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Status: **draft only – for comment**

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## Draft Practical Compliance Guideline

# Income tax – legal liability of a legal personal representative of a deceased person

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### **📌 Relying on this draft Guideline**

This is a draft consolidation outlining proposed changes to PCG 2018/4 to uplift the threshold for the market value of estate assets to \$10 million and the inclusion of additional examples to provide greater certainty to legal personal representatives of the deceased in distributing estate assets.

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

*This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.*

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### What this draft Guideline is about

1. [This draft Guideline<sup>1</sup> is intended to enable certain legal personal representatives \(LPRs\)<sup>2</sup> of less complex estates<sup>3</sup> to finalise those estates before the expiration of the relevant review period without concern that they may have to fund an outstanding tax-related liability of the deceased person from their own assets. It sets out when an LPR will be treated as having notice of a claim by the ATO \(including a claim arising from an amended assessment\).](#)
2. An [LPR includes an](#) executor who has obtained probate of a deceased person's will, or an administrator who has obtained letters of administration of a deceased person's estate.
3. [An LPR is:](#)
  - required to provide tax returns and other information that the deceased was required to provide to the ATO. ~~In this Guideline, both are referred to as the legal personal representative (LPR) of the deceased.~~
  - [liable to pay any outstanding tax-related liabilities of a deceased person up to the market value of the deceased's assets that come into the LPR's hands.](#)<sup>4</sup>
4. If the LPR fails to lodge a return or provide relevant information, the ATO can assess the amount of the deceased person's [outstanding tax-related](#) liability.<sup>5</sup>
5. ~~An LPR is also liable to pay any outstanding tax-related liabilities of a deceased person up to the value of the deceased's assets that come into the LPR's hands.~~ The LPR may have to meet ~~those~~[the deceased person's](#) liabilities personally if they distribute estate assets [within situations where the LPR is considered to have notice of any such amounts that the deceased owed to the ATO at the date of their death \(referred to in this Guideline as 'notice of a claim by the ATO-ATO'\).](#)
6. ~~As~~[Such](#) liability may relate to either an assessment or an amended assessment that is made after the death of the deceased person. Feedback from practitioners has been that distributions of estate assets are sometimes delayed until after the relevant review period (either 2 or 4 years from the date of an assessment), to ensure that the LPR does not have to personally satisfy a liability relating to an amended assessment. ~~This Guideline is intended to enable 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. It sets 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. This Guideline **does not** deal with [outstanding tax-related](#) liabilities that an LPR may have in relation to the deceased estate, that is, for the period after the death of the deceased person.<sup>6</sup>

<sup>1</sup> For readability, all further references to 'this Guideline' refer to the Guideline as it will read when finalised. Note that this Guideline will not take effect until finalised.

<sup>2</sup> An LPR for the purpose of this Guideline is defined in paragraph 2 of this Guideline.

<sup>3</sup> A reference to a 'less complex estate' is a reference to a deceased estate to which this Guideline applies in accordance with paragraphs 8 to 10 of this Guideline.

<sup>4</sup> As explained in *Barkworth Olives Management Ltd v Deputy Commissioner of Taxation* [2010] QCA 80 at [40], the rationale for limiting the LPR's liability in this way is that the LPR had no opportunity during the period when the income was derived to make provision for any tax liability.

<sup>5</sup> Section 260-140 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

<sup>6</sup> The LPR may have a liability under section 99 of the *Income Tax Assessment Act 1936* as trustee of the estate.

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### Who this Guideline applies to

8. This Guideline applies to an LPR who has ~~obtained probate of a deceased person's will, or letters of administration of a deceased estate provided that:~~

- obtained probate of a deceased person's will (to manage the deceased person's estate), or
- letters of administration of a deceased person's estate

where the deceased person's estate is less complex.

