THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 34 – Part IV

Trusts and Administration of Estates: Recognition of Interstate and Foreign Grants of Probate and Administration

WORKING PAPER

DECEMBER 1980

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

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PREFACE

As part of its review of the law of trusts and administration of estates, the Law Reform Commission of Western Australia has been asked to review the law relating to the recognition of interstate and foreign grants of probate.

The Standing Committee of Attorneys General has agreed that the Commission be asked to prepare proposals for a uniform law on this subject throughout Australia.

The Commission, having completed its first consideration of the matter, now issues this working paper. The paper does not necessarily represent the final views of the Commission. Comments and criticisms (with reasons where possible) on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, including the question of uniformity, are invited. Comments will be examined not only with a view to reforming the law in Western Australia, but with a view to consideration by the Standing Committee of Attorneys General in connection with its study of the possibility of uniform law and practice.

The Commission requests that such comments be submitted by 15 April 1981.

A notice has been placed in *The Australian*, *The West Australian* and *The Financial Review* inviting anyone interested to obtain a copy of the paper and submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there, upon request.

Unless advised to the contrary, the Commission will assume that comments received on this Working Paper are not confidential and that commentators agree to the Commission quoting from, or referring to, their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

In preparing this Working Paper the Commission has received generous written and verbal assistance as to present Australian jurisdictional and procedural requirements from the

appropriate officers of the various State and Territory Supreme Courts and especially from Mr M.S. Ng, Registrar of the Supreme Court of Western Australia. The Commission has also received considerable assistance from the Commonwealth Secretariat. The Commission wishes to acknowledge its gratitude.

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CHAPTER 1
GENERAL

(a) 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 thereon throughout Australia.

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

1.3 In doing so 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 1976.

1.4 In December 1976 the Commission received a reference from the 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 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. A report on Part I dealing with the distribution of estates of persons dying intestate was issued in May 1973. A report on Part II dealing with administration bonds and sureties was submitted in March 1976. A report on Part III dealing with the administration of deceased insolvent estates was submitted in December 1978.

(b) The problem

1.7 Many people, whether or not Australians by origin or residence, die leaving assets in more than one state or territory of Australia. As well as leaving assets in parts of Australia other than their own state or territory of domicile, people also sometimes die leaving actual or potential litigation in another 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 there are certain inhibiting factors.

1.8 First, for the purpose of the administration of estates, as for most conflict of law problems, the Australian states and territories are separate "countries" in relation to one another.[1] The provisions of the Australian Constitution do not alter this situation.[2]

1.9 Secondly, whether a deceased person dies testate or intestate, Australian law, being grounded in English concepts, does not recognise that the deceased person continues to possess any legal personality,[3] even though this might be the case under the law of his last domicile.[4]

1.10 Thirdly, courts in Australia, as in England, will only recognise the right of a person to represent the interests of a deceased person if that person has obtained, within the jurisdiction

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1 *Pedersen v Young* (1964) 110 CLR 162, 170 per Windeyer J, and other authorities cited in P E Nygh, *Conflict of Laws in Australia*, (3rd ed. 1976) ch 1.

2 For example, as to section 118 dealing with "full faith and credit" see *Re Butler* [1969] QWN 48. Provisions requiring judicial notice to be taken of the statute law of other Australian states and territories do not assist to overcome jurisdictional limitations either.

3 It is beyond the Commission's terms of reference to explore the interesting suggestion made by Mr F C Hutley, QC, (as he then was) that Australian law should recognise the continuation of the legal personality of the deceased so that the legal personal representative would be its agent: see "Reconstruction of the Law of Succession", 1973 *Journal of the Indian Law Institute* 420 and also Hutley, Woodman and Wood, *Cases and Materials on Succession*, (2nd ed. 1975) 1.

4 *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682, 691 per Scrutton LJ.

itself, either a grant of probate or a grant of letters of administration. Such grants do not of their own force carry power to deal with property beyond the jurisdiction of the courts which grant them.[5] Thus the authority conferred by a grant of representation to a person to administer a deceased estate in one country, state or territory is insufficient to enable that person to do so in another jurisdiction [6] or, in another jurisdiction, to sue or be sued in his representative capacity.[7] This defect apparently cannot be cured by waiver or submission.[8] The foreign executor must thus obtain a fresh grant of authority in the other countries, states or territories in which the deceased left assets and this may be expensive, time-consuming and inefficient.

(c) Resealing - the Costs and Formalities

1.11 To simplify this process, provision has been made in each of the Australian states and territories for the resealing of grants of representation made elsewhere.

1.12 Procedures for obtaining an original grant either of probate or of letters of administration, and of obtaining resealing, vary from state to state within Australia. In Western Australia,[9] for example, an applicant for an original grant of probate will be required to lodge at the Supreme Court -

(a) a motion for grant;

(b) an affidavit by the applicant verifying certain matters detailed by rules of court;

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5 *Blackwood v R* (1882) 8 App Cas 82, 92.

6 To this rule there appear to be two provisos -
(a) 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 is not entitled as of right to such an order. *Re Achillopoulos* [1928] Ch 433; *In the Estate of Weiss* [1962] p 136. Cf *Re Lorillard* [1922] 2 Ch 638; *Re Manifold* [1962] Ch 1.
(b) A foreign personal representative has a good title to any movables of the deceased (whether tangible, or intangible) to which he has acquired a good title in a foreign country under the lex situs and which he has reduced into possession. Dicey & Morris, *The Conflict of Laws* (9th ed. 1973) 579-582.

7 *Electronic Industries Imports Pty Ltd v Public Curator of Queensland* [1960] VR 10. There appear to be two exceptions to this rule in respect of the immunity from suit: first, if the foreign personal representative brings to the jurisdiction movables of the deceased, which retain their character as property of the deceased, an action to which a local personal representative must be a party may be brought for their judicial administration in the jurisdiction, and secondly, if the foreign personal representative by dealing with the deceased's property incurs personal liability as a trustee or a debtor. See Dicey and Morris, *The Conflict of Law* (9th ed. 1973) 583.

8 *Boyd v Leslie* [1964] VR 728. *Cash v. Nominal Defendant* (1969) 90 WN (Pt 1) NSW 77. But see *Lea v Smith* [1923] SASR 560.

9 *Non-Contentious Probate Rules 1967-1980*.

(c) the original will;
(d) a death certificate; and
(e) a draft grant.

In cases of intestacy or of applications for letters of administration with the will annexed, guarantees by way of security for due administration are required in certain circumstances. The consent of, or notice to, the next of kin, if applicable, may be necessary. Since 1 September 1980, unless the applicant is the Public Trustee or either of the two statutory trustee companies, a statement verified by affidavit and exhibited thereto giving particulars of -

(a) all movable property, wherever situated, and all immovable property in Western Australia, comprised in the estate of the deceased;
(b) the value of such property at the death of the deceased; and
(c) all debts, wherever situated, owing by the deceased at the time of his death

is also required.

In cases of doubt the court may require further affidavits to establish due execution of the will or other matters.

In due course, an engrossed grant in parchment form is also required.

Fees are payable, including basic fees on application of $45.00.

On the other hand an applicant for resealing of a grant made elsewhere will, in Western Australia, be required to lodge -

(a) a motion for grant;
(b) a short affidavit by the applicant verifying certain facts including the fact that the original grant is unrevoked, and the applicant's source of authority to apply;
(c) a certified copy of the original grant including a copy of the original will, if any; and

(d) a copy of the power of attorney giving authority to apply, if appropriate.

If leave was reserved by the original grant to another executor to come in and prove, then the applicant must depose that that other executor has not so proved.

In cases of intestacy or of applications for letters of administration with the will annexed guarantees by way of security for due administration are required in certain circumstances as for original grants. Unless the applicant is the Public Trustee or either of the two statutory trustee companies, a statement verified by affidavit and exhibited thereto giving particulars of-

(a) all movable and immovable property in Western Australia comprised in the estate of the deceased;
(b) the value of such property at the death of the deceased; and
(c) all debts in Western Australia owing by the deceased at the time of his death

is also required.

The same fees are payable as on an application for original grant. The reseal is endorsed on the original grant or a certified copy thereof embossed with the seal of the court.

1.13 The scales[10] which provide the rates of remuneration for solicitors in Western Australia provide, at present, for the following charges -

Where the gross value of property in Western Australia does not exceed:	For obtaining a grant of probate or letters of administration, or resealing in Western Australia probate or letters of administration granted elsewhere:
$	$
5,000	80
10,000	120
20,000	200
40,000	275
60,000	350
80,000	425
100,000	500
More than $100,000	$500 plus $100 per $50,000 or part thereof, with a maximum of $1,250.

10 *Probate (Non-Contentious) Rules 1949-1976*.

Thus solicitors charges are the same for an original application and for a resealing application. These charges are for services rendered in connection with performing such of the following as are requisite in the particular case:

> "Instructions for Probate, Letters of Administration, Order to Administer, or Re-sealing Foreign Grant.
> Fair copy of Will or Foreign Grant for use, not exceeding five folios.
> Attendance bespeaking and uplifting Death Certificate.
> Preparing Oath of Executor or Administrator or affidavit to Re-seal and marking exhibits thereto.
> Preparing affidavit of attesting witness to a will and marking exhibits thereto.
>
> Preparing affidavit verifying the Statement of Assets and Liabilities and marking exhibit thereto.[11]
> Preparing Bond[12] and attending on execution thereof, and attending stamping[13] and preparing affidavits of justification. Attendances on parties being sworn to all the above affidavits, or correspondence therefor.
> Drawing and engrossing Probate (including engrossing and collating Will, where the Will does not exceed five folios, or the first five folios thereof where the Will exceeds five folios), or Letters of Administration, including copy for the Court and one certified copy (if required).
> Engrossing and collating Foreign Grant and Will (where the Will does not exceed five folios and the first five folios where the Will does exceed five folios) for registration on re-sealing, and one certified copy (if required).
> Preparing the motion of Probate, Administration Order to Administer, or Re-sealing. Attendance at the Court -
>
> (a) to file the Motion, Will and Affidavits;
> (b) to ascertain grant made; [14]
> (c) to ascertain and pay duty and fees, and to uplift Grant and Certificate.
>
> Preparing notice to creditors and copies and attendances to have same settled and advertised".

These charges of course apply only in non-contentious matters and do not include disbursements. Additional charges apply where the solicitor has his office outside the City of Perth and employs a Perth practitioner as his agent. Filing may be made by post by an applicant in person residing, or by a solicitor who carries on practice, outside a radius of 30 kilometres from Perth GPO.

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11 This will be necessary on in respect of the estates of persons dying before 1 January 1980.

12 Guarantees were substituted for bonds in 1977 and this item should now presumably be read as "Preparing Guarantee".

13 Although the *Stamp Act 1921-1979* has, since 1976, exempted administration bonds from stamp duty, guarantees are not so exempt.

14 Duty is payable only in respect of the estates of persons dying before 1 January 1980.

1.14 The formal and practical requirements for resealing vary in each of the other states and territories in Australia and this of itself is a source of expense and delay. The information which the Commission has received from other states and territories indicates, however, that fees and costs applying elsewhere are no lower than in Western Australia. Advertising costs, for example, do not arise in Western Australia, and court fees and scale fees for solicitors in Western Australia are also reasonable in comparison to those applying elsewhere in Australia.

1.15 It is, therefore, difficult to estimate the cost to executors and administrators of resealing grants of administration relating to deceased estates comprising assets situated in more than one Australian jurisdiction. The figures available to the Commission suggest that about 1,000 applications for resealing are made to Australian courts each year. Allowing about $200.00 in fees and other disbursements and solicitors' costs for each application, a conservative cost estimate might total $200,000. To that, however, must be added the delay and inconvenience factors. In the House of Lords in 1971, in introducing the United Kingdom Administration of Estates Bill 1971, which abolished the need for resealing within the United Kingdom, Lord Simon of Glaisdale[15] said that resealing "is a simpler and cheaper procedure than the original grant but it is still troublesome and of some expense... [A] Committee under the chairmanship of one of the registrars of the Principal Probate Registry and consisting of probate officials...and solicitors...estimated the annual cost of resealing, both the direct cost to the public and the administrative overheads, to be between 71,000 pounds and 81,000 pounds a year".

(d) Matters to be Discussed

1.16 The device of resealing, adopted from imperial precedents, is used widely in the Commonwealth of Nations. Compared to obtaining an original grant, the process is relatively simple, and the procedure relatively standard. Further it usually avoids the necessity to consider the law of the country of original grant. At the same time resealing allows the receiving court some discretion not to reseal, for example, where the type of original grant is not one that that court would have made.[16]

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15 United Kingdom Parliamentary Debates, 5th Series, House of Lords, Vol 316, para 421.

16 "It is permissive whether the courts here will reseal the grants or not; the real object of the section is to relieve applicants here from the proof of relative facts already proved in another jurisdiction and to act on such facts in so far as they will justify a grant here" *Public Trustee of NZ v Smith* (1924) 42 WN (NSW) 30, 31 per Harvey J. See Chapter 2 below.

1.17 However, resealing is not the only possible system. A system has been developed by the 1973 Hague Convention concerning the International Administration of the Estates of Deceased Persons which 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.[17] The Hague Convention System will not be further explored.[18]

1.18 A further alternative, adopted within the United Kingdom, is a system of automatic recognition without Court intervention.[19]

1.19 At three meetings organised by the Commonwealth Secretariat in 1978, 1979 and 1980, attended by many senior legal officers of various Commonwealth territories, the delegates concluded that neither the 1973 Hague Convention system nor a scheme of automatic recognition offer the same advantages as resealing in dealing with recognition as between different independent countries.

1.20 The meeting involving Commonwealth jurisdictions in North America and the Caribbean concluded however that[20] "automatic recognition schemes were of value between

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17 Some Commonwealth legal systems are based on civil law, eg Malta, Mauritius and Quebec. In civil law systems in the case of testate succession the heir or legatee will normally be made by law the direct successor 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*: *A Further Report* 156-174, published by the Commonwealth Secretariat, and reports of three working meetings organised by the Secretariat referred to at para 1.19 below.

18 The Commonwealth Secretariat is to study the Hague Convention further. Many Commonwealth countries in Africa have, of course, civil law neighbours. The Secretariat has recommended that "consideration should be given by Commonwealth Governments to the possibility of accession to the Convention...."as a potential supplementary scheme to meet circumstances not covered by the Commonwealth resealing arrangements.

19 Para 4. 1 below. For another form of recognition system see the United States Uniform Probate Code adopted in some ten States, and especially Article IV section 4-201 which permits domiciliary personal representatives to collect debts and personal property and give good discharge therefor without resealing, subject to certain requirements for affidavit evidence to be supplied to the creditor or holder in support of the personal representative's claim to collect. Yet another device, available as between Kenya, Tanzania, Uganda and Zambia, is to have the Public Trustee in each country on a reciprocal basis empowered to act as agent to administer estates on behalf of personal representatives in any of the other countries, without resealing. In the Federation of Malaysia the need to reseal is avoided because legislative power is vested in the Federal legislature.

20 Commonwealth Secretariat, *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Report on Working Meeting held at Basseterre, St Kitts, 24-26 April 1978, 18 and A Report of a Second Working Meeting held at Apia, Western Samoa, 18-23 April 1979*, 74.

jurisdictions within a single sovereign state but favoured some form of judicial intervention as a final safeguard as far as international arrangements were concerned".

1.21 As between the various states and territories which make up the Commonwealth of Australia the Commission is of the view that a scheme of automatic recognition, if feasible, would be preferable to any resealing scheme.

1.22 In Chapter 4, the Commission considers whether there is a need to reseal a grant of representation, obtained in one Australian jurisdiction, in the other states or territories in which the estate has assets, or whether such resealing can safely be abolished, provided certain safeguards are adopted, thus saving costs and fees and avoiding delay and inconvenience.

1.23 The implications of this for testator's family maintenance legislation are dealt with in Chapter 5.

1.24 Implications would also arise for the collection of revenue from succession duties. This is dealt with in Chapter 6.

1.25 Other implications especially in relation to the validity of wills are dealt with in Chapter 7.

1.26 In relation to the recognition by Australian states and territories of grants made outside Australia, only the resealing system will be further considered.

1.27 Certain matters though must be discussed whether or not resealing of other Australian grants is retained. As Australia is not one, but eight, jurisdictions, each state and territory has traditionally, (by statute and by rules of court), exercised the power to determine when, and by what procedures, resealing will be permitted within its own jurisdiction. Where the statutes and rules of court are silent Australian courts have fallen back on conflict of laws principles as providing basic jurisdictional rules. There are three major areas of difference separating the various Australian states and territories.

1.28 First, the jurisdictional principles embodied in the statutory provisions and rules of court vary in determining to whom and when resealing may be granted. The Commission suggests that these principles should be made uniform and sets out tentative suggestions therefor in Chapter 2.

1.29 Secondly, even if a system of automatic recognition were adopted within Australia procedures for resealing grants made elsewhere would be required. At present, the procedural requirements for resealing grants vary. They should be uniform. This is shortly dealt with in Chapter 3. The Commission has prepared a description of present resealing procedures in Australia setting out these matters in more detail. Appendix II summarises the major points. A narrative description of certain aspects in more detail forms Appendix IX.

1.30 Thirdly, the lists of countries whose original grants may be resealed vary and should be made uniform. This is dealt with in Chapter 8.

1.31 In dealing with these matters the Commission wishes to pay special regard to the proposals made by the Commonwealth Secretariat to Commonwealth Law Ministers for uniform Commonwealth resealing legislation, and in Chapter 9 seeks comment thereon. These proposals may form a model for dealing with the matters the subject of Chapters 2, 3 and 8.

CHAPTER 2
RESEALING: THE JURISDICTION AND PRINCIPLES

(a) The jurisdiction to make grants

2.1 The various resealing schemes introduced by statute in the Australian states and territories are based upon nineteenth century United Kingdom precedents. These schemes assume certain basic jurisdictional principles and add various refinements.

2.2 The same jurisdictional principles substantially apply to the question whether resealing should be granted to a foreign grant as apply to the making of an original grant of probate or letters of administration to a foreign executor or administrator. [1]

2.3 Whether or not Australia adopts a scheme of automatic recognition of grants made within its own borders as suggested below, there will remain a need for uniform jurisdictional and procedural principles. This chapter will deal with jurisdictional matters and Chapter 3 with procedural matters.

(b) Is property within the resealing jurisdiction required?

2.4 In all Australian jurisdictions except Queensland,[2] it has been provided by statute that jurisdiction to grant probate or letters of administration exists where the deceased left either real or personal property within the jurisdiction.[3]

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1 *Re Carlton* [1924] VLR 237.

2 As to proposed changes to the Queensland position see para 2. 10 below.

3 NSW: *Wills, Probate and Administration Act 1898-1979*, s 40.
Vic: *Administration and Probate Act 1958-1977*, s 6.
SA: *Administration and Probate Act 1919-1980*, s 5.
WA: *Administration Act 1903-1980*, s 6.
Tas: *Supreme Court Civil Procedure Act 1932-1979*, s 6(5).
ACT: *Administration and Probate Ordinance 1929-1980*, s 9(1)(2).
NT: *Administration and Probate Ordinance 1969-1979*, s 14(1)(2).
The legislation applies equally to limited grants: *Re Aylmore dec'd* [1971] VR 375. The Full Court of Victoria has held in *Re Carlton* [1924] VLR 237 that so long as the testator left property in 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 operate in any way howsoever within the jurisdiction. It is sufficient for the legal estate to be within the jurisdiction although the legal estate is held on trust: *Re Blackwood* (1891) 13 ALT 94; and it may be sufficient to have a "right to property": *Re Uniacke* [1912] QWN 43.

2.5 Originally grants of representation were made exclusively by ecclesiastical courts, and ecclesiastical jurisdiction was originally dependent on the presence of movable property of the deceased within the court's diocese or province. The reforms of the nineteenth century are reflected in the existing Australian legislation. As will be seen below the question is whether the reforms went far enough.

2.6 In the Australian Capital Territory, section 9(2) of the *Administration and Probate Ordinance 1929-1980* permits the court to grant representation of a deceased estate without property in the jurisdiction, if the court is satisfied that the grant is "necessary". Similar provision appears in the Northern Territory *Administration and Probate Ordinance, 1969-1979*, section 14(2).

2.7 In Queensland, the presence of personal property of the deceased within Queensland is usually required. (In Queensland, the devisee by will of freehold land still succeeds to the land automatically).[4] In exceptional cases, however, the Court has granted probate where the deceased left only real property in Queensland,[5] or where the deceased died domiciled in Queensland but left no property in that State.[6]

2.8 The Australian position specifically in relation to resealing is set out in Appendix I. The position varies between different jurisdictions. The Commission notes the view of Hastings and Weir, *Probate Law and Practice*,[7] that in New South Wales the effect of ss 40 and 107 may not be to restrict the jurisdiction of the Court to resealing grants only where the deceased left real or personal property within the jurisdiction. The Western Australian provisions, ss 6 and 61, are in identical terms. To read the jurisdiction as being so restricted is, however, the strict interpretation of the provisions.

2.9 It seems clear from the following examples that the making of either an original grant or a grant by way of resealing should be possible even where no real or personal property is left within the jurisdiction -

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4 This is not the position though upon intestacy. The Queensland Law Reform Commission in its *Report on the Law Relating to Succession* (No 22, 1978) 29 has recommended that the position be altered so that all the estate of a deceased person passes to an executor or administrator.

5 *Re Hall* [1923] QWN 40.

6 *Re Bowes* [1963] QWN 35.

7 (2nd ed 1948) 310.

(a) the making of a grant may have effects on foreign revenue laws beneficial to the estate;[8]

(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;[9]

(c) certain foreign countries apparently require a grant by the country of nationality of the deceased before themselves making a grant;

(d) where a will only appoints a testamentary guardian the will is not at present admissible to probate;[10]

(e) as the Queensland Law Reform Commission has pointed out, an additional reason arises in litigation in which the deceased estate is a party but in reality in which any judgment will be met by the deceased's insurers.[11]

2.10 The Queensland Law Reform Commission has proposed that in Queensland the Supreme Court should have jurisdiction to "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" and that "a grant may be made to such person and subject to such provisions, including conditions or limitations, as the Court may think fit." A Bill to implement the Report has been introduced into the Queensland Parliament.[12]

2.11 In New Zealand the *Administration Act 1969*, section 5(2) provides that "… the Court shall have jurisdiction to make a grant of probate or letters of administration in respect of a

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8 *Re Wayland* [1951] 2 All ER 1041.

9 Hutley, Woodman and Wood, *Cases and Materials on Succession*, (2nd ed. 1975) 26.

10 *The Lady Chester's case*, 1 Vent 207; 86 ER 140.

11 As in *Kerr v Palfrey* [1970] VR 825. *Report on the Law Relating to Succession* (No 22, 1978) 5.

12 Queensland Law Reform Commission *Report on the Law Relating to Succession* (No 22, 1978) Clauses 5, 6(2) and 6(3), and Queensland Succession Bill 1980 incorporating the same clauses. The report does not specifically deal with the question of resealing foreign grants or of making grants in respect of foreign wills. The Queensland Law Reform Commission expresses the hope that "in the not too distant future the Australian States may be able to work out a uniform probate practice".

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".

2.12 The United Kingdom *Administration of Justice Act 1932*, section 2(1) goes further and provides jurisdiction to make a grant where a deceased person left no estate at all. Dicey and Morris, *The Conflict of Laws*,[13] describes the requirement that the deceased left property within the jurisdiction as one which "could be very inconvenient". The learned authors in supporting the reform point out that the power to make a grant is discretionary and that the applicant's oath must show the reason the grant is required and that the court may refuse a grant if it considers the reasons insufficient.

2.13 In *Aldrich v Attorney General*, Ormrod J expressed the inherent limits to the circumstances in which courts will make grants even given the 1932 United Kingdom provisions. In that case the petitioner sought a grant as a method of obtaining a declaration of validity of marriage and a declaration that another, deceased, person was his child. Ormrod J refused to make use of the 1932 provisions for this purpose where the deceased was not domiciled in England and left no assets there, saying:[14]

> "Apart from the case of Wayland, there is no authority upon it, and it appears to me to be contrary to principle for this court to make a grant of representation in the estate of a person domiciled in some other country who died leaving no assets within the jurisdiction of this court. Such a grant in a case such as this would be nothing more than a piece of paper."

If a scheme of automatic recognition of grants made in other Australian states and territories by courts of the deceased's last domicile is adopted, then provisions similar to the United Kingdom provision will be necessary in order to ensure that the court of domicile has power to make a grant whether or not the deceased left assets within its jurisdiction.

2.14 The Commonwealth Secretariat reporting upon the meeting of African law officers at Nairobi in January 1980 referred to in paragraph 1.19 above commented that:[15]

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13 (9th ed. 1973) 567.

14 [1968] P 281, 295.

15 Commonwealth Secretariat, *Recognition and Enforcement of Judgment 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*.

> "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".

The approach adopted by the Commonwealth Secretariat was to leave the matter at large by not dealing expressly with the question in the Draft Model Bill which it prepared for consideration by Commonwealth law ministers.[16] The Commonwealth Secretariat however was not contemplating a scheme of automatic recognition of grants but one based on traditional resealing.

2.15 The Commission is tentatively of the view that the question should be expressly dealt with. The Commission favours the approach of the Queensland Law Reform Commission, both in relation to the making of original grants and to resealing. If uniform agreement can not be reached as to that, then Western Australia should at least amend its own Act.

(c) To whom will a grant be made?

2.16 The rule, which is unaffected by statute, is that in the case of an estate consisting only of movable property a court of probate should follow the grant made by the competent court of the deceased's last domicile since the law of the domicile governs succession to movables. Thus the person recognised by the domicile should be recognised elsewhere so as to be in a position to represent the deceased.[17] Normally, therefore, where there has been a grant by the court of the deceased's last domicile the validity of the will as a testamentary instrument relating to movables outside the domicile will be accepted elsewhere, without questions of testamentary capacity, fraud, undue influence or duress being entertained.

2.17 Similarly a grant will normally be made to the person who would be entitled to such a grant by the law of the domicile even though no such grant has in fact been made. If the executor dies without completing administration of the estate, administration will be granted to the same person as would be granted administration with the will annexed or the nearest equivalent thereof, by the domicile.

2.18 These are however only rules of convenience and certain exceptions have been established. For example, the grantee must be a person who by the law of the granting court is

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16 Appendix III.

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

of age and of sound mind.[18] Again, rules of public policy may operate against recognition, as where the making of a grant would operate as an indirect method of enforcing a foreign revenue claim.[19]

2.19 Despite the strength of the rule there thus seems to be a residual discretion in the court to refuse to make a grant. The original grant assumes an evidentiary nature. Although some of the statutory resealing provisions, such as those of Tasmania and Victoria, appear at first sight to make resealing mandatory once the formal provisions have been complied with, this is not the way in which the provisions have been interpreted.[20] The provision is mandatory only where literal compliance with the section has been effected and where the issuing of an original grant would not be improper.

2.20 In like manner, if the will is invalid, or not proved to be valid, by the law of the deceased's last domicile then, in the absence of statutory authority, a grant of probate made in favour of the will elsewhere will generally not be resealed.[21]

2.21 When the deceased's estate consists either solely or in part of immovables within the jurisdiction the court must make its own determination as to entitlement to a grant, since succession to immovables is governed by the law of the place in which the immovables are situated, not by the law of the deceased's domicile.[22] Again therefore the decision whether resealing will be granted is ultimately a matter for the resealing court.

2.22 As a result Australian courts will not reseal grants dealing with immovables situated within the jurisdiction of the court unless the grant was originally made to a person entitled to a grant from the court itself.

2.23 These basic principles are not addressed in the Australian statutes. Australian courts therefore rely on conflict of laws principles which seem to apply equally to resealing as to the making of an original grant.

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18 In the *Goods of D'Orleans* (*Duchess*) (1859) 1 Sw and Tr 253; 164 ER 716.

19 *Bath v British and Malayan Trustees Ltd* [1969] 2 NSWR 114.

20 R A Sundberg, *Griffith's Probate Law and Practice in Victoria* , (2nd ed 1976) 117; *In Re Buckley* (l889) 15 VLR 820; *Re Carlton* [1924] VLR 237, 242-3; cf *Drummond v Registrar of Probates* (1918) 25 CLR 318.

21 *In the Will of Lambe,* [1972] 2 NSWLR 273.

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

2.24 The United Kingdom position is somewhat different. Resealing in one part of the United Kingdom of grants made by the court of the deceased's last domicile in another part of the United Kingdom has, as between England and Wales, Scotland and Northern Ireland, been entirely abolished. As a result, if a person dies domiciled within the United Kingdom, grants will be made by United Kingdom courts, other than the court of the deceased's last domicile, only as limited grants.[23] In the case of grants made outside the United Kingdom, but within certain territories to which the *Colonial Probates Act 1892* applies, resealing will be permitted.

2.25 The jurisdictional principles upon which an English court will grant representation where the deceased died domiciled outside England are set out in Rule 29 of the *Non-Contentious Probate Rules, 1954* 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;

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23 Para 4. 1 below.

> (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".

These provisions vary from the Australian position. For example, in the United Kingdom where an estate comprised both movable and immovable property a grant would be made, it seems, to the person entitled by the law of the deceased's last domicile. Dicey and Morris, *The Conflict of Laws*,[24] ascribes the English practice to the advantage of having the administration of the estate in the same hands in both countries.

2.26 Another provision dealing with jurisdictional principles is contained in the Draft Model Bill prepared by the Commonwealth Secretariat for consideration by the meetings referred to in paragraph 1.19 above as a basis for uniform resealing legislation in the Commonwealth of Nations. It is set out in Appendix III, and provides that:

> "5(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."

The Commonwealth Secretariat apparently took this provision from the Malaysian[25] and Singapore[26] statutes. The Secretariat describes it as logical and as reflecting the practice in many Commonwealth jurisdictions and as tying in the resealing provisions with the general conflicts rules on the making of the grants to foreign representatives. Similar provisions are to be found in some of the Australian jurisdictions.[27] "[T]he grantee under the grant to be resealed must be a person to whom the court would have made an original grant. In practice what often happens is that a grant made by a court not in the country of domicile of the deceased is made to an attorney of the person entitled to the grant in the country of domicile; and that attorney....will be recognised. But the attorney of a person to whom the grant out of the domicile was made is not recognised, unless he is also attorney for the person entitled to the primary grant. An executor by representation is entitled to have both grants of which he is executor resealed."[28] This sort of provision, however, does not override the decision in *Lewis*

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24 (9th ed. 1973) 571.

25 *Probate and Administration Act 1959-1972*, s 52.

26 *Probate and Administration Act 1970*, s 46.

27 For example, in Queensland see Order 71 rules 65-79 of the *Supreme Court Rules*.

28 W A Lee, *Manual of Queensland Succession Law*, 93.

v Balshaw[29] that where immovable property forms part of the deceased's estate in the resealing jurisdiction the resealing court must determine for itself entitlement to a grant.

