NSW LAW REFORM COMMISSION

Report 124

Uniform succession laws: Administration of estates of deceased persons

December 2009

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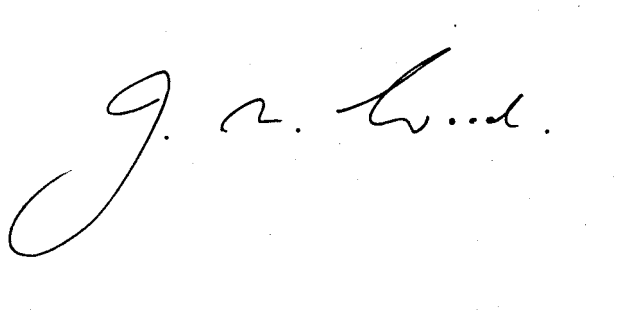
Letter to the Attorney General

To the Hon John Hatzistergos
Attorney General for New South Wales

Dear Attorney

Uniform succession laws: Administration of estates of deceased persons

We make this Report pursuant to the reference to this Commission received May 1995.



The Hon James Wood AO QC

Chairperson

December 2009

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Terms of Reference

New South Wales Law Reform Commission (May 1995)

To inquire into and report on the existing law and procedure relating to succession and to recommend and draft a model State and Territories law on succession.

In undertaking this inquiry the Commission is to consult with the Queensland Law Reform Commission which has accepted responsibility for the co-ordination of a uniform succession laws project.

Queensland Law Reform Commission (January 1992)

To review the existing law and procedure relating to succession and to recommend and draft a model State and Territory law on succession;

To co-ordinate the conduct of the reference with other States' and Territories' law reform agencies and other relevant persons or bodies.

Participants

Pursuant to s12A of the *Law Reform Commission Act 1967*(NSW) the Chairman of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon James Wood AO QC (Chairman)
The Hon Justice David Hodgson (Commissioner-in-charge)
Professor Michael Tilbury

Officers of the Commission

Executive Director
- Mr Peter Hennessy (until 30 October 2008)
- Ms Deborah Sharp (acting) (10 November 2008 – 23 October 2009)

Legal Research
- Mr Joseph Waugh

Paralegal assistance
- Mr Max Walker

Librarian
- Ms Anna Williams

Desktop Publishing
- Mr Terence Stewart

PREVIOUS PUBLICATIONS IN THIS PROJECT

WILLS

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

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

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

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

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

FAMILY PROVISION

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

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

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

Report, *Uniform Succession Laws: Family Provision* (NSWLRC, Report 110, May 2005)

INTESTACY

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

Report, *Uniform Succession Laws: Intestacy* (NSWLRC, Report 116, April 2007)

ADMINISTRATION OF ESTATES

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

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

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

Report, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General* (QLRC, Report 65, April 2009)

MISCELLANEOUS

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

GLOSSARY

Ademption. When a testator has made particular property the subject of a specific legacy in his or her will, but that property no longer forms part of the estate at the testator's death, under the doctrine of ademption, the legacy cannot be paid to the beneficiary and is said to have been "adeemed".

Administration. Administration is the process by which a personal representative administers a deceased estate, that is, generally, by collecting the assets, paying the debts and distributing the balance of the estate according to the will or intestacy rules.

Administration *de bonis non.* A court makes a grant of administration *de bonis non* to a person so he or she can complete the administration of an estate where all previous administrators or executors have ceased to hold office.

Administrator. An administrator is a personal representative to whom the Court has granted letters of administration in order to administer an estate.

Beneficiary. A beneficiary is a person entitled to receive all or part of an estate according to the terms of a will or the intestacy rules.

De bonis non *see* **Administration *de bonis non***.

Domicile. A person's domicile is the place where he or she is permanently resident, requiring both the fact of residence and an actual intention to remain permanently.

Double probate. A grant of double probate arises where some of the executors nominated by a will reserve leave to apply for probate at a future date and, subsequently, do so. The subsequent grant then runs concurrently with the first grant.

Election to administer. An election to administer is a means of obtaining authority to administer an estate under a specified value, without the need to apply formally to a court for a grant of representation. A prescribed person, usually a public trustee, trustee company or a legal

practitioner, may obtain an election to administer by filing the prescribed form with the court.[1]

Executor. An executor is a personal representative, nominated in a deceased person's will, to whom a court grants probate in order to administer the estate.

Executor de son tort. (Literally, an "executor of his own wrong".) An executor de son tort is person who acts in the administration of an estate without being formally appointed as a personal representative.

Exemplification. An exemplification is an official copy of a public or judicial record made under the seal of a court that may be used to prove the contents of the original record.

Family provision. A court may order family provision be made from a deceased person's estate for the proper maintenance and support of the deceased's family or dependants where the deceased's will or the intestacy rules make inadequate provision for them. In NSW, Chapter 3 of the *Succession Act 2006* (NSW) governs family provision.

Grant (of representation). A grant of representation is a document, generally issued by a court, that officially recognises the right of an executor or administrator to administer an estate. Examples include a grant of probate made by a court, a grant of letters of administration made by a court, an order to administer made by a court or an election to administer filed in a court.

Intermeddle. When an executor de son tort acts in the administration of an estate, he or she is sometimes said to intermeddle in the estate.

Intestate. A person is intestate if he or she dies without leaving a will, or leaving a will that does not effectively dispose of the whole or part of his or her estate.

Letters of administration. Letters of administration authorise an administrator to administer an estate. A court grants letters of administration where the deceased does not leave a will and grants letters of administration with the will annexed where the deceased leaves a will that does not appoint an executor or appoints executors who are unable or unwilling to act.

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1. See Chapter 3 part 6.

Order to administer. Referred to in some jurisdictions as an "order to collect and administer" or as an "administration order". An order to administer allows the public trustee (or equivalent official) to deal with certain estates, in absence of anyone else applying for a grant of representation, as though he or she had obtained a grant of administration. In NSW, the Supreme Court may allow the NSW Trustee to act "if it appears to the Court that there are reasonable grounds to suppose that the person has died intestate (whether in or outside New South Wales) leaving property in New South Wales".[2]

Personal representative. A personal representative is generally either an executor or administrator or other person with authority to administer an estate.

Probate. Probate is the authority which a court gives an executor to administer an estate. "Probate" is sometimes also used to refer to the registry of a court that deals with the issuing of grants of probate or letters of administration.

Testator. A testator is a person who makes a will.

Will. A will is a formal document (or documents) made by a testator that disposes of his or her property on death and includes a codicil and any other testamentary disposition. In NSW, Chapter 2 of the *Succession Act 2006* (NSW) governs the making and interpretation of wills

2. *NSW Trustee and Guardian Act 2009* (NSW) s 25.

PREFACE

0.1 This Report provides a commentary on the model administration of estates legislation proposed in the report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General on the administration of estates of deceased persons.[1] It represents the conclusion of the fourth and final stage of the work of the National Committee which has encompassed the law of wills, family provision, intestacy, and the administration of estates.[2]

0.2 The administration of estates is concerned with the management and distribution of a person's property after he or she has died. The model legislation, therefore, deals with the transmission of the property after death, the payment of debts and other liabilities, the distribution to beneficiaries entitled under a will or according to the statutory regime on intestacy, the appointment of people to manage the process (usually either executors or administrators) and mechanisms for holding them to account.

PREVIOUS REVIEWS

0.3 The National Committee's review is the first major review of the administration of estates provisions in any Australian jurisdiction since 1990.

0.4 The most recent substantial review to be implemented arose from the Queensland Law Reform Commission's 1978 Report,[3] which resulted in the *Succession Act 1981* (Qld). The Queensland Act, which provides the most recently enacted set of Australian provisions on the administration of estates, therefore, provided a starting point for the National Committee's deliberations.

0.5 The other major review was that of the Law Reform Commission of Western Australia. The Law Reform Commission produced a series of

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1. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65").
2. Previous publications relating to the National Committee's work are listed at page xiv.
3. Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978).

reports of relevance to the administration of estates as part of Project 34 in the period 1976-1988.[4] The earlier reports, on administration bonds and sureties and the administration of deceased insolvent estates, were implemented in 1976 and 1984.[5] No action, however, has been taken with respect to the reports on interstate and foreign grants of probate and administration and the administration of assets of solvent estates, or with respect to a 1990 report on the *Administration Act 1903* (WA).[6] The Western Australian reports have provided background material for the National Committee's deliberations.

0.6 There have also been minor reviews in South Australia, in 1985, on survivorship where the order of deaths is uncertain,[7] and in NSW, in the 1970s, on administration bonds.[8]

APPROACH OF THE NATIONAL COMMITTEE

Simplification of the law and procedures

0.7 In framing modern legislation to govern the administration of deceased estates the National Committee has aimed, wherever possible, to simplify the law and procedures. Examples of simplification include:

- the simplification and clarification of the classes of assets that are applied to the payment of debts in the administration of solvent estates;[9]

4. Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34, pt 2 (1976); *Administration of Deceased Insolvent Estates*, Report, Project No 34, pt 3 (1978); *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984); *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 pt 7 (1988).
5. *Administration Act Amendment Act 1976* (WA) and *Acts Amendment (Insolvent Estates) Act 1984* (WA).
6. Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990). On implementation, see Law Reform Commission of Western Australia, *Annual Report 2008-2009*, 61, 67.
7. Law Reform Committee of South Australia, *Problems of Proof of Survivorship as Between Two or More Persons Dying at About the Same Time in One Accident*, Report 88 (1985).
8. New South Wales Law Reform Commission, *Administration Bonds*, Working Paper 18 (1978).

- the introduction of a scheme for the automatic recognition of a grant of representation made in another Australian jurisdiction;[10]
- the removal of advertising requirements in some circumstances;[11] and
- limiting the filing of statements of assets and liabilities of an estate and accounts of an administration to cases where the Court considers it necessary.[12]

0.8 The National Committee has also continued the long-standing trend in most jurisdictions of assimilating, wherever possible, the offices of executor and administrator. The most notable examples of this continuing trend in the model legislation are:

- the extension of the chain of representation to administrators as well as executors;[13] and
- the abolition of administration bonds and sureties which have only ever been required with respect to administrators.[14]

Recognising people with an interest in the administration of an estate

0.9 The need to provide greater recognition of the information and other needs of people who have an interest in an estate (including beneficiaries, potential claimants for family provision, and creditors) has led the National Committee to recommend provisions that:

- clarify a personal representative's duty to maintain documents relevant to the administration of the estate;[15]
- provide a mechanism for interested parties to access those documents;[16]
- give the Court power to review the amount of remuneration that a personal representative can claim from an estate;[17] and

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9. See cl 502; para 5.11-5.17.
10. See Chapter 3 part 7; para 3.132-3.140.
11. See, eg, para 3.23, para 3.91.
12. See cl 402; para 4.8-4.14.
13. See Chapter 3 part 8; para 3.148-3.155.
14. See cl 617; para 6.49-6.58.
15. See cl 403; para 4.15-4.18.
16. See cl 615 and cl 616; para 6.39-6.48.
17. See Chapter 4 part 10; para 4.123-4.130.

- allow beneficiaries, where all agree, to nominate a personal representative to replace an existing personal representative.[18]

Recognising informal administration

0.10 The National Committee has also recognised the extent to which many estates can be administered informally, that is, without the need to obtain a grant of representation. It has, therefore, recommended provisions that can facilitate this course, where appropriate. These provisions include ones that:

- allow legal practitioners, as well as trustee companies and the NSW Trustee, to file elections to administer;[19]
- clarify the liability of a person who administers an estate without a grant;[20] and
- protect a person who holds money or property of the deceased up to a certain value when he or she hands over that money or property to a person without requiring him or her to produce a grant.[21]

Matters not suitable for the model legislation

Matters of procedure

0.11 The National Committee has generally followed a policy of recommending the inclusion of procedural matters, as far as possible, in rules of court rather than in the model legislation.[22] This means that, in some cases, the National Committee has recommended that provisions currently in the *Probate and Administration Act 1898* (NSW) should be relocated to the rules of court. In some cases, however, matters of procedure have been included in the model legislation where they have a substantive effect or have been considered important to the achievement of uniformity among the Australian jurisdictions.

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18. See cl 349; para 3.192-3.197.
19. See Chapter 3 part 6; para 3.90 and para S3.31.
20. See cl 435; para 4.145-4.147.
21. See cl 434; para 4.136-4.144.
22. See, eg, New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) ("NSWLRC, DP 42") [8.141], [18.14], [18.28].

Matters more relevant to other statutes

0.12 The National Committee has also generally followed a policy that "provisions should be located in the legislation that is most relevant to the focus of those provisions".[23] This means that the National Committee has recommended that some provisions currently in the *Probate and Administration Act 1898* (NSW), if retained at all in some cases, should be relocated to more relevant statutes, for example, those relating to property law or trusts. Appendix A of this Report deals with many of these provisions.

National Committee's other recommendations

0.13 The model legislation reproduced in this Report assumes the implementation of the National Committee's other model legislation on wills, family provision and intestacy. In NSW, the *Succession Act 2006* (NSW) substantially implemented the model wills legislation. The *Succession Act 2006* (NSW) has since been amended to implement, with minor changes, the model family provision legislation[24] and the model intestacy legislation.[25]

DRAFTING OF THE MODEL LEGISLATION AS A QUEENSLAND BILL

2009

A Bill for

An Act relating to the administration of estates of deceased persons, and to amend the [Property Law Act 1974] for related purposes

The Parliament of Queensland enacts—

0.14 The Queensland Parliamentary Counsel has drafted the model legislation for the National Committee as a bill of the Queensland Parliament. Amendments will need to made, where appropriate, for it to be implemented in NSW. The need for such amendments is noted, where relevant, throughout this Report.

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23. NSWLRC, DP 42 [8.141].
24. *Succession Amendment (Family Provision) Act 2008* (NSW).
25. *Succession Amendment (Intestacy) Act 2009* (NSW). These amendments will commence in 2010.

Chapter 1. Preliminary

1.1 The provisions in this Chapter are mostly of a general nature, being common to all statutes and, therefore, do not generally require comment. However, cl 103 and cl 106 are discussed because they contain provisions that are specifically relevant to later clauses in the model legislation.

100 Short title

This Act may be cited as the *Administration of Estates Act 2009*.

101 Commencement

This Act commences on a day to be fixed by proclamation.

102 Definitions

(1) The dictionary in schedule 3 defines particular words used in this Act.

(2) A definition in this Act applies except so far as the context or subject matter otherwise indicates or requires.

***Drafter's note**: Subsection (2) may be unnecessary in some jurisdictions. See Acts Interpretation Act 1954 (Qld), s 32A.*

1.2 Subclause 102(2) is unnecessary in NSW in light of s 6 of the *Interpretation Act 1987* (NSW) which states that "definitions that occur in an Act ... apply to the construction of the Act ... except in so far as the context or subject-matter otherwise indicates or requires".

103 Relationships

(1) For this Act—

(a) an adopted child is to be regarded as a child of the adoptive parent or parents; and

(b) the child's family relationships are to be decided accordingly; and

(c) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

(2) Also, a person is a brother or sister of another person if they have 1 or both parents in common.

1.3 These provisions follow the National Committee's model bill and recommendations in its report on intestacy. They are necessary for the

parts of this Bill that refer to those people who are entitled to inherit from an intestate estate.

1.4 Sub-clause 103(1) follows the National Committee's recommendation in its report on intestacy.[1] The provision may now be found in s 109 of the *Succession Act 2006* (NSW).[2]

1.5 Sub-clause 103(2) follows the National Committee's recommendation in its report on intestacy.[3] The definition may now be found in s 101 of the *Succession Act 2006* (NSW).[4]

104 Notes in text

A note in the text of this Act is part of this Act.

***Drafter's note**: This statement may be unnecessary in some jurisdictions. See Acts Interpretation Act 1954 (Qld), s 14(4).*

105 Examples

In this Act—

(a) an example of the operation of a provision is not exhaustive; and

(b) an example of the operation of a provision does not limit, but may extend, the meaning of the provision; and

(c) an example of the operation of a provision and the provision are to be read in the context of each other and the other provisions of this Act, but, if the example and the provision so read are inconsistent, the provision prevails.

***Drafter's note**: This statement may be unnecessary in some jurisdictions. See Acts Interpretation Act 1954 (Qld), s 14D.*

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1. New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) ("NSWLRC, Report 116") [7.59], recommendation 27.
2. Inserted by *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1[4].
3. NSWLRC, Report 116 [8.53], recommendation 30.
4. Definition of "brother or sister" in *Succession Act 2006* (NSW) s 101 inserted by *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1[4].

106 Act binds all persons

> This Act binds all persons, including the State, and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States [and Territories].

1.6 This provision, based on a similar one in the *Succession Act 1981* (Qld),[5] is principally intended to abolish the priority of Crown debts in an insolvent estate that is administered outside the provisions of the *Bankruptcy Act 1966* (Cth).[6] The priority of Crown debts flows from a general prerogative giving preference to the Crown over subjects in instances of competing rights.[7] Legislation can abolish the priority of Crown debts either expressly or impliedly. The *Bankruptcy Act 1966* (Cth) has abolished the priority of Crown debts in a bankruptcy.[8]

1.7 NSW does not currently have a provision that expressly binds the Crown in the administration of insolvent estates. However, it is arguable that, by importing the provisions of the *Bankruptcy Act 1966* (NSW) into the *Probate and Administration Act 1898* (NSW),[9] NSW has implicitly abolished the priority.[10]

1.8 The National Committee expressed the view that the priority of debts in insolvent estates should be assimilated with the priority that applies under the *Bankruptcy Act 1966* (Cth).[11] It is, therefore, necessary to abolish the Crown priority of debts by way of a provision that states that this Act binds the Crown.[12]

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5. *Succession Act 1981* (Qld) s 4(2).
6. See Chapter 6 part 4; para 5.56-5.68.
7. *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 301 (Dixon J).
8. *Bankruptcy Act 1966* (Cth) s 8 and s 108.
9. *Probate and Administration Act 1898* (NSW) s 46C(1) and sch 3 pt 1 class 2.
10. See Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [16.27]; R A Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, Law Book Company, 1983) 67.
11. See para 5.62.
12. QLRC, Report 65 [16.132].

1.9 The provision is stated to bind the Crown in all of its capacities "to the extent the legislative power of the Parliament permits".[13] The extent to which this is possible is doubtful. For example, it appears that, as a general principle, a State may be unable to bind the Crown in right of the Commonwealth.[14] The National Committee decided to use the broadest possible expression so that a clear intention is disclosed in the event that it is possible for a State to bind the Crown in any of its other capacities.[15]

13. Similar expressions are employed in NSW statutes. See, eg: *Interpretation Act 1987* (NSW) s 4.

14. See QLRC, Report 65 [16.130]; *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 424-426 (Brennan CJ), 440 (Dawson, Toohey and Gaudron JJ).

15. QLRC, Report 65 [16.133]-[16.134].

Chapter 2. Vesting of estate

2.1 The provisions in this chapter ensure that a deceased person's property will always have an owner from the moment of death onwards.

200 Initial vesting on death

(1) If a person dies leaving a will appointing 1 or more executors who survive the person, the person's estate vests, on the person's death—

(a) if only 1 executor survives the person—in the surviving executor; or

(b) if more than 1 executor survives the person—in the surviving executors as joint tenants.

Drafter's note*: Individual jurisdictions may need to amend their trust legislation to deal with the vesting of trust property. [R 10-2]*

(2) However—

(a) if any, but not all, of the executors lack legal capacity to act as executor—the estate vests in the executor or executors who have legal capacity and, if more than one, as joint tenants; or

(b) if the executor or all of the executors lack legal capacity to act as executor—the estate vests in the [public trustee].

Drafter's note*: Public trustee as used in the Bill is in [square brackets]. In Victoria the reference will need to be to State Trustees. Public trustee is in the dictionary for definition as appropriate for each jurisdiction.*

(3) If a person dies—

(a) without leaving a will; or

(b) leaving a will appointing 1 or more executors none of whom survives the person;

the person's estate vests, on the person's death, in the [public trustee].

(4) Subsections (1), (2) and (3)(b) apply despite a testamentary disposition to the contrary.

(5) In this section—

estate, of a deceased person, means property to which a person was entitled at the time of his or her death, but does not include—

(a) property of which the person was a trustee; or

(b) an interest in property that ceased on the person's death.

2.2 This provision is based on s 45(1) of the *Succession Act 1981* (Qld). It deals with the initial vesting of the estate upon the death of the deceased. Questions of vesting at other times, including the doctrine of relation back,[1] are dealt with in subsequent provisions in this Chapter.

2.3 Currently, in NSW, upon the deceased's death, the estate is "deemed to be vested in the NSW Trustee[2] in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England".[3]

2.4 In adopting the model provision, the National Committee considered that an estate should vest in the public trustee (or equivalent), a public official, only as a last resort.[4] The Queensland Law Reform Commission, in proposing the original provisions, in 1978, considered that vesting the deceased's estate in a public official was "a departure from the existing policy favouring the private administration of deceased estates".[5]

2.5 The model provision departs from the current Queensland provision in some aspects. The National Committee considered that the

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1. See cl 206; para 2.24-2.26.
2. In NSW, the reference to the public trustee should now be read as a reference to the NSW Trustee or the NSW Trustee and Guardian: *NSW Trustee and Guardian Act 2009* (NSW) s 5.
3. *Probate and Administration Act 1898* (NSW) s 61. The Ordinary, or Judge Ordinary, was a judge with original, or "ordinary", jurisdiction over ecclesiastical matters (including probate matters). The Ordinary was an ecclesiastical judicial function annexed to the office of Bishops in England, who had inherent authority to adjudicate on those ecclesiastical matters that arose in the territory of their diocese.
4. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [10.48]. Note, especially, the concerns expressed about the trend towards the "commercialisation" of public trustees in some jurisdictions: New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) ("NSWLRC, DP 42") [12.25].
5. Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978), 30.

"intermediate position", where only some of the named executors are able and willing to act, should be clarified in the model legislation.[6] The National Committee also considered that the current Queensland formulation, in requiring that a named executor be "willing to act", led to uncertainty and recommended that the executor must simply have "legal capacity" to act so that no investigation need be made into any executor's willingness to act before the estate vests.[7] The National Committee also noted that renunciation[8] is available to any executors who have legal capacity but are unwilling to act.[9]

Property of which the deceased was trustee

2.6 Sub-clause 200(5), which derives from part of s 45(1) of the *Succession Act 1981* (Qld), expressly excludes from the vesting provisions property of which the deceased was trustee at his or her death. The National Committee considered this desirable because, even though trust property could be vested initially in a personal representative, this would not, of itself, constitute the personal representative as a trustee of the property in question because "a person cannot have powers authorities and discretions of a trustee unless that person has been appointed trustee by the person creating the trust or has been pointed to in some way as a person proper to exercise those powers authorities and discretions".[10] The Committee considered it more appropriate that the relevant trustee legislation should deal with the vesting of trust property,[11] as is already the case, for example, in Queensland.[12]

2.7 By contrast, in NSW, s 45 of the *Probate and Administration Act 1898* (NSW) currently provides that real estate that the deceased held in trust vests in the deceased's personal representative "subject to the trusts ... affecting the same". This provision, in so far as it relates to trusts, should, therefore, be included in the *Trustee Act 1925* (NSW).[13]

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6. See cl 200(2)(a).
7. QLRC, Report 65 [10.52]-[10.53].
8. See Chapter 3 part 6; para 3.51; para 3.53-3.56.
9. QLRC, Report 65 [10.54].
10. H A J Ford and W A Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [8600].
11. QLRC, Report 65 [10.64]-[10.66].
12. *Trusts Act 1973* (Qld) s 16(2).
13. Note that *Trustee Act 1925* (NSW) s 9 currently deals with vesting of trust property on the appointment of a new trustee or the retirement of a trustee

201 Property subject to a general power of appointment exercisable by will

> A deceased person is taken to be entitled at his or her death to any interest in property in relation to which a disposition contained in the deceased's will operates as an exercise of a general power of appointment.

2.8 This provision states that a deceased is entitled to property that passes to a beneficiary as a gift under the deceased's will granted pursuant to an exercise of a general power of appointment. A general power of appointment gives a person the right to distribute property to any person at all, including him or herself. The instrument giving the power will usually specify when it is to be exercised, for example, during the person's lifetime or by will.[14]

2.9 It is based on s 6(2) of the *Administration and Probate Act 1935* (Tas). However, the model provision differs from the Tasmanian provision which only operates in relation to real property.

2.10 At common law, appointed property does not vest in the executor of the deceased's estate. However, in equity the appointed property can become liable to satisfy any debts that the deceased's estate is unable to satisfy.[15]

2.11 Currently, in NSW, property that passes under a gift in a will in exercise of a general power of appointment vests in the personal representatives of the estate as if the deceased had been entitled to it at his or her death.[16]

2.12 The National Committee considered that the model provision is necessary because it "clarifies the basis on which a personal representative is entitled to call for the appointed property" when the

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where there are continuing trustees. *Trustee Act 1925* (NSW) s 101 deals with the vesting in a new trustee of trust property that has been vested in the NSW Trustee by virtue of the *Probate and Administration Act 1898* (NSW).

14. See H A J Ford and W A Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [5080] and [5090].
15. *O'Grady v Wilmot* [1916] 2 AC 231.
16. *Probate and Administration Act 1898* (NSW) s 46B.

personal representative must sell appointed property in order to satisfy the debts of the estate.[17]

2.13 The model provision is also consistent with the provisions in Chapter 3 of the *Succession Act 2006* (NSW)[18] that allow the court to designate property as "notional estate" where the deceased held a power of appointment over the property but failed to exercise that power before his or her death.[19]

202 On the making of a grant of representation

(1) On the making of a grant of representation of a deceased person's estate, the estate that vested in the deceased's executor or the [public trustee] under section 200(1), (2) or (3)—

(a) is divested from the executor or [public trustee]; and

(b) vests in—

(i) the person to whom the grant is made; or

(ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.

(2) If any grant of representation (the relevant grant) of a deceased person's estate is revoked, ends or ceases to have effect—

(a) on the revocation, ending or ceasing of effect of the relevant grant, the deceased person's estate that is vested in the person to whom the relevant grant was made is divested from the person; and

(b) on the making of a subsequent grant of representation, the deceased person's estate vests in—

(i) the person to whom the subsequent grant is made; or

(ii) if the subsequent grant is made to more than 1 person, the persons to whom it is made as joint tenants.

17. QLRC, Report 65 [10.164].

18. *Succession Act 2006* (NSW) s 75(1), (3), s 76(2)(a) and s 80.

19. QLRC, Report 65 [10.166].

Example for subsection (2)—

Assume the relevant grant is a grant of representation of a deceased person's estate made by the Supreme Court and endorsed under section 305.

On the making of an interstate grant of representation as mentioned in section 335(1), the relevant grant ceases to have effect under section 335(2)(c)(i). Paragraph (a) of this subsection operates to divest the deceased person's estate from the person to whom the relevant grant was made. Further, because, under section 335(2)(a), the interstate grant of representation has the same force, effect and operation in this jurisdiction as it would have if it had been originally made by the Supreme Court, paragraph (b) operates to vest the deceased person's estate in—

(a) the person[20] to whom the interstate grant of representation is made; or

(b) if the interstate grant of representation is made to more than 1 person, the persons to whom it is made as joint tenants.

(3) If there is an interval between the revocation, ending or ceasing of effect of a grant of representation and the making of a subsequent grant of representation, the deceased person's estate vests in the [public trustee] until the making of the subsequent grant.

2.14 This provision deals with three distinct situations:

1. Where the personal representatives that the Court appoints are not the executors named in the will, or alternatively the public trustee, in whom the estate initially vested under cl 200. In this case the estate divests from the original holders and is vested in the appointed personal representatives. (Sub-clause 202(1).)

2. Where the Court subsequently appoints new personal representatives to replace the earlier appointed representatives who have ceased to operate as such. In this case the estate divests from the final remaining personal representative and vests in the new appointees. (Sub-clause 202(2).)

20. For example, where the appointment ceases to have effect under cl 335(2)(c).

3. Where there is a gap between a subsequent appointment and an earlier appointment ceasing to have effect. In this case, the estate vests in the public trustee until the subsequent appointment is made. (Sub-clause 202(3).)

2.15 It is based on s 45(2) and (3) of the *Succession Act 1981* (Qld). However, unlike s 45(3) of the Queensland Act, cl 202(2)(b)(ii) makes provision for the appointment of more than one personal representative for the sake of consistency with cl 202(1).

2.16 Sub-clause 202(1) will replace s 44(1) of the *Probate and Administration Act 1898* (NSW) with amendments necessary to accommodate the new provisions relating to initial vesting in cl 200. NSW legislation does not currently deal with the vesting of an estate upon or between subsequent appointments of personal representatives.

203 On death of personal representative

(1) This section applies if, on the death of a deceased person's last surviving, or sole, personal representative, the deceased person's estate is unadministered.

(2) On the personal representative's death, the unadministered estate that is vested in the personal representative vests in the [public trustee].

(3) If, after the unadministered estate is vested in the [public trustee], the Supreme Court makes a grant of representation of the deceased's estate, on the making of the grant the unadministered estate—

(a) is divested from the [public trustee]; and

(b) vests in—

(i) the person to whom the grant is made; or

(ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.

(4) This section applies despite [insert local equivalent of the Trusts Act 1973 (Qld), section 16].

2.17 This clause makes provision for the vesting of any estate property that is left unadministered after the death of a sole, or last remaining, personal representative. The property initially vests in the public trustee and, subsequently, in the person or people to whom the Court makes a

grant of representation. This clause applies notwithstanding provisions dealing with the vesting of property of which the deceased was trustee.[21]

2.18 The provision, which has no current counterpart in any Australian jurisdiction, is intended to deal with the consequences of the National Committee's recommendations in relation to executors and administrators by representation.[22] At the death of the sole or last remaining personal representative, the Court will not yet have appointed anyone as personal representative of the deceased personal representative's estate and may never appoint someone who is prepared to be an executor by representation or administrator by representation of the original estate.[23]

204 On becoming an executor or administrator by representation

> If, under section 338, a person becomes an executor or administrator by representation of a deceased person's will or estate, on the happening of that event the deceased person's unadministered estate—
>
> (a) is divested from—
>
> (i) if it is vested in the [public trustee]—the [public trustee]; or
>
> (ii) if it is vested in another person—the other person; and
>
> (b) vests in—
>
> (i) the executor or administrator by representation; or
>
> (ii) if there is more than 1 executor or administrator by representation, the executors or administrators by representation as joint tenants.

2.19 This provision deals with the vesting of an estate where a person becomes an executor or administrator by representation under cl 338.[24] This would normally follow on from a vesting under cl 203(2). The unadministered estate is divested from the public trustee or another

21. See cl 200(5); para 2.6. In NSW, these provisions, in relation to real estate, are currently contained in *Probate and Administration Act 1898* (NSW) s 45.
22. See Chapter 3 part 8; para 3.148-177.
23. QLRC, Report 65 [10.91] and [10.92].
24. See para 3.160-3.161.

person and vests in such executors or administrators by representation as the Court may appoint.

205 On executor or administrator by representation ceasing to hold office

(1) Subsections (2) and (3) apply if—

(a) an executor or administrator by representation (the representative) of the deceased person's will or estate stops holding office as executor or administrator by representation for the person under section 341 or 342; and

(b) the deceased person's estate is unadministered.

(2) If the representative stops holding office under section 341, on the happening of that event the unadministered estate vested in the representative—

(a) is divested from the representative; and

(b) vests in—

(i) the person to whom a grant of probate is made under section 341(2); or

(ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.

(3) If the representative stops holding office under section 342, on the happening of that event the unadministered estate vested in the representative—

(a) is divested from the representative; and

(b) vests in—

(i) the person to whom a grant of letters of administration is made under section 350 or 351; or

(ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.

(4) Subsection (5) applies if—

(a) the last surviving, or sole, executor or administrator by representation (the representative) of the deceased person's will or estate stops holding office as executor or administrator by representation for the person under

section 343, other than because of section 335(2)(c)(i), or section 344; and

(b) the deceased person's estate is unadministered.

(5) On the happening of the event mentioned in subsection (4), the unadministered estate vested in the representative—

(a) is divested from the representative; and

(b) vests in the [public trustee].

(6) Subsection (7) applies if—

(a) all of the executors or administrators by representation (the representatives) of the deceased person's will or estate stop holding office as executor or administrator by representation for the person under section 343, other than because of section 335(2)(c)(i), or section 344; and

(b) the deceased person's estate is unadministered.

(7) On the happening of the event mentioned in subsection (6), the unadministered estate vested in the representatives—

(a) is divested from the representatives; and

(b) vests in the [public trustee].

(8) If the unadministered estate of a deceased person vests in the [public trustee] as provided under subsection (5) or (7), on the making of a grant of representation of the deceased's estate to another person the unadministered estate—

(a) is divested from the [public trustee]; and

(b) vests in—

(i) the person to whom the grant is made; or

(ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.

(9) If 1 or more, but not all, of the executors or administrators by representation stop holding office for any reason (the outgoing representatives), on the happening of that event, the unadministered estate, to the extent it is vested in the outgoing representatives—

(a) is divested from the outgoing representatives; and

(b) vests in—

(i) if only 1 person continues to be an executor or administrator by representation—the person; or

(ii) if more than 1 person continues to be an executor or administrator by representation—the persons as joint tenants.

2.20 This clause deals with the vesting of any unadministered estate when one or more of the executors or administrators by representation (in whom the estate vested under cl 204) ceases to hold office. These include where:

- the executor by representation ceases to hold office because the Court has made a further grant of probate, under cl 341, to a previously non-proving executor under the deceased's will (cl 205(1) and (2));
- the executor or administrator by representation ceases to hold office because the court has granted letters of administration under cl 350 or cl 351 (cl 205(1) and (3));
- all of the executors or administrators by representation (including the sole or surviving executor or administrator by representation) cease to hold office because the grant of representation is revoked, ends or ceases to have effect under cl 343[25] (cl 205(4)-(7));
- all of the executors or administrators by representation (including the sole or surviving executor or administrator by representation) cease to hold office because they have renounced the executorship or administratorship by representation under cl 344 (cl 205(4)-(7));
- the public trustee, in whom the unadministered estate has vested under cl 205(5)(b) and (7)(b), ceases to hold the estate because representation has been granted to another person (cl 205(8)); and
- some, but not all, of the executors or administrators by representation cease to hold office for any reason (cl 205(9)).

2.21 When the Court makes a new grant of representation, the unadministered estate vests in the new appointees (cl 205(2)(b), (3)(b) and (8)(b)). When the Court has not yet made a grant, the unadministered estate vests in the public trustee (cl 205(5)(b) and (7)(b)). Where only some

25. Except where the grant ceases to have effect because a court in another jurisdiction endorses a grant in that jurisdiction to effect that the deceased died domiciled in that jurisdiction: see cl 335(2)(c)(i) and QLRC, Report 65 [10.112-10.114].

of the administrators or executors by representation cease to hold office, the unadministered estate vests in the remaining office holders (cl 205(9)(b)).

2.22 The above provisions have the effect of vesting in the person to whom the Court has granted representation the unadministered property of any other deceased person of whose estate the deceased was personal representative or administrator or executor by representation.[26]

2.23 This clause currently has no counterpart in any jurisdiction. The National Committee has recommended it because cl 202, which is based on s 45(3) of the *Succession Act 1981* (Qld), only covers situations where a grant of representation is revoked or otherwise ended and does not cover estates held by executors or administrators by representation since they are not subject to a direct grant.[27]

206 Title relates back

(1) This section applies to the following persons—

(a) an executor to whom a grant of probate of a deceased person's will is made by the Supreme Court;

(b) an administrator of a deceased person's estate;

(c) an executor or administrator by representation of a deceased person's estate.

(2) The title of the executor, the administrator, or the executor or administrator by representation, to the deceased's estate relates back to, and is taken to have arisen on, the deceased's death.

2.24 This clause states that the title of a personal representative in an estate, once vested, dates from the deceased's death rather than the date of vesting. The doctrine of relation back of title allows a personal representative in whom the estate has subsequently vested to sue in respect of matters occurring between the deceased's death and the subsequent vesting.

2.25 It is based on s 45(4) of the *Succession Act 1981* (Qld) but, unlike s 45(4), which deals only with relation back of the title of administrators,

26. See QLRC, Report 65 [10.102], [10.108], [10.114], [10.117].

27. See QLRC, Report 65 [10.99].

it deals with relation back of the title of executors and of administrators and executors by representation.[28] Under the proposed scheme, an executor would normally derive his or her title from the will and the question of relation back would be unnecessary.[29] However, the National Committee has added an executor to whom a grant of probate has been made to the list because an executor who may have lacked capacity to act at the deceased's death, for example, because of age, may obtain a grant of probate upon attaining or recovering the capacity to act.[30]

2.26 The current NSW provision[31] deals with the relation back of title of both executors and administrators simply because, upon the death of the deceased person, property initially vests in the NSW Trustee. This will only be the case in some circumstances under the model legislation.[32]

207 Role of [public trustee]

(1) If the estate of a deceased person vests in the [public trustee] under section 200, 202, 203 or 205, the section does not require the [public trustee]—

(a) to act in the administration of the deceased's estate or in any trust created by the deceased's will; or

(b) to exercise any discretion, power, or authority of a personal representative, trustee or beneficiary.

(2) An act lawfully done by, or in relation to, the [public trustee] in relation to the estate is as valid and effectual as it would be if it had been done by, or in relation to, the holder of a grant of representation of the estate.

(3) Subsection (2) applies despite section 206.

2.27 This provision deals with the uncertainty surrounding the nature of the public trustee's role when an estate vests in the public trustee pending a grant of representation, especially in relation to litigation affecting an estate.[33] The issue has been litigated extensively in NSW,[34]

28. QLRC, Report 65 [10.81].
29. QLRC, Report 65 [10.30].
30. QLRC, Report 65 [10.79].
31. *Probate and Administration Act 1898* (NSW) s 44(1).
32. See cl 200; para 2.4.
33. QLRC, Report 65 [10.126]-[10.131].

which does not have a provision setting out the role of the public trustee beyond stating that the estate "shall be deemed to be vested in the NSW Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England".[35]

2.28 Sub-clause 207(1), which states that the public trustee is not required to do anything in relation to a deceased estate that vests in him or her by reason of the operation of cl 200, 202, 203 or 205, is based on s 45(6) of the *Succession Act 1981* (Qld). This is consistent with the view of the National Committee that the model legislation should not impose any positive obligations on a public trustee to do anything in relation to property that has vested as a result of the provisions in this Chapter.[36] The National Committee had previously considered framing a provision that allowed only for a "notional vesting", but noted that there might be circumstances where a public trustee would need to act, for example, to maintain the estate, especially in emergency situations.[37]

2.29 Sub-clause 207(2), which provides a legal basis for any acts performed by, or done to, the public trustee, is based on s 45(4A) of the *Succession Act 1981* (Qld) but extended to refer to other holders of grants of representation in addition to administrators. The National Committee recommended its inclusion to deal with the uncertainty surrounding the legal status of acts done by, or in relation to, the public trustee before an estate vests in a personal representative.[38]

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34. See *Darrington v Caldbeck* (1990) 20 NSWLR 212, 218.
35. *Probate and Administration Act 1898* (NSW) s 61. The Ordinary, or Judge Ordinary, was a judge with original, or "ordinary", jurisdiction over ecclesiastical matters (including probate matters). The Ordinary was an ecclesiastical judicial function annexed to the office of Bishops in England, who had inherent authority to adjudicate on those ecclesiastical matters that arose in the territory of their diocese.
36. QLRC, Report 65 [10.145].
37. NSWLRC, DP 42 [12.26].
38. QLRC, Report 65 [10.146].

Chapter 3. Grants of representation

- Part 1 Supreme Court's jurisdiction
- Part 2 Caveats
- Part 3 Renunciation
- Part 4 Particular provisions for probate and executors
- Part 5 Particular provisions for letters of administration
- Part 6 Elections to administer—simplified procedure for small estates
- Part 7 Automatic recognition
- Part 8 Chain of representation
- Part 9 Passing over
- Part 10 Foreign domicile
- Part 11 Resealing foreign grants of representation
- Part 12 Disposition under a grant of representation affected by a defect
- Part 13 Revocation, ending or ceasing of effect of a grant of representation

PART 1 SUPREME COURT'S JURISDICTION

3.1 This Part, in collecting together all of the relevant provisions relating to the Supreme Court's jurisdiction, draws substantially on s 6 of the *Succession Act 1981* (Qld). The National Committee identified a number of advantages of such a collection including:

- the convenience of having all of the powers and jurisdiction of the court gathered in one place;[1] and
- the consequential elimination of a large number of subsequently unnecessary provisions that dealt with specific circumstances where the Court could make a grant and the conditions to which Court can make a grant subject.[2]

3.2 The National Committee decided to adopt the whole of s 6 of the *Succession Act 1981* (Qld) in order to confer a broad jurisdiction on the Supreme Court.[3] The Queensland Court of Appeal has observed that the "ultimate basis" for the Court's exercise of discretion under s 6 is the "due and proper administration of the estate".[4]

Division 1 General jurisdiction

300 Application of part

> This part applies in relation to a deceased person whether the person died before or after the commencement of this section.

3.3 This clause ensures that the jurisdiction of the Court, as outlined in this Part, extends to the estate of a deceased person regardless of when they died. It is based on s 6(5) of the *Succession Act 1981* (Qld) and is

1. New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) ("NSWLRC, DP 42") [3.6].
2. NSWLRC, DP 42 [3.7]. See also para 3.15.
3. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [3.26].
4. *Baldwin v Greenland* [2007] 1 QdR 117 [43].

consistent with the National Committee's decision to adopt the whole of s 6 in order to confer a broad jurisdiction on the Supreme Court.[5]

3.4 The Queensland Law Reform Commission, in proposing the original provision, noted that the retrospective operation of the widened jurisdiction of the Supreme Court was desirable "so that if there are more convenient modes of practice which the Court wishes to adopt, it may do so as soon as the Act commences, and in relation to existing deceased estates".[6]

301 Jurisdiction

(1) Subject to this Act, the Supreme Court has jurisdiction, including jurisdiction for all purposes the court considers appropriate—

(a) to make and revoke a grant of probate of the will or letters of administration of the estate of any deceased person; and

(b) to hear and decide all testamentary matters; and

(c) to hear and decide all matters relating to the estate and the administration of the estate of any deceased person.

(2) The Supreme Court may make any declaration, and make and enforce any order, that may be necessary or convenient in the exercise of its jurisdiction under this Act.

3.5 This clause, which sets out the jurisdiction of the Court to hear matters relating to the administration of estates, is based on s 6(1) of the *Succession Act 1981* (Qld). It is consistent with the National Committee's decision to adopt the whole of s 6 in order to confer a broad jurisdiction on the Supreme Court.[7]

3.6 In proposing s 6(1), in 1978, the Queensland Law Reform Commission explained that the underlying intention of the provision was

5. QLRC, Report 65 [3.26].
6. Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978) ("QLRC, Report 22") 4.
7. QLRC, Report 65 [3.26].

"to give the Court plenary jurisdiction in respect of all matters in this area of the law".[8]

3.7 The current NSW provision unhelpfully states that the Court is invested with the "jurisdiction and authority ... vested in or exercised by the Court or by the Primary Judge in Equity in respect of the estates of deceased persons" that applied before the commencement of the *Probate Act 1890* (NSW).[9]

Revocation of a grant

3.8 Paragraph 301(1)(a) gives the Court power to revoke a grant of representation. Currently, in NSW, the Court's power to revoke a grant of probate depends on the Court's inherent jurisdiction,[10] while the Court may revoke a grant of administration under s 66(a) of the *Probate and Administration Act 1898* (NSW). The National Committee concluded that there was no need to include any further provisions in the draft legislation relating to the Court's power to revoke a grant.[11] Part 13 of this Chapter deals with the effect of the revocation of a grant.[12]

302 Jurisdiction is not dependent on particular factors relating to property, residence or domicile

(1) The Supreme Court may make a grant of probate of the will or letters of administration of the estate of a deceased person even though—

(a) the deceased left no estate in this jurisdiction or elsewhere; or

(b) the person to whom the grant is made is not resident or domiciled in this jurisdiction.

(2) However, a person who is not resident in this jurisdiction must file with the application for the grant a notice giving an address for service in this jurisdiction.

(3) Service of a document relating to the administration of the estate, or a proceeding relating to the administration of the

8. QLRC, Report 22, 5.
9. *Probate and Administration Act 1898* (NSW) s 33.
10. *Bates v Messner* (1967) 67 SR (NSW) 187, 191 (Asprey JA).
11. QLRC, Report 65 [25.38].
12. See para 3.284-3.308.

estate, at the address for service given under subsection (2) is taken to be personal service of the document on the holder of the grant.

Example of a document for a proceeding relating to the administration of the estate—

an originating process

Jurisdiction

3.9 Clause 302(1) provides that the Supreme Court's jurisdiction is not dependant on:

- the deceased leaving any property in his or her estate;
- the deceased leaving property in the Court's jurisdiction;
- the person to whom the grant of representation is made being resident in the jurisdiction; or
- the person to whom the grant of representation is made being domiciled in the jurisdiction.

It is based on s 6(2) of the *Succession Act 1981* (Qld).

3.10 It differs significantly from the current NSW provision which merely states that the Court shall have jurisdiction with respect to the estate of "any deceased person leaving property ... in New South Wales".[13]

3.11 The National Committee gave particular consideration to the question of the presence of property of the deceased in the jurisdiction and concluded that there were a number of reasons why it was desirable that the Court's jurisdiction not be dependent upon the presence of property within the jurisdiction, including:

- it allows the Court to grant representation for the purposes of litigation against an "estate" where the litigation is really against the deceased's insurers;[14]
- it allows a personal representative to give directions about the disposal of the deceased's body even when the deceased left no property in the jurisdiction;[15]

13. *Probate and Administration Act 1898* (NSW) s 40.

14. QLRC, Report 65 [3.33]. See also QLRC, Report 22, 5; Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [9.27].

- it allows the Court to grant representation in the case of a will that only appoints a testamentary guardian;[16]
- foreign revenue laws may be beneficial to the estate if the Court grants representation;[17]
- some jurisdictions may require a grant from the deceased's country of nationality before making a grant themselves;[18] and
- the first stage of the National Committee's proposals for the automatic recognition of grants of representation within Australia[19] would be rendered unworkable if the Court in the jurisdiction in which the deceased died domiciled was not able to make a grant because the deceased did not leave any property in the jurisdiction.[20]

Address for service when person resides out of the jurisdiction

3.12 The range of possibilities that cl 302(1)(b) presents for the location of an estate's personal representative has necessitated provisions that require a personal representative who is not resident in the Court's jurisdiction to provide an address for service with his or her application for the grant.[21] Sub-clauses 302(2) and (3), are based on part of the NSW provision which deems every executor or administrator applying for resealing of a grant of representation to be resident in NSW and makes provision for service when they were not actually resident.[22] However, unlike the NSW provision, the service here is of documents and proceedings that relate only to the administration of the estate in

15. QLRC, Report 65 [3.34]. See *Re Dempsey* (unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987) 9-10.
16. See Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [9.27].
17. See Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [9.27].
18. See Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [9.27].
19. Para 3.134.
20. QLRC, Report 65 [3.44].
21. See QLRC, Report 65 [40.58].
22. *Probate and Administration Act 1898* (NSW) s 97(2). See QLRC, Report 65 [40.43]-[40.47].

question. It has been said that the NSW provision ensures that personal representatives are amenable to court process without the need for those seeking to effect service to rely on rules of court and Commonwealth legislation dealing with interstate service of process.[23]

303 Grant of probate and letters of administration may be made subject to limitations

(1) The Supreme Court may make a grant of probate or letters of administration to any person and may make the grant subject to any conditions or limitations that the court considers appropriate.

(2) Subsection (1) is subject to section 312.

3.13 This clause confirms the power of the Court to make various types of limited or special grants. It is based on s 6(3) of the *Succession Act 1981* (Qld) and, as such, is consistent with the National Committee's decision to adopt the whole of s 6 in order to confer a broad jurisdiction on the Supreme Court.[24]

3.14 In recommending the original provision, in 1978, the Queensland Law Reform Commission noted that it would enable the Court to "continue its practice of making limited grants, such as grants *ad colligenda bona*, *ad litem*, *durante minore*, and so on" and would, in fact, enlarge the Court's jurisdiction by enabling it to "attach any provisions to the grant it thinks fit".[25]

3.15 The broad reach of this provision renders unnecessary several specific NSW provisions including those that deal with:

- a grant of administration that has effect until an executor turns 18;[26]
- a grant to a person acting under a power of attorney for a person residing out of the jurisdiction;[27]

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23. L Handler and R Neal, *Succession Law and Practice NSW* (LexisNexis, online) [1489.1] (at 8 October 2009).
24. QLRC, Report 65 [3.26].
25. QLRC, Report 22, 6.
26. *Probate and Administration Act 1898* (NSW) s 70 and s 71. See NSWLRC, DP 42 [3.22]-[3.25]; QLRC, Report 65 [4.214]-[4.235].
27. *Probate and Administration Act 1898* (NSW) s 72. See QLRC, Report 65 [4.240]-[4.244].

- an administrator appointed by the Court pending any suit touching the validity of a will or the "obtaining, recalling, or revoking" of a grant of probate or administration, or during a "contested right to administration" (that is, pendente lite);[28] and
- the appointment of a special administrator if the executor or administrator are absent from the jurisdiction.[29]

3.16 In recommending the general provision, in 1978, the Queensland Law Reform Commission was satisfied that many of the specific provisions outlined above would "in a modern legislative scheme, be found in subordinate legislation and not in the statute itself".[30] The National Committee concurred with this conclusion in light of the broad jurisdiction that this clause confers.[31]

3.17 Given its broad reach, it is necessary for cl 303(2) to state that this clause is subject to the limitations on grants of representation in cl 312 with respect to the age of personal representatives and the number who may hold office at any one time.

304 Grant of representation—[Queensland] domicile

(1) If, in making a grant of representation, the Supreme Court is satisfied that the deceased person died domiciled in this jurisdiction, the court must endorse the grant to that effect.

(2) In this section—

grant of representation does not include an election to administer.

3.18 This provision, which does not have a counterpart in any Australian jurisdiction, is necessary to support the new system for the recognition of interstate grants of probate.[32] Under the first stage of the new scheme,[33] it is necessary, if the court that grants representation finds

28. *Probate and Administration Act 1898* (NSW) s 73. See QLRC, Report 65 [4.249]-[4.251].
29. *Probate and Administration Act 1898* (NSW) s 76-80. See QLRC, Report 65 [4.245]-[4.248].
30. QLRC, Report 22, 5.
31. QLRC, Report 65 [4.271].
32. See Chapter 3 part 7.
33. See para 3.134.

that the deceased was domiciled in the court's jurisdiction, that the court note on the grant that the deceased's domicile was in that jurisdiction.[34]

3.19 Sub-clause 304(2), in expressly excluding elections to administer,[35] makes it clear that this provision only extends to grants of probate and letters of administration and orders to administer the estate of a deceased person.[36] The express exclusion of elections to administer is not strictly necessary since cl 304(1) refers to the "making" of a grant of representation. The exclusion of elections to administer from this provision preserves the particular safeguards for small estates that arise from court supervision under the election to administer regime.[37]

305 Grant of representation—domicile other than [Queensland]

(1) This section applies if, in making a grant of representation (the local grant), the Supreme Court—

(a) is satisfied that the deceased person died domiciled in an interstate jurisdiction; or

(b) does not make a finding about where the deceased died domiciled.

(2) The Supreme Court must endorse the local grant to the effect that it ceases to have effect if a later interstate grant of representation is endorsed by the court making it to the effect that the deceased person died domiciled in the interstate jurisdiction in which the court is situated.

(3) In this section—

grant of representation does not include an election to administer.

3.20 This provision, which does not have a counterpart in any Australian jurisdiction, is necessary to support the new system for the automatic recognition of interstate grants of representation[38] and guard against the possibility that there could be two grants that are both

34. QLRC, Report 65 [38.72]-[38.73].

35. See Chapter 3 part 6.

36. In NSW, the Supreme Court's granting of an order to administer in favour of the NSW Trustee is governed by *NSW Trustee and Guardian Act 2009* (NSW) s 25.

37. QLRC, Report 65 [38.61]-[38.64].

38. See Chapter 3 part 7.

effective in the relevant jurisdiction.[39] Under the first stage of the new scheme,[40] it is necessary, if the court that grants representation finds that the deceased was domiciled in another Australian jurisdiction or makes no finding as to domicile, that the court note on the grant that the grant will cease to have effect if the court of an Australian jurisdiction where the deceased was domiciled subsequently makes a grant in relation to the estate.

3.21 Like cl 304(2), this provision only extends to grants of probate and letters of administration and orders to administer the estate of a deceased person.[41]

306 Application for grant of probate or letters of administration to be made as provided under the rules of court

> An application for a grant of probate or letters of administration must be made in the way prescribed under the rules of court.

3.22 This provision requires that an application for a grant of representation must be made in accordance with the relevant rules of court. It is based on s 42(1) of the *Probate and Administration Act 1898* (NSW).

3.23 The National Committee considered that it was not necessary to include in the model legislation the remaining sub-sections of s 42 (which deal with the application procedure) as they are more appropriately contained in the rules of court.[42] In particular, the National Committee, while noting doubts about the utility of advertising in newspapers,[43] left it to individual jurisdictions to consider whether the rules of court should make such provision as is necessary for a person to advertise his or her intention to apply for a grant of representation.[44]

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39. QLRC, Report 65 [38.114]-[38.116].
40. See para 3.134.
41. See para 3.19.
42. QLRC, Report 65 [40.15].
43. QLRC, Report 65 [8.18]-[8.19], [8.26].
44. QLRC, Report 65 [8.25]-[8.26]. The advertising provisions in NSW are contained in *Supreme Court Rules 1970* (NSW) pt 78 r 10.

3.24 Rules of court in relation to the administration of estates are discussed further in relation to cl 611.[45]

307 Supreme Court's jurisdiction extends to making of orders available under the [insert local equivalent of Trusts Act 1973 (Qld)]

(1) The Supreme Court may make, for the proper administration of any property in a deceased person's estate, any order that it may make for the administration of trust property under [insert local equivalent of the Trusts Act 1973 (Qld)].

(2) Subsection (1) does not limit sections 301 to 303.

3.25 This provision is based on s 6(4) of the *Succession Act 1981* (Qld) and, as such, is consistent with the National Committee's decision to adopt the whole of s 6 in order to confer a broad jurisdiction on the Supreme Court.[46] The Queensland Law Reform Commission in recommending this provision, in 1978, merely noted that the provision was "self-explanatory".[47] In NSW, the powers of the Supreme Court in relation to trusts are located in Part 3 of the *Trustee Act 1925* (NSW).[48]

3.26 In a recent Queensland Supreme Court case, the judge considered that s 6(4) combined with s 80 of the *Trusts Act 1973* (Qld) would give the Court power to appoint an executor or administrator in place of an existing one "as it would be an order it would have jurisdiction to make in relation to the administration of trust property under the *Trusts Act*". However, he concluded that the Court's powers under s 6(1) were "clearly wide enough to include the removal of an executor who had not taken out probate and the appointment of an administrator in his stead".[49] This raises a question about the necessity for this clause.

45. See para 6.26.
46. QLRC, Report 65 [3.26].
47. QLRC, Report 22, 6.
48. *Trustee Act 1925* (NSW) s 70-s 94.
49. *Williams v Williams* [2004] QSC 269 [13].

Division 2 Grants of representation on inference or presumption of death

3.27 This Division deals with grants of representation when the Court has no actual evidence of a body (usually proved by a death certificate), but must rather infer or presume that a person has died.[50]

3.28 A court may, in certain circumstances, presume that a person has died. For the presumption to operate at common law, at least seven years must have elapsed since the person was "last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communications from him [or her] or to have learned of his [or her] whereabouts, were he [or she] living", and there must be no evidence to the contrary.[51] The presumption operates only to prove the fact of death for the purposes of the relevant legal proceedings[52] and does not set any particular date on or before which the person is presumed to have died.[53]

3.29 Depending on the nature of the available evidence, a court may, rather than relying on the common law presumption, infer from the circumstances of the case that a person has died and also set a date on or about which the death occurred. Examples of such circumstances might include where the person was a passenger on a ship that was wrecked;[54] the person was washed out to sea while fishing;[55] or the person was lost on a diving expedition.[56]

308 Definition for division

In this division—

> **grant of representation** does not include an election to administer.

3.30 Elections to administer have been omitted because they can only be filed upon proof that the person has died. The proceedings that would be

50. See the definition of "deceased person" in sch 3; and para S3.5-S3.7.
51. *Axon v Axon* (1937) 59 CLR 395, 405 (Dixon J).
52. *Axon v Axon* (1937) 59 CLR 395, 412 (Evatt J).
53. *Axon v Axon* (1937) 59 CLR 395, 405 (Dixon J).
54. *Mackay v Mackay* (1901) 18 WN (NSW) 266, 268-269.
55. *Re Parker* (1995) 2 Qd R 617.
56. *Re Bennett* [2006] QSC 250.

required for the Court to make the necessary presumption or inference would defeat the purpose of filing an election to administer, namely to avoid the cost of instituting formal proceedings.

309 Validity if death is inferred or presumed

(1) This section applies if the Supreme Court—

(a) infers that a person has died or declares, in relation to a person, that the common law presumption of death is satisfied; and

(b) makes a grant of representation of the person's estate.

(2) The grant is valid even though it may subsequently be established that the person whose death was inferred or who was presumed to be dead was living when the grant was made.

Note—

See section 372 if the person was living when the grant of representation was made.

3.31 This clause confirms the validity of a grant of representation where the Court either infers that a person has died or declares that the common law presumption of death is satisfied but the person is later found to have been living when the grant was made. It is based on s 9A(2) of the *Administration and Probate Act 1929* (ACT).