9. A deceased person's estate is considered less complex if:

- in the 4 years before the deceased person's death, they
  - ~~the deceased~~ did not carry on a business
  - ~~the deceased was/were~~ not assessable on a share of the net income of a discretionary trust
  - ~~the deceased was/were~~ not a member of a self-managed superannuation fund
- the ~~estate~~ assets of the deceased estate consist only of
  - public company shares or other interests in widely-held entities
  - death benefit superannuation
  - Australian real property
  - cash and personal assets such as cars and jewellery, ~~and~~
- the total market value of the assets of the deceased estate ~~assets~~ at the date of the deceased person's death was less than \$510 million, and
- none of the assets of the deceased estate ~~assets~~ are intended to pass to a foreign resident, a tax exempt entity or a complying superannuation entity.

10. This Guideline does not apply if probate or letters of administration have not been obtained because in these cases an LPR is not made personally liable for the ~~deceased's~~ deceased person's outstanding tax-related liabilities. A different collection mechanism applies under sections 260-145 and 260-150 of Schedule 1 to the TAA.

### When a legal personal representative LPR has notice of a claim by the ATO

11. It is a question of fact whether the LPR has notice of a claim by the ATO. Paragraphs 12 to 51 of this Guideline set out the situations when we consider the LPR has such notice and those when we will treat an LPR as not having notice.

### **Notice of amounts owing at the date of death**

12. Because an LPR 'stands in the shoes of the deceased person' regarding the ~~deceased's~~ deceased person's outstanding tax-related liabilities<sup>7</sup>, the ATO considers that the LPR has notice of any amount that the deceased owed to the ATO at the date of their death (in addition to charges accruing in respect of those amounts following death, such as interest).

<sup>7</sup> Subsection 260-140(2) of Schedule 1 to the TAA.

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### **Notice of liabilities from outstanding assessments**

13. Similarly, the ATO considers that an LPR has notice of any [outstanding tax-related liabilities](#) arising from the assessment of income tax on returns that the deceased person had lodged, but that had not been issued at the time of the [deceased](#) person's death.

### **Notice of liabilities arising in respect of outstanding returns**

14. An LPR is required by law to lodge all tax returns that the deceased person has not lodged, including for the period up to the date of their death.<sup>8</sup> The ATO considers that an LPR has notice of any [outstanding tax-related liability](#) arising from assessments relating to these returns. The LPR should also notify the ATO if a particular outstanding return is not required to be lodged because, for example, the amount of the deceased person's taxable income was below the tax-free threshold.

### **Notice of liabilities arising from amendments or other changes**

15. Where the ATO has decided to review or examine the affairs of a deceased estate, it will notify the LPR. The LPR will have notice of liabilities that may arise from the review. Where any [outstanding tax-related liability](#) arises, such as from omissions of rental income from estate assets, the ATO will [promptly](#) amend relevant returns.

### **Lodgments and advice of no lodgments necessary by an LPR**

#### **[Legal personal representative acting reasonably](#)**

16. The ATO will treat an LPR as not having notice of any further ATO claim relating to returns the LPR lodged (or advised were not necessary) if:

- the LPR acted reasonably in lodging all of the deceased person's outstanding returns (or in advising the ATO that they were not necessary), and
- the ATO has not given the LPR notice that it intends to examine the deceased person's taxation affairs within 6 months from the lodgment (or advice of non-lodgment) of the last of the outstanding returns by the LPR.

### **Lodgments and advice of no lodgments necessary by the deceased**

17. ['Acted reasonably' in the context of ensuring that the deceased person's outstanding tax returns were lodged correctly, or otherwise in advising the ATO that a tax return was not necessary, means exercising sound judgment or good sense and requires the LPR to act with a degree of prudence.](#)<sup>9</sup> [An LPR who abdicates responsibility and relies in blind faith on their co-LPR, a solicitor, accountant or other person is not considered to be acting reasonably.](#)<sup>10</sup> [Reliance on written legal advice that they have sought about a particular matter may, however, be a relevant factor in establishing that an LPR has acted reasonably.](#)<sup>11</sup>

<sup>8</sup> Subsection 260-140(3) of Schedule 1 to the TAA.

