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# Australia

## International Estate Planning Guide

### Individual Tax and Private Client Committee

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## I. Wills and disability planning documents

### A. Will formalities and enforceability of foreign wills

Australia is a federation and has government at both the federal and state or territory levels. The law in relation to wills and the administration of estates operates at the state or territory level. Although there are eight jurisdictions (six states and two territories), there is substantial uniformity across the jurisdictions. The comments below are general in nature and do not propose to highlight any differences in the law in particular states or territories.

#### 1. FORMAL REQUIREMENTS

A valid will must be:

- in writing;
- signed on each page and on the final page either by the will-maker or by an agent for the will-maker in the will-maker's presence and at the will-maker's direction; and
- witnessed by at least two witnesses who see the will-maker sign and who each sign the will in the presence of the will-maker. A witness must be at least 18 years of age. While the 'witness-beneficiary rule' has been relaxed in some states, it is advisable that the witnesses are independent persons so as to avoid the possibility in which a gift passing to a beneficiary who is also a witness is deemed void.

It must be possible to determine the date on which the will was made. Usually, the date is written on the first or last page of the will.

To avoid a presumption arising that the will-maker did not sign the will in the presence of both witnesses, it is best practice for the will-maker and both witnesses to use the same pen to sign the will.

A will can be revoked at any time. A new will should include a clause that explicitly revokes all previous testamentary documents. In the absence of such a clause, the wills will be read together and an earlier will revoked to the extent that it is inconsistent with a later will.

It is possible to register a will with a registry service (these registry services are privately owned) or to have a will held in safe deposit with an Australian solicitor.

Alteration of a will occurs when the will is changed by informal means (ie, amending the will by hand to add, delete or cross out words) as opposed to amending a will by codicil. For an alteration to be effective, it must be proven that it was made prior to the execution of a will or, if made after execution, executed in the same way as the will. In general, the court will accept an alteration that has been initialled by the will-maker and both witnesses.

An alteration to a will that is not properly attested may be validated subsequently by a codicil (an instrument executed by the will-maker for the purpose of altering, confirming or explaining a previous will).

A will may be in writing, but written in such a way that a question arises as to whether or not:

- all of the writing was before the will-maker when the will was executed (eg, if the will is written in several different colours of ink or in different handwriting);
- some part of the will has been misplaced since execution (eg, if marks appear on the will made by pins or paper clips); or
- words are missing from the will.

If such a question arises, it may be necessary to provide supporting evidence to the Registrar of the court, usually by affidavit when applying for a grant of probate. If a will does not appear to carry out the intentions of the deceased, because of a clerical error or it doesn't represent the deceased's instructions, an application to the court for rectification can be made in most

jurisdictions. Such an application is subject to statutory time limits and will need to be supported by evidence, such as solicitor file notes or the will-maker's instructions.

## 2. INFORMAL DOCUMENTS INTENDED TO ACT AS A WILL

Australian succession laws generally allow the courts to admit to probate an informal document that may not comply with some or all of the formalities recognised under law as necessary for a valid will. The court must be satisfied that the instrument expresses the testamentary intention of the will-maker. This has been extended to embrace 'wills' made in electronic format, including on an iPhone.

## 3. TESTAMENTARY CAPACITY

Before a will may be admitted to probate, testamentary capacity of the will-maker must be proven. The common law test for testamentary capacity dates back to the 19th century and consists of four limbs, namely it must be shown that, when the will was executed, the will-maker understood the nature and effect of the will, the extent of the property being disposed of under the will, can understand those who may have a claim on the estate and was not suffering with a 'delusion' at the time of executing the will.

If the will is considered rational on the face of it, a presumption of testamentary capacity arises.

Minors (those under 18 years of age) lack testamentary capacity as a matter of law, unless they are married; otherwise, testamentary capacity is a question of fact.

If the will-maker suffered with dementia or another cognitive disability at the time of his or her death and this is named in the death certificate as a cause of death, the court will refer to the date of execution of the will. Where there is any doubt as to whether the will-maker had capacity at the time of executing the will, the presumption of testamentary capacity is displaced. In practical terms, this will usually result in the court requesting evidence of capacity at the time of execution of the will, often in the form of an affidavit from the will-maker's treating medical practitioner, and/or any solicitor who drafted the will and oversaw its execution.

