdiction. The National Committee's proposal avoids this situation.

Effect of an endorsed interstate grant on a local limited grant, an election to administer or a resealed grant

38.117 Earlier in this chapter, the National Committee has proposed that, if a grant is made in another State or Territory in relation to the estate of a deceased person (the 'interstate grant') and is endorsed by the court making it to the effect that the deceased died domiciled in that jurisdiction, the interstate grant is to have the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction.¹⁴⁶⁹ This raises the issue of what should happen to any instruments that may already have effect in the enacting jurisdiction in relation to the estate of the deceased person.

38.118 To avoid having two instruments effective in the enacting jurisdiction (the local limited grant and the endorsed interstate grant), the model legislation should provide that, on the endorsing of the interstate grant, a limited grant made by the Supreme Court of the enacting jurisdiction in relation to the deceased person's estate ceases to have effect.

38.119 Further, because the term 'grant', for the purpose of the proposed automatic recognition scheme, does not include an election to administer the estate of a deceased person,¹⁴⁷⁰ the model legislation should also provide that, on the endorsing of the interstate grant, an election to administer the deceased person's estate that was previously filed in the Supreme Court of the enacting jurisdiction by a professional administrator ceases to have effect.

¹⁴⁶⁹ See [38.45]–[38.47], [38.75] above and Recommendation 38-3 below.

¹⁴⁷⁰ See [38.61]–[38.64] above and Recommendation 38-4 below.

38.120 Finally, it may be that an interstate or overseas grant¹⁴⁷¹ in relation to the estate of the deceased person has been resealed in the enacting jurisdiction. Because a resealed grant has the same force, effect and operation in the enacting jurisdiction as if it were an original grant made in the enacting jurisdiction, the model legislation should also provide that, on the endorsing of the interstate grant, the resealed grant ceases to have effect.

No resealing of an Australian grant if the deceased died domiciled in another State or Territory

38.121 Although it is possible for a limited grant to be resealed, on the resealing of the grant, the limitation imposed in the jurisdiction in which the grant was originally made operates in the resealing jurisdiction.¹⁴⁷² The above proposal means that a limited grant made in a State or Territory other than that in which a deceased person died domiciled will cease if and when a grant is made in the State or Territory in which the deceased died domiciled. As a grant that has been resealed takes effect as if it were an original grant made in the jurisdiction in which it is resealed, the National Committee considers it inconsistent for a grant that is limited in this way to be capable of being resealed in the State or Territory in which the deceased died domiciled. This is because, on being resealed, the very grant on which the resealing is founded ceases to have effect. The National Committee is therefore of the view that such a limited grant should not be capable of being resealed in the State or Territory in which the deceased died domiciled. For consistency, it should not be possible for such a limited grant to be resealed in any other State or Territory.

38.122 The National Committee is conscious that, if a grant has been obtained in a State or Territory other than that in which the deceased died domiciled, and property is subsequently discovered in another Australian jurisdiction, it will be necessary for an original grant to be sought in the latter jurisdiction. However, the National Committee considers that the practice referred to by the Law Reform Commission of Western Australia of seeking a grant in a State or Territory other than that in which the deceased died domiciled with the intention of having the grant resealed in the State or Territory in which the deceased died domiciled¹⁴⁷³ is an undesirable one, and should not be possible under the proposed scheme. As the purpose of the scheme is to enable a single grant to be effective throughout Australia, the scheme should not facilitate the making of two applications (one for an original grant and one for the resealing of that grant) when one would suffice. Neither the additional expense of making a resealing application in these circumstances nor the court time in dealing with the resealing application can be justified.

1471 In this context, 'grant' is used to refer to any instrument that may be resealed under the National Committee's recommendations: see Chapter 31 of this Report.

1472 *Re Bedford* [1902] QWN 63.

1473 See [38.105]–[38.107] above.

38.123 The fact that it will not be possible to apply for the resealing of a grant made in a State or Territory other than that in which the deceased died domiciled should operate as an incentive for a personal representative to seek a grant in the jurisdiction of domicile, unless it is quite clear that there will be no property to be administered in any other Australian jurisdiction.¹⁴⁷⁴

Resealing of an Australian grant if the deceased died domiciled overseas

38.124 The above discussion concerns the situation where the deceased has died domiciled in an Australian State or Territory. The question arises, however, as to whether the same or different principles should apply if a person has died domiciled overseas, leaving property in more than one Australian jurisdiction. For example, a person might die domiciled in New Zealand, leaving property in Queensland and New South Wales.

38.125 When stage two of the National Committee's proposed scheme is implemented, a grant obtained in Queensland will be effective in New South Wales, regardless of whether the deceased died domiciled in Queensland, in another Australian jurisdiction, or overseas. However, under stage one of the proposed scheme it will not be possible for the personal representative of a person who has died domiciled overseas to obtain a grant in an Australian jurisdiction that will automatically be effective in the other Australian jurisdictions.¹⁴⁷⁵ If the model legislation does not enable a grant obtained in one Australian jurisdiction to be resealed in another Australian jurisdiction where the deceased has died domiciled overseas, it will be necessary for a fresh grant to be obtained in every Australian jurisdiction in which the deceased left property.

38.126 Further, this situation does not present any difficulty with conflicting grants, as each grant will give the authority to administer the property of the deceased only in the jurisdiction in which the grant is made.

38.127 For these reasons, the National Committee considers that a different regime is justified where the deceased died domiciled overseas. Accordingly, a grant made in one Australian jurisdiction in relation to the estate of a person who died domiciled overseas should be able to be resealed in another Australian jurisdiction.

1474 Note, however, that as the automatic recognition scheme does not apply to interstate elections to administer, it is not necessary to provide that an interstate election to administer can be resealed only if the deceased died domiciled overseas.

1475 See [38.84]–[38.92] above and the National Committee's proposal at [38.90] to restrict automatic recognition to Australian grants.

Stage two

Limited grant if the deceased died domiciled in another State or Territory or if the court does not make a finding about the deceased's domicile

38.128 As mentioned previously, the National Committee is conscious that the States and Territories will not necessarily implement stage two of the proposed scheme at the same time. It has therefore considered whether, under stage two of the proposed scheme, the model legislation should continue to provide that a grant made by the enacting jurisdiction is to be limited to operate until a grant is made in the State or Territory in which the deceased died domiciled.

38.129 In the absence of such a requirement, it is possible for the situation to arise where more than one grant is effective in the same State or Territory. Suppose, for example, that when South Australia enacts stage two of the proposed scheme, some States and Territories have also enacted stage two, while others have only enacted stage one. If the Supreme Court of South Australia makes a grant in relation to the estate of a person who died domiciled in a jurisdiction that has only enacted stage one, there is a risk that, if a grant is later made in the jurisdiction of domicile (which may be necessary if assets are subsequently discovered in that jurisdiction), that grant and the South Australian grant will both be effective in those States and Territories that have enacted stage two of the proposed scheme.

38.130 Accordingly, the model legislation should continue to provide that if, in making a grant of a deceased person's estate, the Supreme Court of the enacting jurisdiction:

- is satisfied that the deceased died domiciled in another State or Territory;
or
- does not make a finding about where the deceased died domiciled;

the grant should be limited in time, and must be endorsed to the effect that it ceases to have effect if a grant of the deceased's estate is made in another State or Territory and is endorsed by the court making it to the effect that the deceased died domiciled in that State or Territory.

38.131 Further, the model legislation should continue to provide that the limited grant made in the enacting jurisdiction ceases to have effect if a grant is subsequently made in another State or Territory and is endorsed by the court making it to the effect that the deceased died domiciled in that other State or Territory.

38.132 If such a limited grant is made by the enacting jurisdiction, the grant will be effective in those States and Territories that have enacted stage two of the proposed scheme, but will cease to be effective in those jurisdictions if a grant is subsequently made in the State or Territory in which the deceased died domiciled. In that event, the grant made in the State or Territory of domicile,

rather than the limited grant made in the enacting jurisdiction, will be the grant recognised in those States and Territories that have enacted stage two of the proposed scheme.

38.133 In addition, to avoid the possibility of having two instruments that are both effective in the enacting jurisdiction, it will be necessary for the model legislation to provide that:

- an election to administer a deceased person's estate that was previously filed in the enacting jurisdiction; and
- a grant that was previously resealed in the enacting jurisdiction;

cease to have effect if a grant of the deceased person's estate is subsequently made in any other State or Territory (whether or not the deceased died domiciled in that jurisdiction).

No resealing of any Australian grants

38.134 Under stage two of the proposed scheme, a grant made in any State or Territory will be effective in the enacting jurisdiction, regardless of whether the deceased died in that jurisdiction, in another Australian State or Territory, or overseas. As a result, there will no longer be any need for an application to be made for the resealing of an Australian grant. The model legislation should therefore be amended to omit the provisions that specify which Australian grants may be resealed.

Implementation of stage two by all States and Territories

38.135 When all States and Territories have implemented stage two of the proposed scheme, the model legislation can be amended to omit the provision that a grant made in the enacting jurisdiction in relation to the estate of a person who died domiciled in another State or Territory is to operate only until a grant is made in the Australian jurisdiction in which the deceased died domiciled.

38.136 However, the model legislation should continue to provide that an election to administer the estate of a deceased person that is filed in the enacting jurisdiction ceases to have effect if a grant of the deceased's estate is subsequently made in any State or Territory. It should also continue to provide that a grant previously resealed in the enacting jurisdiction ceases to have effect in those circumstances.

PROTECTION FOR PERSONAL REPRESENTATIVE WHOSE LIMITED GRANT HAS CEASED TO HAVE EFFECT

Background

38.137 As explained earlier, under stage one, a grant made in an Australian jurisdiction other than that in which the deceased died domiciled is to be a limited grant, which ceases if a grant is subsequently made in another Australian jurisdiction (the 'interstate grant') and is endorsed to the effect that the deceased died domiciled in the interstate jurisdiction.

38.138 In most situations where a limited grant has been made under the provision giving effect to this proposal, and it later becomes necessary to obtain a grant in the jurisdiction in which the deceased died domiciled, the person who obtains the grant in the domicile will be same person to whom the limited grant was previously made. This is the effect of the similar requirements of the States and Territories concerning the execution requirements for wills¹⁴⁷⁶ and of the National Committee's recommendations in this Report for model provisions prescribing the order of priority for letters of administration.¹⁴⁷⁷

38.139 However, it is possible under the National Committee's proposals that, in rare circumstances, a limited grant could cease to have effect because a grant was made to another person in the State or Territory in which the deceased died domiciled. This raises an issue about the extent to which the personal representative who was appointed under the limited grant should be protected if he or she purports to act in the administration of the estate, without knowledge that the limited grant has ceased to have effect.

The National Committee's view

38.140 In the National Committee's view, the model legislation should protect the personal representative in respect of two types of potential liability.

38.141 First, the model legislation should provide that the personal representative whose limited grant has ceased to have effect may retain from the estate and reimburse himself or herself for an amount equivalent to the amount of payments made by him or her that the personal representative appointed under the endorsed interstate grant might properly have made.¹⁴⁷⁸

38.142 Secondly, the model legislation should provide that the personal representative whose limited grant has ceased to have effect is not liable for any legacy paid or asset distributed in good faith and without negligence in

1476 See [39.10]–[39.17] below.

1477 See Chapter 5 of this Report.

1478 This protection is similar to that provided by cl 369(2) of the Administration of Estates Bill 2009 to a personal representative whose grant is subsequently revoked.

reliance on the grant, despite the fact that the grant had ceased to have effect when the payment or distribution was made.¹⁴⁷⁹

38.143 The National Committee considered, but decided against, protecting the personal representative in respect of a disposition of an interest in property made to a purchaser in good faith after the limited grant had ceased to have effect. The difficulty with protecting the personal representative in this situation is that the personal representative to whom the subsequent endorsed interstate grant is made (and in whom all the deceased's property is vested) may also have made a disposition of the same property.

38.144 In the National Committee's view, it would not be appropriate to protect the personal representative under the limited grant at the expense of either the personal representative under the endorsed interstate grant or a purchaser to whom the personal representative under the endorsed interstate grant disposed of the property. Such a proposal would significantly undermine the value of the grant made in the deceased's domicile.

38.145 The only other way in which the personal representative under the limited grant could be protected in respect of the disposition of an interest in property would be for the purchaser of that interest to bear any loss. However, as between the personal representative under the limited grant and the purchaser, the National Committee considers it more appropriate for the personal representative to bear the loss. He or she is better placed than the purchaser to ensure that no further grant has been made before disposing of the relevant interest. Further, if he or she wishes to avoid this risk altogether, the simplest solution is to apply for a grant in the State or Territory in which the deceased died domiciled.

38.146 The National Committee has also proposed above that an election to administer filed in the enacting jurisdiction and a resealed grant should cease to have effect if an interstate grant is made and endorsed by the court making it to the effect that the deceased died domiciled in the interstate jurisdiction (under stage one) or if a grant is made in any State or Territory (under stage two).¹⁴⁸⁰ The protection proposed above for a personal representative whose limited grant has ceased should apply, with appropriate modifications, to a person whose election to administer or resealed grant¹⁴⁸¹ has ceased to have effect in these circumstances.

1479 This protection is similar to that provided by cl 369(3) of the Administration of Estates Bill 2009 to a personal representative whose grant is subsequently revoked.

1480 See [38.119]–[38.120], [38.133] above.

1481 In this context, 'grant' is used to refer to any instrument that may be resealed under the National Committee's recommendations: see Chapter 31 above.

APPLICATION OF THE PROPOSED SCHEME TO GRANTS THAT HAVE BEEN RESEALED IN AN AUSTRALIAN JURISDICTION

Recommendation of the Law Reform Commission of Western Australia

38.147 Under the main recommendations of the Law Reform Commission of Western Australia, a grant made by an Australian jurisdiction other than that in which the deceased died domiciled, and all overseas grants, would continue to require resealing to be effective within a particular State or Territory.¹⁴⁸² However, the Western Australian Commission further recommended that, if a grant (whether made in Australia or overseas) was resealed by the court of the Australian State or Territory in which the deceased died domiciled, 'that grant, when resealed, should be automatically recognised as effective throughout Australia in the same way as an original grant made by' that court.¹⁴⁸³

38.148 The Western Australian Commission noted that, although this recommendation went beyond the United Kingdom scheme that was being used as a model,¹⁴⁸⁴ it was:¹⁴⁸⁵

consistent with the fundamental objective of that scheme, which is to allow the court of the domicile to have a decisive say in whether a grant should be issued.

Discussion Paper

38.149 The preliminary view expressed in the Discussion Paper on the recognition of interstate and foreign grants was that the proposal that automatic recognition be given to a grant (whether made in Australia or overseas) that was resealed by the court of the Australian State or Territory in which the deceased died domiciled did not constitute an essential part of the automatic recognition scheme. However, it was suggested that there did not seem to be any fundamental objection to the proposal.¹⁴⁸⁶

38.150 The National Committee sought submissions on whether a grant that has been resealed by the court of the Australian jurisdiction in which the

1482 See [38.13], [38.84]–[38.85] above.

1483 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.3] Recommendation (23).

1484 Under the United Kingdom scheme, automatic recognition applies only to original grants made within the United Kingdom. See [37.15]–[37.18] above.

1485 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.19].

1486 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 45. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.23].

deceased died domiciled should be automatically recognised in all Australian jurisdictions.¹⁴⁸⁷

Submissions

38.151 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar and the New South Wales Bar Association all agreed that, if a grant was resealed in the Australian jurisdiction in which the deceased died domiciled, the grant should be automatically recognised throughout Australia.¹⁴⁸⁸

38.152 In contrast, the Trustee Corporations Association of Australia was of the view that, once an overseas grant is resealed by any Australian court, the grant should be automatically recognised throughout Australia.¹⁴⁸⁹ This view is consistent with the Association's support for the automatic recognition of all Australian grants, regardless of the jurisdiction in which the grant is made.¹⁴⁹⁰

The National Committee's view

38.153 The recommendation made by the Law Reform Commission of Western Australia and the preliminary view expressed in the Discussion Paper were both premised on the assumption that it would be possible for a grant made in an Australian jurisdiction other than that in which the deceased died domiciled to be resealed.

38.154 However, the National Committee has proposed earlier in this chapter that, if a person dies domiciled in an Australian State or Territory, it should not be possible for a grant made in another State or Territory to be resealed in any other State or Territory (whether in the State or Territory in which the deceased died domiciled or in any other State or Territory).¹⁴⁹¹ Accordingly, the effect of resealing in the Australian jurisdiction in which the deceased died domiciled does not arise.

STAGE TWO: NOTICE OF INTENTION TO APPLY FOR A GRANT AND OF GRANTS MADE

38.155 It is fundamental to the feasibility of stage two of the proposed scheme that it should be relatively easy to ascertain when an application has been made for a grant in a particular jurisdiction and when a grant has actually been made.

¹⁴⁸⁷ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 46. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 29 (Issue 3).

¹⁴⁸⁸ Submissions R1, R2, R4, R5.

¹⁴⁸⁹ Submission R6.

¹⁴⁹⁰ See [38.31] above.

¹⁴⁹¹ See [38.121]–[38.123] above.

This is essential in order to avoid the situation where more than one grant is operative throughout Australia at any one time.¹⁴⁹²

Recommendation of the Law Reform Commission of Western Australia

38.156 In its Report, the Law Reform Commission of Western Australia noted that resealing created 'a public record of the grant in the place of recognition', so that 'interested parties have information as to the legal position of a particular estate'.¹⁴⁹³ It suggested that, under a scheme of automatic recognition, it would still be possible to have a system whereby the making of a grant, and any revocation or alteration of its terms, could be notified to other jurisdictions. It pointed out, however, that the United Kingdom scheme did not have such a system, and that it has never been suggested that the lack of a notification procedure is a problem.¹⁴⁹⁴

38.157 The recommendation of the Law Reform Commission of Western Australia was that it was 'not necessary, as part of the proposed system of automatic recognition, for the court of the State or Territory of domicile, having made an original grant, to notify the courts of the other States and Territories'.¹⁴⁹⁵ In its view:¹⁴⁹⁶

The slight disadvantage of having to address enquiries to the court of grant rather than the local Supreme Court is not felt to be sufficient to warrant the expense and inconvenience of insisting upon such a proposal.

38.158 This view was, however, based on the assumption that only one court — the court of the Australian jurisdiction in which the deceased died domiciled — would be able to make a grant that would be recognised throughout Australia.

Probate Registrars

38.159 In 1990, when this issue was considered by the Probate Registrars, they formed the view that a national register for grants and caveats would be essential for the proper administration of the proposed scheme of automatic recognition:¹⁴⁹⁷

1492 The National Committee has proposed that, under stage one of the scheme, a grant made in an Australian jurisdiction other than that in which the deceased died domiciled will cease to have effect if a grant is subsequently made in the Australian jurisdiction in which the deceased died domiciled: see [38.114]–[38.115] above.

1493 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.36].

1494 Ibid.

1495 Ibid [11.3] Recommendation (29). See also at [7.36].

1496 Ibid.

1497 *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 16.

The establishment of such a register with a computer link-up in each of the States and Territories could only be achieved at considerable cost which in view of the small number of reseals could not be considered justified.

Discussion Paper

38.160 The preliminary view expressed in the Discussion Paper on the recognition of interstate and foreign grants was that, if a system for the notification of grants was considered to be a necessary requirement for the proposed scheme of automatic recognition, compliance with that requirement should be much easier than it would have been in 1984 when the Law Reform Commission of Western Australia considered the matter. Details of grants and other relevant information could be entered on a computer database available to all Australian State and Territory Supreme Courts. It was acknowledged, however, that there would be a financial outlay involved, and it would be necessary for the States and Territories to agree on who should be responsible for maintaining the integrity of the database.¹⁴⁹⁸

38.161 Alternatively, it was suggested that it might be possible to implement a system of notification that would avoid the need to establish a national register of grants. Such a system would involve two aspects.

38.162 First, where an application was made for a grant in an Australian jurisdiction in which the deceased did not die domiciled, the applicant would have to satisfy the court that a grant had not already been made in the jurisdiction in which the deceased died domiciled.¹⁴⁹⁹

38.163 Secondly, where such an application was granted, the court would have to inform the court of the jurisdiction in which the deceased died domiciled that a grant had been made in another jurisdiction.¹⁵⁰⁰ The effect of the latter requirement would be that, if a grant were subsequently sought in the jurisdiction in which the deceased died domiciled, the court in that jurisdiction would be aware that a grant had already been made elsewhere in Australia.

38.164 The National Committee sought submissions on whether a national database for grants or a less formal system for the notification of grants, as discussed above, was a necessary requirement for the implementation of the proposed scheme of automatic recognition.¹⁵⁰¹

1498 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 50. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.36]–[4.37].

1499 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 40.

1500 *Ibid* 50–1.

1501 *Ibid* 51. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 33 (Issue 6).