2.27 Some Canadian legislation appears to base jurisdiction upon whether the deceased had a fixed place of abode within the forum or failing that upon whether he had assets present within the forum at his death. English practice favours the domicile even where immovables are involved subject to the modifications seen above. Cheshire and North, *Private International Law*,[30] describes the ideal as being "to have one administration in the domicile for the whole of the property, but such principle of unity is not found in practice and is attainable only by international agreement".

2.28 The Commission seeks comment on whether the United Kingdom provisions should be embodied in uniform Australian legislation, or whether the existing Australian position should be retained with or without statutory restatement. Should a provision such as that proposed by the Commonwealth Secretariat be adopted in any event? If uniform agreement to vary the present position does not emerge there seems little good reason to statutorily vary the existing Western Australian position.

(d) The need to avoid duplication

2.29 If a uniform system of automatic recognition of Australian grants were adopted, there would seem to be clear advantages in vesting original jurisdiction in the court of the deceased's last domicile. Such a system would avoid duplication and inconsistency of grants. It is consistent with the earlier recommendation[31] that it not be necessary for the deceased to have left property within the jurisdiction of the granting court, while recognising that in the vast majority of cases the deceased's property will all be situated within the jurisdiction of the court of his last domicile. Jurisdiction to make and reseal original grants on the present jurisdictional basis could be retained. It would be restricted, on lines similar to those adopted in the United Kingdom,[32] first, to cases where the deceased died domiciled outside Australia, and secondly, in the case of persons dying domiciled elsewhere within Australia than in the jurisdiction of the granting court, to the making of a grant limited in effect to assets within the

29 (1934) 54 CLR 188.
30 (10th ed. 1979) 591.
31 Paras 2.4 to 2.15 above.
32 Para 4.1 below.

jurisdiction of the granting court pending grant in the jurisdiction of the deceased's last domicile.

2.30 It is important that within such a country as Australia there be as little duplication of legal proceedings and as little confusion as to the jurisdiction of courts as possible. Where principles and concepts of law are understood and applied in the same way by the courts of all jurisdictions within one federation there seems to be good reason to vest original jurisdiction in relation to the affairs of the deceased only in the court of his last domicile rather than in the court of each territorial jurisdiction in which the deceased left property.

(e) Subsidiary matters

2.31 There are a large number of other subsidiary and connected matters with which the statutes and rules of court of some, but not necessarily all, states and territories deal expressly. By way of example Appendix II sets out the present Australian position as to certain of these matters. Many provisions are already adopted in all or the majority of jurisdictions. The Draft Model Bill prepared for the Commonwealth Secretariat set out in Appendix III adverts to some of them. The Commission does not foresee great objection to its proposals in respect of these subsidiary matters.

2.32 The Commission tentatively suggests that the jurisdictional principles governing resealing should be made uniform by legislation. Such legislation would apply to the original grants of such other jurisdictional areas as may be geographically or otherwise provided for. The geographical limits will be dealt with in Chapter 8 below. In addition it may be that as between Australian states and territories automatic recognition can be adopted as suggested in Chapter 4 above. The jurisdictional questions now dealt with are independent of such geographical limits as may be imposed to resealing and of the question of any scheme of automatic recognition.

2.33 Tentatively therefore the Commission takes the view that uniform provision should be made -

(i) that the deceased need not have left real or personal property within the resealing state or territory, and that provision be made for resealing in other circumstances, as recommended in paragraphs 2.4 to 2.15 above;

(ii) for jurisdictional principles based on recognition of the primary jurisdiction of the court of the deceased's last domicile - see paragraphs 2.16 to 2.30 above;

(iii) for uniform adoption of the provision suggested by the Commonwealth Secretariat referred to in paragraph 2.26 above;

(iv) for resealing orders in favour of 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 capable of taking an original grant in the resealing state, and excluding the necessity for security to be provided in such cases - see Appendix III, Clauses 2(1) and 5(2);

(v) for orders in favour of the executor of an executor appointed in relation to an estate - see Appendix III, Clause 2(1);

(vi) for applications to be made either by the personal representative or his legal representative or by a person appointed under a power of attorney by the personal representative - see Appendix III, Clause 3(2);

(vii) defining the effects of resealing to be the same as those of an original grant - see Appendix III, Clause 6(1);

(viii) defining the powers and duties of persons to whom resealing is granted including those appointed under a power of attorney - see Appendix Ill, Clauses 6(2) and 7(1), (2);

(ix) to make clear that all persons named in the grant, or authorised by power of attorney, are entitled to act as personal representative on the sealing;

(x) expressly providing that a grant made for special or limited or temporary purposes may be resealed;

(xi) to enable the resealing of probate granted to several executors upon the application of only one or some of them - probably by rules of court;

(xii) to provide for the situation where a grant to one executor is resealed after an original grant has been made to another executor - probably by rules of court;

(xiii) to impose the duty of resealing upon the registrar rather than the court but making provision for reference by the registrar to the court in a proper case, and for appeal from the registrar to the court - see Appendix III, Clauses 3(2) and 5(5);

(xiv) to make clear that grants which can be resealed include instruments, which are given like effect to grants of probate or letters by the law of the country in a court of which the instrument was first filed or issued, for example a Scottish confirmation or South African letters of executorship - see Appendix III, Clause 2(1);

(xv) to make express provision that the executor or administrator need not be required to be within the jurisdiction of the granting or resealing court, and that resealing in such a case may be made by registrar's order without reference to a judge;

(xvi) to make provision for the resealing of orders to administer small estates made in favour of a Public Trustee or a Curator or a trust company; and possibly to make provision in respect of elections to administer such estates;

(xvii) to reseal grants in favour of an executor appointed by the original court of grant in substitution for the executors to whom a grant was originally made by that court;

(xviii) to make clear that resealing will be granted of an exemplification of probate or letters of administration - probably by rules of court;

(xix) to make clear that the court retains a residual discretion to refuse resealing, for example, for reasons of public policy or to an incapable person.

CHAPTER 3
RESEALING PROCEDURES

3.1 Whether or not a system of automatic recognition of Australian grants is introduced within Australia, Australian courts will continue to be faced with the need for a system of recognition of grants of representation made overseas. The jurisdictional principles upon which such a system might be based were discussed in Chapter 2 and the geographical or territorial limitations will be discussed in Chapter 8. The question of practical or formal requirements remains to be considered. It is to deal with such matters that various rules of court or rules of practice have been established in the courts in each Australian jurisdiction. The more important of these rules are set out in tabular form in Appendix II to this paper. A narrative description of present procedural requirements in the various Australian jurisdictions forms Appendix IX of this Working Paper. It illustrates the present similarities and diversities, while also illustrating the possibilities for uniform procedures.

3.2 The major matters to be noticed in respect of the varying procedural requirements may be divided into several categories -

(i) the form of application, and by whom, when and how it may be lodged;

(ii) the necessary evidence in support;

(iii) whether the application need be advertised, and details thereof;

(iv) whether caveats may be lodged against resealing, by whom, and with what consequences;

(v) whether security may be or is required in case of intestacy, and the form thereof;

(vi) whether notice of resealing is to be sent to the court of original grant;

(vii) whether, when the court of original grant varies or revokes such grant, it gives notice thereof to any resealing court;

(viii) whether probate or other duties are required to be assessed or paid prior to resealing, and what other provisions are made in respect thereto;

(ix) the passing of accounts.

3.3 The Commission seeks comment as to the desirability of uniform rules of procedure in these areas.

3.4 The Draft Model Bill prepared for the Commonwealth Secretariat set out in Appendix III might operate as a basis for consideration in so far as statutory provisions are involved. Of course some of the matters referred to above are appropriately dealt with by rules of court.

3.5 The Commission is tentatively of the view that, just as jurisdictional and territorial principles should in the interests of efficiency be uniform, so the procedures of each state and territory in relation thereto should also be uniform, not only in relation to the grants of other Australian states and territories but in relation to grants originally made overseas.

3.6 In respect of these matters the Commission notes the simplicity of certain provisions adopted by the United Kingdom *Non-Contentious Probate Rules, 1954* in respect of resealing under the *Colonial Probates Act 1892*.[1] These are that -

(i) the only documents required are -

(a) the grant, or an officially issued duplicate copy or exemplification including, or accompanied by, a copy of the will, if any.

(b) a complete copy of the grant, including a copy of any will for deposit. If desired, a photographic copy will be made in the Registry.

(c) where the application is made by some person on behalf of the grantee, the power of attorney or other document authorising the agent to apply for resealing .

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1 Tristram and Coote, *Probate Practice*, (25th ed 1978) 487-505.

(d) where the application is to reseal a grant of letters of administration, with or without the will, if required by the registrar a guarantee by sureties or (if accepted by the registrar in lieu of a guarantee) a certificate of sufficient security.

(e) an Inland Revenue affidavit submitted to the Estate Duty Office for control before the papers are lodged.

(ii) no advertisement is required and no oath by the applicant need be filed, unless otherwise directed in either case.

(iii) the application may be made by the grantee or any person authorised in writing to apply on his behalf, and a formal power of attorney is not essential in cases of application by an authorised person. In this the United Kingdom goes further than the proposal made by the Commonwealth Secretariat in its Draft Model Bill.

(iv) the papers may be lodged by the grantee or by such an authorised person or by a solicitor and may be lodged by post, or at the registry.

(v) there is no necessity for an address for service within the jurisdiction .

3.7 In relation to the content of such provisions the Commission tentatively suggests the following guidelines to be incorporated into any uniform legislation -

(i) Advertising of the intention to apply for resealing may be the cause of unnecessary cost and delay in many cases and is often unlikely to be productive of benefit. In this the Commission, with the benefit of long standing local practice, differs from the view of the Commonwealth Secretariat that advertising is necessary and useful without adding undue cost. However the Commission specifically seeks comment thereon.

(ii) 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. This seems necessary both in relation to security in administration cases and to collection of succession duties. As to this in the context of automatic recognition of Australian grants see Chapter 4.

(iii) Provision should be made for the lodgment of caveats with the usual consequences.

(iv) If provision is to be made for security in cases of intestacy, then preferably this should be by way of guarantees, to be provided, in the context of automatic recognition of Australian grants, on the basis that the security is intended to protect all beneficiaries and creditors of the estate of the deceased within Australia.

(v) The Commonwealth Secretariat's Draft Model Bill includes provision requiring non-residential executors and administrators to file a local address for service. The Commission agrees with this necessity in Australian conditions, subject to any scheme for automatic recognition of Australian grants as suggested in Chapter 4.

(vi) A duty should be placed on the resealing court to notify the original court of the resealing, and on Australian courts of original grant to notify any resealing court of any variation or revocation of the original grant.

3.8 Subject to these comments, matters of procedural requirement are matters for the rules of court of the resealing court although it would be preferable if these could be uniform. The Commission directs attention to certain other procedural requirements suggested by the Commonwealth Secretariat's Draft Model Bill set out in Appendix III as guidelines, and seeks comment.

CHAPTER 4
AUSTRALIAN GRANTS

SHOULD AUSTRALIAN STATES AND TERRITORIES ADOPT A SYSTEM OF AUTOMATIC RECOGNITION OF GRANTS MADE BY COURTS OF OTHER AUSTRALIAN STATES AND TERRITORIES?

4.1 By sections 1 to 4 of the United Kingdom *Administration of Estates Act 1971* grants of probate and of letters of administration (or their Scottish equivalent) made in one part of the United Kingdom, in respect of the estate of a person domiciled in that part, are required to be treated in any other part of the United Kingdom as if the grant had been made in the latter part.[1] 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. A system is established for a notation of the deceased's last domicile to be made on each original grant, if necessary subsequently to the issue of the grant. To entitle a grant to automatic recognition a statement of the deceased's domicile within the jurisdiction of the court of original grant is required. Where 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 prior to, or in place of, application in the place of domicile. To prevent multiple grants of representation 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 representation is granted in the country of domicile. The appropriate Inland Revenue certificate must disclose all United Kingdom estate.

4.2 The United Kingdom provisions were introduced following the report referred to in paragraph 1.15 above. The Committee which considered the matter of resealing in the United Kingdom was asked to consider whether resealing[2] "any longer served any really useful purpose. They found that in Scotland it was a mere empty formality, in England it still served two useful purposes. But the Committee came to the conclusion, which … has commanded general approbation, that those advantages could be obtained in other ways. Their conclusion was 'Resealing does not fulfil any useful purpose on either side of the Border'."

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1 Sections 1 and 4 are set out as part of Appendix IV to this Paper. Sections 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.

2 United Kingdom Parliamentary Debates, 5th Series, House of Lords, Vol 316, para 421.

4.3 In *Lewis v Balshaw*[3] all five members of the High Court of Australia confirmed that while succession to movables is governed by the law of the deceased's last domicile, succession to immovables is governed only by the law of the place where the immovables are situated. The Court held that neither convenience nor comity overcame these propositions. The result is that in Australia the court of the jurisdiction in which the immovables are situated has the obligation to decide for itself questions both of validity of any will and of entitlement to a grant.

4.4 Thus, if Australia is to adopt some form of automatic recognition by courts of each state and territory of the grants of probate or administration of the courts of the other states and territories, the result flowing from the principle embodied in *Lewis v Balshaw* would have to be abrogated as between Australian states and territories. A fundamental question to be determined is whether in the interests of convenience and comity that should now be done.

4.5 The Commission considers that a scheme along the lines of the United Kingdom scheme might by uniform legislation be brought into effect as between the Australian states and territories, provided certain safeguards are adopted. It is, of course, to be noticed that the United Kingdom is both geographically small and for taxation purposes a single unit, and also that the United Kingdom scheme only operates in respect of persons dying domiciled within the jurisdiction of the court of original grant. But the introduction of such a scheme would avoid the costs and delays now involved in the necessity to reseal original grants of representation made in another state or territory.

4.6 There are however advantages of the resealing system, to be offset against the costs and delays thereby incurred, which the Commission wishes to retain if possible. Resealing provides an opportunity for local claimants to dispute whether the personal representative under the original grant was validly appointed, having regard to the conflict of laws rules of the country of recognition and, at least where immovables are concerned, to vitiating factors, such as duress, undue influence, incapacity and lack of formal validity of the will. In addition, however, resealing results in a record of the grant in the country of recognition. It provides a further means to ensure due compliance with local succession duty laws. It facilitates the taking of administration bonds or sureties in respect of local estate, and it reminds foreign administrators of local responsibilities.

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3 (1935) 54 CLR 188.

4.7 It should be noted that even if a scheme of automatic recognition were adopted it would remain necessary to provide a resealing scheme for the recognition of original grants made outside Australia. Such a dual system operates in the United Kingdom.

4.8 Nonetheless the advantages of an automatic recognition scheme within Australia remain. In 1963 and 1964 some steps were taken towards developing such a scheme. These were apparently generated by the introduction of section 95(3) of the 1961 *Uniform Companies Act* which provides that:

> "Where the personal representative of a deceased holder duly constituted as such under the law of another State or of a Territory of the Commonwealth -
>
> (a) executes an instrument of transfer of a share, debenture or interest of the deceased to himself or to another person; and
> (b) delivers the instrument to the company, together with a statutory declaration made by him to the effect that… no grant of representation of the estate of the deceased holder has been applied for or made in the State and no application for such a grant will be made...
>
> the company shall register the transfer and pay to the personal representative any dividends or other moneys accrued...but this subsection does not...require the company to do an act or thing which 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".

4.9 The purpose of this and the subsequent subsection is "to render unnecessary the resealing of a grant...obtained elsewhere for the sole purpose of obtaining a transfer of shares". Wallace and Young, *Australian Company and Practice*,[4] comments that the subsections achieve the desired result subject to the question whether they apply to shares on a branch register of a company incorporated elsewhere. The authors regard the proviso as merely making it clear that in regard, say, to disputes as to title or in respect to death duties, the company effecting the transfer pursuant to these provisions is in no different position than otherwise it would have been had the previous practice of sighting a resealed probate been adopted.[5] The Commission is not aware of any problems having been created by the enactment of this provision, although apparently some companies, at least in respect of large parcels of shares, adopt a cautious attitude to the section.[6]

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4 at p 339.

5 There are similar provisions in Canadian federal companies legislation. The Commission is aware that the Melbourne Stock Exchange is seeking an extension of the provisions of s 95 in favour of personal representatives appointed, for example, in New Zealand or the United Kingdom.

6 Paterson and Ednie, *Australian Company Law*, (2nd ed 1972) 1710.

4.10 Should provision be made, in any event, for the collection of life assurance proceeds or monies at bank or otherwise upon deposit upon a similar basis to that set out in section 95 of the *Companies Act*.

4.11 There seems to be no logical reason for confining the procedure adopted in section 95 of the *Companies Act* to shares, debentures and interests within the provisions of that Act. The Canadian Parliament has extended like provisions to bank deposits. There seems no reason why provision should not be made by the Commonwealth Parliament in respect of monies deposited in banks over which the Commonwealth has legislative powers, and also in respect of the proceeds of life assurance policies. Similar provision could be made by state legislatures in respect of monies held in banks, building societies, credit unions and similar institutions for which the state is the responsible legislative body. Such action might, of course, raise fears in respect of revenue protection. That matter will be dealt with in Chapter 6. Since any benefit flowing from such legislation would flow to the residents of other states and territories there seems to be a general advantage in such legislation being uniformly adopted and no self-advantage in anyone state or territory so legislating.

4.12 Such provisions for the disposal of the proceeds of life assurance policies were advocated in 1963 by The Life Offices' Association for Australasia. 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". The Law Council of Australia accepted both recommendations and referred the proposal to the Standing Committee of 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 its Minister for Justice "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". The Law Society of New South Wales, however, adopted the view that resealing of probates 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".

4.13 The Commonwealth Attorney General, Sir Garfield Barwick, subsequently proposed to the Law Council of Australia certain preliminary guide lines as a basis for discussion. In essence the guide lines 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 reseal. 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 of such a request the request would be sealed by the recognising court and one copy 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.[7]

4.14 The reaction to these guide lines was mixed. The Law Society of Western Australia adhered to its original view that "a grant....in one state or territory should be recognised for all purposes in other states or territories" and thus that the proposed procedure was "cumbersome and unnecessary". The Law Institute of Victoria and the Law Society of Tasmania agreed.

4.15 The Law Society of South Australia and the Victorian Bar Council supported the Attorney General's proposals subject to the need to protect the revenue. The Victorian Bar Council also saw a need to protect the rightful personal representative "in the unlikely event that the probate falls into the wrong hands", to ensure that the procedure was available at any stage in an administration and not merely when the original grant was sought, and to ensure notification not only of "court orders" but of "registrar's orders".

4.16 In New South Wales however both the Law Society and the Bar Association opposed the suggestions. For this each gave various reasons. The relevant objections are summarised in paragraph 4.21 below.

4.17 Draft legislation was then prepared in Victoria under the direction of the Standing Committee of Attorneys General based on the then existing Victorian provisions. It departed

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7 See Appendix V.

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.[8] 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.

4.18 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".

4.19 The Law Society of New South Wales opposed the bill to the extent that it provided for resealing letters of administration without need of a bond made in the resealing state or territory. The Society opposed this on the ground that in some states such bonds could be dispensed with on the original grant, and 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.

4.20 The Queensland Law Society approved the draft Bill.

4.21 No uniform legislation was enacted and the Commission has no knowledge of any later proposals, although the Commission is advised that the Standing Committee of Attorneys General again discussed the matter in 1969.

4.22 The objections raised in 1963 and 1964 by the Law Society of New South Wales and New South Wales Bar Association to proposals for automatic recognition by Australian courts of grants made by courts in other Australian jurisdictions were based upon the following propositions -

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8 Appendix VI.

(a) Advertisement

That persons wishing to object to recognition of the original grant should – except perhaps in case of very small estates – be advised by advertisement in the resealing jurisdiction, and not merely in the jurisdiction of domicile, of the intention to apply for resealing, and be at liberty to lodge a caveat in the recognising jurisdiction and so to challenge the resealing application, and that creditors and beneficiaries should be given an address for service of claims within the recognising jurisdiction and be advised by advertisement of the intention to apply for resealing or for reduction or dispensation of security.

Commission's comment

As to these matters, the Commission is not convinced at this stage that advertising fulfils any necessary purpose. The Commission's tentative view is that advertising is probably ineffective and therefore incurs unnecessary expense and delay.

Advertisement is not required at all in Western Australia and only in special circumstances in Queensland and South Australia. The Master of the Supreme Court of Western Australia has advised the Commission that he would regard introduction of advertisement requirements as undesirable. The Commission specifically seeks comment from persons with experience in jurisdictions which require such advertising as to the merits thereof.

(b) Security for proper administration in case of intestacy

That beneficiaries of intestate estates should be protected from unlawful or improper administration within the recognising jurisdiction by satisfactory bond or guarantee arrangements made within that jurisdiction.

Commission's comment

Provided provision is made in the jurisdiction of original grant for an adequate and uniform system by way of security for the proper administration of intestate estates

there seems to be no need of separate security in each other relevant Australian jurisdiction. The English Law Commission in its Report No 31 in relation to Administration Bonds expressed doubts as to the necessity for security to be given in all administration cases and finally set out five cases in which sureties (not bonds) might be required. One of the cases is where the applicant is not resident within the jurisdiction. This reform was effected in the United Kingdom in 1971[9] and subsequently in Victoria[10] and Western Australia[11] The South Australian Law Reform Committee has recommended similarly.[12] The New South Wales Law Reform Commission Working Paper on Administration Bonds in 1978 proposed that if procedures were adopted to require evidence of the applicant's fitness security requirements could be abolished provided the administrator was required –

(i) to give and maintain an address for service within the jurisdiction; and
(ii) to submit to the jurisdiction of the court in all matters relating to the estate.

In 1979 the New Zealand[13] requirements for administration bonds in case of intestacy were abolished and replaced by provisions giving the court, in cases where the court considers 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".

All jurisdiction except South Australia and Tasmania provide for security to be dispensed with, although the Commission understands the view of the New South Wales and Victorian registries, at least, to be that provision of adequate security in the jurisdiction of the original grant would not at present be sufficient ground for dispensation.[14] The Queensland Law Reform Commission[15] after a detailed

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9 *Administration of Estates Act 1971*, s 8 (see Appendix IV) and s 11 and *Non-Contentious Probate Rules 1954*, rr 38(1) and 41.

10 *Administration and Probate Act (Amendment) Act 1977*, s 4 amending *Administration and Probate Act 1958*, s 57.

11 *Administration Act 1976*, ss 5 and 14 amending *Administration Act 1903-1973*, ss 26 and 62.

12 Twenty-Second Report, relating to *Administration Bonds*.

13 *Administration Amendment Act 1979*, s 3 amending *Administration Act 1969*, s 6.

14 The Court has insisted that sureties be resident in and justify to assets within New South Wales: *Re Bance* (1890) 6 WN (NSW) 150; *Re Jolliffe* (1887) 4 WN (NSW) 81; *Re Kruttschnitt* (1941) 42 SR (NSW) 79; 59 WN (NSW) 40.

15 *Report on the Law Relating to Succession*, (No 22, 1978) para 51. The Succession Bill 1980 to give effect to the proposal in this Report has been introduced into Parliament.

examination of the matter has recommended that no only administration bonds but also sureties be abolished altogether.

The Commission believes that if adequate security was provided in the place of original grant within Australia to cover administration throughout Australia suitable arrangements would exist to protect interested parties. The Commission would welcome comment on the need for security at all, and if so, the form thereof.

(c) Revenue

That collection of fees and of state or territory death duties should be adequately provided for.

Commission's comment

No such duties are payable in the Australian Capital Territory and duties have now been abolished in respect of persons dying after certain dates in the Northern Territory, Queensland, Western Australia and South Australia. Federal Estate Duty has also been abolished. In Victoria and New South Wales such duties have been substantially reduced. The New South Wales government has announced plans to wholly abolish such duties. In addition in Victoria, Tasmania and Western Australia no obligation is imposed on the Court in respect of ensuring revenue protection even where succession duties are payable. This matter is further dealt with in Chapter 6.

(d) Notification of variations to grants

That proper provision should be made for notification of any revocation or alteration to the terms of any original grant and that any revocation or alteration be recorded in the Probate Office of the recognising or resealing jurisdiction.

Commission's comment

The British scheme of automatic recognition has not apparently found this a problem. The present Australian position as to this and other matters is set out in Appendix II. A

system of notification of the making, variation and revocation of grants to the courts of each other relevant Australian jurisdiction would be simple to introduce and operate, and would provide an effective means by which interested persons could make enquiry as to the position concerning the estate.

4.23 It is the tentative view of the Commission that the interests of potential applicants, beneficiaries and creditors would be adequately protected by a system of automatic recognition of Australian grants along the general lines of the United Kingdom provisions, provided the following conditions are met -

(a) First, that suitable uniform jurisdictional principles are adopted by each Australian jurisdiction to prevent conflicting claims to jurisdiction.

(b) Secondly, that provision is made to enable an interested party whatever his address to lodge a caveat, in the usual way, either in the state or territory of original jurisdiction[16] or in the caveator's local registry with a system of notification to the courts of other jurisdictions.[17]

(c) Thirdly, that suitable uniform rules are adopted to make provision for security for proper administration throughout Australia in cases of intestacy.

(d) Fourthly, that a uniform system is adopted whereby the making of original grants, and revocation or variation thereof, is notified by the court of original grant to the court of each Australian jurisdiction in which assets of the deceased are known or believed to be situated.

(e) Finally that suitable revenue protection arrangements are developed.

By adopting uniform provisions similar to the United Kingdom provisions it would seem that the position in respect of jurisdiction over non-resident executors and administrators would remain unchanged.

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16 Similarly to the New Zealand position: *Code of Civil Procedure Rules* 517 and 531K.

17 The Commission notes that in Malaysia a central register of caveats is kept with a system of notification by and to local registries of caveats registered.

4.24 Uniform jurisdictional principles are necessary to ensure that no court seeks to make excessive claims to jurisdiction. The United Kingdom system is based upon the domicile of the deceased within the jurisdiction. Whilst such a system represents a modification of the traditional Australian basis of jurisdiction as confirmed in *Lewis v Balshaw*, it nonetheless has the advantage of avoiding conflict as to the appropriate court of original grant.

4.25 For the same reason it provides a convenient means of establishing a court for the lodgment of caveats and the determination of disputes, as to entitlement to a grant or as to the validity and construction of a will.

4.26 One subsidiary question which arises is whether any system of automatic recognition should apply not only to original grants made by a court of another Australian state or territory, but also to any grant originally made elsewhere but resealed by such a court. Provided the principles, both jurisdictional and territorial, adopted in each state and territory are uniform and the same as those outlined in Chapters 2 and 8, the Commission cannot see any good reason why such resealing should not be so recognised.

4.27 The Commission is tentatively of the view that the time has come for Australia to adopt a system of automatic recognition of grants made within Australia. However, if that is not possible other alternatives arise. Should automatic recognition be granted, for example, where the estate concerns only personal property. Are either the Commonwealth Attorney General's 1963 proposals or the Draft Uniform Bill prepared for the Standing Committee of Attorneys General acceptable?

4.28 Failing uniformity should Western Australia act unilaterally in these matters? There seems little point in so doing. The number of applications for resealing in Western Australia is relatively small, due no doubt to the comparatively small population and the physical distance dividing the State from the other states and territories. The benefit to any state or territory in adopting a system of automatic recognition lies largely in the benefit to its citizens of obtaining recognition elsewhere. There would be little benefit to Western Australian residents in acting unilaterally.

CHAPTER 5
THE CONSEQUENCES - THE PROBLEM OF TESTATOR'S FAMILY MAINTENANCE LEGISLATION

5.1 Each Australian jurisdiction has enacted legislation of the *Testator's Family Maintenance Act* type, now in Western Australia contained in the *Inheritance (Family and Dependants Provision) Act 1972*.

5.2 By section 10 of that Act it is provided that:

> "Every provision made by an order shall, subject to this Act, operate and take effect either as if the same had been made by a codicil to the will of the deceased executed immediately before his death or, in the case of intestacy, as a modification of the applicable rules of distribution".

5.3 Provision is also made by section 15 for orders to be rescinded, suspended or reduced, and, by section 16, increased.

5.4 By section 14(4):

> "The Court, in every case in which an order is made or altered...shall 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 estate of the deceased, as the case may be, and for that purpose may require the production of the probate or letters of administration".

5.5 Similar provisions appear in the corresponding legislation of each other State and Territory,[1] except that Queensland has no equivalent to sections 10 and 14(4), and except that apart from Western Australia only Tasmania and Queensland confer power to increase a prior order for provision.

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[1] NSW: *Testator's Family Maintenance and Guardianship of Infants Act 1916-1977*, s.4(1), (2), s.6(4), (3).
Vic: *Administration and Probate Act 1958-1977*, s 97(4), (5), (3).
Qld: *Succession Acts Amendment Act 1968*, s 12 amending the *Succession Acts 1867-1943*, s 91.
SA: *Inheritance (Family Provision) Act 1972-1975*, ss 10, 9(5), (4).
Tas: *Testator's Family Maintenance Act 1912-1974*, s 9(3) , (5), (2).
ACT: *Family Provision Ordinance 1969-1978*, ss 16, 17(1), 18.
NT: *Family Provision Ordinance 1970-1979*, ss 16, 17(1), 18.

5.6 In each case the legislation is silent as to the jurisdictional principles embodied in the Act. The High Court of Australia has held[2] that an application may be brought under this legislation to vary a resealed probate or administration as if it were an original grant.

5.7 The courts have also settled certain principles as to the basis for the exercise of jurisdiction under the legislation. These may be summarised in the following terms[3] -

(a) a court has jurisdiction to hear an application for provision to be made out of immovable property situated within that state or territory, regardless of the domicile or residence of the deceased;

(b) a court does not have such jurisdiction in respect of immovable property situated outside that state or territory;

(c) a court has such jurisdiction in respect of movable property wherever situated if the testator died domiciled within the state or territory;

(d) a court does not have such jurisdiction in respect of movable property of a testator dying domiciled outside the state or territory, regardless of where the movables are situated.

In determining whether a court has jurisdiction upon one of the bases set out above, the place of residence or domicile of the applicant is irrelevant.

5.8 An unfortunate result of these rules is that in the case of an estate comprising either -

(a) immovable property in more than one state or territory; or

(b) immovable property in a state or territory which is not the place of domicile of the deceased and movable property within the state or territory of domicile

an applicant will be forced into making application in two or more states or territories if there is insufficient property in one state or territory to satisfy the claim.

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2 *Holmes v Permanent Trustee Co of NSW Ltd* (1932) 47 CLR 113.

3 D St L Kelly, *Testator's Family Maintenance and the Conflict of Laws* (1967) 41 ALJ 382, 383-4.

5.9 Even where a successful application is made which can be satisfied from assets within one jurisdiction the result may lead to injustice in imposing the burden of a successful claim upon certain beneficiaries only, depending on the fortuitous choice of court by the applicant.