## 4. REQUIREMENT FOR KNOWLEDGE AND APPROVAL

Even if a will-maker has testamentary capacity when the will was executed, the will-maker must also have knowledge and approval of the contents of the will. Usually, in the absence of any suspicious circumstances, provided the will is duly executed the will-maker's knowledge and approval is presumed. However, suspicion will arise if a beneficiary has participated in the making of the will (eg, by drafting the will or instructing the drafter). In such a case, the beneficiary will have to prove that the benefit was properly left to the beneficiary. An absence of knowledge and approval may also be alleged in the context of an allegation of fraud or undue influence. The onus of proving undue influence or fraud is on the party alleging it.

## 5. ENFORCEABILITY OF FOREIGN WILLS

A will has a foreign connection if it was made outside Australia by a person who was, at that time, a foreign resident or who, at that time, had a domicile or habitual residence outside Australia.

Australian state and territory courts have the jurisdiction to declare as valid a will that has a foreign connection. Courts have, in certain circumstances, power to apply the Australian adoption of the conclusions reached at the Ninth Session of the Hague Conference on Private International Law (the convention concluded on 5 October 1961, on the Conflict of Laws Relating to the Form of Testamentary Dispositions).

In general, the formal validity of the will is measured by the formality requirements of the jurisdiction with which the deceased was most closely connected.

The validity considered by the courts under this jurisdiction is formal validity, not substantive validity. In other words, the court will consider whether or not the will has to be in writing, to be signed, to be witnessed, how many witnesses are required and so on. The court does not, under this jurisdiction, determine whether or not the provisions in the will validly dispose of the assets.

## B. Assets passing on death other than by will

There are some assets that the will-maker will own or have a beneficial interest in, but which are not considered part of his or her estate and do not pass on death under the terms of his or her will. The main examples of this are discussed below.

### 1. JOINT TENANCY

A joint tenancy is subject to the rule of 'survivorship', under which the interest of a deceased joint tenant passes automatically on death to any surviving joint tenant or joint tenants, regardless of any provision in the will. Joint tenancy is a particularly popular form of co-ownership between spouses, particularly in respect of real property and bank accounts.

### 2. INTER VIVOS (LIFETIME) TRUSTS

Trusts are discussed below under III.

### 3. SUPERANNUATION (PENSION) FUNDS

Australian superannuation funds are pension funds. On death, the fund is required to pay a member's entitlements. These entitlements consist of contributions made by the member and his or her employer during the term of the member's employment and, in most cases, an amount payable under life insurance cover. These are known as 'death benefits'.

A member may have his or her own superannuation fund (a self-managed superannuation fund or SMSF) or be part of an industry fund.

In many circumstances, members can nominate the persons to whom the trustee of the fund must pay their death benefits provided the nominated person(s) come within the class of 'dependent', as defined under superannuation law, or is their legal personal representative. There are broadly four types of death benefit nominations: binding death benefit nominations, reversionary nominations, non-binding nominations and non-lapsing binding death benefit nominations.

If there is no valid binding nomination in place at the time of the member's death, the fund trustee will have discretion to determine who receives the payment of the death benefits, provided the payment is made in accordance with the rules of the fund and any requirements under superannuation law. For this reason, it is recommended that a binding nomination is reviewed regularly to ensure that it remains valid at the time of the member's death and reflects the member's wishes.

There are tax concessions available for certain dependents (known as 'tax law dependents'), including the spouse of the member and minor children who receive a member's death benefits on his or her death.

### 4. LIFE INSURANCE POLICY WITH NOMINATED BENEFICIARIES

Persons who take out life insurance policies may, depending on the nature of the life insurance taken out, be able to nominate who receives the benefits of the life insurance policy upon the person's death. Whether or not there are any restrictions on who may be nominated is a matter for the insurer in defining the terms upon which it offers life insurance. There are no particular statutory or other legal rules governing these matters.

### 5. DONATION *MORTIS CAUSA* (DEATHBED GIFTS)

A donation *mortis causa* is a gift made in contemplation of death. It is sometimes referred to as a 'deathbed gift'. Such a gift is uncommon in Australia. If it is made effectively, it passes title to the subject matter, such that the subject matter does not remain part of the donor's estate. The required elements are:

- the gift must be made in contemplation of the donor's death: for a gift to be made in contemplation of death, death must be more than inevitable; it needs to be impending;
- the gift must be intended to be absolute until the donor's death; and

- the donor must part with dominion over the subject matter of the gift: parting of dominion means actual delivery to the donee or his or her agent.

