

# Australia



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## 1. Types of tax

### 1.1 Inheritance tax

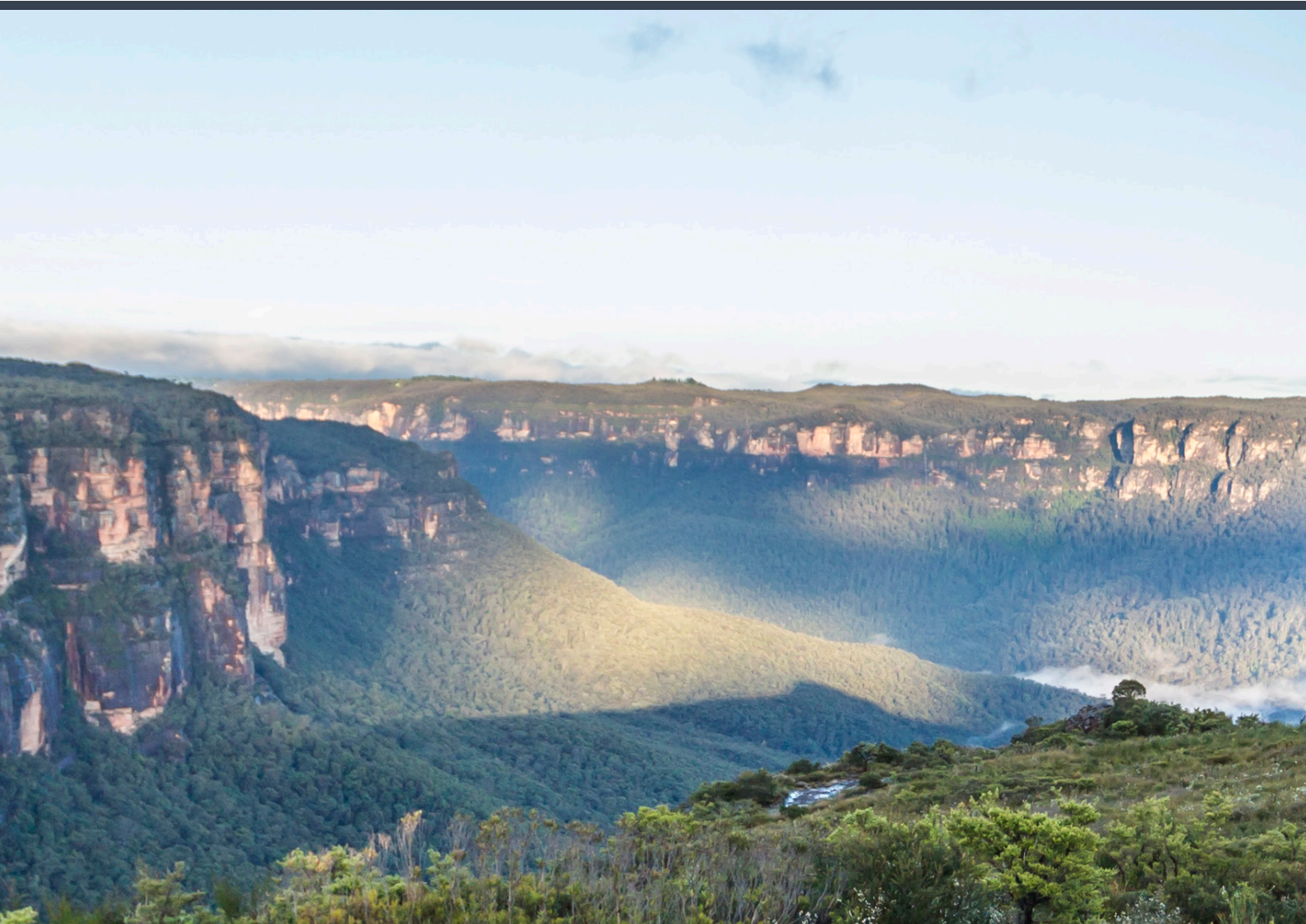
There is no inheritance tax in Australia.

### 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

In some circumstances, an immediate income tax liability can arise upon death, including:

- ▶ Asset transfers on death to a charity, superannuation fund or foreign resident may have a capital gains tax (CGT) liability.
- ▶ Immediate CGT liability can arise when 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).
- ▶ When benefits in an Australian complying superannuation fund are paid to non-dependents on death, a 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 not applicable.

## 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 as described above. Listed below are adult income tax rates for the 2022-2023 income year (1 July 2022 to 30 June 2023) for resident individuals.

Taxable income (AUD)	Tax payable thereon (AUD)
0-18,200	None
18,201-45,000	19% in excess of 18,200
45,001-120,000	5,092 plus 32.5% in excess of 45,000
120,001-180,000	29,467 plus 37% in excess of 120,000
More than 180,000	51,667 plus 45% in excess of 180,000

A Medicare levy of 2% of taxable income applies to residents.

Individual tax returns lodged under a tax agent lodgement program 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. Otherwise, lodgement is due by 31 October following year-end.

## 4. Exemptions and reliefs

There are no inheritance or gift taxes in Australia. There are also exemptions from income tax and capital gains tax.



## 5. Filing procedures

The executor of a deceased estate is responsible for filing the deceased's final year income tax return. During the administration of the estate, the executor must file income tax returns for the deceased 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 high-net-worth individuals (HNWIs) in Australia to hold assets in discretionary trusts, a superannuation fund (particularly nearing and post-retirement) and in private ancillary funds (PAFs).

