

Taxation of deceased estates

Clients for life!

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FQQQ
CONGRESS
2023 ADELAIDE NOVEMBER 20-22

Overview

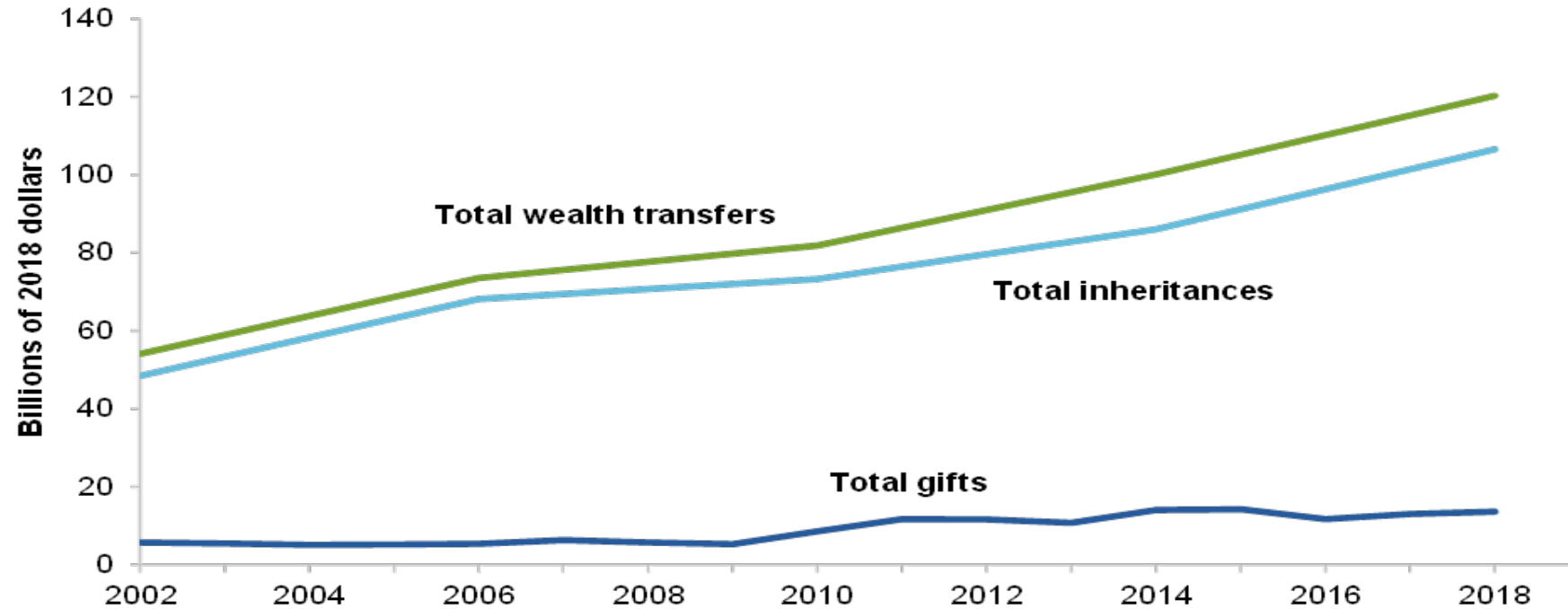
- Deceased's taxation liabilities
- Estate tax liabilities
- Capital gains tax
- Superannuation
- Case study

Mortality statistics

Year	Deaths
2017	140,760
2018	158,493
2019	169,301
2020	141,116
2021	161,400
2022	190,394 (521 per day)



The value of inheritances



\$ 48B in 2002

\$ 107B in 2018

\$ 224B projected by 2050

Productivity Commission Report 2021: Wealth Transfers and The Economic Effect

Deceased's tax

LPR must

- Notify ATO of death / address
- Lodge outstanding returns
- Date of death income tax return
- ABN / GST registrations
- Pay outstanding tax debts

Date of death tax return

- Tax has been paid or withheld
- Franking credits
- Taxable income above \$18,200
- Conducting a business
- Non-lodgment advice



Errors in returns lodged by deceased?

- Probate or Letters of Admin
- In last 4 years, not carrying on a business or a beneficiary of a discretionary trust
- Assets including public shares, super, real property and cash
- Estate value \$5m or less
- Not a member of an SMSF
- No tax advantaged entity beneficiaries

Unless... notice period

- Tax debts at DoD
- Awaiting NOA (pre/post)
- 6 months notice
- Material irregularity
- Discovery of further assets



Estate tax

LPR must

- Tax file number (if applicable)
- Estate income tax return(s)
- ABN / GST registrations
- Pay tax if necessary (inc. legal disability)

Estate income tax return

- Division 6 – trust return
- If LPR taxed - section 99
- 3 years tax-free threshold
- Stage of administration *FCT v Whiting* and IT2622
- If beneficiaries presently or specifically entitled they will be taxed
- Special rules may assess trustee if entitled beneficiary is tax exempt

LPR Personal Liability

Tax clearance

- Tax clearance withdrawn
- Chapter 32 'Receivables Policy' (April 2011)
- Beneficiaries, DCT v Brown (1958) 100 CLR 32
- Executor, S. 254 (1)(e) ITAA
- Liability of executor for tax debt post distribution of estate assets now unclear!



Should I lodge anyway?