### C. Powers of attorney, directives and similar disability documents

#### 1. POWER OF ATTORNEY

Powers of attorney are available in all Australian state and territory jurisdictions. In Australia, a power of attorney is an instrument by which one person (usually called the 'principal' or 'donor') formally appoints another person to act for the principal in one or more transactions or to manage the principal's affairs generally.

There are two types of power of attorney:

- a general power of attorney will automatically cease in the event that the principal loses legal capacity; and
- an enduring power of attorney will continue to be valid if the principal loses legal capacity.

A loss of legal capacity occurs when a person is unable to comprehend the nature and legal effect of a document. In addition to the automatic revocation of a general power of attorney upon loss of legal capacity, a power of attorney cannot be created by a person once he or she has lost legal capacity, although a guardian may be appointed for the person in accordance with state/territory legislation (discussed below under I.C.3).

A power of attorney made in another Australian state is generally recognised if it was validly created in the jurisdiction in which it was made. A power of attorney made in a jurisdiction outside of Australia can be used in Australia, but it is recommended that it be notarised in the jurisdiction it was created in as complying with the relevant laws of that jurisdiction.

#### 2. DIRECTIVES

Future medical directives (also called 'advance health directives') are available in some, but not all, Australian jurisdictions. These are directives about the medical treatment a person wishes to receive in the future. The law in relation to future medical directives is governed by Australian state and territory law, not all of which have enacted legislation to allow specifically for future medical directives. The laws in each state and territory regarding future medical directives are often quite different from each other and it is recommended that specialist advice be taken in relation to particular state and territory requirements.

In the relevant jurisdictions, a person who is legally competent may give a future health directive. The effect (where the directive prohibits certain medical care) is that, in the event of the person becoming terminally ill, medical practitioners are to refrain from giving certain medical care. Practitioners must comply and compliance, in good faith, will exempt the practitioner from any professional misconduct liability.

A future health directive made in another Australian state is recognised if it was validly created in the jurisdiction in which it was made, but generally only to the extent that the directives are allowed for in the state where the directive is being enforced. A future health directive made in a foreign jurisdiction will most likely not comply with the generally strict formal requirements for future medical directives in Australian jurisdictions and, therefore, may not be effective in Australia as such. However, the instructions contained in a foreign future health directive may still take effect outside of the statutory regimes under the Australian common law. In practice, if possible, a person who has made a foreign future health directive should make a corresponding future health directive in the most relevant Australian jurisdiction in accordance with the particular statutory requirements of that jurisdiction.

#### 3. COURT-APPOINTED GUARDIANSHIP

As discussed above, a person who has lost legal capacity cannot make a power of attorney. In those circumstances, for decisions to be made on the person's behalf, it will be necessary to obtain an order to appoint a guardian in accordance with relevant state/territory legislation. The appointment will be made subject to approval by the relevant tribunal.

A court-appointed guardianship order made in another Australian state/territory is generally recognised if it was validly created in the jurisdiction in which it was made, although most jurisdictions have special registration procedures that must be followed in those circumstances. Guardianship statutes in most Australian jurisdictions do not provide for the recognition of a foreign guardianship order. Although Australian courts have inherent powers in relation to guardianship, it is recommended that a statutory guardianship order be sought in the relevant Australian jurisdiction before the guardian makes any decision in respect of a person in Australia.

## **II. Estate administration**

### *A. Overview of administration procedures*

Under Australian law, the responsibility for administering deceased estates rests with the personal representative or representatives of the deceased.

In the case of administration pursuant to a will, the personal representative is known as the executor. The executor is nominated by the will-maker under their will. The position of executor is voluntary. If there is a will but no executor appointed or no appointed executor willing or able to act, one of the beneficiaries usually applies to the court to administer the estate and is known as an administrator.

A circumstance where a person dies, either without any will at all, or with a will that is totally ineffective, is known as 'intestacy'. In the case of intestacy, the personal representative is also known as an administrator. The right to administer on intestacy is determined broadly in an order of priority, set forth in each jurisdiction either in legislation or in rules of court, or in some cases, simply by the established practice of the court, by which a person with a larger interest on intestacy generally has priority over a person with a smaller interest.

