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UNIFORM SUCCESSION LAWS

**RECOGNITION OF INTERSTATE AND FOREIGN
GRANTS OF PROBATE AND
LETTERS OF ADMINISTRATION**

Discussion Paper

WP No 55

Queensland Law Reform Commission
December 2001

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GRANTS OF PROBATE AND
LETTERS OF ADMINISTRATION**

Discussion Paper

WP No 55

Prepared with the assistance
of
Associate Professor P R Handford

Queensland Law Reform Commission
December 2001

COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues raised and on the preliminary views expressed in this Discussion Paper.

Written comments and submissions should be sent to:

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Queensland Law Reform Commission (as co-ordinating agency for the
National Committee for Uniform Succession Laws)
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or by the lodgment facility on the Commission's home page at:
<http://www.qlrc.qld.gov.au>

Oral submissions may be made by telephoning: (07) 3247 4544

Closing date: 3 May 2002

It would be helpful if comments and submissions addressed specific issues or questions in the Discussion Paper.

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

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

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.

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FOREWORD

This Discussion Paper deals with the recognition by one jurisdiction of grants of probate and letters of administration issued in other Australian jurisdictions or overseas.

Throughout the course of this project, it has been the practice of the National Committee for Uniform Succession Laws to identify suitable recent legislation or reform proposals to serve as a basis for the discussion of model legislation for particular areas of succession law. Following this practice, the National Committee determined that the recommendations of the Law Reform Commission of Western Australia in its 1984 Report entitled *Recognition of Interstate and Foreign Grants of Probate and Administration* should be used as the starting point for the discussion of reform in this area.

The Queensland Law Reform Commission gratefully acknowledges the assistance of Associate Professor Peter Handford of the Law School, University of Western Australia, in the preparation of this Discussion Paper. Associate Professor Handford prepared an initial paper, from which this Discussion Paper was developed in consultation with him. Associate Professor Handford was formerly the Executive Officer and Director of Research at the Law Reform Commission of Western Australia and, until 1997, was the Western Australian representative on the National Committee. In his role with the Western Australian Commission, he had the carriage of that Commission's reference on the recognition of interstate and foreign grants of probate and administration. Associate Professor Handford's contribution to this project was made possible by a grant to the Queensland Law Reform Commission from the Queensland Department of Justice and Attorney-General.

This Discussion Paper has been published for the purpose of seeking comment from interested organisations and individuals. Throughout this paper, preliminary views are expressed about particular issues. Those preliminary views, which have been suggested by Associate Professor Handford, are intended to facilitate discussion. They do not necessarily represent the views of the National Committee, which is yet to adopt a position in relation to some of the issues discussed.

The Hon Mr Justice J D M Muir
Chairman
Queensland Law Reform Commission
Co-ordinating agency for the National Committee
for Uniform Succession Laws

18 December 2001

ABBREVIATIONS

Administration of Estates Discussion Paper (1999): National Committee for Uniform Succession Laws, Discussion Paper, *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999, NSWLRC DP 42, October 1999).

Family Provision Report (1997): National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997).

Report of the Conference of Probate Registrars (1990): *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2-4 May 1990 - unpublished).

WALRC: The Law Reform Commission of Western Australia.

WALRC Report (1984): The Law Reform Commission of Western Australia, *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* (Project No 34 Part IV, November 1984).

WALRC Working Paper (1980): The Law Reform Commission of Western Australia, *Working Paper on Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration* (Project No 34 Part IV, December 1980).

Wills Report (1997): National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on The Law of Wills* (QLRC MP 29, December 1997; NSWLRC R 85, April 1998).

CHAPTER 1

INTRODUCTION

1. THE UNIFORMITY PROJECT

(a) Co-ordination of the project on a national basis

In 1991 the Standing Committee of Attorneys General (SCAG) approved the development of uniform succession laws for the whole of Australia. In 1992 the Queensland Law Reform Commission was requested by the Queensland Attorney-General to co-ordinate that project.

In order to ensure that the Uniform Succession Laws Project maintained an Australia-wide focus and was regarded as an undertaking of all Australian jurisdictions, the Queensland Law Reform Commission in 1995 asked the then Queensland Attorney-General to request his counterpart in each other Australian jurisdiction to nominate a person or agency to represent that jurisdiction on a National Committee to guide the project.² Nominees were subsequently appointed in each Australian jurisdiction.³

(b) The achievability of uniformity

Ideally, uniform laws should be identical, word for word, in every State and Territory. However, given the fact that each jurisdiction already has its own legislation and legislative drafting style, this may not be easy to achieve.

Nonetheless, it may be possible to arrive at consistency of succession law in major respects. If the substance and the underlying policy direction of the various pieces of legislation are consistent, then a great deal will have been achieved. Further, if there is fundamental agreement about issues of policy, there is less risk of divergences arising in the future as a result of the amendment or repeal of provisions in individual jurisdictions.

(c) The work of the National Committee

The inaugural meeting of the National Committee was held in September 1995. The National Committee has since submitted reports to the Standing Committee of

² For a more detailed account of the formation of the National Committee and of the need for uniformity, see the Preface to the *Wills Report* (1997).

³ The current members of the National Committee are set out at the beginning of this Discussion Paper.

Attorneys General on wills⁴ and family provision.⁵ In each case, the report was preceded by an issues paper, which raised a number of issues on which submissions were sought.⁶

The National Committee is currently working on the law relating to the administration of estates. The National Committee decided to divide its work on the administration of estates into two parts, to facilitate identification of issues and for ease of discussion:

- The first part is a review of the general law relating to the administration of estates in all Australian States and Territories. The National Committee has already published a Discussion Paper on that topic.⁷
- The second part deals with the recognition of interstate and foreign grants of probate and letters of administration, and is the subject of this Discussion Paper.

It is anticipated that each part will be the subject of a separate report to SCAG.

The fourth stage of the project will concern the law relating to intestate estates.

2. PURPOSE OF THIS DISCUSSION PAPER

This Discussion Paper raises, and invites comments on, a number of issues in relation to the recognition of interstate and foreign grants of probate and letters of administration. As noted above, other issues relating to the administration of estates of deceased persons are the subject of a separate Discussion Paper.⁸

The National Committee invites members of the public and organisations with an interest or expertise in the issues under review to comment on the preliminary views and questions set out at the end of the discussion of each issue or set of issues. Comments on all or any of the issues referred to in this Discussion Paper, and comments on any other issue that should be addressed in this review, would be welcomed.

Details on how to make written, electronic or oral submissions are provided at the beginning of this Discussion Paper.

⁴ *Wills Report* (1997).

⁵ *Family Provision Report* (1997).

⁶ Details of the publications related to this project are set out at the beginning of this Discussion Paper.

⁷ *Administration of Estates Discussion Paper* (1999).

⁸ *Ibid.*

3. PREVIOUS REFORM PROPOSALS: THE WALRC REPORT

As explained in the Foreword, this Discussion Paper has used, as the starting point for its consideration of the issues, the recommendations made by the WALRC in its 1984 *Report on Recognition of Interstate and Foreign Grants of Probate and Administration*.

(a) Background to the WALRC Report

In June 1976, in accordance with resolutions of the Australian Law Reform Agencies Conference held in Sydney in April 1975 and Canberra in May 1976, the WALRC - which was already engaged in a wide-ranging review of various aspects of the law of trusts and administration of estates - proposed to the Attorney General of Western Australia that it be given a reference to review the law relating to the recognition of grants of probate and letters of administration, with a view to proposing uniform legislation throughout Australia.⁹

In December 1976, the Attorney General of Western Australia formally referred this matter to the WALRC, asking it:¹⁰

To review the law relating to the recognition in Western Australia of grants of probate and of administration made outside Western Australia with a view to proposing uniform legislation thereon throughout Australia.

In March 1977, the Standing Committee approved the reference and agreed to consider the WALRC's proposals as a basis for possible uniformity between all Australian States and Territories.¹¹

The WALRC issued a Working Paper in December 1980.¹² The Working Paper described the process by which, under the present law, a grant of probate or letters of administration issued elsewhere must be "resealed" in each jurisdiction before a personal representative has authority to deal with the assets situated in that jurisdiction. The Working Paper also called attention to the wide variations in the rules and procedures governing resealing as between the laws of each Australian State and Territory. Various options for reform were proposed.

⁹ In so doing, the WALRC was following the established procedure for processing suggestions for uniform laws adopted by resolution of the Standing Committee of State and Commonwealth Attorneys General made in July 1975: *WALRC Report* (1984) at paras 1.2, 1.3.

¹⁰ *WALRC Report* (1984) at para 1.4. This became Part IV of the WALRC's reference on trusts and the administration of estates (Project No 34). For details of the other Parts of this reference, the reports issued and the legislation implementing them, see the WALRC's *Annual Report 1 July 2000-30 June 2001*, Appendix III at 38-39 <www.wa.gov.au/lrc/Annual%20Report/AnnRep2000-01.pdf> (4 February 2002).

¹¹ *WALRC Report* (1984) at para 1.5.

¹² *WALRC Working Paper* (1980).

Copies of the Working Paper were distributed to interested persons and bodies in each Australian State and Territory and a number of overseas jurisdictions, and to members of the public. A considerable number of submissions were received, including submissions from probate registrars or their equivalents in all the Australian States and Territories, New Zealand and England, public trustees, trustee companies, law societies, and a number of academics with expertise in the law of succession.¹³

The WALRC submitted its Report to the Attorney General of Western Australia in November 1984.¹⁴ The Report recommended that there should be a uniform code of procedure for the resealing of grants, and set out the general principles that should be incorporated in such a code.¹⁵ It also recommended that a grant made by the court of the Australian State or Territory in which the deceased died domiciled¹⁶ should be automatically recognised, without any need for resealing, in each other Australian State and Territory.¹⁷

(b) Subsequent history of the WALRC Report

In accordance with the agreed procedure referred to above, the Attorney General of Western Australia tabled the WALRC Report at a SCAG meeting in 1985. A number of SCAG Officers' Papers were subsequently prepared and a Committee of Parliamentary Counsel commenced drafting a uniform code of procedure as recommended by the WALRC.

However, during this process a fundamental change was made to the recommendations. It was now proposed that *all* grants of probate and letters of administration made in an Australian State or Territory (rather than a grant issued in the jurisdiction in which the deceased died domiciled) should receive automatic recognition throughout Australia.¹⁸ This raised the possibility that there might be two or more conflicting grants in respect of a particular estate, although proposals were developed to deal with this.¹⁹ The new proposals were not consistent with those in the WALRC Report.

¹³ *WALRC Report (1984)* at para 1.9.

¹⁴ *WALRC Report (1984)*.

¹⁵ These recommendations are discussed in detail in Chapter 5 of this Discussion Paper.

¹⁶ A reference in this Discussion Paper to the jurisdiction in which "the deceased died domiciled" is a reference to the jurisdiction in which the deceased was domiciled at the time of his or her death. See the discussion of the concept of domicile at pp 33-34 of this Discussion Paper.

¹⁷ These recommendations are discussed in detail in Chapter 4 of this Discussion Paper.

¹⁸ *Report of the Conference of Probate Registrars (1990)* at 13-14, referring to paras 4 and 5 of the *Report of the Parliamentary Counsel's Committee*, 6 September 1989.

¹⁹ See p 38 of this Discussion Paper.

At a conference of Probate Registrars held in May 1990, the Probate Registrars rejected the revised scheme as completely unacceptable, and expressed a clear preference for the original WALRC scheme. However, they were of the view that it was not necessary to implement any scheme of automatic recognition, and that the existing scheme of resealing would be satisfactory once uniform procedural rules had been adopted.²⁰

The matter was subsequently removed from the SCAG agenda, and no further steps have been taken to implement the recommendations of the WALRC.

It was as a consequence of the rejection of the WALRC recommendations that the Northern Territory Law Reform Committee put forward the proposal that there was a need for the law of succession to be uniform throughout Australia. In the absence of a scheme under which a grant made by the jurisdiction with which the deceased was most closely connected could be automatically recognised in all jurisdictions, a similar result might be achieved by ensuring that the laws governing the administration of estates and the disposition of the deceased's property were the same in every State and Territory.

This proposal was approved by the Australasian Law Reform Agencies Conference in 1991 and by SCAG in 1992, and resulted in the present reference being given to the Queensland Law Reform Commission.

The National Committee has been charged with the task of making recommendations designed to unify the law of succession in force in the various Australian States and Territories. As part of that task, it is necessary to revisit the proposals made by the WALRC for a uniform resealing procedure. However, the National Committee has decided that the time has come to review the case for some form of automatic recognition as an alternative to resealing, and that the recommendations of the WALRC should form the starting point for that review.

4. OUTLINE OF DISCUSSION PAPER

(a) Automatic recognition

Chapter 2 of this Discussion Paper outlines the present system of resealing. Chapter 3 examines some possible alternatives to resealing, and Chapter 4 puts forward for discussion a scheme of automatic recognition based largely on the recommendations of the WALRC, under which a grant made by the Australian jurisdiction in which the deceased died domiciled²¹ would be automatically recognised throughout Australia.

²⁰ *Report of the Conference of Probate Registrars (1990)* at 13-16.

²¹ See note 16 of this Discussion Paper.

(b) Resealing

Even if the scheme outlined in Chapter 4 were ultimately implemented, some Australian grants, and all grants from overseas, would still require resealing. Chapter 5 sets out provisional proposals for a uniform resealing procedure.

Chapter 6 outlines proposals for a uniform approach to the question of the countries whose grants should be able to be resealed.

(c) Conflict of laws issues

This Discussion Paper addresses a number of issues that raise a question of conflict of laws.

(i) Jurisdiction

When a court is considering whether to make an original grant of probate or letters of administration, or to reseal a grant made elsewhere, it may have to decide whether it has jurisdiction to make or reseal the grant. At present, some States require assets within the jurisdiction before a grant can be made.

Chapter 7 discusses proposals for uniform rules on jurisdiction (endorsing proposals made in the Discussion Paper on the administration of estates). It also discusses the effect on these rules of a scheme of automatic recognition.

(ii) The person to whom the grant should be made

A further issue that may arise where a court is considering the making of an original grant of probate or letters of administration, or the resealing of a grant made elsewhere, is the question of the person to whom the grant should be made or on whose application it may be resealed. This issue is sometimes referred to as official succession.²² Where some other legal system is involved (for example, if the deceased was domiciled elsewhere, or if there is already a grant issued by the court of another jurisdiction), the court may have to decide whether to refer this issue to its own rules or to those of the other legal system in question. This is a question of choice of law.

Chapter 8 examines proposals for the reform of the choice of law rules dealing with the appointment of personal representatives. It also discusses the effect on these rules of a scheme of automatic recognition.

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In contrast, the term "beneficial succession" is used to refer to questions concerning the distribution of an estate. See p 176 of this Discussion Paper for an explanation of the extent to which these issues are considered in this Discussion Paper.

(iii) Resealing where original grant not made in domicile

Chapter 9 examines the existing statutory restrictions that apply in some Australian jurisdictions if the grant that is sought to be resealed has issued from a jurisdiction in which the deceased was not domiciled immediately prior to his or her death.

(iv) Effect of a scheme of automatic recognition on other areas of succession law

Choice of law issues are not limited to the question of the person to whom a grant should be made.²³ Such issues may also arise in relation to other questions, such as the validity of a will or the distribution of the estate under intestacy rules. Where more than one legal system is involved, the court must decide whether to refer these issues to its own rules or to those of another legal system.²⁴ These rules do not fall within the areas examined in this Discussion Paper. However, Chapter 10 discusses the effect of a scheme of automatic recognition on the other areas of succession law that have been examined or are being examined by the National Committee - wills, family provision, the administration of estates, and intestacy.

Except where otherwise stated, this Discussion Paper states the law as at 31 December 2001.

5. ABBREVIATIONS AND TERMS

The abbreviations used in this Discussion Paper are set out at page ii. A glossary of terms is set out in Appendix A to this Discussion Paper.

²³ See pp 63-64 and Chapter 8 of this Discussion Paper.

²⁴ See p 163 of this Discussion Paper.

CHAPTER 2

THE RESEALING SYSTEM

1. INTRODUCTION

When a person dies, someone has to be appointed to deal with the assets of the deceased person. Under Australian law the deceased does not continue to possess a legal personality,²⁵ even though this might be the case under the law of the deceased's domicile.²⁶ A deceased person's estate is administered by a personal representative,²⁷ who is either an executor, appointed under a will, or an administrator, appointed by the court in a case where the deceased did not leave a will or left a will, but named no executor. Even though an executor derives authority to act from the will, a grant of probate may be necessary to give the executor full power to deal with the estate.²⁸ An administrator, being appointed by the court, cannot act until the court makes a grant of letters of administration.²⁹

Many people die leaving assets not only in the State or Territory in which they have their permanent home, but also in other States and Territories, or other countries. In addition to leaving assets in other jurisdictions, people sometimes die leaving claims by or against them in litigation, actual or potential, elsewhere. It is likely that the number of persons whose estates involve more than one jurisdiction is increasing.

Even if a personal representative has obtained a grant of probate or letters of administration in the jurisdiction in which the deceased died domiciled,³⁰ that grant does not of its own force give the personal representative any authority to deal with

25 See Wood O and Hutley NC, *Hutley, Woodman and Wood: Cases and Materials on Succession* (3rd ed, 1984) at 1, making a distinction between systems of law in which the legal personality of the deceased continues after his or her death and those in which it does not. Muslim law is a leading example of a legal system in the former category: see Pearl D, *A Textbook on Muslim Law* (1979) at 114-117.

26 *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682 per Scrutton LJ at 691. Generally, a person's domicile is the place where the person is ordinarily or permanently resident. It requires both physical presence and an actual intention to reside. Many matters of administration and succession are referred by the rules of conflict of laws to the law of the deceased's last domicile. See pp 33-34 of this Discussion Paper for a more detailed discussion of domicile.

27 The role of the personal representative is to collect the assets of the deceased, pay the debts and distribute the remainder of the estate to those entitled under the deceased's will or according to the rules of intestacy. See *Administration of Estates Discussion Paper* (1999).

28 See Crago N, "Executors of Unproved Wills: Status and Devolution of Title in Australia" (1993) 23 *UWAL Rev* 235.

29 Where the deceased left a will but named no executor, the court makes a grant of administration *cta* ("cum testamento annexo", that is, with the will annexed).

30 See note 16 of this Discussion Paper.

assets elsewhere,³¹ nor does such a grant confer on the personal representative so appointed any right to payment,³² allow the personal representative to sue³³ or be sued³⁴ on behalf of the estate in another jurisdiction, or permit the personal representative to administer the estate in another jurisdiction.³⁵ Even where a foreign personal representative has entered an unconditional appearance to a writ, the court has no jurisdiction to hear the action against the foreign personal representative unless he or she has obtained a grant of representation in that jurisdiction.³⁶ Likewise, a court will not entertain an action against a person who represents the deceased as his or her universal heir under civil law, but who has not been appointed as personal representative in the jurisdiction in which the action is brought.³⁷ A foreign personal representative has no authority to act unless he or she obtains a grant of probate or letters of administration in the jurisdiction in question. Consequently, a personal representative must obtain a fresh grant in each jurisdiction in which the deceased left assets.

However, a person, including a foreign executor, who intermeddles with the estate in another jurisdiction may become liable to suit in that jurisdiction as an “executor de son tort” (executor of his own wrong).³⁸ This may occur, for example, where the

³¹ *Blackwood v The Queen* (1882) 8 App Cas 82 at 92; *Arnot v Chapman* (1884) 5 LR (NSW) Eq 66; *The New York Breweries Company, Limited v The Attorney-General* [1899] AC 62; *Re Fitzpatrick* [1952] Ch 86. Ontario authorities to the contrary are criticised in Feeney TG, *The Canadian Law of Wills* (3rd ed, 1987) vol 1 at 188-189.

³² *Re Ricketson* (1917) 17 SR (NSW) 233.

³³ See *Whyte v Rose* (1842) 3 QB 493 per Tindal CJ at 507, 114 ER 596 at 602. However, a foreign executor may be able to claim money by virtue of a provision in a will that operates as a gift over to the executor in the event of the beneficiary's death: *Re Scarfe* [1904] SALR 15.

³⁴ *Electronic Industries Imports Pty Ltd v Public Curator of the State of Queensland* [1960] VR 10; *Boyd v Leslie* [1964] VR 728; *Cash v The Nominal Defendant* (1969) 90 WN (Pt I) (NSW) 77 at 78-79; *Degazon v Barclays Bank International Ltd* [1988] 1 FTLR 17; *Re the Estate of Webb* (Unreported, Supreme Court of South Australia, No 1554 of 1990, Mohr J, 2 August 1991). Note however that two exceptions to this rule are suggested by Dicey and Morris (L Collins and others (eds), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 1020-1021):

- (1) if the foreign personal representative sends or brings into [the jurisdiction] assets which have not been so appropriated as to lose their character as part of the assets of the deceased, an action, to which the [local] personal representative must be a party, may be brought for their judicial administration in [the jurisdiction];
- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in [the jurisdiction] as a trustee or a debtor. [notes omitted]

³⁵ It is suggested by Dicey and Morris that there are exceptions to this rule: (1) a person who has a grant of representation or is otherwise authorised to represent a deceased person under the law of the deceased's last domicile may apply to the court “for an order for the transfer to him of the net balance of assets under the ... administration but is not entitled as of right to such an order”; (2) a “foreign personal representative has a good title ... to any movables of the deceased (whether ... goods or ... choses in action) to which he has in a foreign country acquired a good title under the *lex situs* and reduced into possession”: L Collins and others (eds), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 1018.

³⁶ *Boyd v Leslie* [1964] VR 728. The contrary decision in *Lea v Smith* [1923] SASR 560 appears to be wrong: see Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 554, note 13.

³⁷ *L'Abbate v Collins & Davey Motors Pty Ltd* [1982] VR 28.

³⁸ The liability of an executor de son tort is generally limited to assets that have come into his or her hands: see *Cash v The Nominal Defendant* (1969) 90 WN (Pt I) (NSW) 77 at 81; *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.

person deals with the assets in the jurisdiction without taking out a local grant,³⁹ transfers assets to a foreign executor who has not taken out a local grant,⁴⁰ or appears in legal proceedings on behalf of the estate and raises defences other than that he or she is not the executor in that jurisdiction.⁴¹

It might be thought that these rules apply only as between Australian and overseas jurisdictions, and not within Australia, but that is not the case. As Windeyer J said in *Pedersen v Young*:⁴²

The States are separate countries in private international law, and are to be so regarded in relation to one another.

The provisions of the *Australian Constitution* do not alter this situation. For example, section 118, which provides that full faith and credit is to be given throughout Australia to the laws, public acts and records, and judicial proceedings of every State, does not allow a grant of probate or letters of administration made in one jurisdiction to be effective in another.⁴³

2. RESEALING

To overcome the need for an executor or administrator to obtain a fresh grant of probate or letters of administration in every jurisdiction in which the deceased left assets, each Australian State and Territory has introduced provisions under which a grant made elsewhere - either in another Australian jurisdiction or overseas - can be "resealed" in the jurisdiction in question. Resealing - that is, certification by a competent probate authority - is simpler than obtaining an original grant because it does not involve the investigation of the title of the grantee.⁴⁴ Similar provisions are found in other Commonwealth countries. These provisions are based on legislation originally introduced in England in 1857.⁴⁵

In England before 1858, jurisdiction to grant probate or letters of administration of deceased estates "was vested in some 370 ecclesiastical or secular courts or

³⁹ *Cash v The Nominal Defendant* (1969) 90 WN (Pt I) (NSW) 77 at 79.

⁴⁰ *The New York Breweries Company, Limited v The Attorney-General* [1899] AC 62; *Inland Revenue Commissioners v Stype Investments (Jersey) Ltd* [1982] 1 Ch 456.

⁴¹ *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.

⁴² (1964) 110 CLR 162 at 170. "Private international law" is another name for "conflict of laws", that is, the legal rules that govern cases involving a connection with more than one system of law.

⁴³ *Re Butler* [1969] QWN 48. However, in view of s 118 of the *Australian Constitution* and s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (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: *The Estate of Natrass* (Unreported, Supreme Court of New South Wales, No PD 114522 of 1992, Powell J, 29 October 1992).

⁴⁴ See Cretney S, "Administration of Estates Act 1971" (1971) 115 SJ 762 at 763.

⁴⁵ See p 11 of this Discussion Paper.

persons in England and Wales in addition to the Prerogative Courts of Canterbury and York".⁴⁶ Since these courts each had jurisdiction over a particular geographical area, and exercised jurisdiction based on the presence of movable property in that area,⁴⁷ it was often necessary for a personal representative to obtain several grants, since the deceased might have property within the jurisdiction of several different courts. This practice became more inconvenient during the nineteenth century, as it became increasingly common for people to transfer their wealth into stocks, shares and other forms of personal property.⁴⁸

In 1858, the probate jurisdiction of the ecclesiastical courts was transferred to the newly established Court of Probate,⁴⁹ which had jurisdiction throughout England and Wales.⁵⁰ At the same time, legislation was introduced under which a grant made in one part of the United Kingdom - England, Scotland or Ireland - could be resealed in another part of the United Kingdom.⁵¹ The effect of resealing was that the grant was then operative in that part of the United Kingdom where it had been resealed. Later legislation extended the principle of resealing to grants made in countries outside the United Kingdom, both within the Commonwealth and elsewhere.⁵²

These provisions have served as the model for the resealing legislation now found in all Australian States and Territories.⁵³ The statutory provisions set out in detail the procedure for resealing a grant of probate or letters of administration, and the overseas countries whose grants may be resealed. The rules vary quite considerably from one jurisdiction to another, but the basic principle is the same. Each statute provides that a grant of probate or letters of administration, once resealed, is as effective as if the original grant had been obtained in that jurisdiction.⁵⁴

46 Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 1.01.

47 Collins L and others (eds), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 1007.

48 Cretney S, "Administration of Estates Act 1971" (1971) 115 SJ 762 at 762.

49 *Court of Probate Act 1857* (UK) ss 3, 4. This Act came into operation on 11 January 1858: Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at paras 1.03-1.04.

50 In the same year, the matrimonial jurisdiction of the ecclesiastical courts was transferred to the Court for Divorce and Matrimonial Causes: *Matrimonial Causes Act 1857* (UK) ss 2, 4, 6.

51 *Probates and Letters of Administration Act (Ireland) 1857* (UK); *Confirmation of Executors (Scotland) Act 1858* (UK). Changes to the scheme were necessary after Ireland (except for Northern Ireland) ceased to be part of the United Kingdom: see Russell JEN and others (eds), *Tristram and Coote's Probate Practice* (22nd ed, 1964) at 462-473.

52 *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). See the discussion of these Acts in *Halsbury's Laws of England* (4th ed) vol 17(2) at para 245.

53 *Administration and Probate Act 1929* (ACT) ss 80-83; *Wills, 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.

54 *Administration and Probate Act 1929* (ACT) s 80(2); *Wills, Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act* (NT) s 111(4); *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).

3. STATISTICS ON RESEALING

(a) Number of applications for resealing

The National Committee sought details from the Probate Registrars of the latest annual figures available in each jurisdiction in relation to applications for original grants and applications for the resealing of grants. The information provided is set out in Table 1.

Table 1: Number of applications for grants and reseals in 2000⁵⁵

Jurisdiction	Grants	Reseals
Australian Capital Territory	429	11
New South Wales	20,672	210
Northern Territory	115	5
Queensland	4,200	109
South Australia	5,009	35
Tasmania	1,869	21
Victoria	14,887	144
Western Australia	4,576	31
Total	51,757	566

Figures supplied by the Probate Registrars indicate that applications for resealing represented just over one per cent of the total number of applications for original grants.

It is instructive to compare the figures for reseals set out in Table 1 with similar figures obtained by the WALRC for the purposes of its Working Paper and Report covering the period 1978-80, and with the figures for 1989, which were collected for the purposes of the conference of Probate Registrars in May 1990. These figures are set out in Table 2. Although the WALRC figures are only approximate,⁵⁶ the three sets of figures make it possible to make some assumptions about trends in applications for resealing over a twenty year period.

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For New South Wales, the Northern Territory, Victoria and Western Australia, the figures are for the 2000 calendar year. The Victorian figures represent the number of grants resealed, rather than the number of applications filed. For the Australian Capital Territory, Queensland and Tasmania, the figures are for the 2000-2001 financial year. For South Australia, the figures are for the 12 month period to 29 September 2001.

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See note 57 of this Discussion Paper.

Table 2: Comparison of number of applications for resealing

Jurisdiction	1978-1980 ⁵⁷	1989 ⁵⁸	2000
Australian Capital Territory	188	77	11
New South Wales	276	185	210
Northern Territory	6	5	5
Queensland	No figures	36	109
South Australia	40	28	35
Tasmania	23	21	21
Victoria	550	50	144
Western Australia	26	28	31
Total	c.1000	430	566

It appears from the WALRC figures that in 1980 there were about 1,000 applications for resealing.⁵⁹ By 1989 the figure had declined to 430. Between 1989 and 2000, however, there was an increase in the total number of applications for resealing of approximately thirty per cent. This increase did not occur uniformly across all jurisdictions, but was largely attributable to increases in Queensland and Victoria.

Various reasons have been put forward for the drop in resealing applications between 1980 and 1989, but it seems that this was principally the result of the abolition of succession duty by the States, the Northern Territory and the Commonwealth between 1977 and 1984.⁶⁰ It was suggested to the conference of Probate Registrars in 1990 that the Australian Capital Territory figure was high because of the large number of shares registered on ACT share registers to avoid duty that would have been payable if they had been registered elsewhere, and that this figure would decrease in the future.⁶¹ The figures for 2000 bear out the accuracy of this forecast.

The National Committee 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 3.

⁵⁷ These figures are approximate only, as the information given to the WALRC by the Probate Registrars did not cover the same period in each case, and in the case of some jurisdictions was anecdotal only. For the Australian Capital Territory and New South Wales, the figures are an average derived from exact figures given to the WALRC for the years 1978 and 1979. For the Northern Territory, Tasmania and Western Australia, the averages are based on figures for a longer period. The South Australian and Victorian figures are estimates given to the WALRC.

⁵⁸ The figures appearing in this column represent the number of grants resealed, rather than the number of applications filed. With the exception of the figure for New South Wales, the figures are those recorded in the *Report of the Conference of Probate Registrars (1990)* at 15. The New South Wales figure is that recorded in *The Supreme Court of New South Wales, Annual Review: Year Ended 31 December 1989* at 12.

⁵⁹ *WALRC Report (1984)* at para 2.12. The figure is of course heavily dependent on the Victorian figure, which seems large compared with New South Wales.

⁶⁰ See p 146 of this Discussion Paper.

⁶¹ *Report of the Conference of Probate Registrars (1990)* at 16.

Table 3: Proportion of applications for resealing that related to a grant made overseas

Jurisdiction	Estimate
Australian Capital Territory	30% (20% from New Zealand, 10% from other Commonwealth countries)
New South Wales	75%, mainly from the United Kingdom and New Zealand
Northern Territory	None during 2000
Queensland	A minority
South Australia	46%
Tasmania	Approximately 4%
Victoria	Slightly less than half, mostly from the United Kingdom
Western Australia	Up to 1/3 of the total

Quite clearly, the New South Wales figure for overseas reseals - about 75 per cent - is much higher than anywhere else. In all other Australian jurisdictions, the percentage of applications for resealing that related to grants issued in another Australian State or Territory exceeded the percentage that related to overseas grants. However, overseas grants were still the subject of a substantial proportion of the applications made in the Australian Capital Territory, South Australia, Victoria and Western Australia.

(b) Time taken

The National Committee asked the Probate Registrars of each State and Territory 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 no complications occur.

Table 4: Usual time taken to reseal a grant

Jurisdiction	Number of days
Australian Capital Territory	7 days
New South Wales	1-2 days
Northern Territory	1-2 days
Queensland	3-5 business days
South Australia	4-5 days
Tasmania	1 week maximum
Victoria	4.5 days
Western Australia	3 weeks

(c) The cost of resealing

Making an application for the resealing of a grant of probate or letters of administration involves the payment of court filing fees. These fees, which vary quite considerably, are set out in Table 5.

Table 5: Fees payable for filing an application for the resealing of a grant

Jurisdiction	Fees
Australian Capital Territory ⁶²	All estates \$547
New South Wales ⁶³	Gross value of estate: less than \$50,000 Nil \$50,000 to less than \$250,000 \$495 \$250,000 to less than \$500,000 \$624 \$500,000 to less than \$1,000,000 \$938 \$1,000,000 and above \$1,250
Northern Territory ⁶⁴	All estates \$300
Queensland ⁶⁵	All estates \$220
South Australia ⁶⁶	All estates \$503
Tasmania ⁶⁷	Gross value of estate: less than \$20,000 \$25 \$20,000 to less than \$50,000 \$50.50 \$50,000 and above \$116
Victoria ⁶⁸	Gross value of estate: less than \$1,000 \$85 \$1,000 and above \$218
Western Australia ⁶⁹	Value of estate: less than \$5,000 \$50 \$5,000 and above \$120

The cost of resealing is not limited to these court fees. If, as is likely, a personal representative engages lawyers to act on behalf of the estate in the resealing jurisdiction, the estate will have to pay the lawyers' fees. If the lawyers are not located in a capital city, there may be additional fees charged by lawyers in a capital

⁶² *Supreme Court Act 1933 (ACT)* s 37(1), Combined Determination of Fees and Explanatory Memorandum, No 105 of 2001, Sch 3, Item 203.

⁶³ *Supreme Court Regulation 2000 (NSW)* cl 4, Sch 1, Item 1(3).

⁶⁴ *Supreme Court Regulations (NT)* reg 4, Sch, Item 1 (Fees payable for all other proceedings in the Supreme Court). In addition, a \$4 file search fee is imposed.

⁶⁵ *Uniform Civil Procedure (Fees) Regulation 1999 (Qld)* s 3(1), Sch 1, Item 1(b).

⁶⁶ *Supreme Court (Probate Fees) Regulations 1999 (SA)* reg 5(1), Sch, Item 1(b).

⁶⁷ *Tasmanian Government Gazette*, 15 June 1999 at 660 (notification made under s 8(1) of the *Fees Units Act 1997* (Tas)).

⁶⁸ *Supreme Court (Fees) Regulations 1991 (Vic)* reg 7(1), Sch 2, Item 1. On 1 January 2002, these Regulations will be repealed and replaced by the *Supreme Court (Fees) Regulations 2001 (Vic)*.

⁶⁹ *Supreme Court (Fees) Regulations 2001 (WA)* reg 4(1), Sch 1, Div II, Item 15. On 1 January 2002, these Regulations will be repealed and replaced by the *Supreme Court (Fees) Regulations 2002 (WA)*.

city acting as agents. 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 resealing.⁷⁰ Consequently, it is usual for costs to be incurred in respect of advertising fees.

4. THE NEED FOR UNIFORMITY IN RELATION TO RESEALING

The present legislation governing resealing is not uniform. The procedure for resealing, and the applicable rules, differ quite considerably from one jurisdiction to another.⁷¹ There are also considerable variations as to the countries whose grants may be resealed,⁷² and the jurisdictional requirements.⁷³

If the rules and procedures could be made uniform, it would simplify the task of a personal representative who was administering an estate that had assets located in several jurisdictions. This would be so even if all the jurisdictions concerned were Australian States and Territories (assuming no alternative to resealing for such grants was introduced). Uniformity would be equally advantageous where the original grant was made overseas. A personal representative seeking entitlement to deal with Australian assets located in several jurisdictions would be greatly assisted if the resealing rules of each jurisdiction were made uniform.

⁷⁰ See p 136 of this Discussion Paper.

⁷¹ See Chapter 5 of this Discussion Paper.

⁷² See Chapter 6 of this Discussion Paper.

⁷³ See Chapter 7 of this Discussion Paper.

CHAPTER 3

AUTOMATIC RECOGNITION OF AUSTRALIAN GRANTS: BACKGROUND

1. INTRODUCTION

A fundamental question is whether resealing remains the best way of dealing with the problem of estates that have assets in several Australian jurisdictions. Since Australia is a federation, and it is common for Australians to move from one State or Territory to another and acquire property in various different places, it seems unnecessary that, in order to administer an estate with property in several jurisdictions within Australia, a personal representative should have to seek fresh authority to carry out his or her responsibilities in each different jurisdiction. There might be some justification for this if the law differed appreciably from one jurisdiction to another. However, there is already substantial uniformity between the laws of succession in each State and Territory, and the National Committee's recommendations, if largely accepted, will bring about an even greater degree of uniformity.⁷⁴

The United Kingdom resolved this problem thirty years ago by introducing a system under which a grant of representation made in one part of the United Kingdom is automatically recognised throughout the whole of the United Kingdom.⁷⁵ Similar schemes have been proposed for Australia on a number of previous occasions.⁷⁶ In relation to certain kinds of property, automatic recognition is already operative.⁷⁷

This chapter examines the position in the United Kingdom and in some other federal jurisdictions. It also examines existing legislation in Australia under which, in certain limited circumstances, grants can be recognised in other jurisdictions without resealing, as well as previous Australian proposals for automatic recognition. Against this background, Chapter 4 outlines and assesses possible schemes for automatic recognition.

⁷⁴ The National Committee's recommendations for the reform of the law of wills, contained in the *Wills Report* (1997), have been largely implemented in the Northern Territory: see the *Wills Act* (NT), which commenced on 1 March 2001. See the discussion about the achievability of uniformity at p 1 of this Discussion Paper.

⁷⁵ See pp 18-20 of this Discussion Paper.

⁷⁶ See pp 30-31 of this Discussion Paper.

⁷⁷ See the discussion of the transfer of shares, debentures and interests in companies and of the payment of monies under life insurance policies at pp 23-27 of this Discussion Paper.

2. AUTOMATIC RECOGNITION IN THE UNITED KINGDOM

Automatic recognition is not a new idea. Before 1858, jurisdiction to grant probate and letters of administration was exercised in England by ecclesiastical and other courts, each having authority over a defined geographical area.⁷⁸ At that time, if a deceased person owned property located in a number of different areas, it was necessary to obtain a fresh grant in each ecclesiastical district.⁷⁹ With the growth of industry and the spread of capital investment in the nineteenth century, this became increasingly inconvenient.⁸⁰ As a result, in 1853, “attempts were unsuccessfully made to pass a bill through Parliament with a view to providing that a grant of representation, obtained in any part of the United Kingdom, should be effective throughout the whole kingdom”.⁸¹ Instead, Parliament transferred probate jurisdiction to a new court, the Court of Probate, which had jurisdiction throughout England and Wales,⁸² and introduced a system of resealing for English, Scottish and Irish grants.⁸³

These measures may have answered the needs of the nineteenth century, but a century later, with the expansion of business communications, the improvement in transport and other social changes, the need to reseal an English grant in Scotland or Northern Ireland before the personal representative could deal with assets of the estate situated in either of those jurisdictions had become highly inconvenient.

The issue of reciprocal recognition of grants of representation was referred to a Working Party of probate officials and solicitors under the chairmanship of one of the registrars of the Principal Probate Registry.⁸⁴ This body 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 be preserved in other ways.⁸⁵ The Working Party’s recommendations were implemented by the *Administration of Estates Act 1971* (UK).

78 This situation changed with the commencement of the *Court of Probate Act 1857* (UK) on 11 January 1858. See p 11 of this Discussion Paper.

79 Cretney S, “Administration of Estates Act 1971” (1971) 115 SJ 762.

80 Ibid.

81 Russell JEN and others (eds), *Tristram and Coote’s Probate Practice* (22nd ed, 1964) at 454.

82 *Court of Probate Act 1857* (UK).

83 *Probates and Letters of Administration Act (Ireland) 1857* (UK) ss 94, 95; *Confirmation of Executors (Scotland) Act 1858* (UK) ss 12-14. These Acts enabled a grant obtained in any part of the United Kingdom, upon being resealed by the competent probate authority in another part of the United Kingdom, to be effective in that part of the United Kingdom: see Russell JEN and others (eds), *Tristram and Coote’s Probate Practice* (22nd ed, 1964) at 454-456.

84 United Kingdom, *Parliamentary Debates*, House of Lords, Fifth Series, vol 316, 16 March 1971, col 421 (Lord Simon of Glaisdale).

85 Ibid.

The *Administration of Estates Act 1971* (UK) provides that, where a person dies domiciled in England and Wales, a grant of probate of the will or letters of administration of the estate (or any part of it) made by the High Court in England and Wales and noting the deceased's domicile there 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 Ireland,⁸⁶ and for the purposes of the law of Scotland, as if it were a confirmation⁸⁷ made by the appropriate officer of the Scottish courts.⁸⁸ There are similar provisions dealing with the automatic recognition of Northern Irish grants⁸⁹ and Scottish confirmations.⁹⁰ These provisions apply to grants issued both before and after the commencement of the legislation (1 January 1972).⁹¹ Consequently, resealing is no longer necessary even if the original grant was issued many years before that date.

Since 1971, it has not been possible to apply in one part of the United Kingdom for the resealing of a grant made in another part of the United Kingdom;⁹² instead, there is now a system of issuing limited grants. If no grant has been made in the place of domicile, application may be made for an original grant in any other part of the United Kingdom. The grant so made will be specifically limited to the deceased's estate in the place of grant, and further limited to operate only until a grant is made in the place of domicile.⁹³ This prevents the making of multiple grants.

Under rule 8 of the *Non-Contentious Probate Rules 1987* (UK),⁹⁴ the oath required to be made by an applicant in support of a grant must state where the deceased died domiciled,⁹⁵ unless otherwise directed by a district judge or registrar. The deceased's domicile will then be noted on the grant.⁹⁶ Probate fees are now assessed on the net value of the deceased's estate in England and Wales, Scotland and Northern Ireland⁹⁷ - so the value of the whole of the United Kingdom estate is

86 *Administration of Estates Act 1971* (UK) s 2(1).

87 A confirmation is the Scottish equivalent of a grant of probate or letters of administration.

88 *Administration of Estates Act 1971* (UK) s 3(1)(a).

89 *Administration of Estates Act 1971* (UK) s 1(4) (recognition in England and Wales), s 3(1)(b) (recognition in Scotland).

90 *Administration of Estates Act 1971* (UK) s 1(1) (recognition in England and Wales), s 2(2) (recognition in Northern Ireland). Section 4 deals with evidence of grants.

91 *Administration of Estates Act 1971* (UK) ss 1(6), 2(5), 3(2), 14(2).

92 Section 12 and Sch 7 of the *Administration of Estates Act 1971* (UK) repealed ss 168 and 169 of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK), which had replaced the original resealing provisions contained in the *Probates and Letters of Administration Act (Ireland) 1857* (UK) and the *Confirmation of Executors (Scotland) Act 1858* (UK). See p 11 of this Discussion Paper for a discussion of the original resealing provisions.

93 Practice Direction (Probate Grants: Sureties) [1971] 1 WLR 1790.

94 This rule replaced r 6 of the *Non-Contentious Probate Rules 1954* (UK).

95 See note 16 of this Discussion Paper.

96 *Administration of Estates Act 1971* (UK) ss 1(1), (4), 2(1), (2), 3(1).

97 Practice Direction (Probate Grants: Sureties) [1971] 1 WLR 1790.

assessed at the time of making the original grant in the domicile, instead of the former system, under which the value of the estate in each jurisdiction would have been assessed separately at the time of making or resealing the grant in that jurisdiction.

The Solicitor General described the reforms made by the *Administration of Estates Act 1971* (UK) as affecting “a little known and supremely unexhilarating part of the law”.⁹⁸ However, it has been suggested that the 1971 Act is a measure of considerable importance in that it saves work for solicitors and the staff of probate registries and saves the expense involved in obtaining grants of administration.⁹⁹

The Principal Registry of the Family Division of the English High Court of Justice¹⁰⁰ has advised the National Committee that no reports of any difficulties with the operation of the legislation have been drawn to the attention of the Probate Registry.¹⁰¹

3. THE POSITION IN OTHER JURISDICTIONS

(a) The United States of America

In the United States a procedure has also been developed as an alternative to taking separate court proceedings where a deceased person has left assets in two or more states.

Under section 4-201 of the *Uniform Probate Code*, a personal representative appointed by the court of the deceased’s domicile may collect debts and personal property in another state without initiating separate court proceedings, provided the necessary affidavit evidence is given to the debtor or holder of the property in support of the personal representative’s claim. The affidavit is required to set out the date of death, the fact that no local administration has been commenced, and that the personal representative is entitled to payment or delivery. However, this provision does not apply to real property, which must be dealt with by a personal representative who has been authorised to act by a grant issued in the state in which the property is situated.

⁹⁸ Cretney S, “Administration of Estates Act 1971” (1971) 115 SJ 762.

⁹⁹ Ibid.

¹⁰⁰ From 1 October 1971, the Probate, Divorce and Admiralty Division of the High Court was renamed the Family Division: *Administration of Justice Act 1970* (UK) s 1(1), SI No 1244 of 1971. Non-contentious probate business continued to be assigned to the Family Division, but all other probate business was assigned to the Chancery Division: *Administration of Justice Act 1970* (UK) s 1(4). See now *Supreme Court Act 1981* (UK) s 61(1), Sch 1.

¹⁰¹ Letter to Associate Professor Handford from Mr Clive Buckley of the Court Service Secretariat, Principal Registry of the Family Division, 13 May 1999.

Further, section 4-205 provides that a personal representative appointed by the court of the deceased's domicile may, upon filing authenticated copies of his or her appointment and of any official bond that he or she has given, exercise all the powers of a local personal representative and maintain actions and proceedings subject to any conditions imposed on non-resident parties generally.

These and other procedural sections of the *Uniform Probate Code* have now been adopted in 26 states.¹⁰²

In the states that have not adopted the *Uniform Probate Code*, the position differs significantly, and ancillary administration proceedings are necessary in each state where the deceased left assets.¹⁰³

(b) Canada

In contrast to the United Kingdom and the United States, Canada has not adopted any alternative to resealing, and the position is similar to the present position in Australia in many respects.¹⁰⁴ In recent years, in some jurisdictions there has been some simplification of the application process involved in resealing.¹⁰⁵

¹⁰² By 1997, 25 states had adopted the procedural provisions of the *Uniform Probate Code*: see Stein RA, "Probate Reformation: The Impact of the Uniform Laws" (1997) 23 *The Probate Lawyer* 1 at 14, note 53. Maryland has recently become the 26th state: letter to Associate Professor Handford from Professor JH Langbein, Chancellor Kent Professor of Law and Legal History, Yale University, a Uniform Law Commissioner from Connecticut and member of the Joint Editorial Board for the Uniform Probate Code, 14 May 1999.

¹⁰³ See Lerner SD, "The Need For Reform in Multistate Estate Administration" (1977) 55 *Texas Law Review* 303.

¹⁰⁴ See Feeney TG, *The Canadian Law of Wills: Probate* (3rd ed, 1987) vol 1 at 188-191. Feeney notes that there are some statutory modifications, in federal legislation, of the general rule requiring an ancillary grant or the resealing of the original grant in the province in which the asset is situated: see now *Bank Act*, SC 1991, c 46, s 96; *Canada Business Corporations Act*, RSC 1985, c 44, s 51. The *Bank Act*, SC 1991, c 46 also makes provision for the transmission on death "of a deposit, of property held by a bank as security or for safe-keeping or of rights with respect to a safety deposit box and property deposited therein" without the need for a grant to be resealed: *Bank Act*, SC 1991, c 46, s 460. That section provides that the delivery to the bank of an affidavit or declaration in a form satisfactory to the bank, together with an authenticated copy of a grant of probate or letters of administration (or other document of like import) that purports to be issued by any court or authority in Canada or elsewhere or an authenticated copy of a notarial will, is sufficient justification and authority for transmitting the property in accordance with the claim. The Canadian legislation referred to is current to 30 April 2001.

¹⁰⁵ For example, in Alberta, although there are no special rules about the recognition of Commonwealth or even other Canadian grants, there has been "a slight lessening of the application process" for resealing set out in the Surrogate Rules for Alberta: letter to Associate Professor Handford from Professor PJM Lown QC, Director of the Alberta Law Reform Institute, 6 May 1999, referring to Surrogate Rules rr 13(5), (6), 35, 36. Those rules, which deal with the procedure for resealing, give effect to recommendations made by the Alberta Law Reform Institute and the Surrogate Rules Committee: see Alberta Law Reform Institute, Final Report, *Revision of the Surrogate Rules: A Joint Project of The Alberta Law Reform Institute and The Surrogate Rules Committee* (Report No 73, May 1996) at 13, 128-129, 134.