<sup>9</sup> [The concept of acted or acting reasonably' has a history of usage in the context of State Trustee Act legislation, and its meaning in that context has been considered in a number of State Supreme Court cases – for example, \*Green v Wilden Pty Ltd\* \[2005\] WASC 83 at \[508\].](#)

<sup>10</sup> [Gritzman v McRae](#) [2022] NSWSC 745 at [223–225].

<sup>11</sup> [Cardaci v Filippo Primo Cardaci as executor of estate of Marco Antonio Cardaci \[No 5\]](#) [2021] WASC 331 at [770]; Heydon JD & Leeming MJ (2016), *Jacob's' Law of Trusts in Australia*, 8<sup>th</sup> ed, LexisNexis Australia, Chatswood at [22.14]. See also *Re Investa Properties* [2001] NSWSC 1089 at [41–43].

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**Legal personal representative and material irregularities**

18. An LPR may become aware (or should reasonably have become aware) of a material irregularity (or irregularities) in a tax return lodged by the deceased person prior to their death. When this occurs the LPR will be required to bring it to the attention of the ATO in writing (for example, by requesting an amendment).

19. TheGenerally, the ATO will treat the LPR as not having notice of an ATO claim relating to that irregularity if:

- the LPR brings it to the attention of the ATO in writing (for example, by requesting an amendment), and
- the ATO does not, within 6 months of the LPR bringing it to the ATO's attention, issue an amended assessment or indicate that it intends to review the matter.

20. However, the LPR will not be considered to have acted reasonably in the circumstances if they distribute the estate assets after the 6-month period where the LPR believes that there is, or may reasonably be expected to be, an outstanding tax liability. In such cases, the LPR is considered to have notice of an ATO claim of any amount that the deceased owed to the ATO at their date of death, and the LPR may be personally liable for the outstanding amounts.

21. For example, this may arise where the ATO has:

- not been able to process the amendment request within the 6-month period, or
- had to seek further information to confirm the details of the amendment request.

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**Example 1 – straightforward *small* estate**

22. *Alfred died on 1 June 2017. Bill was appointed executor of Alfred's will. He obtained probate in July 2017. Alfred's estate consists of his main residence, (in Australia), shares in publicly-listed companies and money in a bank account. The collective market value of the estate is less than \$1 million. Up until his death, Alfred had been receiving a pension. Alfred had advised the ATO in 2012 that he was not required to lodge further returns.*

23. *Based on all of the information available to him, Bill determines that no return is necessary for the period from 1 July 2016 to 1 June 2017. Bill lodged a Return Not Necessary (RNN) Advice with the ATO on 31 October 2017. If the ATO did not notify Bill that it intended to review Alfred's tax affairs by 30 April 2018 (6 months from the time Bill lodged his RNN advice), the ATO will treat Bill as not having notice of any claim relating to Alfred's estate. Bill can distribute the estate to beneficiaries without risk of personal liability.*

**Example 2 – small estate legal personal representative acting reasonably to complete the tax affairs of the deceased**

24. Mario died on 1 March 2018. Sergio was appointed executor of Mario's will. He obtained probate in May 2018.

25. In the course of discharging his duties as executor, Sergio discovered that Mario's estate consisted of his main residence, 2 rental properties and shares in publicly-listed companies. The collective market value of the estate is less than \$10 million and the main residence and rental properties are located in Australia.