Submissions

38.165 The former Principal Registrar of the Supreme Court of Queensland was of the view that neither a national database nor a system for the notification of grants was required.¹⁵⁰² He stated that it was proposed in the coming years to make all Queensland grants available through the Supreme Court's website.¹⁵⁰³

38.166 The Public Trustee of New South Wales commented that the cost and problem of obtaining cooperation for a national database of grants would be difficult to resolve. In his view, the more limited requirement of notification to the jurisdiction of domicile was more realistic.¹⁵⁰⁴

38.167 The Queensland Law Society, on the other hand, favoured a national database of grants, reseals and caveats, although it did acknowledge that there could be difficulties in relation to who would operate and maintain the register, and bear the costs associated with it.¹⁵⁰⁵

38.168 The Victorian Bar also favoured a national database of grants, on the basis that it would minimise the scope for error and confusion that could arise in cases where there was doubt as to the jurisdiction in which the deceased died domiciled.¹⁵⁰⁶ However, it did not consider such a database to be essential.¹⁵⁰⁷

38.169 The Trustee Corporations Association of Australia also expressed support for a national database of grants, caveats and reseals, suggesting that 'with goodwill, regional obstacles should be able to be overcome'.¹⁵⁰⁸

The National Committee's view

38.170 In the National Committee's view, it is essential that it should be possible to ascertain whether a grant has already been sought or made in a particular jurisdiction. However, the National Committee does not consider it necessary to establish a national database of grants or a system of notifications as proposed in the Discussion Paper. Given the relatively small number of grants that are presently resealed in Australian jurisdictions each year and the even smaller number that are Australian grants (and therefore capable of being recognised under stage two of the National Committee's proposed scheme),¹⁵⁰⁹

1502 Submission R1.

1503 Ibid. See [38.173] below for a discussion of the functionality of the Supreme Court of Queensland's website.

1504 Submission R2.

1505 Submission R3.

1506 Submission R4.

1507 Ibid.

1508 Submission R6.

1509 See [37.7]–[37.9] above.

it would be difficult to justify the resources that would be involved in the establishment of a full national database.

38.171 The National Committee considers that much more modest developments in terms of the notification of applications and grants made will meet the requirements for stage two of the proposed scheme.

38.172 As mentioned earlier in this Report, the Supreme Court of Victoria now provides for notice of intention to apply for a grant to be given on the court website.¹⁵¹⁰

38.173 Further, as foreshadowed in the submission made by the former Principal Registrar of the Supreme Court of Queensland,¹⁵¹¹ the Supreme Court of Queensland has a searchable facility on its website that provides details of all grants of probate, letters of administration, and orders to administer made, as well as details of elections to administer that have been filed (although not the text of these various instruments).¹⁵¹² These details can be searched by reference to the name of the deceased. As the data that is available through the Supreme Court of Queensland website is updated in real time, it is likely to be more up to date than information that has to be entered into a national database or forwarded to the responsible person for entry into that database.

38.174 The development of similar, but extended, facilities by the Supreme Courts of all States and Territories would provide a reliable means of searching whether a grant had been sought or made in a particular jurisdiction, and whether a caveat against the making of a grant had been filed. The websites would also need to provide the text of the documents filed. The National Committee notes that the Federal Court of Australia already has this technology in place and that the Federal Court's 'eCourt' presently makes some orders available in full text.¹⁵¹³

1510 See [8.10]–[8.16] in vol 1 of this Report.

1511 See [38.165] above.

1512 See <<http://www.courts.qld.gov.au/esearching/party.asp>> at 21 February 2009. Searches may be made under 'Ecclesiastical', 'Order to Administer/Election' or 'Originating Application (Supreme Court)'.

1513 See <<http://www.comcourts.gov.au/public/esearch>> at 21 February 2009.

IMPACT OF THE PROPOSED SCHEME FOR THE AUTOMATIC RECOGNITION OF GRANTS ON VARIOUS ASPECTS OF PROBATE PRACTICE

Notice of intention to apply for a grant or for the resealing of a grant

Background

38.175 In all jurisdictions except South Australia and Western Australia, a person who intends to apply for a grant must publish a notice to that effect in accordance with the requirements of the particular jurisdiction.¹⁵¹⁴

38.176 In the ACT, New South Wales, the Northern Territory, Tasmania and Victoria, a person who intends to apply for the resealing of a grant of probate or letters of administration must publish a notice advising of that intention.¹⁵¹⁵ In Queensland and South Australia, on the other hand, no advertisement is necessary unless required by the registrar.¹⁵¹⁶ In Western Australia, there is no requirement to advertise.¹⁵¹⁷

38.177 In Chapter 8 of this Report, the National Committee has recommended that the model legislation should not include specific requirements for publishing a notice of a person's intention to apply for an original grant or for the resealing of a grant.¹⁵¹⁸ It recommended instead that any specific requirements about such notices should be contained in the court rules of the individual jurisdictions.¹⁵¹⁹

Discussion Paper

38.178 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee noted that the Law Reform Commission of Western Australia, in considering a scheme for the automatic recognition of grants, had suggested that advertising:¹⁵²⁰

is often ineffective and causes undue expense and delay without providing sufficient compensating advantages to beneficiaries, creditors or anyone else.

¹⁵¹⁴ See [8.1]–[8.12] in vol 1 of this Report.

¹⁵¹⁵ See [8.27]–[8.29] in vol 1 of this Report.

¹⁵¹⁶ See [8.30]–[8.31] in vol 1 of this Report.

¹⁵¹⁷ See [8.32] in vol 1 of this Report.

¹⁵¹⁸ See Recommendation 8-1 in vol 1 of this Report.

¹⁵¹⁹ See Recommendation 8-2 in vol 1 of this Report.

¹⁵²⁰ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 137, referring to Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.29].

38.179 It was further noted that the Western Australian Commission was of the view that a uniform rule on advertising was not essential for the proposed scheme, and that each jurisdiction could continue its own practices.¹⁵²¹

38.180 The National Committee sought submissions on whether uniform advertising requirements were essential for the implementation of the proposed scheme of automatic recognition or whether each jurisdiction could continue to apply its own practices.¹⁵²²

Submissions

38.181 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales and the Victorian Bar did not consider uniform advertising requirements to be necessary for the proposed scheme of automatic recognition.¹⁵²³ The former Principal Registrar of the Supreme Court of Queensland and the Public Trustee of New South Wales both expressed the view that the requirements in relation to advertising should be left to each jurisdiction to decide.¹⁵²⁴

38.182 In contrast, the Trustee Corporations Association of Australia considered that uniformity in relation to advertising was 'highly desirable' and that '[w]ith good will, there seems no reason why this cannot be achieved'.¹⁵²⁵

The National Committee's view

38.183 Under stage one of the proposed scheme, if a grant of a deceased person's estate is made in the State or Territory in which the deceased died domiciled, the grant will be effective in the enacting jurisdiction without being resealed. Accordingly, it will not be necessary or possible to give notice in the enacting jurisdiction of intention to apply for a grant of the deceased's estate in that jurisdiction, or of intention to apply for the resealing of the interstate grant. It will therefore be necessary for an interested person to monitor notices given in the State or Territory in which the deceased died domiciled. That would be the usual situation under the law as it presently stands.

38.184 The National Committee has acknowledged the importance, for stage two of the scheme, of the establishment in all Australian jurisdictions of a mechanism by which it can be ascertained whether an application for a grant is to be made in a particular jurisdiction. It has therefore proposed earlier that the

¹⁵²¹ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 54, referring to Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.29].

¹⁵²² *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 55. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 73 (Issue 33).

¹⁵²³ Submissions R1, R2, R4.

¹⁵²⁴ Submissions R1, R2.

¹⁵²⁵ Submission R6.

implementation of stage two of the scheme should be deferred until all States and Territories have a searchable facility on their Supreme Court website, so that it can be readily ascertained whether someone has given notice of his or her intention to apply for a grant in a particular jurisdiction.¹⁵²⁶

38.185 In view of the National Committee's proposals for a staged implementation of the automatic recognition scheme, it does not consider that uniform advertising requirements are essential to the implementation of the proposed scheme.

Caveats

Background

38.186 At present, it is possible in all jurisdictions to file a caveat against the making of an original grant, as well as against the resealing of a grant made in another jurisdiction.¹⁵²⁷

38.187 In Chapter 8 of this Report, the National Committee has recommended that the model legislation should enable a person, at any time before a grant is made, to file a caveat against the making of the grant. Similarly, it has recommended that the model legislation should enable a person, at any time before a grant is resealed, to file a caveat against the resealing of the grant.¹⁵²⁸

Discussion Paper

38.188 In the Discussion Paper on the recognition of interstate and foreign grants, it was observed that the Law Reform Commission of Western Australia had noted in its Report on automatic recognition that, in practice, caveats against resealing are rarely used, and that that Commission did not regard the loss of the opportunity to file a caveat against the resealing of a grant as a reason for not adopting a scheme of automatic recognition.¹⁵²⁹

38.189 The National Committee noted that, although a grant made in an Australian jurisdiction (or in the Australian jurisdiction in which the deceased died domiciled) would be effective in all other Australian jurisdictions, it would still be possible to file a caveat against the making of that original grant, as the Western Australian Commission had emphasised in its Report.¹⁵³⁰

1526 See [38.32]–[38.44] above.

1527 See [8.47]–[8.54], [8.70]–[8.75] in vol 1 of this Report.

1528 See Recommendations 8-3 and 8-4 in vol 1 of this Report.

1529 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 55, referring to Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.30]. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.43].

1530 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 55.

38.190 It was suggested, in the context of the proposal of a scheme for the automatic recognition of grants made in the Australian jurisdiction in which the deceased died domiciled, that a person wishing to file a caveat against the making of the original grant could do so in the jurisdiction of domicile prior to the making of the original grant.¹⁵³¹ It was further suggested that, in all but very exceptional cases, the domicile of the deceased would be likely to be readily apparent.¹⁵³²

38.191 Although the loss of the opportunity to file a caveat against the resealing of a grant was not regarded as an impediment to the proposed scheme of automatic recognition,¹⁵³³ the National Committee sought submissions on whether it was necessary for the implementation of the proposed scheme to establish a national register of grants and caveats or whether a person opposing the making of a grant could simply file a caveat in the court of the jurisdiction in which the deceased died domiciled.¹⁵³⁴

Submissions

38.192 The former Principal Registrar of the Supreme Court of Queensland, the Victorian Bar and the New South Wales Bar Association, all of whom favoured a scheme restricted to the recognition of grants made in the jurisdiction in which the deceased died domiciled,¹⁵³⁵ were of the view that a person opposing the making of a grant should simply file the caveat in the court of the jurisdiction in which the deceased died domiciled.¹⁵³⁶ The Public Trustee of New South Wales, who also favoured a limited scheme of automatic recognition,¹⁵³⁷ expressed the view that the cost of establishing a national register is not justified.¹⁵³⁸

38.193 However, the Queensland Law Society and the Trustee Corporations Association of Australia both supported the establishment of a national register for grants, reseals and caveats.¹⁵³⁹

1531 Ibid 55.

1532 Ibid 55–6. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.44].

1533 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 56. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [4.44].

1534 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 56. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 35.

1535 See [38.29] above.

1536 Submissions R1, R4, R5.

1537 See [38.29] above.

1538 Submission R2.

1539 Submissions R3, R6.

38.194 The Trustee Corporations Association of Australia commented that caveats should be filed in the jurisdiction in which the grant was made, and notified on the register.¹⁵⁴⁰

38.195 Although it supported a national register, the Queensland Law Society acknowledged that the establishment of a register could present some difficulties.¹⁵⁴¹

The difficulty may be who runs and maintains it and bears the cost.

38.196 The Trustee Corporations Association of Australia had a more optimistic view about the prospects of establishing a national register.¹⁵⁴²

With good will, there seems no reason why this should not be simple and cost effective.

The National Committee's view

38.197 Under stage one of the proposed scheme, if a grant of a deceased person's estate is made in the State or Territory in which the deceased died domiciled, and there is property to be administered in the enacting jurisdiction, the scheme will obviate the need for another grant to be sought, or for the first grant to be resealed, in the enacting jurisdiction. Accordingly, there will be no further opportunity for a person to file a caveat against the making, or resealing, of a grant of the deceased's estate in the enacting jurisdiction, as no new authority will be necessary to administer the deceased's estate in that jurisdiction. However, a person who wishes to oppose the making of the original grant may always file a caveat in the particular State or Territory in which the deceased died domiciled.

38.198 The National Committee acknowledges that a grant may not initially be sought in the State or Territory in which the deceased died domiciled, but in another Australian jurisdiction in which there is property to be administered. In those circumstances, a person who wishes to oppose the making of a grant in that jurisdiction may, as at present, file a caveat in that jurisdiction.

38.199 For stage two of the scheme, the National Committee has proposed earlier that a caveat filed in one Australian jurisdiction will operate as a caveat filed in every other Australian jurisdiction.¹⁵⁴³

1540 Submission R6.
1541 Submission R3.
1542 Submission R6.
1543 See [38.41] above.

Administration bonds and sureties

Background

38.200 At present, the legislation or court rules in most jurisdictions require, or enable the court to require, a person applying for letters of administration or a person granted letters of administration to provide some form of security for the due administration of the estate — whether by way of an administration bond, with or without sureties, or by way of an administration guarantee given by a surety.¹⁵⁴⁴

38.201 All jurisdictions also make provision for the court to require an administration bond or sureties, or other security, in respect of an application for the resealing of a grant.¹⁵⁴⁵

Discussion Paper

38.202 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee sought submissions on whether, if security were required on the making of an original grant, it should be based on the value of the assets in all Australian jurisdictions.¹⁵⁴⁶

Submissions

38.203 Only two submissions commented on this issue. The former Principal Registrar of the Supreme Court of Queensland was of the view that security should not be based on the value of the assets in all Australian jurisdictions.¹⁵⁴⁷ The Trustee Corporations Association of Australia, on the other hand, commented that, if security were required, it should be based on the value of all Australian assets.¹⁵⁴⁸

The National Committee's view

38.204 In Chapter 9 of this Report, the National Committee has recommended that the model legislation should provide that neither administration bonds nor sureties may be required of an administrator, and that neither administration bonds nor sureties (nor any other form of security) may be required of a person applying for the resealing of a grant.¹⁵⁴⁹

1544 See [9.10]–[9.29] in vol 1 of this Report. As explained at [9.30], s 51 of the *Succession Act 1981* (Qld) provides that neither an administration bond nor sureties in support of an administration bond may be required of any administrator.

1545 See [9.88]–[9.95] in vol 1 of this Report.

1546 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 60.

1547 Submission R1.

1548 Submission R6.

1549 See Recommendations 9-1 and 9-2 in vol 1 of this Report.

38.205 Obviously, if all jurisdictions abolish their requirements for administration bonds and sureties, the issue of bonds and sureties will not be an impediment to the implementation of the proposed scheme for the automatic recognition of grants made by an Australian court. However, if only some jurisdictions adopt the National Committee's recommendations in relation to administration bonds and sureties, the issue arises as to how this will affect the implementation of the National Committee's proposed scheme.

38.206 Under stage one of the proposed scheme, if a grant of a deceased person's estate has been made in the State or Territory in which the deceased died domiciled, and there is property to be administered in the enacting jurisdiction, there will be no need for a further grant to be sought, or for the interstate grant to be resealed, in the enacting jurisdiction. This means that, once the enacting jurisdiction implements stage one of the proposed scheme, any local requirement in the enacting jurisdiction for an applicant for a grant, as part of the application, to provide an administration bond or surety, will not apply to the personal representative acting under the interstate grant that is automatically recognised in the enacting jurisdiction.

38.207 However, any legislative requirement in the enacting jurisdiction that a person to whom letters of administration have been granted must provide some form of security¹⁵⁵⁰ would apply to a personal representative acting under a grant that is automatically recognised in that jurisdiction. As the grant takes effect as if it had been originally made in the enacting jurisdiction, the personal representative appointed under the interstate grant will be subject to the same duties as a personal representative appointed directly in the enacting jurisdiction.

38.208 This position will remain unchanged when stage two of the scheme is implemented.

Inventories

Background

38.209 In most Australian States and Territories, a person who applies for a grant of probate or letters of administration is required to provide the court with an inventory of the assets in the estate or a statement of the assets and liabilities of the estate.¹⁵⁵¹

38.210 Similar provisions apply when an application is made for the resealing of a grant.¹⁵⁵²

1550 See, for example, the requirement in s 25(1) of the *Administration and Probate Act 1935* (Tas) for a person 'to whom a grant of administration is made' to give a bond to the registrar.

1551 See [11.23]–[11.44] in vol 1 of this Report.

1552 See [11.82]–[11.90] in vol 1 of this Report.

38.211 Most Australian jurisdictions require the inventory or statement to be filed with the application for the grant or resealing. In New South Wales and South Australia, in addition to that requirement, a person appointed under a grant is under a continuing obligation to disclose previously undisclosed assets.¹⁵⁵³

38.212 In Queensland, a personal representative has a duty to file an inventory only when required to do so by the court.¹⁵⁵⁴

38.213 In Chapter 11 of this Report, the National Committee has expressed the view that a personal representative should no longer be required to file an inventory as part of the usual application process for a grant.¹⁵⁵⁵ Instead, it recommended that a personal representative should file a statement of assets and liabilities whenever required by the court to do so.¹⁵⁵⁶

Discussion Paper

38.214 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee noted that the Law Reform Commission of Western Australia had proposed that, when an application is made for an original grant:¹⁵⁵⁷

The applicant should be required to produce to the court of original grant an appropriately verified statement of all assets and liabilities of the estate within Australia listed so as to establish the situs of each.

38.215 It was suggested in the Discussion Paper that a person acting under a grant to which automatic recognition was given could still be subject to the specific requirements of the recognising jurisdiction.¹⁵⁵⁸ The National Committee therefore sought submissions on whether, if uniform laws are not ultimately adopted in relation to the disclosure of assets and liabilities, the proposed statement about the effect of automatic recognition¹⁵⁵⁹ should warn the personal representative about the requirements in particular Australian jurisdictions.¹⁵⁶⁰

1553 See [11.28], [11.35] in vol 1 of this Report.

1554 See [11.23]–[11.24] in vol 1 of this Report.

1555 See [11.77] in vol 1 of this Report.

1556 See Recommendation 11-3 in vol 1 of this Report.

1557 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 57, referring to Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.34].

1558 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 58.

1559 See [38.66], [38.74] above.

1560 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 58.

Submissions

38.216 The former Principal Registrar of the Supreme Court of Queensland was opposed to a uniform requirement in relation to the disclosure of assets and liabilities, whether prior to, or after, the issue of a grant. In relation to the suggestion about possible warnings on a grant, he was of the view that there should be a warning, but that it should be expressed only in general terms. It should be for the personal representative 'to decide what particular jurisdiction it may concern'.¹⁵⁶¹

38.217 The Public Trustee of New South Wales also agreed that the grant should carry a warning in relation to jurisdictional requirements, but did not express any view about how detailed such a warning should be.¹⁵⁶²

38.218 The Trustee Corporations Association of Australia commented that, in applying for an original grant, an applicant should be required to disclose all the estate's assets and liabilities that are to be the subject of the grant, wherever situated.¹⁵⁶³ The Association also expressed the view that a grant should note any particular jurisdictional requirements.¹⁵⁶⁴

The National Committee's view

38.219 As mentioned earlier, the National Committee has recommended in Chapter 11 of this Report that a personal representative should be required to file a statement of assets and liabilities whenever required by the court to do so. A personal representative who is acting under an interstate grant that is recognised in the enacting jurisdiction (under either stage of the National Committee's proposed scheme) will be subject to any such order made by the Supreme Court in the enacting jurisdiction.

38.220 Similarly, any requirement that the enacting jurisdiction might retain that imposes a continuing duty on a personal representative to file a statement of any previously undisclosed assets and liabilities would apply to a personal representative acting under a grant that is automatically recognised in the enacting jurisdiction. As the grant will take effect as if it had been originally made in the enacting jurisdiction, the personal representative appointed under the grant will be subject to the same duties as a personal representative appointed directly in the enacting jurisdiction.

38.221 However, any requirement that the enacting jurisdiction might retain that requires an applicant for a grant to file a statement of assets and liabilities contemporaneously with the application, would not apply to a personal representative who had not sought the grant in that jurisdiction, but who was

1561 Submission R1.

1562 Submission R2.

1563 Submission R6.

1564 Ibid.

simply acting under an interstate grant that was recognised in the enacting jurisdiction.

38.222 Because a personal representative acting under a recognised interstate grant will be subject to the same duties as a personal representative appointed under an original grant made in the enacting jurisdiction, the court rules should provide that a grant that will, under the National Committee's proposed scheme, be effective in other States and Territories must contain a short statement explaining that, in any State or Territory in which the grant is effective, the personal representative is required to comply with the law in that jurisdiction regarding the duties of a personal representative. However, the statement should not attempt to spell out in any detail what those duties are.

38.223 This requirement should apply under both stages of the proposed scheme.

Passing of accounts

Background

38.224 The requirements for the passing of accounts differ from one Australian jurisdiction to another.¹⁵⁶⁵ In some jurisdictions, there is a mandatory requirement for an executor or administrator to file his or her accounts, while in other jurisdictions accounts must be filed only if required by the court. In some jurisdictions, the requirement applies only to particular categories of personal representatives.

38.225 In Chapter 11 of this Report, the National Committee has recommended that a personal representative must file, or file and pass, accounts of the administration of the estate whenever required to do so by the court.¹⁵⁶⁶

Discussion Paper

38.226 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee noted that the Law Reform Commission of Western Australia had expressed the view that uniform rules relating to the passing of accounts were not essential to the operation of the proposed scheme of automatic recognition:¹⁵⁶⁷

although a uniform practice might be desirable under a scheme of automatic recognition, it would be satisfactory if the personal representative was bound to comply with the requirements as to passing of accounts of the court of original

¹⁵⁶⁵ See [11.99]–[11.121] in vol 1 of this Report.

¹⁵⁶⁶ See Recommendation 11-4 in vol 1 of this Report.

¹⁵⁶⁷ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 60, referring to Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.37].

grant. That court could inquire into the administration of the whole of the estate in Australia and deal with any claim for commission on the same basis. The United Kingdom scheme of automatic recognition operates satisfactorily without any uniform rules on this matter.

