



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 34 – Part IV

**Recognition of Interstate and Foreign
Grants of Probate and Administration**

REPORT

NOVEMBER 1984

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on recognition of interstate and foreign grants of probate and administration (Project No 34 Part IV).

Daryl R Williams
Chairman

12 November 1984

CONTENTS

Paragraph

PART 1: INTRODUCTION

CHAPTER 1 - GENERAL

- | | | |
|----|------------------------------------|-----|
| 1. | TERMS OF REFERENCE | 1.1 |
| 2. | WORKING PAPER | 1.7 |
| 3. | ASSISTANCE GIVEN TO THE COMMISSION | 1.8 |

CHAPTER 2 - THE ISSUES

- | | | |
|----|---------------------------------------|------|
| 1. | INTRODUCTION | 2.1 |
| 2. | RESEALING | 2.5 |
| 3. | THE PROBLEMS OF RESEALING | 2.8 |
| | (a) Cost | 2.9 |
| | (b) Inconvenience and delay | 2.13 |
| | (c) Diversity in rules | 2.14 |
| 4. | SUMMARY OF REPORT AND RECOMMENDATIONS | |
| | (a) Resealing | 2.15 |
| | (b) Automatic recognition | 2.16 |
| | (c) Jurisdiction | 2.20 |
| | (d) Other matters | 2.23 |

PART II: RESEALING

CHAPTER 3 - RESEALING PROCEDURE

- | | | |
|----|---|------|
| 1. | INTRODUCTION | 3.1 |
| 2. | THE PRESENT PROCEDURE IN OUTLINE | 3.5 |
| 3. | THE COMMISSION'S PROPOSALS | |
| | (a) Introduction | 3.16 |
| | (b) A uniform code of procedure | 3.20 |
| | (c) Discretion | 3.22 |
| | (d) Persons who may apply for resealing | 3.23 |
| | (e) Instruments which may be resealed | 3.26 |
| | (f) Procedure | 3.31 |
| | (g) Advertisements | 3.36 |
| | (h) Caveats | 3.44 |
| | (i) Security | 3.46 |
| | (j) Effects of resealing | 3.53 |
| | (k) Powers and duties of persons to whom resealing is granted | 3.54 |
| | (l) Notification | 3.55 |

CHAPTER 4 - THE COUNTRIES WHOSE GRANTS MAY BE RESEALED

- | | | |
|----|--|-----|
| 1. | THE PRESENT POSITION | 4.1 |
| | (a) New South Wales; Western Australia | 4.2 |
| | (b) Queensland | 4.6 |
| | (c) Victoria | 4.8 |

(d)	South Australia	4.10
(e)	Tasmania	4.12
(f)	Australian Capital Territory	4.13
(g)	Northern Territory	4.14
2.	THE COMMISSION'S PROPOSALS	4.15

PART III: AUTOMATIC RECOGNITION

CHAPTER 5 - INTRODUCTION

1.	GENERAL	5.1
2.	EXISTING AUSTRALIAN LEGISLATION	
(a)	National companies legislation	5.4
(b)	Commonwealth Life Insurance Act	5.6

CHAPTER 6 - SOME POSSIBLE ALTERNATIVES

1.	EARLIER AUSTRALIAN PROPOSALS	6.1
2.	SOME OVERSEAS SCHEMES	
(a)	Introduction	6.8
(b)	Legislative schemes in the United States, East Africa and Malaysia	6.10
(c)	Hague Convention on the International Administration of the Estates of Deceased Persons	6.14
(d)	Automatic recognition in the United Kingdom	6.15

CHAPTER 7 - PROPOSALS FOR AN AUTOMATIC RECOGNITION SCHEME

1.	INTRODUCTION	7.1
2.	APPLICATION OF THE SCHEME	
(a)	Grants made in Australia in the domicile of the deceased	7.4
(b)	Other grants	
(i)	Other grants made in Australia	7.5
(ii)	Grants made outside Australia	7.6
(c)	Resealing of other grants	7.9
(i)	Grants made outside Australia	7.10
(ii)	Australian grants not made in the deceased's domicile	7.12
(d)	Automatic recognition of grants resealed in Australia in the domicile of the deceased	7.18
3.	DETAILS OF THE SCHEME	
(a)	Matters to be notified on the grant	7.20
(b)	Instruments which can be automatically recognised	7.22
(c)	Jurisdictional matters	7.24
4.	CONSIDERATIONS AFFECTING THE PROPOSALS	7.25
(a)	Discretion not to recognise	7.26
(b)	Advertising	7.28
(c)	Caveats	7.30
(d)	Security	7.32
(e)	Notification	7.36

(f) Passing of accounts	7.37
(g) Revenue protection	7.38

CHAPTER 8 - OTHER PROPOSALS

1. INTRODUCTION	8.1
2. BANK DEPOSITS	8.2
3. EXTENSION OF THE NATIONAL COMPANIES ACT PROVISIONS TO OTHER COUNTRIES	8.5

PART IV: JURISDICTION AND ALLIED PROBLEMS

CHAPTER 9 - JURISDICTION

1. INTRODUCTION	9.1
2. JURISDICTION TO MAKE A GRANT	
(a) The basis of jurisdiction	9.3
(b) The person to whom the grant will be made	9.10
3. JURISDICTION TO RESEAL A GRANT	
(a) The basis of jurisdiction	9.23
(b) The person in whose favour the grant will be resealed	9.32
(c) Resealing where original grant not made in domicile	9.44
4. JURISDICTION AND AUTOMATIC RECOGNITION	9.53
(a) Domicile as the basis of automatic recognition	9.54
(b) Domicile and property requirements	9.56
(c) Domicile and movables	9.58
(d) Domicile and immovables	9.59

CHAPTER 10 - EFFECT OF AUTOMATIC RECOGNITION ON OTHER AREAS OF SUCCESSION LAW

1. VALIDITY OF WILLS	10.1
2. INTESTATE SUCCESSION	10.6
3. ADMINISTRATION OF ASSETS	10.7
4. FAMILY PROVISION	10.10

PART V: SUMMARY OF RECOMMENDATIONS

CHAPTER 11 - SUMMARY OF RECOMMENDATIONS

1. GENERAL RECOMMENDATIONS	
(a) Resealing procedure (Chapter 3)	11.1
(b) The countries whose grants may be resealed (Chapter 4)	11.2
(c) Proposals for an automatic recognition scheme (Chapter 7)	11.3
(d) Other proposals (Chapter 8)	11.4
(e) Jurisdiction (Chapter 9)	11.5
2. RECOMMENDATIONS RELATING TO INDIVIDUAL JURISDICTIONS	
(a) Australian jurisdictions	11.6

APPENDICES

APPENDIX I COMMONWEALTH SECRETARIAT'S DRAFT MODEL BILL

APPENDIX II THE COMMONWEALTH OF NATIONS

APPENDIX III UNITED KINGDOM ADMINISTRATION OF ESTATES ACT 1971

PART I: INTRODUCTION

CHAPTER 1 - GENERAL

1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the law relating to the recognition of grants of probate and of letters of administration with a view to proposing uniform legislation throughout Australia.

1.2 In accordance with a resolution of the Standing Committee of Commonwealth and State Attorneys General made in July 1975, which adopted a procedure to be followed in relation to suggestions for uniform Australian laws, the Commission in June 1976, acting under section 11(1) of the *Law Reform Commission Act 1972-1978*, proposed this matter to the then Attorney General of Western Australia for consideration as a suitable subject for uniform Australian law reform.

1.3 In so doing, the Commission had the approval of a resolution of the Second Conference of Australian Law Reform Agencies held in Sydney in April 1975 that the matter was a suitable topic for uniform law. This view was confirmed by participants at the Third Conference in Canberra in May 1976.

1.4 In December 1976 the Commission received a reference from the then Attorney General in the following terms:

"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."

1.5 In March 1977 the then Attorney General informed the Commission that the Standing Committee had approved the reference and had agreed to consider the Commission's proposals as a basis for possible uniformity between the States. He advised the Commission that:

"The proposal was greeted with approval by all the other States and by the New Zealand Minister for Justice who expressed the hope that we could consider any relevance which the New Zealand situation might have in the same context."

1.6 This review forms Part IV of the Commission's reference to review the law of trusts and of administration of estates generally. Reports on the following parts of this project have already been submitted -

- Part I - Distribution on intestacy (May 1973)¹
- Part II Administration bonds and sureties (March 1976)²
- Part III - Administration of deceased insolvent estates (December 1978)³
- Part V - Trustees' powers of investment (January 1984).

2. WORKING PAPER

1.7 In December 1980 the Commission issued a working paper. The working paper was distributed to a large number of persons and bodies throughout Australia, including the Registrars of all Supreme Courts and all law societies and trustee companies. A notice was also placed in *The Australian* the *West Australian* and *The Australian Financial Review* newspapers inviting interested persons to submit comments.

3. ASSISTANCE GIVEN TO THE COMMISSION

1.8 The Commission received a considerable number of significant written submissions on the proposals contained in the working paper. It has also been greatly assisted by discussions held by the Commissioner in charge of the project with a number of interested persons or bodies in Sydney, Melbourne and Perth. In addition, the Commission has received generous written and oral assistance as to present Australian jurisdictional and procedural requirements from the appropriate offices of the Supreme Courts of each State and Territory.

1.9 Those who assisted the Commission, whether by making a submission on the working paper or by providing information and views orally or in writing, are as follows -

Australian Capital Territory

Registrar of Probates of the Australian Capital Territory
Law Society of the Australian Capital Territory

¹ Implemented by *Administration Act Amendment Act 1976* (WA), *Administration Amendment Act 1984* (WA).

² Implemented by *Administration Act Amendment Act 1976* (WA).

³ Implemented by *Acts Amendment (Insolvent Estates) Act 1984* (WA).

New South Wales

Registrar in Probate of the Supreme Court of New South Wales

Public Trustee of New South Wales

Judge P E Nygh of the Family Court of Australia, formerly Professor of Law, Macquarie University

Mr J M Power, formerly Public Trustee of New South Wales

Mr P N Whiteman, Manager, Trust Administration, Burns Philp Trustee Company Ltd

Australian Mutual Provident Society

Perpetual Trustee Company Ltd

Northern Territory

Registrar of Probate of the Supreme Court of the Northern Territory

Queensland

Registrar of the Supreme Court of Queensland

Mr W A Lee, Reader in Law, University of Queensland

South Australia

Registrar of Probates of the Supreme Court of South Australia

The Ron K T Griffin, then Attorney General and Minister of Corporate Affairs

Public Trustee of South Australia

Law Society of South Australia Inc

Tasmania

Registrar of the Supreme Court of Tasmania Victoria

Victoria

Registrar of Probates of the Supreme Court of Victoria

Law Institute of Victoria

Trustee Companies Association of Australia

Share Registrars Association

Western Australia

Principal Registrar of the Supreme Court of Western Australia West Australian Trustees Ltd

Overseas

Senior Registrar of the Family Division of the High Court of Justice, England

Professor K W Patchett, Professor of Law, University of Wales Institute of Science and Technology, Wales

Registrar of Probate of the Supreme Court of New Zealand

Professor P R H Webb, Professor of Law, Auckland University, New Zealand

Public Trustee of Kenya

Director of the Legal Division of the Commonwealth Secretariat

CHAPTER 2 - THE ISSUES

1. INTRODUCTION

2.1 Many people die leaving assets not only in the State or Territory in which they reside but also in other Australian States and Territories, or in other countries. In addition to leaving assets outside their own State or Territory of residence, people sometimes die leaving claims by or against them in litigation, actual or potential, outside their own State or Territory. The number of deceased persons whose estates may in these ways concern more than one jurisdictional area seems likely to increase. It is therefore desirable to ensure that such estates can be administered rapidly, efficiently and with minimal expense. At present, however, three factors combine to cause difficulties in this regard.

2.2 First, for the purposes of administration of estates, as for most problems of 'conflict of laws' (that is, problems involving a contact with more than one system of law), the Australian States and Territories are regarded as separate legal systems.¹ The provisions of the Australian Constitution do not alter this situation.²

2.3 Secondly, Australian law does not recognise that a deceased person continues to possess any legal personality,³ even though this might be the case under the law of his last domicile.⁴ In this respect Australian law has inherited the general view of the English common law.

¹ "The States are separate countries in private international law, and are to be so regarded in relation to one another": *Pedersen v Young* (1964) 110 CLR 162, 170 per Windeyer J. Note that Windeyer J uses the word 'country' as the equivalent of 'legal system'. The word 'jurisdiction' is commonly used in the same sense. See generally P E Nygh, *Conflict of Laws in Australia* (4th ed 1984), ch 1; E I Sykes and M C Pryles, *Australian Private International Law* (1979), 1-5.

² For example, s 118, dealing with the giving of full faith and credit throughout Australia to the laws, public Acts and records, and judicial proceedings of every State, does not allow a grant of probate or administration made in one jurisdiction to be effective in another: *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338; *Re Butler* [1969] QWN 48. Nor does the similar provision in s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth): *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338; *In the Will of Lambe* [1972] 2 NSWLR 273. See generally M C Pryles and P Hanks, *Federal Conflict of Laws* (1974).

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

⁴ *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682, 691 per Scrutton LJ. For the meaning of 'domicile', see para 2.16 below.

2.4 Thirdly, courts in Australia, as in England, will only recognise that a person has the right to represent the interests of a deceased person in a particular jurisdiction if the former has obtained, within the jurisdiction concerned, either a grant of probate or a grant of administration; Such grants do not of their own force carry power to deal with property beyond the jurisdiction of the court which granted them.⁵ The authority conferred by a grant of probate or administration to a person in one jurisdiction is insufficient to allow that person to administer the estate in another jurisdiction,⁶ or to sue or be sued in another jurisdiction in his representative capacity.⁷ This defect cannot be cured by waiver or submission.⁸ A foreign personal representative must therefore obtain a fresh grant of authority in all other countries, States or Territories in which the deceased left assets, and this may be expensive, time-consuming and inefficient.

2. RESEALING

2.5 To overcome these problems and simplify the task of the personal representative in such situations, all Australian States and Territories introduced provisions allowing grants of probate and administration made elsewhere, either in Australia or overseas, to be resealed in that jurisdiction.⁹ These provisions were based on the English example, as are similar provisions to be found in most countries in the Commonwealth of Nations.

⁵ *Blackwood v R* (1882) 8 App Cas 82; *Re Fitzpatrick* [1952] Ch 86.

⁶ Except that: (1) A person who has a grant of representation or otherwise has authority to represent a deceased person under the law of a foreign country where the deceased died domiciled may apply to the court for an order for the transfer to him of the net balance of assets under the administration, but he 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 acquired a good title in a foreign country under the law of the place in which the assets are situated and which he has reduced into possession: J H C Morris (ed), *Dicey and Morris on the Conflict of Laws* (10th ed 1980), 602-605 (Dicey and Morris).

⁷ *Electronic Industries Imports Pty Ltd v Public Curator of Queensland* [1960] VR 10; *Cash v Nominal Defendant* (1969) 90 WN (Pt I) (NSW) 77. However if a 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 deceased's assets, an action, to which the local personal representative must be a party, may be brought for their judicial administration in the jurisdiction. In addition, a foreign personal representative may, by his dealing with the deceased's property, incur personal liability in the jurisdiction as a trustee or debtor. On these matters, see Dicey and Morris, 605-607.

⁸ *Boyd v Leslie* [1964] VR 728; but see *Lea v Smith* [1923] SASR 560.

⁹ For the legislative provisions, see :

Administration and Probate Ordinance 1929 (ACT), ss 80-83;

Wills, Probate and Administration Act 1898 (NSW), ss 107-110;

Administration and Probate Act (formerly Administration and Probate Ordinance 1969) (NT), ss 111-114;

British Probates Act 1898 (Qld);

Administration and Probate Act 1919-1984 (SA), ss 17-20;

Administration and Probate Act 1935 (Tas), ss 47A-53;

Administration and Probate Act 1958, (Vic) ss 80-89;

2.6 Resealing was introduced in England in 1857. Before then, probate jurisdiction had been exercised by ecclesiastical courts scattered throughout the country, each with an authority limited to its own territorial area, and with a jurisdiction based on the presence of movable property within that territorial area. The growth in importance of personal property as a form of wealth made it increasingly necessary to obtain multiple grants, and this was highly inconvenient. In 1857 the *Court of Probate Act* transferred probate jurisdiction to the newly created Court of Probate, which had authority throughout England and Wales. At the same time, the *Probates and Letters of Administration Act* (Ireland) 1857 and the *Confirmation of Executors (Scotland) Act 1858*¹⁰ introduced the resealing procedure for grants made in other parts of the United Kingdom. Under this procedure, a grant of probate or administration obtained in another part of the United Kingdom could be made operative elsewhere in the United Kingdom simply by having it resealed, that is, certified, by the competent probate authority. By the *Colonial Probates Acts 1892* and 1927, and the *Foreign Jurisdiction Act 1913*, the principle of resealing was extended to grants made in other countries outside the United Kingdom.¹¹

2.7 It is these provisions which have provided the model for the resealing provisions in the Australian States and Territories. The statutory provisions in each State and Territory set out in detail the procedure for resealing a grant of probate or administration,¹² and also give particulars of the overseas countries whose grants may be resealed.¹³ There are also jurisdictional rules, which may or may not be set out in the statutes.¹⁴ All these rules vary somewhat as between each Australian jurisdiction. However, all the statutory provisions state that a grant of probate or administration, when resealed, is as effective as if an original grant had been obtained there.¹⁵

Administration Act 1903-1984 (WA), ss 61-62.

¹⁰ Later replaced by the *Supreme Court of Judicature (Consolidation) Act 1925* (UK), ss 168-169.

¹¹ See generally W J Pickering, E Heward and G F Dawe (eds), *Tristram and Coote's Probate Practice* (24th ed 1973), 480-481 (Tristram and Coote).

¹² See paras 3.5 to 3.15 below.

¹³ See paras 4.1 to 4.14 below.

¹⁴ See paras 9.23 to 9.52 below.

¹⁵ *Administration and Probate Ordinance 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 1919-1984 (SA), s 17;
Administration and Probate Act 1935 (Tas), s 48(2);
Administration and Probate Act 1958 (Vic), s 81(2);
Administration Act 1903-1984 (WA), s 61(2).

3. THE PROBLEMS OF RESEALING

2.8 It is questionable whether resealing is any longer the best possible way of enabling the personal representative to deal with the deceased's assets in a jurisdiction other than that in which the grant was made. Resealing may involve considerable cost, inconvenience and delay. In addition, there is much diversity between the various Australian States and Territories as to the rules governing resealing.

(a) Cost

2.9 Western Australia offers an example of the cost of resealing in one Australian jurisdiction. The fee payable on application for an original grant or to reseal a grant made elsewhere is \$53.¹⁶ In addition, solicitors' costs will amount to at least \$275. The scale¹⁷ which sets out solicitors' rates of remuneration on application for an original grant or to reseal a grant made elsewhere provides for the following charges -

Value of Estate	Fee
Where the gross value of the property of the deceased in Western Australia -	\$
does not exceed \$20,000	275
exceeds \$20,000 and does not exceed \$40,000	310
exceeds \$40,000 and does not exceed \$60,000	350
exceeds \$60,000 and does not exceed \$80,000	425
exceeds \$80,000 and does not exceed \$100,000	500
exceeds \$100,000	500, plus \$50 for each \$50,000 or part thereof, with a maximum allowance of \$1,500.

In addition, there is an agency allowance where the solicitor does not carry on practice in the Perth metropolitan area and employs a solicitor in Perth as his agent -

¹⁶ *Rules of the Supreme Court 1971* (WA), 5th Schedule, Part II, Item 19 (as amended 20 January 1984).

¹⁷ *Non-Contentious Probate Rules 1967* (WA) (as amended 6 March 1981), 2nd Schedule.

Value of Estate	Fee
Where the gross value of the property of the deceased in Western Australia	\$
does not exceed \$20,000	40
exceeds \$20,000	50

2.10 The fees so prescribed do not include the costs of preparation of the statement giving particulars of the deceased's assets and liabilities which is required by Rule 9B of the *Non-Contentious Probate Rules*.¹⁸ (This statement is normally verified in the executor's oath.) In addition, where an application for an original grant or to reseal a grant is unusually complex, or involves an unusually high degree of skill or urgency, the solicitor may charge such further fee as is reasonable in the circumstances.¹⁹

2.11 The information which the Commission has received from other States and Territories indicates that fees and costs applying elsewhere are comparable to those applying in Western Australia. In some States and Territories, for example New South Wales, the costs will be increased by advertising requirements which do not exist in Western Australia.²⁰

2.12 All in all, it is likely that the average cost involved in resealing a grant of probate or administration is in the region of \$500. Figures available to the Commission suggest that about 1,000 applications for resealing are made to Australian courts each year. Thus, the annual cost of resealing to the estates of deceased persons might be of the order of \$500,000.