(c) Hague Convention on the International Administration of the Estates of Deceased Persons

The 1973 Hague Convention Concerning the International Administration of the Estates of Deceased Persons¹⁰⁶ resulted from the Twelfth Session of the Hague Conference of Private International Law in 1972.¹⁰⁷ The Convention is in force in only three countries - the Czech Republic, Portugal and Slovakia. Australia is not a party.¹⁰⁸

The Convention provides for Contracting States to issue a certificate, which may be recognised by other Contracting States, designating the person or persons entitled to administer the movable estate of a deceased person and indicating the powers of the certificate holder.¹⁰⁹

The certificate may be issued only by the competent authority in the State in which the deceased had his or her habitual residence.¹¹⁰ Generally, the internal law of that State will be applied to determine who should be designated as the holder of the certificate and the powers that should be exercisable by that person, although, in certain circumstances, these issues will be determined according to the internal law of the State of which the deceased was a national.¹¹¹ Recognition of the certificate in another Contracting State is not necessarily automatic. A Contracting State may establish “an expeditious procedure” for determining the recognition of certificates issued by other Contracting States,¹¹² and the Convention specifies a number of grounds on which one Contracting State may refuse to recognise a certificate issued by another Contracting State.¹¹³

The Convention also includes provisions in relation to the immovable property of a deceased person. If the law that governs the issuing of the certificate¹¹⁴ gives the holder of the certificate powers over immovable property situated in another State, the issuing authority must indicate the existence of those powers in the certificate.

106 The full text of the Convention is set out at <www.hcch.net/e/conventions/text21e.html> (20 October 2001).

107 <www.hcch.net/e/conventions/menu21e.html> (20 October 2001).

108 <www.hcch.net/e/status/statmtrx.pdf> (20 October 2001). This information is current to 1 October 2001. The United Kingdom became a signatory to the Convention on 2 October 1973, but never ratified it. Consequently, the Convention does not have force in the United Kingdom. See <www.hcch.net/e/status/stat21e.html> (20 October 2001).

109 *Convention Concerning the International Administration of the Estates of Deceased Persons* Article 1.

110 *Convention Concerning the International Administration of the Estates of Deceased Persons* Article 2.

111 *Convention Concerning the International Administration of the Estates of Deceased Persons* Article 3.

112 *Convention Concerning the International Administration of the Estates of Deceased Persons* Article 10.

113 *Convention Concerning the International Administration of the Estates of Deceased Persons* Articles 13-17. Recognition may be refused in relation to all or only certain of the powers indicated in the certificate: Article 18.

114 As noted above, this will usually be the internal law of the State in which the deceased had his or her habitual residence, although in certain circumstances it may be the internal law of the State of which the deceased was a national. See note 111 of this Discussion Paper.

Other Contracting States may recognise these powers in whole or in part, and must indicate the extent to which they do so.¹¹⁵

The WALRC expressed the view in its 1984 Report that the Convention “was principally designed to cope with the needs of civil law heirs seeking authority in common law countries”.¹¹⁶ It also observed that the Convention had attracted little support and appeared to involve complex requirements.¹¹⁷ The WALRC concluded that the Convention was not “suitable for adoption as between Australian States and Territories, or between Australia and other common law countries”.¹¹⁸

4. EXISTING AUSTRALIAN LEGISLATION FACILITATING THE ADMINISTRATION OF CERTAIN KINDS OF PROPERTY

Under existing legislative provisions, it is unnecessary to reseal a grant of probate or letters of administration made in one Australian State or Territory in order to administer an asset situated in another Australian State or Territory, if the asset consists of:

- a share, debenture or interest in a company to which section 1091 of the *Corporations Act 2001* (Cth) applies; or
- an amount below a statutory limit payable under a life insurance policy.

These provisions reduce the cost, delay and inconvenience involved in resealing. The WALRC received advice that without provisions of this kind the number of applications for resealing would be substantially greater.¹¹⁹

(a) Legislation

(i) Shares, debentures and interests in companies

The *Corporations Act 2001* (Cth), which commenced on 15 July 2001, regulates the transfer by the personal representative of a deceased person of

¹¹⁵ *Convention Concerning the International Administration of the Estates of Deceased Persons* Article 30. The Czech Republic, for example, has indicated that it does not recognise, in whole or in part, the powers relating to immovables situated within its territory, issued in conformity with Article 30 of the Convention: see <www.hcch.net/e/status/stat21e.html> (20 October 2001).

¹¹⁶ *WALRC Report* (1984) at para 6.14.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Id* at para 5.3.

a share, debenture or interest¹²⁰ of the deceased person.¹²¹ Before the commencement of the *Corporations Act 2001* (Cth), the transfer of a share, debenture or other interest of a deceased person was regulated by section 1091 of the *Corporations Law*¹²² Although the mechanism provided in section 1091 of the *Corporations Act 2001* (Cth) is virtually identical to that previously found in the *Corporations Law*, section 1091 of the *Corporations Act 2001* (Cth) appears to have a more extended operation than its predecessor in terms of the personal representatives who may apply under the legislation for the transfer of the shares, debentures or other interests of a deceased person.

Section 1091 of the *Corporations Act 2001* (Cth) 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”.¹²³ A personal representative is a “local representative” if he or she “is duly constituted as personal representative under the law of the State or Territory in which the share, debenture or interest is situated”.¹²⁴

Section 1091(7) of the *Corporations Act 2001* (Cth) provides a mechanism for the transfer of a share, debenture or interest of a deceased person by a personal representative who is not a local representative. This provision would appear to apply not only to a person who is constituted as personal representative under the law of another Australian State or Territory, but also to a person who is constituted as personal representative under the law of another country. In this respect, the provision has a broader application than section 1091(4) of the *Corporations Law*, which applied only to a personal representative constituted as such under the law of another Australian State or Territory.¹²⁵

The mechanism provided in section 1091(7) of the *Corporations Act 2001* (Cth) avoids the need for a personal representative who is not a local personal representative to have the grant under which he or she has been appointed resealed in the State or Territory in which the shares, debentures or

120 “Interest” includes an interest in a managed investment scheme: *Corporations Act 2001* (Cth) s 1090.

121 *Corporations Act 2001* (Cth) s 1091(3)-(11).

122 A similar provision was originally found in s 183(4) of the *Companies Act 1981*, which was adopted in all States and Territories. For a discussion of that provision, see *WALRC Report* (1984) at para 5.4.

123 *Corporations Act 2001* (Cth) s 1091(4). Where the personal representative is a local representative, an instrument of transfer executed by the personal representative is as valid as if the personal representative had been the holder of the share, debenture or interest at the time when the instrument was executed: *Corporations Act 2001* (Cth) s 1091(6).

124 *Corporations Act 2001* (Cth) s 1091(5). A share or interest is situated where the relevant register is kept: *Corporations Act 2001* (Cth) s 1085(3).

125 Section 1091(4) of the *Corporations Law* referred to “the personal representative of a dead holder duly constituted as such under a law of another jurisdiction” [emphasis added]. The term “jurisdiction” was defined in s 9 of the *Corporations Law* to mean “a State or the Capital Territory ...”. The term “State” was further defined in that section to include the Northern Territory.

interests are situated in order to deal with those assets. Section 1091(7) of the *Corporations Act 2001* (Cth) provides:

If:

- (a) the personal representative is not a local representative; and
- (b) the representative:
 - (i) executes an instrument of transfer of the share, debenture or interest to the representative or to another person; and
 - (ii) delivers the instrument to the company; and
 - (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 share, debenture or interest is located and no application for such a grant will be made; and
- (c) the statement is made within the period of 3 months immediately before the date on which the statement is delivered to the company;

the company must register the transfer and pay to the representative any dividends or other money accrued in respect of the share, debenture or interest up to the time when the instrument was executed.

Notwithstanding anything in the constitution of a company, or in a deed relating to debentures or interests, 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, having been granted to the personal representative of a deceased person must be accepted by the company as sufficient evidence of the grant.¹²⁶

Section 1091(7) does not operate so as to require the company to do anything it would not have been required to do if the personal representative were a local representative.¹²⁷

A transfer or payment made under section 1091(7) 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.¹²⁸ An application by a personal representative for registration as the holder of a share, debenture or interest in place of the deceased person is deemed to be

126 *Corporations Act 2001* (Cth) s 1091(11).

127 *Corporations Act 2001* (Cth) s 1091(8).

128 *Corporations Act 2001* (Cth) s 1091(9).

an instrument of transfer effecting a transfer of the share, debenture or interest to the personal representative.¹²⁹

(ii) Life insurance policies

Section 211 of the *Life Insurance Act 1995* (Cth)¹³⁰ applies where there is a single life policy under which money¹³¹ is payable by a particular life company to the personal representative of a deceased person, and the money does not exceed \$50,000 or such other amount as is prescribed. The company may, without requiring the production of any probate or letters of administration,¹³² pay the money to the spouse, father, mother, child, brother, sister, niece or nephew of the deceased person, to a person who satisfies the company that he or she is entitled to the property of the deceased person under the deceased person's will or under the law relating to the disposition of the property of deceased persons, or to a person who satisfies the company that he or she is entitled to obtain probate of the will of the deceased person or to take out letters of administration of the deceased person's estate.¹³³

A company that makes a payment under section 211 is discharged from all further liability in respect of the money payable under the policy.¹³⁴ A person to whom a company makes a payment under this section must apply the money in due course of administration.¹³⁵

Section 212 contains equivalent provisions dealing with the situation where there are two or more life policies, the total payable under which does not exceed \$50,000 or such other amount as is prescribed.

Section 213 deals with the situation where the owner of the policy is not the person whose life is insured under it. It applies if the owner of the policy dies before the person whose life is insured by the policy and the adjusted surrender value of the policy¹³⁶ (or policies, if the policy is one of two or more policies owned by the deceased owner and issued by the same company) is less than \$25,000 or such other amount as is prescribed.¹³⁷

129 *Corporations Act 2001* (Cth) s 1091(10).

130 This section replaced s 103 of the *Life Insurance Act 1945* (Cth), discussed in *WALRC Report* (1984) at para 5.6.

131 "Money", in relation to a life policy, means the total of the money payable under the policy, less any debt due to the company under, or secured by, the policy: *Life Insurance Act 1995* (Cth) s 211(5).

132 *Life Insurance Act 1995* (Cth) s 211(2).

133 *Life Insurance Act 1995* (Cth) s 211(1).

134 *Life Insurance Act 1995* (Cth) s 211(3).

135 *Life Insurance Act 1995* (Cth) s 211(4).

136 The adjusted surrender value of a policy is the surrender value of the policy as at the day on which the owner died, less any debt due to the company under, or secured by, the policy: *Life Insurance Act 1995* (Cth) s 213(6).

137 *Life Insurance Act 1995* (Cth) s 213(1), (7).

Section 213 provides that, if a person (the applicant) satisfies the company that issued the policy that he or she is entitled to the benefit of the policy under the will or on the intestacy of the deceased owner, or that he or she is entitled to obtain probate of the will or take out letters of administration of the estate, the company may, without requiring the production of any probate or letters of administration,¹³⁸ endorse on the policy a declaration that the applicant has so satisfied the company and is the owner of the policy,¹³⁹ and the applicant then becomes the owner of the policy.¹⁴⁰ This provision does not confer on the applicant any beneficial interest in the policy that he or she would not otherwise have had, or affect any right or interest of a person other than the applicant in relation to the policy.¹⁴¹

(b) WALRC recommendations

(i) Extension of companies legislation to certain overseas grants

In its Report, the WALRC considered whether the operation of section 183(4) of the *Companies Act 1981*¹⁴² should be extended by “treating grants of probate or administration obtained in New Zealand or the United Kingdom as having the same effect as an Australian grant for the purposes of the Act”:¹⁴³

The effect would be that a personal representative, having obtained a grant of probate or administration in New Zealand or the United Kingdom, could execute a transfer of shares in an Australian company without resealing the grant in Australia.

The WALRC recommended the extension of this provision to grants of probate and administration made in New Zealand and the United Kingdom.¹⁴⁴ The reason given for such an extension was that people from New Zealand and the United Kingdom were more likely than people from other countries to hold shares in Australian companies.¹⁴⁵

However, section 1091(7) of the *Corporations Act 2001* (Cth) would appear to apply not only to a person who is constituted as personal representative under

138 *Life Insurance Act 1995* (Cth) s 213(3).

139 *Life Insurance Act 1995* (Cth) s 213(2).

140 *Life Insurance Act 1995* (Cth) s 213(4).

141 *Life Insurance Act 1995* (Cth) s 213(5).

142 Section 183(4) of the *Companies Act 1981* was the predecessor of s 1091(4) of the *Corporations Law*. The latter provision is discussed at p 24 of this Discussion Paper.

143 *WALRC Report* (1984) at para 8.5.

144 *Ibid.*

145 *Ibid.*

the law of another Australian State or Territory, but also to a person who is constituted as personal representative under the law of another country. Consequently, it is not necessary to consider whether section 1091 should be amended in order to facilitate the transfer of shares, debentures and interests by a personal representative who has been appointed in another country.

(ii) Adoption of similar legislation in relation to other types of property

The WALRC also considered whether provisions similar to section 183(4) of the *Companies Act 1981*¹⁴⁶ should be enacted to facilitate the transfer of other assets to a personal representative without the need for the personal representative to have the grant resealed in the jurisdiction in which the asset was located.

The WALRC recommended that similar provisions should be adopted in relation to deposits in banks, building societies, credit unions and similar institutions.¹⁴⁷

(iii) Informal administration

The WALRC also recommended that, where the amount deposited in a bank, building society, credit union or similar institution did not exceed a specified amount, legislation should enable “payments to be made to a specified person without the need for a grant of probate or administration”.¹⁴⁸ The WALRC further recommended that the prescribed amount for the purposes of the legislation should be the same as the maximum amount that may be paid under a life insurance policy without the production of a grant.¹⁴⁹

(c) Preliminary view¹⁵⁰

In view of the extended operation of section 1091(7) of the *Corporations Act 2001* (Cth), the recommendations made by the WALRC raise two distinct issues:

- whether, upon production of a grant issued by a court of an Australian State or Territory, the person named in the grant should be able to give a valid discharge for the release of monies held on deposit in a bank, building

¹⁴⁶ See note 142 of this Discussion Paper.

¹⁴⁷ *WALRC Report* (1984) at para 8.3.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Id* at para 8.4. See p 26 of this Discussion Paper.

¹⁵⁰ As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

society, credit union or other similar financial institution in another State or Territory, without the need to have the grant resealed in that State or Territory;

- whether, if the monies held by the financial institution are below a particular amount, a specified person should be able to give, on behalf of the estate, a valid discharge for the payment of those monies, without the need to obtain a grant at all.

(i) Adoption of similar legislation in relation to other types of property

The first issue arising from the WALRC recommendations concerns the possibility of the automatic recognition, within Australia, of a grant issued by a court of an Australian State or Territory, insofar as the property sought to be administered consists of monies held on deposit in a bank, building society, credit union or other similar financial institution. However, this Discussion Paper raises for consideration whether a scheme of more general application should be adopted.¹⁵¹ Under the proposed scheme, which is not limited to assets of a particular kind, certain grants issued by a court of an Australian State or Territory would be automatically recognised within Australia without the need to first be resealed. If such a scheme were ultimately recommended by the National Committee, it would not be necessary to make separate provision for a limited scheme of automatic recognition to facilitate the administration of monies held on deposit in a bank, building society, credit union or other similar financial institution.

(ii) Informal administration

The second issue arising from the WALRC recommendations concerns the extent to which legislation should facilitate the informal administration of estates by enabling certain payments, where they are below a specified amount, to be made to a person on behalf of a deceased estate, without the need for that person to produce a grant. This issue is already being considered by the National Committee in the context of its work on the administration of the estates of deceased persons. In its Discussion Paper on that topic, the National Committee acknowledged that provisions of this kind could be a useful adjunct to the informal administration of a deceased estate.¹⁵² However, it proposed, on a preliminary basis, that such provisions, if considered desirable, should be included in the substantive legislation to which they relate, rather than in the model legislation dealing with the administration of estates.¹⁵³ As this issue is already under consideration by the National Committee, it will not be further addressed in this Discussion Paper.

151 See Chapter 4 of this Discussion Paper.

152 *Administration of Estates Discussion Paper* (1999) QLRC at 160; NSWLRC at para 10.56.

153 *Administration of Estates Discussion Paper* (1999) QLRC at 160; NSWLRC at 228 (Proposal 67).

5. EARLIER AUSTRALIAN PROPOSALS

(a) The Barwick proposals

The WALRC Report records that in 1963 and 1964, as a result of “dissatisfaction with the system of resealing”, proposals were put forward for a scheme under which a grant of probate or administration “made in one Australian jurisdiction would be automatically recognised throughout Australia”.¹⁵⁴ The proposal was inspired by the introduction of section 95(3) of the uniform *Companies Act 1961*, the predecessor of section 183(4) of the *Companies Act 1981*,¹⁵⁵ and by similar provisions for the disposal of the proceeds of life insurance policies advocated by the Life Offices’ Association for Australasia in 1963.¹⁵⁶ 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 and to the Commonwealth Attorney General, Sir Garfield Barwick.¹⁵⁷

Sir Garfield Barwick subsequently put forward preliminary guidelines to the Law Council of Australia as a basis for discussion. It was proposed that:¹⁵⁸

... 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.

Draft legislation was then prepared in Victoria under the direction of the Standing Committee of Attorneys General.¹⁵⁹ However, the draft legislation departed from the Attorney General’s proposal to the Law Council of Australia:¹⁶⁰

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.

154 *WALRC Report* (1984) at para 6.1.

155 See note 142 of this Discussion Paper.

156 *WALRC Report* (1984) at para 6.2.

157 *Ibid.*

158 *Id* at para 6.3. For a discussion of the reaction to these guidelines, see *WALRC Report* (1984) at para 6.4.

159 *WALRC Report* (1984) at para 6.5.

160 *Ibid.* For a discussion of the reaction to the draft legislation, see *WALRC Report* (1984) at para 6.6.

No uniform legislation was enacted as a result of the proposal.¹⁶¹

(b) The WALRC proposals for automatic recognition of certain grants

As noted earlier, the WALRC was asked to review the law relating to the recognition of interstate and foreign grants of probate and letters of administration in 1976.¹⁶² Its Working Paper, issued in 1980, canvassed the possibility of a scheme of automatic recognition, within Australia, of certain grants issued by the court of an Australian State or Territory, and in its Report, submitted in 1984, it recommended the adoption of a scheme of automatic recognition similar to that in operation in the United Kingdom. The major recommendations were that:¹⁶³

- Grants of probate and administration made by the court of the Australian State or Territory in which the deceased died domiciled should be automatically recognised, without being resealed, as effective in every other Australian State or Territory.
- All other Australian grants, and all overseas grants, should be recognised as effective in a particular State or Territory only when resealed in that jurisdiction.
- However, when a grant that required resealing in order to be effective in an Australian State or Territory 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.

These proposals are discussed in detail in Chapter 4 of this Discussion Paper.

¹⁶¹ *WALRC Report (1984)* at para 6.7.

¹⁶² See p 3 of this Discussion Paper.

¹⁶³ *WALRC Report (1984)* at paras 7.4-7.19 and recommendations 21-23.

CHAPTER 4

AUTOMATIC RECOGNITION OF AUSTRALIAN GRANTS: PROPOSALS

1. INTRODUCTION

As explained in the Foreword to this Discussion Paper, the National Committee determined that the proposals contained in the WALRC's 1984 Report should be used as the starting point for its consideration of a scheme for the automatic recognition throughout Australia of grants made by the court of an Australian State or Territory.¹⁶⁴ This chapter sets out the essential elements of those proposals. It also sets out details of an alternative scheme that, while initially based on the original WALRC proposals, made significant modifications to those proposals. The latter scheme was developed by the Parliamentary Counsel's Committee, which was requested to prepare draft legislation for the resealing and recognition of certain grants on instructions from SCAG Officers.¹⁶⁵

The main difference between the two schemes lies in the grants that would, under the respective schemes, qualify for automatic recognition. Generally, the effect of the scheme proposed by the WALRC was that only a grant made in the Australian State or Territory in which the deceased was domiciled at the time of death would be automatically recognised.¹⁶⁶ On the other hand, the revised scheme proposed by the Parliamentary Counsel's Committee did not contain such a limitation.

Because the operation of the WALRC scheme would necessarily entail a determination of the domicile of the deceased at the time of death, this chapter briefly examines the law in relation to domicile.

This chapter also summarises the effect of automatic recognition on a number of key areas of succession law.¹⁶⁷

164 A reference in this Discussion Paper to the court of an Australian State or Territory is intended to refer to a court of competent jurisdiction.

165 See p 4 of this Discussion Paper.

166 The WALRC also recommended that automatic recognition be given to certain grants, if resealed in the Australian jurisdiction in which the deceased died domiciled, even though the original grant was not made in the jurisdiction of domicile. See p 45 of this Discussion Paper.

167 See pp 62-68 of this Discussion Paper. The effect of a scheme of automatic recognition on these areas of succession law is considered in more detail in Chapter 10, in the light of the conflict of laws issues addressed in Chapters 7 and 8.

2. DOMICILE

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 conflict of laws rules provide that many issues that arise in these areas of the law - for example, succession to movable property¹⁶⁸ - are to be determined according to the law of the jurisdiction in which the deceased was domiciled at the time of death.

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.¹⁶⁹

In Australia, the question of a person's domicile was, until the late 1970s, largely determined by the common law.¹⁷⁰ However, during the following few years, *Domicile Acts* were passed by each of the States, the Northern Territory and the Commonwealth.¹⁷¹ Because these Acts were passed in virtually identical terms, the law relating to domicile is uniform throughout Australia.¹⁷² Although the *Domicile Acts* did not abrogate the common law in relation to domicile, they did modify it in a number of important respects.¹⁷³

There are three types of domicile:¹⁷⁴

- domicile of origin, which each person has at birth, by force of law;

¹⁶⁸ Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 563. Succession to immovable property is governed by the law of the place where the property is situated: Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 564.

¹⁶⁹ Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 200. Note, however, that s 39(3) of the *Family Law Act 1975* (Cth) simply requires that a person "be 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 purposes of the *Family Law Act 1975* (Cth).

¹⁷⁰ 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 Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 203-204.

¹⁷¹ See *Domicile Act 1982* (Cth) (which applies to the Australian Capital Territory, 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). 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; *Domicile Act 1979* (NSW) s 4; *Domicile Act 1981* (Qld) s 4; *Domicile Act 1980* (SA) s 4; *Domicile Act 1980* (Tas) s 4, SR No 100 of 1982; *Domicile Act 1978* (Vic) s 4; *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.

¹⁷² For convenience, reference will be made in the following discussion only to the relevant provisions of the *Domicile Act 1982* (Cth).

¹⁷³ Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 199. 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 177 and 215 of this Discussion Paper in relation to the abolition of the common law rule of revival of the domicile of origin.

¹⁷⁴ Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 203.

- 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;¹⁷⁵ 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”.¹⁷⁶

The domicile that a person has at any given time continues until the person acquires a different domicile.¹⁷⁷ 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.¹⁷⁸

To acquire a domicile of choice, a person must have, at the same time, both a lawful physical presence in a country¹⁷⁹ and an actual intention to make his or her home indefinitely in that country.¹⁸⁰

3. PROPOSALS FOR THE AUTOMATIC RECOGNITION OF AUSTRALIAN GRANTS

(a) WALRC scheme

(i) Automatic recognition of a grant made by the court of the Australian State or Territory in which the deceased died domiciled

The WALRC recommended that the “Australian States and Territories should by uniform legislation adopt a scheme whereby a grant of probate or letters of 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”.¹⁸¹

¹⁷⁵ 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.

¹⁷⁶ Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 203.

¹⁷⁷ *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 Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 204.

¹⁷⁸ *Domicile Act 1982* (Cth) s 8.

¹⁷⁹ *Puttick v Attorney-General* [1980] Fam 1. See also Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 207-208.

¹⁸⁰ *Domicile Act 1982* (Cth) s 10.

¹⁸¹ *WALRC Report* (1984) at recommendation 21. See also *WALRC Report* (1984) at paras 7.1-7.4.

The WALRC 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.¹⁸²

In making these recommendations, the WALRC stated that its primary concern was to develop a system based on certainty that would avoid the jurisdictional disputes that were likely to arise if automatic recognition were extended to grants based on other connecting factors, for example, permanent residence or the existence of assets within the jurisdiction.¹⁸³

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 - the State or Territory in which the person had been domiciled at the time of death. Because the law relating to domicile is uniform throughout Australia,¹⁸⁴ 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.

(ii) **The resealing of other Australian grants**¹⁸⁵

A. Background

If the scheme proposed by the WALRC were implemented, the usual practice would no doubt be to apply for a grant in the State or Territory in which the deceased was domiciled at the time of death, as such a grant would then be automatically recognised throughout Australia. However, the WALRC did not recommend that, in the context of its scheme of automatic recognition, the making of a grant should be restricted to the court of the jurisdiction in which the deceased was domiciled at the time of death; nor is such a proposal made in this Discussion Paper.¹⁸⁶

182 Id at para 7.5 and recommendation 22. Such grants should continue to require resealing: see pp 36-38 of this Discussion Paper.

183 Id at para 9.55.

184 See p 33 of this Discussion Paper.

185 See also Chapter 9 of this Discussion Paper.

186 There are cases in which it would be quite proper to seek a grant in a jurisdiction in which the deceased did not die domiciled, rather than in the jurisdiction in which the deceased died domiciled. For example, the only assets that are to be administered might be situated in a jurisdiction in which the deceased did not die domiciled. In such a case, it would be quite appropriate to seek a grant in the jurisdiction where the assets were situated, notwithstanding that the deceased did not die domiciled in that jurisdiction.

It would seem undesirable to restrict the power of the courts to make an original grant to those cases where the deceased died domiciled in the jurisdiction in question. In some matters, the court of a State or Territory in which the deceased did not die domiciled might be the only court with jurisdiction to make an order affecting immovable property forming part of the estate. For example, if a person died domiciled in Queensland leaving real property in Victoria, the Supreme Court of Queensland could not make a family provision order affecting the Victorian real property. An application for family provision would have to be made in the Supreme Court of Victoria if an order were

As it would still be possible to apply for a grant in an Australian State or Territory in which the deceased was not domiciled at the time of death, the question arises whether it should continue to be possible to apply for the resealing of such a grant, so as to be effective in the resealing jurisdiction.

It is arguable that, if a grant made by the court of an Australian State or Territory in which the deceased died domiciled were to be automatically recognised throughout Australia, there would be no need to retain a system of resealing within Australia for grants made in an Australian State or Territory in which the deceased did not die domiciled.

However, if resealing were abolished for Australian grants, it could cause inconvenience in the administration of some estates. If it became apparent, after a grant had been obtained in a jurisdiction in which the deceased did not die domiciled, that it would also be necessary to administer the estate in a State or Territory other than that in which the grant was made, there would be two ways in which a personal representative could proceed. He or she could either:

- apply for a grant in the jurisdiction in which the deceased died domiciled, as such a grant would then be recognised throughout Australia; or
- apply for a grant in the jurisdiction in which authority to administer the estate is required (assuming that this jurisdiction is not the same as the jurisdiction in which the deceased died domiciled).

In either case, it would be necessary to apply for a grant.

B. WALRC recommendation

The WALRC recommended that “it should remain possible for Australian grants other than those made by the court of the deceased’s domicile to be resealed”.¹⁸⁷

This recommendation was a departure from the United Kingdom model on which the WALRC’s recommendation for automatic recognition was generally

sought affecting that property. See *Re Paulin* [1950] VLR 462 per Sholl J at 465, which is discussed at pp 206-207 of this Discussion Paper.

Further, although, in the context of a scheme for automatic recognition of Australian grants, it might be arguable that it is unnecessary for the courts to retain jurisdiction to make a grant where the deceased did not die domiciled in the State or Territory in question, the courts would nevertheless have to retain that jurisdiction in respect of persons who died domiciled overseas leaving property in Australia. It would seem anomalous to restrict the jurisdiction of the courts so that, where a person died leaving property in an Australian State or Territory, the Supreme Court of that jurisdiction could make a grant if the person died domiciled overseas, but not if the person died domiciled in another Australian State or Territory.

based.¹⁸⁸ As noted earlier, in the United Kingdom, a system of automatic recognition was introduced from 1972 for certain grants made in England and Wales, Scotland and Northern Ireland.¹⁸⁹ Automatic recognition is confined to a grant made in the deceased's domicile, which notes his or her domicile on the grant.¹⁹⁰ It is no longer possible to have a grant that has been made in one part of the United Kingdom resealed in another part of the United Kingdom.¹⁹¹ However, it is still possible to apply for a grant in a country within the United Kingdom in which the deceased did not die domiciled. Such a grant is limited to the deceased's estate in the place of grant. Further, to avoid the possibility of dual grants, the grant is also limited to operate only until a grant is made in the place of domicile.¹⁹²

The WALRC expressed the view that "in Australia resealing would operate more satisfactorily than a system of limited grants".¹⁹³ 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".¹⁹⁴ This applies particularly to persons domiciled in New South Wales who live in particular parts of that State.¹⁹⁵ For example, persons resident in Broken Hill are often advised by solicitors and trustee companies in Adelaide and appoint them as executors.¹⁹⁶

The WALRC 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.¹⁹⁷

188 See pp 18-20 of this Discussion Paper.

189 See p 19 of this Discussion Paper.

190 Ibid.

191 Ibid.

192 Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 12.23. See also note 93 of this Discussion Paper. The first of the two limitations seems only to be declaratory of the general law in relation to the effect of a grant - namely, that it does not give the personal representative power to deal with assets outside the jurisdiction of grant.

193 *WALRC Report* (1984) at para 7.14.

194 Id at para 7.15.

195 Ibid.

196 Similarly, persons resident in northern New South Wales may use Brisbane executors; and persons resident near the Australian Capital Territory may use Canberra executors: *WALRC Report* (1984) at para 7.15.

197 *WALRC Report* (1984) at para 7.15.

The WALRC 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.¹⁹⁸

The WALRC 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.¹⁹⁹

(b) Revised scheme proposed by the Parliamentary Counsel's Committee

(i) Automatic recognition of all Australian grants

The Parliamentary Counsel's Committee did not agree with the approach taken by the WALRC in relation to automatic recognition. 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".²⁰⁰

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.²⁰¹

(ii) Resealing of Australian grants unnecessary

Under the revised scheme proposed by the Parliamentary Counsel's Committee, no question would arise as to whether it should remain possible to

¹⁹⁸ Id at para 7.16.

¹⁹⁹ Ibid.

²⁰⁰ *Report of the Conference of Probate Registrars* (1990) at 13, referring to para 4 of the *Report of the Parliamentary Counsel's Committee* (6 September 1989) and s 73 of draft bill no 10.

²⁰¹ Id at 14, referring to para 5 of the *Report of the Parliamentary Counsel's Committee* (6 September 1989). The *Report of the Conference of Probate Registrars* (1990) does not record whether the *Report of the Parliamentary Counsel's Committee* considered what factors might be considered to support the view that another court was the more appropriate forum.

reseal, within Australia, a grant made in an Australian State or Territory in which the deceased did not die domiciled. There would never be any need to reseal an Australian grant as every grant made by the court of any Australian State or Territory would, under the revised scheme, be effective throughout Australia as if it were an original grant made in the jurisdiction in question.

(c) Arguments in support of the scheme proposed by the WALRC

The advantage of limiting automatic recognition to a grant made in the jurisdiction of the deceased's domicile is that there would be only one grant that would be entitled to automatic recognition throughout Australia, and this would be the grant made by the jurisdiction with which the deceased was most closely connected. If any other basis of jurisdiction were used, either as an addition or as an alternative, the possibility could arise that there were two or more grants that were entitled to automatic recognition in every Australian State and Territory.

The certainty provided by the existence of a single grant is the most important factor in favour of the WALRC proposal. The possibility of multiple grants that would all be entitled to recognition throughout Australia, and the need for further provisions to deal with the resulting problems (for example, the 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 and the SCAG officers²⁰²), are the chief disadvantages of the alternative proposal.

(d) Arguments in support of the revised scheme proposed by the Parliamentary Counsel's Committee

In Chapter 2 of this Discussion Paper, it was observed that applications for the resealing of grants represent little more than one per cent of the total number of applications made annually for original grants.²⁰³ It is arguable that an advantage of the revised scheme would be the absence of the need to identify domicile for all the 52,000 or so grants made annually²⁰⁴ when the issue of their effect in another Australian jurisdiction is likely to be relevant only to a small percentage of those grants.

A further advantage of the revised scheme would be that, although resealing would still be required in relation to foreign grants, resealing would not be necessary in relation to any grant made by the court of an Australian State or Territory, as such a grant would automatically be effective in every State and Territory.²⁰⁵

202 See p 38 of this Discussion Paper.

203 See p 12 of this Discussion Paper.

204 See Table 1 at p 12 of this Discussion Paper.

205 See pp 38-39 of this Discussion Paper.

(e) Preliminary view²⁰⁶

(i) Automatic recognition

Confusion could ensue if a grant made in an Australian jurisdiction other than the deceased's domicile were to receive automatic recognition elsewhere. If grants made in two or more jurisdictions were automatically recognised throughout Australia, there would be the possibility of competing grants dealing with the same property. There would also be the possibility of grants being made to different personal representatives. The only way of avoiding such problems would be to have a register of grants that would have to be searched each time a grant was made to ensure that a grant had not already been made in another State or Territory.

It is acknowledged that, under the WALRC scheme, 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 operative in a particular jurisdiction. That situation could arise if grants were made both in the jurisdiction in which the deceased died domiciled and in another Australian jurisdiction.

However, under the WALRC scheme, it would, to a large extent, be possible to avoid the situation where there were two grants operative in the one jurisdiction by requiring, before making a grant in a State or Territory in which the deceased was not domiciled at the time of death, evidence that a grant had not already been made in the State or Territory in which the deceased had died domiciled. That would usually necessitate making a search in only one jurisdiction.²⁰⁷

It was suggested earlier that a possible advantage of the revised scheme was that it would not be necessary for the court to identify the deceased's domicile each time a grant was made.²⁰⁸ However, it is doubtful whether such an advantage would be realised in practice. As part of the revised scheme, the Parliamentary Counsel's Committee recommended that the courts should have the power to decline to make a grant if it appeared that the court of another jurisdiction was the more appropriate forum for the application. In order for a court to be able to decide whether the application for a grant had

²⁰⁶ As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

²⁰⁷ 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. See also the discussion of the notification of grants at pp 49-51 of this Discussion Paper.

²⁰⁸ See p 39 of this Discussion Paper.

been brought in the appropriate jurisdiction, the court would presumably require evidence as to the deceased's domicile.²⁰⁹

It is therefore suggested that, if a scheme of automatic recognition is 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.

(ii) The continued resealing of Australian grants

If automatic recognition were introduced for grants made in the deceased's domicile, it is likely that, in the ordinary course, application would be made for a grant in the deceased's domicile and there would rarely be any need to apply for the resealing of a grant made in another Australian State or Territory.

However, 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.

The flexibility referred to by the WALRC under the present system of resealing would also be preserved by continuing to allow a grant made in a State or Territory in which the deceased did not die domiciled to be resealed in another State or Territory.²¹⁰

Consequently, the WALRC recommendation that it should remain possible to reseat a grant made by the court of a State or Territory in which the deceased was not domiciled is supported.

(f) Issues for consideration

4.1 Should all Australian jurisdictions by uniform legislation adopt a scheme whereby a grant of probate or letters of administration made by the court of the Australian jurisdiction in which the deceased died domiciled would be automatically recognised, without being resealed, as effective in every other Australian jurisdiction?

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Further, in the Australian Capital Territory, it is already the case that the court or the registrar cannot make or reseat a grant unless the court or the registrar has made a finding with respect to the domicile of the person at the time of death: *Administration and Probate Act 1929* (ACT) s 8C. See p 118 of this Discussion Paper in relation to this requirement and the similar requirements in other jurisdictions.

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See pp 37-38 of this Discussion Paper.

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|------------|---|
| 4.2 | Alternatively, should automatic recognition be given to a grant of probate or to letters of administration granted by an Australian court regardless of whether the deceased died domiciled in the jurisdiction in which the grant was made? |
| 4.3 | If the scheme outlined in question 4.1 is adopted: |
| (a) | should it continue to be possible to reseal a grant that was made in an Australian jurisdiction in which the deceased was not domiciled at the time of death; or |
| (b) | should the resealing of Australian grants be abolished? |
| 4.4 | If the resealing of Australian grants is abolished, should a grant made in an Australian jurisdiction in which the deceased was not domiciled at the time of death be limited to operate only until a grant is made in the jurisdiction of domicile?²¹¹ |

4. OVERSEAS GRANTS GENERALLY

(a) WALRC recommendation

The WALRC recommended that a grant of probate or letters of administration made by a court outside Australia should not be automatically recognised in Australia, whether or not the deceased died domiciled in the jurisdiction in which the grant was made.²¹² It proposed that such a grant should, as at present, be recognised as effective in a particular Australian State or Territory only when resealed by the court of that State or Territory.²¹³

(b) Discussion

Automatic recognition is suitable only for jurisdictions within a federation such as Australia where the law of succession is similar in all jurisdictions. Although at present there are some differences of detail between 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:

²¹¹ This limitation is presently imposed in the United Kingdom when a grant is made in a part of the United Kingdom other than that in which the deceased died domiciled: see p 19 of this Discussion Paper.

²¹² *WALRC Report (1984)* at para 7.6 and recommendation 22.

²¹³ *Id* at para 7.11 and recommendation 22.

- what property passes under a will or on intestacy;
- how executors and administrators are appointed; and
- that freedom of testation is subject to family provision legislation.

This is not necessarily so in the case of overseas jurisdictions. Even in jurisdictions that follow the common law tradition, such as England, there are a number of differences, for example, in the acceptance of informal wills²¹⁴ and in the interpretation of the concept of domicile.²¹⁵ Further, there are many jurisdictions in which the law of succession operates on very different principles from those recognised in Australia: these include not only civil law countries and others based on legal traditions other than the common law, but even some common law countries. For example, certain United States jurisdictions have special rules for holograph wills or for giving a spouse an automatic share of the estate.²¹⁶

Considerations such as these led the WALRC to recommend that the automatic recognition scheme should be limited to Australian grants, and should not extend to any grants made by overseas jurisdictions.²¹⁷

The WALRC gave particular consideration to the question of whether any of its recommendations should be extended to New Zealand.²¹⁸ It recommended that New Zealand should not be included in the proposed automatic recognition scheme for a number of reasons, including differences in the law of succession between the two countries and the need to protect New Zealand's revenue in the collection of death and succession duties.²¹⁹ The WALRC also noted that the incidence of persons leaving property in Australia but being domiciled in New Zealand, or vice versa, was apparently not large.²²⁰

²¹⁴ 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 valid if it is proved that it represents the testamentary intentions of the deceased: Sherrin CH and others (eds), *Williams on Wills: The Law of Wills* (1995) vol 1 at 109. Most Australian jurisdictions have such a provision and the model legislation recommended by the National Committee includes a provision to this effect: draft *Wills Bill 1997* cl 10. See *Wills Report* (1997) QLRC at 12-16; NSWLRC at paras 3.6-3.14.

²¹⁵ Australian and English law have different rules as to 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 p 34 of this Discussion Paper. 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 note 177 of this Discussion Paper), whereas in England, when 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 at 454-455.

²¹⁶ See Miller G, *The Machinery of Succession* (2nd ed, 1996) at 45-46, 159-161.

²¹⁷ *WALRC Report* (1984) at para 7.6.

²¹⁸ Id at paras 1.5, 7.7, 7.8. In 1977, the Western Australian Attorney General had informed the WALRC that the New Zealand Minister for Justice had "expressed the hope that we could consider any relevance which the New Zealand situation might have in the same context": *WALRC Report* (1984) at para 1.5.

²¹⁹ *WALRC Report* (1984) at para 7.8. The WALRC also considered that, if New Zealand were included, it would then be questioned whether the United Kingdom or nearby countries such as Papua New Guinea should be brought within the scheme.

²²⁰ *WALRC Report* (1984) at para 7.8.

In making its recommendation, the WALRC was also able to rely on the work of the Commonwealth Secretariat on the recognition and enforcement of judgments and orders within the Commonwealth of Nations. The Commonwealth Secretariat, as the result of a series of meetings held between 1975 and 1980, drew up model resealing legislation in an attempt to unify the resealing laws applying as between Commonwealth countries.²²¹ The WALRC observed that the Commonwealth Secretariat had come to the conclusion that:²²²

... 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; it ensured due compliance with local estate duty laws; and it facilitated the taking of security to protect creditors.

(c) Preliminary view

There should be no automatic recognition of any overseas grants of probate or letters of administration. The concept of automatic recognition is suitable only for operation within a federation, such as Australia, or a single political unit comprising a number of different legal systems, such as the United Kingdom.

(d) Issues for consideration

4.5 Are there any circumstances in which grants of probate or letters of administration made by the courts of overseas countries should be entitled to automatic recognition?

4.6 Alternatively, should such grants continue to require resealing in all cases, as at present?

²²¹ Id at para 3.17, note 1.

²²² Id at para 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* at 18.

5. AUTOMATIC RECOGNITION OF CERTAIN GRANTS RESEALED IN AUSTRALIA IN THE DECEASED'S DOMICILE

(a) WALRC recommendation

Under the WALRC's recommendations, 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.²²³ However, the WALRC recommended that, if a grant (Australian 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.²²⁴

(b) Discussion

The WALRC noted that, although this recommendation went beyond the United Kingdom scheme being used as a model,²²⁵ it was:²²⁶

... 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.

(c) Preliminary view

The proposal that automatic recognition should be given to a grant (Australian or overseas) that has been resealed by the court of the Australian State or Territory in which the deceased died domiciled does not constitute an essential part of the automatic recognition scheme. The scheme could be confined to automatic recognition of an original grant made in the domicile of the deceased, and grants made in other Australian jurisdictions or overseas could simply be resealed in as many Australian jurisdictions as is necessary.

However, there does not seem to be any fundamental objection to the proposal. Once a grant had been resealed in the Australian jurisdiction of domicile, there would be no need to reseat it in any other Australian jurisdiction.

223 See p 35 of this Discussion Paper.

224 *WALRC Report (1984)* at para 7.18 and recommendation 23.

225 Under the scheme that applies in the United Kingdom, automatic recognition applies only to original grants. See p 19 of this Discussion Paper.

226 *WALRC Report (1984)* at para 7.19.

(d) Issue for consideration

4.7 Should a grant of probate or letters of administration that has been resealed by the court of the Australian jurisdiction in which the deceased died domiciled be automatically recognised as effective in all other Australian jurisdictions, in the same way as an original grant made in that jurisdiction?

6. DETAILS OF THE SCHEME**(a) Matters to be notified on the grant****(i) WALRC recommendation**

The WALRC recommended that, when a grant was made or resealed by the court of the Australian State or Territory in which the deceased died domiciled, the deceased's domicile should be notified on the grant.²²⁷ This recommendation was based on the similar requirement under the United Kingdom scheme of automatic recognition.²²⁸ It serves the obvious purpose that it clearly identifies the grant as one made or resealed by the court of the domicile.

Following a suggestion made to the WALRC by a commentator on its Working Paper,²²⁹ the WALRC also recommended that, when a grant was made by the court of the deceased's domicile and that fact was noted on the grant, a short statement in simple language should be added, setting out the effect of the grant - namely, that it was effective in each other Australian State and Territory without any need for resealing.²³⁰

The WALRC recommended that the same procedure should be adopted when a grant was resealed in the deceased's domicile.²³¹

227 Id at para 7.20 and recommendation 24.

228 See p 19 of this Discussion Paper.

229 This suggestion was made by Mr WA (Tony) Lee, as noted in *WALRC Report (1984)* at para 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.

230 *WALRC Report (1984)* at para 7.21.

231 Id at para 7.21 and recommendation 24.

(ii) Discussion

The National Committee has made the preliminary proposal that, for general purposes, there is no need to include in the model legislation on administration of estates a provision that the court should make a finding with respect to the deceased's domicile.²³² However, if a scheme of automatic recognition were introduced, different considerations might apply when the grant was made in the deceased's domicile.

(iii) Preliminary view

Both WALRC recommendations should be adopted.²³³ In so far as they apply to the resealing of grants in the domicile - as opposed to the making of original grants - they are dependent on acceptance of the WALRC's recommendation that, when a grant made elsewhere is resealed in the Australian jurisdiction in which the deceased died domiciled, the resealed grant should be automatically recognised in other Australian jurisdictions.²³⁴

(iv) Issues for consideration

4.8	When a grant is made by the court of the Australian jurisdiction in which the deceased died domiciled:
	(a) should the deceased's domicile be notified on the grant;
	(b) should the grant contain a short statement, in simple language, of the effect of automatic recognition?
4.9	Should similar statements be endorsed on a grant that is resealed by the court of the Australian jurisdiction in which the deceased died domiciled?

(b) Instruments that may be automatically recognised

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.²³⁵ Such an order in general confers on

²³² *Administration of Estates Discussion Paper* (1999) QLRC at 262; NSWLRC at para 18.17 and Proposal 95.

²³³ See the discussion of the WALRC recommendations at p 46 of this Discussion Paper.

²³⁴ See p 45 of this Discussion Paper.

²³⁵ See pp 100-101 of this Discussion Paper for a detailed examination of orders to administer.

the public trustee the same powers, rights and obligations as a grant of administration.²³⁶ The circumstances in which an order to administer can be sought vary from jurisdiction to jurisdiction, but in general cover cases where there is no proper person available or willing to administer the estate.²³⁷

In most 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 any need for a grant of probate or letters of administration.²³⁸

(i) WALRC recommendation

The WALRC expressed the following view about the instruments that should be capable of being automatically recognised:²³⁹

Automatic recognition should be given not only to grants of probate and administration made or resealed by the court of an Australian State or Territory in which the deceased died domiciled, but also to elections and orders to administer granted to a Public Trustee or Curator, or any other person or body, by such a court.

It recommended that orders to administer and elections to administer should be automatically recognised when made in the deceased's domicile.²⁴⁰

(ii) Probate Registrars

At a conference in 1990, the Probate Registrars expressed the view that resealing should be limited to documents issued under the seal of the court, and that elections should therefore not be resealed.²⁴¹

(iii) Discussion

Orders to administer made in favour of a public trustee present no special problem since, like grants of probate and letters of administration, they involve the making of an order by a court of competent jurisdiction, and this process provides the necessary safeguards for those interested in the administration of the estate.

236 See notes 452 and 453 of this Discussion Paper.

237 See pp 100-101 of this Discussion Paper.

238 See pp 103-104 of this Discussion Paper for a detailed examination of elections to administer.

239 *WALRC Report* (1984) at recommendation 25. See also *WALRC Report* (1984) at paras 3.30, 7.23.

240 *Id* at para 7.23. This recommendation was consistent with the WALRC's recommendation that orders to administer and elections should be able to be resealed. See p 105 of this Discussion Paper.

241 *Report of the Conference of Probate Registrars* (1990) at 6-7.

However, elections to administer are in a different category. In its Discussion Paper on the administration of estates, the National Committee considered that an election results in what is in effect a deemed grant, but without the benefit of the court's scrutiny and directions. Although the concept of an election was developed as a cheaper and quicker way of administering a small estate, this has not been the universal result. The National Committee expressed the preliminary view that elections should be abolished, and that, if an estate could not be effectively administered informally, a grant should be sought, since this would give certain protections to those interested in the administration of the estate.²⁴²

(iv) Preliminary view

Automatic recognition should be given to orders to administer estates. However, it is proposed that elections to administer estates, if they are retained under the model administration legislation,²⁴³ should not be automatically recognised throughout Australia.

(v) Issues for consideration

4.10 Should automatic recognition be given to an order to administer made in favour of a public trustee (or similar officer) by the court of the Australian jurisdiction in which the deceased died domiciled?

4.11 Should automatic recognition be given to an election to administer an estate that is filed by a public trustee (or similar officer) or by a trustee company in the court of the Australian jurisdiction in which the deceased died domiciled (where an election to administer is permitted under legislation in that jurisdiction)?

