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## Explanatory Statement

# Taxation Administration (Remedial Power- Disclosure of Protected Information by Taxation Officers) Determination 2020

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### General outline of instrument

1. This instrument is made under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). All references to legislative provisions in this Explanatory Statement are references to Schedule 1 to the TAA 1953 unless otherwise stated.
2. This instrument modifies the operation of subsection 355-25(2) to ensure a taxation officer can disclose protected information to the registered tax agent or BAS agent, or legal practitioner of an executor or administrator of an estate of an individual who has died. This information assists an executor or administrator to attend to the affairs of the deceased. In this Explanatory Statement all references to representative(s) refer to a registered tax agent or BAS agent, or legal practitioner of an executor or administrator of an estate of an individual who has died unless otherwise stated.
3. This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Section 370-15 allows the Commissioner to prepare another legislative instrument to repeal this instrument. Subsection 370-15(3) states that subsection 33(3) of the *Acts Interpretation Act 1901* applies only to the extent that it allows the Commissioner to amend or vary this instrument.

### Date of effect

5. Section 370-20 requires a determination made under section 370-5 must not commence before the first day it is no longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*. Therefore, this determination commences on the first day the determination is no longer liable to be disallowed, or to be taken to have been disallowed.

### What is this instrument about

6. The purpose of this instrument is to allow a taxation officer to disclose protected information of a deceased person to:
  1. the registered tax agent or BAS agent; and
  2. a legal practitioner,of an executor or administrator of an estate of the individual who has died.

## What is the effect of this instrument

7. This instrument ensures that the making of such disclosures will not be an offence.
8. The instrument recognises that an executor or administrator of a deceased estate effectively 'stands in the shoes' of the deceased person, in the sense that they assume the rights, burdens and obligations of the deceased person after death. By allowing taxation officers to disclose the deceased person's protected information to a representative; the executor or administrator is able to be represented in performing their duties in the same way that the deceased person could have if they were alive.
9. The instrument notionally amends subsection 355-25(2), it is not a textual amendment rather it modifies and clarifies the operation of subsection 355-25(2). The effect of this instrument is to provide for representatives of an executor or administrator of a deceased estate to be considered a covered entity for the purposes of subsection 355-25(2).

## Background

10. Taxation officers are bound by strict taxpayer confidentiality laws. These rules contain a general prohibition on the disclosure of protected information about a taxpayer's affairs to another person except in certain limited circumstances.
11. Under those rules, a taxation officer **can** provide protected information of a deceased person to an executor or administrator of an estate of an individual who has died. However, such information **cannot** be provided to a representative appointed by an executor or administrator of the deceased person's estate, except in limited circumstances.
12. This instrument has been developed to ensure a taxation officer does not commit an offence when protected information of the deceased is disclosed to a representative of an executor or administrator of the deceased person's estate.

## Explanation

13. The TAA 1953 generally prohibits taxation officers from disclosing taxpayer information except as permitted by Division 355. Subdivision 355-B contains provisions governing the disclosure of protected information by taxation officers.
14. Under section 355-25, a taxation officer is prohibited from disclosing protected information to another entity (other than the entity to which it relates or to a court or tribunal) unless the disclosure is to a covered entity, or unless another exception applies. Paragraphs (a) to (g) of subsection 355-25(2) specify the different types of entities which are considered covered entities.
15. A legal personal representative that is an executor or administrator of an estate of an individual who has died is, under paragraph (d) of that subsection, expressly an entity to whom the taxation officers can provide information about the deceased's tax affairs. There is no statutory permission for taxation officers to provide such information to representatives of those executors or administrators.
16. The restrictive nature of the covered entity definition means that a representative appointed by an executor or administrator cannot receive protected information about the deceased person directly from the ATO. An exception may be available under section 355-50, if a taxation officer can make an assessment that a specific disclosure is in the performance of their duties as a taxation officer. However,

the circumstances in which this exception can be exercised are limited and must be assessed on a case by case basis.

17. As a result, an executor or administrator of a deceased estate is in a more disadvantageous position to other entities that are able to appoint such representatives to assist them in understanding and complying with their taxation obligations.

18. It is desirable that executors and administrators are able to obtain assistance from tax agents and legal practitioners in finalising the tax affairs of the deceased where needed. In many cases, it will be more efficient for those executors and administrators if their representatives were able to obtain that information directly from the ATO, including electronically through on-line services.

19. After the death of a person, the executor or administrator of the estate effectively 'stands in the shoes' of the deceased person. This can be a stressful and emotional period. Managing the affairs of the deceased includes a range of final tax obligations which can be complex. The tax obligations include lodging the final individual return for the deceased person, obtaining a tax file number for the deceased estate (which is a separate entity), lodging the tax return of the estate, paying any outstanding tax debts and ensuring that refunds, credits or other entitlements are paid to the estate for the benefit of the beneficiaries.