The personal representative is involved in the administration process until all of the estate has been completely distributed to the correct beneficiaries. The following are the key steps taken by the personal representative in the administration of an estate:

1. the initial vesting of the estate is with the personal representative. It is the personal representative's responsibility to establish title and gather assets. This procedure usually requires evidence of the validity and contents of the will in the form of a court order known as the grant of probate (in the case of effective wills), the grant of letters of administration (in the case of intestacy) and where there is a will that is effective to dispose of the estate, but not effective to appoint an executor;
2. the personal representative is responsible for paying any taxes associated with the estate. These are most commonly taxes under federal income tax law, particularly capital gains tax (CGT). Generally, exemptions or concessions apply in respect of state/territory taxes. In relation to the period before the deceased's death, the personal representative must lodge any outstanding tax returns of the deceased up to the date of death, secure an assessment and pay the amount required to be paid upon assessment from the assets of the estate. In relation to the period after the deceased's death, the estate is treated as a separate taxpayer and the personal representative must lodge tax returns, secure assessments and pay assessments from the estate assets on the estate's behalf (see further below under IV.B); and
3. the personal representative is responsible for distributing the estate. The distribution is generally made in accordance with the wishes of the will-maker as expressed in his/her will or, if there is no will, in accordance with the intestacy rules in the relevant jurisdiction. Distribution may also be subject to the outcome of a family provision application (see further below under II.B).

Although estates are frequently administered without obtaining formal valuations, such valuations may be necessary or desirable in some circumstances, for example, where there is a likelihood of a CGT issue arising (since the valuation will allow the personal representative



to advise beneficiaries of the relevant asset's cost base for CGT purposes) or where the estate is, or is expected to be, challenged by way of a family provision application.

### *B. Intestate succession and forced heirship*

#### 1. INTESTATE SUCCESSION

The intestacy rules under Australian law call effectively for the creation of an 'inventory' of those most closely related to the deceased by blood, marriage or civil partnership/de facto relationship. Distributions are made in accordance with this inventory, without regard to the deceased's wishes (because, by definition, there is no will in which any wishes have been expressed).

Generally, in all Australian states and territories, spouses (lawful or de facto, including statutorily recognised civil partners) occupy the highest position. Depending on the state, the surviving spouse may receive the whole of the estate or share the estate, with shares determined under a statutory scheme, with any children of the deceased.

The intestacy rules are also subject to a family provision application (discussed below).

#### 2. FORCED HEIRSHIP

There is no forced heirship regime as such in any Australian state or territory.

The succession regime in Australia, so far as wills are concerned, is one of full testamentary freedom, subject to validity or a successful family provision application.

A family provision application is a court application brought by a disappointed beneficiary (who must establish eligibility in accordance with the legislation dealing with family provision applications in each jurisdiction) claiming that he or she should receive a share or larger share of the estate for the adequate provision of his or her proper maintenance and support. The following principles apply:

- a claim needs to be brought ordinarily within six months of issue of the grant of probate/grant of letters of administration, unless leave of the court is granted;
- the claimant needs to come within a class of eligible person(s), which includes a spouse, former spouse, person who shared a household with the deceased and persons who treated the deceased as a parent, such as stepchildren;
- in all states, except for New South Wales, a claim for family provision can only be ordered from assets that form part of the estate of the deceased. In New South Wales, however, 'notional' assets (ie, assets held outside a person's estate and not in his or her personal name), such as trust assets and superannuation can be included as part of a family provision claim. This has resulted in claims being commenced in New South Wales, despite the deceased being domiciled elsewhere in Australia;
- determining what constitutes 'adequate' provision for the claimant requires a comparison between the applicant's financial circumstances and those of the beneficiaries who were favoured by the will or the intestacy, relative to the size of the estate; and
- determining what is 'proper' maintenance and support requires consideration (and evidence) of the totality of the relationship between the applicant and the deceased as well as the relationship between the applicant and the other beneficiaries.

### *C. Marital property*

To the extent marital property was held by the deceased and his or her spouse as joint tenants, the principles discussed above (under I.B.1) apply. In particular, the right of survivorship operates so that the deceased's interest in the property held as joint tenant passes automatically to his or her spouse (and any other joint tenants in equal shares), regardless of any provision in the deceased's will.

To the extent marital property was not held by the deceased and his or her spouse as joint tenants, the property will be distributed in the first instance in accordance with the deceased's will or the applicable intestacy rules.

*D. Tenancies, survivorship accounts and payable on death accounts*

The principles applicable in relation to joint tenancies are discussed above under I.B.1. There is no concept in Australia of 'survivorship accounts' separate from the general concept of property held in a joint tenancy. There is no concept of 'payable on death accounts' recognised in Australian law separate from general concepts of trust accounts.

