

05 December 2019

Ms Karen Payne  
Inspector-General of Taxation and Taxation Ombudsman  
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Sydney NSW 2001

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Dear Ms Payne

## Death and taxes: an investigation into ATO systems and processes for dealing with deceased estates

As the representatives of over 200,000 current and future professional accountants in Australia, the two major Australian accounting bodies Chartered Accountants Australia and New Zealand and CPA Australia (together 'the Major Accounting Bodies') make this joint submission on the Inspector-General of Taxation's investigation into ATO systems and processes for dealing with deceased estates.

Our submission focuses on the issues faced by tax agents whose clients are deceased.

The ATO's Online services for agents (OSfA) system does not allow tax agents to access the records of deceased clients. This functionality was on the ATO Portals and ceased with their closure on 29 November 2019.

This issue has created concern for tax agents since its identification in early 2018 during beta testing for OSfA. Indeed, discussions with the ATO suggest that the legal basis for ATO Portal access in the past is questionable following [legislative](#) changes in 2010.

We await the resolution of the issues created by section 355-25(2)(d) of the *Taxation Administration Act 1953 (TAA)* through the use of the Commissioner's Remedial Powers (CRP) and note that there will be a minimum six-month period during which tax agents will have no access to deceased client records.

Legal personal representatives (LPRs) also face risks when they are not able to be adequately supported by a tax agent due to current legislative impediments. This includes exposure to tax liabilities if an estate is distributed without fully identifying any outstanding tax obligations of the deceased.

Further, while we accept that any application of the Commissioner's Remedial Powers (CRP) is proposed to be limited to where probate is granted, or letters of administration are obtained, we are aware that there may be situations when this does not occur or there are significant delays. The ATO should therefore ensure that it can provide services in all situations related to deceased taxpayers and that they provide support to those seeking to finalise a deceased taxpayer's affairs in an empathetic, cost-effective and timely way.

Finally, it is important to note the risks posed to the Australian tax system when the tax affairs of a deceased person cannot be dealt with efficiently and expeditiously without the assistance of the tax agent community.

It is often the case that, in the period prior to death, important decisions will be made about asset dispositions, donations, accessing superannuation benefits and determining access to superannuation death benefits. Many of the decisions will impact the date of death tax return as well as the tax returns of the deceased's estate.

It is concerning that Australia's tax administration system does not provide the legal foundation for tax professionals to directly assist the ATO to obtain assurance that relevant tax and superannuation laws and guidance have been applied in these pre-death transactions.

Additional comments are included in the attachment.

If you have any queries about this submission, please contact either Elinor Kasapidis (CPA Australia) at [elinor.kasapidis@cpaaustralia.com.au](mailto:elinor.kasapidis@cpaaustralia.com.au) or Michael Croker (Chartered Accountants ANZ) at [michael.croker@charteredaccountantsanz.com](mailto:michael.croker@charteredaccountantsanz.com).

Yours sincerely



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## Attachment

### 1. Tax agents do not have access to deceased taxpayer records

This issue first became known around February 2018 during beta testing of the ATO's OSfA. Tax agents found that they could not access the files of deceased taxpayers as they had previously done through the BAS and Tax Agent Portals.

The ATO advised that when developing OSfA, it had been identified that section 355-25(2)(d) of the Taxation Administration Act 1953 (TAA) prevents the disclosure of that information to anyone other than the LPR of the deceased estate<sup>1</sup>. The limited exception provided in section 355-50 is inhibiting as it requires a case-by-case assessment to be made that information can be disclosed to tax agents and legal practitioners in the given circumstances.

With the permanent closure of the Portals in November 2019, the ATO has been actively seeking a resolution. Most recently, the ATO has sought to utilise the CRP to modify the law. The proposal allows the ATO to disclose pre-death information concerning a deceased taxpayer to a tax agent or legal practitioner of the deceased taxpayer's LPR.