(b) Inconvenience and delay

2.13 To the cost of resealing must be added the factors of delay and inconvenience. The process of obtaining resealing of a grant is likely to take some time, and until the grant is resealed the personal representative will be unable to deal with the deceased's assets in the jurisdiction in question. Complications resulting from the differences in resealing procedure as between different jurisdictions may add to the delay and inconvenience.

¹⁸ Id, r 43B(3).

¹⁹ Id, r 43B(5).

²⁰ See para 3.36 below.

(c) Diversity in rules

2.14 A major problem of the present legislation governing resealing in the various Australian jurisdictions is its lack of uniformity. The procedure for resealing differs considerably from one jurisdiction to another.²¹ There are also considerable variations as to the countries outside Australia whose grants may be resealed,²² and as to jurisdictional requirements.²³

4. SUMMARY OF REPORT AND RECOMMENDATIONS**(a) Resealing**

2.15 The first question which the Commission considers in this report is whether the existing system of resealing of grants of probate or administration made elsewhere is capable of improvement. The Commission considers that the position would be greatly improved if all Australian jurisdictions were to adopt uniform rules as to the procedure for resealing and as to the countries whose grants may be resealed. The Commission's recommendations as to uniform procedural rules, and as to the countries whose grants should be allowed to be resealed, are set out in chapters 3 and 4.

(b) Automatic recognition

2.16 Such reforms, while representing a considerable improvement over the present position, do not overcome the problems of cost, inconvenience and delay associated with resealing which were dealt with earlier.²⁴ The Commission has therefore considered whether there are any alternatives to resealing as a means of recognising grants made elsewhere. Alternatives presently found in Australian legislation are dealt with in chapter 5, and other possible alternatives are reviewed in chapter 6. The alternative which the Commission finds most suitable is that adopted in the United Kingdom, where grants of probate or

²¹ See paras 3.1 to 3.15 below.

²² See paras 4.1 to 4.14 below.

²³ See paras 9.23 to 9.52 below.

²⁴ See paras 2.8 to 2.13 above.

administration made in one part of the United Kingdom, being the domicile of the deceased,²⁵ are automatically recognised as effective in other parts of the United Kingdom.

2.17 The Commission has come to the conclusion that a system of automatic recognition should be adopted as between the Australian States and Territories. It therefore recommends that a grant of probate or administration made by the court of an Australian State or Territory in which the deceased died domiciled should be automatically recognised throughout Australia.

2.18 Grants of probate or administration made by Australian jurisdictions other than the jurisdiction of domicile, and grants made by overseas jurisdictions whether the deceased died domiciled there or not, would continue to require resealing as at present. However, the Commission considers that when a grant, whether of an Australian or an overseas jurisdiction, is resealed in the Australian jurisdiction in which the deceased died domiciled, the resealed grant should also be automatically recognised as effective throughout Australia, and so recommends.

2.19 The Commission makes detailed recommendations for a scheme of automatic recognition along these lines in chapter 7. Proposals for the extension of existing Australian legislation are made in chapter 8.

²⁵ Many matters of administration of estates and succession (like many other matters in conflict of laws) are referred to the law of the deceased's last domicile. The notion which lies at the root of the concept of domicile is that of the permanent home. However, a person will be domiciled in a particular country if he is resident there with an intention of permanent or *indefinite residence*: Dicey and Morris, 110-115. Domicile is a connection with a legal system (except that the *Family Law Act 1975* (Cth) simply requires a domicile "in Australia"). Every person must have a domicile, and no person can have more than one domicile (except that, as already mentioned, a person may have a 'federal domicile' for the purposes of the *Family Law Act*). The rules for the determination of domicile sometimes differ from country to country (see, for more detail, para 9.14 below), but it is settled that domicile has to be determined according to the law of the jurisdiction dealing with the dispute: *Re Annesley* [1926] Ch 692.

There is no difference in the meaning of domicile as between the Australian States and Territories, which have all adopted Domicile Acts in the same terms, following agreement by the Standing Committee of Commonwealth and State Attorneys General to reform the law of domicile on a uniform basis. See *Domicile Act 1982* (Cth) (applying to the Australian Capital Territory, the Jervis Bay Territory and declared external territories, and for the purposes of the Commonwealth);

Domicile Act 1979 (NSW);

Domicile Act 1979 (NT);

Domicile Act 1981 (Qld);

Domicile Act 1980 (SA);

Domicile Act 1980 (Tas);

Domicile Act 1978 (Vic);

Domicile Act 1981 (WA).

(c) **Jurisdiction**

2.20 The existing jurisdictional rules governing the making of a grant of probate or administration vary somewhat as between the various Australian jurisdictions, some requiring that the deceased should have left property within the jurisdiction and some not having such a requirement. Succession to movable property is usually governed by the law of the deceased's domicile, and therefore a court in another jurisdiction will normally follow a grant which has been or would be made by the court of the deceased's domicile, both in relation to the person to whom the grant should be made and as to the validity of any will - although there is a discretion as to whether or not to do so. Where, however, the estate consists of or includes immovable property situated within a jurisdiction other than the domicile, the court of that jurisdiction will decide for itself as to the validity of any will and as to entitlement to a grant. It is generally accepted that the jurisdictional rules for resealing are the same as those governing the making of an original grant.

2.21 The Commission considers the question of jurisdiction in chapter 9. Its major recommendation is that courts in all Australian jurisdictions should be given power to make, and to reseal, grants of probate and administration even though the deceased left no property within the jurisdiction, or left no property at all. If automatic recognition is to be given throughout Australia to all grants made by the court of the Australian jurisdiction in which the deceased died domiciled, then it is desirable that the court of the domicile should be able to make a grant of probate or administration notwithstanding that the deceased left no property there.

2.22 The effect of automatic recognition on the other rules set out above²⁶ will be that, once a grant has been made by the court of the Australian jurisdiction in which the deceased died domiciled, any other Australian jurisdiction will have to recognise it as effective to dispose of all property, both movable and immovable, within that jurisdiction. The discretion which presently exists to reseal a grant in favour of a different personal representative, or not to reseal it at all, will disappear. In other words, the effect of automatic recognition is that the grant will be regarded as deemed to have been resealed. However, the exercise of discretion in relation to the making of original grants will not be in any way affected.

²⁶ Para 2.20.

(d) Other matters

2.23 The Commission's recommendations as to automatic recognition are not intended to affect other areas of the law of succession. These matters are considered in chapter 10.

PART II: RESEALING

CHAPTER 3 - RESEALING PROCEDURE

1. INTRODUCTION

3.1 As already explained, even though a personal representative has obtained a grant of probate or administration of the estate of a deceased person in one Australian State or Territory, he cannot deal with assets of the deceased which are situated in another State or Territory unless he has obtained a grant of probate or administration in the jurisdiction in which the assets are situated or has had the original grant of probate or administration resealed in that jurisdiction. Each State and Territory has traditionally exercised the power to determine when, and by what procedures, resealing will be permitted in its own jurisdiction.

3.2 As a result there is some diversity between the procedural rules of the various jurisdictions. Especially where it is necessary to reseal a grant of probate or administration in more than one jurisdiction, this diversity makes the process of resealing more complicated than necessary, and causes extra expense, delay and inconvenience.

3.3 It is thus highly desirable that consideration be given to the introduction of a uniform resealing procedure throughout Australia. This is especially important if the requirement that grants made in one jurisdiction must be resealed in another is to be maintained as between Australian jurisdictions. Lawyers and others would then know that the resealing rules of their own jurisdiction would also apply to the resealing of a grant elsewhere within Australia.

3.4 The introduction of a uniform procedure is still important even if a system is introduced whereby grants made in the Australian jurisdiction in which the deceased died domiciled are automatically recognised throughout Australia.¹ First, even under such a system it will still be necessary for Australian grants not made in the deceased's domicile to be resealed in order to be effective in another Australian jurisdiction. Second, it will still be necessary for overseas grants to be resealed in Australia, and in any case where a personal representative is seeking to reseal an overseas grant made in respect of a person who has left assets in two or more Australian jurisdictions, he will be assisted if all Australian jurisdictions have a common resealing procedure.

¹ As to which, see ch 7 below.

2. THE PRESENT PROCEDURE IN OUTLINE

3.5 In each Australian jurisdiction, the procedure for resealing is set out in statutory provisions and rules of court.² A detailed account of the procedural rules in each of the eight Australian jurisdictions, as they stood in December 1980, was set out in the working paper.³

3.6 The procedure in each State and Territory differs. As an example of the procedural rules of one jurisdiction, an outline of the procedure for resealing in Western Australia is set out in the following paragraphs.⁴

3.7 In Western Australia, the person entitled to apply for resealing is the executor or administrator named in the grant,⁵ and so a corporation, Public Trustee or other public officer to whom a grant has been made outside Western Australia may apply for resealing.

3.8 It is not necessary to advertise notice of intention to apply for resealing. Proceedings for resealing are commenced by motion.⁶ The application must contain notice of an address for service in Western Australia.⁷ It is not necessary to show that the deceased was domiciled in the jurisdiction in which the original grant was made.

3.9 The application for resealing must be supported by an affidavit by the executor or administrator. It is the practice for such an affidavit to set out -

- (1) the full name, address and occupation of the executor or administrator;

² *Administration and Probate Ordinance 1929* (ACT); *Rules of the Supreme Court*, Part 4; *Wills, Probate and Administration Act 1898* (NSW), Part II; *Supreme Court Rules*, Part 78; *Administration and Probate Ordinance 1969* (NT); *Rules of the Supreme Court*, Part 3, *Probate and Administration Rules*; *Succession Act 1981-1983* (Qld), Part V; *British Probates Act 1898*; *Supreme Court Rules*, O 71, O 73; *Administration and Probate Act 1919-1984* (SA); *Rules of the Supreme Court (Administration and Probate Act) 1984*;

Administration and Probate Act 1935 (Tas); *Probate Rules 1936*; *Administration and Probate Act 1958* (Vic); *Rules of the Supreme Court*, ch 3, *Probate and Administration Rules*; *Administration Act 1903-1984* (WA); *Non-Contentious Probate Rules 1967*.

³ Appendices II and IX. See also J M Power, *Will Making and Administration of Estates - A Short Guide* (1984), ch 10 and Appendix.

⁴ For more detail, see working paper, Appendix IX Part 6.

⁵ *Administration Act 1903-1984* (WA), s 61(1).

⁶ *Non-Contentious Probate Rules 1967* (WA), r 6(1).

⁷ *Administration Act 1903-1984* (WA), s 53(2).

- (2) the name and the late address or occupation of the deceased, and the date and place of his death;
- (3) the name of the court which granted the probate or administration and the date on which the grant was made;
- (4) that the grant was made to the deponent;
- (5) that the deceased left estate in Western Australia;
- (6) that the deponent is applying for the grant to be resealed;
- (7) where applicable, that by power of attorney the executor or administrator appointed the applicant to apply to the court to reseal the grant of probate or administration, and the date of the power of attorney.

3.10 The affidavit must also exhibit and verify a statement giving particulars of

- (1) all movable and immovable property in Western Australia comprised in the estate of the deceased;
- (2) the value at the time of the death of the deceased of the property referred to;
- (3) all debts in Western Australia owing by the deceased at the time of his death.⁸

3.11 Where the applicant is an administrator the court may require one or more sureties to enter a guarantee,⁹ but guarantees are not mandatory except in particular circumstances set out in the Rules.¹⁰

3.12 Where a grant lodged for resealing relates to a will or codicil, it must include an authentic copy of the will or codicil, or be accompanied by a copy certified as correct by or under the authority of the court by which the grant was made.¹¹

⁸ *Non-Contentious Probate Rules 1967* (WA), r 9B(2).

⁹ *Administration Act 1903-1984* (WA), s 62(1).

¹⁰ *Non-Contentious Probate Rules 1967* (WA), r 27A.

¹¹ *Id.*, r 43(1).

3.13 A person claiming to have an interest in the estate and intending to oppose the application for resealing may either personally or by his solicitor lodge a caveat in the registry requiring that nothing be done in the proceedings without notice to him.¹² However, on the application of the person applying for resealing, the court may remove the caveat.¹³

3.14 When resealed, the grant of probate or administration has the same force and effect and the same operation in Western Australia as if such probate or administration had been originally granted by the court, and the executor or administrator must perform the same duties and is subject to the same liabilities.¹⁴

3.15 The person in whose favour the resealing is made must file an inventory of the estate of the deceased and pass his accounts within such time as may be specified by the Rules, or as the court may order.¹⁵ According to the Rules, the accounts must normally be filed within 12 months of resealing.¹⁶

3. THE COMMISSION'S PROPOSALS

(a) Introduction

3.16 In the working paper, the Commission suggested that the procedure governing resealing in the various Australian States and Territories should be made uniform, and it made a number of detailed proposals on particular matters. These proposals were in general approved by those who commented on the working paper, though one or two matters engendered differences of view.¹⁷

3.17 In making these suggestions, the Commission had the advantage of being able to consider the model resealing legislation which has been drawn up on behalf of the Commonwealth Secretariat, in an attempt to unify the law of resealing in the Commonwealth

¹² *Administration Act 1903-1984* (WA), s 63(1).

¹³ *Id.*, s 64(1).

¹⁴ *Id.*, s 61(2).

¹⁵ *Id.*, s 43(1)(b).

¹⁶ *Non-Contentious Probate Rules 1967* (WA), r 37(3).

¹⁷ Particularly the need for advertisement of intention to apply for resealing, and for security for due administration.

of Nations.¹⁸ Most countries in the Commonwealth of Nations have resealing legislation based on the United Kingdom *Colonial Probates Act 1892*, but many variations have been introduced in particular jurisdictions, and the aim of the Commonwealth Secretariat has been to develop an acceptable uniform model.

3.18 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.

3.19 In the working paper, the Commission asked to what extent the provisions of the Commonwealth Secretariat's draft model bill would provide a satisfactory basis for Australian uniform resealing legislation. The commentators thought that, in general, these proposals would provide a satisfactory basis, though once again there were some differences of opinion on particular matters.¹⁹

(b) A uniform code of procedure

3.20 The Commission is convinced that uniformity in the procedure to be adopted for resealing is highly desirable. It therefore recommends that a uniform code of procedure for resealing should be drawn up, and in the paragraphs that follow it makes recommendations as to the basic features which should be incorporated in such a code. Many of these features are already to be found in the existing procedural rules of some or all Australian jurisdictions.

¹⁸ A preliminary report on grants of probate and administration, prepared by Professors J D McClean and K W Patchett, was considered by Commonwealth Law Ministers at Lagos, Nigeria, in 1975 and a further report at Winnipeg, Canada, in 1977. 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. The first, held in Basseterre, St Kitts in 1978, involved those in North America and the Caribbean; the second, held in Apia, Western Samoa in 1979, involved those in the Pacific; and the third, held in Nairobi, Kenya in 1980, involved those in Africa and Asia. As a result of these various considerations of the matter, 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. This revised version of the draft model bill is set out in Appendix I.

¹⁹ Especially the need for advertisement of intention to apply for resealing.

3.21 The Commission has not attempted to settle the finer details of such a code itself. In its view, this task would be most satisfactorily performed by the Parliamentary Counsel's Committee²⁰ in association with the Probate Registrars of the various States and Territories. The matter should be referred to the Committee, which would ask each Probate Registrar to submit comments on the Commission's proposals and on the provisions to be included in the code. The Committee would then draft a code of uniform rules and submit it to each Probate Registrar for approval. The matter might be assisted by convening a conference of Probate Registrars. The code, as settled by mutual agreement, could then be implemented in each jurisdiction, either by legislation or by rules of court. The Commission therefore recommends that the Standing Committee of Attorneys General refer the matter to the Parliamentary Counsel's Committee.

(c) Discretion

3.22 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.²¹ 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.²² 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.²³

²⁰ This Committee is a standing sub-committee of the Standing Committee of Commonwealth and State Attorneys General. It comprises the Parliamentary Counsel of the Commonwealth, each State, and the Northern Territory.

²¹ "It is permissive whether the Courts here will reseal the grants or not; the real object of the [resealing legislation] is to relieve applicants here from the proof of relative facts already proved in another jurisdiction and to act on such parts in so far as they will justify a grant here." *Public Trustee of New Zealand v Smith* (1924) 42 WN (NSW) 30, 31 per Harvey J.

²² For cases, and for more detail, see para 9.15 below.

²³ If the recommendation made in ch 7 below, that grants made in an Australian jurisdiction in which the deceased died domiciled be automatically recognised throughout Australia, is adopted, there will be no discretion to refuse to recognise such grants. The recommendation in the text is confined to cases where resealing continues.

(d) Persons who may apply for resealing

3.23 Under the present law in force in the various States and Territories, there are considerable differences as to the persons who may apply for the resealing of a grant of probate or administration.²⁴ The Commission proposes that these differences should be eradicated and that 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.²⁵

3.24 It should be expressly provided that the executor or administrator need not be within the jurisdiction of the granting or resealing court.

3.25 It should be made clear that:

- (a) all persons named in the grant, or authorised by power of attorney, are entitled to act as personal representatives on the resealing;
- (b) a grant made to several personal representatives may be resealed upon the application of only one or some of them;

²⁴ See working paper, Appendix I, paras 3-5; Appendix 11, paras 1-2.

²⁵ The recommendations in paragraph 3.23 are consistent with the Commonwealth Secretariat's draft model bill: see cls 2(1), 3(2).

- (c) a grant to one executor may be resealed after an original grant has been made to another executor;
- (d) a grant may be resealed in favour of an executor appointed by the court of original grant in substitution for the executor to whom a grant was originally made by that court.

(e) **Instruments which may be resealed**

3.26 Under the present law in all States and Territories, all grants of probate and administration, including grants made for special or limited or temporary purposes,²⁶ can be resealed.²⁷ The uniform code of procedure should specifically state that all such grants may be resealed.

3.27 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,²⁸ for example a Scottish confirmation.²⁹

3.28 Provision should be made for the resealing of elections and orders to administer made in favour of a Public Trustee or Curator, or any other person or body.³⁰

3.29 At present, the practice as to resealing such elections or orders varies. It appears that elections and orders made in one Australian jurisdiction are rarely resealed in another

²⁶ Grants may be made for a special purpose, as where a grant 'ad colligenda bona' is made in order to enable the personal representative to deal with perishable property, or a grant 'ad litem' is made to enable the estate to be represented in legal proceedings. Grants may be made which are limited to particular property, or limited as to time, such as a grant during the minority of a person named in the will as sole executor.

²⁷ See working paper, Appendix I, para 8.

²⁸ This paragraph adopts the provisions of the Commonwealth Secretariat's draft model bill: see cl 2(1).

²⁹ All Australian jurisdictions reseal Scottish confirmations: see working paper, Appendix VIII.

³⁰ In all Australian jurisdictions except South Australia, the Public Trustee (in the Australian Capital Territory, the Curator of Intestate Estates) may file an election to administer estates of a value below a prescribed limit where no other person applies to do so. In Queensland and New South Wales, authorised trustee companies may also file a similar election. (For details, see working paper, Appendix I, para 9, but note that in Victoria the statutory limit was increased to \$50,000 by the *Public Trustee (Amendment) Act 1981*, s 4.)

In all Australian jurisdictions, there are provisions whereby an order to administer may be made in favour of the Public Trustee or Curator in a variety of cases. Such orders confer on him the same powers, rights and obligations as a grant of administration. The circumstances in which such an order can be sought vary from jurisdiction to jurisdiction but can generally be categorised as cases where there is no proper person available or willing to administer the estate. See, for example, *Public Trustee Act 1941-1984* (WA), s 10.

Australian jurisdiction, since if a deceased in respect of whose estate an election or order to administer has been made in one jurisdiction is found to have property in another jurisdiction, a grant of probate or administration or an election or order to administer can be obtained in that jurisdiction. Elections and orders made by Australian courts are however occasionally resealed in England under the *Colonial Probates Act 1892*. In the case of elections and orders from Victoria, Western Australia and Tasmania, the English court will not assume without evidence in the particular case under consideration that such elections and orders qualify as grants which may be resealed, but they may be used to lead to an order for a grant to the person entitled on it being sworn that they are still in force.³¹ In contrast, elections and orders made in favour of the Public Trustee of Queensland or New Zealand may be resealed in England on it being sworn that the election or order is still in force.³² In the case of New Zealand elections, an undertaking must be given 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 England without obtaining further representation in the place of election.³³

3.30 There seems no reason why elections or orders to administer should not be resealed in appropriate cases, and the Commission therefore recommends that resealing of elections and orders should be expressly permitted. As in England, the person who is seeking the resealing of the election or order should be required to swear that it is still in force and, in the case of an election, to give an undertaking in the terms set out in the previous paragraph.

(f) Procedure

3.31 The details of resealing procedure in each Australian State and Territory were set out, and the differences between the jurisdictions analysed, in the Appendices to the working paper.³⁴ The Commission does not propose to make recommendations on all the detailed procedural issues which appear in the rules of the various jurisdictions, but in this section it makes recommendations on some particular points which are of special importance.

³¹ Registrar's Direction, 20 November 1972.