### **III. Trusts and other planning structures**

*A. Common techniques*

Australian law recognises and commonly uses trusts in the structuring of family estates. Trust law is regulated by state and territory legislation.<sup>1</sup> A trust in Australian law is a device by which one person ('trustee') holds property ('trust property') for the benefit of one or more other persons ('beneficiaries', of whom the trustee may be one). This definition reveals that there are three things needed for a valid trust to exist: (1) a trustee; (2) trust property; and (3) beneficiaries.

Australian law imposes an equitable obligation upon the trustee to deal with the trust property for the benefit of the beneficiaries, any one of whom may enforce that obligation. The trust property is registered in the name of the trustee as the legal owner rather than in the name of the trust.

Trusts can be divided into two broad categories: discretionary trusts and fixed trusts. The trustee of a discretionary trust has discretion as to the distribution of the income and capital of the trust, usually as to whether income will be distributed and to whom it will be distributed. The trustee of a fixed trust has no such discretion. A fixed trust gives the beneficiaries a fixed entitlement in the income and capital of the trust in proportion to the interests that they hold, and the trustee must make distributions only in accordance with these entitlements.

A common structure used for family estate planning includes a corporate trustee with the beneficiaries as directors of the trustee corporation and members of the family as the beneficiaries. A common example has a corporate trustee with mother and father as directors; the family's capital assets and money as the trust property; and the mother, father and children as the beneficiaries. These structures commonly include a corporate beneficiary as the final beneficiary because this may result in a lower overall tax liability in respect of trust distributions (discussed further below under IV).

The key benefits of this type of structure are:

- trust property may be protected from the provisions of a will;
- trust property may be protected from creditors and spouses of beneficiaries; and
- the corporate trustee has discretion to distribute income and capital in a way that may minimise tax liabilities.

*B. Fiduciary duties (trustee, board members, directors etc)*

1. TRUSTEES' FIDUCIARY DUTIES

Trustees occupy a fiduciary position in relation to the beneficiaries of the trust and owe those beneficiaries fiduciary duties under Australian law. The central concept in the Australian law of fiduciary obligations is the concept of loyalty. The fiduciary's general duty of loyalty to his or her principal is regarded as encompassing two specific fiduciary duties:

1. the fiduciary must not enter into a transaction, arrangement or other engagement in which conflict does, or might, arise between the fiduciary's personal interest and the fiduciary's duty to his or her principal, or between the fiduciary's duties to multiple principals, without the principal's informed consent; and

2. the fiduciary must not use his or her position as fiduciary, or knowledge or an opportunity obtained or received because of that position, to gain profit or an advantage for him or herself, or another person, without the principal's informed consent.

Thus, a trustee must not, for example, receive remuneration for being a trustee; deal with any trust property for the benefit of any person other than the beneficiaries; or act as the solicitor for the estate and receive fees for so acting, unless authorised by the trust instrument or all the beneficiaries being *sui juris*.

Trustees also have various other duties that are not strictly fiduciary in nature. These duties do not arise from the trustee's position as a fiduciary but from his or her role as trustee. They include duties for the trustee to:

- acquaint him or herself with the terms of the trust and comply with those terms;
- ensure that all trust property is vested in the current trustee or trustees;
- maintain control of the trust property within the joint control of all trustees;
- preserve the capital and income of the trust property, including an obligation to invest funds and dispose of property in certain circumstances;
- use reasonable diligence and caution when dealing with trust property;
- act personally, except when it is necessary to seek external advice;
- not permit others, including the beneficiary, to fetter the trustee's discretion;
- use his or her discretion impartially between beneficiaries;
- distribute income and capital between the beneficiaries correctly (in accordance with the trust instrument);
- decide unanimously with any other trustees (except where otherwise agreed in the trust instrument);
- keep proper accounts;
- provide beneficiaries with access to information concerning the trustee's management of the trust property generally and the beneficiary's share; and
- duly and properly invest trust money coming into his or her hands that is not presently used for the purposes of the trust.

## 2. COMPANY DIRECTOR'S DUTIES

Company directors are fiduciaries of the company (not of the company's shareholders) under Australian law and, accordingly, owe to the company the same duties of loyalty as trustees owe to beneficiaries. These are the duties not to improperly benefit or gain from their position and to avoid conflicts of interest and duty, and conflicts of duty and duty. These fiduciary duties, and other duties, are now also given statutory force by the federal Corporations Act. The duties imposed on company directors and other company officers by that act include to:

- exercise their powers and discharge their duties with the degree of care and diligence that would be exercised by a reasonable director occupying the same position in a corporation in the same circumstances;
- act in good faith in the best interests of the corporation and for a proper purpose;
- not improperly use their position as director or information gained in that position;
- disclose material personal interests; and
- prevent the company from trading while insolvent.