20. The modification made by this instrument will ensure that those representatives will be covered entities to which taxation officers can disclose protected information of a deceased person.

21. The modification provides a precise and narrow change to the disclosure provisions, ensuring that it does not provide any wider authority for a taxation officer to make a disclosure of information to another entity.

22. This modification does create a change to taxpayer confidentiality provisions. The key principle to be considered is the protection of taxpayer information. Any disclosure of information exceptions are only provided in instances where privacy concerns are outweighed by the public benefit of these disclosures. The Commissioner has carefully considered this issue in light of this principle and considers it reasonable to make this modification. The Commissioner has carefully weighed all the considerations which attach to confidentiality of taxpayer information and exhausted all other interpretative and administrative solutions available to solve this issue.

### **Modification is not inconsistent with intended purpose or object of the provision**

23. The Commissioner considers the modification is not inconsistent with the intended purpose or object of the provision, being subsection 355-25(2). In ascertaining the intended purpose or object of the provision, consideration was given to:

1. the explanatory memorandum and second reading speeches to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*;
2. the inquiry into the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* and the submissions;
3. the former taxation secrecy provision and the explanatory memorandum relating to those bills containing the provisions;

4. the consultation paper on 'The Review of Taxation Secrecy and Disclosure Provisions' and the submissions relating to this paper;
5. the submissions relating to the exposure draft of the Confidentiality of Taxpayer Information Bill.

24. The policy intent of Subdivision 355-B and in particular, subsection 355-25(2), indicates that the covered entity exceptions have been drafted as a practical pathway for taxation officers to determine whether an agency relationship exists. That is, the list of covered entities at subsection 355-25(2) is intended to eliminate or reduce the problems for taxation officers in determining whether someone is an entity's agent and the scope of that relationship; while still recognising the need for taxpayers to be able to be represented in their dealings with the Commissioner. It was also considered important to permit disclosures to representatives who might not be considered an agent under the common law, but who otherwise might have a legitimate need to access a taxpayer's information in their capacity as a representative of a taxpayer.

25. The Commissioner considers that had these particular circumstances been considered at the time the law was drafted, the law would have been drafted differently. It would have provided for this circumstance while still upholding the key principle of the protection of taxpayer information.

#### **Modification is reasonable**

26. The Commissioner considers the modification to be a reasonable measure to ensure that the taxpayer confidentiality provisions avoid creating unintended outcomes for executors or administrators of a deceased estate.

27. The modification will significantly reduce the administrative burden for an executor or administrator of a deceased estate in finalising the tax affairs of the deceased. It will enable them to be represented by a registered tax agent, BAS agent or legal practitioner in their dealings with the Commissioner; placing them in a similar position to other taxpayers.

28. The Commissioner recognises that managing the affairs of the deceased can be complex, that the passing of a deceased person can be a stressful and emotional time, and that executors and administrators often need to be able to obtain assistance from their representatives in finalising those affairs.

29. In light of the intended purpose of the taxpayer confidentiality provisions, the Commissioner considers it reasonable to exercise the Commissioner's discretion to use the remedial power for this issue.

#### **Compliance cost**

30. Compliance cost impact: Minor – There will be minimal impact for both implementation and ongoing compliance costs. The legislative instrument is minor and machinery in nature.

#### **Budgetary impact**

31. The Commissioner has received advice from the Department of the Treasury that the proposed exercise of the CRP would have a negligible cost to the budget.

## Consultation

32. Subsection 17(1) of the *Legislation Act 2003* requires, before the making of a determination, that the rule-maker is satisfied that appropriate and reasonably practicable consultation has been undertaken.

33. Broad consultation has been undertaken. The draft determination and draft explanatory statement were published on the ATO Legal database <http://www.ato.gov.au> seeking feedback and comments for a period of four weeks. Notice of the draft determination was also published on <http://www.ato.gov.au> and subscriptions alerts issued. Tax professionals and tax associations regularly review both the Legal database and <http://www.ato.gov.au> and further promulgate advice of new drafts issued in their internal news bulletins. The major legal publishers also publish news of the drafts in their key tax alerting services- such as the Weekly Tax Bulletin (published by Thomson Reuters Australia) and Tax Tracker and Tax Week (published by CCH Australia). Additionally, the draft determination and explanatory statement were published on the ATO Consultation Hub.