38.227 The National Committee sought submissions on whether uniform provisions relating to the passing of accounts are necessary for the implementation of the proposed scheme of automatic recognition, or whether individual jurisdictions could continue to apply their own practices, with a personal representative required to comply only with the requirements of the jurisdiction in which the original grant is made.¹⁵⁶⁸

Submissions

38.228 Only two respondents addressed this issue.

38.229 The former Principal Registrar of the Supreme Court of Queensland was of the view that the requirements in relation to the passing of accounts should be left to individual jurisdictions.¹⁵⁶⁹

38.230 In contrast, the Trustee Corporations Association of Australia was of the view that uniformity of rules relating to the passing of accounts was highly desirable and that, with good will, there seems to be no reason why this cannot be achieved.¹⁵⁷⁰

The National Committee's view

38.231 As mentioned above, the National Committee has recommended in Chapter 11 of this Report that a personal representative must file, or file and pass, accounts of the administration of the estate whenever required by the court to do so, and may otherwise file his or her accounts and apply to have them passed if he or she wishes to do so (for example, in order to apply for commission). A personal representative who is acting under an interstate grant that is recognised in a particular Australian jurisdiction (under either stage of the National Committee's proposed scheme) will be subject to any order made by the court in that jurisdiction requiring the filing or passing of accounts. He or she will also be able to file his or her accounts if he or she wishes to have them passed.

38.232 Although uniform laws regarding the passing of accounts are desirable, the National Committee does not consider them to be essential to the operation of either stage of the proposed scheme.

38.233 If the enacting jurisdiction retains an existing requirement that a personal representative must file his or her accounts, that requirement will apply

¹⁵⁶⁸ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 61.

¹⁵⁶⁹ Submission R1.

¹⁵⁷⁰ Submission R6.

to a personal representative acting under an interstate grant that is effective in the enacting jurisdiction. As the grant takes effect as if it had been originally made in the enacting jurisdiction, the personal representative appointed under the interstate grant will be subject to the same duties as a personal representative appointed directly in the enacting jurisdiction.

Revenue protection

Background

38.234 The need to reseal a grant obtained in another jurisdiction was once a means of ensuring the payment of State and Territory death and succession duties.¹⁵⁷¹ As these duties have been abolished in respect of the estates of persons who have died after a particular date,¹⁵⁷² it can no longer be argued that resealing plays an important role in the process of revenue protection.

Discussion Paper

38.235 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee sought submissions on whether, given that very few estates are now liable to succession duty, it is necessary for a scheme of automatic recognition of grants to include a mechanism to assist in the collection of succession duty.¹⁵⁷³

Submissions

38.236 Only one respondent addressed this issue. The former Principal Registrar of the Supreme Court of Queensland was of the view that it is not necessary for the scheme to include any such mechanism.¹⁵⁷⁴

The National Committee's view

38.237 Given that it would now be extremely rare for an estate to be liable to succession duty, the National Committee does not consider it necessary for the proposed scheme to include any mechanism for the collection of succession duty.

REVIEW OF THE PROPOSED SCHEME

38.238 Once the enacting jurisdiction has implemented stage one of the proposed scheme, it will be necessary at some point for a decision to be made

¹⁵⁷¹ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [7.38].

¹⁵⁷² See [35.129] above. See also the discussion at [35.130]–[35.132] above of the circumstances in which certain estates may still be liable to succession duty when they are eventually administered.

¹⁵⁷³ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 62.

¹⁵⁷⁴ Submission R1.

about when it is appropriate to implement stage two of the proposed scheme. In addition to determining whether the necessary technological enhancements are in place in the probate registries of the other States and Territories,¹⁵⁷⁵ it is desirable that an assessment is made about the effectiveness of the legislation that has implemented stage one of the proposed scheme.

38.239 In order to provide a trigger for this assessment, the model legislation should include a provision requiring the Minister to review the operation of the legislative provisions that implement stage one of the proposed scheme with a view to determining:

- the effectiveness of stage one of the automatic recognition scheme; and
- whether the National Committee's further recommendations for stage two of the scheme can be implemented.

38.240 The model provision should require the review to be started within five years of the commencement of the model provision. This should allow sufficient time to accumulate the necessary data about the operation of stage one of the scheme.

38.241 The model provision should also require the Minister to table the report of that review in Parliament. The Report should be tabled as soon as practicable, but within one year after the end of the five year period referred to above.

RECOMMENDATIONS

38-1 The model legislation should include provisions creating a scheme for the automatic recognition of grants made by the Supreme Court of an Australian State or Territory.¹⁵⁷⁶

38-2 The scheme for the automatic recognition of grants should be implemented in two stages.¹⁵⁷⁷

1575 See [38.38]–[38.41], [38.171]–[38.174] above.

1576 See [38.6], [38.90]–[38.91] above.

1577 See [38.32]–[38.44] above.

Stage one

38-3 The model legislation should include a provision that:

- (a) applies if, after the commencement of the provision giving effect to this recommendation:¹⁵⁷⁸
 - (i) the Supreme Court of the enacting jurisdiction has not made a grant endorsed to the effect that the deceased person died domiciled in the enacting jurisdiction;¹⁵⁷⁹ and
 - (ii) a grant of the deceased person's estate is made in another State or Territory (the '*interstate grant*') and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated; and
- (b) provides that, on the endorsing of the interstate grant:¹⁵⁸⁰
 - (i) the interstate grant has the same force, effect and operation in the enacting jurisdiction as it would have if it had been originally made by the Supreme Court of the enacting jurisdiction; and
 - (ii) the force, effect and operation of the interstate grant in the enacting jurisdiction is subject to the Supreme Court's jurisdiction.

See Administration of Estates Bill 2009 cl 335(1), (2)(a), (b).

38-4 The model legislation should provide that, for the purpose of these recommendations, 'grant' means:

- (a) probate of the will of a deceased person;
- (b) letters of administration of the estate of a deceased person;
or

¹⁵⁷⁸ See [38.75]–[38.76] above.

¹⁵⁷⁹ See Recommendation 38-5 below.

¹⁵⁸⁰ See [38.6]–[38.11], [38.45]–[38.47] above.

(c) an order to administer the estate of a deceased person.¹⁵⁸¹

See Administration of Estates Bill 2009 cll 304(2), 305(3), 335, sch 3 dictionary (definitions of 'grant of representation', 'interstate grant of representation').

38-5 The model legislation should provide that if, in making a grant of a deceased person's estate, the Supreme Court of the enacting jurisdiction is satisfied that the deceased died domiciled in the enacting jurisdiction, the court must endorse the grant to that effect.¹⁵⁸²

See Administration of Estates Bill 2009 cl 304.

38-6 The court rules should provide that if, in making a grant of a deceased person's estate, the Supreme Court of the enacting jurisdiction is satisfied that the deceased died domiciled in the enacting jurisdiction, the court must endorse the grant with a statement:

- (a) specifying the particular States and Territories in which the grant is effective without the need for resealing;¹⁵⁸³ and
- (b) explaining that, in any State or Territory in which the grant is effective, the personal representative is required to comply with the law in that jurisdiction regarding the duties of a personal representative.¹⁵⁸⁴

38-7 The model legislation should include a provision that:¹⁵⁸⁵

- (a) applies if, in making a grant of a deceased person's estate (the '*local grant*'), the Supreme Court of the enacting jurisdiction:
 - (i) is satisfied that the deceased died domiciled in another State or Territory; or

1581 See [38.60]–[38.64] above.

1582 See [38.72]–[38.73] above.

1583 See [38.74] above.

1584 See [38.222]–[38.223] above.

1585 See [38.99], [38.114]–[38.116] above.

- (ii) does not make a finding about where the deceased died domiciled; and
- (b) provides that the Supreme Court must endorse the local grant to the effect that it ceases to have effect if a grant of the deceased person's estate is subsequently made in another State or Territory and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated.

See Administration of Estates Bill 2009 cl 305.

38-8 The model legislation should include a provision that:¹⁵⁸⁶

- (a) applies if, after the commencement of the provision giving effect to this recommendation:
 - (i) the Supreme Court of the enacting jurisdiction has not made a grant endorsed to the effect that the deceased person died domiciled in the enacting jurisdiction;¹⁵⁸⁷ and
 - (ii) a grant of the deceased person's estate is made in another State or Territory (the '*interstate grant*') and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated; and
- (b) provides that, on the endorsing of the interstate grant, each of the following ceases to have effect:
 - (i) a local grant of the deceased person's estate that was previously made by the Supreme Court of the enacting jurisdiction and endorsed under the provision that gives effect to Recommendation 38-7;
 - (ii) an election to administer the deceased person's estate that was previously filed in the Supreme Court of the enacting jurisdiction by a professional administrator; and

¹⁵⁸⁶ See [38.117]–[38.120] above.

¹⁵⁸⁷ See Recommendation 38-5 below.

- (iii) an interstate or overseas grant of the deceased person's estate that was previously resealed by the Supreme Court of the enacting jurisdiction.

See Administration of Estates Bill 2009 cl 335(1), (2)(c).

38-9 The provision that gives effect to Recommendation 32-1 (which provides for the resealing of foreign grants) should provide that the Supreme Court of the enacting jurisdiction may reseat a grant made by the court of another State or Territory only if it is satisfied that the deceased did not die domiciled in Australia.¹⁵⁸⁸

See Administration of Estates Bill 2009 cl 353(2).

38-10 The model legislation should include a provision that deals with the protection from liability of a person administering an estate if the person's limited grant, election to administer or resealed grant¹⁵⁸⁹ ceases to have effect because an interstate grant is made in relation to the deceased person's estate and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated.¹⁵⁹⁰

38-11 The model legislation should provide that the person:

- (a) may retain from the estate, and reimburse himself or herself, an amount equivalent to the amount of payments made by the person that the personal representative appointed under the subsequent interstate grant might properly have made,¹⁵⁹¹ and
- (b) is not liable for any distribution of the estate made in good faith and without negligence in reliance on the grant endorsed under the provision that gives effect to Recommendation 38-7, the election to administer or the resealed grant, despite the fact that the relevant instrument had ceased to have effect when the payment or distribution was made.¹⁵⁹²

¹⁵⁸⁸ See [38.121]–[38.127] above.

¹⁵⁸⁹ In this context, 'grant' is used to refer to any instrument that may be resealed under the National Committee's recommendations: see Chapter 31 above.

¹⁵⁹⁰ See [38.140]–[38.146] above.

¹⁵⁹¹ See [38.141], [38.146] above.

¹⁵⁹² See [38.142], [38.146] above.

See Administration of Estates Bill 2009 cl 373.

Implementation of stage two by a State or Territory other than the enacting jurisdiction

38-12 Once a State or Territory other than the enacting jurisdiction has implemented stage two of the proposed scheme, the court rules of the enacting jurisdiction should be amended to provide that every grant made by the Supreme Court of the enacting jurisdiction must be endorsed with a short statement specifying the particular States and Territories in which the grant is effective without the need for resealing.¹⁵⁹³

Stage two

38-13 Stage two of the automatic recognition scheme should be implemented when all States and Territories have the technology to publish on their Supreme Court website, in a format that can be searched by interested parties and by the Supreme Courts of the other States and Territories:

- (a) a notice of intended application for a grant;
- (b) details of all grants and orders to administer made by the Supreme Court, and of all elections to administer filed in the Supreme Court; and
- (c) details of all caveats filed against the making of a grant.¹⁵⁹⁴

38-14 The model legislation should be amended to provide that a caveat filed in the Supreme Court of a State or Territory, other than the enacting jurisdiction, against the making of a grant in that State or Territory has the same force, effect and operation in the enacting jurisdiction as if it had been filed in the Supreme Court of the enacting jurisdiction.¹⁵⁹⁵

¹⁵⁹³ See [38.77]–[38.78] above.

¹⁵⁹⁴ See [38.38]–[38.41], [38.170]–[38.174] above.

¹⁵⁹⁵ See [38.41] above.

38-15 The model legislation should be amended to provide that:

- (a) a grant made in another State or Territory has the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction;¹⁵⁹⁶ and
- (b) the force, effect and operation of the interstate grant in the enacting jurisdiction is subject to the Supreme Court's jurisdiction.

38-16 The model legislation should be amended to provide that the Supreme Court of the enacting jurisdiction may decline to make a grant if it appears that the Supreme Court of another State or Territory would be a more appropriate forum in which to apply for that grant.¹⁵⁹⁷

38-17 The model legislation should continue to include a provision that gives effect to Recommendation 38-5.¹⁵⁹⁸

38-18 The court rules should continue to include a rule that gives effect to Recommendation 38-6.¹⁵⁹⁹

38-19 The model legislation should continue to include a provision that gives effect to Recommendation 38-7.¹⁶⁰⁰

38-20 The model legislation should:

- (a) continue to include a provision that gives effect to Recommendation 38-8(a), (b)(i);¹⁶⁰¹

¹⁵⁹⁶ See [38.48] above.

¹⁵⁹⁷ See [38.50]–[38.51] above.

¹⁵⁹⁸ See [38.79]–[38.80] above.

¹⁵⁹⁹ See [38.81], [38.222]–[38.223] above.

¹⁶⁰⁰ See [38.128]–[38.130] above.

¹⁶⁰¹ See [38.131]–[38.132] above.

- (b) provide that an election to administer a deceased person's estate that was previously filed in the enacting jurisdiction ceases to have effect if a grant of the deceased person's estate is subsequently made in any other State or Territory;¹⁶⁰² and
- (c) provide that a grant that was previously resealed in the enacting jurisdiction ceases to have effect if a grant of the deceased person's estate is subsequently made in any other State or Territory.¹⁶⁰³

38-21 The provisions in the model legislation giving effect to the following Recommendations are to be omitted:

- (a) Recommendation 38-3 (Effectiveness of grant made in the State or Territory in which the deceased died domiciled and endorsed to the effect that the deceased died domiciled in that jurisdiction);¹⁶⁰⁴ and
- (b) Recommendations 32-1 and 38-9 (Australian grants that may be resealed).¹⁶⁰⁵

Implementation of stage two by all States and Territories

38-22 When all States and Territories have implemented stage two of the proposed scheme:

- (a) the provision giving effect to Recommendations 38-5 and 38-17 is to be omitted (Certain grants made in the enacting jurisdiction to be endorsed to the effect that the deceased died domiciled in that jurisdiction);¹⁶⁰⁶

1602 See [38.133] above.

1603 Ibid.

1604 See [38.49] above.

1605 See [38.134] above.

1606 See [38.82] above.

- (b) the court rule giving effect to Recommendation 38-6(a) is to be amended to provide that every grant made by the Supreme Court of the enacting jurisdiction must be endorsed with a short statement to the effect that the grant is effective in every other State and Territory without the need for resealing;¹⁶⁰⁷
- (c) the provision giving effect to Recommendations 38-7 and 38-19 is to be omitted (Certain grants made in the enacting jurisdiction to be limited in time until a grant is made in the State or Territory in which the deceased died domiciled);¹⁶⁰⁸ and
- (d) the model legislation should continue to provide that the following cease to have effect if a grant of the deceased person's estate is made in any State or Territory:¹⁶⁰⁹

 - (i) an election to administer the deceased's estate that was filed in the enacting jurisdiction; and
 - (ii) a grant that was previously resealed in the enacting jurisdiction.

Review of the automatic recognition scheme

38-23 The model legislation should provide that, within five years of the commencement of the provision giving effect to this recommendation, the Minister must start a review to determine:

- (a) the effectiveness of the legislative provisions that implement the National Committee's recommendations for stage one of the automatic recognition scheme; and
- (b) whether the National Committee's further recommendations for stage two of the scheme can be implemented.¹⁶¹⁰

1607 See [38.83] above.

1608 See [38.135] above.

1609 See [38.136] above.

1610 See [38.238]–[38.240] above.

38-24 The model legislation should require the Minister to table the report of that review in Parliament as soon as practicable, but within one year after the end of the five year period.¹⁶¹¹

See Administration of Estates Bill 2009 cl 336.

¹⁶¹¹

See [38.241] above.

Chapter 39

The effect of automatic recognition on other areas of succession law

INTRODUCTION	412
THE PERSON TO WHOM THE GRANT WILL BE MADE	412
Background	412
Effect of proposed scheme of automatic recognition	413
VALIDITY OF WILLS	414
Background	414
Effect of the proposed scheme of automatic recognition	417
INTESTACY	417
Background	417
Effect of the proposed scheme of automatic recognition	418
FAMILY PROVISION	418
Background	418
Jurisdictional rules	419
Effect of the proposed scheme of automatic recognition	422
ADMINISTRATION OF ESTATES	422
THE NATIONAL COMMITTEE'S VIEW	423

INTRODUCTION

39.1 In deciding whether to recommend a scheme for the automatic recognition of Australian grants, it is important to have regard to the impact, if any, that such a scheme will have on other areas of succession law.

39.2 This chapter examines the effect that the National Committee's proposals in Chapter 38 for a scheme for the automatic recognition of Australian grants will have on the following areas of succession law:

- the person to whom a grant may be made;
- the formal validity of wills;
- intestacy;
- family provision; and
- administration.

39.3 The effect on these areas is considered in the light of the choice of law rules that apply to the different aspects of succession law, and of any statutory provisions that supplement or modify those rules.

39.4 Where the effect on the particular area will depend on the form of the scheme adopted,¹⁶¹² the different effects are noted. However, unless otherwise indicated, a reference to the 'proposed scheme for the automatic recognition of grants' refers generally to the National Committee's proposals for a scheme to recognise some or all Australian grants without the need for resealing, and not specifically to either stage of the proposed scheme.

THE PERSON TO WHOM THE GRANT WILL BE MADE

Background

39.5 As explained in Chapter 36, it is the law in all Australian jurisdictions that, if a person has died domiciled in another Australian State or Territory and the estate within the jurisdiction where a grant is sought consists entirely of movable property, the grant of probate or letters of administration will generally be made to the person entitled to act as executor or administrator according to the law of the deceased's domicile. However, if the estate consists of, or includes, immovable property, the court will generally make a grant to the

¹⁶¹²

Under stage one of the National Committee's proposed scheme, a grant made in the Australian jurisdiction in which the deceased died domiciled is recognised in the enacting jurisdiction; under stage two of the proposed scheme, a grant made in any Australian jurisdiction will be recognised in the enacting jurisdiction. See Chapter 38 above.

person entitled according to the *lex situs* — the law of the jurisdiction in which the property is situated.¹⁶¹³

39.6 These rules also apply to the resealing of grants.¹⁶¹⁴ As a result, if the property within the jurisdiction in which resealing is sought consists of, or includes, immovable property, the resealing court will determine, according to its own laws, whether the applicant for resealing is a person who would be entitled to an original grant in the resealing jurisdiction. If the court within the resealing jurisdiction finds that the applicant would not be so entitled, it will exercise its discretion to decline to reseal the grant.

Effect of proposed scheme of automatic recognition

39.7 Under a scheme of automatic recognition, once the court of an Australian State or Territory (or of the Australian State or Territory in which the deceased died domiciled) appointed a person as personal representative, that person would, in effect, be the personal representative of the deceased's estate in all other Australian jurisdictions. Consequently, individual jurisdictions would lose the opportunity that they presently have to exercise their discretion to decline to reseal a grant. In particular, this would have an impact where the estate within a particular jurisdiction included immovable property and the person in whose favour the grant was made was not a person in whose favour the court in the particular jurisdiction would make a grant.

39.8 The adoption of either stage of the proposed scheme for automatic recognition could therefore have the effect, in certain estates, that a person who would not otherwise be entitled to a grant in a particular State or Territory would be entitled to act as personal representative in that jurisdiction. However, the person who was recognised as personal representative would still be a person who was entitled to be appointed under the laws of another Australian jurisdiction.

39.9 Moreover, in Chapter 36 of this Report, the National Committee has recommended the inclusion in the model legislation of a provision to the general effect of rule 40.01 of *The Probate Rules 2004* (SA), but applying whether the deceased died in an Australian State or Territory or overseas. Accordingly, the notion of who is entitled to be appointed under a grant will itself change, with a greater emphasis being given to the law of the deceased's domicile, even where the estate in the granting or resealing jurisdiction consists of, or includes, immovable property.

¹⁶¹³ See [36.11]–[36.24] above. As explained at [36.25] above, r 40.01 of *The Probate Rules 2004* (SA) does not apply if the deceased died domiciled in an Australian State or Territory.

¹⁶¹⁴ See [36.64] above.

VALIDITY OF WILLS

Background

39.10 The issue of a will's validity arises not only when an application is made for an original grant,¹⁶¹⁵ but also when an application is made for the resealing of a grant made in another jurisdiction.¹⁶¹⁶

39.11 As explained in Chapter 36, there are two aspects to a will's validity: formal validity and essential validity.

39.12 At common law, in so far as a will disposes of movable property, the formal validity of the will is governed by the law of the jurisdiction in which the deceased was domiciled at the time of death. In so far as a will disposes of immovable property, the formal validity of the will is governed by the law of the jurisdiction in which the property is situated.¹⁶¹⁷

39.13 These common law rules have been supplemented in all Australian jurisdictions by legislative provisions that significantly extend the bases on which the formal validity of a will may be upheld. The legislation in all Australian jurisdictions provides that a will is to be treated as properly executed if it has been executed in accordance with the internal law in force in the place:¹⁶¹⁸

- where the will was executed;
- where the testator was domiciled, either at the time the will was executed or at the time of the testator's death;
- where the testator had his or her habitual residence, either at the time the will was executed or at the time of the testator's death; or
- of which the testator was a national, either at the time the will was executed or at the time of the testator's death.

39.14 The legislation in most jurisdictions further provides that the following wills are also taken to have been properly executed:¹⁶¹⁹

¹⁶¹⁵ See *Lewis v Balshaw* (1935) 54 CLR 188, which is discussed at [36.15]–[36.23] above.

