Australia

Contacts

Brisbane

EY
Level 47
111 Eagle Street
Brisbane, QLD 4000
Australia

Ian Burgess
ian.burgess@au.ey.com
+61 7 3243 3711

Peter Vilaysack
peter.vilaysack@au.ey.com
+61 7 3011 3162

1. Types of tax

1.1 Inheritance tax

There is no inheritance tax in Australia.

1.2 Gift tax

There is no gift tax in Australia.

1.3 Real estate transfer tax

There is no real estate transfer tax in Australia.

1.4 Endowment tax

There is no endowment tax in Australia.

1.5 Transfer duty

In all states and territories there is an exemption from stamp duty (or only nominal duty) regarding the vesting of dutiable property in the executor of a deceased person. This also applies to the transfer of assets to the beneficiary of a deceased estate.

1.6 Net wealth tax

There is no net wealth tax in Australia.

1.7 Others

Limited circumstance arises upon death where an immediate tax liability is included when:

- Asset transfers on death to a charity, superfund or foreign resident can have capital gains tax (CGT) costs
- Immediate CGT liability can arise where a discretionary trust deed provides that the trust is to vest on a specific date or on the death of the specified individual (often the parents), where benefits in an Australian complying superannuation fund are paid to non-dependents on death, tax of 17% is payable on the taxable component
- Earnings in a foreign superannuation or retirement fund that have accumulated since the member became an Australian resident may be taxable on payment to nominated beneficiaries

2. Who is liable?

There is no inheritance tax in Australia so this is inapplicable.

3. Rates

Although Australia does not have an inheritance or gift tax there are certain circumstances where tax can be paid by an individual as a result of death. Listed below are adult income tax rates for the 2014–2015 income year 30 June.

Taxable income	Tax payable thereon
A$0–A$18,200	None
A$18,201–A$37,000	19% in excess of A$18,200
A$37,001–A$80,000	A$3,572 plus 32.5% in excess of A$37,000
A$80,001–A$180,000	A$17,547 plus 37% in excess of A$80,000
More than A$180,000	A$54,547 plus 45% in excess of A$180,000

A Medicare levy of 2.0% of taxable income applies to residents plus a 2.0% Temporary Budget Repair Levy. The Temporary Budget Repair Levy is payable for taxable incomes over A$180,000 for the 2014–15, 2015–16 and 2016–17 income years. This is reduced for low-income levels of family income.

Individual tax returns are generally due between 31 March and 15 May of the year following year-end (30 June each year) with tax payable broadly five weeks post-lodgement.

4. Exemptions and reliefs

Specific CGT rules

An individual's death and the subsequent passing of his or her assets to his or her beneficiaries constitute as disposal of an asset and is subject to CGT. However, exceptions are available with respect to assets owned upon death. These exceptions include transfers to a charity, superfund or foreign resident.

Where the CGT exemption is available, such disposals or transfers will not be subject to CGT.

Where the CGT exemption is not available, the result is that the beneficiary that inherits and subsequently sells the assets is subject to CGT on disposal (or the legal personal representative where there is a sale by the legal personal representative).

CGT would then broadly apply to the beneficiary as follows:

- CGT assets acquired prior to 20 September 1985 (pre-CGT assets) by the deceased will be deemed to have a cost base to the beneficiary equal to the market value of the asset as of the date of the deceased's death.
- CGT assets acquired post–19 September 1985 (post-CGT assets) by the deceased will be deemed to have a cost base to the beneficiary equal to the deceased's cost base (normally this would be cost at acquisition and additional expenditure post-acquisition).
- If a capital gain arises between the disposal proceeds and cost base as outlined above, it will be included in the beneficiaries' assessable income. A 50% reduction in the capital gain (offset first by any available CGT losses is available when the asset has been held for at least 12 months (for post-CGT assets and the acquisition date of the deceased is used for the 12-month rule). For assets acquired prior to 21 September 1999 and held for 12 months, an alternative to the 50% reduction is indexation of the cost base for inflation (capped at 30 September 1999) if this produces a lower capital gain.
- If a capital loss arises, it is available for offset against assessable capital gains in the same year of income or future years if not exhausted.
- There are some exceptions to the above rules for trading stock, main residences and an individual who was a foreign resident at the time of death.