³² Ibid. There appears to be no direction regarding the resealing of elections and orders made in the other Australian jurisdictions.

³³ Registrar's Direction, 24 March 1958.

³⁴ See especially Appendix II, paras 10-30.

3.32 The duty of resealing should be imposed on the Registrar, rather than on the court, but 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.³⁵

3.33 It should be possible to grant resealing on production either of the grant of probate or administration or of an exemplification³⁶ 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.³⁷

3.34 The applicant should be required to produce to the court of original grant an appropriately verified statement of all assets and liabilities of the estate within Australia listed so as to establish the situs of each.³⁸ This will be necessary if a requirement of security for due administration is retained.³⁹

3.35 Non-resident executors and administrators should be required to file a local address for service.⁴⁰

(g) Advertisements

3.36 In New South Wales, Victoria, Tasmania and the two Territories, notice of intention to apply for resealing of a grant of probate or administration must be advertised in the jurisdiction in which it is sought to obtain resealing. In Queensland and South Australia, on the other hand, no advertisement is necessary unless required by the Registrar. In Western Australia, advertisements are not required at all.⁴¹

3.37 In the working paper the Commission expressed the view that advertising did not fulfil any necessary purpose, was probably ineffective, and thus caused unnecessary expense and delay.

³⁵ See *id.*, para 9. The recommendation is consistent with the Commonwealth Secretariat's draft model bill: see cl s 3(2), 5(5).

³⁶ An exemplification is an official copy of a document made under the seal of a court.

³⁷ See working paper, Appendix II, para 18. The recommendation is consistent with the Commonwealth Secretariat's draft model bill: see cl 3(4).

³⁸ See working paper, Appendix II, para 14.

³⁹ See paras 3.46 to 3.52 below.

⁴⁰ See working paper, Appendix II, para 12.

⁴¹ See working paper, Appendix II, para 10.

3.38 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 anyone 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.

3.39 Several commentators supported a requirement of advertising. The view was expressed that it was preferable that there should be some opportunity to search for applications, whether or not it was taken up. Even among those who took this view, several agreed that advertising was limited in its effectiveness.

3.40 Other commentators agreed with the Commission's view that advertising was unnecessary.

3.41 Advertising is required by the Commonwealth Secretariat's draft model bill.⁴² The view of the Commonwealth Secretariat is that advertising is necessary and useful without adding undue cost. However, the Commonwealth Secretariat was dealing with the resealing in one independent country of a grant made in another, not with resealing of a grant made by another jurisdiction within the same federation.

3.42 The Commission maintains its view that advertising is often ineffective and causes delay and expense which can be avoided. It therefore recommends that the uniform code of procedure for resealing should not incorporate a requirement of advertising.

3.43 However, if it is not possible to produce a uniform view on advertising, this should not be allowed to prejudice agreement on a uniform procedure in other respects.

(h) Caveats

3.44 The present procedure in all jurisdictions expressly provides for the lodgement of caveats against resealing.⁴³ The effect of lodging a caveat is that the application cannot proceed without notice being given to the caveator.

⁴² Cl 3(3).

⁴³ See working paper, Appendix II, para 3. For the provision in South Australia, see *Rules of the Supreme Court (Administration and Probate Act) 1984 (SA)*, r 50(1).

3.45 In practice, caveats against resealing are rare.⁴⁴ However, the commentators were generally in favour of retaining the opportunity to lodge a caveat against resealing, and the Commission agrees with this view. The Commission therefore recommends that the uniform code of procedure should make provision for the lodgement of caveats against resealing. The consequences of lodgement should be the same as at present.⁴⁵

(i) Security

3.46 The traditional way of providing against unlawful or improper administration of the estate has been for the court to require the provision by an administrator of a bond or guarantee to ensure that the estate is duly administered. However, such requirements have begun to lose favour in recent times.

3.47 Bonds were only ever required in the case of grants of administration and not grants of probate. Where required, the bond repeats the obligations of the administrator as specified in the oath he is required to make. The penalty for breach of the bond is generally equal to the gross value of the estate. There is also usually provision for requiring one or more sureties to guarantee the bond. The main purpose of the bond, in practical terms, is to allow a remedy against the sureties in the event of default by the administrator, and a number of jurisdictions have seen this as being more simply achieved by way of guarantee. Under such a system sureties are required to guarantee any loss suffered by any person interested in the administration of the estate in consequence of a breach of duty by the administrator.

3.48 The abolition of the requirement of administration bonds and its replacement with a guarantee requirement limited to specific cases was recommended by the English Law Commission in 1970⁴⁶ and became law in the United Kingdom in 1971.⁴⁷ Bonds were

⁴⁴ The Victorian Registrar of Probates commented to the Commission that over a period of 30 years there had, to his knowledge, been one caveat lodged "many years ago" and "possibly one fairly recently". He said that there were apparently no real grounds in either case and they were withdrawn. However the important High Court decision in *Lewis v Balshaw* (1935) 54 CLR 188 (see para 9.16 below) arose out of a New South Wales caveator's attempt to prevent the making of a grant to the attorney of an English executor when the caveator regarded the will as defective.

⁴⁵ Similar provisions appear in the Commonwealth Secretariat's draft model bill: see cl 4.

⁴⁶ Report on *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters* (1970).

⁴⁷ *Supreme Court of Judicature (Consolidation) Act 1925* (UK), s 167 as substituted by *Administration of Estates Act 1971* (UK), s 8. This provision has now been replaced by *Supreme Court Act 1981* (UK), s 120.

subsequently abolished in Western Australia, Victoria and Queensland.⁴⁸ The Queensland legislation not only abolishes the bond requirement but also abolishes requirements as to guarantees. Bonds are required in all other Australian jurisdictions,⁴⁹ although the South Australian Law Reform Committee has recommended abolition.⁵⁰ All of the jurisdictions that retain a security requirement, with the exception of Tasmania, provide for security to be dispensed with.

3.49 In 1979 the New Zealand requirements for administration bonds in case of intestacy were abolished and replaced by provisions giving the court, in cases where the court considers it necessary having regard to specified factors, power to require "such security as the Court may require for the due collection, getting in, and administration of the estate".⁵¹

3.50 The requirements as to bonds or guarantees apply on an application for resealing in the same way as they do in relation to an application for an original grant.⁵² However it appears that the provision of adequate security in the jurisdiction of original grant would not be a sufficient ground for dispensation.⁵³

3.51 It appears that bonds are called up extremely rarely. One commentator,⁵⁴ writing before the abolition of security requirements in Queensland by the *Succession Act 1981*, said that the experience of the legal profession in Queensland was that bonds were never called upon. The majority of commentators felt that any advantages arising from the taking of security, such as its effect as a disincentive to maladministration, were far outweighed by the expense involved. It was generally felt that guarantees were to be preferred over bonds.

⁴⁸ *Administration Act 1903-1984* (WA), ss 26 and 62, amended by *Administration Act Amendment Act 1976* (WA), ss 5 and 14 - the amendment implemented the Commission's report on *Administration Bonds and Sureties* (1976);

Administration and Probate Act 1958 (Vic), s 57, amended by *Administration and Probate (Amendment) Act 1977* (Vic), s 4(1);

Succession Act 1981-1983 (Qld), s 51.

⁴⁹ *Administration and Probate Ordinance 1929* (ACT), s 14;

Wills, Probate and Administration Act 1898 (NSW), s 64;

Administration and Probate Act (NT), s 23;

Administration and Probate Act 1919-1984 (SA), s 31;

Administration and Probate Act 1935 (Tas), s 25.

⁵⁰ Report on *Administration Bonds and the Rights of Retainer and Preference of Personal Representatives of Deceased Persons* (1972).

⁵¹ *Administration Act 1969* (NZ), s 6(5).

⁵² See working paper, Appendix II, paras 4-7.

⁵³ The Commission understands that this is the view of the New South Wales and Victoria Registries. In New South Wales the court has insisted that sureties be resident in and testify to assets in that State: *Re William Jolliffe* (1887) 4 WN (NSW) 81; *In Re Bance* (1890) 6 WN (NSW) 150; *In the Estate of Kruttschnitt* (1941) 42 SR (NSW) 79.

⁵⁴ Mr W A Lee, Reader in Law at the University of Queensland.

3.52 The view of the Commission is that if a security requirement is to be retained, it should be by way of guarantee rather than bond. The New Zealand provision,⁵⁵ which gives the court power to require security in cases where it considers it necessary and gives it a discretion as to the nature of the security required in such cases, would be suitable for adoption by Australian jurisdictions. However the Commission emphasises that, if it proves impossible to reach agreement on this issue, this should not prejudice the reaching of agreement as to uniformity on other matters.

(j) Effects of resealing

3.53 The present legislation in all jurisdictions expressly provides that, when resealed, a grant of probate or administration has the same force, effect and operation as if it had been originally granted by that court.⁵⁶ The uniform rules of procedure should contain such a provision.⁵⁷

(k) Powers and duties of persons to whom resealing is granted

3.54 The existing legislation in some jurisdictions expressly defines the powers and duties of persons to whom resealing is granted, including those appointed under a power of attorney.⁵⁸ The Commission considers that it is desirable for such powers and duties to be expressly set out, and therefore recommends that the uniform code of procedure should incorporate a statement of the powers and duties of those to whom resealing is granted.⁵⁹

(l) Notification

3.55 Under the present law in three jurisdictions, and as a matter of practice in two others, notice of the resealing must be given by the court in the jurisdiction in which resealing was granted to the court in the jurisdiction which made the original grant; and in circumstances in

⁵⁵ *Administration Act 1969* (NZ), s 6(5) - see para 3.49 above.

⁵⁶ See working paper, Appendix I, para 6.

⁵⁷ This is consistent with the Commonwealth Secretariat's draft model bill: see cl 6(1).

⁵⁸ See working paper, Appendix I, para 7.

⁵⁹ For an example of such a provision, see the Commonwealth Secretariat's draft model bill, cl 7.

which the court of original grant has been informed of the resealing, it must notify any resealing court of revocation or alteration of the original grant.⁶⁰

3.56 In the working paper the Commission suggested that a notification procedure along these lines should be generally adopted. No commentator expressed disagreement. The Commission therefore recommends accordingly.

⁶⁰ See working paper, Appendix 11, paras 31-32.

CHAPTER 4 - THE COUNTRIES WHOSE GRANTS MAY BE RESEALED

1. THE PRESENT POSITION

4.1 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,¹ but beyond that there is considerable diversity as between the various provisions. As a result, a grant of probate or administration made by the court of a particular overseas jurisdiction may be acceptable for resealing in one Australian jurisdiction but not in another.² In addition, the national divisions of the world, and the status and allegiance of countries, are continually changing. As a result, many of these legislative provisions are now out of date, giving rise to anomalies and to doubts as to which grants will and will not be accepted.

(a) New South Wales; Western Australia

4.2 Section 107(1) of the New South Wales *Wills, Probate and Administration Act 1898*, and section 61(1) of the Western Australia *Administration Act 1903-1984*, provide that a grant of probate or administration made by any court of competent jurisdiction in "any portion of Her Majesty's dominions" may be resealed. "Her Majesty's dominions" means all territories under the sovereignty of the Crown.³ Thus many of the independent countries which are members of the Commonwealth of Nations⁴ are included, and those parts of Her Majesty's dominions which are not self-governing (and thus not members of the Commonwealth of Nations) are also included.

4.3 However, a number of countries with legal systems based on the common law are excluded, such as -

¹ Except that grants made in the Northern Territory may not be resealed in Queensland: see para 4. 7 below.

² For a list of the countries whose grants would be resealed in each Australian jurisdiction, as at December 1980, see working paper, Appendix VIII.

³ *Halsbury's Laws of England* (4th ed), vol 6, para 803; cf Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), 23.

⁴ For a list of members of the Commonwealth of Nations, see Appendix II, para 1. The external territories of Australia, the associated states and territories of New Zealand, and the dependent territories of the United Kingdom, not being independent territories, are not members of the Commonwealth of Nations, but may be said to be 'within the Commonwealth of Nations': Sir William Dale, *The Modern Commonwealth* (1983), 59. For a list of these territories, see Appendix II, para 2.

- (1) countries within the Commonwealth of Nations which are not part of Her Majesty's dominions because they have their own sovereign, such as Malaysia;
- (2) countries within the Commonwealth of Nations which have adopted Republican status, such as Guyana and India;
- (3) countries which were once part of the Commonwealth of Nations and are not any longer, such as Ireland, South Africa and Pakistan;
- (4) countries which have never been part of the Commonwealth of Nations, such as the United States of America.

4.4 In contrast, some of the areas which are included, such as Mauritius and Quebec, have civil law systems.

4.5 Clearly excluded are many countries, both in Europe and elsewhere, from which large numbers of Australians or their forebears have come but which have never been part of the Commonwealth of Nations.

(b) Queensland

4.6 By section 4(1) of the British *Probates Act 1898*, the only grants which may be resealed are those made by a court in a part of "Her Majesty's dominions" to which the Act has been extended by Order in Council. According to section 3, the Act will be extended to a particular part of Her Majesty's dominions when the Governor in Council is satisfied that the country in question "...has made adequate provision for the recognition in that part of probates and letters of administration granted by the Supreme Court [of Queensland] ...".⁵

4.7 Orders in Council have been made applying the Act to all the Australian States and the Australian Capital Territory - but not the Northern Territory. It has also been applied to British

⁵ By s 5, Orders in Council may also extend the Act to grants made by British courts having jurisdiction out of Her Majesty's dominions. This provision, found in similar form in the *Administration Act 1969* (NZ), s 71(1)(b), applied at a time when certain British courts were empowered, usually under treaty arrangements, to exercise such powers. This provision no longer seems to be of any effect and remains only as a historical curiosity.

Guiana, British New Guinea, Fiji, Hong Kong, New Zealand, Singapore, Straits Settlements and the United Kingdom.⁶

(c) Victoria

4.8 Section 81(1) of the *Administration and Probate Act 1958* provides for the resealing of grants made by "any court of competent jurisdiction in the United Kingdom or in any of the Australasian States". The phrase "Australasian States" is defined by section 80 to include all the Australian States, the Northern Territory, New Zealand, Fiji and any "British colony or possession" in Australasia existing in 1958 or thereafter created, which the Governor in Council declares to be an Australasian State. The Australian Capital Territory and Norfolk Island are the only jurisdictions to have been so declared. The meanings of "British colony or possession" and "Australasia" are by no means clear. For example, it is uncertain whether all Australian and New Zealand dependencies are included.⁷

4.9 Section 81(1) goes on to provide for the resealing of grants made by a court of competent jurisdiction in a country specified in a proclamation made under section 88. By section 88(1), the Governor in Council may proclaim certain countries to be countries whose grants or orders, issued by courts of competent jurisdiction, correspond to grants of probate or administration issued by the Supreme Court of Victoria. The "countries" so proclaimed to date are the Canadian Provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Saskatchewan, and Guyana, Hong Kong, Kenya, Malaysia, Papua New Guinea and Singapore.⁸ Although the power of proclamation is not limited to Commonwealth countries or territories its exercise has, to date, been so limited.

⁶ Many of these Orders in Council are now out of date. 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.

⁷ For example Cocos (Keeling) Islands, which in general retained the laws of the Colony of Singapore which were in force in the islands immediately before the transfer to Australia: *Cocos (Keeling) Islands Act 1955* (Cth).

⁸ Gibraltar was also proclaimed under s 88, but the proclamation has been revoked.

(d) South Australia

4.10 Section 17 of the *Administration and Probate Act 1919-1984* provides for the resealing of "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". Section 20 defines the phrase "Australasian States" to mean all other Australian States, New Zealand, Fiji and "any British colonies or possessions in Australasia now existing or hereafter to be created, which the Governor may....declare to be Australasian States". Grants from the Australian Capital Territory and the Northern Territory are in practice resealed, these jurisdictions being regarded as the equivalent of Australian States. However, no jurisdictions have been proclaimed as "Australasian States" under section 20. As is the case with the Victorian legislation,⁹ the meaning of "Australasia" is unclear. "United Kingdom" is defined to mean "Great Britain and Ireland" and includes the Channel Islands. South Australia alone among Australian jurisdictions permits the resealing of Irish grants.¹⁰

4.11 By section 19(1) "probate or administration granted by a foreign court" means "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 South Australia. To that end the Registrar may accept a certificate from a consul or consular agent of the foreign country or such other evidence as appears to him sufficient. 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".¹¹ 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. Such a result would be anomalous, and apparently contrary to the legislative intention.

⁹ See para 4.8 above.

¹⁰ On the other hand all Australian jurisdictions reseat Scottish confirmations, some by reason of express statutory authority, others in practice or by reason of judicial authority: see working paper, Appendix VIII.

¹¹ *In Re Campbell* [1920] 1 Ch 35, 39 per Eve J (dealing with the meaning of the term "foreign country" for the purposes of the *Rules of the Supreme Court* (UK) O 11); but see the doubts expressed by Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), 78-79.

(e) Tasmania

4.12 In Tasmania there is a further variation. Section 48(1) of the *Administration and Probate Act 1935* permits the resealing of a grant of probate or administration made by "any court of competent jurisdiction in a State or Territory of the Commonwealth or a reciprocating country". A "reciprocating country" is defined to include the United Kingdom, New Zealand, Fiji and any other country proclaimed as a reciprocating country.¹² 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 administration granted by the Supreme Court of Tasmania, may proclaim that country to be a reciprocating country.¹³ "Country" includes any territory or other jurisdiction.¹⁴ Before 1978, only a "British possession" could be declared to be a reciprocating country. Proclamations were made in respect of South Africa, Ireland, British Columbia, Ontario, Papua New Guinea, Hong Kong, British Guiana (now Guyana), Northern Rhodesia (now Zambia), Straits Settlements, Federated Malay States and Sarawak. The last three territories together approximate to but are not identical with Singapore and Malaysia. It is doubtful whether the proclamations made in respect of British Guiana, Northern Rhodesia, Straits Settlements, Federated Malay States and Sarawak remain effective. As a result of constitutional developments in South Africa and Ireland, the present status of the proclamations made in respect of these countries prior to 1978 is uncertain.

(f) Australian Capital Territory

4.13 Section 80(1) of the *Administration and Probate Ordinance 1929* provides for the resealing of any grants made by a court of competent jurisdiction "in a State or Territory of the Commonwealth or in a Commonwealth country". The expression "Commonwealth country" is not defined and there seems to be some doubt as to its meaning.¹⁵ For example, it is unclear whether a colony such as Hong Kong is included.

¹² *Administration and Probate Act 1935* (Tas), s 47A(2).

¹³ *Id.*, s 53.

¹⁴ *Id.*, s 47A(2).

¹⁵ Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), 16.

(g) Northern Territory

4.14 Section 111(1) of the *Administration and Probate Act* provides for resealing of grants made by "a court of competent jurisdiction in a Commonwealth country". Section 6(1) defines "Commonwealth country" to mean the States and Territories of the Commonwealth other than the Northern Territory, and the countries specified in the Fifth Schedule. The colonies, overseas territories or protectorates of such countries, and territories for the international relations of which such countries are responsible, are included. There are, however, some uncertainties. Pakistan is listed but is no longer a member of the Commonwealth of Nations. Bangladesh is not listed but originally formed part of Pakistan and is a member of the Commonwealth of Nations. The list is not a complete list of independent members of the Commonwealth of Nations.

2. THE COMMISSION'S PROPOSALS

4.15 The present legislation, under which the countries whose grants may be resealed differ from one Australian jurisdiction to another, is unsatisfactory. In most cases, the legislation also requires amendment because it is out of date.

4.16 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.

4.17 The Commonwealth Secretariat's draft model bill and the New Zealand legislation offer contrasting approaches to the problem.

4.18 The Commonwealth Secretariat's draft model bill allows the resealing of a grant of probate or administration made by a court "in any part of the Commonwealth or in any other country".¹⁶ "Grant of administration" is defined to mean 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 to a probate or

¹⁶ Cl 3(1).

letters of administration under the law of the resealing jurisdiction.¹⁷ "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.¹⁸

4.19 The New Zealand *Administration Act 1969*, on the other hand, permits resealing of a grant made by any competent court in any Commonwealth country (other than New Zealand) or the Republic of Ireland, or by any competent court of any other country to which by Order in Council the section is declared to apply.¹⁹ The Act provides that "'Commonwealth country' means a country that is a member of the Commonwealth; and includes every territory for whose international relations the Government of that country is responsible".²⁰ By the *Commonwealth Countries Act 1977* a list of Commonwealth countries is officially established subject to amendment by Order in Council.

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. Under the Commonwealth Secretariat's draft model bill, a foreign grant will not be resealed unless it constitutes a "grant of administration" as defined by the bill. Under the New Zealand Act, the only countries outside the Commonwealth whose grants may be resealed are the Republic of Ireland and those countries to which the statute is extended by Order in Council.

4.21 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

¹⁷ Cl 2(1).