5.10 One way to avoid these problems would be the enactment of uniform legislation providing for the court of domicile alone to have jurisdiction and for such jurisdiction to exist over the whole of the estate, movable wherever situated and immovable within Australia, applying the legislation of the place of domicile alone. This would not necessarily mean uniform legislation, but merely uniform agreement to vest jurisdiction in each case solely in the court of the deceased's last domicile. Uniform substantive provisions seem desirable in themselves, but not necessary for this purpose.

5.11 That is the United Kingdom position, and in the United Kingdom it is consistent with the 1971 legislation providing for automatic recognition within the United Kingdom of grants of representation made by the court of the domicile.

5.12 It would not provide for situations where the deceased died domiciled outside Australia leaving assets within Australia, or where the deceased died domiciled within Australia leaving immovable assets situated outside Australia. In such cases the normal rules might apply.

5.13 Usually a deceased will have immovable property only in the jurisdiction of his domicile. Probably only movable property will be situated elsewhere. Thus the court of the domicile will usually now have full jurisdictional powers. In those cases when it does not, and which now cause difficulty, the Commission is of the view that ideally jurisdiction under this type of legislation might be more appropriately vested solely in the court of domicile. Such a scheme would have the benefit that it would be consistent with the automatic recognition scheme tentatively suggested above.

5.14 The major difficulty confronting the concept of vesting jurisdiction solely in the court of the domicile, however, is the expense and inconvenience to which this would put litigants and witnesses. Against this must be balanced the saving of multiple proceedings and the injustices thereby created.

5.15 If the existing *Testator's Family Maintenance Act* principles of jurisdiction are to continue unaltered, either resealing of interstate grants of probate and of letters of administration will have to continue or a system will be required whereby the grant made by the court of another state or territory will be required to be delivered up to enable the notation thereon of any orders made by the court determining the Testator's Family Maintenance proceedings. Additionally, it would be desirable to give such orders effect as if they were orders of the court of original grant or, alternatively, to limit them to particular assets within the jurisdiction of the court making the order under the Testator's Family Maintenance legislation. Similarly the legislation makes the time limit for the bringing of applications calculable by reference to the date of grant. Provision would be required also in respect of this.

5.16 Tentatively, the Commission supports the introduction of legislation vesting sole jurisdiction in the court of domicile in conjunction with an automatic recognition of probate scheme. However, it would not be fatal to the scheme of automatic recognition of probate proposed herein if this were not done.

5.17 The existing *Testator's Family Maintenance Act* provisions are consistent with the proposals contained in the Draft Model Bill prepared by the Commonwealth Secretariat based on an expanded but simplified resealing scheme. They are also consistent with the proposals of the then Commonwealth Attorney General to the Law Council of Australia based on a system of resealing by registration.[4] They are of course also consistent with the proposals contained in section 88 of the Draft Uniform Bill prepared for the Standing Committee of Attorneys General in 1964.[5]

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4 Appendix V.

5 Appendix VI.

CHAPTER 6
THE CONSEQUENCES - THE PROBLEM OF SUCCESSION DUTIES - THE COLLECTION OF REVENUE

6.1 One matter which might give concern when considering uniform resealing legislation is the question of revenue collection. The present position in relation to Australian succession duties is that -

(i) No Federal duty is payable in respect of the estates of persons dying after 30 June 1979.

(ii) No Western Australian duty is payable in respect of the estates of persons dying after 31 December 1979.

(iii) No South Australian duty is payable in respect of the estates of persons dying after 31 December 1979.

(iv) No Northern Territory duty is payable in respect of the estates of persons dying after 30 June 1978.

(v) No Queensland duty is payable in respect of the estates of persons dying after 31 December 1976.

(vi) New South Wales duty has been reduced in respect of the estates of persons dying after 31 December 1978 and the Government has announced that such duties will be abolished in respect of the estates of persons dying after 31 December 1981.

(vii) In Victoria the incidence of duty has recently been lessened by, for example, abolition of duty on property passing to a surviving spouse or child.

(viii) Succession duties are not levied in the Australian Capital Territory.

(ix) In Tasmania duties are still levied.

6.2 The position is rendered simpler also because at least in Victoria, Tasmania and Western Australia the collection of revenue is not regarded as part of the function of the probate jurisdiction of the Supreme Court.[1]

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[1] Control over disposition of assets is exercised by the issue of certificates by the revenue authorities. Of course, in respect of land and other assets within its own territory each state and territory is in a position to protect its own revenue.

6.3 The 1963 proposals by the then Attorney General did not address this issue, other than to assert the necessity that "in all states and territories a procedure is enforced which protects the revenue by requiring that property cannot be dealt with until a certificate of the revenue officer is obtained".

6.4 The Draft Uniform Bill prepared for the Standing Committee of Attorneys General embodied a procedure which left the revenue collection position untouched, but did not abolish the need for resealing.

6.5 The 1971 United Kingdom precedent is of no assistance because the United Kingdom is a unitary state for revenue purposes.

6.6 The Commission tentatively proposes, therefore, 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 be required to file an inventory of all property, real and personal, of the deceased situated within Australia, and that the court then forward a copy to the revenue authority of each state and territory within which such property is situated. Each state and territory would then be able to protect its own revenue by appropriate legislation.

6.7 Another possible mechanism would be for each state and territory to enact legislation placing the persons to whom a grant or resealing is made in that jurisdiction under a duty to meet out of the estate all succession duties payable in the state or territory in which the property forming part of the deceased estate is situated and making such payment a debt due out of the deceased's estate.[2] Such provisions would ensure that states and territories in which succession duties are still levied are not disadvantaged by the proposed scheme of automatic recognition and may well benefit therefrom in revenue protection .

6.8 It is commonly provided in resealing statutes that succession duty must be paid, or at least secured, before resealing is effected.

For this purpose a certificate from the relevant authority is commonly required. The Commonwealth Secretariat's Draft Model Bill so provides. The Commission tentatively

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[2] Part VA of the ACT *Administration and Probate Ordinance 1929-1980* suitably amended might serve as a precedent. See Appendix VII.

supports such a provision - in those jurisdictions where it is still applicable - as being generally regarded as necessary in situations where resealing is to continue.

6.9 An alternative provision which might be adopted is suggested by the Sarawak *Administration of Estates Ordinance 1933*, apparently still in force, in which the following scheme of automatic recognition of overseas grants was adopted:

> "14. (1) Where a grant of probate or letters of administration...has not been obtained under this Ordinance, a grant of representation to the estate of such person obtained... in any part of the British Empire...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.
>
> (2) Such authentication shall be conditional upon payment of the Estate Duty under the Estate Duty Ordinance and the due fulfilment of such other conditions as are required in the case of a grant of probate or letters of administration, as the case may be, under this Ordinance.
>
> (3) The holder of a grant so authenticated shall have the same powers and be subject to the same liabilities and obligations as an executor or administrator under a grant of probate or letters of administration issued under this Ordinance".

6.10 The Commission seeks comment as to these tentative proposals.

CHAPTER 7
OTHER IMPLICATIONS

(a) The Validity of Wills

7.1 The Commission wishes to stress that the matters the subject of this Working Paper do not interfere with the principles upon which, within each state and territory, the courts exercise power to determine the validity or construction of wills and the principles upon which deceased estates are to be administered. Such matters are outside the terms of reference of the Commission and will not be affected by any proposals contained herein. If a system of automatic recognition of grants of probate were adopted, as here tentatively suggested, the system would however involve each state and territory in treating the grant of representation of each other state or territory as if it were its own, as is done in the United Kingdom by the 1971 Act. It is universally accepted in Australia, despite different regimes in relation to the formal validity of wills, that a will in relation to movables validly executed in conformity with the law in the place in which at the time of his death the testator was domiciled is to be treated as properly executed. In most states and territories the same applies also to wills dealing with immovables. In most jurisdictions a will can be treated as properly executed also on other criteria. Whilst it would be preferable to have one uniform set of criteria throughout Australia, this is not necessary to the Commission's proposals. In addition the actual criteria for the valid execution of a will in the various Australian jurisdictions are very similar, if not identical. Objections to the validity of a will may alternatively be based not on objections as to formal requirements for valid execution but on grounds of -

(a) lack of testamentary capacity;
(b) the existence of fraud, duress or undue influence;
(c) reasons of public policy.

The Commission is of the view that in these areas the comity and convenience of all Australians should permit each state and territory to recognise decisions of the courts of the other states and territories as to validity of wills based on the law of the last domicile of the deceased. The law, after all, in these areas is substantially common if not identical. Of course, there may be a few cases in which a will formally invalid if made in one state or territory would, under a scheme of automatic recognition, be recognised as valid in that state or

territory because it was valid in the state or territory of the deceased's last domicile but that is presently the case under the law of most states and territories.[1] If the will is invalid according to the law of the deceased's last domicile but valid in another state or territory that state or territory would retain capacity to make a grant on traditional lines limited to its own jurisdiction.

(b) Distribution on Intestacy and in Testate Succession

7.2 The scheme tentatively proposed in Chapter 4 would not affect questions of distribution on intestacy, which would as before, be governed by internal state and territory law. It would merely involve the acceptance of the appointment by the court of the deceased's last domicile of an administrator by other states and territories in which the deceased estate has assets. The law of the place in which immovables are situated governs not only their descent on intestacy, but whether the immovables can be devised and whether a will in relation to them has essential validity. For example in Queensland the existing position is that realty vests by law in the devisee in the case of testate succession. Thus also a testamentary disposition of land void in one jurisdiction as contravening the rule against perpetuities may be valid in another jurisdiction. The Commission accepts that courts in each state and territory should retain power to make grants limited to their own jurisdiction, to deal with, for example, partial intestacies caused by such vagaries of the law. But these will be few and far between. This power is, of course, also necessary in order to deal with other situations, such as that arising where no grant is sought in the jurisdiction of domicile, and is additional to the power to reseal overseas grants.

(c) Administration of Estates

7.3 The "undoubted proposition" applied by Australian courts is that the administration of an estate is to be carried out in accordance with the law of the country in which representation has been granted.[2]

7.4 Once administration is complete the personal representative holds the assets of the estate as trustee for the beneficiaries or next-of-kin. In the case of movables this is under the

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1 The Queensland Law Reform Commission's proposals in its *Report on the Law Relating to Succession* (No 22, 1978) also adopts this approach.

2 *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338, 342-3.

law of the deceased's domicile, and in case of immovables under the law of the place where the immovables are situated. Often, of course, there is difficulty in distinguishing administration from trusteeship, and the two may both exist simultaneously in relation to the one estate. The operation of a system such as that tentatively proposed would leave the position in these matters untouched. It would simply be necessary to adopt an equivalent provision to section 1(4) of the United Kingdom *Administration of Estates Act 1971*.[3]

(d) Passing of Accounts

7.5 The provisions relating to the passing of accounts presently applying in the Australian states and territories vary widely. A summary of them forms part of Appendix II. Further detail is contained in Appendix IX. The Commission's tentative view is that whilst uniform practice might be desirable, it would be sufficient if the executor or administrator was bound to comply with the requirements of the court of original grant leaving it to that court to inquire into the administration of the whole Australian estate and dealing with any claim for commission on the same basis. Alternatively the executor or administrator might be required to pass accounts and to make any claims for commission on a state or territory basis, obviously at increased cost and inconvenience.

7.6 The Commission's terms of reference do not require consideration of model uniform rules for the passing of accounts. It is not a matter which has concerned either the United Kingdom or the Commonwealth Secretariat.

(e) Small Estates

7.7 None of the proposals set out in this paper in any way affect the provisions contained in the legislation of various states and territories allowing small estates to be administered without the necessity of a grant of representation.

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3 Appendix IV.

CHAPTER 8
RESEALING OVERSEAS GRANTS

(a) Geographical limits to the resealing Australia of grants of representation made overseas

8.1 The legislation adopted in the various Australian states and territories to enable the resealing of foreign grants of representation,[1] although based on imperial precedents, contains major variations in relation to the countries whose grants of representation will be resealed.

8.2 Section 61 of the Western Australian Act provides that a grant of probate or administration granted by any court of competent jurisdiction in "any portion of Her Majesty's Dominions" may be resealed in Western Australia. The New South Wales *Wills, Probate and Administration Act 1898-1919*, section 107(1) contains a like provision.

8.3 The test is clearly that the grant is one made in a territory over which the Queen is the Head of State at the moment of resealing. Thus where a nation adopts Republican status, whether or not within the Commonwealth of Nations, it ceases to satisfy the definition. Commonwealth countries with their own Sovereign such as Malaysia are also excluded. The countries presently included are the Australian States and Territories, Bahamas, Barbados, Canada, Fiji, Grenada, Jamaica, Mauritius, New Zealand, Papua New Guinea, Solomon Islands, St Lucia, St Vincent, Tuvalu, the United Kingdom and those other territories which are "part of Her Majesty's Dominions" although not self-governing.[2]

8.4 The countries thus excluded therefore include some with a common law legal system outside the Commonwealth of Nations such as the United States of America, others formerly within the Commonwealth of Nations but no longer so such as Ireland, Pakistan and South

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1 See NSW: *Wills, Probate and Administration Act 1898-1979*, ss 107-110.
Vic: *Administration and Probate Act 1958-1977*, ss 80-89.
Qld: *British Probates Act 1898*, ss 1-7
SA: *Administration and Probate Act 1919-1980*, ss 17-20
WA: *Administration Act 1903-1980*, ss 61-62
Tas: *Administration and Probate Act 1935-1978*, ss 47A-53
ACT: *Administration and Probate Ordinance 1929-1980*, Part V
NT: *Administration and Probate Ordinance 1969-1979*, Part V
Christmas Island and Cocos (Keeling) Islands' law is that of Singapore. Norfolk Island law is that of the ACT.

2 A list of these is in footnote 8 to Appendix VIII. But even then there are doubts: for example, Brunei's status is a matter of doubt.

Africa, and others which remain within the Commonwealth of Nations such as Singapore and Malaysia.

8.5 Another anomaly is that some Commonwealth areas (for example, Malta, Mauritius and Quebec) have civil law systems and of these Mauritius and Quebec form part of "Her Majesty's Dominions".

8.6 The legislation clearly, of course, excludes many countries, both in Europe and elsewhere, from which large numbers of Australian residents have come, but which have never been part of the Commonwealth of Nations, and which do not have common law backgrounds.

8.7 The Queensland *British Probates Act l898*, sections 3 and 4 contains a similar provision which applies only in relation to those parts of "Her Majesty's Dominions" the subject of Orders in Council based on a reciprocity requirement. Section 3 provides:

> "When the Governor in Council is satisfied that the Legislature of any part of Her Majesty's Dominions has made adequate provision for the recognition in that part of probates and letters of administration granted by the Supreme Court [of Queensland], he may direct by Order in Council that this Act shall ...apply to that part of Her Majesty's Dominions....".

By Orders in Council the Act has apparently been applied to all the Australian states and territories and, in addition, to British Guiana, British New Guinea, Fiji, Hong Kong, New Zealand, Singapore, Straits Settlements, and United Kingdom. In relation to British Guiana, Singapore and Straits Settlements, however, these Orders in Council seem not now to be effective as these areas are no longer parts of "Her Majesty's Dominions".[3] British New Guinea is presumably now to be interpreted as Papua New Guinea.

8.8 By section 5 and section 2, the Act may also be extended by Orders in Council to apply to grants made by British Courts having jurisdiction out of Her Majesty's Dominions. This seems now to be an historical curiosity.[4]

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3 Save for those parts of "Straits Settlements" now Australian territory, ie Cocos (Keeling) Island and Christmas Island.

4 Footnote 8 below.

8.9 Quite apart from its uncertainties, the Queensland position is clearly more restrictive than that in Western Australia and New South Wales. The reason for the reciprocity requirement is obscure, except that for imperial or political reasons it appeared in the early British legislation. It seems to fulfil no real purpose in modern Australian legislation. It does however continue to appear in the United Kingdom *Colonial Probates Act*. The Commonwealth Secretariat proposes[5] that resealing should be granted irrespective of reciprocal territorial arrangements and the Commission agrees.

8.10 In Victoria, sections 80 and 81 of the *Administration and Probate Act 1958-1977* provide 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 to include all the other Australian States, the Northern Territory, New Zealand, Fiji and any other British colony or possession in Australasia existing in 1958 or thereafter created, which the Governor in Council declares to be an Australasian State. Apparently the Australian Capital Territory and Norfolk Island have been so declared. The meaning of "British colony or possession" is by no means clear, and neither is the meaning of " Australasia". Are all Australian and New Zealand dependencies included?

8.11 By section 88 the Governor in Council may also proclaim certain countries to be countries whose grants or orders, issued by courts of competent jurisdiction, correspond to grants of probate or letter of administration issued by the Supreme Court of Victoria. The "countries" so proclaimed to date are apparently the Canadian Provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Saskatchewan and also Gibraltar, Guyana, Hong Kong, Kenya, Malaysia, Papua New Guinea and Singapore. Thus the power of proclamation is not limited to Commonwealth countries or territories, although only Commonwealth "countries" have to date been proclaimed.

8.12 In South Australia, section 17 of the *Administration and Probate Act 1919-1980* 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

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5 Appendix III.

…declare to be Australasian States". No such proclamations have apparently been made. The reference in legislation to" Australasia" is of course vague and confusing. "United Kingdom" is defined to mean "Great Britain and Ireland" and includes the Channel Islands. South Australia alone permits the resealing of Irish grants.

8.13 By section 19 "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. This is presumably the provision used to enable resealing of grants made in the various Australian territories, as well as elsewhere. 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".[6] 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.

8.14 In Tasmania there is yet further variation. The *Administration and Probate Act 1935-1978*, section 48 permits the resealing of a grant of representation made by "any court of competent jurisdiction in a State or Territory of the Commonwealth or a reciprocating country". By section 47A(2) a "reciprocating country" is defined to include the United Kingdom, New Zealand, Fiji, and any other country proclaimed as a reciprocating country. The Governor on being satisfied that the laws of any country make adequate provision for the recognition in that country of probates and letters of administration granted by the Supreme Court of Tasmania may proclaim that country to be a reciprocating country. "Country" includes any territory or other jurisdiction. Before 1978, only a "British possession " could be declared to be a reciprocating country. Proclamations were made in respect of British Columbia, Ontario, Papua New Guinea, Hong Kong, British Guiana (now Guyana), Straits Settlements, Federated Malay States and Sarawak (which together approximate but are not identical with Singapore and Malaysia) and Northern Rhodesia (now Zambia). It is therefore

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6 *Re Campbell* [1920] 1 Ch 35 but see Roberts-Wray: *Commonwealth and Colonial Law*, 78 dubitante.

doubtful whether the proclamations made in respect of British Guiana, Straits Settlements, Federated Malay States, Sarawak and Northern Rhodesia remain effective. Proclamations made in respect of the Union of South Africa and the Irish Free State prior to 1978 seem to have been invalidated by constitutional developments in those countries prior to 1978.

8.15 The Australian Capital Territory *Administration and Probate Ordinance 1929-1980*, by sections 80-82 provides for resealing of any grant made by a court of competent jurisdiction "in a State or Territory of the Commonwealth or in a Commonwealth country". The latter expression is not defined. A list of Commonwealth countries which the Commission believes to be up to date is set out in the Australian Capital Territory column of Appendix VIII. There appears to be doubt however as to the meaning of the expression "Commonwealth country".[7] Are colonies such as Hong Kong included?

8.16 The Northern Territory *Administration and Probate Ordinance 1969-1979*, section 111 provides for resealing of grants made by "a court of competent jurisdiction in a Commonwealth country" but by section 6 and the Fifth Schedule defines these countries and includes their colonies, overseas territories or protectorates and territories for the international relations of which the specified countries are responsible. Even then questions arise. Pakistan is included but is no longer part of the Commonwealth. Bangladesh is not included, but formed part of the original Pakistan and forms part of the Commonwealth. Which is now included? Furthermore, the list is now incomplete as other territories have attained independence.

8.17 A table setting out the present position arising pursuant to these various provisions forms Appendix VIII.

(b) The desirability of uniformity

8.18 The Commission suggests that it would be desirable to have a uniform list for identifying those countries, states and territories whose grants of representation are capable of resealing within Australia and that the list be as wide as is properly possible. Clearly the present position is confusing, inconsistent and in need of revision. Similar deficiencies exist in the legislation of many other Commonwealth countries and territories.

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7 Roberts-Wray, *Commonwealth and Colonial Law*, 16.

8.19 The Draft Model Bill prepared by the Commonwealth Secretariat set out in Appendix III attempts to overcome these deficiencies by proposing that resealing be made available to any grant of probate or letters of administration made by a court of competent jurisdiction "in any part of the Commonwealth or in any other country". The words and phrases "court", "personal representative", "probate and letters of administration" and references to "the making by a court of a grant of probate or letters of administration" are all defined in the widest possible way.

8.20 The Commission seeks comment on the acceptability of these definitions as well as on the principle of extending resealing facilities to grants made in countries beyond those to whom traditionally such facilities have been extended. In particular, the Commission notes that the recent legislative trends in Australia have been to the widening of the countries to which such facilities are granted. The danger in listing specified countries or even of referring to such concepts as "the Commonwealth " is that events require revision of the list from time to time. Changes of name or boundaries and the making and breaking up of federations add confusion. The history of Zimbabwe is an example. In addition the Commonwealth of Nations as presently constituted clearly includes some civil law systems and excludes some common law ones. The Commission sees little value in reciprocity provisions.

(c) The New Zealand position

8.21 In New Zealand section 71 of the *Administration Act 1969* permits resealing of a grant made -

(a) by any competent court in any Commonwealth country (other than New Zealand) or in the Republic of Ireland; or

(b) by any court of any Commonwealth country (other than New Zealand) which at the date of the grant has jurisdiction out of the Commonwealth in pursuance of an Order in Council;[8] or

[8] This provision found in similar form in the Queensland legislation seems now to be a historical curiosity. Certain British courts were empowered, usually under treaty arrangements, to exercise such powers, but the last of such Orders in Council apparently ceased to operate with the cessation of certain British arrangements in the Persian Gulf in the early 1970's.

(c) by any competent court of any other country to which by Order in Council the section is declared to apply.[9]

8.22 The term "Commonwealth country" is defined by section 2 as meaning "a country that is a member of the Commonwealth; and includes every territory for whose international relations the Government of that country is responsible". By the *Commonwealth Countries Act 1977* a list of Commonwealth countries is officially established subject to amendment by Order in Council.

8.23 In respect of both these matters the New Zealand position is more liberal than most Australian positions, since only South Australia, Tasmania and Victoria amongst the Australian jurisdictions contemplate inclusion of non-Commonwealth areas.

8.24 It may be both possible and desirable for Australian states and territories and New Zealand to adopt uniform legislation in these matters and for the Australian position to be at least as liberal as that in New Zealand. However, the New Zealand provisions suffer the disadvantage that references to the "Commonwealth" need constant revision and use of Orders in Council is a clumsy mechanism which the South Australian and Commonwealth Secretariat provisions avoid. Section 71 (b) seems now to fulfil no useful purpose.[10]

(d) Conclusion

8.25 The Commission tentatively supports uniform provisions drawn on the lines of the Commonwealth Secretariat's draft proposals subject to modifications, so as to place the final decision with the Registrar as is done in South Australia. An appropriate provision might read:

> "Where a grant of administration of the estate of any deceased person has been made by any court of competent jurisdiction in any part of the Commonwealth or elsewhere and the Registrar is satisfied that in the country, state or territory in which the grant was made the grant corresponds to a grant of probate of a will or to a grant of letters of

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9 The Commission understands there are no countries to which such an Order has been made.

10 The United Kingdom approach is unsatisfactory for Australian purposes. Statutory provisions have dealt with constitutional changes on an individual, country by country, basis as constitutional changes have occurred: South Africa is included, Ireland not, and Zimbabwe has recently been added to the list with provision also that grants issued by courts in Southern Rhodesia, irrespective of the date of issue, may once more be resealed.

administration in this State an application may be made under this section for the resealing of the grant of administration".

CHAPTER 9
THE COMMONWEALTH SECRETARIAT'S PROPOSALS

9.1 The Commission's terms of reference do not extend to the development of uniform principles and practice for resealing grants of representation within the Commonwealth of Nations. However the Commission has been greatly assisted by, and is appreciative of, the work of the Commonwealth Secretariat in this area.

9.2 The Commission would not wish, unnecessarily, to recommend any steps which might be inconsistent with the development of uniform principles and practice within the Commonwealth of Nations.

9.3 The Commission has commented throughout this paper, and especially in Chapters 2, 3 and 8, on the draft proposals prepared for the consideration of Commonwealth countries contained in Appendix III.

9.4 Quite apart from any scheme of automatic recognition of grants of representation made by Australian courts of the deceased's last domicile, Australian courts will need to retain provisions for the resealing of overseas grants. The Commission seeks comment as to the extent to which the Commonwealth Secretariat's proposals for uniform resealing legislation provide a satisfactory basis for uniform Australian resealing legislation.

CHAPTER 10
QUESTIONS AT ISSUE

10.1 The Commission would welcome comment, with reasons wherever possible, on any of the issues arising out of its terms of reference and in particular on -

(1) What jurisdictional principles should be adopted in Australian resealing legislation.

(paragraphs 2.1 to 2.33)

(2) Should property, real or personal, within the resealing jurisdiction be required?

(paragraphs 2.4 to 2.15)

(3) Should the resealing implications as to jurisdiction resulting from *Lewis v Balshaw* (1935) 54 CLR 188 be replaced by provisions similar to those adopted by United Kingdom Non-Contentious Probate Rule 29?

(paragraphs 2.16 to 2.25)

(4) Should Australian states and territories uniformly adopt a provision similar to that set out in paragraph 2.26?

(paragraphs 2.26 to 2.28)

(5) Should uniform provision be adopted for the various matters set out in paragraph 2.33?

(paragraphs 2.31 to 2.33)

(6) Should uniform resealing procedures be adopted throughout Australia, and, if so, should these conform to the guidelines set out in paragraph 3.7?

(paragraphs 3.1 to 3.8)

(7) Whether the Australian states and territories should adopt a uniform system of automatic recognition of grants of representation made by the court of another Australian state or territory being the court of the deceased's last domicile?

(paragraphs 4.1 to 4.27)

(8) If so, what safeguards are required to protect -

(a) other possible claimants for a grant;

(b) beneficiaries;

(c) creditors?

(9) Are the following safeguards necessary and sufficient -

> First, suitable uniform jurisdictional principles to prevent conflicting claims to jurisdiction.
>
> Secondly, provision to enable an interested party whatever his address to lodge a caveat, in the usual way, in the state or territory of original jurisdiction, or in the local registry.
>
> Thirdly, suitable uniform rules to make provision for security for proper administration throughout Australia in cases of intestacy.
>
> Fourthly, a uniform system whereby the making of original grants, and revocation or variation thereof, is notified by the court of original grant to the court of each Australian jurisdiction in which assets of the deceased are known or believed to be situated?

(paragraph 4.22)

(10) If a uniform system is not adopted, should Western Australia act alone?

(paragraph 4.28)

(11) Would such a scheme be consistent with existing *Testator's Family Maintenance Act* or *Inheritance (Family and Dependants Provision) Act* legislation?

(paragraphs 5.1 to 5.17)

(12) What suitable revenue protection arrangements should be adopted if such a scheme were adopted?

(paragraphs 6.1 to 6.10)

(13) Should uniform provision be made throughout Australia as to the countries and territories overseas whose grants may be resealed in Australia? If so, what criteria should be uniformly adopted?

(paragraphs 8.1 to 8.25)

(14) To what extent does the Draft Model Bill prepared by the Commonwealth Secretariat provide a satisfactory basis for Australian uniform resealing legislation, other than the situations in which a scheme of automatic recognition might operate?

(paragraphs 9.1 to 9.4)

APPENDIX I

(see Chapter 2, especially 2.4 to 2.15 and 2.31 to 2.33)

TABLE OF PRESENT AUSTRALIAN JURISDICTIONAL REQUIREMENTS FOR RESEALING

	NSW	QLD	SA	TAS	VIC	WA	ACT	NT
1. Is resealing possible only if the deceased left property within the resealing state or territory?	Yes, if ss 40 and 107(s) and RSC Pt 78 r 28(1)(a) are strictly interpreted but see Hastings & Weir, *Probate Law & Practice* 2nd ed., 310	Yes, unless court is shown other good reason for resealing. See *Re Bowes* 1963 QWN 35	Yes, s 5, r 83 and form 20	Yes, s 48(1) expressly as to resealing	Yes, s 81(1) expressly as to resealing	Yes, s 6 so requires for original grants and is constructed impliedly as applying to reseals although s 61 does not expressly so require	No. s 9	No. s 14(1), (2)
2. Must deceased have been domiciled in the jurisdiction in which the original grant was made?	No, but where it appears that the deceased was domiciled out of NSW, the Court may require evidence of domicile. RSC Pt 78 r 12. *In re Lambe* (1972) 2 NSWLR 273.	O 71 rr 67 & 73. In the absence of such a domicile link, the grant will only be sealed, if it is such as the Supreme Court of Qld would have granted, ie, if the applicant is the person entitled to the primary grant Qld Note: *Re Prendergast* 1902 QWN 78	r 87. In the absence of such a domicile link, the grant will only be sealed if it is such as the Supreme Court of SA would have granted. Note: Appendix IX Part 8 as to grants to a trust company in another jurisdiction and as to applications by an executor of an executor	In the absence of such a domicile link, the grant will only be sealed if it is such as the Supreme Court of Tas would have granted: r 50	No	No	The court or registrar must make a finding as to domicile s 8C	No

3. Can an order in favour of a public trustee, a curator or other similar person of another jurisdiction to collect and minister an estate be resealed?	Yes. As in Tas. See *In Estate of Williams* 1914 VLR 417. s 110 relieves such a person from giving security – *In the Will of Constant* (1925) 42 WM (NSW) 12	No. Certain Qld trustee companies are authorised to act as attorneys to obtain reseals in Qld of foreign grants – s 11 *Trustee Companies Act 1968*.	Yes if the order is in the nature of a grant.	Yes. The Act and Rules are silent but as a matter of interpretation this is regarded as permissive.	As in Tas if the order is under the seal of the Court.	Yes, s 3 "administration"	Yes[1] ss 80 (1) & 83(a)	Yes[1] ss 111(1) & 114(a)
4. Can an order in favour of an executor by representation be resealed?	Yes s 107 (4)	No	Yes *Drummond v Registrar of Probates*[2]	Yess ss 47A & 48(1)	Yes ss 80 & 81(1)	No	Yes s 80(1)	Yes s 111(1)
5. Can an order in favour of a person authorised by power of attorney be resealed?	Yes S 107(1). Attorney must swear he has received no notice of revocation – RSC Pt 78 r 28 & Form 106	Yes O 71 r 65. A person lawfully authorised by executor or administrator may apply	Yes r 82(b)	Yes and attorney must swear power has not been revoked s 48(1)(a). Power of attorney must be registered	Yes and attorney must swear power has not been revoked s 81(1)(b)	Yes s 61(1)	Yes s 80(1)	Yes s 111(1)

[1] In the case of a public trustee, it is sufficient to produce an exemplification of probate: ACT *Administration and Probate Ordinance*, s 80(5) and NT *Administration and Probate Ordinance*, s 111(7)

[2] (1918) 25 CLR 318.

