



Law Council
OF AUSTRALIA

Office of the President

16 March 2023

Mr Chris Jordan AO
Commissioner of Taxation
GPO Box 9990
CANBERRA ACT 2600

By email: tpsg@ato.gov.au

Dear Commissioner Jordan

PCG 2018/4—Income tax—liability of a legal personal representative of a deceased person

The Law Council of Australia thanks the Australian Taxation Office (**ATO**) for the opportunity to make a submission in relation to the ATO's consultation regarding Practical Compliance Guideline 'PCG 2018/4—Income tax—liability of a legal personal representative of a deceased person' (**PCG 2018/4**).

The Law Council is grateful to its National Elder Law and Succession Law Committee, the Taxation Committee of its Business Law Section (**Taxation Committee**), the Victorian Bar and the Law Society of New South Wales for their input to this submission.

Executive Summary

1. The Law Council reiterates¹ that PCG 2018/4 is a positive measure to assist an executor or administrator of a deceased person's estate (a legal personal representative (**LPR**)) perform in good faith their obligations in relation to addressing the tax liabilities of a deceased person, without exposing themselves to personal liability.
2. The Law Council has made several suggestions below as to how PCG 2018/4 could be improved and expanded to assist a greater number of LPRs perform this function. Most significantly, it suggests:
 - expanding the applicability of PCG 2018/4 to estates with a total market value of estate assets of up to \$10 million, with consideration also given to:
 - permitting estates where the deceased person was a member of self-managed superannuation funds (**SMSF**) to come within the PCG's purview; or/and
 - (depending on the ATO's comfort) removing the total market value limit altogether;

¹ Law Council of Australia, 'Death and Taxes – Investigation into ATO Systems and Processes for Dealing with Deceased Estates' (18 December 2019) <https://www.lawcouncil.asn.au/publicassets/e27e311f-4f9e-ea11-9434-005056be13b5/3724%20-%20IGTO%20death%20and%20taxes.pdf> [24].

- increasing the examples in PCG 2018/4, with a particular example provided in relation to compliance with the requirement that ‘the deceased was not assessable on a share of the net income of a discretionary trust’; and
 - increasing public awareness of PCG 2018/4.
3. The Law Council’s submission is not intended to be a comprehensive response to all questions—there may be matters on which tax agents or LPRs themselves can provide different perspectives not addressed in this response.

Context

The purpose of PCG 2018/4

4. PCG 2018/4 relates to operation of section 260–140 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**), which applies when a person has an outstanding tax-related liability when they die (**deceased person**) and either probate of the deceased person’s will or letters of administration of the deceased person’s estate are granted after death.²
5. The section details the obligations and liabilities of the trustee of the deceased person’s estate—that is, an executor who has obtained probate of the deceased person’s will or administrator who has obtained letters of administration of the deceased person’s estate (an LPR). Under the section:
- the Commissioner may deal with the LPR as if the deceased person were still alive and the LPR was that person;³
 - the LPR must provide any required returns or other information relating to the liability of the deceased person and discharge the liability for which the deceased person would be liable if they were alive;⁴ and
 - if the amount of liability requires an assessment and the LPR has failed to provide a return or information in relation to assessing that amount, the Commissioner may assess the amount.⁵
6. PCG 2018/4 is expressed to be designed to mitigate the delay of distribution of estate assets which may otherwise occur until after the end of the relevant review period for tax assessments (either two or four years), to ensure that the LPR does not have to personally satisfy a liability relating to an amendment assessment.⁶
7. Specifically, it does this by enabling ‘LPRs of smaller and less complex estates to finalise those estates without concern that they may have to fund a liability of the deceased from their own assets’ by ‘setting out when an LPR will be treated as having notice of a claim by the ATO (including a claim arising from an amended assessment)’.⁷

² Subclause 260-140(1) of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

³ *Ibid* subclause 260-140(2).

⁴ *Ibid* subclause 260-140(3).

⁵ *Ibid* subclause 260-140(4).

⁶ PCG 2018/4 [3].

⁷ *Ibid* [4].

This consultation

8. The ATO's present consultation gives effect to a recommendation of the report of the Inspector-General of Taxation and Taxation Ombudsman review, *Death and Taxes: An Investigation into ATO Systems and Processes for dealing with Deceased Estates*⁸ (**IGTO Review**). Specifically, part (b) of recommendation 10 of the IGTO Review report was that the ATO should conduct a post-implementation review of PCG 2018/4 in consultation with external stakeholders to assess the effectiveness of the Guideline in providing sufficient certainty for LPRs to finalise an estate. The IGTO Review suggested the 'role and effectiveness of PCG 2018/4 in providing finality for LPRs could also be examined and its scope of operation expanded, as appropriate'.
9. This recommendation was consistent with the Law Council's submission to the IGTO Review, in which it stated:⁹

The Law Council considers that the Commissioner has taken positive steps toward simplification of the administration of small estates. Practical Compliance Guideline 2018/4 assists in the smallest and least complex of matters. However, the Law Council considers that the monetary and qualitative limits should be reviewed (and programmed for regular re-examination) such that similar assistance may also be extended, as appropriate, to the LPRs of somewhat larger and more involved estates.