3.32 The National Committee, however, decided not to include a provision to the effect of s 9A(1) of the *Administration and Probate Act 1929* (ACT). Sub-section 9A(1) confers power on the Court to make a grant where it is "satisfied, by direct evidence or by evidence supporting a presumption of death" that a person has died. The Committee considered that the effect of s 9A(1) could be achieved by adjusting the definition of "deceased person" to include a person whose death the Court has inferred or presumed at common law.[57] The equivalent provision in NSW is s 40A(1) of the *Probate and Administration Act 1898* (NSW).

3.33 Consideration will also need to be given to ensuring that the new definition of "deceased person" applies to the relevant provisions in statutes listed in s 40A(2) of the *Probate and Administration Act 1898* (NSW)

57. See the definition of "deceased person" in sch 3; and para S3.5-S3.7.

– the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW),[58] Part 15 of the *Conveyancing Act 1919* (NSW), the *Succession Act 2006* (NSW) and the *Real Property Act 1900* (NSW). The National Committee's view was that a provision to the effect of s 40A(2) was not necessary as "the grant itself would be sufficient evidence of the death of a person to found ... an application for family provision or a conveyance of the person's property".[59]

310 Endorsement if death is presumed

> If the Supreme Court makes a grant of representation on the presumption of a person's death, the grant must be endorsed by the court to the effect that it has been made on the presumption of the person's death.

3.34 This clause requires that, if the Court makes a grant on the presumption of death, the grant must be expressed to have been made on the presumption of death. It is based on s 40B(2) of the *Probate and Administration Act 1898* (NSW) and s 9B(1)(a) of the *Administration and Probate Act 1929* (ACT).

3.35 Previously, in NSW, the provision had been necessary because of the effect that a presumed death will have on the operation of the seniority rule. The seniority rule has been held not to apply in cases where one of the deaths has been presumed.[60] It was, therefore, said to be important in such cases that a presumption of death should be obvious on the face of the grant.[61] However, this reason will no longer apply since the National Committee has recommended that the survivorship provisions are to apply regardless of whether a death has been presumed.[62]

3.36 The National Committee has concluded that there is a practical reason for the retention of such a provision. If a grant is made on the presumption of death, it will not be possible for the date of death of the deceased to be recorded on the grant. The same requirement is said not to

58. To be renamed the *Guardianship of Infants Act 1916* (NSW) upon the commencement of *Succession Amendment (Intestacy) Act 2009* (NSW).
59. QLRC, Report 65 [24.59].
60. *Halbert v Mynar* [1981] 2 NSWLR 659.
61. QLRC, Report 65 [24.63].
62. See para 8.11 and para 8.14.

be necessary in the case of inferred deaths because "in many instances, the court will be able to infer that the deceased person died on or about a particular date".[63]

311 Imposition of conditions

(1) The Supreme Court may impose conditions on a grant of representation made on an inference or presumption of death.

Example of a condition—

that the personal representative not distribute any part of the estate to a beneficiary unless the beneficiary gives an undertaking or security to restore or return any property the beneficiary receives from the estate, or its value, to the person entitled if the grant is subsequently revoked because the person was alive when the grant was made

(2) If the grant is subject to a condition, the Supreme Court may revoke or vary the condition at any time on the application of the personal representative or a person affected by the condition.

(3) This section does not limit section 303.

3.37 This provision does two things. First, it empowers the court to impose conditions on a grant of representation made on an inference or presumption of death. This provision is based on s 40B(3) of the *Probate and Administration Act 1898* (NSW) which, however, also specifies "in particular" that the Court may impose a condition requiring "an undertaking being entered into or security being given by any person who takes under the distribution that the person will restore any money or property received by the person or the amount or value thereof in the event of the grant being revoked".[64] The substance of this part of the provision has now been included as an example for cl 311(1).

3.38 Secondly, it empowers the Court, on the application of the personal representative or person affected by any conditions imposed under cl 311(1), to revoke or vary these conditions. This provision is based on s 16(7) of the *Administration and Probate Act* (NT).

63. QLRC, Report 65 [24.65].

64. *Probate and Administration Act 1898* (NSW) s 40B(3).

3.39 Clause 311, unlike its counterparts in various Australian jurisdictions, applies to inferred deaths as well as presumed one. This is because the National Committee considers that, while it is more likely that a person whose death has been presumed may be alive at the date of grant, there is still a risk, albeit a small one, that a person whose death has been inferred may be alive at the date of the grant.[65]

3.40 The NSW provisions dealing with notice requirements and caveats for grants made on a presumption of death[66] have not been included in the model bill. The National Committee is of the view that the general provisions dealing with notice requirements and caveats[67] should be drafted so as to accommodate applications for grants in relation to inferred or presumed deaths.[68]

3.41 This provision also states that it does not limit the operation of cl 303. Given the broad operation of cl 303, this provision simply draws attention to the desirability of the Court imposing conditions in certain circumstances when it presumes or infers that a person has died.

Division 3 Limitations

312 Grants of probate and letters of administration

(1) The Supreme Court may make a grant of probate or letters of administration of a deceased person's will or estate to an individual only if the individual is an adult.

(2) Not more than 4 persons may hold a grant of probate or letters of administration of a deceased person's will or estate at any 1 time.

(3) If more than 4 persons are named as executors of a deceased person's will, the order of their entitlement to a grant of probate is the order in which they are named.

Note—

See section 318 about reserving leave to apply for a grant of probate.

65. QLRC, Report 65 [24.73].

66. *Probate and Administration Act 1898* (NSW) s 40B(4) and (5).

67. See cl 306, para 3.23 and cl 313, para 3.47-3.50.

68. QLRC, Report 65 [24.68].

3.42 This provision imposes three limitations on the Court's ability to grant representation. It provides that

- the Court may make a grant to an individual only if the individual is an adult;
- the Court may not appoint more than four personal representatives at any one time;
- where a will names more than four executors, their order of entitlement to a grant of probate is the order in which they are named.

3.43 Sub-clause 312(1) is a general provision about the minimum age for personal representatives. In recommending this provision, the National Committee decided not to include the historic provisions dealing with grants when the sole executor is under 18 years of age.[69] It considered that the rules of court could more appropriately deal with the procedures for dealing with such situations.[70] The National Committee considered that this provision would "serve to highlight a threshold requirement for eligibility for appointment as an executor or administrator".[71]

3.44 Clause 312(2) is based on the first half of s 48(1) of the *Succession Act 1981* (Qld). The Queensland Law Reform Commission, in its 1978 report, considered that it was desirable to restrict the number of personal representatives to whom a grant could be made because "personal representatives must act together and the larger the number the greater the possibility of disagreement or failure of communication".[72] The limitation is particularly desirable in light of the recommendation that personal representatives be required to act jointly.[73] There is currently no provision in NSW limiting the number of executors, but the proposed limitation is consistent with provisions in the *Trustee Act 1925* (NSW) which limit to four the number of trustees that can be appointed for a private trust.[74]

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69. *Probate and Administration Act 1898* (NSW) s 70 and s 71. See para 3.15.
70. QLRC, Report 65 [4.234]-[4.235].
71. QLRC, Report 65 [4.275].
72. QLRC, Report 22, 31.
73. See cl 406(3) and para 4.32-4.34. See also NSWLRC, DP 42 [8.85]-[8.86].
74. *Trustee Act 1925* (NSW) s 6(5)(b), (c) and s 7(5).

3.45 The National Committee decided not to follow the Tasmanian precedent[75] of requiring more than one administrator in certain situations, including where there is a minority or life interest in an estate.[76]

3.46 Clause 312(3) is based on the second half of s 48(1) of the *Succession Act 1981* (Qld) and simply provides the Court with the priority to be applied where more than four executors are named in a will.

PART 2 CAVEATS

313 Person objecting to grant of representation

(1) A person may, at any time before a grant of representation of a deceased person's estate is made, file with the registrar a caveat against the making of a grant.

(2) The caveat must be filed as required under the rules of court.

(3) The rules of court may provide for how a caveat filed under this section may be dealt with by the Supreme Court.

(4) In this section—

grant of representation includes a foreign grant of representation.

make, a grant of representation, includes reseal a foreign grant of representation.

3.47 This provision, which applies to both applications for original grants of representation and applications for the resealing of foreign grants, allows that a person may, at any time before the Court grants representation, lodge a caveat against the making of the grant, in accordance with the relevant rules of court. The effect of a caveat is generally that the application for a grant of representation cannot proceed until the person who lodged the caveat has received notice of the application. Situations in which a person may lodge a caveat include where the person disputes the validity of a will, wants to prevent a person from obtaining a grant of representation, or wants to commence family provision proceedings against the estate.[77]

75. *Administration and Probate Act 1935* (Tas) s 14.

76. QLRC, Report 65 [4.303]-[4.307].

77. See D M Haines, *Succession Law in South Australia* (2003) [20.2].

3.48 The model provision is based on s 44 of the *Administration and Probate Act* (NT). In NSW, the current provisions similarly allow a person to lodge a caveat against an application for a grant "at any time previous to such probate or administration being granted, or to the sealing of any such probate or letters of administration".[78] However, there are also additional provisions in the *Administration and Probate Act 1898* (NSW) that set out the form and content of a caveat against an application for a grant, and the procedures for dealing with them,[79] in addition to further provisions in the *Supreme Court Rules 1970* (NSW).[80]

3.49 The National Committee is of the view that it is desirable that the model bill flag the possibility of lodging a caveat.[81] However, it also considered that questions of the form and content of the caveats and the procedures for dealing with them would be more appropriately dealt with in the relevant rules of court.[82] The model provision is, therefore, based on the Northern Territory provision and does not contain the other material currently included in the *Administration and Probate Act 1898* (NSW).

3.50 The National Committee was further of the view that the caveat provisions should also extend to caveats lodged against the resealing of a grant.[83] This is consistent with the approach in the current NSW provisions which cover applications for resealing as well as for original grants.

PART 3 RENUNCIATION

3.51 This Part deals with issues surrounding an executor's renunciation of his or her executorship and a person's renunciation of his or her entitlement to seek a grant of letters of administration.[84] Unlike cl 315 in relation to executors, there is no express provision dealing with a

78. *Probate and Administration Act 1898* (NSW) s 144(1), s 145, s 146, s 148.
79. *Probate and Administration Act 1898* (NSW) s 144(2), s 145, s 146, s 148.
80. *Supreme Court Rules 1970* (NSW) pt 78 r 61-70.
81. QLRC, Report 65 [8.67].
82. QLRC, Report 65 [8.68].
83. QLRC, Report 65 [8.82].
84. The priority for grants of letters of administration is set out in cl 321 and cl 322. Renunciation of letters of administration is contemplated in cl 321(4) and cl 322(4)

person's ability to renounce his or her entitlement to apply for letters of administration. However, cl 316 and cl 317 refer to the ability to renounce an entitlement to apply for letters of administration.

314 Application of part

> This part only applies in relation to a deceased person who dies after the commencement of this section.

3.52 Unlike other provisions in the model legislation that relate to the period between a person's death and the Court's grant of representation which are stated to apply regardless of whether the person dies before or after commencement of the provision,[85] this clause states that it only applies with respect to a person who dies after commencement of the provision. If this Part were to apply to a deceased person who died before the commencement of this clause, it could affect an existing right, that is, the right of an interested person to cite the executor who has acted without a grant to apply for probate. The current NSW law[86] will, therefore, continue to apply to estates where the deceased has died before the commencement of this clause, but the Court has not yet granted representation so that, in certain circumstances, the Court will be able to compel a person who has already acted in the administration of an estate to undertake an executorship, even though he or she wants to renounce it.

315 Renunciation of executorship

> (1) An executor named in the will of a deceased person may renounce his or her executorship of the deceased's will.
>
> (2) Subsection (1) applies whether or not the executor has intermeddled in the administration of the estate.
>
> (3) However, the renunciation may only be made before a grant of probate of the deceased's will has been made to the executor.

3.53 This provision allows an executor named in a will to renounce the executorship and to do so regardless of whether he or she has "intermeddled" in the administration of the estate, so long as the executor renounces the executorship before the Court grants it to him or her. "Intermeddling" is a term used to describe the actions of an executor who

85. For example, cl 300, cl 320(2), cl 324, cl 345(1), and cl 352(2).

86. See para 3.54.

acts without a grant in the administration of an estate. Renunciation of an executorship is a formal act in writing.[87] The model provision is based on s 54(2) of the *Succession Act 1981* (Qld).

3.54 In NSW, the general position is that an executor who has intermeddled in an estate cannot ordinarily renounce the executorship because the intermeddling is taken to be an "indication of an intention to accept the executorship and will constitute an acceptance of that office".[88] In such circumstances, the Court may compel the executor to accept the executorship.[89] However, there is a significant body of case law identifying what acts may amount to intermeddling and so prevent an executor from renouncing. The National Committee considered that much of this law displays "a considerable degree of inconsistency".[90]

3.55 In recommending the model provision, the National Committee accepted that there was no doubt that a person named as executor in a will could renounce that executorship but considered that a general provision in the model bill would be of assistance to lay executors.[91] The National Committee presented a number of arguments for allowing a named executor who has intermeddled in an estate to renounce the executorship, namely that:

- "it must, as a matter of principle, be undesirable to compel the person to do so for the sole reason that he or she has intermeddled in the estate";[92]

87. J R Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th edition, Sweet and Maxwell, 2008) [30-01].
88. *Howling v Kristofferson* (Unreported, NSW Supreme Court, Cohen J, 14 October 1992) 11.
89. *In the Will of Lyndon* [1960] VR 112, 113-114.
90. QLRC, Report 65 [4.30]-[4.38]. In NSW, Needham J has suggested that "the trend of more modern cases is to take a more lenient view of acts of nominated executors": *Mulray v Ogilvie* (1987) 9 NSWLR 1, 6.
91. QLRC, Report 65 [4.50].
92. QLRC, Report 65 [4.51]. See also the view of the Queensland Law Reform Commission that preventing renunciation may "in some cases, be rather harsh, particularly where a person who happens to be nominated executor performs acts of administration in the emergency following a death without any intention of taking up his executorship": QLRC, Report 22, 37.

- it would be consistent with the policy behind cl 435 of the model bill which deals with the liability of people who administer an estate informally;[93]
- it would be consistent with the National Committee's policy of assimilating the roles of executors and administrators since a person entitled to letters of administration may renounce their entitlement even if he or she has already acted in the estate;[94] and
- it will avoid the need for the Court to make an assessment of an executor's acts so as to determine whether the executor can renounce the executorship.[95]

3.56 The model provision allows an executor to renounce at any time before the Court grants representation. This differs from the Queensland provision which allows an executor to renounce only in the period before he or she applies for a grant of probate. The National Committee has recommended that the executor be able to renounce at any time before the Court grants representation[96] because some cases have allowed executors to renounce after having taken the oath of office (as a preliminary to applying for probate)[97] and after having advertised their intention to apply for probate.[98]

316 Limited ability to apply for a grant of representation in another capacity

> A person who has renounced the executorship of the will or administration of the estate of a deceased person in 1 capacity may not be the holder of a grant of representation of the deceased's estate in another capacity unless the Supreme Court otherwise directs.

3.57 This clause provides that a person who has renounced his or her right to probate or administration in one capacity cannot be granted representation in another capacity unless the Court directs otherwise. This would cover a situation where, for example, a renouncing executor would also be entitled to apply for a grant of administration as a relative

93. QLRC, Report 65 [4.53].
94. QLRC, Report 65 [4.54].
95. QLRC, Report 65 [4.41], [4.55].
96. QLRC, Report 65 [4.57].
97. *Jackson v White* (1821) 3 Phill Ecc 577; 161 ER 1420; *M'Donnell v Prendergast* (1830) 3 Hag Ecc 212; 162 ER 1134.
98. *In the Will of Colless* (1941) 41 SR (NSW) 133, 134.

of the deceased, or where a renouncing relative might be entitled to apply for a grant of administration as a creditor of the deceased.[99]

3.58 The model provision is based on rule 28 of the *Non-Contentious Probate Rules 1967* (WA), except that it specifies the Supreme Court rather than the Registrar may otherwise direct, leaving it to individual jurisdictions to allocate responsibility between judges, associate judges and registrars.[100] In NSW, the rules of court currently provide that a person who has renounced probate or administration in one capacity cannot be granted representation in another capacity.[101]

3.59 The National Committee considered that such a provision would avoid the need for a person who is entitled to apply for administration of an estate to "clear off" a person with a higher entitlement who has already renounced the executorship. The Committee also considered that the WA provision, in permitting the Registrar to allow a renouncing executor to apply in an appropriate case, preserved a desirable degree of flexibility in the system.[102]

317 Retraction

(1) This section applies if a person has renounced the executorship of the will or administration of the estate of a deceased person and applies to the Supreme Court to retract the renunciation.

(2) The Supreme Court may permit the person to retract the renunciation if the court is satisfied that the retraction would be for the benefit of the estate or persons interested in the estate.

(3) However, if a grant of letters of administration of the deceased's estate has been made to someone (the current administrator) lower in priority than the person, the Supreme Court may permit the retraction only if the court is satisfied that it would be to the detriment of the estate or persons interested in the estate for the current administrator to continue as administrator.

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99. See sch 1 and sch 2.

100. QLRC, Report 65 [4.70].

101. *Supreme Court Rules 1970* (NSW) pt 78 r 14(1).

102. QLRC, Report 65 [4.68].

Note—

See sections 321 and 322 for the order of priority for letters of administration.

3.60 This clause deals with two situations where a person retracts a renunciation of representation:

- where the Court has not granted administration to a person lower in priority; and
- where the Court has granted administration to a person lower in priority. [103]

3.61 The National Committee has included this model provision because it considers that there are "circumstances where it will clearly be in the interests of an estate" for a person to retract his or her renunciation and apply for a grant.[104]

3.62 When the Court has not granted administration to a person lower in priority, the Court may permit the person to retract if it is satisfied that the retraction would be for the benefit of the estate or those interested in it.

3.63 When the Court has granted administration to a person lower in priority, the Court may permit the person to retract if it is satisfied that detriment would be caused to the estate or those interested in it if the current administrator continued in that role. The National Committee recommended the different test in such circumstances because of the potentially disruptive effect that a change in personal representatives would have on an estate that was already being administered, especially in situations where the current administrator is an executor or administrator by representation. In recommending that the Court must be satisfied that it would be to the detriment of the estate or those interested in it for the current administrator to continue, the National Committee rejected the formulations used in Tasmania and South Australia that only permitted retraction in "exceptional circumstances".[105]

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103. QLRC, Report 65 [4.112].

104. QLRC, Report 65 [4.110].

105. *Probate Rules 2004* (SA) r 48.06; *Probate Rules 1936* (Tas) r 67(4).

3.64 In NSW, retraction of a renunciation of probate or administration is currently governed by general law principles.[106]

PART 4 PARTICULAR PROVISIONS FOR PROBATE AND EXECUTORS

318 Leave to apply for a further grant of probate

(1) This section applies if an application is made for a grant of probate by some, but not all, of the executors named in a deceased person's will.

(2) The Supreme Court may—

(a) make a grant of probate to 1 or more of the executors who apply for the grant; and

(b) reserve leave to the executor or executors who have not applied for the grant and have not renounced their executorship to apply for a grant of probate at a later time.

3.65 This provision deals with the situation where some of the executors named in a will apply for probate and some do not apply but also do not renounce their executorship. In such cases, the Court may make a grant to some or all of the executors who apply and may also reserve leave to the others to apply for a grant of probate in future.

3.66 The National Committee considered that, while there was no doubt that the Court had inherent jurisdiction to grant probate to one or more of the executors named in a will and to reserve leave to those who had not renounced to apply in future, it would assist lay executors if the model legislation included an express power.[107]

3.67 The clause is based on s 41 of the *Probate and Administration Act 1898* (NSW), but differs from it to the extent that it would appear to allow the Court to reserve leave only for those executors who have not applied for a grant. The NSW provision appears also to allow the Court to reserve leave for those who have applied but who have not received a grant. The model provision would, therefore, exclude a fifth-named executor who

106. See QLRC, Report 65 [4.71]-[4.81]; *Re Thurston; Thurston v Fuz* [2001] NSWSC 144 [13].

107. QLRC, Report 65 [4.8].

applied with four others but could not be appointed because of the operation of cl 312(2) and (3).

319 When an executor's right to prove the will ends

(1) This section applies if a person appointed executor by a will—

(a) survives the testator but dies without having a grant of probate being made to him or her; or

(b) renounces his or her executorship of the will; or

(c) after being required by the Supreme Court, including by citation or summons, to apply for a grant of probate, fails to apply for the grant as required by the court.

(2) The person's rights in relation to the executorship end.

(3) The testator's personal representative is to be determined, and the administration of the testator's estate is to be dealt with, as if the person had never been appointed executor.

Examples of ways in which a testator's personal representative may be determined—

- *by operation of law*
- *on application to the Supreme Court for a grant of representation*

(4) Nothing in this section affects the person's liability for an act or omission happening before the person's rights in relation to the executorship end.

3.68 This clause provides that a person named as executor in a will ceases to have rights in relation to the executorship when that person:

- survives the testator but dies before the Court grants probate;
- renounces the executorship; or
- fails to apply for a grant when the Court requires it.

The effect of this provision is that the estate's personal representative must be determined as if the will had never appointed the person executor.

3.69 The current NSW provision[108] covers the same ground as s 46 of the *Succession Act 1981* (Qld) on which the model provision is based.

3.70 The National Committee recommended a provision based on s 46 of the *Succession Act 1981* (Qld) because it would provide "certainty as to those circumstances that, of themselves, bring to an end an executor's entitlement to a grant of probate".[109] The National Committee also recommended the inclusion of a new provision, which does not have a counterpart in any Australian jurisdiction, to confirm that nothing in this clause affects the named executor's liability for an act or omission happening before the right to prove the will ends.[110]

PART 5 PARTICULAR PROVISIONS FOR LETTERS OF ADMINISTRATION

3.71 This part sets out the priority of people to whom the Court may make a grant of letters of administration. In general, the practice of the Court has been to favour the person with the largest beneficial interest in the estate.[111] The largest beneficial interest will be determined, when the deceased has died without leaving a will, by the rules of distribution on intestacy and, when the Court grants letters of administration with the will annexed, it will be determined by the terms of the will. Clause 321, therefore, sets out the priority that the Court should follow when granting letters of administration with the will annexed and cl 322 sets out the priority where the deceased dies without leaving a will.

320 Application of part

(1) This part applies if a person dies—

(a) intestate; or

(b) leaving a will, but without having appointed an executor; or

108. *Probate and Administration Act 1898* (NSW) s 69.

109. QLRC, Report 65 [4.20].

110. QLRC, Report 65 [4.22].

111. QLRC, Report 65 [5.1]. For the common law position, see *Re Slattery* (1909) 9 SR (NSW) 577.

(c) leaving a will and having appointed an executor or executors, if the executor, or if more than 1 executor is appointed, each of the executors either—

(i) renounces his or her executorship of the will; or

(ii) lacks legal capacity to act as executor; or

(iii) is not willing to act.

(2) For this part, it does not matter whether the person's death happens before or after the commencement of this section.

(3) Nothing in this part limits the Supreme Court's jurisdiction under section 301.

3.72 This clause identifies the subject matter of Part 5, by setting out the situations where the Court must appoint an administrator. These are where the deceased did not leave a will, where the deceased left a will but did not appoint an executor, or where the deceased left a will but the appointed executors were unwilling or unable to act. The National Committee recommended its inclusion, despite the breadth of cl 303, to assist lay people by identifying the circumstances in which the Court will usually grant letters of administration.

3.73 It is based on s 74 of the *Probate and Administration Act 1898* (NSW). However, the model provision omits s 74(c)(ii) which allows the Court to appoint an administrator where the appointed executor is resident out of NSW. This provision was omitted as no longer appropriate because communication over distance is now much easier than it was when the provision was first framed, at the end of the 19th century.[112] As cl 303 deals with the Court's power to appoint an administrator, it was not necessary to include the provisions in s 74 that deal with conditions upon which the Court may appoint an administrator.[113]

321 Priority for grant—will and [Queensland] domicile

(1) This section applies if a person dies domiciled in this jurisdiction.

(2) The priority of persons to whom the Supreme Court may make a grant of letters of administration with the will annexed of the

112. NSWLRC, DP 42 [5.12]; QLRC, Report 65 [4.181].

113. QLRC, Report 65 [4.184].

estate of the deceased person is stated in descending order in schedule 1.

(3) If 2 or more persons have the same priority, the order of priority must be decided according to which of them has the greater interest in the estate.

(4) An applicant for the grant must establish that any person higher than the applicant in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation.

(5) This section does not limit section 303.

3.74 This clause deals with the priority that the Court may accord to applicants for letters of administration with the will annexed, unless the Court decides to grant representation to another person in accordance with other provisions of the model legislation, such as cl 303 and cl 347.

3.75 It is based on the provisions in rule 603 of the *Uniform Civil Procedure Rules 1999* (Qld). The National Committee considered that setting out an order of priority for the granting of letters of administration would "create certainty" and simplify the administration of estates.[114] It further decided that it was in the interests of accessibility to include these provisions in the model bill.[115]

3.76 However, the National Committee decided to vary some aspects of rule 603 so that the model provision should:

- simply provide that the applicant must establish that any person of higher priority is not entitled because of death, lack of legal capacity or renunciation because it considered it unnecessary to state, as r 603(4) does, that an applicant must establish his or her priority "by providing evidence" that any person of higher priority is not entitled for the reasons listed;[116]
- not include a provision to the effect of r 603(5) as this is more appropriately located in court rules;[117] and

114. QLRC, Report 65 [5.45].

115. QLRC, Report 65 [5.47], [5.48].

116. QLRC, Report 65 [5.70].

117. QLRC, Report 65 [5.71].

- not include a provision to the effect of r 603(6) as it is unnecessary to establish priority for a person of equal or lower priority than the applicant.[118]

3.77 Finally, the National Committee recommended the inclusion of cl 321(1) so that the provision will not apply if the deceased died domiciled outside the enacting jurisdiction.[119] As a result, in cases where the deceased died domiciled outside the enacting jurisdiction, cl 352(6)(b) will apply. This sub-clause is based on r 36.02 of the *Probate Rules 2004* (SA) which achieves the same outcome in South Australia.

3.78 The term "renunciation" in cl 321(4), which derives from r 603(4) of the *Uniform Civil Procedure Rules 1999* (Qld), refers to an executor's renunciation of his or her executorship and a person's renunciation of an entitlement to apply for administration both of which are dealt with under Part 3 of Chapter 3.[120]

3.79 NSW does not currently have a provision that establishes a priority for applicants for a grant of administration with the will annexed. This leaves the question of priority to be governed by relevant case law which can be quite complex and technical.[121]

322 Priority for grant—intestacy and [Queensland] domicile

(1) This section applies if a person dies domiciled in this jurisdiction.

(2) The priority of persons to whom the Supreme Court may make a grant of letters of administration on intestacy of the estate of the deceased person is stated in descending order in schedule 2.

(3) A person who represents a person mentioned in schedule 2 has the same priority as the person represented.

(4) An applicant for the grant must establish that any person higher than the applicant in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation.

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118. QLRC, Report 65 [5.72].

119. QLRC, Report 65 [5.77].

120. See para 3.51-3.64.

121. See R S Geddes, C J Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) 502-505.

(5) The applicant must file in the Supreme Court an affidavit, sworn by the applicant or someone else with relevant knowledge, about the existence or nonexistence and beneficial interest of any spouse or a person claiming to be a spouse.

(6) This section does not limit section 303.

Example for subsection (6)—

If there is more than 1 surviving spouse, the Supreme Court may make the grant to 1 or more of them, or to a person lower than the surviving spouse or spouses in the order of priority.

3.80 This clause deals with the priority that the Court must accord to applicants for letters of administration in cases where the deceased dies intestate, that is, without leaving a will, unless the Court decides to grant representation to another person in accordance with other provisions of the model legislation, such as cl 303 and cl 347.

3.81 It is based on the provisions in rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld). The National Committee considered that setting out an order of priority for the granting of letters of administration would "create certainty" and simplify the administration of estates.[122] It further decided that it was in the interests of accessibility to include these provisions in the model bill.[123]

3.82 The priority set out in Schedule 2 is broadly consistent with the National Committee's recommendations about the distribution of estates on intestacy[124] which have now been adopted in NSW.[125] Details are discussed in the commentary to Schedule 2.[126]

3.83 The current NSW provision sets out a simplified order of priority of people to whom the Court may grant letters of administration on intestacy, which, after listing the spouse of the deceased merely refers to "one or more of the next of kin".[127] The National Committee was of the view that the more detailed priority list in Schedule 2 would "greatly

122. QLRC, Report 65 [5.45].

123. QLRC, Report 65 [5.47], [5.48].

124. See New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007).

125. *Succession Amendment (Intestacy) Act 2009* (NSW).

126. See para S2.2.

127. *Probate and Administration Act 1898* (NSW) s 63.

simplify the issue of the ranking of applicants for letters of administration, especially in those jurisdictions where the matter is still largely governed by case law".[128]

3.84 The National Committee also decided to vary some aspects of rule 610 so that the model provision should:

- simply provide that the applicant must establish that any person of higher priority is not entitled because of death, lack of legal capacity or renunciation because it considered it unnecessary to state, as r 610(5) does, that an applicant must establish his or her priority "by providing evidence" that any person of higher priority is not entitled for the reasons listed;[129]
- not include a provision to the effect of r 610(6) as this is more appropriately located in court rules;[130] and
- not include a provision to the effect of the first part of r 610(7) as it is unnecessary to establish priority for a person of equal or lower priority than the applicant.[131]

3.85 Finally, the National Committee recommended the inclusion of cl 322(1) so that the provision will not apply if the deceased died domiciled outside the enacting jurisdiction.[132] As a result, in cases where the deceased died domiciled outside the enacting jurisdiction, cl 352(6)(b) will apply. This provision is based on r 36.02 of the *Probate Rules 2004* (SA) which achieves the same outcome in South Australia.

3.86 The term "renunciation" in cl 322(4), which derives from r 610(5) of the *Uniform Civil Procedure Rules 1999* (Qld), refers to an executor's renunciation of his or her executorship and a person's renunciation of an entitlement to apply for administration, both of which are dealt with under Part 3 of Chapter 3.[133]

128. QLRC, Report 65 [5.48].
129. QLRC, Report 65 [5.61].
130. QLRC, Report 65 [5.62].
131. QLRC, Report 65 [5.63].
132. QLRC, Report 65 [5.77].
133. See para 3.51-3.64.

323 Endorsement if grant made to creditor

(1) This section applies if a grant of letters of administration is made to a person who applies for the grant as a creditor of the deceased person's estate.

(2) The grant must be endorsed by the Supreme Court to the effect that it has been made to the administrator of the deceased's estate as a creditor of the estate.

3.87 This provision, which does not have a counterpart in any Australian jurisdiction, requires the Court, when it has granted administration to a person only because he or she is a creditor of the deceased's estate,[134] to endorse the grant to that effect. It is necessary, in light of the National Committee's recommendations concerning the chain of representation when an executor or administrator dies,[135] to ensure that a person who has become administrator solely because they are a creditor of the deceased's estate does not also become an executor or administrator by representation of any other deceased estate.[136]

PART 6 ELECTIONS TO ADMINISTER—SIMPLIFIED PROCEDURE FOR SMALL ESTATES

3.88 An election to administer, which involves filing a prescribed notice with the Court, is a simple and less expensive way for certain specified people to obtain authority to administer small estates under a specified value, without the need to apply to the Court for a grant of representation.

3.89 The National Committee has decided to retain elections to administer as they "provide a cheaper and more convenient method ... to administer an estate having a relatively low value". In particular, elections to administer are seen as a means of avoiding the greater costs involved in applying for a grant of probate or letters of administration.[137]

3.90 In most jurisdictions, other than the NT, the provisions relating to elections to administer are contained in the relevant public trustee and trustee company legislation. In NSW, the provisions are contained in the

134. In accordance with either cl 321 and sch 1 item 4; or cl 322 and sch 2 item 11.

135. See Chapter 3 Part 8; para 3.158.

136. QLRC, Report 65 [7.51]-[7.52].

137. QLRC, Report 65 [29.25], [29.114].

NSW Trustee and Guardian Act 2009 (NSW) and the *Trustee Companies Act 1964* (NSW) and the NSW Trustee and the trustee companies are the only bodies in NSW currently entitled to file an election to administer.[138] The National Committee decided that the provisions relating to elections to administer should be included in the model legislation rather than in the relevant public trustee and trustee company legislation because of the proposals to follow the position in the NT and include legal practitioners among those who are entitled to file elections to administer.[139] The National Committee considered that the model provisions should generally be based on s 110B and s 110C of the *Administration and Probate Act* (NT).[140]

3.91 Consistent with the general position that elections to administer provide a simpler and cheaper means of administering small estates, the National Committee has decided not to include the advertising requirements currently contained in s 110B(4) of the *Administration and Probate Act* (NT). The National Committee was of the view that the cost involved in giving public notice either before or after the filing of an election to administer under either cl 326 or cl 330 was not justified. The National Committee observed that in a number of jurisdictions, including NSW,[141] such provisions are primarily concerned with proof of authority to act in the administration of the estate. The National Committee considered that the professional administrator could prove authority to act by obtaining an authenticated copy of the filed document.[142]

3.92 In recommending the provisions in this Part, the National Committee also considered the inclusion of a provision to facilitate the administration of small estates without the need to obtain a grant or file an election to administer.[143] NSW currently has provisions that allow the NSW Trustee to administer small estates up to a value of $20,000 as if the

138. *NSW Trustee and Guardian Act 2009* (NSW) s 26; *Trustee Companies Act 1964* (NSW) s 15A.

139. QLRC, Report 65 [29.47]. See Schedule 3, definition of "professional administrator"; para S3.31.

140. QLRC, Report 65 [29.47], [29.115].

141. *NSW Trustee and Guardian Act 2009* (NSW) s 30; *Trustee Companies Act 1964* (NSW) s 15A.

142. QLRC, Report 65 [29.99]-[29.100], [29.119].

143. QLRC, Report 65 [29.120]-[29.180].

Court had made a grant of representation in the NSW Trustee's favour.[144] The National Committee gave particular attention to new NT provisions that allow a "professional personal representative" (that is, the public trustee, a trustee company or a legal practitioner) to administer a small estate without a grant of representation and without filing an election.[145] The National Committee, however, concluded that such provisions were not necessary in light of the provisions in this Part that:

- allow a public trustee, trustee companies and legal practitioners to file an election to administer;
- increase the number of estates that can be administered under an election to administer (by increasing the maximum prescribed value); and
- simplify the process for filing by removing the public notice requirements.[146]

3.93 The National Committee also noted that filing an election to administer has the additional advantage that a search in the Court's registry can easily ascertain whether an estate is being administered under an election to administer.[147] The National Committee, therefore, rejected the NT provisions that allow specified people to administer small estates without applying for a grant or filing an election. The NSW equivalent, s 31 of the *NSW Trustee and Guardian Act 2009* (NSW), should, therefore, be repealed.[148]

3.94 The provisions in this Part are divided, in divisions 2 and 3, according to whether there has or has not been a previous grant of representation in relation to the estate.

Division 1 Preliminary

324 Application of part

> This part applies in relation to a deceased person whether the person died before or after the commencement of this section.

144. *NSW Trustee and Guardian Act 2009* (NSW) s 31; *NSW Trustee and Guardian Regulation 2008* (NSW) cl 35(3).
145. *Administration and Probate Act* (NT) s 110A.
146. QLRC, Report 65 [29.179].
147. QLRC, Report 65 [29.180].
148. See para 7.3.

3.95 This clause follows the application clauses in Queensland's current provisions relating to elections to administer.[149]

325 Definitions for part

In this part—

> **CPI** means the all groups consumer price index, being the weighted average of the 8 capital cities, published by the Australian statistician.
>
> **CPI indexed**, in relation to an amount for a preceding calendar year, means the amount is increased by the percentage change in CPI for the [September] quarter for the calendar year immediately before the preceding calendar year and the [September] quarter for the preceding calendar year.
>
> **preceding calendar year**, in relation to a later calendar year, means the calendar year immediately preceding the later calendar year.
>
> **prescribed amount** means—
>
> (a) for the calendar year ending 31 December [insert relevant year]—$100000; or
>
> (b) for a later calendar year—the amount for the preceding calendar year, CPI indexed.

3.96 The definitions in this clause identify the "prescribed amount" for the purposes of cl 326. The prescribed amount is a net value of $100,000 adjusted annually to account for movements in the CPI.

3.97 Currently, in NSW, the gross value of an estate for which the NSW Trustee or a trustee company may file an election to administer can be no more than $100,000.[150] This figure was increased from $50,000[151] in 2008.[152]

3.98 The National Committee decided to adopt the approach of CPI indexing in the expectation that a fixed amount was unlikely to be

149. *Public Trustee Act 1978* (Qld) s 30.

150. *NSW Trustee and Guardian Regulation 2008* (NSW) cl 35(1).

151. *Public Trustee Regulation 2001* (NSW) cl 34(1).

152. *Public Trustee Regulation 2008* (NSW) cl 35(1).

reviewed on a regular basis and that this approach would ensure that the prescribed amount would retain its current value in real terms.[153]

Division 2 No previous grant of representation

3.99 This division deals with the filing of elections to administer in situations where there has been no previous grant of representation either in this jurisdiction or in another Australian jurisdiction the grants of which are recognised automatically under cl 335.

326 Filing an election to administer

> A professional administrator may file in the Supreme Court an election to administer the estate of a deceased person if—
>
> (a) the professional administrator is entitled to have a grant of probate of the deceased's will or letters of administration of [or an order to administer] the deceased's estate made to the professional administrator; and
>
> (b) the professional administrator estimates that the net value of the estate in this jurisdiction at the time of filing the election to administer is not more than the prescribed amount; and
>
> (c) no grant of representation of the estate has been made in this jurisdiction; and
>
> (d) no interstate grant of representation of the estate has been made that is effective in this jurisdiction under section 335.

3.100 This provision allows a professional administrator to file in the Supreme Court an election to administer an estate where the estate has not previously been subject to a grant of representation. However, the professional administrator can only do so if he or she is entitled, in relation to the estate, to a grant of probate or letters of administration or, in accordance with the definition of "grant of representation" in the dictionary, an order to administer.[154] The other conditions that must be met are that:

153. QLRC, Report 65 [29.63].

154. See sch 3; para S3.17.

- the professional administrator's estimate of the net value of the estate must be no more than the prescribed amount;[155]
- no grant of representation has been made in this jurisdiction; and
- no grant of representation has been made in another Australian jurisdiction that is automatically recognised under cl 335.

3.101 It is generally based on s 110B(1) of the *Administration and Probate Act* (NT). This is consistent with the decision of the National Committee that the provisions relating to elections to administer should be included in the model legislation and should generally be based on s 110B of the *Administration and Probate Act* (NT).[156]

Existing entitlement to a grant or an order to administer

3.102 The requirement in cl 326(a), that a professional administrator can only file an election to administer if he or she is entitled, in relation to the estate, to a grant of probate or letters of administration or an order to administer,[157] has been included as an appropriate restriction upon a procedure that provides an alternative to obtaining a grant.[158]

3.103 In NSW, existing provisions require that, in order to file an election to administer, the public trustee must be entitled to obtain a grant of probate[159] and a trustee company must be entitled to obtain a grant.[160]

3.104 The reference to the professional administrator's entitlement is intended to extend beyond merely being named as executor in the deceased's will to cover situations where:

- the public trustee has a statutory entitlement to apply for a grant or an order to administer;[161]

155. "Prescribed amount" is defined in cl 325.
156. QLRC, Report 65 [29.47].
157. The Supreme Court can issue an order to administer in favour of the NSW Trustee where there are reasonable grounds to suppose that a person has died intestate: *NSW Trustee and Guardian Act 2009* (NSW) s 25.
158. QLRC, Report 65 [29.80].
159. *NSW Trustee and Guardian Act 2009* (NSW) s 26(1), (2).
160. *Trustee Companies Act 1964* (NSW) s 15A.
161. The Supreme Court can issue an order to administer in favour of the NSW Trustee where there are reasonable grounds to suppose that a person has died intestate: *NSW Trustee and Guardian Act 2009* (NSW) s 25.

- the person otherwise entitled to apply for a grant has authorised a trustee company to do so;[162] and
- the person otherwise entitled to apply for a grant has authorised a legal practitioner under a power of attorney to apply for the grant.[163]

Prescribed amount

3.105 Unlike the current NSW provisions, which refer to gross value,[164] the model provision refers to the net value of the estate. The National Committee considered that a reference to gross value was not desirable in the context since an estate with a high gross value (for example, consisting of a house with a large mortgage) might have a relatively small net value.[165] The prescribed amount is defined in cl 325, above.

Pre-existing grants

3.106 In NSW, the current provisions include a restriction on filing an election to administer if the Court has granted representation to another person in the jurisdiction.[166]

3.107 The condition in cl 326(d) in relation to interstate grants of probate has been included to accommodate the automatic recognition provisions set out below.[167]

327 Form and content of election to administer

(1) An election to administer filed under section 326 must be in writing and state the following matters—

(a) the deceased's name, address, occupation and date of death;

(b) details of the deceased's estate;

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162. Under *Trustee Companies Act 1964* (NSW) s 5, s 6(1)(b).
163. As currently authorised under *Probate and Administration Act 1898* (NSW) s 72(1), but now covered by cl 303. See para 3.15.
164. *NSW Trustee and Guardian Act 2009* (NSW) s 26(1), (2), s 27(1), (2); *NSW Trustee and Guardian Regulation 2008* (NSW) cl 35(1); *Trustee Companies Act 1964* (NSW) s 15A.
165. QLRC, Report 65 [29.64].
166. *NSW Trustee and Guardian Act 2009* (NSW) s 26(1)(b); *Trustee Companies Act 1964* (NSW) s 15A.
167. QLRC, Report 65 [29.82]. See cl 335.

(c) whether the deceased died leaving a will or without leaving a will;

(d) if the deceased died leaving a will, a statement that, after making proper inquiries, the professional administrator believes—

(i) that the document annexed to the election to administer is the deceased's last will or a certified copy of the deceased's last will; and

(ii) that the will has been properly executed.

(2) If the form of an election to administer is approved for use under section 619, the election to administer must be in the approved form.

(3) In this section—

properly executed, in relation to a will, means executed in accordance with the law governing the execution of the will.

3.108 This provision lists the information that the professional administrator must provide when he or she files an election to administer, including the matters that he or she must be satisfied of, including, if there is a will, that it is the last will of the deceased and that it has been properly executed. It is generally based on s 110B(2) of the *Administration and Probate Act* (NT). This is consistent with the decision of the National Committee that the provisions relating to elections to administer should be included in the model legislation and should generally be based on s 110B of the *Administration and Probate Act* (NT).[168]

3.109 The equivalent provisions in NSW are contained in s 26(1) and (2) of the *NSW Trustee and Guardian Act 2009* (NSW) and apply to the NSW Trustee and trustee companies.[169] The only significant difference from the model provision is that the NSW provision refers only to the will of the deceased and not to a certified copy.

3.110 The assessment that must be made as to the validity of the deceased's will under cl 327(1)(d) requires particular legal knowledge and is one of the reasons why the professional administrator must be the public trustee, a trustee company or a legal practitioner.

168. QLRC, Report 65 [29.47].

169. Applied to trustee companies by *Trustee Companies Act 1964* (NSW) s 15A.

328 Status of professional administrator after filing an election to administer

On filing the election to administer, the professional administrator is taken to be—

(a) if the deceased died leaving a will and the professional administrator is an executor of the will—the holder of a grant of probate of the will; or

(b) if the deceased died leaving a will and the professional administrator is not an executor of the will—the holder of a grant of letters of administration with the will annexed; or

(c) if the deceased died without leaving a will—the holder of a grant of letters of administration on intestacy of the deceased's estate.

3.111 This provision confers on a professional administrator filing an election to administer the status of the holder of a grant of probate or administration as the case may be.

3.112 It is generally based on s 110B(3) of the *Administration and Probate Act* (NT). This is consistent with the decision of the National Committee that the provisions relating to elections to administer should be included in the model legislation and should generally be based on s 110B of the *Administration and Probate Act* (NT).[170]

3.113 The model provision is consistent with the current NSW provision which states that upon filing an election the public trustee or the trustee company "is taken to have been appointed by the Supreme Court as the executor of the estate or the administrator of the estate".[171]

329 Value of estate must not exceed prescribed amount

If, after filing the election to administer, the professional administrator discovers that the net value of the estate in this jurisdiction is more than 150% of the prescribed amount, the professional administrator must—

(a) file in the Supreme Court a memorandum stating the value of the estate in this jurisdiction; and

170. QLRC, Report 65 [29.47].

171. *NSW Trustee and Guardian Act 2009* (NSW) s 26(3); *Trustee Companies Act 1964* (NSW) s 15A.

(b) apply for a grant of probate or letters of administration [or an order to administer].

3.114 This clause provides that a professional administrator, who has filed an election to administer and subsequently discovers that the net value of the estate is more than 150% of the prescribed amount, must file a memorandum and apply to the Court for a grant of representation. It is generally based on s 110B(5) of the *Administration and Probate Act* (NT). This is consistent with the decision of the National Committee that the provisions relating to elections to administer should be included in the model legislation and should generally be based on s 110B of the *Administration and Probate Act* (NT).[172]

3.115 The model provision is consistent with the current NSW provision which, however, rather than specifying a percentage, merely states that the trustee must apply for a grant of representation if the gross value of the estate exceeds "the amount prescribed for the purposes of making an election".[173] The regulations currently prescribe an amount in excess of $120,000.[174]

Division 3 Previous grant of representation

3.116 This division allows professional administrators to file elections to administer in situations where there has been a previous grant of representation either in this jurisdiction or in another Australian jurisdiction the grants of which are recognised automatically under cl 335 and the last remaining holder of that grant of representation has ceased to hold office. This involves dealing with the property that remains in the estate at the time when the personal representative ceases to hold office. This remaining property is referred to as the "unadministered" part of an estate.

3.117 The National Committee considered the inclusion of the provisions in this division particularly desirable because the estate that remains to be distributed in some cases may be very small and the filing of an election to administer may avoid the costs associated with obtaining a grant of

172. QLRC, Report 65 [29.47].

173. *NSW Trustee and Guardian Act 2009* (NSW) s 28(1), (2).

174. *NSW Trustee and Guardian Regulation 2008* (NSW) cl 35(2).

administration of the unadministered estate (referred to as "administration *de bonis non*").[175]

330 Filing election to administer

> A professional administrator may file in the Supreme Court an election to administer the unadministered part of a deceased person's estate if—
>
> (a) a grant of representation of a deceased person's estate has been made to a person (the last personal representative) but, because of the death or loss of legal capacity of the last personal representative, the estate has been left unadministered; and
>
> (b) the professional administrator is entitled to have a grant of letters of administration [or an order to administer] of the unadministered estate made to the professional administrator; and
>
> (c) the professional administrator estimates that the net value of the unadministered estate in this jurisdiction at the time of filing the election to administer is not more than the prescribed amount; and
>
> (d) no grant of representation of the unadministered estate as been made since the death or loss of legal capacity of the last personal representative; and
>
> (e) no interstate grant of representation of the unadministered estate has been made that is effective in this jurisdiction under section 335.

3.118 This provision allows a professional administrator to file in the Supreme Court an election to administer an estate where the estate has previously been subject to a grant of representation and property remains that has not been distributed (referred to as "unadministered estate"). However, the professional administrator can only file an election to administer if he or she is entitled, in relation to the estate, to a grant of probate or letters of administration or an order to administer. The other conditions that must be met are that:

- the professional administrator's estimate of the net value of the estate must be no more than the prescribed amount;[176]

175. QLRC, Report 65 [29.114].

- the Court has not already granted representation in this jurisdiction; and
- no interstate grant of representation has been made that is automatically recognised under cl 335.

3.119 It is generally based on s 110C(1) of the *Administration and Probate Act* (NT). This is consistent with the decision of the National Committee that the provisions relating to elections to administer the unadministered part of an estate should be included in the model legislation and should generally be based on s 110C of the *Administration and Probate Act* (NT).[177] The effect of this clause is also consistent with that of the relevant part of the current NSW provisions.[178]

3.120 These provisions are similar to those in cl 326 and the comments in relation to the provisions in cl 326[179] apply equally to them.

331 Form and content of election to administer

(1) An election to administer filed under section 330 must be in writing and state details of the following matters—

(a) the last grant of representation;

(b) the death or loss of legal capacity of the last personal representative;

(c) the estate in this jurisdiction left unadministered.

(2) If the form of an election to administer is approved for use under section 619, the election to administer must be in the approved form.

(3) A statement by the professional administrator in the election to administer giving details of the death or loss of legal capacity of the last personal representative—

(a) is evidence of the details stated; and

176. See cl 325; para 3.96-3.98.

177. QLRC, Report 65 [29.115].

178. *NSW Trustee and Guardian Act 2009* (NSW) s 27(1), (2), *Trustee Companies Act 1964* (NSW) s 15A.

179. See para 3.100-3.107.

(b) in the absence of evidence to the contrary, is to be accepted by all courts and persons, whether acting under an Act or not, without further proof.

3.121 Sub-clause 331(1) lists the information that the professional administrator must provide when he or she files an election to administer when there is unadministered estate. Sub-clause 331(3) provides that details provided about the death or incapacity of the last personal representative are conclusive evidence of the same in absence of evidence to the contrary.

3.122 Sub-clause 331(1) is generally based on s 110C(2) of the *Administration and Probate Act* (NT) and cl 331(3) is generally based on s 110C(5) of the *Administration and Probate Act* (NT). This is consistent with the decision of the National Committee that the provisions relating to elections to administer the unadministered part of an estate should be included in the model legislation and should generally be based on s 110C of the *Administration and Probate Act* (NT).[180]

3.123 The equivalent provision in NSW is contained in s 27(1) of the *NSW Trustee and Guardian Act 2009* (NSW) and applies to the NSW Trustee and trustee companies.[181] However, the NSW provisions do not include a provision to the effect of cl 331(3).

332 Status of professional administrator

(1) On filing the election to administer, the professional administrator is taken to be the administrator of the unadministered estate as if a grant of letters of administration of the unadministered estate had been made to the professional administrator.

(2) However, if the professional administrator filed the election to administer because of the last personal representative's lack of legal capacity, subsection (1) applies only for the period of the lack of legal capacity.

3.124 This provision confers on a professional administrator, who files an election to administer the unadministered part of an estate, the status of the holder of a grant of administration. However, in circumstances where the last personal representative lacks legal capacity, the professional

180. QLRC, Report 65 [29.115].

181. Applied to trustee companies by *Trustee Companies Act 1964* (NSW) s 15A.

administrator only retains the status so long as the personal representative continues to lack legal capacity.

3.125 It is generally based on s 110C(3) of the *Administration and Probate Act* (NT). However, while the NT provision merely states that the professional administrator has the status of an administrator *de bonis non*, the model provision instead essentially follows the courts' practice in granting administration *de bonis non* by stating that the professional administrator retains the status of administrator only so long as the personal representative continues to lack legal capacity.[182]

3.126 The model provision is consistent with the current NSW provision which states that, upon filing an election, the NSW Trustee or a trustee company is "taken to have been appointed by the Supreme Court as the administrator de bonis non of the estate".[183]

333 Value of unadministered estate must not exceed prescribed amount

> If, after filing the election to administer, the professional administrator discovers that the net value of the unadministered estate in this jurisdiction is more than 150% of the prescribed amount, the professional administrator must—
>
> (a) file in the Supreme Court a memorandum stating the value of the unadministered estate in this jurisdiction; and
>
> (b) apply for letters of administration of [or an order to administer] the unadministered estate.

3.127 This clause provides that a professional administrator, who has filed an election to administer and subsequently discovers that the net value of the estate is more than 150% of the prescribed amount, must file a memorandum and apply to the Court for a grant of representation.

3.128 It is generally based on s 110C(4) of the *Administration and Probate Act* (NT). The National Committee[184] included the model clause in this form for consistency with the views expressed in relation to cl 329.[185]

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182. QLRC, Report 65 [29.117].
183. *NSW Trustee and Guardian Act 2009* (NSW) s 27(3); *Trustee Companies Act 1964* (NSW) s 15A.
184. QLRC, Report 65 [29.118].
185. See para 3.114-3.115.

Division 4 Estate administration fees

334 Fees that may be charged under this part

(1) A professional administrator who administers an estate under this part may charge a fee for the administration.

(2) A regulation may prescribe the maximum fee that a professional administrator may charge under this section.

(3) If a maximum fee is not prescribed, a professional administrator may charge a fee that is not more than the amount that the [public trustee] is entitled to charge according to the [insert local equivalent of scale of commission and fees prescribed under section 74(5) of the *Public Trustee Act* (NT)].

3.129 This clause allows for a cap to be set on the fees that a professional administrator can charge for administering an estate under an election to administer. It is based on s 110D of the *Administration and Probate Act* (NT). The maximum fee prescribed in the NT is currently $1,500.[186] This stands in contrast to the position in NSW where there is no general provision limiting the fees that a trustee can charge for administering an estate under an election to administer.[187]

3.130 The National Committee considered that such a provision provides a "useful cap" on costs where an estate is being administered under an election to administer.[188]

3.131 Sub-clause 334(3) refers to the scale of commission and fees prescribed under s 74(5) of the *Public Trustee Act* (NT). This reference results from a drafting error in s 110D(3) of the *Administration and Probate Act* (NT). The correct reference is s 74(2), which allows the minister, by notice in the Gazette, to determine the commission and fees that the Public Trustee may charge against an estate or trust for services that he or she provides. In NSW, s 111(2) of the *NSW Trustee and Guardian Act 2009* (NSW) allows that fees charged in respect of the functions of the NSW

186. *Administration and Probate Regulations* (NT) reg 2C.

187. But see *NSW Trustee and Guardian Act 2009* (NSW) s 31(2).

188. QLRC, Report 65 [29.192].

Trustee may be determined "by way of percentage or otherwise" and must be prescribed by the regulations.[189]

PART 7 AUTOMATIC RECOGNITION

3.132 Currently, in NSW, a grant of representation made in another Australian jurisdiction can only become effective in NSW if the Supreme Court reseals it.[190] A system of automatic recognition simply allows a grant of representation made in another Australian jurisdiction to become automatically effective in NSW, thereby avoiding the need for the Supreme Court to reseal it.[191] The National Committee was not satisfied that the process of resealing was necessary in the case of grants made by the courts in other Australian jurisdictions.[192] Adopting a scheme of automatic recognition is consistent with the National Committee's aim that, to the greatest extent possible, the uniform legislation should "endeavour to simplify, and reduce the expense involved in, the administration of estates".[193]

3.133 The National Committee has generally followed the United Kingdom legislation that provides for automatic recognition of grants of representation as the basis for the model provisions.[194] However, some modifications to the UK scheme are necessary because, unlike the UK, no one parliament in Australia can require that a grant made in one jurisdiction must be recognised by all other Australian jurisdictions.[195] In Australia, for a scheme of automatic recognition to have full effect, each jurisdiction must legislate for the recognition of grants made in all other Australian jurisdictions.

3.134 The National Committee has proposed a two-stage implementation of automatic recognition of grants made by other Australian jurisdictions. The first stage involves a system of automatic recognition of grants issued by the Court in the jurisdiction where the deceased died domiciled. The

189. Scales of commission are prescribed by *NSW Trustee and Guardian Regulation 2008* (NSW) cl 16-21.

190. *Probate and Administration Act 1898* (NSW) s 107.

191. QLRC, Report 65 [38.3].

192. QLRC, Report 65 [37.47].

193. QLRC, Report 65 [37.47].

194. QLRC, Report 65 [38.6].

195. QLRC, Report 65 [38.7].

second stage involves a system of automatic recognition of grants issued by a court in any Australian jurisdiction regardless of domicile. The second stage has been delayed pending the introduction of procedures to protect the interests of people with an interest in the proper administration of an estate. The National Committee considered it possible that, under a scheme of automatic recognition regardless of domicile combined with the removal of the jurisdictional requirement that the deceased leave property in the jurisdiction,[196] a person could deliberately seek a grant of representation in a jurisdiction where the application may not come to the attention of people who might oppose the grant.[197] In order to guard against such a scenario, it is necessary to set up a network of searchable, publicly accessible databases across all jurisdictions that record:

- notices of intention to apply for a grant of representation;
- the fact of grants having been made; and
- the existence of caveats against the making of a grant.[198]

However, pending the introduction of appropriate technology to achieve this, the National Committee considered that the benefits of automatic recognition could be achieved by a more limited scheme allowing only for automatic recognition of grants made in the jurisdiction where the deceased died domiciled.[199]

335 Effect of an interstate grant of representation for an Australian domicile

(1) This section applies if, after the commencement of this section—

(a) the Supreme Court has not made a grant of representation endorsed under section 304 to the effect that the deceased person died domiciled in this jurisdiction; and

(b) an interstate grant of representation (the interstate grant) is made and endorsed by the court making it to the effect

196. See cl 302.

197. QLRC, Report 65 [38.36]-[38.37].

198. QLRC, Report 65 [38.38]-[38.42].

199. QLRC, Report 65 [38.43].

that the deceased person died domiciled in the interstate jurisdiction in which the court is situated.

(2) On the endorsing of the interstate grant—

(a) the interstate grant has the same force, effect and operation in this jurisdiction as it would have if it had been originally made by the Supreme Court; and

(b) the force, effect and operation of the interstate grant in this jurisdiction is subject to the Supreme Court's jurisdiction; and

(c) each of the following ceases to have effect—

(i) a grant of representation of the deceased's estate previously made by the Supreme Court and endorsed under section 305;

(ii) an election to administer the deceased's estate previously filed in the Supreme Court by a professional administrator;

(iii) a foreign grant of representation of the deceased's estate previously resealed by the Supreme Court under section 353.

