



Law Council
OF AUSTRALIA

Office of the President

18 December 2019

Ms Karen Payne
Inspector-General of Taxation and Taxation Ombudsman
GPO Box 551
SYDNEY NSW 2001

By email: estates@igt.gov.au

Dear Ms Payne

Death and Taxes – Investigation into ATO Systems and Processes for Dealing with Deceased Estates

1. The Law Council welcomes the opportunity to submit to the Inspector-General of Taxation and Taxation Ombudsman (**IGT**) Investigation into Australian Taxation Office (**ATO**) Systems and Processes for Dealing with Deceased Estates (**the Investigation**).
2. The Law Council acknowledges the significant assistance of the Law Society of New South Wales, the Taxation Law Committee of the Law Council's Business Law Section, and the National Elder Law and Succession Law Committee in the preparation of this submission.
3. This submission does not seek to address the full scope of the terms of reference (**the ToR**) of the Investigation but provides information relevant to points 2 (receiving information from and dealing with deceased estates), 4 (ATO portals), and 5 (legislative impediments) of the ToR.

Background and current practice

4. In recent years, approximately 160,000 deaths have occurred per annum in Australia.¹ In many instances, the family of the deceased person are called upon to interact with the taxation system as a part of winding up the deceased's affairs.
5. This can be a stressful and emotional time. That fact is well understood and is put to one side for the purposes of this submission.
6. In the course of addressing the requirements of a deceased's estate, there are significant barriers to dealing effectively with the taxation system. Some of those barriers arise from the application of laws governing how the Commissioner of Taxation (**the Commissioner**) handles information.

¹ See:

<https://www.abs.gov.au/ausstats/abs@.nsf/0/C67A858BA00CB846CA2568A9001393C6?Opendocument>.

7. Of particular relevance to this submission is clause 355-25 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (**the Act**) which, in effect, prevents any person other than a legal personal representative (**LPR**) from directly accessing the tax records of a deceased person or their estate.
8. The Law Council understands from its constituent bodies that many of the concerns outlined in the preamble to the ToR are experienced in practice, including in particular the inability to appoint registered tax practitioners or solicitors as authorised contacts.
9. As the IGT would be aware, an LPR will typically be responsible for:
 - preparing and lodging the deceased's (pre-death) final tax return;
 - obtaining a tax file number for the deceased estate; and
 - preparing and lodging tax returns for the deceased estate.
10. An LPR who lacks the expertise personally to complete the tasks associated with that role will generally seek the advice or assistance of a solicitor or registered tax practitioner (**RTP**). However, pursuant to clause 355-25, neither the RTP nor the solicitor is permitted to locate and download the relevant data on behalf of the LPR.
11. Accordingly, the LPR must request the ATO to provide historical information concerning the deceased's tax history, which the LPR may then pass to the solicitor or RTP for the purpose of preparing the advice or assistance. The LPR must continue to act as a conduit between the solicitor or RTP and the ATO if further information or clarification is needed.
12. Requiring the LPR to liaise between the expert professional and the ATO inevitably complicates and prolongs the administration of the deceased estate and incurs greater costs to the estate.
13. Where an LPR's professional adviser does not have direct visibility across the tax position and the estate, this also increases the risk that tax aspects will be overlooked – including tax owed by the deceased or owed by the estate, such as superannuation death benefits or capital gains tax.

Recent changes

14. The Commissioner's office is in a difficult position with regard to clause 355-25. Breach of confidentiality laws would result in potential criminal liability for an officer. This may, consequently, lead to the narrow interpretation of such laws.
15. The ATO's practice was amended to tighten the application of clause 355-25 at the end of November 2019. Prior to the decommissioning of the ATO's 'Tax Agent Portal'² on 29 November 2019, it was possible for an authorised solicitor or RTP to access the equivalent data directly via that service. In accordance with clause 355-25, that access is no longer possible through the ATO's new 'Online Services for Agents' portal³ (**the New Portal**).
16. While this change has occasioned some concern, the Law Council notes that the Commissioner has moved to propound an instrument in accordance with his remedial

² Formerly accessible at <https://www.ato.gov.au/tax-professionals/services-and-support/working-online/tax-agent-portal/>.

³ Accessible at <https://tap.ato.gov.au/>.

powers under Division 370-A of Schedule 1 of the Act.⁴ The instrument proposes a modification of the application of clause 355-25 to allow the ATO to disclose a deceased person's information to a solicitor or RTP acting on behalf of the LPR (**the Proposed Modification**). The Proposed Modification is grounded on an argument that such practice is consistent with the original purpose and object of the protection of information by Division 355-B of Schedule 1 of the Act.