Response to consultation questions

Sufficient certainty

Question 1—In your experience, given the current scope of PCG 2018/4, does it operate appropriately in practice? Do you have any issues in applying the PCG?

10. The Law Council received little feedback on this question. The Victorian Bar considered PCG 2018/4 to operate appropriately by providing a high level of certainty to an LPR in small estates.

Question 2—In what way can the PCG be improved in order to provide greater certainty to LPRs to whom the PCG applies (as per paragraph 6 of the Guideline) when finalising estates?

11. The Taxation Committee observes that, in principle, the reference in paragraph 6 to PCG 2018/4 applying on the proviso that, among other things, 'in the four years before the deceased person's death, that person was not assessable on a share of the net income of a discretionary trust' may limit its certainty.
12. This is due to the theoretical possibility that the Commissioner might later raise a tax assessment that is contrary to an apparent trustee resolution. Specifically, if there is a dispute involving a trust, the ATO may later raise a number of assessments. The assessments may contradict what is written in a trust resolution. The assessments may be on the assumption that the trust resolution is incorrect or has two or more potential meanings.
13. The Taxation Committee notes that these actions could theoretically raise doubt as to whether the deceased person was, as a matter of fact, 'not assessable on a share of the net income of a discretionary trust' [emphasis added]. This uncertainty may be

⁸ Inspector-General of Taxation, '*Death and Taxes: An Investigation into ATO Systems and Processes for dealing with Deceased Estates*' (July 2020) https://www.igt.gov.au/wp-content/uploads/2021/07/060_IGTO-Final-Report-Death-and-Taxes_3.pdf.

⁹ Law Council of Australia, '*Death and Taxes – Investigation into ATO Systems and Processes for Dealing with Deceased Estates*' (18 December 2019) <https://www.lawcouncil.asn.au/publicassets/e27e311f-4f9e-ea11-9434-005056be13b5/3724%20-%20IGTO%20death%20and%20taxes.pdf> [24].

addressed by way of an example listed in the PCG, as described in the response to the following question.

Question 3—Are there any additional examples the ATO can include in the PCG to illustrate the most common scenarios faced by LPRs to whom the Guideline applies? Please specify.

14. The Taxation Committee suggests the following example could be included in PCG 2018/4. This example seeks to provide an LPR with sufficient certainty about compliance with the requirement that ‘the deceased was not assessable on a share of the net income of a discretionary trust’.

15. Specifically, it is proposed the following two steps could be illustrated:

Step 1:

- The LPR could **examine the deceased person’s records** (including records of companies of which the deceased was a director) for the four-year period before their death. (The LPR separately could take into account any knowledge of the fact that the deceased was not a beneficiary assessable on a share of the net income of a trust; however, some LPRs are independent professionals, including court appointed administrators, who have no prior knowledge, and are reliant on documents being provided by those close to the deceased.)

Step 2:

- The LPR should **attempt to identify, from the deceased’s records, whether the deceased was a beneficiary of a trust**. The LPR could request resolutions of trustees of any such trusts of which the deceased was known to be a beneficiary. The LPR should be able to rely on documents provided by trustees, if any.¹⁰ The LPR should be entitled to act upon information provided by the trustee, such as an assurance that no amount was appointed in favour of the deceased in the four years before his or her death, and that the trustee considers that the deceased did not take as a default beneficiary.
16. The Law Society of New South Wales makes a suggestion in relation to paragraph 14 of PCG 2018/4, which provides:
- ... an LPR may become aware (or should reasonably have become aware) of a material irregularity (or irregularities) in an income tax return lodged by the deceased.*
17. It suggests that it would be helpful to provide examples of a ‘material irregularity’ and of corresponding action taken by the LPR to discharge their obligation under the PCG.
18. The Victorian Bar suggests generally (going also to question 2) that the PCG would be improved by further examples relating to small, moderate and large estates (the expansion of the PCG to larger estates is discussed below), on the basis that the scenarios increase certainty for LPRs. It suggests the following scenarios: sales of businesses; change in control of assets; common capital gains taxation scenarios in relation to shares, settlement of litigation and family law proceedings rollover relief.
19. The Law Council agrees with these suggestions.

¹⁰ This recognises that a trustee may refuse to provide a resolution to an outsider to the trust (for example in a situation where someone is not or is no longer a beneficiary). It also recognises that a resolution might contain private information, about other beneficiaries, and thus not be provided in whole or part.