(3) For this section, it does not matter whether the deceased died before or after the commencement of this section.

3.135 This clause provides that when a court in another Australian State or Territory makes a grant of representation and endorses it to the effect that the deceased died domiciled in that State or Territory:

- the grant will operate in this jurisdiction in the same way as if it had been originally granted by the Supreme Court in this jurisdiction;
- the grant will be subject to this jurisdiction's Supreme Court; and
- the following grants, if previously made, will cease to have effect:
  - any grant endorsed by the Supreme Court under cl 305, that is, to the effect that the deceased died domiciled in another jurisdiction or the court made no finding as to domicile;
  - an election to administer filed by a professional administrator under Chapter 3 part 6; and
  - a foreign grant of representation resealed by the Supreme Court under cl 353.

However, this automatic recognition of grants of representation in other Australian jurisdictions will also only have effect if the Supreme Court in this jurisdiction has not already endorsed a grant under cl 304 to the effect that the deceased person died domiciled in NSW.

3.136 For the purposes of this clause, "interstate grant of representation" is defined, in accordance with the dictionary in schedule 3, as including grants of probate, letters of administration and orders to administer, but as excluding elections to administer. Orders to administer have been included because they have a very similar effect to a grant and are made under the seal of the Court.[200] Elections to administer[201] have been specifically excluded from the operation of the automatic recognition scheme (notwithstanding their inclusion in the resealing proposals) because they are an alternative to seeking a grant of representation and, as they do not require Court approval, will not be subject to the safeguards imposed under cl 355 when they are resealed.[202]

3.137 This is a new provision that implements the National Committee's recommendations relating to the automatic recognition of grants made in other Australian jurisdictions. While based on the UK legislation, the drafting of this provision has been tailored to accommodate the fact that no Australian jurisdiction can legislate to require the other States and Territories to recognise its grants of representation. An Australian jurisdiction can only legislate to recognise, within its own jurisdiction, the grants of representation of other jurisdictions.[203]

3.138 This provision currently depends on the granting jurisdiction endorsing the grant with respect to domicile. This will be unnecessary when stage two of the scheme is implemented so that any grant made by the court of another Australian jurisdiction will be recognised without the need for domicile to be endorsed on the grant.[204]

3.139 The National Committee, in recommending the current domicile requirement, has acknowledged that evidence of the deceased's domicile will need to be included in any application for a grant of representation but considers that this is not an "unreasonable requirement given the

200. QLRC, Report 65 [38.60].

201. See Chapter 3 part 6.

202. QLRC, Report 65 [38.61]-[38.64]. See also cl 355 and para 3.233.

203. QLRC, Report 65 [38.9].

204. QLRC, Report 65 [38.48]-[38.51].

benefits that the implementation of the first stage of the scheme will provide".[205]

3.140 Paragraph 335(2)(c) is necessary to avoid having two instruments effective in the same jurisdiction, that is, the automatically recognised interstate grant, and a limited local grant, a resealed foreign or interstate grant or an election to administer.[206]

336 Review

(1) The Minister must review the operation of provisions of this Act providing for automatic recognition of interstate grants of representation—

(a) to decide their effectiveness; and

(b) to ascertain whether the further recommendations for automatic recognition of interstate grants of representation contained in the Law Reform Report can be implemented.

(2) The review must be started within 5 years after the commencement of this section.

(3) As soon as practicable, but within 1 year after the end of the 5 year period, the Minister must table a report about the review in the Legislative Assembly.

(4) In this section—

Law Reform Report means the Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General published by the Queensland Law Reform Commission.

205. QLRC, Report 65 [38.47].

206. QLRC, Report 65 [38.118].

Editor's note—

The report is Report 65 and the recommendations are R 38-14 to 38-16 and 38-20 to 38-21.

3.141 This provision requires the responsible minister to commence, within five years of the commencement of this clause, a review of the operation of first stage of the automatic recognition scheme to assess its effectiveness and to ascertain whether the second stage of the National Committee's proposals[207] can and should be implemented.

3.142 The National Committee has included this new provision to ensure that timely consideration is given to implementing stage two of the proposals on automatic recognition of interstate grants of representation.[208]

3.143 As the model bill has been drafted in the form of a bill for the Queensland Parliament, cl 336(3) refers only to tabling in the Legislative Assembly. This is because Queensland only has one house of parliament. The practice in NSW is for legislation to require that reports of legislative reviews be tabled in each House of Parliament.[209]

Changes to be made when stage 2 is implemented

3.144 The second stage of the National Committee's proposed scheme involves the automatic recognition of grants made by a court in any Australian jurisdiction regardless of domicile. If the review finds that the conditions have been met for the implementation of the second stage, then a number of changes will have to be made to the legislation.

3.145 First, the legislation should be amended to provide that a grant made by the court of any other Australian jurisdiction has the same force, effect and operation in this jurisdiction as if it had been made by the Court in this jurisdiction.[210]

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207. See para 3.134.

208. QLRC, Report 65 [38.238]-[38.241].

209. See, eg, *Succession Act 2006* (NSW) s 106.

210. QLRC, Report 65 [38.48].

3.146 Secondly, provisions relating to the effectiveness of a grant endorsed to the effect that the deceased died domiciled in the jurisdiction of the court making the grant, should be repealed.[211]

3.147 Thirdly, the National Committee considered it necessary to give the Court an express power to decline to make a grant on the ground that another Australian jurisdiction is the more appropriate forum. The Committee doubted that, notwithstanding the discretionary nature of the Court's power, the Court could simply decline an application that was otherwise properly made.[212]

PART 8 CHAIN OF REPRESENTATION

3.148 The chain of representation refers to the process whereby the executor of a deceased executor's estate becomes the executor of the estates of which the deceased executor was executor at his or her death. The chain of representation avoids the cost and complexity involved in someone having to seek a grant of administration *de bonis non* in order to complete the administration of an estate left partially administered at the death of its executor. Traditionally it has only been possible to have executors by representation. In NSW, this general position is currently set out in s 13 of the *Imperial Acts Application Act 1969* (NSW). Executorship by representation was justified by the "special confidence" that the deceased reposes in his or her executor.

3.149 In general, the chain of representation has not been available for estates where an administrator has died before completing the administration, neither has it been available where the Court has granted letters of administration in relation to a deceased executor's estate. However, in NSW, a limited form of administratorship by representation currently exists by virtue of s 44(2) of the *Probate and Administration Act 1898* (NSW) which allows it where the NSW Trustee or a trustee company is appointed executor or administrator of an estate and the deceased was, at the time of death, the administrator of another estate.

3.150 The National Committee decided to retain the doctrine of executorship by representation because of its potential to simplify and reduce the cost of completing the administration of an estate that is only

211. That is, cl 304, cl 305 and the relevant parts of cl 335. See QLRC, Report 65 [38.49].

212. QLRC, Report 65 [38.50]-[38.51].

partially administered when its last surviving or sole executor dies. It would do this principally by eliminating the need to apply for the appointment of an administrator *de bonis non* with respect to the unadministered estate.[213]

3.151 The National Committee further decided that the factors that justified the retention of the doctrine of executorship by representation also justified the extension of the doctrine to cover estates that are in the hands of an administrator who dies before the administration of the estate has been completed.[214] It was also noted that the distinction between executors and administrators, with respect to the devolution of office, could no longer be justified.[215] This is consistent with the National Committee's policy to assimilate as far as possible the offices of administrator and executor.[216]

3.152 The provisions in this Part will, therefore, make it possible for the office of personal representative to be transmitted from executor to executor, from administrator to administrator, from executor to administrator and from administrator to executor.[217]

3.153 Whether the holder of a transmitted office is called an executor by representation or an administrator by representation will depend on the designation of the original grant. So if a deceased person is first represented by an administrator, subsequent representation of that deceased person's estate, if determined by the chain of representation, will always be referred to as "administratorship by representation". Likewise, a deceased person who is first represented by an executor will, following the death of the executor and any subsequent personal representatives, always be represented by an "executor by representation" regardless of whether the person is an executor of any other estate in the chain.

3.154 The National Committee, in proposing this scheme, acknowledged that a person may, by chain of representation, become an executor or administrator of an estate of a deceased person with whom he or she had no connection. However, in relation to this, it observed that the existing

213. QLRC, Report 65 [7.28]. See cl 330-333; para 3.116-3.128.

214. QLRC, Report 65 [7.40].

215. QLRC, Report 65 [7.40].

216. See para 0.8.

217. QLRC, Report 65 [7.49].

doctrine of executorship by representation could achieve the same undesirable result and that the model provisions relating to the cessation of the office of executor or administrator by representation[218] may help in ameliorating such outcomes.[219]

3.155 The following provisions deal with:

- becoming an executor or administrator by representation (division 2);
- the rights and liabilities of such a person (division 3);
- renouncing the office (division 4); and
- ceasing to hold office (division 5).

Division 1 Preliminary

337 Definitions for part

In this part—

deceased personal representative means a deceased person who, immediately before his or her death, was—

(a) the last surviving, or sole, executor of a deceased person's will and was the holder of a grant of probate of the will; or

(b) the last surviving, or sole, administrator of a deceased person's estate.

grant of representation, of the estate of a deceased personal representative, does not include—

(a) a grant of letters of administration made only because the administrator is a creditor of the estate; or

(b) [an order to administer]; or

(c) an election to administer.

3.156 This clause provides two definitions for the purpose of the provisions relating to the chain of representation in this part.

218. See cl 350 and cl 351; and para 3.199.

219. QLRC, Report 65 [7.50].

Deceased personal representative

3.157 The definition of "deceased personal representative" makes it clear, for the purposes of these provisions, that the deceased personal representative, immediately before his or her death, must be the last surviving or sole personal representative of the estate.[220]

Grant of representation

3.158 The definition of "grant of representation" makes it clear that the usual definition of "grant of representation" contained in the dictionary in schedule 3 does not apply. Therefore, "grant of representation", for the purposes of this Part, means a grant of probate or letters of administration made by the Supreme Court but not if the grant is made to a person only because he or she is a creditor of the estate. This ensures that a person who has become administrator solely because he or she is a creditor of the deceased's estate does not also become an executor or administrator by representation of any other deceased estate.[221]

3.159 Orders to administer and elections to administer are also excluded from the definition of grant of representation because, their aims of providing simple, cost-effective procedures for the administration of small estates are not consistent with the administration of multiple estates under a chain of representation.

Division 2 Becoming an executor or administrator by representation

338 Executor or administrator by representation

(1) If, after the commencement of this section, the Supreme Court makes a grant of probate or letters of administration of the will or estate of a deceased personal representative to a person, the person is, on the making of the grant of probate or letters of administration—

(a) an executor by representation of any will of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, executor under a grant of probate; and

220. QLRC, Report 65 [7.43].

221. QLRC, Report 65 [7.51]-[7.52].

(b) an administrator by representation of any estate of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, administrator; and

(c) an executor by representation of any will of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, executor by representation; and

(d) an administrator by representation of any estate of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, administrator by representation.

(2) However, subsection (3) applies if—

(a) after the death of the deceased personal representative; and

(b) before the grant of probate or letters of administration is made of the will or estate of the deceased personal representative;

a grant of probate or letters of administration is made of the will or estate of any person (the other person) of whose will or estate the deceased personal representative was the executor, administrator, or executor or administrator by representation.

(3) The person to whom a grant of probate or letters of administration is made of the will or estate of the deceased personal representative does not, on the making of the grant, become the executor or administrator by representation of—

(a) the will or estate of the other person; or

(b) any will or estate of which the other person was the executor, administrator, or executor or administrator by representation.

3.160 This provision, which has no counterpart in any Australian jurisdiction, sets out the circumstances in which a person becomes an executor or administrator by representation. The general position is that, following the death of a personal representative, when the Court grants to a person probate or letters of administration in respect of the deceased personal representative's estate, the person becomes:

- an executor by representation of any estate of which the person was the last surviving or sole executor or executor by representation; or

- an administrator by representation of any estate of which the person was the last surviving or sole administrator or administrator by representation.

3.161 However, under cl 338(2) and (3), the person will not become an executor or administrator by representation of an estate if, in the interval between the death of the deceased personal representative and the Court granting representation of the deceased personal representative's estate, the Court grants representation of that estate to another person. This simply confirms that the chain of representation is broken if another person (for example, a non-proving executor for whom leave to apply for probate had been reserved,[222] or an applicant for a grant of letters of administration *de bonis non*) obtains a grant of representation with respect to the estate which the deceased personal representative was administering before he or she died.[223]

Division 3 Rights and liabilities of executor or administrator by representation

339 Rights and liabilities

An executor or administrator by representation—

(a) has the same rights in relation to any estate of which the person is the executor or administrator by representation that the deceased personal representative of the estate would have had if living; and

(b) is, to the extent to which any estate mentioned in paragraph (a) has come under his or her control, accountable in the same way as the person would be if he or she were an original executor or administrator of the estate.

3.162 This provision sets out the rights and liabilities of both executors and administrators by representation, assimilating them with the rights and liabilities that the original (deceased) personal representative would have had. While based on s 47(4) of the *Succession Act 1981* (Qld), it extends to administrators by representation as well as executors by

222. Under cl 318.

223. QLRC, Report 65 [7.117]-[7.118].

representation.[224] The equivalent provision in NSW may be found in s 13(4) of the *Imperial Acts Application Act 1969* (NSW).[225]

Division 4 Renouncing executorship or administratorship by representation

340 Renunciation

(1) This section applies to a person who is an executor of the will or administrator of the estate of a deceased personal representative.

(2) The person may renounce the executorship or administratorship by representation of the will or estate (the other estate) of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.

(3) The renunciation may be made without renouncing the executorship or administratorship of the will or estate of the deceased personal representative.

(4) The renunciation must be filed in the Supreme Court and may be made before or after a grant of representation of the deceased personal representative's estate has been made.

(5) However, the renunciation must be made before the person takes any active step in the administration of the other estate.

(6) In this section—

active step, in the administration of the other estate, does not include any of the following—

(a) an act of necessity;

(b) an act taken to protect or preserve any property in the estate;

(c) an act of a minor character that is for the estate's benefit;

(d) an act taken for the purpose of arranging disposal of the deceased person's remains.

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224. QLRC, Report 65 [7.56].

225. The NSW provision derives originally from the imperial provisions 30 Charles II c 7 (1678) and 4 William and Mary c 24 (1692) s 12.

3.163 This provision allows an executor or administrator of a deceased personal representative to renounce his or her office with respect to any estate to which he or she may become executor or administrator by representation. This can be done without renouncing representation of the estate of the deceased personal representative. The renunciation must be filed in the Supreme Court and may be made at any time, whether before or after the Court has granted representation of the deceased personal representative's estate. However, the person must not have taken any active steps in the administration of the estate that he or she seeks to renounce.

3.164 The model provision is generally based on s 47(5) of the *Succession Act 1981* (Qld) which was originally enacted to overcome the harshness of the rule that a person seeking to renounce an executorship by representation also had to renounce his or her executorship under the deceased personal representative's will. The Queensland Law Reform Commission, in its 1978 report, considered that, while it might be convenient to have an executor undertake the executorship by representation of the estate of someone to whom he or she was a total stranger, the executor should not be forced to undertake all of the executorships or none of the executorships.[226] Other law reform bodies have reached similar conclusions.[227] The National Committee generally adopted this approach.[228]

3.165 The provision has been drafted so that the personal representative is not forced to renounce all of the executorships or administratorships by representation in the chain, if he or she wishes only to renounce some of them.[229]

3.166 However, under this provision, a person cannot renounce the executorship or administratorship by representation if he or she has taken an "active step" in the administration of the estates he or she seeks to renounce. The National Committee decided it was appropriate to restrict the executor or administrator by representation's right to renounce because he or she is "formally constituted as the executor". This is to be

226. QLRC, Report 22, 31.

227. Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.12]; Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 30.

228. QLRC, Report 65 [7.63]-[7.64].

229. QLRC, Report 65 [7.66].

compared with cl 315(3) which applies to original executors and allows an executor to renounce, even if he or she has acted in the administration of the estate, but only before the Court has granted probate. Once the Court has granted probate, the executor can only retire from office with court approval.[230] Clause 340, therefore, grants a concession in that an executor or administrator by representation, although "formally constituted" as such, may still renounce in some circumstances even after the Court has granted representation of the deceased personal representative's estate.[231]

3.167 The National Committee decided to use the term "active step" to identify what would and would not be an act on the part of an executor or administrator by representation that is sufficient to prevent renunciation. This approach was preferred over making "any" step sufficient to prevent renunciation as this would be "a stricter test than currently determines what acts will amount to intermeddling in the context of an ordinary executor who wishes to renounce".[232] The list of exclusions set out in cl 340(6) has been provided to bring greater certainty and to clarify what acts would not be sufficient to prevent an executor from renouncing an executorship or administratorship by representation.[233]

3.168 So long as the executor or administrator by representation has not taken an active step in the administration of the estate he or she wishes to renounce, it should not matter that the renunciation takes place after the Court has granted representation of the deceased personal representative's estate. Clause 340(4), therefore, provides that the renunciation may be made "before or after a grant of representation of the deceased personal representative's estate has been made".[234]

3.169 Clause 344 deals with the effect of the renunciation of an executorship or administratorship by representation.

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230. A retiring executor would need the Court to revoke the grant under cl 301(1)(a). The National Committee decided that the model legislation should not prescribe the grounds on which the Court can revoke a grant: QLRC, Report 65 [25.53]-[25.59]. See also para 3.8.
231. QLRC, Report 65 [7.69], [7.72]-[7.73].
232. QLRC, Report 65 [7.74].
233. QLRC, Report 65 [7.77].
234. QLRC, Report 65 [7.75].

Division 5 Ceasing to hold office as executor or administrator by representation

3.170 This division essentially sets out the circumstances (arising under other provisions in the model bill) that can result in an executor or administrator by representation ceasing to hold office.

341 Grant of probate to someone else—leave reserved

(1) This section applies if—

(a) the Supreme Court—

(i) has made a grant of probate to only 1 or some of the executors named in a deceased person's will (the proving executors); and

(ii) reserved leave to apply for a grant of probate at a later time to other executors who have not renounced their executorship (the non-proving executors); and

(b) the last surviving, or sole, proving executor dies; and

(c) a person becomes the executor by representation of the deceased person's will under section 338.

(2) On the making of a grant of probate by the Supreme Court to 1 or more of the non-proving executors, the executor by representation of the deceased person's will stops being—

(a) an executor by representation of the deceased's will; and

(b) an executor or administrator by representation of any will or estate of which the deceased was the executor, the administrator, or the executor or administrator by representation.

3.171 This provision deals with the situation where a person has become an executor by representation of a will (under cl 338) and the Supreme Court has also previously granted one or more non-proving executors of that will leave to apply for a grant of probate at a future date (under cl 318) and the last surviving or sole proving executor of the will has died. Sub-clause 341(2) provides that, if the Supreme Court subsequently grants probate of the will to one or more of the non-proving executors, the executor by representation ceases to be an executor by representation of the will and also ceases to be the executor or administrator by representation of any estates in a chain of representation.

3.172 Clause 341 is generally based on s 47(1A) of the *Succession Act 1981* (Qld) but modified to accommodate the possibility of administrators by representation. The equivalent provision in NSW may be found in s 13(1) of the *Imperial Acts Application Act 1969* (NSW).[235] Such provisions generally reflect the view that the testator's choice of executor is to be preferred over an executor chosen by the testator's executor[236] or, under the provisions in this model bill, an administrator appointed to administer that executor's estate.

342 Grant of letters of administration to someone else—s 350 or 351 applies

> A person who is an executor or administrator by representation of the will or estate of a deceased person stops being—
>
> (a) an executor or administrator by representation of the deceased's will or estate; and
>
> (b) an executor or administrator by representation of any will or estate of which the deceased was the executor, the administrator, or the executor or administrator by representation;
>
> if section 350 or 351 applies and the Supreme Court makes a grant of letters of administration of the deceased's estate to another person.

3.173 This clause provides that an executor or administrator by representation of an estate ceases to hold office in relation to that estate, and in relation to any other estates in a chain of representation, if the Court grants letters of administration to another person under the provisions that allow the Court:

- to pass over an executor or administrator by representation where all the adult beneficiaries of the estate agree that the Court should grant letters of administration to a person other than the executor or administrator by representation of the estate (cl 350); or
- to grant letters of administration to a person who would otherwise be entitled to letters of administration notwithstanding that there is

235. Adopting the form of *Administration of Estates Act 1925* (Eng) s 7(1) which superseded 25 Edward III stat 5 c 5 (1351-1352).

236. QLRC, Report 65 [7.83].

already an executor or administrator by representation of the estate (cl 351).

3.174 This provision does not have a counterpart in any Australian jurisdiction and has been included in this division as part of the list of circumstances that give rise to an executor or administrator by representation ceasing to hold office.

343 Grant of representation is revoked, ends or ceases to have effect

(1) Subsection (2) applies if a person is the holder of a grant of representation of a deceased personal representative's estate and the grant is revoked, ends or ceases to have effect.

(2) The person stops being an executor or administrator by representation of any will or estate of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.

3.175 Clause 343 provides that an executor or administrator by representation of an estate ceases to hold office in relation to that estate, and in relation to any other estates in a chain of representation, if the grant of representation with respect to the deceased personal representative is revoked, ends or ceases to have effect.[237]

3.176 The National Committee recommended this provision because a revocation, ending, or ceasing to have effect, of a grant of representation of the deceased personal representative's estate would remove "the very foundation" for being the executor or administrator by representation of another estate in the chain of representation.[238]

344 Renunciation

(1) This section applies to a person who—

(a) is the holder of a grant of representation of a deceased personal representative's estate; and

(b) renounces the executorship or administratorship by representation of the will or estate of any deceased person of which the deceased personal representative

237. See Chapter 3 Part 13.

238. QLRC, Report 65 [7.108].

was the executor, the administrator, or the executor or administrator by representation.

(2) The person stops being an executor or administrator by representation of—

(a) the deceased person's will or estate; and

(b) any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

3.177 This clause provides that an executor or administrator by representation of an estate ceases to hold office in relation to that estate, and in relation to any other estates in a chain of representation, if he or she renounces that executorship or administratorship by representation.[239]

PART 9 PASSING OVER

3.178 This Part deals with the power of the Court to "pass over" a nominated executor or a person who is entitled to apply for a grant of letters of administration.[240]

3.179 The provisions in this part give the Court a general discretion to pass over a person otherwise entitled to the grant of representation (cl 347) but also deal with some specific circumstances in which the Court may appoint someone in place of the person otherwise entitled (cl 348-351).

3.180 In framing these provisions, the National Committee was "generally of the view that it would be desirable to give the court a discretion, in certain circumstances, to pass over a named executor and appoint an administrator".[241] It also balanced the desirability of giving effect to the wishes of the testator with the very real interest that beneficiaries have in the efficiency and cost-effectiveness of the administration of estates.[242]

239. QLRC, Report 65 [7.67].

240. See cl 321 and cl 322.

241. NSWLRC, DP 42 [5.13].

242. NSWLRC, DP 42 [5.13].

3.181 The provisions in this Part all involve giving the Court the discretion to pass over administrators as well as executors.[243]

3.182 A particular reason for the discretion arises in relation to the provisions that allow the Court to pass over those entitled to apply for letters of administration and to appoint another person, nominated by the beneficiaries, in their place (cl 349 and cl 350). In these cases, usually involving intestate estates, the Court has historically been unwilling to grant letters of administration to a stranger to the estate, even if that person is nominated by beneficiaries who, in the case of intestacy, would normally be the very people entitled to apply for letters of administration.[244] The National Committee considered that the Court's discretion should not be constrained by these earlier decisions and considered it desirable to make it clear that, in the case of intestacy, the Court may grant letters of administration to anyone, including a person nominated by all of the beneficiaries.[245]

345 Application of part

(1) This part applies in relation to a deceased person whether the person died before or after the commencement of this section.

(2) This part does not limit section 301, 302, 303 or 307.

346 Definitions for part

In this part—

lawful authority includes authority under a law of another State [or Territory].

prescribed provision means section 349(1)(b) or 350(1)(c).

substitute decision-maker, for a beneficiary of an estate who lacks legal capacity to enter into an agreement under a prescribed provision, means a person, other than a person who is also a beneficiary of the estate, who has lawful authority to make binding decisions for the beneficiary for the agreement.

243. QLRC, Report 65 [4.208].

244. See, eg, *Re McCormack* (1902) 2 SR (NSW) B&P 48; and *Re Chave* (1930) 30 SR (NSW) 180.

245. QLRC, Report 65 [4.206].

3.183 The definitions in this provision support the provisions that allow the substitute decision-maker of an adult beneficiary who lacks legal capacity to act with the other adult beneficiaries to agree that the Court should grant representation:

- in accordance with cl 349, to a person or persons other than those entitled to the grant of representation of the estate; and
- in accordance with cl 350, to a person or person other than those who are executors or administrators by representation of the estate.

3.184 The National Committee considered it important that someone other than a person who also has a personal interest as a beneficiary of the estate should represent the interests of those beneficiaries who lack capacity.[246] The definition of substitute decision-maker has, therefore, been drafted to exclude anybody who is already a beneficiary of the estate.

347 Supreme Court's general discretion

(1) This section applies if the Supreme Court, on application, considers it appropriate to make a grant of probate or letters of administration of a deceased person's will or estate to a person other than the person, or all of the persons, otherwise entitled to the grant of probate or letters of administration—

(a) for the proper administration of the deceased's estate; and

(b) in the interests of the persons who are, or may be, interested in the deceased's estate.

(2) The Supreme Court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and make the grant to—

(a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled; or

(b) any person the court considers appropriate.

3.185 This clause sets out the Court's general discretion to pass over a person who is otherwise entitled to apply for a grant of representation. It

246. QLRC, Report 65 [4.196]-[4.197].

provides that the Court may refuse to grant representation to a person otherwise entitled to a grant and, instead, make a grant to one or more people who are also entitled, or to any other person the Court considers appropriate. The Court may only take this course of action on application and when it considers it appropriate for the "proper administration" of the estate and "in the interests" of anyone who is, or may be, interested in the estate. This provision will effectively allow the Court to bypass the priorities for the granting of letters of administration established by cl 321 and cl 322.

3.186 An express provision setting out the Court's general discretion is necessary, despite cl 303 of the model bill,[247] because the Supreme Court of Queensland has held that the equivalent Queensland provision[248] does not permit the Court to pass over a prior claim and make a grant to some other person on the grounds of necessity or expediency.[249]

3.187 The drafting of cl 347(1)(a) and (b) draws on the expression of the principle said to underlie the Court's exercise of its inherent power, in limited circumstances, to pass over a named executor:

> the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto.[250]

The reference to a person who is "interested in the deceased's estate" has been drafted to include not only beneficiaries but also creditors in cases where the estate is insolvent.[251]

3.188 In proposing this clause, the National Committee also gave some consideration to an English provision that enables the High Court, if "by reason of any special circumstances" it considers it "necessary or expedient", to pass over a person who would otherwise be entitled to a grant and appoint another person as administrator.[252] The National Committee, however, considered that the Court's power should not be

247. Which allows the Court to make a grant to "such person... as the court may think fit".

248. *Succession Act 1981* (Qld) s 6(3).

249. *E Car and Son Pty Ltd v Hood* [2003] QSC 453.

250. *In the Goods of Loveday* [1900] P 154, 156.

251. QLRC, Report 65 [4.188].

252. *Supreme Court Act 1981* (Eng) s 116(1).

limited by the requirement of "special circumstances" as this could be construed restrictively.[253]

3.189 This provision renders unnecessary provisions dealing with specific circumstances where the Court may pass over the person who would otherwise be entitled to the grant of representation, for example, the current NSW provision that deals with situations where the executor named in a will neglects or refuses to prove the will or to renounce probate.[254]

348 Offences relating to the deceased's death

(1) This section applies if the Supreme Court, on application, considers there are reasonable grounds for believing that a person otherwise entitled to a grant of probate or letters of administration of a deceased person's will or estate has committed an offence relating to the deceased's death.

(2) The Supreme Court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and make the grant of probate or letters of administration to—

(a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled; or

(b) any person the court considers appropriate.

3.190 This clause provides that the Court may pass over a person otherwise entitled to a grant of representation and may make a grant to another person if it considers there are reasonable grounds for believing that the person otherwise entitled has committed an offence related to the deceased's death.

3.191 This is a new provision. It is consistent with the practice of the courts. In NSW, for example, the Court has passed over an executor who was convicted of murdering the testator and was serving a term of imprisonment for the crime.[255]

253. QLRC, Report 65 [4.186].

254. *Probate and Administration Act 1898* (NSW) s 75. See QLRC, Report 65 [4.136].

255. *Re Pedersen* (Unreported, NSW Supreme Court, Holland J, 17 June 1977).

349 Person entitled to original grant of probate or letters of administration

(1) This section applies if—

(a) all the beneficiaries of a deceased person's estate are adults; and

(b) all the beneficiaries agree that a grant of probate or letters of administration of the deceased's will or estate should be made to a person or persons, other than the person or all of the persons otherwise entitled to the grant, nominated by the beneficiaries.

(2) The Supreme Court may, on application, make the grant of probate or letters of administration to the person or persons nominated by all the beneficiaries.

(3) However, the Supreme Court may not make the grant of probate or letters of administration unless it is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.

(4) For subsection (1)(b), if a beneficiary lacks legal capacity to enter into the agreement, a reference to the beneficiary is taken to be a reference to the beneficiary's substitute decision-maker.

3.192 This clause provides that, if all the beneficiaries of an estate are adults and they agree to nominate one or more people to administer the estate, the Court may pass over some or all of those who are otherwise entitled to the grant and may grant representation to one or more of the people so nominated. However, before it makes the grant, the Court must be satisfied that the estate has sufficient assets to pay its debts in full. Provision is also made for a substitute decision-maker to act on behalf of an adult beneficiary who lacks the legal capacity to enter into an agreement.

3.193 The National Committee acknowledged that, in the case of testate estates, this provision operates to override the intentions of the testator. However, it considered that, in the circumstances outlined, the passing over of all or some of those nominated as executor might "result in a more harmonious administration than where the beneficiaries are hostile

to the executor".[256] It is important to note that the provision cannot operate if any of the following circumstances applies:

- one or more of the beneficiaries is under the age of 18;
- one or more of the beneficiaries is an adult who lacks capacity and does not have a substitute decision-maker; or
- the beneficiaries and/or substitute decision-makers cannot reach a unanimous decision.

3.194 The provision has been limited to estates where all of the beneficiaries are adult on the assumption that, with respect to an estate with beneficiaries who are under 18, the testator has chosen the executor with a view to protecting their interests. The same can be said of beneficiaries who are adults but lack legal capacity and do not have a substitute decision-maker.[257] However, the National Committee also considered that, once the beneficiaries are of full age and capacity, the original choice of executor, made when some or all of the beneficiaries were children or lacked capacity, may no longer be justified.[258]

3.195 The National Committee's reasons for including cl 349(2), which allows the Court to appoint a person nominated by all the beneficiaries, are discussed above.[259]

3.196 The National Committee was also of the view that the wishes of the beneficiaries are irrelevant in situations where the estate is unable to meet its debts in full. Sub-clause 349(3) has been framed to address the difficulty, in some cases, of identifying whether an estate is solvent or not.[260]

3.197 The definition of "substitute decision-maker", as mentioned in cl 349(4), is discussed in relation to cl 346.[261]

350 Person who is executor or administrator by representation

(1) This section applies if—

256. QLRC, Report 65 [4.198].
257. QLRC, Report 65 [4.199]-[4.200].
258. NSWLRC, DP 42 [5.14].
259. See para 3.182.
260. QLRC, Report 65 [4.201].
261. See para 3.184.

(a) there is an executor or administrator by representation of a deceased person's will or estate; and

(b) all the beneficiaries of the deceased's estate are adults; and

(c) all the beneficiaries agree that a grant of letters of administration of the deceased's estate should be made to—

(i) without limiting subparagraph (ii), if there is more than 1 executor or administrator by representation—1 or more executors or administrators by representation nominated by the beneficiaries; or

(ii) another person or other persons nominated by the beneficiaries.

(2) The Supreme Court may, on application, make the grant of letters of administration of the estate to the person or persons nominated by all the beneficiaries.

(3) However, the Supreme Court may not make the grant of letters of administration unless it is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.

(4) For subsection (1)(c), if a beneficiary lacks legal capacity to enter into the agreement, a reference to the beneficiary is taken to be a reference to the beneficiary's substitute decision-maker.

3.198 This clause deals with the passing over of executors and administrators by representation and the appointment of a person nominated by all of the beneficiaries. This clause is necessary because cl 349 deals only with the passing over of those named as executors in the will or entitled to be administrators.[262]

3.199 Much of the commentary for cl 349 applies to this clause.[263] The National Committee, in recommending this provision, also acknowledged that, while the doctrine of executorship or administratorship by representation can promote the efficient

262. QLRC, Report 65 [7.97].

263. See para 3.192-3.197.

administration of estates, it can also result in an estate being administered by a person with no connection to either the testator or the beneficiaries of the estate.[264] For this reason, the National Committee supported provisions to the same effect as cl 349 being applied to executors and administrators by representation.[265]

3.200 Sub-clause 350(2) is also necessary for the operation of cl 342.[266]

351 Executor or administrator by representation—other applications

(1) This section applies if—

(a) there is an executor or administrator by representation of a deceased person's will or estate; and

(b) a person who, if there were no executor or administrator by representation of the will or estate, would be entitled to a grant of letters of administration applies to the Supreme Court for a grant of letters of administration.

(2) The Supreme Court may make the grant of letters of administration to the person mentioned in subsection (1)(b).

3.201 This clause provides that the Court may appoint an applicant who would otherwise be entitled to a grant of letters of administration of an unadministered estate in place of an executor or administrator by representation.

3.202 The National Committee observed that this provision "merely preserves the ordinary order of entitlement for a grant that would apply in the absence of an executor or administrator by representation".[267] It is also necessary for the operation of cl 342.

264. QLRC, Report 65 [7.99].

265. QLRC, Report 65 [7.99]-[7.100].

266. See para 3.173.

267. QLRC, Report 65 [7.104]. The ordinary order of entitlement for a grant is set out in cl 321 and cl 322.

PART 10 FOREIGN DOMICILE

352 Grant of representation when deceased person dies domiciled outside this jurisdiction

(1) This section applies if a person dies domiciled outside this jurisdiction, including outside Australia.

(2) For this section, it does not matter whether the person's death happens before or after the commencement of this section.

(3) The Supreme Court may make a grant of representation of the deceased person's estate under subsection (4) or (6) as it considers appropriate.

(4) The Supreme Court may make a grant of representation to any of the following persons—

(a) the person entrusted with the administration of the estate by the court (the domiciliary court) having jurisdiction at the place where the deceased died domiciled;

(b) the person entitled to administer the estate by the law of the place where the deceased died domiciled;

(c) a person to whom the domiciliary court could entrust the administration of the estate;

(d) another person the Supreme Court considers appropriate to administer the estate if—

(i) there is no person who meets the description of a person mentioned in paragraph (a), (b) or (c); or

(ii) the court considers the circumstances of the case require it.

(5) However, the Supreme Court may not make a grant of representation under subsection (4) if—

(a) the deceased appointed 1 or more executors in this jurisdiction to administer the deceased's estate in this jurisdiction; and

(b) the executor or executors have legal capacity and are willing to administer the estate.

(6) The Supreme Court may—

(a) if the deceased left a will admissible to proof in this jurisdiction, make a grant of probate of the will to—

(i) an executor named in the will; or

(ii) if the will describes the duties of a named person in terms that are sufficient to constitute the named person executor according to the tenor of the will—the named person; or

(b) if the whole, or substantially the whole, estate consists of immovable property, make a grant of representation of the whole estate to the person or persons who would have been entitled to the grant if the deceased had died domiciled in this jurisdiction.

Notes—`

1 For paragraph (a), a will is admissible to proof in this jurisdiction if it is taken to be properly executed under [insert local equivalent of the Succession Act 1981 (Qld), part 2, division 6 (Wills with a foreign connection)].

2 See sections 321 and 322 for the priority of persons to letters of administration if a person dies domiciled in this jurisdiction.

(7) This section does not limit section 303.

3.203 This clause sets out the principles that the Court must apply in making a grant of representation where a deceased person has died domiciled outside this jurisdiction (whether in another Australian jurisdiction or outside Australia) in three situations.

3.204 First, where the deceased person has not nominated any executors in this jurisdiction. In general, under cl 352(4), the Court may grant representation to either:

- the person to whom the domiciliary court has entrusted the administration of the estate in that jurisdiction;
- the person entitled to administer the estate according to the law of the jurisdiction where the deceased died domiciled;
- a person to whom the domiciliary court could entrust the administration of the estate; or
- another person the Court considers appropriate in the circumstances of the case, including if there is no person who meets the other criteria listed above.

3.205 Secondly, where the deceased has left a will that is admissible to proof (that is, is formally valid)[268] in this jurisdiction and that nominates an executor or an office-holder in terms sufficient to constitute that person as an executor. In this circumstance, the Court may, under cl 352(6)(a), grant probate to the person so named.

3.206 Thirdly, where the whole, or substantially the whole of the estate consists of immovable property. In this circumstance, the Court may grant representation to the person who would have been entitled if the deceased had died domiciled in this jurisdiction.

3.207 The National Committee has noted that the rules in this provision may be displaced in contentious proceedings and the Court may then grant representation to such a person as "necessity or convenience" requires.[269]

3.208 The provisions are based generally on r 40.01 of the *Probate Rules 2004* (SA) and r 30 of the *Non-Contentious Probate Rules 1987* (Eng). They represent a departure from the current operation of the law in NSW.

3.209 Currently, in NSW, the Court's appointment of a personal representative for an estate where the deceased has died domiciled outside of NSW depends upon whether the estate in NSW consists of movable or immovable property. Generally, where an estate consists of movable property, the Court will give effect to the law of the place where the deceased died domiciled and will grant representation to the person entitled under that law.[270] However, where an estate consists of, or includes immovable property, the Court will not simply follow the grant made in the domiciliary jurisdiction but must rather decide on the validity of any will and any questions concerning the entitlement of a person to be appointed as an executor or administrator.[271] This leaves open the possibility that the Court could make a grant to one person

268. The requirements for formal validity of wills in NSW may be found generally in *Succession Act 2006* (NSW) s 6, s 7 and, in relation to a will executed in a foreign place, in *Succession Act 2006* (NSW) Part 2.4.

269. QLRC, Report 65 [36.63]. See *Bath v British and Malayan Trustees Ltd* [1969] 2 NSWR 114, 120.

270. *Lewis v Balshaw* (1935) 54 CLR 188, 197. However, this general rule may be displaced "if the necessity or convenience of administration of the estate requires it": *Bath v British and Malayan Trustees Ltd* [1969] 2 NSWR 114, 120; see also *Lewis v Balshaw* (1935) 54 CLR 188, 193.

271. *Lewis v Balshaw* (1935) 54 CLR 188, 195.

limited to the movable property in an estate and make a grant to another person limited to the immovable property.[272]

3.210 The National Committee considered it undesirable that, in some non-contentious matters, it may not be possible for the Court to make one grant in relation to all of the property within its jurisdiction. The Committee, therefore, recommended provisions based generally on the South Australian Rules to govern the Court's appointment of personal representatives in these circumstances.[273]

Application to other Australian jurisdictions and jurisdictions outside Australia

3.211 Sub-clause 352(1) departs from the South Australian Rules by applying this provision where the deceased dies domiciled in another Australian jurisdiction as well as a jurisdiction outside Australia. The National Committee considered it undesirable to apply different principles depending on whether the deceased died domiciled in another Australia jurisdiction or overseas.[274]

People to whom the Court may grant representation

3.212 Sub-clause 352(4) is drafted so as to enable the Court to grant representation of the whole estate to any representatives that are or could be recognised under the law of the jurisdiction where the deceased died domiciled even though the estate in the Court's jurisdiction includes immovable property. The National Committee considered it appropriate that such grants should be made, at least in circumstances where there is no opposition to the making of the grant.[275]

3.213 A provision to the effect of cl 352(4)(c) does not appear in the South Australian Rules. It has been included in the model bill to deal with a situation that cl 352(4)(b) has not covered, namely, where the domiciliary court must make a grant of representation before a person can be entitled to administer the estate.[276] The National Committee considered it desirable to avoid any uncertainty about the scope of cl 352(4)(b).[277]

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272. *Lewis v Balshaw* (1935) 54 CLR 188, 192, 195, 198. See also QLRC, Report 65 [36.22].
273. QLRC, Report 65 [36.50]-[36.51].
274. QLRC, Report 65 [36.53].
275. QLRC, Report 65 [36.54].
276. See J I Winegarten, R D'Costa and T Synak (ed), *Tristram and Coote's Probate Practice* (30th ed, 2006) 540.
277. QLRC, Report 65 [36.57].

Where an executor has been appointed to administer the estate in the jurisdiction

3.214 Sub-clause 352(5) limits the operation of cl 352(4) to situations where the deceased has not appointed any executors to administer the estate in this jurisdiction. The National Committee considered this provision important to ensure that the Court can give effect to the testator's intentions.[278] The provisions of cl 352(4) will continue to have effect, however, if the testator's choice of executor does not have legal capacity or is unwilling to act.

Where the Court may grant representation as if the deceased had died domiciled in the jurisdiction

3.215 The provision in cl 352(6)(b) departs from the equivalent provision in the South Australian Rules[279] in that it applies not only when the "whole" estate consists of immovable property within the jurisdiction, but also applies when "substantially the whole" estate consists of immovable property within the jurisdiction. This is consistent with the equivalent English provision.[280] The National Committee considered that the presence of some movable property in the jurisdiction should not prevent the Court from making a grant with respect to the whole estate in accordance with the law that would have applied if the deceased had died domiciled in the Court's jurisdiction.[281]

Other powers of the Supreme Court preserved

3.216 Clause 352(7) has been added to make it clear that this provision does not limit the Supreme Court's power to grant representation to any person the Court considers appropriate.[282]

PART 11 RESEALING FOREIGN GRANTS OF REPRESENTATION

3.217 A grant of representation is generally only effective in the jurisdiction of the court that makes it. Therefore, a personal representative who has a grant made in one jurisdiction cannot administer the deceased's estate in another jurisdiction. This Part sets out a procedure whereby a personal representative who has a grant made in another jurisdiction can apply to the Court to reseal that grant in this

278. QLRC, Report 65 [36.60].

279. *Probate Rules 2004* (SA) r 40.01(2).

280. *Non-Contentious Probate Rules 1987* (Eng) r 30(3)(b).

281. QLRC, Report 65 [36.62].

282. QLRC, Report 65 [36.52].

jurisdiction without the need for him or her to apply for an original grant of representation. Once the grant is resealed, the personal representative will be able to administer the estate in this jurisdiction as though the Court had made an original grant of representation in this jurisdiction.

3.218 Automatic recognition of grants made in other Australian jurisdictions[283] will largely do away with the need for resealing with respect to grants of representation made in Australia. However, under this model bill, the Court will still need to reseal grants made by jurisdictions outside of Australia.

Division 1 Supreme Court may reseal foreign grants of representation

353 Resealing foreign grants of representation

(1) The Supreme Court may reseal a foreign grant of representation of a deceased person's estate.

(2) However, the Supreme Court may reseal an interstate grant of representation of a deceased person's estate only if the court is satisfied that the deceased person was not domiciled in Australia when the person died.

Note—

See part 7 for provisions dealing with the automatic recognition of interstate grants of representation.

(3) The Supreme Court may reseal a foreign grant of representation even though—

(a) the deceased left no estate in this jurisdiction or elsewhere; or

(b) the person applying to reseal the foreign grant is not resident or domiciled in this jurisdiction.

(4) If the person applying to reseal a foreign grant of representation (the applicant) is not resident in this jurisdiction, the applicant must file with the application a notice giving an address for service in this jurisdiction.

283. See Chapter 3 part 7; para 3.132-3.134.

(5) Service of a document relating to the administration of the estate, or a proceeding relating to the administration of the estate, at the address for service given under subsection (4) is taken to be personal service of the document on the applicant.

Example of a document for a proceeding relating to the administration of the estate—

an originating process

3.219 Clause 353 provides the Court with the general power to reseal a foreign grant of representation. This power is not dependent upon the deceased leaving property in the Court's jurisdiction or elsewhere and is also not dependent upon the applicant being resident or domiciled in the Court's jurisdiction. However, the Court may not reseal an interstate grant of representation if the deceased died domiciled in Australia. When the deceased died domiciled in Australia, the automatic recognition provisions in Chapter 3 Part 7 will apply.

The general power to reseal

3.220 The Court's power to reseal in cl 353(1) extends to a variety of grants of representation and instruments similar to grants of representation, by virtue of the definition of "foreign grant of representation" in the dictionary in schedule 3.[284] This includes instruments that have the effect of an order to administer[285] and an election to administer.[286]

3.221 The use of "may" in cl 353(1) is intended to emphasise the discretionary nature of the Court's power to reseal a foreign grant of representation.[287]

3.222 The general power conferred by cl 353(1) applies to overseas grants as well as grants made by courts in other Australian jurisdictions. It achieves this by means of the definitions in the dictionary in schedule 3 of

284. See para S3.10-S3.16.

285. QLRC, Report 65 [31.60].

286. QLRC, Report 65 [31.86]-[31.87].

287. QLRC, Report 65 [35.101].

"foreign grant of representation",[288] "interstate jurisdiction"[289] and "overseas jurisdiction".[290]

Resealing where the deceased died domiciled in another Australian jurisdiction

3.223 However, the aspect of the power that applies to grants made in other Australian jurisdictions is subject to cl 353(2), which prevents the Court from resealing a grant made in another Australian jurisdiction when the deceased died domiciled in Australia. This provision is necessary because the first stage of the scheme of automatic recognition[291] allows a court in an Australian jurisdiction where the deceased did not die domiciled to make a limited grant which ceases when the court in the domiciliary jurisdiction makes a grant. The National Committee, first, considered that the domiciliary court should not be capable of resealing a limited grant because of the inconsistency involved in the domiciliary court resealing a limited grant which would then be subject to the limitations in the original grant[292] including that it would cease to have effect upon the domiciliary court granting representation of the estate.[293] The National Committee, then, concluded that, for the sake of consistency, it should also not be possible for a court in any other Australian jurisdiction to reseal a grant that is subject to these limitations.[294]

3.224 The National Committee acknowledged that the effect of cl 353(2) is that the personal representative who has a grant made by a non-domiciliary court may, upon the discovery of property in another Australian jurisdiction where the deceased did not die domiciled, be compelled to take out another limited grant in that jurisdiction because resealing is no longer available. However, the National Committee considered that the current practice, in some cases, of seeking a grant in a non-domiciliary jurisdiction and then applying for a reseal of that grant in the domiciliary jurisdiction was undesirable and, in light of the automatic recognition proposals, could not be justified in terms of

288. See para S3.10-S3.16.

289. See para S3.21.

290. See para S3.26.

291. See para 3.134.

292. See *Re Bedford* [1902] QWN 63.

293. QLRC, Report 65 [38.121].

294. QLRC, Report 65 [38.121].

expense and court time.[295] The National Committee also considered that preventing non-domiciliary courts from resealing grants will "operate as an incentive" for a personal representative to seek a grant in the domiciliary jurisdiction, "unless it is quite clear that there will be no property to be administered in any other Australian jurisdiction".[296] These considerations will not be relevant when the second stage of the automatic recognition scheme is implemented so that any grant of representation made by an Australian jurisdiction will be recognised across Australia regardless of domicile.[297]

Resealing where the deceased died domiciled outside Australia

3.225 The considerations that apply where the deceased died domiciled in Australia do not apply where the deceased died domiciled overseas. Pending the implementation of stage 2, the National Committee has decided that the model legislation should allow a court in any Australian jurisdiction to reseal a grant made by the court in any other Australian jurisdiction where the deceased died domiciled outside of Australia. This is because, under stage 1, automatic recognition is not possible without the link of the deceased's domicile in an Australian jurisdiction. Further, the absence of a domiciliary jurisdiction within Australia means that there is no question of conflicting grants being made, since every Australian grant will only be effective within its own jurisdiction.[298]

Jurisdiction

3.226 On the question of the presence of property of the deceased in the jurisdiction, the National Committee concluded that the jurisdictional requirements for the resealing of a grant should be the same as the requirements for the making of an original grant.[299] Sub-clause 353(3), therefore, follows cl 302(1) which makes the same provision with respect to original grants.[300] Currently, in NSW, there is no express jurisdictional requirement for the resealing of a grant.[301] It is arguable whether the

295. QLRC, Report 65 [38.122].

296. QLRC, Report 65 [38.123].

297. See para 3.134.

298. QLRC, Report 65 [38.124]-[38.127].

299. QLRC, Report 65 [3.67].

300. See para 3.9.

301. See *Probate and Administration Act 1898* (NSW) s 107.

jurisdictional requirements for the making of an original grant can be said to apply to the resealing of a grant or not.[302]

3.227 The National Committee also decided that, for consistency with cl 302(1)(b), the Court should be able to reseal a grant even though the applicant is not resident or domiciled in the jurisdiction.[303] This provision is consistent with the recommendations of the Law Reform Commission of Western Australia.[304] Currently, in NSW, there is no express provision relating to the residence or domicile of an applicant for resealing. However, s 97(1) of the *Probate and Administration Act 1898* (NSW), in deeming an applicant for resealing to be resident in NSW, clearly contemplates that an applicant can be resident outside of NSW.[305]

Address for service when person resides out of the jurisdiction

3.228 The provisions in cl 353(4) and (5) that relate to applicants for resealing who are not resident in the jurisdiction are necessary because of the range of possibilities that cl 353(3)(b) presents for the location of an estate's personal representative.[306] They are based on part of a NSW provision which deems every executor or administrator applying for resealing of a grant of representation to be resident in NSW and makes provision for service when he or she is not actually resident.[307] However, unlike the NSW provision, the service here is of documents and proceedings that relate only to the administration of the estate in question. The NSW provision has been said to ensure that personal representatives are amenable to court process without the need for those

302. See *In the Estate of Rogowski* [2007] SASC 161; *Re Carlton* [1924] VLR 237. Commentators in NSW have, however, argued that *Probate and Administration Act 1898* (NSW) s 107 should not be constrained by s 40: R Hastings and G Weir, *Probate Law and Practice* (2nd ed, 1948) 310; R S Geddes, C J Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) 625.

303. QLRC, Report 65 [40.37].

304. Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [3.24], [11.1], Recommendation 5.

305. QLRC, Report 65 [40.27].

306. QLRC, Report 65 [40.58].

307. *Probate and Administration Act 1898* (NSW) s 97(2). See QLRC, Report 65 [40.43]-[40.47].

seeking to effect service having to rely on rules of court and Commonwealth legislation dealing with interstate service of process.[308]

Division 2 Limitations on resealing

354 Foreign grant of representation must be held by particular persons

> Unless the Supreme Court otherwise orders, a foreign grant of representation of a deceased person's estate may be resealed only if the foreign grant—
>
> (a) was made to the person entrusted with the administration of the estate by the court (the domiciliary court) having jurisdiction at the place where the deceased died domiciled; or
>
> (b) was made to the person entitled to administer the estate by the law of the place where the deceased died domiciled; or
>
> (c) was made to a person to whom the domiciliary court could entrust the administration of the estate; or
>
> (d) was made to, for a grant of probate of a will admissible to proof in this jurisdiction—
>
> (i) an executor named in the will; or
>
> (ii) if the will describes the duties of a named person in terms that are sufficient to constitute the person executor according to the tenor of the will—the named person.
>
> ***Note—***
>
> *For paragraph (d), a will is admissible to proof in this jurisdiction if it is taken to be properly executed under [insert local equivalent of the Succession Act 1981 (Qld), part 2, division 6 (Wills with a foreign connection)].*

3.229 This clause identifies the people who should usually hold a foreign grant of representation (whether made in the jurisdiction in which the deceased died domiciled or in another foreign jurisdiction) before the Court can reseal it. The provision states that the Court may, unless it orders otherwise, reseal a foreign grant of representation only if that foreign grant was made to:

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308. L Handler and R Neal, *Succession Law and Practice NSW* (LexisNexis, online) [1489.1] (at 8 October 2009). See *Uniform Civil Procedure Rules 2005* (NSW) r 10.3 and *Service and Execution of Process Act 1901* (Cth).

- the person to whom the domiciliary court has entrusted the administration of the estate in that jurisdiction;
- the person entitled to administer the estate according to the law of the jurisdiction where the deceased died domiciled;
- a person to whom the domiciliary court could entrust the administration of the estate; or
- a person named in the will where that will is admissible to proof (that is, is formally valid[309]) in this jurisdiction and nominates that person as an executor or an office-holder in terms sufficient to constitute that person as an executor.

3.230 This list generally follows the list of people in cl 352 to whom the Court can grant representation when a person dies domiciled outside of the Court's jurisdiction.[310] The National Committee[311] decided to follow the approach in the English *Non-Contentious Probate Rules 1987* (Eng) where the English equivalent of this clause[312] operates as a corollary to the English equivalent of cl 352.[313] This clause differs from the English provision to the extent necessary to achieve consistency with cl 352.[314]

3.231 It should be noted that, under all provisions but cl 354(a), the foreign grant that has been presented for resealing may not have been made by the domiciliary court but may have been made in a jurisdiction other than the one in which the deceased died domiciled.[315] For example, cl 354(c) could only operate if the foreign grant was made in a jurisdiction other than the one in which the deceased died domiciled.

355 Interstate and overseas elections to administer

(1) The Supreme Court may reseal a certified interstate election to administer or a certified overseas election to administer a

309. The requirements for formal validity of wills in NSW may be found generally in *Succession Act 2006* (NSW) s 6, s 7 and, in relation to a will executed in a foreign place, in *Succession Act 2006* (NSW) Part 2.4.
310. See cl 352(4)(a), (b), (c), and (6)(a).
311. QLRC, Report 65 [36.101].
312. *Non-Contentious Probate Rules 1987* (Eng) r 39(3).
313. *Non-Contentious Probate Rules 1987* (Eng) r 30.
314. QLRC, Report 65 [36.102].
315. See QLRC, Report 65 [36.104].

deceased person's estate only if the person applying to reseal it—

(a) estimates that the net value of the estate in this jurisdiction at the time of the making of the application is not more than the prescribed amount; and

(b) gives an undertaking to the Supreme Court as required by subsection (2).

(2) The person must undertake that, if relevant assets are discovered, no further step in the administration of the estate in this jurisdiction will take place until lawful authority is obtained in the foreign jurisdiction to administer the estate in that jurisdiction.

(3) In this section—

certified interstate election to administer means an interstate election to administer certified under the seal of, or under the authority of, the court in which it is filed as a correct copy of the instrument filed in that court.

certified overseas election to administer means an overseas election to administer certified under the seal of, or under the authority of, the court in which it is filed as a correct copy of the instrument filed in that court.

prescribed amount has the same meaning it has in section 325.

relevant assets means assets in the jurisdiction in which the interstate election to administer or the overseas election to administer was filed that prevent the estate in that jurisdiction being administered under the authority of the existing interstate election to administer or overseas election to administer.

3.232 The Court's power to reseal certified copies of foreign elections to administer comes from cl 353(1), combined with paragraph (d) of the definition of "foreign grant of representation" in the dictionary in schedule 3.

3.233 This provision sets out the requirements that an applicant (the professional personal representative who has filed a foreign election to administer) must meet before the Court can reseal a certified foreign election to administer. These requirements are that the applicant for resealing must:

- estimate the value of the property in this jurisdiction is not more than the prescribed amount; and
- undertake, if further assets are discovered in the jurisdiction in which the overseas or interstate election has been filed that prevent the administration of the estate in that jurisdiction, to take no further steps in administering the estate in this jurisdiction until lawful authority has been obtained to administer the estate in the foreign jurisdiction.

3.234 No Australian jurisdiction currently makes express provision for the resealing of elections to administer. In NSW, the document that is resealed must purport to be "under the seal of a court of competent jurisdiction".[316] This would preclude elections to administer since they are merely filed in the registry.[317]

3.235 The limitation imposed in relation to the value of the estate within the resealing jurisdiction is consistent with the rationale of minimising the costs involved in administering a small estate.[318] If the property in this jurisdiction is worth more than the prescribed amount, then a person should seek a grant of representation, if that is required to administer the estate.

3.236 The provisions have been drafted generally for consistency with the model provisions relating to the filing of elections to administer in this jurisdiction. The prescribed amount under cl 325 is $100,000 adjusted annually to reflect changes in the CPI. Clause 356 deals with the circumstance where the value of the property in this jurisdiction exceeds the prescribed amount.

3.237 The undertaking in cl 355(2) is necessary because the authority of the holder of the resealed election to administer in this jurisdiction is dependent up the continued authority of the holder of the election to administer in the foreign jurisdiction and may, therefore, cease to apply if property is discovered in the foreign jurisdiction that requires the estate to be administered under different provisions.[319] This part of the model

316. *Probate and Administration Act 1898* (NSW) s 3, definition of "administration" and "probate".

317. QLRC, Report 65 [31.76].

318. QLRC, Report 65 [31.88].

319. QLRC, Report 65 [31.92]-[31.94].

provision is consistent with recommendations of the Law Reform Commission of Western Australia.[320]

3.238 Certified copies of the foreign elections to administer are required because elections to administer only take effect by being filed in court and do not take effect by being issued under seal, as is the case with grants of probate and administration.[321]

356 Value of estate must not exceed prescribed amount

(1) If, after the resealing of the certified interstate election to administer or certified overseas election to administer, the person who applied to reseal it discovers that the net value of the estate in this jurisdiction is more than 150% of the prescribed amount, the person must—

(a) file in the Supreme Court a memorandum stating the value of the estate in this jurisdiction; and

(b) apply for a grant of probate or letters of administration [or an order to administer].