### 7.1 Trusts

Discretionary trusts are generally established to hold property for the benefit of beneficiaries, with the trustee having the power and control to make decisions in relation to the trust property and on when and how much of the income and property of the trust is distributed to beneficiaries. Discretionary trusts are commonly used in Australia for HNWIs to hold the family's wealth, particularly investment assets, as a discretionary trust structure can provide asset protection and flexibility to stream income and capital to different beneficiaries in different proportions at the trustee's discretion. However, assets held within a discretionary trust cannot be dealt with in an individual's will. Testamentary trusts are discussed at 10.1 below.

The major estate planning consideration for discretionary trusts is the ongoing control of the trust. This involves a consideration of whom 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, as this enables the successor appointor or guardian role to be handled more efficiently and consistently.

Family members may 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 any 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 any 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

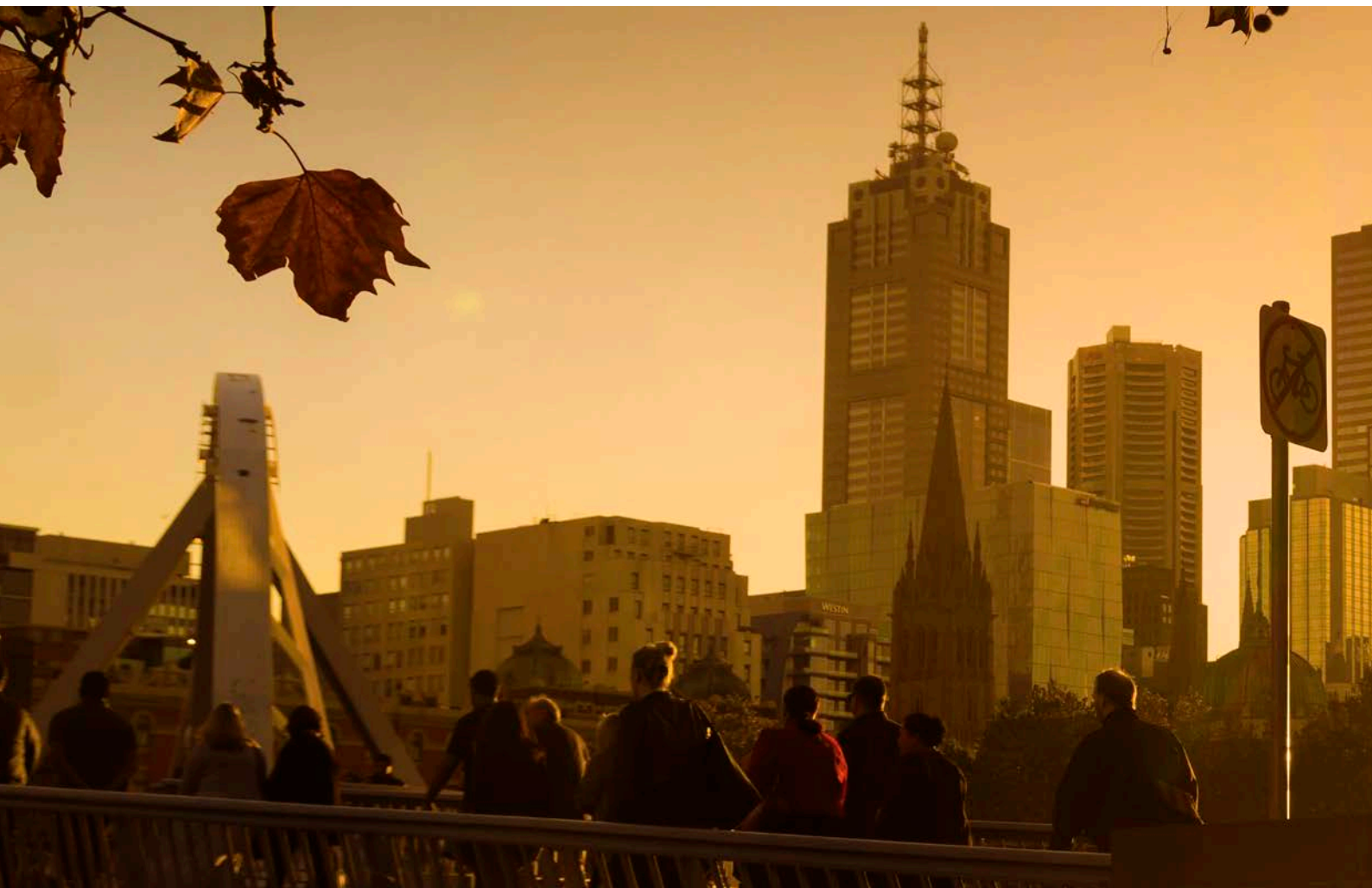
Superannuation funds are used in Australia to accumulate assets over time to fund the retirement of individuals. A complying superannuation has generous tax concessions.

Monies held within superannuation are primarily dealt with outside 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 HNWLs 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 charitable trust 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 income 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 should be undertaken.



Considerations and strategies relevant for individuals include:

- ▶ Should a discretionary testamentary trust be established? A testamentary trust, which is a type of trust established under an individual's will that only comes into existence on the death of the individual, can provide asset protection advantages and access to generous income tax concessions, including the CGT discount. Minors are not subject to punitive tax rates on income distributions received from testamentary trusts. 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 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. When an individual has unused capital losses, where capital gains are realized as the result of transfer of assets prior to death, the losses may be able to be utilized at that time, whereas the losses will not be available post-death (as capital losses that would otherwise be lost on death can be offset against realized capital gains 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:

- ▶ Any tax implications arising from the transfer of assets to nominated beneficiaries are considered at this time.
- ▶ 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

Statutory rules of intestacy are discussed below in Section 10.5.

## 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 has identifiable next of kin.

## 10.6 Probate or letters of administration

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

A grant can be either a grant of probate of a will or a grant of letters of administration when 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 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).