¹⁸ Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report of a Second Working Meeting held at Apia, Western Samoa 18-23 April 1979*, 67 (explanatory notes to cl 3(1)). This definition is to be inserted in the bill if the jurisdiction in question has no such definition in other legislation.

¹⁹ S 71(1).

²⁰ S 2(1).

difficulty in ensuring that the lists in the various Australian States and Territories remained uniform.

4.22 The Commission therefore recommends that all Australian States and Territories by uniform legislation adopt a provision, based on that in the Commonwealth Secretariat's draft model bill, allowing the resealing of a grant of probate or administration made by a court of competent jurisdiction in any part of the Commonwealth of Nations or in any other country. "Grant of probate or administration", and "any part of the Commonwealth of Nations", should be defined in terms similar to those in the draft model bill.²¹

4.23 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.

²¹ See para 4.18 above.

PART III: AUTOMATIC RECOGNITION

CHAPTER 5 - INTRODUCTION

1. GENERAL

5.1 The adoption of a uniform code of procedure for resealing, and of uniform provisions as to the countries whose grants may be resealed, will bring about a great improvement in the law. However, the other disadvantages of resealing already referred to¹ - the cost, inconvenience and delay associated with resealing - will remain.

5.2 In this part of the report, the Commission therefore considers whether there are any better alternatives to resealing as a means of recognising grants of probate and administration made in other jurisdictions.

2. EXISTING AUSTRALIAN LEGISLATION

5.3 In relation to shares in companies, and to amounts below a statutory limit payable under life insurance policies, existing Australian legislation makes it unnecessary to reseat a grant of probate or administration made in one Australian State or Territory in order to administer assets which are situated in another State or Territory. These provisions avoid some of the costs, inconvenience and delay involved in resealing. The Commission is advised that without them the number of resealing applications to Australian courts would be substantially greater.

(a) National companies legislation

5.4 Section 183(4) of the national *Companies Act 1981*, which has been adopted in all Australian jurisdictions except the Northern Territory,² provides that where the personal representative of a deceased holder, duly constituted as such under the law of another State or Territory, executes an instrument of transfer of a share, debenture or interest of the deceased holder to himself or to another person, and delivers the instrument to the company, together with a statement in writing in specified terms, the company shall register the transfer and pay

¹ See paras 2.8 to 2.13 above.

² This replaces provisions of the uniform *Companies Act 1961*, for example *Companies Act 1961-1981* (WA), s 95(3). For the Northern Territory provision, see *Companies Ordinance* (NT), s 95(6).

to the personal representative any dividends or other moneys accrued in respect of the share, debenture or interest up to the time of the execution of the instrument. The statement in writing must be a statement made by the personal representative within the period of three months immediately preceding the date of delivery of the statement to the company, and must be to the effect that, to the best of his 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 question and no application for such a grant will be made. This section does not operate so as to require the company to do an act or thing that it would not have been required to do if the personal representative were the personal representative of the deceased holder duly constituted under the law of the State or Territory.

5.5 A transfer or payment made pursuant to section 183(4) and a receipt or acknowledgment of such a payment is, for all purposes, as valid and effectual as if the personal representative were the personal representative of the deceased holder duly constituted under the law of the State or Territory.³

(b) Commonwealth Life Insurance Act

5.6 Section 103 of the *Commonwealth Life Insurance Act 1945*, as amended by the *Life Insurance Amendment Act 1977*, applies where moneys not exceeding \$6,000, or such other amount as is prescribed, excluding bonus additions, are payable to the personal representative of a deceased person. An amount of \$10,000 was prescribed under this section in 1983.⁴ The life insurance company may, without requiring the production of any grant of probate or administration, pay the moneys, together with the bonuses (if any) which have been added to the policy or policies, to a person who is the husband, wife, father, mother, child, brother, sister, nephew or niece of the deceased person, or who satisfies the company that he is entitled to the property of the deceased person under his will or under the law relating to the disposition of the property of deceased persons or that he is entitled to obtain probate of the will of the deceased person or to take out letters of administration of his estate.⁵

³ *National Companies Act 1981*, s 183(5).

⁴ *Life Insurance Regulations (Amendment) 1977* (Cth), reg 26.

⁵ *Life Insurance Act 1945* (Cth), s 103(1).

5.7 The company making any such payment shall be thereby discharged from all further liability in respect of the moneys payable under the policy or policies.⁶ All persons to whom any such moneys are paid shall apply those moneys in due course of administration and, if the company thinks fit, it may require those persons to give sufficient security by bond or otherwise that the moneys so paid will be so applied.⁷

5.8 Section 103A deals with the situation where the owner of the policy is not the person whose life is insured under it. The section applies where the owner predeceases the person whose life is insured, and another person satisfies the company that issued the policy that he is entitled, under the will or on the intestacy of the deceased owner, to the benefit of the policy, or that he is entitled to obtain probate of the will, or to take out letters of administration of the estate, of the deceased owner. In these circumstances the company may, without requiring the production of any grant of probate or administration, endorse on the policy a declaration that the person in question has satisfied the company and is the owner of the policy, and that person thereupon becomes the owner of the policy.⁸ This provision does not apply where the surrender value of a policy (or, where the deceased owner held more than one policy with the same company, the aggregate of the surrender values of policies held) exceeds or exceeded \$3,000 or such other amount as is prescribed.⁹ An amount of \$5,000 was prescribed under this section in 1983.¹⁰

⁶ Id, s 103(2).

⁷ Id, s 103(3).

⁸ Id, s 103A(1).

⁹ Id, s 103A(2).

¹⁰ *Life Insurance Regulations (Amendment) 1983* (Cth), reg 26A.

CHAPTER 6 - SOME POSSIBLE ALTERNATIVES

1. EARLIER AUSTRALIAN PROPOSALS

6.1 In 1963 and 1964, dissatisfaction with the system of resealing led to the development of proposals for a scheme whereby grants of probate and administration made in one Australian jurisdiction would be automatically recognised throughout Australia.

6.2 These proposals were generated by the introduction of section 95(3) of the uniform *Companies Act 1961*, the predecessor to section 183(4) of the national *Companies Act 1981*.¹ Similar provisions for the disposal of proceeds of life assurance policies were advocated by the Life Offices' Association for Australasia in 1963. This proposal was referred to the Law Institute of Victoria, which endorsed it and recommended to the Law Council of Australia "that the principle be extended to cover all forms of property both real and personal".² The Law Council of Australia accepted both recommendations and referred the proposal to the Standing Committee of Commonwealth and State Attorneys General and to the Commonwealth Attorney General. The proposal relating to the proceeds of life assurance policies was also adopted by the New South Wales Bar Association and the Queensland Law Society. The Law Society of Western Australia recommended to the Minister for Justice of Western Australia "that legislation be introduced to obviate the necessity for resealing of grants of probate or administration made by the Supreme Court of any State or Territory within the Commonwealth and that this should apply to all forms of property both real and personal".³ The Law Society of New South Wales, however, adopted the view that resealing of probate should be retained in respect of real estate and that as regards personal estate "whilst there may be a case for dispensing with reseal in the case of shares in companies, monies payable under life policies, and perhaps monies in Bank Accounts, the whole question should be fully investigated...having regard to the necessity to supervise the administration of estates and for the protection of creditors in relation to the appropriate State laws".⁴

6.3 The then Commonwealth Attorney General, Sir Garfield Barwick, subsequently proposed to the Law Council of Australia certain preliminary guidelines as a basis for

¹ Dealt with in paras 5.4 and 5.5 above.

² Letter from Law Institute of Victoria to Law Council of Australia, 19 June 1963.

³ Letter from Law Society of Western Australia to Law Council of Australia, 6 November 1963.

⁴ Letter from Law Society of New South Wales to Law Council of Australia, 29 October 1963.

discussion.⁵ In essence the guidelines proposed that 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 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. Extension of the *Companies Act* provisions into the fields of insurance proceeds and bank deposits was not felt to be possible "for the present", but the Attorney General gave no reasons.

6.4 The reaction to these guidelines was mixed. The Law Society of Western Australia adhered to its original view that "a grant of probate or administration in one State or Territory of the Commonwealth should be recognised for all purposes in other States or Territories of the Commonwealth" and that the proposed procedure was thus "cumbersome and unnecessary".⁶ The Law Institute of Victoria and the Law Society of Tasmania agreed. The Law Society of South Australia and the Victorian Bar Council supported the Attorney General's proposals, with minor reservations. In New South Wales, however, both the Law Society and the Bar Association opposed the suggestions.

6.5 Draft legislation was subsequently prepared in Victoria under the direction of the Standing Committee of Attorneys General.⁷ It departed from the Attorney General's proposals to the Law Council of Australia, and 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. Provision was also made in the Bill for resealing of foreign or overseas grants on traditional lines.

⁵ Letter from Commonwealth Attorney General to Law Council of Australia, quoted in working paper, Appendix V.

⁶ Letter from Law Society of Western Australia to Law Council of Australia, 4 February 1964.

⁷ For the draft provisions, see working paper, Appendix VI.

6.6 The draft legislation met with approval from the Queensland Law Society. However, the Law Society of Western Australia, consistently with its previous views, concluded that the draft bill provided "a procedure most unsuitable for this State and one which indeed complicates the procedures already in existence".⁸ The Law Society of New South Wales also opposed the Bill to the extent that it provided for the resealing of letters of administration without the need for a bond in the resealing State or Territory. The Society's view was that, since in some States such bonds could be dispensed with on the original grant, there might therefore be no supporting bond at all. The Society also suggested that information as to the place of domicile should appear on all original grants. The Society did however approve the proposal to dispense with advertisement in the resealing jurisdiction.

6.7 No uniform legislation was enacted consequent on these proposals.

2. SOME OVERSEAS SCHEMES

(a) Introduction

6.8 It is instructive to see how other jurisdictions, particularly those in a federation, have dealt with the problems caused by the need to reseal grants of probate and administration. Legislative schemes avoiding the need for resealing have been devised in the United States, East Africa and Malaysia. Another scheme is to be found in the Hague Convention on the International Administration of the Estates of Deceased Persons. In the United Kingdom, resealing has been replaced by a system of automatic recognition without court intervention.

6.9 It should however be noted that in one important federation, Canada, no alternative to resealing has been adopted. The position seems similar to that in Australia in many respects.⁹

⁸ Letter from Law Society of Western Australia to the Hon Minister for Justice of Western Australia, 6 October 1964.

⁹ See T G Feeney, *The Canadian Law of Wills: Probate* (1976), 145-148.

(b) Legislative schemes in the United States, East Africa and Malaysia

United States

6.10 The *Uniform Probate Code*, adopted in 14 States, permits personal representatives appointed by the court of the deceased's domicile to collect debts and personal property in another jurisdiction without resealing, subject to certain requirements for affidavit evidence to be supplied to the debtor or holder of the property in support of the personal representative's claim. The affidavit should 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.¹⁰ Real estate, however, must be dealt with by a personal representative to whom authority has been granted in the State in which the real property is situated. In States other than those which have adopted the *Uniform Probate Code*, the position varies significantly.¹¹

East Africa

6.11 Under a scheme in force in Kenya, Tanzania, Uganda and Malawi, where a person dies leaving movable property in one of these jurisdictions, and also leaves estate in one of the other jurisdictions, the Public Trustee of the former jurisdiction, if requested to do so by the Public Trustee of the latter jurisdiction, can apply to the court for an order authorising him to collect the assets in that jurisdiction and hand them over.¹² In practice, however, the Public Trustee will ask the court to reseal the grant made in the other jurisdiction, under a simplified procedure for resealing available to him.¹³ In practice, then, the scheme operates as a procedure for simplified resealing.

Malaysia

6.12 In Malaysia the need to reseal in one State grants of probate or administration made in another State is avoided because legislative power in respect of these matters is vested in the

¹⁰ *Uniform Probate Code 1974*, s 4-201.

¹¹ See S D Lerner, "The Need for Reform in Multistate Estate Administration" (1977) 55 *Texas L Rev* 303.

¹² For example *Public Trustee Act* (Kenya), s 15(1).

¹³ For example, *id.*, s 6(3).

federal legislature.¹⁴ Grants made under the *Probate and Administration Act 1959* are thus effective throughout Malaysia.¹⁵

6.13 Another interesting precedent is to be found in legislation formerly in force in Sarawak, one of the constituent States of Malaysia, which provided:

"Where a grant of probate or letters of administration in respect of a deceased person owning assets in the Colony has not been obtained under this Ordinance, a grant of representation to the estate of such person obtained from the proper authority in any part of the British Empire (including British Protectorates and Mandated Territories) or from any competent British Court in any foreign country shall be effective in the Colony as regards property specified in a schedule authenticated under the hand and official seal of the Probate Officer and annexed thereto."¹⁶

The holder was given the same rights and subjected to the same liabilities and obligations as the holder of an original grant.¹⁷

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

6.14 Mention should be made of the 1973 Hague Convention concerning the International Administration of the Estates of Deceased Persons, which resulted from the Twelfth Session of the Hague conference of Private International Law in 1972.¹⁸ This convention permits the issue of an internationally recognised certificate of authority to the person authorised to administer the estate. It has attracted little support and appears to involve complex requirements. It was principally designed to cope with the needs of civil law heirs seeking authority in common law countries.¹⁹ The Hague Convention system does not seem to be

¹⁴ *Malaysia Federal Constitution*, art 74 and 9th Schedule, List I, para 4(e)(i). Islamic personal law relating to succession is excluded: id, para 4(e)(ii), and for Sabah and Sarawak native law and custom relating to succession is also excluded: Constitution art 95B(1)(a) and 9th Schedule, List IIA, para 13.

¹⁵ It is possibly beyond the Commission's terms of reference to consider such a system, but in any event resealing should not be dealt with separately from questions such as probate, wills and succession, all of which are matters of State jurisdiction.

¹⁶ *Administration of Estates Ordinance 1933* (Sarawak), s 14(1) (repealed by the *Probate and Administration Act 1959* (Malaysia), s 89 and 2nd Schedule).

¹⁷ Id, s 14(3).

¹⁸ Australia was not a party to the Convention, which has not yet been ratified by the number of countries necessary for it to come into force.

¹⁹ Some Commonwealth legal systems are based on civil law, eg Malta, Mauritius and Quebec. In civil law systems, where there is a will, the law normally provides that the heir or legatee succeeds to the property directly, precluding the need for a grant. There is thus no formal authority which the heir can present to a common law country for resealing. In cases of intestacy the court issues "letters of verification". See J D McClean and K W Patchett: *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth* (1977), 156, published by the Commonwealth Secretariat.

suitable for adoption as between Australian States and Territories, or between Australia and other common law countries such as New Zealand and the United Kingdom.

(d) Automatic recognition in the United Kingdom

6.15 Under the system now in operation in the United Kingdom, grants of probate and administration made in one part of the United Kingdom are, in certain circumstances, automatically effective throughout the United Kingdom.

6.16 The United Kingdom *Administration of Estates Act 1971* provides that grants of probate and of letters of administration (or their Scottish equivalent, grants of confirmation) made in one part of the United Kingdom, in which the deceased died domiciled, are, without being resealed, to be treated in any other part of the United Kingdom as if the grant had been made in the latter part.²⁰ The deceased's domicile is to be noted on the grant. Provision is made for such recognition to apply to grants issued before, as well as those issued after, the date of commencement of the legislation.²¹

6.17 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. However, to prevent multiple grants being made, 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 domicile.²² Resealing of such grants in other parts of the United Kingdom is no longer possible.²³

6.18 The United Kingdom provisions were introduced following the report of a committee under the chairmanship of one of the registrars of the principal Probate Registry, consisting of probate officials and solicitors. The Committee was asked to consider whether resealing any longer served any really useful purpose. The Committee came to the conclusion that the

²⁰ S 1, which deals with the recognition in England and Wales of Scottish confirmations and Northern Irish grants of representation, is set out in Appendix III. Ss 2 and 3 contain the complementary provisions providing for recognition in Northern Ireland of grants made in England and Wales and of confirmations made in Scotland, and in Scotland of grants made in England and Wales and Northern Ireland. In each case recognition is given only if the deceased died domiciled in the jurisdiction of original grant. S 4, which deals with evidence of grants, is also set out in Appendix III.

²¹ Ss 1(6), 2(5), 3(2).

²² See Tristram and Coote, 399 and 483.

²³ As a result of the repeal, by section 7 of the Act, of sections 168 and 169 of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK): see para 2.6 above.

advantages of resealing could be obtained in other ways, and that as between the constituent parts of the United Kingdom resealing could be abolished.²⁴

²⁴ *Parliamentary Debates* (UK), 5th Series, House of Lords, vol 316, col 421.

CHAPTER 7 - PROPOSALS FOR AN AUTOMATIC RECOGNITION SCHEME

1. INTRODUCTION

7.1 In the working paper, the Commission suggested that the Australian States and Territories should by uniform legislation adopt a scheme of automatic recognition of grants of probate and administration on the lines of the system adopted in the United Kingdom. As in the United Kingdom, a grant of probate or administration made by the court of an Australian jurisdiction in which the deceased died domiciled would be automatically recognised as effective in every other Australian State or Territory.

7.2 The commentators unanimously agreed with this proposal.¹ The Commission therefore recommends the introduction of an automatic recognition scheme on the above basis.

7.3 The Commission's recommendations are in general accord with the earlier Australian proposals for an automatic recognition scheme.² These proposals were eventually not proceeded with. However, they were made before the introduction of automatic recognition in the United Kingdom in 1971. In the opinion of the Commission, the example of the United Kingdom shows that it is possible to devise a satisfactory scheme of automatic recognition.

2. APPLICATION OF THE SCHEME

(a) Grants made in Australia in the domicile of the deceased

7.4 Consistently with the United Kingdom scheme, a grant of probate or administration made by the court of the Australian State or Territory in which the deceased died domiciled would be automatically recognised throughout Australia.

¹ The agreement of the Principal Registrar of the Supreme Court of Western Australia, Mr M S Ng, was subject to the necessity to preserve the rule in *Lewis v Balshaw* (1935) 54 CLR 188. On this, see para 9.16 below.

² See paras 6.1 to 6.7 above.

(b) Other grants

(i) Other grants made in Australia

7.5 A grant of probate or administration made by the court of an Australian State or Territory in which the deceased was not domiciled at the time of his death would not qualify for automatic recognition.

(ii) Grants made outside Australia

7.6 Likewise, a grant of probate or administration made by a court outside Australia would not qualify for automatic recognition within Australia, whether the deceased died domiciled in the jurisdiction in which the grant was made or not.³

7.7 In this respect, the Commission has devoted particular attention to the question of New Zealand grants. The Attorney General informed the Commission in 1977 that the New Zealand Minister for Justice had expressed the hope that the Commission would consider whether its proposals would be suitable for adoption in New Zealand.⁴ The Commission has therefore considered whether the automatic recognition scheme should extend also to grants made in New Zealand, in cases where the testator died domiciled there.

7.8 The Commission recommends that New Zealand should not be included in the automatic recognition scheme, at least initially, for the following reasons -

- (1) A number of differences in law as between Australia and New Zealand, such as the rules governing domicile, and the formal validity of wills, are more likely to raise problems once jurisdictions outside Australia are admitted to the scheme.⁵ The problem of protecting the New Zealand revenue in the collection of death and succession duties will also arise, whereas if the automatic

³ However, the Commission recommends that, if the grants referred to in paras 7.5 and 7.6 are resealed in the Australian jurisdiction in which the deceased died domiciled, the resealed grant should be automatically recognised throughout Australia : see para 7.18 below.

⁴ See para 1.5 above.

⁵ The rules as to domicile are uniform throughout Australia: see para 2.16 above. On the rules as to formal validity of wills, see paras 10.3 and 10.4 below.

recognition scheme is confined to Australia the abolition of such duties in all Australian jurisdictions disposes of this problem.⁶

- (2) Once the scheme is opened to New Zealand, the question will be asked whether the grants of other countries, such as Papua New Guinea or the United Kingdom, should be brought within the scheme. The complications referred to in (1) above are compounded each time the scheme is widened.
- (3) The incidence of persons leaving property in Australia but dying domiciled in New Zealand or vice versa is apparently not large. The main concern is the number of New Zealand residents holding shares in Australian companies. This problem can be catered for by proposals limited to shares which appear below.⁷

(c) Resealing of other grants

7.9 Where a grant does not qualify for automatic recognition, it will remain necessary for it to be resealed, as at present, before it can be effective in any Australian jurisdiction, other than an Australian jurisdiction in which it was made.

(i) Grants made outside Australia

7.10 In the Commission's view, resealing is an appropriate method for the recognition of overseas grants. The Commonwealth Secretariat, when considering the question of recognition of grants of probate and administration as between the member countries of the Commonwealth of Nations, came to the conclusion that 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.⁸

⁶ See para 7.38 below.

⁷ See para 8.5 below.

⁸ 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, 24-26 April 1978*, 18.

7.11 The Commission agrees with these views, and recommends that resealing of overseas grants should continue, on the lines set out in chapters 3 and 4, but subject to the recommendations as to jurisdiction made in chapter 9.

