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Engagement and Support | Individuals and Intermediaries

By email only: tpsg@ato.gov.au

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Dear Sir/Madam

Thank you for the opportunity to provide feedback in respect to the following matters arising from recommendations of the Inspector General and Taxation Ombudsman's review of the tax arrangements for deceased estates:

Recommendation 1c

We invite your comment on changes you think may simplify the experience for taxpayers completing the trust tax return for simple deceased estates while still retaining enough detailed instructions for those with more complex affairs.

Please see our response at Attachment A

Recommendation 1d

The website updates went live in December 2021 and we are now inviting your comments to better understand if the new checklist is meeting its aim and what you believe the best channels for promoting this web-based Checklist to relatives and executors may be. We intend to reach out to the funeral industry and other industry stakeholders to draw their attention to our updated web content (in particular the checklist) so they may be able to incorporate the content in the information that they provide to their clients.

Please see our response at Attachment B

Of more significance to us however is the accuracy of the website content relating to deceased estates. During the 'consultation' process, we raised particular issues about the website content which we believe are inaccurate or apt to mislead. These were not addressed in the rewritten content.

We were disappointed that we were unable to speak directly with those clearing the web content to ensure our issues had been understood and more than a little frustrated to receive a thank-you indicating that 'Your feedback helped us confirm that the updated content is technically correct' (which we don't believe it is).

We understand that the focus of the rewrite was to make the information more readily accessible to users, but there's little to be gained if the information is inaccurate or misleading. Having reviewed just a few of the pages of the rewritten content, we have set out below some examples of matters we think should be addressed:

- **Use of the expression LPR**

Throughout the content references are made variously to legal personal representative (LPR), authorised LPR, executor, administrator and trustee. We are not convinced that the current use of these expressions always conveys the meaning that is intended. Further the use of different expressions may cause confusion among users.

Our biggest concern relates to the expression 'LPR'. In some situations, your content needs to distinguish between LPRs who have obtained a Court grant and those who have not. So, you have introduced a concept of authorised LPR, but it has not been used consistently. This means that some of the content which is meant to apply to an authorised LPR might be viewed as applying to any LPR.

The expression authorised LPR should be used in the context of provisions in the tax administration provisions that require a grant of probate or letters of administration. For example, the ATO will only provide information about a deceased person's tax affairs to an LPR who has a grant of probate or letters of administration. So on page QC56967, the appropriate heading should be *If you are an authorised LPR* or *If you are not the authorised LPR*.

Another example relates to the rules in section 260-140 of the TAA, which make an LPR responsible for a deceased person's tax liabilities only if they have obtained probate or letters of admin. Section 260-145 contains different rules for other cases.

An 'LPR' should include an 'executor' or 'administrator' as those concepts are understood in each of the Australian jurisdictions (and as contemplated in section 6 of the ITAA 1936). In particular, there is no necessary requirement that probate of a Will be obtained in order for a person to be regarded as an executor.

So, for example when the CGT provisions talk about an asset passing to a legal person presentative, they are intended to apply to an executor in Queensland to whom assets devolve upon death and without the need for probate.

- **Present entitlement to trust income as the basis of beneficiary assessment**

QC 40485 indicates that a beneficiary will be assessable if they are presently entitled to estate income. We have previously made the point that this information should be updated to reflect changes to the law over the last decade such as streaming.

In order not to be misleading this page should say at the very least that beneficiaries will be assessed if they are specifically entitled to capital gains made by the estate (given that to be specifically entitled to franked dividends they probably have to be presently entitled to them).

More detailed information about specific entitlement should be included on QC 40484. Further in relation to this page, the trustee is advised to tell the beneficiaries about the share of the trust's net income that they are assessable on. While it is a difficult balance to explain how the trust assessing provisions work without getting too technical, this is the only reference to net income (which is the correct concept for the amount that is assessed to the beneficiary). If the beneficiary gets this information, the rest of the page doesn't explain how it is relevant (rather it says incorrectly that the beneficiary is assessable on their share of trust income).

- **Death benefits paid to an estate**

Frequently superannuation death benefits are paid to the estate of a deceased person and assessed to the trustee. There is no information about this on QC 49907 where one would expect to see it.

[There is information about payments made directly from a super fund to a 'beneficiary' on QC 40485 - although the page is about beneficiaries of a deceased estate – direct death benefit payments are not received in that capacity, rather they are received as a beneficiary of the super fund.

As indicated previously, BNR Partners works almost exclusively in the area of deceased estates. It is in our interest as well as the ATO's that we can direct people to accurate information on your website. We are more than willing to support the ATO in its endeavours to implement the IGTO recommendations. We would be happy to provide comments about other issues in the web content that we feel could be improved. However, we don't want to spend the time doing this if that would not be helpful.

Attachment A

We don't really understand the thrust of this item, so our comments might miss the point.

- A common issue that we encounter is people lodging a trust tax return simply to obtain a refund of franking credits. Would it be possible to develop a form like the one that is available for individual taxpayers to enable LPRs to do this in the first three years of an estate's administration.
- Another issue that we encounter frequently is whether a deceased estate is the same entity as a trust created under a Will which is intended to have ongoing operation (ie not a mere bare trust for distribution of estate assets). We are not sure that people appreciate that these are separate entities and require a new file number and should not be using the deceased estate codes. Our experience with your office is that this is seen as Medicare avoidance.
- The following comments relate to the instructions that you circulated (which we assume are to be directed at LPRs wishing to lodge estate returns directly – not via an agent):
 - o The reference to a \$10,000 threshold for the CGT Schedule, might suggest to the inexperienced that capital gains less than this amount are tax free
 - o The reference to amounts other than foreign income might suggest to those who don't read all of the instructions that foreign income is excluded.
 - o There should be something somewhere to say that the form is limited to estates where the deceased, the LPR and beneficiaries are Australian tax residents, otherwise they are likely to mislead.
 - o The instructions raise the same issues as in our covering letter about the use of the various expressions, LPR, trustee, executor and administrator. In relation to the last do point we don't understand what it is intended to mean.
 - o Some of the instructions appear to be inconsistent and will need to be refined:
 - not every deceased estate [needs to lodge a trust tax return](#)
 - You will need to complete a trust tax return for a deceased estate if assessable income is received after a taxpayer's death.

- Financial Information –while we understand that a distribution from an estate to an existing trust may attract the operation of Division 6D, what is your approach to the transfer of income/assets to a testamentary trust that arises out of a deceased estate.
- The Statement of Distribution Label does not contain any references to streamed capital gains or franked dividends.

Attachment B

- We think that it may be a little too early in the grieving process for the funeral industry to offer people tax information (unless specifically requested).
- It might be more appropriate for the funeral industry to refer people to the Australian Death Notification Service which covers a range of topics including grief and counselling services and for the ATO to have its Checklist on the Services Page on that website. [It would also be good for the ATO to sign up to the DN service. We would be interested in your feedback about whether this is likely to happen in the near future or at all.]

Otherwise, the Checklist could usefully be promoted via:

- The registration of death process by relevant State government departments
- State Law Societies and practitioners engaged in estate administration
- Probate offices
- Other professional associations so that members could alert affected clients

Yours sincerely

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Managing Director