The CRP Advisory Panel agreed on 21 October 2019 that the CRP is suitable for use to resolve the identified issues with section 355-25(2)(d). There is currently a public consultation on the [draft legislative instrument](#). Subject to the outcomes of that consultation and/or any other delays, the ATO's Tax Practitioner Stewardship Group has been advised that the earliest this legislative instrument can take effect is 13 May 2020.

The ATO is developing an interim solution in the form of an information pack sent, upon request, to the LPR who can then pass on the information to a registered agent.

Presuming that the CRP process is successful, this will resolve our primary concerns in terms of removing legislative barriers. We do, however, note that there remains no similar solution for unadministered estates.

The ATO has advised that it is ready to deploy the necessary changes to its OSfA platform once the legislative impediments are resolved.

While outside the scope of this investigation, we note the length of time it has taken the ATO to design a response to the legal issues identified during beta testing in February 2018. We suggest that the Inspector General of Taxation consider a future review into the ATO's beta testing processes, including investigating options to improve how it resolves legal and administrative issues identified during testing of new systems.

<sup>1</sup> It is our understanding that the ATO sought legal advice on this matter and we assume a copy of this advice will be provided to the Inspector-General.

## 2. Risks borne by legal personal representatives heightened by difficulties and delays

LPRs are subject to a range of requirements in relation to a deceased person's tax affairs and the ATO considers that the LPR has notice of claim over:

- Amounts owing at time of death
- Liabilities from outstanding assessments
- Liabilities arising in respect of outstanding returns
- Liabilities arising from amendments or other changes, and
- Liabilities where further assets discovered.

The LPR is therefore currently required to resolve a potential array of complex tax issues that can arise in resolving the outstanding tax affairs of the deceased person. Many people acting in the capacity of an LPR may not have any tax expertise or may need expert tax advice to supplement their broader expertise (e.g. where a general legal practitioner is acting in the capacity of an LPR). It remains common for deceased persons to appoint lay people such as family members and friends as their executors.

Such executors often have very limited taxation or estate administration knowledge and rely on expert assistance. However, existing legislation does not allow the direct involvement of tax professionals who have the requisite tax compliance and/or tax technical expertise to engage with the ATO.

The current ATO processes seem unnecessarily restrictive, time consuming and stressful, particularly for the lay executor, even where the deceased's taxation affairs are not complex. While [PCG 2018/4](#) provides some certainty for smaller and less complex estates, it is limited in its application and LPRs may still require the support of tax professionals.

With the denial of access through OSfA, the ATO process becomes manual and paper-based. The LPR must act as an intermediary on tax matters between the tax professional and the ATO. It is likely that protracted discussions between tax professionals and an LPR will occur, leading to incorrect requests, misunderstandings and errors, increased costs and, in some instances, personal distress. It can also result in significant reverse workflow for the ATO.

The increased risks resulting from this manual process are borne by the LPR who is liable to pay any outstanding tax-related liabilities of a deceased person, including meeting them personally if estate assets are distributed with a notice of a claim by the ATO. It is therefore essential that LPRs can nominate tax professionals to ensure that the tax affairs are finalised correctly and completely.

### 3. ATO services should be tailored to ensure deceased estates can be finalised without grant of probate or letters of administration

The law does not allow the ATO to engage with anyone in relation to an estate unless they have obtained a grant of probate or letter of administration authorising them as an LPR. However, many estates do not require the formal appointment of an executor or administrator (i.e. an LPR)<sup>2</sup>. This can be due either due to a relatively low value of the estate or because many of the assets are jointly owned, particularly in the situation where it is the first of a couple to pass away.

Specifically in Queensland, the assets vest automatically in the deceased's executor and paragraph 31 of [PCG 2018/4](#) confirms that section 260-140 of Schedule 1 of the *Taxation Administration Act 1953 (TAA)* applies in those circumstances (i.e. it is an administered estate). However, this view does not similarly extend to the disclosure provisions under section 355-25(2)(d). This means that while the executor is liable for the outstanding tax-related liabilities of the deceased taxpayer, the ATO does not consider them to be an LPR for the purposes of disclosure.

