



THE TAX INSTITUTE

19 December 2019

Ms Usha Narain
Assistant Commissioner | Law and Policy Design
Policy, Analysis and Legislation
Australian Taxation Office
CANBERRA ACT 2600

By email: CRPSecretariat@ato.gov.au.

Dear Ms Narain,

Access to a deceased person's information – Draft Legislative Instrument

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the draft *CRP 2019/D1 Taxation Administration (Remedial Power-Disclosure of Protected Information by Taxation Officers) Determination 2019 (Draft Legislative Instrument)*.

We provide our comments responding to the consultation questions below.

Discussion

1. *Do you agree that the taxpayer confidentiality provisions under the taxation law, as enacted, are leading to, or could lead to, unintended outcomes in the context of representatives of executors and administrators of deceased estates?*

Yes. There are significant compliance issues and potential risks to revenue collection arising from the current law being interpreted in such a way that in practical effect does not allow an executor or administrator to be represented by a tax agent or legal representative to act for a deceased taxpayer. Not only are the specialist skills of the appointee required in many cases, the inability to be represented by a tax agent or representative in this situation will cause unintended administrative delays and risks of potential errors in managing tax affairs, which we do not believe was intended by the law.

2. *Is the proposed Legislative Instrument reasonable and not inconsistent with the intended object or purpose of the law?*

The proposed Draft Legislative Instrument is reasonable, well worded, and in our view very consistent with the intention of the law to enable proper representation.

3. *Is the proposed Legislative Instrument reasonable having regard to the cost of compliance?*

The proposed Draft Legislative Instrument is reasonable having regard to cost. There would appear to be negligible cost to implementing the Draft Legislative Instrument, because it is consistent with the way the law has been interpreted and administered in the past. There is a significant potential cost to executors and administrators, and to the system as a whole, should the Draft Legislative Instrument as proposed not go ahead.

4. *Does the proposed Legislative Instrument result in outcomes for an entity that might be less favourable than those under existing law?*

No, none that we can foresee.

5. *Does the proposed Legislative Instrument ensure that relevant provisions of Subdivision 355-B continue to operate in accordance with the intended purpose or object of the law?*

Yes, we believe so.

6. *Legislative instruments ordinarily apply prospectively and they cannot apply retrospectively to disadvantage an entity other than the Commonwealth or an authority of the Commonwealth (section 12 Legislation Act 2003). For the present proposal, prospective application is proposed. What application date should this instrument have?*

As the Draft Legislative Instrument merely confirms the Commissioner's long-standing approach, it should ideally be retrospective. However, it is unique in a way, because the affected people are not taxpayers but ATO officers who arguably have breached the Secrecy provisions in the *Taxation Administration Act 1953* (Cth). In the circumstances, there is probably no real need for it to be retrospective.

However, we believe that the timing for implementation is critical and that the Draft Legislative Instrument should be introduced as soon as possible. The inability for tax agents (who are not themselves an executor or administrator of an estate) to access ATO Online in respect of the tax affairs of a deceased person will already be causing the problems we have identified given that access to the now defunct Tax Agent Portal (through which this information could be accessed albeit in breach of the law) ceased at the end of November 2019.

Other matters

There are other common situations where persons acting on behalf of others may need to be provided with that other person's Tax File Number by an ATO officer. An example may be where an adult child has power of attorney with respect to their elderly parent who requires a Tax File Number to complete the sale of their family home to enable the child to arrange aged care for the parent. There should be a simple process for the provision of the elderly parent's Tax File Number to the person with power of attorney (or to be able to obtain a Tax File Number easily if the elderly parent does not have one). While not strictly related to the ambit of the Draft Legislative Instrument, the current process is a very difficult compliance process to follow and should also be addressed by the Commissioner.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

A handwritten signature in black ink that reads "Tim Neilson". The signature is written in a cursive, flowing style.

Tim Neilson
President