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26. Sergio obtained documentation from the ATO about Mario's tax affairs, documentation from the bank, property manager and share trading platform. Based on all of the information available to him including tax returns for earlier years, Sergio determined that all tax returns had been lodged except for the final period to Mario's date of death. Sergio reviewed Mario's tax returns within the relevant review period and identified that:
- rental and dividend income were reported and assessed
  - one of the rental properties was sold with capital gains tax reported in the tax return in the year the property was sold.
27. Sergio also examined Mario's records for the 4-year period prior to his death and found that he was a beneficiary of a discretionary trust. Following Sergio's enquiry of the trustee, they provided trust resolutions and documents evidencing that Mario was not assessable on any share of the net income of the trust in the 4-year period prior to his death, and that the trustee considered that Mario was not entitled to take as a default beneficiary. Sergio has acted reasonably in undertaking these steps and is entitled to act upon the information provided by the trustee.
28. As Sergio did not discover any material irregularities in earlier year tax returns within the relevant review period, he is acting reasonably in completing Mario's tax affairs by ensuring that the date of death tax return and the returns for the preceding 4 income years are lodged.
29. On 22 June 2018, Sergio lodged a final date of death tax return for Mario. In this return, Sergio reported rental income, dividend income and capital gains from sales of shares reconciling this income with statements from the bank, property manager and share trading platform.
30. On 1 July 2018, the ATO issued a notice of assessment relating to the date of death tax return that Sergio lodged. Sergio promptly paid the tax liability out of the estate's assets.
31. If the ATO did not notify Sergio that it intended to review Mario's tax affairs by 22 December 2018 (6 months from the time Sergio lodged the date of death tax return), the ATO will treat Sergio as not having notice of any claim relating to Mario's estate. Sergio can distribute the estate to beneficiaries without risk of personal liability.

**Example 3 – material tax irregularity identified by the legal personal representative**

32. Peter died on 12 December 2016. Jill was appointed ~~executrix~~executor of his will. She obtained probate in January 2017.
33. In the course of discharging her duties as ~~executrix~~executor, Jill confirmed with the ATO that ~~Peter had lodged~~ all of ~~his~~Peter's income tax returns had been lodged other than the returns for the 2015–16 year and the final period to Peter's date of death.
34. In preparing those returns, Jill discovered that Peter had never returned rental income from a property that he had owned in Sydney since 2010. Jill included rental income from that property in the returns for the 2016 income year (\$20,000) and the period to Peter's date of death (\$10,000). She lodged both returns on 3 March 2017. Jill did not seek to amend any of Peter's earlier year assessments or otherwise bring the irregularities to the ATO's attention.
35. On 4 April 2017, the ATO issued notices of assessment relating to the returns that Jill had lodged. Jill paid those assessments out of the estate's assets.

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36. On 1 July 2017, Jill published a Notice of Intended Distribution (under State succession laws) for claims to be made within 30 days. On 4 August 2017, Jill distributed the remaining assets of the estate.

37. On 20 October 2017, the ATO wrote to Jill advising that Peter's assessments for the 2014 and 2015 years were being reviewed because of the non-reporting of rental income.

38. Jill had become aware of a material irregularity for those income years because she had discovered that Peter had not included rental income in his returns. Jill will be personally liable for any outstanding tax-related liabilities resulting from the amendment of Peter's 2014 and 2015 income tax assessments. Jill cannot avoid liability on the basis that she had no notice of it.

39. If Jill had brought the prior year irregularities to the ATO's attention when she lodged the outstanding returns, Jill would not be personally liable because the ATO did not advise her within 6 months that it was intending to review the assessments.

#### **Example 4 – legal personal representative acting reasonably when material irregularity is discovered**

40. Wing died on 18 May 2018. Wing's daughter, Trang, was appointed executor of Wing's will. She obtained probate in July 2018.

41. In the course of discharging her duties as executor, Trang examined the assets of Wing's estate and found that it comprised cash, public company shares, a rental property and a main residence (with all real property located in Australia). The collective market value of the estate is less than \$10 million. After reviewing Wing's tax records, Trang identified that all but the tax return for the 2016–17 year and the return for the final period to Wing's date of death had been lodged. Trang also discovered a material irregularity, being unreported rental income from the rental property that Wing owned in Brisbane over the past 10 years.

42. On 15 August 2018, Trang lodged the outstanding tax returns and amended the returns still within the relevant review period for the unreported rental income. On the same day, Trang also lodged a voluntary disclosure with the ATO to inform them of rental income unreported in the returns outside the relevant review period.