(2) In this section—

prescribed amount has the same meaning it has in section 325.

3.239 This provision deals with the circumstance where the value of the property being administered under a resealed election to administer in this jurisdiction is subsequently discovered to exceed the prescribed amount by 150%. In such cases the holder of the resealed election to administer must file a memorandum and apply to the Court for a grant of representation.

3.240 It has been drafted for consistency with the model provisions that deal with the situation where, when the estate is being administered under an election to administer, the value of the estate is subsequently discovered to exceed the prescribed amount by 150%.[322]

320. Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [3.29].

321. QLRC, Report 65 [31.87].

322. Clause 333. QLRC, Report 65 [31.90].

3.241 The prescribed amount under cl 325 is $100,000 adjusted annually to reflect changes in the CPI.

Division 3 Applications for resealing

3.242 This division deals with the procedural requirements for applications for resealing as well as identifying the classes of people who may apply for resealing.

357 Requirements

(1) An application to the Supreme Court to reseal a foreign grant of representation must be made in the way prescribed under the rules of court.

(2) If the applicant for the resealing is an individual, the applicant must be an adult.

(3) The applicant must depose, by affidavit, that the foreign grant has not been revoked or changed in the foreign jurisdiction in which it was made.

(4) Subsections (2) and (3) do not limit the requirements for resealing a foreign grant of representation that may be provided for under the rules of court.

(5) In this section—

applicant, for the resealing of the foreign grant of representation, includes—

(a) a trustee company; and

(b) a person who is acting as an attorney for the holder of the foreign grant.

3.243 This clause sets out some miscellaneous requirements that must be met in an application for resealing. The applicant for resealing must be an adult and may be a trustee company or a person acting as an attorney for the holder of the foreign grant. The application must be in accordance with the relevant rules of court and the applicant must depose that the foreign grant has not been revoked or changed.

3.244 The requirement in cl 357(1) to follow the relevant rules of court has been drafted to mirror cl 306 which requires applicants for a grant of

representation to apply in accordance with the rules of court.[323] The National Committee has recommended the enactment of a number of rules of court in relation to applications for resealing, including provisions setting out the documentation required in an application for resealing.[324] The rules of court may also make provision for such advertising requirements as may be considered necessary.[325]

3.245 The age requirement in cl 357(2) has been included for consistency with the approach adopted with respect to original grants of representation in cl 312(1).[326]

3.246 The requirement in cl 357(3) that the applicant for resealing depose that the foreign grant has not been revoked or changed is part of the notification requirements related to resealing.[327] The National Committee has emphasised the importance in any resealing scheme of guarding against the possibility that the Court may inadvertently reseal a grant that the original court has already revoked or altered.[328] It considered it was appropriate for the Court to rely on material filed in support of a resealing application in order to determine whether the original grant had been revoked or altered. [329]

3.247 The definition of "applicant" in cl 357(5) is necessary because of cl 359(1) which allows the holder of a foreign grant of representation to apply to reseal the foreign grant, and the provisions of cl 360 which allow the Supreme Court to reseal a foreign grant of representation held by a trustee company even though the Court could not make an original grant representation to the trustee company under the laws of this jurisdiction.

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323. QLRC, Report 65 [40.14].
324. QLRC, Report 65 [35.18]-[35.29]. See also para 6.25.
325. QLRC, Report 65 [8.41]-[8.42]. See also para 6.26. The advertising provisions in NSW are contained in *Probate and Administration Act 1898* (NSW) s 109; and *Supreme Court Rules 1970* (NSW) pt 78 r 10. Note the doubts about the effectiveness of advertising a notice of intention raised in QLRC, Report 65 [8.18]-[8.19], [8.26].
326. See para 3.43.
327. See cl 363; para 3.269-3.271.
328. QLRC, Report 65 [35.120].
329. QLRC, Report 65 [35.122].

358 Holders of a foreign grant of representation

(1) The holder of a foreign grant of representation may apply to reseal the foreign grant.

(2) If there is 1 or more holders of the foreign grant, any 1 or more, or all, of the holders may apply to reseal the foreign grant.

(3) However, if fewer than all the holders apply to reseal the foreign grant, the consent to the application, by affidavit, of each of the holders who did not apply must be produced in support of the application.

(4) If any holder is unable to consent because of death or lack of legal capacity, the person applying to reseal the foreign grant must establish the death or lack of legal capacity of that holder.

(5) If the last surviving, or sole, holder of a foreign grant of representation has died (the deceased holder), a person who is either of the following is taken to be the holder of the foreign grant—

(a) a person to whom the Supreme Court has made a grant of probate or letters of administration of the deceased holder's will or estate;

(b) a person recognised in this jurisdiction as the executor or administrator by representation of the will or estate of the deceased holder.

(6) Subsection (5) applies only if the foreign grant is a grant of probate or letters of administration.

3.248 This clause identifies holders of a foreign grant of administration as one of the categories of people who may apply to the Court for the resealing of that grant. In providing that one or more holders of a foreign grant of representation may apply to reseal the foreign grant, it also sets out the procedures that the holders of a foreign grant must follow if they are only some of a number of holders of the foreign grant. It also provides a means of determining who can apply for resealing as the "holder" of the foreign grant where the sole or last surviving holder has died before the foreign grant has been resealed.

3.249 The "holder of a foreign grant of representation" in cl 358(1), by virtue of the definitions of "holder" and "foreign grant of

representation",[330] includes a public trustee in whose favour an order to administer has been made[331] and a person who has filed an election to administer.[332] This is necessary because the model legislation will enable the Court to reseal an order to administer and an election to administer in certain circumstances.[333]

3.250 Sub-clauses 358(2)-(4) make provision for applications for resealing to be made by, and with the consent of, multiple personal representatives. The provisions have been drafted in such a way as to accommodate executors under a grant of probate as well as under a grant of double probate.[334] A grant of double probate arises where some of the executors nominated by a will reserve leave to apply for probate at a future date and, subsequently, do so. The subsequent grant then runs concurrently with the first grant.

3.251 Sub-clause 358(3) states the current position at law[335] that, if two or more people hold a foreign grant of representation, they must all apply for resealing[336] unless the applicants for the resealing have applied with the consent of those who are not applying.[337]

3.252 The provisions have also been drafted in such as way as to accommodate any substituted personal representatives who the Court may have appointed following the removal of a personal representative.[338] This approach is consistent with what appears to be the position at law.[339]

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330. See the definitions of "holder" and "foreign grant of administration" in the dictionary in sch 3.
331. QLRC, Report 65 [31.60]. The Supreme Court can issue an order to administer in favour of the NSW Trustee where there are reasonable grounds to suppose that a person has died intestate: *NSW Trustee and Guardian Act 2009* (NSW) s 25.
332. QLRC, Report 65 [31.86]-[31.87].
333. QLRC, Report 65 [33.58] and [33.59]. See para 3.220.
334. QLRC, Report 65 [35.58]-[35.61].
335. QLRC, Report 65 [35.41].
336. *In the Will of Rofe* (1904) 29 VLR 681.
337. *Re Benn* [1905] QWN 30. See also J I Winegarter, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [18.95].
338. QLRC, Report 65 [35.81]-[35.82].
339. See *Re Bell* [1929] VLR 53.

3.253 The National Committee recommended the inclusion of cl 358(4) in order to deal expressly with the situation where one or more of the holders of the foreign grant have died or lost capacity.[340] The position at law in such cases is currently not clear.[341]

3.254 Clause 358(5) is intended to deal with the situation where the holder of the foreign grant of representation dies before the grant has been resealed. For the purposes of the resealing application, this provision deems someone to be the new "holder" of the foreign grant if the resealing jurisdiction recognises him or her as the executor or administrator by representation of the estate of the deceased personal representative, or if the Court of the resealing jurisdiction has made a grant of representation of the estate of the deceased personal representative to him or her.

3.255 In proposing this provision, the National Committee departed from its original proposal that the jurisdiction in which the grant was made should recognise the person as the executor or administrator by representation of the estate of the deceased personal representative.[342] The National Committee's view was that its original proposal did not deal adequately with situations where the foreign jurisdiction did not recognise the broad range of executorships or administratorships by representation now proposed in the model legislation.[343] It also noted that, even if the foreign jurisdiction did recognise, for example, administratorship by representation, the deceased personal representative's personal representative would still have needed to apply to the Court of the foreign jurisdiction for an original grant or for the resealing of a grant made in this jurisdiction.[344] It should be emphasised that the resealing of a grant in these circumstances in NSW will not give the applicant for resealing any authority to administer the original deceased person's estate in the foreign jurisdiction and it will be irrelevant whether the foreign jurisdiction would recognise the applicant

340. QLRC, Report 65 [35.42].

341. See, eg, *In the Will of Rofe* (1904) 29 VLR 681, 682 (A'Beckett J). See also QLRC, Report 65 [35.32].

342. QLRC, Report 65 [33.43].

343. QLRC, Report 65 [33.43]-[33.45].

344. QLRC, Report 65 [33.46].

for resealing as the original deceased's executor or administrator by representation.[345]

3.256 Sub-clause 358(5), like cl 358(2)-(4), has been drafted in such as way as to accommodate executors under a grant of probate as well as under a grant of double probate.[346]

359 Persons authorised under a power of attorney

(1) The holder of a foreign grant of representation may, by power of attorney, authorise a person (the attorney) to apply to reseal the foreign grant.

(2) However, if there is more than 1 holder of the foreign grant, each holder must authorise the attorney to apply to reseal the foreign grant.

(3) If any holder is unable to give the authorisation because of death or lack of legal capacity, the attorney must establish the death or lack of legal capacity of that holder.

3.257 This clause allows a person authorised under a power of attorney given by the holder of a foreign grant of representation to apply to the Court for the resealing of that grant. It also outlines the process that two or more holders of the foreign grant must follow to authorise a person under a power of attorney both in situations where they are all capable of agreeing and in situations where some are dead or have lost capacity.[347]

3.258 The provisions have been drafted in such a way as to accommodate executors under a grant of probate as well as under a grant of double probate.[348]

3.259 The National Committee favoured the authorisation to act being by power of attorney rather than simply in writing because this approach is already the general practice in most Australian jurisdictions, including NSW[349] and because the formalities involved in executing a power of

345. QLRC, Report 65 [33.49].

346. QLRC, Report 65 [35.62].

347. See QLRC, Report 65 [35.44]-[35.45].

348. QLRC, Report 65 [35.63]-[35.64].

349. *Probate and Administration Act 1898* (NSW) s 107(1).

attorney are desirable since it makes the person, in effect, the personal representative of the estate within the resealing jurisdiction.[350]

3.260 The National Committee, in proposing this provision, also confirmed its preliminary view that the legal representative of the holder of a foreign grant of representation should not be able to apply for resealing unless he or she was authorised under a power of attorney to do so.[351]

360 Trustee companies

(1) This section applies if a trustee company—

(a) is the holder of a foreign grant of representation; or

(b) is authorised by the holder of a foreign grant of representation, by power of attorney, to apply to reseal the foreign grant.

(2) The Supreme Court may reseal the foreign grant of representation even though a grant of representation of the estate could not be made to the trustee company under the laws of this jurisdiction.

(3) This section does not limit section 358 or 359.

3.261 This clause, which is in addition to cl 358 and cl 359, allows the Court to reseal a foreign grant of representation where a trustee company has applied either as the holder of a foreign grant of representation or as the person authorised by power of attorney to do so by the holder of a grant of foreign representation.

3.262 Sub-clause 360(2) confirms the current position in NSW that the Court can reseal a grant made in favour of a foreign trustee company even though the company was not one to which the Court could have made an original grant.[352]

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350. QLRC, Report 65 [33.41].

351. QLRC, Report 65 [33.50]. See New South Wales Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*, Issues Paper 21 (2002) [5.11].

352. *In the Will of Thornley* (1903) 4 SR (NSW) 246; *Re Galletly* (1900) 10 QLJ 74. *In the Will of Finn* (1908) 8 SR (NSW) 32 stands for the proposition that a trustee company incorporated under the statute of another jurisdiction can have no

3.263 The National Committee has left each jurisdiction to deal with the question of the procedure by which a trustee company may apply for the resealing of a grant of probate in its rules of court.[353]

361 Special circumstances

(1) A person who is not otherwise permitted under this division to apply to reseal a foreign grant of representation may apply to the Supreme Court for an order to reseal the foreign grant.

(2) The Supreme Court may make an order under subsection (1) if it is satisfied that there are special circumstances warranting the making of the order.

3.264 This clause allows the Court to reseal a grant of representation in favour of a person who is not otherwise permitted to apply, but only if it is satisfied that there are special circumstances warranting the making of the order.

3.265 The purpose of this provision is to avoid the need for a person to make an application for an original grant of representation in this jurisdiction because nobody is entitled to apply for the resealing of the foreign grant of representation. Such a circumstance might arise where the personal representative has died and nobody else is entitled to apply for resealing.[354]

3.266 The National Committee considered that such a provision would be used infrequently and only when the costs of making an application for an original grant of representation are in excess of the costs of applying to have a foreign grant resealed. This might occur, for example, where the foreign grant was made on the presumption of death and it would be necessary to prove afresh the matters previously brought before the foreign Court that originally granted representation.[355]

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standing to apply for a grant of representation in NSW (at 33). See QLRC, Report 65 [35.83]-[35.85].

353. QLRC, Report 65 [35.93].

354. QLRC, Report 65 [33.54].

355. QLRC, Report 65 [33.56].

Division 4 Supreme Court may impose conditions etc.

362 Imposing conditions on, or revoking, the resealing of a foreign grant of representation

(1) The Supreme Court may reseal a foreign grant of representation subject to any conditions the court considers appropriate.

(2) Without limiting section 364(2)(b), the Supreme Court may revoke the resealing of a foreign grant of representation or change or add to the conditions to which the resealing is subject.

3.267 This clause gives the Court the power, in resealing a foreign grant of representation under cl 353(1), to make the resealing subject to conditions. It also allows the Court to change or add to these conditions as well as revoke the resealing.

3.268 This is a necessary provision following the National Committee's recommendation that the Court be given an express discretion whether or not to reseal a foreign grant of representation.[356]

Division 5 Notice

363 Notification

(1) If the Supreme Court reseals a foreign grant of representation, it must notify the relevant court of the jurisdiction in which the foreign grant was made that the foreign grant has been resealed in this jurisdiction.

(2) If the Supreme Court is notified by a court of a foreign jurisdiction that a grant of representation made by the Supreme Court has been resealed in the other jurisdiction, the Supreme Court must notify the court of the other jurisdiction if—

(a) it has revoked the grant or changed or added to any conditions to which the grant is subject; or

(b) after receiving the notice, it revokes the grant or changes or adds to any conditions to which the grant is subject.

356. QLRC, Report 65 [35.101]-[35.102].

3.269 This provision deals with two situations. First, it requires the Court to advise a foreign court that it has resealed one of the foreign court's grants of representation. Secondly, it provides that, if the Court receives notice that a foreign court has resealed one of its grants of representation, the Court must notify the foreign court if it has revoked or altered that grant of representation. It is consistent with a recommendation of the Law Reform Commission of Western Australia.[357]

3.270 Sub-clause 363(1) provides a means by which the resealing Court can discover whether the foreign court's original grant has been altered or revoked. The National Committee, in recommending this provision, was conscious that the co-operation of the relevant foreign court would be required if it was to achieve its aim and also that any reporting from the foreign court might be subject to delays.[358] The National Committee intends that the primary means by which the Court can inform itself as to the status of the foreign grant is the applicant's affidavit under cl 357(3).[359]

3.271 The effective operation of the system of notification rests on the court that receives notice of a resealing reporting back about any changes to the original grant. Sub-clause 363(2), therefore, places an obligation on the Court, upon receipt of a resealing notification, to report back to the resealing court about any changes to the original grant.[360]

Division 6 Effect of resealing a foreign grant of representation

364 Resealed foreign grant of representation operates as a grant of representation

(1) A foreign grant of representation of a deceased person's estate, when resealed in this jurisdiction, has the same force, effect and operation in this jurisdiction as a grant of representation made in this jurisdiction.

(2) On the resealing of a foreign grant of representation of a deceased person's estate—

357. Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 pt 4 (1984) [11.1], Recommendation 19.

358. QLRC, Report 65 [35.121].

359. QLRC, Report 65 [35.123].

360. QLRC, Report 65 [35.124].

(a) the person who applied to reseal the foreign grant—

(i) has the same rights and powers, and is subject to the same duties and liabilities, that the person would have or be subject to if the resealed foreign grant of representation were a grant of representation made in this jurisdiction; and

(ii) is to be taken, for all purposes, to be the personal representative of the deceased person in relation to the deceased's estate in this jurisdiction; and

(b) the force, effect and operation of the foreign grant in this jurisdiction is subject to the Supreme Court's jurisdiction.

(3) Subsections (1) and (2)(a) are subject to sections 355(2) and 356.

(4) Nothing in this section requires the Supreme Court to endorse the resealed foreign grant of representation under section 304 or 305.

3.272 This provision sets out the effect of the Court resealing a foreign grant, namely, that:

- the foreign grant has the same force, effect and operation as it would if it had been granted originally in this jurisdiction, including becoming subject to the Court's jurisdiction; and
- the applicant for resealing becomes, in effect, the personal representative of the estate in this jurisdiction.

3.273 The purpose of allowing the Court to reseal foreign grants is to provide an alternative to having to apply to the Court for an original grant of probate. The National Committee considered cl 364(1) necessary to ensure this.[361] The National Committee also considered cl 364(2)(b) necessary to ensure that the Court has the same jurisdiction with respect to a resealed grant as it would if it had been originally grant in this jurisdiction.[362]

3.274 In NSW, s 107(2) of the *Probate and Administration Act 1898* (NSW) currently makes similar provision to cl 364(1) by stating that resealed grants have the same force, effect and operation as if they had been originally granted by the Court. The NSW provision also makes the

361. QLRC, Report 65 [34.9].

362. QLRC, Report 65 [34.10].

executors and administrators under resealed grants subject to the same duties and liabilities as they would be if the Court had originally made the grants, however, unlike the model provision, it does not include a person that the executor or administrator has authorised to apply for the resealing.[363]

3.275 The provision in cl 364(2)(a)(ii) is based on s 85 of the *Administration and Probate Act 1958* (Vic) which provides that the holder of the resealed grant "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".[364] The National Committee recommended a provision based on the Victorian Act to ensure that the applicant for resealing will, in all respects, be placed in the same position as if he or she had been appointed personal representative under an original grant.[365]

3.276 The provisions to the effect of cl 364(2)(a) do not appear in the provisions dealing with automatic recognition in cl 335 which only has a provision to the effect of cl 364(1) and (2)(b). This is because the automatic recognition provisions do not need to contemplate the existence of a person authorised under a power of attorney to apply for resealing.[366]

3.277 The effect of applying cl 364(a)(i) and (ii) to the person who applies for the reseal (rather than to the executor or administrator under the foreign grant, as in NSW) is to place a person authorised by power of attorney in the same position as a personal representative of the estate rather than merely the agent of a foreign executor or administrator.[367]

365 Particular provision for attorneys

(1) This section applies if—

(a) a person's authority to apply to reseal a foreign grant of representation of a deceased person's estate was a power of attorney; and

363. See QLRC, Report 65 [34.14].

364. See also *Administration and Probate Act 1958* (Vic) s 81(3) which makes similar provision for grants of representation from the United Kingdom.

365. QLRC, Report 65 [34.30].

366. QLRC, Report 65 [38.10]-[38.11].

367. See QLRC, Report 65 [34.20].

Note—

See section 359 (Persons authorised under a power of attorney).

(b) the Supreme Court resealed the foreign grant of representation; and

(c) the person has satisfied or provided for the claims against the estate of all persons resident in this jurisdiction of which the person has notice.

(2) For subsection (1)(c), it does not matter whether the person had notice of the claims before or after advertising for creditors.

(3) The person may dispose of the balance of the estate in this jurisdiction to, or as directed by, the donor of the power of attorney.

(4) The person—

(a) is not required to see to the application of the balance of the estate disposed of under subsection (3); and

(b) is not liable for the disposition of the balance of the estate as provided for under subsection (3).

(5) However, the person must account to the donor for the person's administration of the estate.

(6) In this section—

claims includes debts.

3.278 This clause sets out what a person, in whose favour the Court has resealed a grant of representation and who is acting under a power of attorney, must do with the remainder of the property in a deceased estate in the jurisdiction where he or she has administered the estate and dealt with the claims against the estate of all the people in the jurisdiction of which he or she had notice. In such circumstances, the person may dispose of the balance of the estate either to the holder of the foreign grant who granted the power of attorney or as directed by that person. Once this disposition takes place, the person acting under the power of attorney is still accountable for his or her own administration of the estate to the person who granted the power of attorney, but he or she is neither required to see to the application of the balance of the estate nor is he or she liable for the disposition of the balance.

3.279 In the normal course of events, under cl 364(2), a person holding a resealed grant of representation will be required to see to the distribution of the estate in the resealing jurisdiction.[368] This would, without special provision, preclude a person who is also acting under a power of attorney from paying the balance of the estate to the person who granted the power of attorney (in this case, the holder of the foreign grant).[369]

3.280 However, the National Committee considered there may be circumstances where it is more convenient for the holder of the foreign grant to distribute some parts of the estate rather than the person acting under the power of attorney. The National Committee, therefore, recommended this clause, which is generally based on s 86 of the *Administration and Probate Act 1958* (Vic), be included to allow the holder of the resealed grant to pay the balance of the estate as described above. However, the National Committee considered that the model provision should differ from s 86 and not allow a person acting under a power of attorney who has not been appointed by the holder of the foreign grant to make use of the provision. This is to ensure that the "relevant protection is given only if the principal-attorney relationship exists and the principal has been appointed under a grant that is capable of being resealed".[370]

PART 12 DISPOSITION UNDER A GRANT OF REPRESENTATION AFFECTED BY A DEFECT

366 Disposition of property in reliance on a grant of representation

(1) This section applies to a person who, in good faith, disposes of a deceased person's property under a grant of representation.

(2) The person is not liable for the disposition despite any defect or circumstance affecting the validity of the grant.

(3) In this section—

dispose, of property, includes pay an amount.

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368. See cl 364(2).

369. See QLRC, Report 65 [34.32].

370. QLRC, Report 65 [34.47]; see also [14.71]. The National Committee concluded, however, that there should not be a model provision "prescribing the circumstances in which an attorney-administrator may pay or transfer the balance of the estate to his or her foreign principal and be discharged from further liability": QLRC, Report 65 [14.83].

3.281 This provision protects a person who has disposed of property in the estate in good faith under a grant even though the grant is subject to a defect or other circumstance affecting its validity. It is based on s 53(1) of the *Succession Act 1981* (Qld). NSW makes similar provision in s 91(1) of the *Probate and Administration Act 1898* (NSW).[371]

3.282 The National Committee has suggested that this provision will protect a registrar of titles who registers a transfer in reliance upon a grant that is subsequently revoked.[372] This would, incidentally, eliminate the need for a provision to the effect of s 40D(3A) of the *Probate and Administration Act 1898* (NSW).

3.283 In most cases, the grant will need to be revoked and a new grant issued. Clause 369 deals with dispositions or distributions of property that a personal representative makes in reliance on a grant that is subsequently revoked.

PART 13 REVOCATION, ENDING OR CEASING OF EFFECT OF A GRANT OF REPRESENTATION

3.284 This Part ensures that, in certain circumstances, people who deal with property of a deceased estate are protected against further claims and that their dealings are effective notwithstanding the fact that one of them (either the person who gives or who receives the property) is a personal representative appointed under a grant that is subsequently revoked, ended or ceases to have effect.

3.285 The provisions in this Part are based largely on the various provisions in s 53 of the *Succession Act 1981* (Qld). The National Committee chose to use s 53 as the model for these provisions because it considered that it deals "comprehensively" with the effect of the revocation of a grant.[373]

3.286 The Court's power to revoke a grant of representation is contained in cl 301(1)(a).[374]

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371. But subject to *Probate and Administration Act 1898* (NSW) s 91(2) so that the indemnity only applies in relation to property that is listed in a document issued by the Court.

372. QLRC, Report 65 [25.98].

373. QLRC, Report 65 [25.93].

374. See para 3.8.

367 Definition for part

In this part—

dispose, of property, includes pay an amount.

368 Disposition to personal representative is a valid discharge

(1) This section applies if a person, in good faith, disposes of a deceased person's property to the personal representative named in a grant of representation before the revocation, ending or ceasing of effect of the grant.

(2) The disposition is a valid discharge to the person making it.

(3) For subsection (2), it does not matter whether the disposition was made before the grant of representation was made.

3.287 This provision ensures the valid discharge of a person who, in good faith, has handed over property in an estate to the personal representative and the grant under which the person representative is appointed (whether made before or after the disposition) is subsequently revoked, ends or ceases to have effect. It ensures, for example, that a debtor of the deceased, who repays the debt to a personal representative, will not be required to pay the same amount again to another personal representative appointed under a subsequent grant.

3.288 It is based on the first half of s 53(2) of the *Succession Act 1981* (Qld) and follows the long-established common law position.[375] The nearest equivalent provision in NSW is the first half of s 40D(3) of the *Probate and Administration Act 1898* (NSW) which provides that a revocation "shall not invalidate any payment or transfer lawfully made" to the personal representative during the course of administration before the revocation.

369 Distribution or disposition by personal representative

(1) This section applies to a personal representative who has acted under a grant of representation of a deceased person's estate that is subsequently revoked or ends.

(2) The personal representative may retain from the estate, and reimburse himself or herself, an amount equivalent to the amount of prescribed payments he or she made.

375. *Allen v Dundas* (1789) 3 Tr 125; 100 ER 490.

(3) The personal representative is not liable for any distribution of the estate made in good faith and without negligence in reliance on the grant.

(4) However, the personal representative must have sought the grant of representation in good faith and without negligence.

(5) A disposition of an interest in property by the personal representative to a purchaser in good faith is valid.

(6) In this section—

prescribed payments, made by a personal representative, means payments made by the personal representative that a person to whom a grant of representation of the estate is afterwards made might properly have made.

3.289 This clause does three things in relation to a grant of representation that has been revoked or ended:

- it allows the personal representative to retain from the estate an amount equivalent to any payments that the personal representative has made that the subsequently appointed personal representative might properly have made (cl 369(2) and (6));
- it provides that the personal representative is not liable for any distribution he or she makes in good faith without negligence in reliance on the grant, so long as he or she sought the grant in good faith and without negligence (cl 369(3) and (4)); and
- it ensures the validity of any disposition of an interest in property that the personal representative makes to a purchaser in good faith (cl 369(5)).

3.290 Sub-clauses 369(2) and (6) are derived from the second half of s 53(2) of the *Succession Act 1981* (Qld). They relate to payments that the personal representative may have made in the course of the administration before the revocation of the grant and for which he or she could seek reimbursement. The equivalent NSW provision is s 90(2) of the *Probate and Administration Act 1898* (NSW).

3.291 Sub-clauses 369(3) and (4) are derived from s 53(4) of the *Succession Act 1981* (Qld). The National Committee considered that they provide the "clearest protection" for a personal representative in the circumstances

described.[376] The equivalent provision in NSW is s 40D(2) of the *Probate and Administration Act 1898* (NSW).

3.292 Sub-clause 369(5) is derived from s 53(3) of the *Succession Act 1981* (Qld). It follows an English decision which held that a purchaser for value without notice obtained a good title to property notwithstanding the fact that the grant was subsequently revoked when it was found that the deceased had left a will.[377] However, the National Committee emphasised that the model provision should not validate a purchase made by a person who, for example, purchased a property when he or she had reason to believe the grant would be revoked.[378]

3.293 Clause 373 makes separate provision for personal representatives who have operated under limited grants that have ended because the court in the Australian jurisdiction where the deceased died domiciled has made a grant that is entitled to automatic recognition under Chapter 3 part 7 of the model legislation.

370 Personal representative may recover particular distributions

(1) This section applies if—

(a) a distribution of a deceased person's estate is made under a grant of representation (the first grant); and

(b) the first grant is subsequently revoked and a new grant of representation (the subsequent grant) is made; and

(c) the person to whom the distribution was made under the first grant is not entitled to it under the subsequent grant.

(2) The holder of the subsequent grant may recover the distribution, or its value, from the person to whom the distribution was made.

(3) However, if the person—

(a) has received the distribution in good faith; and

(b) has so altered the person's position in reliance on the correctness of the distribution that, in the Supreme

376. QLRC, Report 65 [25.93].

377. *Hewson v Shelley* [1914] 2 Ch 13, 29 (Cozens-Hardy MR), 36 (Buckley LJ), 46 (Phillimore LJ).

378. QLRC, Report 65 [25.97].

Court's opinion, it would be inequitable to order the recovery of the distribution, or its value;

the court may make any order it considers to be just in all the circumstances.

(4) Subsection (3) does not limit any other defence available, under an Act or at law or in equity, to the person to whom the distribution has been made.

3.294 This clause allows a personal representative to recover property, or its value, from someone who has received the property under a previous (revoked) grant of representation but who is not entitled to it under the current grant of representation. It also provides that the Court can make any order it considers just in the circumstances where the person has received the property in good faith and has so altered his or her position in reliance on the correctness of the distribution that the Court considers it would be inequitable to order recovery.

3.295 It derives from s 53(5) of the *Succession Act 1981* (Qld). The National Committee observed that the Queensland provision was the only express provision giving a subsequent personal representative the ability to recover already-distributed property from a person who was not entitled to it under the subsequent grant.[379] The Queensland Law Reform Commission originally recommended s 53(5) to overcome the unjustness of the old rule that made personal representatives personally liable to the beneficiaries under the new grant and also prevented them from recovering anything from the beneficiaries under the revoked grant.[380] The Queensland Law Reform Commission also considered that there should be some protection for beneficiaries, particularly if there is a delay in the new personal representative commencing recovery proceedings, and so recommended the inclusion of a defence of change of position based on s 109 of the *Trusts Act 1973* (Qld).

3.296 In NSW, the provision that preserves the validity of any distribution made before the revocation also states that it shall not prejudice the right of any person to follow assets into the hands of any

379. QLRC, Report 65 [25.93].

380. QLRC, Report 22, 37.

person who may have received the property.[381] This, however, stops short of the express provision now made in the model legislation.

371 Proceedings may be continued by or against new personal representative

(1) This section applies if—

(a) a proceeding by or against a personal representative to whom a grant of representation has been made is pending in a court of this jurisdiction; and

(b) the grant is revoked, ends or ceases to have effect and a grant of representation is made to someone else (the new personal representative).

(2) The court in which the proceeding is pending may order that the proceeding be continued by or against the new personal representative as if it had been originally commenced by or against the new personal representative.

(3) The order may be made subject to any conditions or variations the court considers appropriate.

3.297 This clause allows any court in this jurisdiction that has before it a proceeding involving a personal representative under a grant that has been revoked to order that the proceedings be continued by or against the personal representative under the new grant, subject to any conditions or variations the court considers appropriate.

3.298 It derives from s 53(6) of the *Succession Act 1981* (Qld). NSW currently has a similar provision that allows for the continuation of proceedings in such circumstances in the name of the new personal representative.[382] Such provisions are said to ensure that the revocation of a grant does not prejudice pending actions.[383]

381. *Probate and Administration Act 1898* (NSW) s 40D(3).

382. *Probate and Administration Act 1898* (NSW) s 81(1) and (2).

383. See L Handler and R Neal, *Succession Law and Practice NSW* (LexisNexis online) [1409.1] (at 8 October 2009).

372 Person living when grant of representation is made

(1) If—

(a) a grant of representation of a person's estate has been made by the Supreme Court, whether before or after the commencement of this section; and

(b) it is established that the person was living when the grant was made;

the Supreme Court must revoke the grant of representation.

(2) The Supreme Court may impose any conditions in relation to a proceeding commenced by or against the personal representative, or in relation to costs or other matters, that the court considers appropriate.

(3) A proceeding for the revocation may be started by the person, or, if the person has since died, by any person entitled to apply for a grant of representation of the person's estate or by any person interested in the estate.

(4) The Supreme Court may make any order, including an order for an injunction against the personal representative or any other person and an order for the appointment of a receiver, that the court considers appropriate for protecting the estate.

(5) An order mentioned in subsection (4) may be made at any time, whether before or after the revocation.

3.299 This clause deals with the specific situation where the Court has made a grant of representation in relation to a person's estate and it is subsequently established that the person was alive when the grant was made.

3.300 The provisions in this section, therefore, make provision for the revocation of the grant and its consequences by:

- allowing the person or, if the person has since died, any person entitled to apply for a grant, to apply to the Court to revoke the grant (cl 372(3));
- requiring the Court, once the essential facts have been established, to revoke the grant (cl 372(1));
- allowing the Court, at any time either before or after the revocation, to make any order that the Court considers appropriate to protect the estate (cl 372(4) and (5)); and

- allowing the Court to impose such conditions as it considers appropriate in relation to any proceedings involving the personal representative under the revoked grant (cl 372(2)).

3.301 The National Committee decided to include these provisions, which are based generally on s 40C of the *Probate and Administration Act 1898* (NSW), as a corollary to the other provisions in the model legislation[384] relating to grants of representation upon a presumption or inference of death.[385] It should be noted, however, that the provisions extend to any situation where the person in relation to whose estate a grant has been made is subsequently found to be alive, whether or not death has been presumed or inferred.

3.302 Sub-clause 372(1) is based on the first half of s 40C(1) of the *Probate and Administration Act 1898* (NSW). Sub-clause 372(2) is based on the second half of s 40C(1) of the *Probate and Administration Act 1898* (NSW).[386] Sub-clause 372(3) is based on s 40C(2) of the *Probate and Administration Act 1898* (NSW). Sub-clauses 372(4) and (5) are based on s 40C(3) of the *Probate and Administration Act 1898* (NSW).

373 Former personal representative—reimbursement and liability

(1) This section applies if—

(a) a grant of representation ceases to have effect under section 335(2)(c)(i); or

(b) an election to administer ceases to have effect under section 335(2)(c)(ii); or

(c) a resealed foreign grant of representation ceases to have effect under section 335(2)(c)(iii).

(2) The former personal representative may retain from the estate, and reimburse himself or herself, an amount equivalent to the amount of payments made by the former personal representative that the person to whom the interstate grant of representation has been made might properly have made.

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384. See chapter 3, part 1, div 2, above.

385. QLRC, Report 65 [25.109].

386. It would appear that a provision to the effect of *Probate and Administration Act 1898* (NSW) s 81(3) about the continuation of proceedings in these circumstances is unnecessary.

(3) Also, the former personal representative is not liable for any distribution of the estate made in good faith and without negligence in reliance on the grant of representation, election to administer or resealed foreign grant of representation.

(4) In this section—

former personal representative means—

(a) the person who was the holder of the grant of representation mentioned in subsection (1)(a); or

(b) the professional administrator who filed the election to administer mentioned in subsection (1)(b); or

(c) the person who applied to reseal the foreign grant of representation mentioned in subsection (1)(c).

3.303 This clause makes special provision for personal representatives in situations where the grant they are operating under is a "limited" one that ceases to have effect because the court of an Australian jurisdiction where the deceased died domiciled has made a grant that is entitled to automatic recognition under Chapter 3 part 7. The personal representatives whose roles come to an end in these circumstances are ones under:

- a grant of representation made by the Court that records that the deceased died domiciled in another jurisdiction or that makes no record of the deceased's domicile;[387]
- an election to administer (that is, professional administrators who have filed the election to administer);[388] and
- a foreign grant of representation that the Court has previously resealed.[389]

387. See cl 335(2)(c)(i).

388. See cl 335(2)(c)(ii).

389. See cl 335(2)(c)(iii).

3.304 Under this provision, the personal representatives:

- may retain an amount from the estate to reimburse themselves for payments that might properly have been made by the holder of the automatically recognised interstate grant of representation (cl 373(2)); and
- are not liable for any distribution of the estate that they made in good faith and without negligence in reliance on their authorising documents (cl 373(3)).

3.305 Sub-clauses 373(2) and (3) are similar to cl 369(2) and (6) and cl 369 (3) respectively. However, cl 373(3) has not adopted a version of the provision in cl 369(4) that also requires the personal representative to have sought the authority to act in good faith and without negligence.

3.306 The protections are not limited, as the ones in cl 369 are, to acts undertaken before the authority to act ceases. The National Committee was concerned to ensure that former personal representatives should be protected in circumstances where they act without knowledge that the limited grant has ceased to have effect under the automatic recognition provisions.[390]

3.307 The National Committee noted that in most cases the person who obtains the grant of representation in the domiciliary jurisdiction will be the same person who held the limited grant in this jurisdiction.[391] However, it did envisage the possibility that a different person could obtain the grant in the domiciliary jurisdiction[392] and considered that the person under the limited grant deserved some form of protection.[393]

3.308 While the National Committee decided to extend most of the protections contained in cl 369 to personal representatives under the limited grants, it decided not to protect the validity of a distribution to a purchaser in good faith. The National Committee did not consider it appropriate to protect a personal representative under a limited grant at the expense of either the personal representative under an automatically recognised grant from another Australian jurisdiction or a purchaser to

390. QLRC, Report 65 [38.139], [38.142].

391. QLRC, Report 65 [38.138].

392. QLRC, Report 65 [38.139].

393. QLRC, Report 65 [38.140]-[38.142].

whom the property had been sold under the limited grant.[394] In particular, it considered that the former personal representative was in a better position than the purchaser to ensure that no further grant had been made and that the former personal representative could avoid the risk altogether by seeking a grant in the Australian jurisdiction in which the deceased died domiciled.[395]

394. QLRC, Report 65 [38.144].

395. QLRC, Report 65 [38.145].

Chapter 4.

Personal representatives

PART 1 ACCOUNTABILITY

400 Rights and liabilities of administrators

(1) A person to whom the Supreme Court makes a grant of letters of administration of a deceased person's estate has the same rights and liabilities, and is accountable in the same way, as the person would be if the person were the deceased's executor.

Note—

See section 339 for the accountability of executors and administrators by representation.

(2) Subsection (1) is subject to any condition or limitation of the grant of letters of administration.

4.1 This provision assimilates the rights, liabilities and accountabilities of administrators with those of executors, subject to any restrictions contained in the letters of administration. It is based on s 50 of the *Succession Act 1981* (Qld). The equivalent NSW provision is s 14 of the *Imperial Acts Application Act 1969* (NSW).

4.2 These provisions derived originally from old English statutes of 1357 and 1685.[1] Such provisions are of long standing and the presence of such a provision in the model legislation has not been challenged.[2]

PART 2 DUTIES

401 General duties

(1) A personal representative has the following general duties—

(a) to collect the deceased person's real and personal estate and administer it according to law;

(b) if the personal representative is appointed under a grant of representation—to deliver up the grant of

1. 31 Edward III St 1 c 11 (1357) and 1 James II c 17 (1685) s 6.
2. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [11.4]-[11.6].

representation to the Supreme Court, when required to do so by the court;

(c) to distribute the deceased person's estate, subject to its administration, as soon as practicable.

(2) Subsection (1) does not limit any other duty to which a personal representative may be subject under an Act, at law or in equity.

4.3 This clause sets out the general duties of a personal representative, namely, to collect the deceased's property, administer it according to law and distribute it as soon as practicable and, if he or she is appointed under a grant of representation, to deliver up that grant when required to do so by the Court.

4.4 The provisions are based on s 52(1)(a), (c) and (d) of the *Succession Act 1981* (Qld). There are no equivalent provisions in NSW.

4.5 The Queensland provisions upon which cl 401(1)(a) and (b) are based[3] were derived from provisions in s 25 of the *Administration of Estates Act 1925* (Eng). The English provisions were enacted upon the abolition of administration bonds in that jurisdiction to serve as a simple, clear statement of the duties of an administrator that would previously have been set out in an administration bond.[4] Currently, in NSW, an administration bond, if entered into, requires the proposed administrator to covenant to pay a certain amount if, amongst other things, he or she:

- "does not collect, get in and administer the estate according to law";
- "does not pay out of the estate the just debts of the deceased";
- prefers any debt of the deceased to him or her; and
- does not verify, file (and pass) accounts relating to the estate, depending on the circumstances of the grant, within 12 months of the grant or such time as the Court may order.[5]

The model legislation proposes the abolition of any requirement for administration bonds and sureties.[6]

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3. *Succession Act 1981* (Qld) s 52(1)(a), (c).
4. England and Wales, Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report 31 (1970) [10]-[11].
5. *Supreme Court Rules 1970* (NSW) sch F form 102.

4.6 The National Committee considered that, while the statement of duties of a personal representative would be well-known to lawyers and professional personal representatives, the provisions in cl 401 would serve to emphasise the importance of the duties and also bring them to the attention of lay personal representatives.[7]

4.7 The Queensland Law Reform Commission originally recommended the provision upon which cl 401(1)(c) is based[8] as a statement, in positive terms, of the provision in the *Statute of Distributions of 1670* (Eng)[9] that an administrator in an intestacy was not under a duty to distribute the estate less than a year after the deceased's death.[10]

402 Providing information

(1) A personal representative has a duty, whenever required by the Supreme Court, to do any or all of the following—

(a) file a statement of the assets and liabilities of the deceased person's estate, whether situated within this jurisdiction or outside this jurisdiction, including outside Australia;

(b) file, or file and have approved by the Supreme Court, the personal representative's accounts of the administration of the deceased person's estate.

Notes—

1 For the effect of the Supreme Court approving a personal representative's accounts, see section 429(2).

2 For a personal representative's ability to apply to the Supreme Court to have his or her accounts approved, see section 428.

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6. See cl 617.
7. QLRC, Report 65 [11.19].
8. *Succession Act 1981* (Qld) s 52(1)(d).
9. 22 & 23 Charles II c 10 (1670).
10. Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978) ("QLRC, Report 22") 36. The National Committee has, however, decided that there is no need to enact a provision to the effect of *Succession Act 1981* (Qld) s 52(1A) which preserves any role or practice deriving from the principle of the executor's year: QLRC, Report 65 [11.251].

(2) The Supreme Court may require a personal representative to do a thing mentioned in subsection (1)(a) or (b) if the court considers it necessary in a particular case.

4.8 This clause allows the Court, if it thinks it necessary in the circumstances, to require a personal representative to file a statement of assets and liabilities wherever situated and/or file or file and have approved by the Court the accounts of the administration. It also places a duty on the personal representative to carry out these requirements. It derives from s 52(1)(b) of the *Succession Act 1981* (Qld).

4.9 The provisions cover both personal representatives who are operating under a grant of representation and personal representatives who are not operating under a grant,[11] for example, an executor appointed under a will who has not sought a grant.[12]

4.10 The provisions also cover, by force of cl 364(2), those who have successfully applied to the Court to reseal a foreign grant.[13]

Statement of assets and liabilities

4.11 In allowing the Court the discretion to require a statement of assets and liabilities, the National Committee considered that the cost and inconvenience involved in preparing such a statement should only be incurred when there is a particular reason for requiring it.[14] However, it should be noted that personal representatives are still required to maintain the necessary records of their administration under cl 403.

4.12 NSW currently has quite detailed provisions requiring an applicant for a grant of administration to file an inventory of assets and liabilities in court,[15] and imposing a continuing duty of disclosure with respect to subsequently discovered assets and liabilities.[16] However, the assets covered by these provisions are thought to be only those located in

11. See para 4.133-4.135.
12. QLRC, Report 65 [11.79], [11.153].
13. QLRC, Report 65 [11.96].
14. QLRC, Report 65 [11.77].
15. *Probate and Administration Act 1898* (NSW) s 81A(1) and *Supreme Court Rules 1970* (NSW) pt 78 r 24 and r 24A. See also *Probate and Administration Act 1898* (NSW) s 85(1), (5).
16. *Probate and Administration Act 1898* (NSW) s 81A(2).

NSW.[17] Similar requirements exist in the *Supreme Court Rules 1970* (NSW) with respect to applications for resealing.[18] NSW also prohibits personal representatives from disposing of property that has not been disclosed to the Court.[19] The National Committee noted that such a requirement could operate only in the context of a mandatory requirement to file a statement of assets and liabilities. Such a provision would, therefore, be inconsistent with the discretion granted to the Court under cl 402(2).[20]

Accounts of the administration

4.13 NSW currently has provisions that differ substantially from those in cl 402 relating to the filing and passing of accounts in that they require certain categories of personal representative to verify and file, or verify, file and pass, accounts, including:

- a creditor of the estate;
- a guardian of a minor beneficiary;
- the personal representative of the estate where the whole, or a substantial part of the estate passes to one or more charities or public benevolent institutions; and
- a person not being a beneficiary or substantial beneficiary of the estate, selected at random by the Court.[21]

In addition, the Court can require any other person representative to provide accounts if it so orders.[22]

4.14 The National Committee, in recommending the inclusion of the accounts provisions in cl 402, acknowledged the importance of recognising the interests of people with an interest in the proper administration of the estate, but concluded that their interests were not best met by routinely requiring all personal representatives or particular categories of personal representatives to file, or file and pass, accounts. It considered that, even where the personal representative was a creditor of the estate, there would be at least one other person with an interest in the

17. R S Geddes, C J Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) 544.
18. *Supreme Court Rules 1970* (NSW) pt 78 r 28; sch F form 106 item 12-14.
19. *Probate and Administration Act 1898* (NSW) s 81B(1).
20. QLRC, Report 65 [11.80].
21. *Probate and Administration Act 1898* (NSW) s 85(1AA)(a)-(d).
22. *Probate and Administration Act 1898* (NSW) s 85(1AA)(e).

due administration of the estate to seek an appropriate order from the Court, if the circumstances required it.[23] The National Committee concluded that allowing the Court to order that accounts be filed, or filed and passed, only when the circumstances require it would avoid the cost and inconvenience of preparing formal accounts for estates that do not require such a course of action.[24] The National Committee emphasised that the requirement to file, or file and pass, accounts should be made only where there is a reason and should not be imposed on the basis of random selection as is currently the case in NSW.[25]

403 Maintaining documents

> A personal representative must keep the documents necessary to enable the personal representative to comply with the duty mentioned in section 402 for 3 years after the administration of the deceased person's estate is complete.
>
> ***Note—***
>
> *See section 615 for a beneficiary's right to access particular documents.*

4.15 This clause requires a personal representative to keep, for three years after the administration of the estate is complete, the documents necessary to comply with any requirement to file, or file and pass a statement of assets and liabilities or accounts of the administration.

4.16 The current law in NSW is that it is a personal representative's duty "to render accounts when properly called upon and to be constantly ready so to do".[26]

4.17 In recommending this provision, the National Committee acknowledged that the duty under cl 402 to file statements and accounts when required to do so would encompass a duty to keep the necessary records. However, it considered it desirable to include an express statement of the duty to keep the necessary records in order to make lay personal representatives aware of this requirement and, thus, reduce the

23. QLRC, Report 65 [11.148].
24. QLRC, Report 65 [11.149].
25. *Probate and Administration Act 1898* (NSW) s 85(1AA)(d).
26. *Re Craig* (1952) 52 SR (NSW) 265, 267. See also *Freeman v Fairlie* (1817) 3 Mer 24, 43; 36 ER 10, 17; *Pearse v Green* (1819) 1 Jac & W 135, 140; 37 ER 327, 329.

possibility of compromising their ability to comply with a court order because of failure to maintain the necessary documents.[27]

4.18 In recommending that the personal representative be under a duty to maintain records for three years after the completion of the administration, the National Committee noted that some personal representatives choose to maintain documents for a longer period, having regard to the limitation periods that apply to some causes of action against personal representatives and trustees.[28]

PART 3 FAILURE TO PERFORM DUTIES

404 Remedy if personal representative fails to perform duties

(1) If a personal representative fails to perform his or her duties as personal representative, the Supreme Court may, on the application of any person aggrieved by the failure, make any order it considers appropriate.

(2) Without limiting subsection (1), the court may make any or all of the following orders—

(a) an order for damages;

(b) an order requiring the personal representative to pay interest on any amount under the personal representative's control;

(c) an order for the costs of the application.

4.19 This provision allows the Court to make any order it considers appropriate on application by a person aggrieved by a personal representative's failure to perform his or her duties. It is based on s 52(2) of the *Succession Act 1981* (Qld), however, expanded to apply to any failure to perform any of the duties of a personal representative and not just the duties imposed by the model legislation.[29]

4.20 The National Committee noted that, despite, the widening of the Court's power, the Court would still retain its discretion under s 85 of the *Trustee Act 1925* (NSW) to relieve a personal representative from personal

27. QLRC, Report 65 [11.181].

28. QLRC, Report 65 [11.188]. See, eg, *Limitation Act 1969* (NSW) s 47-50.

29. QLRC, Report 65 [14.15].

liability if the Court considers that he or she "acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which [he or she] committed the breach".[30]

4.21 The Queensland Law Reform Commission, in its 1978 report, observed that such a provision was "probably unnecessary, apart from the provision for the payment of interest which may be desirable and which should be expressly stated".[31] The National Committee has, however, concluded that such a provision is "a useful provision, as it enables the court to make a wide range of orders in circumstances where a personal representative has not performed his or her duties".[32] For example, the Court could award damages against a personal representative for failure to provide a beneficiary access to information under cl 615.[33]

405 Relief from liability for failing to maintain documents

If it appears to the Supreme Court that a personal representative—

(a) may be liable for a breach of statutory duty because of a failure to comply with section 403; but

(b) has acted honestly and reasonably and ought fairly to be excused for the breach;

the court may relieve the personal representative either entirely or partly from liability for the breach.

4.22 This clause allows the Court to relieve a personal representative from liability for failure to maintain documents as required by cl 403 if the Court considers that he or she has "acted honestly and reasonably and ought fairly to be excused for the breach".

4.23 This provision reflects the wording in s 85 of the *Trustee Act 1925* (NSW). The National Committee recommended its inclusion in the model bill to "avoid any doubt about whether the provisions in the trustee

30. QLRC, Report 65 [14.16].

31. QLRC, Report 22, 36.

32. QLRC, Report 65 [14.13]. See, eg, *Re Hill* (unreported, Queensland Supreme Court, Carter J, 17 June 1988).

33. QLRC, Report 65 [11.210].

legislation would apply to a personal representative who failed to maintain the relevant documents".[34]

PART 4 POWERS

406 Real and personal estate

(1) A personal representative—

(a) represents the deceased person in relation to his or her real and personal estate; and

(b) has, in relation to the real and personal estate, from the deceased's death—

(i) all the powers exercisable by an executor in relation to personal estate; and

(ii) all the powers conferred on personal representatives by [insert local equivalent of the *Trusts Act 1973* (Qld)].

(2) The Supreme Court may confer on the personal representative any further powers for the administration of the deceased's estate that the court considers appropriate.

(3) If there is more than 1 personal representative of a deceased person, the powers of the personal representatives must be exercised by them jointly.

4.24 This provision sets out the general powers of a personal representative, assimilating them to all the powers:

- exercisable by an executor in relation to personal estate in relation to both the real and personal estate of the deceased; and
- conferred on personal representatives by the *Trustee Act 1925* (NSW).

Where there is more than one personal representative the powers must be exercised jointly.

4.25 This provision also allows the Court to confer on a personal representative such further powers as the Court considers appropriate for the administration of an estate.

34. QLRC, Report 65 [11.191].

Powers in relation to real and personal estate

4.26 Paragraph 406(1)(a) and cl 406(1)(b)(i) both derive from part of s 49(1) of the *Succession Act 1981* (Qld). Together, they ensure that the personal representative has the same powers in relation to both the real and personal estate of the deceased and remove any remaining distinctions between executors and administrators.[35]

4.27 NSW currently has a provision that gives an executor the same rights and imposes the same duties with respect to the real estate that executors had previously had with respect to personal estate.[36] However, no provision in NSW assimilates the office of administrator with that of executor.

4.28 Provisions such as those in cl 406(1)(a) and (2)(b)(i) are necessary because, historically:

- personal representatives' powers were only exercisable in relation to personal property as the real property of a deceased person did not vest in the personal representative but rather in the devisee under a will or in the heir-at-law under an intestacy;[37] and
- executors had extensive powers to deal with the deceased's personal estate at general law whereas administrators had more limited powers because of the different origins of the office.[38]

The provisions, therefore, by referring to the executor's powers at general law in relation to personal estate, avoid the need to list such powers specifically in relation to real property in an estate.[39]

4.29 In relation to the assimilation of the offices of executor and administrator, the National Committee has noted that there are limitations. For example, unlike an executor, an administrator cannot exercise any powers before the grant of representation and some administrators may receive only a limited grant.[40]

35. QLRC, Report 65 [12.26].
36. *Probate and Administration Act 1898* (NSW) s 48.
37. QLRC, Report 65 [12.3].
38. QLRC, Report 65 [12.2]-[12.4].
39. QLRC, Report 65 [12.7].
40. QLRC, Report 65 [12.11], [12.28]. See also QLRC, Report 22, 32-33.

Personal representatives' powers under the Trust Act

4.30 Sub-paragraph 406(1)(b)(ii) derives from the part of s 49(1) of the *Succession Act 1981* (Qld) that relates to personal representatives' powers under the *Trusts Act 1973* (Qld). It confirms that personal representatives can exercise the powers conferred under the NSW equivalent, the *Trustee Act 1925* (NSW), in particular those in relation to investment and property transactions under Part 2 Division 2.

4.31 Commentary on the Queensland provision has suggested that, while the powers appear to be very extensive, they are effectively limited to the particular purpose of administering the estate and should, therefore, not be used in a way that would impede the distribution, for example, by investing funds for a lengthy term.[41]

Joint exercise of powers

4.32 Clause 406(3) derives from s 49(4) of the *Succession Act 1981* (Qld). The Queensland Law Reform Commission, in originally proposing s 49(4), noted that third parties were "rightly reluctant" to deal with only one executor in situations where there was more than one executor. The Commission also commented that the new provision would not require every executor to perform every act since some executors could easily authorise another to act as their agent.[42]

4.33 While noting the potential for practical difficulties, the National Committee considered that personal representatives should be required to act jointly because this would:[43]

- create certainty, especially about the manner in which administrators must exercise their powers;[44]
- potentially provide some additional protections for beneficiaries; and

41. A A Preece, *Lee's Manual of Queensland Succession Law* (6th ed, Law Book Company, 2007) [9.140], [9.160].
42. QLRC, Report 22, 33.
43. QLRC, Report 65 [12.63].
44. For a discussion of some of the uncertainty surrounding the powers of personal representatives, see: R A Sundberg, "Powers of One of Several Personal Representatives" (1985) 59 *Australian Law Journal* 649; *Exception Holdings Pty Ltd v Albarran* (2005) 223 ALR 487 [20]-[27].

- be consistent with the requirement that trustees act jointly[45] (this is especially important in light of the fact that some personal representatives will continue to act as trustees).

4.34 In NSW, care will need to be taken that this model provision does not conflict with the provisions dealing with situations where the NSW Trustee is appointed and acts jointly with any other person in the administration of an estate.[46]

Court may grant additional powers

4.35 Clause 406(2) is based on s 49(5) of the *Succession Act 1981* (Qld). In NSW, the Court can already extend the powers conferred on executors and administrators in certain circumstances under s 81 of the *Trustee Act 1925* (NSW).

4.36 The National Committee considered a specific provision of this sort desirable to make it clear, in the model legislation, that the Court can confer on a "personal representative" such further powers as it considers appropriate for the administration of the estate.[47]

4.37 This provision will also render unnecessary s 4 of the *Administration (Validating) Act 1900* (NSW) which grants the Court power to authorise an administrator or an executor of a partially intestate estate to "sell, mortgage, or lease all or any of the real estate of the deceased person".

407 On the making of a grant of representation

(1) On the making of a grant of representation, only a personal representative to whom the grant is made may—

(a) exercise the powers of a personal representative; and

(b) bring actions or otherwise act as personal representative without the Supreme Court's consent.

(2) The personal representative's powers relate back to, and are taken to have arisen on, the deceased person's death as if the making of the grant happened immediately after the deceased's death.

45. *Sky v Body* (1970) 92 WN (NSW) 934, 935.

46. *NSW Trustee and Guardian Act 2009* (NSW) s 15.

47. QLRC, Report 65 [12.36]-[12.37].

(3) Subsections (1) and (2) are subject to the terms of the grant.

4.38 This clause confirms two things that occur in relation to the standing of a personal representative when the Court makes a grant of representation. First, that only a personal representative who has the grant of representation may act as personal representative of an estate. Secondly, that, upon the making of the grant, the personal representative's powers relate back to the deceased's death.

Only personal representative with grant may act

4.39 Sub-clause 407(1) is based on s 49(2) of the *Succession Act 1981* (Qld). It is particularly intended to make clear that a person who is named as an executor in a will, but who does not seek a grant, cannot act as a personal representative once the court has made a grant of representation to another person.[48] This provision is necessary because of the model bill's recognition of informal administration where a person named in a will may act as executor without a formal grant.[49]

4.40 This provision is also consistent with cl 202 which provides for the vesting of the estate in the person to whom the Court has made a grant of representation.[50]

Relation back of powers of personal representative

4.41 Sub-clause 407(2) is based on s 49(3) of the *Succession Act 1981* (Qld) and is intended to ensure that the powers of a personal representative with respect to the estate relate back to the deceased's death.[51] It has been included for consistency with cl 206(2) which relates back to the deceased's death the title to property that has vested in a personal representative.[52]

4.42 No other Australian jurisdiction provides for the relation back of a personal representative's powers.

408 Carrying on a business

(1) This section applies if, at the time of a person's death, the person is engaged in carrying on a business.

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48. QLRC, Report 65 [12.45]-[12.46]. See QLRC, Report 22, 33.
49. See Chapter 4 part 11; para 4.133-4.135.
50. QLRC, Report 65 [12.39].
51. QLRC, Report 65 [12.27].
52. QLRC, Report 65 [12.12]. See also QLRC, Report 22, 32.