- Two schools of thought
- Self assessment
- Executor's liability
- Fraud or evasion unlimited
- 2 to 4 year amendment periods



Suggestions



- Assess tax history
- Notices of assessment
- Advance distributions
- Non-lodgment advice
- Make enquiry with ATO (inc. TFN)
- Advertise
- Indemnity
- Professional indemnity insurance!
- Resource - BNR E-Book

Capital gains tax

CGT consequences on death

- Automatic rollover
 - Capital gains or losses ignored on assets held at date of death (subject to exclusions)
 - Executor has CGT consequences if sold during admin
 - Beneficiary has CGT consequences if sold I post admin
- Personal assets mostly exempt
- Losses a planning opportunity, cannot be primarily tax driven

Cost base of assets

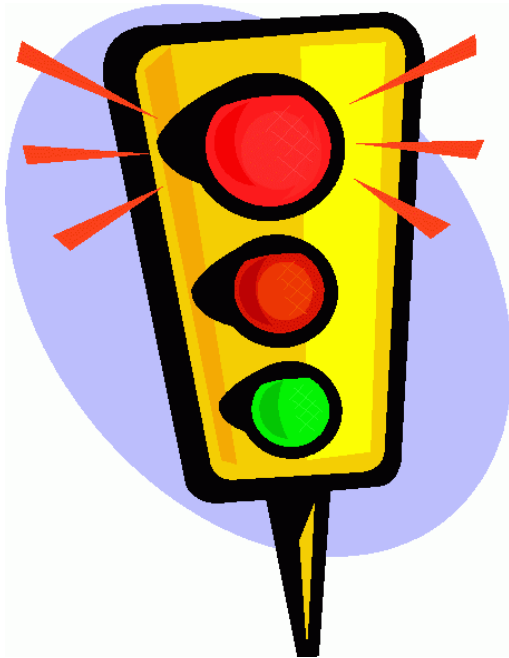


- Assets purchased prior to 20 Sept 1985
 - Market value at date of death
- Assets purchased on or after 20 Sept 1985
 - Deceased's cost base
- Main residence no income producing use
 - Market value at date of death

Other CGT considerations

- Capital losses
- Disposal during administration
- Small business CGT concessions (up to 2 years)
- Right of acquisition under a Will
- Double Death

Exclusions from CGT rollover



- Non-resident taxpayer (unless taxable Australian property)
- Tax exempt entity (unless a DGR)
- Complying superannuation entity

Non-resident beneficiary

- Post CGT assets
- Applies to Non-Taxable Australian Property assets
- Taxable Australian Property includes:
 - Australian real property
 - Minerals or petroleum rights
 - 10%+ holdings
 - Business assets



What happens to exclusions?

- Deemed capital gains tax event – K3
- Date of death return
- Amendment periods
- Administration issues or life interests



Deceased's residence

- Sold and settled within 2 years, or
- Non income producing and became the PPR of:
 - Deceased's spouse
 - Individual with the right to occupy
 - Individual inheriting the property
- Main residence immediately pre-death & non income producing (post '85 only)



...other considerations

- Discretion to extend 2 years (2008/09)
- 6 years exemption if income producing
- Indefinitely, if not income producing
- Partial exemption
- Only one main residence at a time
- Can include up to two hectares of land
- PCG 2019/5 (safe harbour)



Superannuation death benefits

What happens on death?

- Trustee to pay Reg. 6.21(1) SIS Regulations
- Lump Sum or Income Stream payment
- Lump Sum can be paid to estate or beneficiary
- Income Stream to beneficiary
- Estate asset only if paid to LPR

Tax on death benefit paid to estate

Will lump sum benefit dependant or non-dependant?

- Dependant – no tax payable
- Non-dependant - tax payable by LPR

Tax payable by LPR depends on components of death benefit

Who is a tax dependant?

Individual who was	Tax Dependant?
Spouse including de facto & same sex but not former spouse	Yes
Child under 18*	Yes
Child over 18 and financially independent	No
Child 18-25 and financially dependent	Yes
Disabled child - any age	Yes
Interdependent relationship with deceased at time of death	Yes
Financial dependant at time of death	Yes

Financial dependant

- Not defined
- IT / case law and AAT decisions
- ‘Necessities of life’ – ‘Standard of living’
- *Malek v COT* (1999) AATA

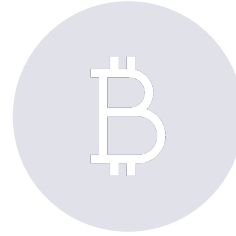
Interdependent Relationship



Have a close personal relationship



Live together



One or each of them provides the other with financial support, and



One or each of them provides the other with domestic support and personal care

Tax payable on lump sum

Component	Dependant	Non-dependant
Taxable (taxed)	Tax free	Lower of MTR or 15%
Taxable (Untaxed)	Tax free	Lower of MTR or 30%
Tax free	Tax free	Tax free

Payments from foreign super funds

- Classified as non-complying funds
- Payout of death benefits
- Div 305 quarantines prior residency period
- Applicable funds earnings
 - Under 6 months tax free - section 305-60
 - Post 6 months assessable - section 305-70



Case study

Background



Retired gentleman – luxury home



Pension and Australian securities supporting him



Solicitors appointed LPRs



\$1m portfolio, but never quoted TFN – cost base history minimal



Foreign credit card



Foreign bank account, annuity + dividends



20 years no tax returns

Outcome

¥ Obligation for 20 years ITRs

₿ Reconstruction (global income)

✓ Voluntary Disclosure

📄 ATO due diligence

💰 Six figure tax payment

👤 Release from Commissioner

📊 DSS discussion ...

Closing remarks

- Law Council of Australia
- 12-14% interpretative advice
- Business and investment structures...
- International aspects!
- Expect the unexpected

Key takeouts for your practice

- How does your advice impact intergenerational wealth transfers?
- Clients for life + their family!
- Collaborative practice opportunities
- Quality estate planning essential
- Cost base information
- Watch capital losses
- Executor roles??

Q&A

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