43. The ATO did not advise Trang within 6 months of Trang lodging the relevant return and disclosure, that it was intending to review the lodgments or Trang's voluntary disclosure. As Trang acted reasonably when the material irregularity was discovered, she can distribute the estate to beneficiaries without risk of personal liability. Trang can finalise the estate without waiting for the expiry of the period for amending tax returns.

#### **Example 5 – what is not a material irregularity**

44. Susan died on 1 June 2017. John was appointed executor of her will. He obtained probate in July 2017.

45. In the course of discharging his duties as executor, John confirmed with the ATO that Susan had lodged all of her tax returns other than the final period to Susan's date of death. John prepared and lodged a date of death tax return and paid the tax liability when the ATO issued a notice of assessment.

46. When preparing the date of death tax return, John identified that there was an error in the assessment for the 2015 income year, noting that the tax return for that year disclosed that Susan's rental property was rented for half a year when in fact the property

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*[was rented for a full year. Following enquiries with Susan’s property manager, John confirmed that the reported rental income for the 2015 income year was still correct.](#)*

47. *[John does not need to bring this disclosure error to the ATO’s attention as it is not a material irregularity. This is because this disclosure error does not impact on the calculation of Susan’s income tax liability for the 2015 income year.](#)*

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#### **Notice of liabilities where further assets discovered**

48. If further assets come into the hands of an LPR after what was thought to be the completion of the estate’s administration, the LPR must reconsider the deceased’s tax position. The identification of further assets might suggest that the deceased’s taxable income was understated previously. The ATO will treat the LPR as having notice of a claim by the ATO to the extent of those further assets.

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#### **Example 36 – further assets identified**

49. *Vincent died on 26 November 2016. Ben was appointed executor of Vincent’s will and obtained probate. To the best of Ben’s knowledge, the assets included in Vincent’s estate consist of his main residence, a number of rental properties that Vincent acquired using his superannuation lump sum, and some money in a bank account. Based on all of the information available to him including tax returns for earlier years, Ben determined that no return was necessary for the period from 1 July 2016 to 26 November 2016 because Vincent’s income was below the tax-free threshold. Six months after advising the ATO that no return was necessary, Ben proceeded to distribute the estate’s assets.*

50. *In 2019, the ATO receives information that Vincent owned further assets, the income from which was not disclosed by Vincent or Ben (due to Ben not knowing of their existence).*

51. *The ATO issues amended assessments for the 2017 and 4 preceding income years. The ATO is not bound by this Guideline to refrain from issuing an assessment or amended assessment to reflect the income from the further assets. The ATO will seek to recover tax-related liabilities from Ben up to the [market](#) value of the further assets that come into Ben’s hands as LPR.*

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#### **Date of effect**

52. When finalised, this Guideline is proposed to apply both before and after its date of issue. It will be reviewed from time to time under the ATO’s standard review process to ensure the currency and relevance of the content, and that the content remains aligned with Australian taxation requirements and industry practice.

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#### **Background and additional information**

##### **Deceased estates and legal personal representatives**

53. Succession law in Australia is state and territory-based. While the laws of each state and territory operate in a broadly similar manner, there are differences. For example, in most states assets that a deceased person owned and which form part of their estate vest in their LPR once a grant of probate or letters of administration have been obtained.

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However in Queensland, those assets vest automatically in the deceased's executor if they died leaving a will. This can mean that section 260-140 of Schedule 1 of the TAA applies to some, but not all executors.

54. An LPR is responsible for collecting the assets of the deceased person, paying their debts and funeral and testamentary expenses and distributing the residue to the beneficiaries. An LPR will always remain such, so that if further assets of the deceased are identified after the estate was thought to have been fully administered, the LPR's duties continue in respect of those assets.

55. Not all assets that a person owned when they died will form part of their deceased estate. Most significantly, assets which they owned as a joint tenant will pass by survivorship to the surviving joint tenant or tenants and superannuation benefits may be paid directly to a dependant. These assets are not available to satisfy the debts of the deceased including outstanding tax-related liabilities.

