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Dear Siobhan

**New Consultation: PCG 2019/5 The Commissioner's discretion to extend the two-year period to dispose of dwellings acquired from a deceased estate**

Thank you for inviting us to participate in the consultation on the review of Practical Compliance Guideline PCG 2019/5. As you may know, BNR Partners has specialized in the taxation of deceased estates since 2000. We provide advice and other tax compliance services to legal practitioners and licenced trustee companies involved in the administration of deceased estates and testamentary trusts all around Australia.

I was involved in consultation on the draft PCG before it was issued. Our practice has found the PCG to be a valuable resource. It has enabled the administration of many estates to be undertaken in a more timely and cost effective manner.

**Consultation questions**

**Safe harbour**

- *Is the additional 18 months' timeframe under the safe harbour sufficiently long?*

In general, the provision of an additional 18-month period in which to conclude the sale of a deceased person's dwelling is sufficient.

However, we would like to see a longer period in cases where the deceased's dwelling is occupied by their spouse or someone with a right to occupy the dwelling (like in example 1). Consider this example.

*Phoebe owns a dwelling. She leaves the property on trust for her husband Paul to occupy for life, with the remainder to benefit her two children Pansy and Penny. Paul lives in the dwelling for 8 years following Phoebe's death. The trustee sells the property within six months of Paul's death.*

It appears to be the case that the Commissioner will exercise the discretion to extend the two-year period in item 1 column 3 of the table in subsection 118-195(1). Our understanding is that usually a further two years is granted (that is, from the time the spouse or other person with an occupancy right ceases to live at the property). If this is the standard practice, then we'd suggest that the 18-month requirement be modified in this case.

- *Any other feedback on safe harbour conditions.*

Our comment relates to the condition in red text below. If there is a delay which is caused by a contract falling through, could paragraph 11 be clarified to make it clear that the relevant 12-month rule is from when the dwelling is re-listed for sale not the original listing.

To qualify for the safe harbour, you must satisfy all of the following conditions:

- during the first two years after the deceased's death, more than 12 months was spent addressing one or more of the circumstances described in paragraph 12 of this Guideline
- the dwelling was listed for sale as soon as practically possible after those circumstances were resolved (and the sale was actively managed to completion)
- **the sale completed (settled) within 12 months of the dwelling being listed for sale**
- if any of the circumstances described in paragraph 13 of this Guideline were applicable, they were immaterial to the delay in disposing of your interest, and
- the longer period for which you would otherwise need the discretion to be exercised is no more than 18 months.

#### *Circumstances that took more than 12 months to resolve*

12. One or more of the following circumstances must have taken more than 12 months to address:

- the ownership of the dwelling, or the will, is challenged
- a life or other equitable interest given in the will delays the disposal of the dwelling
- the complexity of the deceased estate delays the completion of administration of the estate, or
- **settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside of your control.**

#### **PCG examples**

- *Do examples cover the most common scenarios?*
- *What additional examples (or improvements to existing examples) might be useful?*

Some mention should be made of Covid 19 in the factors that will be considered – perhaps in an example. We have seen instances where significant delays have occurred because family members have been unable to travel to Australia (or even interstate) in order to clear the deceased's property and make it available for sale.

One of the disqualifying conditions for the safe harbour is waiting for the property market to pick up. This can be distinguished from a case where the only offers that are made in respect of the purchase of a dwelling are well below the valuation obtained by the LPR. That is, the LPR is not waiting for the market to pick up but to achieve the market value (if they sold for less than that amount the LPR could be in breach of their fiduciary duties). An example to highlight this point would be helpful. Again, it raises the issue about the requirement for a sale within 12 months of the dwelling being listed.

### **Does the property need to be sold before a discretion could be exercised?**

- *We find that many discretion requests are received before the property is sold. At a practical level, the facts that the Commissioner would take into account in deciding whether to exercise the discretion are likely to be fully understood only once the CGT event has occurred. In the ordinary circumstance, it would not be appropriate for the Commissioner to exercise the discretion prior to that time. Would clarifying this be useful?*

We note that the ATO will generally refuse to exercise the discretion if the relevant dwelling has not actually been sold. We have seen numerous cases where the parties in an estate are in dispute and they need clarity about the potential tax liability that might arise from the sale of a dwelling.

We ask that you consider the exercise of the discretion in these cases – provided all of the relevant conditions are otherwise satisfied and the sale is completed within a specified period.

### **Visibility of PCG**

- *Is the tax agent/professional associations community aware of the PCG 2019/5? How about your clients, are they aware of it?*
- *How can we improve the visibility of PCG 2019/5?*

In our experience there is a growing awareness of the PCG amongst legal practitioners specialising in estates and trusts, and tax agents, albeit that doesn't necessarily translate an understanding of the PCG requirements. Community awareness understandably is minimal at best.

It will be interesting to see the restructured web content for deceased estates – there is clearly an opportunity to make the PCG more visible via that work.

### **Other**

- We would appreciate your feedback on any aspects of PCG 2019/5 you may have
- Suggestions for improvements are welcome.

We are aware of different approaches taken in the ATO as to whether the exercise of a discretion can properly be the subject of a private ruling. For example, the ATO will not issue a private ruling about the discretion in paragraph 292-95(1)(b) of the ITAA 1997.

While it might not be appropriate to deal with a general issue like this in the context of a document dealing with one particular discretion you might consider saying something

in the PCG about how taxpayers should apply for an exercise of this discretion (that is, whether it is by way of private ruling or another form of request). Can we also suggest that you deal with the broader issue in another document.

Finally, we note that not dissimilar issues can arise in the context of the discretion in section 152-80 of the ITAA 1997. It would be useful if a related PCG could be developed to deal with this discretion.

Please do not hesitate to contact the writer or Lyn Freshwater of our office should you wish to discuss our comments in further detail.

Yours sincerely

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**Ian Raspin** FCPA, CA, CTA, TEP  
Managing Director

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