¹⁶¹⁶ See *In the Will of Lambe* [1972] 2 NSWLR 273, which is discussed at note 1257 above.

¹⁶¹⁷ See [36.12] above.

¹⁶¹⁸ *Wills Act 1968* (ACT) s 15C; *Succession Act 2006* (NSW) s 48(1); *Wills Act* (NT) s 46(1); *Succession Act 1981* (Qld) s 33T(1); *Wills Act 1936* (SA) s 25B; *Wills Act 2008* (Tas) s 60(1); *Wills Act 1997* (Vic) s 17(1); *Wills Act 1970* (WA) s 20(1).

¹⁶¹⁹ *Wills Act 1968* (ACT) s 15D; *Succession Act 2006* (NSW) s 48(2); *Wills Act* (NT) s 46(2)–(5); *Succession Act 1981* (Qld) s 33T(2); *Wills Act 1936* (SA) s 25C; *Wills Act 2008* (Tas) s 60(2); *Wills Act 1997* (Vic) s 17(2); *Wills Act 1970* (WA) s 20(2).

- a will executed on board a vessel or aircraft and in accordance with the internal law in force in the place with which the vessel or aircraft was most closely connected having regard to its registration and other relevant circumstances;
- a will, so far as it disposes of immovable property, if it was executed in accordance with the internal law in force in the place where the property is situated;
- a will, so far as it exercises a power of appointment, if it was executed in accordance with the law governing the essential validity of the power;¹⁶²⁰
- a will, so far as it revokes—
 - a will, or a provision of a will, that has been executed in accordance with the relevant Act; or
 - a will, or a provision of a will, that is taken, by the provisions of the relevant Act dealing with the formal validity of foreign wills, to have been properly executed;

if the later will has been executed in accordance with a law under which the earlier will or provision would be taken to have been properly executed.

39.15 The essential validity of a will, in so far as the will disposes of immovable property, is governed by the law of the jurisdiction in which the deceased was domiciled at the time of death. In so far as the will disposes of immovable property, the essential validity of the will is governed by the law of the jurisdiction in which the property is situated.¹⁶²¹

39.16 All Australian jurisdictions presently have similar legislative provisions in relation to the execution¹⁶²² and alteration¹⁶²³ of wills.¹⁶²⁴ They also have similar legislative provisions enabling a document to be admitted to probate, notwithstanding that its execution does not comply with the requirements of the

¹⁶²⁰ This circumstance does not appear in the *Wills Act 1968* (ACT) s 15D or in the *Succession Act 2006* (NSW) s 48(2).

¹⁶²¹ See [36.13] above.

¹⁶²² See *Wills Act 1968* (ACT) ss 9–11, 13; *Succession Act 2006* (NSW) s 6; *Wills Act* (NT) ss 8–9; *Succession Act 1981* (Qld) s 10; *Wills Act 1936* (SA) ss 8, 10; *Wills Act 2008* (Tas) ss 8–9; *Wills Act 1997* (Vic) ss 7–8; *Wills Act 1970* (WA) ss 8–9.

¹⁶²³ See *Wills Act 1968* (ACT) s 12; *Succession Act 2006* (NSW) s 14; *Wills Act* (NT) s 16; *Succession Act 1981* (Qld) s 16; *Wills Act 1936* (SA) s 24; *Wills Act 2008* (Tas) s 18; *Wills Act 1997* (Vic) s 15; *Wills Act 1970* (WA) s 10.

¹⁶²⁴ Model wills legislation was included in the National Committee's *Wills Report* (1997). Legislation that is largely consistent with the model wills legislation has been enacted in New South Wales, the Northern Territory, Queensland, Tasmania and Victoria: see *Succession Act 2006* (NSW); *Wills Act* (NT); *Succession Amendment Act 2006* (Qld); *Wills Act 2008* (Tas); *Wills Act 1997* (Vic). In Western Australia, the *Wills Amendment Act 2007* (WA) implements some of the National Committee's recommendations in relation to the law of wills.

jurisdiction, if the court is satisfied that the deceased intended the document to constitute his or her will.¹⁶²⁵

39.17 In view of the similarity in the State and Territory provisions dealing with the execution and alteration of wills, and the fact that the jurisdictions have substantially the same provisions dealing with the formal validity of foreign wills, it is unlikely that a will that has been held by the court of an Australian jurisdiction (or by the court of the Australian jurisdiction in which the deceased died domiciled) to be formally valid would be held by the court of another Australian jurisdiction not to have been properly executed. Certainly, if a will has been made in accordance with the internal law in force in the Australian jurisdiction in which the deceased died domiciled, it will be treated as a properly executed will in all other Australian jurisdictions.

39.18 However, it is possible that, although the courts in the various Australian jurisdictions might be applying the same laws to determine the validity of a will, they could come to different conclusions on the evidence before them.¹⁶²⁶

39.19 Similarly, even though two jurisdictions have the same laws in relation to the essential validity of a will, the situation may arise where the issue of the will's validity is not raised on the application for an original grant, but is raised on the application for resealing. If the estate within the resealing jurisdiction includes immovable property, the court will not simply accept the validity of the will, but will decide afresh, according to its own laws, the question of the will's

1625

See *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 1936* (SA) s 12(2)–(4); *Wills Act 2008* (Tas) s 10; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) ss 32, 33. The Tasmanian provision, unlike the provisions in the other jurisdictions, requires a higher standard of proof. The court must be satisfied beyond reasonable doubt that the deceased intended the document to constitute his or her will.

1626

See *Perpetual Trustees Victoria Ltd v Sabine* (Unreported, Supreme Court of Victoria, O'Bryan J, 5 May 1992) and *The Estate of Natrass* (Unreported, Supreme Court of New South Wales, Powell J, 29 October 1992), which concerned the validity of the will of the same testator. The testator died domiciled in New South Wales (where he was also habitually resident), leaving immovable property in New South Wales and movable property, most of which was situated in Victoria. His will had been made in New South Wales. The executor named in the will obtained probate of the will in Victoria and then sought a supplementary grant of probate in Victoria in respect of a letter written by the deceased, which, it argued, embodied the testator's testamentary intentions. Although Victoria did not at the time have a legislative provision enabling an improperly executed instrument to be admitted to probate, New South Wales had recently enacted such a provision.

The Supreme Court of Victoria observed that the letter would be treated as properly executed under section 20B of the *Wills Act 1958* (Vic) (see now *Wills Act 1997* (Vic) s 17(1)) if its execution conformed to the internal law of New South Wales, that being the place where the testator had his habitual residence. In that respect, the Court held that the 'internal law' in force in New South Wales was not limited to s 7 of the *Wills, Probate and Administration Act 1898* (NSW), which dealt with the form and manner of execution of wills (see now *Succession Act 2006* (NSW) s 6), but also included s 18A of that Act, which dealt with the admission to probate of informal wills (see now *Succession Act 2006* (NSW) s 8). As a question of fact, however, the Supreme Court of Victoria was not satisfied that the letter in question embodied the testator's testamentary intentions, and it therefore refused the application for the supplementary grant of probate.

When the executor applied to have the Victorian grant resealed in New South Wales, Powell J expressed the view that, had the matter come before him initially, he would have come to a contrary conclusion regarding the admission to probate of the letter in question. He therefore considered whether the Court should reseat the Victorian grant, or should require an application for a fresh grant of probate in relation to both the will and the letter. Powell J held that the Court had a discretion in relation to resealing, but that, in the circumstances of the case, it would not be a proper exercise of the Court's discretion to refuse the application for resealing.

validity.¹⁶²⁷ This could result in a refusal to reseal the grant if the court in the resealing jurisdiction is not satisfied of its essential validity.

Effect of the proposed scheme of automatic recognition

39.20 The adoption of the National Committee's proposals in Chapter 38 will not affect the domestic rules of individual jurisdictions as to the validity of wills.¹⁶²⁸

39.21 However, under the proposed scheme of automatic recognition, once a will is held to be valid by the court of an Australian jurisdiction (or by the court of in the Australian jurisdiction in which the deceased died domiciled), the will will be treated as a valid will in every other Australian jurisdiction — not only in cases where the estate in the recognising jurisdiction consists entirely of movable property, but also in cases where the estate in that jurisdiction consists of, or includes, immovable property. This means that, in the latter instance, the recognising jurisdiction will lose the power it now has to decide issues relating to the formal and essential validity of the will.

39.22 The impact of this should be minimal. As noted above, it is unlikely that a will that was held by the court of one Australian jurisdiction to have been properly executed would be held by the court of another Australian jurisdiction not to have been properly executed. However, it will be important that any issue relating to the essential validity of a will be raised when an application is first made for an original grant, as the grant, once made, will have the effect that the will is a valid will in each Australian jurisdiction that enacts the proposals recommended in Chapter 38.

INTESTACY

Background

39.23 When a person dies intestate, the person's property vests in his or her administrator, who is required to distribute the property according to the relevant intestacy rules. Within Australia, the jurisdictions have different provisions in relation to the order of priority for appointment as an administrator¹⁶²⁹ and the manner in which the estate of the deceased person is to be distributed.¹⁶³⁰

39.24 In certain situations, the intestacy laws of more than one jurisdiction may apply to the distribution of an intestate estate. This is because the choice of law rules draw a distinction between succession to movable property and

¹⁶²⁷ *Lewis v Balshaw* (1935) 54 CLR 188, which is discussed at [36.15]–[36.23] above.

¹⁶²⁸ For a general discussion of these rules, see *Wills Report* (1997).

¹⁶²⁹ See Chapter 5 of this Report.

¹⁶³⁰ For a discussion of the various provisions, see *Intestacy Report* (2007).

succession to immovable property. Succession to movable property is governed by the law of the jurisdiction in which the deceased was domiciled at the time of death,¹⁶³¹ whereas succession to immovable property is governed by the *lex situs* (the law of the jurisdiction in which the property is situated), regardless of the deceased's domicile at the time of death.¹⁶³²

39.25 Consequently, if, for example, a deceased person dies domiciled in New South Wales, leaving movable and immovable property in both that jurisdiction and South Australia, distribution of the movable property in New South Wales and South Australia will be governed by New South Wales intestacy laws (New South Wales being the jurisdiction in which the deceased died domiciled). While New South Wales intestacy laws will also govern the distribution of the immovable property in New South Wales, the intestacy laws of South Australia will govern the distribution of the immovable property in South Australia.

Effect of the proposed scheme of automatic recognition

39.26 The proposed scheme of automatic recognition will not affect the choice of law rules governing distribution on intestacy. Once an administrator is appointed under a grant made in an Australian jurisdiction (or in the Australian jurisdiction in which the deceased died domiciled), the administrator will be obliged, as at present, to distribute movable property in accordance with the intestacy rules of the jurisdiction in which the deceased died domiciled and to distribute immovable property in accordance with the intestacy rules of the jurisdiction in which the property is situated.

39.27 The only effect of the proposed scheme will be that the administrator appointed under a grant made in an Australian jurisdiction (or in the Australian jurisdiction in which the deceased died domiciled) will be the administrator of the deceased's estate in each Australian jurisdiction that enacts the proposals recommended in Chapter 38. As the courts presently have a discretion to decline to reseal a grant made in another jurisdiction,¹⁶³³ the opportunity for the exercise of that discretion will no longer exist.

FAMILY PROVISION

Background

39.28 All Australian jurisdictions have family provision legislation that enables specified persons (in most cases, members of the deceased person's family and certain dependants) to apply to the court for provision out of the deceased's

¹⁶³¹ *Bremer v Freeman* (1857) 10 Moo PC 306, 357–8; 14 ER 508, 526 (Lord Wensleydale).

¹⁶³² *Re Ralston* [1906] VLR 689, 695, 700 (Cussen J).

¹⁶³³ See [35.94]–[35.96] above.

estate if either the will or the operation of the intestacy rules has failed to make adequate provision for them.¹⁶³⁴ When the court makes a family provision order, it alters how the deceased's estate would otherwise have been distributed, as the property that is the subject of the order must necessarily come out of what would have been the share of another beneficiary or of other beneficiaries.

39.29 At present, there are substantial differences between the legislative provisions of the various jurisdictions. The main areas of difference concern the persons who are eligible to apply for provision and the property out of which provision may be ordered.¹⁶³⁵

39.30 In most jurisdictions, it would appear that an order for provision may be made only if there has been a grant in respect of the deceased person's estate.¹⁶³⁶ The High Court has held that, if a grant has been resealed in the jurisdiction where the application for provision has been made, no original grant is required, as the resealed grant has the same operation as an original grant.¹⁶³⁷

Jurisdictional rules

39.31 In all States and Territories, except New South Wales and South Australia, the rules governing the court's jurisdiction to make a family provision order are not found in the legislation, but are part of the common law.

39.32 In *Re Paulin*,¹⁶³⁸ Sholl J set out the relevant jurisdictional rules:¹⁶³⁹

¹⁶³⁴ *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW) ch 3; *Family Provision Act* (NT); *Succession Act 1981* (Qld) Pt 4; *Inheritance (Family Provision) Act 1972* (SA); *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1958* (Vic) Pt IV; *Inheritance (Family and Dependants Provision) Act 1972* (WA).

¹⁶³⁵ For a discussion of the legislation of the Australian States and Territories and the National Committee's recommendations for model family provision legislation, see *Family Provision Report* (1997) and *Family Provision Supplementary Report* (2004).

¹⁶³⁶ In Queensland and New South Wales the court may make an order for family provision even though a grant has not been made in relation to the deceased person's estate: *Succession Act 1981* (Qld) s 41(8); *Succession Act 2006* (NSW) s 58(1).

In most other jurisdictions, the requirement for a grant to have been made is said to result from the fact that the legislation provides that any application for provision must be made within a specified time from the date of the grant (see *Family Provision Act 1969* (ACT) s 9(1); *Family Provision Act* (NT) s 9(1); *Inheritance (Family Provision) Act 1972* (SA) s 8(1); *Testator's Family Maintenance Act 1912* (Tas) s 11(1); *Administration and Probate Act 1958* (Vic) s 99; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(2)) and from various provisions that require service of notices on the deceased's 'executor' or 'administrator': A Dickey, *Family Provision After Death* (1992) 11–12. Dickey (at 11) suggests that the provisions regarding the time for commencing proceedings may even have the effect of requiring that a grant be made *before* proceedings can even be instituted.

¹⁶³⁷ *Holmes v Permanent Trustee Co of New South Wales Ltd* (1932) 47 CLR 113, 118–9 (Rich J, with whom Evatt and McTiernan JJ agreed). See the discussion of this decision at [34.4] above.

¹⁶³⁸ [1950] VLR 462.

¹⁶³⁹ *Ibid* 465. See also DStL Kelly, 'Testator's Family Maintenance and the Conflict of Laws' (1967) 41 *Australian Law Journal* 382, 383–4; JG Miller, 'Family Provision on Death — The International Dimension' (1990) 39 *International and Comparative Law Quarterly* 261, 269–75.

- (1) The Courts of the testator's domicile alone can exercise the discretionary power arising under the appropriate testator's family maintenance legislation of the domicile so as to affect his movables and his immovables in the territory of the domicile;¹⁶⁴⁰ ...
- (2) The same Courts alone can exercise such discretionary power as to affect under the same legislation his movables outside the territory of the domicile;¹⁶⁴¹ ...
- (3) The Courts of the *situs* can alone exercise a discretionary power to affect, and then only if there is testator's family maintenance legislation in the *situs* providing for it, immovables of the testator out of the jurisdiction of the Courts of his domicile; and the Courts of his domicile cannot exercise their discretion so as to deal with such immovables;¹⁶⁴² ... (notes added)

39.33 The effect of these rules is that, if an estate includes movable and immovable property in the jurisdiction in which the deceased died domiciled and in another jurisdiction, and the applicant is seeking provision out of the property in both jurisdictions, it is necessary for an application for provision to be made in each jurisdiction. This is because the court of the State or Territory in which the deceased died domiciled does not have jurisdiction to make an order for provision out of immovable property situated in another jurisdiction.¹⁶⁴³

39.34 In New South Wales and South Australia, legislation has modified the operation of these rules.

39.35 In New South Wales, section 64 of the *Succession Act 2006* (NSW), which recently replaced section 11(1)(b) of the *Family Provision Act 1982* (NSW),¹⁶⁴⁴ provides:

¹⁶⁴⁰ See also *Pain v Holt* (1919) 19 SR (NSW) 105 (cited by Sholl J); *Re Sellar* (1925) 25 SR (NSW) 540; *Re Osborne* [1928] St R Qd 129. For authority from overseas jurisdictions see *Re Roper* [1927] NZLR 731; *Re Terry* [1951] NZLR 30.

¹⁶⁴¹ See also *Re Sellar* (1925) 25 SR (NSW) 540 (cited by Sholl J); *Heuston v Barber* (1990) 19 NSWLR 354, 360 (Master Windeyer). For authority from overseas jurisdictions see *Ostrander v Houston* (1915) 8 WWR 367 (cited by Sholl J); *Re Roper* [1927] NZLR 731; *Re Elliott* [1941] 2 DLR 71; *Re Herron* [1941] 4 DLR 203; *Re Corlet* [1942] 3 DLR 72; *Re Greenfield* [1985] 2 NZLR 662.

¹⁶⁴² See also *Pain v Holt* (1919) 19 SR (NSW) 105 (cited by Sholl J); *Re Donnelly* (1927) 28 SR (NSW) 34 (cited by Sholl J); *Re Osborne* [1928] St R Qd 129 (cited by Sholl J); *Re Perkins* (1957) 58 SR (NSW) 1; *Heuston v Barber* (1990) 19 NSWLR 354, 360 (Master Windeyer). For authority from overseas jurisdictions see *Ostrander v Houston* (1915) 8 WWR 367; *Re Butchart* [1932] NZLR 125 (cited by Sholl J); *Re Rattenbury Estate* [1936] 2 WWR 554; *Williams v Moody Bible Institute* [1937] 4 DLR 465; *Re Bailey* [1985] 2 NZLR 656.

¹⁶⁴³ In *Re Paulin* [1950] VLR 462, where the deceased had died domiciled in Victoria leaving movable and immovable property in Victoria and immovable property in New South Wales, Sholl J held (at 465–7) that the Supreme Court of Victoria did not have jurisdiction to make a family provision order affecting the immovable property in New South Wales.

¹⁶⁴⁴ The *Family Provision Act 1982* (NSW) was repealed when the *Succession Amendment (Family Provision) Act 2008* (NSW) commenced on 1 March 2009. In its review of family provision legislation in Australia, the National Committee recommended that the model family legislation include a provision to the effect of s 11(1)(b) of the *Family Provision Act 1982* (NSW): see *Family Provision Report* (1997) 113–14; *Family Provision Supplementary Report* (2004) Appendix 2 (Draft Family Provision Bill 2004 cl 15).

64 Orders may affect property in or outside jurisdiction

A family provision order may be made in respect of property situated in or outside New South Wales when, or at any time after, the order is made, whether or not the deceased person was, at the time of death, domiciled in New South Wales.

39.36 Section 64 of the *Succession Act 2006* (NSW) enables the court to make a family provision order affecting movable property within the jurisdiction, even though the deceased was not domiciled in New South Wales at the time of death.¹⁶⁴⁵ It also enables the court to make a family provision order affecting immovable property situated outside New South Wales. It has been held in relation to its predecessor (section 11(1)(b) of the *Family Provision Act 1982* (NSW)) that, despite the broad terms in which that provision was expressed, the legislation would be read down if a nexus with New South Wales was not established in a particular case.¹⁶⁴⁶

39.37 In South Australia, the legislation enables the court to make a family provision order '[w]here ... a person has died domiciled in the State or owning real or personal property in the State'.¹⁶⁴⁷ The provision enables the court to make a family provision order in respect of movable property in South Australia, even though the deceased was not domiciled in the State at the time of death. However, the provision does not give the court power to deal with immovable property outside the State.¹⁶⁴⁸

¹⁶⁴⁵ See *Heuston v Barber* (1990) 19 NSWLR 354, 360, where Master Windeyer observed that 'domicile is no longer essential for the bringing of an action in New South Wales in respect of property in New South Wales'.

¹⁶⁴⁶ *Balajan v Nikitin* (1994) 35 NSWLR 51. That case concerned an application for family provision made in respect of the estate of a deceased person who died domiciled in Queensland. At the time of the deceased's death, almost the entire estate, including all the immovable property, was situated in Queensland. The plaintiffs were eligible to apply for family provision under the New South Wales legislation, but not under the Queensland legislation, and therefore brought their application in New South Wales. Windeyer J (at 56) referred to the extra-territorial operation of the New South Wales legislation:

On its face s 11(1)(b) would empower the Court in any action commenced in New South Wales to make an order in respect of property outside New South Wales whether or not there were any link with New South Wales other than that the proceedings were commenced in this State.

However, Windeyer J refused the application, holding (at 61) that the section should be read down by requiring an appropriate nexus with New South Wales:

The only possible nexus could be property in the jurisdiction or domicile of the deceased in the jurisdiction. Thus I am of the view that in so far as that section purports to give power to make orders affecting property outside New South Wales of a deceased person domiciled outside New South Wales it is not within the competence of the New South Wales legislature to make such provision. ...

In accordance with s 31 of the *Interpretation Act 1987* the offending section should be read down so that in this case it will operate as it was intended to operate.

In *Brinkman v Johnston* (Unreported, Supreme Court of New South Wales, Hodgson J, 4 February 1994) Hodgson J suggested (at 19), although his Honour did not have to decide the issue, that it might be a sufficient connection to justify the application of the *Family Provision Act 1982* (NSW) that the deceased left a son, resident and domiciled in New South Wales, who was in need of support.

¹⁶⁴⁷ *Inheritance (Family Provision) Act 1972* (SA) s 7(1).

