Administering estates without probate: catch-22!

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It is common for executors lawfully appointed under wills to administer estates without obtaining probate. Administering estates without probate substantially reduces costs and avoids unnecessary delays. Yet the ATO puts executors without probate in an impossible position. It tells them that they must finalise the deceased's taxation affairs but denies them the tax information and online access that they and their tax agents need to comply. Catch-22! This article examines whether these practices are justified at law. It concludes that they are not justified and, further, that the provisions for collecting tax and paying refunds on income derived by deceased taxpayers are defective in relation to estates administered by executors without probate. These defects could be easily remedied with simple amendments.

Introduction

The ATO has an administrative practice of distinguishing between executors of deceased estates who have or have not been granted probate. The ATO refers to those with probate as "authorised legal personal representatives" (authorised LPRs) and those without as merely "legal personal representatives" (LPRs). The ATO makes this distinction notwithstanding that the conception of an authorised LPR does not appear in the taxation law itself and notwithstanding that many executors do not need probate to administer estates under state and territory succession laws.[1]

Executors whom the ATO deems to be merely LPRs rather than authorised LPRs — and the tax agents who act on their behalf — are routinely (but not consistently) denied access by the ATO to information about the taxation affairs of deceased taxpayers. They are also refused tax refunds and franking credits owing to deceased taxpayers. Perversely, however, the ATO tells these LPRs that they must finalise the deceased's taxation affairs, including by notifying the ATO of the death, lodging outstanding tax returns up to the date of death, and paying the deceased's outstanding taxes.[2]

The ATO's practices put executors without probate in an impossible position — on the one hand, the ATO is telling them that they are responsible for finalising the deceased's taxation affairs, while on the other hand, it is denying them the tax information and online access that they and their tax agents need to evaluate their obligations and comply with the law. Catch-22!

The upshot is that executors feel pressured by the ATO to obtain probate, irrespective of whether it is ultimately in the interests of their estates for them to seek a grant,[3] and notwithstanding that there is in fact no explicit requirement in the taxation law that they should obtain probate. This is exposing many estates[4] to what are otherwise avoidable costs[5] and to unnecessary delays. Indeed, it is not uncommon for executors to obtain probate only to discover that the costs of obtaining the probate are excessive relative to the refunds owing to the deceased.[6]

Concerns about these, and other ATO practices affecting deceased estates, have been the subject of numerous complaints, from individuals and professional bodies, both to the ATO and the Office of the Inspector-General of Taxation and Taxation Ombudsman (IGTO). Indeed, from May 2015 onwards, the volume of complaints to the IGTO were so large that the IGTO instigated an investigation into the compliance burdens imposed by the taxation system on the LPRs of deceased taxpayers.

In 2020, the then IGTO published a report of her investigation.[7] She endorsed many of the concerns that had been raised about the ATO's practices and found that the compliance burdens being imposed on estates in relation to deceased taxpayers were disproportionate to the revenue that was being raised.[8] She therefore made a series of recommendations including, inter alia, that the ATO change its administrative practices and/or consider the necessity for legislative change.[9] Yet, in 2026, there has been no law reform and the ATO's haphazard practices continue unabated. This is disappointing. Australia's population is rapidly ageing[10] and these are issues which will affect many in the community.

Given the inaction, the purpose of this article is to examine whether the ATO's practices with respect to executors without probate are in fact justified under the taxation laws. Specifically, it considers the general law status and obligations of executors, the statutory mechanisms for assessing and collecting tax on income derived by persons who have died (Subdiv 260-E of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53)), and the statutory provisions governing the disclosure of taxpayer information (Div 355, Sch 1 TAA53).

The article reaches five key conclusions:

1. the taxation laws, and ATO practices, adopt a narrower conception of administered estates than at general law and this was likely inadvertent;
2. Subdiv 260-E does not empower the Commissioner to assess executors on income derived by deceased taxpayers if the executors do not obtain probate;
3. the ATO is right to be concerned that it may not have the authority to pay refunds to executors (including, in some cases, to executors with probate);

4. Div 355 does not prevent ATO officers from disclosing taxation information to executors without probate provided the officers take reasonable steps to satisfy themselves that they are dealing with lawful executors. In choosing not to make the disclosures, the ATO is putting revenue at risk; and
5. simple remedial amendments could make the taxation law fit for purpose, without requiring *all* executors to obtain probate.

Grants of representation and the administration of estates

Subdivision 260-E contains provisions dedicated to collecting the outstanding tax-related liabilities of persons who have died.[11] The provisions distinguish between estates in which there has or has not been a formal grant of representation (that is, probate or letters of administration). Those with grants are labelled "administered estates",[12] and those without are labelled "unadministered estates".[13] The distinction, introduced in 1999, likely explains the ATO's practice of distinguishing between authorised LPRs and mere LPRs. But it is a distinction that has no basis at general law.