(ii) Australian grants not made in the deceased's domicile

7.12 The Commission recommends that grants made by Australian courts in cases where the deceased was not domiciled in the jurisdiction of grant should continue to be resealed.

7.13 In so recommending, the Commission is departing from the practice now established in the United Kingdom, where it is no longer possible for grants made in one United Kingdom jurisdiction to be resealed in another. In the United Kingdom, grants made in a jurisdiction other than that in which the deceased died domiciled will be limited to property in that jurisdiction and will be further limited to operate only until a grant is made in the domicile.⁹

7.14 The Commission's view is that in Australia resealing would operate more satisfactorily than a system of limited grants.

7.15 It is common practice for persons living close to some State borders to use professional advisers and appoint executors resident in an adjacent State.¹⁰ For example, persons resident in Broken Hill and domiciled in New South Wales are often advised by Adelaide solicitors and trustee companies and appoint them as executors.¹¹ At present the personal representative will obtain a grant in the place where the will has been made and the executor resides (in South Australia, in the example above) and then reseat it in the State where the assets are (in the example, 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.

7.16 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 court of the deceased's domicile. If

⁹ See para 6.17 above.

¹⁰ For these points, the Commission is particularly indebted to the representatives of the Australian Mutual Provident Society and the Perpetual Trustee Company Ltd who held discussions with the Commissioner in charge of the project in Sydney in July 1981.

¹¹ Similarly, people resident in Northern New South Wales may use Brisbane executors, and people resident in New South Wales near to the Australian Capital Territory may use Canberra executors.

resealing within Australia were to be abolished, then, whether the personal representative obtained a limited grant in any other jurisdiction or not, it would usually be necessary for him to obtain a grant in the domicile. In cases such as that being considered, it may be more convenient for the personal representative to obtain the original grant in his own State and then have it resealed in the domicile through agents.

7.17 The Commission accordingly recommends that it should remain possible for Australian grants other than those made by the court of the deceased's domicile to be resealed, on the lines set out in chapters 3 and 4, but subject to the recommendations as to jurisdiction made in chapter 9.

(d) Automatic recognition of grants resealed in Australia in the domicile of the deceased

7.18 In those cases in which resealing continues to be necessary, the Commission recommends that, when a grant is resealed by the court of an Australian jurisdiction 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 such a court.

7.19 The automatic recognition scheme in the United Kingdom applies only to original grants and not to resealed grants. The recommendation made in the previous paragraph thus goes beyond the United Kingdom scheme. It is however 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. In the working paper, the Commission suggested an extension of the United Kingdom scheme along these lines, and no commentator dissented.

3. DETAILS OF THE SCHEME

(a) Matters to be notified on the grant

7.20 The Commission recommends that, as in the United Kingdom scheme, when a grant is made or resealed by the court of the Australian jurisdiction in which the deceased died domiciled, the deceased's domicile should be notified on the grant.¹²

¹² The rules as to domicile are uniform throughout Australia: see para 2.16 above.

7.21 One commentator¹³ suggested that when the grant was made by the court of the deceased's domicile and that fact was noted thereon, a short statement in simple language should be added, setting out the effect of the grant in such circumstances, that is, that it would be automatically recognised throughout Australia. The Commission agrees and so recommends. The same procedure should apply when a grant is resealed in the deceased's domicile.¹⁴

(b) Instruments which can be automatically recognised

7.22 The scheme proposed by the Commission will apply to grants of probate and administration, when such grants are made or resealed by the court of the deceased's domicile

7.23 The Commission also recommends that automatic recognition should be given to elections and orders to administer granted to a Public Trustee or Curator, or any other person or body, by the court of the Australian State or Territory in which the deceased died domiciled. The Commission has recommended that such elections and orders should be capable of being resealed.¹⁵ It is consistent with the Commission's other recommendations that when such elections and orders are made or resealed in the deceased's domicile, they should be automatically recognised as effective throughout Australia.

(c) Jurisdictional matters

7.24 It is necessary for the proposed scheme of automatic recognition to be consistent with existing jurisdictional rules as to the making of grants of probate and administration. It is also desirable that its effect on other rules of the law of succession should be no greater than is necessary. These matters are dealt with in chapters 9 and 10 below.

4. CONSIDERATIONS AFFECTING THE PROPOSALS

7.25 At present, the system of resealing offers certain safeguards which will disappear under a system of automatic recognition.

¹³ Mr W A Lee, Reader in Law at the University of Queensland.

¹⁴ As to which, see para 7.18 above.

¹⁵ See para 3.30 above.

The Commission has considered these matters, but has come to the conclusion that the advantages of the automatic recognition scheme outweigh any possible adverse effects resulting from the disappearance of these safeguards.

(a) Discretion not to recognise

7.26 Resealing gives each jurisdiction a discretion whether or not to recognise a grant of probate or administration made elsewhere. It may be that, in the circumstances, a court in the jurisdiction in which the application to reseal is brought might not issue an original grant.

7.27 Generally this is not a particularly relevant consideration as between the various Australian jurisdictions, where similar rules are applied in determining the validity of testamentary documents. However, in relation to questions of formal validity South Australia and Queensland have recently adopted rules under which, while the formal rules of the Wills Act as to execution must normally be complied with, a court is given a discretion to admit to probate a testamentary document not complying with those rules if it is satisfied that the testator intended the instrument to be his will.¹⁶ The discretion which a resealing court has at present to refuse to reseal a grant made in another jurisdiction could be exercised where a grant has been made in South Australia or Queensland in circumstances where the will would not at present be admitted to probate in the resealing jurisdiction. Such discretion would disappear if a system of automatic recognition were introduced.¹⁷ However, the Commission does not view the divergence that presently exists between the law in these two States and the law elsewhere in Australia as a sufficient reason for retaining the discretion to refuse to recognise a grant.

¹⁶ The *Wills Act 1936-1980* (SA), s 12(2) provides that:

"A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."

The *Succession Act 1981-1983* (Qld), s 9(a) provides that:

"The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator."

For considerations of a similar reform in other jurisdictions, see Northern Territory Law Reform Committee, *Report relating to the Attestation of Wills by Interested Witnesses and Due Execution of Wills* (1979) (recommending the adoption of the South Australia provision); Tasmania Law Reform Commission, *Report on Reform in the Law of Wills* (1983); Western Australia Law Reform Commission Discussion Paper, *Wills: Substantial Compliance* (1984). A report is also to be submitted by the New South Wales Law Reform Commission.

¹⁷ For further discussion, see para 10.5 below.

(b) Advertising

7.28 As mentioned in chapter 3,¹⁸ a majority of jurisdictions require that advertisements be issued before making or resealing a grant of probate or administration. A scheme of automatic recognition would necessarily mean that all jurisdictions which at present require applications for resealing to be advertised would have to forego any advantages that might be seen to arise out of such a requirement. However, it would remain possible to require an advertisement before the issue of an original grant.

7.29 It would be desirable for all Australian jurisdictions to adopt a uniform view on the question of advertisements. The Commission's view, as already expressed in chapter 3 in relation to resealing,¹⁹ is that advertisement is often ineffective and causes undue expense and delay without providing sufficient compensating advantages to beneficiaries, creditors or anyone else. The Commission believes that advertising should not be required for the making of an original grant. However, agreement concerning advertising is not essential to the proposed automatic recognition scheme, and each jurisdiction could continue its own practices. The Commission does not regard the issue as so fundamental that disagreement over it should jeopardise the automatic recognition proposals.

(c) Caveats

7.30 At present, caveats may be lodged both against the making of a grant of probate or administration and against the resealing of that grant in another jurisdiction. Under a system of automatic recognition there would be no opportunity to lodge a caveat, once an original grant had been made, to oppose the recognition of that grant elsewhere. In practice, caveats against resealing are rarely used, and the Commission does not see the loss of the opportunity to lodge a caveat as in any way a reason for not adopting a scheme of automatic recognition.

7.31 The right to lodge a caveat against the making of the original grant would remain.

¹⁸ See para 3.36 above.

¹⁹ See para 3.42 above.

(d) Security

7.32 As mentioned in chapter 3,²⁰ the rules in operation in the various States and Territories relating to the taking of security for due administration vary considerably. Some jurisdictions require bonds, some require guarantees, and one jurisdiction - Queensland - has abolished all security requirements. In general, the rules are the same for the making of original grants as for resealing.

7.33 Under a system of automatic recognition, once an original grant had been made in the jurisdiction in which the deceased died domiciled, there would be no further opportunity for the taking of security in any other jurisdiction.

7.34 It would therefore 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. The Commission's views as to the form which such rules might take were set out in chapter 3.²¹

7.35 However, a uniform rule about the taking of security is not a prerequisite to a scheme of automatic recognition, and it would be possible for each jurisdiction to retain its own practices as to such matters. The need to protect beneficiaries entitled to the property of the deceased situated in other jurisdictions would be one factor for the court making the grant to take into account in deciding whether or not to require some form of security when considering a particular case.

(e) Notification

7.36 Resealing results in the creation of a public record of the grant in the place of recognition. Thus interested parties have information available as to the legal position of a particular estate. Under a scheme of automatic recognition it would still be possible to have a system of notification of the making of grants, and of any revocation or alteration to their terms. The court of grant would simply notify all relevant jurisdictions, providing a local point of enquiry for interested parties. However, the United Kingdom scheme of automatic

²⁰ See paras 3.48 and 3.49 above.

²¹ See para 3.52 above.

recognition does not have such a system and has apparently not found this a problem. 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.

(f) Passing of accounts

7.37 The provisions relating to the passing of accounts presently applying in the Australian States and Territories vary widely. The Commission's view is that 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.

(g) Revenue protection

7.38 The necessity to reseal a grant obtained in another jurisdiction has, in the past, been used to ensure the due payment of local death and succession duties. With the repeal throughout Australia of the legislation that formerly imposed such duties²² it is no longer a valid argument to suggest that resealing aids in revenue protection. This statement, of course, does not apply to those cases, which however must be few in number, where the deceased died before the cut-off date for duty stipulated in the various statutory provisions.

7.39 Despite the removal of such duties, both State and federal, throughout Australia, it is still necessary to consider this problem in case such duties are ever reintroduced.

²² Federal Estate Duty - abolished on estates of persons dying on or after 1 July 1979.
 New South Wales Death Duty - abolished on estates of persons dying on or after 1 January 1982.
 Victorian Probate Duty - abolished on estates of persons dying on or after 1 January 1984.
 Queensland Succession Duty - abolished on estates of persons dying on or after 1 January 1977.
 South Australian Succession Duty - abolished on estates of persons dying on or after 1 January 1980.
 Western Australian Death Duty - abolished on estates of persons dying on or after 1 January 1980.
 Tasmanian Death Duties - abolished on estates of persons dying on or after 1 October 1982.
 Northern Territory Succession Duty - abolished on estates of persons dying on or after 1 July 1978.

7.40 The working paper suggested, as part of any scheme of automatic recognition of Australian grants, that each State and Territory should provide that when any original grant is sought, or when any overseas grant is sought to be resealed, the applicant or his representative should be required to file an inventory of all property, real and personal, of the deceased situated within Australia, and that the court should then forward a copy to the revenue authority of each State and Territory within which such property is situated. Each State and Territory would thus be supplied with a basis upon which its own revenue legislation could be applied.

7.41 The working paper also suggested that each State and Territory should also enact legislation placing the person to whom a grant or reseat is made under a duty to meet out of the estate all succession duties payable in each State and Territory in which the property forming part of the estate is situated and making such payment a debt due out of the deceased's estate.²³ Such provisions would ensure that jurisdictions in which succession duties are levied would not be disadvantaged by an automatic recognition scheme.

7.42 The commentators agreed with these suggestions. However, the abolition of death and succession duties makes it unnecessary for such provisions to be included in legislation dealing with automatic recognition. In the Commission's view, the question of protection of the revenue in the context of automatic recognition of grants of probate and administration need not be examined unless or until death or succession duties are reintroduced.

²³ Cf *Administration and Probate Ordinance 1929* (ACT), s 83B.

CHAPTER 8 - OTHER PROPOSALS

1. INTRODUCTION

8.1 In addition to the proposal for an automatic recognition scheme outlined in the previous chapter, there are other ways in which the existing law can be improved.

2. BANK DEPOSITS

8.2 As explained earlier, the provisions of the national *Companies Act* make it unnecessary to reseal a grant of probate or administration made in one Australian jurisdiction in order to deal with shares in a company in another Australian jurisdiction which the deceased held at his death.¹ Under the *Commonwealth Life Insurance Act*, where the amount payable under a life insurance policy is below a statutory limit, it can be paid direct to the person specified in the Act and no grant of probate or administration need be obtained.² These provisions have been of considerable help in offsetting the disadvantages of resealing.

8.3 There seems to be no logical reason for confining the procedure adopted by the national *Companies Act* to shares, debentures and interests covered by that legislation. The Canadian Parliament has extended like provisions to bank deposits,³ and the Commonwealth Parliament has legislative power in respect of monies deposited in banks.⁴ Similar provisions could be adopted by State legislatures with regard to monies held in banks, building societies, credit unions and similar institutions for which they are the responsible legislative bodies.⁵ Such action was generally supported by commentators on the working paper, and need no longer raise fears concerning revenue protection.⁶ The Commission therefore recommends

¹ See paras 5.4 and 5.5 above.

² See paras 5.6 to 5.8 above.

³ *Canada Corporations Act 1970* (Canada), s 42;
Bank Act 1970 (Canada), s 97.

⁴ *Australian Constitution*, s 51 (xiii).

⁵ Indeed, some limited provisions already exist, for example the *Administration Act 1903-1984* (WA), s 139, which applies where a person dies leaving a sum not exceeding \$3,000 (an amount proclaimed under this provision in 1976) standing to his credit in any bank (which includes a building society). In such circumstances, if no grant of probate or administration is produced to the bank within one month of death, and no notice in writing of any will and of intention to prove it, or of intention to apply for a grant of administration, is given to the bank within that period, the bank may apply the money in payment or reimbursement of funeral expenses and pay the balance to the widower, widow, parent or child of the deceased. Alternatively, it may apply the money in payment to such other persons or for such other purposes as may be proclaimed. Such payment is a valid discharge to the bank. Similar provisions exist in at least some other States: see for example *Administration and Probate Act 1919-1984* (SA), ss 71-72.

⁶ See para 7.38 above.

that the provisions of the national *Companies Act* should be extended to deposits in banks, building societies, credit unions and similar institutions, and that the appropriate legislation should be amended accordingly.

8.4 In the opinion of the Commission, where the amount deposited does not exceed a given maximum, this legislation could also adopt the provisions of the *Commonwealth Life Insurance Act* allowing payments to be made to a specified person without the need for a grant of probate or administration. The limit presently prescribed under that Act, \$10,000, would be an appropriate limit, but the legislation should allow the limit to be increased from time to time, as the *Commonwealth Life Insurance Act* does.

3. EXTENSION OF THE NATIONAL COMPANIES ACT PROVISIONS TO OTHER COUNTRIES

8.5 Some commentators on the working paper⁷ suggested that the provisions of the national *Companies Act* could also be extended in another way - 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. 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. New Zealand and the United Kingdom were singled out because people from those countries are more likely to hold shares in Australian companies than people from any other country, and in practice it is in respect of such cases that problems arise. The Commission accordingly recommends that the relevant provisions of the Act should be extended to grants of probate and administration made by courts in New Zealand and the United Kingdom.

⁷ The Share Registrars Association and the Victorian Registrar of Probates.

PART IV: JURISDICTION AND ALLIED PROBLEMS

CHAPTER 9 - JURISDICTION

1. INTRODUCTION

9.1 It is generally accepted that the principles which determine whether a court will entertain an application for resealing of a grant of probate or administration are the same as those that determine whether the court would have had jurisdiction to make an original grant.¹ All Australian States and Territories have jurisdictional rules which determine whether their courts will entertain applications for grants of probate and administration, and rules which determine to whom such a grant will be made. The Commission's terms of reference relate only to recognition of grants made elsewhere, by resealing or otherwise, and do not extend to revising the jurisdictional rules for the making of original grants. It is therefore necessary to ensure that the Commission's proposals, both as to resealing and as to automatic recognition, are consistent with these rules. This important issue has not been explored in earlier chapters, but must now be considered. It is dealt with in this chapter.

9.2 Where a court exercises its jurisdiction to make an original grant, it also has jurisdiction to determine the succession to the property in question² - that is to say, it can determine issues relating to the validity or construction of any will, and to succession on intestacy. The court also has jurisdiction to determine questions of succession when it reseals a grant made elsewhere.³ In exercising this jurisdiction, the court will determine the law according to which such issues should be decided by applying the appropriate conflict of laws rule. Most succession matters relating to immovable property are referred to the law of the place where that property is situated (the 'lex situs'), and most succession matters relating to movable property are determined according to the law of the deceased's domicile. Likewise, there are conflict of laws rules which govern the law by which the estate is to be administered. In addition, there are rules governing the jurisdictional reach of applications for family provision. In general, the Commission's proposals as to resealing and automatic recognition are not intended to disturb these established conflict of laws rules. The relationship between these matters and the Commission's proposals is considered in more detail in chapter 10.

¹ *In re Carlton* [1924] VLR 237.

² See Dicey and Morris, 608.

³ *Id.*, 608-609.

2. JURISDICTION TO MAKE A GRANT

(a) The basis of jurisdiction

9.3 In all Australian States and Territories, jurisdiction to make grants of probate and administration has been given to the Supreme Court of the State or Territory concerned. In five States, this jurisdiction is limited to cases in which the deceased left either real or personal property within the jurisdiction.⁴

9.4 This rule was inherited from the practice of the courts in England. Grants of probate and administration were originally made by the ecclesiastical courts established in each diocese, and jurisdiction to make a grant was dependent on the deceased leaving personal property within that diocese. In 1857, jurisdiction in such matters was transferred to the Court of Probate,⁵ and in 1875, as a result of the reorganisation of the courts by the *Supreme Court of Judicature Acts 1873 and 1875*, was vested in the Probate, Divorce and Admiralty Division of the High Court.⁶ The principle that the deceased must have left personal property within the jurisdiction of the court (which now extended over the whole of England) was retained, but from 1898, when the Court was given jurisdiction to make grants in respect of real as well as personal property,⁷ it could make a grant if the deceased left either real or personal property situated within the jurisdiction.⁸

9.5 In 1932, the *Administration of Justice Act*, section 2(1) extended the jurisdiction of the English court so as to allow it to make a grant where a deceased person left no estate at all. The requirement that there had to be property within the jurisdiction could be very inconvenient, as, for example, in a case where the deceased died domiciled in England leaving property in another country but not in England, and the foreign court refused to make a grant

⁴ *Wills, Probate and Administration Act 1898* (NSW), s 40;
Administration and Probate Act 1919-1984 (SA), s 5;
Supreme Court Civil Procedure Act 1932 (Tas), s 6(5);
Administration and Probate Act 1958 (Vic), s 6;
Administration Act 1903-1984 (WA), s 6.

⁵ *Court of Probate Act 1857* (UK), ss 3-4.

⁶ As from 1971, when the Probate, Divorce and Admiralty Division was re-named the Family Division, non-contentious probate business remains vested in 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) and Schedule 1.

⁷ By the *Land Transfer Act 1897* (UK).

⁸ On the history of probate jurisdiction in England, see Tristram and Coote, 3-5; Dicey and Morris, 589. As to the history of resealing, see para 2.6 above.

until a grant had been obtained in the deceased's domicile.⁹ In support of the reform, it has been pointed out that the power to make a grant is discretionary.¹⁰ If there is no property in England the personal representative must state the reasons why a grant is required,¹¹ and the court may refuse a grant if it considers the reasons insufficient.

9.6 If the deceased left no property in England and was not domiciled there, the court is very reluctant to exercise its discretion. *Aldrich v Attorney General*¹² concerned the estate of a child who died leaving substantial assets in Switzerland but none in England. The petitioner asked for a declaration that his marriage to the child's mother (also deceased) was valid and that he was the child's lawful father. Under Swiss law he would then inherit a substantial part of the estate. Ormrod J granted the first declaration but not the second. He also held that in the circumstances of the case it would be improper to make a grant of administration under the provisions of the *Administration of Justice Act 1932*.

9.7 The English reform has now been adopted in three Australian jurisdictions. In the Australian Capital Territory, section 9(2) of the *Administration and Probate Ordinance 1929* (added in 1965¹³) allows the court to make a grant in respect of the estate of a deceased person who did not leave property within the jurisdiction, "if the Court is satisfied that the grant of probate or administration is necessary". In the Northern Territory, section 14(2) of the *Administration and Probate Act* again allows the court to make a grant in such circumstances if it is satisfied that it is necessary. In Queensland, section 6 of the *Succession Act 1981-1983*, implementing the recommendations of the Queensland Law Reform Commission,¹⁴ provides:

- "(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 he left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled 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."

9.8 A similar reform was implemented in New Zealand by section 5(2) of the *Administration Act 1969*, which provides that:

⁹ Dicey and Morris, 589-590.