Scope of the PCG

Question 4: In light of the improved access to information by LPRs, is the issue previously raised in the Compendium to PCG 2018/4 still current (items 2, 3 and 4 suggesting that the scope of the PCG needs to be extended to larger estates)? If so, what are some ways the ATO can expand PCG 2018/4 beyond smaller and less complex estates?

Question 5 - What amount would be appropriate to uplift the threshold for total market value of assets in the PCG (currently \$5 million, see paragraph 6 of the Guideline) in light of current inflation and Australian real property prices?

20. The Law Council has addressed questions 4 and 5 together, given that the main suggestion made in relation to how the PCG may be expanded (question 4) relates to lifting the threshold of the total market value of the estate assets at the date of death above \$5 million (question 5).

Improved access to information

21. As a general point, the connection between the greater access to information by LPRs and the current scope of paragraph 6 of the PCG is not clear to the Law Council.

22. The Law Council notes that the ATO identifies the 'improved access to information' as being:

- the *Taxation Administration (Remedial Power—Disclosure of Protected Information by Taxation Officers) Determination 2020* (Cth)—which modified clause 355–25 of Schedule 1 to the TAA to effectively enable an LPR to appoint a tax agent, BAS agent or legal practitioner to receive information from the ATO on their behalf; and
- the deceased estate data package of tax and superannuation information about the deceased person which an LPR may request from the ATO.¹¹

23. Conversely, items 2–4 of the PCG 2018/4 compendium relate to the expansion of the scope of estates subject to the purview of the PCG.

24. The Law Council previously expressed strong support for the exercise of the Commissioner's remedial power to modify the application of clause 355–25.¹² However, while this expansion may allow LPRs of larger estates to benefit from professional advice, there are still clear benefits to the LPR in having the certainty of being covered by PCG 2018/4. The Law Council is interested in the ATO's views about this and would be happy to engage further.

Requirement in the PCG for there to be probate

25. The requirement for an LPR to have obtained probate in order for PCG 2018/4 to apply¹³ is an additional burden, particularly with smaller estates and in Queensland (where less

¹¹ Australian Taxation Office, 'Accessing a deceased person's tax and super information' (webpage, accessed on 9 March 2023) < [Accessing a deceased person's tax and super information | Australian Taxation Office \(ato.gov.au\)](#)>.

¹² Law Council of Australia, 'Death and Taxes – Investigation into ATO Systems and Processes for Dealing with Deceased Estates' (18 December 2019) <https://www.lawcouncil.asn.au/publicassets/e27e311f-4f9e-ea11-9434-005056be13b5/3724%20-%20IGTO%20death%20and%20taxes.pdf> [17].

¹³ PCG 2018/4 [6].

complex estates are routinely managed without probate as contemplated by its *Succession Act 1981* (Qld)).

26. Recent research by the Productivity Commission indicates that fewer than half of deaths result in a grant of probate in any given year 'because probate is unnecessary in some circumstances' and 'is not comprehensive in terms of assets covered'.¹⁴ In these circumstances, there may be many small estates that are not covered by the PCG, and the ATO requirement of probate to gain the benefit of the PGC may be increasingly inconsistent with State and Territory approaches to the transfer of assets on death.
27. While the PCG is not required where inheritance is as a 'survivor' of jointly held assets (such as the main residence, bank account, shares and personal effects), as those assets do not form part of the estate, it is recommended that the ATO consider further how to assist those with small estates that do not require probate or letters of administration for whom the PCG could provide some assistance.

Increasing the current \$5 million threshold

28. All contributors to this submission agree that the threshold should be increased to estates with up to \$10 million market value of the estate assets at the date of death.
29. The Law Society of New South Wales says that the experience of practitioners is that it is reasonably common for an estate to exceed \$5 million in value, even though it comprises only the deceased's principal residence, which is exempt from taxation, and other simple assets such as shares, superannuation, cash and personal assets.
30. The Law Society of New South Wales suggested that consideration could be given to amending the criteria in paragraph 6 so that the principal residence is excluded from the calculation of the value of the estate. It suggested that alternatively, the threshold could be raised to \$10 million. It also recommends, in any case, including a method of indexation so that the threshold regularly increases.
31. The Victorian Bar advised that LPRs experience difficulties arising from a failure to understand the matters that must be included in the estate taxation return. It suggests that the most common problems in this regard include information in relation to businesses and partnerships that have come to an end. The nature of a deceased estate for taxation purposes is a trust. A capital gain, discount or otherwise must be calculated based on proper information. Personal use assets and collectables, motor vehicles and disposal of assets by the LPR often give rise to taxation and the circumstances in which they do, is varied and often the outcomes for taxation not understood by LPRs.
32. The Victorian Bar advised that lawyers are usually involved in the administration of larger estates in addition to accountants who prepare the final taxation return of the deceased person and the estate return. As a result, the propensity for the same volume of problems to arise in moderate to large estates is less than in small estates, but there is often a further level of complexity which one does not find in smaller estates. These include foreign assets, sales by the LPR as trustee within the estate and corporate and other trusts in which the deceased was involved.