56. Relevant Acts of the various states and territories ensure that an LPR who has satisfied certain advertising requirements is protected from certain claims of which they did not have notice at the time they distribute the assets of the estate. It is not the case that an LPR has notice only of the claims made in response to an advertisement. For example, if an LPR has notice of a claim prior to advertising, that notice persists even if the creditor does not respond to the advertisement.

57. If estate debts (including the funeral and testamentary expenses) exceed the value of the assets, then the estate is insolvent. An insolvent deceased estate may be administered in bankruptcy (under the Bankruptcy legislation or provisions in state and territory Acts dealing with insolvent estates). See Law Administration Practice Statement PS LA 2011/16 *Insolvency – collection, recovery and enforcement issues for entities under external administration*.

### **Collection of outstanding tax liabilities of deceased persons**

58. Income tax on a person's income, though not assessed until after their death, has been held to answer the description of an outstanding tax-related liability.<sup>12</sup>

59. In the absence of fraud or evasion, the Commissioner cannot seek to recover estate assets that have been distributed to beneficiaries in order to satisfy outstanding tax-related liabilities of a deceased person. In *Deputy Commissioner of Taxation (NSW) v Brown*<sup>13</sup>, the High Court held that the liability of any person to pay a debt for unpaid income tax is conditional upon the right of the Commissioner to assess that person and upon the correlative right of that person to appeal against the assessment (which right the beneficiaries did not possess).

60. The scope of an LPR's liability was considered in *Deputy Commissioner of Taxation (Cth) v Taylor*<sup>14</sup> and on appeal in *Taylor v Deputy Commissioner of Taxation (Cth)*.<sup>15</sup> The LPR was paid an amount which it understood to be a repayment of a gambling debt. In fact, the amount was attributable to a share trading profit which had not been returned by the deceased or the LPR.

61. The [Deputy Commissioner in that case](#) argued that the LPR should have been on notice of a claim for additional income tax in respect of the profit.

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<sup>12</sup> *Binetter v. Commissioner of Taxation* [2016] FCAFC 163 – in the context of section 260-145 of Schedule 1 of the TAA.

<sup>13</sup> [\[1958\] HCA 2.](#)

<sup>14</sup> [12 FLR 173.](#)

<sup>15</sup> [\[1969\] HCA 25.](#)

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62. The LPR in that case was able to discharge the onus that rested on them of showing that they had no notice of any claim, contingent or otherwise, against the estate by the Deputy Commissioner when they distributed the estate assets.<sup>16</sup>

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**Commissioner of Taxation**  
27 September 2023

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<sup>16</sup> The High Court assumed that the making of an assessment was not a condition precedent to the making of a claim by the Deputy Commissioner.

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## **Your comments**

63. You are invited to comment on this draft Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

64. A compendium of comments is prepared when finalising this Guideline, and an edited version (names and identifying information removed) may be published to the Legal database on ato.gov.au

65. Please advise if you do not want your comments included in the edited version of the compendium.

**Due date: 10 November 2023**

**Contact officer details have been removed following publication of the final guideline.**

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## References

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*Previous draft:*

Not previously issued as a draft

*Legislative references:*

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TAA 1953 260-140(2)  
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Bankruptcy Act 1966

Binetter v Commissioner of Taxation  
[2016] FCAFC 163; 2016 ATC 20-593;  
249 FCR 534; 104 ATR 145

Deputy Commissioner of Taxation  
(NSW) v Brown [1958] HCA 2; 100  
CLR 32; 11 ATD 374; [1958] ALR 285  
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118

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ATD 292

*Cases relied on:*

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Commissioner of Taxation [2010] QCA 80; 2010  
ATC 20-172; 238 FLR 465; 78 ATR 827

*Other references:*

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*Jacobs' Law of Trusts in Australia*, 8<sup>th</sup>  
ed, LexisNexis Australia, Chatswood

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ATO references

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