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Our ref: [SS:SL]

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Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
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24 Lonsdale Street  
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By email: [REDACTED]

Dear Dr Popple

#### **Draft Deceased Estates: 'double death' tax determination**

Thank you for the opportunity to provide feedback on Draft Taxation Determination TD 2025/DX – deceased estates: 'double death' tax determination (**draft Determination**) released by the Australian Taxation Office (**ATO**). The Queensland Law Society (**QLS**) appreciates being consulted on this matter.

This response has been compiled by the QLS Succession Law Committee, whose members have substantial expertise in this area.

#### **Requirement to obtain probate/letters of administration**

Our Committee members have raised concerns about the draft Determination's interpretation of the law and its applicability across jurisdictions.

The draft Determination asserts that a beneficiary is not considered to own estate assets until probate is obtained for a valid will or letters of administration are granted for intestacy (see paragraph 10 of the draft Determination). This appears to state, as a universal principle, that assets do not "pass" to a beneficiary under a will until such grant is made.

This proposition does not reflect the legal position in all Australian jurisdictions. Notably, in Queensland, a grant of probate (or letters of administration) is not a precondition for assets to devolve upon a beneficiary under a will in every case. Probate is not required for many smaller estates or where assets are jointly held, and in many instances, an estate can be fully administered and assets pass to the beneficiaries without any formal Court application.

The draft Determination, as currently worded, may cause confusion and inappropriately restrict the main residence exemption and other CGT concessions based on a procedural requirement (probate) that is not otherwise demanded by law.

## Draft Deceased Estates: 'double death' tax determination

QLS proposes the relevant paragraphs are re-written to clarify that the need for probate as a pre-condition to asset devolution is jurisdictionally dependent, and not required in all cases.

Perhaps a more appropriate approach would be to reference the stages of administration set out in IT2622 as being the relevant test for determining whether the interest in the asset has "passed" to the beneficiary.

### Distinction between assets

The examples provided in the draft Determination suggest the draft Determination is intended to apply to both specific gifts and the residue of an estate.

QLS suggests the draft Determination makes a distinction between CGT assets that are specifically gifted and CGT assets that form part of the residue of the estate. We understand there should be a functional difference between when a specific gift "passes" to a beneficiary and when a share of the residue of the estate is considered to pass to a beneficiary.

### Concluding comments

We commend the ATO's efforts to clarify the operation of Division 128 of the *Income Tax Assessment Act 1997* (Cth), but we urge reconsideration of the issues we have outlined to ensure consistency with both law and practice across jurisdictions.

Failure to address these concerns may lead to unintended disadvantage to beneficiaries and legal representatives, contradictory outcomes, and administrative complexity.

Our Committee would welcome further engagement on the drafting of this draft Determination.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully



Genevieve Dee  
President