¹⁶⁴⁸ PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [37.15].

39.38 When a court has jurisdiction to make a family provision order, it applies its own family provision legislation.¹⁶⁴⁹ Accordingly, the legislation of the jurisdiction in which the application is made will govern such matters as the persons who are eligible to apply and the property out of which provision may be ordered.

Effect of the proposed scheme of automatic recognition

39.39 In those jurisdictions where a grant is required before an application for provision may be made, or before the court may make an order for provision, the proposed scheme for automatic recognition will have the effect that, if a grant has already been made in another Australian jurisdiction, it will not be necessary to obtain a fresh grant, or to have the interstate grant resealed, before applying for provision. The original grant will take effect as if it had been made in the jurisdiction in which provision is sought.

39.40 Further, in those jurisdictions where the time within which an application must be made runs from the date of the grant, time would run from the date of the interstate grant to which recognition is being given.¹⁶⁵⁰

39.41 However, the proposed scheme will not affect the rules that govern the court's jurisdiction to make a family provision order.¹⁶⁵¹ As at present, there will still be cases where it will be necessary for an applicant for family provision to bring applications in two or more jurisdictions. Both applications, however, will be served on the same personal representative.

ADMINISTRATION OF ESTATES

39.42 In the context of the choice of law rules, the administration of an estate refers to the getting in of the deceased's estate and to the payment of debts.¹⁶⁵² It would, therefore, cover matters such as the order in which debts are payable.¹⁶⁵³

39.43 It is settled law that the administration of the estate of a deceased person is to be carried out in accordance with the law of the jurisdiction in which

1649 See [39.32] above.

1650 The National Committee has recommended that an application for provision must be made not later than 12 months after the death of a deceased person, unless the court otherwise directs: see *Family Provision Report* (1997) 35–7; *Family Provision Supplementary Report* (2004) Appendix 2 (Family Provision Bill 2004 cl 9).

1651 See [39.31]–[39.38] above.

1652 PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [36.8]. The distribution of assets is governed by the choice of laws rules that apply to succession to property: see PE Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) [37.1].

1653 Sir L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 2, [26–034].

representation has been granted, since it is from this law that the personal representative derives his or her authority.¹⁶⁵⁴

39.44 Under the proposed scheme of automatic recognition, the personal representative would derive his or her authority from the recognising jurisdiction, as it would be the legislation of that jurisdiction that would give the personal representative the authority to act in the recognising jurisdiction.

39.45 Accordingly, the adoption of the proposed scheme for the automatic recognition of grants would not affect the law governing the administration of an estate in the recognising jurisdiction. The administration would be carried out in accordance with the law of that jurisdiction, in the same way as it would be if the personal representative were appointed under an original grant made in that jurisdiction.

THE NATIONAL COMMITTEE'S VIEW

39.46 The examination of the effect of the proposed scheme of automatic recognition on other areas of succession law demonstrates that the implementation of the proposals set out in Chapter 38 is likely to have very little effect, if any, on most of these areas. Most importantly, the implementation of the scheme will not affect the manner in which the personal representative of a deceased person is required to administer or distribute the deceased's estate.

39.47 To the extent that any of these areas will be affected, the National Committee is of the view that that should not constitute an impediment to the implementation of the proposed scheme.

1654

Permanent Trustee Co (Canberra) Ltd v Finlayson (1968) 122 CLR 338, 342–3 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer and Owen JJ). Earlier authority to the same effect includes *Preston v Melville* (1841) 8 Cl & F 1, 12–13; 8 ER 1, 5–6 (Cottenham LC); *Blackwood v The Queen* (1882) 8 App Cas 82, 93 (PC); *Re Kloebe* (1884) 28 Ch D 175, 178–9 (Pearson J); *Re Lorillard* [1922] 2 Ch 638, 645–6 (Warrington LJ); *Re Wilks* [1935] 1 Ch 645, 648 (Farwell J).

Chapter 40

Miscellaneous administration provisions

APPLICATION FOR A GRANT TO BE MADE IN ACCORDANCE WITH COURT RULES	427
Existing legislative provisions.....	427
Discussion Paper	428
Submissions	429
The National Committee's view.....	429
DELAY IN APPLYING FOR A GRANT OR THE RESEALING OF A GRANT	430
Existing provisions in court rules.....	430
Discussion Papers	431
Submissions	431
The National Committee's view.....	431
APPLICATION BY A NON-RESIDENT EXECUTOR OR ADMINISTRATOR	432
Existing legislative provisions.....	432
Recommendation of the Law Reform Commission of Western Australia	432
Discussion Paper	432
Submissions	433
The National Committee's view.....	433
DEEMED RESIDENCE OF, AND SERVICE ON, A NON-RESIDENT EXECUTOR OR ADMINISTRATOR.....	434
Introduction.....	434
Existing legislative provisions.....	435
Recommendation of the Law Reform Commission of Western Australia	436
Discussion Papers	436
Submissions	437
The National Committee's view.....	438
FINDING AS TO DOMICILE	439
Existing legislative provisions.....	439
Existing provisions in court rules.....	440
Discussion Papers	441
Submissions	443
The National Committee's view.....	445
RECORD OF GRANT	446
Existing legislative provisions.....	446
Discussion Paper	448
Submissions	448
The National Committee's view.....	448
REGISTRAR'S POWERS	449
Existing legislative provisions.....	449
Discussion Paper	451
Submissions	451
The National Committee's view.....	451
COURT PRACTICE	452
Existing legislative provisions.....	452
Discussion Paper	457
Submissions	457
The National Committee's view.....	458

SERVICE	458
Introduction.....	458
Discussion Paper	459
Submissions	460
The National Committee's view.....	460
RECOMMENDATIONS	460

APPLICATION FOR A GRANT TO BE MADE IN ACCORDANCE WITH COURT RULES

Existing legislative provisions

40.1 Each jurisdiction in Australia has a defined procedure for applying for a grant. In most jurisdictions, the relevant procedure is set out in the court rules. In New South Wales, however, some of the requirements for applying for a grant are contained in the *Probate and Administration Act 1898* (NSW).

New South Wales

40.2 Section 42 of the *Probate and Administration Act 1898* (NSW) provides:

42 Application for probate or administration

- (1) All applications for probate or letters of administration may be made to the Court in such manner as may be prescribed by the rules.
- (2) Notice of such intended application shall be published in such newspaper or newspapers as may be prescribed by the rules at least fourteen days before such application is made.
- (3) Application for probate of a will not deposited as in section 32 provided or for letters of administration shall be supported by an affidavit that a search has been made in the proper office for a will of the deceased, and stating whether any such will remains deposited with the officer for the time being authorised to have the custody of deposited wills, or by a certificate from the Registrar to the like effect.
- (4) The Court may by order direct that any partial or total failure to comply with the requirements of subsections (2) and (3) shall not bar the granting of probate or letters of administration.
- (5) The Court may refuse to revoke a grant of probate or letters of administration notwithstanding that in respect of the application for the grant there was any partial or total failure to comply with the requirements of subsections (2) and (3).

40.3 Section 42(1) of the *Probate and Administration Act 1898* (NSW) requires an application for a grant to be made in the manner prescribed by the *Supreme Court Rules 1970* (NSW).

40.4 Section 42(2) requires notice of an intended application to be published in such newspaper or newspapers, as may be prescribed by the rules, at least 14 days before application is made for the grant.¹⁶⁵⁵ As noted in Chapter 8 of this Report, New South Wales is the only Australian jurisdiction where the

¹⁶⁵⁵

See Chapter 8 of this Report for a discussion of this requirement and the notice requirements in the other Australian jurisdictions.

requirement to give notice of intended application for a grant is found in the legislation, rather than in the relevant court rules.¹⁶⁵⁶

40.5 Where the application is for probate of a will that was not deposited with the registry in accordance with section 32 of the Act, or for letters of administration, section 42(3) requires the application to be supported by an affidavit as to the searches made in the proper office of the Registrar of Probate for a will of the deceased.

Other Australian jurisdictions

40.6 The other Australian jurisdictions do not have a legislative provision to the effect of section 42 of the *Probate and Administration Act 1898* (NSW). They do, however, have provisions in their court rules that prescribe the procedure governing applications for probate and letters of administration, including the requirements for giving notice of intended application¹⁶⁵⁷ and, in Victoria, the requirements concerning searches for deposited wills.¹⁶⁵⁸

Discussion Paper

40.7 In the Discussion Paper, the National Committee considered whether a provision dealing with the manner in which applications for probate and letters of administration are to be made should be included in the model legislation and, if so, whether it would be more appropriate for provisions to the effect of section 42(2)–(5) of the *Probate and Administration Act 1898* (NSW) to be located in court rules, rather than in the model legislation.¹⁶⁵⁹

40.8 The National Committee referred to its policy that procedural matters should, as far as possible, be located in court rules, rather than in the model administration legislation. It considered that:¹⁶⁶⁰

- Rules are better able to be moulded to the unique requirements of, and facilities available in, individual jurisdictions.
- The alteration of procedures, particularly at short notice, may be more easily achieved by the amendment of rules rather than Acts of Parliament.

¹⁶⁵⁶ See [8.4] in vol 1 of this Report.

¹⁶⁵⁷ *Court Procedures Rules 2006* (ACT) rr 3005–3011; *Supreme Court Rules* (NT) rr 88.07, 88.09, 88.23–88.25; *Uniform Civil Procedure Rules 1999* (Qld) rr 597–599, 602; *The Probate Rules 2004* (SA) pt 2, in particular rr 6–8, 11; *Probate Rules 1936* (Tas) rr 4–5, 25–27; *Supreme Court (Administration and Probate) Rules 2004* (Vic) O 2–4; *Non-contentious Probate Rules 1967* (WA) rr 6–9. Note, in South Australia and Western Australia, there is no requirement for an applicant for a grant to publish a notice of intended application: see [8.17] in vol 1 of this Report.

¹⁶⁵⁸ *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 2.05(1)(a)(i), 4.05.

¹⁶⁵⁹ *Administration of Estates Discussion Paper* (1999) QLRC 257; NSWLRC [18.3].

¹⁶⁶⁰ *Ibid*, QLRC 258; NSWLRC [18.4].

40.9 The National Committee proposed that the model legislation should include a ‘signposting’ provision, based on section 42(1) of the *Probate and Administration Act 1898* (NSW). It also proposed that individual jurisdictions should consider introducing a provision to the effect of section 42(2)–(5) of the *Probate and Administration Act 1898* (NSW) in their court rules.¹⁶⁶¹

Submissions

40.10 The National Committee’s proposal to include a provision to the effect of section 42(1) of the *Probate and Administration Act 1898* (NSW) was supported by the Bar Association of Queensland, a former ACT Registrar of Probate, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁶⁶²

40.11 The former ACT Registrar of Probate suggested that:¹⁶⁶³

it is imperative that the Committee’s views be adopted and that all procedural matters be dealt with in rules with a ‘sign posting’ in the model legislation.

40.12 The Trustee Corporations Association of Australia, although agreeing that the model legislation should include a ‘signpost’ provision and that procedural matters were more appropriately located in court rules, disagreed with the requirement found in section 42(2) of the *Probate and Administration Act 1898* (NSW) to publish a notice of intended application.¹⁶⁶⁴

The National Committee’s view

40.13 The model legislation should include a provision to the effect of section 42(1) of the *Probate and Administration Act 1898* (NSW), which requires an application for a grant to be made in such manner as may be prescribed by the court rules.

40.14 It should also include an additional provision requiring an application for the resealing of a grant to be made in such manner as may be prescribed by the court rules.

40.15 However, the procedural requirements for obtaining a grant, or the resealing of a grant, are more appropriately located in court rules, and should not be included in the model legislation.

¹⁶⁶¹ Ibid, QLRC 258; NSWLRC 370 (Proposal 91).

¹⁶⁶² Submissions 1, 2, 6, 7, 8, 11, 12, 14, 15.

¹⁶⁶³ Submission 2.

¹⁶⁶⁴ Submission 6. This issue is considered in Chapter 8 of this Report.

DELAY IN APPLYING FOR A GRANT OR THE RESEALING OF A GRANT

Existing provisions in court rules

40.16 A number of jurisdictions have provisions in their court rules requiring an applicant for a grant, or for the resealing of a grant, to explain the delay in making the application.

Application for an original grant

40.17 In the ACT, the rules provide that, if an application for a grant is made more than six months after the deceased person's death, the applicant's affidavit in support of the application must state the reasons for the delay.¹⁶⁶⁵

40.18 Similarly, the rules in New South Wales and the Northern Territory provide that, if an application for a grant is made six months or more after the deceased person's death, the applicant must file an affidavit explaining the delay.¹⁶⁶⁶ The Northern Territory rules also provide that, if an application for a grant is made after a lapse of two or more years from the deceased person's death, the affidavit in support of the application must state whether a prior application for a grant or resealing has been made in connection with the estate.¹⁶⁶⁷

40.19 In Tasmania, the rules provide that, if an application for a grant is made after the lapse of three years from the deceased person's death, the reason for the delay must be certified to the registrar.¹⁶⁶⁸ If the certificate is unsatisfactory, the registrar must require such proof of the alleged cause of the delay as he or she may see fit.¹⁶⁶⁹

40.20 The Victorian rules also require an applicant for a grant to explain the delay in applying for a grant if an application for a grant, or for a grant of the unadministered estate of the deceased person, is made for the first time more than three years after the deceased person's death.¹⁶⁷⁰

Application for resealing

40.21 In Tasmania, the rules provide that, if an application for the resealing of a grant is made after a lapse of three years from the deceased person's death, the reason for the delay must be certified to the registrar.¹⁶⁷¹ If the certificate is

¹⁶⁶⁵ *Court Procedures Rules 2006* (ACT) r 3010(1)(e).

¹⁶⁶⁶ *Supreme Court Rules 1970* (NSW) Pt 78 r 11; *Supreme Court Rules* (NT) r 88.10.

¹⁶⁶⁷ *Supreme Court Rules* (NT) rr 88.23(1)(c)(iv), 88.24(1)(c)(iv), 88.25(1)(a).

¹⁶⁶⁸ *Probate Rules 1936* (Tas) r 58(1).

¹⁶⁶⁹ *Probate Rules 1936* (Tas) r 58(2).

¹⁶⁷⁰ *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 6.02.

¹⁶⁷¹ *Probate Rules 1936* (Tas) r 52(1).

unsatisfactory, the registrar must require such proof of the alleged cause of the delay as he or she may see fit.¹⁶⁷²

40.22 In the Northern Territory, if an application for resealing is made after a lapse of two or more years from the deceased person's death, the affidavit in support of the application must state whether a prior application for resealing has been made in connection with the estate.¹⁶⁷³

Discussion Papers

40.23 The Discussion Paper on the administration of estates did not consider the issue of whether an applicant for a grant should be required to explain any delay in applying for the grant.¹⁶⁷⁴ However, the issue of delay was considered in the Discussion Paper on the recognition of interstate and foreign grants. The preliminary view expressed in that paper was that it was not necessary to adopt provisions to the effect of the Tasmanian and Northern Territory rules that apply in respect of an application for the resealing of a grant.¹⁶⁷⁵

Submissions

40.24 The proposal not to include a provision requiring an explanation of the delay in applying for the resealing of a grant was supported by the former Principal Registrar of the Supreme Court of Queensland, the Victorian Bar and the New South Wales Bar Association.¹⁶⁷⁶

The National Committee's view

40.25 The National Committee notes that some jurisdictions have court rules requiring an applicant for a grant, or for the resealing of a grant, to explain the delay if the application is made more than a specified period after the deceased's death. Those provisions do not concern substantive matters of succession law and should not be included in the model legislation.

¹⁶⁷² *Probate Rules 1936* (Tas) r 52(2).

¹⁶⁷³ *Supreme Court Rules* (NT) r 88.26(1)(b)(iv).

¹⁶⁷⁴ *Administration of Estates Discussion Paper* (1999).

¹⁶⁷⁵ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 120. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.72].

¹⁶⁷⁶ Submissions R1, R4, R5.

APPLICATION BY A NON-RESIDENT EXECUTOR OR ADMINISTRATOR

Existing legislative provisions

40.26 The administration legislation in Tasmania and Victoria provides expressly that an executor or administrator who applies for the resealing of a grant need not be within the jurisdiction of the resealing court.¹⁶⁷⁷

40.27 In the ACT, New South Wales, the Northern Territory and Western Australia, there is no express provision to this effect. However, the legislation in these jurisdictions contemplates that an applicant for the resealing of a grant need not be resident within the jurisdiction in which resealing is sought.¹⁶⁷⁸

40.28 In Queensland, section 6(2) of the *Succession Act 1981* (Qld) provides that the court may make a grant to a person, even though the person is not resident or domiciled in Queensland. In Chapter 3 of this Report, the National Committee has recommended that the model legislation should include a provision to this effect. Although there is no equivalent provision in relation to resealing, the Supreme Court of Queensland has resealed grants on the application of a person who was not resident in Queensland.¹⁶⁷⁹

40.29 In South Australia, the legislation and rules are silent on this issue.

Recommendation of the Law Reform Commission of Western Australia

40.30 When the Law Reform Commission of Western Australia considered this issue in the context of developing a uniform resealing procedure, it recommended that it 'should be expressly provided that the executor or administrator need not be within the jurisdiction of the ... resealing court'.¹⁶⁸⁰

Discussion Paper

40.31 The preliminary view expressed in the Discussion Paper on the recognition of interstate and foreign grants was that the model legislation should provide expressly that an executor or administrator applying for the resealing of a grant need not be resident within the jurisdiction of the resealing court.¹⁶⁸¹

¹⁶⁷⁷ *Administration and Probate Act 1935* (Tas) s 48(1)(a); *Administration and Probate Act 1958* (Vic) s 81(1)(a).

¹⁶⁷⁸ See *Administration and Probate Act 1929* (ACT) s 69(a); *Probate and Administration Act 1898* (NSW) s 97(1)(a); *Administration and Probate Act* (NT) s 101(1)(a); *Administration Act 1903* (WA) s 53(1), which are considered at [40.43]–[40.47] below.

¹⁶⁷⁹ See *In the Goods of Bedford* [1902] QWN 63; *Re Manson* [1908] QWN 8.

¹⁶⁸⁰ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.24], [11.1] Recommendation (5).

¹⁶⁸¹ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 91. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 49.

40.32 It was further suggested that, although the Tasmanian and Victorian provisions are expressed in terms of an executor or administrator who applies for the resealing of a grant, the model legislation should provide additionally that a person appointed under a power of attorney given by an executor or administrator to apply for the resealing of a grant need not be resident within the jurisdiction of the resealing court.¹⁶⁸²

40.33 It was suggested that these provisions should be located in the model legislation on the basis that they relate to a 'core matter'.¹⁶⁸³

40.34 The National Committee sought submissions on whether all jurisdictions should provide expressly that an executor, administrator, or a person appointed under power of attorney given by an executor or administrator who applies for the resealing of a grant need not be resident within the jurisdiction of the resealing court, and on whether such a provision should be located in the model legislation, rather than in court rules.¹⁶⁸⁴

Submissions

40.35 The former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association and the Trustee Corporations Association of Australia were of the view that all jurisdictions should provide expressly that an executor or administrator applying for the resealing of a grant, or a person appointed under a power of attorney by an executor or administrator to apply for the resealing of a grant, need not be resident within the jurisdiction of the resealing court.¹⁶⁸⁵

40.36 Only two respondents, the former Principal Registrar of the Supreme Court of Queensland and the Trustee Corporations Association of Australia, commented on the location of this provision. Both respondents were of the view that the relevant provision should be included in the model legislation.¹⁶⁸⁶

The National Committee's view

40.37 For consistency with the model provision that is based on section 6(2) of the *Succession Act 1981* (Qld),¹⁶⁸⁷ the model legislation should provide that the court may reseal a grant even though the applicant for resealing is not resident or domiciled in the jurisdiction.

¹⁶⁸² Ibid.

¹⁶⁸³ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 91.

¹⁶⁸⁴ Ibid. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 49.

¹⁶⁸⁵ Submissions R1, R2, R4, R5, R6.

¹⁶⁸⁶ Submissions R1, R6.

¹⁶⁸⁷ See [40.28] above.

DEEMED RESIDENCE OF, AND SERVICE ON, A NON-RESIDENT EXECUTOR OR ADMINISTRATOR

Introduction

40.38 At common law, an originating process does not run outside the State or Territory in which it is issued.¹⁶⁸⁸ Except as otherwise provided by statute, ‘the court’s jurisdiction in an action in personam depends on the defendant’s presence inside the jurisdiction’.¹⁶⁸⁹

40.39 This rule has been modified by the *Service and Execution of Process Act 1992* (Cth) and by the court rules of the Australian jurisdictions.

40.40 The *Service and Execution of Process Act 1992* (Cth) provides that an ‘initiating process’ may be served in another State or Territory.¹⁶⁹⁰ The Act does not ‘state a need for any particular nexus between the State where the proceeding is issued and where it is served’.¹⁶⁹¹ Service under the Act must be effected in the same way as service of such an initiating process in the place of issue.¹⁶⁹²

40.41 Service of an originating process overseas is facilitated by the court rules of all Australian jurisdictions.¹⁶⁹³ The rules prescribe the circumstances in which an originating process may be served overseas. The nature of the prescribed circumstances ensure that there is ‘a connection of either a party or the subject-matter with the forum’.¹⁶⁹⁴ Included among the various circumstances in which service overseas is permissible is that the action is for relief against a person domiciled or ordinarily resident within the jurisdiction.¹⁶⁹⁵ This rule ‘is useful where a natural person is temporarily absent from the

1688 See *Laurie v Carroll* (1958) 98 CLR 310, 322 (Dixon CJ, Williams and Webb JJ).

1689 BC Cairns, *Australian Civil Procedure* (7th ed, 2007) 115.

1690 *Service and Execution of Process Act 1992* (Cth) ss 3(1) (definition of ‘State’), 5, 15(1).