(c) Notification to other jurisdictions

(i) WALRC recommendation

In its Report, the WALRC noted that resealing created “a public record of the grant in the place of recognition”, so that interested parties had information as to the legal position of a particular estate.²⁴⁴ It suggested that, under a

²⁴² *Administration of Estates Discussion Paper* (1999) QLRC at 163-164; NSWLRC at paras 11.10-11.12.

²⁴³ See note 242 of this Discussion Paper.

²⁴⁴ *WALRC Report* (1984) at para 7.36.

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.²⁴⁵ The WALRC suggested that interested persons could address inquiries to the jurisdiction in which the original grant is likely to have been made. It concluded:²⁴⁶

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.

The WALRC recommended 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”.²⁴⁷

(ii) Probate Registrars

In 1990, the Probate Registrars concluded that a national register of grants and caveats would be essential for the proper administration of the proposed scheme of automatic recognition.²⁴⁸

(iii) Preliminary view

If it is concluded that notification of grants made is 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 WALRC 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. Of course, 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.

Alternatively, it might be possible to implement a system of notification that would avoid the need to establish a national register of grants. This could be achieved by requiring a court, if it made a grant in respect of the estate of a deceased person who did not die domiciled in that jurisdiction, to notify the

245 *Ibid.*

246 *Ibid.*

247 *Id* at recommendation 29. See also *WALRC Report* (1984) at para 7.36.

248 *Report of the Conference of Probate Registrars* (1990) at 16.

court of the jurisdiction in which the deceased died domiciled²⁴⁹ that it had made a grant. The advantage of such a 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.²⁵⁰

(iv) Issues for consideration

4.12 Is it necessary, as part of the proposed scheme of automatic recognition, to provide a means whereby appropriate details of all grants made in an Australian jurisdiction in which the deceased died domiciled (or possibly, all grants made in any Australian jurisdiction) are made available to probate authorities in other Australian jurisdictions, whether by:

(a) establishing a computerised national register of grants; or

(b) requiring the court in which a grant is made to notify the Supreme Court of every other State or Territory?

4.13 Alternatively, should a more limited requirement for notification be imposed, so that the court of an Australian jurisdiction other than that in which the deceased died domiciled must notify the court of the jurisdiction in which the deceased died domiciled if the former court makes a grant?

7. CONSIDERATIONS AFFECTING THE ADOPTION OF THE PROPOSED SCHEME OF AUTOMATIC RECOGNITION

(a) Arguments in support of the proposed scheme

(i) Cost savings

As explained in Chapter 2, an application for the resealing of a grant of probate or letters of administration in another jurisdiction involves

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See note 207 of this Discussion Paper, where it is observed that, in an exceptional case, it might be difficult to determine the deceased's last domicile. In such a case, it would be desirable for the court to notify the courts in both jurisdictions in which the deceased could arguably have died domiciled.

²⁵⁰

On the other hand, if a grant were first made in the jurisdiction in which the deceased died domiciled, and subsequently a grant were sought in another Australian jurisdiction, the existence of the initial grant would be revealed by the suggested requirement that the applicant should have to satisfy the court that a grant had not already been made in the jurisdiction in which the deceased died domiciled: see p 40 of this Discussion Paper.

considerable costs to an estate.²⁵¹ In addition to the court filing fees involved,²⁵² it is likely that the personal representative will have to engage solicitors in the resealing jurisdiction and possibly also in the jurisdiction in which the original grant was issued. Further, it is likely that costs will be incurred in respect of advertising fees.²⁵³ If there were an alternative to resealing for a grant issued by the court of another Australian State or Territory, these costs could be eliminated.

(ii) Reduction in delay and inconvenience

The figures set out in Chapter 2 show that the resealing process is generally completed in under eight working days from the date of lodgment of an application for resealing, provided no complications occur.²⁵⁴ Although this is not a protracted process, there is also the additional time involved in preparing the documentation that must be lodged with the court in order to obtain the resealing of a grant. If there were some alternative to resealing for a grant issued by the court of another Australian State or Territory, the delay before a personal representative could deal with assets of the estate located elsewhere in Australia would be eliminated.

A system of automatic recognition would also avoid the inconvenience of having to apply for the resealing of a grant, perhaps two or three times if the estate has assets in a number of Australian jurisdictions.

(b) Arguments against the adoption of the proposed scheme

The main argument against the adoption of the proposed scheme of automatic recognition is that certain safeguards afforded by the resealing process would be lost, in particular:

- the opportunity for the resealing court to scrutinise the foreign grant, both as to the validity of any will and as to the person appointed under the grant;
- the opportunity for the resealing court to order that the applicant for resealing provide security in relation to the administration of the estate within the resealing jurisdiction; and
- the opportunity for a person opposed to the resealing to lodge a caveat in the resealing jurisdiction.

251 See pp 15-16 of this Discussion Paper.

252 See Table 5 at p 15 of this Discussion Paper.

253 See p 136 of this Discussion Paper.

254 See Table 4 at p 14 of this Discussion Paper.

(c) WALRC recommendation

The WALRC was aware that, under a system of automatic recognition, certain safeguards afforded by the resealing process would disappear.²⁵⁵ However, it considered that some of these safeguards, such as the giving of security, could be accommodated within the scheme of automatic recognition.²⁵⁶ Although it acknowledged that other safeguards, such as the court's discretion to decline to reseal a grant, would disappear under a system of automatic recognition, it questioned whether these safeguards were needed where the grant in question had been made in another Australian State or Territory.²⁵⁷

The WALRC concluded that the advantages of the automatic recognition scheme outweighed "any possible adverse effects resulting from the disappearance of these safeguards".²⁵⁸

(d) Discussion

As explained above, there are a number of aspects of the resealing process that are said to be safeguards for persons with an interest in the proper administration of an estate. The decision whether or not to adopt the proposed scheme for the automatic recognition of certain Australian grants requires a consideration of:

- the importance of these safeguards where the grant in question is made in an Australian State or Territory, rather than in an overseas country;
- the extent to which particular safeguards that are considered important can be accommodated within the proposed scheme; and
- the impact of the proposed scheme of automatic recognition on other areas of succession law.

These issues are considered in the balance of this chapter.

²⁵⁵ *WALRC Report* (1984) at para 7.25.

²⁵⁶ *Id* at paras 7.32-7.35.

²⁵⁷ *Id* at para 7.27.

²⁵⁸ *Id* at para 7.25.

8. EFFECT OF AUTOMATIC RECOGNITION ON SPECIFIC ASPECTS OF THE RESEALING PROCESS

(a) Advertising

(i) Background

In the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Victoria, a person applying for the resealing of a grant of probate or letters of administration must publish an advertisement in the jurisdiction in question giving notice of intention to make the application.²⁵⁹ In Queensland and South Australia, on the other hand, no advertisement is necessary unless required by the registrar.²⁶⁰ In Western Australia, there is no requirement to advertise.

Under a system of automatic recognition, there would no longer be an opportunity to advertise notice of intention to apply for the resealing of a grant. It would still be possible, however, to require an advertisement before the making of an original grant.

(ii) WALRC recommendation

The WALRC noted that different views had been expressed about the necessity for, and usefulness of, advertising notice of intention to apply for the resealing of a grant.²⁶¹ In its view, advertising.²⁶²

... is often ineffective and causes undue expense and delay without providing sufficient compensating advantages to beneficiaries, creditors or anyone else.

The WALRC expressed the view that advertising should not be required for the making of an original grant. It considered, however, that a uniform rule on advertising was not essential for the proposed automatic recognition scheme, and that each jurisdiction could continue its own practices.²⁶³

(iii) Preliminary view

The view of the WALRC that a uniform rule on advertising is not necessary for the proposed automatic recognition scheme is supported.

²⁵⁹ See note 607 of this Discussion Paper.

²⁶⁰ See notes 608 and 609 of this Discussion Paper.

²⁶¹ *WALRC Report (1984)* at paras 3.37-3.41.

²⁶² *Id* at para 7.29. See also *WALRC Report (1984)* at para 3.42.

²⁶³ *WALRC Report (1984)* at para 7.29.

(iv) Issue for consideration

4.14 Is it necessary for the implementation of the proposed scheme of automatic recognition for the States and Territories to have uniform advertising requirements for the making of an original grant or could each jurisdiction continue to apply its own practices?

(b) Caveats**(i) Background**

At present, it is possible in all jurisdictions to lodge a caveat against the making of a grant of probate or letters of administration and against the resealing in that jurisdiction of a grant made elsewhere.²⁶⁴

If a scheme of automatic recognition were introduced, it would no longer be possible to lodge a caveat against the resealing of a grant made in the Australian jurisdiction in which the deceased died domiciled, as resealing would be unnecessary in such a case. It would, however, remain possible to lodge a caveat against the making of the original grant, as the WALRC emphasised in its Report.²⁶⁵

(ii) WALRC recommendation

The WALRC expressed the view that, in practice, caveats against resealing were rarely used (a fact confirmed by information given by the Probate Registrars to the National Committee), and it did not regard the loss of the opportunity to lodge a caveat as a reason for not adopting a scheme of automatic recognition.²⁶⁶

(iii) Preliminary view

There is no reason why, if the proposed scheme of automatic recognition were implemented, a person wishing to lodge a caveat could not do so in the jurisdiction of domicile prior to the making of the original grant, since in all but

²⁶⁴ See pp 133-134 of this Discussion Paper. See also *Administration of Estates Discussion Paper* (1999) QLRC at 37-39; NSWLRC at paras 5.34-5.39.

²⁶⁵ *WALRC Report* (1984) at para 7.31 and recommendation 27.

²⁶⁶ *Id* at para 7.30.

very exceptional cases the domicile of the person in question would be likely to be readily apparent.²⁶⁷

It is suggested that the loss of the opportunity to lodge a caveat against the resealing of a grant is not a sufficient objection to the introduction of a scheme of automatic recognition.

(iv) Issue for consideration

4.15 Is it necessary for the implementation of the proposed scheme of automatic recognition to establish a national register of grants and caveats or could a person claiming an interest who wishes to lodge a caveat simply lodge the caveat in the court of the jurisdiction in which the deceased died domiciled?

(c) Disclosure of assets and liabilities

(i) Background

Legislation in most Australian States and Territories requires a person who applies for a grant of probate or letters of administration to provide the court with a statement of the deceased's assets and liabilities.²⁶⁸

The legislation in South Australia requires a person who applies for a grant of probate or letters of administration, or for the resealing of such a grant, to disclose to the court the assets and liabilities of the estate known to him or her at the time of making the application or that come to his or her knowledge while acting in the capacity of personal representative or trustee.²⁶⁹ The legislation provides that a personal representative or trustee must not dispose

²⁶⁷ See note 207 of this Discussion Paper. See also the discussion of a national register of grants at pp 50 and 142 of this Discussion Paper.

²⁶⁸ See note 637 of this Discussion Paper. These provisions are also discussed in *Administration of Estates Discussion Paper* (1999) QLRC at 125-129; NSWLRC at paras 9.9-9.21. Under the scheme of automatic recognition in the United Kingdom, a person seeking an original grant in the jurisdiction of domicile is required, where the deceased died domiciled in England and Wales, to swear an affidavit as to the gross value of the estate in the United Kingdom: Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 4.202. As to the requirement where the deceased died domiciled in Scotland or Northern Ireland or outside the United Kingdom, see para 4.203. Under s 25(b) of the *Administration of Estates Act 1925* (UK), the personal representative of a deceased person is under a duty to exhibit on oath a full inventory of the estate only when required by the court to do so.

²⁶⁹ *Administration and Probate Act 1919* (SA) s 121A(1), (2); *The Probate Rules 1998* (SA) rr 8.01-8.03. Section 121A of the *Administration and Probate Act 1919* (SA) is set out at pp 143-144 of this Discussion Paper. In its Discussion Paper on the administration of estates, the National Committee proposed, on a preliminary basis, that provisions to the general effect of ss 44(1) and 121A of the *Administration and Probate Act 1919* (SA) should be included in the model administration legislation, although it sought submissions on whether the model provisions should impose criminal sanctions: *Administration of Estates Discussion Paper* (1999) QLRC at 128-129; NSWLRC at paras 9.19-9.21, Proposal 60 and Question 9.2.

of an asset that has not been disclosed to the court.²⁷⁰ Further, a personal representative or trustee who contravenes that requirement is guilty of a summary offence.²⁷¹ The registrar is required to issue a certificate annexing a copy of the affidavit of assets and liabilities,²⁷² and a person who deals with an asset of the estate must be satisfied, either by examining the registrar's certificate, or on the basis of some other reliable evidence, that the asset has been disclosed.²⁷³ The legislation provides that it is a summary offence to deal with an asset without being satisfied that the asset has been disclosed.²⁷⁴

The South Australian requirement to disclose the assets and liabilities of a deceased person is expressed to apply to a person who applies "for probate or administration" or "for the sealing of any probate or administration granted by a foreign court".²⁷⁵ Consequently, the requirement would not apply to a person who was administering an estate in South Australia pursuant to a grant made in another Australian State or Territory. However, if the South Australian provision or the similar provisions in other jurisdictions²⁷⁶ were amended to apply to a person who was acting under a grant issued elsewhere in Australia, the question would arise whether a scheme of automatic recognition could coexist with such provisions.

(ii) WALRC recommendation

The WALRC did not address the issue of legislation that prohibits persons from dealing with assets of an estate that have not been disclosed. However, in relation to the issue of disclosure, the WALRC recommended a change to the disclosure requirements that apply when an application is made for an original grant:²⁷⁷

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.

270 *Administration and Probate Act 1919*(SA) s 121A(3).

271 *Administration and Probate Act 1919*(SA) s 121A(5).

272 *The Probate Rules 1998*(SA) rr 9.01-9.02.

273 *Administration and Probate Act 1919*(SA) s 44(1).

274 *Administration and Probate Act 1919*(SA) s 44(2).

275 *Administration and Probate Act 1919*(SA) s 121A(1).

276 See for example ss 81A and 81B of the *Wills, Probate and Administration Act 1898* (NSW), which are discussed in *Administration of Estates Discussion Paper* (1999) QLRC at 126; NSWLRC at paras 9.13-9.15.

277 *WALRC Report* (1984) at para 3.34 and recommendation 12. The provision of a statement of assets and liabilities is discussed at pp 143-145 of this Discussion Paper.

(iii) Preliminary view

Ideally, under a scheme of automatic recognition, it should not be necessary for a personal representative appointed by the court of the Australian jurisdiction in which the deceased died domiciled to comply with the local requirements of a jurisdiction where the grant is automatically recognised. In Chapter 5 of this Discussion Paper it is suggested that, where a grant is made by the court of the Australian jurisdiction in which the deceased died domiciled, that court should have before it a statement of all assets and liabilities of the estate within Australia, with the situs of each identified.²⁷⁸ This should be a sufficient safeguard.

However, it is suggested that the scheme of automatic recognition proposed earlier in this chapter could still operate if the South Australian provisions about the disclosure of assets and liabilities or the similar provisions in other Australian jurisdictions were amended so as to apply to a personal representative acting under a grant issued by the court of the Australian jurisdiction in which the deceased died domiciled. In those circumstances, although the grant would be automatically recognised throughout Australia, the personal representative would have to comply with the requirements of individual Australian jurisdictions about the filing of a statement of assets and liabilities. If this approach were ultimately adopted, it would be desirable if the statement discussed above about the effect of automatic recognition²⁷⁹ warned the personal representative of the particular requirements of the South Australian legislation or of similar legislation in other Australian States or Territories.

(iv) Issue for consideration

4.16 If uniform laws are not ultimately adopted in relation to the disclosure of assets and liabilities, should the statement about the effect of automatic recognition²⁸⁰ warn the personal representative about the requirements in particular Australian jurisdictions?

278 See p 145 of this Discussion Paper.

279 See pp 46-47 of this Discussion Paper.

280 Ibid.

(d) Security**(i) Background**

At present, the legislation on administration of estates in most jurisdictions makes it possible to require an administrator to enter into some form of security for the due administration of the estate. In some jurisdictions the security takes the form of an administration bond; other jurisdictions have abolished bonds, but have retained provisions enabling the court to require a guarantee from a surety or sureties. Security can be required both on the making of an original grant²⁸¹ and when it is sought to reseal a grant made elsewhere.²⁸²

Under the proposed scheme of automatic recognition, it would no longer be possible to require the taking of security on the resealing of a grant made by the Australian jurisdiction in which the deceased died domiciled, because resealing would be unnecessary in such a case.²⁸³ However, it would still be possible to impose a security requirement as a condition of making an original grant. The security could be based on the totality of the assets owned by the deceased within Australia, rather than on the assets in that particular jurisdiction.

Options for possible uniform rules on security have been canvassed by the National Committee in its Discussion Paper on the administration of estates.²⁸⁴

(ii) WALRC recommendation

The WALRC expressed the view that:²⁸⁵

It would be desirable for the Australian States and Territories to adopt uniform rules as to the taking of security on original grants, so that each jurisdiction in which the grant is automatically recognised could be assured that satisfactory security arrangements had been made.

That Commission concluded, however, that “a uniform rule about the taking of security [was] not a prerequisite to a scheme of automatic recognition, and it would be possible for each jurisdiction to retain its own practices”.²⁸⁶

281 See pp 139-140 of this Discussion Paper. See also *Administration of Estates Discussion Paper* (1999) QLRC at 129-135; NSWLRC at paras 9.22-9.43.

282 The provisions under which security can be required as a condition of resealing are discussed at pp 138-139 of this Discussion Paper.

283 *WALRC Report* (1984) at para 7.33.

284 *Administration of Estates Discussion Paper* (1999) QLRC at 134-135; NSWLRC at paras 9.41-9.43 and Proposal 61.

285 *WALRC Report* (1984) at para 7.34.

286 *Id* at para 7.35. See also *WALRC Report* (1984) at recommendation 28.

(iii) Preliminary view

The view of the WALRC that a uniform rule on the taking of security is not necessary for the proposed automatic recognition scheme is supported.²⁸⁷

(iv) Issue for consideration

4.17 Where security is required on the making of an original grant, should the security requirement be based on the value of assets in all Australian jurisdictions?

(e) Passing of accounts**(i) Background**

The rules as to the passing of accounts differ from one Australian jurisdiction to another.²⁸⁸

(ii) WALRC recommendation

The WALRC recommended that uniform rules relating to the passing of accounts were not essential to the operation of the proposed scheme of automatic recognition.²⁸⁹ It expressed the view that:²⁹⁰

... 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 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.

²⁸⁷ See, however, the proposal at p 145 of this Discussion Paper to the effect that, when an application is made for an original grant, all the assets and liabilities of the deceased, wherever situate, should be disclosed to the court.

²⁸⁸ *Administration and Probate Act 1929* (ACT) ss 58, 58A, 59; *Wills, Probate and Administration Act 1898* (NSW) s 85; *Administration and Probate Act* (NT) ss 89-91; *Succession Act 1981* (Qld) s 52(1)(b); *Administration and Probate Act 1919* (SA) ss 56, 56A; *Administration and Probate Act 1935* (Tas) s 56; *Administration and Probate Act 1958* (Vic) s 28; *Administration Act 1903* (WA) s 43(1)(b). See also *Administration of Estates Discussion Paper* (1999) QLRC at 135-137; NSWLRC at para 9.44.

²⁸⁹ *WALRC Report* (1984) at recommendation 30.

²⁹⁰ *Id* at para 7.37.

(iii) Preliminary view

It is suggested that uniform rules relating to the passing of accounts are not essential to the operation of the proposed scheme of automatic recognition.

(iv) Issue for consideration

4.18 Is it necessary for the implementation of the proposed scheme of automatic recognition for the States and Territories to have uniform rules relating to the passing of accounts or could each jurisdiction continue to apply its own practices, with a personal representative required to comply only with the requirements of the jurisdiction in which the original grant is made?

(f) Revenue protection**(i) Background**

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.²⁹¹ Now that these duties have been abolished in respect of the estates of persons who have died after a particular date,²⁹² it can no longer be argued that resealing plays an important role in the process of revenue protection.

(ii) WALRC recommendation

In its Working Paper (which was published in 1980, before the abolition of death and succession duties in all jurisdictions), the WALRC considered how the issue of revenue protection might be addressed under a scheme of automatic recognition.²⁹³ The Commission suggested two principal proposals:

- that an applicant for an original grant, or for the resealing of an overseas grant, should “be required to file an inventory of all property ... of the deceased situated within Australia” and that the court should

291 Id at para 7.38.

292 See note 644 of this Discussion Paper. See also the discussion at pp 146-147 of this Discussion Paper of the circumstances in which certain estates may still be liable to succession duty when they are eventually administered.

293 *WALRC Working Paper* (1980) at paras 6.6-6.9. In its Report, the WALRC suggested that there was no need to give further consideration to this issue unless or until such duties were reintroduced: *WALRC Report* (1984) at para 7.42.

“then forward a copy to the revenue authority of each state and territory within which such property is situated”,²⁹⁴

- that each State and Territory should “enact legislation placing the persons to whom a grant or resealing is made in that jurisdiction under a duty to meet out of the estate all succession duties payable in the state or territory in which the property forming part of the deceased estate is situated and making such payment a debt due out of the deceased’s estate”.²⁹⁵

(iii) Issue for consideration

4.19 Given that very few estates are now liable to succession duty,²⁹⁶ is it necessary for a scheme of automatic recognition of grants to include a mechanism to assist in the collection of succession duty?

4.20 If so, does either of WALRC’s proposals provide a suitable mechanism?

9. EFFECT OF AUTOMATIC RECOGNITION ON OTHER AREAS OF SUCCESSION LAW

This section briefly summarises the effect of automatic recognition in a number of key areas. The matters referred to here are dealt with more fully in Chapters 7, 8 and 10.

(a) Jurisdiction

(i) Background

At present, some jurisdictions require that the deceased should have left assets within the jurisdiction as a condition of making a grant of probate or letters of administration, while others do not.²⁹⁷

²⁹⁴ *WALRC Working Paper* (1980) at para 6.6.

²⁹⁵ *Id* at para 6.7.

²⁹⁶ See pp 146-147 of this Discussion Paper.

²⁹⁷ This issue is discussed in detail in Chapter 7 of this Discussion Paper.

(ii) WALRC recommendation

The WALRC commented that, for a scheme of automatic recognition to work as intended, it would be necessary for all jurisdictions to be able to make a grant whether or not the deceased left property in that jurisdiction.²⁹⁸ In the absence of such a rule, if the deceased died domiciled in a jurisdiction in which he or she had no assets, there would be no jurisdiction capable of making a grant that would be entitled to automatic recognition.

(iii) Preliminary view

The National Committee, in its Discussion Paper on the administration of estates, has proposed that all jurisdictions should adopt the Queensland provision²⁹⁹ as a model.³⁰⁰ Under this provision, assets within the jurisdiction are not required. The adoption of a provision of this kind is essential for the operation of the proposed scheme of automatic recognition.

(b) The person to whom the grant is made**(i) Background**

Under the law in all Australian jurisdictions, where the deceased died domiciled in an Australian State or Territory and the estate consists entirely of movable property, the grant of probate or letters of administration will usually be made to the person or persons entitled to act as executor or administrator according to the law of the deceased's domicile, since most matters of succession to movable property are referred to the law of the domicile. However, where the estate consists of or includes immovable property, the court will make the grant to the person entitled according to the *lex situs* - the law of the place in which the property is situated. These rules also apply to the resealing of grants.³⁰¹ Suppose that the deceased died domiciled in Queensland leaving movable and immovable property in Western Australia. If it were sought to reseal the Queensland grant in Western Australia, at present the Western Australian court would be entitled to apply its own rules in determining who to appoint as administrator of the estate - and this might not be the person appointed under the Queensland grant. In such a case, the resealing court would have a discretion to decline to reseal the grant.

298 *WALRC Report* (1984) at para 9.56.

299 *Succession Act 1981* (Qld) s 6(2), which is set out at pp 168-169 of this Discussion Paper.

300 *Administration of Estates Discussion Paper* (1999) QLRC at 18; NSWLRC at 28 (Proposal 4). See also p 174 of this Discussion Paper.

301 See p 189 of this Discussion Paper.

On the other hand, under a scheme of automatic recognition, once the court of the deceased's last domicile had appointed a person as administrator, that person would be entitled to be recognised as the person entitled to administer the estate in all other Australian jurisdictions.³⁰²

(ii) Preliminary view

As explained below,³⁰³ there is no compelling reason why questions involving an estate that consists of both movable and immovable property should be referred to the *lex situs*. Some overseas countries refer the issue to the law of the domicile both where the estate consists entirely of movables and where it also includes immovable property, and refer to the *lex situs* only where the estate consists entirely or substantially of immovables.³⁰⁴ In Australia, South Australia has adopted the rule that, where a deceased person dies domiciled other than in an Australian State or Territory and the estate in South Australia consists of or includes movable property, the registrar may make a grant to the person entrusted to administer the deceased's estate by the court in the jurisdiction in which the deceased died domiciled or to the person entitled to administer the estate by the law of that jurisdiction.³⁰⁵ Chapter 8 discusses a proposal to adopt the South Australian rule as the model law for Australia.³⁰⁶

(c) Formal validity of wills

(i) Background

Although the Australian States and Territories have similar provisions in relation to the formal requirements for the execution of a will, there are still some differences between the provisions in the various jurisdictions that deal with the power of the courts to dispense with the formal execution requirements.³⁰⁷ Consequently, a defectively executed will might be able to be admitted to probate in some jurisdictions, but not in others.

The issue of a will's validity arises not only when a court decides whether to make an original grant, but also when it is sought to have a grant made

302 See p 34 of this Discussion Paper.

303 See pp 192-193 of this Discussion Paper.

304 See the discussion of r 30 of the *Non-Contentious Probate Rules 1987* (UK) and of the position under New Zealand and Canadian law at pp 184-186 and 188 of this Discussion Paper.

305 *The Probate Rules 1998* (SA) r 40.01.

306 See pp 192-193 of this Discussion Paper.

307 See the discussion of this issue and the National Committee's recommendation in *Wills Report* (1997) QLRC at 12-16; NSWLRC at paras 3.6-3.14 and the more detailed discussion of the provisions in Queensland Law Reform Commission, Issues Paper, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (WP 46, June 1995) at 14-22 and in New South Wales Law Reform Commission, Issues Paper, *Uniform Succession Laws: The law of wills* (IP 10, February 1996) at 23-36.

elsewhere resealed.³⁰⁸ Accordingly, if a person who died domiciled in New South Wales had made a will in New South Wales disposing of movable property in New South Wales and immovable property in Victoria, and the New South Wales court decided that the will was valid and issued a grant, on an application to reseal the grant in Victoria, the Victorian court would have an opportunity to examine the issue of validity afresh. This raises the possibility that the Victorian court might decide the question of the will's validity differently from the New South Wales court.

At common law, the formal validity of a will in relation to movables is governed by the law of the jurisdiction in which the deceased died domiciled, while the formal validity of a will in relation to immovables is governed by the *lex situs*.³⁰⁹ However, these common law rules have been supplemented in all Australian jurisdictions by legislative provisions³¹⁰ that give effect to the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.³¹¹ The effect of these provisions is to extend the bases for upholding the formal validity of a will. In particular, legislation in all Australian jurisdictions provides that a will is to be treated as properly executed if its execution conformed to the internal law in force in the place where the deceased was domiciled at the time of death.³¹²

(ii) Preliminary view

In view of the legislation in all Australian jurisdictions dealing with the formal validity of foreign wills, it is unlikely that a will that was held by the court of the deceased's last domicile to have been validly executed would, at present, be held to be invalid by the court of another Australian jurisdiction. Certainly, if a will was valid according to the internal execution requirements of the jurisdiction in which the deceased died domiciled, it would be treated, in all Australian jurisdictions, as having been properly executed.³¹³

308 See pp 196-197 of this Discussion Paper.

309 Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 565-566.

310 *Wills Act 1968* (ACT) ss 15A-15H; *Wills, Probate and Administration Act 1898* (NSW) ss 32A-32F; *Wills Act* (NT) ss 45-48; *Succession Act 1981* (Qld) ss 22-26; *Wills Act 1936* (SA) ss 25A-25D; *Wills Act 1992* (Tas) ss 28-30; *Wills Act 1997* (Vic) ss 17-19; *Wills Act 1970* (WA) ss 20-23. For a discussion of these provisions see Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 566-569 and *Wills Report* (1997) QLRC at 99-105; NSWLRC at paras 7.1-7.12.

311 This Convention is set out at <www.hcch.net/e/conventions/text11e.html> (8 November 2001).

312 *Wills Act 1968* (ACT) s 15C(b)(ii); *Wills, Probate and Administration Act 1898* (NSW) s 32C(b); *Wills Act* (NT) s 46(1)(b); *Succession Act 1981* (Qld) s 23; *Wills Act 1936* (SA) s 25B; *Wills Act 1992* (Tas) s 29; *Wills Act 1997* (Vic) s 17(1)(b); *Wills Act 1970* (WA) s 21. Other bases for upholding the validity of a will are included in the legislation, but this basis is relevant in the light of the scheme for automatic recognition proposed in this Discussion Paper.

313 See note 312 of this Discussion Paper. In *Perpetual Trustees Victoria Ltd v Sabine* (Unreported, Supreme Court of Victoria, No 6562 of 1992, O'Bryan J, 5 May 1992), the executor appointed by the Victorian Supreme Court sought a supplementary grant of probate in respect of a letter written by the deceased. It was argued, on behalf of the executor, that the letter embodied the deceased's testamentary intentions within the meaning of s 18A of the *Wills, Probate and Administration Act 1898* (NSW). The Supreme Court of Victoria had previously made a grant of probate, although the deceased had died domiciled in New South Wales and had executed the will in New South Wales. The Court considered the letter's validity as a testamentary document in the light of s 20B of the *Wills Act 1958* (Vic) (see now s 17(1) of the *Wills Act 1997* (Vic)), which provided that a will was to be treated as properly executed if:

Under a system of automatic recognition, the ability of a court in a jurisdiction other than that in which the deceased died domiciled to re-examine the question of the formal validity of a will on a resealing application would be lost. Once a will had been adjudged valid by the court of the deceased's last domicile, it would have to be accepted as valid in all other Australian jurisdictions.³¹⁴ However, given the effect of the legislation in all Australian jurisdictions dealing with the formal validity of foreign wills,³¹⁵ the introduction of a system of automatic recognition would be likely to cause little change.

Consequently, although it is obviously desirable for the draft wills legislation contained in the National Committee's report on wills to be implemented,³¹⁶ the implementation of that legislation is not essential for the operation of the proposed scheme of automatic recognition.

(d) Distribution on intestacy

(i) Background

The law in relation to intestacy differs from one Australian jurisdiction to another, in relation to both the person entitled to be appointed as administrator and the manner in which the estate of a person who dies intestate is to be distributed.³¹⁷

... its execution conformed to the internal law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a country of which, at either of those times, he was a national.

The Court held that the reference in s 20B of the *Wills Act 1958* (Vic) to "the internal law in force in the place where the testator had his habitual residence" was not limited to s 7 of the *Wills, Probate and Administration Act 1898* (NSW), which deals with the form and manner of the execution of wills, but was also intended to refer to s 18A of the New South Wales legislation, which deals with informal wills. Although the Court ultimately refused the application, it did so not because the letter did not comply with Victorian requirements for the execution of wills, but because it was not satisfied that the letter embodied the testamentary intentions of the testator within the meaning of s 18A of the *Wills, Probate and Administration Act 1898* (NSW). (The subsequent application to reseal the original Victorian grant in New South Wales is the subject of the decision in *The Estate of Natrass* (Unreported, Supreme Court of New South Wales, No PD 114522 of 1992, Powell J, 29 October 1992), which is referred to at note 43 of this Discussion Paper.)

314 See p 34 of this Discussion Paper.

315 See note 310 of this Discussion Paper.

316 That Report makes provision for model laws which, if adopted, would ensure that the rules as to the validity of wills were the same throughout Australia. See note 74 of this Discussion Paper in relation to the implementation of these model laws in the Northern Territory.

317 See *Administration and Probate Act 1929* (ACT) Pt 3A; *Wills, Probate and Administration Act 1898* (NSW) Pt 2 Div 2A; *Administration and Probate Act*(NT) Pt III Divs 4, 4A, 5; *Succession Act 1981* (Qld) Pt 3; *Administration and Probate Act 1919* (SA) Pt 3A; *Administration and Probate Act 1935* (Tas) Pt V; *Administration and Probate Act 1958* (Vic) Pt 1 Div 6; *Administration Act 1903* (WA) ss 12A-14.

(ii) Preliminary view

The proposed scheme of automatic recognition would not affect the rules governing distribution on intestacy. Its only effect would be that the administrator appointed by the court of the deceased's last domicile would have to be accepted by other jurisdictions in which the deceased left assets.

(e) Family provision**(i) Background**

The law in relation to family provision differs from one Australian jurisdiction to another.³¹⁸

(ii) Preliminary view

The proposed scheme of automatic recognition would not affect the jurisdictional rules relating to family provision, except that, where a testator died domiciled in one jurisdiction leaving property in that and another jurisdiction, it would be unnecessary to have the grant resealed in the second jurisdiction in order to make a family provision claim in that jurisdiction, and the administrator's authority could not be questioned in the second jurisdiction. The distributive rules would be unaffected.³¹⁹

(f) Administration of estates**(i) Background**

The law in relation to the administration of the estates of deceased persons differs from one Australian jurisdiction to another.³²⁰

(ii) Preliminary view

The proposed scheme of automatic recognition would have no effect whatsoever on the rules governing the administration of estates, since the administration of an estate is carried out according to the law of the jurisdiction in which representation has been granted.³²¹ Since under the proposed scheme a grant made in the jurisdiction of domicile would have the

318 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).

319 See pp 208-209 of this Discussion Paper.

320 For a discussion of the legislation of the Australian States and Territories, see *Administration of Estates Discussion Paper* (1999).

321 See p 209 of this Discussion Paper.

same effect in other jurisdictions as if it had been resealed there, the administration of an estate in a particular jurisdiction would still be carried out in accordance with the law of that jurisdiction, even though it would no longer be necessary to have the grant resealed in that jurisdiction.³²²

CHAPTER 5

A UNIFORM RESEALING PROCEDURE

1. INTRODUCTION

Even if a scheme of automatic recognition such as that proposed in Chapter 4 were adopted, the need for resealing would not disappear. Since the proposed scheme would be confined to the recognition of grants of probate and letters of administration made in an Australian State or Territory, all overseas grants would continue to require resealing. Further, since under the proposed scheme the only grants that would be automatically recognised without any need for resealing would be those made by the court of the deceased's last domicile,³²³ any other Australian grants would also continue to require resealing.

If it is decided not to introduce a scheme of automatic recognition, all grants, both Australian and overseas, will continue to require resealing, as at present.

Consequently, whether or not a scheme such as that proposed in Chapter 4 is introduced, it remains desirable to unify the present resealing procedure. The statutory provisions in each jurisdiction have a number of basic similarities, reflecting the fact that in most, if not all, cases they were originally based on nineteenth-century English legislation such as the *Colonial Probates Act 1892* (UK). However, the process of gradual amendment of both the legislation and the probate rules in each State and Territory over the years has resulted in considerable differences of detail.³²⁴

The resulting diversity between the procedural rules of the various jurisdictions is a problem for a person applying in one jurisdiction for the resealing of a grant of probate or letters of administration made in another jurisdiction. Lawyers well versed in the rules of their own jurisdiction will encounter differences when they need to have a grant resealed in another State or Territory. Where there is an overseas grant that requires resealing in several Australian jurisdictions, lawyers will need to contend with several different sets of rules. The adoption of a uniform procedure for resealing would considerably simplify the process, reducing the delay and expense involved.

323 See the discussion of the concept of domicile at pp 33-34 of this Discussion Paper.

324 One particular problem is that, whereas the rules of some jurisdictions contain a specific division dealing with resealing, in other jurisdictions resealing is referred to only incidentally in several different parts of the rules which deal with other matters concerning the administration of estates.

In putting forward proposals for a uniform resealing procedure, particular consideration has been given to the earlier work of the WALRC, which made a detailed study of the resealing rules in each jurisdiction in its 1980 Working Paper³²⁵ and made recommendations for a uniform resealing procedure in its 1984 Report. The WALRC made a number of general recommendations,³²⁶ but recommended that the finer details should be left to a Committee of Parliamentary Counsel, which should draw up a code in association with the Probate Registrars of the various States and Territories.³²⁷ The Probate Registrars commented on the WALRC proposals in 1986 at the invitation of the Standing Committee of Attorneys General, and ultimately at a conference held in 1990.³²⁸ Although some drafting work was done, it appears that after 1990 no further steps were taken. Reference is made in this chapter to the comments made by the Probate Registrars at their 1990 conference.

Consideration has also been given to the model resealing legislation drawn up on behalf of the Commonwealth Secretariat between 1975 and 1980 in an attempt to unify the law of resealing in the Commonwealth of Nations.³²⁹ However, the usefulness of the Commonwealth Secretariat draft model bill is limited by the fact that it was dealing with the resealing of grants as between independent countries. In the words of the WALRC:³³⁰

The Commonwealth Secretariat's proposals set out basic requirements for resealing as between independent nations widely scattered throughout the world. Although most of the Commission's proposals are consistent with the proposals of the Commonwealth Secretariat, the Commission does not believe that proposals to unify the procedure for resealing in Australian jurisdictions should be in any way limited by the Commonwealth Secretariat's proposals. Limitations and safeguards appropriate to the resealing by a court in one independent nation of a grant made by a court in another independent nation are not necessarily appropriate for jurisdictions within a federation having a common heritage and substantially similar law.

325 See *WALRC Working Paper* (1980) Appendices I, II, VIII and IX.

326 These included the basic recommendation that there should be a uniform code of procedure: *WALRC Report* (1984) at paras 3.3-3.4 and recommendation 1.

327 *WALRC Report* (1984) at para 3.21 and recommendation 2.

328 See *Conference of Probate Registrars Report* (1990).

329 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* at v (Introductory Note). A draft model bill drawn up 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* at 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 B to this Discussion Paper.

330 *WALRC Report* (1984) at para 3.18.

In this Discussion Paper, it is suggested that provisions that relate to what may be regarded as “core” elements of the proposed scheme for resealing should be contained in the model legislation and that matters of detail should be located in rules of court. No attempt has been made to put forward uniform proposals on matters of fine detail, such as the matters to which a person seeking the resealing of a grant is required to swear in the affidavit or oath.

2. PERSONS ENTITLED TO APPLY FOR THE RESEALING OF A GRANT

(a) The present law

(i) An executor, an administrator or a person appointed by the executor or administrator to apply for the resealing of a grant

Legislation in the Australian Capital Territory and the Northern Territory provides that the following persons may apply for the resealing of a grant of probate or letters of administration:³³¹

- in the case of a probate of a will - the executor named in the will;
- in the case of administration of an estate - the administrator to whom letters of administration were granted;
- a person authorised by that executor or administrator, under a power of attorney, to make the application.³³²

In South Australia, the same persons are authorised to apply for the resealing of a grant, although the relevant provision is set out in the rules, rather than in the legislation.³³³

In New South Wales, Tasmania, Victoria and Western Australia, the legislation is drafted in a slightly different form, although it has the same effect. In these jurisdictions, the legislation provides that, when a grant of probate or of letters of administration is produced to, and a copy of such grant is deposited with, the registrar by a specified person, the grant of probate or letters of administration may be resealed.³³⁴ The persons specified for this purpose are:

331 *Administration and Probate Act 1929* (ACT) s 80(1); *Administration and Probate Act* (NT) s 111(1).

332 The document conferring the power must authorise the making of the application for resealing, expressly or impliedly: *Re Luckie* (1888) 14 VLR 211; *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. The attorney may be a trustee company: *In the Will of Hicks* (1890) 4 QLJ 39.

333 *The Probate Rules 1998* (SA) r 50.01.

334 *Wills, Probate and Administration Act 1898* (NSW) s 107(1); *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).

- the executor named in the grant of probate;
- the administrator named in the letters of administration; or
- any person duly authorised by power of attorney for that purpose by the executor or administrator named in the grant of probate or letters of administration.

In Queensland, where the relevant provision is set out in the rules, an application for resealing may be made by the executor or administrator, or by “a person lawfully authorised for the purpose by the executor or administrator”.³³⁵ Whereas in other Australian jurisdictions the authorisation given by the executor or administrator must be given by power of attorney, the Queensland rule does not contain that requirement.³³⁶

(ii) Executor or administrator by representation

Legislation in a number of Australian jurisdictions provides expressly for the transmission of the office of executor upon the death of a sole or last surviving executor.³³⁷ In these jurisdictions, the executor of an executor who dies becomes the executor of any estate that was being administered by the deceased executor. The executor of a deceased executor is known as an executor by representation.

In addition, legislation in New South Wales provides, in limited circumstances, for the transmission of the office of administrator. Where the public trustee or a trustee company is appointed administrator of an estate, the public trustee or trustee company, as the case may be, becomes the administrator by representation of any estate of which the deceased person had been granted administration.³³⁸

³³⁵ *Uniform Civil Procedure Rules 1999*(Qld) r 616. The former rule, O 71 r 65 of the *Rules of the Supreme Court 1900* (Qld), also referred to “a person lawfully authorised for the purpose by such executor or administrator”. O 71 r 67(3) of those rules provided, in relation to the affidavit that must be filed by an applicant:

Where the applicant is a person lawfully authorised by the executor or administrator the original certificate or letter of authority addressed to the applicant by the executor or administrator authorising the applicant to make such application on behalf of such executor or administrator shall be exhibited to the affidavit.

³³⁶ This is also the position in England and Wales, where r 39(1) of the *Non-Contentious Probate Rules 1987* (UK) provides that an application for the resealing of a grant may be made by “the person to whom the grant was made or by any person authorised in writing to apply on his behalf”.

³³⁷ *Imperial Acts (Substituted Provisions) Act 1986* (ACT) s 3, Sch 2 Pt 3; *Imperial Acts Application Act 1969* (NSW) ss 5, 13, First Sch; *Wills, Probate and Administration Act 1898* (NSW) s 44(2)(a); *Succession Act 1981* (Qld) s 47; *Administration and Probate Act 1935* (Tas) s 10; *Administration and Probate Act 1958* (Vic) s 17. In South Australia and Western Australia, the relevant legislation is an Imperial Act, (1351-52) 25 Edw 3 st 5 c 5. That Act, which continued to apply in England until it was repealed by s 56 and the Second Sch of the *Administration of Estates Act 1925* (UK), 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: *Acts Interpretation Act 1915* (SA) s 4A; *Interpretation Act 1984* (WA) s 73. Generally, see the discussion of executors by representation in *Administration of Estates Discussion Paper* (1999) QLRC at 40-45; NSWLRC at paras 6.1-6.17.

³³⁸ *Wills, Probate and Administration Act 1898* (NSW) s 44(2)(b).

Neither an executor by representation nor an administrator by representation is the executor or administrator named in the original grant. Whether such a person can apply under the existing legislation in the Australian States and Territories for the resealing of a grant turns on how broadly the legislation in the particular jurisdiction in which resealing is sought is expressed.

A. Executor by representation

The legislation in the Australian Capital Territory and the Northern Territory provides expressly that an executor by representation may apply for the resealing of a grant.³³⁹ Similarly, in New South Wales, Tasmania and Victoria, where the resealing provisions of the legislation define “executor” to include an executor by representation,³⁴⁰ an executor by representation may produce and deposit the relevant documents for the purpose of obtaining a reseal.

In Queensland, South Australia and Western Australia there are no express statutory provisions enabling an application to be made by an executor by representation.

It has been held that, under the South Australian legislation, an executor by representation may apply for the resealing of a grant.³⁴¹ That would also appear to be the position in Queensland, where the rules provide that an application may be made by “the executor”³⁴² without imposing any further limitation that the executor must be the executor named in the original grant.

However, it does not appear that an executor by representation could apply for the resealing of a grant in Western Australia. The legislation in that State provides that the probate may be produced “by any person being the executor ... therein named”.³⁴³ 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

339 *Administration and Probate Act 1929* (ACT) s 80(1)(a)(iii); *Administration and Probate Act* (NT) s 111(1)(a)(iii).

340 *Wills, 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.

341 *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), which was in similar terms to s 17 of the *Administration and Probate Act 1919* (SA). Section 26 of the *Administration and Probate Act 1891* (SA) did not specify by whom the application could be made, but provided that, on the resealing of a probate or administration, “every executor or administrator thereunder” should have certain specified rights and duties. The relevant rule at the time permitted the application to be made by “the executor”. See the discussion of this decision in Weir G, “Resealing by Representative of Executor or Administrator” (1939) 13 ALJ 102 at 103.

342 *Uniform Civil Procedure Rules 1999* (Qld) r 616.

343 *Administration Act 1903* (WA) s 61(1).

the executor of that executor.³⁴⁴

B. Administrator by representation

No Australian jurisdiction provides expressly that an administrator by representation may apply for the resealing of a grant.

It would seem that such an application would be possible under the rules in Queensland and South Australia. These rules provide that an application for the resealing of a grant may be made by the administrator, but do not limit the making of such an application to an administrator named in the grant.³⁴⁵

However, it would seem that an administrator by representation could not apply for the resealing of a grant under the legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania, Victoria or Western Australia. Although the legislation in these jurisdictions enables an application for the resealing of a grant to be made by an administrator, the application must be made by “the administrator to whom the administration was granted”³⁴⁶ or by the “administrator therein named”.³⁴⁷ Those words would not seem to extend to an administrator by representation, who is neither the administrator to whom the grant was made nor the administrator named in the grant, but, rather, is the administrator of such an administrator.³⁴⁸

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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 Supreme Court of Victoria refused an application for resealing made by an executor by representation. Irvine CJ acknowledged (at 142-143) that there was “a serious omission in the Act” but one which 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; ...

A commentator has noted that *In the Will of Hill* governed resealing in New South Wales until the legislation in that State was amended in 1938 to allow an application for resealing to be made by an executor by representation: Weir G, “Resealing by Representative of Executor or Administrator” (1939) 13 *ALJ* 102.

345

Uniform Civil Procedure Rules 1999 (Qld) r 616; *The Probate Rules 1998* (SA) r 50.01(a). See *Drummond v The Registrar of Probates (South Australia)* (1918) 25 CLR 318, which is discussed at note 341 of this Discussion Paper. Although that decision concerned an application by an executor by representation, the same reasoning would apply to an application made in South Australia by an administrator by representation.

346

Administration and Probate Act 1929 (ACT) s 80(1)(b)(i); *Administration and Probate Act* (NT) s 111(1)(b)(i).

347

Wills, 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); *Administration Act 1903* (WA) s 61(1).

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See *In the Will of Hill* [1921] VLR 140, which is discussed at note 344 of this Discussion Paper. 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.

(iii) A public trustee to whom an order to collect and administer is made³⁴⁹

Legislation in the Australian Capital Territory and in the Northern Territory expressly provides that, in the case of an order to collect and administer an estate,³⁵⁰ a public trustee in the country or part of a country to whom the order was granted may apply to have the order resealed.³⁵¹

(b) Commonwealth Secretariat draft model bill

Clause 3(2) of the Commonwealth Secretariat draft model bill provided that an application for the resealing of a grant could be made by:

- (a) a personal representative³⁵² 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]

Although paragraph (c) permitted an application for resealing to be made by a legal practitioner acting on behalf of a personal representative or on behalf of a person authorised under power of attorney to apply for the resealing, the draft model bill did not provide that, on the resealing of the grant, a legal practitioner who applied for the resealing would be subject to the duties or liabilities of a personal representative.³⁵³

(c) WALRC recommendation

The WALRC referred 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:³⁵⁴

349 The question of whether a public trustee to whom such an order has been made should be able to apply for the resealing of the order is based on an assumption that an order to collect and administer or an order to administer is, or should be, an instrument capable of being resealed. That issue is discussed at pp 100-103 and 105-106 of this Discussion Paper.

350 See the explanation of orders to administer and orders to collect and administer at pp 100-101 of this Discussion Paper.

351 *Administration and Probate Act 1929* (ACT) s 80(1)(c); *Administration and Probate Act* (NT) s 111(1)(c).

352 The term "personal representative" was defined in cl 2(1) of the Commonwealth Secretariat draft model bill to mean:
[T]he 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; ...

353 See the discussion of cl 6(2) of the Commonwealth Secretariat draft model bill at pp 126-127 of this Discussion Paper.