(2) Subject to any other Act, it is lawful for the deceased person's personal representative to continue to carry on the business for—

(a) the period, up to 2 years from the person's death, necessary or desirable for the winding up of the business; or

(b) the further period or periods that the Supreme Court approves.

(3) For the purpose of carrying on the business, the personal representative may do any of the following—

(a) use any part of the deceased's estate that is reasonably necessary;

(b) increase or reduce, as necessary, usage of the estate under paragraph (a);

(c) purchase stock, machinery, implements and chattels;

(d) employ the managers, agents, workers and others the personal representative considers appropriate;

(e) at any time, enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the deceased's death or at any time after;

(f) enter into share-farming agreements.

(4) For subsection (3)(e), it does not matter that the personal representative was a partner of the deceased in his or her own right.

(5) The personal representative or a beneficiary of the deceased's estate may apply to the Supreme Court for leave to carry on the business at any time, whether or not any previous authority to carry on the business has ended.

(6) For subsection (5), the Supreme Court may make the order, including an order subject to conditions, it considers appropriate.

(7) Nothing in this section affects any other authority to do the acts authorised to be done under this section.

(8) If the deceased's estate is being administered under the deceased's will, this section is subject to a contrary intention appearing in the will.

4.43 This clause makes special provision, subject to a contrary intention in the will, for a personal representative to carry on a business that the deceased was engaged in when he or she died for the purpose of winding that business up. In such circumstances, there is no need for personal representatives to apply to the Court to postpone the realisation of an estate under cl 410.

4.44 In NSW, s 5 of the *Administration (Validating) Act 1900* (NSW) allows the Court to postpone the sale of any real property in a wholly intestate estate or that is subject to a partial intestacy in order to allow the personal representative to carry on the deceased's "trade, business or occupation" on the property subject to such conditions as the Court sees fit to impose. With respect to property that is used for business purposes but that is not subject to an intestacy, the law is currently less simple. The power to postpone the sale of trust property[53] has been held to imply a power in the personal representatives to carry on a deceased's business.[54] At general law, a personal representative's power to carry on the deceased's business is limited to such activities as are necessary for the sole purpose of realising it.[55] Under the *Trustee Act 1925* (NSW), the Court may, where a trustee (including a personal representative) does not have the necessary power to manage an estate, confer such powers on personal representatives as the Court may think fit, including the power to postpone the sale of property and to carry on any business during the period of the postponement.[56] The model provision, by contrast, gives the personal representative specific powers in relation to carrying on a business of the deceased without the need to refer to the Court for at least two years following the deceased's death.[57]

4.45 The provisions in this clause are generally based on s 55 of the *Trustees Act 1962* (WA). In importing provisions to the effect of the Western Australian provision into the model legislation, the National Committee considered that, while it would be ideal to have provisions relating to the carrying on of a business that applied to both personal representatives and trustees, specific provisions should be included in the

53. *Trustee Act 1925* (NSW) s 27B(1).

54. *Re Hammond* (1903) 3 SR (NSW) 270, 272.

55. *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324.

56. *Trustee Act 1925* (NSW) s 81(2)(b), (c).

57. QLRC, Report 65 [11.263].

model legislation because of the differences in the relevant provisions in trustee legislation of the various Australian jurisdictions.[58]

4.46 Sub-clause 408(2) has been drafted to make it clear that the business should only be continued for as long as is necessary or desirable to wind it up. The period of two years, with leave to apply to the Court, has been set to avoid disputes with beneficiaries about what time, beyond two years, is necessary or desirable for the winding up of the business.[59]

4.47 Paragraph 408(3)(a), in permitting the personal representative to use any part of the estate that is "reasonably necessary" for carrying on the business, departs from s 55(2)(a) of the Western Australian Act which allows the use of any part of the estate "that is subject to the same trusts".[60]

409 Subscribing to a relevant fund if carrying on a business

(1) This section applies if a personal representative is carrying on a business under section 408.

(2) The personal representative may subscribe to any relevant fund in connection with the business that the personal representative considers would be prudent to subscribe to if he or she were acting for himself or herself.

(3) Subscriptions must be paid from the business income.

(4) Nothing in this section affects any other authority the personal representative may have to subscribe to a relevant fund.

(5) If the deceased's estate is being administered under the deceased's will, this section is subject to a contrary intention appearing in the will.

(6) In this section—

relevant fund, in connection with a business, means any fund created for objects or purposes in support of any business of a similar nature and subscribed to by other persons engaged in a similar business.

58. QLRC, Report 65 [11.274].
59. QLRC, Report 65 [11.279].
60. QLRC, Report 65 [11.280].

4.48 Clause 409 allows a personal representative to subscribe to relevant trade and other associations for the purposes of carrying on a business under cl 408. It is based on s 55(5) of the *Trustees Act 1962* (WA).

410 Postponing realisation of estate

(1) A personal representative may apply to the Supreme Court for an order to postpone the realisation of the deceased person's estate.

(2) The Supreme Court may, if it considers it appropriate to do so, order that the realisation of the estate be postponed for the period it decides.

4.49 This clause allows the Court, on a personal representative's application, to postpone the realisation of an estate. Such an application would be necessary in circumstances that required a postponement other than for the carrying out of a business under cl 408.

4.50 In NSW, under the *Trustee Act 1925* (NSW), the Court may, where a trustee (including a personal representative) does not have the necessary power to manage an estate, confer such powers on personal representatives as the Court may think fit, including the power to postpone the sale of property in the estate.[61]

4.51 This clause is based on s 43(2)(a) of the *Administration and Probate Act 1935* (Tas). The National Committee noted that there will inevitably be circumstances where it is in the "best interests" of an estate for the personal representative to postpone the realisation of assets.[62]

4.52 In importing provisions to the effect of the Tasmanian provision into the model legislation, the National Committee considered that, while it would be ideal to have provisions relating to the postponement of the realisation of an estate that applied to both personal representatives and trustees, specific provisions should be included in the model legislation because of the differences in the relevant provisions in the trustee legislation of the various Australian jurisdictions.[63]

61. *Trustee Act 1925* (NSW) s 81(2)(b).
62. QLRC, Report 65 [11.274].
63. QLRC, Report 65 [11.274].

411 Ratifying particular acts

> A personal representative may ratify and adopt any act done on behalf of the deceased person's estate by someone else if the act was one that the personal representative might properly have done himself or herself.

4.53 This clause allows a personal representative, upon obtaining a grant, to ratify any act done on behalf of the estate by someone acting informally (that is, without a grant),[64] so long as the act is one that the personal representative might properly have done.

4.54 It is based on s 54(3) of the *Succession Act 1981* (Qld). There are no equivalent provisions in any other Australian jurisdiction. However, the Law Reform Commission of WA has recommended the adoption of a similar provision in WA.[65]

PART 5 OBTAINING THE SUPREME COURT'S ADVICE OR DIRECTIONS

412 Applying to Supreme Court for advice or directions

(1) A personal representative may apply to the Supreme Court for advice or directions about—

  (a) property in the deceased person's estate, or the management or administration of the property; or

  (b) the exercise of a power or discretion vested in the personal representative.

(2) The application must—

  (a) state all relevant facts; and

  (b) be served on each person having an interest in the application.

(3) However, the Supreme Court may dispense with service on a person mentioned in subsection (2)(b) if it considers it appropriate.

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64. See para 4.133-4.135.

65. Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.10].

(4) This section does not limit any other right the personal representative may have to seek the advice or direction of the Supreme Court under another law.

(5) In this section—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes trustee.

4.55 This clause allows a personal representative to apply to the Supreme Court for advice or directions in relation to the administration of an estate. It is based on s 96 of the *Trusts Act 1973* (Qld). The provisions that offer protection to a personal representative who acts in accordance with such advice or directions are contained in cl 414.

4.56 At general law, a personal representative who does not know what course of action to take is always entitled to seek the opinion of the Court as to what to do. The personal representative is then protected from claims of beneficiaries or creditors with respect to the course of action adopted.[66] In NSW, the rules of court have set out the procedure for seeking the Court's determination of questions arising in the administration of an estate.[67] Under trustee legislation, a trustee (including a personal representative) may apply for the Court's opinion, advice or direction concerning any question regarding the management or administration of the trust or the interpretation of the trust instrument. A trustee acting on such opinion, advice or direction is deemed to have discharged his or her trustee's duty with regard to the matter.[68]

4.57 The National Committee acknowledged that these other mechanisms are available for seeking the Court's advice, but considered that an express provision in the model legislation would alert personal representatives and trustees to the existence of the Court's advisory jurisdiction.[69] The National Committee also acknowledged that, while these procedures may not be suitable for all questions that may arise in the administration of an estate, they may provide a convenient way of

66. *Re Atkinson* [1971] VR 612, 615. See also *Re Lemon Tree Passage and Districts RSL and Citizens Club Co-operative Ltd* (1987) 11 ACLR 796, 799.

67. *Uniform Civil Procedure Rules 2005* (NSW) r 54.3.

68. *Trustee Act 1925* (NSW) s 63.

69. QLRC, Report 65 [20.85].

obtaining the Court's assistance where the question is a discrete one and the material facts are not in dispute.[70]

4.58 In NSW, the Court also currently has a limited power, in the case of a total or partial intestacy, to give directions about real estate, including its sale or management, and about the application of infants' shares.[71] The National Committee concluded that such a provision, already considered "redundant" by commentators[72] in light of the availability of other procedures in the rules of court and trustee legislation,[73] is unnecessary in light of the more general provisions contained in this model clause.[74]

4.59 The National Committee recommended the express inclusion of cl 412(4) to confirm that this model clause is not intended to limit a personal representative's or trustee's right to seek advice or directions under any other law, including the relevant trustee legislation.[75]

4.60 Sub-clause 412(5) includes trustee in the definition of personal representative. The National Committee recommended this provision to avoid any disputes about whether a person is acting in the capacity of a personal representative or whether he or she is acting as a trustee. Such disputes could arise from the fact that, in the normal course of an administration, a personal representative will become a trustee and that, in many cases, a will can also make a personal representative the trustee of a testamentary trust.[76]

4.61 The National Committee decided not to include provisions dealing with the extent to which anyone is bound by the Court's advice or directions, since the primary purpose of cl 412 and cl 414 is to protect a personal representative who acts in accordance with the advice or directions of the Court. It also considered that there are more suitable procedures available where a personal representative seeks a binding determination of the rights of beneficiaries and, therefore, did not seek to

70. QLRC, Report 65 [20.91].
71. *Probate and Administration Act 1898* (NSW) s 57.
72. R S Geddes, C J Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) 426.
73. See para 4.56.
74. QLRC, Report 65 [20.93]-[20.95].
75. QLRC, Report 65 [20.92].
76. QLRC, Report 65 [20.84].

overturn the Queensland Supreme Court's ruling[77] that an application under s 96 of the *Trusts Act 1973* (Qld) is not the proper means of seeking a determination on the construction of a will.[78]

PART 6 PROTECTION FOR PERSONAL REPRESENTATIVES

413 Definitions for part

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes trustee.

4.62 These definitions are the same as those in cl 412(5). They are necessary for provisions that follow.

414 Acting in accordance with Supreme Court advice or direction

(1) This section applies if a personal representative is acting in accordance with the advice or direction of the Supreme Court under section 412.

(2) The personal representative is taken, in relation to the personal representative's own liability, to have discharged his or her duty as personal representative in the subject matter of the advice or direction.

(3) Subsection (2) applies even if the advice or direction is later varied or set aside.

(4) This section does not protect the personal representative from liability for an act done in accordance with the advice or direction if the personal representative commits a fraud or wilfully conceals or misrepresents a material matter—

(a) in obtaining the advice or direction; or

(b) in agreeing, either expressly or impliedly, with the Supreme Court in giving the advice or in making the order giving the direction.

77. *Re Petersen* [1920] St R Qd 42, 47; *Re Kirkegaard* [1950] St R Qd 144, 146.

78. QLRC, Report 65 [20.90].

(5) In this section—

varied or set aside includes invalidated, overruled and declared to be of no effect.

4.63 This clause protects a personal representative from liability as a personal representative if he or she acts in accordance with the advice or direction of the Court that has been sought under cl 412, so long as he or she has not acted fraudulently in obtaining the Court's advice.

4.64 It is based on s 97 of the *Trusts Act 1973* (Qld)[79] and follows on from cl 412, which is based on s 96 of the *Trusts Act 1973* (Qld). A provision in similar terms may be found in s 63(1) of the *Trustee Act 1925* (NSW).

415 Advertising intention to distribute

(1) A personal representative intending to distribute the deceased person's estate may give notice of that intention—

(a) by advertising—

(i) in a newspaper circulating throughout this jurisdiction and sold at least once each week; or

[(ii) on the Supreme Court's website in the way prescribed under the rules of court]; and

(b) in the other ways the Supreme Court would direct notice to be given in an action for administration.

(2) The notice must require any person having a claim to, or against, the estate, whether as beneficiary or creditor or otherwise, to send particulars of the person's claim to the personal representative not later than the date stated in the notice (the closing date).

(3) For the purposes of subsection (1)(a)(i), the notice is sufficient if given in the approved form.

(4) The closing date must be at least 2 months after the date of publication of the notice.

(5) After the closing date, the personal representative may distribute the estate having regard only to the claims, whether formal or not, of which the personal representative has notice at the time of the distribution.

79. QLRC, Report 65 [20.89].

(6) For subsection (5), it does not matter whether the personal representative has notice of a claim because it has been made in response to the advertising or has otherwise come to the personal representative's notice.

(7) The personal representative is not liable to any person of whose claim the personal representative had no notice at the time of the distribution for any of the estate distributed after the closing date.

(8) This section does not limit any other protection the personal representative may have in relation to the distribution of the estate.

(9) This section does not affect the right of a person to enforce a remedy for the person's claim against a person to whom a distribution of the estate has been made.

Note—

See sections 424 and 606.

(10) Subsection (9) does not limit section 424(6) or any other defence available, under an Act or at law or in equity, to the person to whom the distribution is made.

(11) In this section—

personal representative includes a person administering a deceased person's estate without a grant of representation.

Drafter's note*: Each jurisdiction should amend its trustee provisions to ensure consistency with this clause. See Trusts Act 1973 (Qld), s 67; Trustee Act 1925 (NSW), s 60 and Supreme Court Rules 1970 (NSW), pt 78, r 91; Trustee Act 1958 (Vic), s 33; Trustee Act 1925 (ACT), s 60; Trustee Act 1898 (Tas), s 25A; Trustee Act (NT), s 22; Trustee Act 1936 (SA), s 29; Trustees Act 1962 (WA), s 63.*

Drafter's note*: Section 47A of the Administration Act 1903 (WA) and equivalent provisions in the status of children legislation in Qld, Vic, Tas, NT and SA should be repealed.*

4.65 This clause sets out the procedures that a personal representative must follow, when he or she seeks to distribute an estate, in order to receive protection from liability to any person of whose claim he or she has no notice. The personal representative (whether acting under a grant or not) is protected provided he or she distributes the estate only after having:

- advertised that he or she intends to distribute the estate and requires any person having a claim to, or against, the estate to provide particulars of that claim; and
- waited at least 2 months (or such other longer period as may be advertised) since the publication of the advertisement.

4.66 In proposing this model clause, the National Committee concluded that there should be a specific provision of this sort because the distribution of the estate is one of the most important duties that a personal representative must undertake.[80] The National Committee was also of the view that the inclusion of specific provisions setting out the procedures to be followed was the "only viable way to achieve uniformity" in relation to these requirements.[81] It also considered that the inclusion of these specific provisions in the model legislation would create greater awareness among personal representatives about the availability of this mechanism for securing relief from liability with respect to unknown claims.[82]

4.67 The National Committee considered, but rejected, a proposal to require personal representatives to advertise their intention to distribute, noting that the incentive to advertise was obvious. It was noted that there are some cases where the expense of advertising would not be justified, for example, where the personal representative is also the sole beneficiary of the estate and would, as a beneficiary, still be open to claims by creditors.[83]

Application to personal representatives and trustees

4.68 This provision, by force of the definitions in cl 413, applies to both personal representatives and trustees and covers both property in the estate and property that is held on trust for a person because of his or her beneficial interest in the estate. The National Committee recommended this approach as being simpler and offering more certain protection to both personal representatives and trustees. In particular, it would avoid disputes about the status of some personal representatives in circumstances where they have also been appointed trustees of a

80. QLRC, Report 65 [21.54].
81. QLRC, Report 65 [21.55].
82. QLRC, Report 65 [21.56].
83. QLRC, Report 65 [21.163].

testamentary trust or have simply become trustees because of the stage of administration that they have reached.[84]

4.69 The National Committee considered cl 415(8) necessary to ensure that a personal representative can claim protection under any other law, including any relevant provisions of trustee legislation.[85] The National Committee also recommended that the relevant trustee provisions should be amended to be consistent with the notice provisions of this clause.[86]

Extension to personal representatives acting without a grant

4.70 Sub-clause 415(11) gives effect to the National Committee's decision to make the protection offered by cl 415 available to an executor named in a will who has not sought a grant of probate but who has assumed the duties of office, so long as that person follows the advertising and notice requirements.[87] In its discussion paper, the National Committee observed:

> It is arguably in the interests of all parties for a person administering an estate – whether or not pursuant to a grant – to be able to "draw out" claims against the estate, rather than for those claims to be made, after the distribution of the estate, against a person who might not be able to satisfy them.[88]

The National Committee considered that the extension of the protection would be particularly advantageous in the case of estates of relatively small value.[89]

4.71 In NSW, it is currently not possible for a personal representative acting without a grant to take advantage of the procedure under s 92 of the *Probate and Administration Act 1898* (NSW).[90] However, the relevant

84. QLRC, Report 65 [21.186]-[21.187].

85. QLRC, Report 65 [21.185]. In NSW, these provisions are *Trustee Act 1925* (NSW) s 60.

86. QLRC, Report 65 [21.188].

87. QLRC, Report 65 [21.182].

88. New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) ("NSWLRC, DP 42") [10.34].

89. QLRC, Report 65 [21.183].

90. R S Geddes, C J Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) 608.

provisions in Queensland and Western Australia would appear to extend to an executor who is administering an estate without a grant.[91]

Manner of giving notice of an intention to distribute the estate

4.72 Paragraphs 415(1)(a) and (1)(b) set out the manner in which the personal representative must advertise his or her intention to distribute the estate. In addition to requiring the notice to be inserted in a newspaper circulating throughout the jurisdiction and sold at least once a week or on a dedicated, publicly searchable section of the Supreme Court's website,[92] the National Committee has recommended that the personal representative must give such other notices as the Court may direct in an administration action. This additional requirement, which appears in one form or other in some Australian jurisdictions,[93] will have effect depending on the circumstances of the case. For example, a personal representative may need to give notices in other jurisdictions if there are likely to be creditors or other claimants in those jurisdictions. The National Committee considered that this was preferable to a more prescriptive provision and observed that personal representatives could always apply to the Court for direction under cl 412.[94]

4.73 Currently, in NSW, a personal representative is merely required to advertise, if the deceased was resident in NSW when he or she died, "in a newspaper circulating in the district where the deceased resided" or, otherwise, "in a Sydney daily newspaper".[95] The National Committee has observed that a personal representative following this requirement cannot be deprived of the protection offered on the basis that the Court, in an administration suit, would have required publication of the notice in a wider area.[96]

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91. See QLRC, Report 65 [21.171]-[21.172].
92. As is the case in Victoria: "Probate Online Advertising System Home" (2009) Supreme Court of Victoria «https://online.justice.vic.gov.au/poas» at 28 August 2009.
93. See, eg, *Trustee Act 1925* (ACT) s 60(2); *Trusts Act 1973* (Qld) s 67(1); *Trustee Act 1958* (Vic) s 33(1)(a).
94. QLRC, Report 65 [21.140].
95. *Supreme Court Rules 1970* (NSW) pt 78 r 91(1).
96. QLRC, Report 65 [21.25].

Approved form of advertisement

4.74 Sub-clause 415(3), in stating that an advertisement in the "approved form" is sufficient to meet the requirements of cl 415(1)(a)(ii), is based on s 67(2) of the *Trusts Act 1973* (Qld).

Time limit for claims

4.75 Under cl 415(2) and (5), the notice is required to state that claims should be made not later than at least two months after the notice's publication. After this date, under cl 415(5), the personal representative may distribute having regard only to the claims of which he or she has notice at the time. This, therefore, includes any claims made between the advertised date and the actual distribution.

4.76 Currently, in NSW, for the protection to take effect, the personal representative must distribute the estate at least six months after the deceased's death and the date specified in the notice of intended distribution must be at least 30 days after publication.[97]

Claims to which the personal representative must have regard

4.77 Sub-clause 415(5), which allows the personal representative to distribute the estate having regard to such claims, whether formal or not, of which he or she has notice at the time, is generally based on s 67(3) of the *Trusts Act 1973* (Qld).

4.78 Sub-clause 415(6) confirms that the personal representative may receive notice of claims by any means and that the notice need not come to the personal representative's attention only by way of response to the advertisement. This model provision draws on a Tasmanian provision[98] which states that the claims of which the personal representative has notice may be filed in accordance with the advertisement or otherwise.[99] However, it goes further than this, by confirming that beneficiaries, of whom the personal representative is already aware, do not need to give notice of their claim at all.

Claims against a person to whom the property has been wrongly distributed

4.79 The National Committee has observed that, because the purpose of this clause is to "facilitate the efficient administration of estates", it only affects the rights of claimants against personal representatives or trustees.

97. *Probate and Administration Act 1898* (NSW) s 92(1)(a), (c).

98. *Administration and Probate Act 1935* (Tas) s 55.

99. QLRC, Report 65 [21.153].

However, it considered it desirable to follow s 67(4)(a) of the *Trusts Act 1973* (Qld) and confirm that this clause does not affect the right of a claimant to any remedy against a person to whom the property in the estate has been distributed.[100] Sub-clause 415(9) achieves this outcome. This provision, and similar ones in other Australian jurisdictions, are generally based on part of s 29 of *Lord St Leonard's Act*.[101] The National Committee favoured the use of the term "any remedy" as this would cover personal actions in equity as well as the right to trace money or property.[102] The equivalent provision in NSW[103] refers only to the narrower "right to follow assets".[104]

4.80 The National Committee considered cl 415(10) necessary to make it clear that the right to enforce any remedy against a person to whom a wrongful distribution has been made is subject to the defence of change of position established under cl 424(6)[105] or any other defence that may be available.[106] Examples of such defences, with respect to the right to trace property, include laches, acquiescence and being a purchaser in good faith for value without notice of the wrongful distribution.[107]

PART 7 BARRING OF CLAIMS

4.81 Normally, when a personal representative comes to know of a claim (under cl 415, or otherwise), he or she can set a sum aside to meet that claim and distribute the balance of the estate pending the resolution of the claim. Matters can, however, become complicated when the claim is for an unliquidated sum or is speculative. This can leave a personal representative with the choice of either delaying the distribution of the estate until the limitation period for the claim expires and, thereby, potentially depriving the beneficiaries of their entitlements for that

100. QLRC, Report 65 [22.51]-[22.52].

101. *Law of Property and Trustees Relief Amendment Act 1859* (Eng) 22 & 23 Vict c 35.

102. These are the two remedies, described, respectively, as "*in personam*" and "*in rem*" identified in *Re Diplock* [1948] Ch 465, 502, 536-537.

103. *Probate and Administration Act 1898* (NSW) s 95.

104. QLRC, Report 65 [22.52].

105. See para 4.108.

106. QLRC, Report 65 [22.53].

107. See H A J Ford and W A Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.3060], [18.3070]-[18.3090], [18.5010]-[18.5070] at 12 October 2009.

period, or compromising the claim. The strong pressure on personal representatives to compromise so that they can, at least, distribute the balance of the estate has led to suggestions that some claims against estates in these circumstances may almost amount to a "blackmailing proceeding".[108]

4.82 All Australian jurisdictions have sought to alleviate this problem by setting up procedures that a personal representative can follow so that a claim will be barred if the claimant does not take the required steps to enforce it within the specified period. The NSW provisions are contained in s 93 of the *Probate and Administration Act 1898* (NSW). Such provisions have been said to complement provisions such as cl 415 which establish procedures to invite notice of claims against an estate.[109] The clauses in this Part are, therefore, intended to complement the provisions in cl 415 and ensure that estates are administered expeditiously and are not unduly delayed by the actions, or lack of action, of claimants.[110] The National Committee has recommended that the provisions in this Part should be generally based on s 68 of the *Trusts Act 1973* (Qld).[111]

416 Application of part

This part does not apply to a claim—

(a) under the [insert local equivalent of the Succession Act 1981 (Qld), part 4]; or

(b) that is an application to revoke a grant of representation.

4.83 This clause provides that the barring of claims under Part 7 does not apply to a claim against the estate for family provision[112] or to an application to revoke a grant of representation.[113] It is based on the exception in s 68(5) of the *Trusts Act 1973* (Qld). This is a statutory statement of the position at general law that provisions about the barring

108. Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1911, 2023. See also *Ludwig v Public Trustee* (2006) 68 NSWLR 69, 77.

109. See QLRC, Report 65 [22.63].

110. QLRC, Report 65 [22.64], [22.96].

111. QLRC, Report 65 [22.98].

112. *Succession Act 2006* (NSW) Chapter 3.

113. See cl 301(1)(a).

of claims do not apply to claims against the personal representative's grant of representation.[114]

417 Definitions for part

In this part—

claim does not include a claim for which insurance is required to be, and is, maintained under an Act.

claimant includes each of the following—

(a) a creditor;

(b) a person who makes a claim as a beneficiary;

(c) a person who the personal representative has reason to believe may become a claimant.

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes trustee.

4.84 This clause sets out the definitions necessary for the operation of this Part.

4.85 The definition of "claim" has been included to accord with the exclusion, in s 68(1) of the *Trusts Act 1973* (Qld), of claims "in respect of which any insurance is on foot, being insurance required by any Act".[115] The provision was included in the Queensland Act because it was felt that cases under statutory insurance schemes, for example, motor accident cases, where the claim is, in reality, decided between the claimant and the insurance company, should not have any effect on the distribution of an estate.[116]

4.86 Paragraphs (a) and (b) of the definition of "claimant" derive from s 68(5) of the *Trusts Act 1973* (Qld).

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114. *Bramston v Morris* (Unreported, NSW Supreme Court, Powell J, 20 August 1993) 11. See also *Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115.

115. QLRC, Report 65 [22.98].

116. H A J Ford and W A Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16340] at 12 October 2009.

4.87 The definition of "personal representative" accords with the National Committee's view that the procedures under this Part should be available to trustees as well as personal representatives for the same reasons as those given with respect to cl 412(5) and cl 415.[117] The extension of the definition of "personal representative" to include a trustee means that the definition of "estate" must also include property held on trust for a person because of his or her beneficial interest in the estate.[118]

418 Requiring claimant to start a proceeding

(1) Subsection (2) applies if a personal representative does not accept a claim that has been made, or that the personal representative has reason to believe may be made—

(a) to, or against, the deceased person's estate; or

(b) against the personal representative personally because the personal representative is under a liability for which the personal representative is entitled to reimbursement out of the estate.

(2) The personal representative may serve on the claimant a notice requiring the claimant, within 6 months after the date of service of the notice, to start a proceeding to enforce the claim and to prosecute the proceeding with proper diligence.

***Drafter's note**: Provisions in jurisdictions that create special procedures for trustee companies are to be repealed [R 22-7]. See Public Trustee Act 1978 (Qld), s 131 and Trustee Companies Act 1968 (Qld), s 32; Public Trustee Act 1913 (NSW), s 34B and Probate and Administration Act 1898 (NSW), s 93(3) and (4); Trustee Companies Act 1984 (Vic), s 43; Public Trustee Act 1930 (Tas), s 58 and Trustee Companies Act 1953 (Tas), s 26; Public Trustee Act 1985 (ACT), s 33.*

4.88 This clause provides that a personal representative may serve a notice requiring a claimant to commence proceedings to enforce a claim.

4.89 Sub-clause 418(1), which is generally based on s 68(1) of the *Trusts Act 1973* (Qld), applies to a claim that the personal representative "does not accept". This is different to the provision in s 68(1) of the *Trusts Act 1973* (Qld) which refers to a claim that the personal representative

117. QLRC, Report 65 [22.97]. See para 4.57 and para 4.68-4.69.

118. QLRC, Report 65 [22.98].

"wishes to reject". The National Committee recommended the phrasing in the model provision to "cover those situations where a personal representative or trustee has not actually rejected a claim, but does not have sufficient information to accept the claim".[119]

4.90 Sub-clause 418(1) applies not only to a claim that has been made in response to an advertisement under cl 415 but also to any claim that the personal representative has reason to believe may be made. The National Committee considered this preferable to provisions, such as s 93(1) of the *Probate and Administration Act 1898* (NSW), that appear only to apply to claims that have been received following the placing of an advertisement under cl 415.[120]

4.91 The time period of six months in cl 418(2) and in cl 419, below, follows the period specified in the relevant provisions in the ACT, NT, Queensland, SA and Tasmania.[121] The current period in NSW is three months.[122]

4.92 The repeal of special provisions barring claims against public trustees or trustee companies is dealt with in the commentary to cl 419.[123]

419 Applying to Supreme Court to make orders

(1) At the end of the 6 month period, the personal representative may apply to the Supreme Court for an order under subsection (4).

(2) A copy of the application must be served on the claimant.

(3) The Supreme Court may make an order under subsection (4) if, on the hearing of the application, the claimant does not satisfy the Supreme Court that the claimant—

(a) has started a proceeding to enforce the claim; and

(b) is prosecuting the proceeding with proper diligence.

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119. QLRC, Report 65 [22.100].

120. QLRC, Report 65 [22.98].

121. *Administration and Probate Act 1929* (ACT) s 65(1); *Trustee Act* (NT) s 22(2); *Administration and Probate Act* (NT) s 97(1); *Trusts Act 1973* (Qld) s 68(1); *Trustee Act 1936* (SA) s 29(2); and *Trustee Act 1898* (Tas) s 25A(5).

122. *Probate and Administration Act 1898* (NSW) s 93(1) and (2).

123. See para 4.97.

(4) The Supreme Court may, by order—

(a) extend the period, or bar the claim (including for all purposes), or enable the estate to be dealt with without regard to the claim; and

(b) impose the conditions and give the directions, including a direction as to the payment of the costs of or incidental to the application, that the court considers appropriate.

(5) If a personal representative has served notices under section 418 on 2 or more claimants, the personal representative may seek orders against any or all of the claimants in a single application and the Supreme Court may make orders accordingly.

4.93 This clause, which follows on from cl 418, deals with the situation that arises once six months have elapsed and the claimant has not commenced proceedings or is not proceeding with proper diligence. It does two things. First, it allows the personal representative to apply to the Court for an order. Secondly, it sets out the orders that the Court may make.

4.94 The provisions are generally based on s 68(2)-(4) of the *Trusts Act 1973* (Qld). Sub-clauses 419(1) and (2) are based on s 68(2), cl 419(3) and (4) are based on s 68(3) and cl 419(5) is based on s 68(4).

4.95 Sub-clause 419(4), in setting out the orders that the Court may make, differs from the equivalent NSW provision. The model clause states that the Court may do one of three things (subject to such conditions as the Court considers appropriate), namely:

- extend the period for the claimant to commence proceedings;
- bar the claim; or
- enable the personal representative to deal with the estate without regard to the claim.

The NSW provision simply provides that the Court may bar the claim against the executor or administrator (subject to such conditions as the Court considers just and equitable) or "make such other order in respect of the application as it thinks just and equitable, having regard to the circumstances of the case".[124]

124. *Probate and Administration Act 1898* (NSW) s 93(2).

4.96 In empowering the Court to order the barring of claims only against the executor or administrator, the NSW provision simply allows the personal representative, in such circumstances, to distribute the estate without regard to the claim but does not prevent the claimant from proceeding against those to whom the estate has been distributed.[125] The current Queensland provision, in referring simply to an order "barring the claim", in addition to an order allowing the estate to be dealt with without regard to the claim,[126] leaves open the possibility that the claim could also be barred in relation to people to whom the estate has been distributed.[127] Paragraph 419(4)(a), however, departs from the Queensland provision by expressly stating that the Court may order that a claim be barred for "all purposes". The expression derives from s 30(3)(b) of the *Administration and Probate Act 1958* (Vic). The National Committee recommended its inclusion to "avoid any doubt about the extent of the court's power".[128]

4.97 In recommending this clause, the National Committee was strongly of the view that the barring of claims should occur only by order of the Court and not by any other procedure. It considered the barring of a claim, even if only against the personal representative or trustee, could significantly affect the claimant's rights, for example, if a beneficiary has dissipated the property in question.[129] The National Committee, therefore, did not recommend the inclusion of any provisions that bar claims (without the need for a Court order) against a personal representative who is the NSW Trustee or a trustee company simply because of a claimant's failure to commence proceedings.[130] It considered such provisions, including s 93(3)-(6) of the *Probate and Administration Act 1898* (NSW) "anomalous" and recommended their repeal.[131]

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125. See QLRC, Report 65 [22.86].
126. *Trusts Act 1973* (Qld) s 68(3)(a).
127. QLRC, Report 65 [22.88].
128. QLRC, Report 65 [22.101]. Notwithstanding the National Committee's view that the expression "barring the claim" in *Trusts Act 1973* (Qld) s 68(3)(a) would include an order barring the claim for all purposes.
129. QLRC, Report 65 [22.102].
130. QLRC, Report 65 [22.103].
131. QLRC, Report 65 [22.103]. The National Committee also recommended the repeal of *Public Trustee Act 1913* (NSW) s 34B. This provision does not appear to have been re-enacted in the *NSW Trustee and Guardian Act 2009* (NSW).

420 Contesting personal representative's right to indemnity

(1) Subsection (2) applies if a beneficiary of the deceased person's estate is not made a party to an application by a personal representative under this part.

(2) An order made by the Supreme Court on the application does not affect the beneficiary's right to contest the claim of the personal representative to be entitled to indemnify himself or herself out of the estate.

4.98 This clause protects a beneficiary's right to contest a personal representative's claim to indemnification out of the estate when that beneficiary was not a party to the personal representative's application under this Part. It is based on s 68(6) of the *Trusts Act 1973* (Qld).

421 Service

Without limiting the [insert local equivalent of the Acts Interpretation Act 1954 (Qld), section 39], a notice or application under this part may be served in any way directed by the Supreme Court.

4.99 This clause makes broad provision for the service of a notice under cl 418 or an application under cl 419, by allowing the Court to direct service "in any way" in addition to the usual service provisions that generally apply to proceedings. It derives from s 68(7) and (8) of the *Trusts Act 1973* (Qld). However, unlike the *Trusts Act* provisions, cl 421 simply refers to s 39 of the *Acts Interpretation Act 1954* (Qld). In NSW, the equivalent provision is in rule 10.5 of the *Uniform Civil Procedure Rules 2005* (NSW) which sets out the various methods of service.[132]

PART 8 WRONGFUL DISTRIBUTIONS

4.100 The clauses in this Part provide a procedure whereby a person who has suffered loss, because a personal representative has wrongfully distributed the estate, can seek a remedy against both the personal representative (so long as the personal representative is not protected under the advertising provisions in Part 6 of Chapter 4 or the barring of

132. *Interpretation Act 1987* (NSW) s 76 does not deal with service of documents generally, but merely makes provision for situations where "an Act or instrument authorises or requires any document to be served by post".

claims provisions in Part 7) and any person to whom the estate has been distributed.[133]

422 Application of part

This part applies if a personal representative wrongfully distributes a deceased person's estate.

423 Definitions for part

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes—

(a) a trustee; and

(b) a person who is administering a deceased person's estate without a grant of representation.

prescribed person means a person to whom a deceased person's estate has been wrongfully distributed.

4.101 This clause sets out the definitions necessary for the operation of this Part.

4.102 The definition of "personal representative" accords with the National Committee's view that the procedures under this Part should be available against trustees as well as personal representatives for the same reasons as those given with respect to cl 412(5) and cl 415.[134] The extension of the definition of "personal representative" to include a trustee means that the definition of "estate" must also include property held on trust for a person because of his or her beneficial interest in the estate.[135]

4.103 The definition of "personal representative" also includes a personal representative acting without a grant. This is consistent with cl 415(11).[136]

133. QLRC, Report 65 [22.54].

134. QLRC, Report 65 [22.54]. See para 4.57 and para 4.68-4.69.

135. QLRC, Report 65 [22.98].

136. See para 4.70-4.71.

424 Rights of persons suffering loss

(1) A person who suffers loss because of the wrongful distribution may start a proceeding to enforce a remedy against either or both of the following—

(a) the personal representative;

(b) a prescribed person.

(2) If the wrongful distribution was a distribution of trust property made by a trustee, the person who suffers loss may enforce the same remedies against the trustee and against the prescribed person that the person could enforce if the wrongful distribution—

(a) were a distribution of property in the estate, other than trust property; and

(b) had been made by the executor or administrator of the estate.

(3) It is not necessary for the person to exhaust the person's remedies against the personal representative before proceeding against a prescribed person.

(4) Proceedings against persons mentioned in subsection (1) may be started and progressed at the same time.

(5) However, a proceeding against a prescribed person that is not also against the personal representative requires the Supreme Court's leave.

(6) If—

(a) a proceeding is started against a prescribed person; and

(b) the prescribed person—

(i) has received the distribution in good faith; and

(ii) has so altered the person's position in reliance on the correctness of the distribution that, in the Supreme Court's opinion, it would be inequitable to enforce the remedy;

the Supreme Court may make any order it considers to be just in all the circumstances.

(7) Subsection (6) does not limit any other defence available, under an Act or at law or in equity, to the prescribed person.

4.104 This clause allows a person who has suffered loss because of a personal representative's wrongful distribution of the estate to seek a remedy against both the personal representative and any person to whom the estate has been distributed. It includes provisions generally based on s 109 of the *Trusts Act 1973* (Qld) which deals with remedies for the wrongful distribution of trust property.

4.105 Sub-clause 424(2), which is based on s 109(1) of the *Trusts Act 1973* (Qld) ensures that the remedies for the wrongful distribution of trust property are the same as those for the wrongful distribution of a deceased estate.[137] It is included here because of doubts[138] about the availability of some actions in relation to the distribution of trust property.[139]

4.106 Sub-clause 424(3), in providing that it is not necessary for the person to exhaust the remedies against the personal representative before he or she can proceed against a person to whom the estate has been distributed, removes an "unnecessary restriction" on a claimant's rights that exists at general law[140] and under s 109(2) of the *Trusts Act 1973* (Qld).[141]

4.107 Sub-clause 424(4), therefore, allows proceedings to be brought at the same time against both personal representatives and people to whom the personal representatives have distributed the estate.[142] However, cl 424(5) requires the Court's leave if proceedings are not also brought against the personal representatives.[143]

4.108 Sub-clause 424(6), which is based on s 109(3) of the *Trusts Act 1973* (Qld), establishes the defence of change of position for a person to whom a wrongful distribution has been made. Sub-section 424(7), however, makes it clear that a person to whom a wrongful distribution has been made is not limited to this statutory defence, but may take advantage of

137. QLRC, *The Law Relating to Trusts, Trustees, Settled Lands and Charities*, Report 8 (1971) 74.

138. Raised in *Ministry of Health v Simpson* [1951] AC 251, 265-266.

139. QLRC, Report 65 [22.55].

140. *Re Diplock* [1948] Ch 465, 503.

141. QLRC, Report 65 [22.57].

142. QLRC, Report 65 [22.57].

143. QLRC, Report 65 [22.58].

other defences under statute, at law or in equity, including such defences as may become available in the future.[144]

425 Rights of prescribed persons

(1) This section applies if a person who suffers loss because of the wrongful distribution by the personal representative starts a proceeding against a prescribed person.

(2) The prescribed person—

(a) is entitled to a contribution and indemnity from the personal representative in the amount or on the terms that the Supreme Court considers appropriate; and

(b) may join the personal representative as a party to an action started against the prescribed person.

4.109 The provisions in this clause follow on from cl 424 and allow a person to whom the estate has been distributed and against whom proceedings have been brought, to seek contribution and indemnity from the personal representative and also to seek to join the personal representative as a party to the action.[145]

426 Judgement limited to amount of wrongful distribution

(1) This section applies if a prescribed person has received the distribution in good faith.

(2) In a proceeding against the prescribed person under this part, judgement against the prescribed person must not be for an amount more than the amount of the distribution made to the prescribed person.

(3) In deciding whether the amount of the judgement is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

4.110 This clause limits any judgment against a person to whom the estate has been distributed to an amount that is no more than the amount of the distribution, so long as the person received the distribution in good faith. The National Committee recommended this provision because it is possible that a person's loss might exceed the amount of the wrongful

144. QLRC, Report 65 [22.61].

145. QLRC, Report 65 [22.59].

distribution. Sub-clause 426(3) will ensure that any amount the Court may award by way of interest is not included in the equation.[146]

PART 9 APPROVAL OF ACCOUNTS

4.111 The clauses in this Part:

- allow a personal representative to apply to the Court to approve the accounts of the administration of the estate;
- set out the Court's power to approve accounts (whether the personal representative files them voluntarily or in accordance with an order of the Court); and
- set out the effect of the Court's approval of accounts.

427 Definitions for part

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes trustee.

4.112 The definition of "personal representative" accords with the National Committee's view that procedures under other Parts should be available to trustees as well as personal representatives for the same reasons as those given with respect to cl 412(5) and cl 415.[147] The extension of the definition of "personal representative" to include a trustee means that the definition of "estate" must also include property held on trust for a person because of his or her beneficial interest in the estate.[148]

428 Applying for approval of accounts

A personal representative may apply to the Supreme Court to file, and have approved, the personal representative's accounts of the administration of the deceased person's estate.

146. QLRC, Report 65 [22.60].

147. See para 4.57 and para 4.68-4.69.

148. QLRC, Report 65 [22.98].

4.113 This clause allows a personal representative, whom the Court has not required to file the accounts, and have them approved, to apply voluntarily to the Court to do so. It derives from s 85(1B) of the *Probate and Administration Act 1898* (NSW).

4.114 The National Committee noted that there are "several reasons" why a personal representative or trustee might wish to file the accounts of the administration and have the Court approve them.[149] One reason is that the personal representative might intend to apply for commission.[150] Others are to seek exoneration and to bind the beneficiaries, especially where there may be some dissatisfaction with the administration or where some of the beneficiaries are unable to give releases.[151]

429 Approval of accounts by the Supreme Court

(1) This section applies if—

(a) a personal representative applies to the Supreme Court under section 428 to file, and have approved, the personal representative's accounts of the administration of the deceased person's estate; or

(b) the Supreme Court requires a personal representative to file, and have approved, the personal representative's accounts of the administration of the deceased person's estate under section 402(1)(b).

(2) If the Supreme Court, by order, approves the accounts, the order is evidence of the correctness of the accounts and, subject to subsections (3) and (4), operates as a release for the personal representative.

(3) If, in approving the accounts, the Supreme Court disallows, wholly or partly, the amount of any disbursement, the court may order the personal representative to refund the amount disallowed to the estate.

(4) The approval of the accounts does not—

(a) prevent a person who is interested in the accounts applying to the Supreme Court, within 3 years after the

149. QLRC, Report 65 [11.153].

150. QLRC, Report 65 [11.119] footnote 1293. See Chapter 4 part 10.

151. QLRC, Report 65 [11.154]-[11.156].

order, to show that there is an error or omission in the accounts; or

(b) operate as a release for the personal representative in relation to any material nondisclosure or fraudulent entry in the accounts.

(5) Nothing in subsection (3) limits a right a person may have, apart from this section, to proceed against a personal representative.

4.115 The National Committee considered it desirable to include a model provision to clarify the extent of the protection that the passing of accounts will afford to a personal representative.[152]

4.116 Sub-clause 429(2) is based on the first part of s 85(3) of the *Probate and Administration Act 1898* (NSW).

4.117 Sub-clause 429(3) is based on the first part of s 85(4) of the *Probate and Administration Act 1898* (NSW). Subsection 85(4) was first introduced to overcome the position at general law that the Court's disallowance of an item in the accounts did not determine the liability of the personal representative to repay the amount to the estate.[153] The National Committee considered that allowing the Court to order the repayment of a disallowed amount would increase the "efficacy of the passing of accounts".[154]

4.118 Sub-clause 429(4) is based on the second part of s 85(3) of the *Probate and Administration Act 1898* (NSW). However, s 85(3) provides for the release of the personal representative only three years after the order and only if an interested person has not shown an error, omission or fraudulent entry. Unlike s 85(3), the combined effect of cl 429(2) and cl 429(4) is to allow for an immediate release. However, cl 429(4)(a) allows a person interested in the accounts to show an error or omission in the accounts within three years of the order and cl 429(4)(b) provides that there will be no release where there is a material nondisclosure or fraudulent entry in the accounts even after the expiration of three years. The National Committee recommended these changes because it considered that exceptions provided by s 85(3) were too extensive and

152. QLRC, Report 65 [11.161].

153. *In the Will of Lucas-Tooth* (No 2) (1932) 50 WN (NSW) 86.

154. QLRC, Report 65 [11.166].

that the exceptions of error or omission provided "very limited protection" to a personal representative.[155] The National Committee also considered that the passing of the accounts should not release the personal representative from liability in the case of a fraudulent entry, "irrespective of the period of time that has elapsed since the order was made".[156]

4.119 Sub-clause 429(5) is based on the second part of s 85(4) of the *Probate and Administration Act 1898* (NSW).

PART 10 PAYMENT FOR SERVICES

4.120 The provisions in this Part deal with the entitlement of personal representatives (whether acting on their own behalf, or engaging a legal practitioner) to remuneration for personal representative's services, sometimes referred to as "commission". It also includes provisions aimed at keeping the amount of that remuneration within reasonable bounds.

430 Definitions for part

In this part—

> **estate**, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.
>
> **personal representative** includes trustee.

4.121 The definition of "personal representative" includes a trustee to cover situations where a personal representative becomes a trustee, either because the will makes him or her a trustee or because a beneficiary is under a legal disability. The National Committee considered that it makes sense, in the context of cl 431, for one provision to cover both personal representatives and trustees. This recommendation was necessary because s 68 of the *Succession Act 1981* (Qld), on which cl 431 is based, does not cover trustees who, in Queensland, must apply for remuneration under s 101 of the *Trusts Act 1973* (Qld). Including "trustee" in the

155. QLRC, Report 65 [11.161].

156. QLRC, Report 65 [11.161].

definition of personal representative in these circumstances is consistent with the practice in other Australian jurisdictions, including NSW.[157]

4.122 The extension of the definition of personal representative to include a trustee means that the definition of "estate" must also include property held on trust for a person because of his or her beneficial interest in the estate.[158]

431 Supreme Court may authorise payment for services

(1) The Supreme Court may authorise the payment of an amount, from a deceased person's estate, to the personal representative for the personal representative's services.

(2) The amount to be paid to the personal representative is the amount that the court considers appropriate.

(3) The court may attach any conditions to the payment that it considers appropriate.

(4) Without limiting when the court may authorise the payment to be made, the court may authorise payment to be made periodically.

4.123 This clause, which allows the Court to authorise remuneration out of the estate of a personal representative for his or her services in the administration of the estate, is based on s 68 of the *Succession Act 1981* (Qld). It deals with those situations where a personal representative applies for a payment for services because he or she is not otherwise authorised under the will or by statutory provision.[159] It supersedes s 86(1) and (2) of the *Probate and Administration Act 1898* (NSW).

4.124 In recommending this provision, the National Committee preferred the phrase "payment of an amount ... for services" and deliberately refrained from using terms such as "commission" and "percentage" in order to reflect better the nature of the Court's assessment. The National Committee was of the view that terms such as "commission" and "percentage" did not "sufficiently emphasise that the court's primary assessment must be of the services provided, rather than of the size of the

157. *Probate and Administration Act 1898* (NSW) s 86.

158. QLRC, Report 65 [27.90].

159. See cl 432.

estate".[160] The National Committee also decided not to impose a maximum rate of commission on the basis that such a figure could wrongly be taken to apply to estates without complicating factors, or could act as a cap in cases where greater remuneration was justified.[161] It also felt that a reference to a "maximum rate of commission" would be inconsistent with the view that the model legislation should not refer to "commission".[162]

4.125 The National Committee considered that the "appropriate" amount referred to in cl 431(2) would depend on such matters as the nature of the services provided and the size of the estate. It considered, for example, that an appropriate amount for a very large estate might not be appropriate for a relatively small estate.[163]

4.126 The periodic payments in cl 431(4) may be necessary when an estate is administered over a long period, for example, where the personal representative must wind up an ongoing business. The National Committee considered that, in such cases, periodic payments might be preferable to making the personal representative wait until the estate is fully distributed.[164]

432 Supreme Court may reduce amounts that are excessive

(1) This section applies if the Supreme Court considers that either of the following amounts is excessive—

(a) an amount payable to a personal representative for the personal representative's services;

(b) an amount charged or proposed to be charged by the personal representative in relation to the deceased person's estate.

(2) The Supreme Court may, on its own initiative or on the application of a person interested in the estate, review the amount and may, on the review, reduce the amount.

(3) Subsection (2) applies despite—

160. QLRC, Report 65 [27.82].
161. QLRC, Report 65 [27.86].
162. QLRC, Report 65 [27.87].
163. QLRC, Report 65 [27.83].
164. QLRC, Report 65 [27.84].

(a) any provision of a will authorising the charging of the amount; or

(b) any provision of an Act [or subordinate legislation] authorising the charging of the amount.

(4) In this section—

amount includes a part of the amount.

4.127 This clause, which is generally based on s 86A of the *Probate and Administration Act 1898* (NSW), is intended to deal with the problem of remuneration for a personal representative's services being set at excessive amounts.

4.128 The National Committee, in proposing this mechanism for review, expressed particular concern about some solicitors acting as personal representatives who have drafted wills that "give them an entitlement to commission at a much higher rate than they would be likely to be awarded if they applied to the court".[165]

4.129 The National Committee opted for a provision that requires either the Court or an interested person to commence proceedings for review, for the sake of certainty and to ensure that only those matters where there is a dispute about remuneration for personal representative's services will come before the Court.[166]

4.130 The National Committee also expressed concern that the statutory fee structures for public trustees[167] and trustee companies,[168] which are generally based on a percentage of the value of the estate and of income generated, are inconsistent with the view that remuneration of personal representatives should be based on the value of the services provided and not on the value of the estate.[169] The National Committee noted that a review of the fees charged under these structures could not take place in the context of a project on the administration of deceased estates because they related to the management of property in many capacities other than

165. QLRC, Report 65 [27.124].

166. QLRC, Report 65 [27.125]-[27.127].

167. See *NSW Trustee and Guardian Act 2009* (NSW) s 111; *NSW Trustee and Guardian Regulation 2008* (NSW) cl 16-19, 21.

168. See *Trustee Companies Act 1964* (NSW) s 18, 18A.

169. QLRC, Report 65 [27.166]. See para 4.124.

as a personal representative.[170] However, the National Committee considered that it was appropriate that a public trustee or a trustee company should be subject to the same review of their remuneration as applies to any other personal representative.[171] Sub-clause 432(3), by stating that this clause applies despite any statutory provision authorising the charging of an amount, is, therefore, intended to ensure that the Court may review and, if appropriate, reduce the fees and charges of a public trustee or a trustee company that acts as a personal representative.[172]

433 Limited right to indemnity for costs in a particular case

(1) This section applies if a personal representative renounces the personal representative's right to an amount for the personal representative's services for a particular 12 month period.

(2) The personal representative is entitled to indemnity out of the deceased person's estate for the charges and disbursements of an Australian legal practitioner engaged by the personal representative to undertake non-professional work in the 12 month period.

(3) However, the entitlement under subsection (2) can not be more than the lesser of the following amounts—

(a) the amount to which the personal representative would have been entitled if the personal representative had undertaken the work personally and not renounced the personal representative's right to an amount for the services;

(b) [the amount of the legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale].

4.131 This clause allows a personal representative, in certain limited circumstances, to be indemnified for the cost of retaining a legal practitioner to undertake tasks of a non-professional nature in the administration of an estate. A personal representative is not normally entitled to indemnification for retaining a legal practitioner in such

170. QLRC, Report 65 [27.167].

171. QLRC, Report 65 [27.168].

172. QLRC, Report 65 [27.169].

circumstances, unless the will contains an express provision.[173] However, the National Committee considered that a personal representative should be entitled to such indemnification so long as the "cost to the estate is no greater than if the personal representative ... had undertaken those duties personally and been remunerated for them".[174] Sub-clause 433(3) achieves this outcome by ensuring that the amount does not exceed the lesser of the amounts identified in paragraphs (a) and (b).[175] Also, a personal representative can only claim the right to indemnification if he or she has renounced the right to remuneration for services for the particular 12 month period.

4.132 The National Committee recommended that the model provision be to the general effect of s 86(3) of the *Probate and Administration Act 1898* (NSW).[176]

PART 11 INFORMAL ADMINISTRATION

4.133 This Part deals with the liability or release from liability of a person acting in the administration of an estate without a grant of representation, whether they have been named as executor in the will, or not. The National Committee, in discussing this provision, noted that, in all jurisdictions, a significant number of people administer estates informally and that they are assisted by such factors as survivorship in relation to jointly owned property, and the policies of certain financial and other organisations to release money up to a specified amount without the production of a grant.[177] In response to suggestions that the model legislation should not give recognition to informal administration, the National Committee stated:

> Given the acknowledged high level of incidence of informal administration in all jurisdictions, it would be unrealistic for the model legislation simply to ignore the extent to which informal administration was presently occurring, and that to exclude it from

173. *In the Will of Douglas* (1951) 51 SR (NSW) 282, 283-284.

174. QLRC, Report 65 [27.91].

175. However, in NSW, paragraph (b) will need to be omitted or redrafted because there is no relevant professional scale for a legal practitioner's charges and disbursements in such matters under *Legal Profession Regulation 2005* (NSW) Part 9.

176. QLRC, Report 65 [27.91].

177. NSWLRC, DP 42 [10.25]. See also QLRC, Report 65 [29.230]-[29.231].

> the legislation would give the impression that a matter of considerable significance had been overlooked.[178]

4.134 Apart from this Part, other provisions dealing with people who informally administer an estate include:

- cl 315 which allows a person to renounce his or her executorship of an estate notwithstanding that he or she has acted informally in the administration of that estate;
- cl 411 which allows a personal representative who holds a grant to ratify any act done on behalf of the estate by a person acting informally; and
- cl 415 which allows a person who acts informally to take advantage of the provisions relating to the advertising of an intention to distribute the estate.

4.135 In drafting the relevant provisions, the National Committee has chosen to avoid the use of certain terminology to describe a person acting informally in the administration of an estate (that is, without a grant) such as *executor de son tort*, intermeddling and "executor in the person's own wrong".[179]

434 Protection for limited payments made without production of a grant of representation

(1) This section applies if a person holds money or personal property for a deceased person of not more than $15000 in value.

(2) The person may, without requiring production of a grant of representation, pay the money or transfer the personal property to any of the following persons having legal capacity—

(a) a surviving spouse of the deceased; or

(b) a child of the deceased; or

(c) another person who appears to be entitled to the money or personal property.

178. NSWLRC, DP 42 [10.27].

179. QLRC, Report 65 [29.275]. See, eg, *Sykes v Sykes* (1870) LR 5 CP 113, 114 (Montague Smith J).

(3) A payment of money or transfer of personal property under subsection (2), if made in good faith, is a complete discharge to the person of all liability for the money or personal property.

(4) This section does not affect the right of a person who has a claim to, or against, the deceased's estate to enforce a remedy for the person's claim against a person to whom a payment or transfer has been made under subsection (2).

4.136 This provision allows a person or institution holding money or property of the deceased valued at less than $15,000 to obtain a complete discharge of all liability for the money or property if the money or property is transferred to a person identified in cl 434(2).

4.137 The National Committee reviewed a number of provisions from various jurisdictions that facilitate the informal administration of small estates by offering protection to certain institutions which transfer money or property to people who do not have a grant of representation (without the need to seek indemnity from them).[180] It concluded that the "specific nature" of the provisions "significantly reduces their potential to facilitate the informal administration of small estates". The National Committee, therefore, proposed a provision of general application.[181]

4.138 Clause 435 is derived from s 32 of the *Administration and Probate Act 1958* (Vic) but is of general application, unlike the Victorian provision which applies only to distributions by people who were employers of the deceased and held money or personal property on their behalf.[182]

4.139 The reference to "holding" money or personal property to the value of $15,000 in cl 434(1) is intended to ensure that people holding a large sum of money or property with a high value cannot take advantage of the protection offered by transferring that money or property by way of a series of smaller transactions designed to get around the $15,000 limit.[183] However, the National Committee noted that it would be possible for several institutions or individuals each to hold money or property up to the monetary limit and that this could amount to a considerable sum in

180. *Administration and Probate Act 1919* (SA) s 71, s 72; *Administration and Probate Act 1958* (Vic) s 32; *Administration Act 1903* (WA) s 139.

181. QLRC, Report 65 [29.313].

182. QLRC, Report 65 [29.314].

183. QLRC, Report 65 [29.316].

total.[184] However, if an upper limit were to be imposed on the value of all property transferred in this way, there would be considerable difficulty involved in, for example, satisfying each financial institution that the total sums held by all financial institutions did not amount to more than the prescribed amount.[185] The National Committee also decided not to restrict the provision further by requiring (as is the case in Victoria[186]) that the person transferring the money or property be satisfied that the value of the estate was less than a certain amount.[187]

4.140 The National Committee also noted that this model provision will not prevent a person holding money or property valued at more than $15,000 from transferring it. Any person transferring money or property valued at more than $15,000 will simply not be able to discharge his or her liability under this provision.[188] He or she will, however, still be able to seek indemnity from the person receiving the property.

4.141 The amount of $15,000 is not indexed. Unlike other provisions in the model legislation that refer to indexed amounts,[189] this provision may need to be interpreted by a person informally administering an estate or a person who simply holds assets of a deceased person up to a value of $15,000. The need to calculate CPI increases or to refer to tables setting out such increases would arguably make the administration of small estates unnecessarily complex for some people.