At general law, deceased estates can be administered by executors appointed under wills or, absent wills, by administrators appointed by courts. For both taxation law and general law purposes, executors and administrators are collectively referred to as LPRs.[14] The legal source of their authority is, however, very different.

An executor lawfully appointed under a will derives their status and authority,[15] and in at least four states, their title to the assets of the estate,[16] from the will, not from probate. As such, executors may "lawfully and properly" administer an estate, and be subjected to the responsibilities of the office, without obtaining probate.[17] Probate is merely conclusive proof of a person's status as executor and authentication of their right to deal with the title to the deceased's assets.[18]

An administrator, in contrast, is wholly a creature of the court. An administrator derives their status and authority, and their title, from the grant of representation. Until a putative administrator has received a formal grant of representation, they have no status or authority as an administrator, and no standing, to deal with the deceased's assets.[19]

Understood from that perspective, the Subdiv 260-E categories of "administered" and "unadministered" estates are confusing.[20] Substantively, they do not distinguish between estates that are being administered and those which are not; rather, they distinguish between estates in which probate or letters of administration have or have not been granted. And they are mutually exclusive. An estate that is being administered by a person who has accepted the office of executor, and assumed all the responsibilities of the office (referred to in this article as a "lawful executor"), is nonetheless treated by Subdiv 260-E as an unadministered estate if the executor has not obtained probate.

The discrepancy between the general law position and the Subdiv 260-E nomenclature begs an important question — why has the statute employed a narrower conception of administered estates than the general law? Could it have been a policy choice? Research undertaken for this article has not located any evidence that it was. To the contrary, the statutory history, set out below, strongly suggests that the narrow conception of an administered estate in Subdiv 260-E was introduced inadvertently, in 1999, when the Commissioner's former collection and recovery powers for deceased estates were standardised and co-located with other collection and recovery powers in the TAA53.

This is unfortunate. As discussed below, the narrow conception of an "administered estate" in Subdiv 260-E fails to recognise that persons appointed as executors under valid wills may be lawfully administering estates without probate. That failure represents a lacuna in the taxation law which puts revenue at risk and denies refunds that would otherwise have been due to deceased taxpayers. As explored below, that lacuna could be removed by simple remedial amendments.

Statutory history

The history of the Commissioner's statutory collection and recovery powers with respect to the outstanding tax liabilities of deceased taxpayers are long and complex. The story begins with s 46 of the *Income Tax Assessment Act 1915* (Cth). Section 46, as later supplemented by s 46A, provided that the Commissioner could assess "executors and administrators" in the place of deceased taxpayers whose taxable income had not been assessed during their lifetime. To that end, the Commissioner was given "the same powers and remedies against the executors and administrators of the taxpayer as he would have had against the taxpayer" and was empowered to require executors and administrators to make returns of the taxable income derived by the deceased taxpayer. Where executors or administrators were assessed to tax, the liability operated as a charge on "all the taxpayer's estate in the hands of the executors and administrators".

Sections 46 and 46A were re-enacted in ss 61 and 62 of the *Income Tax Assessment Act 1922* (Cth), in broadly similar terms. Very soon, however, the Commissioner began to encounter cases where he was unable to locate any executors or administrators "in whose name assessments could be made" or "against whom recovery action might be instituted".[21] This led, in 1927, to the parliament supplementing the Commissioner's powers in ss 61 and 62 by inserting new s 62(3A) to (3G). The new provisions gave the Commissioner a special power, only exercisable if probate or letters of administration had not been granted within six months of a taxpayer's death, to assess tax due by a deceased taxpayer. Once made, and published in a daily newspaper, such an assessment provided conclusive evidence that the deceased was indebted to the Commissioner in an amount which the Commissioner could then recover, by distress, against any assets that the deceased had left behind. But the Commissioner wasn't bound to assess the deceased person. His separate power

to assess executors or administrators under ss 61 and 62(1) to (3) remained in effect and unaltered providing he could locate persons to whom the provisions applied.

When the *Income Tax Assessment Act 1936* (Cth) (ITAA36) arrived, former s 61 became s 216, former s 62(1) to (3) became s 217, and former s 62(3A) to (3G) became s 220. Although the basic structure of the provisions remained relatively intact, some of the terminology changed. Significantly, instead of the Commissioner's powers being exercisable with respect to "executors or administrators", now they were exercisable with respect to "trustees of the estate of the taxpayer". The change in wording was unexplained at the time, but likely the draftsman was relying on the broad definition of "trustee" in s 6(1) ITAA36 which then, as now, included "an executor or administrator" and any other person "acting in any fiduciary capacity".