354 *WALRC Report* (1984) at para 3.23. See also *WALRC Report* (1984) at recommendation 4.

... it should be possible to reseal a grant in favour of any of the following -

- (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 appointed in relation to the estate;
- (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.

It also recommended that “[i]t should be made clear that ... all persons named in the grant, or authorised by power of attorney, are entitled to act as personal representatives on the resealing”.³⁵⁵ Consequently, unless a legal practitioner who applied for the resealing of a grant did so under a power of attorney given by the executor or administrator, the legal practitioner would not, on the resealing of the grant, be entitled to act as a personal representative.³⁵⁶

The WALRC stated that its recommendations were consistent with the provisions of the Commonwealth Secretariat draft model bill.³⁵⁷

(d) Probate Registrars

In 1990, the Probate Registrars made the following specific points about the WALRC recommendations:³⁵⁸

- It should be made clear that the executor in favour of whom a grant could be resealed should be the executor named in the original grant.³⁵⁹ This was clearly the WALRC’s intention, but the form of words used in its recommendation was perhaps ambiguous.
- It should not be possible for the legal representative of an executor or administrator to apply for the resealing of a grant unless he or she has been appointed, either under a power of attorney or in writing, by the executor or administrator. The Probate Registrars suggested that the WALRC

³⁵⁵ Id at para 3.25(a) and recommendation 6(a).

³⁵⁶ The effects of the resealing of a grant are discussed at pp 120-130 of this Discussion Paper.

³⁵⁷ *WALRC Report* (1984) at para 3.23, note 1. Clause 3(2) of the Commonwealth Secretariat draft model bill is discussed at p 75 of this Discussion Paper.

³⁵⁸ *Report of the Conference of Probate Registrars* (1990) at 3-4.

³⁵⁹ See the discussion at pp 85-88 of this Discussion Paper of applications made by an applicant who is not the executor or administrator named in the original grant, but who has been substituted for such an executor or administrator.

recommendation about legal representatives could result in persons other than those named in the original grant, or different people in each jurisdiction, being able to act in respect of the same estate. This criticism clearly exposed the importance of maintaining the distinction between those who might apply and those who would, on the resealing of a grant, be empowered to act.

- In the case of an application for resealing made by an executor by representation, it is essential that probate of the will of the deceased executor should have been granted or resealed in the resealing jurisdiction by his or her executor.³⁶⁰

The Probate Registrars agreed with the WALRC recommendation that a public officer who is authorised to administer an estate in another jurisdiction should be able to apply for the resealing of a grant.³⁶¹ However, it is not clear whether the Probate Registrars required these officers to be named as executor or administrator in a grant, or whether they were of the view that a public officer who was authorised to administer an estate under an order to collect and administer or under an order to administer should be able to apply for the resealing of the order.

(e) Preliminary view³⁶²

The model legislation should provide that the following persons may apply for the resealing of a grant:

- in the case of probate of a will:
 - * 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 of representation has been granted or resealed in the resealing jurisdiction;
 - * 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;

³⁶⁰ In *Drummond v The Registrar of Probates (South Australia)* (1918) 25 CLR 318, where the High Court held that, under South Australian legislation, a grant of probate could be resealed on an application by an executor by representation, the executor by representation had had the grant of probate in relation to the estate of his own testator (the deceased executor) resealed in South Australia. For a discussion of this issue, see Weir G, "Resealing by Representative of Executor or Administrator" (1939) 13 ALJ 102 at 103-104.

³⁶¹ *Report of the Conference of Probate Registrars* (1990) at 5.

³⁶² As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

- in the case of letters of administration of an estate:
 - * the administrator named in the grant of letters of administration;
 - * the administrator by representation,³⁶³ 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.

If a public trustee or similar officer has been appointed executor or administrator in the jurisdiction in which the grant was made, there is no special problem and no need for a separate category. However, there are some jurisdictions that distinguish between a grant of administration and an order to administer, or an order to collect and administer, made in favour of a public trustee or similar officer.³⁶⁴ Such orders are essentially the same as grants of administration. To cater for such cases, the model legislation should also allow a public trustee or similar officer to apply for the resealing of such an order.

It is not proposed to include, as an applicant for resealing, the legal representative of the executor or administrator, as originally recommended by the WALRC and as provided for in the Commonwealth Secretariat draft model bill.³⁶⁵ It is not considered appropriate for the legal representative of the executor or administrator to be an applicant for the resealing of a grant unless it is 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.³⁶⁶

The exclusion of the legal representative of an executor or administrator from the list of persons eligible to apply for the resealing of a grant 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; nor would the exclusion prevent a legal representative from acting for an applicant in an application for resealing.³⁶⁷

363 The office of administrator by representation is recognised in New South Wales: see p 72 of this Discussion Paper.

364 See pp 100-101 of this Discussion Paper.

365 See pp 75-76 of this Discussion Paper.

366 See the discussion of the duties and liabilities of an applicant for resealing at pp 122-128 of this Discussion Paper. It is not proposed in this 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.

367 The issue of legal representation is discussed at pp 107-108 of this Discussion Paper.

(f) Issues for consideration

5.1	Should the model legislation include a provision listing the persons who are entitled to apply for the resealing of a grant?
5.2	If so, should such persons include:
(a)	in the case of probate of a will:
(i)	the executor named in the grant of probate;
(ii)	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 of representation has been granted or resealed in the resealing jurisdiction;
(iii)	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;
(b)	in the case of letters of administration of an estate;
(i)	the administrator named in the grant of letters of administration;
(ii)	the administrator by representation, 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;
(iii)	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;
(c)	in the case of an order to collect and administer an estate or an order to administer an estate - the public trustee or similar officer to whom the order was granted?³⁶⁸

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See the related question at p 106 of this Discussion Paper as to whether it should be possible to reseal an order to administer an estate or an order to collect and administer an estate.

5.3 In the alternative to questions 5.2(a)(iii) and (b)(iii), should the model legislation enable an application for the resealing of a grant of probate or letters of administration to be made by a person who, although not authorised to do so by a power of attorney given by a person described in those paragraphs, is authorised in writing by such a person?³⁶⁹

3. APPLICATIONS FOR RESEALING: PROCEDURAL ISSUES

(a) Application by one of the personal representatives named in the original grant

(i) The present law

Where the grant that is the subject of the resealing application was made to two or more executors or administrators, the question arises as to whether the application for resealing may be made by only one, or by some, of the executors or administrators, or whether it must be made by all the executors or administrators named in the grant.

Generally, where the grant was made to several persons, all persons to whom the grant was made must apply for the resealing of the grant.³⁷⁰ In *In the Will of Rofe*,³⁷¹ 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. In declining the application for resealing, the Supreme Court of Victoria observed 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”.³⁷²

There are, however, exceptions to the general rule that an application for resealing must be made by all the personal representatives named in the original grant. In *In the Will of Rofe*,³⁷³ the Court acknowledged that, if one of

³⁶⁹ See the discussion of the Queensland requirement at p 72 of this Discussion Paper.

³⁷⁰ *In the Will of Rofe* (1904) 29 VLR 681.

³⁷¹ (1904) 29 VLR 681.

³⁷² *Id* at 682. Instead, the Court (at 682-683) 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 pp 82-84 of this Discussion Paper). 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. See the discussion of the effects of resealing at pp 122-130 of this Discussion Paper.

³⁷³ (1904) 29 VLR 681.

two executors died and an application for resealing were made by the surviving executor, it would not decline to reseal the grant.³⁷⁴ Grants have been resealed on the application of only one of the executors named in the original grant where the other executor has been discharged and therefore no longer holds office,³⁷⁵ and where the application is made with the consent of the other executors.³⁷⁶

In South Australia, the rules reflect the last of these exceptions and provide that an application for the resealing of a grant may be made:³⁷⁷

... 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 ...

No other jurisdiction has an express provision dealing with this situation.

(ii) WALRC recommendation

The WALRC 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”.³⁷⁸

(iii) Probate Registrars

The Probate Registrars agreed with the WALRC recommendation, provided that the consent of the other personal representatives had been obtained.³⁷⁹

(iv) Preliminary view

It is proposed that a provision be inserted in the rules allowing a grant made to several personal representatives to be resealed on the application of only one or some of them, provided the consent of the others has been obtained, and is evidenced by affidavit.

374 Id at 682.

375 *In the Will of Vivian* (1901) 23 ALT 37. See the discussion of this case at note 392 of this Discussion Paper.

376 *Re Benn* [1905] QWN 30. See also Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 18.94, 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”.

377 *The Probate Rules 1998*(SA) r 50.01(a).

378 *WALRC Report* (1984) at para 3.25(b) and recommendation 6(b).

379 *Report of the Conference of Probate Registrars*(1990) at 5.

(v) Issues for consideration

5.4 Should it be possible for a grant made to several personal representatives to be resealed on the application of only one or some of them, provided the consent of the others has been obtained, and is evidenced by affidavit?

5.5 Should a provision to this effect be located in court rules, rather than in the model legislation?

(b) Application where a grant of double probate has been made**(i) Introduction**

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.³⁸⁰ 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”.³⁸¹ A grant of double probate “runs concurrently with the first grant if any of the first grantees are still living”.³⁸²

Where double probate has been granted, two issues arise for consideration:

- who should be able to apply for resealing; and
- which instrument or instruments should be resealed.

No Australian jurisdiction has an express provision dealing with this situation.

In England, the practice in relation to resealing where a grant of double probate has been made is that:³⁸³

³⁸⁰ See for example *Administration and Probate Act 1929 (ACT)* s 10B; *Wills, Probate and Administration Act 1898 (NSW)* s 41; *Administration and Probate Act (NT)* s 19; *Administration Act 1903 (WA)* s 7. See also the *Probate Rules 1936 (Tas)* r 60.

³⁸¹ Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 13.122.

³⁸² *Ibid.*

³⁸³ *Id* at para 18.101.

An exemplification³⁸⁴ 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 added]

(ii) WALRC recommendation

The WALRC 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”.³⁸⁵

(iii) Probate Registrars

The Probate Registrars were prepared to accept the WALRC recommendation, provided the consent of the other executors had been obtained.³⁸⁶

(iv) Preliminary view

Where a grant of double probate has been made, it should be possible to reseal:

- the probate (or an exemplification of probate) and the double probate (or an exemplification of the double probate), provided both instruments are deposited together in the court; or
- an exemplification that contains copies of the probate and the double probate.

An application to reseal grants of probate and double probate, or an exemplification of probate and double probate, should be able to be made by:

- the executor under the probate and the executor under the double probate;
- the executor under the probate or the executor under the double probate, provided the consent of the executor under the other grant has been obtained, and is evidenced by affidavit; or

384

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 virtual, though not an exact, copy of the grant”: Yeldham RF and others (eds), *Tristram and Coote’s Probate Practice* (28th ed, 1995) at para 21.35. See the discussion at pp 112-116 of this Discussion Paper of the documents that must be produced to the court for the purpose of resealing.

385

WALRC Report (1984) at para 3.25(c).

386

Report of the Conference of Probate Registrars (1990) at 6.

- where more than one executor has been appointed under the probate or the double probate, one or more of the executors under the probate or the double probate, provided the consent of all executors under both grants has been obtained, and is evidenced by affidavit.

(v) Issues for consideration

5.6	Should all jurisdictions adopt a provision to the effect that, where grants of probate and double probate have been made in respect of a will:
	(a) it should be possible to reseal:
	(i) the probate (or an exemplification of probate) and the double probate (or an exemplification of the double probate), provided both instruments are deposited together in the court; or
	(ii) an exemplification that contains copies of the probate and the double probate;
	(b) an application for resealing should be able to be made by:
	(i) the executor under the probate and the executor under the double probate;
	(ii) the executor under the probate or the executor under the double probate, provided the consent of the executor under the other grant has been obtained, and is evidenced by affidavit; or
	(iii) where more than one executor has been appointed under the probate or the double probate, one or more of the executors under the probate or the double probate, provided the consent of all executors under both grants has been obtained, and is evidenced by affidavit?
5.7	If so, should the provision be located in court rules, rather than in the model legislation?

(c) Application where an executor or administrator has been substituted for an executor or administrator in the original grant

(i) Introduction

In some Australian and overseas jurisdictions, a court may substitute an executor or administrator for an executor or administrator named in an original grant.

For example, legislation in the Australian Capital Territory, the Northern Territory and Victoria enables the court to discharge or remove an executor or administrator to whom a grant has been made where 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.³⁸⁷ The legislation provides that, in these circumstances, the court may order the appointment of a person or trustee company 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.³⁸⁸ Where the executor or administrator who has been discharged or removed was a sole or surviving executor or administrator, it will be necessary for the court to appoint a substitute administrator. Similar legislation exists in New Zealand³⁸⁹ and in England.³⁹⁰

The effect of these 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.³⁹¹

387 *Administration and Probate Act 1929* (ACT) s 32(1); *Administration and Probate Act* (NT) s 41(1); *Administration and Probate Act 1958* (Vic) s 34(1). In Queensland, the practice in these circumstances is to revoke the original grant: *Uniform Civil Procedure Rules 1999* (Qld) r 642(1). The Rules provide that, if the court revokes a grant or replaces it with a limited grant, the “personal representative must bring the original grant into the registry as soon as practicable after the order is made”: *Uniform Civil Procedure Rules 1999* (Qld) r 642(3). It is suggested that the reference in sub-rule (3) to “the personal representative” is a reference to the personal representative named in the grant that has been revoked.

388 *Administration and Probate Act 1929* (ACT) s 32(1); *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). The court has a discretion to discharge or remove one of two or more co-executors without appointing an administrator to replace that executor: *Re Coverdale* [1909] VLR 248.

389 *Administration Act 1969* (NZ) s 21, which allows the court in the circumstances specified to discharge or remove an administrator and appoint another administrator in his or her place. The term “administrator” includes a person appointed under a grant of probate or letters of administration: *Administration Act 1969* (NZ) s 2 (definitions of “administration” and “administrator”).

390 Under the *Administration of Justice Act 1985* (UK), the court may appoint a person (called a “substituted personal representative”) to act as personal representative in place of the existing personal representative or representatives: *Administration of Justice Act 1985* (UK) s 50(1)(a). Where the substituted personal representative is appointed to act with an executor or executors, the substituted personal representative is constituted as an executor, except for the purpose of including him or her in any chain of representation: *Administration of Justice Act 1985* (UK) s 50(2)(a). In any other case, the substituted personal representative is constituted as an administrator: *Administration of Justice Act 1985* (UK) s 50(2)(b).

391 In Victoria, if the court orders the appointment of a substitute administrator, 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”: *Administration and Probate Rules 1994* (Vic) r 6.09(3).

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.³⁹²

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.

However, the Supreme Court of Victoria considered this issue in *Re Bell*.³⁹³ 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 substitution for the named executors. 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.³⁹⁴ 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.

The Victorian practice would appear to differ from that adopted in England, where the practice is not to reseat the two separate instruments.³⁹⁵

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.

(ii) WALRC recommendation

The WALRC 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

³⁹² 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.

³⁹³ [1929] VLR 53.

³⁹⁴ Id at 55.

³⁹⁵ Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 18.100.

substitution for the executor to whom a grant was originally made by that court".³⁹⁶

(iii) Preliminary view

Where 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.

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;
- 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 executors or administrators has been obtained, and is evidenced by affidavit.

(iv) Issues for consideration

5.8	Should all jurisdictions adopt a provision to the effect that, where an order has been made substituting an executor or administrator for an executor or administrator named in an original grant:
	(a) it should be possible to reseal:
	(i) an exemplification that contains copies of the grant and the order by which an executor or administrator is substituted; or

³⁹⁶

WALRC Report (1984) at para 3.25(d).

(ii)	the grant and the order, or exemplifications of either or both, provided both instruments are deposited together in the court;
(b)	an application for resealing should be able to be made by:
(i)	where there is no continuing executor or administrator - the substitute executor or administrator;
(ii)	where there is a continuing executor or administrator - the continuing executor or administrator and the substitute executor or administrator;
(iii)	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 executors or administrators has been obtained, and is evidenced by affidavit?
5.9	Should this provision be located in court rules, rather than in the model legislation?

(d) Application by a trustee company for the resealing of a grant

(i) The present law

Legislation in each Australian State and Territory enables certain specified trustee companies to be appointed as executors or, in certain circumstances, to be appointed as administrators in the jurisdiction in question.³⁹⁷ This raises the question of whether a trustee company that has been appointed as executor or administrator in one jurisdiction can apply to have the grant under which it has been appointed resealed in another State or Territory.

³⁹⁷

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 5-7; *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 5-8.

Grants made in favour of foreign trustee companies have been resealed in New South Wales and in Queensland,³⁹⁸ even though the companies were not ones to which original grants would have been made in those jurisdictions.³⁹⁹ It has been held, however, that, where the executor is a foreign trustee company, the application should be made by a person appointed by the executor under a power of attorney for that purpose.⁴⁰⁰

In South Australia, the rules provide expressly that, where a trustee company is the executor, administrator or attorney, application for the resealing of the grant may be made:⁴⁰¹

... 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.

(ii) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill defined “personal representative” to include a corporation named in the probate or letters of administration as executor or administrator.⁴⁰²

(iii) WALRC Report

The WALRC did not make a recommendation about this issue.

398 See *Re Galletly* (1900) 10 QLJ 74 and *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. The Court held 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.

399 In *In the Will of Finn* (1908) 8 SR (NSW) 32, the New South Wales Supreme Court refused to make a grant of probate to a trustee company that was incorporated under South Australian law, even though the company was entitled to act as executor in South Australia. Street J held (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.

400 *Re Sutherland* [1936] QWN 20. See also *Re Galletly* (1900) 10 QLJ 74 where the court held that the conditions prescribed by the Rules of Court must be complied with and that the affidavit must be made by the applicant's duly constituted attorney.

401 *The Probate Rules 1998*(SA) r 50.01(c).

402 Commonwealth Secretariat draft model bill cl 2(1).

(iv) Preliminary view

It is proposed that a model rule based on the South Australian rule should be adopted. It has the merit of stating the precise procedure to be adopted when a trustee company has been appointed executor or administrator or has been given a power of attorney by an executor or administrator.

(v) Issues for consideration

5.10 Should all jurisdictions adopt a provision based on rule 50.01(c) of *The Probate Rules 1998 (SA)* setting out the procedure to be adopted when a trustee company is appointed as executor or administrator or as the attorney of an executor or administrator?

5.11 Should such a provision be located in court rules, rather than in the model legislation?

(e) Application by a non-resident executor or administrator**(i) Executor or administrator need not be within the jurisdiction of the resealing court****A. The present law**

The legislation in Tasmania and Victoria expressly provides that an executor or administrator who applies for the resealing of a grant need not be within the jurisdiction of the resealing court.⁴⁰³ There is no express provision to that effect in the other Australian jurisdictions, although the legislation in the Australian Capital Territory, New South Wales, the Northern Territory and Western Australia appears to contemplate that an applicant for resealing need not be resident in the jurisdiction in which resealing is sought.⁴⁰⁴

Although there is no specific provision in Queensland, grants have been resealed on the application of a person who was not resident within Queensland.⁴⁰⁵

⁴⁰³ *Administration and Probate Act 1935* (Tas) s 48(1)(a); *Administration and Probate Act 1958* (Vic) s 81(1)(a).

⁴⁰⁴ See the discussion at pp 91-92 of this Discussion Paper of the requirements that apply in these jurisdictions where a non-resident executor or administrator applies for the resealing of a grant.

⁴⁰⁵ See *In the Goods of Bedford* [1902] QWN 63; *Re Manson* [1908] QWN 8; *Re Dawson* [1935] QWN 6.

B. WALRC recommendation

The WALRC recommended that it “should be expressly provided that the executor or administrator need not be within the jurisdiction of the ... resealing court”.⁴⁰⁶

C. Preliminary view

The model legislation should provide expressly that the executor or administrator need not be resident within the jurisdiction of the resealing court, as does the legislation in Tasmania and Victoria. Although the Tasmanian and Victorian provisions are expressed only in terms of an executor or administrator who applies for a reseal, it is considered that the model legislation should also provide that a person appointed to apply for a reseal under a power of attorney given by an executor or administrator need not be resident within the jurisdiction of the resealing court. As such a provision relates to a core matter, it should be located in the model legislation.

D. Issues for consideration

5.12 Should all jurisdictions 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?

5.13 Should this provision be located in the model legislation, rather than in court rules?

(ii) Deemed residence of, and service on, a non-resident executor or administrator

A. The present law

The legislation in the Australian Capital Territory, New South Wales, the Northern Territory and Western Australia provides that every executor or administrator named in any probate or letters of administration and applying for the resealing of such probate or letters of administration is deemed to be resident within the jurisdiction in which resealing is sought.⁴⁰⁷

⁴⁰⁶ *WALRC Report* (1984) at para 3.24 and recommendation 5. The WALRC also recommended that it should be expressly provided that the executor or administrator need not be within the jurisdiction of the granting court. That recommendation will be considered by the National Committee in its report on the administration of estates.

⁴⁰⁷ *Administration and Probate Act 1929* (ACT) s 69(1)(a); *Wills, Probate and Administration Act 1898* (NSW) s 97(1); *Administration and Probate Act* (NT) s 101(1)(a); *Administration Act 1903* (WA) s 53(1).

The legislation in these jurisdictions requires a non-resident executor or administrator to file a local address for service at which notices, processes or documents may be served on the executor or administrator,⁴⁰⁸ and provides that any notice, process or document served at that address is deemed to have been served personally on the executor or administrator.⁴⁰⁹

A commentator on the New South Wales provision has 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”. The commentator also noted 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 Commonwealth legislation dealing with the service of court processes.⁴¹⁰

The rules in Queensland,⁴¹¹ South Australia⁴¹² and Victoria⁴¹³ require the filing of an address for service regardless of whether the executor or administrator is resident outside the jurisdiction. However, these rules do not have the effect of deeming an executor or administrator who applies for the resealing of a grant to be resident within the jurisdiction in which resealing is sought.

B. WALRC recommendation

The WALRC did not make any recommendation about whether an applicant for resealing who is not resident within the jurisdiction in which resealing is sought should be deemed to be resident within that jurisdiction. It did, however, recommend that a non-resident executor or administrator should be required to file a local address for service.⁴¹⁴

408 *Administration and Probate Act 1929* (ACT) s 69(2) (“a document”); *Wills, Probate and Administration Act 1898* (NSW) s 97(2) (“notices and processes”); *Administration and Probate Act* (NT) s 101(2) (“notices and processes”); *Administration Act 1903* (WA) s 53(2) (“notices and processes”).

409 *Administration and Probate Act 1929* (ACT) s 69(3); *Wills, Probate and Administration Act 1898* (NSW) s 97(2); *Administration and Probate Act* (NT) s 101(2); *Administration Act 1903* (WA) s 53(2).

410 *Wills Probate and Administration Service New South Wales* (Butterworths) at para 1489.1, referring to Pt 10 of the *Supreme Court Rules 1970* (NSW) and to the *Service and Execution of Process Act 1901* (Cth). That Act has since been repealed and replaced by the *Service and Execution of Process Act 1992* (Cth). See also Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at 617.

411 A proceeding for the resealing of a grant must be started by application: *Uniform Civil Procedure Rules 1999* (Qld) rr 597(1), 617(2). As an “originating process”, the application must contain, whether the applicant is acting personally or through a solicitor, an address for service. In the case of an applicant who intends to act personally, the address must be not more than 30 kilometres from the issuing registry: *Uniform Civil Procedure Rules 1999* (Qld) r 17(1)(a)(ii). Where a solicitor is appointed to act for the applicant, the application must specify an address for service in Queensland: *Uniform Civil Procedure Rules 1999* (Qld) r 17(1)(b).

412 *The Probate Rules 1998* (SA) r 59.01 requires all “summonses, caveats, citations, warnings and appearances” to contain an address for service.

413 *Supreme Court (General Civil Procedure) Rules 1996* (Vic) r 5.07 requires all originating processes to contain an address for service within Victoria.

414 *WALRC Report* (1984) at para 3.35 and recommendation 13.

C. Preliminary view

All jurisdictions should provide that a non-resident executor or administrator is deemed to be resident in the jurisdiction in which resealing is sought and must file an address for service in that jurisdiction. Service of any notice or process at that address should be deemed to be personal service on the executor or administrator.

Although the existing provisions to this effect in the Australian Capital Territory, 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, it is considered that the model provision should also apply to a person appointed under a power of attorney given by an executor or administrator who applies for the resealing of a grant.

However, such a provision clearly relates to matters of detail and should therefore be located in the rules, rather than in the model legislation.

D. Issues for consideration

5.14 Should all jurisdictions provide expressly that a non-resident executor, administrator or person appointed under power of attorney given by an executor or administrator who applies for the resealing of a grant:

(a) is deemed to be resident in the jurisdiction in which resealing is sought; and

(b) must file a local address for service in the jurisdiction in which resealing is sought?

5.15 If so, should all jurisdictions provide expressly that service of any notice or process at such an address is to be deemed to be personal service on the executor, administrator or attorney?

5.16 Should this provision be located in court rules or in the model legislation?

4. INSTRUMENTS THAT MAY BE RESEALED

(a) All grants of probate and administration, including grants made for special, limited or temporary purposes

(i) The present law

The legislation in all Australian jurisdictions provides that a grant of probate or letters of administration may be resealed, provided the conditions imposed are satisfied.⁴¹⁵ In the Australian Capital Territory, New South Wales, the Northern Territory, Victoria and Western Australia, “administration” is defined to include a grant made for a general, special or limited purpose.⁴¹⁶ In the remaining jurisdictions, it is provided in the rules that a special, limited or temporary grant is not to be resealed except by order of a judge or, in South Australia, the registrar.⁴¹⁷

(ii) WALRC recommendation

The WALRC recommended that it should be possible to reseat all grants of probate and administration, including grants made for special, limited and temporary purposes.⁴¹⁸

(iii) Preliminary view

The WALRC recommendation should be adopted. As it concerns core matters, it is appropriate that it be included in the model legislation.

(iv) Issues for consideration

5.17 Should all jurisdictions provide expressly that it should be possible to reseat all grants of probate and letters of administration, including grants made for special, limited or temporary purposes?

⁴¹⁵ *Administration and Probate Act 1929* (ACT) s 80(1); *Wills, 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).

⁴¹⁶ *Administration and Probate Act 1929* (ACT) s 5(1); *Wills, Probate and Administration Act 1898* (NSW) s 3; *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration Act 1903* (WA) s 3. See the discussion of the types of limited grants that may be made in *Administration of Estates Discussion Paper* (1999) QLRC at 5-6; NSWLRC at paras 2.10-2.11.

⁴¹⁷ *Uniform Civil Procedure Rules 1999* (Qld) r 619; *The Probate Rules 1998* (SA) r 50.08; *Probate Rules 1936* (Tas) r 53.

⁴¹⁸ *WALRC Report* (1984) at para 3.26 and recommendation 7.

5.18 Should this provision be located in the model legislation, rather than in court rules?

(b) Instruments given an effect similar to grants of probate and administration by country of issue

(i) The present law

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.

Whereas the legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Western Australia is directed to the type of document that is sufficient evidence of a grant of probate or administration, the Queensland, South Australian and Victorian legislation is framed in broader terms and refers to the effect of the instrument in question.

A. Australian Capital Territory, New South Wales, Northern Territory, Tasmania and Western Australia

The legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Western Australia defines the terms “probate” and “administration” in almost identical terms.⁴¹⁹ The New South Wales definitions are typical:⁴²⁰

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]

⁴¹⁹ *Administration and Probate Act 1929* (ACT) s 5(1); *Wills, Probate and Administration Act 1898* (NSW) s 3; *Administration and Probate Act* (NT) s 6; *Administration and Probate Act 1935* (Tas) s 3(1) (which refers to the opinion of a judge); *Administration Act 1903* (WA) s 3.

⁴²⁰ *Wills, Probate and Administration Act 1898* (NSW) s 3.

These definitions allow the resealing of an instrument other than the actual grant of probate or letters of administration, such as an exemplification⁴²¹ of probate or administration or some other formal instrument that the court considers to be sufficient evidence of such a grant. However, the terms of these definitions suggest that, in these jurisdictions, resealing is possible only where there has been a grant of probate or administration in the foreign court.⁴²²

B. Queensland

The Queensland legislation contains the following definition of the terms “probate” and “letters of administration”:⁴²³

“**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.

This definition is expressed in much broader terms than the definitions considered above, and enables the resealing of an instrument other than a grant of probate or letters of administration, provided the instrument has, in the country in question, the same effect as that given in Queensland to either type of grant.

C. South Australia

In the South Australian legislation, the definition of “probate” is expressed in almost identical terms to the definition of “probate” in the legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Western Australia,⁴²⁴ except that it refers to the opinion of the registrar, rather than to the opinion of the court.⁴²⁵ The definition of “administration” is substantially the same as the definition of “administration” in those jurisdictions except that, as noted earlier,⁴²⁶ it does not expressly refer to grants for special or limited purposes. The definition is in the following terms:⁴²⁷

421 See note 384 of this Discussion Paper.

422 Note, however, that the Supreme Court of South Australia has taken a contrary view of the meaning of the words “or such other formal evidence of probate ... , as in the opinion of the Registrar, is sufficient”: see *Re Wilson* [1920] SALR 48, which is discussed at p 98 of this Discussion Paper.

423 *British Probates Act 1898* (Qld) s 2. These definitions are virtually identical to the definitions of “probate” and “letters of administration” in s 6 of the *Colonial Probates Act 1892* (UK).

424 See p 95 of this Discussion Paper.

425 *Administration and Probate Act 1919* (SA) s 20.

426 See p 95 of this Discussion Paper.

427 *Administration and Probate Act 1919* (SA) s 20.

“**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.

However, in addition to referring to the types of instruments that are sufficient evidence of a grant of probate or letters of administration, the South Australian legislation enables certain instruments to be resealed if they “correspond” to a grant of probate or letters of administration in South Australia.⁴²⁸ Section 19(1) of the *Administration and Probate Act 1919* (SA) provides:

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, or the United Kingdom, and that in such country it corresponds to a probate of a will or to an administration in this State.

D. Victoria

In Victoria, the term “letters of administration” is defined to include “exemplification of letters of administration” and the term “probate” is defined to include “exemplification of probate”.⁴²⁹ However, in addition to providing for the resealing of probate or administration granted by a court of competent jurisdiction in the United Kingdom or in any of the Australasian States,⁴³⁰ the legislation provides for the resealing of:

- 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;

issued by a court of competent jurisdiction in a country specified under section 88 of the Victorian legislation.⁴³¹

E. Scottish confirmations

The legislation in the Australian Capital Territory, the Northern Territory, Queensland and Victoria, specifically provides that a reference to probate or administration is to be read as including a Scottish confirmation⁴³² - an order

428 See the discussion of *Re Wilson* [1920] SALR 48 at p 98 of this Discussion Paper.

429 *Administration and Probate Act 1958* (Vic) s 80.

430 See the discussion of the definition of this term at p 154 of this Discussion Paper.

431 *Administration and Probate Act 1958* (Vic) s 81(1).

432 *Administration and Probate Act 1929* (ACT) s 83(b); *Administration and Probate Act* (NT) s 114(b); *British Probates Act 1898* (Qld) s 2; *Administration and Probate Act 1958* (Vic) s 87.

granted by a Sheriff Court in Scotland which has an equivalent effect to a grant of probate or administration. In the other jurisdictions, although there are no statutory provisions, case law confirms that it is possible to reseal a Scottish confirmation.⁴³³

For example, in *Re Wilson*,⁴³⁴ an application was made to the Supreme Court of South Australia to reseal a duplicate “testament-testamentar”, a document 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. The Court considered the effect of the instrument in question, finding it to be different in several respects from either a grant of probate or administration:⁴³⁵

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.

Nevertheless, the Court held that, having regard to the definitions of “probate” and “administration” contained in the South Australian legislation,⁴³⁶ the instrument could be resealed.⁴³⁷

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.

(ii) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill provided for the resealing of a “grant of administration”,⁴³⁸ which was defined to mean:⁴³⁹

433 *Dykes v Archer* (1906) 2 Tas LR 1; *Re Wilson* [1920] SALR 48.

434 [1920] SALR 48.

435 *Id* at 52-53.

436 These definitions are discussed at pp 96-97 of this Discussion Paper.

437 *Re Wilson* [1920] SALR 48 at 53.

438 Commonwealth Secretariat draft model bill cl 3(1).

439 Commonwealth Secretariat draft model bill cl 2(1).

... 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.

(iii) WALRC recommendation

The WALRC recommended that instruments that have a similar effect to a grant of probate or administration should be capable of being resealed.⁴⁴⁰

It should be made clear that the grants which can be resealed include instruments which are given an effect similar to grants of probate or administration by the law of the country in a court of which the instrument was first filed or issued, for example a Scottish confirmation. [notes omitted]

This recommendation was based on the definition of “grant of administration” contained in the Commonwealth Secretariat draft model bill.⁴⁴¹

(iv) Preliminary view

The WALRC recommendation should be adopted. It is important that the model legislation incorporate a provision dealing in general terms with all kinds of orders having an effect similar to grants of probate and administration which may be made by a court of competent jurisdiction. Such a provision is broad enough to include Scottish confirmations, without singling them out for special mention.

(v) Issues for consideration

5.19 Should all jurisdictions provide expressly that the grants that can be resealed include instruments that are given an effect similar to grants of probate or administration by the law of the country in a court of which the instrument was first filed or issued?

5.20 Should this provision be located in the model legislation, rather than in court rules?

⁴⁴⁰ *WALRC Report (1984)* at para 3.27. See also *WALRC Report (1984)* at recommendation 8.

⁴⁴¹ *Id* at para 3.27, note 3.

(c) Orders to administer and elections to administer

(i) The present law

A. Orders to administer

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.⁴⁴² In the Australian Capital Territory, 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.

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 Australian Capital Territory, Queensland, South Australia and Western Australia provides that a public trustee may apply for an order to administer in respect of the estate of a person who died leaving property in that jurisdiction if:

- the deceased died intestate (Queensland)⁴⁴³ 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 (Australian Capital Territory, South Australia and Western Australia);⁴⁴⁴
- the deceased left a will, but there is no executor resident in the jurisdiction who is willing and capable of acting;⁴⁴⁵
- 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;⁴⁴⁶
- the estate is liable to waste and the executor (Queensland), or the executor, spouse or next of kin (Australian Capital Territory, South

⁴⁴² *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).

⁴⁴³ *Public Trustee Act 1978* (Qld) s 29(1)(a).

⁴⁴⁴ *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).

⁴⁴⁵ *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)(i); *Public Trustee Act 1941* (WA) s 10(1)(a).

⁴⁴⁶ *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).

Australia and Western Australia), is absent from the locality of the estate, is not known or has not been found;⁴⁴⁷

- 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 trustee⁴⁴⁸ or part of the estate, already partly administered, is unadministered owing to the death, incapacity, insolvency, disappearance or absence from the jurisdiction of the executor or administrator.⁴⁴⁹

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 may be appointed under such an order where “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”.⁴⁵⁰ Similar provisions are also found in the legislation in the Australian Capital Territory and South Australia.⁴⁵¹

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 administration⁴⁵² or probate or letters of administration⁴⁵³ had been granted to the public trustee.

Legislation in the Australian Capital Territory and in the Northern Territory provides specifically that an order to collect and administer may be resealed.⁴⁵⁴

However, the legislation in the Australian States is silent as to whether an order to administer made in another State or Territory or in another country is an instrument that may be resealed. Consequently, whether an order to administer may be resealed in an Australian State will depend on the

447 *Administration and Probate Act 1929 (ACT) s 88(1)(e); 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).*

448 *Public Trustee Act 1978 (Qld) s 31(1).*

449 *Public Trustee Act 1995 (SA) s 9(1)(i).*

450 *Public Trustee Act 1913 (NSW) s 23(1).* Where a person dies intestate, dies leaving a will, but without having appointed an executor, or dies leaving a will having appointed an executor, but the executor is not willing and competent to take probate or is resident out of New South Wales, s 74 of the *Wills, Probate and Administration Act 1898 (NSW)* provides that the Court may appoint “some person” to be the administrator of the estate.

451 *Administration and Probate Act 1929 (ACT) s 92; Public Trustee Act 1995 (SA) s 9(2).*

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

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

454 *Administration and Probate Act 1929 (ACT) s 80(1); Administration and Probate Act (NT) s 111(1).* Both provisions refer to an “order to collect and administer”.

interpretation of the definitions of “probate” and “administration” discussed above⁴⁵⁵ and on whether the legislation is otherwise expressed in terms that are sufficiently broad to apply to an order to administer.

As discussed earlier in this chapter, the legislation in New South Wales, Tasmania and Western Australia defines “probate” and “administration” in terms of whether the instrument in question is sufficient evidence of a grant of probate or administration, rather than in terms of whether the instrument has the same effect as a grant of probate or letters of administration.⁴⁵⁶ Consequently, it would appear that an order to administer could not be resealed under the legislation in these jurisdictions.

In Queensland, the definition of the terms “probate” and “letters of administration”⁴⁵⁷ is arguably broad enough to enable the resealing in Queensland of an order to administer made in an Australian State or Territory.

In South Australia, although the legislation provides for the resealing of a document that “corresponds to a probate of a will or to an administration” in that State,⁴⁵⁸ the extended definition of probate and administration applies only to a document issued in a country other than an Australasian State⁴⁵⁹ or the United Kingdom. Consequently, the South Australian legislation would not enable an order to administer made by the court of an Australian State or Territory to be resealed.

Similarly, 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”,⁴⁶⁰ the resealing of such an order is limited to one made in a country proclaimed under section 88 of the legislation. As that section precludes a proclamation from being made in respect of the “Australasian States”⁴⁶¹ or the United Kingdom,⁴⁶² 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 State”.

455 See pp 95-98 of this Discussion Paper.

456 See pp 95-96 of this Discussion Paper.

457 See p 96 of this Discussion Paper.

458 See p 97 of this Discussion Paper.

459 See the discussion of this term at p 152 of this Discussion Paper.

460 See p 97 of this Discussion Paper.

461 See the definition of this term at p 154 of this Discussion Paper.

462 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.

It is noted that, in *In the Estate of Williams*,⁴⁶³ 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 reseal and whether, given that the Victorian Curator of Intestate Estates was willing to administer the estate, the Court should reseal the order to administer 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.

In England and Wales, where the definition of the terms “probate” and “letters of administration” in the *Colonial Probates Act 1892* (UK) is almost identical to the definition in the Queensland legislation,⁴⁶⁴ the practice is to reseal orders to administer made in favour of either the Public Trustee of New Zealand or the Public Trustee of Queensland.⁴⁶⁵

B. Elections to administer

The legislation in all Australian jurisdictions except South Australia provides that, in certain circumstances, where a person has died leaving property in that jurisdiction, the gross value of which does not exceed a specified amount,⁴⁶⁶ the public trustee or similar officer⁴⁶⁷ in that jurisdiction may file in the registry an election to administer the estate of the deceased person.⁴⁶⁸ Generally, the effect of filing an election is that the public trustee or similar officer is deemed to be the executor or administrator of the estate.⁴⁶⁹

463 [1914] VLR 417.

464 See p 96 of this Discussion Paper.

465 Registrar's Direction (Consolidated Direction), 20 November 1972.

466 The specified amounts for the various jurisdictions are: Australian Capital Territory: \$100,000 (*Administration and Probate Act 1929* (ACT) s 87C(1)(b)); New South Wales: \$50,000 (*Public Trustee Act 1913* (NSW) s 18A(1), (2), (3A)(a), *Public Trustee Regulation 2001* (NSW) cl 34(1)); Northern Territory: \$75,000 where the person died on or after 1 December 1998 and no grant has been made (*Public Trustee Act* (NT) s 53(1), *Public Trustee Regulations* (NT) reg 7(1), Sch 3 Item 2), \$65,000 where the person died on or after 1 December 1998 and the estate has been partly administered (*Public Trustee Act* (NT) s 54(1), *Public Trustee Regulations* (NT) reg 7(1), Sch 3 Item 4), or \$65,000 where the person died before 1 December 1998 (*Public Trustee Act* (NT) ss 53(1), 54(1), *Public Trustee Regulations* (NT) reg 7(2), Sch 4 Items 1, 3); Queensland: \$100,000 (*Public Trustee Act 1978* (Qld) ss 30, 31(2A), (4A)); Tasmania: \$20,000 (*Public Trustee Act 1930* (Tas) s 20(1)); Victoria: \$50,000 (*Trustee Companies Act 1984* (Vic) s 11A(4)); Western Australia: \$10,000 (*Public Trustee Act 1941* (WA) ss 10(4), 14(1)).

467 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).

468 *Administration and Probate Act 1929* (ACT) s 87C; *Public Trustee Act 1913* (NSW) s 18A; *Public Trustee Act* (NT) ss 53, 54; *Public Trustee Act 1978* (Qld) ss 30, 31(4A); *Public Trustee Act 1930* (Tas) s 20; *Trustee Companies Act 1984* (Vic) ss 4 (definition of “trustee company”), 6, 11A, Sch 2 (reference to State Trustees Limited); *Public Trustee Act 1941* (WA) ss 10(4)-(6), 14. Generally, see *Administration of Estates Discussion Paper* (1999) QLRC at 161-164; NSWLRC at paras 11.2-11.12.

469 *Public Trustee Act 1913* (NSW) s 18A(3), (3A)(b); *Public Trustee Act* (NT) ss 53(2), 54(2); *Public Trustee Act 1978* (Qld) ss 32(1), 33(1); *Public Trustee Act 1930* (Tas) s 20(2); *Trustee Companies Act 1984* (Vic) s 11A(3); *Public Trustee Act 1941* (WA) ss 10(5), 14(2). In the Australian Capital Territory, the public trustee has the powers 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).

The legislation in these jurisdictions provides that where, after a 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. It also provides that, in these circumstances, either the election is revoked⁴⁷⁰ or the public trustee must proceed in the ordinary manner to obtain probate or letters of administration.⁴⁷¹

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.⁴⁷² The circumstances in which a trustee company may file an election are similar to the circumstances in which a public trustee in those jurisdictions may do so. 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 specified amount.⁴⁷³

No Australian jurisdiction provides expressly for the resealing of an election to administer made by a public trustee or similar officer or by a trustee company.

In England and Wales, the practice is to reseal an election to administer made by either the Public Trustee of New Zealand or the Public Trustee of Queensland.⁴⁷⁴ The Public Trustee must certify that the election is still in force, and undertake that, in the event of further estate being discovered that would result in the value of the estate exceeding the prescribed value for the election procedure,⁴⁷⁵ the Public Trustee “will not act further in the administration of the estate in England and Wales without obtaining further representation there”.⁴⁷⁶ In relation to an election to administer made by the Public Trustee in Western Australia or Tasmania, the court may require evidence, in the particular case, that the election qualifies as a grant that may be resealed.⁴⁷⁷

470 *Administration and Probate Act 1929* (ACT) s 87C(9); *Public Trustee Act 1930* (Tas) s 20(4).

471 *Public Trustee Act 1913* (NSW) s 18A(5); *Public Trustee Act* (NT) ss 53(6), 54(3); *Public Trustee Act 1978* (Qld) s 33(2); *Public Trustee Act 1930* (Tas) s 20(4); *Trustee Companies Act 1984* (Vic) s 11A(10); *Public Trustee Act 1941* (WA) s 14(4).

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

473 *Trustee Companies Act 1964* (NSW) s 15A, *Public Trustee Act 1913* (NSW) s 18A(5); *Trustee Companies Act 1968* (Qld) ss 12(7), 13(4); *Trustee Companies Act 1953* (Tas) s 10A(6); *Trustee Companies Act 1984* (Vic) s 11A(10); *Trustee Companies Act 1987* (WA) s 10(3).

474 Registrar's Direction (Consolidated Direction), 20 November 1972.

475 See note 466 of this Discussion Paper.

476 Registrar's Direction, 24 March 1958, referred to in Yeldham RF and others (eds), *Tristram and Cooté's Probate Practice* (28th ed, 1995) at para 18.86 (in relation to elections to administer by the Public Trustee of New Zealand) and Registrar's Direction, 18 June 1979 (which provides that the principles that apply to the resealing of elections to administer by the Public Trustee of New Zealand apply to the resealing of elections to administer by the Queensland Public Trustee).

477 Registrar's Direction (Consolidated 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. Such an election may be resealed provided.⁴⁷⁸

- it is certified on behalf of the trustee company that the election is still in force;
- an undertaking is given that, in the event of further estate being discovered in the country in which the election was filed that 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 England without obtaining further representation in the country in which the election was filed; and
- the local ordinance that establishes that the document has the same effect as a grant is produced.

(ii) WALRC recommendation

The WALRC recommended that, upon an appropriate undertaking being provided, it should be possible to reseal an election or order to administer made in favour of a public trustee or curator or other person or body.⁴⁷⁹

It should be possible to reseal elections or orders to administer estates made in favour of a Public Trustee or Curator, or any other person or body, on an undertaking being given that the election or order is still in force and, in the case of an election, 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.

The WALRC observed⁴⁸⁰ that elections and orders made by Australian courts were occasionally resealed in England,⁴⁸¹ and modelled the requirement for an undertaking on the English practice.⁴⁸¹

(iii) Probate Registrars

The Probate Registrars were unanimously of the opinion that orders to administer in favour of a public trustee should be able to be resealed, but not

478 Practice Direction (Resealing: Elections to Administer), 2 March 1982 (1982) 126 SJ 176.

479 *WALRC Report* (1984) at recommendation 9. See also *WALRC Report* (1984) at paras 3.28-3.30.

480 *Id* at para 3.29.

481 See the discussion at pp 104-105 of this Discussion Paper of the practice in England in relation to the resealing of elections to administer.

elections. Their reasoning was that only documents issued under the seal of a court of competent jurisdiction should be capable of being resealed.⁴⁸²

(iv) Preliminary view

A. Orders to administer

The resealing of orders to administer would be covered by the provision already proposed,⁴⁸³ under which the instruments that can be resealed would include instruments that are given an effect similar to a grant of probate or administration by the law of the country in a court of which the instrument was first filed or issued. There would be no need for any other provision.

B. Elections to administer

It should not be possible to reseal an election to administer, as only documents issued under the seal of a court of competent jurisdiction should be capable of being resealed.

In any event, in its Discussion Paper on the administration of estates, the National Committee has proposed that elections should be abolished and that, if an estate cannot be effectively administered informally, a grant should be sought.⁴⁸⁴ Depending on the National Committee's final recommendation on elections, the issue of resealing may well be confined to orders to administer.

(v) Issues for consideration

5.21 Should the model legislation provide that an order to administer made in favour of a public trustee or similar officer may be resealed?⁴⁸⁵

5.22 Should the model legislation provide that an election to administer may be resealed?

5.23 If so, should the model legislation provide that an application for the resealing of an election to administer may be made:

⁴⁸² *Report of the Conference of Probate Registrars* (1990) at 7.

⁴⁸³ See p 99 of this Discussion Paper.

⁴⁸⁴ *Administration of Estates Discussion Paper* (1999) QLRC at 163-164; NSWLRC at paras 11.10-11.12.

⁴⁸⁵ The issue of whether it should be possible for an application for resealing to be made by a public trustee in whose favour an order to administer is made is discussed at pp 75 and 78 of this Discussion Paper.

(a)	in the case of an election to administer filed by a public trustee or similar officer - by the public trustee or similar officer who filed the election;
(b)	in the case of an election to administer filed by a trustee company - by the trustee company that filed the election, provided that the trustee company complies with any procedural requirements relating to an application for resealing made by a trustee company;⁴⁸⁶
(c)	upon an undertaking being given by the public trustee or similar officer or trustee company that, in the event of further estate being discovered in the jurisdiction in which the election was filed that 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 grant in the jurisdiction in which the election was filed?

5. THE RESEALING PROCESS

(a) Applying in person or through a legal representative

(i) The present law

In Tasmania and Victoria, the legislation expressly permits an application for the resealing of a grant to be made by the executor or administrator or person authorised by power of attorney either in person or through a legal practitioner.⁴⁸⁷ In South Australia, the rules contain a similar provision.⁴⁸⁸

In the Australian Capital Territory,⁴⁸⁹ New South Wales,⁴⁹⁰ the Northern

⁴⁸⁶ See pp 88-90 of this Discussion Paper in relation to applications made by trustee companies.