4.142 Sub-clause 434(2) is based on part of s 32(1) of the *Administration and Probate Act 1958* (Vic). The National Committee noted that the final category of "another person who appears to be entitled to the money or personal property" would include a person named in a will that had not been admitted to probate.[190] Again, the National Committee emphasised that a person who does not transfer the money or property in accordance

184. QLRC, Report 65 [29.316].

185. See QLRC, Report 65 [29.304]. See also Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.23].

186. See *Administration and Probate Act 1958* (Vic) s 32(1)(b).

187. QLRC, Report 65 [29.317].

188. QLRC, Report 65 [29.318].

189. See cl 325 and cl 355; para 3.98 and para 3.236.

190. QLRC, Report 65 [29.319].

with this provision will not discharge his or her liability with respect to it.[191]

4.143 The requirement that the person to whom the transfer is made be of full legal capacity is intended to ensure that the person holding the property cannot obtain a discharge by transferring the money or property to a person who is not capable of giving a valid discharge.[192]

4.144 Sub-clause 434(4) is based on s 32(3) of the *Administration and Probate Act 1958* (Vic). However, it goes beyond the Victorian provision by preserving the rights or remedies of "a person who has a claim to, or against, the deceased's estate" rather than simply a person entitled to claim under the deceased's will or under the law relating to the disposition of deceased estates.[193]

435 Persons acting informally

(1) This section applies if a person who does not hold a grant of representation of a deceased person's estate—

(a) obtains, receives or holds the estate other than for full and valuable consideration; or

(b) effects the release of any debt payable to the estate.

(2) The person is liable to account for estate assets to the extent of—

(a) the estate obtained, received or held by the person; or

(b) the debt released.

(3) However, the person's liability is reduced to the extent of any payment made by the person that might properly be made by a personal representative to whom a grant of representation of the estate is made.

4.145 This clause provides that a person, who acts in the administration of an estate without a grant of representation (whether nominated in the will or not), is liable to account for any estate that comes into his or her

191. QLRC, Report 65 [29.320].

192. QLRC, Report 65 [29.322]. The model provision, therefore, differs from *Administration and Probate Act 1958* (Vic) s 32(2) which allows a person over 16 years of age to give a valid receipt.

193. QLRC, Report 65 [29.324].

hands, as well as for any debt that he or she releases, but that the liability is reduced to the extent of any payment that he or she makes that a duly appointed personal representative might properly have made.

4.146 The clause is based on s 54(1) of the *Succession Act 1981* (Qld).[194] In recommending s 54(1), the Queensland Law Reform Commission, in 1978, noted the desirability of protecting people who "act informally, but properly" in the administration of an estate and further observed that "provided such person does what a duly constituted personal representative should properly do the estate will not be harmed".[195]

4.147 The model provision essentially states the current general law with respect to people who act in the administration of an estate without a grant of representation.[196] The National Committee preferred a statutory statement of the law because it would make the law "more accessible to non-lawyers".[197] The National Committee also considered that a statement to the effect of s 54(1) would clarify the extent to which a person administering an estate without a grant is liable to account for assets in the estate.[198]

194. QLRC, Report 65 [29.274]. *Succession Act 1981* (Qld) s 54(1) is based on *Administration and Probate Act 1958* (Vic) s 33(1) which, in turn, derived from *Administration of Estates Act 1925* (Eng) s 28, a descendant of the original provision (which dealt only with fraudulent practices) in 43 Elizabeth I c 8 (1601) s 2. The Elizabethan provision was repealed as unnecessary in NSW by *Imperial Acts Application Act 1969* (NSW) s 8(1).

195. QLRC, Report 22 (1978) 37.

196. For example, in relation to the discharge of debts: *Parker v Kett* (1701) 1 Ld Raym 658, 661; 91 ER 1338, 1340; and in relation to liability for property received: *Yardley v Arnold* (1842) Car & M 434, 438; 174 ER 577, 579; *Lowry v Fulton* (1839) 9 Sim 104, 123; 59 ER 298, 305.

197. NSWLRC, DP 42 [10.28].

198. QLRC, Report 65 [29.274].

Chapter 5. Administration of assets

- Part 1 Property for payment of debts
- Part 2 Solvent estates
- Part 3 Interest
- Part 4 Insolvent estates

5.1 The provisions in this chapter deal with the administration of the assets of an estate. The manner in which a personal representative distributes assets to creditors and beneficiaries will depend on whether the estate is solvent or insolvent. Part 1 generally identifies what property in the estate will be an asset for the payment of debts. Part 2 deals with the payment of debts and the distribution of assets in solvent estates, while Part 4 deals with the payment of debts and the distribution of assets in insolvent estates.

PART 1 PROPERTY FOR PAYMENT OF DEBTS

500 Property that is an asset available for the payment of debts

(1) The following property is an asset for the payment of the debts of a deceased person's estate—

(a) property in the estate that, on the deceased's death, vests in his or her executor or the [public trustee];

Notes—

1 Property that, in the exercise of a general power of appointment, the deceased disposes of by will also vests in his or her executor or the [public trustee] because of sections 200 and 201.

2 Property of which the deceased was trustee is not an asset for the payment of the deceased's debts. See section 200 (Initial vesting on death).

(b) property to which the deceased's personal representative becomes entitled, as personal representative, after the deceased's death.

(2) Any disposition by the deceased's will inconsistent with subsection (1) is void as against creditors of the estate, and the Supreme Court may, if necessary, administer the property for the payment of the debts.

(3) This section does not affect the rights of a mortgagee or other encumbrancee.

5.2 This provision identifies what property is an asset available for the payment of the debts of the estate. It is generally based on s 56 of the *Succession Act 1981* (Qld). The equivalent provisions in NSW are s 46 and s 46A of the *Probate and Administration Act 1898* (NSW).

5.3 The identification of what constitutes assets for the payment of debts has important consequences when a creditor brings an action against a personal representative. In some cases the personal representative can plead the defence of *plene administravit*, that is, that the personal representative is not holding any assets that could satisfy the claim.[1]

5.4 Paragraph 500(1)(a) is based on the first half of s 56(1) of the *Succession Act 1981* (Qld). It identifies as assets for the payment of debts any property that vests, upon the deceased's death, in the executor or in the NSW Trustee under cl 200. Under cl 200(5) that property is defined as:

> property to which a person was entitled at the time of his or her death, but does not include—
>
> (a) property of which the person was a trustee; or
>
> (b) an interest in property that ceased on the person's death.

5.5 It also includes, under cl 201, property that passes to a beneficiary as a gift under the deceased's will granted pursuant to an exercise of a general power of appointment.[2] Although the effect is the same, this approach is different to that in the relevant NSW provision which currently identifies the assets for the payment of debts as "the real and personal estate of a person... to the extent of the person's beneficial interest therein".[3] The NSW provision also deals expressly with property that the deceased has disposed of by will in exercise of a general power.[4]

5.6 Paragraph 500(1)(b) is new. It has been included because cl 500(1)(a) deals only with property that vests on a person's death. The

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1. See *Harriton v Macquarie Pathology Services Pty Ltd (No 3)* (unreported, NSW Supreme Court, Harrison M, 7 July 1998) 71-75. See also E V Williams, *A Treatise on the Law of Executors and Administrators* (12th edition, Sweet and Maxwell, London, 1930) vol 2, 1240.
2. The National Committee considered cl 201 necessary because it "clarifies the basis on which a personal representative is entitled to call for the appointed property" when the personal representative must sell appointed property in order to satisfy the debts of the estate: Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [10.164].
3. *Probate and Administration Act 1898* (NSW) s 46A(1).
4. *Probate and Administration Act 1898* (NSW) s 46A(1).

National Committee considered it important to ensure that any property that vests after the death of a person in his or her personal representative will also be an asset for the payment of debts.[5]

5.7 Sub-clause 500(2) is based on the second half of s 56(1) of the *Succession Act 1981* (Qld).

5.8 Sub-clause 500(3) is based on s 56(2) of the *Succession Act 1981* (Qld). It states that this clause does not prejudice the rights of mortgagees or other encumbrancees. It has no counterpart in NSW. While acknowledging that the effect of this sub-clause is declaratory only and not strictly necessary, the National Committee nevertheless considered such a provision desirable "as it provides a clear statement about the effect of the model provision".[6]

PART 2 SOLVENT ESTATES

5.9 When an estate is solvent, there will be sufficient assets to pay all of the estate's debts, liabilities and expenses. The personal representative, therefore, does not need to consider the question of priority among creditors as he or she would have to do in the case of an insolvent estate.[7] However, the order in which particular assets are used to meet the debts of the estate will, ultimately, determine what the personal representative can distribute to particular beneficiaries or classes of beneficiaries. This Part deals with the issues arising in such circumstances.

Division 1 Application

501 Application of part

> This part applies if a deceased person's estate is sufficient to pay, in full, the debts of the estate.

5.10 This clause establishes the circumstances in which this Part applies, namely when the assets in the estate are sufficient to pay the estate's debts. The definition of "debts" in the Dictionary in schedule 3 states that debts include "funeral, testamentary and administration expenses, and other liabilities payable out of the estate of a deceased person".

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5. QLRC, Report 65 [15.20].
6. QLRC, Report 65 [15.33], [15.36].
7. See Chapter 5 part 4.

Division 2 Classes of property for payment of debts

502 Payment of debts

(1) The debts of the estate are, subject to sections 506 and 507, to be paid from the estate as follows—

(a) first, from the following property (class 1 property), if any—

(i) property specifically appropriated or given by will (either by a specific or general description) for the payment of debts;

(ii) property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts;

(b) second, from property (class 2 property) comprising—

(i) the residuary estate; and

(ii) any property in relation to which a disposition by will operates under [insert local equivalent of the *Succession Act 1981* (Qld), section 33J] as the exercise of a general power of appointment;

(c) third, from property (class 3 property), if any, specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on the property given or appointed.

(2) Property within each class must be applied in the discharge of the debts and, if applicable, in the payment of pecuniary legacies rateably according to value.

Example—

Assume class 1 property and class 2 property have been applied fully in the discharge of the debts and there are still debts of $20000 to be paid out of class 3 property. Assume further that class 3 property is comprised of jewellery valued at $40000, which is given to A, and a parcel of shares valued at $60000, which is given to B. To discharge the remaining debts, $20000 (20% of the value of the class 3 property) is required to be applied for the purpose.

In this example, the rule requiring property in the class to be applied in the discharge of debts rateably according to value requires 20% of each of the jewellery and parcel of shares to be applied in the discharge of the debts. As a result, A receives a distribution to the

value of $32000 (80% of $40000) and B receives a distribution to the value of $48000 (80% of $60000).

(3) Also, if a specific property must be applied in the discharge of the debts and a legacy is charged on the specific property—

(a) the legacy and the specific property must be applied rateably according to value; and

(b) for the purpose of paragraph (a), the value of the specific property must be reduced by the amount of the legacy charged on it.

Example—

Assume a deceased person's estate has a total value of $200000. It is comprised of two properties, Blackacre and Whiteacre, each of which has a value of $100000. Assume further that, under the deceased's will, Blackacre is given to A, Whiteacre is given to B and a legacy of $50000, charged on Whiteacre, is given to C. The estate has unsecured debts of $50000.

In this example, the rule in paragraph (a) requires that Blackacre, Whiteacre and the legacy charged on Whiteacre be applied in the discharge of the debts rateably according to value. However, for the purpose of paragraph (a), paragraph (b) provides that the value of Whiteacre is $50000 ($100000 less the amount of the legacy that is charged on Whiteacre). So the total value of the class 3 property is $200000. Because the debts are $50000 (25% of the value of the class 3 property), 25% of the value of Blackacre and Whiteacre and of the legacy will be applied in the discharge of the debts. As a result, A receives a distribution to the value of $75000 (75% of $100000), B receives a distribution to the value of $37500 (75% of $50000) and C receives a distribution of $37500 (75% of $50000).

(4) If the deceased left a will, the order in which the estate is to be applied towards the discharge of debts, and the incidence of rateability as between different properties within each class, may be varied by a contrary intention appearing in the will.

Order for the payment of debts

5.11 Sub-clause 502(1) sets out the order for the application of property for the payment of debts in a solvent estate. It has its origins in s 59(1) of the *Succession Act 1981* (Qld). This model provision reflects the National Committee's aim to achieve "a much simpler and more rational order for the application of assets towards the payment of debts". The National Committee observed that this may lead to "greater certainty in relation to the application of assets" and may "reduce opportunities for litigation". It

also felt that the shorter the list of classes, the easier it would be to understand the effect of a direction in a will to pay debts.[8]

5.12 The National Committee, having acknowledged that "the law has always preferred a rule that debts should be paid out of residuary assets ahead of specific assets",[9] concluded that the personal representative should use assets comprising the residuary estate to pay debts (class 2 property) before using assets that are specifically disposed of by the will (class 3 property).[10]

5.13 ***Class 1 property.*** The inclusion of this class of property in the model bill has been questioned because, arguably, cl 502(4), in providing that the statutory order is subject to the testator expressing a contrary intention, renders it unnecessary to list property that the will has specifically appropriated for, or made subject to a charge for, the payment of debts.[11] There are a number of reasons for the inclusion of cl 502(1), including that it will provide clear guidance to personal representatives as to the order in which they should use such property[12] and that it will avoid uncertainty where the will specifically appropriates some property for the payment of debts and also subjects other property to a charge for the payment of debts.[13] The latter reason is important in light of the possibility that the general rule may reassert itself that personal representatives must use property left on trust to pay debts ahead of property subject to a charge for the payment of debts.[14] Other Australian jurisdictions, including NSW, currently rank property specifically appropriated for the payment of debts ahead of property made subject to a charge for the payment of debts.[15] The National Committee, however, considered that there was "no cogent reason" to suppose that a testator

8. QLRC, Report 65 [17.34].
9. QLRC, Report 65 [17.37].
10. QLRC, Report 65 [17.40].
11. QLRC, Report 65 [17.63]. See also Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978) ("QLRC, Report 22") 42.
12. QLRC, Report 22, 42. See also QLRC, Report 65 [17.75].
13. QLRC, Report 65 [17.68], [17.75].
14. QLRC, Report 65 [17.71].
15. See, eg, *Probate and Administration Act 1898* (NSW) s 46C(2), sch 3 pt 2 class 3 and 4.

who included both kinds of direction in a will would intend to use one class of property ahead of the other.[16]

5.14 ***Class 2 property.*** Residuary estate is defined in the Dictionary in schedule 3 to include not only property that is residue under a will but also property that has not been disposed of by a will, that is, subject to either a partial or a total intestacy.[17] This follows the current approach in Queensland which has combined, in the one class, property to which residuary beneficiaries are entitled and property to which intestacy beneficiaries are entitled.[18] This is different to the current situation in NSW, where assets undisposed of by will are ranked ahead of residuary estate in the order for the payment of debts.[19] The Queensland Law Reform Commission, in recommending the relevant provisions, in 1978, noted that it was rare that intestacy beneficiaries and residuary beneficiaries would exist side by side, especially in light of provisions intended to avoid partial intestacies. It could find no necessary reason to prefer residuary beneficiaries over intestacy beneficiaries.[20] A provision intended to avoid partial intestacies of shares of the residuary estate has now been enacted in NSW.[21] The National Committee has observed that, in light of these developments, "there may be little point in maintaining the difficult distinction between assets undisposed of by the will and assets forming part of a residuary gift".[22]

5.15 Class 2 of the current Queensland provision includes in property comprising the residuary estate, "property in respect of which any residuary disposition operates as the execution of a general power of appointment".[23] The National Committee was concerned that this wording was not sufficiently broad to encompass a general disposition of all of the testator's property or all of the testator's property of a particular description. The National Committee, therefore, recommended, for the sake of clarity, that the model provision refer to the types of dispositions in a will that operate as an exercise of a general power of appointment as

16. QLRC, Report 65 [17.68].
17. See para S3.34.
18. See *Succession Act 1981* (Qld) s 55, s 59(1).
19. *Probate and Administration Act 1898* (NSW) s 46C(2), sch 3 pt 2 class 1 and 2.
20. QLRC, Report 22, 40.
21. See, eg, *Succession Act 2006* (NSW) s 42(2).
22. QLRC, Report 65 [17.47].
23. *Succession Act 1981* (Qld) s 59(1).

set out in s 33J of the *Succession Act 1981* (Qld).[24] The equivalent provision in NSW is s 37 of the *Succession Act 2006* (NSW).

5.16 Class 2 property does not refer to pecuniary legacies because they "do not consist of specific property".[25] However, in order for pecuniary legacies to be met from class 2 property in accordance with cl 504, the "residuary estate", which is defined in the dictionary as including property not otherwise disposed of and any residuary disposition, must also be taken to include the "fund" that will meet any pecuniary legacies.

5.17 ***Class 3 property.*** The inclusion of property specifically appointed under a general power of appointment in cl 502(1)(c) is consistent with the current position in NSW whereby property that is specifically appointed is applied rateably alongside other property that is specifically given by the will.[26] The National Committee recommended this provision as being consistent with the identification of class 3 property in the current Queensland provision.[27]

Rateability of property in the same class

5.18 Sub-clause 502(2) deals with a situation where not all of the property in a particular class is required for the payment of debts and, if necessary, the payment of pecuniary legacies. In these circumstances, the intended beneficiaries of the property in that class must bear the loss equally, that is, the personal representative must distribute the remaining property among the intended beneficiaries rateably according to value. The provision is based on the first part of s 59(2) of the *Succession Act 1981* (Qld).[28] In NSW, rateability does not apply to all classes of property, but only to the class of assets that are specifically disposed of by will, if required.[29]

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24. QLRC, Report 65 [17.89].
25. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) [1115].
26. That is, they are ranked with assets in class 6 under *Probate and Administration Act 1898* (NSW) sch 3 pt 2: R S Geddes, C J Rowland, and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) 388.
27. *Succession Act 1981* (Qld) s 59(1).
28. QLRC, Report 65 [17.113].
29. *Probate and Administration Act 1898* (NSW) s 46C(2), sch 3 pt 2 class 6.

Rateability of property in the same class that is also subject to a demonstrative legacy

5.19 A demonstrative legacy is a pecuniary legacy payable out of a particular fund or property. A demonstrative legacy is regarded as a specific legacy to the extent that it can be paid out of the property on which it is charged, and is regarded as a general legacy to the extent that it cannot be paid out of that property. This arrangement is reflected in paragraph (c) of the definition of "pecuniary legacy" in the Dictionary in schedule 3.

5.20 Sub-clause 502(3) deals with the situation where a specific item of property is required to contribute to the payment of debts and is also required to satisfy a demonstrative legacy. In such circumstances, the value of the specific property must be reduced by the amount of the legacy and the personal representative must use the balance of the value of the property and the demonstrative legacy to pay the debts rateably according to value. It is based on the second part of s 59(2) of the *Succession Act 1981* (Qld). The Queensland Law Reform Commission originally recommended this provision because it considered that the old rule, which still applies in NSW,[30] was unfair to the intended beneficiary of the property on which the demonstrative legacy was charged.[31] The National Committee agreed with this position.[32] The old rule requires that the whole value of the property must be taken into account in determining the extent to which the property will be used in paying the estate's debts. This means that, in some cases, little or nothing will be left for the intended recipient of property that has met its rateable share of the debt and also satisfied a demonstrative legacy. This model provision will ensure that, when not all of the property in a class is required to meet debts, the debts will be paid off and the beneficiary of the demonstrative legacy and the beneficiary of the property so charged will each obtain some benefit.

Contrary intention

5.21 Sub-clause 502(4) allows a testator to vary the statutory order and the incidence of rateability by expressing a contrary intention in the will. It derives from part of s 59(3) of the *Succession Act 1981* (Qld).[33] The

30. See QLRC, Report 65 [18.25].
31. QLRC, Report 22, 43.
32. QLRC, Report 65 [18.76].
33. QLRC, Report 65 [17.119].

current NSW provision merely states that the payment of debts according to the statutory order is subject to "the provisions, if any, contained in the deceased person's will".[34]

5.22 The expression of contrary intention is limited to that expressed in the will, rather than in other extrinsic material. The National Committee decided on this limitation in order to avoid uncertainty as to whether a testator has varied the statutory order and, thereby, avoid costly disputes on the question.[35] The National Committee also observed that the proposed provision, coupled with a broad dispensing power in relation to the execution of wills,[36] would allow sufficient flexibility in determining a contrary intention.[37]

Gifts in contemplation of death

5.23 At common law, a person may deliver property to another, in contemplation of death, the gift being conditional upon the donor's death and revocable at any time before that death. Traditionally referred to as a *donatio mortis causa*, such a gift is not traditionally included among the statutory classes of property available for the payment of a deceased's debts.

5.24 The National Committee decided not to follow the Queensland model of including *donationes mortis causa* among the statutory classes of property available for the payment of debts,[38] considering that an estate that cannot be administered without resort to such property should, properly, be regarded as insolvent.[39] However, the National Committee did recommend that the model legislation should not prevent proceedings being brought to recover a *donatio mortis causa* that is necessary to pay the debts of an estate.[40]

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34. *Probate and Administration Act 1898* (NSW) s 46C(2).
35. QLRC, Report 65 [17.130].
36. See *Succession Act 2006* (NSW) s 8.
37. QLRC, Report 65 [17.129].
38. *Succession Act 1981* (Qld) s 59(1) Class 4.
39. QLRC, Report 65 [17.102].
40. QLRC, Report 65 [17.103]. This went against the Law Reform Commission of Western Australia's recommendation that a *donatio mortis causa* should not be available as a last resort to meet an estate's debts: Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 pt 7 (1988) [5.17], [6.2].

503 Effect of general direction or disposition for the payment of debts

> The appearance of either or both of the following in a will does not constitute the estate or the residuary estate as class 1 property and is not a contrary intention for the purposes of this part—
>
> (a) a general direction, charge or trust for the payment of debts, or of all the debts, out of the estate or the residuary estate;
>
> (b) a disposition of the estate or the residuary estate after, or subject to, the payment of debts.

5.25 This clause provides that a general direction or disposition for the payment of debts out of the estate or residuary estate does not make the relevant property class 1 property and does not amount to a statement of contrary intention for the purposes of this Part.

5.26 It is derived from part of s 59(3) and from s 61(2) of the *Succession Act 1981* (Qld). These provisions each provide that certain statements do not amount to a contrary intention for the purposes of provisions that are the equivalent of cl 502(4) (in relation to the payment of debts generally) and cl 506 (in relation to encumbered property).

5.27 The Queensland Law Reform Commission proposed s 59(3), in 1978, in order to overcome the old position that a mere general direction for the payment of debts out of an estate was sufficient to move property that was subject to a specific disposition into the class of property charged with the payment of debts.[41] The QLRC considered that, in the past, "disproportionate significance" had been attached to such directions "for historical reasons now irrelevant". The Commission was of the view that it was "important to ensure that a general direction to pay debts out of residue cannot be used as an argument to drive a wedge of litigation between residuary beneficiaries taking under the will and the next of kin entitled on a partial intestacy".[42]

5.28 However, the position in NSW is that the old rule of construction does not apply to the statutory order because the legislation "has drastically altered the rules as to the order of administration which were

41. *Calcino v Fletcher* [1969] QdR 8, 23.

42. QLRC, Report 22, 43. The Law Reform Commission of Western Australia has supported this reform: Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 pt 7 (1988) [4.39].

applicable under the earlier law".[43] The National Committee nevertheless considered cl 503 desirable to "put beyond doubt that a general direction for the payment of debts out of the estate cannot affect the operation of the model statutory order".[44]

5.29 The Queensland Law Reform Commission proposed s 61(2), which is based on existing English and Australian precedents in relation to real property, to set out what expressions are insufficient to indicate an intention contrary to the rule that encumbered property should be primarily liable for its own debts.[45] The National Committee considered that commonly-used expressions that merely direct a personal representative to do what the law requires (that is, for example, pay debts out of the residuary estate) "do not sufficiently demonstrate that a testator has turned his or her mind to the question of negativing the principle that would otherwise apply".[46] The current relevant provision in NSW may be found in s 145(2) of the *Conveyancing Act 1919* (NSW).

5.30 The reference to directions and dispositions not constituting the estate or the residuary estate as class 1 property has been included "because the existence or otherwise of class 1 property will be critical in determining which of [cl 506 or cl 507] applies in a particular situation".[47] Clauses 506 and 507 deal with the question of whether particular encumbered assets of an estate are liable for their own debts.

Division 3 Pecuniary legacies

504 Payment

(1) Pecuniary legacies must be paid out of available class 2 property.

(2) However, to the extent that available class 2 property is insufficient to pay the pecuniary legacies, the legacies must abate proportionately.

43. *Nield v Fowler* [1961] NSWR 85, 91.
44. QLRC, Report 65 [17.137].
45. QLRC, Report 22, 44. See cl 505-509.
46. QLRC, Report 65 [17.216].
47. QLRC, Report 65 [17.232].

Example—

Assume a deceased person, by will, gives pecuniary legacies totalling $4000 to A, B and C. A is to receive $500, B is to receive $1500 and C is to receive $2000. However, available class 2 property has a value of $2000.

In this example the rule requires the pecuniary legacies to abate proportionally. So as only 50% of the value of the gifts is available to meet them, each gift must abate by 50%. As a result, A receives $250, B receives $750 and C receives $1000.

(3) Subsections (1) and (2) are subject to a contrary intention appearing in the deceased person's will.

(4) In this section—

available class 2 property means class 2 property or, if debts are to be discharged from the property, class 2 property after the discharge of the debts.

5.31 This clause limits the payment of pecuniary legacies to the size of the residuary estate (that is, class 2 property) after the payment of such debts as must be paid out of that property.[48] The term "pecuniary legacy" is defined in the Dictionary in schedule 3.[49]

5.32 The National Committee acknowledged that, under this proposal, people entitled to pecuniary legacies appear to be treated less favourably than the beneficiaries of specific gifts, since specific gifts do not abate in order to allow pecuniary legacies to be paid. However, the National Committee noted that other principles operated to the advantage of beneficiaries of pecuniary legacies. First, provisions to the effect of Locke King's legislation[50] make encumbered property primarily liable for the payment of its own debt, thereby leaving the residuary estate available to meet pecuniary legacies. Secondly, pecuniary legacies are not subject to the doctrine of ademption and will be paid if there is sufficient property in the residuary estate, unlike specific gifts which adeem when the testator disposes of the property in question before death.[51]

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48. See cl 502; para 5.14-5.16.
49. This overcomes the problem that pecuniary legacy is not currently defined for this purpose in NSW: R F Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.7.6].
50. See cl 506 and cl 507.
51. QLRC, Report 65 [18.46]-[18.47].

5.33 Clause 504 is based on s 60 of the *Succession Act 1981* (Qld). In recommending this provision, the National Committee also considered an alternative proposal to treat pecuniary legacies as if they were specific legacies (that is, class 3 property). The National Committee rejected it because it would disturb other settled principles, such as Locke King's legislation and the doctrine of ademption and would "necessitate reverting to a more complicated order for the payment of debts, without necessarily producing a result, in terms of the distribution of the estate, that better reflects the intentions of the testator".[52] The Queensland Law Reform Commission, in its 1978 report, even though it considered it difficult to justify a distinction between pecuniary legacies and specific legacies, noted that, if pecuniary legacies were also to be met from property in class 3 (that is, specific legacies), the personal representative would need to sell such property more often in order to achieve abatement and added:

> We doubt whether a testator would really wish this, particularly where the subject matter of a specific legacy has some sentimental value.[53]

5.34 In NSW, the current statutory order for the payment of debts specifically mentions "the fund, if any, retained to meet pecuniary legacies" to be derived from property that is subject to a partial intestacy and property that is part of the residuary estate.[54] The fund, which is listed as class 5, is made available after assets specifically appropriated or charged for the payment of debts but before assets specifically disposed of by will.[55] To this extent, the model provision is consistent with the law in NSW in not permitting property that is the subject of a specific gift to be made available to satisfy pecuniary legacies.

5.35 Sub-clause 504(3) states that this provision is subject to a contrary intention expressed in the will.[56] This also derives from s 60 of the *Succession Act 1981* (Qld).

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52. QLRC, Report 65 [18.67].
53. QLRC, Report 22, 42.
54. *Probate and Administration Act 1898* (NSW) sch 3 pt 2, class 1, 2 and 5.
55. In light of the proposed changes to the statutory order, the Queensland Law Reform Commission did not consider it necessary to make separate provision for the pecuniary legacies fund: QLRC, Report 22, 42.
56. See QLRC, Report 65 [18.80]-[18.81].

Division 4 Encumbered property

5.36 Provisions in almost all of the Australian jurisdictions, commonly referred to as "Locke King's legislation",[57] establish a significant statutory exception to the order of application of assets for the payment of debts set out above.[58] In NSW, the relevant provision may be found in s 145 of the *Conveyancing Act 1919* (NSW). Such provisions generally state that property that is charged with a debt must bear that debt and any person taking that property takes it subject to that debt.

5.37 In recommending a provision to the effect of Locke King's legislation, the National Committee noted that the principle argument in favour of its inclusion was that "it provides a simple, settled rule for the administration of assets where a person dies leaving property charged with the payment of a debt".[59] The National Committee also observed that there would be a great many wills drafted on the basis that Locke King's legislation would continue to apply.[60] This would be particularly so, since Locke King's provisions are available in all Australian jurisdictions except the Northern Territory.[61]

5.38 Clauses 506 and 507 have been drafted to clarify the situations where a testator intends to negative the effect of Locke King's legislation by creating class 1 property, that is, property in the estate appropriated or subject to a charge for the payment of debts.[62] Clause 506 deals with the situation where the testator has not identified class 1 property and cl 507 deals with the situation where the testator has identified class 1 property.

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57. The Locke King legislation encompassed provisions in the *Real Estate Charges Act 1854* (Eng); *Real Estate Charges Act 1867* (Eng); and *Real Estate Charges Act 1877* (Eng).
58. See cl 502.
59. QLRC, Report 65 [17.161].
60. QLRC, Report 65 [17.161]. See also New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) [15.147] where the National Committee suggested that any changes to the traditional formulation would be disruptive.
61. QLRC, Report 65 [17.145].
62. QLRC, Report 65 [17.227]-[17.228]. See para 5.13.

505 Definitions for division

In this division—

> **encumbered property**, of the deceased person, means property, or an interest in the property, that at the time of the deceased's death is charged with the payment of any property debt.
>
> **property debt** includes mortgage and charge, whether legal or equitable (including a lien for unpaid purchase money).

5.39 The inclusion of the lien for unpaid purchase money in the definition of "property debt" means that, if a testator enters a contract to purchase a property and dies before completion, the property is subject to a lien for unpaid purchase money which must be borne by the property.[63] The National Committee observed that the inclusion of liens for unpaid purchase money may be inequitable where the purchase price was to be paid primarily from assets in what became the residuary estate, however, it also noted that, in the vast majority of cases, the funds are likely to come from a mortgage secured on the property.[64] In recommending this inclusion, the National Committee noted that this position now applies in all Australian jurisdictions that have adopted Locke King's legislation.[65]

5.40 By the operation of the definition of "property" in the Dictionary in schedule 3, the property referred to in these definitions includes both real property and personal property.[66] This is consistent with the approach of most Australian jurisdictions, including NSW, and with the view identified by the National Committee that there is no reason in principle why personal property that secures a debt should be treated any differently to real property that secures a debt through a mortgage.[67]

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63. See QLRC, Report 65 [17.155].
64. QLRC, Report 65 [17.186].
65. QLRC, Report 65 [17.189]. The NSW provision is in *Conveyancing Act 1919* (NSW) s 145(1).
66. QLRC, Report 65 [17.184].
67. QLRC, Report 65 [17.181]. See also Law Reform Commission of British Columbia, *Wills and Changed Circumstances*, Report 102 (1989) 59-60.

506 Payment of property debts if there is no class 1 property

(1) This section applies if, on the person's death—

(a) the person is entitled to encumbered property; and

(b) there is no class 1 property in the person's estate.

Note—

Under section 201, a testator is taken to have been entitled at his or her death to any interest in property in relation to which a disposition contained in his or her will operates as an exercise of a general power of appointment.

(2) The encumbered property is, as between the different persons claiming through the deceased person, primarily liable for the payment of the property debt with which it is charged and each part of the encumbered property, according to its value, is to bear a proportionate part of the property debt.

Example—

Assume that a deceased person's estate has a total value of $300000. It is comprised of Blackacre, which has a value of $200000 and other property with a value of $100000. Assume further that the estate has total debts of $80000. This is comprised of a property debt of $50000 secured by mortgage on Blackacre and unsecured debts of $30000. The deceased's will gives Blackacre to A and B in equal share as tenants in common and the residuary estate to C. The estate does not include class 1 property.

In this example, the rule in subsection (2) requires that Blackacre is primarily liable for the payment of the property debt of $50000 with which it is charged. As a result, the debt secured on Blackacre must be paid out of Blackacre and not out of class 2 property. As a result, C receives a distribution to the value of $70000 ($100000 less the unsecured debts of $30000).

Because the rule in subsection (2) further requires that each part of Blackacre, according to its value, is to bear a proportionate part of the property debt, A and B each receive a distribution to the value of $75000 ($100000, which is half the value of Blackacre, less $25000, which is a proportionate part of the property debt).

(3) Subsection (2) does not apply if a contrary intention appears in the deceased person's will.

5.41 This clause essentially provides that property that is charged with a debt must bear that debt and any person taking that property takes it

subject to that debt. It derives from s 61(1) of the *Succession Act 1981* (Qld) which is an expression of the Locke King legislation that has been adopted by most Australian jurisdictions.[68]

5.42 The contrary intention mentioned in cl 506(3) is subject to cl 503 which provides that a general direction or disposition for the payment of debts out of the estate or residuary estate does not amount to a statement of contrary intention.[69] This is consistent with the current NSW provision.[70] However, the model provision, in referring only to the deceased's will, is narrower than the NSW provision which allows that the contrary intention may be expressed in a "will, deed, or other document".[71] The National Committee recommended the restriction to expressions in the will, having considered criticisms that wider provisions incorporating statements in other documents were not justified[72] and presented problems of proof and left open the possibility of fraud.[73] The National Committee also observed that the dispensing powers now available to the Court[74] gave a wider meaning to the term "will" than was previously the case.[75]

507 Payments of property debts if there is class 1 property

(1) This section applies if, on the person's death—

(a) the person is entitled to encumbered property; and

(b) there is class 1 property in the person's estate.

Note—

Under section 201, a testator is taken to have been entitled at his or her death to any interest in property in relation to which a disposition contained in his or her will operates as an exercise of a general power of appointment.

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68. The NSW provision is in *Conveyancing Act 1919* (NSW) s 145(1).
69. See para 5.26.
70. *Conveyancing Act 1919* (NSW) s 145(2).
71. *Conveyancing Act 1919* (NSW) s 145(1).
72. R A Woodman, *Administration of Assets* (2nd ed, Law Book Company, 1978) 93.
73. Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34, pt 7 (1988) [3.29].
74. *Succession Act 2006* (NSW) s 8.
75. QLRC, Report 65 [17.200].

(2) The class 1 property must be applied rateably towards discharging—

(a) the property debt to which the encumbered property is subject; and

(b) the unsecured debts of the deceased person's estate.

(3) If the class 1 property is not sufficient to discharge the property debt to which the encumbered property is subject—

(a) the encumbered property is, as between the different persons claiming through the deceased person, primarily liable for the payment of the remainder of the property debt after the application of the class 1 property; and

(b) each part of the encumbered property, according to its value, is to bear a proportionate part of the property debt.

Example—

Assume that a deceased person's estate has a total value of $240000. It is comprised of two properties, Blackacre and Whiteacre, each of which has a value of $90000, and other property with a value of $60000. Assume further that the estate has total debts of $120000. This is comprised of a property debt of $80000 secured by mortgage on Blackacre and unsecured debts of $40000.

Under the deceased's will, Blackacre is given to A and the residuary estate is given to B. The executors are directed to pay 'all my debts' out of Whiteacre, which is therefore class 1 property.

In this example the rule in subsection (2) requires that Whiteacre, as class 1 property, must be applied rateably towards discharging the property debt of $80000 to which Blackacre is subject and the unsecured debts of $40000. Because the value of Whiteacre ($90000) is 75% of the total amount of the debts ($120000), Whiteacre will be applied to pay 75% of the property debt of $80000 ($60000) and 75% of the unsecured debts of $40000 ($30000).

The rule in subsection (3) further requires that, because Whiteacre is not sufficient to discharge the property debt to which Blackacre is subject, Blackacre is primarily liable for the payment of the remainder of the property debt of $20000.

As a result A receives a distribution of $70000 ($90000 less the remaining property debt of $20000). As Whiteacre has been fully applied, the unsecured debts of $10000 that remain after the application of Whiteacre must be paid out of class 2 property. B, as

the residuary beneficiary, therefore receives a distribution to the value of $50000 ($60000 less the remaining unsecured debts of $10000).

(4) Subsections (2) and (3) do not apply if a contrary intention appears in the deceased person's will.

5.43 This clause introduces a new provision to clarify how the personal representative is to pay the debt or charge to which encumbered property is subject, if the testator creates class 1 property.[76]

5.44 First, it provides that the personal representative should use the class 1 property to discharge the debt to which the encumbered property (the "secured debt") is subject and also to discharge the estate's unsecured debts. If the class 1 property is insufficient to discharge all the debts, it should be applied rateably to both the secured debt and the unsecured debts. The remaining unsecured debt must, then, be paid out of the encumbered property and the personal representative must pay the unsecured debts out of any class 2 property and, if necessary, out of class 3 property.

5.45 The contrary intention mentioned in cl 507(4) is subject to cl 503.[77]

508 Abolition of rule in Lutkins v Leigh

(1) The rule in Lutkins v Leigh is abolished.

Note—

Lutkins v Leigh (1734) Cases T Talbot 53; 25 ER 658

(2) Consequently, if, for section 506 or 507—

(a) a contrary intention appears in the deceased person's will; and

(b) as a result of the contrary intention, all or part of a property debt charged against encumbered property is payable out of class 2 property;

the person to whom the encumbered property is specifically given by the will or appointed under a general power of appointment is not required to restore to class 2 property any

76. QLRC, Report 65 [17.228].

77. See para 5.42.

> amount applied from class 2 property towards the discharge of the property debt charged against the encumbered property.

5.46 This provision abolishes the rule in *Lutkins v Leigh*[78] and provides that, where a testator expresses an intention in his or her will that the Locke King's provisions in cl 506 or cl 507 do not apply to a gift of encumbered property, and the debt must be paid, all, or in part, from class 2 property, the beneficiary of the encumbered property is not required to restore an amount equivalent to the class 2 property so used.

5.47 A testator who gives property that is subject to a mortgage can negative the operation of the Locke King's provisions in cl 506 or cl 507 in a number of ways, one of which is simply stating that the beneficiary is to take the property free of the mortgage. The effect of such a provision is that the personal representative must treat the mortgage debt as an unsecured debt and pay it out of the estate according to the statutory order.[79] However, the Rule in *Lutkins v Leigh* provides that, if the personal representative must use funds that would otherwise be used for pecuniary legacies to satisfy the mortgage debt, the beneficiaries of the pecuniary legacies are entitled to have restored to the fund the amount that has been paid towards the mortgage debt. This effectively means that the fund retained for the payment of pecuniary legacies cannot be used to satisfy the mortgage debt.

5.48 The National Committee, having considered various criticisms of the rule,[80] concluded that it would undermine the operation of the model statutory order for payment of debts set out in cl 502 and would be inconsistent with the specific wishes of the testator that the encumbered property be given free of the mortgage to which it is subject.[81]

509 Division does not affect other rights to payment

> This division does not affect the right of a person entitled to a property debt charged against an encumbered property to obtain

78. *Lutkins v Leigh* (1734) Cases T Talbot 53; 25 ER 658.
79. See para 5.13.
80. *Re Smith* [1899] 1 Ch 365, 371; *Re McIntosh (No 2)* (1902) 2 SR (NSW) Eq 247, 253; Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 pt 7 (1988) [3.43].
81. QLRC, Report 65 [18.90].

payment for, or satisfaction of, the property debt out of the other assets of the deceased person's estate or otherwise.

5.49 Clause 509 confirms that this Division does not affect the rights of anyone entitled to payment of the debt charged on the encumbered property to obtain payment or satisfaction of that debt from the estate or otherwise.

5.50 The National Committee observed that, strictly, such a provision is not necessary since cl 506 and cl 507 refer only to the resolution of issues "between the different persons claiming through the deceased person".[82] However, it acknowledged that, since all Australian jurisdictions, apart from Queensland, include such a provision in relation to their Locke King's provisions, "the omission of the provision from the model legislation could give rise to confusion in those other jurisdictions".[83] The model provision is, therefore, based on s 500(5) of the *Civil Law (Property) Act 2006* (ACT). The equivalent provision in NSW is s 145(3) of the *Conveyancing Act 1919* (NSW).

PART 3 INTEREST

510 General legacies

(1) The personal representative must pay interest at the prescribed rate on a general legacy to the beneficiary of the legacy as provided under this section.

(2) Interest is payable on the general legacy—

(a) from the first anniversary of the deceased person's death until the general legacy is paid; or

(b) if, under the will, the general legacy is payable at a future date—from that date until the general legacy is paid.

(3) Payment of interest on the general legacy is subject to a contrary intention in the will about any of the following—

(a) whether interest is payable on the general legacy;

(b) the time from when interest is payable on the general legacy;

82. QLRC, Report 65 [17.233], [17.236].

83. QLRC, Report 65 [17.237].

(c) the rate of interest that is payable on the general legacy.

(4) In this section—

prescribed rate, of interest, means the rate that is 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.[1]

1 See <http://www.rba.gov.au/Statistics/cashrate_target.html>.

***Drafter's note**: In some jurisdictions, year may be defined under its interpretation legislation to mean calendar year.*

5.51 This clause sets out when a personal representative must pay interest on a general legacy. It also establishes the interest rate that is to be applied.

5.52 General legacies are usually either gifts of sums of money (pecuniary legacies) or of other property (but not specific items of property) which may be given directly from the estate, or purchased by the estate, or its value given to the beneficiary as a sum of money. The fund necessary to satisfy general legacies must be obtained from the assets of the estate.

5.53 The position at law has long been that a general legacy carries interest calculated from one year after the death of the testator until it is eventually paid[84] or, if the will specifies a future date for payment, from that date until it is eventually paid.[85] The justification for this arrangement being that residuary beneficiaries should not stand to benefit from interest earned because of delays in the payment of general legacies at the expense of the beneficiaries of those general legacies.[86] The model clause is based on s 52(1)(e) of the *Succession Act 1981* (Qld) which is consistent with the rules under the general law.[87]

5.54 Currently, in NSW, the relevant provisions merely state that, if interest is payable on any legacy, the annual rate is 2% above the cash rate

84. *Permanent Trustees Co of NSW Ltd v Royal Prince Alfred Hospital* (1944) 45 SR (NSW) 339; *Walford v Walford* [1912] AC 658, 662-663.

85. *Donovan v Needham* (1846) 9 Beav 164, 167; 50 ER 306, 307.

86. See *Re Wyles; Foster v Wyles* [1938] Ch 313, 315-316.

87. See also QLRC, Report 65 [18.105], [18.117]-[18.118].

last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.[88]

5.55 The definition of "prescribed rate" in cl 510(4) is consistent with the National Committee's proposals in its report on intestacy.[89] This new provision renders unnecessary a provision, like those in Queensland and NSW,[90] that allows the Court to set a different rate either generally, or to suit a specific case.[91]

PART 4 INSOLVENT ESTATES

5.56 Currently, when a person dies, if his or her estate is insolvent and not already being administered under the *Bankruptcy Act 1966* (Cth), or if the estate is later found to be insolvent, the personal representative essentially has two options available. He or she may either seek to have the estate administered under Part 11 of the *Bankruptcy Act 1966* (Cth)[92] or seek to have the estate administered under the administration of estates provisions that deal with the administration of insolvent estates. This Part of the model legislation deals with the administration of insolvent estates for those who choose the second option.

5.57 The National Committee, having noted that it is not mandatory for a personal representative to administer an estate under the *Bankruptcy Act 1966* (Cth),[93] and having noted concerns about the additional costs, expense and delay that may arise in an administration under the *Bankruptcy Act*,[94] concluded that it was "essential" for there to be a regime

88. *Probate and Administration Act 1898* (NSW) s 84A(1) and (3).

89. New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) [4.61]. The proposed provision has now also been adopted in *Probate and Administration Act 1898* (NSW) s 84A(3).

90. *Succession Act 1981* (Qld) s 52(1)(e); *Probate and Administration Act 1898* (NSW) s 84A(1).

91. QLRC, Report 65 [18.124].

92. *Bankruptcy Act 1966* (Cth) s 247.

93. QLRC, Report 65 [16.64].

94. QLRC, Report 65 [16.62], [16.63]. See also Law Reform Commission of Western Australia, *Administration of Deceased Estates: Administration of Deceased Insolvent Estates*, Working Paper, Project No 34, pt 3 (1977) [86].

for the administration of insolvent estates that are not being administered under the *Bankruptcy Act*.[95]

511 Application of part

This part applies if a deceased person's estate—

(a) is insufficient to pay, in full, the debts of the estate; and

(b) is not being administered under the *Bankruptcy Act 1966* (Cwlth).

5.58 "Debts" are defined in the Dictionary in schedule 3 to include funeral, testamentary and administration expenses, and other liabilities payable out of the estate of a deceased person. This follows the National Committee's preference for clearly stating that an estate must be administered as an insolvent estate if it is unable to pay its expenses, debts and liabilities in full.[96]

5.59 The relevant NSW provision states that insolvent means "insufficient for the payment in full of the debts and liabilities of the deceased".[97]

5.60 According to s 109 of the *Constitution* (Cth), the model provisions will not apply when an insolvent estate is being administered under the *Bankruptcy Act 1966* (Cth). It is, therefore, not necessary to include a provision to the effect of paragraph (b). However, the National Committee considered that such a provision would serve to alert people to the potential application of the *Bankruptcy Act 1966* (Cth).[98]

512 Application of bankruptcy rules

(1) The bankruptcy rules as in force at the date of the deceased person's death apply to the following—

(a) the rights of secured and unsecured creditors against the deceased's estate;

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95. QLRC, Report 65 [16.64].
96. QLRC, Report 65 [16.69]. The provision is derived, in part, from *Administration and Probate Act 1929* (ACT) s 41C(2) and *Administration and Probate Act* (NT) s 57(2).
97. *Probate and Administration Act 1898* (NSW) s 46C(3).
98. QLRC, Report 65 [16.75]-[16.76].

(b) the debts and liabilities provable against the deceased's estate;

(c) the valuation of annuities and future and contingent liabilities of the deceased's estate;

(d) the priorities of debts and liabilities of the deceased's estate.

(2) A demand, in relation to which proceedings are maintainable against the deceased's estate, is provable against the estate despite being a demand in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust.

(3) For the purpose of applying the bankruptcy rules for this part—

(a) a reference to either of the following—

(i) the date of the order for administration under Part XI;

(ii) the date on which the administration under Part XI is deemed to have commenced;

is taken to be a reference to the date of the deceased's death; and

(b) a reference to the Court is taken to be a reference to [insert relevant court of local jurisdiction].

(4) In this section—

bankruptcy rules means the provisions of the *Bankruptcy Act 1966* (Cwlth) and the regulations under that Act applying in relation to the administration of estates of deceased persons in bankruptcy.

5.61 This clause applies the relevant bankruptcy rules as currently established under the *Bankruptcy Act 1966* (Cth) to insolvent estates administered under the model legislation. It is derived principally from the provisions of s 57 of the *Succession Act 1981* (Qld).

5.62 This means that the priorities established by the *Bankruptcy Act* apply to the payment of debts in an insolvent estate. This accords with the National Committee's aim that "the administration of insolvent

estates will continue to be largely assimilated with the position under the *Bankruptcy Act 1966* (Cth)".[99]

5.63 Under cl 512(1), the bankruptcy rules are those in force at the date of the deceased's death. The National Committee considered that this expression provides more certainty than the alternative, used in some jurisdictions,[100] of "in force for the time being".[101] This expression accords with the formulation in the relevant NSW provision.[102]

5.64 Sub-clause (2) is intended to deal with the unfair operation of s 82(2) of the *Bankruptcy Act 1966* (Cth) in relation to deceased estates. Under s 82(2), "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust" are not provable in an administration under the Act. When a living bankrupt is discharged, he or she is only released from the debts that were provable in the bankruptcy.[103] This means that a bankrupt is not normally released from demands in the nature of unliquidated damages arising from, for example, negligence in tort. However, in the case of a bankrupt deceased estate, the bar on such claims effectively operates for all time. The National Committee, therefore, proposed the inclusion of a provision, based on one in WA,[104] that overrides the effect of s 82(2).[105]

5.65 Sub-clause 512(3) makes some necessary adaptations of the relevant bankruptcy rules to administration under the model legislation. In particular, it provides that a reference in the bankruptcy rules to the date on which an order for administration under the rules was made, or the date on which that administration commenced, is to be read as a reference to the deceased's date of death. The National Committee noted that it was not necessary to include a reference to the date of a sequestration order[106] since the *Bankruptcy Act*[107] already provides that

99. QLRC, Report 65 [16.86].
100. See, eg, *Succession Act 1981* (Qld) s 57(b).
101. QLRC, Report 65 [16.88].
102. *Probate and Administration Act 1898* (NSW) sch 3 pt 1 class 2.
103. *Bankruptcy Act 1966* (Cth) s 153.
104. *Administration Act 1903* (WA) sch 5 cl 2.
105. QLRC, Report 65 [16.104]-[16.105].
106. As is the case under *Probate and Administration Act 1898* (NSW) sch 3 pt 1 class 2.
107. *Bankruptcy Act 1966* (Cth) s 248(3)(a).

such a reference is to be read as a reference to an order for administration of an estate under that Act.[108]

5.66 In cl 512(4), the term "bankruptcy rules" is defined to mean provisions of the *Bankruptcy Act 1966* (Cth) that apply in relation to the administration of the estate of a deceased person. The National Committee preferred this formulation, which derives from s 57(b) of the *Succession Act 1981* (Qld), because the bankruptcy rules that are thus imported will be "framed in terms that are more appropriate in the context of the administration of [an] estate".[109] The current NSW provision contains a reference to the more general "law of bankruptcy with respect to the assets of persons adjudged bankrupt".[110]

5.67 This model provision differs from the provisions in most Australian jurisdictions, including NSW,[111] in that it does not purport to give priority to the payment of funeral, testamentary and administration expenses. The National Committee noted the priority given in such provisions is "to a large degree, illusory", for example, because of the payment of certain liabilities that arise under the *Child Support (Registration and Collection) Act 1988* (Cth), and the *Income Tax Assessment Act 1936* (Cth).[112] The National Committee considered it "more important to maintain consistency with the priorities that apply under the *Bankruptcy Act 1966* (Cth) unless there is a compelling reason to depart from those priorities".[113]

5.68 The adoption of the priorities that apply under the *Bankruptcy Act 1966* (Cth) renders unnecessary provisions, such as s 82 of the *Probate and Administration Act 1898* (NSW), that abolish the old common law priorities in relation to the payment of debts.[114]

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108. QLRC, Report 65 [16.92]-[16.93].
109. QLRC, Report 65 [16.87].
110. *Probate and Administration Act 1898* (NSW) sch 3 pt 1 class 2.
111. *Probate and Administration Act 1898* (NSW) sch 3 pt 1 class 1.
112. QLRC, Report 65 [16.112]-[16.113].
113. QLRC, Report 65 [16.115].
114. QLRC, Report 65 [16.144].

513 Preference, right of retainer and the payment of debts by personal representatives

(1) A personal representative's right to prefer creditors and right of retainer are abolished.

(2) A personal representative—

(a) must pay the debts of the deceased person's estate rateably according to the priority required by law; and

(b) must not—

(i) exercise any right to give preference as between creditors of the deceased person's estate of equal standing; or

(ii) prefer his or her own debt only because he or she is the personal representative.

(3) However, a personal representative who, acting genuinely, pays an amount to a creditor is not liable to account to a creditor of equal standing to the paid creditor for the amount paid to the paid creditor if—

(a) it subsequently appears that the estate is insolvent; and

(b) the personal representative—

(i) if subparagraph (ii) does not apply—pays the debt of any person, including himself or herself, who is a creditor of the estate; or

(ii) if the personal representative is a person to whom a grant of letters of administration has been made only because he or she is a creditor of the estate—pays the debt of another person who is a creditor of the estate.

(4) In this section—

acting genuinely, in relation to a personal representative, means acting in good faith and at a time when the personal representative has no reason to believe that the deceased's estate is insolvent.

5.69 This clause abolishes a personal representative's right to pay one creditor in preference to another creditor of equal degree[115] and his or her right of retainer (that is the ability to prefer his or her own debt)[116] and sets out how he or she must go about paying the debts of the estate. It derives from s 58 of the *Succession Act 1981* (Qld) which abolishes the right to prefer creditors and the right of retainer.

5.70 The National Committee recommended the abolition of rights of preference and of retainer, preferring instead that all debts of equal priority should be paid proportionately.[117] In making this recommendation, the National Committee noted that the protection of a personal representative who paid creditors before the full liabilities of the estate is known is no longer a valid reason for retaining the right of preference.[118] It also noted the observation of the Law Commission of England and Wales[119] that advertising an intention to distribute was now the method by which personal representatives protected themselves from unknown claimants.[120] The National Committee also noted the Law Commission's view that the traditional reason for the right of retainer, namely that a personal representative required compensation for his or her inability to sue the estate and thus convert his or her claim into a judgment debt, is no longer relevant because judgment debts are no longer payable in priority to others and the abolition of the right of retainer would not impact on a personal representative's right to pay his or her debt proportionately with the others.[121]

5.71 Sub-clause 513(2) follows the National Committee's recommendation that the model legislation should not simply abolish the

115. *Lyttleton v Cross* (1824) 3 B&C 317; 107 ER 751.

116. *Probate and Administration Act 1898* (NSW) s 82(2) has abolished retainer in NSW.

117. QLRC, Report 65 [16.161].

118. QLRC, Report 65 [16.157].

119. England and Wales, Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report 31 (1970) [8].

120. QLRC, Report 65 [16.157].

121. QLRC, Report 65 [16.158] quoting England and Wales, Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report 31 (1970) [8].

two principles by name, but should also state the obligations of the personal representative following the abolition.[122]

5.72 However, cl 513(3) protects a personal representative from claims of creditors if he or she pays other creditors at a time when he or she had no reason to believe the estate was insolvent. This provision is based on s 58(2) of the *Succession Act 1981* (Qld).[123] Both the Queensland Law Reform Commission and Law Reform Commission of Western Australia have previously recommended similar provisions, recognising that a personal representative might well pay debts in good faith and without knowledge of an impending insolvency.[124] The National Committee considered that, in these circumstances, it is "difficult to argue that the personal representative should generally be in a worse position than other creditors".[125] However, cl 513(3)(b)(ii) makes special provision for a personal representative who holds office merely by reason of being a creditor to the estate, so that such a personal representative is only protected when he or she pays another creditor and not when he or she pays him or herself.[126] The National Committee was of the view that such a provision "provides an added degree of protection to other creditors in circumstances where the personal representative may be more likely to suspect that an estate is insolvent".[127]

122. QLRC, Report 65 [16.168].

123. Which, in turn, was based on *Administration of Estates Act 1971* (Eng) s 10.

124. QLRC, Report 22, 41; Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34, pt 3 (1978) [2.42].

125. QLRC, Report 65 [16.181].

126. In the case of a grant to a creditor, administration bonds were used to exclude the administrator's rights of retainer and preference: England and Wales, Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report 31 (1970); QLRC, Report 65 [9.7].

127. QLRC, Report 65 [16.182].

Chapter 6. General

- Part 1 Subsisting causes of action
- Part 2 Supreme Court practice and the Registrar
- Part 3 Concealing wills etc.
- Part 4 Other provisions

PART 1 SUBSISTING CAUSES OF ACTION

Division 1 Causes of action continue

600 Survival of causes of actions

(1) On a person's death, all causes of action subsisting against or vested in the person survive against, or for the benefit of, the person's estate.

(2) However, subsection (1) does not apply if, or to the extent, [insert any provisions providing exceptions] or another Act provides otherwise in relation to a specific cause of action.

6.1 This clause states that, subject to exceptions contained here and in other legislation, causes of action against, or for the benefit of, a person survive for the benefit of his or her estate. This reverses the common law position that causes of action against, or for the benefit of, a person die with that person. It is derived from s 6(1) of the *Succession Act 1981* (Qld). The equivalent NSW provision is the first part of s 2(1) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW).

6.2 In recommending this provision, the National Committee decided not to refer specifically to the exceptions contained in the various similar provisions around Australia. For example, in NSW, exceptions include claims for the adjustment of property interests under the *Property (Relationships) Act 1984* (NSW),[1] and causes of action for defamation, seduction and "for inducing one spouse to leave or remain apart from the other".[2] The National Committee considered that such matters are essentially ones of tort law and are "more properly located in separate legislation dealing with the survival of specific causes of action".[3] The National Committee applied the same reasoning to specific provisions detailing what damages should be recoverable when a cause of action survives for the benefit of an estate. In NSW, these include specific

1. *Property (Relationships) Act 1984* (NSW) part 3 div 2.
2. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1).
3. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [26.38].

provisions barring exemplary damages and damages for future loss and pain and suffering.[4]

6.3 The National Committee observed that this provision simply "reflects the fact that a cause of action that survives for the benefit of an estate is an asset of the estate, while a cause of action that survives against an estate is a liability of the estate".[5]

601 Cause of action subsists in particular circumstances

(1) This section applies if damage has been suffered because of an act or omission in relation to which a cause of action would have subsisted against a person (the respondent) if the respondent had not died before or at the same time as the damage was suffered.