¹⁰ Id, 590.

¹¹ Registrar's Direction, 30 November 1932.

¹² [1968] p 281.

¹³ By *Administration and Probate Ordinance 1965* (ACT), s 6.

¹⁴ Queensland Law Reform Commission, *Report on the Law Relating to Succession* (1978).

" ...the Court shall have jurisdiction to make a grant of probate or letters of administration in respect of a deceased person, whether or not the deceased person left any estate in New Zealand or elsewhere, and whether or not the person to whom the grant is made is in New Zealand."

9.9 In New South Wales, Victoria, South Australia, Western Australia and Tasmania, by contrast, property within the jurisdiction continues to be a necessary prerequisite for obtaining a grant of probate or administration, and this is so even in the case of an application for a limited grant such as a grant of administration 'ad litem' to enable a personal representative to be a party to legal proceedings.¹⁵ However, any property appears to be sufficient.¹⁶ Providing that there is property within the jurisdiction, the fact that no property within the jurisdiction is disposed of by the will is not a ground for refusing a grant, unless the will itself indicates a manifest intention that it should not have any testamentary operation within the jurisdiction.¹⁷

(b) The person to whom the grant will be made

9.10 In the ordinary case where the deceased was domiciled within the jurisdiction where the grant is sought, then, in the absence of an executor to whom the grant of probate may be made, the court grants administration to the person entitled to such a grant according to the law of that jurisdiction. The rules which specify the persons entitled to a grant of administration are usually set out in a statute¹⁸ or in rules made under a statute.

9.11 Where the deceased died domiciled elsewhere, however, it is necessary to decide whether the grant should be made according to the rules of the jurisdiction in which the grant is sought or according to the rules of the deceased's domicile. Since succession to movables is normally governed by the law of the deceased's domicile, a court, in making a grant of probate or administration in respect of movable property within the jurisdiction, will generally give effect to the law of the domicile and make a grant to the person entitled under that law.¹⁹ The

¹⁵ *Re Aylmore* [1971] VR 375.

¹⁶ There is thus the possibility that the presence of small items of personal property within the jurisdiction can be used as the basis of jurisdiction. In *Re Aylmore* [1971] VR 375, it was suggested that if the deceased had taken out motor vehicle insurance within the jurisdiction, and the insurance documents were situated within the jurisdiction, the property requirement would be satisfied.

¹⁷ *In re Carlton* [1924] VLR 237; *In the Estate of Wayland* [1951] 2 All ER 1041.

¹⁸ *Administration and Probate Ordinance 1929* (ACT), s 12; *Wills, Probate and Administration Act 1898* (NSW), s 63; *Administration and Probate Act* (NT), s 22; *Administration Act 1903-1984* (WA), s 25.

¹⁹ *Lewis v Balshaw* (1935) 54 CLR 188.

person recognised as personal representative in the domicile is thereby entitled to represent the deceased elsewhere.²⁰

9.12 Normally, therefore, where a grant has been made by the court of the deceased's last domicile, the court of the jurisdiction in which the grant is sought will accept it and make a grant to the person who has been recognised as personal representative in the domicile without further investigation. Where there is a will, the court thus accepts the validity of that will as a testamentary instrument for all purposes, and does not investigate matters of formal validity, testamentary capacity, fraud, duress or undue influence.²¹

9.13 Similarly, if no grant has been made by the court of the deceased's last domicile, a grant will normally be made to the person who would be entitled to a grant under the law of the domicile.²² If the personal representative dies without completing administration of the estate, administration will be granted to the person who would be granted administration with the will annexed, or the nearest equivalent thereof, under the law of the domicile.²³ If the law of the domicile does not recognise executors and administrators as understood in the common law, the granting court must follow the law of the deceased's domicile as far as it can and entrust the administration of the estate in that jurisdiction to the person whose function it is to administer the estate under the law of the domicile.²⁴

9.14 It should be noted that different legal systems sometimes understand the concept of domicile in different senses.²⁵ Thus it may happen that a person can be domiciled in a particular country according to the laws of one country but not according to those of another. Recent statutory reforms of the law of domicile in Australia and England, which differ in particular respects, raise the possibility that Australian and English law may not agree as to the domicile of particular individuals.²⁶ However, within Australia the law of domicile is

²⁰ Id, 197 per Starke J.

²¹ Ibid.

²² *In the Goods of Rolland* (1893) 14 LR(NSW) (B & P) 102.

²³ *In the Goods of Hill* (1870) LR 2 P & D 89.

²⁴ *In the Goods of Meatyard* [1903] P 125.

²⁵ For a survey of the rules as to domicile in all countries in the Commonwealth of Nations, see J D McClean, *Recognition of Family Judgments in the Commonwealth* (1983), ch 1.

²⁶ Compare the *Domicile and Matrimonial Proceedings Act 1973* (UK), ss 1-4, with the Australian legislation cited in para 2.16 above. In England, a person has capacity to acquire a domicile of choice at 16, and in Australia at 18. In England, when a domicile of choice is abandoned and no other is acquired the domicile of origin revives, whereas in Australia the domicile of origin, once lost, never revives, and a domicile of choice is not lost until another is acquired.

uniform.²⁷ Since the meaning of domicile is determined according to the law of the jurisdiction dealing with the dispute, all Australian jurisdictions, in determining where a deceased person dies domiciled, will apply the same rules.

9.15 The rule that, as respects movables, the granting court will follow the grant that has been, or would be, made in the domicile is a rule of convenience only, not an inflexible rule,²⁸ and certain exceptions have been established. Thus a court will not make a grant to the person recognised by the law of the domicile unless under its own law that person is of age and of sound mind.²⁹ Again, rules of public policy may rule out a grant to the foreign personal representative, as where the making of a grant to that person would operate as an indirect method of enforcing a foreign revenue claim.³⁰ Despite the strength of the general rule, there thus seems to be a residual discretion in the granting court to refuse to make a grant.

9.16 Where the estate within the jurisdiction consists of, or includes, immovable property, the position is different. It is again a well-settled principle that succession to immovable property is governed by the *lex situs*. Thus, if the assets within the jurisdiction consisted only of immovable property, the granting court could not follow the grant made in the domicile, because the title to such property has to be determined not by the law of the domicile but by the law of the jurisdiction of grant as the *lex situs*.³¹ In *Lewis v Balshaw*,³² where the deceased had died domiciled in England leaving both movable and immovable property in New South Wales, the High Court had to decide what principles should be adopted when the will related both to movables and immovables. It was held unanimously that in such a case a court should not simply follow the grant made in the domicile. By so doing, the court would be accepting the validity of the will as a testamentary instrument relating to immovables without reference to the *lex situs*, which was the appropriate law for the determination of such matters. Neither convenience nor comity overcame such considerations.³³

²⁷ See para 2.16 above.

²⁸ *Lewis v Balshaw* (1935) 54 CLR 188, 197 per Starke J.

²⁹ *In the Goods of HRH the Duchess d'Orleans* (1859) 1 Sw & Tr 253, 164 ER 716.

³⁰ *Bath v British and Malayan Trustees Ltd* [1969] 2 NSW 114 (executor, in order to obtain grant in Singapore, had undertaken to have New South Wales assets transferred there to pay estate duty).

³¹ *Lewis v Balshaw* (1935) 54 CLR 188, 197 per Starke J.

³² (1935) 54 CLR 188.

³³ The High Court allowed an appeal from the decision of the New South Wales Supreme Court, which had held that the grant made in the deceased's domicile should be followed and that issues raised by a caveator should not be heard. The matter was remitted to the Supreme Court of New South Wales for further hearing.

9.17 Thus, in Australia, where the assets within the jurisdiction consist of, or include, immovable property, the court will not follow the grant made in the domicile but is obliged to decide for itself questions both of the validity of any will and of entitlement to a grant. As in cases where the estate within the jurisdiction consists entirely of movables, the question of who is entitled to a grant of probate or administration is ultimately a matter for the jurisdiction making the grant.

The law elsewhere

9.18 It seems that the law in England would once have made similar distinctions.³⁴ However, the position was altered by rule 29 of the *Non-Contentious Probate Rules 1954*.³⁵ The present position is set out in rule 29 as follows:

"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 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,
- (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, not 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) ...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;

³⁴ For the pre-1954 position see A V Dicey, *Conflict of Laws* (3rd ed 1922), 486-489, especially Illustration 4. Compare Dicey and Morris, 588-595, setting out the present law.

³⁵ See *The Non-Contentious Probate Rules 1954* (1954) 104 LJ 548.

- (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. "

9.19 Thus, where the whole of the estate in England 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 England - that is, the *lex situs*. However, in all other cases, including the case where the estate consists partly of movables and partly of immovables, the English court will generally follow the grant made in the domicile.

9.20 The general principle that succession to immovable property is governed by the *lex situs* is adhered to in England no less strongly than in Australia. However, as to making grants of probate and administration, the considerations which weighed strongly with the High Court in *Lewis v Balshaw*³⁶ have been outweighed by the advantage of having the administration of the estate in the same hands both in the domicile and in the *lex situs*,³⁷ so avoiding conflict as to who is the appropriate person to receive a grant.

9.21 In New Zealand, it appears that the position is that the court will follow the grant made in the domicile of the deceased, and will make no distinction between movables and immovables.³⁸ In *In re the Will of Ronaldson*,³⁹ the testatrix died domiciled in Scotland leaving immovable property in New Zealand in addition to her Scottish estate. Her will was valid by Scottish law, but not according to the law of New Zealand. It was held that a will valid according to the law of the testatrix's domicile would be admitted to probate in New Zealand. In this respect the position was the same whether the property in New Zealand dealt with by the will was movable or immovable.

9.22 The differences between the various jurisdictions on this matter are summed up by a leading English text as follows:

"The ideal....is to have one administration in the domicil for the whole of the property, but such principle of unity is not found in practice and is attainable only by international agreement."⁴⁰

³⁶ (1935) 54 CLR 188.

³⁷ Dicey and Morris, 593.

³⁸ See G Cain and D V Jenkin, *Dobbie's Probate and Administration Practice* (3rd ed 1978), ch 15.

³⁹ (1891) 10 NZLR 228.

⁴⁰ P M North, *Cheshire and North's Private International Law* (10th ed 1979), 591.

3. JURISDICTION TO RESEAL A GRANT

(a) The basis of jurisdiction

9.23 As has been pointed out above,⁴¹ the jurisdictional principles which determine whether a court will entertain an application for resealing of a grant of probate or administration are the same as those that determine whether the court has jurisdiction to make an initial grant. Thus, in all Australian jurisdictions except Queensland, the Australian Capital Territory and the Northern Territory, the court will not reseal a grant made elsewhere unless the deceased left property, real or personal, within the resealing jurisdiction.

9.24 In Tasmania and Victoria, this requirement is specifically stated in the legislative provisions relating to resealing.⁴² In New South Wales, South Australia and Western Australia, by contrast, the statutory provisions, which are all couched in similar terms, do not expressly require that there must be property within the resealing jurisdiction.⁴³ It has been suggested that section 107 of the New South Wales Act, read together with section 40 which states the court's jurisdiction to make grants of probate or administration in respect of the estates of persons leaving property in New South Wales, has the effect of limiting resealing to cases where the deceased left property in New South Wales. A better view, however, is that the section should not be so construed, and that the New South Wales court could reseal a grant even where the deceased left no property in New South Wales if there were good grounds for so doing.⁴⁴ In Western Australia, however, where the provisions of sections 6 and 61 of the *Administration Act* are the same in all essential respects as the New South Wales provisions, the strict interpretation is adopted and grants made elsewhere will not be resealed unless the deceased left property in Western Australia.

9.25 In the Australian Capital Territory and the Northern Territory, the resealing provisions again do not specifically require property within the resealing jurisdiction.⁴⁵ However, here it

⁴¹ Para 9.1.

⁴² *Administration and Probate Act 1935* (Tas), s 48(1);
Administration and Probate Act 1958 (Vic), s 81(1).

⁴³ *Wills, Probate and Administration Act 1898* (NSW), s 107;
Administration and Probate Act 1919-1984 (SA), s 17;
Administration Act 1903-1984 (WA), s 61.

⁴⁴ R Hastings and G Weir, *Probate Law and Practice* (2nd ed 1948), 310.

⁴⁵ *Administration and Probate Ordinance 1929* (ACT), s 80;
Administration and Probate Act (NT), s 111.

can be assumed that grants will be resealed in the absence of property within the jurisdiction because original grants may be made in such circumstances.

9.26 The Queensland *Succession Act 1981-1983*, section 6 of which allows the making of an original grant in the absence of property within the jurisdiction, does not deal with resealing. The resealing provisions are contained in the British *Probates Act 1898*, section 4. This provision again does not specifically require property within the resealing jurisdiction but in *In re Uniacke*⁴⁶ it was held that the deceased had to have property within the jurisdiction before a grant could be resealed. This decision was given against the background of the old law in Queensland, which required the deceased to leave personal property within the jurisdiction.⁴⁷ The Queensland court will presumably now follow the principle of section 6 of the *Succession Act 1981-1983* and reseat grants without imposing a property requirement.

9.27 In the working paper the Commission suggested that it should be possible to make or reseat a grant even where no real or personal property was left within the jurisdiction. It gave a number of examples of circumstances in which the making or resealing of a grant in such circumstances would be desirable -

- (a) The making of a grant may have effects on foreign revenue laws beneficial to the estate.⁴⁸
- (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.⁴⁹
- (c) Certain foreign countries apparently require a grant by the country of nationality of the deceased before themselves making a grant.⁵⁰

⁴⁶ [1912] QWN 43.

⁴⁷ As to the old law in Queensland, see P E Nygh, *Conflict of Laws in Australia* (3rd ed 1976), 464.

⁴⁸ *In the Estate of Wayland* [1951] 2 All ER 1041.

⁴⁹ F C Hutley, R A Woodman and O Wood, *Cases and Materials on Succession* (3rd ed 1984), 414.

⁵⁰ *In the Goods of Tamplin* [1894] P 39. See Dicey and Morris, 589-590.

- (d) Where a will only appoints a testamentary guardian, the will is not admissible to probate.⁵¹
- (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.⁵²

9.28 The Commission accordingly asked for comment on whether property, real or personal, within the resealing jurisdiction should be required. Most commentators who commented on this issue agreed that the property requirement was not necessary,⁵³ though one commentator⁵⁴ suggested that in cases where there was no property within the jurisdiction it would be desirable to require the applicant to give reasons why resealing was sought -as is the practice in England.⁵⁵

9.29 The Commission agrees that it is unnecessary to require property within the resealing jurisdiction. However, there seems little point in abolishing this requirement unless it is also abolished in respect of the making of original grants. It is clear that most of the commentators who advocated this change contemplated that it should also apply to the making of original grants. In addition, the principle behind the system of automatic recognition proposed in this report is that matters relating to the affairs of a deceased person are most suitably dealt with by the court of the jurisdiction in which he died domiciled.⁵⁶ This system cannot operate properly if the deceased must have left property in the domicile before the court of that jurisdiction can make a grant.

9.30 The Commission therefore recommends that the legislation in New South Wales, Victoria, South Australia, Western Australia and Tasmania should be amended so as to

⁵¹ *The Lady Chester's Case* (1673) 1 Vent 207, 86 ER 140.

⁵² As in *Kerr v Palfrey* [1970] VR 825. See also 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*, 6-7, confirming that there "may be circumstances, such as pending proceedings in which it was desirable to substitute the personal representative for a deceased defendant, where resealing without assets would be justified".

⁵³ The Victorian Registrar of Probates was, at least by implication, in favour of requiring property within the resealing jurisdiction. He said that in Victoria the problem was overcome by filing an affidavit that the deceased left personal property within the jurisdiction to a value of, say, \$10. The Commission considers this artifice undesirable. The then Attorney General of South Australia said that the total abolition of the property requirement was not desirable, and that if a grant was to be resealed where there was no property within the jurisdiction the court should be satisfied that it was necessary in the circumstances.

⁵⁴ The Law Institute of Victoria.

⁵⁵ See para 9.5 above.

⁵⁶ See para 9.54 below.

provide specifically that grants may be made or resealed even though the deceased left no property within the jurisdiction in question. Though the Commission's terms of reference are limited to recognition of grants of probate and administration made in other jurisdictions, and do not extend to the making of original grants, the question whether property should be required before an original grant can be made is vitally connected with the proposed scheme of automatic recognition.

9.31 Section 6 of the Queensland *Succession Act 1981-1983*⁵⁷ would be a suitable model for a legislative provision on the making of original grants. It makes it clear that the jurisdiction to make a grant in the absence of property is discretionary, and contains an express provision that a grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit. It does not specifically state that the court must be satisfied that a grant is necessary, as do the Australian Capital Territory and Northern Territory statutes,⁵⁸ but the Commission considers that the Queensland provision contains sufficient safeguards without such a requirement being specifically stated. There would also need to be an equivalent provision dealing with resealing.⁵⁹

(b) The person in whose favour the grant will be resealed

9.32 It will be recalled that, on an application for an original grant, the court, in deciding to whom the grant should be made, applies the conflict of laws principles that succession to movables is governed by the law of the deceased's domicile and succession to immovables is governed by the law of the place in which they are situated.⁶⁰

9.33 A resealing court will attempt to apply the same principles. Thus, on an application to reseat a grant made in respect of an estate which consists of movables only, the resealing court will reseat the grant if the applicant was the person who would be entitled to a grant from the court of the deceased's domicile.

⁵⁷ Quoted, para 9.7 above.

⁵⁸ *Administration and Probate Ordinance 1929* (ACT), s 9(2); *Administration and Probate Act* (NT), s 14(2).

⁵⁹ It should be noted that the Queensland provision also states that a grant may be resealed notwithstanding that the person to whom the grant is made is not resident or domiciled in Queensland. Cf the Commission's recommendation in para 3.24 above.

The Commission does not recommend the insertion in either proposed statutory provision of a requirement for the giving of reasons. This would be more suitable as the subject of practice rules, as in England, and need not be the subject of uniform provisions.

⁶⁰ Paras 9.11 and 9.16 above.

9.34 Providing both jurisdictions have the same rules as to domicile, both the granting and the resealing court would be looking to the rules of the same jurisdiction and so the person to whom the original grant was made will be the appropriate person in the eyes of the resealing court.

9.35 The resealing court, like the granting court, will look to the law of the domicile not only to determine in whose favour the grant should be resealed but also to ascertain whether any will in respect of which the grant was made was valid. In so doing, the court will simply be applying the ordinary conflict of laws rule which applies to most aspects of validity of wills, namely that in the case of movables such matters are referred to the law of the domicile.

9.36 Thus, in *In the will of Lambe*,⁶¹ probate was granted in Victoria of the will of an Australian national who died domiciled in Portugal. The will was formally invalid according to Portuguese law, but was valid according to the Victorian conflict of laws rule, under which a will was formally valid not only if it was formally valid according to the law of the deceased's domicile but also, as the result of a statutory reform of the law,⁶² according to the internal law of a country of which the deceased was a national. The administrator then sought to reseat the grant in New South Wales. New South Wales law had not then adopted the statutory reform,⁶³ and so according to its own conflict of laws rules, the will was formally invalid because it was invalid according to the law of the deceased's domicile. The court therefore refused to reseat the grant.

9.37 As *In the Will of Lambe* shows, it is clear that the resealing court has a residual discretion to refuse to reseat. The original grant is merely evidentiary. Some of the statutory provisions as to resealing, such as those of Victoria, appear at first sight to make resealing mandatory once the formal provisions have been complied with, since they provide that the grant **shall** be sealed with the seal of the Supreme Court. However, this is not the way in which the provisions have been interpreted. The provision is mandatory only where there has been literal compliance with the section, and where the issuing of an original grant would not be improper.⁶⁴

⁶¹ [1972] 2 NSWLR 273.

⁶² *Wills Act 1958* (Vic), ss 20A-20D, inserted by *Wills (Formal Validity) Act 1964* (Vic).

⁶³ But has now adopted it: *Wills, Probate and Administration Act 1898* (NSW), ss 32A-32F, inserted by *Wills, Probate and Administration (Amendment) Act 1977* (NSW), Schedule I.

⁶⁴ R A Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed 1983), 134-135; *In the Will Of Buckley* (1889) 15 VLR 820; *In re Carlton* [1924] VLR 237, 242-243; cf *Drummond v Registrar of*

9.38 Where a court is asked to reseal a grant made in respect of an estate which consists of, or includes, immovable property, then, in accordance with *Lewis v Balshaw*,⁶⁵ it will look to the law of the jurisdiction in which the property is situated. If the immovable property is situated in the resealing jurisdiction, the court will decide for itself the questions of validity of the will and of entitlement to a grant, and so an Australian court will not reseal grants dealing with immovables situated within its jurisdiction unless the grant was originally made to a person entitled to a grant from that court. Again, therefore, the resealing court has a discretion as to whether or not to reseal.

