AUSTRALIAN CAPITAL TERRITORY

ADMINISTRATION AND PROBATE ORDINANCE 1970

EXPLANATORY STATEMENT

Issued by the Authority of the Attorney-General

The purpose of the Ordinance is to amend the Administration and Probate Ordinance 1929-1969 of the Australian Capital Territory to prevent avoidance of State death duties by means of the device of transferring assets to the Territory.

In the case of Permanent Trustee Co. (Canberra) Ltd. v. Finlayson, the High Court held that, where a person died domiciled in New South Wales leaving assets in the Australian Capital Territory, those assets were not available for the payment of death duty levied by the State. The assets in the State being insufficient to meet the duty, there was no means by which the State could recover the outstanding duty.

The Ordinance overcomes the effect of the High Court's decision by amending the Administration and Probate Ordinance 1929-1969 so that -

(a) where a person dies domiciled in a State leaving assets in the Territory, the State death duty will constitute a debt payable out of the assets in the Territory; and

(b) probate of the will, or administration of the estate, of such a person may not be granted in the Territory until the State authorities have made an assessment of death duty or have given their consent to a grant of probate or administration.

Details of the provisions of the Ordinance are set out in the succeeding paragraphs.

In the new Part VA (inserted by clause 6 of the draft Ordinance), the operative section is section 83B. Sub-section (1.) provides that, where -

(a) a person was, at the time of his death, domiciled in a State;

(b) probate of his will is granted in the Australian Capital Territory; and

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

the State duty constitutes a debt payable by the executor in the Territory to the Crown in right of the State. A debt so payable by an executor is payable out of the assets of the deceased person in the Territory, and the liability of the executor is limited to the value of the assets of the deceased person vested in him under the law of the Territory.

Sub-section (2.) of section 83B places a debt created by sub-section (1.) in the same position as any other debt of the deceased person for the purposes of the administration of his estate in the Territory.

The preceding paragraphs refer to the situation where probate of a will is granted in the Territory. The position there set out applies also where letters of administration are granted or an order to collect and administer the estate is made and also where a grant made outside the Territory is resealed in the Territory.

Section 8C (inserted by section 5 of the draft Ordinance) provides that, on an application for probate, the Supreme Court of the Australian Capital Territory shall determine where the deceased person was domiciled at the date of his death. If the Court finds that the deceased person was domiciled in a State, it is prevented from granting probate of his will unless the relevant authority of the State in which he was domiciled has either -

(a) made an assessment of the death duty payable under the law of the State; or

(b) given his consent in writing to the grant of probate.

The purpose of section 8 C is to ensure that, in a case to which it applies, the administration of the estate does not commence until the death duty authority in the State concerned has had an opportunity to determine the amount of death duty payable and to make a claim upon the executor in the Territory.

The conditions imposed by section 8C on the grant of probate apply equally to the grant of letters of administration of, and orders to collect and administer, estates, and also to the resealing of grants and orders made outside the Territory. They also apply where an application for a grant or an order is made to the Registrar under section 10 of the Administration and Probate Ordinance 1929-1969 instead of to the Supreme Court under section 9.