# Australia

## 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) in respect of the vesting of dutiable property in the executor of a deceased person and to the transfer of assets to a beneficiary of a deceased estate.

### 1.6. Net wealth tax

There is no net wealth tax in Australia.

### 1.7. Others

There are limited circumstances where an immediate tax liability can arise on death. These can include asset transfers on death to a charity, superfund or foreign resident. This can have capital gains tax (CGT) implications. Also, an immediate tax liability can arise where a discretionary trust deed provides that the vest date is on the death of the specified individuals (often the parents). This can result in CGT implications to the discretionary trust.

In addition, where the taxable component of superannuation benefits is paid to non-dependents on death, tax of 16.5% is payable.

## 2. Who is liable?

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

## 3. Rates

While Australia does not have an inheritance or gift tax, as indicated above, there are certain circumstances where tax can be paid by an individual as a result of death; accordingly, adult income tax rates are provided below (for the 2011–2012 income year (30 June year-end).

| Taxable income (A$) | Tax payable thereon (A$) |
|---|---|
| A$0–A$6,000 | Nil |
| A$6,001–A$37,000 | 15% in excess of A$6,000 |
| A$37,001–A$80,000 | A$4,650 plus 30% in excess of A$37,000 |
| A$80,001–A$180,000 | A$17,550 plus 37% in excess of A$80,000 |
| A$180,000+ | A$54,550 plus 45% in excess of A$180,000 |

In addition, a Medicare levy of 1.5% of taxable income applies for residents (this is reduced for low income levels and levels of family income). For 2012 only, there is an additional Medicare levy of between 0.5% and 1% of taxable income for taxpayers with taxable income of more than A$50,000 (certain people are exempt from this levy, including taxpayers who are recipients of Disaster Recovery Assistance). The Australian government has proposed that there will be a two-stage increase in the tax-free threshold to A$18,200 from 1 July 2012 and to A$19,400 from 1 July 2015.

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

The death of an individual and the subsequent passing of the individual’s assets to beneficiaries would ordinarily constitute the disposal of an asset subject to CGT.

However, an exemption is available in respect of assets owned on death (exceptions can include transfers to a charity, superfund or foreign resident).

Where the CGT exemption is 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:

1. CGT assets acquired prior to 20 September 1985, 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 death of the deceased.

2. 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).

3. If a capital gain arises (by reference to the difference 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 — see 4. below) is available if the asset has been held for at least 12 months (for post-CGT assets, 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.

4. 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.

5. There are some exceptions to the above rules for trading stock, main residences and an individual who was a foreign resident on 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 non-residents 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 high-net-worth individuals (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. A will can only deal with assets that an individual owns at the date of death.

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 appointer 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 appointer or guardian is considered to be the "Ultimate Controller" of the Trust.

It is important in the selection of the successor appointer and guardian 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 appointer or guardian is appropriate (this enables the successor appointer or guardian role to be handled more efficiently and consistently).

Family members often have unpaid present entitlements (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 in the situation where the desire is to treat family members equally.

It is necessary to review the vest date of discretionary trusts during an estate planning review. As discussed in the "Introduction," some deeds may provide 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. The tax liability in respect of the crystallization of the CGT liabilities 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, 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 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 on death and estate planning measures that should be undertaken.

Considerations and strategies relevant for individuals include:

1. Should a discretionary testamentary trust be established? A testamentary trust can provide asset protection advantages, access to the CGT discount and minors are not subject to punitive tax rates on income distributions. In certain circumstances, family law protection can be enhanced with the establishment of a testamentary trust. The use of a testamentary trust is a common strategy for funding the education costs of grandchildren. The testamentary trust is established in the individual's will. 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.

2. 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).

3. There are various strategies regarding donations, including the timing thereof and the form of the gift. For example, it can be more tax-effective to make donations pre-death instead of post-death in circumstances where the gift is in the form of property instead of cash.

4. 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).

5. 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 are considered.

An estate planning review (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

The basic procedures of administration and probate for deceased estates are generally the same in each state or territory of Australia. Before administration of the deceased's estate can commence, the executor must obtain probate of the will. When probate has been obtained, the executor obtains legal title to the assets of the deceased estate. After administration of the deceased's estate is completed, the executor 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

Australia has not concluded any estate tax treaties.

## Contacts

### Brisbane

**Ernst & Young**
Level 5, Waterfront Place
1 Eagle Street
Brisbane, QLD 4000
Australia

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