Subsequently, in 1984, ss 216 and 217 were consolidated by amendments to s 216 and the repeal of s 217. Among other things, the amendments to s 216 specified, for the first time, that the Commissioner's power to assess and recover tax from a trustee of a deceased estate related to the deceased's liability to tax for income derived by the taxpayer in their lifetime, being tax which had not been "assessed or paid" before death.[22] Despite the new words, there is no sense in the extrinsic materials that the amended s 216 was intended to operate differently from the combined operation of former ss 216 and 217.[23] Relevantly, s 220 ITAA36 was not amended at that time.

Then came the process, in 1999, when the parliament standardised and co-located all of the Commissioner's powers of collection and recovery into the TAA53. This process resulted in a new Pt 4-15 being inserted into Sch 1 TAA53.[24] Part 4-15 included Subdiv 260-E. Section 260-140 is a rewrite of former s 216, and ss 260-145 and 260-150 combined are a rewrite of former s 220. Although the new provisions use different terminology, the changes made are largely explicable as aids to the standardisation process. The only substantive changes apparent in the statutory text, and flagged by the explanatory memorandum, were the removal of the charge that the Commissioner previously had on a "taxpayer's estate" for tax assessed to trustees under s 216, and the introduction of a new regulation making power in s 260-150 for setting out "procedures" governing the seizure and disposal of property belonging to deceased persons when their estates are unadministered. According to the explanatory memorandum, the first change removed the Commissioner's "priority", and the second change provided for regulations that must be made before "the Commissioner could exercise" his powers to distrain the deceased's property (that is, by seizing and selling the property).[25] To date, however, no such regulations have in fact been made.

One final change — not acknowledged in the explanatory memorandum — was the addition of a threshold requirement limiting the Commissioner's power to assess trustees under s 260-140 to estates where probate or letters of administration have been granted. For reasons explained below, the threshold represents a major curtailment of the Commissioner's powers. He can no longer assess executors of deceased estates who do not have probate, but who are otherwise properly and fully administering estates in accordance with the law.

Existing law

Taxpayers may die with assessed (that is, cohate) and/or unassessed (that is, inchoate) taxation liabilities or entitlements. This part of the article examines how the general law of succession, and Subdiv 260-E, deals with these liabilities and entitlements if the estates of the deceased taxpayer are administered by executors without probate.

Assessed tax liabilities and entitlements

If the Commissioner has, in a person's lifetime, assessed the person to tax on income derived or gains made by the person but the person dies before they have paid the resulting tax liability (s 5-5 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)), or before they have received a refund (s 8AAZLF TAA53), the debt or the right to the refund will fall into the deceased estate and be dealt with in accordance with the common law and jurisdiction-specific statutory principles that apply to any other debts or assets of that estate.

Generally speaking, this will be uncontentious if the estate is being administered by an executor who has obtained probate. In that case, the Commissioner's powers of recovery are enhanced by s 260-140(2) which permits him to treat the executor as if the executor were the deceased taxpayer. As explained in PCG 2018/4 at paras 12 to 13, the result is that the executor is taken to have notice of the deceased taxpayer's outstanding tax-related liabilities. However, the position is more complicated if the estate is being administered by an executor without probate.

If the taxpayer dies with a tax debt due and payable to the Commissioner, an executor without probate, who has assumed the responsibilities of the office, will be liable to discharge the debt to the full extent to which the assets of the estate admit or they risk being held personally liable, just as they would had they obtained probate.[26] This presupposes, however, that the executor without probate, who is not subject to s 260-140(2), has notice of the tax debt. If they do not have notice, in some states and territories (but not necessarily all), the executor without probate will be protected from liability so long as they have observed the statutory procedures for giving prescribed notices to claimants.[27] To the extent that the ATO refuses to disclose the existence of tax debts to executors without probate, it is therefore putting the collection of those debts at risk.

If the taxpayer dies with an outstanding entitlement to a refund, an executor without probate may or may not have title to enforce the chose in action depending on the particular jurisdiction in which they reside.[28] Further, even in those jurisdictions where title does not depend on probate, the Commissioner may be within his rights to insist on executors obtaining grants of representation to prove that

they can give him a valid discharge.[29] However, tax returns and applications for refunds are typically made online, and the associated payments are automated, so the legal questions concerning outstanding refunds are likely more theoretical than practical.

Unassessed tax liabilities and entitlements

It is an entirely different matter, however, if the Commissioner has not assessed the deceased on income derived or gains made by the deceased prior to death, either because the deceased was not up to date with their tax returns or because the deceased's returns were incomplete or inaccurate.