⁴⁸⁷ *Administration and Probate Act 1935* (Tas) s 48(1); *Administration and Probate Act 1958* (Vic) s 81(1).

⁴⁸⁸ *The Probate Rules 1998* (SA) r 50.01(b).

⁴⁸⁹ *Supreme Court Rules* (ACT) O 8 r 1.

⁴⁹⁰ The *Rules of the Supreme Court 1970* (NSW) provide that proceedings in the Court may be commenced only by summons or by statement of claim: Pt 4 r 1. The Rules further provide that non-contentious proceedings for resealing shall be commenced by summons, and that contentious proceedings for resealing shall be commenced by summons where there is no defendant and by statement of claim where there is a defendant: Pt 78 r 8(1) (non-contentious proceedings); Pt 78 r 36 (contentious proceedings). A person bringing either type of proceeding may do so by a solicitor or in person: Pt 4 r 4.

Territory,⁴⁹¹ Queensland⁴⁹² and Western Australia,⁴⁹³ the rules also permit an application for the resealing of a grant to be made in person or through a legal practitioner, although the relevant rules are ones of general application and are not limited in their operation to applications for resealing.

(ii) Preliminary view

It is considered appropriate to provide expressly that an applicant for resealing should be able to apply either in person or through a legal practitioner. Since this is essentially a matter of detail, it is proposed that the provision should be located in court rules, rather than in the model legislation itself.

(iii) Issues for consideration

5.24 Should an applicant for the resealing of a grant be able to apply through a legal practitioner?

5.25 Should a provision to this effect be located in court rules, rather than in the model legislation?

(b) Resealing by the court or the registrar

(i) The present law

In each of the Australian States and Territories, the legislative provisions on resealing provide that a grant of probate or letters of administration or other

⁴⁹¹ *Supreme Court Rules* (NT) rr 1.14, 88.01(2).

⁴⁹² In Queensland, O 71 r 65(2) of the former *Rules of the Supreme Court 1900* provided in relation to an application to reseal a grant of probate or letters of administration:

The application may be made by the executor or administrator, or a person lawfully authorised for the purpose by such executor or administrator, either in person or by solicitor. [emphasis added]

The words “either in person or by solicitor” have been omitted from r 616 of the of the *Uniform Civil Procedure Rules 1999* (Qld) (Who may apply for reseal of foreign grant). However, the effect of the *Uniform Civil Procedure Rules 1999* (Qld) is still to allow an application for resealing to be made through a solicitor. A proceeding for the resealing of a foreign grant is required to be started by application: *Uniform Civil Procedure Rules 1999* (Qld) rr 597(1), 617(2). As an originating process, the application must be signed by the applicant or by the applicant’s solicitor: *Uniform Civil Procedure Rules 1999* (Qld) r 19(1). The Rules also provide that every act required or permitted to be done by a party in the conduct of a proceeding in a court may be done by the party’s solicitor: *Uniform Civil Procedure Rules 1999* (Qld) r 985(1).

⁴⁹³ *Rules of the Supreme Court 1971* (WA) O 4 r 3; *Non-contentious Probate Rules 1967* (WA) r 3(1).

instrument is ultimately to be sealed with the seal of the court.⁴⁹⁴ However, most of the statutes give the registrar an important role in the process - for example, requiring that the necessary documents be produced to, and copies lodged with, the registrar.⁴⁹⁵ In some jurisdictions the rules specifically provide that the registrar can exercise the powers of the court,⁴⁹⁶ and in the other jurisdictions it appears that this is assumed to follow from the statutory references to the part played by the registrar.

In some jurisdictions the registrar's power is subject to specific limitations.

In Queensland, the registrar may not reseal a grant if a caveat against resealing has been filed.⁴⁹⁷ The position is similar in the Australian Capital Territory and the Northern Territory, where the registrar may not, without an order of the court, reseal a grant of probate or administration if a caveat against resealing has been filed.⁴⁹⁸

In the Australian Capital Territory and in Queensland, the registrar may at any time refer an application for resealing to the court,⁴⁹⁹ in which case, in the Australian Capital Territory, the grant shall not be resealed except under a court order.⁵⁰⁰ In the Northern Territory, the legislation does not confer on the registrar a power to refer a resealing application to the court, although it provides that the registrar may not, without an order of the court, reseal a grant of probate or administration or an order to collect and administer if it appears doubtful to the registrar whether the instrument should be resealed.⁵⁰¹ In those circumstances, the registrar must serve a notice on the applicant giving his or her reasons for not dealing with the application.⁵⁰² An applicant who is served with such a notice may apply to the court for the resealing.⁵⁰³

494 *Administration and Probate Act 1929 (ACT)* s 80(1); *Wills, 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).

495 The *British Probates Act 1898 (Qld)* s 4 is the only statute in which the registrar receives no mention.

496 *Supreme Court Rules 1970 (NSW)* Pt 78 r 5(1)(a); *Uniform Civil Procedure Rules 1999 (Qld)* rr 601, 617(2); *Non-contentious Probate Rules 1967 (WA)* r 4. The Western Australian rules provide for an appeal from the Registrar to a Judge in Chambers: *Non-contentious Probate Rules 1967 (WA)* r 5.

497 *Uniform Civil Procedure Rules 1999 (Qld)* rr 601(1)(a), 617(2).

498 *Administration and Probate Act 1929 (ACT)* s 80(1A), *Supreme Court Rules (ACT)* O 72 r 19(a)(i); *Administration and Probate Act (NT)* s 111(3)(a), *Supreme Court Rules (NT)* r 88.89(1)(a).

499 *Administration and Probate Act 1929 (ACT)* s 80(1B); *Uniform Civil Procedure Rules 1999 (Qld)* rr 601(2), 617(2).

500 *Administration and Probate Act 1929 (ACT)* s 80(1B).

501 *Administration and Probate Act (NT)* s 111(3)(b).

502 *Supreme Court Rules (NT)* r 88.89(1)(c).

503 *Supreme Court Rules (NT)* r 88.89(2).

In Queensland and Tasmania, special, limited and temporary grants⁵⁰⁴ may not be resealed without an order of a judge.⁵⁰⁵ In South Australia such grants may not be resealed except by order of the registrar.⁵⁰⁶

(ii) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill provided that the registrar would have the function of causing a grant to be resealed, once satisfied that the statutory conditions had been met.⁵⁰⁷ However, the draft bill also provided that the registrar was empowered, if he or she thought fit, at any time before resealing to refer an application to the Supreme Court, in which case the grant could not be resealed except in accordance with a court order.⁵⁰⁸ The draft bill further provided that the registrar was not to proceed with an application for resealing without a court order if a caveat against resealing had been lodged.⁵⁰⁹

(iii) WALRC recommendation

The WALRC recommended that the duty of resealing should be imposed on the registrar, rather than on the court,⁵¹⁰ but that “there should be provision for reference by the Registrar to the court in a proper case, and for an appeal to the court against the Registrar’s decision”.⁵¹¹

This recommendation was generally consistent with the Commonwealth Secretariat draft model bill, although that bill contained some detailed provisions not specifically recommended by the WALRC.⁵¹²

(iv) Preliminary view

Provisions to the effect of those in the Commonwealth Secretariat draft model bill should be adopted. Those provisions are consistent with the spirit of the WALRC recommendations, but provide more detail.⁵¹³

504 See the discussion of special and limited grants in *Administration of Estates Discussion Paper* (1999) QLRC at 5-6; NSWLRC at paras 2.10-2.11.

505 *Uniform Civil Procedure Rules 1999*(Qld) r 619; *Probate Rules 1936*(Tas) r 53.

506 *The Probate Rules 1998*(SA) r 50.08.

507 Commonwealth Secretariat draft model bill cl 5(1).

508 Commonwealth Secretariat draft model bill cl 5(5).

509 Commonwealth Secretariat draft model bill cl 4(3).

510 *WALRC Report* (1984) at para 3.32 and recommendation 10.

511 *Ibid.*

512 See p 110 of this Discussion Paper.

513 The provision relating to caveats is set out at p 134 of this Discussion Paper.

(v) Issues for consideration

5.26	Should the registrar be given the function of causing a grant to be resealed, once satisfied that the statutory conditions have been met?
5.27	Should the registrar be empowered to refer an application for the resealing of a grant to the Supreme Court at any time before resealing if the registrar thinks fit?
5.28	Should it be provided that, where an application for the resealing of a grant is so referred, the grant cannot be resealed except in accordance with a court order?
5.29	Should these provisions be located in the model legislation or in court rules?

(c) Process by which an application for resealing must be commenced**(i) The present law**

Each jurisdiction has its own rules dealing with the process by which an application for resealing must be commenced. In the Australian Capital Territory, the rules provide for an application accompanied by an affidavit, all in prescribed forms.⁵¹⁴ In New South Wales, proceedings for resealing must be commenced by either summons or statement of claim, depending on whether the proceedings are non-contentious or contentious and on whether there is a defendant.⁵¹⁵ In the Northern Territory, proceedings are commenced by application in accordance with a prescribed form and supported by affidavit.⁵¹⁶ In Queensland, proceedings must be commenced by application.⁵¹⁷ In South Australia, the application must be accompanied by the oath of the applicant (or, in the case of a trustee company, by the oath of an officer of the company) in a prescribed form.⁵¹⁸ In Tasmania, the process is commenced by filing the necessary documents in the registry; there is no formal process, but the application must be accompanied by the oath of the

⁵¹⁴ *Supreme Court Rules (ACT)* O 72 rr 5, 14A.

⁵¹⁵ See note 490 of this Discussion Paper.

⁵¹⁶ *Supreme Court Rules (NT)* r 88.07.

⁵¹⁷ *Uniform Civil Procedure Rules 1999 (Qld)* rr 597, 617(2).

⁵¹⁸ *The Probate Rules 1998 (SA)* r 50.02.

executor, administrator or attorney in the prescribed form.⁵¹⁹ In Victoria, the process is commenced by filing an originating motion, in the same way as a normal application for an original grant.⁵²⁰ In Western Australia, the process is commenced by ex parte motion.⁵²¹

(ii) Preliminary view

The WALRC did not recommend any uniform means of initiating a resealing application; nor is any specific proposal made in this Discussion Paper.

A uniform procedure for resealing would, however, be a considerable advantage. At present, a person who wishes to apply for the resealing of an overseas grant in two or more Australian jurisdictions will have to contend with a variety of different procedural rules. This is likely to cause problems that would be avoided if all jurisdictions had a common form of initiating applications. In most cases, a person contemplating civil proceedings is unlikely to initiate an action in two or more jurisdictions at the same time. Resealing is a special case where, if the deceased left assets in several jurisdictions, the personal representative is likely to have to bring proceedings in each of those jurisdictions more or less simultaneously.

(iii) Issues for consideration

5.30 Should there be a uniform procedure for initiating a resealing application?

5.31 If so, what form should it take?

(d) Documents that must be produced to the court

(i) The present law

In all jurisdictions the applicant is required to produce the grant of probate or letters of administration (or other order⁵²²) to the registrar, and deposit a copy

⁵¹⁹ *Probate Rules 1936* (Tas) r 46.

⁵²⁰ *Administration and Probate Rules 1994* (Vic) r 2.02.

⁵²¹ *Non-contentious Probate Rules 1967* (WA) r 6(1).

⁵²² See the discussion at pp 95-106 of this Discussion Paper of other instruments that may be resealed.

with the registrar or, in the case of Queensland, with the Supreme Court.⁵²³

In all jurisdictions, except Queensland, the legislation provides that a reference to a grant of probate or administration includes an exemplification⁵²⁴ of probate or letters of administration.⁵²⁵ The Queensland legislation provides that a duplicate of any probate or letters of administration, sealed with the seal of the granting court, or a copy certified as correct by or under the authority of the granting court, is sufficient.⁵²⁶ In addition, the rules make it clear 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”.⁵²⁷

In some jurisdictions, the rules contain further provisions about documentation. The New South Wales and Northern Territory rules require that all “relevant original documents” must be produced.⁵²⁸ In Queensland, the rules provide that the “grant or copy of the grant of probate, or administration with the will, to be sealed, and the copy to be filed in the registry, must include copies of all testamentary papers admitted to probate”.⁵²⁹ There is a similarly worded provision in Tasmania.⁵³⁰ Under the South Australian rules, 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”.⁵³¹ In Western Australia, the grant lodged for resealing is to include “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”.⁵³²

523 *Administration and Probate Act 1929* (ACT) s 80(1); *Wills, 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(1); *Administration and Probate Act 1958* (Vic) s 81(1); *Administration Act 1903* (WA) s 61(1).

524 See note 384 of this Discussion Paper.

525 *Administration and Probate Act 1929* (ACT) s 5(1); *Wills, 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 definitions of “probate” and “administration” in these provisions are set out at pp 95-97 of this Discussion Paper.

526 *British Probates Act 1898* (Qld) s 4(4). See *Re Whittingham* [1905] QWN 17.

527 *Uniform Civil Procedure Rules 1999* (Qld) r 618(3). Case law had earlier confirmed that the statutory provision allowed the court to reseat an exemplification of probate or administration: *Re Manson* [1908] QWN 8; *Re Levi* [1908] QWN 30; *Re Rubin* [1921] QWN 25.

528 *Supreme Court Rules 1970* (NSW) Pt 78 r 28(4); *Supreme Court Rules* (NT) r 88.26(4).

529 *Uniform Civil Procedure Rules 1999* (Qld) r 618(1).

530 *Probate Rules 1936* (Tas) r 51.

531 *The Probate Rules 1998* (SA) r 50.07.

532 *Non-contentious Probate Rules 1967* (WA) r 43(1).

The rules in most jurisdictions contain provisions setting out the matters that must be included in the affidavit or oath sworn by the applicant.⁵³³

(ii) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill required the applicant to produce the grant of administration or an exemplification or duplicate of the grant sealed by the court that made the grant, or a copy of such a document, certified as a correct copy by or under the authority of that court.⁵³⁴ Where 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.⁵³⁵

(iii) WALRC recommendation

The WALRC recommended that it should be possible for a grant to be resealed on production:⁵³⁶

... 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]

(iv) Probate Registrars

The Probate Registrars agreed with the WALRC recommendation, subject to the qualification that a copy of the grant, exemplification or duplicate should be certified as such under seal.⁵³⁷

(v) Preliminary view

The WALRC recommendation is essentially a compendious statement of the requirements of the existing law. It is proposed, subject to two modifications, that the WALRC recommendation should be adopted. The two modifications concern the situation where a copy of the grant, or of an exemplification of the grant is produced. The copy should, as suggested by the Probate Registrars,

533 *Supreme Court Rules*(ACT) O 72 r 14A; *Supreme Court Rules 1970* (NSW) Pt 78 r 28; *Supreme Court Rules* (NT) r 88.26; *The Probate Rules 1998* (SA) r 50.02; *Probate Rules 1936* (Tas) r 46. In Queensland, the *Uniform Civil Procedure Rules 1999* (Qld) do not contain a rule setting out the matters to be included in the oath, although there is an approved form for an affidavit in support of an application for resealing (Form 113).

534 Commonwealth Secretariat draft model bill cl 3(4)(a).

535 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.

536 *WALRC Report* (1984) at para 3.33 and recommendation 11.

537 *Report of the Conference of Probate Registrars*(1990) at 7.

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.

An applicant for resealing should be required to:

- produce to the registrar:
 - * 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 or either, provided it is certified under seal as a correct copy by or under the authority of the granting court; and
- deposit a copy of the grant of probate or letters of administration with the registrar.

Under the present law these requirements are set out in legislation. It might be thought that they are matters of detail and that they would therefore be more appropriately located in the rules. However, as they operate as conditions that must be satisfied before the court can exercise its discretion to reseal a grant, it is proposed that they should appear in the model legislation.

It is 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 included in the document required as a precondition for resealing. This provision should be set out in rules of court, after the manner of the existing rules in a number of jurisdictions.

(vi) Issues for consideration

5.32 Should an applicant for resealing be required:

(a) to produce to the registrar:

- (i) the grant of probate or letters of administration; or**
- (ii) 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**

(iii)	a copy of the grant of probate or letters of administration, or 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;
(b)	to deposit a copy of the grant of probate or letters of administration with the registrar; and
(c)	to produce a copy of the will (if there is one), if this is not included in the documentation already referred to?
5.33	If so, should these provisions, or any of them, be located in court rules or in the model legislation?

(e) The power to reseal

(i) The present law

The core provision of the resealing legislation, which is in essence the same in all jurisdictions, allows the court to reseal the grant if the various conditions dealt with above have been satisfied - namely, the making of a grant of probate or administration or similar order by a court of competent jurisdiction in a recognised country, the production of the specified documents, and the deposit of copies with the court.⁵³⁸ It is clear that the relevant provisions in all States and Territories give the court a discretion whether or not to reseal the grant, even if the specified conditions are satisfied. In most cases, the legislation provides that the court “may” reseal the grant. In Tasmania and Victoria, the legislation provides that, on satisfaction of the specified conditions, the court “shall” reseal the grant, although it is clear that the court still has a discretion whether or not to reseal.⁵³⁹

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Administration and Probate Act 1929 (ACT) s 80(1); *Wills, 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 for example *In the Will of Buckley* (1889) 15 VLR 820; *In the Estate of Williams* [1914] VLR 417; and *Re Carlton* [1924] VLR 237 at 242-243. For other cases on the court’s discretion see *Re MacNeil* (1901) 1 SR (NSW) B & P 20 at 24; *Public Trustee of New Zealand v Smith* (1924) 42 WN (NSW) 30 at 31; *In the Will of Lambe* [1972] 2 NSWLR 273 at 279. However, in *Drummond v The Registrar of Probates (South Australia)* (1918) 25 CLR 318, Isaacs J held (at 321) that the word “shall” in the similar provision in s 26(1) of the *Administration and Probate Act 1891* (SA), now repealed, was mandatory. The current South Australian provision, s 17 of the *Administration and Probate Act 1919* (SA), 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.

(ii) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill emphasised the element of discretion by providing that, if the application has been duly made, the registrar may, if satisfied that all necessary conditions have been met, cause the grant to be resealed.⁵⁴⁰

(iii) WALRC recommendation

The WALRC recommended that the proposed uniform laws “should specifically state that the courts have a residual discretion to refuse resealing”.⁵⁴¹ It commented:⁵⁴²

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. The Commission therefore considers that the uniform code of procedure should specifically state that courts have a residual discretion to refuse resealing. [notes omitted]

(iv) Preliminary view

It is important to make it quite clear that the court has a discretion in the matter of resealing. Although this is essentially a matter of drafting, it is proposed that the model legislation should follow the Commonwealth Secretariat model provision by providing that, if the specified conditions are satisfied, the court may reseal a grant.

(v) Issue for consideration

5.34 Should the model legislation, in order to emphasise that resealing is discretionary, provide that, if the specified conditions are satisfied, the court may grant resealing?

⁵⁴⁰ Commonwealth Secretariat draft model bill cl 5(1).

⁵⁴¹ *WALRC Report* (1984) at para 3.22 and recommendation 3.

⁵⁴² *Id* at para 3.22.

(f) Finding as to domicile**(i) The present law**

There are three different provisions concerned with the domicile of the deceased which are in force in various jurisdictions:

- In the Australian Capital Territory, the court may not make or reseal a grant unless it has made a finding with respect to the domicile of the deceased at the time of death.⁵⁴³
- In New South Wales and the Northern Territory, if it appears in proceedings for a grant or for the resealing of a grant 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.⁵⁴⁴
- In Tasmania, if 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 as to the deceased's domicile.⁵⁴⁵ Similarly, in South Australia, if the domicile of the deceased as sworn to in the affidavit differs from that suggested by the description in the grant, the registrar may require further evidence as to the deceased's domicile.⁵⁴⁶

(ii) WALRC Report

The WALRC did not make any recommendation corresponding to any of the above provisions, but did recommend that, where a grant of probate or administration was made or resealed in the domicile of the deceased, the domicile should be noted on the grant.⁵⁴⁷ This recommendation was made in the context of its proposals for a scheme of automatic recognition throughout Australia of grants made by the deceased's domicile.⁵⁴⁸

543 *Administration and Probate Act 1929* (ACT) s 8C.

544 *Supreme Court Rules 1970* (NSW) Pt 78 r 12; *Supreme Court Rules* (NT) r 88.11.

545 *Probate Rules 1936* (Tas) r 49. For the former Queensland provision to the same effect, not retained in the new rules, see *Rules of the Supreme Court 1900* (Qld) O 71 r 72.

546 *The Probate Rules 1998* (SA) r 50.05.

547 *WALRC Report* (1984) at para 7.20.

548 See Chapter 4 of this Discussion Paper.

(iii) Preliminary view

No preliminary view is expressed on this issue.

(iv) Issue for consideration**5.35 Should the court rules in all jurisdictions provide that:**

- (a) where it appears in proceedings for resealing that the deceased was domiciled out of the jurisdiction, the court may require evidence of:**
- (i) the domicile of the deceased;**
 - (ii) the requirements of the law of the domicile as to the validity of any will made by the deceased; and**
 - (iii) the law of the domicile as to the persons entitled on distribution of the estate; and/or**
- (b) 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?**

(g) Time limits**(i) The present law**

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 death of the deceased, the reason for the delay must be certified to the registrar, who, if not satisfied with the certificate, "shall require such proof of the cause of delay as he may think fit".⁵⁴⁹ No other jurisdiction has an equivalent provision.

In the Northern Territory, if an application for resealing is made after a lapse of two or more years from the death of the deceased, the affidavit in support of the application must state whether a prior application for resealing has been made in connection with the estate.⁵⁵⁰

⁵⁴⁹ *Probate Rules 1936 (Tas)* r 52.

⁵⁵⁰ *Supreme Court Rules (NT)* r 88.26(1)(b)(iv).

(ii) Preliminary view

It is not proposed to adopt these provisions as model rules of procedure, as they are not considered necessary.

(iii) Issues for consideration

5.36 Should all jurisdictions adopt a rule of court requiring the reason for delay to be certified to the registrar when an application for the resealing of a grant is made after a lapse of three years (or some other specified period) from the death of the deceased, and giving the registrar powers to require further proof of the cause of delay if not satisfied with the certificate?

5.37 Should all jurisdictions adopt a rule of court requiring the applicant for resealing, where there has been a delay of or exceeding a specified period in making the application, to depose to whether a prior application for resealing has been made in connection with the estate?

6. EFFECTS OF RESEALING

Legislation in all jurisdictions deals with the effects of resealing a grant of probate or letters of administration. The main effects of the legislation are that, on resealing:

- the resealed grant has effect as if it had been granted by the resealing jurisdiction;
- the duties and liabilities of a personal representative are, in most jurisdictions, imposed on the person who applied for the reseal, which has the effect of allowing that person to act as the personal representative within the resealing jurisdiction; and
- in some jurisdictions, the person who applies for the reseal is deemed, for all purposes, to be the personal representative of the estate within the resealing jurisdiction.

These matters are discussed below.

(a) Resealed grant of same force and effect as if granted by the resealing court

(i) The present law

A key provision of the resealing legislation in all jurisdictions is that a grant, when resealed, has the same force, effect and operation as if it had been originally granted by the resealing court.⁵⁵¹

The effect of resealing “is simply to put the administrator under it in the same position as if he were an original administrator”.⁵⁵² 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.⁵⁵³

In *Holmes v Permanent Trustee Company of New South Wales Limited*,⁵⁵⁴ 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.⁵⁵⁵ It was not necessary for an executor to be appointed under an original grant because:⁵⁵⁶

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.

551 *Administration and Probate Act 1929* (ACT) s 80(2)(a); *Wills, 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).

552 *Re Ralston* [1906] VLR 689 at 693.

553 *Public Trustee of New Zealand v Smith* (1925) 42 WN (NSW) 30. In that case, Harvey J held that the resealing in New South Wales of a New Zealand grant in favour of the Public Trustee of New Zealand gave the Public Trustee of New Zealand good title to convey real estate situated in New South Wales. Harvey J declined to follow the decision of the Full Court of the Supreme Court of Queensland in *Re Heathcote* [1903] St R Qd 57, commenting (at 31), “I must confess I do not follow the reasoning on which it was based”.

In *Re Heathcote* [1903] St R Qd 57, the Full Court of the Supreme Court of Queensland held that the resealing in Queensland of letters of administration that had been granted in New South Wales did not vest in the administrator realty situated in Queensland. Griffith CJ, delivering the judgment of the Court, held (at 60) that, if the resealing in Queensland of letters of administration granted in New South Wales vested Queensland realty in the administrator appointed under the New South Wales grant, “succession to that land in Queensland would be determined to a certain extent by the act of the Supreme Court in New South Wales”. It has been suggested that, because s 111(2)(a) of the *Land Title Act 1994* (Qld) allows the registrar to register a lot in the name of a person as personal representative if the person has obtained the resealing of a grant of representation in Queensland, the difficulty presented by the decision in *Re Heathcote* has been overcome: de Groot JK, *Wills, Probate and Administration Practice (Queensland)* (looseleaf) at para 431. See also the criticism of *Re Heathcote* in Lee WA and Preece AA, *Lee’s Manual of Queensland Succession Law* (5th ed, 2001) at para 854.

554 (1932) 47 CLR 113.

555 Id per Rich J (with whom Evatt and McTiernan JJ agreed) at 118-119.

556 Ibid.

(ii) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill included a provision dealing with the effect of resealing that was similar to the legislative provisions found in all Australian jurisdictions. Clause 6(1) provided:

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.

(iii) WALRC recommendation

The WALRC recommended that the uniform resealing legislation should include a provision to the effect that a grant, when resealed, has the same force, effect and operation as if it had been originally granted by the resealing court.⁵⁵⁷

(iv) Preliminary view

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.

(v) Issue for consideration

5.38 Should the model legislation provide that a grant, when resealed, is to have the same force, effect and operation as if it had been originally granted by the resealing court?

(b) Imposition of duties and liabilities of a personal representative**(i) Introduction**

Legislation in all jurisdictions except Queensland provides that, on the resealing of a grant of probate or letters of administration, certain specified persons (usually the applicant for resealing) are to perform the same duties

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WALRC Report (1984) at para 3.53 and recommendation 17.

and be subject to the same liabilities as if the grant of probate or letters of administration had been originally granted by that court.⁵⁵⁸

The main differences between the provisions in the various jurisdictions concern the persons on whom the various duties and liabilities are imposed and the terms in which those duties and liabilities are expressed.

(ii) The present law

A. The persons on whom the relevant duties and liabilities are imposed

In the Australian Capital Territory and the Northern Territory, the duties and liabilities are imposed on the person who applied for the resealing of the grant.⁵⁵⁹ The provision in the Australian Capital Territory legislation states:

- (2) Where a probate or administration is sealed under subsection (1) -
 - (a) ...
 - (b) the person who made the application under subsection (1) shall perform the same duties and be subject to the same liabilities as if the probate or administration had been originally granted by the court and he or she was the person to whom the probate or administration had been so granted. [emphasis added]

Accordingly, in the Australian Capital Territory and in the Northern Territory, the person who is, in effect, entitled to act as the personal representative upon the resealing of a grant will be - depending on who applied for the resealing - the executor or administrator, the executor by representation, the person appointed under a power of attorney by the executor or administrator to make the application or, in the case of an order to collect and administer, the public trustee to whom the order was granted.⁵⁶⁰

The legislation in Tasmania and in Victoria is similar to that which applies in the Australian Capital Territory and in the Northern Territory. It imposes the relevant duties and liabilities on the executor, administrator or person authorised by power of attorney who produced and deposited the relevant

⁵⁵⁸ *Administration and Probate Act 1929* (ACT) s 80(2)(b); *Wills, Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act* (NT) s 111(4)(b); *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(3); *Administration Act 1903* (WA) s 61(2).

⁵⁵⁹ *Administration and Probate Act 1929* (ACT) s 80(2)(b); *Administration and Probate Act* (NT) s 111(4)(b). There are also equivalent provisions dealing with the resealing of orders to collect and administer: *Administration and Probate Act 1929* (ACT) s 80(3); *Administration and Probate Act* (NT) s 111(5).

⁵⁶⁰ See the discussion of persons who may apply for the resealing of a grant at pp 71-80 of this Discussion Paper.

documents for the purposes of obtaining the resealing of the grant.⁵⁶¹

However, in New South Wales and Western Australia, although a person authorised under a power of attorney by the executor or administrator may produce and deposit the relevant documents for the purpose of obtaining a reseal,⁵⁶² the duties and liabilities of a personal representative are expressed to apply only to the executor or administrator; the legislation does not refer to the duties or liabilities of a person authorised by the executor or administrator to produce and deposit the relevant documents.⁵⁶³ For example, section 107(2) of the *Wills, Probate and Administration Act 1898* (NSW) provides:

When so sealed such probate or letters of administration shall have the like force and effect and the same operation in New South Wales, and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities as if such probate or administration had been originally granted by the Court.

Similarly, in South Australia, although the attorney of an executor or administrator is authorised to apply for the resealing of a grant,⁵⁶⁴ the relevant duties and liabilities are expressed to apply only to the executor or administrator.⁵⁶⁵

The legislation in Queensland is silent as to the persons on whom the relevant duties and liabilities are imposed when a grant is resealed.

B. The nature of the duties and liabilities imposed when a grant is resealed

As noted above, there are slight variations between the jurisdictions as to the nature of the obligations that are imposed when a grant is resealed. In particular, the legislation in some jurisdictions refers to “rights” in addition to “duties and liabilities”.

561 *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(3). Note that the legislation in Tasmania and Victoria does not refer to an applicant for a reseal, but simply specifies the person who may produce and deposit the relevant documents for the purpose of obtaining a reseal. See the discussion of this issue at pp 71-72 of this Discussion Paper.

562 See pp 71-72 of this Discussion Paper.

563 *Wills, Probate and Administration Act 1898* (NSW) s 107(2); *Administration Act 1903* (WA) s 61(2).

564 *The Probate Rules 1998* (SA) r 50.01(b), which is discussed at p 71 of this Discussion Paper.

565 *Administration and Probate Act 1919* (SA) s 17.

Legislation in the Australian Capital Territory and in the Northern Territory provides that, on the resealing of the grant, the applicant:⁵⁶⁶

... shall perform the same duties and be subject to the same liabilities as if the probate or administration had been originally granted by the court and he or she was the person to whom the probate or administration had been so granted.

The legislation in New South Wales and Western Australia is expressed in similar terms, providing that, on resealing, the executor or administrator under the grant:⁵⁶⁷

... shall perform the same duties and be subject to the same liabilities as if such probate or administration had been originally granted by the Court.

The Tasmanian and Victorian provisions, which are virtually identical, are expressed in slightly broader terms.⁵⁶⁸ In addition to imposing on a person who obtains the resealing of a grant the duties, liabilities and obligations of a personal representative, these provisions also confer on such a person the rights of a personal representative. For example, the Victorian legislation provides that the person who obtains the resealing of a grant:⁵⁶⁹

... shall perform the same duties and shall have the same rights, and ... shall be subject to the same liabilities and obligations as if such probate or letters of administration or grant or order had been originally granted by the Supreme Court of Victoria.

The legislation in South Australia is also framed in quite broad terms. Although it omits the reference to “obligations” that is contained in the Tasmanian and Victorian provisions, it confers on an executor or administrator who obtains the resealing of a grant both the rights and powers of a personal representative.⁵⁷⁰

... every executor and administrator thereunder shall, ... have the same rights and powers, perform the same duties, and be subject to the same liabilities, as if such probate or administration had been originally granted by the Supreme Court.

566 *Administration and Probate Act 1929* (ACT) s 80(2)(b). The Northern Territory provision is in almost identical terms: *Administration and Probate Act* (NT) s 111(4)(b).

567 *Administration and Probate Act 1898* (NSW) s 107(2); *Administration Act 1903* (WA) s 61(2).

568 *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(3).

569 *Administration and Probate Act 1958* (Vic) s 81(3). See the discussion at pp 128-129 of this Discussion Paper of how this provision, in conjunction with s 85 of the *Administration and Probate Act 1958* (Vic) significantly affects the position of a person who is authorised by power of attorney to apply for the resealing of a grant.

570 *Administration and Probate Act 1919* (SA) s 17.

The legislation in Queensland is silent as to nature of the duties and liabilities imposed when a grant is resealed.

(iii) Commonwealth Secretariat draft model bill

A. The persons on whom the relevant duties and liabilities are imposed

It was noted above, in relation to the issue of persons who are entitled to apply for the resealing of a grant, that clause 3(2)(c) of the Commonwealth Secretariat draft model bill 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.⁵⁷¹ However, the effect of clause 6(2) of the Commonwealth Secretariat draft model bill 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.

Clause 6(2) provided that the relevant duties and liabilities would be imposed on:

- the personal representative or grantee, where the application was made by the personal representative or grantee or by a legal practitioner on behalf of the personal representative or grantee; or
- the person authorised by power of attorney given by the personal representative or grantee, where the application was made by the authorised person or by a legal practitioner on his or her behalf.

B. The nature of the duties and liabilities imposed when a grant is resealed

Clause 6(2) of the Commonwealth Secretariat draft model bill provided that, on resealing, the personal representative or grantee or the duly authorised person who made the application for resealing should perform the same duties and be subject to the same liabilities as if he or she were the personal representative under a probate or letters of administration granted by the Supreme Court that resealed the grant:

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See p 75 of this Discussion Paper.

Effects of resealing

- (1) ...
- (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.

(iv) WALRC recommendations

A. The persons on whom the relevant duties and liabilities are imposed

The WALRC 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.⁵⁷²

B. The nature of the duties and liabilities imposed when a grant is resealed

The WALRC concluded that it was desirable for these powers and duties to be expressly set out, and recommended that uniform resealing legislation “should incorporate a statement of the powers and duties of those to whom resealing is granted”,⁵⁷³ including the powers and duties of such persons appointed under a power of attorney.⁵⁷⁴

(v) Probate Registrars

The Probate Registrars suggested a slight qualification to the WALRC recommendation, namely, that the powers and duties of those to whom resealing was granted “should be *as far as possible* expressly defined in the legislation”.⁵⁷⁵

⁵⁷² *WALRC Report* (1984) at para 3.25(a) and recommendation 6(a). As noted 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 lodge the necessary documents to obtain a reseat, it does not provide that, on resealing, such a person may perform the duties, and be subject to the liabilities, of a personal representative: see p 124 of this Discussion Paper.

⁵⁷³ *WALRC Report* (1984) at para 3.54.

⁵⁷⁴ *Id* at recommendation 18.

⁵⁷⁵ *Report of the Conference of Probate Registrars* (1990) at 9.

(vi) Preliminary view

A provision to the general effect of clause 6(2) of the Commonwealth Secretariat draft model bill⁵⁷⁶ should be incorporated in the model legislation. It is clear that the WALRC had in mind a clause of this kind, and so any reservations the Probate Registrars may have had about the advisability of attempting to set out comprehensively the powers and duties of those to whom resealing has been granted may be laid to rest.

The model provision should also confer on the person who obtains the resealing of a grant the rights and powers of a personal representative.

(vii) Issue for consideration

5.39 Should the model legislation provide that, on the resealing of a grant, the applicant for resealing⁵⁷⁷ 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 granted by the resealing court?

(c) Personal representative deemed to be the personal representative of the estate of the deceased person within the jurisdiction of the court**(i) The present law**

The legislation in Tasmania and Victoria 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 purpose the executor or administrator of the estate of the deceased within the jurisdiction of the court.⁵⁷⁸

The effect of deeming the person who obtains the resealing of a grant to be, for every purpose, the executor or administrator of the estate in the resealing jurisdiction is that an attorney who applies for the resealing of a grant is not

⁵⁷⁶ Clause 6(2) of the Commonwealth Secretariat draft model bill is set out at p 127 of this Discussion Paper. The entire draft bill is reproduced in Appendix B to this Discussion Paper.

⁵⁷⁷ See the proposal at pp 77-78 of this Discussion Paper about persons who should be entitled to apply for the resealing of a grant.

⁵⁷⁸ *Administration and Probate Act 1935* (Tas) s 52; *Administration and Probate Act 1958* (Vic) s 85.

merely the agent of the foreign executor or administrator, but is placed in the position of an original personal representative in the resealing jurisdiction.

Consequently, where the attorney dies after obtaining the reseal, but before completing the administration of the estate, the office of executor will devolve to his or her executor.⁵⁷⁹ In addition, an attorney will be allowed a commission on the passing of the accounts⁵⁸⁰ and, in the absence of legislation allowing a different course,⁵⁸¹ must see to the distribution of the estate in the resealing jurisdiction.⁵⁸²

(ii) Commonwealth Secretariat draft model bill

Clause 6(2) of the Commonwealth Secretariat draft model bill provided that the personal representative or grantee or the duly authorised person who made the application for resealing should, “after resealing, be deemed to be, for all purposes, the personal representative of the deceased person in respect of such of his estate as is” within the resealing jurisdiction.⁵⁸³

(iii) WALRC Report

The WALRC did not make any recommendation about this issue.

(iv) Preliminary view

It is desirable to remove any doubt as to whether, on a grant being resealed, the applicant for resealing is, for all purposes, the personal representative of all the estate in the resealing jurisdiction, or merely subject to the duties and liabilities of a personal representative. As noted above, this distinction may be important to issues such as whether the office of personal representative will devolve where a person appointed under power of attorney has applied

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In *Re Watmough* [1913] VLR 435 an executor under an English grant of probate irrevocably appointed an attorney who resided in Victoria to apply in that State for the resealing of the English grant. The attorney obtained the resealing of the English grant, but died before completing the administration of the estate in Victoria. The Court held (at 440) that the effect of appointing the Victorian attorney to apply for the reseal was to vest the office of executor in him and his executors. Consequently, the attorney’s wife, who proved as the executor under his will, became the executor in Victoria under the resealed grant. This decision was based on 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). Section 81(3), which confers on a person who obtains the resealing of a grant the rights of a personal representative, is set out at p 125 of this Discussion Paper.

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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”.

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See the discussion of s 86 of the *Administration and Probate Act 1958* (Vic) at pp 130-131 of this Discussion Paper.

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See the discussion of *Permezel v Hollingworth* [1905] VLR 321 at p 131 of this Discussion Paper.

583

This clause is set out at p 127 of this Discussion Paper.

for a reseal and has died after the grant has been resealed, but before completing the administration of the estate in the resealing jurisdiction.⁵⁸⁴

It is therefore proposed that, in addition to conferring on the applicant the rights, powers, liabilities and duties of a personal representative,⁵⁸⁵ an applicant for resealing should, on the resealing of a grant, be deemed for all purposes to be the personal representative of the estate within the resealing jurisdiction.

(v) **Issue for consideration**

5.40 Should the model legislation provide that, upon the resealing of a grant, the applicant for resealing⁵⁸⁶ is to be deemed to be, for all purposes, the personal representative of the deceased in respect of his or her estate within the resealing jurisdiction?

7. DUTIES AND LIABILITIES OF PERSON AUTHORISED BY POWER OF ATTORNEY

(a) **The present law**

The legislation in Victoria contains a specific provision dealing with the duties and liabilities of a person, authorised under a power of attorney, who obtains the resealing of a grant of probate or letters of administration. Section 86 of the *Administration and Probate Act 1958* (Vic) provides:

Administrator under power of attorney⁵⁸⁷

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;

584 See pp 128-129 of this Discussion Paper.

585 See p 128 of this Discussion Paper.

586 See the proposal at pp 77-78 of this Discussion Paper about persons who should be entitled to apply for the resealing of a grant.

587 Paragraph (b) of s 86 of the *Administration and Probate Act 1958* (Vic), which related to the payment of charges, duties and fees under the *Probate Duty Act 1962* (Vic), was repealed by s 3 and Sch 1, item 3.5 of the *Statute Law Revision Act 2000* (Vic). See the discussion of the abolition of estate duty at pp 146-147 of this Discussion Paper.

- (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. [note added]

The section applies to an attorney who has obtained the resealing of a grant and has satisfied or provided for the debts and claims of which the attorney has notice. It allows such an attorney to pay or transfer the balance of the estate to the personal representative of the estate in the country in which the deceased died domiciled, to the donor of the power of attorney, or as directed by either of such persons, rather than requiring the attorney to see to the distribution of those assets personally.

No other jurisdiction has an equivalent provision.

Prior to the enactment of the predecessor of section 86 of the *Administration and Probate Act 1958* (Vic),⁵⁸⁸ an attorney who obtained the resealing of a grant in Victoria was required to distribute the estate to the persons beneficially entitled.⁵⁸⁹ In *Permezel v Hollingworth*,⁵⁹⁰ the Supreme Court of Victoria held that, under Victorian law, an attorney who obtained the resealing of a grant 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.⁵⁹¹ Consequently, the attorney was bound to distribute the estate in Victoria to the persons beneficially entitled under the deceased's will.

(b) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill addressed the duties of a person who, acting under a power of attorney given by the personal representative, obtained the resealing of a grant. Clause 7 provided:

588 *Administration and Probate Act 1907* (Vic) s 4. This Act amended the *Administration and Probate Act 1890* (Vic).

589 *Permezel v Hollingworth* [1905] VLR 321.

590 [1905] VLR 321.

591 *Id* at 324, where Madden CJ referred to s 44 of the *Administration and Probate Act 1890* (Vic). That provision was in almost identical terms to s 85 of the *Administration and Probate Act 1958* (Vic), which is discussed at pp 128-129 of this Discussion Paper.

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 _____.

This provision is similar to section 86 of the *Administration and Probate Act 1958* (Vic), except that it is expressed in mandatory terms and it does not expressly provide that the attorney who pays or transfers the balance of the estate does not incur any liability in relation to the payment or transfer.

(c) WALRC Report

The WALRC did not make any recommendation about the inclusion of such a provision in the model legislation.

(d) Preliminary view

It is proposed that a provision to the effect of section 86 of the *Administration and Probate Act 1958* (Vic) should be included in the model legislation.⁵⁹² The case for inclusion is strengthened by the fact that a similar provision is included in the Commonwealth Secretariat draft model bill.

(e) Issue for consideration

5.41 Should the model legislation include a provision to the general effect of section 86 of the *Administration and Probate Act 1958* (Vic)?

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The National Committee considered this provision in its Discussion Paper on the administration of estates: *Administration of Estates Discussion Paper* (1999) QLRC at 120-121; NSWLRC at paras 8.196-8.205. The issue there considered was whether such a provision should apply in relation to an original grant.

8. CAVEATS

(a) The present law

A person who wishes to object to the making or resealing of a grant of probate or letters of administration in a particular jurisdiction does so by lodging a caveat with the registrar. The provisions dealing with lodging a caveat against resealing vary somewhat from one jurisdiction to another.⁵⁹³

The Australian Capital Territory, the Northern Territory, Tasmania and Victoria all have essentially the same statutory provision.⁵⁹⁴ The legislation in the Australian Capital Territory provides:

Any person may lodge with the registrar a caveat against the sealing of any such probate or administration, and any such caveat shall have the same effect, and shall be dealt with in the same manner, as if it were a caveat against the granting of probate or administration.

In Queensland, the rules about the lodging of a caveat against the making of an original grant⁵⁹⁵ also apply to the lodging of a caveat against the resealing of a grant.⁵⁹⁶

The Western Australian Act,⁵⁹⁷ and the rules in New South Wales and South Australia,⁵⁹⁸ provide for the lodging of a caveat against resealing, but do not expressly provide that such a caveat shall have the same effect and shall be dealt with in the same manner as a caveat against the making of a grant. The South Australian rules also set out a number of detailed procedural provisions regarding the lodgment of a caveat.⁵⁹⁹ The Western Australian Act also contains the provision that the caveat must set forth the name of the person lodging it and an address for service of notices.⁶⁰⁰

593 In its Discussion Paper on the administration of estates, the National Committee examined the legislative provisions dealing with the lodgment of a caveat against the making of an original grant: *Administration of Estates Discussion Paper* (1999) QLRC at 37-39; NSWLRC at paras 5.34-5.39.

594 *Administration and Probate Act 1929* (ACT) s 81; *Administration and Probate Act* (NT) s 112; *Administration and Probate Act 1935* (Tas) s 49(2); *Administration and Probate Act 1958* (Vic) s 82.

595 *Uniform Civil Procedure Rules 1999* (Qld) rr 623-628, which are contained in Part 7 of Chapter 15 of the rules.

596 *Uniform Civil Procedure Rules 1999* (Qld) r 623 provides that, for the purposes of Part 7 of Chapter 15 of the rules, the term "grant" includes "a resealing of a foreign grant".

597 *Administration Act 1903* (WA) s 63(1).

598 *Supreme Court Rules 1970* (NSW) Pt 78 r 61; *The Probate Rules 1998* (SA) r 52.01.

599 *The Probate Rules 1998* (SA) rr 52.02-52.13.

600 *Administration Act 1903* (WA) s 63(2).

As noted earlier, the legislation in the Australian Capital Territory and the Northern Territory further provides that the registrar shall not, without an order of the court, reseal the grant if a caveat has been lodged with the registrar.⁶⁰¹ The rules in Queensland provide that the registrar may not reseal a grant if a caveat against resealing has been filed.⁶⁰²

(b) Commonwealth Secretariat draft model bill

Clause 4 of the Commonwealth Secretariat draft model bill contained all three provisions found in the legislation of the Australian Capital Territory and the Northern Territory:

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.

(c) WALRC recommendation

The WALRC commented that, in practice, caveats against resealing are rare.⁶⁰³ However, those who commented on its Working Paper were generally in favour of retaining the opportunity to lodge a caveat against resealing, and the WALRC agreed with this view. It therefore recommended that there should be a uniform rule making provision for the lodgment of caveats against resealing, and that the “consequences of lodgment should be the same as under the present law”⁶⁰⁴ - that is, they should be the same as for a caveat against an original grant.

⁶⁰¹ *Administration and Probate Act 1929* (ACT) s 80(1A); *Administration and Probate Act* (NT) s 111(3)(a). See also p 109 of this Discussion Paper.

⁶⁰² *Uniform Civil Procedure Rules 1999* (Qld) rr 601(1)(a), 617(2).

⁶⁰³ *WALRC Report* (1984) at para 3.45. The WALRC referred (*WALRC Report* (1984) at para 3.45, note 1) to comments made by the then Victorian Registrar of Probates that “over a period of 30 years there had, to his knowledge, been one caveat lodged ‘many years ago’ and ‘possibly one fairly recently’”. The Deputy Registrar of the Supreme Court of Tasmania has made a similar comment to the National Committee, advising that he could not recall a caveat having been lodged to prevent a reseal over the past 16 years: letter from the Deputy Registrar of the Supreme Court of Tasmania to the Queensland Law Reform Commission, 5 May 1999. The WALRC pointed out (*WALRC Report* (1984) at para 3.45, note 1), however, that “the important High Court decision in *Lewis v Balshaw* (1935) 54 CLR 188 ... arose out of a New South Wales caveator’s attempt to prevent the making of a grant to the attorney of an English executor” because the caveator contended that the will was invalid. See the discussion of *Lewis v Balshaw* at pp 177-178 and 179-180 of this Discussion Paper.

⁶⁰⁴ *WALRC Report* (1984) at recommendation 15. See also *WALRC Report* (1984) at para 3.45.

The WALRC noted that similar provisions appeared in the Commonwealth Secretariat draft model bill.⁶⁰⁵

(d) Preliminary view

There should be a uniform rule making provision for the lodgment of caveats against resealing. The main issue is whether this should appear in the model legislation or in rules of court. It is proposed that the three provisions found in the Commonwealth Secretariat draft model bill should be incorporated in the model legislation. Any further provisions should be set out in the rules. The South Australian rules provide a suitable model.⁶⁰⁶

(e) Issues for consideration

5.42 Should the following be adopted as model provisions:

- (a) that any person who wishes to oppose the resealing of a grant should lodge a caveat against the resealing by a specified date;**
- (b) that a caveat against resealing should have the same effect and should 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;**
- (c) that, if a caveat against resealing has been lodged, the registrar should not, without an order of the Supreme Court, proceed with an application for resealing?**

5.43 Should the above provisions appear in the model legislation, rather than in court rules?

⁶⁰⁵ Id at para 3.45, note 2. The provisions contained in the Commonwealth Secretariat draft model bill are set out at p 134 of this Discussion Paper.

⁶⁰⁶ *The Probate Rules 1998* (SA) rr 52.02-52.13. These rules supplement s 26 of the *Administration and Probate Act 1919* (SA).