6. When resealed, does the probate or administration have the same force effect and operation as if such probate or administration had been originally granted by the Court?	Yes[3] s 107 (2)	Yes s 4(1)	Yes s 17	Yes[4] s 48(2)	Yes[4] s 81(2)	Yes[3] s 61(2)	Yes s 80(2) (a) & (3)	Yes s 111(4) & (5)
7. Does the legislation expressly define responsibility of persons acting under Power of Attorney?	No but note s 107(2)	No	No but note s 17. However, r 93 provides attorney is liable to file accounts to render particulars and notices of succession and to pay the fees and duties	Yes s 48(2)	Yes s 81(3)	No, but note s 61(2) and implication from Rules 8(vii) & 9 (vii)	Yes s 80(2) (b)	Yes s 111(4) (b) & (5)
8. Can letters of administration granted for special or limited purposes or with the Will annexed be resealed?	Yes s 107 (1) & (3)	Yes O 71 r 76	Yes ss 17 & 4	Yes ss 48 & 3	Yes ss 81 & 5	Yes ss 61 (1) & (3)	Yes ss 80 & 5	Yes ss 111 & 6

[3] The New South Wales and Western Australian Acts also provide that every executor or administrator making application for a reseal if deemed to be a resident in New South Wales and Western Australia respectively: ss 97(1) and 53(1) respectively.

[4] The Tasmanian and Victoria Acts also provide that upon a reseal, the executor, administrator or attorney is deemed for every purpose to be the executor or administrator of the estate within the receiving state or territory: ss 52 and 85 respectively.

9. What provision is made for an election by a public trustee or Curator or trustee company to administer a small estate?	By s 18A *Public Trustee Act 1913* the Public Trustee may elect to administer an estate not exceeding $15,000. This now applies in respect of authorised trustee companies. See s 15A *Trustees Companies Act 1964-1979*	By s 12(1) *Trustee Companies Act 1968* a trustee company may elect to administer an estate not exceeding $1,000 in Qld. By s 30 *Public Trustee Act 1978* the Public Trustee may elect to administer an estate not exceeding $20,000 gross value in Qld	No	S 20 *Public Trust Office Act 1930 – 1977* provides for Public Trustee to elect to administer estates not exceeding in value $10,000	S 17 *Public Trustee Act 1958* permits the Public Trustee to elect to administer an estate not exceeding in gross value in Victoria $10,000	S 14 *Public Trustee Act 1941-1978* permits the Public Trustee to elect to administer an estate not exceeding in gross value in WA $10,000	S 87B *Administration and Probate Ord 1969* provides for the Curator of Intestate Estates to administer estates not exceeding $500 without filing an election. S 87B provides for the Curator to file election to administer estates not exceeding in gross value in ACT $2,000	The Public Trustee may file election to administer estates not exceeding a value of $15,000: s 53 *Public Trustee Act 1979*

APPENDIX II

(see Chapter 2, especially 2.31 and 2.33, Chapter 3, Chapter 4 especially 4.20 to 4.26 and Chapter 7 especially 7.5 and 7.6)

TABLE OF PRESENT AUSTRALIAN PROCEDURAL PROVISIONS

	NSW	QLD	SA	TAS	VIC	WA	ACT	NT
A. **WHO MAY MAKE THE APPLICATION?**								
1. A legal practitioner authorised in writing to apply on behalf of the executor or administrator	No	Yes O 71 r 65	Yes [1] r 82(c) of Part II	Yes (if authorised in writing to act as a proctor, the memo in writing being filed at the Court, but these requirements of writing and filing may be waived in case of Tasmanian solicitors)	Yes (verbal authorisation would be sufficient – s 81)	No	Yes O 72 r 5(2)	Yes O 69 r 5 (2)

[1] Where a practitioner authorised in writing applies, instead of an oath, the Registrar may accept a certificate from the practitioner certifying to the matters set out in r 83(2). The practitioner has the same liabilities as an attorney does under r 93.

2. In the case of a corporation being the executor, administrator or attorney, by the manager acting manager, assistant manager or secretary of the corporation duly authorised for the purpose.	(a) By a person under power of Attorney – s 107(1) (b) Where the attorney or legal personal representative is a local trustee company by one of the designated officers – ss 9, 13 & 31 Trustee Companies Act 1964. (c) Where the corporation applies direct – s.107(1) similar to (b) in practice	Yes O 71 r 65 & Form 387	Yes r 82(d) of Part II	A corporation may only apply by a person resident in Tasmania acting under power of attorney	Yes – application may be by an officer of the company or a solicitor or by a person under power of attorney	The corporation can either appoint a person in WA to apply as its Attorney or apply direct	The practice is that a corporation must apply by a solicitor. The *Trustee Companies Ordinance 1947* seems to provide that a manager or director may act	In practice the corporation appoints a solicitor to obtain sealing in his own name on its behalf
B. **CAVEATS** 3. Can a caveat (having the same effect as a caveat against the granting of probate or administration) be lodged against the resealing of a probate or letters of admin-istration?	Yes RSC Pt 78 r 61	Yes O 71 rr 79 & 51-64	Not expressly. Provision made in practice	Yes s 49(2)	Yes s 82.	Yes s 63(1)	Yes s 81, O 72 rr 52-58	Yes s 112, O 69 rr 49-60, Form 12

C. **SECURITY**								
4. Is an administration bond required as if the administration had been originally granted by the Court?	Yes s 108(2). There is power for the Court to dispense with the bond. Also see s 110.	Yes (but if sufficient security is given in the Court which made the grant the bond may be dispenses with – *Probate Act 1867*, ss 36-38 O 71 r 68)	Yes[2] s 18(1)	Yes s 50(2). There is no power to dispense with a bond. A local surety is required on the bond of a non-resident administrator	No Administration bonds have been abolished in favour of guarantees, which are necessary in specified cases rr 23-26 Form 3	No As in Vic. s 26 rr 27, 27A Forms 2, 2A	Yes s 82(2) O 72 rr 30-33, but there is power to vary the bond or sureties thereto. s 16, O 72 rr 3(2), 19	Yes s 113(2), O 69 rr 29-30, but there is power to vary the bond or sureties thereto s 23, O 69 r 3(2)
5. May the Court or Registrar require sureties to guarantee any loss suffered by any person interested in the administration of the estate in the receiving State or Territory in consequence of a breach of duty by the administrator?	No	No	No	No	Yes but not where the grant was for the use or benefit of Her Majesty or to any person, body corporate or holder of an office in any place outside Vic specially exempted by any Act or by the rules made under s 89 – s 84(4)	Yes ss 62 & 5 & r 4	No	No

[2] If the proper officer of the court which made the original grant certified that security has been given covering the property to which the reseal will relate, a judge may dispense with a bond: r 85 of Part II. There is also power to dispense with a bond in the case of an original grant.

6. Can the Court require that security be given for debts due to creditors?	Yes provided the debts are "matters or claims" in NSW – s 107(3). In practice, security is never required of an executor and, in the case of an administrator, the bond as required by s 108(2) and RSC Pt 78 r 28(2) in the full value of NSW estate is sufficient. Note the discretion to reduce – RSC Pt 78 r 25(6), (7)	Yes[3] provided the creditors reside in Qld – s 4(3)	No	Yes provided the creditors reside in Tas – s 51	Not expressly but see question re security generally above – r 23	Not expressly, but s 26(4) & r 27(6) inherently seems to require or at least allow this to be taken into account in cases of guarantees required in case of intestacy	Yes s 80(4). "The appellant may be required to give security for the proper administration of the estate to which it relates"	Yes s 111(6). As in ACT
7. Can the Court require that security be given for the protection of the interests of beneficiaries or next of kin?	Yes but only in respect of matters or claims in NSW – s 107(3)	Yes s 4(3)	No	No	Not expressly but see question re security generally above – r 23	No See previous question	Yes s 80(4) as above	Yes s 111 (6). As above

[3] A creditor, beneficiary or next of kin desiring to obtain an order for security under s 4(3) of the Act may lodge a caveat: O 71 rr 69 & 70.

D.**SUCCESSION DUTIES** 8. Must the duties which would have been payable if the grant had originally been made by the receiving Court be paid?	Yes In addition the same stamp and other duties must be paid s 108(1). A sworn copy of the statement of assets and liabilities must also be filed with the Court in duplicate – RSC Pt 78, r 28(1)(c)	No[4] but a certificate from the Commissioner of Stamp Duties that adequate security has been given in respect of estate liable for duty in Queensland must be filed – s 4(2)	Yes in respect of the estates of persons dying prior to 1/1/80	Yes s 50(1). Also a sworn copy of a statement of assets & liabilities must be filed – r 63(1). But grant of resealing is not dependent upon prior payment of duty.	No	No[5]	Yes s 82(1) Also see ss 83A, 83B[6]	Yes in respect of the estates of persons dying prior to 1/7/78 – s 113 (1)
E. **REGISTRAR** 9. Can the sealing be done by the Registrar without the order of a Judge?	Yes RSC Pt 78 R 5(1)(a)	Yes O 71 r 65 except in the case of a special limited or temporary grant O 71 r 76	Yes – r 97 of Pt II) except in the case of a special limited or temporary grant r 89	Yes except in the case of a special limited or temporary grant – r 53	Yes	Yes ss 61 & 5, & r 4	Yes except where a caveat has been lodged[7] – s 80	Yes except where a caveat has been lodged or it is doubtful whether the grant should be sealed – s 111(3)

4 No duty, is payable on "successions" which vest in possession on or after 1 January 1977.

5 Death duty has been abolished in WA in respect of the estates of persons dying after 31 December 1979. In other cases except where the Master otherwise directs, a grant of administration shall not be resealed until the estate to which the administration relates has been assessed for duty: s 29(2).

6 There is now no Federal Estate Duty levied on deceased estates. The Commission knows of no provisions which barred resealing until such duties were paid.

7 In the ACT, the Registrar may at any time refer an application to reseal to the Court and where this occurs the reseal may not be effected except in accordance with the order of the Court: s 80(1B).

F. **PROCEDURAL VARIATIONS**

10. Must notice of intention to apply for a reseal be advertised?	Yes[8] in one Sydney daily newspaper & in a paper published & circulating in the district where he resided if more than 50 kms from Sydney but within NSW – s 109 & RSC Pt 78 r 10(1), r 28(1)(b)(i) & Form 98	No, but in special circumstances, Registrar may require notice to be advertised in the Gazette & two newspapers each being newspapers published at intervals not exceeding 7 days – O 65 rr 66 & 3	Not unless the Registrar so requires in which case the notice must be advertised at least 8 days before the application – r 84 of Pt II	Yes in the Government Gasette and 2 papers published in different parts of the State – s 49	Yes in one of the daily Melbourne newspapers – s 83 & rr 4, 9 & 1	No	Yes in a paper published & circulating in the ACT s 82(3)	Yes,[9] in a paper printed & published in Darwin & in a paper printed & published in Alice Springs – s 113(3)
11. By what document is the application commenced?	By summons – RSC Pt 78 rr 7 & 8	A request or other formal application is not necessary – O 71 r 65. Affidavit of application – Form 387	By lodging a grant, the oath in the prescribed form (Form 20) and in the case of administration where a bond is required, a bond in the prescribed form (Forms 23 & 24)	By filing the necessary documents in the Registry. No formal originating process is required	By lodging as with a normal application for an original grant	By motion ex parte to the Master in Chambers – rr 6(i) & 39 (1)	By motion made ex parte unless otherwise ordered – O 72 r 5(1)	By motion ex parte unless otherwise ordered – O 69 r 4(1) In practice by formal application

8 Where it is intended to apply for dispensing with an administration bond, or with one or both of the sureties or for reduction of the penalty of the bond, the notice must require creditors to send their claims to the applicant's solicitors, or when applicable, their agents: Pt 78 r 10(3).

9 In addition to giving notice of the intended application, the notice must set out an address at which notices may be served. Where reduction of or dispensation with the administration bond is to be requested, the notice must require creditors to send their claims to the solicitor making the application: O 69 r 3 and Form 3.

12. Does executor or administrator not resident within the State have to file an address for service within the resealing State or Territory?	Yes – s 97(2) & RSC Pt 78 r 8(2)	Yes[10] not more than 10 kms from the Registry – O2 r 9	No. See Appendix IX	No, but only a solicitor in Tasmania or an executor administrator or attorney acting in person and residing in Tas could lodge the application	No	Yes, within Western Australia – r 14	Yes, within the city area – s 69(2)	Yes, not more than 3 miles from the Supreme Court
13. Must list of creditor of estate be filed before resealing?	In the case of an application to reseal letters of administration applicant must swear that they are as set out in the statement of assets & liabilities (Pt 78 r 28 & Form 106) but only as to creditors in NSW	Yes – O 71 r 67 – in applicant's affidavit	No	No	No	Yes except where the applicant is the Public Trustee or either of the statutory trustee companies or the requirement is waived – r 9B	No	No

10 There are Supreme Court registries outside Brisbane: *Supreme Court Act 1921*, s 6.

14. Does an inventory of the real and personal estate of the deceased have to be lodged?	No. Section 85(1) refers to an inventory but the rules are silent. In practice the duplicate sworn statement of assets and liabilities Form D serves as an inventory Pt 78 r 29(1)(c)	No, but value of real and personal estate to be sworn to when application made relating to administration: O 71 r 67 & Form 387	Yes Rules 82 & 83 of Pt II & Form 20	Yes, Personal representative to lodge an inventory when lawfully required to do so – s 26	Yes, the inventory of Vic assets only is set out in the applicant's affidavit	Yes unless the applicant is the Public Trustee or either of the statutory trustee companies. Also in case of letters of administration if death before 1/1/80, if guarantee required under r 27(a) or (d). If death after 1/1/80 a list giving brief details and valuation will be required	Yes within 3 months of the reseal unless the Court or Registrar makes an order dispensing – ss 80(2) & 58 & O 72 rr 51, 37	Yes within 1 mth of the reseal ss 111(4) & 89(1) & O 69 r 34. Instead of filing an inventory, the personal representative may file a copy of the statement complying with s 9 of *Succession Duties Act 1892* (SA): s 89(4)[11]
15. Does the executor or administrator have to pass accounts?.	No s 85 & Pt 78 rr 71-87 only requires filing. An executor or administrator need only pass accounts – a) to obtain his release under s 85(3) b) if he seeks commission c) if the court so orders under s	No unless a beneficiary requires it to be done or executor or administrator wants commission – SCR O 73 rr 1- 9	Where grant resealed is an administration, within 6 mths of reseal (or whenever ordered by the Court so to do) administrator must deliver statement & account to Public Trustee: ss 17, 56 & 31. Public Trustee may	No unless he wishes to be released from all claims on him as executor or administrator – s 56. But the Court may require the passing of accounts – s 64	15 mths after the reseal an interested party may require the executor or administrator to deposit an account in the prescribed form in the office of the Registrar: r 28. The Court can in an administration action require	Yes s 43(1) & r 37. In practice it appears that accounts are only passed if the executor requires commission or a beneficiary insists	Yes within 12 mths of the reseal unless the Court or Registrar makes an order dispensing with this requirement – ss 80(2) & 58, & O 72 rr 37-44 & 51	Accounts to be filed within 12 mths of the reseal and from time to time thereafter as Registrar directs: ss 111(4) & 89(1) & O 69 rr 35-37. Court or Registrar may extend the 12 mths. Executor or administrator does not have to

[11] If the statement is approved by the Commissioner with alterations, the personal representative must file a copy of the statement as so approved: s 89(4).

	85(2) on application of an interested party		extend the 6 mths: s 56 If executor or administrator wishes to obtain commission he must file his accounts with the Master: s 70 & rr 15-23 & Pt 3		the passing of accounts			proceed with passing accounts unless he wishes to do so or to apply for commission: ss 111(4) 89(1) & 102 (2) & O 69 r 37
16. Must the probate or administration lodged for sealing include a copy of any testamentary papers to which the grant relates or be accompanied by a copy thereof certified as correct by or under the authority of the Court by which the grant was made?	All relevant original documents must be produced Pt 78 r 28(4)	Yes O 71 r 74	Yes r 88(1) or Pt II	It must include copies of all testamentary papers admitted to probate: r 51	A certified copy of the will must be filed	Yes r 43	Yes – the documents attached to the grant originally made must be attached to the application for resealing	Yes – a copy only of the testamentary writings is required together with the original grant

17. Must a copy of the probate or administration be deposited with the Registrar?	Yes – a certified copy – Pt 78 r 28(3)	Yes s 4(1)	Yes [12] s 17	Yes a verified copy: s 81(1)	Yes a verified copy: s 81(1)	Yes [13]	Yes s 80(1)	Yes s 111(1)
18. Is it sufficient to produce an exemplification of the probate or administration purporting to be under the seal of a Court as in the opinion of the Court is sufficient?	Yes ss 107 & 3	No – but a sealed duplicate or a certified copy are sufficient: s 4 (4)	Yes ss 17 & 20	Yes ss 48 & 3	Yes ss 80 & 81 A certified copy is also sufficient	Yes ss 61& 3	Yes ss 80 & 5	Yes ss 111 & 6
19. Must the applicant's affidavit annex certified copies of any relevant documents?	Yes Pt 78 & 28 (1)(a)(v)	No – but the actual letter or certificate of authority to apply must be exhibited	No	No but a verified copy of the power of attorney must be deposited with the application: s 48(1)	No but a verified copy is lodged: see s 81(1) (b)	No	No	No
20. Must the applicant's affidavit set out particulars of the persons beneficially entitled under the grant sought to be sealed?	Yes Pt 78 r 28 (1)(a)(iv)	No	No	No but the accompanying affidavit of assets and liabilities must do so	No	No	No but in an administration the affidavit must set out the relatives or next of kin surviving the deceased, so far as is material – O 72 r 14(3)	No as in ACT – O 69 r 16(f)

[12] Two copies of the grant and testamentary papers must be lodged. Unless otherwise directed by the Registrar, these must be photographic copies made in the Registry: rr 88(2) and (3) of Part II.

[13] Unless otherwise directed by the Master, the copy to be lodged is to be a photographic copy made in the Registry: rr 43(2) and (3)

21. In the case of resealing of letters of administration, must applicant swear that he is not bankrupt, and has not assigned or encumbered his interest (if any) in the estate?	Yes Pt 78 r 28(1)(a)(vi)	No	No	No	No	No	No	No
22. Must applicant swear he is over 18?	Yes Pt 78 r 28 28(1)(a)(vii)	No	No	No	Yes rr 4, 9 & 1	No	Yes O 72 r 6(1)(a)	Yes O 69 rr 6(1)(a) & 16(1)(a)
23. Must applicant swear whether deceased died intestate or testate and in the latter case the date of the Will and the fact that the applicant was appointed executor?	Yes Pt 78 r 28 (1)(a) & Form 106	No but the applicant must set out the nature of the original grant and identify the original representative – Form 387	No but affidavit must indicate the type of grant involved eg probate, and that the grant was made to the applicant – r 83(i) of Pt II & Form 20	No but affidavit must indicate the type of grant involved eg probate, and that the grant was made to the applicant – r 46 & Form XXI	Yes rr 4, 9 & 1	Yes by practice	Yes O 72 rr 6(d) & 14(d)	Yes O 69 r 6(d)
24. Must applicant swear as to the name of the court which made the grant and the date on which the grant made?	Yes Pt 78 r 28 (1)(a) & Form 106	Yes O 71 r 67, Form 387	Yes r 83(i) of Pt II & Form 20	Yes r 46 & Form XXI	Yes but date of grant need not be sworn to	Yes in practice	Yes in practice	Yes in practice

25. Must applicant swear that the grant has not been revoked?	Yes Pt 78 r 28 (1)(a) & Form 106	No	No	Not expressly this is deemed to be implicit in the application	Yes	No	Yes	Yes (in practice)
26. Where applicable, must applicant swear that by power of attorney the executor or administrator appointed him his attorney to apply to the court to reseal the probate or letters of administration?	Yes Pt 78 r 28 (1)(a) & Form 106	No (but must swear that he is authorised by letter or otherwise and produce authority – O 71 r 67, Form 387)	Yes (except the date need not be given – Pt II r 83(i) & Form 20)	Yes (r 46 & Form XXI)	No (but power of attorney is exhibited to the applicant's affidavit)	Yes	Yes	In practice, the applicant swears he is the appointed attorney. The power of attorney is exhibited to the applicant's affidavit
27. Must applicant swear that he is aware that if the grant is sealed accounts relating to the estate must be filed within 12 mths after the sealing?	Yes Pt 78 r 28 (1)(a) & Form 106	No	No	No	No	No	In practice the applicant swears that if a grant is sealed accounts will be filed	No

28. Where the application is for resealing letters of administration, must the applicant swear as to his knowledge of claims against the estate?	Yes Pt 78 r 28(1)(a)(vii) (viii)	No	No	No but applicant must lodge a duplicate original of the death duty affidavit of assets and liabilities	No	No	No	No
29. Must search in the registry for a will of the deceased deposited there be sworn to?	Yes Pt 78 r 28(b)(ii)	No	No	No	No	No	Yes O 72 rr 6(m) & 14(k)	Yes O 69 rr 4(j) & 16 (j)
30. Where two years or more have elapsed since the death of the deceased, must the fact of whether prior application for a grant or reseal has been made by sworn to?	Yes Pt 78 r 28(i)(b)(iv)	No	No	No but where 3 years have elapsed, the reason for delay must be certified to the Registrar – r 52(ii). This can be done by letter	Irrespective of what time has elapsed, applicant swears that no application for a grant or reseal has been made to or been granted by the Court or Registrar – rr 4, 9 & 1	No	An affidavit of search showing that no prior application has been made is required	Irrespective of any time lapse, the matter must be sworn to O 69 rr 6(m) and 16(m)
31. Must notice of sealing the receiving state be sent to the court from which the grant issued?	No	Yes O 71 rr 77	Yes r 90	Yes r 54	No	Yes in practice only	No	Yes in practice

32.. Where the Court which issued the grant has been informed of a reseal, must the Registrar send notice of revocation or alteration of the grant to the resealing Court?	No	Yes O 71 r 78	Yes r 91	Yes r 55	No	Yes in practice	No	Yes in practice

APPENDIX III

(See Chapter 2 especially 2.14, 2.15, 2.26 and 2.31 to 2.33, Chapter 3, also Chapter 8 at 8.19 and Chapter 9)

DRAFT MODEL BILL

Entitled

GRANTS OF ADMINISTRATION (RESEALING) ACT, 19 __

Prepared by the Commonwealth Secretariat

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 _____[Act] and for matters incidental thereto.

Short title

1. This Act may be cited as *Grants of Administration (Resealing) Act*, 19__.

Interpretation

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

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

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

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

"Registrar" means the Registrar of the Supreme Court;

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

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

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

Applications for

3. (1) Where a grant of probate or letters of administration of the estate of

Resealing

any deceased person has been made by a court in any part of the Commonwealth or in any other country, an application may be made under this section for the resealing of the grant of administration.

(2) An application under this section shall be made to the Registrar and may be made by -

(a) a personal representative or the grantee, as the case may be; or
(b) a person authorised by power of attorney given by any such personal representative or grantee; or
(c) a legal practitioner registered in _____acting on behalf of any such personal representative or grantee or of a person referred to in paragraph (b).

(3) Not less than twenty-one days before making an application under this section, the person intending to make it shall cause to be published in a newspaper or newspapers circulating in _____and approved for the purpose of this section by the Registrar an advertisement which -

(a) gives notice that the person named in the advertisement intends to make an application under this section ;
(b) states the name and the last address of the deceased person;
(c) requires any person wishing to oppose the resealing of the grant letters of administration to lodge a caveat with the Registrar by a date specified in the advertisement which shall be a date not less than twenty-one days after the date of the publication of the advertisement .

(4) An applicant under this section shall produce to the Registrar -

(a) the grant of administration or an exemplification thereof or a duplicate thereof sealed with the seal of the court by which the grant was made or a copy of any of the foregoing certified as a correct copy by or under the authority of that court;
(b) where the document produced under paragraph (a) does not include a copy of the will, a copy of the will, verified by or under the authority of that court;
(c) an affidavit stating that an advertisement has been duly published pursuant to sub- section (3);
(d) where the applicant is a person referred to in subsection (2)(b) , the power of attorney authorising him to make the application and an affidavit stating that the power has not been revoked;
(e) [an Inland Revenue certificate affidavit] as if the application were one for the making of a grant of administration by the Supreme Court; and
(f) such evidence, if any, as the Registrar thinks fit as to the domicile of the deceased person,

and shall deposit with the Registrar a copy of the grant of administration.

Caveats

4. (1) Any person who wishes to oppose the resealing of a grant of administration shall, by the date specified in the advertisement published

pursuant to section 3(3), lodge a caveat against the sealing.

(2) a caveat under subsection (1) shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the making of a grant of probate or letters of administration by the Supreme Court.

(3) The Registrar shall not, without an order of the Supreme Court, proceed with an application under section 3 if a caveat has been lodged under this section.

Resealing of grants of administration

5. (1) Subject to this section, where an application has been duly made under section 3 and the date specified in the advertisement published pursuant to section 3(3) has passed and no caveat has been lodged under section 4 or any caveat so lodged has not been sustained, the Registrar may, if he is satisfied that -

(a) such estate duties, if any, have been paid as would have been payable if the grant of administration had been made by the Supreme Court;
(b) security has been given in a sum sufficient in amount to cover the property in _____to which the grant of administration relates and in relation to which the deceased died intestate, cause the grant of administration to be resealed.

(2) It is not necessary for security to be given under subsection (1)(b) in the case of a grant of administration which was made to any public official outside _____.

(3) Where it appears that a deceased person was not, at the time of his death, domiciled within the jurisdiction of the court by which the grant was made, probate or letters of administration in respect of his estate may not be resealed, unless the grant is such as the Supreme Court would have had jurisdiction to make.

(4) The Registrar may, if he thinks fit, on the application of any creditor require, before resealing, that adequate security be given for the payment of debts or claims due from the estate to creditors residing in _____.

(5) The Registrar -

(a) may, if he thinks fit, at any time before resealing refer an application under section 3 to the Supreme Court; and
(b) shall make such a reference if so requested in writing by the applicant at any time before resealing or within twenty-one days after he has refused to reseal,

and where an application is so referred, the grant of administration may not be resealed except in accordance with an order of the Supreme Court.

Effects of resealing

6. (1) A grant of administration resealed under section 5(1) shall have like force and effect and the same operation in _____, and such part of

his estate as in _____shall be subject to the same liabilities and obligations, as if the probate or letters of administration had been granted by the Supreme Court.

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

Duties of person authorised by personal representative, etc.

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

(2) Any such person referred to in subsection (1) shall duly account to the personal representative or grantee, as the case may be, for his administration of the estate in _____.

Rules of court

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

Repeals

9. The _____[Act] is hereby repealed.

Commencement

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

APPENDIX IV

(See Chapter 4 especially 4.1 and 4.22 to 4.23. Also 7.1)

SECTIONS 1, 4, 8 AND 9 UNITED KINGDOM ADMINISTRATION OF ESTATES ACT 1971

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, subject to subsections (3) and (5) below, 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.

(3) ….

(4) Subject to subsection (5) below, 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.

(5) ….

(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.

(7) ….

4. Evidence of grants

(1) …

(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.

(3) …

Rights and duties of personal representative in England and Wales

8. Power to require administrators to produce sureties

…..

(1) As a condition of granting administration to any person the High Court may, subject to the following provisions of this section and subject to and in accordance with probate rules and orders, require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of a breach by the administrator of his duties as such.

(2) A guarantee given in pursuance of any such requirement shall enure for the benefit of every person interested in the administration of the estate of the deceased as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally.

(3) No action shall be brought on any such guarantee without the leave of the High Court.

(4) ….

(5) ….

9. Duties of personal representatives

…..

The personal representative of a deceased person shall be under a duty to -

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

(c) when required to do so by the High Court, deliver up the grant of probate or administration to that court.

APPENDIX V

(see 4.13 and 5.17)

PROPOSALS BY COMMONWEALTH ATTORNEY GENERAL TO LAW COUNCIL OF AUSTRALIA 1963

Dear Mr. Greenwood,

I refer again to your letter of 2nd September, 1963, concerning the necessity for resealing in Australian States and Territories of a probate granted in another State or Territory.

The question was discussed at a meeting of the Standing Committee of Commonwealth and State Attorneys-General which was held in Sydney on 6th December, 1963. The Committee, whilst generally agreeing that the present practice should be simplified, felt that the procedures provided in section 95 of the *Companies Act* could not be extended, for the present, beyond shares and debentures of companies.

The Committee felt that a procedure along the following lines provided the basis for discussion:

1. Where an application for probate or administration in any State or Territory or an applicant to reseal a grant made outside Australia wishes to have his position as personal representative recognized in another State or Territory he should make a formal request for such recognition when he lodges the original application.

2. An additional 2 copies of the probate or letters of administration should be lodged with the application for each State or Territory in which he desires to obtain recognition.

3. When the grant is made in the original State the Registrar should forward 2 copies of the grant which he has made to the Registrar of Probates in each State or Territory in which the applicant desires recognition.

4. The Registrar of Probates who receives those 2 copies of the grant should file 1 copy and seal the other with the seal of his Court and return it to the Registrar who forwarded the copies.

5. The Registrar of the Court of the original State which made the original grant should be obliged to notify all those Courts to which he sent a particular grant for sealing of any order he has made which affects the original grant.

6. Provision should be made for the executor or administrator under a grant which has been recognized in another State or Territory to have the same powers and duties as if he had been granted Probate or Letters of Administration originally.

It is suggested that at least for the present the new procedure should be cumulative upon the existing procedure. The following comments on the proposals are made:-

Firstly, it is assumed that in all States and Territories a procedure is enforced which protects the revenue by requiring that property cannot be dealt with until a certificate of the revenue officer is obtained.

Secondly, as documents are to be dealt with through official channels there would appear to be no need for any formal proofs.

Thirdly, any fees at present charged upon resealing by the States may continue to be charged if this is so desired. These could be collected by the Registrar in the State making the original grant and forwarded with the duplicate copies of the grant for resealing.

Fourthly, the problems that could arise from the revocation of the original grant will be dealt with by requiring the Registrar in the revoking State to notify all other States and Territories concerned.