In that case, the deceased likely died with an inchoate liability,[30] the perfection of which is conditional on assessment and objection.[31] Assessment is the event which ascertains the amount of the liability and converts it into a debt due and payable.[32] If the Commissioner wishes to perfect the liability, and recover, the debt, he must do so in accordance with Subdiv 260–E. Given the statutory history and context, the better view is that Subdiv 260-E is an exclusive code for these purposes (at least with respect to liabilities).[33]

Administered estates

If a deceased estate is administered in the Subdiv 260-E sense that probate or letters of administration have been granted, and if the deceased died with an "outstanding tax-related liability" that was unassessed as at the date of death,[34] the Commissioner can assess the executor or administrator on the deceased's income as if they were the deceased based on the returns that the deceased was, or would have been, required to lodge.[35] In effect, the deceased's inchoate liability is perfected and imposed on the executor or administrator, quoad the estate, as a representative taxpayer for the deceased.[36] This aspect of the taxation law, explained in PCG 2018/4, is uncontentious.

It is not obvious, however, what should happen if a taxpayer dies with an inchoate entitlement to a refund rather than with an "outstanding tax-related liability". For example, if their income at the date of death was below the tax-free threshold, yet they had unclaimed franking credits. On its face, s 260-140 would not apply (irrespective of whether the LPR has probate) because the taxpayer would not have died with a tax liability of any kind.[37] But if s 260-140 does not apply, how then does a deceased taxpayer's inchoate entitlement to a refund crystallise into an entitlement due and payable by the Commissioner to the deceased estate? There are no clear answers to this question.[38]

Unadministered estates

If a taxpayer dies with inchoate tax liabilities, but the estate is unadministered in the Subdiv 260-E sense,[39] there is nobody for the Commissioner to assess as a representative taxpayer for the deceased.

Although s 260-140 empowers the Commissioner to assess a "trustee" of a "deceased person's estate" in their "representative capacity" as if they "were the deceased person", that power does not apply to a lawful executor administering an estate without probate. This stands in contrast to former ss 216 and 217, and their predecessor provisions in 1915, none of which were expressly restricted to executors who had been granted probate. As discussed above, this change was likely inadvertent.

Nor does s 254 ITAA36 assist the Commissioner. Although it permits him to assess trustees as representative taxpayers, including trustees of deceased estates, he may only assess them with respect to income, profits or gains that they derive as trustees.[40] In other words, s 254 cannot operate with respect to income, profits or gains derived by a deceased person before they died.

If probate has not been granted, the Commissioner's only powers to collect tax on the unassessed income of a deceased person are in ss 260-145 and 260-150. To recover tax, his only course is to "determine" the "total amount" of the deceased's "outstanding tax-related liabilities", as at the date of death, and to recover the same by "seizing and disposing" of any "property of the deceased". Relevantly:

- "outstanding tax-related liabilities" include inchoate, contingent liabilities that have not been ascertained by a process of assessment;[41]
- although a determination is conclusive evidence of the amount of the deceased's "outstanding tax-related liabilities", it does not retrospectively convert those liabilities into debts due and payable by the deceased and recoverable in the usual manner, nor does it have any legal effect on the estate itself.[42] Instead, the Commissioner is given a statutory right to recover the amount so determined by distraining against property that belonged to the deceased;
- as the Commissioner's right of recovery rests solely on a determination of the deceased's inchoate liabilities rather than a full assessment of the deceased's taxable income,[43] it is doubtful whether a determination can crystallise any entitlements that might have been due to the deceased had they been assessed. If that is correct, s 260-145 does not give the Commissioner the power to refund unadministered estates amounts that would otherwise have been due to a deceased had the deceased been assessed in their lifetime;[44]
- persons with an interest in unadministered estates, or who are subsequently granted administration, may object to the determination as if they were the deceased person. But if they do object, there is nothing which personally attaches the underlying liability to those persons;
- the "property of the deceased person" which may be seized and disposed of is not defined; arguably, it only includes assets of the deceased which were owned by the deceased, and which pass to the executor and/or a beneficiary.[45] On that view, it would not extend to subsequently acquired property of an estate or a beneficiary. Note that the antecedent provisions, ss 216 and 220, explicitly distinguished between charges on a "deceased estate" (that secured a trustee's debt as a representative taxpayer) and "property of the deceased" (which could be distrained to recover the deceased's

unassessed liability). Arguably, an "estate in the hands of" executors and the "property of the deceased" are discrete, albeit potentially overlapping, categories of assets; and

- the authorised person "*may* seize and dispose" of property as prescribed by regulations. The statutory language is thus ambiguous as to whether the power can be exercised if regulations have not been made. That depends on whether "may" in s 260-150(2) is mandatory or permissive.[46]

In summary, it is possible that s 260-145 does not apply to property acquired by executors (or beneficiaries) by converting property of the deceased. If that is correct, and an executor converts or liquidates assets coming to them from a deceased before the Commissioner makes a determination, there may be no property against which the Commissioner can recover. Further, there is a respectable argument that the Commissioner's seizure and disposal powers have no operation without regulations that prescribe how those powers should be exercised.