9. ADVERTISEMENT OF INTENTION TO RESEAL

(a) The present law

The question whether a person who applies for the resealing of a grant should be required to advertise his or her intention to do so has occasioned considerable controversy.

In the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Victoria, where advertising is mandatory, the statutory provisions are all in essentially the same form.⁶⁰⁷ The Victorian provision is typical:

The seal of the Court shall not be affixed to any such probate or letters of administration or grant or order until after the publication of an advertisement by such executor administrator or person authorized by power of attorney or by a legal practitioner on his behalf in one of the Melbourne daily newspapers of the intention of such executor administrator or person to apply for the same to be duly affixed, nor until an affidavit has been filed stating that such advertisement was duly published at least fourteen days before the making of such affidavit and that no caveat has been lodged up to the morning of the application.

In Queensland, it is not necessary to publish or serve a notice of intention to apply for the resealing of a grant unless there are debts owing in Queensland at the date of the application or the court or registrar requires it for another reason.⁶⁰⁸ In South Australia, if the registrar so requires, notice of the application shall be advertised in such manner as he or she may direct.⁶⁰⁹ In each case, the provision appears in the rules and not in the legislation.

In Western Australia there is no requirement that the applicant advertise his or her intention to apply for resealing.

(b) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill provided that a person intending to apply for the resealing of a grant must cause to be published an advertisement giving notice of that intention and requiring any person wishing to oppose the resealing to lodge a caveat by a specified date.⁶¹⁰

⁶⁰⁷ *Administration and Probate Act 1929* (ACT) s 82(3); *Wills, Probate and Administration Act 1898* (NSW) s 109; *Administration and Probate Act* (NT) s 113(3); *Administration and Probate Act 1935* (Tas) s 49(1); *Administration and Probate Act 1958* (Vic) s 83. For additional provisions in rules of court see *Supreme Court Rules 1970* (NSW) Pt 78 r 10; *Supreme Court Rules* (NT) r 88.09.

⁶⁰⁸ *Uniform Civil Procedure Rules 1999* (Qld) r 617(1).

⁶⁰⁹ *The Probate Rules 1998* (SA) r 50.03.

⁶¹⁰ Commonwealth Secretariat draft model bill cl 3(3).

(c) WALRC recommendation

The WALRC expressed the view that advertising was often ineffective and caused delay and expense.⁶¹¹

Part of the ineffectiveness of advertising was seen to arise out of the method of advertising. Advertisements may appear in any place on any date in any one of several newspapers. Although Public Trustees and trustee companies would no doubt monitor the daily press for notices of application, it is most unlikely that the average beneficiary or creditor would do so, and some interested parties would be resident outside the State or Territory in which it was sought to reseal the grant. It thus seems to be merely a matter of chance whether an advertisement comes to the attention of interested persons.

Consequently, the WALRC recommended “that the uniform code of procedure for resealing should not incorporate a requirement of advertising”.⁶¹² However, it also recommended that:⁶¹³

Though it would be desirable if all Australian States and Territories could adopt a uniform rule as to the necessity for advertising as a prerequisite to resealing, a uniform rule on this matter is not essential.

(d) Probate Registrars

At a conference in 1990, the Registrars were unanimously of the view that advertising should be at the discretion of the registrar in the resealing jurisdiction.⁶¹⁴

It is envisaged that, where an applicant was directed to advertise notice of the resealing application, the direction would have a similar effect to the issuing by the registrar of a requisition in relation to the application.

(e) Preliminary view

It is proposed that the model resealing procedure should adopt the approach endorsed by the registrars in 1990 that advertising should be at the discretion of the registrar in each jurisdiction. It would seem appropriate that this, being essentially a matter of detail, should be located in rules of court, rather than in the model legislation.

611 *WALRC Report* (1984) at para 3.38.

612 *Id* at para 3.42.

613 *Id* at recommendation 14.

614 *Report of the Conference of Probate Registrars* (1990) at 8.

(f) Issues for consideration

5.44	Should the uniform procedure in relation to resealing include a mandatory provision in relation to advertising?
5.45	Alternatively, should all jurisdictions adopt a provision that, if the registrar so requires, notice of the application for resealing should be advertised in such manner as he or she may direct?
5.46	If so, what matters would be relevant to the exercise of the registrar's discretion to direct that notice of the application for resealing should be advertised?
5.47	Should a provision in relation to advertising the notice of application for resealing be located in court rules, rather than in the model legislation?
5.48	Are there any procedures, other than advertising, that could be used to bring to the attention of interested parties the fact that an application for resealing was to be made?

10. SECURITY**(a) The present law**

Although all jurisdictions have legislative provisions dealing with the provision of security in connection with an application for resealing, there is no uniformity between them. The following different kinds of provisions can be identified:

- In the Australian Capital Territory and the Northern Territory, the legislation provides that the court may, before or after resealing a grant, require the applicant to give security for the proper administration of the estate.⁶¹⁵
- In New South Wales, the legislation provides that the court may require an applicant for resealing "to give security for the due administration of the estate in respect of matters or claims in New South Wales".⁶¹⁶
- In Queensland and Tasmania, the legislation provides that the court may, on the application of any creditor, require, before resealing, that adequate security be given for the payment of debts due from the estate to creditors

⁶¹⁵ *Administration and Probate Act 1929* (ACT) s 80(4); *Administration and Probate Act* (NT) s 111(6).

⁶¹⁶ *Wills, Probate and Administration Act 1898* (NSW) s 107(3).

residing in that State.⁶¹⁷ The Queensland provision further provides that the court may, on the application of any beneficiary or next of kin, require that adequate security be given for the protection of the interests of the beneficiary or next of kin.⁶¹⁸

- In the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Tasmania, the legislation provides that a grant of administration shall not be resealed until such bond has been entered into as would have been required if administration had been originally granted by the court.⁶¹⁹
- In Victoria and Western Australia, the legislation provides that, as a condition of resealing a grant of administration, the court may require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss that any person interested in the administration of the estate in that jurisdiction may suffer in consequence of a breach by the administrator of his or her duties in administering the estate in that jurisdiction.⁶²⁰

In relation to original grants of administration, there has been a legislative trend away from the provision of administration bonds, or at least away from the mandatory requirement for the provision of such bonds.

Administration bonds have been abolished⁶²¹ in England,⁶²¹ Western Australia⁶²² and

⁶¹⁷ *British Probates Act 1898* (Qld) s 4(3); *Administration and Probate Act 1935* (Tas) s 51.

⁶¹⁸ *British Probates Act 1898* (Qld) s 4(3).

⁶¹⁹ *Administration and Probate Act 1929* (ACT) s 82(2); *Wills, Probate and Administration Act 1898* (NSW) s 108(2); *Administration and Probate Act* (NT) s 113(2); *Administration and Probate Act 1919* (SA) s 18(1); *Administration and Probate Act 1935* (Tas) s 50(2), and see also s 50(3) (bond may be entered into by the administrator outside Tasmania before a commissioner of the court for taking affidavits). In some jurisdictions there are supplementary provisions in the rules: see *The Probate Rules 1998* (SA) r 50.04; *Probate Rules 1936* (Tas) r 47.

⁶²⁰ *Administration and Probate Act 1958* (Vic) s 84(1); *Administration Act 1903* (WA) s 62(1). In both jurisdictions, similar provisions apply where an application is made for an original grant: see notes 622 and 623 of this Discussion Paper. The guarantee enures for the benefit of every person interested in the administration of the estate in that jurisdiction as if contained in a contract under seal made with the surety or sureties: *Administration and Probate Act 1958* (Vic) s 84(2); *Administration Act 1903* (WA) s 62(2). In Victoria, no action may be brought on the guarantee without the leave of the court: *Administration and Probate Act 1958* (Vic) s 84(3). There is, however, an exemption "where the letters of administration or grant or order were granted to a person for the use or benefit of Her Majesty or to any person body corporate or holder of an office in any place outside Victoria specially exempted by any Act": *Administration and Probate Act 1958* (Vic) s 84(4).

⁶²¹ *Supreme Court of Judicature (Consolidation) Act 1925* (UK) s 167, which was substituted by s 8 of the *Administration of Estates Act 1971* (UK). The *Supreme Court of Judicature (Consolidation) Act 1925* (UK) was subsequently repealed by s 152(4) and Sch 7 of the *Supreme Court Act 1981* (UK). See now s 120(1) of the *Supreme Court Act 1981* (UK), which provides that, as a condition of granting administration to any person, the court may require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate in that jurisdiction may suffer in consequence of a breach by the administrator of his or her duties.

⁶²² *Administration Act 1903* (WA) s 26, which was substituted by s 5 of the *Administration Act Amendment Act 1976* (WA). Section 26(1) provides that, as a condition of granting administration to any person, the court may require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss that any person interested in the administration of the estate may suffer in consequence of a breach by the administrator of his or her duties as an administrator.

Victoria.⁶²³ Both administration bonds and sureties have been abolished in Queensland.⁶²⁴ In South Australia, although administration bonds have not been abolished, they are not required in every case where a grant of administration is made. The legislation specifies the circumstances in which a bond is required.⁶²⁵ Similarly, in New Zealand, there is no longer a mandatory requirement for an administrator to enter into an administration bond,⁶²⁶ although the court may make a grant of administration (other than the probate of a will) conditional upon the person to whom the grant is made giving such security as the court may require.⁶²⁷

In its Discussion Paper on the administration of estates, the National Committee proposed that the provision of bonds and sureties should not be mandatory, but should be among the options that may be ordered by the court in an appropriate case.⁶²⁸

(b) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill included a requirement for the giving of security (without specifying the form it should take) as a condition of resealing a grant.⁶²⁹

(c) WALRC recommendation

The WALRC expressed the view that, “if a security requirement is to be retained, it should be by way of guarantee rather than bond”.⁶³⁰ However, it also recommended that:⁶³¹

623 *Administration and Probate Act 1958* (Vic) s 57, which was substituted by s 4 of the *Administration and Probate (Amendment) Act 1977* (Vic). Section 57(1) provides that, as a condition of granting administration to any person, the court or the registrar may require one or more sureties to guarantee that they will make good, in an amount not exceeding the amount at which the property of the deceased is sworn, any loss which any person interested in the administration of the estate may suffer in consequence of a breach by the administrator of his or her duties as an administrator.

624 *Succession Act 1981* (Qld) s 51.

625 *Administration and Probate Act 1919* (SA) s 31(2), which was inserted by s 5 of the *Administration and Probate Act Amendment Act 1978* (SA). This provision gave effect to the recommendation of the Law Reform Committee of South Australia that the court should have “a discretionary power to require a bond and sureties in proper cases but that a bond should not be required as of course”: Law Reform Committee of South Australia, *Twenty-Second Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Administration Bonds and to the Rights of Retainer and Preference of Personal Representatives of Deceased Persons* (1972) at 6.

626 *Administration Amendment Act 1979* (NZ) s 4, which repealed ss 15 and 16 of the *Administration Act 1969* (NZ).

627 *Administration Act 1969* (NZ) s 6(5), (6), which were inserted by s 3 of the *Administration Amendment Act 1979* (NZ).

628 *Administration of Estates Discussion Paper* (1999) QLRC at 135; NSWLRC at paras 9.42-9.43 and Proposal 61.

629 Commonwealth Secretariat draft model bill cl 5(1)(b).

630 *WALRC Report* (1984) at para 3.52.

631 *Id* at recommendation 16.

Though it would be desirable if all Australian States and Territories could adopt a uniform rule as to the necessity for, and the form of, security for due administration on resealing, a uniform rule on this matter is not essential.

(d) Preliminary view

Given the preliminary view expressed by the National Committee in its Discussion Paper on the administration of estates, it is proposed that the only provision that should be inserted in the model legislation is one that provides that:

- the registrar may require security for the due administration of the estate in that jurisdiction; and
- if security is required, the grant may not be resealed unless the registrar is satisfied that adequate security has been given.

(e) Issues for consideration

5.49 Should the model legislation provide that the registrar may require security for the due administration of the estate in the resealing jurisdiction?

5.50 If so, should the model legislation also provide that, if security is required, the grant may not be resealed unless the registrar is satisfied that adequate security has been given?

11. NOTIFICATION

(a) The present law

The rules in Queensland, South Australia and Tasmania require that notification of resealing must be given to the court that made the original grant, and that, if the court is informed - or, in Queensland, if the registrar believes - that an original grant issued by it has been resealed elsewhere, the registrar should inform the resealing court of any revocation or alteration of that grant.⁶³² These rules are not expressed to be confined in their operation to a grant issued in another Australian jurisdiction. Although there is no requirement to this effect in the Western Australian rules, it is

⁶³²

Uniform Civil Procedure Rules 1999 (Qld) rr 620, 641; *The Probate Rules 1998* (SA) rr 50.09, 50.10; *Probate Rules 1936* (Tas) rr 54, 55. Revocation of the grant by the jurisdiction that issued it empowers the resealing jurisdiction to revoke the reseat: *Re Hall* [1930] VLR 309.

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.⁶³³

(b) WALRC recommendation

The WALRC recommended that the uniform rules should include a provision:⁶³⁴

... 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.

(c) Probate Registrars

The Probate Registrars suggested a slight qualification to the WALRC recommendation, namely, that the resealing court should notify the granting court of the application for resealing at the time the application was made, so that any notice of revocation or alteration of the original grant could be conveyed to the resealing court prior to the resealing of the grant.⁶³⁵

(d) Preliminary view

The WALRC recommendation, subject to the qualification of the Probate Registrars, is provisionally supported.

In the discussion of the proposed scheme of automatic recognition throughout Australia of grants made by the Australian jurisdiction in which the deceased died domiciled, the differing views on whether there needs to be a national register of grants have been noted.⁶³⁶ Such a register would enable all jurisdictions to be aware of grants that are entitled to automatic recognition. It could also serve to inform all Australian jurisdictions of other grants, and of reseals, made in each State and Territory, of revocations and alterations of grants, and of caveats.

633 Letter from the Registrar of the Supreme Court of Western Australia to the Queensland Law Reform Commission, 12 November 2001.

634 *WALRC Report* (1984) at recommendation 19.

635 *Report of the Conference of Probate Registrars* (1990) at 9-10.

636 See pp 50-51 of this Discussion Paper.

(e) Issues for consideration

5.51	Should court rules require:
	(a) the resealing court to give notice of the application for resealing to the court of original grant; and
	(b) the court of original grant, when informed of an application for resealing, to notify the resealing court of any revocation or alteration of the original grant?
5.52	Should there be a national database of all grants of probate and administration issued or resealed, and all caveats lodged against any grant or resealing, in any Australian jurisdiction?

12. DISCLOSURE OF ASSETS AND LIABILITIES**(a) The present law**

Various provisions in the legislation and rules of a number of States and Territories require a person who applies for a grant or resealing of probate or letters of administration to provide the court with a statement of the deceased's assets and liabilities.⁶³⁷ For example, section 121A of the South Australian Act provides:

- (1) A person who applies -
 - (a) for probate or administration; or
 - (b) for the sealing of any probate or administration granted by a foreign court,

in respect of the estate of a deceased person shall, in accordance with the rules, disclose to the Court the assets and liabilities of the deceased person known to him at the time of making the application.
- (2) An executor, administrator or trustee of the estate of a deceased person (being an estate in respect of which probate or administration has been granted or sealed by the Court) shall, in accordance with the rules, disclose to the Court any assets or liabilities of the deceased person (not being assets

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Administration and Probate Act 1929 (ACT) ss 58(1)(a), 80(2)(b), *Supreme Court Rules (ACT)* O 72 r 37; *Wills, Probate and Administration Act 1898 (NSW)* ss 81A, 107(2), *Supreme Court Rules 1970 (NSW)* r 28A; *Administration and Probate Act (NT)* s 111(4)(b), *Supreme Court Rules (NT)* r 88.27; *Administration and Probate Act 1919 (SA)* s 121A, and see also s 44; *The Probate Rules 1998 (SA)* rr 8.01-8.03; *Administration and Probate Act 1935 (Tas)* s 26, *Probate Rules 1936 (Tas)* r 63; *Administration Act 1903 (WA)* s 61(2), *Non-contentious Probate Rules 1967 (WA)* r 9B.

or liabilities previously disclosed under this section) which come to his knowledge while acting in that capacity.

- (3) An executor, administrator or trustee of an estate shall not dispose of an asset of the estate in respect of which disclosure has not been made to the Court pursuant to this section.
- (4) Nothing in subsection (3) affects the interests of a person who acquires an asset of an estate in good faith for valuable consideration and without knowing that the asset has not been disclosed to the Court pursuant to this section.
- (5) An executor, administrator or trustee who contravenes or fails to comply with a provision of this section is guilty of a summary offence and liable to a penalty not exceeding two thousand dollars.
- (6) This section does not apply in respect of an estate of a deceased person who died before the commencement of this section.
- (7) A reference in this section to the assets and liabilities of a deceased person is a reference to -
 - (a) assets and liabilities of the deceased at the date of his death; and
 - (b) assets falling into the estate after the death of the deceased not being an accretion to the estate arising out of an asset existing at the date of his death,
 but does not include a reference to any asset or liability prescribed by the rules.
- (8) In this section -

“**administration**” includes an order under section 9 of the *Public Trustee Act 1995* authorising the Public Trustee to administer the estate of a deceased person.

(b) WALRC recommendation

The WALRC recommended that an applicant for a grant “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”.⁶³⁸

(c) Probate Registrars

The Probate Registrars made a more extensive recommendation. They were of the view:⁶³⁹

⁶³⁸ *WALRC Report* (1984) at para 3.34 and recommendation 12.

⁶³⁹ *Report of the Conference of Probate Registrars* (1990) at 8.

- (a) that where a grant was sought in an Australian jurisdiction, the Court of original jurisdiction should require as a condition of granting representation that a statement disclosing details of all assets and liabilities wherever situate be filed;
- (b) that the requirements of the resealing jurisdiction for disclosure of assets and liabilities should be the same as would be required in the case of an original grant being sought within that jurisdiction; and
- (c) that it would be desirable for all Australian States to adopt uniform disclosure provisions.

(d) Preliminary view

In its Discussion Paper on the administration of estates, the National Committee proposed that provisions based on the South Australian legislation should be included in the model legislation on administration of estates.⁶⁴⁰ Provided that such legislation made it clear that what was required was disclosure of all assets and liabilities of the deceased wherever situate, and that they should be listed so as to establish the situs of each, this would meet the points emphasised by the WALRC and the Probate Registrars.

The relationship between such a provision and the proposed scheme of automatic recognition has already been discussed.⁶⁴¹ In essence, where a grant was made in the Australian jurisdiction in which the deceased died domiciled, it would not require resealing. Before obtaining the initial grant in the jurisdiction of domicile, it would be necessary to provide a statement of all assets and liabilities wherever situate. Once this had been done, the personal representative would be able to deal with the deceased's assets in any other Australian jurisdiction without providing a further statement of assets and liabilities in that jurisdiction.

(e) Issue for consideration

5.53 Should the model legislation include a provision requiring an applicant for a grant or resealing to disclose all assets and liabilities wherever situate?

⁶⁴⁰ *Administration of Estates Discussion Paper* (1999) QLRC at 128-129; NSWLRC at paras 9.19-9.21 and Proposal 60.

⁶⁴¹ See pp 56-58 of this Discussion Paper.

13. SUCCESSION DUTY

(a) The present law

In the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Tasmania, the legislation provides that the seal of the court shall not be affixed until such succession duties have been paid as would have been payable if the probate or administration had originally been granted by the court.⁶⁴² The Queensland legislation requires the filing of a certificate to the effect that “adequate security has been given for payment of all probate and succession duty”.⁶⁴³

Between 1976 and 1983, the Commonwealth Government, the Australian States and the Northern Territory passed legislation abolishing the payment of succession or estate duty.⁶⁴⁴ In each case, however, the legislation was expressed to apply in respect of the estate of a person who died after a particular date. The legislation did not of itself extinguish the liability of an estate of a person who died before the relevant date.

In Victoria and Western Australia, legislation has since been passed repealing the Acts in those jurisdictions under which succession duty was levied and extinguishing any existing liability in respect of the payment of succession duty.⁶⁴⁵

In South Australia, the legislation under which succession duty is levied is still in force.⁶⁴⁶ Although the equivalent legislation in New South Wales, the Northern Territory, Queensland and Tasmania has since been repealed,⁶⁴⁷ in the absence of a contrary intention, the repeal of an Act does not affect a liability that accrued or was

⁶⁴² *Administration and Probate Act 1929* (ACT) s 82(1); *Wills, Probate and Administration Act 1898* (NSW) s 108(1); *Administration and Probate Act* (NT) s 113(1); *Administration and Probate Act 1919* (SA) s 18(2); *Administration and Probate Act 1935* (Tas) s 50(1).

⁶⁴³ *British Probates Act 1898* (Qld) s 4(2).

⁶⁴⁴ Duty was abolished on the estates of persons dying on or after the following dates: Federal estate duty: 1 July 1979 (*Estate Duty Assessment Amendment Act 1978* (Cth)); New South Wales death duty: 31 December 1981 (*Stamp Duties (Further Amendment) Act 1980* (NSW)); Northern Territory succession duty: 1 July 1978 (*Succession Duties Repeal Ordinance 1978* (NT)); Queensland succession duty: 1 January 1977 (*Succession and Gift Duties Abolition Act 1976* (Qld)); South Australian succession duty: 1 January 1980 (*Succession Duties Act Amendment Act 1979* (SA)); Tasmanian death duties: 1 October 1982 (*Deceased Persons' Estates Duties Amendment Act 1982* (Tas)); Victorian probate duty: 1 January 1984 (*Probate Duty (Amendment) Act 1983* (Vic)); Western Australian death duty: 1 January 1980 (*Death Duty Assessment Act Amendment Act 1978* (WA)).

⁶⁴⁵ *State Taxation Acts (Miscellaneous Amendments) Act 2000* (Vic) s 4; *Statutes (Repeals and Minor Amendments) Act 1997* (WA) s 5.

⁶⁴⁶ See *Succession Duties Act 1929* (SA). The Act applies to the administrator of the estate of a person who died before 1 January 1980: *Succession Duties Act 1929* (SA) s 4E.

⁶⁴⁷ *Stamp Duties (Amendment) Act 1991* (NSW) s 3, Sch 3, Item (11); *Succession Duties Repeal Ordinance 1978* (NT) s 3; *Statute Law Revision Act 1995* (Qld) s 5(1), Sch 6; *Deceased Persons' Estates Duties Amendment Act 1982* (Tas) s 10, SR 48 of 1997.

incurred before the repeal of that Act.⁶⁴⁸ Consequently, in New South Wales, the Northern Territory, Queensland and Tasmania, the estate of a person who died before the date from which succession duty was abolished in the particular jurisdiction will also still be liable to succession duty.

Although legislation in these jurisdictions abolished the payment of succession duty from various dates between 1977 and 1982, it is possible that there could still be some unadministered estates that will be subject to the payment of succession duty when they are eventually administered. Where, for example, a person has been left a life interest in the family home, it is not uncommon for the estate of the testator who left that interest 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.

(b) Commonwealth Secretariat draft model bill

The Commonwealth Secretariat draft model bill included a provision to the effect that a grant could not be resealed until the registrar was satisfied that such estate duties, if any, had been paid as would have been payable if the grant had been made by that court.⁶⁴⁹

(c) WALRC recommendation

The WALRC expressed the view that the abolition of death and succession duties in Australia made it unnecessary to include in the uniform code of resealing a provision making resealing conditional on the payment of death and succession duties.⁶⁵⁰

⁶⁴⁸ *Interpretation Act 1987* (NSW) ss 5(2), 30(1)(c); *Interpretation Act* (NT) ss 3(3), 12(c); *Acts Interpretation Act 1954* (Qld) ss 4, 20(2)(c); *Acts Interpretation Act 1931* (Tas) s 16(1)(c). Further, the *Statute Law Revision Act 1995* (Qld), which repealed the *Succession Duties Act 1892* (Qld) and certain related Acts, expressly declares that the *Succession Duties Act 1892* (Qld) and those related Acts are Acts to which s 20A of the *Acts Interpretation Act 1954* (Qld) applies: *Statute Law Revision Act 1995* (Qld) s 5(3), Sch 9. See also s 5(4) and Sch 10 of that Act, which provide that the *Succession Duties Act 1892* (Qld) and those related Acts continue to apply to specified transactions.

⁶⁴⁹ Commonwealth Secretariat draft model bill cl 5(1)(a).

⁶⁵⁰ *WALRC Report* (1984) at para 7.42. The WALRC did acknowledge 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": *WALRC Working Paper* (1980) at para 7.38.

(d) Preliminary view

In view of the fact that succession duty may still be payable in respect of estates in five Australian jurisdictions, it is proposed that the model legislation should contain a provision to the effect of clause 5(1)(a) of the Commonwealth Secretariat draft model bill.⁶⁵¹

(e) Issue for consideration

5.54 Should the model legislation include a provision that a grant may not be resealed until 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?

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See the discussion of cl 5(1)(a) of the Commonwealth Secretariat draft model bill at p 147 of this Discussion Paper.

CHAPTER 6

COUNTRIES WHOSE GRANTS MAY BE RESEALED

1. INTRODUCTION

In its Report, the WALRC made the following observation about the diversity among the various Australian jurisdictions as to the countries whose grants may be resealed.⁶⁵²

The legislation governing resealing in each Australian State and Territory specifies the countries whose grants may be resealed in that jurisdiction. Grants made by the Supreme Courts of each Australian State and Territory may be resealed in each other Australian jurisdiction,⁶⁵³ but beyond that there is considerable diversity as between the various provisions. [original note substituted]

The legislative techniques used to prescribe the countries whose grants may be resealed also differ considerably, and some operate more successfully than others. Those that adopt the option of setting out lists of countries in subordinate legislation are particularly vulnerable to political developments concerning the status and allegiance of particular countries, which render the lists out of date unless they are regularly reviewed. However, the use of general expressions such as “Commonwealth country”, rather than a list approach, may not be any more satisfactory, since political changes can affect the original intentions of the drafter as to the countries intended to be included.

2. THE PRESENT LAW IN THE AUSTRALIAN STATES AND TERRITORIES AND IN NEW ZEALAND

(a) New South Wales and Western Australia

New South Wales and Western Australia are the only two jurisdictions that adopt the same legislative technique for dealing with this question. In each case, the legislation provides that the Supreme Court may reseat a grant by a court of competent jurisdiction “in any portion of Her Majesty’s dominions”.⁶⁵⁴

652 *WALRC Report* (1984) at para 4.1.

653 The South Australian legislation does not expressly provide for the resealing of grants made in the Australian Capital Territory and the Northern Territory, but such grants are resealed as a matter of practice: see p 153 of this Discussion Paper.

654 *Wills, Probate and Administration Act 1898* (NSW) s 107(1); *Administration Act 1903* (WA) s 61(1).

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.⁶⁵⁵

"Her Majesty's dominions" includes, 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,⁶⁵⁶ and, presumably, the associated states and dependencies of any of those countries.⁶⁵⁷ However it would not cover the members of the Commonwealth that have their own sovereign,⁶⁵⁸ or those that have adopted republican status.⁶⁵⁹

The rule adopted by New South Wales and Western Australia is 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 recognising grants of probate and administration made in that country.

All other things being equal, an Australian court is more likely to recognise a grant of probate or administration made in a common law country than a grant, or its equivalent, made in a country with a different legal tradition. However, one Canadian province - Quebec - is a part of Her Majesty's dominions, but does not have a common law system, while there are many countries that inherited the common law but, because of their form of government, are not part of Her Majesty's

655 *Halsbury's Laws of England* (4th ed) vol 6 at para 803. See also the discussion of the term in Roberts-Wray K, *Commonwealth and Colonial Law* (1966) at 23.

656 In addition to Australia, these are Antigua and Barbuda, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St Christopher and Nevis (now usually referred to as St Kitts and Nevis), St Lucia, St Vincent and the Grenadines, the Solomon Islands and Tuvalu: *Halsbury's Laws of England* (4th ed) vol 6 and 2001 Cumulative Supplement at para 808. Obviously, this list also includes the United Kingdom.

657 The external territories of Australia are the Territory of Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, the Coral Sea Islands Territory, Territory of Heard Island and McDonald Islands and Norfolk Island: *Australian Constitution* s 122; *Ashmore and Cartier Islands Acceptance Act 1933* (Cth) s 5; *Australian Antarctic Territory Acceptance Act 1933* (Cth) s 2; *Christmas Island Act 1958* (Cth) s 5; *Cocos (Keeling) Islands Act 1955* (Cth) s 5; *Coral Sea Islands Act 1969* (Cth) s 3; *Heard Island and McDonald Islands Act 1953* (Cth) s 3, Sch; and *Norfolk Island Act 1913* (Cth) (repealed) s 3. The British Dependent Territories are Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, the Cayman Islands, the Falkland Islands and Dependencies, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena and Dependencies (Ascension and Tristan da Cunha), the South Georgia and South Sandwich Islands, the Sovereign Base Areas of Akrotiri and Dhekelia, the Turks and Caicos Islands and the British Virgin Islands: *Halsbury's Laws of England* (4th ed) vol 6 and 2001 Cumulative Supplement at paras 1041, 1042, 1046, 1047, 1048, 1052, 1054, 1064, 1068, 1069, 1073, 1074, 1077, 1079.

658 Brunei Darussalam, Lesotho, Malaysia, Samoa, Swaziland and Tonga: *Halsbury's Laws of England* (4th ed) vol 6 at paras 891, 938, 940, 975, 968, 970. See also *CIA World Factbook 2001*, where Samoa is listed as having its own monarch: <<http://www.cia.gov/cia/publications/factbook/>> (21 January 2002).

659 Bangladesh, Botswana, Cameroon, Cyprus, Dominica, Fiji, The Gambia, Ghana, Guyana, India, Kenya, Kiribati, Malawi, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, Nigeria, Pakistan, Seychelles, Sierra Leone, Singapore, South Africa, Sri Lanka, Tanzania, Trinidad and Tobago, Uganda, Vanuatu, Zambia and Zimbabwe: *Halsbury's Laws of England* (4th ed) vol 6 and 2001 Cumulative Supplement at paras 886, 890, 859, 909, 910, 852, 911, 913, 915, 918, 935, 936, 939, 944, 945, 947, 808, 949, 950, 957, 958, 963, 964, 965, 857, 967, 969, 971, 973, 974, 976, 977. See also *CIA World Factbook 2001*, where Mozambique is listed as a republic: <<http://www.cia.gov/cia/publications/factbook/>> (21 January 2002).

dominions, for example Zambia.⁶⁶⁰

Finally, any legislative distinction that singles out those Commonwealth jurisdictions that still claim allegiance to the Crown will seem increasingly odd if Australia becomes a republic.

(b) Queensland

The legislation in Queensland provides that a grant may be resealed if it has been made by “a court of probate in a part of Her Majesty’s dominions to which this Act applies”.⁶⁶¹ Whether the Act is to apply to a particular country is determined on the basis of reciprocity. It provides that:⁶⁶²

When the Governor in Council is satisfied that the legislature of any part of Her Majesty’s dominions has made adequate provision for the recognition in that part of probates and letters of administration granted by the Supreme Court, the Governor in Council may declare by regulation that this Act shall, subject to any stated changes, apply to that part of Her Majesty’s dominions.

The regulation made under this provision extends the Act to the other Australian States, the Australian Capital Territory, 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.⁶⁶³

The use of the phrase “Her Majesty’s dominions” entails the same problems as those discussed above in connection with the legislation in New South Wales and Western Australia, although the device of restricting its application to parts of Her Majesty’s dominions listed by regulation has produced a rational, if rather restricted, list. Queensland excludes jurisdictions whose grants of probate and administration would be recognised by most other Australian States and Territories, for example, most provinces of Canada.

However, the problem with the device of applying the legislation to particular countries by regulation or proclamation is that the list may be allowed to become out of date. For example, at the time of the WALRC Report in 1984, the Queensland Act had been declared to apply to an extensive list of countries including British Guiana,⁶⁶⁴ British New Guinea⁶⁶⁵ and the Straits Settlements,⁶⁶⁶ while the Northern

⁶⁶⁰ *Halsbury’s Laws of England* (4th ed) vol 6 at para 976.

⁶⁶¹ *British Probates Act 1898* (Qld) s 4(1).

⁶⁶² *British Probates Act 1898* (Qld) s 3.

⁶⁶³ *British Probates Regulation 1998* (Qld) s 3 and Sch.

⁶⁶⁴ *Queensland Government Gazette*, vol 145, 9 November 1935 at 1296.

⁶⁶⁵ *Queensland Government Gazette*, vol 79, 23 August 1902 at 445.

⁶⁶⁶ *Queensland Government Gazette*, vol 124, 11 April 1925 at 1709.

Territory was excluded.⁶⁶⁷

Another provision in the Queensland Act allows it to be extended to a grant made by a British court in a foreign country, that is, one having jurisdiction out of Her Majesty's dominions.⁶⁶⁸ This provision applied at a time when certain British courts were empowered to exercise jurisdiction in such circumstances, usually under treaty arrangements. The WALRC suggested that the provision remained only as a historical curiosity.⁶⁶⁹

(c) South Australia

Under the South Australian legislation, the Supreme Court may reseal "any probate or administration granted by any Court of competent jurisdiction in any of the Australasian States or in the United Kingdom, or any probate or administration granted by a foreign court".⁶⁷⁰

The legislation defines the expressions "Australasian States" and "United Kingdom" in the following terms:⁶⁷¹

"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.

The broader 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 Ireland⁶⁷² and the Channel Islands.⁶⁷³

667

WALRC Report (1984) at para 4.1, note 1. The WALRC commented (*WALRC Report* (1984) at para 4.7, note 2):

British Guiana is now Guyana, and is no longer part of Her Majesty's dominions. 'British New Guinea' may perhaps be interpreted as Papua New Guinea, but the Queensland court will not reseal Papua New Guinea grants because of the doubt. Straits Settlements was split up in 1946. Cocos (Keeling) Islands and Christmas Island were transferred to Australia, Singapore became a separate colony, and the other territories became parts of the Federation of Malaya and of the colony of North Borneo (both of which are now incorporated within the state of Malaysia). Singapore, and all the other territories formerly part of Straits Settlements except those transferred to Australia, are no longer part of Her Majesty's dominions.

668

British Probates Act 1898 (Qld) s 5.

669

WALRC Report (1984) at para 4.6, note 1.

670

Administration and Probate Act 1919 (SA) s 17. The phrase "probate or administration granted by a foreign court" is defined in s 19(1) of the *Administration and Probate Act 1919* (SA); see p 153 of this Discussion Paper.

671

Administration and Probate Act 1919 (SA) s 20.

672

The only other Australian jurisdiction that provides for the resealing of a grant made in the Republic of Ireland is the Northern Territory: see note 704 of this Discussion Paper.

The definition of “Australasian States” is ambiguous in several respects. It does not expressly include the Australian Capital Territory or the Northern Territory, although grants from these jurisdictions are in practice resealed.⁶⁷⁴ 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 dependencies⁶⁷⁵ are included, although this may not be a problem in practice because no jurisdictions have been proclaimed as “Australasian States” under this provision.

The South Australian provision is not immune from becoming out of date: the term “Dominion” is no longer used and Fiji is no longer a colony.⁶⁷⁶

The phrase “probate or administration granted by a foreign court” is defined in the South Australian legislation to mean:⁶⁷⁷

... any document as to which the Registrar [of the Supreme Court] 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.

For this purpose 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.⁶⁷⁸

In its Report, the WALRC raised the possibility that the South Australian legislation might not be as generous in terms of the countries whose grants may be resealed as it seems:⁶⁷⁹

On its face, the South Australian provisions seem to be the most generous of all the Australian provisions, but there is a possibility that the reference to a “foreign court” might be interpreted to refer only to the court of “a state or country outside the King’s dominions”.⁶⁸⁰ If so, the courts of British and former British territories outside Australasia other than those included within the express provisions of sections 17 and 20 might be excluded.

673 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 at para 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.

674 Letter to the Queensland Law Reform Commission from the South Australian Registrar of Probates, 26 October 2001.

675 See note 657 of this Discussion Paper in relation to Australian external territories.

676 Fiji gained independence in 1970: *Halsbury’s Laws of England* (4th ed) vol 6 at para 852.

677 *Administration and Probate Act 1919* (SA) s 19(1).

678 *Administration and Probate Act 1919* (SA) s 19(2).

679 *WALRC Report* (1984) at para 4.11.

680 *Ibid* note 3, citing *Re Campbell* [1920] 1 Ch 35 at 39 (dealing with the meaning of the term “foreign country” for the purpose of the *Rules of the Supreme Court* (UK) O 11).

However, the WALRC considered that “[s]uch a result would be anomalous, and apparently contrary to the legislative intention”,⁶⁸¹ and noted that that the narrower interpretation of “foreign court” had been criticised.⁶⁸²

The generosity of the South Australian provisions is confirmed by the practice of the court, under which grants made in various states of the United States of America have been resealed⁶⁸³ - something that apparently cannot happen in any other Australian jurisdiction.

(d) Victoria

The legislative provisions in Victoria are very similar to those in South Australia. The Supreme Court may reseal a grant made by:⁶⁸⁴

... 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.

The expressions “Australasian States” and “United Kingdom” are defined in the following terms:⁶⁸⁵

“**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.⁶⁸⁶ [note added]

The Australian Capital Territory is the only jurisdiction that has been declared to be an Australasian State.⁶⁸⁷ The difficulties about the interpretation of various elements in this definition are the same as for the similar definition in South Australia, discussed above.⁶⁸⁸

681 Id at para 4.11.

682 Ibid note 3, citing Roberts-Wray K, *Commonwealth and Colonial Law* (1966) at 78-79.

683 Information from Mr A Faunce de Laune, South Australian Registrar of Probates, 9 July 1999.

684 *Administration and Probate Act 1958* (Vic) s 81(1).

685 *Administration and Probate Act 1958* (Vic) s 80.

686 See note 673 of this Discussion Paper in relation to the Channel Islands.

687 Victoria, *Government Gazette*, No 74, 16 May 1934 at 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 3 (definition of “subordinate instrument”), 16.

688 See p 153 of this Discussion Paper.

Under section 88 of the *Administration and Probate Act 1958* (Vic), the Governor in Council, on being satisfied that a grant of probate or letters of administration or that a grant or order issued by a court of competent jurisdiction in a country other than an Australasian State or the United Kingdom corresponds to a grant of probate or letters of administration issued by the Supreme Court of Victoria, may issue a proclamation declaring that country to be a country to which Part III of the Act (which deals with resealing) applies. The current proclamation, 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 (but, strangely, not New Brunswick, Newfoundland, or Prince Edward Island).⁶⁸⁹ The return of Hong Kong to China has not so far resulted in the revocation of the proclamation in respect of Hong Kong.

(e) Australian Capital Territory

Another different legislative technique can be found in the legislation of the Australian Capital Territory, which provides for the resealing of a grant made by “a court of competent jurisdiction in a State or Territory of the Commonwealth or in a Commonwealth country”.⁶⁹⁰ The expression “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”:⁶⁹¹

... 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, *i.e.* a country within the Commonwealth.

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. [original emphasis; note omitted]

(f) Tasmania

The Tasmanian legislation provides that the Supreme Court may reseal a grant made by “any court of competent jurisdiction in a State or Territory of the

⁶⁸⁹ Victoria, *Government Gazette*, No 117, 19 December 1973 at 4040.

⁶⁹⁰ *Administration and Probate Act 1929* (ACT) s 80(1).

⁶⁹¹ Roberts-Wray K, *Commonwealth and Colonial Law* (1966) at 16.

Commonwealth or a reciprocating country”.⁶⁹² The legislation provides that:⁶⁹³

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.

The Governor, on being satisfied that the laws of any country make adequate provision for the recognition in that country of grants of probate and letters of administration granted by the Supreme Court of Tasmania, may, by proclamation, declare that Part VI of the Act (which deals with resealing) applies to that country.⁶⁹⁴ Formerly, Part VI could be declared to apply only to a “British possession”, but that limitation was removed in 1978.⁶⁹⁵ Proclamations have been made under section 53 of the Tasmanian legislation in respect of Northern Rhodesia (now Zambia),⁶⁹⁶ the Territory of Papua and New Guinea,⁶⁹⁷ the Province of Ontario in the Dominion of Canada⁶⁹⁸ and the Colony of Sarawak (now part of Malaysia).⁶⁹⁹

As will be apparent, no attempt has been made to keep this list up to date in the light of political changes.

(g) Northern Territory

The Northern Territory, which has recently reviewed its legislation, now has arguably the simplest legislative formula of all the Australian jurisdictions.

Until 1998, the Northern Territory legislation provided for the resealing of grants made by a “court of competent jurisdiction in ... a Commonwealth country”,⁷⁰⁰ and defined “Commonwealth country” to mean:⁷⁰¹

⁶⁹² *Administration and Probate Act 1935* (Tas) s 48(1).

⁶⁹³ *Administration and Probate Act 1935* (Tas) s 47A(2).

⁶⁹⁴ *Administration and Probate Act 1935* (Tas) s 53(1).

⁶⁹⁵ *Administration and Probate Act 1978* (Tas) s 8, which amended s 53 of the *Administration and Probate Act 1935* (Tas).

⁶⁹⁶ *Tasmanian Government Gazette*, No 10179, 14 July 1936 at 1911.

⁶⁹⁷ *Tasmanian Government Gazette*, No 12679, 10 September 1953 at 2723.

⁶⁹⁸ SR No 117 of 1954, notified in the *Tasmanian Government Gazette* on 15 September 1954.

⁶⁹⁹ SR No 151 of 1957, notified in the *Tasmanian Government Gazette* on 27 November 1957.

⁷⁰⁰ *Administration and Probate Act* (NT) s 111(1).

⁷⁰¹ *Administration and Probate Act* (NT) s 6(1).

- (a) the States and Territories of the Commonwealth other than the Northern Territory; and
 - (b) the countries specified in a Schedule 5;
- and includes a prescribed country; ...

However, in 1998 the Act was amended to provide that the Supreme Court may reseal a grant made by a court of competent jurisdiction in “a relevant country”.⁷⁰² The term “relevant country” is defined to mean:⁷⁰³

- (a) a State or another Territory of the Commonwealth of Australia;
- (b) a country that is prescribed;⁷⁰⁴ or
- (c) where a part of a country is prescribed - that part of the country.

The Northern Territory Attorney-General explained the reason for the amendment in the following terms:⁷⁰⁵

The *Administration and Probate Act* currently provides for the recognition of grants of probate by courts of countries that are either prescribed in schedule 5 to that act or in regulations under the act. No such regulations have been made and the list of countries in the schedule is incomplete and inaccurate in so far as the names of some countries have changed. Additionally, there are some countries which should be listed but which are not, in fact, listed. Clause 3 of the bill provides for the removal of the list of countries from the act. This will permit revision of the list of countries by making an amendment to the regulations, rather than by an amendment to the act.

The new Northern Territory provision has avoided many of the pitfalls of definition and failure to keep up with changing political developments found in most of the other legislative provisions. The elimination of all reference to the Commonwealth of Nations has made it possible to select countries on the basis of the similarity of their laws to those in the Northern Territory, rather than on the basis of their membership of the Commonwealth of Nations, which does not guarantee that laws are similar or that recognition of grants is appropriate. However, the Northern Territory approach still relies on the ability of the relevant authorities to draw up a list of appropriate countries and keep it up to date.

702 *Administration and Probate Act* (NT) s 111, which was amended by s 3 of the *Statute Law Revision Act (No 2) 1998* (NT).

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

704 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.

705 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 October 1998, <http://notes.nt.gov.au/hansard...> (15 January 2002).

(h) New Zealand

The *Administration Act 1969* (NZ) permits the resealing of a grant made:⁷⁰⁶

- (a) By any competent Court in any Commonwealth country (other than New Zealand) or in the Republic of Ireland; or
- (b) By any Court of any Commonwealth country (other than New Zealand) which at the date of the grant has jurisdiction out of the Commonwealth in pursuance of an Order in Council, whether made under any Act or otherwise; or
- (c) By any competent Court of any other country, being a country to which (at the date of the production for sealing under this section) this section is, by Order in Council, declared to apply ...⁷⁰⁷

The Act provides that “Commonwealth country” means:⁷⁰⁸

... a country that is a member of the Commonwealth; and includes every territory for whose international relations the Government of that country is responsible.

The danger of restricting the countries whose grants can be resealed to particular countries declared by Order in Council is that, without regular review, the list may become out of date.

3. COMMONWEALTH SECRETARIAT DRAFT MODEL BILL

Clause 3(1) of the Commonwealth Secretariat draft model bill⁷⁰⁹ provided for the resealing of “a grant of probate or letters of administration of the estate of any deceased person ... made by a court in any part of the Commonwealth⁷¹⁰ or in any other country”.

⁷⁰⁶ *Administration Act 1969* (NZ) s 71(1).

⁷⁰⁷ The new Northern Territory legislation, which allows for the resealing of a grant made by any competent court in a “relevant country”, and defines “relevant country” to mean a State or another Territory of the Commonwealth of Australia or a country that is prescribed, adopts essentially the same approach: see p 157 of this Discussion Paper.

⁷⁰⁸ *Administration Act 1969* (NZ) s 2(1).

⁷⁰⁹ The Commonwealth Secretariat draft model bill is reproduced in Appendix B to this Discussion Paper.

⁷¹⁰ 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*, Appendix 1 at 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.

The Commonwealth Secretariat draft model bill did not restrict in any way the countries whose grants could be resealed; instead, the issue turned on whether the grant in the country in question had a sufficiently similar effect to a grant of probate or letters of administration made in the resealing jurisdiction. Consequently, much depended on the definition of “grant of administration”, which was defined in the following terms:⁷¹¹

... 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.

This approach is not dissimilar to that found in the South Australian legislation, under which a grant made by a foreign court can be resealed if the registrar is satisfied that it corresponds to a grant of probate or administration in South Australia.⁷¹² This provision has enabled South Australia to reseal United States grants, something that would not appear to be possible in most other Australian jurisdictions.⁷¹³

4. WALRC RECOMMENDATION

The WALRC expressed the view that the existing legislation in the Australian States and Territories was unsatisfactory because the countries whose grants may be resealed differed from one State or Territory to another, and because the legislation was out of date and required amendment.⁷¹⁴ The WALRC drew attention to the drafting shortcomings referred to above, and said:⁷¹⁵

The Australian States and Territories should be able to agree on a uniform approach to the question of the countries whose grants of probate and administration can be resealed. However, careful thought needs to be given to the way in which such a provision is formulated, and none of the present Australian provisions is an entirely satisfactory model.

It considered two contrasting approaches to this problem: the Commonwealth Secretariat draft model bill and the *Administration Act 1969* (NZ) and noted:⁷¹⁶

711 Commonwealth Secretariat draft model bill cl 2(1).

712 See pp 152-153 of this Discussion Paper.

713 See p 154 of this Discussion Paper.

714 *WALRC Report* (1984) at para 4.15.

715 *Id* at para 4.16.

716 *Id* at para 4.20.

These two provisions are alike in that they make special provision for Commonwealth countries and for territories within the Commonwealth of Nations that are not independent member countries. They are also alike in that they permit the resealing of grants made by the courts of countries outside the Commonwealth of Nations. Where they differ is in the method used to restrict the grants which can be resealed to those which are substantially similar to local grants.

The WALRC expressed a preference for the approach taken in the Commonwealth Secretariat draft model bill:⁷¹⁷

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.

Consequently, the WALRC recommended that all Australian States and Territories should by uniform legislation adopt a provision based on that in the Commonwealth Secretariat draft model bill, including the definition in that bill of "grant of administration" and the definition referred to above⁷¹⁸ of "any part of the Commonwealth".⁷¹⁹ It observed:⁷²⁰

Under such a provision, it would be the duty of the Registrar of the Supreme Court of the State or Territory in which resealing is sought to decide whether the document issued by the court of the country in question was issued by a court of competent jurisdiction, and was sufficiently equivalent to a grant of probate or administration issued by that Supreme Court to satisfy the statutory definition.

5. PROBATE REGISTRARS

In 1990, the Probate Registrars put forward a suggestion that was different from either of the alternatives considered by the WALRC, recommending that:⁷²¹

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.

This alternative, while it relies on the list approach, would at least ensure that the countries recognised for this purpose by Australian jurisdictions remained uniform.

⁷¹⁷ Id at para 4.21.