(2) For section 600, a cause of action, of the same kind as would have subsisted if the respondent had died after the damage was suffered, is taken to have been subsisting against the respondent before his or her death in relation to the act or omission.

6.4 This provision extends the coverage of cl 600 to deal with circumstances where the claimant against the estate has suffered damage either at, or after, the deceased's death. It is based on s 66(3) of the *Succession Act 1981* (Qld). The equivalent NSW provision is s 2(4) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). The National Committee recommended its inclusion because without it cl 600 would only apply where the person suffers damage before the deceased's death.[6]

602 Rights are additional

The rights conferred by this division for the benefit of the estates of deceased persons are in addition to, and do not limit, any rights conferred on the dependants of deceased persons by [insert local equivalent of the Supreme Court Act 1995 (Qld), part 4, division 5[2]].

2 *Supreme Court Act 1995*, part 4 (Provisions from Common Law Practice Act 1867), division 5 (Actions against and by executors)

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4. See *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2).
5. QLRC, Report 65 [26.39].
6. QLRC, Report 65 [26.40].

6.5 This clause, which is based on the first part of s 66(4) of the *Succession Act 1981* (Qld),[7] states that the provisions in this division are in addition to, and do not limit, any rights that the deceased's dependents might have in relation to an action for wrongful death. The equivalent NSW provision is s 2(5) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) in relation to the provisions of the *Compensation to Relatives Act 1897* (NSW). NSW also makes similar provision for rights and obligations under various motor accident statutes,[8] however, the model legislation makes no provision for these.

603 Part does not revive cause of action not previously maintainable

> Nothing in this division enables a proceeding to be started for a cause of action that ceased to be maintainable before the commencement of this Act.

6.6 This provision, which is based on s 66(5) of the *Succession Act 1981* (Qld),[9] has its origins in the *Proceedings Against Estates Act 1970* (Eng) which was enacted following a report of the Law Commission of England and Wales.[10] The relevant recommendation[11] arose from a case under the English provisions which preserved actions in tort against deceased estates where the action was pending at the time of death or had been commenced within six months after the grant of representation.[12] The case held that proceedings in tort against an estate, even if they were already statute-barred, would not be statute-barred so long as the plaintiff brought proceedings within six months of the grant of representation.[13] The Law Commission considered that it would be "strange" if a grant of representation could revive a statute-barred right

7. QLRC, Report 65 [26.40].
8. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(6) referring to the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW), the *Transport Accidents Compensation Act 1987* (NSW) and the *Motor Accidents Act 1988* (NSW).
9. QLRC, Report 65 [26.40].
10. England and Wales, Law Commission, *Proceedings Against Estates*, Report 19 (1969).
11. England and Wales, Law Commission, *Proceedings Against Estates*, Report 19 (1969) [24].
12. *Law Reform (Miscellaneous Provisions) Act 1934* (Eng) s 1(3).
13. *Airey v Airey* [1958] 1 WLR 729, 734.

of action against a deceased person.[14] The Queensland Law Reform Commission adopted the English provision in its 1978 report on the basis that "something has to be done about the anomalies uncovered" by the English case.[15] There is no equivalent provision in NSW, which appears never to have adopted the six months provision.[16]

Division 2 Proceedings for causes of action that continue

6.7 This division deals with proceedings for causes of action against an estate that have continued under cl 600. It covers:

- the ability to bring an action against a personal representative or a beneficiary (cl 606);
- a beneficiary's entitlement to seek contribution or indemnity from the personal representative, contribution from beneficiaries of equal degree, and indemnity from beneficiaries of lower degree (cl 607 and cl 608);
- the defences available to a beneficiary (cl 609); and
- limitations on the amounts for which each beneficiary is liable (cl 610).

6.8 NSW does not have equivalent provisions.

604 Application of division

(1) This division applies if a cause of action survives against a deceased person's estate.

(2) This division applies in relation to causes of action under [insert local equivalent of the Supreme Court Act 1995 (Qld), part 4, division 5] as it applies in relation to other causes of action that survive under division 1.

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14. England and Wales, Law Commission, *Proceedings Against Estates*, Report 19 (1969) [2].
15. Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978) ("QLRC, Report 22") 50.
16. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(3) originally preserved actions in tort pending against the estate at the deceased's death and actions arising 12 months before death, so long as the plaintiff commenced proceedings within 12 months of the grant of representation.

6.9 This clause is derived from the second half of s 66(4) of the *Succession Act 1981* (Qld). Part 4 Division 5 of the *Supreme Court Act 1995* (Qld) deals with actions for wrongful death brought by a spouse, parent or child of the deceased. The equivalent provisions in NSW may be found in the *Compensation to Relatives Act 1897* (NSW).

605 Definitions for division

In this division—

claimant means a person whose cause of action survives against a deceased person's estate.

court means the court of this jurisdiction in which a proceeding is brought.

606 Proceeding may be brought against personal representative or beneficiary

(1) A claimant may start a proceeding, for the cause of action, against any or all of the following—

(a) the personal representative of the deceased person's estate;

(b) any beneficiary of the estate to whom the estate has been distributed (a prescribed person).

(2) It is not necessary for the claimant to exhaust all remedies against the personal representative before proceeding against a prescribed person.

(3) Proceedings against persons mentioned in subsection (1) may be started and progressed at the same time.

(4) A proceeding against a prescribed person that is not also against the personal representative requires the court's leave.

6.10 This clause provides that a claimant may proceed against a personal representative or a beneficiary to whom the personal representative has distributed part of the estate. It derives from s 66(6) of the *Succession Act 1981* (Qld). This provision, however, clarifies the provisions in s 66(6) by following similar provisions in cl 424 which deal with the rights of a person who suffers loss because of a wrongful distribution. This includes confirmation that a claimant need not exhaust remedies against the personal representative before proceeding against a beneficiary, and the requirement that a claimant must seek the Court's

leave before proceeding against a beneficiary without also proceeding against the personal representative.[17]

6.11 Sub-clause 606(1) confirms, in conjunction with the definition in cl 605, that "claimant" is not restricted to a creditor, beneficiary or next-of-kin of the deceased.[18]

607 Beneficiary is entitled to contribution or indemnity

(1) If a claimant starts a proceeding, for the cause of action, against a beneficiary of a deceased person's estate, the beneficiary is entitled—

(a) to an indemnity, from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the beneficiary, for the payment of the debts of the estate; and

(b) to a contribution, from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the beneficiary, for the payment of the debts of the estate; and

(c) to a contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate.

(2) If a beneficiary of the estate starts a proceeding, for an indemnity or contribution mentioned in subsection (1)(a) or (b), against another beneficiary of the estate (the respondent beneficiary), the respondent beneficiary is entitled—

(a) to an indemnity, from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the respondent beneficiary, for the payment of the debts of the estate; and

(b) to a contribution, from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the respondent beneficiary, for the payment of the debts of the estate; and

17. QLRC, Report 65 [26.42]-[26.46].

18. QLRC, Report 65 [26.41].

(c) to a contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate.

(3) Subsection (2) may be re-applied, with necessary changes, so that a beneficiary against whom a proceeding is started (as mentioned in subsection (2)(a) or (b) or the re-application of subsection (2) under this subsection) is entitled to the indemnity, contribution, or contribution and indemnity mentioned in subsection (2)(a), (b) or (c).

(4) A beneficiary of the estate may join as a party to a proceeding brought against the beneficiary the following persons—

(a) for a proceeding mentioned in subsection (1)—any other beneficiary mentioned in subsection (1)(a) or (b);

(b) for a proceeding mentioned in subsection (2), including as re-applied under subsection (3)—any other beneficiary mentioned in subsection (2)(a) or (b);

(c) for either of the proceedings mentioned in subsections (1) and (2)—the personal representative.

6.12 Clause 607 deals with a situation where a claimant brings proceedings against a beneficiary. In such a situation the beneficiary may seek contribution or indemnity from the personal representative, contribution from other beneficiaries of equal degree, and indemnity from other beneficiaries of lower degree. A beneficiary's degree is determined by whether he or she holds estate property in the classes established under cl 502. The ranking of beneficiaries by degrees is elaborated in cl 608.

6.13 Clause 607 is derived from s 66(7) of the *Succession Act 1981* (Qld).[19] However, it goes further than s 66(7) since it allows a beneficiary to seek contribution and indemnity from the personal representative[20] and also allows a beneficiary against whom proceedings for indemnity or contribution have been commenced to seek contribution or indemnity from other beneficiaries.[21]

19. QLRC, Report 65 [26.47]-[26.50].
20. QLRC, Report 65 [26.52].
21. QLRC, Report 65 [26.52]-[26.55].

608 Ranking of beneficiaries

(1) For section 607, beneficiaries are ranked for the payment of the debts of the estate as follows—

(a) a beneficiary ranks in equal degree to another beneficiary if each beneficiary is a beneficiary of property that is in the same class under section 502; and

Example—

Each beneficiary is a beneficiary of class 2 property.

(b) a beneficiary (the first beneficiary) ranks in lower degree to another beneficiary if, under section 502, the property of which the first beneficiary is a beneficiary must be used for the payment of the debts before the property of which the other beneficiary is a beneficiary.

Example—

A is a beneficiary of class 2 property and B is a beneficiary of class 3 property. A ranks in lower degree than B because the debts of the estate must first be paid from class 2 property.

(2) If a beneficiary is a beneficiary of a particular class of property and of other property that is of a different class, the beneficiary may be ranked in more than 1 way against another beneficiary for the purposes of contribution and indemnity.

Example—

Assume an action is brought against B who is the beneficiary of class 3 property. A is the beneficiary of class 2 and class 3 property. B is entitled to an indemnity from A to the extent of A's class 2 property and to a contribution from A in relation to A's class 3 property. Under section 610, the liability of a beneficiary can not be more than the amount distributed to the beneficiary.

6.14 This clause explains the ranking of beneficiaries by degree for the purposes of cl 607. A beneficiary's ranking depends on what class of property he or she has received in accordance with the classes of property established under cl 502.

6.15 Sub-clause 608(2) has been included to address the situation where a beneficiary holds property from the estate from more than one class, for

example, property that was the subject of a specific disposition (class 3) and other property that was part of a gift of residue (class 2).[22]

609 Defences available to a beneficiary

(1) If—

(a) a proceeding is brought, under section 606 or 607, against a beneficiary of a deceased person's estate to whom a distribution has been made; and

(b) the beneficiary—

(i) has received the distribution in good faith; and

(ii) has so altered the beneficiary's position in reliance on the correctness of the distribution that, in the court's opinion, it would be inequitable to enforce the action;

the court may make any order it considers appropriate.

(2) Subsection (1) applies whether the proceeding is brought by another beneficiary or someone else.

(3) Subsection (1) does not limit any other defence available, under an Act or at law or in equity, to the beneficiary.

6.16 This clause confirms that a beneficiary may plead any defence available to him or her and may also plead change of position. It is derived from s 66(8) of the *Succession Act 1981* (Qld).[23]

6.17 The Queensland Law Reform Commission, in originally proposing this provision, considered that beneficiaries ought to be able to plead change of position in much the same way as beneficiaries who have received a wrongful distribution,[24] as now provided for in cl 425(6) of the model legislation. The Queensland Law Reform Commission considered that this protection for beneficiaries should "constitute an added incentive to claimants against estates to come into the open and pursue their claims against the personal representatives promptly".[25]

22. QLRC, Report 65 [26.51].
23. QLRC, Report 65 [26.41].
24. QLRC, Report 22, 51.
25. QLRC, Report 22, 51.

6.18 Sub-section 609(3) follows a similar provision in cl 425(7). It goes beyond the Queensland provision which merely states that the beneficiary "may plead equitable defences".[26]

610 Judgement limited to amount of distribution

(1) In a proceeding against a beneficiary under this division, judgement against the beneficiary must not be for an amount more than the amount of the distribution made to the beneficiary.

(2) In deciding whether the amount of the judgement is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

6.19 This provision limits the judgment against a beneficiary to the amount the beneficiary has received from the estate. It derives from s 66(9) of the *Succession Act 1981* (Qld).

6.20 The Queensland Law Reform Commission considered that this protection for beneficiaries should "constitute an added incentive to claimants against estates to come into the open and pursue their claims against the personal representatives promptly".[27]

6.21 Sub-clause 610(2) has been included to make it clear that any interest awarded on the judgment should not be included when deciding whether the amount of the judgment is greater than the amount the beneficiary has received from the estate.[28]

PART 2 SUPREME COURT PRACTICE AND THE REGISTRAR

611 Practice

(1) The practice of the Supreme Court is as provided for under this or another Act or by the rules of court [as in force from time to time].

***Drafter's note**: The bracketed words may be unnecessary in some jurisdictions (Acts Interpretation Act 1954 (Qld), s 14H).*

26. QLRC, Report 65 [26.57].
27. QLRC, Report 22, 51.
28. QLRC, Report 65 [26.59].

> (2) If, in relation to a particular matter, the practice of the Supreme Court can not be ascertained under subsection (1), the practice of the court is the practice of the court before the passing of this Act to the extent the circumstances of the matter will allow.

6.22 This clause provides for the practice of the Court for the purposes of the model legislation. It is based on s 70 of the *Succession Act 1981* (Qld).

6.23 Sub-clause 611(2), in ensuring that, if the Court's practice is not otherwise provided for, the practice is to be the Court's practice before the passing of the model legislation, is intended to fill any "gaps" in the Court's rules.[29] The equivalent provision in NSW is s 62 of the *Probate and Administration Act 1898* (NSW) which applies the practice and proceedings of the Court in relation to the granting of administration of an intestate's personal estate to the granting of administration under the Act except where the Rules of Court have altered that practice. Such provisions, although considered unnecessary by some,[30] appear to have been included to ensure the continuity of the Court's practice when new statutes are enacted.[31]

6.24 Consideration will need to be given to the interaction of this model provision with s 102 of the *Succession Act 2006* (NSW), which provides for Rules of Court to be made "for or with respect to the practice and procedure to be followed in respect of proceedings under [the] Act and any matters incidental to, or relating to, such practice and procedure".

Rules of court

6.25 The National Committee has recommended that each jurisdiction adopt rules of court that:

- establish a summary enforcement procedure to support a beneficiary's right, under cl 615, to access information held by a personal representative;[32]

29. QLRC, Report 65 [40.134].
30. See, eg, QLRC, Report 22, 52; QLRC, Report 65 [40.131].
31. See New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) [18.8].
32. QLRC, Report 65 [11.207]. See para 6.43.

- establish a form of summary relief for a beneficiary when a personal representative fails to make a disposition to which he or she is entitled;[33]
- establish the procedure that creditors or potential claimants for family provision must follow in applying to the Court, under cl 616, to access information held by a personal representative;[34]
- establish a summary procedure to enforce any right of access that the Court orders under cl 616;[35]
- set out the documentation that an applicant for resealing under Chapter 3 Part 11 must produce in his or her application in relation to grants of representation,[36] and to require the applicant to deposit with the registrar a copy of the instrument,[37] and the will (if any, and if it has not already been included in the other documentation);[38]
- set out the procedures to be followed in an application for the resealing of an original grant of probate or an exemplification of a grant together with a grant of double probate;[39]
- set out the procedures to be followed when resealing original grants of probate or exemplifications of grants to substituted personal representatives where the substituted personal representatives do not appear on the grant;[40]

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33. QLRC, Report 65 [14.43]-[14.46]. See Appendix A, para A.23 and *Probate and Administration Act 1898* (NSW) s 84.
34. QLRC, Report 65 [11.212]. See para 6.48.
35. QLRC, Report 65 [11.214]. See para 6.48.
36. QLRC, Report 65 [35.18], [35.29]. The requirement to produce the original instrument or an exemplification in NSW is found in *Probate and Administration Act 1898* (NSW) s 107(1) and s 3 (definition of "probate" and "administration").
37. QLRC, Report 65 [35.19], [35.22], [35.26], [35.29]. The requirement to deposit a copy of the instrument in NSW is found in *Probate and Administration Act 1898* (NSW) s 107(1).
38. QLRC, Report 65 [35.27], [35.29].
39. QLRC, Report 65 [35.56]-[35.64]. NSW does not currently have a provision dealing with the procedures to be followed when resealing grants of probate together with grants of double probate.
40. QLRC, Report 65 [35.79]-[35.80]. NSW does not currently have a provision dealing with the procedures to be followed when resealing grants of probate where a personal representative has been substituted.

- set out the procedures in relation to caveats against original grants and resealing applications;[41]
- require the Court to include on a grant a list of Australian jurisdictions in which the grant will be effective without the need to apply for resealing[42] together with a "short statement explaining that, in any State or Territory in which the grant is effective, the personal representative is required to comply with the law in that jurisdiction regarding the duties of a personal representative";[43]
- set out the procedural requirements for obtaining a grant under s 306;[44]
- deal with grants when the sole executor is under 18 years of age;[45]
- set out the requirements for documents establishing a person's priority in an application for letters of administration with the will annexed under cl 321(4);[46] and
- set out the requirements for documents establishing a person's priority in an application for letters of administration under cl 322(4).[47]

6.26 The National Committee has also left it to individual jurisdictions to consider whether they should make or retain rules of court that:

- make provision for a person to advertise an intention to apply for the making of an original grant of representation[48] or for the resealing of a grant of representation;[49]

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41. QLRC, Report 65 [8.68]. The relevant NSW provisions are *Probate and Administration Act 1898* (NSW) s 144(2), s 145, s 146, s 148; and *Supreme Court Rules 1970* (NSW) pt 78 r 61-70.
42. QLRC, Report 65 [38.74].
43. QLRC, Report 65 [38.222].
44. QLRC, Report 65 [40.15]. The current NSW provisions are in *Probate and Administration Act 1898* (NSW) s 42(2)-(5).
45. QLRC, Report 65 [4.233]-[4.235]. The current NSW provisions are *Probate and Administration Act 1898* (NSW) s 70 and s 71. See para 3.43.
46. QLRC, Report 65 [5.71]. Such a provision may be found in *Uniform Civil Procedure Rules 1999* (Qld) r 603(5).
47. QLRC, Report 65 [5.62]. Such a provision may be found in *Uniform Civil Procedure Rules 1999* (Qld) r 610(6).
48. QLRC, Report 65 [8.25]-[8.26]. The National Committee particularly expressed doubts about the utility of advertising such matters in newspapers.

- set out the procedure by which a trustee company may apply for the resealing of a grant of probate under cl 360;[50]
- require a person applying for a grant of representation more than six months after the deceased's death to file an affidavit explaining the delay;[51] and
- allow the Court to require evidence of a deceased's domicile and other matters under the law of the deceased's domicile affecting the validity of a will or the entitlements of beneficiaries.[52]

612 Registrar's functions and powers

> Subject to this Act, the registrar, in relation to proceedings in the Supreme Court under this Act, has and may exercise—
>
> (a) the functions and powers that may be conferred on the registrar [from time to time] by the court and by the rules of court; and
>
> ***Drafter's note**: The bracketed words may be unnecessary in some jurisdictions. The Supreme Court of Qld has power to confer jurisdiction on registrars under the rules of court. (See also, Acts Interpretation Act 1954 (Qld), s 23.)*
>
> (b) the functions and powers that the registrar exercised before the passing of this Act.

6.27 Clause 612 ensures continuity in the Registrar's functions and powers when the model legislation is enacted. It is based on s 69 of the *Succession Act 1981* (Qld).[53] There is no equivalent provision in NSW, although other Australian jurisdictions do have similar provisions.[54]

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49. QLRC, Report 65 [8.41]. The National Committee particularly expressed doubts about the utility of advertising such matters in newspapers: QLRC, Report 65 [8.26].
50. QLRC, Report 65 [35.93]. An example of such a provision is *Probate Rules 2004* (SA) r 50.01(d).
51. QLRC, Report 65 [40.25]. The current NSW provision is *Supreme Court Rules 1970* (NSW) pt 78 r 11.
52. QLRC, Report 65 [40.86]. The current NSW provision is *Supreme Court Rules 1970* (NSW) pt 78 r 12.
53. QLRC, Report 65 [40.108].
54. See, eg, *Administration and Probate Act 1919* (SA) s 7 and s 7A; and *Administration Act 1903* (WA) s 5.

PART 3 CONCEALING WILLS ETC.

6.28 The provisions in this part are aimed at ensuring that testamentary documents are made available to the Court, an executor, and other interested people in the most complete state possible by allowing:

- the Court to order that a person produce such documents and to question people about the existence of such documents (cl 613); and
- a person who suffers loss to recover damages from a person who fraudulently interferes with a testamentary document (cl 614).

6.29 Ensuring that an executor has access to testamentary documents is important to allow him or her to decide whether to accept the office and undertake the administration of the estate in accordance with the will.[55]

613 Supreme Court may require production of testamentary documents

(1) This section applies if a person (the applicant) applies to the Supreme Court for an order that a person produce to the court a testamentary document of a deceased person or any other document relevant to the matter before the court (each of which is a relevant document).

(2) For subsection (1), it does not matter whether a proceeding about any probate or administration matter in relation to the deceased person is pending in the Supreme Court.

(3) If the Supreme Court is satisfied that the person may have a relevant document in the person's possession or under the person's control, the court may order the person to produce the relevant document to the court.

(4) If the Supreme Court is not satisfied that a relevant document is in the person's possession or under the person's control, but the court is satisfied that the person has knowledge of the relevant document, the court may—

(a) direct the person to attend before the court to be examined about the relevant document; or

(b) give the applicant leave to serve interrogatories on the person about the relevant document.

55. *Hawkins v Clayton* (1988) 164 CLR 539, 552-553.

(5) The person must—

(a) if subsection (4)(a) applies—answer questions put to the person; or

(b) if subsection (4)(b) applies—answer, directly and without evasion or resort to technicality, the interrogatories and return the completed interrogatories to the applicant.

(6) If the person fails, without reasonable excuse—

(a) to produce the relevant document as required under subsection (3); or

(b) to answer questions on the examination or interrogatories as required under subsection (5);

the person commits a contempt of court.

(7) In this section—

testamentary document includes a document purporting to be a testamentary document.

6.30 This clause allows the Court, on application, to order a person to produce testamentary and other documents that are relevant to the application and to question people about the existence of such documents. Failure to comply with such or order, or to answer such questions, may amount to contempt of court. Any person may apply to the Court under this clause and it does not matter that no proceeding is then before the Court.

6.31 This clause is in addition to provisions, such as the one currently in force in NSW, which set out who a person in possession of a will must allow to inspect or take copies of that will and which also require a person in possession of a will to deliver that will up if the Court orders him or her to do so.[56]

6.32 This clause derives mostly from s 150 of the *Probate and Administration Act 1898* (NSW). The National Committee considered the provisions particularly desirable because cl 613(1) also covers any other documents relevant to the matter before the Court and because cl 613(6)

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

gives the Court the specific power to punish a person for contempt for failure to comply with its orders or questions.[57]

6.33 In adopting the NSW provisions, the National Committee preferred to use the term "document" rather than the narrower expression "paper or writing" used in s 150.[58]

6.34 The requirement, in cl 613(5)(b), that a person must, in relation to interrogatories about the existence of any relevant documents, answer "directly and without evasion or resort to technicality" and return them to the applicant, is based on a provision in the Queensland civil procedure rules.[59]

6.35 The model provision has been drafted to state that the Supreme Court may exercise the relevant powers. However, the National Committee[60] has noted that rules of court can provide that the registrar may exercise the powers, as is currently the case in NSW.[61]

614 Person fraudulently disposing of will liable in damages

(1) This section applies if a person suffers loss as a result of a person interfering with a will.

Editor's note—

See [insert local equivalent of the Criminal Code (Qld), sections 398 and 399] for offences involving interfering with wills.

(2) The person may recover damages in relation to the loss by action in a court of competent jurisdiction from the person who interfered with the will.

(3) In this section—

interfere, with a will, includes either or both of the following—

(a) steal the will;

57. QLRC, Report 65 [28.32].

58. QLRC, Report 65 [28.33].

59. *Uniform Civil Procedure Rules 1999* (Qld) r 232(3). *Uniform Civil Procedure Rules 2005* (NSW) r 22.3(2)(b) requires the substance of each interrogatory to be answered "without evasion".

60. QLRC, Report 65 [28.35].

61. *Supreme Court Rules 1970* (NSW) pt 78 r 5(1)(r).

(b) fraudulently destroy, cancel, obliterate or conceal the will.

will includes part of a will.

6.36 Clause 614 gives a person who suffers loss the ability to recover damages from a person whose theft of, or fraudulent interference with, a testamentary document causes him or her loss. It is based on s 127 of the *Administration and Probate Act 1929* (ACT). The National Committee considered that such a provision would be a "useful addition" to the model legislation.[62]

6.37 In recommending this provision, the National Committee rejected the inclusion in the model legislation of a provision making it an offence to steal or conceal a will, preferring that the relevant criminal statutes should deal with such matters,[63] as is the case in NSW with respect to a person who "for any fraudulent purpose destroys, cancels, obliterates, or conceals, the whole or any part of any will, codicil, or other testamentary instrument".[64] The National Committee, however, did suggest that this model provision should contain a note that refers to the relevant criminal offences.[65]

6.38 The definition of "interfere" in cl 614(3) which draws on the terms from the criminal offence in NSW, is not exclusive and must also be taken to include such actions as altering or otherwise damaging a will.

PART 4 OTHER PROVISIONS

615 Access to information held by personal representative—beneficiaries

(1) This section applies to documents the personal representative is required to keep under section 403.

(2) A beneficiary of the deceased person's estate may, on giving reasonable notice to the personal representative—

(a) inspect the documents; and

62. QLRC, Report 65 [28.61].
63. QLRC, Report 65 [28.60].
64. *Crimes Act 1900* (NSW) s 135.
65. QLRC, Report 65 [28.60].

(b) obtain copies of the documents.

(3) The personal representative must allow the beneficiary, or the beneficiary's agent—

(a) to inspect the documents; or

(b) to obtain copies of the documents on payment to the personal representative of the personal representative's reasonable costs of providing the copies.

(4) If the personal representative fails to comply with subsection (3), the beneficiary may apply to the Supreme Court for an order requiring the personal representative to comply with subsection (3).

6.39 This clause allows a beneficiary to inspect, and obtain copies of, the documents in the possession of a personal representative that are necessary to prepare a statement of the estate's assets and liabilities or render an account of the estate's administration. Currently, at general law, a personal representative has a limited obligation to provide to a beneficiary information about an estate's assets.[66] This provision makes the rights of beneficiaries in this regard more certain and follows similar recommendations by the Ontario Law Reform Commission.[67]

6.40 In recommending this provision, the National Committee noted the desirability of encouraging openness in the administration of estates while not imposing unnecessary burdens on personal representatives, adding:

> In an area where suspicion and distrust are common, access to information has the potential to diffuse many conflicts and avoid unnecessary litigation.[68]

6.41 The National Committee noted that some information might not be relevant to all beneficiaries, for example, a residuary beneficiary as opposed to a beneficiary of a specific disposition. However, it decided to

66. *Re Craig* (1952) 52 SR (NSW) 265, 267: "It is the duty of an executor... to render accounts when properly called upon and to be constantly ready to do so". See also *Williams v Stephens* (unreported, NSW Supreme Court, Young J, 24 March 1986), 3.

67. Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 47-48.

68. QLRC, Report 65 [11.201].

allow access to information without restriction in order to avoid disputes about the relevance of particular documents to the interests of an individual beneficiary.[69]

6.42 Paragraph 615(3)(b) is consistent with the position at general law that an executor is not bound to supply copies of the relevant documents unless the beneficiary meets the reasonable costs involved.[70]

6.43 In recommending cl 615(4), the National Committee drew on the recommendation of the Ontario Law Reform Commission that provisions giving a beneficiary the right of access to information should be backed by an "expeditious enforcement procedure" in the nature of a summary procedure against a personal representative who fails to allow access.[71] The National Committee, therefore, proposed that rules of court should support cl 615(4) by creating a summary procedure to enforce a beneficiary's right of access.[72]

Privilege against self-incrimination

6.44 This provision, and cl 616, makes no provision relating to the privilege against self-incrimination that a personal representative may claim in some cases. The National Committee has taken the view that the model legislation, by not expressly abrogating the privilege against self-incrimination, is preserving it. The Committee has decided to preserve the privilege because it considers that the main problem that the model legislation should address is "not the prosecution of personal representatives who may have defrauded beneficiaries, but the lack of certainty surrounding the rights of beneficiaries to information about the administration of estates".[73] The National Committee was of the view that it could deal with the problem of lack of certainty surrounding beneficiaries' rights to information without taking the further step of abrogating the personal representative's right to claim the privilege against self-incrimination with respect to some information.[74]

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69. QLRC, Report 65 [11.203].
70. See *Williams v Stephens* (unreported, NSW Supreme Court, Young J, 24 March 1986) 4.
71. Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 47-48.
72. QLRC, Report 65 [11.207].
73. QLRC, Report 65 [11.216].
74. QLRC, Report 65 [11.216].

616 Access to information held by personal representative—family provision applicants and creditors

(1) This section applies to documents the personal representative is required to keep under section 403.

(2) A person eligible to apply for provision out of the deceased person's estate under [insert local equivalent of the Succession Act 1981, section 41], or a creditor of the estate, may apply to the Supreme Court for access to the documents.

(3) The Supreme Court may order that the personal representative give the person or creditor access to all or some of the documents as the court considers appropriate.

Examples of giving access—

- *allowing inspection of the documents*
- *providing copies of the documents*

(4) If the Supreme Court orders access under subsection (3), the right to access may be exercised by the person or creditor personally, or by the person's or creditor's agent.

(5) The person or creditor must pay to the personal representative the personal representative's reasonable costs of providing the access.

6.45 This clause allows potential applicants for family provision out of the estate or a creditor of the estate to apply to the Court for access to the documents that a personal representative is required to keep, under cl 403, to prepare a statement of the estate's assets and liabilities or render an account of the estate's administration.

6.46 In NSW, s 57 of the *Succession Act 2006* (NSW) sets out who is eligible to apply for a family provision order, including the deceased's (current and/or former) wife or husband, de facto partner, child, and grandchild (if a member of the deceased's household), a person was wholly or partly dependent on the deceased at any time, or a person with whom the deceased was living in a close personal relationship.

6.47 In recommending this provision, the National Committee considered that creditors and people who are eligible to apply for family provision should not have an automatic right to inspect and copy documents, but should rather be able to apply to the Court for such

access as the Court considers appropriate.[75] The National Committee[76] drew on a recommendation of the Ontario Law Reform Commission and particularly noted its observation that, while creditors and claimants for family provision share an interest in the proper administration of the estate, their interests are adverse to the estate and its beneficiaries.[77]

6.48 The National Committee further recommended that rules of court should set out the procedure for making such applications,[78] and should also support cl 616 by providing for a summary procedure to enforce any right of access that the Court orders.[79]

617 Abolition of administration bond and sureties

(1) An administrator of a deceased person's estate can not be required to provide an administration bond or a surety for an administration bond in relation to the grant of representation.

(2) The holder of a foreign grant of representation or another person applying to reseal a foreign grant of representation can not be required to provide an administration bond or a surety for an administration bond for the resealing of the foreign grant of representation.

6.49 This clause abolishes administration bonds and sureties in relation to both grants of representation and the resealing of foreign grants of representation. It derives from s 51 of the *Succession Act 1981* (Qld).[80]

6.50 In NSW, s 64-68 of the *Probate and Administration Act 1898* (NSW) govern the requirement of administration bonds and sureties with respect to both original grants and applications for resealing.[81] The provisions generally require an administrator to enter a bond in an amount equal to the value of the estate as sworn. However, the Court may reduce the

75. QLRC, Report 65 [11.211].
76. QLRC, Report 65 [11.199]-[11.200].
77. Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 48.
78. QLRC, Report 65 [11.212].
79. QLRC, Report 65 [11.214].
80. QLRC, Report 65 [9.86].
81. *Probate and Administration Act 1898* (NSW) s 108(2). The Court has a general power, under s 107(3), to require security.

amount or dispense with the bond or with one or both of the sureties.[82] In practice, while the registrar retains the discretion to require a bond with sureties where appropriate, bonds are generally dispensed with unless a beneficiary opposes an administrator's application.[83] The NSW Law Reform Commission proposed the abolition of administration bonds in 1978.[84]

6.51 The National Committee observed a general trend in Australia, over the past 30 years, away from requiring administration bonds and an extension of the circumstances in which a court may dispense with the requirement for a bond and surety.[85]

6.52 The National Committee has also noted a number of concerns about the existing system of administration bonds and sureties.

6.53 An administration bond does not serve any real purpose since a statement of the duties of the office for the benefit of an administrator is better set out in the legislation and in the administrator's oath and because a beneficiary or creditor will still have a remedy against an administrator who fails to perform his or her duties under cl 404.[86]

6.54 Arguments have also been regularly advanced that sureties should be abolished on the grounds of their cost,[87] the difficulty involved in obtaining them,[88] the infrequent recourse to them as a remedy[89] and their inability to afford meaningful protection.[90]

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82. *Probate and Administration Act 1898* (NSW) s 65.
83. NSW Supreme Court, Probate Registry, "Probate Office Change of Practice" (3 December 2001).
84. NSWLRC, *Administration Bonds*, Working Paper 18 (1978) [23].
85. QLRC, Report 65 [9.9], [9.78].
86. QLRC, Report 65 [9.79].
87. QLRC, Report 65 [9.55]-[9.61]. The National Committee noted that, even when there is no premium to pay in relation to a personal surety, there is still a cost to the estate in preparing the necessary legal documentation: QLRC, Report 65 [9.58]; and there are also costs involved in applications to dispense with bonds and sureties: [9.59].
88. QLRC, Report 65 [9.52], [9.84].
89. QLRC, Report 65 [9.47]-[9.51].
90. QLRC, Report 65 [9.54]. Especially in light of one practice identified of some companies requiring releases and indemnities from adult beneficiaries: Law

6.55 The application of administration bonds and sureties only to administrators is inconsistent with the general assimilation of the offices of administrator and executor. The justification for the current distinction, that security is required in the case of a court-appointed administrator but not in the case of a testator-chosen executor, has also been rejected as not very convincing.[91] The National Committee considered that there was, in fact, no reason to suppose that an estate administered by an administrator is at any greater risk of maladministration than an estate administered by an executor, adding that an administrator under the statutory order of entitlement in cl 322 is likely to be an intestacy beneficiary and will have, at least, the same interest in an estate's proper administration as an executor, and possibly an even greater interest, where the executor is not a beneficiary.[92]

6.56 In recent years it has become more difficult to obtain corporate sureties following the withdrawal of many insurers and guarantee companies from the market.[93] In the case of personal sureties, there is also the potential for unconscionability if an individual is pressured to provide a surety to save the estate the expense involved if he or she refuses to supply the surety.[94]

6.57 The National Committee also emphasised the point that the Court will scrutinise an applicant before appointing him or her as an administrator,[95] and concluded that, "if there is a serious question about a person's suitability... the more appropriate course is for the court to appoint another person".[96]

6.58 Finally, in relation to applicants for resealing of foreign grants, the National Committee concluded that, since there are no features of the resealing process that would justify a different approach to that adopted in relation to original grants, the Court should not require an applicant for resealing to provide any form of security.[97] The National Committee

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Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34, pt 2 (1976) [17].

91. QLRC, Report 65 [9.42]-[9.46], [9.81].
92. QLRC, Report 65 [9.82].
93. QLRC, Report 65 [9.52].
94. QLRC, Report 65 [9.85].
95. QLRC, Report 65 [9.63], [9.82].
96. QLRC, Report 65 [9.87].
97. QLRC, Report 65 [9.102]-[9.103].

added that, if a Court did have doubts about an applicant's suitability, the better course of action would be to decline the application for resealing.[98]

618 Service

(1) This section applies if—

(a) a person wishes to serve, within a prescribed time, notice of a proceeding, or any other document that is required or permitted to be served in relation to a deceased person's estate; and

(b) the person is uncertain as to the person to be served.

(2) The person wishing to serve the document may, within the prescribed time, apply to the Supreme Court for directions as to service.

(3) The Supreme Court may direct how service is to be effected and, if the court considers it appropriate, extend the time within which service may be effected.

(4) In this section—

prescribed time means a time prescribed [by or] under this or another Act.

***Drafter's note**: The bracketed words may be unnecessary in some jurisdictions.*

6.59 This clause allows a person, who is uncertain on whom he or she should serve a document in relation to a deceased estate, to apply to the Court, within the prescribed period for service, for directions on how to serve the document. In providing the directions, the Court may extend the time for service. It is based on s 72 of the *Succession Act 1981* (Qld).

6.60 An example of a situation where a person might be uncertain on whom he she should serve a document is where he or she needs to serve a notice on a person who has recently died and must, therefore, serve the notice on the deceased's personal representative, but it is unclear whether there are yet personal representatives for the deceased's estate.[99]

98. QLRC, Report 65 [9.102].

99. See A A Preece, *Lee's Manual of Queensland Succession Law* (6th ed, Law Book Company, 2007) [1.60].

6.61 The National Committee considered that this provision will perform a "useful function where it is necessary for a document to be served on the personal representative of an estate, especially where there may be some doubt as to the identity of the personal representative".[100]

619 Approval of forms

(1) The [insert relevant officer or body of local jurisdiction] may approve forms for use under this Act.

(2) Without limiting subsection (1), the [insert relevant officer or body of local jurisdiction] may approve the form of an election to administer for use under this Act.

6.62 This is a general machinery provision. In NSW, the creation of forms is governed by the *Supreme Court Rules 1970* (NSW)[101] and *Civil Procedure Act 2005* (NSW).[102]

620 Regulation-making power

(1) The Governor in Council may make regulations under this Act.

(2) Without limiting subsection (1), a regulation may prescribe the fees and charges payable for doing a thing under this Act.

6.63 This is a general machinery provision. In NSW, the current statute gives the Governor only a limited power to make regulations with respect to certain prescribed sums and rates.[103]

100. QLRC, Report 65 [40.141].

101. *Supreme Court Rules 1970* (NSW) pt 1 r 11.

102. *Civil Procedure Act 2005* (NSW) s 17.

103. *Probate and Administration Act 1898* (NSW) s 153.

Chapter 7. Transitional provisions and repeal

7.1 Because the model legislation has been drafted as a bill of the Queensland Parliament, it is not possible for it to contain transitional and repeal provisions that would be relevant to all of the Australian jurisdictions. It has, therefore, been left to each individual jurisdiction to draft the necessary provisions that are relevant to it. Some of the matters that should be taken into account in NSW are outlined in the following paragraphs with respect to repeal, amendment of other statutes and the enactment of transitional provisions.

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[Provisions to be drafted by each jurisdiction.]

Repeal

7.2 Provision will need to be made to repeal certain existing provisions in NSW, including the remainder of the *Probate and Administration Act 1898* (NSW)[1] and some parts of other statutes whose provisions have been superseded by provisions in the model legislation. The following provisions which will need to be repealed are discussed in other parts of this Report:

- *Conveyancing Act 1919* (NSW) s 145;[2]
- *Imperial Acts Application Act 1969* (NSW) s 13 and s 14;[3]
- *NSW Trustee and Guardian Act 2009* (NSW) s 26-s 30;[4]
- *Trustee Companies Act 1964* (NSW) s 15A;[5]
- *Administration (Validating) Act 1900* (NSW) s 4[6] and s 5;[7] and
- *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1), (4) and (5).[8]

1. See Appendix A.
2. To be replaced by cl 506-509.
3. To be replaced by cl 339, cl 341 and cl 400.
4. To be replaced by Chapter 3 pt 6.
5. To be replaced by Chapter 3 pt 6.
6. To be replaced by cl 406.
7. To be replaced by cl 408.
8. To be replaced by cl 600-602.

7.3 Two provisions, however, have not been considered in relation to particular model provisions but are still subject to conclusions of the National Committee, namely:

- *Imperial Acts Application Act 1969* (NSW) s 15; and
- *NSW Trustee and Guardian Act 2009* (NSW) s 31.

These are dealt with in the following paragraphs.

Liability for waste or conversion

7.4 In NSW, s 15 of the *Imperial Acts Application Act 1969* (NSW) provides for the survival of a cause of action against a deceased personal representative for the waste or conversion of estate property. The provision, which is based on a 17th century English statute, has been unnecessary since general provisions for the survival of actions were introduced in the 20th century.[9]

7.5 The National Committee concluded that such a provision was unnecessary in light of general provisions in the model legislation for the survival of actions[10] and should be repealed.[11]

Administering small estates without a grant and without filing an election to administer

7.6 In NSW, s 31 of the *NSW Trustee and Guardian Act 2009* (NSW) allows the NSW Trustee to administer small estates up to a value of $20,000 as if the Court had made a grant of representation in the NSW Trustee's favour.

7.7 The National Committee[12] concluded that it was not necessary to include such a provision in the model legislation, preferring to rely on the model provisions relating to elections to administer in Chapter 3 part 6.[13]

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9. For example, *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2. See A A Preece, *Lee's Manual of Queensland Succession Law* (6th ed, Law Book Company, 2007) [9.290] footnote 83; and Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia*, Report, Project No 75 (1994) 55.
10. Chapter 6 pt 1.
11. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [14.27]–[14.28].
12. See para 3.92.
13. QLRC, Report 65 [29.180].

While the National Committee made no comment on the utility of this specific provision, support for its repeal can be implied.

Amendment of other statutes

7.8 In addition to the amendments to the *Conveyancing Act 1919* (NSW) in relation to the survivorship provisions which are outlined in Chapter 8, the National Committee's recommendations raised the need to consider the amendment or addition of provisions to other statutes. Such changes include:

- the amendment of s 60 of the *Trustee Act 1925* (NSW) to ensure consistency with cl 415(1)-(8);[14]
- the amendment of s 61 of the *Trustee Act 1925* (NSW) to take account of the absence from the model legislation of a provision to the effect of s 94 of the *Probate and Administration Act 1898* (NSW);[15]
- the insertion in the *Trustee Act 1925* (NSW) of so much of s 45 of the *Probate and Administration Act 1898* (NSW) as relates to trusts;[16] and
- the amendment of s 24 of the *NSW Trustee and Guardian Act 2009* (NSW) and s 5 and s 6 of the *Trustee Companies Act 1964* (NSW) to accommodate the absence from the model legislation of a provision to the effect of s 75A of the *Probate and Administration Act 1898* (NSW).[17]

7.9 The National Committee has also recommended that other Australian jurisdictions consider adopting provisions to the effect of s 111 and s 112 of the *Land Title Act 1994* (Qld).[18] These provisions allow for the transfer of real property in a deceased estate, without the production of a grant, to the a person who is, or is entitled to be, the personal representative or would succeed in an application for a grant, or to a person who is beneficially entitled to the real property, so long as the "personal representative" consents in writing. The appropriate statute in NSW would be the *Real Property Act 1900* (NSW).[19]

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14. QLRC, Report 65 [21.188].
15. See Appendix A, para A.33-A.35.
16. See para 2.7.
17. See Appendix A, para A.19-A.20.
18. QLRC, Report 65 [29.221].
19. See *Real Property Act 1900* (NSW) s 93.

7.10 Numerous technical amendments will also need to be made to provisions in other statutes that include reference to the existing provisions that the model legislation will repeal or replace.[20] A particularly complex task is presented by the *NSW Trustee and Guardian Act 2009* (NSW) which provides in its definition section that "words and expressions used in this Act have the same meaning as they have in the Probate and Administration Act 1898".[21] Careful consideration will need to be given to any changes in terminology affected by the model legislation as implemented in NSW. In some cases, it may be desirable to transfer some of the relevant definitions from the *Probate and Administration Act 1898* (NSW) into the *NSW Trustee and Guardian Act 2006* (NSW).

Transitional provisions

7.11 Transitional provisions will also need to be included along the lines of those already contained in schedule 1 of the *Succession Act 2006* (NSW) that relate to earlier implementations of the National Committee's recommendations in NSW.

20. For example, the *Adoption Act 2000* (NSW) s 99(1)(a); *Companies (Death Duties) Act 1901* (NSW) s 10(1)(f); *Compensation to Relatives Act 1897* (NSW) s 7(2); *Contaminated Land Management Act 1997* (NSW) s 7(2)(d), s 38(3); *Conveyancing Act 1919* (NSW) s 7(1), s 23B(2)(a), s 33, s 152(a); *Inheritance Act 1901* (NSW) s 14; *Landlord and Tenant (Amendment) Act 1948* (NSW) s 83B, s 83C; *Limitation Act 1969* (NSW) s 11; *NSW Trustee and Guardian Act 2009* (NSW) s 3(2), s 25(5), s 29(3); *Powers of Attorney Act 2003* (NSW) s 3(1); *Trustee Act 1925* (NSW) s 5, s 61, s 101; *Trustee Companies Act 1964* (NSW) s 15AC(3).

21. *NSW Trustee and Guardian Act 2006* (NSW) s 3(2).

Chapter 8. Amendment of [*Property Law Act 1974*]

8.1 The provisions in this Chapter set out the model survivorship provisions. They deal with a situation where two or more people die, or are presumed dead, in circumstances where the order of their deaths is uncertain and the order of death must be established to resolve the question of the transmission of property to and from their respective estates.

8.2 These provisions are relevant not only to the disposition of property under a will or upon an intestacy, but also to dispositions of property under other instruments that operate upon death. The National Committee has, therefore, decided that the broader application of these provisions justifies their inclusion in legislation relating to property law generally, rather than in a statute that deals only with the administration of deceased estates.[1]

8.3 This model legislation is based upon the existing statutory arrangements in Queensland, so this chapter is framed as an amendment of the *Property Law Act 1974* (Qld). The most appropriate statute in NSW for these provisions is the *Conveyancing Act 1919* (NSW).

8.4 The provisions in this Chapter essentially replace the seniority rule so that, in cases where two or more people die or are presumed dead in circumstances that give rise to a reasonable doubt as to survivorship, the law will no longer presume that the younger survived the older, except as a presumption of last resort. The National Committee has decided to replace the seniority rule with the scheme outlined below because the seniority rule was seen as arbitrary and, in the case of wills, as not reflecting the probable wishes of the testator.[2]

800 Act amended

This chapter amends [insert local equivalent of the Property Law Act 1974 (Qld)].

1. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [23.341].
2. QLRC, Report 65 [23.22]-[23.24].

801 Insertion of new [pt 19A]

After [section 344]—

insert—

'[Part 19A] Rules about survivorship in particular circumstances

8.5 In NSW, s 35 of the *Conveyancing Act 1919* (NSW) currently deals with the presumption of survivorship. The NSW provisions of this Part of the model legislation will, therefore, most likely be expressed as a new division in Part 2 of the *Conveyancing Act 1919* (NSW) which deals with general rules affecting property.

'344A Definitions for [pt 19A]

'In this part—

issue, of a deceased person, includes a person—

(a) who is born after a period of gestation in the uterus that commenced before the deceased's death; and

(b) who survives for at least 30 days after the birth.

property includes real and personal property and any estate or interest in the property and any thing in action and any other right.

this jurisdiction means [Queensland].

***Drafter's note**: This definition may be unnecessary in some jurisdictions. See, for example, the definition property in the Acts Interpretation Act 1954 (Qld), s 36.*

8.6 The definition of "property" is intended to make it clear that it includes both legal and equitable interests in property.[3] It may be unnecessary in NSW since the *Interpretation Act 1987* (NSW) defines "property" to mean "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description, including money, and includes things in action".[4]

3. QLRC, Report 65 [23.160].

4. *Interpretation Act 1987* (NSW) s 21(1).

'344B Relationships

'For this part—

(a) an adopted child is to be regarded as a child of the adoptive parent or parents; and

(b) the child's family relationships are to be decided accordingly; and

(c) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

8.7 This proposed section is based on cl 103(1) of the model legislation.[5]

'344C Application of [pt 19A]

'(1) This part applies if, after the commencement of this part—

(a) 2 or more persons die or are presumed dead, or 1 or more persons die and 1 or more persons are presumed dead, and the circumstances in which they die, or that give rise to the presumption of their death, raise reasonable doubts about the order in which they died or are presumed to have died; or

(b) 2 or more persons die at the same time.

'(2) This part applies in relation to—

(a) all property that devolves on the death or presumed death of a person under this or another Act or law of this jurisdiction; and

Drafter's note: *Under the Acts Interpretation Act 1954 (Qld), s 6(2), a reference to 'an Act' includes the Act in which the reference occurs.*

(b) all appointments of trustees that are made under an Act or law of this jurisdiction.

'(3) For this part, a person is presumed to be dead if, on application to a court of competent jurisdiction of the Commonwealth or a State [or Territory], the court—

(a) declares that the common law presumption of death is satisfied; or

5. See para 1.3-1.4.

(b) having regard to the circumstances of the person's disappearance, infers that the person has died.

'(4) For this part, it does not matter whether the deaths or presumed deaths happen in this jurisdiction or elsewhere.

8.8 This proposed section sets out the circumstances where the survivorship provisions in this Part apply.

8.9 Proposed s 344C(1) states that this Part applies where the circumstances surrounding the relevant deaths raise "reasonable doubts" about the order in which the deaths occurred. The National Committee chose the expression "reasonable doubt" from the relevant Northern Territory provisions[6] in preference to other formulations that refer to uncertainty in the order of survival, including the one in NSW.[7] The National Committee considered that the expression "uncertain" has led to "considerable litigation" resulting in "quite different interpretations".[8]

8.10 The reference to two or more people dying at the "same time" derives from s 120 of the *Property Law Act 1969* (WA).[9]

8.11 This provision follows the relevant Northern Territory provisions[10] in applying not only to people who have died, but also to people who are presumed to have died. The concept of presumption of death is elaborated in proposed s 344C(3).[11] No other Australian jurisdiction has such a provision. The National Committee supported the extension of the model survivorship provisions to apply to presumed deaths because of the importance of dealing "comprehensively with the various situations in which the issue of survivorship can arise".[12] The National Committee was of the view that the traditional reluctance of courts to apply the seniority rule in cases where there is a presumed death[13] could be

6. *Law of Property Act* (NT) s 216(2) and s 217(b).
7. *Conveyancing Act 1919* (NSW) s 35.
8. QLRC, Report 65 [23.279]. The National Committee was of the view that the NT formulation is based on a judgment of Lord Macmillan in *Hickman v Peacey* [1945] AC 304, 323-325: QLRC, Report 65 [23.276].
9. See also *Civil Law (Property) Act 2006* (ACT) s 213 and *Administration and Probate Act 1929* (ACT) s 49P and s 49Q.
10. *Law of Property Act* (NT) s 216 and s 217.
11. See para 8.14.
12. QLRC, Report 65 [23.291].
13. See, eg, *Re Albert* [1967] VR 875, 879-880.

overcome by the fact that the seniority rule would apply only as a last resort under these model provisions.[14]

8.12 Proposed s 344C(1) also provides that this Part applies only to cases where the deaths occur or are presumed after its commencement. The National Committee considered it important to specify this since, in many cases, these provisions will alter the way in which property devolves.[15]

8.13 Proposed s 344C(2) is based on s 214(1) of the *Law of Property Act* (NT) and s 119(1) of the *Property Law Act 1969* (WA).

8.14 Proposed s 344C(3) clarifies that a person is presumed to be dead for the purposes of this Part if the Court is satisfied the person has died according to the common law presumption of death or infers, from the circumstances, that the person has died.

8.15 Proposed s 344C(4) is based on the latter part of s 214(2) of the *Law of Property Act* (NT) and s 119(2) of the *Property Law Act 1969* (WA).

'344D General rule

'(1) The property of each of the persons is to devolve as if he or she had survived the other or others of them and had died immediately afterwards.

'(2) However, if a person mentioned in subsection (1) left a will, subsection (1) is subject to a contrary intention appearing in the will.

'(3) In this section—

property includes property over which a person holds a power of appointment.

8.16 This proposed section sets out the general rule for survivorship, namely, that a deceased person's property is to devolve as if he or she survived the other deceased person and died immediately afterwards.

8.17 Proposed s 344D(1) is generally based on s 216(2)(a) of the *Law of Property Act* (NT) and s 120(a) of the *Property Law Act 1969* (WA). The effect of this provision is largely achieved already in NSW by the operation of the 30 day survivorship rule that applies to wills so that, to

14. QLRC, Report 65 [23.292]-[23.293]. See proposed s 344D and s 344M; para 8.43-8.45.

15. QLRC, Report 65 [23.334].

inherit, beneficiaries must survive the testator by 30 days,[16] and will be achieved by a similar provision requiring intestacy beneficiaries to survive the intestate by 30 days.[17] The National Committee, however, considered it desirable to have the various provisions dealing with reasonable doubt as to survivorship together, otherwise, the effect of the 30 day rule in a particular situation may be overlooked.[18]

8.18 Proposed s 344D(2) states that the devolution of property under s 344D(1) is subject to a contrary intention in the deceased's will. It is based on the relevant part of s 120(a) of the *Property Law Act 1969* (WA). This is consistent with the NSW provision applying the 30 day survivorship rule to beneficiaries under a will, where the general rule is subject to the expression of a contrary intention in the will.[19]

8.19 Proposed s 344D(3) includes property over which one of the deceased held a power of appointment within the definition of property. The National Committee concluded that the existing WA and NT provisions on which the model provision is based would not resolve the issue of survivorship as between the holder of a power of appointment and the appointee.[20] The National Committee's view was that "the principle that underlies the general rule... should also apply to the devolution of property that is the subject of a power of appointment".[21]

'344E Particular provision for substitutional dispositions

'(1) If—

(a) under a will, trust or other disposition, a disposition of property to 1 of the persons (the possible beneficiary) is dependent on the possible beneficiary surviving another of the persons (the specified person); and

(b) under the will, trust or other disposition, there is a further disposition of the property to another person (the substitute beneficiary) if the possible beneficiary does not

16. *Succession Act 2006* (NSW) s 35.
17. Proposed s 107 of the *Succession Act 2006* (NSW) inserted by the not yet commenced *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1.
18. QLRC, Report 65 [23.77].
19. *Succession Act 2006* (NSW) s 35(2).
20. QLRC, Report 65 [23.81].
21. QLRC, Report 65 [23.83].

survive the specified person, either at all or by a stated period; and

(c) apart from this section, the further disposition to the substitute beneficiary would fail because of lack of proof that the possible beneficiary did not survive the specified person, either at all or by the stated period;

for the purposes of the further disposition to the substitute beneficiary, the possible beneficiary is taken not to have survived the specified person.

'(2) Subsection (1) may be re-applied, with necessary changes.

'(3) Subsection (1) or (2) does not apply if a contrary intention appears in the will, trust or other disposition.

8.20 The general rule in proposed s 344D deals adequately with the entitlements of a substitutionary beneficiary (B), for example, where the testator gives property to A but, if A dies before the testator, then to B, where the testator and A die, or are presumed to have died, in circumstances giving rise to a reasonable doubt about the order of survival. However, this proposed section deals with circumstances where the reasonable doubt about survival arises not with respect to the testator and one beneficiary (A) but where the doubt arises with respect to two or more beneficiaries. For example, where the testator leaves a life estate to A with the remainder to B if B survives A, but otherwise to C, and A and B die in circumstances giving rise to reasonable doubt about the order of survival.[22] In such circumstances, the general rule in proposed s 344D will not assist the substitutionary beneficiary (C) who will not be able to prove the facts that would support his or her entitlement. The National Committee's view was that the model legislation should give effect to substitutional dispositions of this kind.[23]

8.21 This proposed section, therefore, applies so that the substitute beneficiary (C) can take because the possible beneficiary (B) is taken not to have survived the specified person (A). This provision, which is based

22. See Law Reform Committee of SA, *Problems of Proof of Survivorship as Between Two or More Persons Dying at About the Same Time in One Accident*, Report 88 (1985) 17-18.

23. QLRC, Report 65 [23.104].

on an option considered by the Law Reform Committee of SA,[24] applies only to the substitute beneficiary and, therefore, avoids the possibility of the general rule in proposed s 344D applying at the same time.[25]

8.22 Proposed s 344E(2) allows this provision to be applied to a chain of substitute beneficiaries.[26]

8.23 Proposed s 344E(3) provides that the section does not apply if a contrary intention is expressed in the will, trust or other disposition.[27]

'344F Gifts made in contemplation of the donor's death

'(1) A gift made in contemplation of death by any of the persons to another of the persons is of no effect.

'(2) In subsection (1)—

gift made in contemplation of death means a gift known in law as a donatio mortis causa.

8.24 This proposed section renders a gift made in contemplation of death (sometimes known as a *donatio mortis causa*)[28] of no effect, if the donor and the intended recipient both die, or are presumed to have died, in circumstances giving rise to a reasonable doubt about the order of survival. This means that the property, which will usually already have been in the possession of the intended recipient,[29] will pass instead to the deceased donor's estate. It derives from s 216(2)(b) of the *Law of Property Act* (NT) and s 120(b) of the *Property Law Act 1969* (WA).

8.25 A person only becomes entitled to property that is given in contemplation of death if he or she survives the donor. The National Committee concluded that it is consistent with this characteristic of a *donatio mortis causa* that the gift should be of no effect if it is uncertain whether or not the intended recipient survived the donor.[30]

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24. Law Reform Committee of SA, *Problems of Proof of Survivorship as Between Two or More Persons Dying at About the Same Time in One Accident*, Report 88 (1985) 22.
25. QLRC, Report 65 [23.107].
26. QLRC, Report 65 [23.110]-[23.111].
27. QLRC, Report 65 [23.265].
28. See para 5.23.
29. Or the intended recipient will have the means of possessing it.
30. QLRC, Report 65 [23.122]-[23.123].

'344G Insurance moneys

'(1) This section applies if—

(a) the life of any of the persons is insured under a policy of life or accident insurance; and

(b) 1 or more of the other persons would, on surviving the insured person, be entitled (other than under a will or the application of the rules of intestacy) to the proceeds or a part of the proceeds payable under the policy.