Analysis

17. While the Law Council strongly supports the exercise of the Commissioner's remedial power to modify the application of clause 355-25, it nevertheless considers this to be an interim solution only.
18. As a further interim measure, the Law Council recommends that the ATO consider resuming its pre-2011 practice of providing the LPR with a 'tax clearance letter' to ensure that all tax obligations in an estate are satisfied.
19. In the longer term, the Law Council considers that a legislative amendment will be required to provide certainty in this aspect of the administration of taxation law. Accordingly, the Law Council recommends consideration of an appropriate legislative reform to allow for access to the New Portal by the LPR's solicitor or RTP.
20. Despite the Proposed Modification, difficulties are faced by a person appointed executor under a will, or a person desiring to wind up a deceased estate where there is no appointment of an executor. In neither case will a person entering on the role of LPR readily be able to find out what that role may entail. The available estate may be exceeded by the costs of compliance, where the deceased has neglected her affairs or left her affairs in confusion.
21. A person, seeking in good faith to perform the public good of winding up the affairs of an estate, should not be exposed to unknown and potentially unlimited costs of winding up the tax side of those affairs. However, that may be the consequence of an overly technical application of taxpayer confidentiality laws. The intending LPR can have no indication, until the grant of representation, of whether there are many years of returns outstanding, or how the estate stands with the Commissioner.
22. It is not a trivial matter for a person who has engaged in winding up a deceased's affairs to be excused from further conduct of that role. As tax administration now stands, it could be considered imprudent for a relative of a deceased person to enter upon the administration of an estate unless the relative is reasonably confident that he or she knows that the affairs are more or less in order.
23. It is also possible that the Commissioner may now require a person who undertakes the role of LPR to take out probate or letters of administration. This would entail considerable cost and inconvenience. In small estates, such as the estate of a full pensioner who filed a 'final' return some time before death, such a requirement would be disproportionate. It should be simple to wind up that person's affairs as against the Commissioner. It should not be necessary to file an expensive court application, for

⁴ Commissioner of Taxation, *Taxation Administration (Remedial Power—Disclosure of Protected Information by Taxation Officers) Determination 2019* (Exposure Draft, 21 November 2019).

the sole purpose of advising the Commissioner that there will be no terminal return or no estate return.⁵

24. The Law Council considers that the Commissioner has taken positive steps toward simplification of the administration of small estates. Practical Compliance Guideline 2018/4⁶ assists in the smallest and least complex of matters. However, the Law Council considers that the monetary and qualitative limits should be reviewed (and programmed for regular re-examination) such that similar assistance may also be extended, as appropriate, to the LPRs of somewhat larger and more involved estates.
25. Finally, the Law Council refers to the use of automated letters by the ATO. These may issue apparently without human review, for instance when a refund is paid by an aged care provider. In practice, it appears that such letters have issued despite the deceased having filed a 'final' return during his or her lifetime (in circumstances where the deceased was on full pension), and where prior notice that there would be no estate return filed had already been given (for instance by an RTP in winding up the estate).
26. Once such automated processes commence, they often continue by default and it may prove difficult for an LPR, solicitor or RTP to intervene and suspend or discontinue that process. The Law Council understands that subsequent letters have in some instances continued to issue, employing an escalating tone and threatening prosecution, despite representations having been made by the RTP, reconfirming that no estate return is required in the given case.
27. Such processes may place a personal representative under significant stress and, where they communicate unwarranted demands, confidence in the administration of the tax system may be diminished.

Conclusion

28. The Law Council considers that a statutory amendment to clause 355-25 of Schedule 1 of the Act will ultimately be required, such that a solicitor or RTP acting on behalf of an LPR are persons to whom the Commissioner can release information.
29. As an interim measure, the Law Council supports the Proposed Modification of the application of clause 355-25 under the Commissioner's remedial power. The Law Council recommends that this be supported by a resumption of the provision of 'tax clearance letters' to LPRs.
30. The Law Council suggests that the office of the Commissioner consider expanding its information-sharing and educational functions in support of potential executors. For instance, more information could be available from the Commissioner on the role and duties of an executor; further Practical Compliance Guidelines issued; the monetary and qualitative restrictions in Practical Compliance Guideline 2018/4 should be revised to assist the LPRs of somewhat larger and more involved estates; and this should be included in an ongoing programme of review.

⁵ In fact, in Queensland, an executor does not need to take out probate for the executor's appointment to be valid. In that jurisdiction, the executor may simply rely upon the will.

⁶ Australian Taxation Office, 'Income tax – liability of a legal personal representative', *PCG2018/4* (2018).

31. Finally, the Law Council recommends cessation of the use of automated letters in regard to deceased estates, noting that threats of court action should be a last resort and should only be employed following human review of relevant files.

Contact

32. Thank you again for the opportunity to submit to the Investigation. Should you require further information or clarification, please contact Mike Clayton, Senior Policy Lawyer on (02) 6246 3755 or at mike.clayton@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President