¹⁴ Productivity Commission, *Wealth transfers and their economic effects: Research Paper* (2021) 14, available, <<https://www.pc.gov.au/research/completed/wealth-transfers/wealth-transfers.pdf>>, drawing on Productivity Commission, Steering Committee for the Review of Government Service Provision), *Report on Government Services 2021 - Part C Justice* (2021) which analysed probate data between 2013 and 2019.

33. It submits that in all estates, LPRs and those who act as their lawyers and accountants require certainty in relation to the treatment of acts of administration, and in addition a consistent approach.
34. The Law Council also received input which suggested that the threshold should be removed altogether. The view was put that, if the PCG is to apply only to estate assets meeting the criteria set out in the second bullet point of paragraph 6, the quantum of the estate should not be consequential for the operation of the PCG. The Law Council would be happy to engage further with the ATO on this point.

Self-managed superannuation funds

35. The Law Council also suggests, as an alternative or as well as the removal of a threshold altogether (but together with its suggestion that the threshold be increased to \$10 million), that consideration be given to removing the requirement that the deceased not be a member of a self-managed superannuation fund (**SMSF**).
36. Practitioners observed that SMSFs are highly regulated, independently audited entities and in this light, could not see what practical safeguard is provided by excluding a person who is a member of an SMSF. It was pointed out that, if a death benefit is paid to an LPR, the LPR has to deduct tax irrespective of whether the death benefit is paid by an SMSF or some other kind of fund. It was suggested that the concern may be that enforcing compliance of SMSFs can be complex and could affect the certainty with which assets distributed through estates should be treated (e.g. if an SMSF is investigated in the future). If this or some other reason is cause for concern, it may be helpful if this is identified and perhaps some intermediate wording could be included.

Question 6 - feedback on any other aspects of PCG 2018/4

Public awareness

37. The Law Council emphasises the need for public awareness measures in relation to PCG 2018/4. Many LPRs who may benefit from PCG 2018/4 may not appoint a tax agent, legal practitioner or BAS agent and so may not be aware of the PCG. This applies particularly to paragraph 13, about when the ATO will treat an LPR as not having notice of any further ATO claim relating to returns.
38. More broadly, the Law Council's National Elder Law and Succession Law Committee suggested that it may be helpful for the ATO to produce an easily accessible plain English checklist of tasks that an LPR should perform in relation to the tax affairs of the deceased person. This is particularly the case, given that sometimes it may not be clear to the LPR who the tax agent for the deceased estate was. The Committee acknowledged that the information about managing the affairs of a deceased estate on the ATO website is very good¹⁵—the suggestion is that consideration be given to an online form of some kind that can be filled out by the LPR and sent to the ATO as evidence of the necessary tasks having been completed.

Access to information

39. The Law Society of New South Wales observes that, in the experience of its members, after the deceased's death but before a grant of probate has been obtained, during which time the LPR has a duty to call in and manage the estate, there can be difficulties obtaining all relevant information and accessing records pertaining to the deceased's

¹⁵ Australian Taxation Office, 'Deceased estates' (website) <<https://www.ato.gov.au/Individuals/Deceased-estates/>>.

tax affairs. It suggests that this increases the risk of the LPR failing to lodge a claim, provide information or pay a tax liability that arose prior to death.

40. While outside the scope of PCG 2018/4 itself, the Law Society of New South Wales expressed support for the suggestion in Item 10 of PCG 2018/4EC compendium that an LPR who has obtained a grant should have the ability to gain access to the deceased's tax file number, four years of tax returns, assessments, objections and paid tax liability. It suggests that this would greatly reduce the risk of their failing to meet the deceased's tax liabilities.
41. The Law Council supports this suggestion.

Information about use and future engagement

42. The Law Council is interested in the ATO's experience to date in relation to the operation of PCG 2018/4, as this will be an important determinant of whether the suggestions made above can be accepted, in whole or part.
43. The Law Council suggests that it would be of assistance, also to the community, for the ATO to report (anonymised) data on the number of estates, size, time of processing and whether they may be subject to this PCG. It observes that the number of estates will continue to increase in coming years, so this policy, and the ATO approach to administration, should involve ongoing review and engagement. This is particularly the case because much administration of deceased estates, including tax aspects, is done by non-tax specialists (family members, solicitors and independent trustees or administrators).

Contact

44. Please contact Matthew Wood, Principal Policy Lawyer, on 02 6246 3755 or matthew.wood@lawcouncil.asn.au. If you wish to discuss this matter further.

Yours sincerely



Luke Murphy
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