'(2) The proceeds are to be distributed as if the insured person had survived the other person or each of the other persons and had died immediately afterwards.

'(3) Subsection (2) is subject to a contrary intention appearing in the instrument governing the distribution of the proceeds under the policy.

8.26 This proposed section deals with the situation where a person is insured under a policy of life or accident insurance and the person or people who would benefit from the policy die, or are presumed to have died, in circumstances which give rise to a reasonable doubt as to the order of survival. In such a case, the proceeds are to be distributed as if the insured person had survived the others and had died immediately afterwards. It is based on s 216(2)(c) of the *Law of Property Act* (NT) and s 120(c) of the *Property Law Act 1969* (WA).[31]

8.27 The National Committee considered it appropriate that the proceeds of the policy should be paid as though the insured had survived the intended beneficiaries because, in the circumstances outlined above, the intended beneficiaries can never benefit personally from the insurance proceeds.[32]

8.28 Proposed s 344G(3) follows the approach taken in Western Australia by making the provision subject to a contrary intention appearing in the instruments governing the distribution of the proceeds of the policy.[33]

31. QLRC, Report 65 [23.133].
32. QLRC, Report 65 [23.134].
33. QLRC, Report 65 [23.263].

'344H Joint property

'Any property that is owned jointly and exclusively by any 2 or more of the persons is to devolve as if it were owned by them as tenants in common in equal shares when they died.

8.29 This proposed section provides that when two or more owners of jointly held property die or are presumed dead in circumstances giving rise to a reasonable doubt as to the order of survival, the property is to devolve as if the owners were tenants in common in equal shares when they died. This changes the usual situation with respect to jointly held property, namely, that the property devolves to the surviving joint tenants. It is based on s 216(2)(d) of the *Law of Property Act* (NT) and s 120(d) of the *Property Law Act 1969* (WA).[34]

8.30 In recommending this provision, the National Committee was of the view that it provides a "more equitable basis for the distribution of property than the seniority rule".[35]

'344I Gifts to survivor of identified beneficiaries

'(1) This section applies if, under a will, trust or other disposition, property would have devolved or passed, whether by operation of statute or otherwise, to any of 2 or more possible beneficiaries, who are from among the persons who die or are presumed dead, if any of the possible beneficiaries could be shown to have survived the other or others of them.

'(2) The disposition takes effect as if the property were given to the possible beneficiaries as tenants in common in equal shares.

'(3) Subsection (2) is subject to a contrary intention appearing in the will, trust or other disposition.

'(4) Subsection (2) does not apply if section 344G or 344J applies.

8.31 This proposed section deals with situations where property is left to the survivor of two or more identified beneficiaries and those beneficiaries die, or are presumed to have died, in circumstances giving rise to a reasonable doubt as to the order of survival. In such circumstances, the property devolves to the estates of the beneficiaries as if it were given to the beneficiaries as tenants in common in equal shares.

34. QLRC, Report 65 [23.158].

35. QLRC, Report 65 [23.157].

It is based on s 216(2)(e) of the *Law of Property Act* (NT) and s 120(e) of the *Property Law Act 1969* (WA).[36]

8.32 An example of the application of this provision can be seen in a scenario where a testator leaves property on trust to pay income to A, B and C in equal shares during their lives and A, B and C die, or are presumed to have died, in circumstances giving rise to a reasonable doubt as to the order of survival. In this case, the property will pass in equal shares to the estates of A, B and C.

8.33 The National Committee considered that such a provision "produces a more equitable result than the application of the seniority rule".[37]

8.34 Proposed s 344I(4) provides that this proposed section does not apply if the distribution of life insurance proceeds (under proposed s 344G) applies to the situation. It also provides that it does not apply if the circumstances involve property that is subject of a power of appointment on the survivor of two or more people (under proposed s 344J).

'344J Property the subject of a power of appointment

'(1) This section applies if a power of appointment could have been exercised over property, whether by operation of statute or otherwise, by any 2 or more of the persons who die or are presumed dead if any of them could be shown to have survived the other or others of them.

'(2) The power of appointment may be exercised as if—

(a) an equal share of the property had been set apart for appointment by each person (the appointable property); and

(b) each person had the power of appointment over his or her appointable property.

'(3) If a person mentioned in subsection (2)(b) does not exercise the power of appointment over his or her appointable property, the appointable property is to devolve in the way in which the property would have devolved if the person had survived the other or others but not exercised the power of appointment.

36. QLRC, Report 65 [23.183].

37. QLRC, Report 65 [23.182].

'(4) Subsections (2) and (3) are subject to a contrary intention appearing in the instrument creating the power of appointment.

'(5) Subsections (2) and (3) do not apply if section 344G applies.

8.35 This proposed section deals with the devolution of property where a power of appointment is conferred on the survivor of two or more people and those people die, or are presumed to have died, in circumstances giving rise to a reasonable doubt about the order of survival. The proposed section treats each of the deceased as having had a power of appointment over an equal share of the property. If any of the deceased donees of the power fails to exercise the power, the share of the property will devolve in the same way as it would if the person had survived the other potential donees. It derives from s 216(2)(f) of the *Law of Property Act* (NT) and s 120(f) *Property Law Act 1969* (WA).[38] The National Committee considered that a provision of this kind resolves the question of survivorship as between the potential donees of the power of appointment and "produces a fair result".[39]

8.36 The phrase "whether by operation of statue or otherwise" in proposed s 344J(1) follows a similar provision in proposed s 344I and is intended to state that the provision applies where the survivor of any two or more people could have exercised the power of appointment, "whether by operation of the relevant anti-lapse provision or otherwise".[40] In NSW, the relevant anti-lapse provision is contained in s 41 of the *Succession Act 2006* (NSW).[41] The National Committee considered it important that the model provision make it clear that it will apply whether the survivor entitled to exercise the power of appointment is directly identified as a potential donee of the power or whether the survivor is a potential donee because of the operation of the relevant anti-lapse provision.[42]

38. QLRC, Report 65 [23.201].
39. QLRC, Report 65 [23.200].
40. QLRC, Report 65 [23.202].
41. See also the definition of "disposition" in *Succession Act 2006* (NSW) s 3(1).
42. QLRC, Report 65 [23.202].

8.37 Proposed s 344J(5) states that this provision does not apply if the provision relating to the distribution of life insurance proceeds[43] applies in the circumstances.

'344K Property left to survivor of 2 or more of testator's issue

'(1) This section applies if—

(a) property is disposed of, or appointed, by will to the survivor of 2 or more of the testator's issue; and

(b) all or the last survivors of the issue are from among the persons who die or are presumed dead.

'(2) For the purpose of [insert local equivalent of the Succession Act 1981 (Qld), section 33N], the disposition or appointment takes effect as if it were in equal shares to the survivors who leave issue who survive the testator for 30 days.

Example—

T, the testator, leaves her estate to the survivor of her children A, B, C and D. A predeceases T and B, C and D. B, C and D predecease T in circumstances where it is not clear who was the last survivor of B, C and D. B did not leave issue but both C and D left issue who survive T by 30 days. The effect of subsection (2) is that the disposition takes effect as if it were in equal shares to C and D.

'(3) Subsection (2) is subject to a contrary intention appearing in the will.

8.38 This provision applies, for example,[44] where a testator make a disposition to the survivor of his or her children and the last survivors of those children (being two or more) die, or are presumed to have died, in circumstances giving rise to a reasonable doubt as to the order of survival. In such circumstances, without this provision, the operation of the anti-lapse rule in s 41 of the *Succession Act 2006* (NSW), combined with the seniority rule would result in the disposition going to the issue of the youngest surviving child. However, if the youngest surviving child to die does not have any issue, the disposition simply lapses and the issue of the older children are ignored. This provision, therefore, ensures that, in such circumstances, the issue of all of the remaining survivors will take, in equal shares, their parents' equal shares. It applies only to

43. Proposed s 344G.

44. The provision would apply equally to a disposition to surviving grandchildren of the testator.

situations where the anti-lapse provision operates to prevent the lapsing of a disposition to surviving issue of the testator. Proposed s 344I and proposed s 344J deal with situations where the will adequately deals with the question of survivorship.[45]

8.39 This provision is based on s 216(2)(g) of the *Law of Property Act* (NT) and s 120(g) of the *Property Law Act 1969* (WA). The National Committee, in recommending such a provision, agreed with the policy underlying the NT and WA provisions.[46] The National Committee also observed that such provisions "ensure that the anti-lapse provisions... operate to the maximum benefit of any issue of the deceased beneficiaries".[47]

8.40 The requirement that the issue must survive the testator by 30 days in proposed s 344K(2) has been included for consistency with the relevant anti-lapse provision.[48]

'344L Application of rules if testator and issue die or are presumed dead

'(1) This section applies if the persons who die or are presumed dead include a testator and 1 or more of his or her issue.

'(2) For the purpose of [insert local equivalent of the Succession Act 1981 (Qld), section 33N], the testator is taken to have survived all of his or her issue who die or are presumed dead and to have died immediately afterwards.

***Drafter's note**: For jurisdictions that do not yet have the equivalent of s 40 of the model Wills Bill, an adjustment may be needed. See 23.235 in the Law Reform Report.*

'(3) Subsection (2) is subject to a contrary intention appearing in the will.

8.41 This provision deals with a situation where the anti-lapse provision[49] applies and the testator and beneficiaries die or are presumed to have died in circumstances giving rise to a reasonable doubt as to the order of survival, by making it clear that the testator is taken to have

45. QLRC, Report 65 [23.217].
46. QLRC, Report 65 [23.216].
47. QLRC, Report 65 [23.214].
48. *Succession Act 2006* (NSW) s 41(2). See QLRC, Report 65 [23.219].
49. *Succession Act 2006* (NSW) s 41.

survived all of his or her issue who have died or are presumed dead and to have died immediately afterwards.

8.42 This provision is based on s 216(2)(h) of the *Law of Property Act* (NT) and s 120(h) of the *Property Law Act 1969* (WA).[50] However, the National Committee decided not to include provisions based on the parts of the NT and WA provisions that state that a testator's disposition to any of his or her issue who die in the circumstances of uncertainty or are already dead lapses unless those issue left issue who survive the testator and these surviving issue take in accordance with the relevant anti-lapse provision. The reason for this decision was that it was not necessary to state the results of the provision since the results followed from the combined effect of the doctrine of lapse and model anti-lapse provision.[51]

'344M Presumption of last resort

'(1) This section applies if no other rule stated in this part applies to circumstances to which this part applies.

'(2) The deaths or presumed deaths or deaths and presumed deaths are taken to have happened in order of seniority so that the younger is taken to have survived the elder.

8.43 This provision sets up the seniority rule as a presumption of last resort to cover those circumstances that are not covered by proposed s 344D-344L. Therefore, in such circumstances, the younger will be deemed to have survived the elder.

8.44 It is based on s 217 of the *Law of Property Act* (NT) and s 120(i) of the *Property Law Act 1969* (WA).[52]

8.45 The National Committee considered that, while the seniority rule is liable to criticism for arbitrary results and not reflecting the testator's probable intentions, these criticisms apply to it as a primary rule for determining issues of survivorship. The same criticisms do not apply to it as a rule of last resort, when it is intended to produce an actual result in terms of survival with respect to the rare circumstances where proposed s 344D-344L do not apply.[53] The National Committee observed that, without such a provision, there might be circumstances where the

50. QLRC, Report 65 [23.232].

51. QLRC, Report 65 [23.233]-[23.234].

52. QLRC, Report 65 [23.247].

53. QLRC, Report 65 [23.235]-[23.247].

question of survivorship could be "incapable of resolution on the available evidence".[54]

'344N Re Benjamin orders

> 'Nothing in this part prevents the distribution of the estate of a deceased person if a beneficiary can not be found and there is no evidence that the beneficiary predeceased the testator.
>
> ***Note—***
>
> *See Re Benjamin [1902] 1 Ch 723.'.*

8.46 This provision preserves the Court's power to make a *Re Benjamin* order, which allows a personal representative to distribute an estate on the basis that a beneficiary who cannot be located did not survive the deceased. Such an order protects a personal representative from liability with respect to any distribution made under it in the event that it transpires that the beneficiary in fact survived the deceased.[55] The provision is based on s 218 of the *Law of Property Act* (NT), but also includes a reference to the case from which the order derived its name.[56]

8.47 By flagging the existence of *Re Benjamin* orders, this provision addresses concerns that their availability may not be widely known.[57] In recommending this provision, the National Committee rejected proposals to restate the Court's power to make *Re Benjamin* orders, or even extend their availability.[58]

54. QLRC, Report 65 [23.246].
55. *Re Green's Will Trusts* [1985] 3 All ER 455, 460. See also *Re Marais* [2009] NSWSC 206 [22]-[23].
56. *Re Benjamin* [1902] 1 Ch 723.
57. QLRC, Report 65 [23.323]. See also New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) [17.54].
58. QLRC, Report 65 [23.323].

Schedule 1: Priority of persons to letters of administration with the will annexed

Schedule 1: Priority of persons to letters of administration with the will annexed

section 321(2)

1 a trustee of the residuary estate

2 a beneficiary entitled to any part of the residuary estate, including a person entitled to all or part of the residuary estate by full or partial intestacy

3 a beneficiary of a specific or pecuniary legacy

4 anyone else the Supreme Court may appoint, including a creditor of the deceased person's estate

S1.1 This schedule sets out the order of priority that the Court must apply in granting letters of administration with the will annexed, as referred to in cl 321(2).

S1.2 It is a simplified version of the priority set out in r 603(1) of the *Uniform Civil Procedure Rules 1999* (Qld). The second category covers four types of residuary beneficiary identified in the Queensland rules, namely, a life tenant of any part of the residuary estate; a remainderman of any part of the residuary estate; another residuary beneficiary; and a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy.[1] This list omits reference to a "person who has acquired the entire beneficial interest under the will"[2] as being too rare a circumstances to warrant specific mention.[3] The fourth category has been drafted for consistency with the drafting of the order of priority for letters of administration on intestacy in schedule 2.[4]

1. *Uniform Civil Procedure Rules 1999* (Qld) r 603(1)(b)-(e).
2. *Uniform Civil Procedure Rules 1999* (Qld) r 603(1)(g).
3. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [5.67].
4. QLRC, Report 65 [5.68].

Schedule 2: Priority of persons to letters of administration on intestacy

Schedule 2: Priority of persons to letters of administration on intestacy

section 322(2)

1 a surviving spouse of the deceased person

2 the deceased person's children

3 the issue of any child of the deceased person who died before the deceased person or who failed to survive the deceased person by 30 days, if the issue are entitled to share in the deceased person's estate

4 the deceased person's parents

5 the deceased person's brothers and sisters

6 the issue of a brother or sister of the deceased person who died before the deceased person or who failed to survive the deceased person by 30 days, if the issue are entitled to share in the deceased person's estate

7 the deceased person's grandparents

8 the brothers and sisters of the deceased person's parents

9 the children of any deceased brother or sister of the deceased person's parents who died before the deceased person or who failed to survive the deceased person by 30 days

10 the [public trustee]

11 anyone else the Supreme Court may appoint, including a creditor of the deceased person's estate

S2.1 This schedule sets out the order of priority that the Court must apply in granting letters of administration for an intestate estate, as referred to in cl 322(2).

S2.2 The order of priority is consistent with the National Committee's recommendations about the distribution of estates on intestacy[1] which have now been adopted in NSW.[2] However, the National Committee decided to follow the policy of rule 610 of the *Uniform Civil Procedure*

1. See New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) ("NSWLRC, Report 116").
2. *Succession Amendment (Intestacy) Act 2009* (NSW).

Rules 1999 (Qld), on which cl 322 is based, and accord higher priority to kin who are more closely related to the deceased.[3] In this way, children of the deceased (item 2) are accorded higher priority than more remote descendants (item 3); the siblings of the deceased (item 5) are accorded higher priority than their descendants (item 6); and the siblings of the deceased's parents (item 8) are accorded higher priority than their children (item 9). The National Committee also decided to limit the standing of those listed in items 3, 6 and 9, by requiring that they be entitled to share in the estate.[4]

S2.3 Note that "spouse" is defined in schedule 3 in a manner consistent with the National Committee's recommendations in the Report on intestacy.[5] However, this definition has been altered in the NSW provision giving effect to the National Committee's recommendation.[6]

3. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [5.52]-[5.53].
4. QLRC, Report 65 [5.56].
5. NSWLRC, Report 116 [2.2]-[2.18], draft Intestacy Bill 2006 cl 7.
6. *Succession Act 2006* (NSW) proposed s 104 and s 105 as inserted by *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1[4].

Schedule 3: Dictionary

Schedule 3: Dictionary

S3.1 Some of the definitions in this Schedule define concepts that are key to the operation of important parts of the model legislation. Other definitions, however, provide no more than a cross reference to the relevant provisions in the model legislation. Generally, commentary is provided for the former, but not the latter. Headings have been included in this schedule only in relation to definitions where commentary is supplied.

section 102

administrator, of a deceased person's estate, means the person to whom a grant of letters of administration of the deceased's estate has been made by the Supreme Court.

administrator by representation means a person who is an administrator by representation as provided under section 338(1).

approved form means a form approved for use under this Act under section 619.

brother see section 103.

Ceases to have effect

ceases to have effect means ceases to have effect under section 335(2)(c).

S3.2 This definition is necessary to cl 202(2).

claim, for chapter 4, part 7, see section 417.

claimant—

(a) for chapter 4, part 7—see section 417.

(b) for chapter 6, part 1, division 2—see section 605.

class 1 property see section 502(1)(a).[3]

3 Section 502 (Payment of debts)

class 2 property see section 502(1)(b).

class 3 property see section 502(1)(c).

court, for chapter 6, part 1, division 2, see section 605.

CPI, for chapter 3, part 6, see section 325.

CPI indexed, for chapter 3, part 6, see section 325.

Death

death includes—

(a) an inference of death made by the Supreme Court; and

(b) a declaration made by the Supreme Court that the common law presumption of death is satisfied.

S3.3 This definition accords with the definition of "deceased person" below.[1]

Debts

debts include funeral, testamentary and administration expenses, and other liabilities payable out of the estate of a deceased person.

S3.4 Debts have been defined to include funeral, testamentary and administration expenses and other liabilities payable out of the estate for the purposes of cl 501 and cl 511, so as to make it clear that:

- an estate must be administered as a solvent estate if it is able to pay its expenses, debts, and liabilities; and
- an estate must be administered as an insolvent estate if it is unable to pay its expenses, debts and liabilities in full.[2]

Deceased person

deceased person includes—

(a) a person whose death is inferred by the Supreme Court; and

(b) a person in relation to whom the Supreme Court declares the common law presumption of death to be satisfied.

S3.5 This expanded definition of "deceased person" is necessary because the Court's jurisdiction, which is established by cl 301(1), is in relation to the estate of "any *deceased* person". Without this expanded

1. See para S3.5-S3.7.
2. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [16.69].

definition, a grant in relation to a person whose death was inferred or presumed and was subsequently found to be alive at the time of the grant would be a nullity.[3]

S3.6 The provisions relating to the Court inferring or presuming that a person has died are contained in Chapter 3 part 1 division 2.[4]

S3.7 This expanded definition renders unnecessary provisions such as those in s 40A(1) of the *Probate and Administration Act 1898* (NSW) which empowers the Court to make a grant where it is satisfied that a person is dead either "by direct evidence or on presumption of death". The National Committee was of the view that an advantage of the expanded definition is that, in relation to an inference or presumption of death, "it is clear that... the court's jurisdiction is as extensive as it is in relation to any other deceased person".[5]

> **deceased personal representative**, for chapter 3, part 8, see section 337.
>
> **dispose**, of property, for chapter 3, part 13, see section 367.
>
> **disposition**, in relation to a will, includes—
>
> (a) any gift of property under the will; and
>
> (b) the creation by the will of a power of appointment affecting property; and
>
> (c) the exercise by the will of a power of appointment affecting property.

Domestic partnership

> **domestic partnership** means a relationship (other than marriage) between the deceased person and another person—
>
> (a) that is a [de facto relationship/domestic partnership/civil union] within the meaning of the [insert the name of the local legislation dealing with the recognition of de facto relationships]; and
>
> (b) that—

3. QLRC, Report 65 [24.4], [24.52].
4. Clauses 308-311.
5. QLRC, Report 65 [24.56].

(i) has been in existence for a continuous period of at least 2 years; or

(ii) has resulted in the birth of a child; or

(iii) is registered under the [insert the name of the local legislation dealing with registration of de facto relationships; or if there is no such legislation, omit this subparagraph].

S3.8 This operates together with the definition of "spouse".[6] Both definitions are necessary as the term "spouse" is used in the order of priority for applications for letters of administration on intestacy in schedule 2.

S3.9 The two definitions are consistent with the National Committee's recommendations in the Report on intestacy.[7] However, this definition has been altered in the NSW provision giving effect to the National Committee's recommendation.[8]

election to administer means an election to administer filed in the Supreme Court under section 327 or 331.

***Drafter's note**: Consequential amendments may be needed to other legislation that presently provides for an election to administer. See, in Qld, the Public Trustee Act 1978 and the Trustee Companies Act 1968.*

encumbered property, for chapter 5, part 2, division 4, see section 505.

estate, of a deceased person—

(a) includes, generally, a part of the deceased person's estate; and

(b) for chapter 4, part 6—see section 413; and

(c) for chapter 4, part 7—see section 417; and

(d) for chapter 4, part 8—see section 423; and

6. See para 3.37-3.38.

7. New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) ("NSWLRC, Report 116") [2.2]-[2.18], draft Intestacy Bill 2006 cl 7. See QLRC, Report 65 [5.59].

8. *Succession Act 2006* (NSW) proposed s 104 and s 105 as inserted by *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1[4].

(e) for chapter 4, part 9—see section 427; and

(f) for chapter 4, part 10—see section 430.

executor by representation includes a person who is an executor by representation as provided under section 338(1).

executor or administrator by representation means an executor by representation or an administrator by representation.

Foreign grant of representation

foreign grant of representation means—

(a) if a single grant of probate or letters of administration has effect in an interstate jurisdiction, or in an overseas jurisdiction prescribed under a regulation—the grant of probate or letters of administration; or

(b) if more than 1 grant of probate has been made in the same interstate jurisdiction, or in the same overseas jurisdiction prescribed under a regulation, and the grants have concurrent effect in that jurisdiction—all of the grants; or

Example for paragraph (b)—

a grant of probate and a grant of double probate

(c) without limiting paragraph (a), an instrument (other than an instrument mentioned in paragraph (d)) made in a foreign jurisdiction and having, within that jurisdiction—

(i) the effect of appointing or authorising a person to collect and administer any part of the estate of a deceased person; and

(ii) an effect equivalent to that given, under a law of this jurisdiction, to a grant of probate or letters of administration in this jurisdiction; or

(d) an interstate election to administer, or an overseas election to administer, certified under the seal of the court in which it is filed by, or under the authority of, the court as a correct copy of the election to administer filed in the court; or

(e) an exemplification of an instrument mentioned in paragraph (a) or (c); or

(f) an exemplification, as required under the rules of court, of an instrument mentioned in paragraph (b); or

(g) other formal evidence, as required under the rules of court, of an instrument mentioned in paragraph (a), (b) or (c).

S3.10 This definition is necessary for the operation of cl 353 and the other provisions in Chapter 3 part 11 relating to the resealing of foreign grants of administration. It encompasses both grants made by overseas jurisdictions and grants made by other Australian jurisdictions (referred to as "interstate jurisdictions").

S3.11 In accordance with the recommendations of the National Committee, it contains reference to grants of probate and letters of administration,[9] grants of double probate (where an original grant and a subsequent grant run concurrently),[10] instruments that have a similar effect to a grant of probate or administration made in the resealing jurisdiction,[11] an order to administer made in favour of a public trustee or similar officer,[12] an exemplification or other formal evidence of any of the previously mentioned instruments,[13] and an election to administer.[14] The definition of "letters of administration", below, extends this definition to include grants of letters of administration for special, limited, or temporary purposes.[15]

S3.12 Paragraphs (a) and (b) include references to grants of probate or letters of administration in an overseas jurisdiction prescribed under a regulation. Paragraph (c), on the other hand, extends the potential range of foreign jurisdictions whose grants the Court may reseal beyond those prescribed under the regulation to those jurisdictions whose grants have

9. QLRC, Report 65 [31.3].
10. QLRC, Report 65 [31.4].
11. QLRC, Report 65 [31.38]. This is consistent with the approach adopted by the Commonwealth Secretariat Draft Model Bill cl 2(1). This category, as currently formulated, eliminates the need to make express reference to a Scottish confirmation: QLRC, Report 65 [31.39].
12. QLRC, Report 65 [31.59]-[31.61]. In NSW, orders to administer in favour of the NSW Trustee are governed by *NSW Trustee and Guardian Act 2009* (NSW) s 25.
13. QLRC, Report 65 [31.65]-[31.67].
14. QLRC, Report 65 [31.85]-[31.87].
15. See para S3.24.

a similar effect to a grant of probate or letters of administration made by the Court in this jurisdiction. It allows, for example, the "holder of a foreign grant of representation" in cl 358(1) to include the public trustee in whose favour an order to administer has been made,[16] or a person who has filed an election to administer.[17] The National Committee was of the view that the description in paragraph (c) was sufficiently broad to allow, for example, an order to administer to be resealed and that such a broad description was required because an express provision referring to an "order to administer" was undesirable in light of the different terminology used within Australia to describe such orders.[18]

S3.13 Paragraph (d), in conjunction with cl 353(1), gives the Court power to reseal a foreign election to administer that has been filed in a foreign court.[19]

S3.14 The National Committee has recommended this dual scheme, first, of recognising the grants of a court in a prescribed country in order to achieve the degree of certainty that a prescribed list can provide and, secondly, of recognising the grants of other countries that have a similar effect to a grant of representation here in order to achieve necessary flexibility, especially when prescribed lists become out of date.[20]

S3.15 Currently, in NSW, the courts of "competent jurisdiction" whose grants may be resealed are identified as those in "any portion of Her Majesty's dominions".[21] The National Committee has noted that this would include those "independent members of the Commonwealth of Nations that still recognise the Queen as Head of State" but would not include any member of the Commonwealth that either has its own sovereign or has become a republic.[22] The National Committee considered that this arrangement was not satisfactory because a country's change in status from a monarchy to a republic, where there has been no change to the legal system relating to the administration of deceased estates, may

16. QLRC, Report 65 [33.57].
17. QLRC, Report 65 [33.58].
18. QLRC, Report 65 [31.59]-[31.61].
19. See para 3.232-2.234.
20. QLRC, Report 65 [32.45]-[32.48].
21. *Probate and Administration Act 1898* (NSW) s 107(1).
22. QLRC, Report 65 [32.10]. See also QLRC, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*, Discussion Paper, WP 55 (2001) 150.

not involve "any change to its legal system that would affect the desirability or otherwise of resealing grants made in that country".[23]

S3.16 Paragraphs (e), (f) and (g) render unnecessary any reference to exemplification in the definition of "letters of administration".[24]

foreign jurisdiction means—

(a) an interstate jurisdiction; or

(b) an overseas jurisdiction.

Grant of representation

grant of representation—

(a) means, generally, any of the following—

(i) a grant of probate made by the Supreme Court;

(ii) a grant of letters of administration made by the Supreme Court;

(iii) [an order to administer] made by the Supreme Court;

(iv) an election to administer filed in the Supreme Court; and

(b) for chapter 3, part 1, division 2—see section 308; and

(c) for chapter 3, part 8—see section 337.

S3.17 This definition is based on the definition of "grant" in s 5 of the *Succession Act 1981* (Qld).[25] Sub-paragraphs (iii) and (iv) of paragraph (a) are intended to make it clear that orders to administer[26] and elections to administer, unless otherwise stated, have the "same effect" and are "subject to the same provisions" as a grant of probate or letters of administration.[27]

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23. QLRC, Report 65 [32.11].
24. See para S3.24.
25. QLRC, Report 65 [4.336].
26. The Supreme Court can issue an order to administer in favour of the NSW Trustee where there are reasonable grounds to suppose that a person has died intestate: *NSW Trustee and Guardian Act 2009* (NSW) s 25.
27. QLRC, Report 65 [4.337].

S3.18 The specific exceptions to the general definition in paragraph (a) are noted in paragraph (b)[28] and paragraph (c).[29]

Holder

> **holder**, of a grant of representation or a foreign grant of representation of a deceased person's estate, means—
>
> (a) for a grant of representation—the person to whom the grant of representation is made; or
>
> (b) for a foreign grant of representation—the person appointed or authorised to collect and administer, under a law of a foreign jurisdiction, any part of the deceased's estate in the foreign jurisdiction in which the foreign grant of representation was made.

S3.19 The definition of "holder" extends, in relation to a foreign grant of administration, to a person appointed or authorised to collect and administer any part of the deceased's estate in the foreign jurisdiction. This allows, for example, the "holder of a foreign grant of representation" in cl 358(1) to include the public trustee in whose favour an order to administer has been made[30] and a person who has filed an election to administer in relation to the estate.[31]

> **interstate election to administer**, a deceased person's estate, means an instrument filed in a court of an interstate jurisdiction that, on being filed, is of the same general effect in the interstate jurisdiction as an election to administer filed in this jurisdiction.

Interstate grant of representation

> **interstate grant of representation** means—
>
> (a) a grant of probate made by a court in an interstate jurisdiction; or
>
> (b) a grant of letters of administration made by a court in an interstate jurisdiction; or

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28. Excluding elections to administer: see para 3.30.
29. Excluding orders to administer, elections to administer and grants to an administrator solely because he or she is a creditor of the deceased's estate: see para 3.158-3.159.
30. QLRC, Report 65 [33.57]. The Supreme Court can issue an order to administer in favour of the NSW Trustee where there are reasonable grounds to suppose that a person has died intestate: *NSW Trustee and Guardian Act 2009* (NSW) s 25.
31. QLRC, Report 65 [33.58].

(c) another instrument, other than an interstate election to administer, made by a court in an interstate jurisdiction that is of the same general effect in that jurisdiction as [an order to administer] in this jurisdiction.

S3.20 This definition is necessary to modify the definition of "grant of representation" for the purposes of the automatic recognition scheme under cl 335.[32]

Interstate jurisdiction

interstate jurisdiction means a State [or Territory], other than this jurisdiction.

S3.21 This definition is necessary to the definitions of "foreign grant of representation" and "interstate grant of representation".

Intestate

intestate, in relation to a deceased person, means without leaving a will, or leaving a will that does not effectively dispose of the whole or part of the deceased's estate.

S3.22 This definition is based on the definition of "intestate" in s 5 of the *Succession Act 1981* (Qld) and is consistent with cl 5 of the National Committee's model Intestacy Bill.[33] It may not be necessary in light of s 102 of the *Succession Act 2006* (NSW).

Issue

issue, of a deceased person, includes a person—

(a) who is born after a period of gestation in the uterus that commenced before the deceased person's death; and

(b) who survives for at least 30 days after the birth.

S3.23 This definition may be unnecessary in light of s 3(2) of the *Succession Act 2006* (NSW)[34] which makes the same provision as this definition with respect to references to children and issue.

last personal representative, for chapter 3, part 6, division 3, see section 330(a).

lawful authority, for chapter 3, part 9, see section 346.

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32. See para 3.136.

33. See NSWLRC, Report 116 [15.6], 260.

34. As amended by *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1[3].

Letters of administration

> **letters of administration** means letters of administration with or without the will annexed, and whether made for general, special or limited purposes.

S3.24 This definition of "letters of administration" is based on the definition of "administration" in s 3 of the *Probate and Administration Act 1898* (NSW) but without the reference to "exemplification of letters of administration or such other formal evidence of the letter of administration purporting to be under the seal of a Court of competent jurisdiction as is in the opinion of the Court deemed sufficient". The latter part of the NSW definition has been omitted because it is only relevant to the resealing of foreign grants of representation, the definition of which includes adequate reference to exemplifications and other formal evidence.[35]

S3.25 The reference to letters of administration "whether made for general, special or limited purposes" follows the National Committee's recommendation that it should be possible to reseal letters of administration granted for special, limited or temporary purposes.[36]

> **made**, in relation to a grant of representation or a foreign grant of representation, means made, granted or issued by, or filed in, a court.
>
> **overseas election to administer**, a deceased person's estate, means an instrument filed in a court of an overseas jurisdiction that, on being filed, is of the same general effect in the overseas jurisdiction as an election to administer filed in this jurisdiction.

Overseas jurisdiction

> **overseas jurisdiction** means a jurisdiction outside Australia, or a part of the jurisdiction.

S3.26 This definition is necessary to the definition of "foreign grant of representation".

Pecuniary legacy

> **pecuniary legacy** includes—
>
> (a) an annuity; and

35. QLRC, Report 65 [4.312]-[4.315].

36. QLRC, Report 65 [31.14].

(b) a general legacy; and

(c) a demonstrative legacy, to the extent it is not discharged out of the specific property on which it is charged; and

(d) any other general direction by a testator for the payment of an amount, including, for example, if a legacy is directed to be paid free of all duties, the payment of any duties to which the legacy is subject.

S3.27 This definition of pecuniary legacy is required for cl 504. Like the relevant Victorian and Tasmanian provisions, it includes general legacies and demonstrative legacies.[37] However, this definition follows the relevant Queensland provision in that it also includes annuities and "any other general direction by the testator for the payment of money".[38]

S3.28 The National Committee noted that this definition makes it clear that "pecuniary legacy" includes a "general legacy that is not pecuniary in nature, as well as a demonstrative legacy to the extent to which it cannot be discharged out of the property on which it is charged".[39]

Personal representative

personal representative—

(a) means, generally, the executor, original or by representation, of a deceased person's will or the administrator, original or by representation, of a deceased person's estate; and

(b) for chapter 4, part 6—see section 413; and

(c) for chapter 4, part 7—see section 417; and

(d) for chapter 4, part 8—see section 423; and

(e) for chapter 4, part 9—see section 427; and

(f) for chapter 4, part 10—see section 430.

37. *Administration and Probate Act 1935* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 5(1), both of which were based on *Administration of Estates Act 1925* (Eng) s 55(1)(ix).

38. *Succession Act 1981* (Qld) s 5.

39. QLRC, Report 65 [18.71].

S3.29 Paragraph (a) of this definition is derived from the definition of "personal representative" in s 5 of the *Succession Act 1981* (Qld).[40] It has been expanded, however, to refer to administrators by representation since these are now possible under cl 338.[41]

> **preceding calendar year**, for chapter 3, part 6, see section 325.
>
> **prescribed amount**, for chapter 3, part 6, see section 325.
>
> **prescribed person**, for chapter 4, part 8, see section 423.
>
> **prescribed provision**, for chapter 3, part 9, see section 346.

Professional administrator

> **professional administrator** means—
>
> (a) the [public trustee]; or
>
> (b) a trustee company within the meaning of the [insert local equivalent of the Trustee Companies Act 1968 (Qld)]; or
>
> (c) an Australian legal practitioner within the meaning of the [insert local equivalent of the Legal Profession Act 2007 (Qld)].

S3.30 This provision defines "professional administrator" for the purposes of the simplified procedure for small estates (elections to administer) outlined in Chapter 3 part 6.

S3.31 The National Committee has followed the lead taken by the Northern Territory in adding legal practitioners to the list of people who can act as professional administrators[42] on the basis that legal practitioners have the "necessary expertise" to carry out the tasks.[43]

Property

> **property** includes real and personal property and any estate or interest in the property and any thing in action and any other right.
>
> ***Drafter's note**: This definition may be unnecessary in some jurisdictions. See, for example, the definition property in the Acts Interpretation Act 1954 (Qld), s 36.*

40. QLRC, Report 65 [4.326].
41. QLRC, Report 65 [4.327].
42. See *Administration and Probate Act* (NT) s 6(1).
43. QLRC, Report 65 [29.38]-[29.39].

S3.32 This definition ensures, amongst other things, that "encumbered property" and "property debt" in cl 505 cover both real property and personal property for the purposes of the provisions relating to payment of debts of encumbered properties.[44] It may be unnecessary in NSW in light of the definition, in s 21(1) of the *Interpretation Act 1987* (NSW), of property as meaning "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description, including money, and includes things in action".

property debt, for chapter 5, part 2, division 4, see section 505.

Public trustee

[**public trustee**] means [insert appropriate definition].

***Drafter's note**: In Victoria, the reference to public trustee is likely to be State Trustees.*

S3.33 In NSW, the Public Trustee is now known as the NSW Trustee.[45]

reasonably believes means believes on grounds that are reasonable in the circumstances.

registrar means a registrar of the Supreme Court.

Residuary estate

residuary estate, of a deceased person, means—

(a) if the deceased left a will, either or both of the following—

(i) property in the deceased's estate that is not effectively disposed of by the deceased's will;

(ii) property in the deceased's estate that is not specifically given by the deceased's will but is included in a residuary disposition, by either a specific or general description; or

(b) if the deceased did not leave a will, the whole of the deceased's estate.

44. QLRC, Report 65 [17.184].

45. *NSW Trustee and Guardian Act 2009* (NSW).

S3.34 This definition is necessary for the provisions that deal with the order for the payment of debts under cl 502.[46] It is based on s 55 of the *Succession Act 1981* (Qld) with the addition of paragraph (b) to clarify that property that is not effectively disposed of by the deceased's will includes, in the case of total intestacy, the whole of the estate.[47]

Revoke

> **revoke**, a grant of representation of a deceased person's estate, includes recall the grant of representation.

S3.35 This definition is necessary for cl 202(2).

Rules of court

> **rules of court** means the [insert local equivalent of the Uniform Civil Procedure Rules 1999 (Qld)].

S3.36 In NSW, the relevant instruments are the *Supreme Court Rules 1970* (NSW) and *Uniform Civil Procedure Rules 2005* (NSW).

> **sister** see section 103.

Spouse

> **spouse**, of a deceased person, is a person—
>
> (a) who was married to the deceased person immediately before the deceased person's death; or
>
> (b) who was a party to a domestic partnership with the deceased person immediately before the deceased person's death.

S3.37 This definition operates together with the definition of "domestic partnership".[48] Both definitions are necessary as the term "spouse" is used in the order of priority for applications for letters of administration on intestacy in Schedule 2.

46. See para 5.14-5.16.
47. QLRC, Report 65 [17.52]-[17.56].
48. See para S3.8-S3.9.

S3.38 The two definitions are consistent with the National Committee's recommendations in the Report on intestacy.[49] However, this definition has been altered in the NSW provision giving effect to the National Committee's recommendation.[50]

> **substitute decision-maker**, for chapter 3, part 9, see section 346.
>
> **this jurisdiction** means [Queensland].
>
> **vests**, in a person, means devolves to and vests in the person.
>
> **will** includes a codicil and any other testamentary disposition.

49. NSWLRC, Report 116 [2.2]-[2.18], draft Intestacy Bill 2006 cl 7. See QLRC, Report 65 [5.59].
50. *Succession Act 2006* (NSW) proposed s 104 and s 105 as inserted by *Succession Amendment (Intestacy) Act 2009* (NSW) sch 1[4].

Appendix A: Provisions in probate and administration legislation not directly addressed by the model legislation

- *Probate and Administration Act 1898*
- *Administration (Validating) Act 1900*

PROBATE AND ADMINISTRATION ACT 1898

A.1 The model legislation has not expressly replaced or otherwise dealt with a number of provisions in the *Probate and Administration Act 1898* (NSW).

A.2 In some cases, the National Committee has suggested that:

- some of the provisions should be repealed;
- some of the provisions (or similar provisions) should be included in rules of court; and
- consideration should be given to including a version of some of the provisions in other, more appropriate statutes, or rules of court.

A.3 The National Committee did not expressly consider some because of their specific relevance to NSW.

A.4 Others are commencement provisions relating to previous amendments to the Act,[1] while others are no longer relevant as relating to succession duties.[2] The National Committee concluded that it was not necessary to include any mechanism to assist in the collection of succession duties since "it would now be extremely rare for an estate to be liable to succession duty".[3]

Storage and access to wills and other documents

A.5 Sections 30 and 31 deal with storage and access to wills and other documents within the control of the Court after probate has been granted. They are to be distinguished from the provisions in s 51-54 of the *Succession Act 2006* (NSW) that deal with the deposit and access to wills before probate has been granted and from the provisions in cl 615 and cl 616 that deal with access to documents held by personal representatives during the course of an administration.

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1. *Probate and Administration Act 1898* (NSW) s 40B(6), s 40C(4), s 40D(6), and s 91(2).
2. *Probate and Administration Act 1898* (NSW) s 40D(4).
3. Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) ("QLRC, Report 65") [38.237].

A.6 Consistent with the National Committee's conclusions with respect to s 152 of the *Probate and Administration Act 1898* (NSW),[4] such provisions are more appropriately located in the rules of court.

Application of income of settled residuary estate

A.7 Section 46D abolishes the rule in *Allhusen v Whittell*,[5] an equitable rule that sought to achieve fairness between beneficiaries where the income of the residuary estate is left to one beneficiary and the capital is left to another and the capital is required to meet the liabilities of the estate. It provides that a trustee is not required to apportion the income produced by the gross estate.

A.8 The National Committee considered that, because this provision is settled on beneficiaries by way of succession, it would be more appropriately located in trustee legislation, for example, the *Trustee Act 1925* (NSW), as is the case in other Australian jurisdictions.[6]

Mode of divesting land from a personal representative

A.9 Section 46E provides that the only ways that a personal representative can divest himself or herself of real estate and vest it in another person is by a registered conveyance, an acknowledgement under s 83[7] or under the provisions of the *Real Property Act 1900* (NSW). The definition of "real estate" in s 3 applies to this section so that it extends to "lands held under building leases or any lease for twenty-one years and upwards". This varies the general law position that a leasehold vests absolutely in a legatee "upon the assent of the executor".[8]

A.10 In light of the National Committee's conclusion that s 83 should be located in legislation relating to the conveyancing of old system land,[9] it may be desirable to locate this provision, if it is to be retained as serving any purpose, in the *Conveyancing Act 1919* (NSW).

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4. See para A.46.
5. *Allhusen v Whittell* (1867) LR 4 Eq 295.
6. *Trusts Act 1973* (Qld) s 78; *Trustee Act 1958* (Vic) s 74; and *Trustees Act 1962* (WA) s 104.
7. See para A.21-A.22.
8. *Re Cluverhouse* [1896] 2 Ch 251, 253; L Handler and R Neal, *Succession Law and Practice NSW* (LexisNexis, online) [1241.1] at 13 October 2009.
9. See para A.22.

No dower or courtesy

A.11 Section 52 abolishes courtesy and right of dower.

A.12 In its report on intestacy, the National Committee observed that, as courtesy and right of dower have been abolished in all Australian jurisdictions, there was no reason why such a provision should be included in any future legislation relating to intestacy.[10] Section 52, therefore, does not need to be re-enacted in the model legislation.

Spouse of intestate to accept value instead of partition

A.13 Section 53 requires an intestate's spouse who is entitled to a share of real estate (other than real estate that the spouse has elected to acquire under s 115 of the *Succession Act 2006* (NSW)) together with other beneficiaries to accept the value of the property instead of partition if all the other beneficiaries require it. This section obviates the need, when the spouse refuses to accept the value of the property, for the other beneficiaries to apply to the Court under s 66G of the *Conveyancing Act 1919* (NSW) for the appointment of trustees for sale or partition.

A.14 This provision should be reviewed together with the partition provisions referred to below.[11]

Partition of land

A.15 Section 58 sets out a summary procedure by which the Court, in the administration of a wholly or partially intestate estate, may order the partition of land that is subject to a joint tenancy.

A.16 Having noted that there is an alternative regime in NSW for partitioning land under s 66F-66I of the *Conveyancing Act 1919* (NSW), the National Committee concluded that "ideally, there should be one simple, uniform, summary procedure for effecting the partition of land"[12] and that the question of the partition of land ought to be the subject of a broader review of partition legislation generally.[13] It, therefore, recommended that the model legislation should not contain a provision

10. New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) [15.25].
11. *Probate and Administration Act 1898* (NSW) s 58: see para A.15-A.16.
12. QLRC, Report 65 [19.39].
13. QLRC, Report 65 [19.40].

to the effect of s 58. However, it did recommend that jurisdictions with a provision to the effect of s 58 might wish to retain that provision in their administration legislation pending such a review.[14]

Personal representative not required to continue as a trustee during an enforced suspension of sale

A.17 Section 59 allows a personal representative, when the Court orders a postponement of the sale of estate property,[15] to relinquish the office of trustee to such person as the Court may appoint.

A.18 The National Committee considered that the preferred means of removing a personal representative should be by revoking the grant and making a fresh grant to any new or continuing personal representatives. However, in doing so, the National Committee considered that no provision was necessary to achieve this other than those provisions[16] based on s 6 of the *Succession Act 1981* (Qld).[17] The Committee further considered that the Court's guiding principle in deciding whether to revoke a grant should be the "due and proper administration of the estate" and that accordingly, the model legislation should not "prescribe specific grounds for the revocation of a grant".[18] Specific grounds would include the grounds in s 59.

Delegation to NSW Trustee or a trustee company

A.19 Section 75A allows a personal representative (including a person who has been appointed executor by a will, but has not obtained a grant of representation) to delegate the office of executor to the NSW Trustee or a trustee company or to have the NSW Trustee or a trustee company appointed as an additional executor.

A.20 The National Committee concluded that the model legislation should not include a provision to the effect of s 75A on the grounds that such provisions are more appropriately contained in the relevant parts of

14. QLRC, Report 65 [19.42].
15. See *Trustee Act 1925* (NSW) s 57 or s 63: L Handler and R Neal, *Succession Law and Practice NSW* (LexisNexis, online) [1293.1] at 13 October 2009.
16. Clause 301 and related provisions.
17. QLRC, Report 65 [25.33]-[25.38].
18. QLRC, Report 65 [25.59].

the NSW Trustee and trustee company legislation.[19] Consideration will need to be given to the interaction of s 75A with the alternative procedures for appointment that also exist in the respective statutes.[20]

Personal representative may sign acknowledgement in lieu of conveyance

A.21 Section 83 facilitates the transfer of old system land that has been devised by will by allowing the personal representative to sign an acknowledgment instead of executing a conveyance.

A.22 The National Committee considered that such provisions are primarily concerned with the conveyance of old system land and are, therefore, more appropriately located in legislation dealing with old system land.[21] In NSW, the relevant statute is the *Conveyancing Act 1919* (NSW).

Application for legacy etc

A.23 Section 84 allows the Court to grant summary relief to a beneficiary against a personal representative who neglects or refuses to make a disposition to which he or she is entitled. The National Committee, while concluding that such provisions are more appropriately located in rules of court, considered that the mechanism contained in s 84 is useful and, therefore, recommended that each jurisdiction should include in its rules of court "a specific provision dealing with the payment or transfer of legacies that are being withheld".[22] However, the National Committee preferred a rule based on r 643 of the *Uniform Civil Procedure Rules 1999* (Qld), in part, because of the Queensland provision's specific reference to a "trustee".[23]

Effect of neglect to file inventory or accounts

A.24 Section 87 sets out the procedure that the registry must follow for notifying a personal representative that he or she has failed to file an

19. QLRC, Report 65 [6.38].
20. *NSW Trustee and Guardian Act 2009* (NSW) s 24; *Trustee Companies Act 1964* (NSW) s 5, s 6.
21. QLRC, Report 65 [12.141].
22. QLRC, Report 65 [14.43]-[14.44].
23. QLRC, Report 65 [14.45].

inventory or accounts and, ultimately, for penalising them for failure to show cause.

A.25 This provision is unnecessary in light of the Court's inherent power to commence proceedings for contempt for failure to comply with an order, for example, to file accounts.[24]

A.26 Section 88, which states that proceedings under s 87 will not prejudice any proceedings with respect to an administration bond, is unnecessary in light of the National Committee's recommended abolition of administration bonds and sureties.[25]

Orders as to disposal of moneys in hands of personal representative

A.27 Section 89 allows the Court to make orders "with reference to the distribution or application of any moneys" which a personal representative may hold, or with reference to the residue of the estate. The NSW Supreme Court gave it a limited construction in 1905 stating that it should only apply as to moneys "appearing by the accounts to be held in trust for any persons".[26]

A.28 It is similar in some respects to s 45 of the *Administration Act 1903* (WA), although the WA provision has a broader application. The National Committee dealt with the WA provision along with those allowing personal representatives to seek the Court's advice or directions.[27] As such, it has been superseded by cl 412 of the model legislation.

Notice of ex-nuptial children

A.29 Sub-section 92(3) deems a personal representative to have notice of the claim of any person whose entitlement to any part of the estate would become apparent upon a search being made under s 50 of the *Births, Deaths and Marriages Registration Act 1995* (NSW). This provision was designed to deal with recognition of ex-nuptial children following the enactment of the *Children (Equality of Status) Act 1976* (NSW).

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24. See cl 402.
25. See cl 617.
26. *In the Will of Mossop* (1905) 5 SR (NSW) 722, 723.
27. QLRC, Report 65 [20.69]-[20.70].

A.30 The National Committee considered this NSW provision within the broader context of provisions in other jurisdictions dealing with the interests of children, including ex-nuptial children. With regards to provisions dealing with the interests of ex-nuptial children, the National Committee concluded that the claims of ex-nuptial children, or people claiming through them, "should not be treated any differently from the claim of any other beneficiary of whose existence a personal representative may be unaware".[28] The National Committee also rejected the need, in the model legislation, for provisions which deem a personal representative to have undertaken certain searches at a registry of births, deaths and marriages. In particular, it noted that s 50 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) related only to the children of the deceased person and would not assist in the identification of other beneficiaries who may be described as the children of some other person. It was also noted that such provisions are limited in operation, since they relate only to registrations within a particular jurisdiction and do not extend to registrations in other Australian jurisdictions or overseas.[29]

Personal representatives may make maintenance distributions

A.31 Section 92A protects a personal representative who makes distributions for proper maintenance, support or education of people who were wholly or partly dependent on the deceased at the deceased's death. The distributions can be made at any time including within 30 days after the death of the deceased person and must be made in good faith.

A.32 It was inserted in the *Probate and Administration Act 1898* (NSW) in 2006,[30] following the recommendations of the National Committee in its report on wills.[31] It should now be relocated to an appropriate part of the *Succession Act 2006* (NSW).

28. QLRC, Report 65 [21.118].
29. QLRC, Report 65 [21.120]-[21.122].
30. *Succession Act 2006* (NSW) sch 2[7].
31. New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998) [9.20]-[9.29]. See also QLRC, Report 65 [13.140].

Protection of personal representative with respect to rents, covenants or agreements

A.33 Section 94 aims to facilitate the distribution of assets by protecting a personal representative who, in his or her capacity as such, distributes the assets in an estate without providing for future breach of covenant or other liability with respect to any real estate or leaseholds which the personal representative has transferred to a beneficiary or otherwise sold. The personal representative must, however, satisfy the obligations to date with respect to the property and provide for future fixed or ascertained amounts. It is a variation of provisions that originally appeared in what was known as *Lord St Leonard's Act*.[32]

A.34 Section 61 of the *Trustee Act 1925* (NSW) currently states that s 94 of the *Probate and Administration Act 1898* (NSW) is to apply to the distribution of trust property in the same way that it applies to property in an estate.

A.35 Consideration should be given to amending s 61 of the *Trustee Act 1925* (NSW) to take account of the absence from the model legislation of a provision to the effect of s 94.

Facilitating probate from small estates

A.36 Division 4 of Part 2 sets out a procedure that can be followed when seeking a grant of representation where the property in the estate does not exceed $15,000 in value. (These provisions should be distinguished from the provisions allowing for the administration of small estates without a grant of representation.[33]) A person can apply for probate under this procedure through either the Registrar or through a district agent. The rules of court provide that the registrar of a Local Court in any town beyond 48 km from Sydney may act as a district agent.[34]

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32. *Law of Property and Trustees Relief Amendment Act 1859* (Eng) 22 & 23 Vict c 35 s 27-28. The National Committee, in DP 42, grouped it with various "assent" provisions and considered that there was no longer any need for assent provisions and that "it is difficult to apply the principles of assent in practice": New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999) [8.114].
33. See cl 324-334.
34. *Supreme Court Rules 1970* (NSW) pt 78 r 4A.

A.37 The National Committee has characterised these provisions, and similar ones in other jurisdictions,[35] as dealing with "the registrar's obligation to provide assistance to certain persons who apply for a grant of a 'small estate'."[36] The National Committee considered that such provisions were not a matter for uniform legislation and depended, ultimately, upon the level of public funding in individual jurisdictions.[37]

Resealing: seal not to be affixed till duty is paid etc

A.38 Sub-section 108(1) provides that the Court is not to affix its seal to any foreign grants of representation until such duties are paid as would have been payable if the Court had originally made the grant.

A.39 While the provisions relating to succession duty have been repealed in NSW,[38] the estates of those who died before 1 January 1982 are still liable to succession duty. The National Committee concluded that the model legislation should not include a provision to facilitate the collection of succession duty because it would only be relevant to some jurisdictions and would only be used in rare circumstances given the small and diminishing number of estates that would still be liable.[39] The National Committee left it to individual jurisdictions to decide whether to include such provisions in their implementation of the model legislation.[40]

Resealing requirements not to apply to public officer or NSW Trustee

A.40 Section 110 has its origins in s 68 of the *Probate Act 1890* (NSW). It appears to have been included among the provisions relating to the resealing of grants of representation to relieve public officers and the NSW Trustee from certain obligations in much the same way as the current s 64(2) excludes the requirement of an administration bond for

35. See, eg, *Administration and Probate Act 1919* (SA) s 9-12; *Administration and Probate Act 1958* (Vic) s 71-78; *Administration and Probate Act* (NT) s 106-110; *Administration Act 1903* (WA) s 55-60.
36. QLRC, Report 65 [29.121].
37. QLRC, Report 65 [29.121].
38. *Stamp Duties (Amendment) Act 1991* (NSW) s 3, sch 3(11) (repealing *Stamp Duties Act 1920* (NSW) pt 4), sch 5(20).
39. QLRC, Report 65 [35.138]-[35.139].
40. QLRC, Report 65 [35.139].

"any person obtaining administration to the use or for the benefit of Her Majesty".[41]

A.41 There is considerable doubt as to what this provision actually achieves. The Commissioner for the Consolidation of the Statute Law, in 1898, noted that the provision had been reproduced in s 110 "though there had been a temptation to leave it out as really unnecessary".[42] Early attempts at interpreting the provision suggested that it, at least, relieved the Public Trustee or other public officer applying for a reseal from having to provide security under s 107(3).[43] Justice Street, in 1917, considered that the provision must go beyond simply relieving the Public Trustee from providing security, but concluded:

> The more I speculate on the matter the more difficult I find it to arrive at any really satisfactory conclusion as to the intention of the Legislature.[44]

A.42 To the extent that it applies to s 107(3), s 110 is unnecessary in light of the model legislation's abolition of administration bonds and sureties in cl 617. Any other ground of operation of the provision has not been identified in nearly 120 years. The provision should, therefore, be repealed and not enacted in any other NSW statute.

Oaths

A.43 Section 151 gives the power to administer oaths to the Registrar, Australian legal practitioners, commissioners for taking affidavits and justices of the peace.

A.44 Affidavits are required to prove certain matters under cl 322(5), cl 357(3), cl 358(3). However, the major provisions relating to presenting evidence by affidavit are contained in the rules of court.[45] Provisions relating to the people entitled to administer oaths are more appropriately included in the rules of court.

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41. The provision was originally contained in *Probate Act 1890* (NSW) s 28.
42. *Wills, Probate and Administration Act 1898*, Commissioner's Memorandum and Certificate.
43. *In the Estate of Hall* (1917) 34 WN (NSW) 160, 161; *In the Will of Constant* (1924) 42 WN (NSW) 12.
44. *In the Estate of Hall* (1917) 34 WN (NSW) 160, 161.
45. See, eg, *Supreme Court Rules 1970* (NSW) pt 78 r 24-26A, 28-28A.

Registrar to keep record of probates etc

A.45 Section 152 sets out the requirements for the Probate Registrar to maintain records in relation to the grants of probate made by the Court.

A.46 The National Committee considered that a provision dealing with the recording of grants was "not an appropriate matter for the model legislation", being generally of the view that such provisions would be better placed in the rules of court,[46] as had occurred in the ACT.[47]

Rules of Court

A.47 Section 152A allows rules of court to be made under the *Supreme Court Act 1970* (NSW) with respect to proceedings under the Act. It also confirms that the power conferred by this section does not limit the Court's rule-making power under s 124 of the *Supreme Court Act 1970* (NSW).

A.48 Section 152A is a standard provision included in many NSW statutes that deal with court procedure. Such provisions were first included in statutes in 1970, with the passing of the *Supreme Court Act 1970* (NSW).[48] The *Supreme Court Act 1970* (NSW) also included amendments to the *Wills, Probate and Administration Act 1898* (NSW) which repealed the old rule-making power in s 154.[49] However, these amendments did not insert the new rule-making provision. It would appear that this omission was rectified by the insertion of s 152A in 1989.[50]

A.49 A provision to the effect of s 152A should, therefore, be included in the NSW bill that implements the model legislation.

46. QLRC, Report 65 [40.92], [40.95].
47. *Court Procedures Rules 2006* (ACT) r 3119.
48. *Supreme Court Act 1970* (NSW) sch 2.
49. *Supreme Court Act 1970* (NSW) sch 2.
50. *Wills, Probate and Administration (Amendment) Act 1989* (NSW) sch 1(15).

ADMINISTRATION (VALIDATING) ACT 1900

A.50 Sections 4 and 5 of the *Administration (Validating) Act 1900* (NSW) have been dealt with elsewhere in this Report.[51] The continuing relevance of s 2 and s 3 to the administration of estates in NSW is doubtful, given their application to grants of representation issued before the commencement of the Act in 1900.

51. See para 4.37, para 4.44 and para 7.2.

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