⁷¹⁸ See note 710 of this Discussion Paper.

⁷¹⁹ *WALRC Report* (1984) at para 4.22 and recommendation 20.

⁷²⁰ Id at para 4.23.

⁷²¹ *Report of the Conference of Probate Registrars* (1990) at 10.

6. PRELIMINARY VIEW⁷²²

In view of the criticisms made above about the existing legislation in the Australian States and Territories, it is suggested that there are two principal alternatives for prescribing the countries whose grants may be resealed. Whichever alternative is adopted, the model provision should first provide that the jurisdiction in question should be able to reseal grants of probate and administration made by a court of competent jurisdiction in each other Australian State or Territory.

The model provision could then provide for the recognition of grants of probate and administration made by a competent court either:

- 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.

The first alternative adopts the approach of the Commonwealth Secretariat draft model bill and makes it unnecessary to have an official list of countries and keep it up to date. It would rely on the courts to determine whether particular grants were sufficiently similar to Australian grants of probate and administration to be recognised. Over time, a body of precedent would accumulate which would assist in this process. There is, however, no certainty that the courts of all Australian jurisdictions would make the same decision in relation to instruments issued from a particular country.

The second alternative combines elements of the Northern Territory legislation and the Probate Registrars' proposal. It relies on the Minister for Foreign Affairs to keep the list up to date. It would be necessary, however, for Commonwealth legislation to be passed conferring on the Minister for Foreign Affairs the power to proclaim certain countries for this purpose. The Commonwealth Parliament does not have the power under section 51 of the *Australian Constitution* to make laws with respect to administration and probate. It may, however, be possible for Commonwealth legislation to be supported by the external affairs power.⁷²³ Alternatively, the States could make a referral of the necessary power to the Commonwealth Parliament for the purposes of section 51(xxxvii) of the Constitution.⁷²⁴

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As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

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See *Australian Constitution* s 51(xxix).

724

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: ...

7. ISSUES FOR CONSIDERATION

6.1 Should the model legislation provide that an Australian court may reseal a grant made by a court of competent jurisdiction:

(a) in any other Australian State or Territory, or in any part of the Commonwealth of Nations, or in any other country, provided the term “grant” is defined in terms similar to the definition of “grant of administration” in the Commonwealth Secretariat draft model bill;⁷²⁵ or

(b) in any other Australian State or Territory, or in any country gazetted from time to time by the Commonwealth Minister for Foreign Affairs?

6.2 If the general approach outlined in question 6.1(a) is favoured, is it necessary or desirable to retain the reference to “any part of the Commonwealth of Nations”⁷²⁶ or is the phrase “any other country” sufficiently wide?

⁷²⁵ See p 159 of this Discussion Paper.

⁷²⁶ This expression is discussed at note 710 of this Discussion Paper.

CHAPTER 7

JURISDICTIONAL ISSUES

1. INTRODUCTION

When a court is considering whether to make an original grant of probate or letters of administration, or to reseal a grant made in another jurisdiction, it may have to consider whether it has jurisdiction to make or reseal the grant, and whether to apply its own laws or the laws of another legal system to determine questions such as the person to whom the grant should be made or on whose application it may be resealed, and how the estate should be distributed. These are issues of conflict of laws. They are more fully considered in this and the next three chapters.

2. THE HISTORICAL BASIS FOR REQUIRING PROPERTY WITHIN THE JURISDICTION OF THE GRANTING COURT

In England, the probate jurisdiction of the ecclesiastical courts, and their successor, the Court of Probate,⁷²⁷ was founded on the presence of personal property within the jurisdiction of the court.⁷²⁸ In 1875, the jurisdiction of the Court of Probate was transferred to the Probate, Divorce and Admiralty Division of the English High Court.⁷²⁹

The High Court's jurisdiction to grant probate and letters of administration was changed by the *Land Transfer Act 1897* (UK), which provided that, where a person died on or after 1 January 1898, the Court could grant probate or letters of

727 The probate jurisdiction of the ecclesiastical courts was transferred to the Court of Probate on 11 January 1858: see note 49 of this Discussion Paper.

728 *Evans v Burrell* (1859) 28 LJPM & A 82; *In the Goods of Tucker* (1864) 3 Sw & Tr 585, 164 ER 1402. Section 77 of the *Court of Probate Act 1877* also conferred on the Court of Probate a further jurisdiction "in respect of devises of real estate ... contained in a will" that disposed of personal as well as real estate: Tristram TH and Jenner HA, *Coote's Common Form Practice and Tristram's Contentious Practice of the High Court of Justice in Granting Probates and Administrations* (12th ed, 1896) at 283-284, note (a).

729 In 1875, the existing courts in England, including the Court of Probate, were united to form the Supreme Court of Judicature: *Supreme Court of Judicature Act 1873* (UK) s 3, *Supreme Court of Judicature (Commencement) Act 1874* (UK) s 2 (the latter Act deferring the commencement of the *Supreme Court of Judicature Act 1873* (UK) until 1 November 1875). The *Supreme Court of Judicature Act 1873* (UK) provided that the Supreme Court would consist of two permanent divisions, the High Court of Justice and the Court of Appeal: *Supreme Court of Judicature Act 1873* (UK) s 4. The causes and matters pending in the Court of Probate at the commencement of the *Supreme Court of Judicature Act 1873* (UK) and the causes and matters that would, but for that Act, have been within the exclusive jurisdiction of the Court of Probate were assigned to the Probate, Divorce and Admiralty Division of the High Court: *Supreme Court of Judicature Act 1873* (UK) s 34. In October 1971, the Probate, Divorce and Admiralty Division of the High Court was renamed the Family Division: *Administration of Justice Act 1970* (UK) s 1(1), SI No 1244 of 1971. Non-contentious probate business continued to be assigned to the Family Division, but all other probate business was assigned to the Chancery Division: *Administration of Justice Act 1970* (UK) s 1(4). See now *Supreme Court Act 1981* (UK) s 61(1), Sch 1.

administration even though the estate consisted of real estate and did not include any personal property.⁷³⁰

3. ORIGINAL GRANTS: THE PRESENT LAW

In each Australian State and Territory, jurisdiction to make a grant of probate or letters of administration is given to the Supreme Court. In five jurisdictions, the court cannot make a grant unless the deceased left property within the jurisdiction. In the remaining jurisdictions, the court may make a grant despite the absence of property.

In the United Kingdom and in New Zealand, the court may also make a grant despite the absence of property within the jurisdiction.

(a) Jurisdictions requiring property

In New South Wales, South Australia, Tasmania, Victoria and Western Australia, the court cannot exercise jurisdiction to make a grant unless the deceased left property within the jurisdiction.⁷³¹

The New South Wales, Victorian and Western Australian provisions are virtually identical. Section 40 of the *Wills, Probate and Administration Act 1898* (NSW) provides:

The Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property, whether real or personal, in New South Wales.

The South Australian and Tasmanian provisions are expressed in quite different terms, although their effect is the same in that both provisions confer jurisdiction on the court where there is real or personal property in the jurisdiction.⁷³²

Any property, real or personal, is sufficient.⁷³³ No other connection with the

⁷³⁰ *Land Transfer Act 1897* (UK) ss 1(3), (5), 25. The other significant change made by the Act concerned the devolution of real property. The Act provided that, where a person died on or after 1 January 1898, real estate that was vested in that person without a right in any other person to take by survivorship would vest in his or her personal representative: *Land Transfer Act 1897* (UK) ss 1(1), (5), 25. In 1932, the jurisdictional requirements for the making of a grant were further changed to allow the making of a grant despite the absence of property within the jurisdiction: see p 167 of this Discussion Paper.

⁷³¹ *Wills, Probate and Administration Act 1898* (NSW) s 40; *Administration and Probate Act 1919* (SA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 6(5); *Administration and Probate Act 1958* (Vic) s 6; *Administration Act 1903* (WA) s 6.

⁷³² *Administration and Probate Act 1919* (SA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 6(5).

⁷³³ See for example *In the Goods of Rowley* (1863) 2 W & W (IE & M) 115 where the only property of an intestate in Victoria was money deposited in a Melbourne bank. The Court held that the intestate died "possessed of or entitled to personal estate within the colony" as required by the relevant legislation at the time.

jurisdiction is required.⁷³⁴ The rule applies even where the application is for a limited grant, such as a grant of administration *ad litem* to enable proceedings to be brought in the jurisdiction.⁷³⁵

Provided there is property within the jurisdiction, the fact that the will does not dispose of property within the jurisdiction is not of itself a ground for refusing a grant of probate.⁷³⁶ The court will refuse to grant probate of the will of a person who left property within the jurisdiction only if the will discloses a sufficient intention that it should not have any testamentary operation within the jurisdiction, whether for the purpose of appointing executors or disposing of property or otherwise.⁷³⁷

It appears, however, that the court may grant letters of administration *de bonis non*⁷³⁸ despite the absence of property within the jurisdiction, provided there is property somewhere that remains to be administered. In *Wimalaratna v Ellies*,⁷³⁹ the deceased died intestate in Western Australia leaving property in that jurisdiction. After the death of the administrator who was originally appointed, the deceased's son applied for letters of administration *de bonis non* of his mother's estate. He sought the grant for the purpose of instituting proceedings against his sister to recover certain jewellery which he alleged his sister had removed from Western Australia and taken to New South Wales shortly after the death of their mother or,

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It does not matter where the deceased was domiciled: *Robinson v Palmer* [1901] 2 IR 489. See also *Re Falconer* [1958] QWN 42, which was decided before s 6(2) of the *Succession Act 1981* (Qld) abolished the requirement for property within the jurisdiction. A testator who was domiciled in Michigan, USA, died in Ontario, Canada, leaving personal but no real property in Queensland. It was held that, since the will was valid according to the law of the testator's domicile, probate should be granted in Queensland. See also *Re Aldis* (1898) 16 NZLR 577.

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Re Aylmore [1971] VR 375. The deceased, Aylmore, had been involved in a car accident in Victoria, in which a minor was injured. Aylmore had been working in Victoria at the time, although it appeared to the Court (at 375) that he was normally resident in Western Australia. The Court drew that inference (at 375) from the fact that the vehicle Aylmore was driving was insured with the Motor Vehicle Trust of Western Australia, rather than with a Victorian authorised insurer. The next friend of the injured minor applied to the Supreme Court of Victoria for a grant of letters of administration *ad litem* to be made to the Public Trustee of Victoria to enable proceedings to be brought in Victoria against the deceased's estate. The question arose as to whether the grant could be made only if there was property in Victoria.

The Court held (at 376) that a limited grant of administration, such as letters of administration *ad litem*, could be made only if there was property within Victoria. It then considered whether that requirement was satisfied. The Court observed (at 377) that the evidence showed only "that if the deceased had been held liable he would have been entitled to indemnity ... from the [Western Australian Motor Vehicle Insurance] Trust", which the Court assumed to be resident in Western Australia. The Court held (at 377) that the "chase in action represented by the [deceased's] right to indemnity" was situated "where the obligor resides because it is there that it is properly enforceable". As there was no evidence that the "obligor", the Motor Vehicle Insurance Trust of Western Australia, resided in Victoria, the requirement for property within Victoria was not satisfied and the Court refused to grant the letters of administration. For a discussion of the rules on where various kinds of property are situated, see Collins L and others (eds), *Dacey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 923-937.

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Re Carlton [1924] VLR 237. It has been suggested that, in the light of *Re Carlton*, decisions to the contrary, such as *In the Will of Palmer* (1904) 29 VLR 946 and *Re Trethewie* [1913] VLR 26, "should be treated with considerable reserve": Sundberg RA, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) at 8. See also Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 553.

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Re Carlton [1924] VLR 237 at 240.

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A grant of letters of administration *de bonis non* is made to enable the grantee to complete the administration of a partly unadministered estate: Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at para 823.

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Unreported, Full Court, Supreme Court of Western Australia, Appeal No 167 of 1984, Burt CJ, Wallace and Brinsden JJ, 9 October 1984.

alternatively, to claim damages for its wrongful detention or for conversion. His sister lodged a caveat against the making of the grant, but the Court, at first instance, ordered that the caveat be removed. Letters of administration *de bonis non* were subsequently granted to the deceased's son.⁷⁴⁰

The sister sought leave to appeal against the order that the caveat be removed, and sought an order revoking the grant made in favour of her brother. Her case was that the Court did not have jurisdiction to grant the letters of administration *de bonis non*, as there was no evidence of the existence of any unadministered assets of her mother's estate either in Western Australia or elsewhere.⁷⁴¹ She denied taking the jewellery, but argued, in the alternative, that any jewellery formerly owned by her mother which she possessed was in her possession in New South Wales and that the situs of any cause of action for its recovery, or for damages, was New South Wales.⁷⁴² She further argued that the limitation period provided under the *Limitation Act 1969* (NSW) for bringing an action for the recovery of the jewellery or for damages had expired,⁷⁴³ and that, in those circumstances, the effect of the legislation was that any claim for recovery of the jewellery or for damages was extinguished.⁷⁴⁴

It was common ground between the parties that the Supreme Court of Western Australia could "make a grant of letters of administration *de bonis non* ... even though there be no assets within the jurisdiction if there are assets somewhere".⁷⁴⁵ Brinsden J made the following observation about the Court's jurisdiction:⁷⁴⁶

The position as agreed by the parties is a common sense one since there may well be a case where there having been a grant of letters of administration in respect of an estate of a deceased leaving assets within Western Australia, after the death a portion of those assets is taken out of Western Australia into another jurisdiction, say New South Wales, by a third party and the administrator having administered the

740 Ibid. These facts are set out in the judgment of Brinsden J at 1-5.

741 Id per Burt CJ at 6-7, per Wallace J at 3-4 and per Brinsden J at 5-6.

742 Id per Burt CJ at 8-9.

743 Under s 14(1)(b) of the *Limitation Act 1969* (NSW), a cause of action founded on tort is not maintainable if brought after six years from the date on which the cause of action first accrued to the plaintiff or to a person through whom the plaintiff claims. The applicant argued that the cause of action commenced to run when letters of administration were granted to the original administrator, and that the limitation period had expired before letters of administration *de bonis non* were granted to her brother: see *Wimalaratna v Ellies* (Unreported, Full Court, Supreme Court of Western Australia, Appeal No 167 of 1984, Burt CJ, Wallace and Brinsden JJ, 9 October 1984) per Burt CJ at 8-10 and per Brinsden J at 8-10.

744 *Wimalaratna v Ellies* (Unreported, Full Court, Supreme Court of Western Australia, Appeal No 167 of 1984, Burt CJ, Wallace and Brinsden JJ, 9 October 1984) per Brinsden J at 8-10. The applicant relied on ss 63 and 65 of the *Limitation Act 1969* (NSW). Section 63 provides that, on the expiration of a limitation period fixed by the Act for the recovery of damages, the right and title of the person formerly having the cause of action to the damages is extinguished. Similarly, s 65 and Sch 4 provide that, on the expiration of a limitation period fixed by the Act for a cause of action for the conversion or detention of goods, the title of a person formerly having the cause of action to the goods is extinguished.

745 *Wimalaratna v Ellies* (Unreported, Full Court, Supreme Court of Western Australia, Appeal No 167 of 1984, Burt CJ, Wallace and Brinsden JJ, 9 October 1984) per Brinsden J at 6-7.

746 Id at 7.

balance of the estate so that there remained no longer any assets of it within Western Australia, dies. In such a case it would be an extraordinary position to find that no letters of administration de bonis non could be granted in this State because there are no assets remaining within it and no grant could be made in New South Wales because there were no assets within that State at the date of death ... There must be, however, as the appellant through Counsel asserted, assets somewhere.

As the Full Court was not satisfied that the limitation period provided by the New South Wales legislation for bringing an action for the recovery of the jewellery or for damages had expired, it refused the application for leave to appeal.⁷⁴⁷

Where a deceased person has made two separate wills, one dealing with property within the jurisdiction and the other dealing with property elsewhere, it is necessary to prove only the former will.⁷⁴⁸ The court will not have jurisdiction to admit the latter will to probate⁷⁴⁹ unless the former will refers to and incorporates the latter will.⁷⁵⁰

(b) Jurisdictions not requiring property

In England, the jurisdiction of the court was extended by the *Administration of Justice Act 1932* (UK)⁷⁵¹ to allow it to make a grant where the deceased left no estate within the jurisdiction. The requirement that the deceased had to have property within the jurisdiction could be very inconvenient, for example, where the deceased died domiciled⁷⁵² in England leaving property elsewhere, but no property in England, and the foreign court refused to make a grant until a grant had been obtained in the deceased's domicile.⁷⁵³ However, in the absence of special circumstances the court will not make a grant unless there is property in England.⁷⁵⁴

⁷⁴⁷ Id per Burt CJ at 10-11 (in addition to the reasons given at 5), per Wallace J at 4 and per Brinsden J at 17-20.

⁷⁴⁸ *Re Haefliger* (Unreported, Supreme Court of New South Wales, No 116810 of 1991, Powell J, 12 May 1992).

⁷⁴⁹ *In the Goods of Coode* (1867) LR 1 P & D 449; *In the Goods of Smart* (1884) 9 PD 64; *In the Goods of Tamplin* [1894] P 39.

⁷⁵⁰ *In the Goods of Harris* (1870) LR 2 P & D 83; *In the Goods of de la Saussaye* (1873) LR 3 P & D 42; *In the Goods of Lord Howden* (1874) 43 LJP & M 26; *In the Goods of Lockhart* (1893) 63 LT 21; *In the Goods of Western* (1898) 78 LT 49. See also *Re Tinkler* [1990] 1 NZLR 621.

⁷⁵¹ *Administration of Justice Act 1932* (UK) s 2(1). The *Administration of Justice Act 1932* (UK) was repealed by s 152(4) and Sch 7 of the *Supreme Court Act 1981* (UK). See now s 25(1) of the *Supreme Court Act 1981* (UK). See also *In the Estate of Wayland* [1951] 2 All ER 1041, in which the Court considered the effect of s 2(1) of the *Administration of Justice Act 1932* (UK). The provision extends the circumstances in which, where there are two separate wills, one dealing with property within the jurisdiction and the other with property elsewhere, the second will may be admitted to probate: see notes 749 and 750 of this Discussion Paper.

⁷⁵² See note 16 of this Discussion Paper.

⁷⁵³ See Collins L and others (eds), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 1007.

⁷⁵⁴ Yeldham RF and others (eds), *Tristram and Coote's Probate Practice* (28th ed, 1995) at para 4.209, citing Registrar's Direction, 30 November 1932. The Direction provides that the oath taken by the personal representative must state "the purpose for which the grant is required". See *Aldrich v Attorney General* [1968] P 281 where the Court refused the application for a grant.

Similar reforms in relation to jurisdiction have been adopted in the Australian Capital Territory,⁷⁵⁵ in the Northern Territory⁷⁵⁶ and in Queensland.⁷⁵⁷ New Zealand has also abolished its property requirement for the making of grants.⁷⁵⁸

The provisions in the Australian Capital Territory and the Northern Territory are virtually identical. The Australian Capital Territory provision is in the following terms:⁷⁵⁹

- (1) The court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property, whether real or personal, within the Territory.
- (2) The court shall have jurisdiction to grant probate of the will, or administration of the estate, of a deceased person who did not leave property, whether real or personal, within the Territory, if the court is satisfied that the grant of probate or administration is necessary.

The Queensland provision is much more comprehensive. Section 6 of the *Succession Act 1981* (Qld) provides:⁷⁶⁰

- (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.
- (2) The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.

⁷⁵⁵ *Administration and Probate Act 1929* (ACT) s 9(2), which was inserted by s 6 of the *Administration and Probate Ordinance 1965* (ACT).

⁷⁵⁶ *Administration and Probate Act* (NT) s 14(2). Prior to the commencement of the *Administration and Probate Act* (NT) on 8 February 1971, the court could make a grant only where there was property within the jurisdiction: *The Administration and Probate Act 1891* (SA) s 6. That Act ceased to apply in the Northern Territory by virtue of s 3(2) and the Second Sch of the *Administration and Probate Act* (NT).

⁷⁵⁷ *Succession Act 1981* (Qld) s 6(2).

⁷⁵⁸ *Administration Act 1969* (NZ) s 5(2). Section 84(1) and the Third Sch of the *Administration Act 1969* (NZ) repealed the *Administration Act 1952* (NZ), s 4 of which required property in New Zealand for the making of a grant.

⁷⁵⁹ *Administration and Probate Act 1929* (ACT) s 9.

⁷⁶⁰ Before the commencement of the *Succession Act 1981* (Qld), the Court's jurisdiction to grant probate and letters of administration was governed by s 23 of the *Supreme Court Act 1867* (Qld), which conferred on the Court the jurisdiction of the Prerogative Court of the Archbishop of Canterbury. The Prerogative Court required the presence of personal property within the jurisdiction: see note 47 of this Discussion Paper. However, in *Re Hall* [1923] QWN 40, the Court granted letters of administration with the will annexed, despite the absence of personal property in Queensland, on the basis that the petitioner established a sufficient reason for the grant. The deceased had left real property in Queensland, but, under the law at the time, no personal or real property could vest in any person under any will or on intestacy until probate of the will or letters of administration had been granted. In *Re Bowes* [1963] QWN 25, the Court also granted probate of a will despite the absence of personal property in Queensland.

- (3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit.
- (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.
- (5) This section applies whether the death has occurred before or after the commencement of this Act.

It does not appear that the restriction in the two Territories to making grants that are “necessary” produces any real difference between these provisions and the English legislation, where the restriction is found in a practice direction, or the Queensland legislation, where the matter is left to the discretion of the court. English authority suggests that, if the deceased left no property in England and was not domiciled there, the court will be very reluctant to exercise its discretion to make a grant.⁷⁶¹

4. RESEALING: THE PRESENT LAW

(a) Jurisdictions expressly requiring property: Tasmania, Victoria

In Tasmania and Victoria, the requirement that the deceased should have left property within the resealing jurisdiction is specifically stated in the legislative provisions on resealing.⁷⁶²

(b) Jurisdictions not expressly requiring property

(i) New South Wales, South Australia, Western Australia

As noted above, the legislation in New South Wales, South Australia and Western Australia provides that the court may exercise jurisdiction to make an original grant where the deceased left property within the particular jurisdiction.⁷⁶³ However, the legislation in these jurisdictions does not expressly impose a property requirement for the resealing of a grant. The question whether the courts in these jurisdictions can reseal a grant where there is no property within the jurisdiction turns on the interpretation of the relevant legislation.

⁷⁶¹ See p 167 of this Discussion Paper.

⁷⁶² *Administration and Probate Act 1935*(Tas) s 48(1); *Administration and Probate Act 1958*(Vic) s 81(1).

⁷⁶³ See p 164 of this Discussion Paper.

In *Re Carlton*,⁷⁶⁴ the Full Court of the Supreme Court of Victoria considered whether an exemplification of a grant of probate made in New Zealand should be resealed in Victoria, given that the will did not dispose of any property in Victoria.⁷⁶⁵ The Court emphasised that the section enabling the resealing of a grant⁷⁶⁶ had to be construed together with, and in the light of, other sections in that Part of the legislation dealing with resealing, including provisions to the effect that:⁷⁶⁷

- a person could lodge a caveat against the resealing of a grant and such a caveat would have the same effect and be dealt with in the same way as a caveat against the making of an original grant;⁷⁶⁸
- a grant was not to be resealed until such probate stamp and other duties and fees (if any) had been paid as would have been payable if the grant had been originally granted by the Supreme Court of Victoria;⁷⁶⁹
- a resealed grant was to operate as an original grant.⁷⁷⁰

The Court concluded that, when the main resealing provision was construed in that light, it was:⁷⁷¹

... sufficient to justify this Court in declining to allow a sealing which would operate as an original grant ... in a case where an original grant should, as a matter of law, be refused.

However, where there was compliance with the provision enabling resealing, and, in the circumstances, the making “of an original grant would not, as a matter of law, be improper”, the Court would allow a resealing that would “have the effect of an original grant”.⁷⁷² Consequently, in exercising its discretion in relation to resealing, the court will apply the same principles that govern the exercise of its discretion in making an original grant.

764 [1924] VLR 237.

765 See p 165 of this Discussion Paper.

766 The provision at the time was s 51 of the *Administration and Probate Act 1915* (Vic).

767 *Re Carlton* [1924] VLR 237 at 242.

768 *Ibid*, referring to s 52 of the *Administration and Probate Act 1915* (Vic).

769 *Ibid*, referring to s 54 of the *Administration and Probate Act 1915* (Vic).

770 *Ibid*, referring to s 55 of the *Administration and Probate Act 1915* (Vic).

771 *Ibid*.

772 *Id* at 242-243.

As the deceased in *Re Carlton* left property in Victoria,⁷⁷³ the decision did not concern the threshold question of whether the court had jurisdiction to reseal the grant in question. However, the decision was reached on the basis that the provision enabling the court to reseal a grant should be construed in the light of the other resealing provisions in the legislation, which had the effect that a resealed grant operated as an original grant. The reasoning applied in that case to the issue of the exercise of the court's discretion can be applied equally to the issue of the court's jurisdiction to reseal a grant. Like the Victorian legislation considered in *Re Carlton*, the legislation in New South Wales, South Australia and Western Australia provides that, on resealing, a grant has the same force, effect and operation as if it had been originally granted by the resealing court.⁷⁷⁴ It is therefore suggested that, because the legislation in these jurisdictions requires the presence of property for the making of an original grant, the legislation should be construed to impose the same requirement in relation to the resealing of a grant, notwithstanding the absence of an express requirement to that effect.⁷⁷⁵

The suggestion that the property requirement for an original grant applies also to an application for resealing has been considered and rejected by commentators on the New South Wales legislation. They have expressed the view that section 107 of the *Wills, Probate and Administration Act 1898* (NSW), under which the court has the power to reseal a grant, should not be given a narrow interpretation by being read in conjunction with section 40⁷⁷⁶ of that Act.⁷⁷⁷ This view, however, is based on a literal interpretation of section 107(1), divorced from any consideration of other provisions in the legislation, and is inconsistent with the general approach taken in *Re Carlton*⁷⁷⁸ and in *In*

773 Id at 239.

774 *Wills, Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act 1919* (SA) s 17; *Administration Act 1903* (WA) s 61(2). See the discussion of this issue at pp 121-122 of this Discussion Paper.

775 This view is also consistent with the approach taken in *In the Will of Buckley* (1889) 15 VLR 820, where the Supreme Court of Victoria refused an application for resealing on the ground of unexplained delay. Probate had been granted more than thirty years before the application for resealing was made. In considering the resealing provisions, which at the time were found in their own separate Act, Hodges J held (at 821):

In my opinion the Act must be construed as an Act dealing with the granting of probates and letters of administrations and must be construed with reference to the law on those subjects at the time the Act was passed ... Under the circumstances disclosed in this case, if an original probate or letters of administration were being applied for the Court would refuse to make such grant. Therefore, I think I ought to refuse to direct the Registrar to affix the seal to this document.

776 Section 40, which is set out at p 164 of this Discussion Paper, limits the court's jurisdiction to make a grant to estates where the deceased left property within New South Wales.

777 Hastings R and Weir G, *Probate Law and Practice* (2nd ed, 1948) at 310; Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at 625. The latter text is expressed to be based on Hastings and Weir, *Probate Law and Practice*. These commentators have suggested, however, that, in the absence of property within the jurisdiction, the court would be "reluctant to reseal unless there were good grounds for doing so": Hastings R and Weir G, *Probate Law and Practice* (2nd ed, 1948) at 310; Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at 625.

778 [1924] VLR 237. See pp 170-171 of this Discussion Paper.

the Will of Buckley.⁷⁷⁹

(ii) Australian Capital Territory, Northern Territory, Queensland

In the Australian Capital Territory and the Northern Territory, the resealing provisions, like those in the three States discussed above, do not specifically require property within the resealing jurisdiction. However, the legislation in the Territories does not require property for the making of an original grant.⁷⁸⁰ Consequently, on either the approach adopted in *Re Carlton*⁷⁸¹ or on the view preferred by the commentators on the New South Wales legislation,⁷⁸² it can be assumed that a grant may be resealed in these jurisdictions despite the absence of property within the particular jurisdiction.

Similarly, in Queensland, section 4 of the *British Probates Act 1898* (Qld) does not specifically require the presence of property within Queensland. As section 6 of the *Succession Act 1981* (Qld) allows the making of an original grant notwithstanding that the deceased left no property within Queensland,⁷⁸³ it can also be assumed that a grant may be resealed in Queensland despite the absence of property in that jurisdiction.⁷⁸⁴

5. WALRC RECOMMENDATION

The WALRC Report recommended that the requirement that there be property within the jurisdiction should be abolished both for the making of original grants and for the resealing of grants made elsewhere.⁷⁸⁵ It suggested that, in a number of circumstances, the making or resealing of a grant was desirable, despite the absence of property within the jurisdiction.⁷⁸⁶

⁷⁷⁹ (1889) 15 VLR 820. See note 775 of this Discussion Paper.

⁷⁸⁰ See p 168 of this Discussion Paper.

⁷⁸¹ [1924] VLR 237. See pp 170-171 of this Discussion Paper.

⁷⁸² See p 171 of this Discussion Paper.

⁷⁸³ See pp 168-169 of this Discussion Paper.

⁷⁸⁴ In *Re Uniacke* [1912] QWN 43 it was held that, as there was evidence of a right to property within Queensland, the grant should be resealed. This decision was given in the context of the pre-1981 Queensland law. At that time, it was generally required, for the making of a grant, that the deceased leave personal property within the jurisdiction although, in exceptional cases, original grants were made despite the absence of personal property: *Re Hall* [1923] QWN 41; *Re Bowes* [1963] QWN 35. See the discussion of these cases at note 760 of this Discussion Paper.

⁷⁸⁵ *WALRC Report* (1984) at para 9.30 and recommendation 33.

⁷⁸⁶ *Id* at para 9.27.

- (a) The making of a grant may have effects on foreign revenue laws beneficial to the estate.⁷⁸⁷
- (b) If a testator died leaving property in one jurisdiction, but none in a second, and his executor obtained a grant only after a trespasser had removed the testator's movable property from the first to the second, probate could not be resealed in the second, if property there was required.⁷⁸⁸
- (c) Certain foreign countries apparently require a grant by the country of nationality of the deceased before themselves making a grant.⁷⁸⁹
- (d) Where a will only appoints a testamentary guardian, the will is not admissible to probate.⁷⁹⁰
- (e) There may be litigation to which the deceased estate may be a party but where in reality any judgment would be payable by the deceased's insurers.⁷⁹¹

The WALRC also noted the comments of the Victorian Registrar of Probates, who said that in Victoria the problem could be overcome by filing an affidavit that the deceased left personal property within the jurisdiction to a value of say \$10.⁷⁹² The WALRC considered such artifices undesirable and an indication of the need for reform.⁷⁹³

Accordingly, the WALRC expressed the view that the legislation in the five States requiring property within the jurisdiction should be amended to provide that a grant could be made or resealed even though the deceased left no property within the jurisdiction. In its view, section 6 of the Queensland Act was a suitable model for a legislative provision on the making of original grants.⁷⁹⁴

Although it was technically outside its terms of reference to make recommendations relating to the making of original grants, since it was formally limited to reviewing the rules relating to the recognition of grants made elsewhere, the WALRC took the view that it was not sensible to recommend a change relating only to resealing unless a

787 Citing *In the Estate of Wayland* [1951] 2 All ER 1041.

788 Citing Wood O and Hutley NC, *Hutley, Woodman and Wood: Cases and Materials on Succession* (3rd ed, 1984) at 414. However, see now *Wimalaratna v Ellies* (Unreported, Full Court, Supreme Court of Western Australia, Appeal No 167 of 1984, Burt CJ, Wallace and Brinsden JJ, 9 October 1984), discussed at pp 165-167 of this Discussion Paper.

789 See *In the Goods of Tucker* (1864) 3 Sw & Tr 585, 164 ER 1402, which is referred to in Collins L and others (eds), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 1007.

790 Citing *The Lady Chester's Case* (1673) 1 Ventris 207, 86 ER 140.

791 Citing as an example *Kerr v Palfrey* [1970] VR 825.

792 *WALRC Report* (1984) at para 9.28, note 1. See, however, *In the Goods of Wilson* [1929] St R Qd 59 where the Court observed (at 64) that the property existing in Queensland was "so small as to be practically negligible". In view of that fact and the considerable delay in applying for letters of administration, the application was refused.

793 *WALRC Report* (1984) at para 9.28, note 1.

794 *Id* at paras 9.30-9.31.

similar change was made to the jurisdictional rules governing original grants.⁷⁹⁵

6. PROBATE REGISTRARS

At a conference in 1990, the Probate Registrars agreed with the WALRC recommendation, provided it was made clear that the court would retain its discretion to refuse to make or reseal a grant for lack of good cause. They suggested that, if there was no property within the jurisdiction, the oath should include some statement of the purpose for which the grant was required.⁷⁹⁶

7. PRELIMINARY VIEW⁷⁹⁷

The jurisdictional requirements for the making of original grants have already been considered by the National Committee in its Discussion Paper on the administration of estates, where it was proposed that a provision based on section 6 of the *Succession Act 1981* (Qld) should be adopted by all States and Territories.⁷⁹⁸ The adoption of the Queensland provision would allow all jurisdictions to make an original grant without the necessity for the deceased to have left property within the jurisdiction.

It is clearly desirable for all jurisdictions to be able to reseal a grant in similar circumstances. Accordingly, it is proposed that the model legislation should contain a provision giving the court jurisdiction to reseal a grant despite the absence of property within the jurisdiction, using wording consistent with section 6 of the *Succession Act 1981* (Qld).

8. ISSUE FOR CONSIDERATION

7.1 Should all jurisdictions adopt a provision allowing the resealing of a grant of probate or letters of administration even though the deceased left no property in the resealing jurisdiction, using wording consistent with section 6 of the *Succession Act 1981* (Qld)?

⁷⁹⁵ Id at para 9.30.

⁷⁹⁶ *Report of the Conference of Probate Registrars* (1990) at 19.

⁷⁹⁷ As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

⁷⁹⁸ *Administration of Estates Discussion Paper* (1999) QLRC at 18; NSWLRC at 28 (Proposal 4).

9. JURISDICTION AND AUTOMATIC RECOGNITION

In order for the proposed scheme of automatic recognition to work effectively, it would be necessary for all jurisdictions to be able to make an original grant of probate or letters of administration whether or not the deceased left property in that jurisdiction. In the absence of such a rule, where the deceased died domiciled in an Australian jurisdiction in which he or she had no property, there would be no jurisdiction capable of making a grant that would be entitled to automatic recognition.

The jurisdictional change provisionally proposed by the National Committee in the Discussion Paper on the administration of estates is clearly desirable if a scheme of automatic recognition is to be adopted. However, the jurisdictional change proposed in this chapter is desirable, for the reasons stated above,⁷⁹⁹ even if resealing remains the only means by which a grant made in one Australian jurisdiction can be recognised in another.

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See pp 172-173 of this Discussion Paper.

CHAPTER 8

CHOICE OF LAWS ISSUES: THE PERSON TO WHOM THE GRANT WILL BE MADE

1. INTRODUCTION

When a court has jurisdiction to make or to reseal a grant of probate or letters of administration,⁸⁰⁰ it can also determine:

- to whom the grant should be made or on whose application the grant may be resealed (sometimes referred to as “official succession”);⁸⁰¹
- to whom the estate is to be distributed, whether under the terms of a will or on intestacy (“beneficial succession”). This may involve determining whether a will is valid, or issues of construction of the will.

This chapter is concerned with the first of these issues, since the question of who has the right to act as personal representative is crucial to the question of administration of estates.

In the ordinary case where the deceased died domiciled⁸⁰² in the jurisdiction in which the grant is sought, the court issues a grant of probate to the executor named in the will or, if there is no will or there is a will but no executor is named in it, the court issues a grant of letters of administration to the person entitled to be appointed as administrator by the rules of that jurisdiction.⁸⁰³ However, where the deceased died domiciled elsewhere, it is necessary to decide whether the grant 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.

As noted previously, within Australia the law in relation to domicile is uniform.⁸⁰⁴ Consequently, all Australian courts would decide the question of a person’s domicile according to the same principles.⁸⁰⁵

800 This issue is considered in Chapter 7 of this Discussion Paper.

801 See Sykes EI and Pryles MC, *Australian Private International Law* (3rd ed, 1991) at 735.

802 See note 16 of this Discussion Paper.

803 For a discussion of the rules relating to the conventional ranking of applicants for letters of administration, see *Administration of Estates Discussion Paper* (1999) QLRC at 34-37; NSWLRC at paras 5.26-5.33.

804 See p 33 of this Discussion Paper.

805 There are a number of differences between English and Australian law as to the meaning of domicile: see pp 33-34 and note 215 of this Discussion Paper. For a survey of the rules as to domicile in all countries of the Commonwealth of Nations, see McClean JD, *Recognition of Family Judgments in the Commonwealth* (1983) ch 1.

2. ORIGINAL GRANTS: THE LAW IN AUSTRALIA

In Australian jurisdictions other than South Australia, the test for determining who is entitled to a grant depends on whether the estate consists entirely of movables, or whether it consists of, or includes, immovables. In South Australia, the situation depends on whether the deceased died domiciled in an Australian jurisdiction or overseas.⁸⁰⁶

(a) Jurisdictions other than South Australia

(i) Movables

A. The general rule

Where the estate within the jurisdiction of the court where the grant is sought consists of movable property, the court will generally follow the rules of the domicile and make a grant to the person entitled under that law. The leading case, *Lewis v Balshaw*⁸⁰⁷ confirms that the court should normally give effect to the law of the domicile in such circumstances.⁸⁰⁸

If the *forum domicilii*⁸⁰⁹ has already constituted an administrator of the movable assets, whether he be an executor, administrator, or bear some other name, a grant is made to him without further investigation of his title, unless he is disqualified under our law, or there is some other special reason against the recognition.⁸¹⁰ [notes added]

The rationale for the rule that the court will follow the grant made in the domicile has been explained on the basis of convenience, given that the representative appointed will be required to distribute the movable property according to the law of the deceased's last domicile.⁸¹¹

The rule is based upon the doctrine of English law that the beneficial succession to a deceased person's movables is governed by the law of his domicile⁸¹² and that consequently the representative recognized by the Court of the domicile should be placed elsewhere in a position to represent the deceased. It is convenient and expedient that such a representative should

806 See pp 180-181 of this Discussion Paper.

807 (1935) 54 CLR 188, which is discussed at pp 179-180 of this Discussion Paper.

808 Id per Rich, Dixon, Evatt and McTiernan JJ at 193.

809 A reference to the *forum domicilii* is a reference to the court of the jurisdiction in which the deceased was domiciled at the time of death.

810 The exceptions are discussed at p 179 of this Discussion Paper.

811 *Lewis v Balshaw* (1935) 54 CLR 188 per Starke J at 197.

812 "Domicil" is an alternative spelling to "domicile".

deal with all the movable property of the deceased the beneficial succession to which is governed by the law of the domicil. [note added]

B. Application of the rule

When a grant has already been made by the court of the deceased's last domicile, the court of the jurisdiction in which a grant is subsequently sought will usually, without further investigation, follow the existing grant and make a grant to the person who has been recognised as the personal representative in the domicile.⁸¹³ The issue is not whether the court in which the grant is sought would appoint the person who has been appointed in the domicile if the case were purely a domestic one, but whether that person has been authorised to administer the estate by the proper authority in the domicile.⁸¹⁴

If the personal representative appointed by the court of the domicile has died without completing the administration of the estate, letters of administration will be granted to the person to whom the court of the domicile has made a grant of administration with the will annexed of the unadministered estate,⁸¹⁵ or the nearest equivalent to such a grant.

If a grant has not been made in the domicile, a grant will normally be made to the person who would be entitled to a grant under the law of the domicile.⁸¹⁶

It is not necessary that the court of the domicile should actually have made a "grant" to the applicant; it is enough that the applicant has been entrusted with the administration by that court, or is the person who is entitled to administer the estate in the domicile.⁸¹⁷ Consequently, if the law of the domicile does not recognise executors and administrators as understood by the common law, the court must follow the law of the domicile as closely as it can and appoint the person whose function it is to administer the estate under the law of the domicile.⁸¹⁸ In such circumstances, although it has been suggested that restrictions placed on the foreign administrator by the domicile should be incorporated in the grant made by the granting court,⁸¹⁹ more recent authority

813 *Lewis v Balshaw* (1935) 54 CLR 188 per Rich, Dixon, Evatt and McTiernan JJ at 193.

814 Sykes EI and Pyles MC, *Australian Private International Law* (3rd ed, 1991) at 743. See also *In the Goods of Earl* (1867) LR 1 P & D 450 and *In the Goods of Hill* (1870) LR 2 P & D 89.

815 *In the Goods of Hill* (1870) LR 2 P & D 89.

816 *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.

817 *In the Goods of Kaufman* [1952] P 325 per Lord Merriman P at 331.

818 *In the Goods of Meatyard* [1903] P 125.

819 *In the Estate of Groos* [1904] P 269. In that case, a grant to a Dutch executor was limited to expire one year after the death of the testator, on evidence that by Dutch law the possessory powers of an executor were limited to one year after the deceased's death.

suggests that such restrictions will be ignored and the foreign administrator will be given all the usual powers of a personal representative according to the law of the forum, that is, the jurisdiction in which the grant is sought.⁸²⁰

C. Exceptions to the general rule

The rule that, in making a grant with respect to movables, the court should give effect to the law of the domicile is “a rule of convenience and expediency, and not an absolute right”.⁸²¹ The law recognises certain exceptional cases in which it would not be proper to follow the law of the domicile. The court will not appoint a person as 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.⁸²² Accordingly, the court will not make a grant to a minor⁸²³ or to a person who is not of sound mind, and it will not make a grant to a person where this would be contrary to public policy, for example, where it would operate as an indirect method of enforcing a foreign revenue claim.⁸²⁴ The granting court retains a residual discretion to refuse to make a grant, or to refuse to make a grant to a particular applicant.

(ii) Immovables

Where the estate within the jurisdiction of the court where a grant is sought consists of or includes immovable property, the situation is different.

In *Lewis v Balshaw*,⁸²⁵ the High Court had to decide what principles should be applied when the estate within the jurisdiction in which the grant was sought consisted of both movables and immovables. The deceased had died domiciled in England leaving both movable and immovable property in New South Wales. Nicholas J in the New South Wales Supreme Court held that the grant made in the deceased’s domicile should be followed and that issues raised by a caveator against the making of a grant in New South Wales should not be heard. The High Court allowed an appeal against this decision, holding that, in such a case, a court should not simply follow the grant made in the domicile, because the grant did much more than constitute a person the

820 *In the Estate of Goenaga* [1949] P 367.

821 *Lewis v Balshaw* (1935) 54 CLR 188 per Starke J at 197.

822 *Id* per Rich, Dixon, Evatt and McTiernan JJ at 193.

823 *In the Goods of HRH the Duchess d’Orléans* (1859) 1 Sw & Tr 253, 164 ER 716. See also *In the Goods of Meatyard* [1903] P 125 at 129-130. It has been suggested that the decision in *In the Goods of the Countess da Cunha* (1828) 1 Hagg Ecc 237, 162 ER 570, where a grant of a very limited nature was made to a minor domiciled abroad, would not now be followed: North PM and Fawcett JJ, *Cheshire and North’s Private International Law* (13th ed, 1999) at 978, note 9.

824 *Bath v British and Malayan Trustees Ltd* [1969] 2 NSW 114 (an executor, in order to obtain a grant in Singapore, had undertaken to have New South Wales assets transferred there to pay estate duty).

825 (1935) 54 CLR 188.

administrator: it established the will as a dispositive instrument.⁸²⁶ The significance of this fact was explained in the following terms:⁸²⁷

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.

The Court held that the only law that could determine the title to land was the *lex situs*.⁸²⁸ It also held that considerations of convenience and comity (which were referred to by Nicholas J) could not overcome this rule.⁸²⁹

Although the case, on its facts, dealt with a grant made by a foreign court, there is no doubt that the same rule would be applied where the deceased died domiciled in an Australian State or Territory leaving immovable property in another Australian State or Territory.⁸³⁰

Accordingly, in Australian jurisdictions other than South Australia, where the assets within the jurisdiction consist of or include immovables, the court will not simply follow the grant made in the domicile, but must decide for itself questions concerning the validity of any will and entitlement to a grant. This means that, in determining who is entitled to a grant of probate or letters of administration, it will follow its own rules.

(b) South Australia

In South Australia, the law was amended with the aim of adopting the practice that applied in England by virtue of the *Non-Contentious Probate Rules 1954 (UK)*.⁸³¹ The relevant South Australian rule now provides as follows:⁸³²

826 Id per Rich, Dixon, Evatt and McTiernan JJ at 195.

827 Ibid.

828 Ibid; see also per Starke J at 197. The case was followed in *Estate of Zerefos v Panagos* (Unreported, Supreme Court of New South Wales, No PD 11 of 1979, Waddell J, 4 December 1985), which concerned a will made in accordance with Greek law which purported to dispose of immovable property in New South Wales. It was held that, although a foreign grant might be sufficient to establish a claim to movable property, the validity of a will of immovable property had to be determined independently of the foreign grant.

829 (1935) 54 CLR 188 per Rich, Dixon, Evatt and McTiernan JJ at 194-195; see also per Starke J at 197.

830 See *Pedersen v Young* (1964) 110 CLR 162 per Windeyer J at 170, which is referred to at p 10 of this Discussion Paper.

831 See r 29 of the *Non-Contentious Probate Rules 1954 (UK)*, which is set out and discussed at pp 183-184 of this Discussion Paper. That rule has since been replaced by r 30 of the *Non-Contentious Probate Rules 1987 (UK)*, which is expressed in slightly different terms.

832 *The Probate Rules 1998 (SA)* r 40.01. The previous rule, r 38 of the *Rules of the Supreme Court (Administration and Probate Act) 1984 (SA)*, was in almost identical terms. See the discussion of the earlier rule at p 192 of this Discussion Paper.

Grants where the deceased died domiciled outside a State or Territory of the Commonwealth of Australia

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 -

- (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;
 - (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.

This rule draws a distinction between a case in which the deceased died domiciled outside Australia and one where the deceased's last domicile was an Australian State or Territory. In the former case, the grant will normally follow the law of the deceased's domicile, not only where the estate consists entirely of movables, but also where it consists of both movables and immovables,⁸³³ although the rule preserves the general discretion of the registrar to make a grant to such person as the circumstances may require.⁸³⁴ Where the estate in South Australia consists entirely of immovables, the court may follow the *lex situs* and 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.⁸³⁵ However, where the deceased died domiciled in another Australian jurisdiction, the rule has no application, and *Lewis v Balshaw*⁸³⁶ presumably applies as before.

833 *The Probate Rules 1998 (SA)* r 40.01(a), (b).

834 *The Probate Rules 1998 (SA)* r 40.01(c).

835 *The Probate Rules 1998 (SA)* r 40.01 proviso (2).

836 (1935) 54 CLR 188.

3. ORIGINAL GRANTS: THE LAW IN OVERSEAS JURISDICTIONS

(a) England

(i) Background

In England, the practice of the Prerogative Court,⁸³⁷ when making a grant in a case where the deceased died domiciled outside England, was to follow the grant made in the deceased's domicile where that could be done.⁸³⁸ As noted earlier, from 11 January 1858, the jurisdiction of the Prerogative Court to grant probate and letters of administration was vested in the Court of Probate.⁸³⁹ The practice that developed in the Prerogative Court continued to be followed by the Court of Probate⁸⁴⁰ and, from November 1875,⁸⁴¹ by the Probate, Divorce and Admiralty Division of the High Court.⁸⁴² Although some of the decisions of the Probate, Divorce and Admiralty Division concerned applications where the estate in England consisted entirely of movable property,⁸⁴³ the practice to be followed in making a grant where the deceased died domiciled outside England was expressed without reference to whether the estate within England consisted of, or included, immovable property.⁸⁴⁴

837 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: Blackstone W, *Commentaries on the Laws of England* (1809) vol III at 64, 65-66.

838 *In the Goods of the Countess da Cunha* (1828) 1 Hagg Ecc 237, 162 ER 570 and *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 at 452.

839 See p 11 of this Discussion Paper.

840 *In the Goods of Earl* (1867) LR 1 P & D 450.

841 See note 729 of this Discussion Paper.

842 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.