Given the above, it is concerning that the Commissioner's practices place pressure on executors to obtain grants of probate not otherwise required for estate purposes. The Commissioner should be transparent about the fact that executors are not obliged to obtain probate for tax purposes and that, if they do obtain probate, they may expose themselves, and their estates, to liabilities that they would not otherwise be subject to. For the same reasons, practitioners should be wary of advising executors without probate that they must lodge tax returns for the deceased up to the date of death.

Returns

Arguably, the Commissioner does not have any power under s 161 ITAA36 to require a lawful executor, without probate, to provide returns of a deceased's taxable income. That is because s 260-145 does not deem the executor to be the deceased taxpayer who derived the income (cf s 260-140(2)). The Commissioner could, however, rely on his power in s 163 ITAA36 to require returns from such executors in their capacity as non-taxpayers.

Confidentiality of deceased's tax information

As documented by the IGTO,[47] the ATO has an administrative practice of refusing to share taxation information with executors who have not obtained probate. The Commissioner justifies this practice citing s 355-25, Sch 1 TAA53. Section 355-25 provides that it is an offence for a tax officer to disclose "protected information" about a taxpayer other than to a "covered entity".

At first blush, the ATO's reliance on s 355-25 is surprising because s 355-25(2)(d) provides that a "covered entity" includes a taxpayer's "legal personal representative". And "legal personal representative" is defined in s 995-1 ITAA97 to mean, inter alia, "an executor or administrator of an estate of a person who has died". The definition does not restrict "executors" to those who are administering estates under grants of representation.

Further, s 355-25 has no application at all if an ATO officer discloses information "in the performance of their duties as a taxation officer" (s 355-30). The performance of duties exception permits, inter alia, disclosures for the purpose of "administering taxation laws" and/or for the purpose of enabling another entity to "understand or comply with its obligations under a taxation law".

> "… if they do obtain probate, they may expose themselves, and their estates, to liabilities …"

How then does s 355-25 justify ATO officers denying protected information to executors who are administering deceased estates without probate? This is not entirely clear. Executors manifestly require the information for a permissible purpose. It must be either that the ATO is reading "executor" in the definition of "legal personal representative" down to exclude executors who have not obtained probate, or that it is simply taking the evidential position that it is unsafe for ATO officers to accept that persons are lawfully fulfilling the office of executor if they have not obtained grants of probate.

Meaning of executor

The most likely explanation for why the ATO denies protected information to executors administering deceased estates without probate is that the ATO construes the term "executor" in the definition of "legal personal representative" to only include executors who have obtained probate. For instance, the Commissioner has said that he cannot use his remedial powers to expand "the definition of legal personal representative to include persons *entitled* to be a taxpayer's legal personal representative" (emphasis added) because he said it would be against legislative policy.[48]

The Commissioner's explanation infers that persons do not have the status of "executors" unless and until they have been granted probate. However, as discussed above, such a view is at odds with the position at general law. At general law, an executor is any person appointed under a valid will who, by their conduct, has accepted their appointment and assumed the burdens and responsibilities of the office.[49] It is not appropriate to describe such a person as one who is "entitled" to be an executor; rather, they are an executor who is "entitled" to apply to the court for a grant of probate.[50]

If the term "executor" in the definition of "legal personal representative" is to be attributed a narrower meaning than it has at general law, there must be something in the statutory context to support that narrower meaning.[51] In that vein, it might be argued that the collocation of

executors with administrators in the definition of "legal personal representatives" infers an intention to only designate representatives who have received formal grants of representation. But the definition of "trustee" in s 6(1) ITAA36 points against such an intention. Under the latter definition, "executors" and "administrators" are collocated with "trustees" and other persons who act in fiduciary capacities. This suggests that, for the purposes of the taxation law, the key attribute "executors" and "administrators" have in common are the fiduciary obligations attaching to their offices rather than the manner in which they assumed their offices. And it makes intuitive sense that the taxation law would be concerned with those more substantive qualities, given the terms "legal personal representative", "executor" and "administrator" serve multiple taxation provisions, not just the confidentiality provisions.

Requisite level of proof that a person is an executor

That leaves the argument that the reason why ATO officers cannot share protected information with executors administering estates without probate is because, without probate, the officers cannot be satisfied that the persons have been validly appointed as executors. But that seems a stretch. Should an ATO officer disclose information to a person whom they reasonably believe to be an executor within the meaning of s 355-25(2)(d), their disclosure would be protected under s 355-50, even if the person turns out not to satisfy s 355-25(2)(d) because they were not validly appointed. That is because the disclosure would have been made by the officer, bona fide, in the performance of their duties.