Where assets are transferred on death to the remaining joint tenant(s), a similar result is achieved for the remaining joint tenant(s) as outlined above in respect of assets transferred on death to beneficiaries.

Other relevant CGT exemptions for the disposal of assets include:

- Disposals by nonresidents of anything other than taxable Australian property (Australian real estate)
- Full or partial exemptions for the main residence of the deceased

5. Filing procedures

The executor of a deceased estate is responsible for filing the deceased's final year tax return. During the administration of the estate, the executor must file tax returns for the deceased's estate.

6. Assessments and valuations

As Australia does not have an inheritance tax on death, this is not applicable.

7. Trusts, foundations and private purpose funds

In addition to assets held in an individual's own name, it is common for HNWIs in Australia to hold considerable wealth in discretionary trusts, a superannuation fund (particularly nearing and post-retirement) and in private ancillary funds (PAFs).

7.1 Trusts

Assets held within a discretionary trust cannot be dealt with in an individual's will. Discretionary trusts are common structures in Australia for HNWIs to hold the family's wealth, particularly investment assets (with the relevant drivers being tax efficiency and asset protection advantages).

The major estate planning consideration for discretionary trusts is the ongoing control of the trust. This involves a consideration of who the individual wishes to control the trust on his or her death (on the assumption that the individual controlled the trust pre-death) and during any period he or she is incapacitated. In the context of control, it is necessary to consider the appointor or guardian (and their successors) and the trustee (including the ownership thereof if a corporate entity). The Trust Deed will determine whether the role of the appointor or guardian is considered to be the "Ultimate Controller" of the trust.

In selecting the successor appointor and guardian, it is important to ensure that the chosen successor (and his or her controlled entities) is not precluded from being a beneficiary of the trust as a result of the successor position.

Where an HNWI has multiple discretionary trusts, consideration should be given as to whether a corporate appointor or guardian is appropriate and this enables the successor appointor or guardian role to be handled more efficiently and consistently.

Family members often have unpaid present entitlements, e.g., rights to draw on prior trust distributions where the cash has not been paid to the beneficiary from discretionary trusts. It is important to take unpaid present entitlements into account in the context of an individual's estate plan, particularly when treating family members equally and for asset protection.

It is necessary to review the vesting date of discretionary trusts during an estate planning review. Some deeds may provide for a specified period to be the vesting date or that the death of the specified individuals (often this will be the parents) results in the trust vesting. This effectively means that the trust ends and can result in the crystallization of CGT liabilities on CGT assets held within the trust and transfer duty in respect of properties owned by the trust. The tax liability in respect of the crystallization of the CGT liabilities and transfer duty will either be paid at the trustee level or by the beneficiaries of the trust in the relevant year of income.

7.2 Superannuation funds

Monies held within a superannuation fund can assist with asset protection, and generous tax concessions are available in respect of contributions and earnings derived by the fund.

Monies held within superannuation are primarily dealt with outside of a person's will (although the will can assist in ensuring the benefit is taxed in the most efficient manner where the fund pays the death benefit to the estate of the individual). The estate planning issues for superannuation are dependent on whether the individual has set up a personal fund or has placed funds in a public fund. It is most common for HNWIs to have a personal fund.

If a personal fund has been established with a corporate trustee, a key issue that requires addressing is the ongoing control of the corporate trustee of the fund to ensure that benefits paid on the death of the individual are distributed in the most tax-efficient manner with asset protection in mind. The use of "reversionary pensions" and "binding death benefit nominations" are also common means of ensuring the tax-efficient transfer of superannuation proceeds to desired beneficiaries.

7.3 Private ancillary funds

Private ancillary funds (a private fund established that is entitled to receive tax-deductible donations) continue after the death of the founder.

8. Grants

With regard to estate taxes, there are no specific rules regarding grants in Australia.