9.39 It was observed earlier that the law in England was somewhat different.⁶⁶ An English court, in determining whether to make an original grant, will refer questions of validity of the will and entitlement to grant to the law of the deceased's domicile both in cases of movables and of immovables. However, where the *whole* of the estate in England consists of immovable property, the court will make a grant limited to that property to the person entitled according to the law which would have been applicable if the deceased had died domiciled in England - that is, the law of England as the situs of the property. The English rules are set out in detail in rule 29 of the *Non-Contentious Probate Rules 1954*.⁶⁷ This provision applies both to original grants and to grants by way of resealing.⁶⁸

9.40 In the working paper the Commission sought comment as to whether, as regards resealing, the Australian rules, and in particular the principle of *Lewis v Balshaw*⁶⁹, should be replaced by provisions similar to those in rule 29 of the *Non-Contentious Probate Rules*. Some commentators were in favour of so doing.

9.41 The Commission has no mandate to recommend that rule 29 be adopted in place of the rule in *Lewis v Balshaw* in relation to the making of original grants. The Commission's terms of reference are confined to the recognition of grants made elsewhere. In the Commission's view it would not be sensible to recommend the adoption of rule 29 for resealing only, because it is a general principle that the jurisdictional rules governing resealing should be the

Probates (1918) 25 CLR 318, in which the court had to interpret a similar provision in s 26(1) of the *Administration and Probate Act 1891* (SA). Isaacs J said that the word "shall" was mandatory. The current provision, s 17 of the *Administration and Probate Act 1919-1984* (SA), says that when the formal provisions have been complied with the grant *may* be sealed with the seal of the Supreme Court.

⁶⁵ (1935) 54 CLR 188, above para 9.16.

⁶⁶ See paras 9.18 and 9.19 above.

⁶⁷ Quoted, para 9.18 above.

⁶⁸ See *Non-Contentious Probate Rules 1954* (UK), r 41(3).

⁶⁹ (1935) 54 CLR 188.

same as those governing the making of original grants.⁷⁰ Furthermore, the Commission, after full consideration of the matter, has come to the conclusion 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*. The Commission therefore recommends that rule 29 in its present form should not be adopted in Australia, either limited to resealing or extending also to original grants.

9.42 However, one advantage of rule 29 is that, in cases where the deceased died outside England, the registrar is given express guidance as to the person to whom a grant may be issued. Some Australian jurisdictions do not have such a provision. In Western Australia, for example, there is no such provision either in the *Administration Act 1903-1984* or in the *Non-Contentious Probate Rules*.

9.43 The Commission sees merit in the adoption by Australian jurisdictions, as part of the uniform code of procedure, of rules which give express guidance as to the persons to whom a grant of administration may be issued, or in whose favour a grant of administration may be resealed, where the deceased died domiciled outside that jurisdiction. These rules would set out the present law. The position as to estates consisting only of movables, and as to estates which consist of or include immovables, should be separately stated. In the former case, the provision could be based on rule 29 with the omission of proviso (b).

(c) Resealing where original grant not made in domicile

9.44 The Commonwealth Secretariat's draft model bill, which was prepared as a suggested basis for uniform resealing legislation in the Commonwealth of Nations, contains the following provision:

"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."⁷¹

⁷⁰ See para 9.1 above.

⁷¹ Commonwealth Secretariat's draft model bill, clause 5(3).

There are similar provisions in the statutory rules of Queensland and Tasmania.⁷² Such a provision formerly appeared in the statutory rules of South Australia,⁷³ but in the new rules adopted in 1984 it has been replaced by a provision stating that where the deceased was not domiciled in the jurisdiction of grant the grant cannot be resealed except by order of the Registrar.⁷⁴ The legislation and rules in the other Australian jurisdictions do not contain any rule equivalent to the Commonwealth Secretariat provision, nor do these jurisdictions adhere to such a rule in practice.

9.45 In the working paper the Commission asked whether all Australian jurisdictions should adopt the Commonwealth Secretariat provision.

9.46 The aim of the provision, according to the Commonwealth Secretariat, is to bring the resealing provisions into line with the jurisdictional principles applying to the making of original grants. It is based on the general principle that matters of succession are normally referred to the law of the domicile - a principle which is qualified by the fact that a court can make a grant even in a case where the deceased was not domiciled in that jurisdiction, on other grounds such as the presence of property within the jurisdiction.⁷⁵ If the deceased is domiciled within the jurisdiction of grant, there is no restriction, but if the deceased was domiciled elsewhere, the requirement that the grant cannot be resealed unless the jurisdictional rules of the resealing jurisdiction are satisfied allows that jurisdiction to exercise a control over resealing equivalent to its control over the making of original grants.

9.47 The general principle adopted by Australian courts, where the estate consists entirely of movable property, is to follow the grant that has been or would be made by the court of the deceased's domicile.⁷⁶ Thus, where the deceased was domiciled in the resealing jurisdiction, the Commonwealth Secretariat provision merely directs the resealing court to do what it would have done anyway. If, however, the deceased was not domiciled in either the jurisdiction of grant or the resealing jurisdiction but in some third jurisdiction, the rule restricts the range of grants that can be resealed. The general principle simply says that the resealing court will follow the grant made in the domicile, but the Commonwealth Secretariat

⁷² *Supreme Court Rules* (Qld), O 71, rr 67 and 73; *Probate Rules 1936* (Tas), r 50.

⁷³ *Rules of the Supreme Court under Administration and Probate Act 1919* (SA), Part II, r 87.

⁷⁴ *Rules of the Supreme Court (Administration and Probate Act) 1984* (SA), r 48(9).

⁷⁵ Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth - Report of a Second Working Meeting held at Apia, Western Samoa, 18-23 April 1979*, 68 (explanatory notes to cl 5(3)).

⁷⁶ See paras 9.11 to 9.13 above.

provision says that the grant cannot be resealed unless it is such as the Supreme Court of the resealing jurisdiction would have made. Adoption of such a rule, by the Australian jurisdictions which do not already have it, would restrict the range of grants which can be resealed, as compared with the present law.

9.48 It should also be noted that the Commonwealth Secretariat provision is based on the English practice of making a grant to the person who would be entitled under the law of the deceased's domicile, which the Commonwealth Secretariat says is followed in most common law jurisdictions.⁷⁷ However, in Australia, this practice is followed only in relation to estates which consist solely of movable property. Where an estate consists of or includes immovables within the court's jurisdiction, under the rule in *Lewis v Balshaw*⁷⁸ an Australian court will not follow the domicile but will decide for itself who is entitled to a grant. This principle follows from the general principle that matters relating to succession to immovables are governed by the *lex situs*. It is only in relation to movable property that succession is governed by the law of the domicile.⁷⁹ This principle is adhered to in Queensland and Tasmania, which have a provision equivalent to the Commonwealth Secretariat provision, just as much as in the other Australian jurisdictions. Even if the deceased was domiciled in the jurisdiction of grant, courts in Queensland and Tasmania will still apply their own rules in deciding who is entitled to a grant where the estate consists of or includes immovables situated within the resealing jurisdiction.

9.49 Professor K W Patchett, one of those responsible for drafting the Commonwealth Secretariat's model bill, suggested to the Commission that, because of these considerations, the provision in its original form might not be appropriate for Australia. He suggested that it might be adapted to meet the Australian circumstances as follows:

"Where it appears that -

(a) a deceased person was not at the time of his death domiciled within the jurisdiction of the court by which the grant was made; or

⁷⁷ Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth - Report of a Second Working Meeting held at Apia, Western Samoa, 18-23 April 1979*, 68 (explanatory notes to cl 5(3)).

⁷⁸ (1935) 54 CLR 188.

⁷⁹ See paras 9.16 and 9.17 above.

(b) there is comprised in the estate of a deceased person immovable property situated within the jurisdiction of the Supreme Court,

probate or letters of administration in respect of the estate of the deceased person may not be resealed, unless the grant is such as the Supreme Court would have had jurisdiction to make."

9.50 Such a provision expressly acknowledges the existing practice in Queensland and Tasmania. However, as described above,⁸⁰ it would still limit the grants which can be resealed in New South Wales, Victoria, Western Australia and the two Territories.

9.51 The Commission therefore recommends that the Commonwealth Secretariat provision should not be adopted in Australia, either in its original form or in the modified form proposed by Professor Patchett. In New South Wales, Victoria, Western Australia, and the two Territories, therefore, there would be no change to the present law. In these jurisdictions, where the estate within the jurisdiction consisted only of movable property, the court, on an application to reseat a grant of probate or administration, would continue to follow the grant that has been or would be made in the domicile, whether or not it was such as it would itself have made. When the estate within the jurisdiction consists of or includes immovables, the court will continue to make its own determination as to whether the grant should be resealed, and, if so, in whose favour.

9.52 Since it is desirable that all Australian jurisdictions should adopt uniform rules relating to resealing, it follows that the rules in Queensland and Tasmania which are similar to the Commonwealth Secretariat provision should be modified. As stated above,⁸¹ the similar provision in South Australia was modified in 1984.

4. JURISDICTION AND AUTOMATIC RECOGNITION

9.53 The Commission has recommended earlier in this report that a grant of probate or administration made by the court of the Australian jurisdiction in which the deceased died domiciled should be automatically recognised throughout Australia. In such circumstances a grant would be effective to deal with property in any other Australian jurisdiction without the need for resealing. It is necessary to consider the effect of this recommendation on the jurisdictional rules considered in this chapter.

⁸⁰ Para 9.47.

⁸¹ Para 9.44.

(a) Domicile as the basis of automatic recognition

9.54 In a federation, where principles and concepts of law are understood and applied in the same way by the courts of all jurisdictions within that federation, there seems to be good reason to vest original jurisdiction in relation to the affairs of a deceased in the court of his last domicile rather than in the court of each jurisdiction in which he left property. It is important that there should be as little confusion as to the jurisdiction of courts as possible, and such a system will avoid inconsistency and duplication of grants.

9.55 The Commission has considered whether any other basis of jurisdiction could, or should, be the subject of automatic recognition, for example, grants based on permanent residence or the existence of assets. However, the Commission's primary concern is to develop a system based on certainty which will avoid the jurisdictional disputes likely to arise out of a choice of a multiplicity of jurisdictional factors, and it therefore recommends that domicile should be the only basis of jurisdiction resulting in automatic recognition. In the vast majority of cases, the deceased's permanent residence and most of his assets will be within the jurisdiction in which he has his domicile.

(b) Domicile and Property Requirements

9.56 If domicile is to be the basis of automatic recognition, then it will be essential for all Australian jurisdictions to recognise that the court of the deceased's domicile is entitled to make a grant whether or not the deceased left property there. It will therefore be necessary for all jurisdictions retaining property requirements as a prerequisite to the making of original grants to abolish such requirements, and the Commission so recommends.⁸²

9.57 The grant, once made, will be effective in all Australian jurisdictions whether the deceased left property in any particular jurisdiction or not. Since grants which will be automatically recognised will not need resealing, it is possible that property requirements as to resealing could be retained. However, the Commission recommends that they too should be abolished.⁸³

⁸² See paras 9.27 to 9.31 above.

⁸³ Ibid.

(c) Domicile and movables

9.58 The choice of domicile as the basis of automatic recognition is consistent with the key position occupied by the law of the deceased's domicile in matters relating to succession. As has been pointed out, at present courts in making or resealing grants of probate or administration usually follow the grant made by the domicile where the estate consists entirely of movable property.

(d) Domicile and immovables

9.59 The major effect of the automatic recognition scheme on existing rules will be in relation to estates which consist of or include immovable property. At present, under the rule in *Lewis v Balshaw*,⁸⁴ where an estate consists of or includes immovable property within a particular jurisdiction, that jurisdiction can decide for itself questions of validity of any will and of entitlement to a grant or reseal.

9.60 The automatic recognition scheme will not affect the rule in *Lewis v Balshaw* in so far as it applies to the decision of a granting court to make a grant. Nor will it affect the decision of a resealing court as to whether to reseal a grant made by an Australian jurisdiction which is not the deceased's last domicile. However, it will mean that once the court of the deceased's domicile has made a grant, another Australian jurisdiction must recognise it as effective to dispose of all property, both movable and immovable, within that jurisdiction - that is, it must be regarded as being deemed to have been resealed in that jurisdiction. The Commission accordingly recommends that the uniform legislation on automatic recognition should specifically state that the effect of automatic recognition of a grant made in the domicile is that such a grant is deemed to have been resealed in all other Australian jurisdictions.

⁸⁴ (1935) 54 CLR 188.

CHAPTER 10 - EFFECT OF AUTOMATIC RECOGNITION ON OTHER AREAS OF SUCCESSION LAW

1. VALIDITY OF WILLS

10.1 The Commission's proposals as to automatic recognition will have no effect on the domestic rules of the various States and Territories as to the validity of wills. The principles on which, in each jurisdiction, the courts adjudicate on the validity and construction of wills will remain the same.

10.2 However, the Commission's proposals would limit the circumstances in which wills considered to be validly made in one Australian jurisdiction can be regarded as invalid in another.

- (1) There would no longer be a discretion to refuse to recognise a grant made by the court of the testator's domicile, either in the case of movables or immovables. In such circumstances, a determination by the courts of the domicile that the will was valid would have to be accepted in all cases.
- (2) In particular, the court of an Australian jurisdiction in which immovable property was situated could not object to the recognition of a grant made elsewhere in Australia by the court of the deceased's domicile on the ground that the will was invalid according to local law.

10.3 It seems appropriate that each Australian jurisdiction should abide by the decisions of the court of the testator's last domicile in matters concerning the validity of wills. However, in practice, the effect of the Commission's recommendations is likely to be very minor. Situations in which the court of one Australian jurisdiction would refuse to recognise the validity of a will made in another Australian jurisdiction are very rare. The rules as to the validity of wills in each Australian jurisdiction are the same in nearly all essential respects.¹ Since many people leave property in more than one jurisdiction, maximum uniformity in such matters is highly desirable.

¹ See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy* (2nd ed 1983), chs 2-3.

10.4 By way of exception to the statements made in the previous paragraph, the law in South Australia and Queensland as to formal requirements for the execution of a valid will differs from that in the other Australian jurisdictions, as the result of the enactment in South Australia and Queensland of provisions whereby a document which fails to comply with the formal requirements may nevertheless be admitted to probate if the court is satisfied that it expresses the testamentary intention of the testator.²

10.5 As a result of the Commission's recommendations, an informal will made in Queensland or South Australia by a testator domiciled in the place of making would qualify for automatic recognition throughout Australia. Other jurisdictions in which the testator left property, whether movable or immovable, could not refuse to recognise it on the ground of formal invalidity, even though it would not have been possible to obtain an original grant from that jurisdiction. However, it is unlikely that such situations would arise very frequently. In any case, once a grant has been obtained in one jurisdiction which is effective in another, it is doubtful whether that other jurisdiction would be concerned about the exact circumstances in which it was issued.³

2. INTESTATE SUCCESSION

10.6 The Commission's proposals as to automatic recognition would have no effect on the law relating to distribution on intestacy. The only effect of the Commission's proposals would be that the administrator appointed by the court of the deceased's last domicile would have to

² *Wills Act 1936-1980* (SA), s 12(2);
Succession Act 1981-1983 (Qld), s 9(a).

See para 7.27 above, in which these provisions are quoted, and in which reports discussing similar reforms in other jurisdictions are listed.

³ The automatic recognition scheme would not be affected in any other way by these statutory provisions. Though they do not say, it seems clear that they only apply to wills made in the jurisdiction in question. It is possible that they only apply to wills made in the jurisdiction in question by persons domiciled there, but if that is not correct then an informal will could be made, for example, in Queensland by a person domiciled in, for example, New South Wales.

(1) The New South Wales court could not make a grant in respect of that will, even though the New South Wales conflict of laws rule says that a will is formally valid if valid according to the law of the place of making, because an informal will is formally valid under the Queensland statute only where the Queensland court so certifies.

(2) The Queensland court could however make a grant of probate which could be resealed in New South Wales (para 7.12 above). There would be no need for the testator to have left property in Queensland: *Succession Act 1981-1983* (Qld), s 6 (para 9.7 above). The New South Wales court would have a discretion whether to reseal, and would not do so if the estate disposed of by the will included immovables in New South Wales. Such property could be the subject of a separate grant in New South Wales and would be distributed under the intestacy rules. If the New South Wales court did reseal the Queensland grant, however, then the reseal would be automatically recognised (para 7.18 above).

be accepted by other jurisdictions in which the deceased left assets. Those assets would be distributed in accordance with the intestacy rules of the deceased's domicile (in the case of movables) or the place where the property is situated (in the case of immovables), as at present.

3. ADMINISTRATION OF ASSETS

10.7 When a grant of probate or administration has been issued, the personal representative must administer the assets of the estate - by taking control of the deceased's property, paying the debts, and distributing the residue. As the High Court of Australia stated in *Permanent Trustee Co (Canberra) Ltd v Finlayson*,⁴ an administration of assets is to be carried out in accordance with the internal law of the country in which representation has been granted. That case concerned a grant of probate in New South Wales which had been resealed in the Northern Territory. Since resealing had the same effect as the original grant, administration of the assets in the Northern Territory was to be conducted according to Northern Territory law.

10.8 The Commission's proposals as to automatic recognition would not in any way affect this situation. It would cease to be necessary to reseat a grant in the jurisdiction in which particular assets were situated, because the original grant would be automatically recognised; but the law of the recognising jurisdiction would still govern the administration of the assets situated there.

10.9 Once administration of the assets is complete, the personal representative holds them as trustee for the beneficiaries or next of kin. In the case of movables, the trust is governed by the law of the deceased's domicile, and in the case of immovables by the law of the place where they are situated. In practice there is often difficulty in distinguishing administration from trusteeship, but the adoption of an automatic recognition scheme would not in any way affect these issues.

⁴ (1968) 122 CLR 338.

4. FAMILY PROVISION

10.10 All Australian jurisdictions have enacted family provision legislation.⁵ This legislation allows certain relatives and dependants to apply to a court for maintenance out of a deceased's estate.⁶ The statutes in each jurisdiction provide that every provision for maintenance made by a court operates and takes effect either as if it had been made by a codicil to the deceased's will executed immediately before his death, or, in the case of intestacy, as a modification of the applicable rules of distribution. Provision is also made for orders to be rescinded, suspended or reduced and in some jurisdictions increased. In each case, the court in making an order must direct that a certified copy of the order or alteration be made upon the probate of the will or the letters of administration of the deceased, as the case may be, and for that purpose may require that the probate or letters of administration be produced. The High Court of Australia has held that an application may be brought under the legislation to vary a resealed grant of probate or administration as if it were an original grant.⁷

10.11 The legislation makes no reference to the jurisdictional principles on which it operates, but these have been determined by the courts and are now regarded as well-settled.⁸ In *In re Paulin*,⁹ Sholl J stated them as follows :

- (1) The courts of the testator's domicile alone can exercise discretionary power to affect the deceased's assets within the place of domicile, whether movable or immovable;
- (2) The courts of the testator's domicile alone can exercise discretionary power to affect movables outside the place of domicile;

⁵ *Family Provision Ordinance 1969* (ACT);
Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW);
Family Provision Act (NT);
Succession Act 1981-1983 (Qld), ss 40-44;
Inheritance (Family Provision) Act 1972-1983 (SA);
Testator's Family Maintenance Act 1912 (Tas);
Administration and Probate Act 1958 (Vic), ss 90-99A ;
Inheritance (Family and Dependants Provision) Act 1972 (WA).

⁶ This legislation originally applied only to cases where a person died leaving a will, but was subsequently extended to cover cases where distribution on intestacy failed to make adequate provision. The traditional name for such legislation, testator's family maintenance legislation, is no longer a technically correct description of its scope.

⁷ *Holmes v Permanent Trustee Co of New South Wales Ltd* (1932) 47 CLR 113.

⁸ See D St L Kelly, "Testator's Family Maintenance and the Conflict of Laws" (1967) 41 *ALJ* 382, 383-384.

⁹ [1950] VLR 462, 465.

- (3) The courts of the situs alone can exercise discretionary power to affect immovables outside the place of domicile.

In all cases, the domicile of the applicant is irrelevant.

10.12 These jurisdictional rules are obviously consistent with the jurisdictional rules for the making and resealing of grants of probate and administration outlined above¹⁰ and in particular with the rule in *Lewis v Balshaw*.¹¹ Thus, in certain cases, it may be necessary for an applicant to make application under the family provision legislation of two or more jurisdictions.

10.13 In the working paper the Commission raised the question of whether the proposed automatic recognition scheme would be consistent with the position as to family provision, as set out above. In particular, although the question of jurisdiction in family provision matters was not within its terms of reference, the Commission canvassed the desirability of changing the jurisdictional rules so as to give the court of the domicile jurisdiction in all cases, as is the position with the equivalent legislation in the United Kingdom.¹² This would avoid the necessity for making applications in more than one jurisdiction. The comments of those who commented on the issue varied, but Mr Justice Nygh and Mr W A Lee both emphasised the importance of treating jurisdiction in family provision matters as an entirely separate issue, and not making any changes which would detract from the principle stated in *Lewis v Balshaw*. The Commission agrees.