On this view, the critical question is not the meaning of "executor". Rather, it is the nature and extent of the information that ATO officers acting reasonably should be required to collect before they can lawfully disclose protected information to persons claiming to be executors of deceased estates.

The evidentiary standard which officers must meet could be the subject of a formal direction from the Commissioner. For example, the Commissioner could direct his officers, in a practice statement, to require persons claiming to be lawfully appointed executors to substantiate that claim by providing proof of their identify, a certified copy of the death certificate and will, and a statutory declaration attesting to the fact that they have accepted appointment as executor under the will and are administering the estate without probate.[52] Officers who comply with that direction would be acting in the performance of their duties.

Possible amendments

As discussed above, the enactment of Subdiv 260-E has removed the Commissioner's power to assess executors who are administering estates without probate. This is a lacuna in the law which puts the collection of deceased taxpayers' inchoate tax liabilities at risk.

Assuming that the lacuna was not intended, and is against policy, an easy remedy would be to remove the threshold requirement in s 260-140 that there must have been a formal grant of representation. That would return the law to the way it was before the rewrite in 1999. Consideration should also be given to clarifying that s 260-140 applies to cases where taxpayers die with an "outstanding tax-related liability".

It would also be useful to include a provision that authorises the Commissioner to pay refunds to persons that the Commissioner is *satisfied* are *entitled* to obtain probate of the will. Such a provision should specify that such persons do not have to obtain probate. Where the Commissioner pays a refund to an executor without probate, he would be discharged from any further liability in respect of the amount. A model provision to this effect can be found in s 211 of the *Life Insurance Act 1995* (Cth).

Conclusion

The taxation law does not oblige executors to obtain grants of probate if probate is not required for estate purposes. Nor should they. It would be poor tax policy to insist that executors expose their estates to unnecessary costs and liabilities simply to comply with the taxation law.

That said, there are gaps in the taxation law that prevent the Commissioner from assessing executors who are administering estates without grants of probate. There also appear to be gaps in the law as to when the Commissioner can pay refunds. This too is poor tax policy. It puts revenue at risk that should be collected and refunds that should be paid. Simple amendments would remedy these deficits in the taxation law.

Finally, the ATO is wrong to say that its officers cannot share protected information with executors who are administering deceased estates without probate. Officers can disclose information to those persons if they are satisfied, on a reasonable basis, that they are lawful executors seeking information for permissible purposes. The Commissioner could put this issue beyond doubt, and protect his officers, by issuing a practice statement specifying the evidence that they must obtain to reasonably satisfy themselves that a person is acting as a lawful executor.

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References

1 Probate is not always required. Whether it is required depends on the composition of the deceased estate and the succession laws of the states and/or territories in which the deceased held their assets.

2 See, for example, Australian Taxation Office, *Who can represent a deceased estate*, 1 May 2025, available at www.ato.gov.au/individuals-and-families/deceased-estates/who-can-represent-a-deceased-estate, and paras 2 to 3 of PCG 2018/4.

3 Generally, executors should not obtain grants of probate if grants are not required and administering without grants would substantially reduce the costs of administering the estates. See, for example, Thomson Reuters, *Lawyers practice manual NSW*, para 12.4.201, and Thomson Reuters, *Lawyers practice manual Victoria*, para 13.3.201.

4 Analysis of published statistics on death and grants of representation in NSW in 2024, and in Victoria in 2024–25, suggests that estates with grants of representation typically represent less than 55% of all reported deaths. See Australian Bureau of Statistics, *Deaths, Australia* 2024, Supreme Court of NSW, *2024 annual review*, Supreme Court of Victoria, *Annual report 2024–25*, and *2025 Australian probate report*, pp 17–19.

5 Filing fees for grants of representation depend on the jurisdiction in question and the gross value of the estate (see *2025 Australian probate report*, pp 32–35). For example, in 2025 in Tasmania, the fee for estates valued at under $50,000 was $534, rising to $2,278.63 for estates valued at $5,000,000 or more. Contrast Victoria, where there are no fees for estates valued at under $250,000, but they rise to $17,297.50 for estates valued at $7,000,000 or more. Legal and other fees apply on top of filing fees (*Australian probate report*, pp 36–39).

6 Chartered Accountants Australia and New Zealand, *Investigating the ATO's probate requirements for deceased estates*, 9 March 2026. Available at www.charteredaccountantsanz.com/member-services/technical/tax/tax-in-focus/investigating-the-atos-probate-requirements-for-deceased-estates.