I do not wish to give the impression that the Committee necessarily supports the scheme I have outlined. The Committee did, however, feel that the scheme did have the benefit of simplicity compared to the present procedures and felt that it was sufficient to provoke discussion.

I should be glad if you will let me know if the Law Council is in favour of any scheme such as I have outlined above; if it feels that such a scheme would be practical and would be of assistance to people faced with the duty of getting in an estate spread over more than one State. If the Law Council has an alternative scheme or any other proposals which would improve the present practice I should be glad if you will let me know so that it can be considered by the Standing Committee at a future meeting.

Yours sincerely,

(Signed) Garfield Barwick

Ivor J. Greenwood, Esq.,
The Honorary Secretary,
The Law Council of Australia,
Owen Dixon Chambers,
205 William Street,
MELBOURNE. C.1. Vic.

APPENDIX VI

(See paragraphs 4.17 to 4.21 and 5.17)

DRAFT UNIFORM ADMINISTRATION AND PROBATE (RESEALS) ACT 1964

(Draft prepared at the direction of the Standing Committee of Attorneys-General as a basis for further public discussion.)

PART III. - RECOGNITION OF FOREIGN GRANTS.

DIVISION 3 - RECOGNITION OF GRANTS MADE IN OTHER AUSTRALIAN STATES AND TERRITORIES

88. (1) Where probate of the will or administration of the estate of any deceased person who has left any property within Victoria has been granted by any court of competent jurisdiction in any other State or in any Territory of the Commonwealth of Australia in which the deceased person was domiciled at the time of his death the executor or administrator therein named whether he is within the jurisdiction of the Supreme Court of Victoria or not may either personally or by some duly qualified legal practitioner on his behalf produce the probate of the will or of the administration of the estate (and in the case of an executor to an executor any later probate also) to the registrar and file a verified copy or verified copies thereof in the office of the registrar.

(2) When such documents have been produced and verified copies thereof deposited as aforesaid by or on behalf of the executor or administrator such probate of the estate of the deceased person or such letters of administration shall be sealed with the seal of the Supreme Court of Victoria, and shall have the like force and effect and the same operation in Victoria as if it or they had been originally granted in Victoria.

(3) Every such executor of any such will and administrator of any such estate and person authorized by power of attorney as aforesaid shall perform the same duties and shall have the same rights, and every such executor and administrator and person authorized by power of attorney as aforesaid and the estate of every such deceased person shall be subject to the same liabilities and obligations as if such probate or letters of administration had been originally granted by the Supreme Court of Victoria.

(4) Upon the sealing of any probate or letters of administration to the estate of any deceased person under this Division every such executor or administrator therein named shall be and be deemed to be for every purpose the executor or administrator of the estate of such deceased person within the jurisdiction of the Supreme Court of Victoria.

DIVISION 4. - GENERAL

89. Any person may lodge with the registrar a caveat against the sealing of any probate or letters of administration under Division 3 of this Part, and such caveat shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the granting of probate or of letters of administration.

89A. The seal of the Court shall not be affixed pursuant to this Part to any probate or letters of administration until the registrar is satisfied -

(a) that the statements of the estate of such deceased person are filed in the office of the Commissioner of Probate Duties in accordance with the provisions of the *Probate Duty Act 1962*;
(b) that such stamp fees (if any) have been paid as would have been payable if such probate or letters of administration had been originally granted by the Court; and
(c) that no caveat has been lodged,

89B. The judges of the Court may in accordance with the *Supreme Court Act 1958* make rules -

(a) for regulating the duties of the registrar and the prothonotary under this Part; and

(b) generally for carrying into effect the provisions of this Part.

APPENDIX VII

(See 6.7)

PART VA - AUSTRALIAN CAPITAL TERRITORY ADMINISTRATION AND PROBATE ORDINANCE 1929-1980

83A. In this Part, a reference to death duty shall read as including a reference to succession duty and probate duty.

83B. - (1.) Where -

(a) in the case of a deceased person who was, at the date of his death, domiciled in a State -

(i) probate of the will, or administration of the estate, of the deceased person is granted under this Ordinance;

(ii) probate of the will, administration of the estate, or an order to collect and administer the estate, of the deceased person granted by a court of competent jurisdiction in a State or other Territory is sealed with the seal of the Court; or

(iii) an order to collect and administer the estate of the deceased person is granted to the Curator; and

(b) death duty is, under the law of the State in which the person was domiciled at the time of his death, payable out of the estate of the deceased person,

the amount of the death duty so payable constitutes a debt due to the Crown in the right of the State in which the deceased person was domiciled, and the debt is payable, as if it were a debt of the deceased person, by the executor of the will, or the administrator of the estate, of the deceased person or the Curator, as the case requires, out of the real and personal estate of the deceased person that has become vested in him under this Ordinance .

(2.) Where a debt is payable under the last proceeding subsection by an executor, by an administrator, or by the Curator, as the case requires, out of the estate of a deceased person, then, for the purposes of administration and distribution of the estate under this Ordinance -

(a) a reference in this Ordinance to a debt of a deceased person and to a debt payable out of the estate of a deceased person shall be read as including a reference to the debt payable under the last preceding sub-section; and

(b) the Crown in the right of the State in which the person was domiciled shall, for the purposes of sections nineB, sixty-four, sixty-five and ninety-nine of this Ordinance, be deemed to be a creditor of the estate for the amount of the debt so payable and to have a claim against the estate for the debt so payable.

APPENDIX VIII

(See Chapter 8)

TABLE SETTING OUT WHICH FOREIGN GRANTS MAY BE RESEALED IN THE VARIOUS AUSTRALIAN STATES AND TERRITORIES

	NSW	QLD	SA	TAS	VIC	WA	ACT	NT
Grants made in independent Commonwealth countries	Those independent Commonwealth countries which are "portion of Her Majesty's Dominions" ie Aust States & Territories Bahamas Barbados Canada Fiji Grenada Jamaica Mauritius NZ Papua New Guinea Solomon Is St Lucia St Vincent Tuvalu UK	Those "parts of Her Majesty's Dominions" which are proclaimed reciprocating states,(1) ie Aust States & Territories Fiji NZ Papua New Guinea(2) & UK	Aust States NZ Fiji & proclaimed Australasian States(3) (as yet there are none) UK "including Ireland". Any other country if the probate or administration corresponds to a probate or administration in SA	Aust States & Territories UK NZ Fiji British Columbia Ontario Papua New Guinea(5)	Aust States NT ACT Norfolk Island(6) Fiji NZ UK Alberta British Columbia Manitoba Nova Scotia Ontario Saskatchewan Guyana Kenya Malaysia Papua New Guinea & Singapore being proclaimed reciprocating countries(7)	As in NSW	All Cwth countries ie Australia Bahamas Bangladesh Barbados Botswana Canada Cyprus Dominica Fiji Gambia Ghana Grenada Guyana India Jamaica Kenya Kiribati Lesotho Malawi Malaysia Malta Mauritius Nauru NZ Nigeria Papua New Guinea St Lucia St Vincent Seychelles Sierra Leone	Aust States & Territories; Cwth countries which are listed as Barbados Botswana Canada Ceylon Cyprus Gambia Ghana Guyana India Jamaica Kenya Lesotho Malawi Malaysia Malta NZ Nigeria Pakistan Sierra Leone Singapore Tanzania Trinidad & Tobago Uganda UK Zambia. Pakistan has now left the Cwth.

							Singapore Solomon Is Sri Lanka Swaziland Tanzania Tonga Trinidad & Tobago Tuvalu Uganda UK Vanuatu Western Samoa Zambia Zimbabwe	However, Bangladesh, formerly part of Pakistan which is now independent, remains in the Cwth, and presumably is included.
Grants made in parts of Commonwealth which are not independent Cwth countries	All parts of Her Majesty's Dominions which are not independent Cwth countries	Hong Kong being a proclaimed reciprocating country(1)	Any 'foreign' country if the probate or administration corresponds to a probate or administration in SA(4)	Hong Kong being a proclaimed reciprocating country(5)	a) Proclaimed Australasian States(7) which are not independent Cwth countries (as yet there are none); b) Gibraltar & Hong Kong being proclaimed reciprocating countries (7)	As in NSW	None (unless the expression "Common-wealth country" includes colonies & dependent territories) see Roberts-Wray, *Commonwealth and Colonial Law*, (16)	Colonies, territories & protectorates of the Commonwealth countries listed above (8)
Grants made in countries outside the Commonwealth	No such countries	No such countries. The Act makes provision for	Any "foreign" country if the probate or administration corresponds	No such countries (9)	No such countries (9)	No such countries	No such countries	No such countries

		resealing the grants of British Courts in foreign countries but none such now seem to exist	to a probate or administration in SA					
Can a confirmation made in Scotland be resealed?	Yes – apparently by practice relying on judicial authorities elsewhere	Yes ss 4 & 2 *Re Macnaughton* 1907 QWN 53	Yes – *Re Wilson* 1920 SALR 48	Yes *Dykes v Archer* 1906 2 Tas LR 1	Yes s 87	Yes – apparently by practice	Yes ss 80 & 83	Yes ss 111 & 114
Can probate or letters of administration granted by a British court in a foreign country be resealed?	No	Yes (s 5)	Yes (if the probate or administration corresponds to one in SA)	No	No	No	No	No

FOOTNOTES

1. See para 8.7.

2. By an Order in Council appearing in the Queensland Government Gazette on 23 August 1902, the Act was applied to British New Guinea (presumably the territory now known as Papua). Query whether this Order in Council is effective today in respect of Papua New Guinea.

3. See para 8.12.

4. But see para 8.13 above.

5. The proclamation in respect of Papua New Guinea was made in 1951 when the country comprised Papua and the mandated territory of New Guinea. The proclamation related to both and it seems is still effective. In respect of British Guiana, Straits Settlements, Federated Malay States, Sarawak, Northern Rhodesia, the Union of South Africa and the Irish Free State see para 8.14 above.

6. See para 8.10.

7. See para 8.11.

8. This includes -

   (i) a colony, overseas territory or protectorate of a Commonwealth country;
   (ii) a territory for the international relations of which a Commonwealth country is responsible: *Administration and Probate Ordinance 1969-1979*, s 6.

UNITED KINGDOM DEPENDENCIES

Associated States - Antigua, St Christopher-Nevis-Anguilla.

Cyprus - Sovereign Base Areas.

Colonies - Belize, Bermuda, Cayman Is, Gibraltar, Montserrat, Turks & Caicos Is, British Virgin Is, Falkland Is and Dependencies, British Antarctic Territory, St Helena and Dependencies, British Indian Ocean Territory, Pitcairn, Henderson, Ducie and Oeno Is, Hong Kong.

Other - Brunei (an independent Sultanate)

AUSTRALIAN TERRITORIES - Ashmore and Cartier Is, Norfolk Is, Australian Antarctic Territory, Heard Is, McDonald Is, Cocos (Keeling) Is, Christmas Is, Coral Sea Islands Territory, Macquarie Is.

NEW ZEALAND EXTERNAL TERRITORIES - Tokelau Is, Ross Dependency.
Associated States : Niue, Cook Is.

9. Tasmania and Victoria can declare countries which are neither Commonwealth countries nor parts of Her Majesty's Dominions to be "reciprocating countries" but as yet have not done so in respect of any such country.

APPENDIX IX

NARRATIVE DESCRIPTION OF AUSTRALIAN RESEALING REQUIREMENTS

INTRODUCTION

The narrative is confined to non-contentious proceedings for resealing.

It is assumed that, in every state and territory, it is necessary for the applicant in his affidavit to swear to the name of the court which granted probate of the Will (or administration of the estate) of the deceased and to the name, address and occupation of the person to whom the grant was made, and that the deponent is applying for the grant to be resealed.

PART 1 - NEW SOUTH WALES

(See *Wills Probate and Administration Act 1898-1979* Part II Division 5 *and Rules of the Supreme Court* Part 78.)

General

1. In New South Wales, any "probate or letters of administration" granted by a court of competent jurisdiction "in any portion of Her Majesty's dominions" may be resealed: section 107. "Letters of Administration" includes letters of administration with the will annexed and letters of administration granted for general, special or limited purpose: section 3.

Who is entitled to apply?

2. The executor or administrator named in the grant is entitled to apply for the reseal: section 107. A corporation which has been granted probate or letters of administration by a court outside New South Wales would be entitled to have the grant resealed. A grant of probate or letters of administration to a Public Trustee or public officer can be resealed: section 110 - Harvey J in *In the Will of Constant* (1925) 42 WN (NSW) 12. An executor by representation may apply for a reseal of a grant of probate: section 107(4). The executor by representation does not have to be named in the grant to be resealed: see 13 ALJ 102. A person authorised by power of attorney under the hand and seal of the executor or administrator may apply for a reseal: section 107(1).

3. Where it appears in the proceedings that the deceased was domiciled out of New South Wales, the Court may require evidence of -

(a) the domicile of the deceased;
(b) the requirements of the law of the domicile as to the validity of any will made by the deceased;
(c) the law of the domicile as to the persons entitled in distribution of the estate: rule 12.

See: *In the Will of Lambe* (1972) 2 NSWLR 273. Query whether the deceased must have left estate in New South Wales: Sections 107(2) and 40. Also rule 28(1)(a)(ii). Hastings & Weir, *Probate Law and Practice*, (2nd ed) p 310 doubts whether this is necessary.

Procedure on an application

4. Notice of an intended application for a resealing must be published in a Sydney daily newspaper 14 days before the applicant swears his affidavit in support: section 109 and rule 10(1). If the deceased resided more than 50 kilometres from the General Post Office Sydney, but within the State of New South Wales the notice must also appear in a newspaper published and circulating in the district where the deceased resided: ibid. Where it is intended to apply to dispense with an administration bond, or with one or both of the sureties, or for reduction of the penalty of the bond, the notice must require creditors to send in their claims to the applicant's solicitors or, when applicable, their agents: rule 10(3) and Form 93. The Court may require further advertisement: rule 10(4).

5. Proceedings for the resealing of a grant are commenced by summons: rule 8. Proceedings are heard in the absence of the public and without the appearance before the Court of any person: rule 9.

6. An executor or administrator who is not resident within New South Wales must file with the Registrar an address for service within the State: section 97(2) and rule 8(2). However this forms part of the summons by which proceedings are commenced. All services at that address are deemed personal service: section 97(2).

7. The application for resealing must be supported by an affidavit by the applicant which sets out -

(i) the full residential address of the applicant;
(ii) the date and place of death of the deceased;
(iii) whether the deceased died intestate or left a will and if the latter then the date of the will and the fact that he appointed the applicant executor of the will;
(iv) the name of the court which granted probate or letters of administration to the applicant and the date on which the grant was made;
(v) that the grant has not been revoked;
(vi) (where applicable) that by Power of Attorney, the executor or administrator appointed the applicant to apply to the Court to reseal the probate or letters of administration and the date of the power of attorney;
(vii) (where applicable) that the applicant has not received any notice of revocation of the Power of Attorney by death, unsoundness of mind, act of the donor or otherwise;
(viii) that the deceased left an estate in New South Wales;
(ix) particulars of the persons beneficially entitled under the grant sought to be sealed;
(x) where the application is for resealing of letters of administration, that the applicant is not a bankrupt and has not assigned or encumbered his interest (if any) in the estate;
(xi) that the applicant is aware that accounts relating to the estate must be filed within 12 months after the sealing;
(xii) that the applicant is over the age of eighteen years; and
(xiii) where the application is for resealing letters of administration, the plaintiff's knowledge of claims against the estate: rule 28(1)(a) and Form 106.

This affidavit must also annex certified copies of any relevant powers of attorney and other relevant documents: ibid.

8. An affidavit must also be lodged in which the deponent swears that -

(i) the notice of intention to apply for the resealing (a copy of which must be annexed to the affidavit) has been published as prescribed by the rules:

(ii) he has that day searched in the registry of the Court and found (if such is the case) -
(a) no evidence of a caveat having been lodged relating to any grant or reseal being made in the estate;
(b) no evidence of a will of the deceased having been deposited in the registry; and
(c) (where two years have elapsed since the date of death) no evidence of any prior application for probate or administration or resealing in the estate having been made:
section 109, rule 28(1)(b) and Form 98.

9. A death duty affidavit in form "D" prescribed by regulations made under the *Stamp Duties Act 1920* must be lodged together with a duplicate sworn copy: rule 28(1)(c).

10. Where the applicant is an administrator, he must file an administration bond, except where the Court dispenses with a bond: section 108(2) and rule 25(5) and (6). In the administration bond, the administrator covenants to pay the penalty of the bond if -
(a) he does not collect, get in and administer the estate according to law;
(b) he does not pay out of the estate the just debts of the deceased;
(c) he prefers any debt of the deceased to him;
(d) he does not file or file and pass his accounts within 12 months after the grant and whenever ordered to do so by the Court: Form 102.

The bond must be in a penalty equal to the amount under which the property of the deceased is sworn: sections 108(2) and 65. Except where the bond is given by a guarantee company approved by the Court, there must be two sureties to the bond: rule 25(5)(b). The Court may dispense with the bond, dispense with one or both of the sureties, or reduce the penalty of the bond but an affidavit in support of the dispensation or reduction must first be filed: rule 25(6) and (7). The Court may direct that more bonds than one be given so as to limit the liability of any surety to such amount as the Court thinks reasonable: sections 108(2) and 65 and *Interpretation Act 1897* section 21. Where there is a surety to a bond, an affidavit of justification by the surety must be filed: rule 25(8). In the affidavit, the surety must not only swear to the net value of his estate but also set out in detail the location and nature of his assets: Form 103. Joint tenants, unless they can justify to separate assets, count as one surety.

11. The Court may require the executor, administrator or attorney to give security for the due administration of the estate in respect of matters or claims in New South Wales: section 107(3). In practice security is never required of an executor. In the case of an administrator a bond in the full value of the New South Wales estate is considered sufficient.

12. All relevant original documents must be produced: rule 28(4). However, instead of the original grant of probate, it is sufficient to produce an exemplification or any other formal document purporting to be under the seal of a court of competent jurisdiction which, in the opinion of the Supreme Court of New South Wales, is deemed sufficient: sections 107 and 3. Similarly, it is sufficient to produce an exemplification of the letters of administration or such other formal evidence of the letters of administration purporting to be under the seal of a court

of competent jurisdiction as is in the opinion of the Supreme Court deemed sufficient: ibid. In addition, a copy of the document sought to be sealed certified by the Supreme Court of New South Wales or by the Court which made the grant, must be filed: rule 28(3).

13. The Court may require further evidence to be furnished, further documents to be filed, and notices to be given: rule 28(5).

Caveats

14. A person claiming to have an interest in the estate may lodge in the registry a caveat requiring that no reseal be made in the estate without prior notice to the caveator: section 144 and rule 61(1) and Form 114.

15. Alternatively, a person claiming to have an interest in the estate may lodge a caveat requiring that any will be proved in solemn form: section 144 and rule 62(1) and Form 115.

16. If a caveat is lodged, the applicant can still proceed with his application but only in accordance with the rules or as the Court directs: section 145. The Court, on the application of the caveator, may order that the application for sealing, as the case may be, proceed and may give directions relating thereto: section 146.

17. All caveats must state fully the nature of the interest of the caveator and give his name and an address for service: section 144(2) and rules 61(2) and 62(2).

18. Unless the Court otherwise orders, a caveat remains in force for six months: rule 63(1). The Court upon application by summons returnable before a judge may extend the period of duration of a caveat: rule 63(2). It is easier to file a fresh caveat.

19. Leave to withdraw a caveat may be given subject to such order as to costs or otherwise as the Court may direct: section 148. Where there are no proceedings for a reseal in the estate, the application for leave is made by summons: rule 64(2). But where there are proceedings, the application is made by motion on notice: rule 65(3). Where leave is given to withdraw a caveat, the caveator or his solicitor may withdraw it by writing in the margin of the caveat the words "I withdraw this caveat" and dating and signing the endorsement: rule 66(1).

20. Where a caveat is withdrawn, and the person on whose application a resealing is made is unable to recover from the caveator costs which the caveator has been ordered to pay to him, that person shall be entitled to be recouped by the estate the amount of the costs properly incurred by him in addition to other costs to which he is entitled out of the estate: rule 67.

21. Where there is in force a caveat requiring proof of a will in solemn form the caveator shall, in proceedings for resealing in which the applicant seeks to prove a will to which the caveat relates, be cited to see the proceedings: rule 68. See also rule 57(3) which provides that where a caveat requiring proof in solemn form is lodged the caveator after entering an appearance may apply for an order adding him as a party in the proceedings.

22. Where a caveat is in force, a person who intends to apply for a reseal may commence proceedings by summons for an order that the caveat cease to be in force: rule 69. The caveator is the defendant to such proceedings: ibid. The Court may make an order that the caveat cease to be in force in respect of the intended application: rule 69(4). Where it decides not to do so, it may give directions for the just, quick and cheap determination of what

resealing, if any, should be made in the estate and these may include a direction that the caveator commence proceedings within a time fixed by the Court: rules 69(6)-(8).

23. Where there is in force a caveat in respect of any resealing, proceedings for resealing shall be commenced by statement of claim: rule 70(1). Unless the Court otherwise directs, the caveator shall be a party in the proceedings: rule 70(2). This rule does not apply to a caveat requiring proof in solemn form: rule 57(3). Where there is no defendant the proceedings shall be commenced by summons: rule 36(2).

Probate duty

24. The seal of the Court may not be affixed to the probate or letters of administration until such probate, stamp, and other duties, if any, have been paid as would have been payable if the probate or administration had been originally granted by the Court: section 108(1) .

Effect of a reseal

25. When resealed, the probate or letters of administration have the same force and effect and the same operation in New South Wales 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: section 107(2).

Passing of accounts

26. The person in whose favour the reseal is made must file an inventory of the estate of the deceased and file or file and pass his accounts relating to the estate within such time, and from time to time, and in such manner as is fixed by the rules, or as the Court may order; sections 107(2) and 85(1). The duplicate sworn affidavit Form "D" (rule 28(1)(c)) serves as the inventory. It is not the practice for the Court of its own motion to order an executor or administrator to file accounts other than the first accounts required to be filed within 12 months from the date of resealing by rule 71 or to order accounts to be filed and passed except pursuant to section 85(2) upon the application of any person interested.

27. The executor or administrator must file his accounts within twelve months after the reseal: RSC Pt 78 rule 71. An executor or administrator may, in the proceedings for the reseal, move for any order extending the period of twelve months, including an order extending the period until the further order of the Court: rule 73. The order extending time must be entered: rule 73(4).

28. Proceedings by an executor or administrator for an order passing his accounts (and for commission) are commenced by summons for a hearing to be appointed: rule 75(1)(a). On the filing of the summons, the plaintiff obtains from the registry an appointment to vouch his accounts before an accounts clerk: rule 75(2). At least fourteen days before the appointment to vouch his accounts the executor or administrator must publish a notice stating that his accounts have been filed, that he seeks an order passing the accounts, and an order for commission (if that is the case), the date and time of the appointment and that any person may attend: rule 76 and Form 116. The notice must be published in one Sydney daily newspaper and if the deceased was resident at the date of his death in New South Wales at a place more than 50 kilometres from the General Post Office Sydney also in a newspaper published and circulating in the district where the deceased resided: rule 76(2). The executor or administrator must file an affidavit in which he swears that these advertising requirements

have been complied with: rule 76(3). Also, at least fourteen days before the appointment the executor or administrator must serve a copy of the notice on any sureties to the administration bond or alternatively, he must file the consent of the sureties to an order passing the accounts; and an affidavit establishing compliance must be filed: rule 77(1)-(3).

29. The Court may order the executor or administrator to give notice to any person of the proceedings for an order passing accounts: rule 87.

30. At any time before the hearing of proceedings for an order passing accounts has been completed, anyone may, unless the registrar otherwise directs, inspect the accounts without leave of the Court and may also enter an appearance: rule 78. For reasons of privacy, inspection is restricted to interested persons. Strictly, only a person entitled to object has the right to enter an appearance.

31. The executor or administrator may vouch his accounts in person, by his solicitor, or by any person authorised by the solicitor: rule 80(1). Unless the court, of its own motion, otherwise orders anyone may attend on the vouching of the accounts and anyone in attendance may ask questions through the accounts clerk: rules 80(2) and (3).

32. On the conclusion of the vouching, the accounts clerk must inform the plaintiff of matters necessary for preparation by the plaintiff of a draft minute of certificate by the accounts clerk of the vouching of the accounts: rule 81(1). The executor or administrator must file a minute of the certificate: rules 81(3) and (4) and 82.

33. The executor or administrator on filing the minute of the certificate must obtain from the registry an appointment for hearing of the proceedings for an order passing accounts: rule 84. But this is not necessary where there is no defendant in the proceedings and the executor or administrator does not seek commission: also in this case, an order may be made without the appearance of anyone before the Court: rule 83(1)-(3).

34. Where the executor or administrator seeks commission, he must file -

(a) an affidavit in support of the application; and
(b) where the accounts were not filed within the time fixed by the rules or any order of the Court, an affidavit explaining the delay: rule 85.

35. Where the executor or administrator files a renunciation of commission, the accounts shall be allowed in accordance with the indemnity under section 86(3). Section 86(3) provides that where an executor or administrator renounces his right to commission in respect of any particular year, he is entitled to indemnity out of the estate's assets for the amount of his solicitor's charges and disbursements, as moderated in accordance with the relevant professional scale, for non-professional work performed in that year, to an amount not exceeding that which the executor or administrator would have been in the opinion of the Court allowed by way of such commission for that year had he not so renounced but had applied therefor.

36. Where the proceedings for an order passing accounts are heard by the registrar, any party may apply to the Court for review of any order made by the registrar on the hearing: rule 88(1).

37. The order passing accounts is prima facie evidence of their correctness, and after the expiration of three years from the date of the order, operates as a release to the person filing the same, except in so far as it is shown by some person interested in the account that an error, omission, or fraudulent entry has been made in the account: section 85(3).

38. Section 85(4) provides that where the Court, in passing any such accounts, disallows in whole or in part the amount of any disbursements, the Court may order the executor or administrator to refund the amount disallowed to the estate of the deceased but this provision does not alter or diminish the right of a person to proceed in equity: section 85(4).

39. An executor or administrator need pass his accounts only if -

(a) he seeks to do so in order to obtain the release under section 85(3).
(b) he seeks commission .
(c) the Court so orders pursuant to section 85(2) upon the application of any person interested. In proceedings under section 85 the applicant may also seek an inventory.

Where an executor or administrator neglects to file an inventory, or to file or file and pass accounts for the space of one month after the expiration of the period fixed, the Registrar must notify the executor or administrator of the neglect: section 87(1). If there is further neglect for a period of a month the Court may, of its own motion, order the executor or administrator to show cause before the Court why he should not remedy the defect forthwith: section 87(2). If the executor or administrator does not then remedy the neglect within the prescribed time or within such further time as is allowed by the Court, he is liable to punishment for contempt of court: section 87(3). These proceedings, however, do not prejudice the right to proceed against the executor or administrator for an account and administration, or prevent the Court from ordering the assignment of any bond to a person with a view to enforcing the penalty of the bond: section 88.

PART 2 - QUEENSLAND

(See *British Probates Act 1898* and *Supreme Court Rules* Orders 71 and 73)

General

1. In Queensland, any "probate or letters of administration in respect of the estate of a deceased person " granted by a "Court of Probate" in a "part of Her Majesty's Dominions" to which the Act applies may be resealed: section 4(1). When the Governor in Council is satisfied that the Legislature of any part of Her Majesty's Dominions has made adequate provision for the recognition in that part of probates and letters of administration granted by the Supreme Court of Queensland he may direct by Order in Council that the Act applies to such part of Her Majesty's Dominions: section 3. By section 5 the Act is extended to authorise the resealing of any probate or letters of administration granted by a British Court in a foreign country in like manner. A British Court in a foreign country means any British Court having jurisdiction out of Her Majesty's Dominions: section 2, "Court of Probate" means any Court or authority by whatever name designated having jurisdiction in matters of probate. "Probate" and "Letters of Administration" include confirmation in Scotland and any instrument having in any part of Her Majesty's Dominions the same effect which under Queensland law is given to probate and letters of administration respectively: section 2. A special, limited or temporary grant may be resealed: but only by the order of a judge: rule 76. A grant made by the court of a jurisdiction wherein the deceased was not domiciled will not be resealed unless the grant is such as would have been made by the Supreme Court of Queensland on application made to it for a grant in the first instance: Rule 73. See *In re Bedford* [1902] QWN 63 and *Re Prendergast* (1902) QWN 78.

Who is entitled to apply?

2. The executor or administrator, or a person lawfully authorised for the purpose by the executor or administrator may apply for resealing, either in person or by solicitor: rule 65,

3. As to when it is necessary for all executors to whom probate was granted to join in the application: see *Re Benn* (1905) QWN 30.

4. Where a grant to one executor is resealed after an original grant to another executor has been made in Queensland the grant will be endorsed accordingly.

5. An application by a company incorporated in another state can be resealed provided the normal requirements for resealing are fulfilled.

6. A grant may be resealed even though it is not to a person or company capable of taking a grant in Queensland.

7. The authority conferred by a Power of Attorney to apply for and obtain resealing should be set out expressly although this may be overcome by other sufficiently clear words.

8. Ancillary Probate or letters of administration with the Will annexed will be granted to executors, resident out of the jurisdiction, of a testator domiciled out of the jurisdiction, in the absence of special circumstances. If special circumstances exist the Court may make a special grant.

Procedure on an application

9. No request or other formal written application is necessary: rule 65.

10. Application is made to the Registrar who (except in case of special, limited or temporary grants) has authority to seal the grant or copy - rules 65, 76. Either the original probate, or letters, or a duplicate sealed by the granting court or a copy certified by the granting court must be produced and a copy deposited with the Queensland court: section 4(1), (2).

11. It is not necessary to advertise notice of the application, but in special circumstances the registrar may require advertisement, in the same way as for an original grant: rule 66. In the case of applications for original grants notice of application must be advertised at least 14 days prior to filing the application both in the Gazette and in two newspapers: rule 3.

12. The applicant must file an affidavit made by the executor or administrator or by a person lawfully authorised by him: rule 67, Form 387. The affidavit should set out -

(a) the name, address and occupation of the executor or administrator;
(b) the names, address and occupation of the deceased;
(c) the place and date of death;
(d) the name of the court making the original grant and the place and date on which the grant was made;
(e) that the deceased was at his death domiciled within the jurisdiction of the court making the original grant;
(f) (where applicable) that the applicant is authorised by the executor or administrator to apply for resealing, and the form of such authority, producing the authority as an exhibit to the affidavit;
(g) (in cases of administration only) the value of the whole of the real estate and personal estate respectively of the deceased in Queensland;
(h) exhibiting a list of creditors of the deceased in Queensland, showing the full name and address of each creditor and the amount of each debt;
(i) exhibiting a certificate from the Court making the original grant that sufficient security has been given in that court for the faithful administration by the administrator of the assets in Queensland.