34. Public consultation resulted in five submissions from the tax profession, mainly comprised of those specialising in the taxation of deceased estates. The submissions all fully supported the decision of the Commissioner to exercise his remedial power to modify the operation of section 355-25. All agreed that the modification is not inconsistent with the intent of the protected information provisions. None of the submissions identified any instances where any entity would be treated less favourably than those under the existing law. Of note, it was emphasised the critical need to ensure that the proposed modification takes effect as soon as practicable given the considerable adverse consequences for taxpayers, the ATO and the broader profession. Without the modification, the only solutions available will inevitably lead to the protracted and prolonged administration of deceased estates which detrimentally impacts not only the Legal Personal Representative (LPR) but also bereaved members of the deceased's family as well as the tax representatives appointed by the LPR whose costs will exponentially balloon.

35. A couple of the submissions raised that it would be preferable, in effect, to have retrospective commencement of the modification. However, the law does not allow retrospective commencement. Section 370-20 provides a determination made under section 370-5 must not commence before the first day it is no longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*. This is to ensure that Parliament has the opportunity to properly scrutinise an instrument made under the remedial power and, if it considers necessary, to disallow it. It is also unsuitable for the instrument to commence prospectively and apply to disclosures from an earlier date. Section 355-25 deals with the disclosure of protected information by taxation officers. The offence occurs at the time of the disclosure.

36. In addition, targeted consultation on a prospective CRP candidate is undertaken with the CRP Advisory Panel, a body comprised of private sector specialists, Treasury and ATO representatives. The Panel supported the exercise of the CRP and provided feedback on the draft determination and explanatory statement.

37. The Board of Taxation was also consulted on the use of the CRP to resolve the issue, the draft determination and explanatory statement. The Board agreed that the modification is consistent with the objects of that provision; and reasonable having regard to the provision's intended purpose. Accordingly the Board considered it would be appropriate to exercise the power.

**Legislative references:**

*Acts Interpretation Act 1901*

*Human Rights (Parliamentary Scrutiny) Act 2011*

*Legislation Act 2003*

*Taxation Administration Act 1953*

*Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*

## **Statement of compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

This Legislative Instrument is made under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), known as the Commissioner's Remedial Power. It modifies the operation of the taxpayer confidentiality rules in Division 355 of Schedule 1 to the TAA 1953. The modification ensures that a taxation officer can disclose protected information of a deceased person to the registered tax agent, BAS agent, or legal practitioner of an executor or administrator of the estate of the individual who has died. Under current law, taxation officers can disclose such information directly to the executor or administrator but cannot disclose the information to their representatives, except in limited circumstances.

Managing the affairs of the deceased can be complex and the passing of a person can be a stressful and emotional time. An executor or administrator, who stands in the shoes of the deceased, may need to obtain assistance from their representatives in finalising those affairs.

In effect, the modification will enable an executor or administrator to obtain assistance from tax agents, BAS agents and legal practitioners in their dealings with the ATO.

#### **Human rights implications**

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits the interference with privacy and attacks on reputation. This modification does modify taxpayer confidentiality provisions relating to personal information. The modification provides a precise and narrow change to those provisions, to allow a taxation officer to disclose protected information relating to a deceased person to a registered tax agent, BAS agent or legal practitioner of the executor or administrator of the individual's estate. It does not provide any wider authority for a taxation officer to make a disclosure of information to another entity. The modification will enable an executor or administrator to be represented in performing their duties in the same way that the deceased person could have if they were alive.

The modification is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances. Taxation officers are bound by strict taxpayer confidentiality laws. The taxpayer confidentiality provisions prohibit the disclosure of information about a taxpayer's tax affairs to another person, except in certain limited circumstances.

There are serious consequences for breaching those provisions, with such a breach being an offence punishable by up to 2 years imprisonment. The Commissioner has carefully considered the human rights implications as articulated in ICCPR and considers that the disclosure of protected information provisions in Division 355 of Schedule 1 to the TAA 1953 continue to provide proper safeguards. The key principle

in these considerations is the protection of taxpayer information; any disclosure of information exceptions are only provided in instances where privacy concerns are outweighed by the public benefit of these disclosures.

## **Conclusion**

The Legislative Instrument is compatible with human rights because the modification enables the executor or administrator, who steps into the shoes of the deceased, to be represented in their dealings with the Commissioner, placing them in a similar position to other taxpayers.

The modification could significantly reduce the administrative burden for an executor or administrator of a deceased estate in managing the range of final tax obligations of the deceased.

To the extent it may limit human rights; those limitations are reasonable, necessary and proportionate. The executor or administrator of a deceased estate has a choice as to whether or not they would want to appoint a registered tax agent, BAS agent or legal practitioner. If they decide that they do not want the information disclosed to such a person, then they do not have to appoint such a representative in their dealings with the ATO.