1691 BC Cairns, *Australian Civil Procedure* (7th ed, 2007) 116.

1692 *Service and Execution of Process Act 1992* (Cth) s 15(2).

1693 See *Court Procedures Rules 2006* (ACT) r 6501; *Uniform Civil Procedure Rules 2005* (NSW) r 11.2, sch 6; *Supreme Court Rules* (NT) r 7.01; *Uniform Civil Procedure Rules 1999* (Qld) r 124; *Supreme Court Civil Rules 2006* (SA) r 40; *Supreme Court Rules 2000* (Tas) r 147A; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.01; *Rules of the Supreme Court 1971* (WA) O 10 r 1 (under which service is permissible with the leave of the court).

1694 BC Cairns, *Australian Civil Procedure* (7th ed, 2007) 117.

1695 *Court Procedures Rules 2006* (ACT) r 6501(1)(d)(i); *Uniform Civil Procedure Rules 2005* (NSW) r 11.2, sch 6 para (g); *Supreme Court Rules* (NT) r 7.01(1)(c); *Uniform Civil Procedure Rules 1999* (Qld) r 124(1)(d); *Supreme Court Civil Rules 2006* (SA) r 40(1)(b); *Supreme Court Rules 2000* (Tas) r 147A(1)(a); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.01(1)(c); *Rules of the Supreme Court 1971* (WA) O 10 r 1(1)(c).

jurisdiction’,¹⁶⁹⁶ as it enables the originating process to be served on the person while overseas.

40.42 The combined effect of these modifications of the common law is that ‘[a] court has jurisdiction in a civil action either because the plaintiff has served the originating process on the defendant while within its territorial jurisdiction or because applicable “long arm” provisions have been invoked’.¹⁶⁹⁷

Existing legislative provisions

40.43 The administration legislation in the ACT, New South Wales, the Northern Territory and Western Australia contains a provision dealing with the deemed residence of an executor or administrator who is appointed under the relevant legislation or who applies for the resealing of a grant in the relevant jurisdiction.¹⁶⁹⁸

40.44 The legislation in New South Wales, the Northern Territory and Western Australia also deals with service on a non-resident executor or administrator.¹⁶⁹⁹

40.45 Section 97 of the *Probate and Administration Act 1898* (NSW), which is typical of these provisions, is in the following terms:¹⁷⁰⁰

97 Every executor etc to be deemed resident in New South Wales

(1) Every executor or administrator:

- (a) named in any probate or letters of administration granted by any court of competent jurisdiction in any portion of Her Majesty’s dominions and making application under the provisions of Division 5 for the sealing of such probate or administration, or
- (b) appointed under this Part,

shall be deemed to be resident in New South Wales.

¹⁶⁹⁶ BC Cairns, *Australian Civil Procedure* (7th ed, 2007) 120.

¹⁶⁹⁷ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁶⁹⁸ *Administration and Probate Act 1929* (ACT) s 69; *Probate and Administration Act 1898* (NSW) s 97(1); *Administration and Probate Act* (NT) s 101(1); *Administration Act 1903* (WA) s 53(1).

¹⁶⁹⁹ *Probate and Administration Act 1898* (NSW) s 97(2); *Administration and Probate Act* (NT) s 101(2); *Administration Act 1903* (WA) s 53(2).

¹⁷⁰⁰ Although s 69 of the *Administration and Probate Act 1929* (ACT) is in similar terms to s 97(1) of the *Probate and Administration Act 1898* (NSW), the ACT legislation no longer contains equivalent provisions to s 97(2) of the New South Wales legislation: see *Administration and Probate Act 1929* (ACT) s 69(2), (3), which were repealed by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 amdt [2.24].

- (2) Where not actually so resident, the executor or administrator shall, before the issue or sealing of any probate or administration, file with the Registrar an address, as prescribed by the rules, within New South Wales, at which notices and processes may be served upon the executor or administrator; and all services at such registered address shall be deemed personal service. (emphasis added)

40.46 These provisions do not simply require a non-resident executor or administrator to file an address for service within the jurisdiction; they ensure that all notices and processes served at that address are taken to be personally served on the non-resident executor or administrator.

40.47 Commentators on the New South Wales provision have suggested that the section 'ensures that the executor or administrator is amenable to court process issued in the state by persons who have claims against the estate',¹⁷⁰¹ and that, in the absence of such a provision, where the executor or administrator was resident outside New South Wales, a person wishing to proceed against the estate would have to rely on the relevant rules of court or on the Commonwealth legislation dealing with the service of court processes out of the jurisdiction.¹⁷⁰²

40.48 The other Australian jurisdictions do not have an equivalent provision.

Recommendation of the Law Reform Commission of Western Australia

40.49 When the Law Reform Commission of Western Australia considered this issue in the context of developing a uniform resealing procedure, it recommended that a non-resident executor or administrator should be required to file a local address for service.¹⁷⁰³ However, it did not make any recommendation about whether an applicant for resealing who is not resident in the jurisdiction in which resealing is sought should be deemed to be resident within that jurisdiction or about whether service of all documents at the applicant's address for service should be taken to constitute personal service of the applicant.

Discussion Papers

40.50 In the Discussion Paper on the administration of estates, the National Committee's preliminary proposal was that the model legislation should not include a provision to the effect of section 97 of the *Probate and Administration*

¹⁷⁰¹ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1489.1] (at 20 February 2009).

¹⁷⁰² Ibid (at 20 February 2009), referring to Pt 10 of the *Supreme Court Rules 1970* (NSW) and to the *Service and Execution of Process Act 1901* (Cth). See now *Uniform Civil Procedure Rules 2005* (NSW) r 10.3 and the *Service and Execution of Process Act 1992* (Cth). See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 617.

¹⁷⁰³ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.35], [11.1] Recommendation (13).

Act 1898 (NSW).¹⁷⁰⁴ It was suggested that, if any jurisdiction considered it necessary, the provision should be included in that jurisdiction's court rules.¹⁷⁰⁵

40.51 This issue was further considered in the Discussion Paper on the recognition of interstate and foreign grants, where the preliminary view expressed was that all jurisdictions should provide, in court rules,¹⁷⁰⁶ that:¹⁷⁰⁷

- a non-resident executor or administrator who applies for the resealing of a grant is deemed to be resident in the jurisdiction in which resealing is sought;
- a non-resident executor or administrator who applies for the resealing of a grant must file an address for service in the jurisdiction in which resealing is sought; and
- service of any notice or process at that address should be deemed to be personal service on the non-resident executor or administrator.

40.52 It was further proposed that, although the existing provisions to this effect in the ACT,¹⁷⁰⁸ New South Wales, the Northern Territory and Western Australia are expressed to apply only to an executor or administrator who applies for the resealing of a grant, the model provision should also be expressed to apply to a person appointed under a power of attorney given by an executor or administrator who applies for the resealing of a grant.¹⁷⁰⁹

Submissions

40.53 All the respondents who commented on the proposal contained in the Discussion Paper on the administration of estates agreed that the model legislation should not include a provision to the effect of section 97 of the *Probate and Administration Act 1898* (NSW). The National Committee's proposal was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁷¹⁰

1704 *Administration of Estates Discussion Paper* (1999) QLRC 261; NSWLRC 374 (Proposal 94).

1705 Ibid.

1706 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 93.

1707 Ibid; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.33].

1708 Although s 69 of the *Administration and Probate Act 1929* (ACT) still provides for the deemed residence of a non-resident executor or administrator, it no longer deems service at the non-resident executor's or administrator's address for service to be personal service. See note 1700 above.

1709 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 93; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.33].

1710 Submissions 1, 8, 11, 12, 14, 15.

However, although the Public Trustee of New South Wales supported this proposal, he commented that uniformity should extend to court rules.¹⁷¹¹

40.54 The National Committee also received submissions on the proposal contained in the Discussion Paper on the recognition of interstate and foreign grants. The former Principal Registrar of the Supreme Court of Queensland and the New South Wales Bar Association agreed with the proposal contained in that paper that all jurisdictions should provide that:¹⁷¹²

- a non-resident executor, administrator, or person appointed under a power of attorney given by an executor or administrator, should be deemed to be resident in the jurisdiction in which resealing is sought and must file an address for service in that jurisdiction; and
- service of any notice or process at such an address should be deemed to be personal service on the executor, administrator or attorney.

40.55 Although the Trustee Corporations Association of Australia did not comment on the proposal that service at the address for service given by the non-resident executor, administrator or attorney should be deemed to be personal service, the Association agreed that a non-resident applicant for the resealing of a grant should be required to provide a local address for service and should be deemed to reside locally.¹⁷¹³

40.56 The former Principal Registrar of the Supreme Court of Queensland agreed with the proposal in the Discussion Paper on the recognition of interstate and foreign grants that the relevant provisions should be located in court rules.¹⁷¹⁴

40.57 However, the Public Trustee of New South Wales and the Trustee Corporations Association of Australia were of the view that the relevant provisions should be included in the model legislation.¹⁷¹⁵

The National Committee's view

40.58 Earlier in this Report, the National Committee has recommended that the model legislation should provide expressly that the court may grant probate or letters of administration to a person, even though the person is not resident or domiciled in the jurisdiction.¹⁷¹⁶ The National Committee has also recommended in this chapter that the model legislation should provide that the

1711 Submission 11.

1712 Submissions R1, R5.

1713 Submission R6.

1714 Submission R1.

1715 Submissions R2, R6.

1716 See Recommendation 3-1 in vol 1 of this Report. See also Administration of Estates Bill 2009 cl 302(1)(b).

court may reseal a grant even though the applicant for resealing is not resident or domiciled in the jurisdiction.¹⁷¹⁷ In light of those recommendations, the National Committee considers it desirable for the model legislation to include a provision to facilitate the service of an originating process, within the jurisdiction, on a non-resident executor or administrator or on a person who obtains the resealing of a grant and is not resident in the jurisdiction.

40.59 Subject to the matters discussed below, the model provision should be based generally on section 97(2) of the *Probate and Administration Act 1898* (NSW).

40.60 In the National Committee's view, it is not necessary to deem the relevant person to be resident in the jurisdiction as section 97(1) does. Although a person's residence within the jurisdiction is a factor enabling an originating process to be served on the person overseas,¹⁷¹⁸ the purpose of the model provision is to avoid the need to effect service out of the jurisdiction. Accordingly, the model provision should not include a subsection to the effect of section 97(1) of the *Probate and Administration Act 1898* (NSW).

40.61 Further, section 97(2) of the *Probate and Administration Act 1898* (NSW) and its counterparts in the Northern Territory and Western Australia appear to deem service at the address for service to be personal service on the executor or administrator of *any* notice or originating process; service under these provisions does not appear to be restricted to service of a notice, or an originating process for proceedings, related to the person's administration of the estate in question. In the National Committee's view, the model provision should apply only to the service of a notice, or an originating process for a proceeding, that relates to the administration of the estate in question.

40.62 Finally, the model provision should not be restricted to an executor or administrator who is granted probate or letters of administration or who applies for the resealing of a grant, but should also apply to an attorney authorised to apply for the resealing of a grant if the attorney is not resident in the jurisdiction.

FINDING AS TO DOMICILE

40.63 A number of Australian jurisdictions have provisions that are concerned with the domicile of the deceased person.

Existing legislative provisions

40.64 In the ACT, the court may not make, or reseal, a grant unless it has made a finding with respect to the domicile of the deceased person at the time

¹⁷¹⁷ See Recommendation 40-4 below. See also Administration of Estates Bill 2009 cl 353(3)(b).

¹⁷¹⁸ See [40.41] above.

of death. Section 8C of the *Administration and Probate Act 1929* (ACT) provides:

8C Supreme Court to make finding about domicile of deceased person

On an application made under this Act—

- (a) for the grant of probate of the will, or administration of the estate, of a deceased person; or
- (b) to have probate of the will, administration of the estate, or an order to collect and administer the estate, of a deceased person granted by a court of competent jurisdiction in a State or other Territory sealed with the seal of the Supreme Court; or
- (c) by the public trustee for an order to collect and administer the estate of a deceased person;

the Supreme Court must not grant the relief sought unless it has made a finding about the domicile of the deceased person at the time of death.

40.65 The court rules provide that the supporting affidavit for a grant must state ‘whether the deceased person considered that the person’s domicile was in the ACT’.¹⁷¹⁹

Existing provisions in court rules

40.66 In New South Wales and the Northern Territory, the rules provide that, if it appears in proceedings for a grant, or the resealing of a grant, that the deceased was domiciled out of the jurisdiction, the court may require evidence of certain matters. The New South Wales rule,¹⁷²⁰ which is in virtually the same terms as its counterpart in the Northern Territory,¹⁷²¹ provides:

12 Domicile out of New South Wales

Where it appears in proceedings for a grant or for resealing that the deceased was domiciled out of New South Wales, the Court may require evidence of:

- (a) the domicile of the deceased,
- (b) the requirements of the law of the domicile as to the validity of any will made by the deceased,
- (c) the law of the domicile as to the person entitled in distribution of the estate.

¹⁷¹⁹ *Court Procedures Rules 2006* (ACT) r 3010(1)(h).

¹⁷²⁰ *Supreme Court Rules 1970* (NSW) Pt 78 r 12.

¹⁷²¹ *Supreme Court Rules* (NT) r 88.11.

40.67 In South Australia and Tasmania, the rules also deal with the registrar's power to require evidence of the deceased's domicile, but only in relation to an application for the resealing of a grant.

40.68 Rule 50.05 of *The Probate Rules 2004 (SA)* provides:

If on an application for the re-sealing of a grant the domicile of the deceased at the date of death as sworn to in the oath differs from that suggested by the description in the grant, the Registrar may require further evidence as to domicile.

40.69 Rule 49 of the *Probate Rules 1936 (Tas)* is in similar terms. It provides:

49 Evidence as to domicile

The Registrar in any case, may require further evidence as to domicile, and shall require such evidence whenever the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant.

40.70 These rules appear to be related to the rules in South Australia and Tasmania that impose restrictions on the resealing of a grant made in a jurisdiction in which the deceased was not domiciled at the date of his or her death.¹⁷²²

Discussion Papers

40.71 At the time the Discussion Paper on the administration of estates was published, section 8C of the *Administration and Probate Act 1929 (ACT)* appeared in a substantially different form from its form today. It provided:

8C The Court to make finding with respect to the domicile of deceased person

- (1) On an application made under this Act—
- (a) for the grant of probate of the will, or administration of the estate, of a deceased person;
 - (b) to have probate of the will, administration of the estate, or an order to collect and administer the estate, of a deceased person granted by a court of competent jurisdiction in a State or other Territory sealed with the seal of the Supreme Court; or
 - (c) by the Public Trustee for an order to collect and administer the estate of a deceased person,

¹⁷²²

See *The Probate Rules 2004 (SA)* r 50.06; *Probate Rules 1936 (Tas)* r 50, which are considered at [36.74], [36.77]–[36.79], [36.105]–[36.107] above.

the Court shall not grant the application or the Registrar shall not issue the grant of probate or administration, seal the probate, administration or order of the court, or grant an order to the Public Trustee, as the case requires, unless the Court or the Registrar has made a finding with respect to the domicile of the deceased person at the time of death, and, if the Court or Registrar has found that the deceased person was, at that time, domiciled in a State under the law of which death duty is payable out of the estates of deceased persons, the Court shall not grant the application or the Registrar shall not issue the grant of probate or administration, seal the probate, administration or order of the court or grant an order to the Public Trustee, as the case requires, unless—

- (d) the Court or Registrar is satisfied that an assessment has been made, in accordance with the law of that State, of the amount of death duty that is, under that law, payable out of the estate of the deceased person; or
- (e) the appropriate officer of that State has consented in writing to—
 - (i) the grant of probate or administration;
 - (ii) the sealing with the seal of the Court of the probate, administration or order; or
 - (iii) the grant of the order to the Public Trustee,
 as the case requires.

(2) In sub-section (1)—

- (a) a reference to death duty shall be read as including a reference to succession duty and probate duty; and
- (b) a reference to the appropriate officer of the State in which a deceased person was domiciled shall be read as a reference to the person for the time being occupying, or performing the duties of, the office specified in the following table opposite to the name of the State in which the deceased person was domiciled.

State	Appropriate Officer
New South Wales	Commissioner of Stamp Duties
Victoria	Commissioner of Probate Duties
Queensland	Commissioner of Stamp Duties
South Australia	Commissioner of Succession Duties
Tasmania	Commissioner of Taxes
Western Australia	Commissioner of State Taxation

40.72 In the Discussion Paper on the administration of estates, the National Committee expressed the view that the model legislation should not include a provision to the effect of section 8C of the *Administration and Probate Act 1929*

(ACT), as it then was.¹⁷²³ It considered that the purpose of section 8C was to close an avenue for the avoidance of death duties, and that the section did not deal with a matter that was relevant to succession legislation.¹⁷²⁴

40.73 Subsequently, in the Discussion Paper on the recognition of interstate and foreign grants, the National Committee sought submissions on whether the court rules in all jurisdictions should provide that:¹⁷²⁵

- where it appears in proceedings for resealing that the deceased was domiciled out of the jurisdiction, the court may require evidence of:
 - the domicile of the deceased;
 - the requirements of the law of the domicile as to the validity of any will made by the deceased; and
 - the law of the domicile as to the persons entitled on distribution of the estate; and/or
- where the domicile of the deceased as sworn to in the affidavit differs from that suggested by the description in the grant, the registrar shall, and in any other case may, require further evidence of the deceased's domicile.

40.74 As explained above, these are matters that are presently addressed by the court rules in New South Wales, the Northern Territory, South Australia and Tasmania.¹⁷²⁶

Submissions

40.75 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies agreed with the National Committee's proposal in the Discussion Paper on the administration of estates that the model legislation should not include a provision to the effect of section 8C of the *Administration and Probate Act 1929* (ACT).¹⁷²⁷

40.76 However, a former ACT Registrar of Probate did not agree with that proposal. She contended that domicile is important for jurisdictional purposes,

¹⁷²³ *Administration of Estates Discussion Paper* (1999) QLRC 262; NSWLRC 376 (Proposal 95).

¹⁷²⁴ *Ibid*, QLRC 262; NSWLRC [18.17].

¹⁷²⁵ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 119. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 65.

¹⁷²⁶ See [40.66]–[40.70] above.

¹⁷²⁷ Submissions 1, 8, 11, 12, 14, 15.

referring to section 9 of the *Administration and Probate Act 1929* (ACT),¹⁷²⁸ which deals with the court's jurisdiction to make a grant.¹⁷²⁹ She also doubted whether 'a provision relating to domicile can validly be the subject of rules of court'.¹⁷³⁰

40.77 Several respondents also commented on the questions posed in the Discussion Paper on the recognition of interstate and foreign grants about whether particular matters should be addressed in court rules.

40.78 The Public Trustee of New South Wales was of the view that court rules should include a rule to the effect of the New South Wales and Northern Territory rules considered above,¹⁷³¹ which provide that, where it appears in proceedings for resealing that the deceased was domiciled out of the jurisdiction in which resealing is sought, the court may require evidence of the domicile of the deceased, the requirements of the law of the domicile as to the validity of any will made by the deceased, and the law of the domicile as to the persons entitled on the distribution of the estate.¹⁷³²

40.79 The Trustee Corporations Association of Australia also supported the inclusion of a similar rule, except that it was of the view that the power to require evidence of these matters should apply if the deceased died domiciled outside Australia, but not if the deceased died domiciled in another Australian jurisdiction.¹⁷³³

40.80 The Public Trustee of New South Wales also favoured the inclusion of a provision to the effect of rule 49 of the *Probate Rules 1936* (Tas),¹⁷³⁴ which provides that the registrar may in any case require evidence of the deceased's domicile and must require such evidence if the domicile of the deceased as sworn to in the affidavit differs from that suggested by the description in the grant that is sought to be resealed.¹⁷³⁵ The Trustee Corporations Association of Australia also supported the inclusion of a rule to that effect.¹⁷³⁶

1728 Submission 2.

1729 However, s 9 of the *Administration and Probate Act 1929* (ACT) does not found the court's jurisdiction to make a grant on the deceased's domicile within the jurisdiction: see [3.30] in vol 1 of this Report.

1730 Submission 2.

1731 See [40.66] above.

1732 Submission R2.

1733 Submission R6.

1734 Submission R2.

1735 *Probate Rules 1936* (Tas) r 49 is set out at [40.69] above.

1736 Submission R6.

40.81 The Victorian Bar also considered the circumstances in which the court should require further evidence of the deceased's domicile. It commented:¹⁷³⁷

Whilst this issue is a significant question, we think that it is really a matter of procedure rather than substance ... One way to address it might be to provide in the [uniform] rules that if the deceased had not been continuously resident for two years prior to the date of death in the state in which the application says that he was domiciled, then the facts relied upon to establish domicile should be set out in detail.

40.82 However, the former Principal Registrar of the Supreme Court of Queensland was generally opposed to the inclusion of rules dealing with the deceased's domicile.¹⁷³⁸

The National Committee's view

No requirement for the court to make finding about the deceased's domicile at the time of death

40.83 In Chapter 38 of this Report, the National Committee has recommended that, under the first stage of its proposed scheme for the automatic recognition of grants, a grant made in another Australian State or Territory that is endorsed with a notation that the deceased died domiciled in the jurisdiction in which the grant was made is to have the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction.¹⁷³⁹ In view of that recommendation, it is to be expected that the court would routinely consider the issue of the deceased's domicile and, where appropriate, cause the relevant notation to be made on the grant.