Where a company to which a grant has been made seeks resealing an affidavit must be made by its attorney.

13. The Court may, if it thinks fit, upon the application of any Creditor require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in Queensland and, upon the application of any beneficiary or next of kin, for the protection of the interests of that beneficiary or next of kin: section 4(3).

14. The administrator of any intestate estate or the person authorised by him to apply for resealing must enter an administration bond in the same manner and for the same amount as for original grants of letters: rule 68. Provided that if the applicant produces evidence (such as a certificate from the Court making the original grant) satisfactory to the Registrar that sufficient security has been given in the original court for the faithful administration by the administrator of the assets of the estate in Queensland, the administration bond may upon application, be dispensed with: rule 68.

15. When the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant the Registrar shall, and in any other case he may, require further evidence as to domicile: rule 72. If it appears that the deceased was not at death domiciled within the jurisdiction of the Court of original grant resealing is not permitted unless the grant is one that the Queensland court would make on an original application, ie the applicant is the person who would be by law entitled to the primary grant in Queensland: rule 73 see 1 above.

16. The grant or copy grant of probate, or administration with the will, to be sealed, and the copy to be deposited in the Registry, must include copies of all testamentary papers admitted to probate: rule 74.

17. Notice of the resealing is sent to the Registrar of the court of original grant: rule 77. Similarly the Queensland court sends to the Registrar of any court which reseals a grant originally made in Queensland notice of any revocation or alteration in the original grant: rule 78.

18. An executor of a person who was also an executor, both wills having been proved in a court of competent jurisdiction in a part of Her Majesty's Dominions and the probate of the will of the deceased executor having been resealed under this section, is entitled to have the probate of the win of the first deceased resealed.

19. There must be some property of the deceased within the jurisdiction. A right to property may be sufficient for this purpose.

20. The Court will give full faith and credence to the facts appearing by the grant to have been established to the satisfaction of the court making it. Therefore, letters of administration will be resealed notwithstanding that a renunciation by a person entitled in priority to the administrator has no effect in Queensland.

21. An exemplification of probate or letters of administration may be resealed provided this is authorised by the statute of the original jurisdiction of grant.

22. The resealing of letters of administration does not confer on the administrator any title to real estate in Queensland.

23. When an application for probate or letters of administration with the will annexed is made more than 3 months after death or in any case of intestacy copy of the notice of application must be served on the Public Curator or his local deputy: rule 4. This is not required in the case of applications for resealing.

As to the foregoing paragraphs see Reprinted Queensland Statutes 1828-1962 Vol 16 p 621-628.

Caveats

24. A creditor, beneficiary or next of kin desiring to obtain an order for security pursuant to section 4(3) may lodge a caveat against resealing: rule 69. Application is by summons to a judge supported by affidavit setting out particulars of the applicant's claim or interest: rule 71. The caveat shall give an address for service: rule 69, Form 399.

25. The grant may not be resealed until the expiration of eight days after notice to the person filing the caveat, unless the Court or a judge otherwise orders: rule 70.

26. Any person interested who desires to object to, or be heard upon, the application for resealing may file a caveat: rules 51 and 79. The caveat shall give an address for service not more than ten kilometres from the registry within which the application is lodged: rule 51, Order 2 rules 9 and 10. Such a caveat remains in force for six months but may be renewed: rule 52. No resealing is granted until at least eight days after notice to the person by whom the caveat was filed unless otherwise ordered: rule 54. Such notice is posted to the caveator requiring him to file an appearance stating his interest in the estate and undertaking to appear to any action commenced: rule 55. If such an appearance is not filed the application proceeds: rules 56 and 57. If it is, no further proceedings are taken on the application until the caveat is set aside or withdrawn but the applicant may commence action against the caveator: rule 58. The caveat or appearance may be set aside by a judge on the ground that the caveator has no sufficient interest: rule 59, or it may be withdrawn by the caveator: rule 60. In either case costs may be ordered against the caveator: rule 61.

27. If a caveator wishes only to be heard, upon the application and does not require the applicant to bring an action he may so state in his appearance, and in such case only two days notice is given and he will be heard on the application: rule 64.

Probate Duty

28. No probate or letters of administration shall be sealed until there is filed a certificate from the Commissioner of Stamp Duties that adequate security has been given for payment of all probate and succession duty in respect of such of the estate as is liable to duty in Queensland: section 4(2). No duty is payable on "Successions" which vest in possession on or after 1 January 1977: *Succession and Gift Duties Abolition Act 1976*.

Effect of a reseal

29. Upon resealing the original grant has the like force and effect as if it were a grant of the Supreme Court of Queensland: section 4(1).

Passing of Accounts - Order 73

30. Any person beneficially interested in an estate or who desires that an executor or administrator be called upon to file and pass an account may at any time apply for an order requiring that the executor or administrator do so, supporting the application with an affidavit stating the reasons for the application.

31. The court or a judge then orders such proceedings as it, or he thinks fit with costs being discretionary: rule 1.

32. The executor or administrator shall within two months of service of an order to do so, file and pass his account, failing which the court or a judge on application of the person beneficially interested may direct such proceedings be taken against the executor or administrator as thought fit: rule 2.

33. Where the executor or administrator proposes to apply for commission or if required by order of the Court or a Judge to have his account examined and passed, the account shall be a full, true and just account of his administration of the estate verified by affidavit. A

trustee who desires to obtain an order for the allowance of commission out of the income or proceeds of the trust property may file an account of his administration, verified by affidavit of, and have such account examined and passed: rule 3.

34. Notice of the filing of the account (and of intention to apply for commission) and of the day fixed for examination shall be given by advertisement published in the same manner as for applications for probate and letters. The notice shall state that any person having claims on the estate or being interested therein may inspect the account at the Registry and may, before the day specified in the advertisement (being not earlier than thirty days after the last publication of the advertisement) file in the Registry a memorandum stating that he claims to be heard on the examination and passing of the account, and/or allowance of commission: rule 4.

35. Notice of the filing of the account and of the day fixed for examination and of the application to pass the account shall be served on the sureties to the bond (if any) unless their consents duly verified are filed. Service may be by registered post addressed to the sureties: rule 4.

36. Any person having claims on, or being interested in, the estate may, before the day specified in the notice, file in the Registry a memorandum stating that he claims to be heard on the examination and passing of the account. The memorandum shall state an address not more than ten kilometres from the Registry at which all notices relating to the matter may be served. The memorandum must be accompanied by an affidavit stating the nature and ground of objection or exceptions (if any) to the account and/or allowance of commission: rule 5.

37. The Registrar may make such order as to service of the memorandum upon any of the parties interested as he thinks fit: rule 6.

38. On the day appointed the Registrar examines the account and hears the executor or administrator or trustee and all persons who have filed a memorandum and who attend and claim to be heard and enquires into any objections or exceptions that may be taken to the account and/or allowance of commission: rule 7.

Other Matters

39. The Registrar may refer any question arising upon the application for resealing to a judge or may require the application to be made to the Court by motion: Order 71 rule 7.

PART 3 - SOUTH AUSTRALIA

(See *Administration and Probate Act 1919-1980* and *Rules of the Supreme Court* under the *Administration and Probate Act 1919-1960* Part II)

General

1. In South Australia, any "probate or administration" granted by a court of competent jurisdiction in any of the "Australasian States" or in the United Kingdom or "a probate or administration granted by a foreign Court" may be resealed: section 17. "Administration" includes letters of administration with the will annexed and letters of administration granted for general, special or limited purposes: section 4. Special, limited or temporary grants may not be resealed without an order of a Judge: rule 89. "Probate or administration granted by a foreign Court" means a document as to which the Registrar is satisfied that it was issued out of a court of competent jurisdiction in a foreign country other than an "Australasian State", or the United Kingdom, and that in such country it corresponds to a probate of a will or to an administration in South Australia: section 19(1). In order to satisfy himself under this provision, the Registrar may accept a certificate from a consul or consular agent in South Australia of the foreign country, or such other evidence as appears to him sufficient: section 19(2).

Who is entitled to apply

2. Application for resealing of a grant may be made either in person or through a practitioner -

(a) by the executor or administrator, or
(b) by the attorney (lawfully authorised for that purpose) of such executor, or administrator, or
(c) by a practitioner authorised in writing to apply on behalf of the executor or administrator: rule 82.

Where the executor, administrator or attorney is a corporation, application for the reseal of the grant may be made by the manager, acting manager, assistant manager or secretary for the time being of the corporation duly authorised for the purpose: rule 82. A grant of probate or letters of administration to a Public Trustee or public officer may be resealed.

3. Where it appears that the deceased was not at the time of his death domiciled within the jurisdiction of the court which made the grant, it may not be resealed unless the grant is such as would have been made by the Supreme Court of South Australia: rule 87. If the deceased died domiciled in South Australia but the grant was obtained by a Trust Corporation in another State appointed the executor of the will the grant may be resealed in South Australia notwithstanding that the type of grant which would have been made in South Australia would have been letters of administration with the will annexed to a syndic of the company and not probate.

Procedure on an application

4. Notice of the application to reseal need not be advertised unless the Registrar requires it to be: rule 84. Where he does so require, notice must be advertised in such manner as he may direct: rule 84. The notice states that after the expiration of eight days from the

publication of the notice, application will be made to the Supreme Court for reseal of the grant. The name, address and occupation of the deceased are shown as in the grant, as are the name of the court which made the grant and the date on which the grant was made: rule 84 and Form 21.

5. It is not necessary for the applicant for a reseal to file an address for service. However where a foreign company is approved as surety an address for service must be given in the bond: Forms 22 and 23.

6. The application for resealing must be supported by an affidavit by the applicant or an officer of the applicant company which sets out -

(i) the full name, address and occupation of the applicant;
(ii) the name and the late address and occupation of the deceased;
(iii) the name of the court which granted probate or letters of administration to the applicant and the date on which the grant was made;
(iv) that the grant was made to the deponent;
(v) the jurisdiction within which the deceased was domiciled at the time of his death.
(vi) (when applicable) the date on which and the name of the newspaper in which notice of the application was advertised - a copy of the notices must be annexed to the affidavit;
(vii) (where applicable) that the deponent is authorised in writing by the executor or administrator to apply on his behalf for the sealing of the grant and that the deponent believes that the signature to the authority is the proper handwriting of the executor or administrator and that the authority has not been revoked - the authority must be annexed; or
(viii) (where applicable) that the deponent is the attorney lawfully appointed by the executor or administrator under his hand and seal, that the appointment has not to the best of the deponent's knowledge and belief been revoked and that the deponent is duly authorised to apply to the court for the sealing of the grant ;
(ix) the date of the death of the deceased;
(x) that the deceased died possessed of real estate in the State of South Australia which did not exceed in value the sum stated in the affidavit and of personal estate in that State which did not exceed in value the sum stated in the affidavit - particulars must be set out in an inventory annexed to the affidavit: rule 83(1) and Form 20.

The following additional information must be given in the affidavit of the applicant when required viz. -

(a) Where the executor, administrator or attorney is a corporation the officer authorized (within the definition of rule 82(d)) for the purposes of making the application must depose to his office and to his authority to make the application on behalf of the company.
(b) If leave has been reserved to another executor to apply for probate this fact must be given in the oath and it must be deposed that no grant of double probate has been made by the Court to such executor to whom leave was reserved.
(c) If an executor predeceased the testator it must be so sworn in the oath.

(d) If the grant was made to two or more executors one of whom has since died the death of the deceased executor must be sworn to in the oath.
(e) If it is sought to reseal a grant where the deceased held no property in South Australia except as trustee then the capacity in which the property is so held must be disclosed in the oath.
(f) An application to reseal a grant of probate made after the death of the executor to whom it has been granted by his executor will be accepted provided that probate of the deceased executor has been granted or resealed in South Australia by his executor. The oath in this instance must fully disclose all the events that have happened so that the title of the executor of the deceased executor to reseal his testator's grant is thereby established.

7. Where the application is made by a practitioner authorised in writing to apply on behalf of the executor or administrator, the Registrar may accept instead of the affidavit a certificate signed by the practitioner certifying -

(i) that the original grant of probate or administration has been made by a court of competent jurisdiction and has not been recalled or revoked;
(ii) that the grantee or grantees or one or more of them to whom the original grant of probate or administration was made is or are still living;
(iii) that all grantees, if more than one, consent to the sealing;
(iv) the domicile of the deceased at the date of his death;
(v) that there is situate within the jurisdiction of the court estate of the deceased in respect of which the resealing of the original grant is required;
(vi) the particulars and value of the estate in South Australia;
(vii) that he is authorised in writing to apply on behalf of the executor or administrator for the resealing of the grant: rule 83(2).

8. In any application for a reseal, the Registrar may require further evidence of the deceased's domicile: rule 86 of Part II.

9. Where an administrator is required to enter into a bond under section 31 the administration may not be resealed until the requisite bond has been entered into by the applicant: section 18(1). The bond must be given to the Public Trustee and conditioned for -

(a) duly getting in and administering the estate of the deceased;
(b) the delivery by the applicant at the office of the Public Trustee, within six months from the date of the administration or such extended time as the Public Trustee upon application by the administrator shall allow, of a statement and account, verified by his declaration of all the estate of the deceased in South Australia, and of his administration thereof;
(c) the delivery by such person to the Public Trustee of an account of his administration of such estate, verified by his declaration, whenever ordered by the Supreme Court or a Judge thereof so to do; and
(d) the performance by him of all acts and things by this Act required to be performed by administrators: sections 18(1) and 31, rule 85 and Form 23.

The bond must be in a penalty equal to the amount under which the estate of the deceased is sworn and, if required by the Registrar, the alleged value of the estate must be verified by affidavit: section 32 and rule 23(3). However, the Court may reduce the amount of the penalty: section 32.

It should be noted that the Public Trustee takes no part in the procedure of the giving of a bond.

If the circumstances are such that the administrator is not required under section 31(2)(a), (b) or (c) to enter into a bond he must however file an affidavit in which he deposes to being a resident in South Australia, that he bas no legal or equitable claim against, or interest in, the estate of the deceased before his death and that there is no person who is not sui juris who is entitled to participate in the distribution of the estate. The affidavit must also disclose the liabilities in the estate and it must be further deposed that there are sufficient assets in the estate for payment of those liabilities. If in the circumstances of any case the Court is of the opinion that an administration bond should be filed then it will so direct: section 31(2)(d).

Section 31(3) provides that no administration bond shall be required of any agency or instrumentality of the Crown the Public Trustee or any body corporate authorized by a special Act to administer the estates of deceased persons.

10. A judge may dispense with a bond upon being satisfied by affidavit that it is beneficial or expedient so to do: section 33(1). Where the proper officer of the court which made the original grant certifies that security has been given in a sum sufficient to cover the property to which the grant will relate after it has been resealed a Judge may dispense with a bond: rule 85.

11. Where the principal or any surety to the bond is resident out of South Australia such principal or surety must submit to the jurisdiction. [Semble: It is not the practice to accept sureties who are not resident within the jurisdiction except in exceptional cases.] If the surety is a foreign guarantee company approved as surety [rule 23(1)] the company must submit to the jurisdiction and provide an address for service. [Forms 22 and 23]. Except where a Judge otherwise orders, a bond must have two sureties: rules 85 and 23(1). Only one surety is required if the administrator is the husband or wife of the deceased, or the bond is given by a guarantee company approved by the Registrar: rules 85 and 23(1). However, no surety shall be required if -

(a) the gross value of the estate does not exceed $200; or
(b) the application is limited to the prosecution or defence of an action: rules 85 and 23(2) .

12. In cases of limited or special administration, the administration bond must be approved by the Registrar: rule 24. The Registrar must so far as possible satisfy himself that every surety to an administration bond is a responsible person: rule 25. The sureties must justify where an administration -

(a) is taken by a person for the use and benefit of a lunatic or person of unsound mind, or
(b) is made to a person for the use and benefit of any other person but this is subject to certain exceptions where the grant is for the use and benefit of minors or infants: rule 26.

13. On application made on motion, petition or summons in a summary way, the Court may on being satisfied that the condition of any bond given under section 31 has been broken,

order the Public Trustee to assign the bond to some person to be named in the order, or may give leave to the Public Trustee to sue on the bond. That person or the Public Trustee is thereupon entitled to sue and recover on the bond, as trustee for all persons interested the full amount recoverable in respect of any breach of the conditions of the bond: section 57. Proceedings under this section are rare.

14. Instead of the original grant of probate or letters of administration it is sufficient to produce to the Registrar an exemplification or any other formal document purporting to be under the seal of a court of competent jurisdiction, which, in the opinion of the Registrar is sufficient: sections 17 and 20. Where instead of the original grant issued by a foreign Court of competent jurisdiction it is sought to reseal a copy of the same purporting to be under the seal of that Court both the grant and the testamentary papers to which the grant relates (if any) must be certified to be a true and correct copy of the original by the officer of the Court having the custody of the records. In the case of grants issuing from Courts in countries other than the "Australasian States" (cf Section 20), the United Kingdom or member countries of the British Commonwealth the signature of the officer authenticating the grant is generally required to be authenticated. The method of authentication is prescribed by sections 66, 66a and 67 of the *Evidence Act 1929-1974*.

15. A copy of the grant must be deposited with the Registrar with the grant: section 17. This copy is a photographic copy made in the Registry. If the grant is unsuitable for photographing, the Registrar may require an engrossment of the grant suitable for photographic reproduction to be lodged: rule 60(1).

16. The probate or administration lodged for resealing must include a copy of any testamentary papers to which the grant relates or be accompanied by a copy thereof certified as correct by or under the authority of the court by which the grant was made: rule 88(1). The applicant must also furnish two copies of any such testamentary papers and of the grant for record purposes but these copies, unless otherwise directed by the Registrar, must be photographic copies made in the Registry: rules 88(1) to 88(3).

Caveats

17. Neither the South Australian Act nor the rules contain provision for the lodging of a caveat with respect to an application for the reseal of a grant. In practice a caveat lodged in the Probate Registry would prevent the resealing of the grant prior to its removal.

Probate duty

18. Pursuant to section 18(2) of the *Succession Duties Act 1919-1979* a grant of probate or administration may be delivered to Public Trustee before Succession Duties are paid.

Effect of a reseal

19. When resealed, the probate or letters or administration have the same force and effect and the same operation in South Australia as if such probate or administration had been originally granted by the Supreme Court and the executor or administrator must perform the same duties and is subject to the same liabilities: section 17.

Delivery of Accounts to Public Trustees – Passing of Accounts

20. Where the grant which is resealed is an administration, the administrator must within six months from the date of the administration or within such extended time as the Public Trustee upon application by the administrator may allow, deliver at the office of the Public Trustee a statement and account, verified by his declaration, of all the estate of the deceased and of his administration of the estate: sections 17 and 56(1). This statement and account should contain -

(a) a statement of moneys received and paid by the administrator;
(b) description and value (at date of death) of real and personal estate in South Australia not converted into money at the date of the account - inventories and proper valuations must be produced;
(c) description and value (at date of death) of real and personal estate not in South Australia;
(d) a statement of debts and liabilities still unpaid;
(e) names, addresses, and occupation or other description of all persons entitled to any of the property under administration : rule 95 and Form 15.

The Court upon the application of the Public Trustee or any person interested in the estate of a deceased person, may of its own motion order delivery of a statement and account: section 56a.

21. If an executor or administrator wishes to obtain commission, it is necessary for him to file his accounts verified on oath at the Supreme Court. However, there is no requirement to pass accounts in the Court. Provision is made for such an executor or administrator to apply by petition for an order for commission and for objection to be made by any interested party or his solicitor: section 70 and rules 15-23 of Part III.

22. One of the conditions of the administrator's bond is that he must deliver to the Public Trustee an account of his administration of the estate verified by his declaration whenever ordered by the Supreme Court or a Judge thereof so to do: section 31(1)(c).

23. If at any time an administrator -

(a) makes default in compliance with section 56; or
(b) being ordered by the Supreme Court or a Judge thereof to deliver to the Public Trustee an account of his administration of the estate verified by his declaration neglects so to do for one month after the date appointed for that purpose,

the Public Trustee or any person interested may cause the administrator to be summoned before a Judge to show cause why he should not deliver such account forthwith: section 58(1). If the administrator does not attend before the Judge at the time and place mentioned in the summons or does not show any reasonable cause to the contrary, the Judge may order the administrator to deliver the statement and account, or the verified account, either forthwith or within such further time as the Judge thinks fit to allow: section 58(2). If the administrator fails to comply with this order, a Judge may order him to pay the Public Trustee or person so applying any sum not exceeding $1,000 for every such default: section 58(3). Proceedings under these provisions of the Act do not prevent the Court from ordering the assignment of the bond to any person with a view of enforcing the penalty of the bond, or giving leave to the

Public Trustee to sue on the bond: section 58(4). Costs and expenses of and incidental to the summoning of an administrator pursuant to this section shall either be chargeable to or paid out of the estate in respect of which the administrator is summoned, or shall be paid by such administrator, as the Judge orders: section 58(5).

24. On the application of a person claiming to have an interest in an estate, or any creditor the Court or a Judge may direct the executor or administrator to file in the Registry an affidavit setting forth particulars of the assets and liabilities of the estate, wherever situated, and the respective values and amounts of them, or may give such other direction as the Court or Judge in the circumstances of the case thinks fit: rules 110(1) and (2). This provision does not affect the power of the Court to require personal representatives to exhibit an inventory and account: rule 110(3).

Other matters

25. Where an attorney applies for the resealing of any probate or administration or where an attorney or a legal practitioner applies for a reseal on behalf of an executor or administrator, that attorney or legal practitioner must make and file all estate and administration accounts, render all particulars and notices of succession, file all succession accounts and pay all fees and duties and is subject to the same liabilities and penalties in making default in any of these matters, as if the probate or administration had been originally granted by the Court to him: rule 93.

26. Under the rules, the Court or a Judge has power to enlarge or abridge the time appointed by the Rules or fixed by any order enlarging or abridging the time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: rule 4 of Part I. Non-compliance with any of the rules does not render the proceedings void unless the Court or a Judge so directs but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or a Judge thinks fit: rule 5 of Part I. The Court or a Judge may dispense with the observance of any rule: rule 6 of Part I.

27. Any person aggrieved by a decision or requirement of the Registrar may appeal by summons to a judge in chambers: rule 105(1).

28. Notice of the resealing in South Australia of any grant must be sent by the Registrar to the court from which the grant issued: rule 90.

29. Where notice has been received in the Registry of the resealing of a South Australian grant, the Registrar must send notice of any amendment or revocation of the grant to the court which resealed the grant: rule 91.

30. Section 94 provides that where the Public Trustee of South Australia has obtained all order to administer the estate in South Australia of any person who at the time of his death was domiciled in one of the other States of Australia, or in the Dominion of New Zealand, and whose estate in the other State or in the Dominion is being administered by the Curator of such other State or Dominion, or by an executor or administrator duly appointed by the Supreme Court of the State or Dominion, the South Australian Public Trustee may pay over to the Curator of the other State or Dominion, or to such executor or administrator, the balance

of the estate, after payment of his debts in South Australia and the charges provided for in the Act or the rules, without seeing to the application of any money so paid, and without incurring any liability in regard to such payment.

PART 4 – TASMANIA

(See *Administration and Probate Act 1935-1978* and *Probate Rules 1936-1980*)

General

1. In Tasmania, when "probate of the will or letters of administration of the estate of a deceased person who has left any property, whether real or personal, within the State has been granted by a court of competent jurisdiction" in a State or Territory of the Commonwealth of Australia, the United Kingdom, New Zealand, Fiji or in a reciprocating country declared to be such pursuant to section 53 the grant may be resealed: sections 48 and 47A(2)." Administration" means letters of administration whether general or limited or with the will annexed or otherwise: section 3. Rule 53 provides that special, limited or temporary grants may not be resealed without an order of a judge. A confirmation made in Scotland will be resealed in Tasmania. A country is declared to be a reciprocating country pursuant to section 53 when the Governor on being satisfied that the laws of that country make adequate provision for the recognition in that country of probates and letters of administration granted by the Tasmanian Supreme Court, by proclamation declares that country to be a country to which the Act applies. The declaration is subject to the exceptions and modifications (if any) specified in the proclamation: section 53(1).

Who is entitled to apply?

2. Application for the resealing of a grant may be made -

(a) by the executor or administrator (including the executor of an executor becoming by representation the executor of the original estate: section 47A);
(b) by a person duly authorised by power of attorney under the hand and seal of the executor or administrator.

Section 48.

The executor, administrator or attorney may apply either in person or by a proctor or solicitor. An executor or administrator can appoint a solicitor to be his proctor by signing a memorandum in writing appointing the solicitor to be his proctor. The memorandum should be lodged at the registry with the application. Where the applicant is a proctor the endorsement which is made on the grant on the resealing specifically states that the reseal was made on the application of A B as proctor. A foreign corporation which is authorised to act as executor or administrator in the country where the original grant is made and to which such a grant is made may apply for a reseal. However, the application can only be made by a person resident in Tasmania who has been duly authorised by a power of attorney from the corporation. A grant of probate or letters of administration or an order to administer in favour of a Public Trustee or public officer may be resealed. However, an election to administer made by a Public Trustee will not be resealed in Tasmania.

3. Jurisdiction depends upon the existence of property, whether real or personal, within Tasmania: section 48(1).

Procedure on an application

4. Rule 5 provides that personal applications will not be received by letter, or through the medium of any lay agent. Hence an executor or administrator who does not employ a

Tasmanian solicitor must lodge the application at the registry himself and collect the grant himself after resealing.

5. Applications can only be lodged at the Supreme Court registry in Hobart. However, the applicant does not have to lodge an address for service. Tasmanian country solicitors may lodge applications for reseals by mail. After resealing, the country solicitor is advised of the court fee and on payment the resealed grant is posted to him.

6. By section 49, notice of intention to apply must be advertised in the Government Gazette and two newspapers published in different parts of the State: See Form II. An affidavit must be lodged stating that the advertisement was duly published at least fourteen days before the making of the affidavit and that no caveat had been lodged up to the morning of the lodging of the application for the reseal: section 49(1). Where an application is lodged by a country solicitor, it is sufficient for the deponent to phone the clerk at the registry, swear in the affidavit that he has that day been informed by the Clerk to the Registrar that no caveat has been lodged (assuming that such is the case) and post the application to the Registrar. The date of publication of notice in the Gazette and the name of and dates of publication in the newspaper are stated in the affidavit: Form IIIA. A copy of the notice is exhibited to the affidavit: ibid.

7. The application for resealing is supported by an affidavit by the applicant which sets out -

(i) the full name , address and occupation of the executor or administrator;
(ii) that a grant of probate of the will [or letters of administration of the estate] of the deceased was made to the applicant;
(iii) the name of the court which made the grant, the place at which that court made the order, and the date on which the grant was made;
(iv) where the deceased was domiciled at the time of his death;
(v) the date of the deceased's death;
(vi) the amount (to the best of the deponent's knowledge, information and belief) of the gross value of the estate in Tasmania;
(vii) (where applicable) that the applicant is the attorney duly appointed by the executor or administrator authorised to apply on behalf of the executor or administrator for reseal of the probate or letters of administration;
(viii) (where applicable) that the power of attorney has not been revoked: rule 46 and Form XXI.

The grant which it is sought to have resealed is lodged with the application but is not exhibited to the affidavit nor do the deponent or the commissioner for affidavits sign the grant. The grant must include copies of all testamentary papers admitted to probate: rule 51. Where the executor of an executor has become by representation the executor of the original estate, in addition to the original grant, any later probate, grant or order must also be lodged. Where the applicant applies pursuant to a power of attorney from the executor or administrator the power of attorney must be registered on the Powers of Attorney Register and the office copy obtainable after such registration must be lodged with the application. A verified copy (usually a verified photocopy) of the office copy of the power of attorney should also be filed with the office copy. The verified copy remains on the registry file. The power of attorney is not exhibited to the affidavit but is referred to in such a way that it is clear that the document lodged is the one to which the deponent intends to refer. After resealing, the grant and the office copy of the power of attorney are returned to the applicant's solicitor.

8. The Registrar in any case may require further evidence as to domicile: rule 49. The Registrar must require such evidence whenever the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant: rule 49. If it appears that the deceased was not at the time of death domiciled within the jurisdiction of the court from which the grant issued, the seal shall not be affixed to the grant unless the grant is such as would have been made by the Supreme Court of Tasmania: rule 50.

9. Where the application is made after the lapse of three years from the death of the deceased, the reason for the delay is to be certified to the Registrar: rule 52(1). If the certificate is unsatisfactory, the Registrar requires such proof of the cause of delay as he thinks fit: rule 52(2).

10. The applicant must lodge with the Registrar an affidavit of assets and liabilities: rule 63. This document must be lodged with the Registrar, even though no duty is payable. Only the limited class of persons specified in rule 63(3) may search for or inspect such an affidavit lodged with the Registrar. The affidavit must be sworn to by the executor or administrator or some person on his behalf: section 50(3).

11. Letters of administration may not be resealed until such affidavits have been filed and such bond has been entered into as would have been required if such letters had been originally granted by the Supreme Court of Tasmania: section 50(3) and rule 47(1). The bond is to the Registrar: section 25(1). The bond must be given to the gross value pf the estate of the deceased within Tasmania: rule 47(1). If the Registrar requires it, the value of the property must be verified by affidavit: section 50(3) and rule 32(2).

The conditions of the bond are that the administrator will -

(a) when lawfully called on in that behalf, make or cause to be made an inventory of the estate in Tasmania which has or shall come to the hands, possession or knowledge of the administrator, or into the hands and possession of any other person for the administrator;
(b) exhibit the same in the Registry of the Supreme Court of Tasmania whenever required by law so to do.
(c) administer the estate according to law;
(d) make a true and just account of his administration whenever required by law so to do: rule 47, Form VIII.

In special circumstances the Registrar may direct that the conditions be in a form which is different from these: rule 32(2). The bond may be entered into by the administrator outside Tasmania before any Commissioner of the Supreme Court of Tasmania for taking affidavits: section 50(3). Where it is sought to reseal a special or limited grant of administration, the form of bond must be settled by the Registrar: rule 33. Neither the Tasmanian Public Trustee or any person obtaining administration to the use or for the benefit of His Majesty shall be required to give an administration bond: section 25(6). On application to seal letters of administration the administrator or his attorney shall give a bond to the value of the deceased's estate in Tasmania. Sureties to administration bonds shall not be required where -

(a) the grant was made to a corporation authorised by any Tasmanian legislation or appointed by the Court in any particular case to be a trustee;

(b) the grant was made to two or more individuals (unless the Registrar otherwise directs)

(c) owing to the smallness of the estate or the fact that the person to whom administration is to be granted is the sole beneficiary, the Registrar deems it unnecessary to require sureties:

section 25(7), rules 35 and 47(2).