9. Life insurance

Life insurance payments are generally exempt from tax when received by the nominated beneficiary.

10. Civil law on succession

10.1 Estate planning

Australia does not have an inheritance or gift tax. However, there are tax consequences that can arise at the time of death and estate planning measures that should be undertaken.

Considerations and strategies relevant for individuals include:

- Should a discretionary testamentary trust be established? A testamentary trust can provide asset protection advantages and access to the CGT discount and minors are not subject to punitive tax rates on income distributions. In certain circumstances, family law protection and bankruptcy protection from creditors can be enhanced with the establishment of a testamentary trust. The use of a testamentary trust is a common strategy for funding the maintenance and education costs of minor children and grandchildren. The testamentary trust is established in the individual's will and only comes into existence on the death of the individual. The expected level of the individual's wealth on death will be a factor, as there are ongoing compliance costs with the maintenance of a testamentary trust.
- To what extent should an older individual transfer assets to intended beneficiaries prior to death? This often assists in the reduction of post-death family disputes and is effective where the individual has unutilized capital losses (as capital losses that would otherwise be lost on death can be offset on assets that have appreciated since acquisition and are transferred).
- There are various strategies regarding donations, including the timing thereof. For example, it can be more tax-effective to make donations pre-death instead of post-death.
- Where the individual has a desire to ensure equity between family members, it is necessary to ensure that the will (and testamentary trust if established) provides for the split of assets between family members to be on a post-tax basis (i.e., after the CGT cost bases that the beneficiaries will inherit have been taken into account).
- It is also necessary to ensure that a family member's will does not undo asset protection strategies put in place during the individual's lifetime. For example, if the will of the spouse of an at-risk individual provides that on the death of the spouse the at-risk person will be the beneficiary of assets, then asset protection is lost. It is also important in the context of asset protection that potential inheritances and control of assets that cannot be dealt with in an individual's will are considered.

An estate planning review of an individual's personal assets and assets that cannot be dealt with in an individual's will (including regular review thereof and the taking of future actions cognizant of the estate plan) will ensure:

- There is a tax-effective transfer of assets to nominated beneficiaries.
- The incapacity of the individual is addressed at all stages, including who is given the responsibility to control the individual's entities upon the death of the individual.
- Asset protection implications for the individual and his or her beneficiaries are considered.

10.2 Succession

This is not applicable to individuals in Australia.

10.3 Forced heirship

This is not applicable in Australia.

10.4 Matrimonial regimes and civil partnerships

This is not applicable in Australia.

10.5 Intestacy

If a person dies without making a will, his or her assets will be dealt with in accordance with the laws of intestacy in that state or territory. One of the relevant factors is whether the deceased had a spouse or children.

10.6 Probate or letters of administration

The basic procedures of administration and probate for deceased estates are generally the same in each state or territory of Australia.

A grant can either be a grant of probate of a will or a grant of letters of administration where the individual dies without a will. In either case, the grant of probate or letters of administration is effectively the official recognition of the will (i.e., for a grant of probate) or appointment by a court of an administrator (i.e., for a grant of letters of administration) and the right of the executor or administrator to administer the estate. There is no statutory requirement that a grant be obtained in every case.

Generally, a grant is obtained in the jurisdiction or place in which the deceased left assets or where the deceased resides. If assets are held outside Australia, the grant obtained in Australia may be "recognized" or "resealed" in a foreign jurisdiction subject to the laws of that jurisdiction being able to "recognize" or "reseal" the grant. The "resealing" of the grant has the effect that the original grant obtained in Australia has been obtained in that foreign jurisdiction.

When a grant has been obtained, the executor or administrator obtains legal title to the assets of the deceased estate. After administration of the deceased's estate is completed, the executor or administrator holds the assets on trust for the beneficiaries, subject to distribution to the beneficiaries.

11. Estate tax treaties

11.1 Unilateral rules

This is not applicable in Australia.

11.2 Double-taxation treaties

There is no gift or estate tax treaty currently in Australia. However, the US continues to recognize the gift and estate tax treaties previously entered into with Australia (please refer to the United States chapter of this guide).