40.84 However, the inclusion of a provision to the effect of section 8C of the *Administration and Probate Act 1929 (ACT)* could have the undesirable effect of preventing the court from making a grant, particularly in a situation of some urgency, simply because there is insufficient evidence for the court to make a finding about the deceased's domicile. This could have the effect of putting the estate assets at risk.

40.85 Accordingly, the National Committee is of the view that the model legislation should not include a provision to the effect of section 8C of the *Administration and Probate Act 1929 (ACT)*.

1737 Submission R4.

1738 Submission R1.

1739 See Recommendation 38-3 above.

No provision dealing with the court's power to require evidence of the deceased's domicile

40.86 Individual jurisdictions may wish to include a provision in their court rules dealing with the court's power to require evidence of the deceased's domicile or other matters affecting the validity of any will or the entitlement of beneficiaries under the law of the deceased's domicile. However, those issues are not matters for the model legislation.

RECORD OF GRANT

Existing legislative provisions

40.87 The administration legislation in the Northern Territory, New South Wales and Western Australia includes a provision requiring the Registrar to keep a record of grants made in the particular jurisdiction.¹⁷⁴⁰

40.88 Section 140 of the *Administration Act 1903* (WA) provides:

140 Records of grants, etc

- (1) The Principal Registrar shall cause entries to be made in a book to be kept for that purpose of—
- (a) all grants of probate and administration, and all orders to collect;
 - (b) the filing, passing, and allowance of the accounts of all executors and administrators; and of
 - (c) any special order extending the time for passing such accounts.
- (2) Such book shall set forth—
- (a) the dates of such grants;
 - (b) the names of the testators or intestates;
 - (c) the place and time of death;
 - (d) the names and description of the executors or administrators;
 - [(e) *deleted*]
 - (f) the dates of the filing, passing, allowance of, and special orders with reference to the said accounts.

¹⁷⁴⁰

Probate and Administration Act 1898 (NSW) s 152; *Administration and Probate Act* (NT) s 148; *Administration Act 1903* (WA) s 140.

- (3) Where a grant of probate or administration is made or resealed by the Court, a copy of that grant may be obtained from the Court with or without the annexure thereto of a copy of the will (if any) to which it relates, and such copy may be issued under seal for all purposes as an office copy, and when so sealed and issued is sufficient evidence of that grant without further proof.

40.89 The New South Wales and Northern Territory provisions are expressed in similar terms, except that they do not include a provision to the effect of section 140(3) of the *Administration Act 1903* (WA).

40.90 Until the amendment of the *Administration and Probate Act 1929* (ACT) in 2006, that Act used to include a similar provision.¹⁷⁴¹ However, that section of the ACT legislation has been repealed, and the requirement for the registrar to keep an administration and probate book is now found in the *Court Procedures Rules 2006* (ACT). Rule 3119 provides:

3119 Administration and probate book

- (1) The registrar must keep an administration and probate book.
- (2) The administration and probate book—
 - (a) must be kept in accordance with the directions of the court; and
 - (b) may be kept in electronic form.
- (3) The registrar must record in the administration and probate book—
 - (a) all grants of probate and administration; and
 - (b) all elections and orders to collect; and
 - (c) the passing of accounts of, and allowance of commission to, all executors and administrators.
- (4) The administration and probate book must set out—
 - (a) the dates of the grants, elections and orders; and
 - (b) the names of testators and intestates; and
 - (c) the place and time of their deaths; and
 - (d) the names and descriptions of executors and administrators; and
 - (e) any other information that the court directs.
- (5) The registrar may record any other information in the administration and probate book.

1741

See *Administration and Probate Act 1929* (ACT) s 125, repealed by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 amdt [2.43].

40.91 Commentators on the Western Australian legislation consider that section 140 of the *Administration Act 1903* (WA) ‘is in need of amendment to allow for the keeping of computer records and a “paperless grant”’.¹⁷⁴² In contrast, rule 3119(2)(b) of the *Court Procedures Rules 2006* (ACT) provides expressly that the administration and probate book in that jurisdiction may be kept in electronic form.

Discussion Paper

40.92 In the Discussion Paper on the administration of estates, the National Committee referred to its policy that procedural matters should, as far as possible, be addressed in each jurisdiction’s court rules, rather than in the model legislation. It expressed the view that a provision dealing with the recording of grants is procedural in nature and would therefore be better placed in each jurisdiction’s court rules.¹⁷⁴³

40.93 The National Committee proposed that the model legislation should not include a provision to the effect of section 140 of the *Administration Act 1903* (WA).¹⁷⁴⁴

Submissions

40.94 The National Committee’s proposal was supported by all the respondents who considered this issue — namely, the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁷⁴⁵

The National Committee’s view

40.95 The model legislation should not include a provision to the effect of section 140 of the *Administration Act 1903* (WA). In the National Committee’s view, a provision dealing with the process of recording grants made in the jurisdiction is not an appropriate matter for the model legislation. The National Committee notes that the former ACT provision dealing with that issue has been repealed and relocated in that jurisdiction’s court rules.¹⁷⁴⁶

¹⁷⁴² JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [1860.1] (at 21 February 2009).

¹⁷⁴³ *Administration of Estates Discussion Paper* (1999) QLRC 265; NSWLRC [18.28].

¹⁷⁴⁴ *Ibid*, QLRC 266; NSWLRC 380 (Proposal 97).

¹⁷⁴⁵ Submissions 1, 8, 11, 12, 14, 15.

¹⁷⁴⁶ See [40.90] above.

REGISTRAR'S POWERS

Existing legislative provisions

40.96 In some Australian jurisdictions the administration legislation contains a provision that provides expressly that the registrar may exercise:

- all the powers and authorities that were exercised by the registrar before the passing of the administration legislation in that jurisdiction (or before some earlier Act); and
- such other powers and authorities as may be conferred on the registrar by the court or by the court rules.

Queensland

40.97 In Queensland, section 69 of the *Succession Act 1981* (Qld) provides:

69 The registrar

Subject to this Act the registrar of the Supreme Court is invested with and shall and may exercise with reference to proceedings in the court under this Act all such powers and authorities as may be conferred on the registrar from time to time by the court and by the rules of court and otherwise all such powers and authorities as the registrar exercised before the passing of this Act.

40.98 This provision was recommended by the Queensland Law Reform Commission in its 1978 Report that resulted in the passing of the *Succession Act 1981* (Qld):¹⁷⁴⁷

The Registrar. Sections 11 and 12 of the *Probate Act of 1867* invest certain powers in the Registrar and although it is not considered desirable to spell out the functions of the Registrar in particular legislation of this kind, as his duties should properly be spelled out in more general legislation, it seems desirable to mention that he may continue to exercise the powers he exercised before the passing of this Act, although subject to it. Apart from that the powers conferred on him by the Court or by the Rules of Court should enable him to perform all his necessary functions in relation to this Act.

South Australia

40.99 In South Australia, sections 7 and 7A(1) of the *Administration and Probate Act 1919* (SA) serve a purpose similar to section 69 of the *Succession Act 1981* (Qld). Sections 7 and 7A(1) provide:

7 Registrar's powers

The Registrar shall have and exercise, with reference to proceedings in the Supreme Court, the like powers and authorities as he had and exercised immediately before the coming into operation of this Act.

1747

Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 51.

7A Exercise by Registrar of jurisdiction, powers or authorities of Court

- (1) The Registrar may exercise the jurisdiction, powers and authorities of the Court whether arising under this Act or otherwise to the extent authorised by the rules.

Tasmania

40.100 In Tasmania, the *Administration and Probate Act 1935* (Tas) invests the registrar with the power and authority exercised by surrogates of the judge of the Prerogative Court of Canterbury before the passing of the *Court of Probate Act 1857* (Eng):¹⁷⁴⁸

9 The Registrar to do all acts heretofore done by surrogates

Subject to the Rules of Court, the Registrar shall be invested with, and shall and may exercise, with reference to proceedings in the Court under this Act, the same power and authority which surrogates of the judge of the Prerogative Court of Canterbury could or might before the passing of the Act of the Imperial Parliament intituled the *Court of Probate Act 1857* have exercised in chambers with reference to proceedings in the said Prerogative Court, and non-contentious business may be transacted and probate of will or letters of administration may, upon application for that purpose, be issued in the usual form by such Registrar as heretofore, or in conformity with the Rules of Court and the duties thereby imposed on him.

Western Australia

40.101 In Western Australia, section 5 of the *Administration Act 1903* (WA) provides:

5 Duties of Principal Registrar

- (1) The Principal Registrar shall, subject to the rules, perform such duties as were immediately prior to the coming into operation of the *Acts Amendment (Master, Supreme Court) Act 1979*, performed by the Master of the Supreme Court in reference to proceedings in the ecclesiastical jurisdiction of the Court, and such other duties, as may be prescribed by the rules.
- (2) Subject to the rules the powers and authority conferred on the Principal Registrar by this Part may be exercised by a registrar. (note omitted)

40.102 The legislation in the other Australian jurisdictions does not include a provision preserving the powers of the registrar that could be exercised before the legislation commenced or before some other particular time.

¹⁷⁴⁸

Administration and Probate Act 1935 (Tas) s 67(1), sch 3 cl 9.

Discussion Paper

40.103 In the Discussion Paper, the National Committee commented that a provision to the effect of section 69 of the *Succession Act 1981* (Qld) would ensure continuity in the powers of the registrar on the implementation of the model legislation.¹⁷⁴⁹

40.104 Although the National Committee tended to the view that the powers of the registrar should generally be a matter for each jurisdiction to determine,¹⁷⁵⁰ it did not form a preliminary view about this issue. Instead, it sought submissions on whether it is necessary for the model legislation to include a provision to the effect of section 69 of the *Succession Act 1981* (Qld) to put beyond doubt the powers of the Registrar.¹⁷⁵¹

Submissions

40.105 The Queensland Law Society supported the inclusion of a provision to the effect of section 69 of the *Succession Act 1981* (Qld).¹⁷⁵²

It is essential for the containment of costs visited on the community, that there be no doubt about the power of the Registrar and so this provision is desirable.

40.106 An academic expert in succession law considered that a provision to that effect may be useful to deal with powers not specifically conferred.¹⁷⁵³

the grip of this provision is in the reference to earlier jurisdiction which might perhaps not be specifically covered in existing rules. I don't think it does any harm.

40.107 The ACT Law Society expressed the view that the powers of the registrar 'should generally be a matter for each jurisdiction to determine'.¹⁷⁵⁴ However, it did not comment on the more fundamental issue of whether the registrar's powers, as exercised before any legislation that implements the model legislation, should be preserved.

The National Committee's view

40.108 A provision to the effect of section 69 of the *Succession Act 1981* (Qld) ensures that there is continuity in the registrar's powers when the model legislation is enacted, subject of course to any provisions about the registrar's

1749 *Administration of Estates Discussion Paper* (1999) QLRC 263; NSWLRC [18.20].

1750 *Ibid*, QLRC 263; NSWLRC [18.21].

1751 *Ibid*, QLRC 263; NSWLRC 377.

1752 Submission 8.

1753 Submission 12.

1754 Submission 14.

powers that might be specifically provided for by the legislation or any powers conferred on the registrar by the court or by the court rules. The model legislation should therefore include a provision to the effect of section 69 of the *Succession Act 1981* (Qld).

COURT PRACTICE

40.109 In most Australian jurisdictions, the administration legislation includes a provision dealing with some aspect of the court's practice. The provisions are generally of two kinds:

- those that provide for the practice of the court in granting letters of administration in relation to real property (being the provisions in the ACT, New South Wales and the Northern Territory); and
- those that provide more generally for the practice of the court if the practice is not otherwise provided for in the legislation or by the court rules (being the provisions in Queensland, South Australia and Victoria).

Existing legislative provisions

Australian Capital Territory, New South Wales, Northern Territory

40.110 The administration legislation in the ACT, New South Wales and the Northern Territory contains a limited provision in relation to the court's practice. Section 62 of the *Probate and Administration Act 1898* (NSW),¹⁷⁵⁵ which is expressed in similar terms to its counterparts in the ACT and the Northern Territory,¹⁷⁵⁶ provides:

62 Practice as to granting administration of real and personal estate

The practice and proceedings hitherto in force with reference to granting administration of the personal estate of an intestate shall, save as hereby altered and subject to the rules, be applicable to administration granted hereunder, and so far as may be to administration of real estate, and administration of both real and personal estate may be granted in and by the same letters.

40.111 These provisions ensure that the previous practice in relation to granting letters of administration of the personal estate of an intestate apply to the granting of letters of administration in relation to real estate, except as otherwise altered by the legislation or the rules.

¹⁷⁵⁵

A provision in virtually identical terms was first enacted in New South Wales in the form of s 25 of the *Probate Act 1890* (NSW) (54 Vic No 25).

¹⁷⁵⁶

Administration and Probate Act 1929 (ACT) s 11; *Administration and Probate Act* (NT) s 21.

Queensland

40.112 In Queensland, section 70 of the *Succession Act 1981* (Qld) provides:

70 Practice

The practice of the court shall, except where otherwise provided in or under this or any other Act or by rules of court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the court before the passing of this Act.

40.113 Immediately before the passing of the *Succession Act 1981* (Qld), the court's practice was regulated by the *Probate Act 1867* (Qld), which was repealed when the *Succession Act 1981* (Qld) commenced. Section 8 of the *Probate Act 1867* (Qld) provided:

8 Practice of the court

The practice under this Act of the Supreme Court shall except where otherwise provided by this Act or by the rules or orders to be from time to time made under this Act be so far as the circumstance of the case will admit according to the practice of the Court of Probate in England.¹⁷⁵⁷

40.114 Given the terms in which section 8 of the *Probate Act 1867* (Qld) was expressed, the effect of section 70 of the *Succession Act 1981* (Qld) is that the court's practice, except where otherwise provided, is the practice of the English Court of Probate immediately before the passing of the *Succession Act 1981* (Qld). As a result, until the commencement of the *Uniform Civil Procedure Rules 1999* (Qld), which provided for the first time for the order of priority for letters of administration, the court's practice was to apply the order of priority found in the *Non-Contentious Probate Rules 1954* (Eng),¹⁷⁵⁸ that being the practice of the Court of Probate that applied immediately before the passing of the *Succession Act 1981* (Qld).¹⁷⁵⁹

40.115 In *Re Wingett*,¹⁷⁶⁰ Shepherdson J, in deciding whether to pass over the persons named as executors in the will and appoint another person, considered the effect of section 70 of the *Succession Act 1981* (Qld) and section 8 of the *Probate Act 1867* (Qld) on the executors' entitlement to a grant.¹⁷⁶¹ His Honour referred to the court's discretion under section 6 of the *Succession Act 1981* (Qld) to grant probate, and commented:¹⁷⁶²

¹⁷⁵⁷ See [3.1] in vol 1 of this Report for a discussion of the origins and jurisdiction of the English Probate Court.

¹⁷⁵⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.360] note 80.

¹⁷⁵⁹ The *Non-Contentious Probate Rules 1987* (UK), which did not commence until after the passing of the *Succession Act 1981* (Qld), have no application.

¹⁷⁶⁰ Unreported, Supreme Court of Queensland, Shepherdson J, 19 March 1982.

¹⁷⁶¹ *Ibid* 3–4.

¹⁷⁶² *Ibid* 6.

However, it does seem to me that despite the apparent wide powers given to this Court by s 6 the Court is to some extent regulated by the practice of the Court of Probate in England.

40.116 Shepherdson J considered the English authorities on passing over and held that the applicant had not established a sufficient ground to warrant passing over the executors named in the will.¹⁷⁶³

40.117 In its 1978 Report, the Queensland Law Reform Commission, in recommending the provision that is now section 70 of the *Succession Act 1981* (Qld), commented:¹⁷⁶⁴

Practice. It is unlikely that there will be any very important changes of practice resulting from the passing of this Act. Probates will issue for realty as well as personalty, because of the new provision that realty will devolve in the same manner as personalty and the practice associated with administration bonds will cease altogether. But otherwise every day matters of practice in ordinary matters will remain very much as they are. It is, perhaps, unnecessary to mention practice in this substantive Act but the existing Act does and so does the Victorian Act. Changes to practice will be possible by way of amendments to Rules of Court and by way of the power given to the Court by s 68 to invest powers and authorities in the Registrar. But, otherwise, where there is no practice, the practice of the past has been to consult the practice of the English probate jurisdiction, now exercised within the Family Division of the High Court.

South Australia

40.118 In South Australia, section 21 of the *Administration and Probate Act 1919* (SA) provides:

21 Practice of the Court

The practice of the Court in its testamentary causes jurisdiction shall, except where otherwise provided by the rules, be according to the practice of the Supreme Court immediately before the coming into operation of this Act.

40.119 Before the commencement of the *Administration and Probate Act 1919* (SA), the court's practice was governed by section 25 of the *Administration and Probate Act 1891* (SA), which provided, in terms similar to section 21 of the current South Australian Act:

25 Practice of the Court

The practice of the Court in its testamentary causes jurisdiction shall, except where otherwise provided by this Act, or by the rules to be made from time to time under the powers hereinafter contained, be, so far as the circumstances of the case will admit, according to the practice of the Supreme Court immediately before the coming into operation of this Act.

¹⁷⁶³ Ibid 6–7.

¹⁷⁶⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 51–2.

40.120 Before the commencement of the *Administration and Probate Act 1891* (SA), the practice of the Supreme Court was governed by section 14 of the *Testamentary Causes Act 1867* (SA), which provided:

14 Practice of the Court

The practice of the Court in its testamentary causes jurisdiction shall, except where otherwise provided by this Act, or by the rules and regulations to be made from time to time under the powers in that behalf hereinafter contained, be so far as the circumstances of the case will admit, according to the practice of the said Court of Probate immediately after the coming into operation of the said "Court of Probate, Act, 1858."¹⁷⁶⁵ (note added)

40.121 As a result of this series of provisions, the practice of the Supreme Court of South Australia, where not otherwise provided for, is the practice of the Court of Probate in England immediately after the commencement of the *Court of Probate Act 1858* (Eng).¹⁷⁶⁶

40.122 The *Court of Probate Act 1857* (Eng),¹⁷⁶⁷ which was amended by the *Court of Probate Act 1858* (Eng), had a similar provision relating to practice. Section 29 of the *Court of Probate Act 1857* (Eng) provided:

29 Practice of the Court

The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court.

40.123 In *In the Estate of Smith*,¹⁷⁶⁸ Walters J discussed the effect of section 21 of the *Administration and Probate Act 1919* (SA) in keeping alive the court's power under section 67 of the *Testamentary Causes Act 1867* (SA) to grant letters of administration to a person other than the person who would, apart from that section, be entitled, even though section 67 of the 1867 Act was not re-enacted when the *Administration and Probate Act 1891* (SA) was passed.¹⁷⁶⁹

s 21 of the *Administration and Probate Act 1919–1971* preserves the testamentary causes jurisdiction which was successively vested in this Court by the *Testamentary Causes Act 1867* (cf ss 6 and 14) and by the *Administration and Probate Act 1891* (cf s 25). And in *In re Noblet*, referred to in the judgment

¹⁷⁶⁵ The *Testamentary Causes Act 1867* (SA) s 4 defined 'Court of Probate Act, 1858' as:

an Act of the Imperial Parliament, made and passed in the twenty-first and twenty-second years of Her Majesty's Reign, intituled 'An Act to amend the Act of the twentieth and twenty-first Victoria, chapter seventy-seven.'

¹⁷⁶⁶ See *Re Kuhl* [1933] SASR 394, 396 (Napier J); *In the Estate of Shephard* (1982) 29 SASR 247, 252 (Legoe J).

¹⁷⁶⁷ 20 & 21 Vict c 77.

¹⁷⁶⁸ (1972) 2 SASR 477.

¹⁷⁶⁹ *Ibid* 479. See also *Re Swale* [1940] SASR 391, 394 (Napier J); *In the Estate of Crane* (2005) 93 SASR 198, 203 (Besanko J).

of Napier J in *In re Swale*, the Full Court held that one of the provisions of the *Testamentary Causes Act 1867* kept alive by s 25 of the *Administration and Probate Act 1891*, which is the precursor of s 21 of the *Administration and Probate Act 1919–1971*, is s 67 of the *Testamentary Causes Act 1867*. (notes omitted)

Victoria

40.124 In Victoria, section 67 of the *Administration and Probate Act 1958* (Vic) provides that the court's practice, except where otherwise expressly provided for, is to be regulated by the practice of the court in its ecclesiastical jurisdiction before 1 January 1873:¹⁷⁷⁰

67 Practice in probate jurisdiction

The practice of the Court in its probate jurisdiction shall except where otherwise expressly provided in this or any other Act or by Rules of Court for the time being in force be regulated so far as the circumstances of the case will admit by the practice of the Court in its ecclesiastical jurisdiction in force previously to the first day of January One thousand eight hundred and seventy-three.

40.125 Before 1 January 1873, the date on which *The Administration Act 1872* (Vic) commenced,¹⁷⁷¹ the Supreme Court of Victoria 'exercised an ecclesiastical jurisdiction conferred upon it by the *Supreme Court Statute 1852 ...*, s 15' and '[i]ts practice was embodied in the *Rules of the Supreme Court 1854*, Ch VIII'.¹⁷⁷²

40.126 In *Re the Estate of Kerr*,¹⁷⁷³ the question arose as to the practice that should apply when an application was made for the issue of a summons to compel an executor who had failed to take out probate to show cause why he or she should not prove the will or renounce probate or, in the alternative, why administration with the will annexed should not be granted to the applicant. Madden CJ applied the predecessor of section 67 of the *Administration and Probate Act 1958* (Vic), section 14 of the *Administration and Probate Act 1890* (Vic), to determine the relevant practice:¹⁷⁷⁴

1770 The predecessors of this provision, s 66 of the *Administration and Probate Act 1928* (Vic) and s 14 of the *Administration and Probate Act 1890* (Vic), were in virtually the same terms and also applied the practice of the Court in its ecclesiastical jurisdiction in force before 1 January 1873.