7 Inspector-General of Taxation and Taxation Ombudsman, *Death and taxes: an investigation into Australian Taxation Office systems and processes for dealing with deceased estates*, report, July 2020.

8 Ibid p 65.

9 Ibid, recommendations 1 and 7.

10 In 2024, Australia recorded 185,766 deaths; the Australian Bureau of Statistics projects that annual deaths will exceed 200,000 by 2030 (*2025 Australian Probate Report*, para 1.1.

11 Separate collection mechanisms apply if LPRs accrue post-death tax liabilities as trustees of the estates.

12 S 260-140, Sch 1 TAA53.

13 S 260-145, Sch 1 TAA53.

14 S 995-1 ITAA97, definition of a "legal personal representative".

15 See, for example, *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603, *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 78 (Gibbs J), *The Estate of the Late Sir Donald Bradman v Allens Arthur Robinson* (2010) 107 SASR 1 at [183].

16 In Victoria, Queensland, South Australia and Tasmania, a deceased's property vests in the "lawful executor" from the moment of the testator's death. For personal property, the vesting is by operation of the common law, for real property, it is by operation of statute. See *Public Trustee v CBA* [2018] SASC 25 at [81]–[87]. The position in the other states and territories is less clear because statutes in those jurisdictions provide for the assets of the deceased to vest in the Public Trustee until probate is granted, whereupon the interest is divested from the Public Trustee and vested in the person named in the grant (in some cases, relating back to the date of the deceased's death, and in other cases, from the date of the grant). Some have suggested that in these states, executors have been assimilated to administrators to the extent that both offices derive their interest in the deceased's property from the grant: see, for example, *Ex parte Public Trustee; Re Birch* (1951) 51 SR (NSW) 345, and FC Hutley, "The executor de son tort in the law of New South Wales", (1952) 25 *Australian Law Journal* 716. But that view is open to challenge: see, for example, *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 77 per Gibbs J, and N Crago, "Executors of unproved wills: status and devolution of title in Australia", (1993) 23(2) *University of Western Australia Law Review* 235.

17 N Crago, "Executors of unproved wills: status and devolution of title in Australia", (1993) 23(2) *University of Western Australia Law Review* 235. Historically, it has been debated whether a lawful executor appointed by a valid will who has accepted the office by their conduct (ie intermeddling), but who has not proved the will, is properly described as an executor de son tort: see GE Dal Pont, Law of succession, Lexis Nexis Australia, 2021, para 10.15. However, recent Australian decisions appear to support the traditional English view that such a person is simply to be regarded as a lawful executor who has subjected themselves to the burdens and responsibilities of the office and who may not renounce the office without curial permission and/or who may be ordered to take out probate: see, for example, *Re Stevens; Cooke v Stevens* [1897] 1 Ch 422, *Holder v Holder* [1968] Ch 353, *In the Will of Lyndon (dec'd)* [1960] VR 112, *Mulray v Ogilvie* (1987) 9 NSWLR 1, *Re Estate Kleinlehrer (dec'd)* [2024] NSWSC 648 at [30], [35], [44], [52] and [89], and *Public Trustee v CBA* [2018] SASC 25 at [99]–[102].

18 See, for example, *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603 at 608, *Public Trustee v CBA* [2018] SASC 25 at [85]–[87], and *Ryan v Davies Bros Ltd* (1921) 29 CLR 527 at 536.

19 See, for example, *Ingall v Moran* [1944] KB 160, *Re Full Board of the Guardianship and Administration Board* [2003] WASCA 268 at [47]

20 Also, the ATO's distinction between authorised LPRs and LPRs.

21 See s 24 of the *Income Tax Assessment Act 1927* (Cth), and Sir George Pearce, *Hansard*, 7 December 1927, p 2716.

22 S 117 of the *Taxation Laws Amendment Act 1984* (Cth).

23 Cls 117 and 118 of Pt B of the explanatory memorandum to the Taxation Laws Amendment Bill 1984.

24 *A New Tax System (Tax Administration) Act 1999* (Cth).

25 Paras 2.48 and 2.50 of the explanatory memorandum to the A New Tax System (Tax Administration) Bill 1999.

26 See, for example, *Levy v Kum Chah* [1936] HCA 60.

27 *DCT v Brown* (1958) 100 CLR 32 at 53; *Taylor v DCT* (1969) 123 CLR 206. Relevantly, see s 64 of the *Administration and Probate Act 1929* (ACT), s 92 of the *Probate and Administration Act 1898* (NSW), s 96 of the *Administration and Probate Act 1969* (NT), s 67 of the *Trusts Act 1973* (Qld), s 63 of the *Trustees Act 1962* (WA), s 33 of the *Trustee Act 1958* (Vic), and s 29(1) of the *Trustee Act 1936* (SA). Historically, the protection offered by the notice procedures was sometimes limited to executors with probate but that was not considered to be good policy: see Queensland Law Reform Commission, *Administration of estates of deceased persons: report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, report no. 65, vol 2, April 2009, pp 298–303.