The same practice as to sureties applies as with an original grant of letters. Upon the reseal of letters of administration granted in another jurisdiction to a non-resident of Tasmania a surety resident in Tasmania will be required.

12. Where the letters of administration which it is sought to reseal were taken out for the use and the benefit of a lunatic or person of unsound mind, the sureties must justify except where the administrator is a committee appointed by the Court: rules 36 and 47(2).

13. The Registrar has power to enforce or assign any administration bond: section 25(2). Furthermore, where it appears to the satisfaction of the Court or of a judge that the condition of an administration bond has been broken, the Court or judge may, on an application in that behalf, order that the bond be assigned to the person specified in the order, The person to whom the bond is assigned by the Registrar in pursuance of the order is entitled to sue on the bond in his own name as if it had been originally given to him instead of the Registrar, and to recover on the bond as trustee for all persons interested the full amount recoverable in respect of the breach of the condition of the bond: sections 25(2) and (4).

14. The Court or a judge on the application of a creditor of the estate of the deceased may require that before the resealing is effected adequate security be given for the payment of debts due from the estate to creditors residing in Tasmania: section 51.

15. Instead of producing the original grant of probate or of letters of administration it is sufficient to produce an exemplification of probate or of letters of administration or such other formal document purporting to be under the seal of a court of competent jurisdiction as is, in the opinion of a judge, deemed sufficient: sections 48 and 3. The verified copy must include copies of all testamentary papers admitted to probate: rule 51. The verified copy is normally a photocopy prepared in the solicitor's office and has an endorsement in which two clerks to the solicitor certify that they have compared the copy with the original and that it is a true and correct copy of the original.

16. Where the application for a reseal is made by the executor of an executor becoming by representation the executor of the original estate, it is necessary not only to produce the original probate (exemplification or other document) and also by later probate (exemplification or other document) but also to lodge verified copies of those documents: section 48(1)(a). Where the application is made by the donee of a power of attorney, a verified copy of the power of attorney must be lodged: section 48(1)(b) - see para 7 above.

Caveats

17. Any person claiming to have an interest in the matter may lodge with the Registrar a caveat against the sealing of the probate or letters of administration: section 49(2). A caveat has the same effect and must be dealt with in the same manner as if it were a caveat against the granting of probate or of letters of administration: ibid. The caveat must bear the date on

which it is entered and give an address within one mile of the Registry at which writs, proceedings and other documents requiring service may be left: rule 78(1) and (3).

18. A grant may not be resealed at any time while an effective caveat exists: rule 79. A caveat remains in force for six months only, unless previously renewed: rule 78(1). A caveat may be renewed at any time prior to its expiry, and shall remain in force for six months from the date of the last renewal: rule 78(2).

19. All caveats are warned from the Registry and the warning must be signed by the Registrar. The warning (addressed to the caveator) informs the caveator that unless he enters an appearance in the Registry and sets forth his interest within a certain number of days after service of the warning the Court will proceed to do all such acts and things as are needful and necessary to be done in and about the matter: Form XXXI. The warning must also state the name and interest of the party at whose instance it was issued, and if that person claims under a will, must state the date of the will, and it must also contain an address for service within one mile of the Registry at which by proceeding or document requiring service may be left: rule 81 and Form XXXI. The time for appearance specified in the warning is fixed by the Registrar in conformity with the rules relating to appearance to writs of summons: rule 80(3). Where no appearance has been entered to a warning which has been duly served, the caveat lapses upon the filing of an affidavit of the service of the warning stating the manner of service, and of search for appearance, and of non-appearance: rule 82.

Probate duty

20. The grant of letters or probate in Tasmania is not now dependant upon the prior payment of probate duty. Liability to pay duty (if any) is determined concurrently with the grant or reseal, and the executor or administrator is advised by the Probate Duty Office of the amount to be paid. Control is exercised by prohibiting transfer of assets to the personal representative unless he can produce a "31A Certificate" showing that duty has been paid or is not payable.

Effect of a reseal

21. When resealed, the probate or letters of administration have the like force, effect and operation in Tasmania as if they had been originally granted in Tasmania. The executor, and administrator or person who was authorised by power of attorney to apply for the reseal -

(a) must perform the same duties and has the same rights; and
(b) he and the estate of the deceased person are subject to the same liabilities and obligations,

as if the probate or letters of administration had been originally granted by the Supreme Court of Tasmania: section 48(2).

22. On the reseal, the executor, administrator or attorney is deemed for every purpose the executor or administrator of the estate of the deceased within the jurisdiction of the Supreme Court of Tasmania: section 52.

Passing of accounts

23. There is no general rule in Tasmania requiring an executor or administrator who has resealed a grant in Tasmania to pass accounts. However, under the Act an executor or

administrator may advertise for claims against the estate to be filed within the time prescribed in the Act: section 54. After the expiration of the prescribed time, the executor or administrator may file an account with the Registrar: section 56. Upon filing the account, he is released from all claims and demands on him as executor or administrator in respect of assets shown in the accounts as paid or distributed except at the suit of persons who have filed claims or of whose claims the executor or administrator has otherwise then had notice. Also the Court can make an order requiring the passing of accounts: section 64. The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the Court a true and perfect inventory and account of the real and personal estate of the deceased and empowers the court to require personal representatives to bring in inventories: section 26.

Other matters

24. Where in this narrative it is stated that a power may be exercised by the Court or a judge, the Registrar may not exercise that power.

25. Notice of the sealing in Tasmania of a grant is sent by the registry in Tasmania to the court from which the grant issued: rule 54. When intimation has been received of the resealing of a Tasmanian grant, notice of the revocation of, or any alteration in, the grant is sent by the Tasmanian registry to the court by whose authority such grant was resealed: rule 55.

PART 5 –VICTORIA

(See *Administration and Probate Act 1958-1977* and
Rules of the Supreme Court Chapter III, *Probate and Administration Rules*)

General

1. In Victoria, when "probate of the will or administration of the estate of any deceased person who has left any property whether real or personal within Victoria has been granted by a court of competent jurisdiction" in the United Kingdom or in any of the "Australasian States" or in a country specified in a proclamation made under section 88 of the Act, the grant may be resealed: sections 81 and 88. "Administration" means letters of administration whether general special or limited or with the will annexed or otherwise. A confirmation of the executor of any person granted in any sheriff court in Scotland may be resealed: sections 81 and 87. In the case of a country specified under section 88 of the Act not only a grant of probate or administration may be resealed but also a grant or order issued by a court of competent jurisdiction in that country appointing a person executor of the will or giving a person authority to administer the estate of a deceased person may be resealed. A country may be specified under section 88 if the Governor in Council is satisfied that a grant of probate or of letters of administration issued by a court of competent jurisdiction in that country other than an Australasian State or the United Kingdom or that a grant or order issued by such a court appointing a person executor of a will or giving a person authority to administer the estate of a deceased person corresponds to a grant of probate or letters of administration issued by the Supreme Court of Victoria: section 88(1). Subject to any exceptions mentioned in the proclamation, the provisions apply to an probates grants and orders made in the country whether they have been made before or after the commencement of the Act.

Who is entitled to apply

2. Application for the resealing of a grant may be made either in person or through a solicitor -

(a) by the executor or administrator (including the executor of an executor becoming by representation the executor of the original estate);
(b) by a person duly authorised by power of attorney under the hand and seal of the executor or administrator;
(c) by a solicitor on behalf of the executor, administrator or donee of a power of attorney.

A foreign corporation which is authorised to act as executor or administrator in the country where the original grant is made and to which such a grant is made may apply for a reseal even though an original grant would not be made to it in Victoria: *Griffith's Probate Law and Practice in Victoria* (2nd ed 1976), 113. A grant of probate or letters of administration to a Public Trustee or public officer may be resealed. Application may be made by an officer of the company or by a person empowered under power of attorney or by a Victorian solicitor.

3. Applications for resealing by attorneys are generally made directly by an attorney resident in Victoria. Where a grant has been made to an attorney in another jurisdiction the power of attorney should contain authority for resealing. Where a solicitor applies for a reseal on behalf of the executor, administrator or donee of the power of attorney he makes the affidavit in support of the application himself, swearing that he has been instructed by the

executor or administrator and that the executor or administrator is desirous of having the grant resealed. It is not necessary to produce written instructions.

Procedure on an application

4. It is not necessary in practice for the applicant to file with the Registrar an address for service in Melbourne. Applications for reseal cannot be lodged through the mail. It is not in practice necessary for the applicant to show that the deceased was domiciled in the law area in which the original grant was made.

5. In relation to grants made by courts in the United Kingdom or any of the Australasian States, the jurisdiction depends upon the existence of assets within Victoria: section 81(1). It is sufficient if the legal title was in the deceased even though the beneficial interest in the assets were held on trust: *In the Will of Blackwood* (1891) 13 ALT 94.

6. Under section 83 of the Act, notice of the intention of the executor or administrator or person authorised by power of attorney to apply for the reseal must be advertised in one of the Melbourne daily newspapers, and an affidavit verifying that such advertisement was published at least 14 days previously must be lodged in support of the application.

7. The application for resealing is also supported by an affidavit by the applicant. The requirements in the case of an affidavit in support of an application for reseal are those thought to be relevant to resealing applications selected from the requirements of the rules relating to applications for original grants. The affidavit therefore should set out -

(i) the full name, address and occupation of the executor or administrator, and in the case of an administrator his relationship to the deceased;
(ii) the name and the late address and occupation of the deceased, and the date and place of his death and in the case of an intestacy, the status of the deceased eg leaving a husband or wife, or dying a bachelor, spinster, etc and the names and relationship of those entitled to share including the applicant;
(iii) if the deceased left a will then the date of the will and the fact that he appointed the applicant executor of the will;
(iv) the name of the court which granted probate or letters of administration to the applicant, the date on which the grant was made and that the deponent is applying for the grant (which is exhibited to the affidavit) to be resealed;
(v) that the grant has not been revoked;
(vi) that the deceased left estate in Victoria, listing the particulars of each item of property left by the deceased in Victoria (and distinguishing between real and personal property) with the value at date of death of each item opposite its particulars - the values are gross values, no liabilities being shown - the Court or a Judge or the Registrar may in special cases dispense with full compliance with this paragraph;
(vii) that the applicant is over the age of eighteen years;
(viii) (where applicable) that produced and shown to the deponent at the time of swearing the affidavit is a power of attorney from the executor or administrator to the deponent;
(ix) (where applicable) that the power of attorney has not been revoked.

No form is prescribed for this affidavit. The grant which it is sought to have resealed is exhibited to the affidavit.

Where the executor of an executor has become by representation the executor of the original estate, in addition to the original grant any later probate, grant or order must be exhibited to the affidavit: section 81(1)(a). Where the applicant applies pursuant to a power of attorney from the executor or administrator, the power of attorney must be exhibited: section 81(1)(b). After the resealing these exhibits are returned by the registry to the applicant's solicitor.

8. An affidavit of notices and searches is also lodged in the registry. In this affidavit, the deponent is required to swear -

(i) that the advertisement required under section 83 was duly published at least fourteen days before the making of the affidavit giving details and setting out the text of the advertisement;
(ii) that he has searched in the office of the Registrar of Probates and found that no caveat had been lodged up to the morning of the lodging of the application for the reseal;
(iii) that no application for probate or administration or the sealing of a foreign grant in the matter has heretofore been made to or been granted by the Court or the Registrar and that no election to administer has been lodged by the Public Trustee - if any previous application has been made full particulars must be given.

Where the affidavit is not made by the applicant in person, it must be made by either the solicitor acting in the application or his clerk and the affidavit should state that it is so made: rule 12(2). Where the applicant is the Public Trustee, the deponent must be a clerk employed in the office of the Public Trustee: ibid.

9. Under section 84(1) of the Act, as a condition of sealing any letters of administration, the Court or the Registrar may subject to and in accordance with the rules, require one or more sureties in such amount as the Court or the Registrar thinks fit to guarantee that they will make good, within any limit imposed by the Court or the Registrar on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased in Victoria may suffer in consequence of a breach by the administrator of his duties in administering it in Victoria. The form of guarantee prescribed under the rules lists these duties of the administrator as -

"(a) well and truly to collect and administer according to law the estate of the deceased which is situated in Victoria;
(b) to make or cause to be made a true and just account of the administration of the estate which is situated in Victoria and exhibit and deposit the same" : rule 23(2) and Form 3.

The giving of time to the administrator or any other forebearance or indulgence does not affect the sureties' guarantee: ibid. A guarantee cannot be required in the case of an application to reseal a grant of probate.

10. A guarantee enures for the benefit of every person interested in the administration of the estate as if contained in a deed made by the surety or sureties by every such person: section 84(2).

11. Under section 84(1), the Court or Registrar has a discretion as to whether to require a guarantee. The rules do not list any cases in which the Court or Registrar may not require a guarantee. However, rule 23(1) does provide that in the case of an application for a grant of administration, as distinct from an application for a reseal, the Court or Registrar may not require a guarantee except where it is proposed to grant administration -

(a) to a creditor of the deceased applying as a creditor;
(b) to a person having no immediate beneficial interest in the estate;
(c) to an attorney of a person entitled to a grant of administration;
(d) to the use and benefit of an infant or of some person incapable of managing his own affairs;
(e) to a person who appears to the Court or the Registrar to be resident outside the State of Victoria;
(f) ad colligenda bona or ad litem;
(g) (i) under section 20 in respect of the real estate of a deceased person or any part thereof separately from administration in respect of his personal estate or any part of it; or administration under section 20 in respect of a trust estate only; or an administration under section 20 which is limited by the Court;
(ii) under section 22 pending litigation ;
(iii) under section 24 where the personal representative is abroad;
(h) where the Court or Registrar considers that there are special circumstances making it desirable to require a surety or sureties.

Presumably, the Court or the Registrar would not require a guarantee as a condition of sealing the grant except where it appeared that the reseal was to be made in favour of a person or in any of the circumstances listed in (a) to (h) of rule 23(1). However, as these would include the case of an administrator who is resident outside Victoria and the attorney of a person entitled to apply for a reseal, only in very rare circumstances would a guarantee not be required on a reseal.

12. A guarantee may not be required where the letters of administration or grant or order were granted -

(i) to a person for the use or benefit of Her Majesty; or
(ii) to any person body corporate or holder of an office in any place outside Victoria specially exempted by any Act or by rules made under section 89.

Section 84(4).

13. Sureties to guarantees must justify by affidavit: rule 24. Affidavits of surety have always been accepted in Victoria if they show sufficient equity in particular assets to cover the amount of the estate. It is only necessary to declare the surety's total assets and liabilities where a surety is resident outside Victoria. If the Registrar of Probates is not fully satisfied with the affidavits, he may require further information or assurance as to the sufficiency of the security, either by affidavit or examination on oath of the proposed surety: ibid.

14. Where the proposed surety is a corporation, there must be filed an affidavit by the proper office of the corporation to the effect that it has power to act as surety and has executed the guarantee in the manner prescribed by its constitution. The affidavit must also contain sufficient information as to the financial position of the corporation to satisfy the Registrar that its assets are sufficient to satisfy all claims which may be made against it under

any guarantee which it has given or is likely to give for the purposes of section 57: rule 25. Instead of requiring an affidavit in every case, the Registrar may accept an affidavit made not less often than once in every year together with an undertaking to notify the Registrar forthwith in the event of any alteration in its constitution affecting its power to become surety under section 57.

15. An action may not be brought on a guarantee without the leave of the Court or a judge: section 84(3). An application to sue on a guarantee must be made by motion or summons. Notice of the application must be given to the administrator, the surety or any co-surety.

16. As well as the original grant of probate or administration and exemplifications thereof certified copies are accepted. These are copies under the seal of the original court certified as true copies by a Registrar: sections 80 and 81. In addition, a verified copy of the grant, or exemplification must be lodged: section 81(1). Part V of the *Evidence Act 1958*: Griffith, 116. The verified copy is exhibited to the affidavit of notices and searches.

17. Where the application for a reseal is made by the executor of an executor becoming by representation the executor of the original estate, it is necessary not only to produce the original probate or exemplification, and also any later probate (or exemplification), but also to lodge verified copies of these documents: section 81(1)(a). Where the application is made by the donee of a power of attorney, a verified copy of the power of attorney must be lodged: section 81(1)(b). These verified copies are exhibited to the affidavit of notices and searches.

Caveats

18. Any person who may have an interest in the matter may lodge with the Registrar a caveat against the sealing of the probate or letters of administration: section 82. See Griffith, 92. A caveat has the same effect and must be dealt with as if it were a caveat against the granting of probate or administration: section 82. The caveat must contain -

(1) the name of the person lodging the same; (section 58)
(2) an address within 50 kilometres of Melbourne GPO at which notices may be served on him; (section 58)
(3) the date it is entered; (rule 29)
(4) the signature of the caveator or his solicitor. (rule 29)

It should also contain -

(5) a precise description of the estate in which it is lodged;
(6) a description of the capacity in which the caveator lodges the caveat, showing his interest in the refusal of the application .

See Griffith, 173.

19. Where a caveat is lodged the Court may upon motion on behalf of the person applying for the reseal supported by affidavits upon which if there had been no caveat probate or administration would have been granted, make an order nisi for the resealing of the grant to the person applying: section 59. The order nisi names a time for showing cause against the order (but the Court may enlarge the time from time to time): section 59. The order nisi must be served on the caveator: section 60. If upon the day named in the order nisi the caveator does not appear the order nisi may be made absolute upon an affidavit of service and the grant sealed: section 61. If the caveator appears, the hearing must be conducted in the same manner

as nearly as may be upon trial and the order nisi may be made absolute or discharged with or without costs as may be just, and if the Court so directs such costs may be paid out of the estate: section 61. However, it is not necessary for either party to prove his case by witnesses in the first instance, but the caveator is required to state generally his grounds of objection and unless it can be disposed of summarily the Court fixes a day for hearing or directs the case to be entered on a list of causes for hearing: rule 30. The caveator must within four days from such direction, unless the Court otherwise orders, deliver to the applicant for the reseal, particulars of objection to the reseal: rules 31 and 32, The Court normally orders "otherwise" by directing the delivery of particulars within seven days, instead of the four days: see Griffith, 175. The hearing is directed before a judge without a jury unless there are special circumstances: see Griffith, 174.

20. The general practice is to adduce viva voce evidence at the hearing of the order nisi. However, under section 62 and rule 34, the parties may verify their cases in whole or in part by affidavit. If a party wishes to do this, he must four clear days before the day appointed for hearing, file in the office of the Registrar of Probates any affidavits he may propose to use at the hearing and serve notice of the filing of the affidavits on the opposite party: rule 34. If the opposite party desires to cross-examine a deponent he must, two clear days before the day appointed for hearing serve a notice requiring the production of the deponent for cross-examination: rule 34. The Court may at its discretion specially order variations from these provisions: rule 34.

21. On the return of an order nisi, the Court may order that the parties or either of them make discovery and inspection of documents in their possession, or which were in the possession of the deceased at the time of his death: rule 35. The Court may make any other order for the conduct of the hearing that the Court in its discretion thinks fit: ibid. It is now the practice to order that discovery be mutual: see Griffith, 182.

22. If a question of fact arises in any proceedings, the Court may, if it thinks fit, cause the same to be tried by a jury or before a judge: section 63. The question of fact would be tried in the same manner as an issue under any rules of the Court for the time being in force relating to the trial of issues: ibid.

23. Where a caveat is lodged by the Public Trustee, the Court may if it thinks fit order costs to be paid to him out of the estate whether the order nisi is discharged or not: section 64.

Probate duty

24. In Victoria, the grant may be sealed even though the probate duty payable in respect of assets in Victoria has neither been assessed nor paid.

Effect of a reseal

25. When resealed, the probate or administration has the like force, effect and operation in Victoria as if it had been originally granted in Victoria: section 81(2). The executor, administrator or person who was authorised by power of attorney to apply for the reseal -

(a) must perform the same duties and has the same rights, and
(b) he and the estate of the deceased person are subject to the same liabilities and obligations,

as if the probate or letters of administration granted by the Supreme Court of Victoria: section 81(3).

26. On the reseal, the executor, administrator or attorney is deemed for every purpose the executor or administrator of the estate of the deceased within the jurisdiction of the Supreme Court of Victoria: section 85.

Passing of accounts

27. Under the rules, the executor or administrator must deposit at the office of the Registrar within fifteen months of the reseal an account of the administration of the estate which he has undertaken: rules 28 and 1. The account (known as a "fifteen months account") must set out -

(a) particulars and amounts of money received by way of corpus and particulars and amounts of disbursements paid out of corpus;
(b) particulars and amounts of income received and particulars and amounts of disbursements paid out of income;
(c) particulars of estate distributed in specie together with particulars of their value for purposes of probate duty;
(d) particulars of estate retained or remaining uncollected together with particulars of their value for purposes of probate duty;
(e) particulars of money now in hand and in held by the executor or administrator.

Rule 28, Form 5.

In practice executors or administrators do not lodge fifteen months accounts. However, if after fifteen months from the reseal a person interested in the estate seeks to view a fifteen months account at the registry and one has not been lodged, the Registrar will advise the solicitor for the estate of the requirement and request him to deposit the account. If the solicitor ignores the request, the Registrar has no power to compel compliance with the request. However, the interested party could (if he wishes) apply to the Court for an order that the executor or administrator lodge the fifteen months account.

28. When the applicant is a creditor to whom a grant was made in his capacity as a creditor, he must swear to the truth of his account: section 28(2). Whenever on the application of the registrar the creditor is ordered by the Court or judge so to do after the expiration of the fifteen months he must deposit such accounts as the Court or judge thinks fit: ibid.

29. There is no general rule in Victoria requiring an executor or administrator who has resealed a grant in Victoria to pass accounts. However, the Court could make a special order in an administration action requiring the passing of accounts: see Griffith, 106. Also section 28(1) provides that the personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the Court a true and perfect inventory and account of the real and personal estate of the deceased and empowers the Court to require personal representatives to bring in inventories.

Other matters

30. Where in this narrative it is stated that a power may be exercised by the Court (and not by the Court or the Registrar, or simply the Registrar) the Registrar may not exercise that power.

31. Except in so far as provision has been made in the Probate and Administration Rules, the rules, practice and mode of procedure of the Supreme Court in its civil procedure apply in applications for reseal of grants of probate and administration: rule 40.

32. Provided a person who under a power of attorney has obtained a reseal of grant in Victoria has -

(a) paid all charges, duties and fees under the *Probate Duty Act 1962*;
(b) satisfied or provided for the debts and claims of all persons resident in Victoria of whose debts or claims he has had notice;

he may pay over or transfer the balance of the estate to or as directed by the executor or administrator of the estate in the country in which the deceased was domiciled at the date of his death or to or as directed by the donor of the power of attorney. In this event, he is under no liability to see to application of the balance and incurs no liability in regard to such payment or transfer but must duly account to the executor, administrator or donor for his administration: section 86.

PART 6 -WESTERN AUSTRALIA

(See *Administration Act 1903-1980* and
Non-Contentious Probate Rules 1967-1980)

General

1. In Western Australia, any "probate or letters of administration " granted by a court of competent jurisdiction in any portion of Her Majesty's dominions may be resealed: section 61(1). "Letters of Administration " includes letters of administration with the will annexed and letters of administration granted for general, special or limited purposes: section 3.

Who is entitled to apply

2. The executor or administrator named in the grant is entitled to apply for the reseal: section 61(1). Thus, a corporation, a Public Trustee or a public officer who has been granted probate or letters of administration by a court outside Western Australia would be entitled to have the grant resealed. A person authorised by power of attorney under the hand and seal of the executor or administrator may apply for a reseal: section 61(1).

Procedure on an application

3. It is not necessary to advertise notice of intention to apply for a reseal.

4. Proceedings for the resealing of a grant are commenced by motion. The motion is dealt with in the absence of the public and without the appearance before the Court of any person. Applications may be lodged by post by an applicant in person residing, or by a solicitor carrying on practice, more than 30 kilometres from Perth GPO, by certified mail including the basic fees of $45.00. An application must however contain notice of an address for service in Western Australia.

5. Where the executor or administrator is not resident within Western Australia, he must file with the Principal Registrar an address for service within Western Australia: section 53(2). All services at that address are deemed personal service: ibid.

6. It is not necessary for the applicant to show that the deceased was domiciled in the jurisdiction in which the original grant was made.

7. The application for resealing must be supported by an affidavit by the executor or administrator which sets out -

(i) the full name, address and occupation of the executor or administrator;
(ii) the name and the late address and occupation of the deceased, and the date and place of his death;
(iii) the name of the court which granted the probate or letters of administration and the date on which the grant was made;
(iv) that the grant was made to the deponent and the relationship (if any) of the deponent to the deceased;
(v) that the deceased left estate in Western Australia;
(vi) that the deponent is applying for the grant to be resealed;

(vii) (where applicable) that by Power of Attorney, the executor or administrator appointed the applicant to apply to the Court to reseal the probate or letters of administration and the date of the Power of Attorney.

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

(a) all movable and immovable property in Western Australia, comprised in the estate of the deceased;
(b) the value at the time of the death of the deceased of the property referred to, and
(c) all debts in Western Australia owing by the deceased at the time of his death.

This does not apply where the deceased died before 1.1.1980, or where the applicant is the Public Trustee or a corporation authorized by law to obtain a grant, or where the Court or the Registrar, in special circumstances, so directs. Such a direction may be given on such terms and conditions as the Court or Registrar thinks fit.

8. Where the applicant is an administrator the Court may, subject to and in accordance with the rules require one or more sureties to enter a guarantee: section 62(1). In the guarantee, the sureties guarantee that they will, when lawfully required to do so make good within the limit imposed by the Court any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of the breach by the administrator of his duty -

(a) to collect and get in the real and personal estate of the deceased and administer it according to law;
(b) to file an inventory of the estate of the deceased, and pass his accounts relating thereto within such time, and from time to time, and in such manner as may be prescribed by the rules or as the Court may order: section 62(1), rule 27A and Form 2A.

The giving of time to the administrator or any other forbearance or indulgence does not affect the sureties' guarantee: Form 2A. The guarantee enures for the benefit of every person interested in the administration of the estate as if contained in a deed made by the surety or sureties with every such person: section 62(2).

9. The rules provide that the Registrar may not require a guarantee except where it is proposed to reseal the grant -

(a) for the use and benefit of another person or where the grant is otherwise limited ;
(b) to an applicant who appears to the Registrar to be resident elsewhere than in Western Australia;
(c) where a beneficiary is not of full age or capacity; or
(d) where a beneficiary is not resident Australia and has no agent or attorney there;

or except where the Registrar considers that there are special circumstances making it desirable to require a guarantee: rules 27A, 27(1). In a case where any of the circumstances outlined in (a) to (d) exists, a guarantee may not be required except in special circumstances, where the applicant or one of the applicants is -

(i) a corporation authorised by the law of Western Australia to obtain a grant; or
(ii) a person holding a current practice certificate under the *Legal Practitioners' Act 1893*: rules 27A, 27(2).

A guarantee may not be required from Western Australia's Public Trustee or from a person obtaining administration for the benefit of the Crown: rule 27(4).

10. The Registrar may not require a guarantee as a condition of granting a reseal to any person without giving that person or, where the application for the grant is made through a solicitor, the solicitor an opportunity of being heard with respect to the requirement: rule 10(4).

11. Where a guarantee is required, it must be by two sureties resident in Western Australia unless the surety is a corporation approved by the Court or the applicant is a corporation authorised by the law of Western Australia to obtain a grant or where the Registrar otherwise orders: rules 27A, 27(5). The guarantee must be for an amount equal to the gross value of the estate in Western Australia or such reduced or increased amount as the Registrar orders: rules 27A, 27(6). In fixing the amount of the guarantee the Registrar must take into account the extent to which the claim of a creditor is secured over a mortgage or charge of real or personal estate of the deceased: rules 27A, 27(6).

12. Under sections 62(3) and 26(2), the Court on the application of any person interested in the estate or of its own motion may require the surety or sureties to give such further or additional guarantee as the Court may direct or may order that the liability of a surety under the guarantee be reduced to such amount as the Court thinks reasonable. Under the same sections, if the further or additional guarantee is not given by the surety or sureties and the administrator does not produce another surety or sureties, as the case may require, to give that further or additional guarantee, the Court may remove the administrator and appoint another in his place. The powers of the court under sections 62(3) and 26(2) may only be exercised by a judge, and not by the Registrar: section 5 and rule 4.

13. A surety other than a corporation must justify by way of affidavit of justification to the satisfaction of the Registrar: rule 27(7).

14. Where a guarantee is given, an action on the guarantee may not be brought without the leave of either the Court or the Registrar, and may be brought only on such terms and conditions as the Court or the Registrar thinks fit: sections 62(3), 26(5). If, on the application of a surety it appears to the Court that -

(a) the estate is being wasted, or is in danger of being wasted;
(b) the surety is being in any way prejudiced, or is in danger of being prejudiced, by the act or default of the person administering the estate; or
(c) any surety desires to be relieved from further liability,

the Court may grant such relief as it thinks fit: sections 62(3) , 26(6).

15. Where the grant to be resealed is a probate, it must include an authentic copy of the will and codicil (if any) to which the grant relates, or be accompanied by a copy of the will or codicil certified as correct by or under the authority of the Court by which the grant was made: rule 43(1). Instead of the original grant of probate, or letters of administration it is sufficient to produce an exemplification or such other formal evidence of the grant purporting

to be under the seal of a court of competent jurisdiction as in the opinion of the Court is sufficient: sections 61(1) and 3. The person producing a grant for sealing must also lodge for record purposes a copy of the grant and of any will and codicil to which it relates: rule 43(2). Unless otherwise directed by the Registrar, this copy must be a photographic copy made in the Registry: rule 43(3).

Caveats

16. A person claiming to have an interest in the estate and intending to oppose the application for a reseal 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: section 63(1), rule 33 and Form 3. The caveat must set forth the name of the caveator and an address for service within Western Australia and state fully the nature of the interest of the caveator: section 63(2) rule 33(2). A caveat remains in force for the space of six months from the date it is lodged: rule 33(3). It then expires and is of no effect, unless otherwise ordered: ibid.

17. A judge may on the application of the person applying for the reseal remove the caveat: section 64(1). This power may not be exercised by the Registrar: section 5 and rule 4. Such an application must be served on the caveator by delivering a copy to him at the address mentioned in his caveat: section 64(2). The application may be heard and order made upon affidavit or oral evidence, or as the Court may direct: section 64(3). Where the applicant does not obtain an order for removal, he must, within one month, or such extended time as a Judge or the Registrar may allow after notice of the lodging of the caveat commence contentious proceedings by issuing a writ against the caveator and proceeding in the ordinary manner: rule 33(5). If no step is taken by the applicant within one month after notice of the lodging of the caveat, the caveator may apply to a Judge or the Registrar for an order directing the applicant to proceed with his application and the Judge or Registrar may make an order upon such terms as he thinks fit: rule 33(6).