1771 *The Administration Act 1872* (Vic) s 1. Section 16 of that Act provided:

16 Practice of Court in its probate jurisdiction

The practice of the court in its probate jurisdiction shall except where otherwise provided by this Act or by the rules to be from time to time made under this Act be regulated so far as the circumstances of the case will admit by the practice of the Supreme Court in its ecclesiastical jurisdiction heretofore in force.

1772 RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 124.

1773 (1904) 29 VLR 862.

1774 *Ibid* 866.

that section tells him that where this particular Act has not provided a practice of its own in respect of the Ecclesiastical jurisdiction, then the practice of the Court in its Ecclesiastical jurisdiction which prevailed before January 1873 is to be followed. Then if one looks at the rules which prevailed in the ecclesiastical jurisdiction in 1854, one finds what was done there was to apply to the Court on affidavit, setting out certain statements of fact prescribed in rule 4 of the “*Probate Rules of 1854*”.

Western Australia

40.127 In Western Australia, the relevant provision is found in the court rules, rather than in the *Administration Act 1903* (WA). Rule 3 of the *Non-contentious Probate Rules 1967* (WA) provides in part:

3 Application of Supreme Court Rules and prior practice

- (1) The *Rules of the Supreme Court 1971*, and the general practice of the Court including the course of practice and procedure in Chambers apply, so far as may be practicable, to proceedings to which these rules relate, but only to the extent that the Act or these rules do not otherwise provide.
- (2) Where no other provision is made, the practice and procedure heretofore in force shall continue to apply.

Discussion Paper

40.128 In the Discussion Paper, the National Committee considered whether the model legislation should include a provision to the effect of section 70 of the *Succession Act 1981* (Qld), in order to retain continuity in the court’s practice on the implementation of the model legislation.¹⁷⁷⁵ Its preliminary view was that ‘transitional provisions such as section 70 of the *Succession Act 1981* (Qld) should be left to each jurisdiction to consider in light of each jurisdiction’s particular circumstances’.¹⁷⁷⁶

40.129 The National Committee therefore proposed that the model legislation should not include a provision to the effect of section 70 of the *Succession Act 1981* (Qld).¹⁷⁷⁷

Submissions

40.130 The National Committee’s preliminary view was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies.¹⁷⁷⁸

¹⁷⁷⁵ *Administration of Estates Discussion Paper* (1999) QLRC 259; NSWLRC [18.7].

¹⁷⁷⁶ *Ibid*, QLRC 259; NSWLRC [18.8].

¹⁷⁷⁷ *Ibid*, QLRC 259; NSWLRC 371 (Proposal 92).

¹⁷⁷⁸ Submissions 1, 8, 11, 14, 15.

40.131 The Queensland Law Society considered that the inclusion of such a provision in the model legislation was unnecessary, and that the transitional provision for dealing with the practice of the court should be left to each jurisdiction.¹⁷⁷⁹

Thoroughly agree with proposal. Section 70 in Queensland has generally been employed to justify looking into the practice of the English courts, as varied by the UK Rules ... , to deal with matters of practice where it could not be established that there was any local practice. In settling the form of the Probate Rules as they appear in the Uniform Civil Procedure Rules, commentators were invited to sever links with the English practice. Therefore, presumably section 70 would not only be unnecessary in the model legislation, but in time, it should become unnecessary in Queensland. Therefore the transitional provision should be left to each jurisdiction.

40.132 The New South Wales Law Society, although agreeing with the National Committee's proposal commented that, 'if any jurisdiction considers it necessary the matters addressed in the [proposal] should be placed in that jurisdiction's rules of Court'.¹⁷⁸⁰

40.133 An academic expert in succession law, who did not expressly agree or disagree with the National Committee's preliminary view, commented that:¹⁷⁸¹

There is no need for this provision where the Rules and Practice are so complete that no unprecedented situation can arise. The reference to the earlier practice of the court in the Queensland Act, justifies the court in looking at the older English Rules. Eventually, however, we must have, if possible nationally, a complete atlas of procedure.

The National Committee's view

40.134 In the National Committee's view, the model legislation should include a provision to the effect of section 70 of the *Succession Act 1981* (Qld). Such a provision ensures that, if the court's practice is not otherwise provided for, it is to be the practice of the court before the passing of the legislation that implements the model legislation. The model provision serves the purpose of filling any gaps that might exist in the jurisdiction's court rules concerning the practice of the court.

SERVICE

Introduction

40.135 The situation can arise where it is 'necessary for a document of some kind, for instance a notice to renew a lease or to exercise an option, ... to be

1779 Submission 8.

1780 Submission 15.

1781 Submission 12.

served on a person but it is discovered that that person has died'.¹⁷⁸² In these circumstances, the relevant notice must be served on the personal representative of the deceased person.¹⁷⁸³ However, the person who is required to serve the document may not know 'whether the deceased person died testate or intestate, or whether, if testate, there are personal representatives, who they are, and whether they are able and willing to act'.¹⁷⁸⁴

40.136 In Queensland, the difficulties in identifying the correct person on whom the relevant document is to be served are overcome by section 72 of the *Succession Act 1981* (Qld), which provides:

72 Service

In any case where any person desires to effect within a prescribed time service of any proceedings against, or of any notice or other document required or permitted to be served in respect of the estate of a deceased person and that person is uncertain as to the person upon whom service should be effected the court may, if application for directions is made to it within the time prescribed for service, direct the mode of service in that case and, if it thinks fit, allow an extension of the time within which service may be effected.

40.137 Provided the application is brought within the time prescribed for service of the relevant document, the court is empowered not only to direct how service is to be effected, but also to extend the time within which service may be effected.

Discussion Paper

40.138 In the Discussion Paper, the National Committee considered whether a provision to the effect of section 72 of the *Succession Act 1981* (Qld) should be included in the model legislation. The National Committee expressed the view that, as the provision dealt with service, it was primarily related to practice and procedure and would be better placed in the court rules of individual jurisdictions.¹⁷⁸⁵ The National Committee therefore proposed that a provision to the effect of section 72 of the *Succession Act 1981* (Qld) should not be included in the model legislation.¹⁷⁸⁶

1782 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [1.60].

1783 Ibid.

1784 Ibid.

1785 *Administration of Estates Discussion Paper* (1999) QLRC 260; NSWLRC [18.11].

1786 Ibid, QLRC 260; NSWLRC 372 (Proposal 93).

Submissions

40.139 The Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies all agreed with this proposal.¹⁷⁸⁷

40.140 However, an academic expert in succession law observed that it was because section 72 of the *Succession Act 1981* (Qld) empowers the court to extend the time for service of a document that the provision was included in the Queensland legislation, rather than in the Queensland court rules.¹⁷⁸⁸ In this sense, the provision might be considered as one conferring substantive rights on a person, rather than simply dealing with a matter of procedure.

The National Committee's view

40.141 The National Committee considers that a provision to the effect of section 72 of the *Succession Act 1981* (Qld) performs a useful function where it is necessary for a document to be served on the personal representative of an estate, especially where there may be some doubt as to the identity of the personal representative. On further consideration, the National Committee is of the view that, as the provision gives the court the power to extend the time for service of the relevant document, the provision confers substantive rights, and should therefore be included in the model legislation, rather than in court rules.

RECOMMENDATIONS

Application for a grant, or the resealing of a grant, to be made in accordance with court rules

40-1 The model legislation should include a provision to the effect of section 42(1) of the *Probate and Administration Act 1898* (NSW), requiring an application for a grant of probate or letters of administration to be made in such manner as may be prescribed by the relevant court rules.¹⁷⁸⁹

See Administration of Estates Bill 2009 cl 306.

¹⁷⁸⁷ Submissions 1, 8, 11, 14, 15.

¹⁷⁸⁸ Submission 12.

¹⁷⁸⁹ See [40.13] above.

40-2 The model legislation should require an application for the resealing of a grant of probate or letters of administration or other instrument¹⁷⁹⁰ to be made in such manner as may be prescribed by the relevant court rules.¹⁷⁹¹

See Administration of Estates Bill 2009 cl 357(1).

Delay in applying for a grant or the resealing of a grant

40-3 The model legislation should not require an applicant for a grant, or for the resealing of a grant, to provide evidence explaining the delay in making the application.¹⁷⁹²

Application for resealing by a non-resident executor, administrator or attorney

40-4 The model legislation should provide that the court may reseal a grant even though the applicant for resealing is not resident or domiciled in the jurisdiction.¹⁷⁹³

See Administration of Estates Bill 2009 cl 353(3)(b).

Service on a non-resident executor, administrator or attorney

40-5 The model legislation should include a provision to the general effect of section 97(2) of the *Probate and Administration Act 1898* (NSW), except that the model provision should:

- (a) apply to the service of a notice, or an originating process for a proceeding, that relates to the administration of the estate in question; and
- (b) apply if a person who applies for a grant of probate or letters of administration, or for the resealing of a grant (including a person who is authorised under a power of attorney to obtain the resealing of a grant), is not resident in the jurisdiction.¹⁷⁹⁴

¹⁷⁹⁰ See Chapter 31 of this Report for the National Committee's recommendations about the instruments that may be resealed.

¹⁷⁹¹ See [40.14] above.

¹⁷⁹² See [40.25] above.

¹⁷⁹³ See [40.37] above.

¹⁷⁹⁴ See [40.58]–[40.62] above.

See Administration of Estates Bill 2009 cll 302(2)–(3), 353(4)–(5).

Finding as to domicile

40-6 The model legislation should not include a provision to the effect of section 8C of the *Administration and Probate Act 1929 (ACT)*.¹⁷⁹⁵

Record of grant

40-7 The model legislation should not include a provision to the effect of section 140 of the *Administration Act 1903 (WA)*.¹⁷⁹⁶

Registrar's powers

40-8 The model legislation should include a provision to the effect of section 69 of the *Succession Act 1981 (Qld)*.¹⁷⁹⁷

See Administration of Estates Bill 2009 cl 612.

Court practice

40-9 The model legislation should include a provision to the effect of section 70 of the *Succession Act 1981 (Qld)*.¹⁷⁹⁸

See Administration of Estates Bill 2009 cl 611.

Service

40-10 The model legislation should include a provision to the effect of section 72 of the *Succession Act 1981 (Qld)*.¹⁷⁹⁹

See Administration of Estates Bill 2009 cl 618.

1795 See [40.83]–[40.85] above.

1796 See [40.95] above.

1797 See [40.108] above.

1798 See [40.134] above.

1799 See [40.141] above.

Appendix 1

Glossary

Administration: in general terms, the process of collecting the assets, paying the debts and distributing the balance of the estate according to the will of a deceased person or the intestacy rules.

Administrator: a person appointed by the court by a grant of letters of administration to administer the estate.

Beneficiary: a person entitled to a share of a deceased estate according to a will or the intestacy rules.

Commonwealth: the Commonwealth of Australia; the federal jurisdiction as opposed to that of the States and Territories, which federated to form the Commonwealth.

Commonwealth of Nations (or British Commonwealth): A voluntary association of independent sovereign states that were formerly British colonies, dominions, or dominion dependencies.

Devolution of property: the passing or 'handing down' of property from one person to another by operation of law.

Domicile: the place where a person is ordinarily or permanently resident, requiring both physical presence and an actual intention to reside.

Estate: the property of a person, comprising both real estate (land, other than leasehold land) and personal estate (goods, money etc).

Executor: a person appointed by will to administer an estate.

Executor de son tort: 'executor of his own wrong'; a person not appointed as an executor by the will or as administrator by the court who 'intermeddles' in the administration of an estate.

Exemplification: an official copy of a document made under the seal of a court which 'contains an exact copy of the will (if any), and a copy of the grant'.¹⁸⁰⁰

Family provision: provision from a deceased person's estate, made by way of court order, for the proper maintenance and support of the deceased's family or dependants.

Grant: an appointment or authorisation by the court officially recognising the right of an executor or administrator to administer an estate.

Immovables/immovable property: Land and other tangible property not capable of being relocated physically.

Intestate: (1) a person dying without a will or a valid will or (2) the state of being without a will or a valid will, in whole or in part, or of having a will that fails to dispose of the whole of the person's estate.

1800

Jl Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [21.37].

Jurisdiction: (1) the scope of the court's power to examine and determine the facts, interpret and apply the law, make orders and declare judgment; (2) a particular legal system with its own court system; for example, each State and Territory of Australia may each be referred to as 'a jurisdiction'.

Letters of administration of the estate: a grant by the court authorising an administrator to administer the estate.

Lex situs: the law of the place where property (usually immovable property) is situated.

Movables/movable property: property capable of being moved physically, such as goods, shares and other investments.

Personal representative/s: a general term referring to the person/s who perform acts associated with the administration of the estate – either an executor or administrator.

Probate: the certification from the court that a will is valid or 'proved'; see grant.

Testator: a person who makes a will.

Will: formal document/s made by a testator disposing of his or her property on death and normally appointing an executor to administer the estate.

Appendix 2

List of respondents: Administration of estates

The following respondents made submissions in relation to the issues raised in QLRC MP 37, NSWLRC DP 42 or the further paper distributed in relation to elections to administer:

Bar Association of Queensland

Circosta, Mrs Jill (a former ACT Registrar of Probate)

Department of Natural Resources

Law Institute of Victoria

Law Society of the Australian Capital Territory

Law Society of New South Wales

Law Society of Tasmania (Property and Commercial Law Committee)

Lee, Mr W A (Tony)

National Council of Women of Queensland Inc

Public Trustee of New South Wales

Public Trustee of Queensland

Public Trustee of South Australia

Public Trustee of Western Australia

Queensland Law Society Inc

Ross, Mr A

State Trustees Limited

Trust Company of Australia Limited

Trustee Corporations Association of Australia

Trustee Corporations Association of Australia (Queensland State Council)

Victorian Bar

A further three submissions were received from individuals.

Appendix 3

List of respondents: Resealing and automatic recognition of grants

The following respondents made submissions in response to the issues raised in QLRC WP 55 or NSWLRC IP 21:

New South Wales Bar Association, The
Principal Registrar, Supreme Court of Queensland
Public Trustee of New South Wales
Queensland Law Society Inc
Trustee Corporations Association of Australia
Victorian Bar

Appendix 4

Commonwealth Secretariat Draft Model Bill

GRANTS OF ADMINISTRATION (RESEALING) ACT, 198- [Revised 1 February, 1980]¹⁸⁰¹

An Act to make new provision for the resealing in _____ of probates and letters of administration and instruments having similar effect granted outside _____; to repeal the [Probates (Resealing) Act] and for matters incidental thereto.

1. Short title

This Act may be cited as Probates and Letters of Administration (Resealing) Act, 198-.

2. Interpretation

(1) For the purpose of this Act, the expression—

“**court**” includes any competent authority, by whatever name it is designated, having jurisdiction to make a grant of administration;

“**grant of administration**” means a probate or letters of administration or any instrument having, within the jurisdiction where it was made, the effect of appointing or authorising a person (in this Act referred to as “the grantee”) to collect and administer any part of the estate of a deceased person and otherwise having in that jurisdiction an effect equivalent to that given, under the law of _____, to a probate or letters of administration;

“**personal representative**” means the executor, original or by representation, or administrator for the time being, of a deceased person and includes any public official or any corporation named in the probate or letters of administration as executor or administrator as the case may be;

[“**Registrar**” means the Registrar of the Supreme Court;]

“**reseal**” means reseal with the seal of the Supreme Court.

(2) Any references in this Act to the making of a grant of administration shall include any process of issuing by or filing with a court by which an instrument is given an effect equivalent to that of a grant of probate or of letters of administration.

1801

Settled at a meeting of Commonwealth Law Ministers in Barbados in 1980: see Commonwealth Secretariat, *Meeting of Commonwealth Law Ministers, Barbados, 28 April-2 May 1980*, Appendix B. Some minor errors that appear in the final version of the draft model bill have been corrected with the aid of the previous version of the bill, revised 1 November 1979: see Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Working Meeting held in Nairobi, Kenya, 9–14 January 1980* (Working Paper 5, 1980) 32–4.

- (3) This Act shall apply in relation to grants of administration granted before or after the passing of this Act.

3. Applications for resealing

- (1) Where a grant of probate or letters of administration of the estate of any deceased person has been made by a court in any part of the Commonwealth or in any other country, an application may be made under this section for the resealing of the grant of administration.
- (2) An application under this section shall be made to the Registrar and may be made by—
- (a) a personal representative or the grantee, as the case may be; or
 - (b) a person authorised by power of attorney given by any such personal representative or grantee; or
 - (c) a legal practitioner registered in _____ acting on behalf of any such personal representative or grantee or of a person referred to in paragraph (b).
- (3) Not less than twenty-one days before making an application under this section, the person intending to make it shall cause to be published in a newspaper or newspapers circulating in _____ and approved for the purpose of this section by the Registrar an advertisement which—
- (a) gives notice that the person named in the advertisement intends to make an application under this section;
 - (b) states the name and the last address of the deceased person;
 - (c) requires any person wishing to oppose the resealing of the probate or letters of administration to lodge a caveat with the Registrar by a date specified in the advertisement which shall be a date not less than twenty-one days after the date of the publication of the advertisement.
- (4) An applicant under this section shall produce to the Registrar—
- (a) the grant of administration or an exemplification thereof or a duplicate thereof sealed with the seal of the court by which the grant was made or a copy of any of the foregoing certified as a correct copy by or under the authority of that court;
 - (b) where the document produced under paragraph (a) does not include a copy of the will, a copy of the will, verified by or under the authority of that court;
 - (c) an affidavit stating that an advertisement has been duly published pursuant to subsection (3);
 - (d) where the applicant is a person referred to in subsection (2)(b), the power of attorney authorising him to make the application and an affidavit stating that the power has not been revoked;

- (e) [an Inland Revenue certificate affidavit] as if the application were one for the making of a grant of administration by the Supreme Court; and
- (f) such evidence, if any, as the Registrar thinks fit as to the domicile of the deceased person,

and shall deposit with the Registrar a copy of the grant of administration.

4. Caveats

- (1) Any person who wishes to oppose the resealing of a grant of administration shall, by the date specified in the advertisement published pursuant to section 3(3), lodge a caveat against the sealing.
- (2) A caveat under subsection (1) shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the making of a grant of probate or letters of administration by the Supreme Court.
- (3) The Registrar shall not, without an order of the Supreme Court, proceed with an application under section 3 if a caveat has been lodged under this section.

5. Resealing of grants of administration

- (1) Subject to this section, where an application has been duly made under section 3 and the date specified in the advertisement published pursuant to section 3(3) has passed and no caveat has been lodged under section 4 or any caveat so lodged has not been sustained, the Registrar may, if he is satisfied that—
 - (a) such estate duties, if any, have been paid as would have been payable if the grant of administration had been made by the Supreme Court;
 - (b) security has been given in a sum sufficient in amount to cover the property in _____ to which the grant of administration relates and in relation to which the deceased died intestate,cause the grant of administration to be resealed.
- (2) It is not necessary for security to be given under subsection (1)(b) in the case of a grant of administration which was made to any public official outside _____.
- (3) Where it appears that a deceased person was not, at the time of his death, domiciled within the jurisdiction of the court by which the grant was made, probate or letters of administration in respect of his estate may not be resealed, unless the grant is such as the Supreme Court would have had jurisdiction to make.
- (4) The Registrar may, if he thinks fit, on the application of any creditor require, before resealing, that adequate security be given for the payment of debts or claims due from the estate to creditors residing in _____.
- (5) The Registrar—
 - (a) may, if he thinks fit, at any time before resealing refer an application under section 3 to the Supreme Court; and

- (b) shall make such a reference if so requested in writing by the applicant at any time before resealing or within twenty-one days after he has refused to reseal,

and where an application is so referred, the grant of administration may not be resealed except in accordance with an order of the Supreme Court.

6. Effects of resealing

- (1) A grant of administration resealed under section 5(1) shall have like force and effect and the same operation in _____, and such part of his estate as is in _____ shall be subject to the same liabilities and obligations, as if the probate or letters of administration had been granted by the Supreme Court.
- (2) Without prejudice to subsection (1), the personal representative or grantee, where the application is made by him or is made under section 3(2)(c) on his behalf or the person duly authorised under section 3(2)(b), where the application is made by him or is made under section 3(2)(c) on his behalf, shall, after the resealing, be deemed to be, for all purposes, the personal representative of the deceased person in respect of such of his estate as is in _____, and, subject to section 7, shall perform the same duties and be subject to the same liabilities as if he was personal representative under a probate or letters of administration granted by the Supreme Court.

7. Duties of person authorised by personal representative, etc

- (1) A person duly authorised under section 3(2)(b) who is deemed to be a personal representative by virtue of section 6(2) shall, after satisfying or providing for the debts or claims due from the estate of all persons residing in _____ or of whose debts or claims he has had notice, pay over or transfer the balance of the estate in _____ to the personal representative named in the grant or the grantee, as the case may be or as such personal representative or grantee may, by power of attorney, direct.
- (2) Any such person referred to in subsection (1) shall duly account to the personal representative or grantee, as the case may be, for his administration of the estate in _____.

8. Rules of court

Rules of court may be made for regulating the practice and procedure, including fees and costs, on or incidental to an application under this Act for resealing a grant of administration.

9. Repeals

The [Probates (Resealing) Act] is hereby repealed.

10. Commencement

This Act shall come into force on such date as the [Head of State] shall, by order, designate.