Directors also owe duties of confidentiality under the general law.

### *C. Treatment of foreign trusts*

Australia has ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition, and given the convention the force of domestic law by the Trusts (Hague Convention) Act 1991. The effect of the convention, as embodied in domestic legislation, is that trusts created in accordance with their governing law (which may be specified by the settler or is otherwise the law with which the trust is most closely connected) are recognised in Australia.

Australia also recognises features of foreign corporations that are duly incorporated in the jurisdiction in which they were established. In particular, Australia recognises the legal status, membership, officers and internal dealings of a foreign corporation in accordance with the laws of the place where the corporation was formed. This means, for example, that foreign corporations can sue and be sued in Australia as legal entities without being registered in Australia, provided they have status as separate legal entities in their place of incorporation. However, a foreign corporation must be registered in Australia if it wishes to carry on business in Australia.

## **IV. Taxation**

### *A. Domicile and residency*

The residency of an individual or entity is relevant to determining his or her income tax liability (discussed below under IV.C). The tests for determining residency vary depending upon the nature of the individual or entity.

#### 1. INDIVIDUALS

An individual's tax residence is determined annually. Citizenship or visa status is not determinative of residency for tax purposes.

Under current law, an individual will be an Australian tax resident if any one of the following requirements is satisfied:

- the individual is an Australian resident according to ordinary concepts under common law. Residence according to ordinary concepts is generally taken to mean 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place';
- the individual has an Australian domicile (by origin, independent choice or dependency), unless the individual's permanent place of abode is outside of Australia;
- the individual has been in Australia for more than 183 days in the relevant income year, unless the individual's usual (as opposed to his or her permanent) place of abode is outside of Australia and the individual does not intend to take up residence in Australia; and
- the individual is a member of an Australian Commonwealth superannuation scheme, or is a spouse or child under 16 of such a person.

It was announced in the 2021/22 Federal Budget that the individual residency test would be amended and take effect from the first financial year after the enabling legislation is passed. To date, however, the proposed legislation has not been introduced and the current tests outlined above remain in force.

#### 2. COMPANIES

A company's tax residence is determined annually. A company will be an Australian tax resident if any of the following requirements is satisfied:

- the company was incorporated in Australia; or
- the company carries on a business in Australia and either:
  - its central management and control is in Australia; or

- its voting power is controlled by shareholders who are Australian residents.

Guidance from the Australian Taxation Office (ATO) indicates that if a foreign incorporated company carries on a business and has its central management and control in Australia, it will be deemed to be carrying on business in Australia, even though no part of the actual trading or investment operations of the business take places in Australia. This will result in the company being considered Australian resident for tax purposes.

The proposals by the former federal government that the existing legislation would be amended so that a foreign incorporated company would only be treated as Australian resident for tax purposes if it has 'a significant economic connection' to Australia have to date not been introduced.

### 3. TRUSTS

The tax status of a trust depends on the nature of the trust. In the case of an 'accumulation trust', in which income or gains are accumulated in the trust in an income year, a trustee of the trust is taxed as a separate entity in respect of that income or those gains and the trust estate will be an Australian resident if any one of the following requirements is satisfied:

- a trustee of the trust was an Australian tax resident at any time during the relevant income year; or
- the central management and control of the trust estate was in Australia at any time during the relevant income year.

In the case of a 'corporate unit trust' or 'public trading trust', which are generally taxed as if they were a company, the trust will be an Australian resident if both of the following requirements are satisfied:

- any trust property is situated in Australia or the trustee carries on business in Australia; and
- either central management and control of the trust is in Australia or Australian resident persons hold more than 50 per cent of the beneficial interests in the income or property of the trust.

In many cases, it is the residency status of the beneficiaries of the trust, rather than the trust itself, that determines the tax treatment of the income and capital distributions paid from the trust fund. The net income of a trust is usually distributed to the beneficiaries of the trust who, in turn, pay tax on their distribution, regardless of whether they receive the distribution in cash or it is just allocated to them in the financial statements of the trust.