The ATO states:

*The ATO may speak directly to an executor or family member who chooses not to seek probate or letters of administration, in limited circumstances, for the purposes of the ATO administering taxation laws. It does not extend to providing broader information that would assist in the administration of the estate. ATO officers will assess any request for information on a case by case basis. In these circumstances, the Commissioner will not record the person as an authorised contact for the deceased estate.*<sup>3</sup>

However, the deceased may still have outstanding taxation obligations. It is an incongruous outcome that the ATO requires all the deceased's tax obligations to be finalised but that they are unable to engage with anyone representing the estate unless there has been a formal appointment. It is difficult for an informal representative who is trying to correctly administer the estate if they are not provided with information by the ATO.

Further, the process by which the ATO finalises unadministered estates under section 260-145 of the *TAA* enables the Commissioner to determine outstanding tax-related liabilities once six months have passed since the person's death and excludes the informal representative from the process until the notice of determination is published. We also note that the publication of

<sup>2</sup> For example, estates can be finalised in Queensland without formal representation as properties can be transferred or sold without a grant of probate.

<sup>3</sup> ATO, [Accessing the deceased person's information](#), last modified 10 October 2018

determinations in daily newspapers<sup>4</sup> is an increasingly archaic mechanism by which to notify claimants.

The administration of the deceased's tax affairs should not drive the administration of the estate – that is, if a formal LPR appointment is not required for estate administration, the person acting informally should still be able to finalise the deceased's taxation obligations by being provided with the information required to do so. The proposed application of the CRP does not currently enable this to occur.

Further consideration should be given to enabling the disclosure of information to informal representatives in the absence of an LPR. Informal representatives should also be able to authorise tax agents.

A hierarchy of matters that the ATO can discuss in the absence of an LPR could be developed. Such a process should be streamlined while satisfying the 'case by case' legislative requirements in the absence of using the CRP. Examples of information to be provided include:

- a simple request to know when the deceased last lodged a tax return to assist those compiling an inventory of the deceased's assets and liabilities and meeting the estate tax obligations, or
- informing the representative of a potential tax liability where a return has been lodged but no assessment issued.

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<sup>4</sup> Subsection 260-145(3) of the TAA

## About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents a network of more than 125,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live. Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

CA ANZ promotes the Chartered Accountant (CA) designation and high ethical standards, delivers world-class services and life-long education to members and advocates for the public good. We protect the reputation of the designation by ensuring members continue to comply with a code of ethics, backed by a robust discipline process. We also monitor Chartered Accountants who offer services directly to the public.

Our flagship CA Program, the pathway to becoming a Chartered Accountant, combines rigorous education with practical experience. Ongoing professional development helps members shape business decisions and remain relevant in a changing world. We actively engage with governments, regulators and standard-setters on behalf of members to advocate in the public interest. Our thought leadership promotes prosperity in Australia and New Zealand.

Our support of the profession extends to affiliations with international accounting organisations. We are a member of the International Federation of Accountants and are connected globally through Chartered Accountants Worldwide and the Global Accounting Alliance. Chartered Accountants Worldwide brings together members of 13 chartered accounting institutes to create a community of more than 1.8 million Chartered Accountants and students in more than 190 countries. CA ANZ is a founding member of the Global Accounting Alliance which is made up of 10 leading accounting bodies that together promote quality services, share information and collaborate on important international issues.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents more than 870,000 current and next generation accounting professionals across 179 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications.

## About CPA Australia

CPA Australia is one of the world's largest accounting and finance bodies, with more than 164,000 members working in 150 countries and regions around the world.

Our aim is to enhance our members' professional knowledge and support their career development. We do this in many ways, starting with the world-class postgraduate CPA Program. Thereafter, we deliver a range of continuous learning programs, utilising our international networks to source leading-edge content and presenters.

We support our members and the profession internationally by advocating for change at the highest levels and contributing to leading networks worldwide in the finance, accounting and business arenas.

A strategic priority and commitment for CPA Australia is to not only advocate on behalf of members, but also to speak up on issues in the public interest.

CPA Australia's members are bound by a strict professional code of conduct, including an obligation to undertake continuous professional development to ensure that the highest professional standards are maintained.