28 See, for example, *Byers v Overton Investments Pty Ltd* [2001] FCAFC 760. Cf RW White, "The position of executors before grant", paper given for the NSW Bar Association, 27 June 2024.

29 See, for example, *Public Trustee v CBA* [2018] SASC 25 at [88] and [120]. But cf s 54 of the *Succession Act 1981* (Qld).

30 See *Binetter v FCT* (2016) 249 FCR 534. Compare the definition of "income tax" in s 6(1) ITAA36 and the definition of "income tax liability" in s 995-1 ITAA97.

31 *Barkworth Olives Management Ltd v DCT* [2010] QCA 80 at [27].

32 S 5-5 ITAA97.

33 On the logic that the deceased taxpayer can no longer send in returns, be subjected to assessments and appeal assessments: *DCT v Brown* (1958) 100 CLR 32 at 51–52.

34 Div 255, Sch 1 TAA53; *Binetter v FCT* (2016) 249 FCR 534.

35 S 260-140, Sch 1 TAA53.

36 See *Aitken v FCT* [1936] HCA 53, *Patterson v FCT* (1936) 56 CLR 507 at 516 and 518–19, *Stapleton v FCT* (1955) 93 CLR 603 at 618, *Taylor v DCT* (1969) 123 CLR 206 at 210; *DCT v Brown* (1958) 100 CLR 32 at 42, 48, 57 and 63.

37 S 260-140(1)(a), Sch 1 TAA53.

38 First, it is not clear whether a nil assessment must be made under s 166 ITAA36 before a refundable offset becomes due and payable by the Commissioner pursuant to s 63-10 ITAA97 and s 8AAZLF TAA53. Second, if an assessment is required, it is also unclear what mechanisms are available to the Commissioner to make that assessment (ie assuming that s 260-140, Sch 1 TAA53 does not apply).

39 S 260-145, Sch 1 TAA53.

40 See, for example, *Commissioner of Taxation (NSW) v Lawford* (1937) 56 CLR 774 at 780, *FCT v Australian Building Systems Pty Ltd (in liq)* [2015] HCA 48, and *Robson v FCT* [2024] FCA 720.

41 See *Binetter v FCT* (2016) 249 FCR 534, and *Bennett v FCT* [2015] 101 ATR 466 at 472.

42 *Binetter v FCT* (2016) 249 FCR 534 at 556.

43 Cf *Bennett v FCT* [2015] 101 ATR 466 at 473.

44 But this assumes that an assessment is required for the entitlement to crystallise (s 260-140(1)(a), Sch 1 TAA53).

45 Cf, generally, *Stapleton v FCT* (1955) 93 CLR 603.

46 Paragraph 2.50 of the explanatory memorandum to the A New Tax System (Tax Administration) Bill 1999, which introduced s 260-145, inferred that the regulations must be made and complied with before an authorised person can exercise the power.

47 Inspector-General of Taxation and Taxation Ombudsman, *Death and taxes: an investigation into Australian Taxation Office systems and processes for dealing with deceased estates*, report, July 2020, pp 22–23.

48 Australian Taxation Office, *When the Commissioner's remedial power was unable to be used to assist individuals*, 22 September 2025. Available at www.ato.gov.au/about-ato/ato-advice-and-guidance/commissioner-s-remedial-power/when-the-commissioners-remedial-power-has-not-been-used/when-commissioners-remedial-power-was-unable-to-be-used-to-assist-individuals#ato-Legalpersonalrepresentativedefinition.

49 *Public Trustee v CBA* [2018] SASC 25 at [86]–[88].

50 Cf ss 211 and 212 of the *Life Insurance Act 1995* (Cth).

51 Ordinarily, statutory words take their general law meaning unless the context demands otherwise: see *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 468 at 531, and D Pearce, *Statutory interpretation in Australia*, Lexis Nexis, 2019, para 4.21.

52 In the alternative, if a solicitor has been appointed to act for a deceased estate, a letter from the solicitor stating that they have no cause to doubt the validity of the will might also be provided. Chartered Accountants Australia and New Zealand has suggested evidentiary requirements along these lines: see Chartered Accountants Australia and New Zealand, *Investigating the ATO's probate requirements for deceased estates*, 9 March 2026. Available at www.charteredaccountantsanz.com/member-services/technical/tax/tax-in-focus/investigating-the-atos-probate-requirements-for-deceased-estates.