Recognition of Interstate & Foreign Grants of Probate & Administration

Terms of Reference

In 1976, the Commission was asked 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. This reference was an extension of the general reference to review the law of trusts and the administration of estates given to the Committee in 1972.

Background of Reference

The reference arose as a result of difficulties associated with the distribution of estates of individuals who die leaving assets outside the state or territory in which they resided. In addition, there may also be claims that remain in effect from another state or territory. The administration of these assets and claims is complicated by three factors:

(a) conflicting laws in different Australian jurisdictions;

(b) Australian law not recognising a deceased person's continuing legal personality; and

(c) the necessity for a personal representative of the deceased to have a grant of probate or administration in each specific jurisdiction in order to be recognised by the court.

To overcome these problems and simplify the task of the personal representative, 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.[1] However, it is questionable whether resealing is the most efficient method of enabling the personal representative to deal with a deceased's assets, as it can involve considerable cost, inconvenience, and delay. Further, there is some disparity between the rules governing resealing in the various Australian jurisdictions.

Because this was a topic that lent itself to consideration of uniform laws, it was resolved by the Standing Committee of Attorneys-General that the Commission should conduct this reference with a view to making recommendations that were suitable for adoption on a uniform basis throughout Australia. The Commission therefore examined the relevant law in all Australian jurisdictions and consulted the appropriate officers in the various state and territorial Supreme Courts. The Commission also corresponded with the Commonwealth Secretariat in London which had, in the past, proposed that a uniform system of resealing grants of probate and letters of administration be adopted throughout the Commonwealth of Nations.

Nature and Extent of Consultation

The Commission issued a working paper in December 1980 that was distributed for comment throughout Australia to parties with an interest in the administration of estates, including the Registrars of the Supreme Courts of the states and territories, the state and territory law societies, law reform agencies and trustee companies. Notices were also placed in *The Australian*, *The West Australian* and the *Australian Financial Review* to encourage public submissions.

The working paper attracted a large number of submissions, which were considered by the Commission in the preparation of its final report, delivered in November 1984.[2]

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1 *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).

2 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Project No 34(IV) (1984).

Recommendations

The Commission made a total of 37 recommendations for reform, including the following primary recommendations.

- The procedure governing resealing in the various Australian states and territories should be made uniform and contained in a code to be drafted by the Parliamentary Counsel's Committee with assistance from the Probate Registrars of each state and territory.
- The uniform code of procedure should incorporate provisions relating to:
  (a) refusal of resealing;
  (b) people favoured by grants of resealing;
  (c) the lack of need for an administrator or executor to be in the jurisdiction of the resealing court;
  (d) grants to more than one executor;
  (e) the possibility of resealing of all types of grants; and
  (f) the powers and duties of persons to whom resealing is granted.
- All Australian states and territories should 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 any other country.
- An automatic recognition scheme should be adopted where a grant of probate or administration made by a court should be automatically recognised without resealing. This should be the case where the court is in the Australian state or territory where the deceased was domiciled, but not if the court is in a different jurisdiction (either Australian or foreign).
- Legislation should be enacted based on the national Companies Act to make it unnecessary for a personal representative to reseal grants of probate or administration in order to deal with money in financial institutions. These provisions should be extended to grants of probate and administration made in New Zealand and the United Kingdom.
- Courts in all Australian jurisdictions should be given power to make and reseal grants of probate and administration even where the deceased left no property within that jurisdiction.

A comprehensive outline of the recommendations may be found at pages 108–116 of the Commission's final report.

Legislative or Other Action Undertaken

In June 1986, the Governor announced that legislation to implement the recommendations made in the Commission's final report would be introduced,[3] however these plans subsequently stalled. In 1993—partly as a result of the failure of the Standing Committee of Attorneys-General to adopt the recommendations for uniform laws—the Queensland Law Reform Commission (QLRC) was asked to make recommendations designed to unify the laws in all Australian states and territories relating to succession on death.

At the suggestion of the QLRC, a national committee comprising representatives from each jurisdiction was set up, with Dr Peter Handford appointed as the Western Australian representative. The national committee has produced two reports, *The Law of Wills* and *Family Provision;* both presented to the Standing

3 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 10 June 1986, 5 (Prof. Gordon Stanley Reid, Governor).

Committee of Attorneys General in December 1997.[4] The reforms recommended by the Commission in its report on *Recognition of Interstate and Foreign Grants of Probate and Administration* are now being considered as part of the QLRC's continuing reference on uniform succession laws.[5]

The proposals were also revisited in the Commission's 1990 report on the *Administration Act 1903* (WA) (Project No 88) which recommended that the reforms be adopted.

Currency of Recommendations

The recommendations remain current. However, in so far as they address national uniformity of succession laws, they remain contingent upon the findings and proposals of the QLRC.

Action Required

Legislative action will be required to amend the *Administration Act 1903–1984* (WA), in order to implement the Commission's recommendations.

Priority – Low

Although problems remain in Western Australia in respect of grants of probate and administration, the primary aim of the reference was to create uniformity of the relevant law across all Australian jurisdictions. It may therefore be prudent to monitor and assist the progress of the QLRC with this objective in mind. If adoption of the uniform legislation ultimately developed by the QLRC becomes untenable, the Commission's report on *Recognition of Interstate and Foreign Grants of Probate and Administration* suggests that a number of the recommendations for reform might nevertheless be enacted.[6]

4 The final report on the *Law of Wills* contained model legislation to be used as the basis for reform by individual states and territories. The Northern Territory has enacted legislation (based upon the Uniform Model Wills Bill) which came into effect on 1 March 2001.

5 The Queensland Law Reform Commission anticipates that a discussion paper on *Interjurisdictional Recognition of Grants of Probate and Administration* will be released by late 2001.

6 Law Reform Commission of Western Australia, *Report on Recognition of Interstate and Foreign Grants of Probate and Administration*, Project No 34(IV) (1984) 117.