843 See *In the Goods of Briesemann* [1894] P 260; *In the Goods of Von Linden* [1896] P 148.

844 See in particular *In the Goods of Meatyard* [1903] P 125, which is discussed at p 184 of this Discussion Paper. That case is regarded by Cheshire and North as authority for the proposition that, in England, the court will make a grant following the one made in the domicile even though the estate in England includes immovables: North PM and Fawcett JJ, *Cheshire and North's Private International Law* (13th ed, 1999) at 978. However, although the will in that case included a devise of real property in England, it is not clear from the judgment whether the estate in England actually included any real property.

In *In the Estate of Cocquerel* [1918] P 4, an application for probate was made in respect of the will of a person who died domiciled in France, leaving movable and immovable property in England. The Court granted probate to the person named as executor in the will, rather than granting letters of administration to the person who would have been entitled to administer the estate under French law. However, the reasons given for making the grant to the executor named in the will were that the will was made in proper English form and that, because no grant had 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] 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".

This approach was generally incorporated into rule 29 of the *Non-Contentious Probate Rules 1954* (UK), although some slight modifications were made to the existing practice. Rule 29 provided:

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,
- (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.

Under paragraphs (a) and (b) of rule 29, the court could continue the practice of making an appointment to the person entrusted with the administration of the deceased's estate by the court having jurisdiction in the place where the deceased died domiciled or, where no such grant had been made, to the person entitled, according to the law of the domicile, to administer the deceased's estate in that jurisdiction. However, a grant could not be made under paragraph (b) if, under the law of the domicile, a grant was necessary to enable administration to be carried out.⁸⁴⁵

Under paragraph (a) of the proviso to rule 29, where a will was admissible, the court could make a grant to the executor named in the will (where the will was in English or Welsh) or to the executor according to the tenor of the will (regardless of the language in which the will was made). At least in relation to a non-contentious application, this paragraph of the proviso superseded the practice stated in *In the Goods of Meatyard*.⁸⁴⁶

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. If that fact situation had arisen in a non-contentious application after the 1954 Rules came into force, paragraph (a) of the proviso to rule 29 would have enabled the court to make a grant of probate to the executors named in the English will, notwithstanding that other persons were entrusted with the administration of the deceased's estate in the domicile.

Paragraph (b) of the proviso to rule 29 enabled the court, in a case where the estate in England consisted entirely of immovable property, to make a grant on the basis of the law that would have applied if the deceased had died domiciled in England.

The making of a grant under rule 29 was discretionary.⁸⁴⁷

(ii) The present law

From 1 January 1988, the *Non-Contentious Probate Rules 1954* (UK) were repealed and replaced by the *Non-Contentious Probate Rules 1987* (UK).⁸⁴⁸ Rule 29 of the 1954 Rules was replaced by rule 30 of the 1987 rules, which,

⁸⁴⁶ [1903] P 125. See Russell JEN and others (eds), *Tristram and Coote's Probate Practice* (22nd ed, 1964) at 116.

⁸⁴⁷ *Non-Contentious Probate Rules 1954* (UK) r 29(c).

⁸⁴⁸ *Non-Contentious Probate Rules 1987* (UK) rr 1, 69, Sch 2. The *Non-Contentious Probate Rules 1954* (UK) continue to regulate certain matters of practice in Queensland for which provision is not otherwise made. Section 70 of the *Succession Act 1981* (Qld) provides that, except where otherwise provided in or under that Act or any other Act or by rules of court for the time being in force, the practice of the Supreme Court is to be regulated so far as the circumstances of the case will admit by the practice of the Court before the passing of the *Succession Act 1981* (Qld). Before the passing of the *Succession Act 1981* (Qld), the practice of the Supreme Court was governed by s 8 of the *Probate Act 1867* (Qld), which provided:

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 circumstances of the case will admit according to the practice of the Court of Probate in England.

For a discussion of these provisions see *Re Wingett* (Unreported, Supreme Court of Queensland, No 1829 of 1981, Shepherdson J, 19 March 1982).

although broadly similar to the previous rule, made some changes to the applicable procedure.

Rule 30 of the *Non-Contentious Probate Rules 1987* (UK) provides:⁸⁴⁹

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]

849

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 at 476-477. That decision concerned s 162(1) of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK), which was replaced by s 116(1) of the *Supreme Court Act 1981* (UK) when the *Supreme Court of Judicature (Consolidation) Act 1925* (UK) was repealed by s 152(4) and Sch 7 of the *Supreme Court Act 1981* (UK).

Rule 30(1)(a) of the *Non-Contentious Probate Rules 1987* (UK) - like rule 29(a) of the *Non-Contentious Probate Rules 1954* (UK) - allows the court to make a grant to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled. Rule 30(3)(a) is also expressed in similar terms to paragraph (a) of the proviso to rule 29 of the 1954 Rules.

However, rule 30(1)(b) of the 1987 Rules, which applies where no person has been entrusted with the administration of the estate, is expressed in different terms from rule 29(b) of the 1954 Rules. Rule 30(1)(b) provides that, in these circumstances, a grant may be made to the person “beneficially entitled to the estate by the law of the place where the deceased died domiciled”. In contrast, rule 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”.⁸⁵⁰

Rule 30(3) of the 1987 Rules also makes a change to the position that applied under the previous rules. Whereas paragraph (b) of the proviso to rule 29 of the 1954 Rules applied where the estate in England consisted of immovable property, rule 30(3)(b) applies where “the whole or substantially the whole of the estate in England and Wales consists of immovable property”. In these circumstances, a grant may be made to the person who would have been appointed if the deceased had died domiciled in England and Wales.

As under rule 29(c) of the 1954 Rules, the making of a grant under rule 30 of the 1987 Rules is discretionary.⁸⁵¹

(iii) Comparison of English and Australian law

The law in England differs from the law that applies in Australian jurisdictions (except in South Australia where the deceased died domiciled overseas) in that it allows a grant to be made to the personal representative appointed by the law of the domicile, even where the estate includes immovable property. The rationale for this practice is stated by Dicey and Morris:⁸⁵²

850 See the discussion of r 29(b) of the *Non-Contentious Probate Rules 1954*(UK) at p 183 of this Discussion Paper.

851 *Non-Contentious Probate Rules 1987* (UK) r 30(1)(c). See also s 116(1) of the *Supreme Court Act 1981* (UK), which provides:

116. Power of court to pass over prior claims to grant

- (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

852 Collins L and others (eds), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) vol 2 at 1010.

The practice of making a grant to the personal representative by the law of the domicile has been based on two grounds. The first is the convenience of having the whole administration carried on by or on behalf of the same person irrespective of the country in which the deceased's assets are situated. The second, justifying the primacy of the domiciliary administration, is the general rule that succession to movables is governed by the law of the deceased's domicile. [notes omitted]

The authors acknowledge, however, that there are difficulties with the argument that, because succession to movables is governed by the law of the deceased's domicile, it is desirable to follow the grant made by the domicile.⁸⁵³

- (1) Under the Wills Act 1861, and even more under the Wills Act 1963 which has replaced it, a will may be formally valid under English rules of the conflict of laws although it is formally invalid by the law of the deceased's domicile. The court may in such a case make a grant to the foreign personal representative or his attorney but require him to distribute the English assets according to the will which English law regards as valid.
- (2) A grant to a foreign personal representative has since 1897 vested in him all the deceased's immovable as well as movable property; and the general rule is that succession to immovables is governed, not by the law of the deceased's domicile, but by the *lex situs*. For this reason the High Court of Australia has refused a grant to a foreign personal representative where the local estate consisted of immovables as well as movables. [notes omitted]

Nevertheless, it is suggested by Dicey and Morris that, despite these difficulties, "there may still be advantages in having the administration in the same hands in both countries".⁸⁵⁴

... there is certainly nothing to be said for having separate English grants for movables and immovables. The practice is therefore in general still to make a grant to the foreign personal representatives, save that where the English estate consists wholly or substantially of immovables a grant limited thereto may be made to the person who would have been entitled if the deceased had died domiciled in England.

In England, when it comes to making a grant of probate or letters of administration, the considerations that weighed strongly with the High Court in *Lewis v Balshaw*⁸⁵⁵ have been outweighed by the advantage of having the administration of the estate in the same hands in both the domicile and the place where the property is situated. In the words of Cheshire and North, commenting on the High Court's decision, "English law does not adopt so

853 Id at 1010-1011.

854 Id at 1011.

855 (1935) 54 CLR 188.

purist an approach, which is highly inconvenient where, as is often the case, the estate consists of both movables and immovables".⁸⁵⁶

(b) New Zealand

In New Zealand also, it appears that the court will follow the grant made by the court of the deceased's domicile, and will make no distinction between whether the estate consists entirely of movables or consists of, or includes, immovables.⁸⁵⁷ In *Re the Will of Ronaldson*,⁸⁵⁸ the deceased, who married a man who was domiciled in Scotland and therefore acquired a dependent domicile in Scotland,⁸⁵⁹ died leaving immovable property in New Zealand. By her will, the deceased appointed her husband as executor and left him her entire estate. The will was valid according to Scottish law, but not according to the law of New Zealand. The deceased's husband applied for probate of the will in New Zealand. The will was admitted to probate, notwithstanding that the estate in New Zealand consisted entirely of immovable property and the will was not executed in accordance with New Zealand law.⁸⁶⁰

(c) Canada

The position in Canada, according to a leading text, is that where the deceased was not domiciled or resident in the jurisdiction in which the grant is sought:⁸⁶¹

... the court ... may be inclined to make the grant either to the person who has been selected in the domicile or residence to perform the duties of administration or to the person who is entitled by that law to administer the estate, provided the appointee is not personally disqualified by the *lex fori*. [notes omitted]

There is no suggestion that this principle is limited to movable property.

856 North PM and Fawcett JJ, *Cheshire and North's Private International Law* (13th ed, 1999) at 978.

857 *Re O'Driscoll* [1952] NZLR 890 at 891.

858 (1891) 10 NZLR 228.

859 See the discussion of domicile at pp 33-34 of this Discussion Paper.

860 The Court observed that the effect of the *Administration Act 1879* (NZ) was that the immovable property in New Zealand vested in the executor so appointed. However, it held that, as the will had not been executed according to New Zealand law, it did not pass any beneficial interest in that immovable property: *Re the Will of Ronaldson* (1891) 10 NZLR 228 at 232. This approach is quite different from that taken by the High Court in *Lewis v Balshaw* (1935) 54 CLR 188 where Rich, Dixon, Evatt and McTiernan JJ observed (at 195) that:

... by admitting the will to probate the Court of New South Wales does much more than constitute an administrator of assets. It establishes the will as a dispositive instrument.

861 Castel J-G, *Canadian Conflict of Laws* (3rd ed, 1994) at 479.

4. RESEALING: THE LAW IN AUSTRALIA

Chapter 5 of this Discussion Paper examined the categories of persons who are eligible to apply for the resealing of a grant under the legislation in the Australian States and Territories.⁸⁶² In determining whether to reseal a grant on the application of such a person, Australian courts apply the same principles as those that govern the making of an original grant.⁸⁶³ Consequently, a distinction will be made between an application to reseal a grant where the property in the resealing jurisdiction consists entirely of movables and one where the property consists of, or includes, immovables. However, in South Australia, different considerations arise if the deceased died domiciled outside Australia.

(a) Jurisdictions other than South Australia

(i) Movables

Where an application is made for the resealing of a grant and the property within the resealing jurisdiction consists only of movables, the court may reseal the grant on the application of the personal representative appointed by the court of the deceased's domicile.⁸⁶⁴

(ii) Immovables

Where an application is made for the resealing of a grant and the estate within the resealing jurisdiction consists of, or includes, immovable property, then, consistently with *Lewis v Balshaw*,⁸⁶⁵ the court will look to its own law as the *lex situs* of the property. This means that the court will decide for itself any issues relating to the validity of the will and of entitlement to a grant. Consequently, the court will not reseal a grant dealing with immovables situated within its jurisdiction unless the grant was made to a person who would be entitled to receive an original grant from that court.⁸⁶⁶

862 See pp 71-80 of this Discussion Paper.

863 *Re Carlton* [1924] VLR 237. See the discussion of this case at pp 170-171 of this Discussion Paper.

864 Provided the rules as to domicile are the same in both jurisdictions, the granting and the resealing courts will be referring the matter to the same jurisdiction, and the grant will be resealed on the application of the person to whom the original grant was made: see *WALRC Report* (1984) at para 9.34. The issue of resealing where the grant that is sought to be resealed was not made in the deceased's domicile is considered in Chapter 9 of this Discussion Paper.

865 (1935) 54 CLR 188. See the discussion of this case at pp 177-178 and 179-180 of this Discussion Paper.

866 Note, however, that in certain circumstances, the courts will reseal a grant made in favour of a foreign trustee company even though the trustee company would not be able to apply for an original grant in the resealing jurisdiction: see p 89 of this Discussion Paper.

(b) South Australia

As noted earlier, rule 40 of *The Probate Rules 1998 (SA)*⁸⁶⁷ allows the court, in a case where the deceased died domiciled outside the Commonwealth of Australia, to make a grant to the person entrusted with the administration of the estate by the court of 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, both when the estate consists entirely of movables and also when it includes immovables. That rule presumably also applies when an application is made to have a grant made elsewhere resealed in South Australia, although there is no express provision to this effect.

5. RESEALING: THE LAW IN ENGLAND

The *Non-Contentious Probate Rules 1987 (UK)* provide that:⁸⁶⁸

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.

Consequently, except by leave of a registrar, a grant cannot be resealed unless 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;
- 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; or
- 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).

This rule applies both where the estate in England and Wales consists of movables, and where it includes immovables.

⁸⁶⁷ This rule is set out at p 181 of this Discussion Paper.

⁸⁶⁸ *Non-Contentious Probate Rules 1987 (UK)* r 39(3). Rule 30 is set out at p 185 of this Discussion Paper.

6. WALRC RECOMMENDATION

The WALRC sought submissions on a proposal to replace the Australian rules as stated in *Lewis v Balshaw*⁸⁶⁹ with a rule based on rule 29 of the *Non-Contentious Probate Rules 1954* (UK).⁸⁷⁰ Such a change would have allowed the court, in making or resealing a grant of probate or letters of administration, to follow the grant made in the domicile in relation to both movables and immovables or, where the estate consisted entirely of immovables, to make or reseal a grant according to its own law. Although some commentators were in favour of such a change, the WALRC acknowledged that it would have been outside its terms of reference to make any such recommendation in relation to the making of original grants.⁸⁷¹

The WALRC concluded that it would not be sensible to recommend the adoption of the English rule for resealing only, because the rules for resealing should be the same as those governing the making of original grants. Further, the WALRC was not convinced that change was desirable. After full consideration, it concluded that “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*”.⁸⁷² It recommended:⁸⁷³

No change should be made in the law as to the persons in favour of whom a grant of probate or administration should be resealed. Rule 29 of the United Kingdom Non-Contentious Probate Rules 1954 should not be adopted as a uniform provision in Australia.

However, the WALRC 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 has died domiciled outside the jurisdiction in question.⁸⁷⁴ It recommended that these rules:⁸⁷⁵

... 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.

869 (1935) 54 CLR 188. See the discussion of these rules at pp 177-178 and 179-180 of this Discussion Paper.

870 *WALRC Working Paper* (1980) at paras 2.16-2.25 and 10.1(3). Rule 29 of the *Non-Contentious Probate Rules 1954* (UK) is set out at p 183 of this Discussion Paper. As noted at pp 184-185, r 29 has since been replaced by r 30 of the *Non-Contentious Probate Rules 1987* (UK).

871 *WALRC Report* (1984) at paras 9.40, 9.41.

872 *Id* at para 9.41.

873 *Id* at recommendation 34. See also *WALRC Report* (1984) at para 9.41.

874 *Id* at para 9.43 and recommendation 35.

875 *Id* at recommendation 35.

7. PROBATE REGISTRARS

At a conference in 1990, the Probate Registrars unanimously disagreed with the WALRC recommendation that rule 29 of the *Non-Contentious Probate Rules 1954* (UK) should not be adopted in Australia. They commented as follows:⁸⁷⁶

Rule 29 of the U.K. Probate Rules is already embodied in the South Australian Probate Rules, Rule 38.⁸⁷⁷ 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.

...

In South Australia where the whole of the estate consists of immovable property, a grant limited to immovable property may be made in accordance with the law which would have been applicable if the deceased had died domiciled in South Australia. In all other cases, where the estate consists of movables or partly movables and partly immovables the Court will in the first instance make the grant to the person entrusted with the administration by the Court having jurisdiction at the place where the deceased died domiciled.

...

Rule 38 is a rule of convenience and the South Australian Court considers that the convenience of having the whole administration carried on by the same person irrespective of where the estate is situated is desirable except where the estate consists of only immovables within the jurisdiction. [note added]

Provisions to the effect of the South Australian rule have not been adopted in other Australian jurisdictions.

8. PRELIMINARY VIEW⁸⁷⁸

Unlike the WALRC, the National Committee's terms of reference do not prevent it from making recommendations about the making of original grants. A number of factors support the adoption of a uniform rule based on the English rule:

- the convenience, as a general rule, of having the whole administration carried on by the same person irrespective of where the estate is situated;
- the unanimous support of the Probate Registrars for such a rule; and

⁸⁷⁶ *Report of the Conference of Probate Registrars*(1990) at 19, 21, 22.

⁸⁷⁷ *Rules of the Supreme Court (Administration and Probate Act) 1984* (SA) r 38, now replaced by *The Probate Rules 1998* (SA) r 40. Rule 38 also applied only where the deceased died domiciled outside Australia.

⁸⁷⁸ As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

- the fact that the Australian Law Reform Commission in its report, *Choice of Law*, concluded that, in matters of succession, it is undesirable to have different rules for succession to movables and immovables, and recommended that a single rule should be adopted referring all questions of succession to the law of the deceased's last domicile. It also recommended that the rule should apply to both interstate and international issues.⁸⁷⁹

The position is complicated by the fact that the rule now adopted in South Australia alters the position only for cases where the deceased died domiciled outside the Commonwealth of Australia. Although in 1990 the Probate Registrars supported the adoption of the South Australian rule on the basis that it mirrored the English rule, it appears that it does not do this exactly. The English rule applies to any case where the deceased died domiciled outside England and Wales, and so presumably covers cases where the deceased died domiciled in Scotland or Northern Ireland,⁸⁸⁰ whereas the South Australian rule appears to have no application if the deceased died domiciled in an Australian jurisdiction other than South Australia. Further, the South Australian rule is based on the rule that applied under the *Non-Contentious Probate Rules 1954* (UK), rather than on the current English rule, which is expressed in slightly different terms.⁸⁸¹

It is proposed that a uniform rule 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. 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. If rule 30 of the *Non-Contentious Probate Rules 1987* (UK) is adopted, the related rule dealing with the resealing of grants, rule 39(3), should also be adopted.

9. ISSUES FOR CONSIDERATION

8.1 Should all Australian jurisdictions adopt provisions to the effect of either:

⁸⁷⁹ Australian Law Reform Commission, Report, *Choice of Law* (ALRC 58, 1992) at paras 9.7-9.9. See also Australian Law Reform Commission, Report, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92, 2001) Recommendation 33-1.

⁸⁸⁰ 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 reseat 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 p 19 of this Discussion Paper. 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.

⁸⁸¹ See pp 181 and 185 of this Discussion Paper.

	(a) rules 30 and 39(3) of the <i>Non-Contentious Probate Rules 1987 (UK)</i> ; ⁸⁸² or
	(b) rule 40 of <i>The Probate Rules 1998 (SA)</i> ? ⁸⁸³
8.2	Alternatively, should all Australian jurisdictions adopt a uniform rule whereby a court in making or resealing a grant of probate or letters of administration should normally make or reseal the 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 (the logical consequence of the Australian Law Reform Commission's recommendation)? ⁸⁸⁴
8.3	Alternatively, should there be no change to the present law?

10. EFFECT OF AUTOMATIC RECOGNITION

If legislation were introduced under which a grant made by the Australian jurisdiction in which the deceased died domiciled would be automatically recognised in all other Australian jurisdictions, it would have a significant impact on who is entitled to administer an estate. Although the rules as to who is entitled to an original grant would be unaffected, a grant made in the Australian State or Territory in which the deceased died domiciled would no longer require resealing. Under the present law, where the estate in the resealing jurisdiction consists of both movables and immovables, or of immovables alone, the resealing jurisdiction does not have to follow the grant made in the domicile, but is entitled to decide for itself whether the grant should be resealed. If the applicant is not a person to whom the court would make an original grant or if the court is not satisfied as to the validity of the will, it may refuse to reseal the grant. Under the proposed scheme of automatic recognition, the grant made by the domicile would be recognised as effective to deal with all property in that jurisdiction, since the grant would be deemed to have been resealed in that jurisdiction. The discretion presently exercised by the resealing jurisdiction would disappear.

The adoption of a rule giving greater prominence to the law of the domicile in determining the person in whose favour a grant of probate or letters of administration should be made or on whose application a grant should be resealed would largely eradicate any difference between the law that would apply to those grants that

⁸⁸² See pp 185 and 190 of this Discussion Paper.

⁸⁸³ See p 181 of this Discussion Paper.

⁸⁸⁴ See p 193 of this Discussion Paper.

would, under the proposed scheme of automatic recognition, continue to require resealing, and the law that would apply under that scheme to grants that would be entitled to receive automatic recognition.

CHAPTER 9

RESEALING WHERE ORIGINAL GRANT NOT MADE IN DOMICILE

1. INTRODUCTION

In Chapter 8, it was explained how, as a general rule, where the estate in an Australian jurisdiction consists entirely of movables:

- the court hearing an application for an original grant will follow the grant made in the jurisdiction in which the deceased died domiciled, or, where a grant has not been made in the jurisdiction in which the deceased died domiciled, the grant that would be made in that jurisdiction;⁸⁸⁵
- the court hearing an application for the resealing of a grant will follow the grant made in the jurisdiction in which the deceased died domiciled.⁸⁸⁶

In some circumstances, an original grant may have been made not in the jurisdiction in which the deceased died domiciled, but in some other jurisdiction.⁸⁸⁷ This chapter considers the law that applies where an application is made for the resealing of such a grant.

(a) Movables

Obviously, where an application is 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, it is not possible for the resealing court to follow the grant made in the domicile. However, where the estate in the resealing jurisdiction consists entirely of movables, the resealing court of an Australian jurisdiction, other than Tasmania,⁸⁸⁸ will still endeavour to follow the grant that would have been made in the domicile.

On that basis, the court may reseal a grant if it is satisfied that:

⁸⁸⁵ See pp 177-179 of this Discussion Paper.

⁸⁸⁶ See p 189 of this Discussion Paper.

⁸⁸⁷ See note 186 of this Discussion Paper for a discussion of the circumstances in which it would be proper to seek a grant in a jurisdiction other than that in which the deceased died domiciled.

⁸⁸⁸ See pp 197-198 of this Discussion Paper.

- the applicant for resealing⁸⁸⁹ is a person to whom the court of the domicile would have made an original grant (even though he or she might not be a person to whom the resealing court would make an original grant); and
- where the grant in question is a grant of probate or letters of administration with the will annexed - the will is a valid testamentary instrument.⁸⁹⁰

(b) Immovables

In a case where the estate in the resealing jurisdiction consists of or includes immovables, Australian courts do not follow the grant made in the deceased's domicile, but decide for themselves whether or not to reseal the grant.⁸⁹¹ The grant will be resealed only if:

- the grant is made to a person to whom the resealing court would make a grant; and
- where the grant in question is a grant of probate or letters of administration with the will annexed - the will is a valid testamentary instrument according to the law of the jurisdiction where resealing is being sought.

2. RESTRICTIONS ON RESEALING IN TASMANIA AND SOUTH AUSTRALIA

(a) Tasmania

The probate rules in Tasmania provide for a special restriction on resealing if the deceased did not die domiciled within the jurisdiction of the court that issued the

⁸⁸⁹ See pp 71-75 of this Discussion Paper for a discussion of the persons who are entitled to apply for the resealing of a grant.

⁸⁹⁰ At common law, a will of movables was formally valid only if its execution complied with the law of the jurisdiction in which the deceased died domiciled: *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 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 Australian Capital Territory. Although the deceased's will was not formally valid according to Portuguese law (Portugal being the deceased's domicile), it was formally valid according to Victorian law dealing with the formal validity of foreign wills. Under Victorian law, a will was formally valid not only if its execution conformed to the law of the deceased's domicile but also, as the result of legislative reforms implementing the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, if its execution conformed to the internal law of 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). New South Wales had not at that time adopted the statutory reforms in relation to the formal validity of foreign wills. According to its conflict of laws rules, the will was formally invalid because it was invalid according to the law of the deceased's domicile. Consequently, the New South Wales Supreme Court refused to reseal the Victorian grant.

Reforms in relation to the formal validity of foreign wills have since been adopted in all Australian jurisdictions: see p 65 of this Discussion Paper. As noted there, the effect of this legislation is to extend the bases for upholding the formal validity of a will. Sections 20A-20D of the *Wills Act 1958* (Vic), which were inserted by the *Wills (Formal Validity) Act 1964* (Vic) have since been replaced by ss 17-19 of the *Wills Act 1997* (Vic).

⁸⁹¹ *Lewis v Balshaw* (1935) 54 CLR 188. See pp 179-180 of this Discussion Paper.

grant of probate or letters of administration. The relevant rule provides.⁸⁹²

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.

There is no equivalent rule in the legislation or rules of any other Australian jurisdiction.

(b) South Australia

The probate rules in South Australia also provide for a restriction on resealing where the deceased did not die domiciled in the jurisdiction of the court from which the grant issued. However, unlike the Tasmanian rule, the South Australian rule does not expressly restrict resealing to those cases where the grant is one that would have been made by the Supreme Court of South Australia. The relevant rule provides:⁸⁹³

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.

3. EFFECT OF A PROVISION ALLOWING RESEALING ONLY WHERE THE GRANT IS ONE THAT WOULD HAVE BEEN MADE BY THE RESEALING COURT

It is possible that, although the applicant for resealing is not a person to whom the resealing court would make an original grant, he or she is nevertheless a person to whom the court of the deceased's domicile would make an original grant. In such a case, in all Australian jurisdictions apart from Tasmania, the fact that the grant that is sought to be resealed was not made by the court of the deceased's domicile does not constitute a bar to the resealing of the grant.

However, in Tasmania, if the deceased was not domiciled in the jurisdiction of grant, the grant cannot be resealed unless it was one that the Tasmanian court could have made, so restricting the range of grants that can be resealed. Where the estate in the resealing jurisdiction consists entirely of movables, the adoption of such a rule by

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Probate Rules 1936 (Tas) r 50. 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 South Australian rule. The present rule is set out at p 198 of this Discussion Paper. Queensland also used to have a similar rule to the Tasmanian rule: *Rules of the Supreme Court 1900 (Qld) O 71 r 73.* The *Uniform Civil Procedure Rules 1999 (Qld)*, which came into effect on 1 July 1999, did not retain that rule. See *Re Prendergast* [1902] QWN 78 in relation to the effect of the former Queensland rule.

⁸⁹³

The Probate Rules 1998 (SA) r 50.06.

the other Australian jurisdictions would restrict the range of grants that could be resealed, compared with the present law.

On the other hand, where the estate in the resealing jurisdiction consists of or includes immovables, it is already the case that, in an Australian jurisdiction other than Tasmania, the court will not reseal a grant unless the grant is one that would have been made by that court. However, whether or not the deceased died domiciled within the jurisdiction of grant has no relevance to that issue.

4. COMMONWEALTH SECRETARIAT DRAFT MODEL BILL

The Commonwealth Secretariat draft model bill imposed a restriction on resealing where the grant was made by the court of a jurisdiction other than that in which the deceased died domiciled. Clause 5(3) of the draft model bill 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.

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”.⁸⁹⁴ A report of the deliberations on the model bill gives some insight into the purpose of this provision.⁸⁹⁵

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 factor was absent, if in similar circumstances the local courts would have had jurisdiction to make an original grant.

Clause 5(3) of the Commonwealth Secretariat draft model bill was expressed to apply in the same circumstances as the Tasmanian rule, namely, where an application was made for the resealing of a grant that had issued from the court of a jurisdiction in which the deceased did not die domiciled. However, whereas the Tasmanian rule permits the resealing of the grant only where it is one that “would have been made” by the Supreme Court of Tasmania, clause 5(3) of the Commonwealth Secretariat draft model bill provided that the grant could not be

⁸⁹⁴ *WALRC Report* (1984) at para 9.46. The jurisdictional requirements for the making of original grants are considered at pp 164-169 of this Discussion Paper.

⁸⁹⁵ 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* at 68 (explanatory notes to cl 5(3)).

resealed unless the grant was one that the resealing court “would have had jurisdiction to make”.

Where the court in a particular jurisdiction can make an original grant only if there is property in that jurisdiction,⁸⁹⁶ the adoption of clause 5(3) by that jurisdiction would appear to have the effect that, if an application were made in that jurisdiction for the resealing of a grant that was 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. However, if the deceased left property in the jurisdiction in which the grant was obtained, 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. Similarly, the fact that the grant was made to a person to whom the resealing court would not make an original grant would not seem to be a bar to the resealing of the grant, provided the deceased left property in the jurisdiction in which the grant was made.

Although clause 5(3) was not as restrictive in its operation as the Tasmanian rule, its adoption in other Australian jurisdictions would still have the potential to limit the range of grants that could be resealed.

5. WALRC RECOMMENDATION

The WALRC recommended that clause 5(3) of the Commonwealth Secretariat draft model bill should not be adopted as uniform law in Australia. It also recommended that the rules in Queensland and Tasmania should be modified with a view to achieving uniform rules relating to resealing.⁸⁹⁷

6. PROBATE REGISTRARS

In 1990, the conference of Probate Registrars unanimously agreed that all jurisdictions should adopt the South Australian provision.⁸⁹⁸

⁸⁹⁶ See pp 164-167 of this Discussion Paper.

⁸⁹⁷ *WALRC Report* (1984) at paras 9.51, 9.52 and recommendation 36. The Queensland rule has since been repealed: see note 892 of this Discussion Paper.

⁸⁹⁸ *Report of the Conference of Probate Registrars* (1990) at 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 1998* (SA). See the discussion of r 50.06 at p 198 of this Discussion Paper.

7. PRELIMINARY VIEW⁸⁹⁹

The Tasmanian provision should not be adopted in the model legislation. That provision has the effect that a grant made in a jurisdiction other than that in which the deceased died domiciled cannot be resealed unless it is one that the resealing jurisdiction would make. 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. The Tasmanian provision restricts the range of grants that can be resealed in the case of estates consisting of movable property⁹⁰⁰ and adds nothing to the deliberations of the court where the estate in the resealing jurisdiction consists of or includes immovable property.⁹⁰¹ It is noted that the former Queensland rule that was in similar terms to the present Tasmanian rule has not been retained in the *Uniform Civil Procedure Rules 1999 (Qld)*.⁹⁰²

The South Australian provision is a preferable alternative. 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 is debatable whether such a provision is necessary, since the court has an overriding discretion not to reseal a grant.⁹⁰³ Moreover, the information supplied by the Probate Registrars to the National Committee suggests that very few applications for resealing are refused, even in relation to overseas grants.

8. ISSUES FOR CONSIDERATION

9.1 Should Australian jurisdictions adopt as uniform law a rule that, if the deceased was not at the date of death domiciled in the jurisdiction that issued the grant, the grant should not be resealed unless it is such as would have been made by the resealing court?

⁸⁹⁹ As noted in the Foreword, the preliminary views expressed in this Discussion Paper have been suggested by Associate Professor Handford for the purpose of facilitating discussion. These views do not necessarily represent the views of the National Committee, which has yet to adopt a position in relation to some of these issues.

⁹⁰⁰ See pp 198-199 of this Discussion Paper.

⁹⁰¹ See p 199 of this Discussion Paper.

⁹⁰² See note 892 of this Discussion Paper.

⁹⁰³ See p 116 of this Discussion Paper.

9.2 Alternatively, should Australian jurisdictions adopt as uniform law a rule that, if the deceased was not at the date of death domiciled in the jurisdiction that issued the grant, the grant should not be resealed except by order of the registrar?

CHAPTER 10

EFFECT OF AUTOMATIC RECOGNITION ON OTHER AREAS OF SUCCESSION LAW

1. INTRODUCTION

The matters discussed in this chapter were dealt with briefly in Chapter 4, which reviewed proposals for a scheme of automatic recognition.⁹⁰⁴ However, their full significance can be appreciated only in the light of the discussion of the conflict of laws issues in Chapters 7 and 8.

2. WILLS

Under the present law, where the estate consists entirely of movables, a court hearing an application for the resealing of a grant of probate or letters of administration with the will annexed will normally accept a grant made in the jurisdiction in which the deceased died domiciled, both as to the validity of the will and as to the appointment of the personal representative.⁹⁰⁵ However, where the estate consists of or includes immovables, the resealing court will decide for itself whether the will is valid and who should be appointed to administer the estate.⁹⁰⁶

The adoption of a scheme of automatic recognition as outlined in Chapter 4 would not affect the domestic rules of individual jurisdictions as to the validity of wills.⁹⁰⁷ However, such a scheme would limit the circumstances in which a will considered to be validly made in one jurisdiction could be regarded as invalid in another. Under the proposed scheme of automatic recognition, a grant made in the Australian jurisdiction in which the deceased died domiciled would have to be accepted elsewhere in Australia, not only in cases where the estate in the recognising jurisdiction consisted entirely of movables, but also in cases where the estate consisted of, or included, immovables. This would mean that, in the latter instance, the recognising jurisdiction would lose the power it now has to decide issues relating to the formal validity of the will.

The impact of this should be minimal. At present, the rules relating to the formal requirements for the execution of wills are broadly the same in all Australian States

904 See pp 62-68 of this Discussion Paper.

905 See pp 177-179 of this Discussion Paper.

906 See pp 179-180 of this Discussion Paper.

907 For a general discussion of these rules, see *Wills Report* (1997).

and Territories, differing only in minor respects. The main difference between the provisions in the Australian States and Territories concerns the power of the courts to dispense with the formal requirements for the execution of wills.⁹⁰⁸ However, as explained in Chapter 4, all Australian jurisdictions have legislation dealing with the formal validity of foreign wills, which significantly extends the bases on which a court can uphold the validity of a will.⁹⁰⁹ The effect of this legislation is that, despite the lack of uniformity in the dispensing power of the courts in the various Australian jurisdictions, it is unlikely that a will that had been held to be valid by the court of the Australian jurisdiction in which a deceased person died domiciled would be held to be invalid by the court of another Australian jurisdiction. Consequently, the introduction of a system of automatic recognition would be likely to cause little change. Although it is desirable for the National Committee's Report on Wills to be implemented,⁹¹⁰ the implementation of uniform wills legislation is not essential for the operation of the proposed scheme of automatic recognition.

3. INTESTACY

The only effect of the proposed scheme of automatic recognition would be that the administrator appointed by the court of the Australian jurisdiction in which the deceased died domiciled would have to be accepted by other jurisdictions in which the deceased left assets, whereas, at present, these jurisdictions have a discretion whether or not to reseal a grant of administration.⁹¹¹

The adoption of the proposed scheme would have no effect on the rules relating to distribution on intestacy.⁹¹² Once an administrator was appointed in the jurisdiction in which the deceased died domiciled, the assets would, as at present, be distributed in accordance with the intestacy rules of the deceased's domicile (in the case of movables) or the *lex situs* (in the case of immovables).

908 See note 307 of this Discussion Paper.

909 See p 65 of this Discussion Paper.

910 See note 74 of this Discussion Paper in relation to implementation in the Northern Territory.

911 Under the present law, where the estate consists entirely of movables, a court hearing an application for the resealing of letters of administration will normally accept the administrator appointed under the foreign grant and reseal the grant in his or her favour. However, where the estate consists of or includes immovables, the appointment of an administrator is carried out according to the law of the jurisdiction in which the assets are situated. See the discussion of this issue at p 189 of this Discussion Paper.

912 The law relating to intestacy will be the next stage of the Uniform Succession Laws project to be considered by the National Committee.

4. FAMILY PROVISION

(a) Introduction

All Australian jurisdictions have family provision legislation⁹¹³ which allows certain relatives and dependants to apply to the court for provision out of the deceased's estate, where inadequate provision has been made for them.⁹¹⁴ The legislation in each jurisdiction except Queensland provides that, where a court makes a family provision order, it operates and takes effect:

- where the deceased died testate - as if it had been made by a codicil to the deceased's will executed immediately before death;⁹¹⁵ or
- where the deceased died intestate - as a modification of the applicable rules of distribution⁹¹⁶ or as a will.⁹¹⁷

In most cases, the legislation provides that a court making an order must direct that a certified copy be endorsed on, or annexed to, the grant of probate or letters of administration.⁹¹⁸

The High Court has held that, if a grant has been resealed in a particular jurisdiction, an application may be made in that jurisdiction for family provision.⁹¹⁹ It is not necessary for an original grant to have been made, as the resealed grant operates as an original grant.⁹²⁰

913 Originally called testator's family maintenance legislation. Generally, see *Family Provision Report* (1997).

914 *Family Provision Act 1969* (ACT); *Family Provision Act 1982* (NSW); *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 Dependents Provision) Act 1972* (WA).

915 *Family Provision Act 1969* (ACT) s 16(1); *Family Provision Act 1982* (NSW) s 14(1)(a); *Family Provision Act* (NT) s 16(1); *Inheritance (Family Provision) Act 1972* (SA) s 10(a); *Testator's Family Maintenance Act 1912* (Tas) s 9(3)(a); *Administration and Probate Act 1958* (Vic) s 97(4)(a); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 10.

916 *Family Provision Act 1969* (ACT) s 16(2); *Family Provision Act* (NT) s 16(2); *Testator's Family Maintenance Act 1912* (Tas) s 9(3)(b); *Administration and Probate Act 1958* (Vic) s 97(4)(b); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 10.

917 *Family Provision Act 1982* (NSW) s 14(1)(b); *Inheritance (Family Provision) Act 1972* (SA) s 10(b).

918 *Family Provision Act 1969* (ACT) s 18; *Family Provision Act* (NT) s 18; *Administration and Probate Act 1958* (Vic) s 97(3); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 14(4). In New South Wales, where a family provision order (other than an interim order) is made, the administrator must lodge in the registry the probate, letters of administration or copy of election, bearing a copy of the minute of order, as well as a separate copy of the minute of order. The registrar must certify on each copy that it is a true copy of the minute of order and send the copy of the minute of order to the Registrar in Probate: *Supreme Court Rules 1970* (NSW) Pt 77 r 65.

919 *Holmes v Permanent Trustee Company of New South Wales Limited* (1932) 47 CLR 113 per Rich J (with whom Evatt and McTiernan JJ agreed) at 118-119. See the discussion of this decision at p 121 of this Discussion Paper.

920 *Id* at 118.

(b) Jurisdictional rules

In all States and Territories, except New South Wales and South Australia, the jurisdictional rules governing family provision applications are not set out in the legislation, but are governed by case law interpreting the legislation. These rules are consistent with the general principles under which succession to movables is governed by the law of the deceased's domicile and succession to immovables is governed by the *lex situs*. The relevant rules were discussed in detail in *Re Paulin*.⁹²¹

In that case, a widow applied to the Supreme Court of Victoria for family provision out of her deceased husband's estate. Her husband died domiciled in Victoria, leaving movable and immovable property in Victoria and immovable property in New South Wales.⁹²² It was suggested by counsel for one of the principal beneficiaries that the Victorian Court could deal with the whole estate.⁹²³ Sholl J acknowledged that the referral of a question to the law of the domicile or to the law of the situs did not necessarily mean that only the court of the domicile or the situs, respectively, could decide the question.⁹²⁴ However, his Honour considered that the nature of the jurisdiction conferred on the court under the family provision legislation had that effect.⁹²⁵ On that basis, Sholl J held that the Victorian Court could not make an order affecting the immovable property in New South Wales. Such an order could be made only by the Supreme Court of New South Wales.⁹²⁶ The jurisdictional rules were expressed in the following terms:⁹²⁷

- (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;⁹²⁸ ...
- (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;⁹²⁹ ...

921 [1950] VLR 462.

922 Id per Sholl J at 464.

923 Id at 465-466.

924 Id at 465.

925 Ibid.

926 Id at 467.

927 Id at 465. See also Kelly DStL, "Testator's Family Maintenance and the Conflict of Laws" (1967) 41 *ALJ* 382 at 383-384; Miller JG, "Family Provision on Death - The International Dimension" (1990) 39 *ICLQ* 261 at 269-275.

928 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.

929 See also *Re Sellar* (1925) 25 SR (NSW) 540 (cited by Sholl J); *Heuston v Barber* (1990) 19 NSWLR 354 at 360. 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.

- (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;⁹³⁰ ... [notes added]

The effect of these rules is that in certain cases it may be necessary for a person to apply under the family provision legislation of two or more jurisdictions. It will be necessary to do this in any situation where the estate includes movable or immovable property in the jurisdiction in which the deceased died domiciled and immovable property in another jurisdiction, and the applicant is seeking provision out of the property in both jurisdictions.

In New South Wales and South Australia, legislation has modified the operation of these rules. In both States, legislation provides that the court may make a family provision order affecting movable property within the jurisdiction, regardless of whether the deceased died domiciled in the jurisdiction in question.⁹³¹ Further, the New South Wales legislation enables the court to make a family provision order affecting immovable property situated outside New South Wales.⁹³² However, it has been held that, despite the broad terms in which the New South legislation is expressed,⁹³³ the legislation will be read down if a nexus with New South Wales is

930 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 at 360. 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.

931 *Family Provision Act 1982* (NSW) s 11(1)(b); *Inheritance (Family Provision) Act 1972* (SA) s 7(1). See *Heuston v Barber* (1990) 19 NSWLR 354 at 360, where Master Windeyer observed, in relation to the change in the Court's jurisdiction to make orders concerning movable property in New South Wales:

... domicile is no longer essential for the bringing of an action in New South Wales in respect of property in New South Wales.

Contrast the restrictive statutory provision in England, under which the court can exercise jurisdiction to make a family provision order only if the deceased died domiciled in England, irrespective of whether the estate consists of movables or immovables: *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 1(1). See *Re Bailey* [1985] 2 NZLR 656 at 660, referring to the *Inheritance (Provision for Family and Dependents) Act 1975* (UK).

932 *Family Provision Act 1972* (NSW) s 11(1)(b), as amended by s 3 and Sch 1 of the *Family Provision (Foreign Land) Amendment Act 1989* (NSW). In South Australia, by contrast, domicile within the jurisdiction does not give the court power to deal with immovable property outside the jurisdiction: Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 573.

933 Section 11(1)(b) of the *Family Provision Act 1982* (NSW) provides:

Orders for provision

- (1) An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may:

...

- (b) be in respect of property which is situated in or outside New South Wales, at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of death, domiciled in New South Wales,

... [emphasis added]

not established in a particular case.⁹³⁴

In no jurisdiction is there any requirement for the applicant for family provision to be domiciled or resident within the jurisdiction in which application is made.⁹³⁵

(c) Effect of the proposed scheme of automatic recognition

The adoption of a scheme of automatic recognition as proposed in Chapter 4 would not involve any change to the rules discussed above.

At present, where the deceased dies domiciled in one jurisdiction leaving property in both that and another jurisdiction, it will be necessary for the personal representative, having obtained a grant in the jurisdiction of domicile, to apply to have the grant resealed in the other jurisdiction or to apply for an original grant in that jurisdiction. If there is immovable property in the latter jurisdiction, the court of that jurisdiction may exercise its discretion and refuse to reseat the grant, or to issue a fresh grant, in favour of the personal representative appointed in the domicile. In those circumstances it will be necessary for an application to be made for an original grant by a person entitled to a grant according to the law of the jurisdiction in which the immovable property is situated. An applicant who wishes to claim provision out of the deceased's estate will usually file a family provision application in the domicile and serve it on the personal representative appointed to act there. If the common law jurisdictional rules apply, the court of the domicile can make an order dealing with all property (movable and immovable) in the domicile and all movable property elsewhere. However, to claim provision out of the immovable property situated in

⁹³⁴ *Balajan v Nikitin* (1994) 35 NSWLR 51 at 60. 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 referred (at 56) 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, No 3583 of 1993, Hodgson J, 4 February 1994) the Court suggested (at 19), although it 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.

⁹³⁵ *Re Roper* [1927] NZLR 731 at 743; *Re Donnelly* (1927) 28 SR (NSW) 34 at 35; *Re Perkins* (1957) 58 SR (NSW) 1 at 7-8.

another jurisdiction, it will be necessary to make a family provision application in that jurisdiction also.

Under the proposed scheme of automatic recognition, it would no longer be necessary for the personal representative to have the grant resealed, or to apply for a fresh grant, in the other jurisdiction, and his or her authority to deal with the estate in that jurisdiction would not be questioned. As at present, there would still be cases where it would be necessary to make a family provision application in two or more jurisdictions, but both would be served on the same personal representative. Where the common law jurisdictional rules apply, the court in which immovable property was situated would still be free to make an order that was different from the order made in the domicile, since the court of the domicile could not exercise jurisdiction over immovable property situated in another jurisdiction.

5. ADMINISTRATION OF ESTATES

Once a grant of probate or letters of administration has been issued, the personal representative must administer the estate. The duties of a personal representative include:

- getting control of the deceased's assets;
- paying the debts; and
- distributing the balance according to the terms of the deceased's will or the rules governing intestacy.

It is settled law that the administration of the estate⁹³⁶ is to be carried out in accordance with the law of the jurisdiction in which representation has been granted, since it is from this law that the personal representative derives his or her authority.⁹³⁷ However, if a grant has to be resealed in another jurisdiction, the administration of the estate in the resealing jurisdiction will be carried out in accordance with the law of that jurisdiction.

The proposed scheme of automatic recognition would not affect these issues. Where a grant was made in the Australian jurisdiction in which the deceased was domiciled at the date of death, it would no longer be necessary to apply to have the grant resealed, or to apply for an original grant, in other Australian jurisdictions in

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In the context of the conflict of laws, administration refers only to the first two of these three stages. The distribution of assets is governed by the choice of laws rules that apply to succession to property: see Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 559, 563.

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Permanent Trustee Company (Canberra) Limited v Finlayson (1968) 122 CLR 338 at 342-343. Earlier authority to the same effect includes *Preston v Melville* (1841) 8 Cl & F 1, 8 ER 1; *Blackwood v The Queen* (1882) 8 App Cas 82 at 93; *Re Kloebe* (1884) 28 Ch D 175 at 178-179; *Re Lorillard* [1922] 2 Ch 638 per Warrington LJ at 645-646; *Re Wilks* [1935] 1 Ch 645 at 648.

which particular assets were situated, because the original grant would be automatically recognised in those jurisdictions. However, the administration of those assets would still be carried out in accordance with the law of the jurisdiction in which they were situated.

Once the administration of an estate is complete, the personal representative holds the assets of the estate on trust for the beneficiaries or next of kin.⁹³⁸ Succession to movable property is governed by the law of the deceased's domicile, while succession to immovable property is governed by the *lex situs*.⁹³⁹ The adoption of a scheme of automatic recognition would not affect these rules.

938 Nygh PE, *Conflict of Laws in Australia* (6th ed, 1995) at 559.

939 *Lewis v Balshaw* (1935) 54 CLR 188 per Rich, Dixon, Evatt and McTiernan JJ at 193.

APPENDIX A

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.

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.

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 B

COMMONWEALTH SECRETARIAT DRAFT MODEL BILL

GRANTS OF ADMINISTRATION (RESEALING) ACT, 198- [Revised 1 February, 1980]⁹⁴⁰

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.

Short title

1. This Act may be cited as Probates and Letters of Administration (Resealing) Act, 198-.

Interpretation

- 2.(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.
- (3) This Act shall apply in relation to grants of administration granted before or after the passing of this Act.

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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, at 32-34.

Applications for resealing

- 3.(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.

Caveats

- 4.(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.

Resealing of grants of administration

- 5.(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 reseat,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.

Effects of resealing

- 6.(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.

Duties of person authorised by personal representative, etc

- 7.(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 _____.

Rules of court

8. 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.

Repeals

9. The [Probates (Resealing) Act] is hereby repealed.

Commencement

10. This Act shall come into force on such date as the [Head of State] shall, by order, designate.