### 4. TEMPORARY RESIDENCY

Australian law has special tax rules that affect individuals who are an Australian resident for tax purposes and satisfy the requirements for being a temporary resident. An individual is a temporary resident only if he or she satisfies both of the following requirements:

- the individual holds a temporary resident visa; and
- neither the individual nor his or her spouse resides in Australia or is an Australian citizen or the holder of a permanent visa or protected category visa.

Being a temporary resident has the following main tax consequences:

- a temporary resident is generally not taxed on income derived directly or indirectly from a foreign source, except on remuneration from employment undertaken or personal services provided while he or she is a temporary resident;
- a temporary resident is generally only taxed on capital gains on 'taxable Australian property' (discussed below under IV.C.2);
- a temporary resident is generally exempt from the usual ten per cent interest withholding tax on interest payable by residents paid to a foreign lender; and

- a temporary resident on whose behalf an employer makes Australian superannuation contributions may, in some circumstances, apply to the Australian Tax Office (ATO) after departing Australia to claim a lump sum payment of the contributions (less any tax applied within the superannuation fund and subject to a one-off withholding tax of up to 45 per cent or 65 per cent for amounts attributable to superannuation contributions made to those persons on a working holiday visa).

## 5. TAXATION ON EXIT

Australia does not impose an exit tax as such. However, when an individual, company or trust that is an Australian resident ceases to be an Australian resident, he or she may be required to pay CGT on the market value of assets (other than taxable Australian property) held on the leaving date. Individuals (not companies or trusts) can elect to defer this CGT in certain circumstances. There are no such CGT implications for temporary or foreign residents on leaving Australia.

### B. Gift, estate and inheritance taxes

#### 1. FEDERAL TAXES

Australia does not impose gift, estate or inheritance taxes. However, transfers of money that might be considered 'gifts' may be treated as being income in limited circumstances, for example, where the 'gift' is closely associated with the recipient's previous employment. Further, *inter vivos* and testamentary gifts of property may have CGT or other tax consequences in certain circumstances. In particular:

- *inter vivos* gifts between related parties, including the gift of a life interest in an asset, may give rise to a capital gain for the donor (based on the market value of the gift). However, the giver may be able to claim a deduction for the gift if it is made to a charity or another entity that is endorsed by the ATO as a 'deductible gift recipient'; and
- testamentary gifts generally do not give rise to a capital gain. However, they may do so if the beneficiary is a foreign resident and the property is not taxable Australian property (discussed below under IV.C.2).

There will also generally be CGT consequences when a gift recipient disposes of property he or she has received, unless the gift was a testamentary gift of the deceased's main residence and the recipient disposes of it within two years of the deceased's death.

As discussed above under II.A, any income received by the estate after the deceased's death (eg, rental income from property held in the estate) will be taxable as usual and tax will be payable out of the estate.

#### 2. STATE/TERRITORY TAXES

Persons are generally required under state territory laws to pay land transfer duty, known as stamp duty, on the acquisition of real property and various other assets, such as non-land business assets and shares in landholder companies even if the property is acquired by way of gift, unless the gift was a testamentary gift.

The duty rate on a transfer of real property is assessed on a sliding scale. The rates vary from state to state and range from nil up to 6.5 per cent depending upon the value of the property. An additional duty surcharge of up to eight percent applies to real property acquired by foreigners in most states and territories. The additional duty extends to persons or entities subject to varying degrees of foreign control or association, depending on the state or territory. The types of real property to which it applies also vary between states and territories, although it is generally restricted to residential property.

Australian states and territories also have a land tax regime. A tax of up to 2.75 per cent on the unimproved value of land (excluding buildings) applies, although there are tax-free thresholds and an exemption for a person's principal place of residence.

Subject to these concessions, the personal representative of a deceased estate will be liable to pay land tax on any land held in the estate.

### *C. Taxes on income and capital*

The Australian tax year runs from 1 July to 30 June. Income tax returns are generally due by 31 October and penalties apply for late lodgement. Individuals must generally pay income tax within 21 days after the tax return is lodged, although tax on employment income is generally withheld by the employer during the year and a credit given on assessment. Similarly, although the due date for companies to pay income tax is technically the first day of the sixth month after the end of the tax year, in practice, companies must pay their income tax in quarterly 'pay-as-you-go' (PAYG) instalments (monthly instalments apply for large entities). The circumstances in which trusts are taxed separately are discussed under IV.A.3.