10.14 The proposed automatic recognition scheme accordingly involves no change in the present jurisdictional rules relating to family provision. At present, where a testator dies domiciled in one jurisdiction leaving property both in that jurisdiction and in another, it will be necessary for his executor, having obtained a grant in the domicile, to reseal the grant in the other jurisdiction - where, in the case of immovable property situated there, the court of that jurisdiction may exercise its discretion and refuse to reseal the grant in his favour, instead resealing in favour of another executor. Applicants wishing to claim maintenance out of the testator's estate will file a family provision application in the domicile, and serve it on the executor. The court can make an order dealing with all property in the domicile and all

¹⁰ See paras 9.3 to 9.52 above.

¹¹ (1935) 54 CLR 188, para 9.16 above.

¹² *Inheritance (Provision for Family and Dependents) Act 1975* (UK), s 1(1).

movable property elsewhere. The order will be attached to the grant. In order to claim maintenance out of the immovable property situated in the other jurisdiction, it will be necessary to make a family provision application in that jurisdiction also.

10.15 Under the automatic recognition scheme, the only change will be that the executor will be freed from the necessity to reseal the grant in the other jurisdiction, and that there will be no questioning of his authority to deal with the estate in that jurisdiction. As at present, it will still be necessary, in some cases, to make two applications for family provision, but the same executor will be the appropriate person to be served with both. All orders will be attached to the grant, as before. Automatic recognition, again, is simply equivalent to deemed resealing. The freedom of the court in which immovables are situated to make an order different from the order made in the domicile is unaffected, since the court of the domicile cannot deal with immovables situated elsewhere.

PART V: SUMMARY OF RECOMMENDATIONS

CHAPTER 11 - SUMMARY OF RECOMMENDATIONS

1. GENERAL RECOMMENDATIONS

(a) Resealing procedure (Chapter 3)

11.1 The Commission recommends that -

- (1) The procedure governing resealing in the various Australian States and Territories should be made uniform.

(paragraphs 3.1 to 3.4)

- (2) The Parliamentary Counsel's Committee should be requested to draw up a uniform code of procedure for resealing, with the assistance of the Probate Registrars of each State and Territory. This code should incorporate the recommendations which follow.

(paragraphs 3.20 and 3.21)

- (3) The uniform code of procedure should specifically state that the court of the jurisdiction in which resealing is sought has a residual discretion to refuse resealing.

(paragraph 3.22)

- (4) It should be possible for a grant to be resealed in favour of -

- (a) the executor or administrator named in the grant;
- (b) the legal representative of such executor or administrator;
- (c) a person appointed under a power of attorney by such executor or administrator;
- (d) the executor of an executor;
- (e) a public officer, such as a Public Trustee or a Curator, or a trust company, authorised to administer an estate in another State or

Territory but not under present law capable of applying for an original grant in the resealing jurisdiction.

(paragraph 3.23)

- (5) It should be expressly provided that the executor or administrator need not be within the jurisdiction of the granting or resealing court.

(paragraph 3.24)

- (6) It should be made clear that -

- (a) all persons named in the grant, or authorised by power of attorney, are entitled to act as personal representatives on the resealing;
- (b) a grant made to several personal representatives may be resealed upon the application of only one or some of them ;
- (c) a grant to one executor may be resealed after an original grant has been made to another executor;
- (d) a grant may be resealed in favour of an executor appointed by the original court of grant in substitution for the executor to whom a grant was originally made by that court.

(paragraph 3.25)

- (7) It should be possible to reseat all grants of probate and administration, including grants made for special, limited or temporary purposes.

(paragraph 3.26)

- (8) It should be possible to reseat instruments which are given an effect similar to grants of probate or administration by the law of the country in which they were first filed or issued, such as Scottish confirmations.

(paragraph 3.27)

- (9) It should be possible to reseat 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.

(paragraphs 3.28 to 3.30)

- (10) The duty of resealing should be imposed on the Registrar, rather than on the court, but 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.

(paragraph 3.32)

- (11) It should be possible to grant resealing on production 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.

(paragraph 3.33)

- (12) 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.

(paragraph 3.34)

- (13) Non-resident executors and administrators should be required to file a local address for service.

(paragraph 3.35)

- (14) 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.

(paragraphs 3.36 to 3.43)

- (15) Provision should be made for the lodgement of caveats against resealing. The consequences of lodgement should be the same as under the present law.

(paragraphs 3.44 and 3.45)

- (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.

(paragraphs 3.46 to 3.52)

- (17) It should be expressly provided that resealing of a grant of probate or administration has the same force, effect and operation as if it had been originally granted by that court.

(paragraph 3.53)

- (18) The powers and duties of persons to whom resealing is granted should be expressly defined, including the powers and duties of such persons appointed under a power of attorney.

(paragraph 3.54)

- (19) It should be provided 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.

(paragraphs 3.55 and 3.56)

(b) The countries whose grants may be resealed (Chapter 4)

11.2 The Commission recommends that -

- (20)(a) 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 part of the Commonwealth of Nations or in any other country.

- (b) "Grant of probate or administration" should be defined to mean a grant of probate or of 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 to a grant of probate or administration under the law of the Australian State or Territory in question.

- (c) "Any part of the Commonwealth of Nations" should be defined as meaning any independent sovereign member of the Commonwealth of Nations for the time being and including any territory for whose international relations any such member is responsible.

(paragraphs 4.15 to 4.22)

(c) Proposals for an automatic recognition scheme (Chapter 7)

11.3 The Commission recommends that -

- (21) The Australian States and Territories should by uniform legislation adopt a scheme whereby a grant of probate or administration made by the court of the Australian State or Territory in which the deceased died domiciled would be automatically recognised, without being resealed, as effective in every other Australian State or Territory.

(paragraphs 7.1 to 7.4)

- (22) Grants of probate and administration made by the court of the Australian State or Territory in which the deceased was not domiciled at the time of his death, and grants of probate and administration made by courts outside Australia (whether the deceased died domiciled in the jurisdiction in which the grant was made or not) should not be automatically recognised within Australia. These grants should, as at present, be recognised as effective in a particular Australian State or Territory when resealed by the court of that State or Territory. Recommendations 1 to 20 as set out above would apply to such resealing.

(paragraphs 7.5 to 7.17)

- (23) When a grant which requires resealing in order to be effective in an Australian State or Territory is 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 such court.

(paragraphs 7.18 and 7.19)

- (24) When a grant is made or resealed by the court of the Australian State or Territory in which the deceased died domiciled, the deceased's domicile should be noted on the grant. A short statement in simple language, setting out the effect of the grant or resealing in these circumstances, should be endorsed on the grant.

(paragraphs 7.20 and 7.21)

- (25) 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.

(paragraphs 7.22 and 7.23)

- (26) 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 the making of an original grant, a uniform rule on this matter is not essential to the operation of the proposed system of automatic recognition.

(paragraphs 7.28 and 7.29)

- (27) It should be possible to lodge a caveat against the making of an original grant, as at present.

(paragraphs 7.30 and 7.31)

- (28) 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 as a condition of the making of an original grant, a uniform rule on this matter is not essential to the operation of the proposed system of automatic recognition.

(paragraphs 7.32 to 7.35)

- (29) It is 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.

(paragraph 7.36)

- (30) Uniform rules relating to the passing of accounts are not essential to the operation of the proposed system of automatic recognition.

(paragraph 7.37)

(d) Other proposals (Chapter 8)

11.4 The Commission recommends that -

- (31) The appropriate federal and State legislatures should enact legislation based on the national *Companies Act*, section 183(4) making it unnecessary for a personal representative to reseal in one Australian jurisdiction a grant of probate or administration obtained in another Australian jurisdiction in order to deal with the deceased's money in accounts in banks, building societies, credit unions and similar institutions in the first-mentioned jurisdiction. Such legislation should also incorporate provisions based on the Commonwealth *Life Insurance Act*, section 103 whereby, if the amount deposited does not exceed \$10,000 or such amount as is prescribed from time to time, payments may be made to specified persons without any need for a grant of probate or administration.

(paragraphs 8.2 to 8.4)

- (32) The provisions of the national *Companies Act*, section 183(4) should be extended to grants of probate and administration made in New Zealand and the United Kingdom.

(paragraph 8.5)

(e) Jurisdiction (Chapter 9)

11.5 The Commission recommends that -

- (33) Courts in all Australian jurisdictions should be given power to make, and to reseal, grants of probate and administration even though the deceased left no property within the jurisdiction in question, or left no property at all.

(paragraphs 9.3 to 9.9, 9.23 to 9.31, 9.56 and 9.57)

- (34) 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.

(paragraphs 9.10 to 9.22, 9.32 to 9.41)

- (35) The uniform code of procedure should contain rules which give express guidance as to the persons to whom a grant of administration may be issued, or in whose favour a grant of administration may be resealed, when the deceased was not domiciled in the jurisdiction in question. These rules 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.

(paragraphs 9.42 and 9.43)

- (36) Australian jurisdictions should not adopt a provision based on section 5(3) of the Commonwealth Secretariat's draft model bill whereby, if the deceased person was not, at the time of his death, domiciled within the jurisdiction of the court by which the grant was made, the grant may not be resealed unless it is such as the resealing court would have had jurisdiction to make. In the interests of uniformity, statutory rules in Queensland and Tasmania imposing such a limitation should be modified. The law in the other jurisdictions would remain unchanged.

(paragraphs 9.44 to 9.52)

- (37) The uniform legislation implementing the scheme of automatic recognition recommended above should specifically state that where a grant of probate or administration is made by the court of the jurisdiction in which the deceased

died domiciled, that grant is deemed to have been resealed in all other Australian States and Territories.

(paragraphs 9.59 and 9.60)

2. RECOMMENDATIONS RELATING TO INDIVIDUAL JURISDICTIONS

(a) Australian jurisdictions

11.6 A number of the Commission's recommendations could be implemented in Western Australia or in any other Australian jurisdiction even if no uniform laws are enacted, namely -

- (1) Such of the Commission's recommendations as to resealing procedure (Recommendations 3-19) as are not already law in the jurisdiction in question;
- (2) The recommendation as to the countries whose grants may be resealed (Recommendation 20);
- (3) The recommendation that the Supreme Court should have jurisdiction to make or reseal a grant of probate or administration even though the deceased left no property within the jurisdiction (Recommendation 33) - except in Queensland, the Australian Capital Territory, and the Northern Territory, where this is already the law;
- (4) The recommendation that the rules of procedure should give express guidance as to the persons to whom a grant of probate or administration should be made, or in whose favour such a grant should be resealed, where the deceased was not domiciled within the jurisdiction (Recommendation 34).

(b) New Zealand

11.7 When, in March 1977, the then Attorney General informed the Commission that the Standing Committee of Commonwealth and State Attorneys General had agreed to consider the Commission's proposals as a basis for uniform law in Australia, he advised the Commission that the New Zealand Minister for Justice had expressed the hope that the

Commission "could consider any relevance which the New Zealand situation might have in the same context".¹

11.8 The Commission has considered whether New Zealand should be included in the proposed scheme of automatic recognition. It has come to the conclusion that the scheme should be confined to Australian jurisdictions and that New Zealand should not be included, at least initially.²

11.9 However many of the other recommendations in this report would be suitable for adoption in New Zealand. The Commission recommends that the following recommendations be referred to the Attorney General of New Zealand for his consideration -

- (1) Such of the recommendations as to resealing procedure (Recommendations 3-19) as are not already incorporated in the law in force in New Zealand;
- (2) The recommendation as to the countries whose grants may be resealed (Recommendation 20);
- (3) The recommendation that the rules of procedure should give express guidance as to the person to whom a grant of probate or administration may be made, or in whose favour such a grant may be resealed, when the deceased was not domiciled in that jurisdiction (Recommendation 34).³

Daryl R Williams
Chairman

H H Jackson
Member

¹ See para 1.5 above.

² See paras 7.7 and 7.8 above.

³ The recommendation that the court should have jurisdiction to make or reseal grants of probate or administration even though the deceased left no property within the jurisdiction (Recommendation 33) is already law in New Zealand.

P W Johnston
Member

C W Ogilvie
Member

J A Thomson
Member

12 November 1984

APPENDIX I

COMMONWEALTH SECRETARIAT'S DRAFT MODEL BILL

GRANTS OF ADMINISTRATION (RESEALING) ACT, 198- (Revised 1 February, 1980)

An Act to make new provisions for the resealing in _____ of probates and letters of administration and instruments having similar effect granted outside _____ ; to repeal the [Probates (Resealing) Act] and for matters incidental thereto.

1. **Short title**

This Act may be cited as *Probates and Letters of Administration (Resealing) Act, 198-*.

2. **Interpretation**

(1) For the purpose of this Act, the expression -

"court" includes any competent authority, by whatever name it is designated, having jurisdiction to make a grant of administration ;

"grant of administration" means a probate or letters of administration or any instrument having, within the jurisdiction where it was made, the effect of appointing or authorising a person (in this Act referred to as "the grantee") to collect and administer any part of the estate of a deceased person and otherwise having in that jurisdiction an effect equivalent to that given, under the law of _____, to a probate or letters of administration ;

"personal representative" means the executor, original or by representation, or administrator for the time being, of a deceased person and includes any public official or any corporation named in the probate or letters of administration as executor or administrator as the case may be;

["Registrar" means the Registrar of the Supreme Court;]

"reseal" means reseal with the seal of the Supreme Court.

(2) Any references in this Act to the making of a grant of administration shall include any process of issuing by or filing with a court by which an instrument is given an effect equivalent to that of a grant of probate or of letters of administration.

(3) This Act shall apply in relation to grants of administration granted before or after the passing of this Act.

3. **Applications for Resealing**

(1) Where a grant of probate or letters of administration of the estate of any deceased person has been made by a court in any part of the Commonwealth or

4. Caveats

- (1) Any person who wishes to oppose the resealing of a grant of administration shall, by the date specified in the advertisement published pursuant to section 3(3), lodge a caveat against the sealing.
- (2) A caveat under subsection (1) shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the making of a grant of probate or letters of administration by the Supreme Court.
- (3) The Registrar shall not, without an order of the Supreme Court, proceed with an application under section 3 if a caveat has been lodged under this section.

5. Resealing of grants of administration

- (1) Subject to this section, where an application has been duly made under section 3 and the date specified in the advertisement published pursuant to section 3(3) has passed and no caveat has been lodged under section 4 or any caveat so lodged has not been sustained, the Registrar may, if he is satisfied that -
 - (a) such estate duties, if any, have been paid as would have been payable if the grant of administration had been made by the Supreme Court;
 - (b) security has been given in a sum sufficient in amount to cover the property in _____ to which the grant of administration relates and in relation to which the deceased died intestate,

cause the grant of administration to be resealed.

- (2) It is not necessary for security to be given under sub-section (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 sure 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.

6. Effects of resealing

- (1) A grant of administration resealed under section 5(1) shall have like force and effect and the same operation in _____, and such part of his estate as in _____ shall be subject to the same liabilities and obligations, as if the probate or letters of administration had been granted by the Supreme Court.
- (2) Without prejudice to subsection (1), the personal representative or grantee, where the application is made by him or is made under section 3(2)(c) on his behalf or the person duly authorised under section 3(2)(b), where the application is made by him or is made under section 3(2)(c) on his behalf, shall, after the resealing, be deemed to be, for all purposes, the personal representative of the deceased person in respect of such of his estate as is in _____, and, subject to section 7, shall perform the same duties and be subject to the same liabilities as if he was personal representative under a probate or letters of administration granted by the Supreme Court.

7. Duties of person authorised by personal representative, etc.

- (1) A person duly authorised under section 3(2)(b) who is deemed to be a personal representative by virtue of section 6(2) shall, after satisfying or providing for the debts or claims due from the estate of all persons residing in _____ or whose debts or claims he has had notice, pay over or transfer the balance of the estate in _____ to the personal representative named in the grant or the grantee, as the case may be or as such personal representative or grantee may, by power of attorney, direct.
- (2) Any such person referred to in subsection (1) shall duly account to the personal representative or grantee, as the case may be, for his administration of the estate in _____.

8. Rules of court

Rules of court may be made for regulating the practice and procedure, including fees and costs, on or incidental to an application under this Act for resealing a grant of administration.

9. Repeals

The [Probates (Resealing) Act] is hereby repealed.

10. Commencement

This Act shall come into force on such date as the [Head of State] shall, by order, designate.

APPENDIX II

THE COMMONWEALTH OF NATIONS

1. Member countries

As at 30 June 1984, there were 49 independent countries which were members of the Commonwealth of Nations, as follows -

Antigua and Barbuda	Malta
Australia	Mauritius
The Bahamas	Nauru
Bangladesh	New Zealand
Barbados	Nigeria
Belize	Papua New Guinea
Botswana	St. Christopher and Nevis
Brunei	St. Lucia
Canada	St. Vincent
Cyprus	Seychelles
Dominica	Sierra Leone
Fiji	Singapore
The Gambia	Solomon Islands
Ghana	Sri Lanka
Grenada	Swaziland
Guyana	Tanzania
India	Tonga
Jamaica	Trinidad and Tobago
Kenya	Tuvalu
Kiribati	Uganda
Lesotho	United Kingdom
Malawi	Vanuatu
Malaysia	Western Samoa
Maldives	Zambia
	Zimbabwe

2. Territories within the Commonwealth

The external territories of Australia, the associated States and territories of New Zealand, and the dependent territories of the United Kingdom, not being independent territories, are not members of the Commonwealth of Nations, but may be said to be "within the Commonwealth of Nations".

Australia - External Territories

Norfolk Island
Australian Antarctic Territory
Cocos (Keeling) Islands
Christmas Island
Heard Island and the McDonald Islands
Coral Islands

New Zealand - Associated States and Territories

Cook Islands
Niue
Ross Dependency
Tokelau

United Kingdom - Dependent Territories

Anguilla
Bermuda
British Antarctic Territory
British Indian Ocean Territory
Cayman Islands
Falkland Islands and Dependencies
Gibraltar
Hong Kong
Montserrat
Pitcairn Group
St Helena and Dependencies
The Sovereign Base Areas of Akrotiri and Dhekelia
Turks and Caicos Islands
Virgin Islands

APPENDIX III

UNITED KINGDOM ADMINISTRATION OF ESTATES ACT 1971 (Extracts)

1. Recognition in England and Wales of Scottish confirmations and Northern Irish grants of representation

- (1) Where a person dies domiciled in Scotland -
- (a) a confirmation granted in respect of all or part of his estate and noting his Scottish domicile, and
 - (b) a certificate of confirmation noting his Scottish domicile and relating to one or more items of his estate,

shall, without being resealed, be treated for the purposes of the law of England and Wales as a grant of representation (in accordance with subsection (2) below) to the executors named in the confirmation or certificate in respect of the property of the deceased of which according to the terms of the confirmation they are executors or, as the case may be, in respect of the item or items of property specified in the certificate of confirmation.

- (2) Where by virtue of subsection (1) above a confirmation or certificate of confirmation is treated for the purposes of the law of England and Wales as a grant of representation to the executors named therein then ...the grant shall be treated -
- (a) as a grant of probate where it appears from the confirmation or certificate that the executors so named are executors nominate; and
 - (b) in any other case, as a grant of letters of administration.
- (4) ...where a person dies domiciled in Northern Ireland a grant of probate of his will or letters of administration in respect of his estate (or any part of it) made by the High Court in Northern Ireland and noting his domicile there shall, without being resealed, be treated for the purposes of the law of England and Wales as if it had been originally made by the High Court in England and Wales.
- (6) This section applies in relation to confirmations, probates and letters of administration granted before as well as after the commencement of this Act, and in relation to a confirmation, probate or letters of administration granted before the commencement of this Act, this section shall have effect as if it had come into force immediately before the grant was made.

[Section 2 sets out equivalent provisions for the recognition in Northern Ireland of English grants of representation and Scottish confirmations.

Section 3 sets out equivalent provisions for the recognition in Scotland of English and Northern Irish grants of representation.]

4. Evidence of grants

- (1) In England and Wales and in Northern Ireland -

- (a) a document purporting to be a confirmation, additional confirmation or certificate of confirmation given under the seal of office of any commissariat in Scotland shall, except where the contrary is proved, be taken to be such a confirmation, additional confirmation or certificate of confirmation without further proof; and
 - (b) a document purporting to be a duplicate of such a confirmation or additional confirmation and to be given under such a seal shall be receivable in evidence in like manner and for the like purposes as the confirmation or additional confirmation of which it purports to be a duplicate.
- (2) In England and Wales and in Scotland -
- (a) a document purporting to be a grant of probate or of letters of administration issued under the seal of the High Court in Northern Ireland or of the principal or district probate registry there shall, except where the contrary is proved, be taken to be such a grant without further proof; and
 - (b) a document purporting to be a copy of such a grant and to be sealed with such a seal shall be receivable in evidence in like manner and for the like purposes as the grant of which it purports to be a copy.

[Subsection (3) contains further provisions relating to Scotland and Northern Ireland.]