Death duty

18. Duty is only payable where the deceased died prior to 1 January 1980. In those cases, except where the Registrar otherwise directs, a grant of administration shall not be resealed until the estate to which administration relates has been assessed for duty under the *Death Duty Assessment Act 1973*: section 29(2). (Provided the administrator has lodged a death duty return with the Commissioner of State Taxation, the Registrar will normally direct that the grant be resealed even though the estate has not been assessed for duty. Section 29(2) is aimed at the exceptional case where a death duty return has not been lodged. Where a return has been lodged the Commissioner will inform the Registrar of the assessed value of the estate and the Registrar will then check the penalty in the guarantee and if necessary require a further guarantee with a higher penalty. If no death duty return is lodged, the Registrar will use other means to ascertain the value of the estate and will not direct that the grant be resealed until satisfied that the penalty in the guarantee is sufficient).

Effect of a reseal

19. When resealed, the probate or letters of administration have 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: section 61(2). (The duties are set out in section 43).

Passing of accounts

20. The person in whose favour the reseal is made must file an inventory of the estate of the deceased and pass his accounts relating to the estate of the deceased within such time, and from time to time, and in such manner as may be prescribed by the rules, or as the Court may order: section 43(1)(b). Where the reseal is in favour of the Public Trustee for Western Australia, it is not necessary for accounts to be passed: rule 37(1). The accounts must set out -

(a) particulars of the receipts and disbursements in the estate;
(b) particulars of the portion of the estate distributed in specie (including particulars of value);
(c) particulars of the portion of estate retained or remaining uncollected (including particulars of value);
(d) particulars of moneys now in hand and investments made since date of death; and
(e) where there is any balance available for distribution a plan of distribution: rules 37(1) and (2) , Form 4.

21. The accounts must be filed within twelve months after the grant, or within such further time as a Judge or the Registrar may allow, and must be verified by the affidavit of the executor or administrator: rule 37(3).

22. At least fourteen days before the day fixed for passing the accounts notice in the prescribed form (Form 5) must be advertised in a daily newspaper published in Perth. The form gives notice that the accounts have been filed in the Registrar's office and that all persons having any claim on the estate or being otherwise interested in the estate may inspect the accounts at the time specified and if they think fit object to them, and that if the accounts are not objected to, they will be examined by the Registrar and passed according to law. The notice is signed by the Registrar.

23. Where there is a guarantee in the case of an administrator, notice of the filing and of the appointment to pass his accounts must be served on the sureties to the administration, bond: rule 37(5). A person wishing to object to the passing of accounts, must file in the registry before the day fixed for the passing of the accounts a notice of his intention to object, and also an affidavit stating his interest and the nature and grounds of his objection: rule 37(6). On the taking of the accounts, the Registrar may make such order as to service upon any of the parties or persons interested as he may think fit: rule 37(7). Any person interested may attend before the Registrar on the taking of the accounts: rule 37(8). The costs of the accounting party and of any person who has filed a notice of objection are in the discretion of the Registrar: rule 37(9). The Registrar's allowance of an account is recorded by a certificate: rule 37(10).

24. The order passing accounts is prima facie evidence of their correctness and after the expiration of three years from the date of the order operates as a release to the person filing the same, except in so far as it is shown by some person interested in the account that a wilful or fraudulent error, omission or entry has been made in the account: section 43(2).

25. Where an executor or administrator neglects to file an inventory or to pass accounts within one month after the expiration of the period fixed by the rules, the Registrar must notify the executor or administrator of the neglect: section 44(1). If there is further delay for a period of a month, the Registrar must apply to a judge for an order upon the executor or

administrator to file such inventory or exhibit such account forthwith: section 44(2). These proceedings, however, do not affect the liability of the executor or administrator to be proceeded against for an account and administration or prevent an action from being brought on any guarantee: section 44(3).

Other matters

26. Except where it has been indicated above that a power may only be exercised by a judge, all the powers of the Court in relation to non-contentious proceedings for the reseal of a grant may be exercised by the Registrar: rule 4.

27. Where a grant has been resealed, a copy of the grant may be obtained from the Court with or without the annexure thereto of a copy of the will (if any) to which it relates: section 140(3). Such copy may be issued under seal for all purposes as an office copy, and when so sealed and issued is sufficient evidence of that grant without further proof: ibid.

28. The practice of the Western Australian registry is to give notice of the sealing to the court from which the grant issued.

29. Where the Public Trustee of Western Australia is administering the estate of any person who at the time of his death was domiciled in any other part of Australia or in New Zealand and whose estate is being administered by the Curator or Public Trustee of the jurisdiction in which the deceased was domiciled, the balance of the estate, after payment of local creditors, commission fees, and expenses, may be paid over to that Curator or Public Trustee: section 142(1).

PART 7 - AUSTRALIAN CAPITAL TERRITORY

(See *Administration and Probate Ordinance 1929-1980* and *Rules of the Supreme Court*, Part 4)

General

1. An order of a court of competent jurisdiction in a State or Territory of the Commonwealth or in a Commonwealth country granting probate of a will, administration of an estate or an order to collect and administer an estate may be resealed: section 80(1).

2. "Administration" includes all letters of administration of the real and personal estate of deceased persons whether with or without the will annexed and whether granted for general, special or limited purposes. "Administration" and "Probate" include exemplification of letters of administration or probate respectively and such other formal document purporting to be under the seal of a Court of competent jurisdiction as is in the court's opinion sufficient: section 5. In addition, "administration" and "probate" also include an order to a curator or other person to collect and administer an estate and a confirmation of the executor or any person granted in any Sheriff Court in Scotland: section 83. An order to collect and administer an estate includes an exemplification of such an order: section 80(5).

Who is entitled to apply?

3. Resealing may be granted to -

(a) in the case of a probate of a will -
  (i) the executor to whom the probate was granted;
  (ii) a person authorised by that executor, under a power of attorney, to make the application; or
  (iii) the executor by representation of the Will;
(b) in the case of administration of an estate -
  (i) the administrator to whom the administration was granted; or
  (ii) the person authorised by that administrator under a power of attorney to make the application; or
(c) in the case of an order to collect and administer the estate - a public trustee in the country or part of a country to whom the order was granted.

Section 80(1).

The application may be made through a solicitor or in person by executors and parties entitled to grants of administration: Order 72 rule 5(2).

Procedure on an application

4. Notice of an intended application must be in accordance with Form 3: rule 4. Application may be made on motion which unless the court otherwise orders, may be made ex parte: rule 5.

5. The application must be accompanied by an affidavit setting forth -

(i) that the original grant was made to the deponent;
(ii) the relationship, if any, of the deponent to the deceased;

(iii) that the deponent seeks to have the grant resealed;
(iv) the name, address and occupation of the deceased;
(v) the name of the court which granted probate or letters of administration and the date of the grant;
(vi) where applicable, that the deceased has left a will;
(vii) where applicable, that the deceased died intestate;
(viii) where applicable, that the deceased left property in the ACT specifying its value, distinguishing real and personal estate and stating shortly what it consists of;
(ix) where applicable, the name, address and occupation of the executor of the will;
(x) where applicable, if the applicant is a creditor, to what amount particulars of the debt and evidence in support;
(xi) where applicable, that by power of attorney the executor or administrator has appointed the applicant to apply to the court for reseal of the grant, giving the date of the power of attorney and that the power of attorney has not been revoked;
(xii) that notice of intention to apply has been published as prescribed;
(xiii) that no caveat has been lodged up to the time of application;
(xiv) that no application for probate or administration has been made to or granted by the Court or Registrar, or if so, full particulars.

Order 72 rules 6 and 14, supplemented by reference to usual practice.

6. The following matters (which are required to be deposed to in support of an application for an original grant) need not be deposed to upon an application for resealing -

(i) that the applicant, being a natural person, is of the full age of 21 years;
(ii) the death of the deceased and whether he was married or not;
(iii) the date of the deceased's death;
(iv) where applicable, that the will is unrevoked and the date of the will;
(v) where applicable, that the testator was of the full age of 21 years at the date of execution of the will;
(vi) where applicable, the name and address of each subscribing witness;
(vii) where applicable, that the will was duly executed and an identification or statement of the contents of the will;
(viii) in the case of intestacy, what relatives or next of kin the deceased left surviving him , so far as is known and material by law to the right to administer or share in his property;
(ix) in the case of intestacy, the character in which the person making the application claims to be entitled and the truth thereof;
(x) in the case of intestacy, that the applicant has carefully inquired if there is a will.

Order 72 rules 6 and 14.

7. Resealing shall not be effected until such bond has been entered into as would be required in case of an original grant: section 82(2), Order 72 rule 30, Forms 4 and 5.

8. In addition, before resealing is effected, the notice of intention to apply for resealing must be published once in a newspaper published and circulating in the Territory at least 14 days prior to the making of an affidavit to that effect. The motion and affidavit must be filed and the probate, administration or order, together with a copy thereof, produced to the Registrar: section 80(1). The Registrar has power to order the resealing but the Registrar shall

not, without an order of the Court, reseal a probate or administration if a caveat has been lodged. The Registrar may, at any time, refer an application for resealing to the Court: section 80(1).

9. Before resealing a probate, administration or order to collect and administer the Court may require the applicant to give security for the proper administration of the estate: section 80(4).

10. The bond of an ordinary administrator and his sureties shall be in accordance with Form 4. The Bond of an administrator to whom administration is granted as a creditor of the deceased shall be in accordance with Form 5: rule 30.

11. Sureties to administration bonds shall justify by affidavits in accordance with Form 6: rule 31. No such affidavit shall be attested by any person who is the solicitor, or the clerk of the solicitor, of the person applying. Such affidavits shall specify the particulars of the property of the person making it, and the value of those particulars over and above his just debts and liabilities, and shall be filed in the office of the Registrar, who, if not fully satisfied therewith, may require further information or assurance as to the sufficiency of the security, either by further affidavit, or by personal attendance and examination upon oath of the proposed surety: rule 31.

12. Where the bond of an incorporated company or guarantee society approved by the Attorney General is received as security instead of the security of individuals, the bond and condition shall be in the same form: rule 32.

Caveats

13. Any person may lodge with the Registrar a caveat against the sealing of any probate or administration. Any such caveat has the same effect and is dealt with in the same manner as if it were a caveat against an original grant: section 81.

14. Where an application for resealing is made and -

(a) a caveat is lodged before resealing is granted; or
(b) it appears doubtful to the Registrar whether the application should be granted;

the Registrar must serve on the applicant notice in writing stating that the Registrar will not deal with the application, giving reasons. The applicant may then apply by motion: Order 72 rule 19.

15. Every caveat shall be in accordance with Form 8 and remains in force for six months only and then expires, but a caveat may be renewed from time to time by lodging a new caveat. Every caveat shall be signed, either by the caveator or his solicitor, and dated: rule 52.

16. Upon the return of any order nisi under section 34, it is not necessary for either party to prove his case by witnesses in the first instance. The caveator must state generally his ground of objection to the grant, and, unless the case is such as can be disposed of summarily, the Court must fix a hearing date or direct the case to be entered in a list of causes for hearing: rule 53.

17. Within four days from such a direction, unless the Court otherwise orders, the caveator must deliver to the party seeking representation particulars of objection. Particulars of Objection to Will must set out details of the following -

(a) later will or act of revocation and date thereof;
(b) not executed by testator;
(c) not executed in conformity with the *Wills, Probate and Administration Act 1898* of the State of New South Wales in its application to the ACT;
(d) want of testamentary capacity -
    (i) confined to the period shortly before and at the time of execution;
    (ii) existing before that period, and due to insanity or imbecility of which the symptoms first manifested themselves at a date to be set out; or
(e) undue influence and by whom exercised.

Particulars of Objections to Grant of Administration of Intestacy must set out details of the following -

(a) a will and date thereof;
(b) the person applying does not fill the capacity or stand in the relationship in which he seeks administration;
(c) the caveator or some other person seeking administration has a better right, stating the nature thereof; or
(d) the proposed administrator is disqualified, and, if so, how.

Rule 54.

18. The caveator must also state any other special grounds of objection and shall not, without the leave of the Court, raise any objection not stated in the particulars. The Court shall, at its discretion, direct the mode of proceeding at the hearing as to right to begin, rebutting case and otherwise: rule 55.

19. Where an order is made fixing a time for showing cause against an order nisi under section 34, both parties may subpoena their witnesses for the hearing in the usual manner: rule 56.

20. Either party must, four days before the day appointed for hearing, file with the Registrar any affidavits he proposes to use at the hearing, and serve notice of filing upon the opposite party. If the opposite party desires to cross-examine a deponent he must, two days before the day appointed for hearing, serve a notice requiring the production of the deponent for cross-examination. The Court may, at its discretion, specially order variations from this rule: rule 57.

21. Upon the return of any order nisi under section 34, the Court may, in its discretion, order that the parties, or either of them, shall make discovery and inspection of documents relating to any matter in dispute, or make any other order for the conduct of the hearing that the Court thinks fit: rule 58.

Probate Duty

22. Resealing may not be effected until all probate, stamp and other duties (if any) other than Commonwealth Estate Duty, have been paid as would have been payable in case of an

original grant: section 82(1). Commonwealth Estate Duty is only payable when the deceased died prior to 1 July 1979.

23. The Court or registrar shall not reseal a probate, administration or order to collect and administer the estate of a deceased person granted by a court bf competent jurisdiction in a State or other Territory unless the Court or Registrar finds with respect to the deceased's domicile at the date of death. If the Court or Registrar finds that the deceased was domiciled in a State, the Court or Registrar shall not grant resealing unless either -

(i) the Court or Registrar is satisfied that an assessment of death, succession or probate duty payable out of the deceased's estate has been made in accordance with the law of such State; or

(ii) the appropriate officer of the State has consented in writing to the resealing.

Section 8C.

24. By section 83A and section 83B, the amount of such duty is made a debt due to the Crown in right of such State payable as if it were a debt of the deceased payable by the executor, administrator or curator out of the deceased's real and personal estate which has become vested under this Ordinance.

Effect of a reseal

25. Where a probate or administration has been resealed, it has the same force and effect as if it were an original grant.

26. Upon resealing the applicant is under the same duties and subject to the same liabilities as if probate or administration had been originally granted by the Court to him: section 80(2). Where an order to collect and administer is sealed, the applicant is under the same duties and subject to the same liabilities as if he was the curator appointed under section 88: section 80(3).

Passing of accounts

27. Every executor and administrator shall, within three months after the grant, make a true and perfect inventory of all the property, lands, goods, chattels and credits of the deceased and lodge the inventory with the Registrar: rule 37.

28. Subject to rule 51, every executor and administrator shall, within twelve months after the grant -

(a) file with the Registrar his accounts relating to the estate, together with a plan of distribution where there is any balance available therefor. Such time may be extended by the Court or the Registrar. Also, he shall, at the time of filing the accounts, take out. an appointment for passing them;

(b) have the accounts passed.

Rule 38.

29. Notice of the filing of the accounts, in accordance with Form 7, and of the day fixed for passing the accounts, must be published in a newspaper published and circulated in the ACT at least 14 days before the day fixed and if the executor or administrator intends to apply

for commission, notice must also be given of that intention: rule 39. In the case of an administrator, notice of the filing and of the application to pass his accounts must also be served on the sureties to the administration bond: rule 39.

30. Any person desiring to object to the passing of the accounts, or the granting of commission, shall file with the Registrar, on or before the day fixed for the passing of accounts, notice of intention to object, and an affidavit stating his interest and the grounds of objection: rule 40.

31. Upon taking the accounts, the Registrar may make an order as to service upon any of the parties interested: rule 41.

32. Any person interested may attend before the Registrar upon the taking of the accounts: rule 42.

33. The Registrar must certify as to the correctness of the accounts, and as to the amount on which commission is allowable: rule 43.

34. Within 14 days after the signing of the certificate, the accounting party must, if he desires to be allowed commission, enter the accounts for allowance by the Court, and for allowance of commission: rule 44.

35. If the accounting party, or any person who has filed a notice of objection, desires to appeal from the finding of the Registrar, he shall, within seven days from the signing of the certificate, file a notice with the Registrar, setting forth the grounds of appeal: rule 45.

36. Where accounts have been filed in pursuance of rule 38, and -

(a) any doubt or difficulty arises; or
(b) any person interested desires the matter referred to the Court,

the Registrar must serve the accounting party with a notice stating that he will not pass the accounts, giving reasons, and the accounting party may, within 14 days after the service of such notice, apply to the Court to pass the accounts: rule 46.

37. Where the accounting party, or any person, has filed a notice with the Registrar setting forth the grounds of appeal pursuant to rule 45, he must within 21 days after filing such notice institute the appeal: rule 47.

38. Every application to the Court under rule 46 to pass accounts, and every appeal under rule 47 must be by summons in Chambers. A copy of the summons must be served on the Registrar seven clear days before the return day: rule 48.

39. The Court may order such persons as it thinks fit to be served: rule 49.

40. Should an accounting party who has filed his accounts and has been served with a notice by the Registrar stating that the Registrar will not pass such accounts, fail within the time prescribed by rule 46, to apply to the Court to pass the accounts, he is deemed to have failed to comply with section 58 and rule 38 relating to the filing and passing of accounts: rule 50.

41. In any case in which application is made by an executor or administrator to the Court or the Registrar for an order that the filing of the inventory mentioned in section 58 and the passing of the accounts relating thereto be dispensed with, and -

(a) such executor or administrator is the only person who is beneficially entitled under the will or in distribution; or
(b) all persons who are beneficially entitled under the will or in distribution are over the age of 21 and consent to such order; and
(c) in the case of an administration, where there are sureties, such sureties consent,

the Court or the Registrar may order that the filing of the inventory and the passing of the accounts be dispensed with: rule 51.

PART 8 - NORTHERN TERRITORY

(See *Administration and Probate Ordinance 1969-1979* and
Rules of the Supreme Court Part 3 - *Administration and Probate Rules*)

General

1. An order of a court of competent jurisdiction in a Commonwealth country granting probate of a will, administration of an estate or an order to collect and administer an estate may be resealed: section 111(1). A "Commonwealth country" is defined by section 6 to mean -

(a) the States and Territories of the Commonwealth other than the Northern Territory;
(b) certain countries specified in the Fifth Schedule; and to include
(c) a colony, overseas territory or protectorate of such a country; and
(d) a territory for the international relations of which such a country is responsible.

2. "Administration" includes all letters of administration of the real and personal estate of deceased persons whether with or without the will annexed and whether granted for general, special or limited purposes. "Administration" and "Probate" include exemplification of letters of administration and probate respectively and such other formal evidence or document purporting to be under the seal of a Court of competent jurisdiction as is in the Court's opinion sufficient: section 6. In addition, administration and probate also include an order to a curator or other person to collect and administer an estate and a confirmation of the executor or another person granted in a Sheriff court in Scotland: section 114. An order to collect and administer an estate includes an exemplification of such an order: section 111(7).

Who is entitled to apply?

3. Resealing may be granted to

(a) in the case of a probate of a will -
  (i) the executor to whom the probate was granted;
  (ii) a person authorised by that executor, under a power of attorney, to make the application; or
  (iii) the executor by representation of the Will;
(b) in the case of administration of an estate -
  (i) the administrator to whom the administration was granted; or
  (ii) the person authorised by that administrator under a power of attorney to make the application; or
(c) in the case of in order to collect and administer the estate - a public trustee in the country or part of the country to whom the order was granted.

Section 111(1).

The application may be made through a solicitor or in person by executors and parties entitled to grants of administration: Order 69 rule 5(2).

Procedure on an application

4. Notice of an intended application must be in accordance with Form 3: rule 4. Application may be made on motion which unless the Court otherwise orders may be made ex parte: rule 5. Usually application will be made by formal application rather than by ex parte motion. The application must be accompanied by an affidavit setting forth -

(i) that the original was made to the deponent;
(ii) the relationship, if any, of the deponent to the deceased;
(iii) that the deponent seeks to have the grant resealed;
(iv) the name, address and occupation of the deceased and the date of death;
(v) the name of the Court which granted probate or letters of administration and the date of the grant;
(vi) where applicable, that the deceased left a will;
(vii) where applicable, that the deceased died intestate;
(viii) where applicable, that the deceased left property in the Northern Territory specifying its value, distinguishing real and personal estate and stating shortly what it consists of;
(ix) where applicable, the name, address and occupation of the executor of the will;
(x) that the applicant is a corporation or is of the full age of 18 years;
(xi) where applicable, if the applicant is a creditor, to what amount, particulars of the debt and evidence in support;
(xii) where applicable, that by power of attorney, the executor or administrator has appointed the applicant to apply to the court for reseal of the grant, giving the date of the power of attorney and that the power of attorney has not been revoked;
(xiii) that notice of intention to apply has been published as prescribed;
(xiv) that no caveat has been lodged up to the time of application;
(xv) that no application for probate has been made to or granted by the Court or Registrar or, if so, full particulars.
(xvi) that relevant searches for wills registered under the *Wills Act* have been made giving results of each search.

Order 69 rules 6 and 16 supplemented by reference to usual practice.

5. The following matters (which are required to be deposed to in support of an application for an original grant) need not be deposed to upon an application for resealing -

(i) the death of the deceased and the matrimonial status of the deceased, if intestate;
(ii) where applicable, the manner in which the applicant identified the will as the will of the deceased and the date of the will;
(iii) where applicable, that the testator has attained the full age of 18 years at the date of execution of the will and had not since married;
(iv) where applicable, the name and address of each subscribing witness;
(v) where applicable, an identification or statement of the contents of the will;
(vi) in case of intestacy, the names and ages of the persons entitled to take an interest in the deceased's estate so far as is known and their relationship to the deceased;
(vii) in case of intestacy, the character in which the person making the application claims to be entitled and the truth thereof;
(viii) in case of intestacy, that the applicant has carefully inquired if there is a will;

(ix) in case of testacy, that a search has been made of wills registered under the *Wills Ordinance* and what that search has revealed as to the deposit of any other will;

(x) in case of intestacy, facts showing that the *Intestate Aboriginals (Distribution of Estates) Ordinance* does not apply.

Order 69 rules 6 and 16.

Resealing shall not be effected until such bond has been entered into as would be required in case of an original grant: section 113(2), Order 69 rules 3, 29 and 30, Forms 6 and 7. Policy is not to require the lodging of a further administration bond if bonds have peen provided in the jurisdiction of original grant. Otherwise bonds are required.

6. In addition, before resealing is effected, the notice of intention to apply for resealing must be published once in a newspaper printed and published in Darwin and once in a newspaper printed and published in Alice Springs at least 14 days prior to the making of an affidavit to that effect: section 113(3). The motion and affidavit must be filed and the probate, administration or order, together with a copy thereof produced to the Registrar: section 111(1).

7. The Registrar has power to order the resealing but the Registrar shall not, without an order of the Court, reseal a probate or administration if a caveat has been lodged: section 111(3)(a) or in any case in which it appears to the Registrar to be doubtful whether the probate, administration or order should be sealed: section l13(3)(b) .

8. Before resealing a probate, administration or order to collect and administer the Court may require the applicant to give security for the proper administration of the estate: section 111(6).

9. The bond of an ordinary administrator and his surety must be in accordance with Form 6, and the bond of an administrator to whom administration has been granted as a creditor of the deceased shall be in accordance with Form 7. An administration bond may be attested, whether within or outside the Territory, by any person referred to in Order 40 rule 4(1) not being a person who is a solicitor acting for the administrator or a clerk, partner, agent or correspondent of such a solicitor.

Caveats

10. Any person may lodge with the Registrar a caveat against the sealing of any probate or administration. Any such caveat has the same effect and is dealt within the same manner as if it were a caveat against an original grant: section 112.

11. Where an application for resealing is made and -

(a) a caveat is lodged before resealing is granted; or

(b) it appears doubtful to the Registrar whether the application should be granted,

the Registrar must serve on the applicant notice in writing stating that the Registrar will not deal with the application, giving reasons. The applicant may then apply by motion: Order 69 rule 20.

12. A caveat must be in accordance with Form 10 and be dated and signed, either by the caveator or his solicitor: rule 49.

13. Upon the return of any order nisi under section 45, it is not necessary for either party to prove his case by witnesses in the first instance, but the caveator must state generally his ground of objection to the grant. Unless the case is such as can be disposed of summarily, the Court must fix a day for hearing, or direct the case to be entered in a list for hearing: rule 50.

14. Within four days from such a direction, unless the Court otherwise orders, the caveator must deliver to the applicant particulars of objection setting out in case of a testacy, Particulars of Objection to Will -

(a) later will or act of revocation and date thereof;
(b) not executed by testator;
(c) not executed in the manner required by section 8 of the *Wills Ordinance 1938-1969*;
(d) want of testamentary capacity -
    (i) confined to the period shortly before and at the time of execution; or
    (ii) existing before that period, and due to insanity or imbecility of which the symptoms first manifested themselves at a date to be set out; or
(e) undue influence and by whom exercised.

and in case of intestacy, Particulars of Objections to Grant of Administration on Intestacy -

(a) a will and date thereof;
(b) the person applying does not fill the capacity or stand in the relationship in which he seeks administration;
(c) the caveator or some other person seeking administration has a better right, stating the nature thereof; or
(d) the proposed administrator is disqualified, and if so, how. Rule 51.

15. The caveator must also state in the particulars any other special grounds of objection, and shall not, without the leave of the Court, raise any objection not stated: rule 52.

16. The Court must, at its discretion, direct the mode of proceeding at the hearing as to right to begin, rebutting case and otherwise: rule 53.

17. Both parties may subpoena their witnesses for the hearing in the same manner as in an action before the Court: rule 54.

18. Either party must, four days before the day appointed for hearing, file with the Registrar any affidavits he proposes to use at the hearing, and serve notice of filing upon the opposite party. If the opposite party desires to cross-examine a deponent he must, two days before the day for hearing, serve a notice requiring the production of the deponent for cross-examination. The court may specially order variations from this: rule 55.

19. Upon the return of any order nisi under section 45 the Court may order that the parties, or either of them, shall make discovery and inspection of documents or any other order for the conduct of the hearing that the Court thinks fit: rule 56.

20. A caveator may make application to the Court for leave to withdraw his caveat by motion, verified by affidavit: rule 57.

Probate duty

21. Resealing may not be effected until all succession and other duties and fees other than Commonwealth Estate Duty have been paid as would have been payable if the probate or administration had been originally granted by the Court: section 113(1).

Effect of a reseal

22. Where a probate or administration has been resealed it has the same force and effect as if it were an original grant: section 111(4)(a).

23. On resealing the applicant is under the same duties and subject to the same liabilities as if probate or administration had been originally granted by the Court to him: section 111(4)(b).

24. Where an order to collect and administer is sealed the applicant is under the same duties and subject to the same liabilities as if he was the Curator appointed under section 122: section 111(5).

Passing of accounts

25. The inventory required to be filed by section 89(1) or the copy statement that may be filed, pursuant to subsection (4), instead of that inventory, must be filed in the office of the Registrar within one month after the grant of probate or administration: rule 34.

26. Every executor and administrator must within twelve months after the grant of probate or administration and from the to time thereafter as the Registrar directs -

(a) file in the office of the Registrar his accounts, verified by affidavit, together with a plan of distribution where there is any balance available unless he obtains a special order from the Court or the Registrar extending the for filing the accounts, in which case he must file the accounts within that extended time; and

(b) where he makes application to the Court, a Judge or the Registrar to fix a date for the passing of his accounts, or where the Court, a Judge or the Registrar calls upon him to take out an appointment to pass them, have the accounts passed on the day appointed or such other day as the Court or the Registrar fixes, unless the Registrar pursuant to rule 44 serves a notice on him stating that he will not pass the accounts: rule 35.

27. An executor, administrator or trustee who intends to apply to be allowed, under section 102, a commission or percentage out of the assets of a deceased person must give notice of his intention.

28. A trustee having such an intention must file his accounts, relating to the estate and at the same time take out an appointment to pass them.

29. The accounts must be filed with the Registrar verified by affidavit: rule 36.

30. Where a day has been fixed for the passing of the accounts the executor, administrator or trustee must cause a notice of the day so fixed to be published. The notice must be published -

(a) once in a newspaper printed and published in Darwin and once in a newspaper printed and published in Alice Springs ;
(b) at least 14 days before the day fixed for the passing of the accounts; and must -
  (i) specify the day fixed for the passing of the accounts; and
  (ii) be in accordance with Form 9.

31. An administrator who has filed with the Registrar a bond under section 23 must serve on the surety, at least 14 days before the day fixed for the passing of the accounts, a copy of each notice that he causes to be published: rule 37.

32. Any person desiring to object to the passing of the accounts of an executor, administrator or trustee or the granting of commission, must file with the Registrar, on or before the day fixed, a notice of his intention to object, and also an affidavit stating his interest and the nature and grounds of his objection: rule 38.

33. Upon taking the accounts, the Registrar may make such order as to service upon any of the parties interested as he thinks fit: rule 39.

34. Any person interested may attend before the Registrar upon the taking of the accounts but no person may object to the passing of the accounts unless he has filed a notice of his intention to object: rule 40.

35. The Registrar must give his certificate as to the correctness of the accounts, and also as to the amount on which commission is allowable: rule 41.

36. Within 14 days after the signing of the certificate by the Registrar, the accounting party, must if he desires to be allowed commission, enter the accounts for allowance by the Court or a Judge, and for allowance of commission: rule 42.

37. If the accounting party, or any person who has filed a notice of intention to object under rule 38 desires to appeal from the finding of the Registrar on the passing of the accounts, he must within 7 days from the signing of the certificate, file a notice with the Registrar setting forth the nature and grounds of his appeal: rule 43.

38. Where accounts have been filed in pursuance of rule 35 or rule 36, and -

(a) any doubt or difficulty arises; or
(b) any person interested desires the matter referred to the Court or a Judge,

the Registrar must serve the accounting party with a notice in writing stating he will not pass the accounts, and giving his reasons, and the accounting party may, within 14 days after the service of the notice, apply to the Court or a Judge to pass the accounts: rule 44.

39. Where the accounting party, or any person, has filed within the prescribed time a notice setting forth the nature and grounds of his appeal pursuant to rule 43 he shall within 21 days after filing the notice institute the appeal: rule 45.

40. Every application to the Court or a Judge under rule 44 to pass accounts, and every institution of an appeal under rule 45 shall be made by summons in Chambers, and a copy of the summons shall be served on the Registrar 7 days before the return day: rule 46.

41. The Court or a Judge may order such persons as it thinks fit to be served with the summons: rule 47.

42. Should an accounting party who has filed his accounts with the Registrar and has been served with a notice in writing by the Registrar stating that the Registrar will not pass these accounts, fail, within the time prescribed by rule 44, to apply to the Court or a Judge to pass the accounts, he is deemed to have failed to comply with the provisions of section 89 and of rule 35 relating to the passing of accounts, or of rule 36 relating to the taking out of an appointment to pass accounts, as the case may be: rule 48.