Australian income tax liability is determined according to the principles of residency and 'source', subject to any applicable double taxation agreement (DTA). The principles applied in determining residency are discussed under IV.A. In relation to the connection between residency and source, the general rules are that:

- Australian tax residents pay tax on all income (including capital gains) from any source, whether in or outside Australia (subject to any applicable DTA);
- foreign tax residents pay tax only on income (other than capital gains) derived directly or indirectly from Australian sources, and capital gains on taxable Australian property; and
- temporary tax residents pay tax on Australian-sourced income (other than capital gains) and remuneration from employment undertaken or personal services provided while they are a temporary resident whether inside or outside Australia, and capital gains on taxable Australian property.

#### 1. TYPES AND SOURCES OF INCOME

The source of income depends on the type of income. Assessable income for Australian tax purposes includes ordinary income (income according to ordinary concepts, including income from employment and personal services, and profits from carrying on a business) and statutory income (amounts deemed by statute to constitute income for tax purposes, notably capital gains, which are discussed further below).

Setting aside capital gains, the main types of income and the associated sources (subject to any applicable DTA) are as follows:

- employment income: where the services are performed;
- business profits: where the contract is performed (although the place where the contract was formed and the place where consideration under the contract was paid may be relevant);
- interest: where the contract under which the interest is payable was negotiated and made;
- dividends: where the company made the profits from which the dividends were paid (although the company's residence may be relevant);
- royalties: Australia, if the royalty payment flows from Australia; otherwise, where the right giving rise to the royalty is located; and
- rental income: for real property, where the property is located; for goods, factors include where the contract is formed and where the goods are used.

#### 2. CAPITAL GAINS

As noted above, Australian residents pay income tax on all capital gains and foreign and temporary residents pay income tax on capital gains on taxable Australian property (subject to any applicable DTA). Generally, capital gains arise when a 'CGT event' happens to a 'CGT asset' and the proceeds from the event (or the market value of the asset in some

circumstances) exceed the amounts expended on acquiring and maintaining the asset ('cost base'). CGT assets include all types of property and rights that are not property. Common CGT events are:

- the disposal of an asset (eg, by sale);
- the loss, destruction or cancellation of an asset;
- the creation of a trust over, or the grant of an option to acquire, an asset; and
- the grant of a lease.

'Taxable Australian property' is a subset of CGT assets, broadly including:

- real property situated in Australia (including certain indirect interests in such property);
- business assets of a permanent establishment in Australia; and
- an option to acquire either of those.

There is no separate CGT in Australia. Rather, capital gains are included in an entity's assessable income together with any other income and taxed at the usual rates applicable to the entity. However, discounts and concessions are available in some circumstances. For example, individuals and trusts (not companies) who hold the relevant CGT asset for at least 12 months before disposing of it receive a 50 per cent CGT discount, although this discount is not available to foreign residents in respect of capital gains accrued after 1930 on 8 May 2012 (unless the foreign resident chooses to obtain a market valuation of the assets as of 8 May 2012). It has been proposed that the CGT discount be reduced to 25 per cent in the future. Entities can also defer capital gains through 'rollovers' in certain circumstances (eg, when they replace an asset).

It is important to note that the capital gains tax legislation was introduced in Australia on 19 September 1985. An asset acquired before this date is known as a 'pre-CGT' asset. The effect of death on a CGT asset is that the asset is taken to be acquired by the personal representative and beneficiary at market value as at the date of death, as opposed to the value of the asset when the deceased acquired it, as is the case with 'post-CGT' assets.

### 3. TAX RATES

The individual tax rates for Australian residents and foreign residents in the 2023/24 income year are as follows:

<b>Taxable income (A\$)</b>	<b>Australian resident tax rate (%)</b>	<b>Foreign resident tax rate (%)</b>
0–18,200	0	32.5
18,201–45,000	19	32.5
45,001–120,000	32.5	32.5
120,001–180,000	37	37
180,001 and above	45	45

Special rates apply to unearned income earned by children and income earned by persons on a working holiday visa.

The company tax rate is currently 30 per cent (regardless of country of residence), although there is a lower rate of 25 per cent, which applies to certain small companies. It is proposed that the lower rate be progressively applied to larger companies and that the rate be lowered in the future.



## Notes

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<sup>1</sup> The Trustee Act 1925 (ACT); the Trustee Acts 1893 and 1907 (NT); the Trustee Act 1925 (NSW); the Trusts Act 1973 (Qld); the Trustee Act 1936 (SA); the Trustee Act 1898 (Tas); the Trustee Act 1958 (Vic); and the Trustees Act 1962 (WA).