



Australian Government
Inspector-General of Taxation
Taxation Ombudsman

Death and Taxes

An investigation into ATO systems and processes for
dealing with Deceased Estates

July 2020

Introduction and Background



Terms of Reference

The investigation seeks to identify opportunities to improve the administration of deceased estate tax compliance. The IGTO will examine and consider:

1. the experiences of the community (family and friends) in managing the tax affairs for the deceased;
2. the ATO's policies, processes and guidelines for receiving information from and dealing with deceased estates;
3. the public guidance issued by the ATO to assist executors or administrators;
4. the ATO's systems, including the ATO Portals, for dealing with deceased estates;
5. any legislative impediments to the efficient administration of deceased estates; and
6. any other relevant issues to the administration of deceased estate tax obligations.

Key findings and statistics

- ABS data shows approximately 160,000 Australians die each year – refer Table 1
- Approximately 82% of Australians are aged 65 or over at their date of death and approximately 55% are over the age of 80.
- It is estimated that approximately 45% of Australians die intestate – without a will.
- An ATO statistical sample suggests that 86% of deceased estates do not lodge a return for more than 3 years ... suggesting that most deceased estates are finalised within 3 years of the date of death.
- Multiple notifications of a death are currently required across Federal, State and Territory and local government and various other business and community organisations.

Key findings and statistics- number of deaths in Australia

	2016	%	2017	%	2018	%
Total	158,503	100%	160,909	100%	158,495	100%
Aged 0 to 14	1,407	0.9	1,472	0.9	1,348	0.9
Aged 15 to 64	27,400	17.3	27,065	16.8	27,194	17.2
Aged 65 to 79	42,339	26.7	43,559	27.1	43,365	27.4
Aged 80 or over	87,354	55.1	88,808	55.2	86,549	54.6

Source: Australian Bureau of Statistics (33020DO003_2018 Deaths, Australia, 2018). In each of 2016, 2017 and 2018 respectively there were 3, 5 and 3 deaths where age was not stated in the data. As at the date of this report, the ABS has not released statistics in relation to deaths for the 2019 Calendar Year.

Key findings and statistics

- State and Territory laws dealing with succession, trusts, wills and estates are relevant in determining who can 'represent' the deceased after their death
- The administration of the estate depends on State and Territory laws dealing with property, survivorship, trusts and other assets
- State and Territory laws may adopt policies to encourage informality in estate administration which do not interact easily with Commonwealth Taxation administration laws in some circumstances
 - not all States and Territories require probate or letters of administration to issue in all circumstances to administer the estate
 - A number of tax provisions operate only in circumstances where probate has been granted
 - For a trust to be recognised for tax purposes assets must vest in a Trustee
 - except in limited circumstances which are assessed on a case-by-case basis, a grant of probate or letters of administration is required before the ATO is able to freely engage with LPRs
- Different institutions with whom the deceased held assets may also impose their own requirements before assets are released
- These uneasy interactions may create unnecessary compliance costs

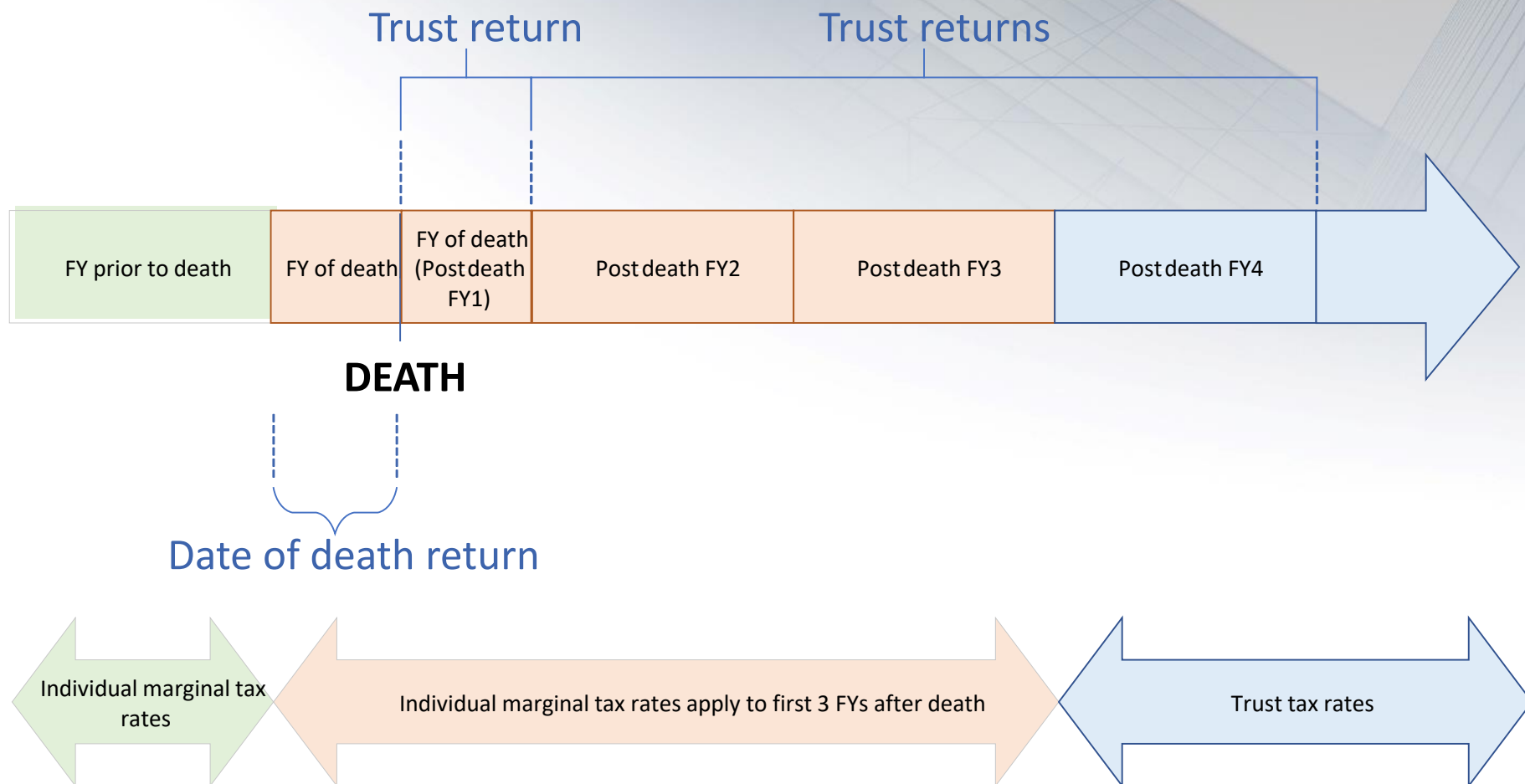
Notification of deaths and subsequent tax lodgements

- Births, Deaths and Marriages (BDM) registries around Australia collect information on deceased taxpayers
- The ATO can match approximately **77%** of this data
- There is no formal requirement to notify the ATO of a death although the ATO encourages such notification so that it can update its records, particularly where death data cannot be matched
- The LPR may have a statutory or fiduciary obligation to:
 - lodge any prior year returns that are outstanding;
 - lodge a date of death return from 1 July to the date of death of the taxpayer; and
 - where required, a deceased estate return (a trust return) for the remainder of the financial year and any other financial years during which the estate is administered.

Tax rules & rates for Deceased Estates

Up to date of death: Individual (I) Returns	3 financial years <i>following</i> date of death: Trust (T) Returns required	3 financial years <i>after</i> date of death: Trust (T) Returns
<p>The deceased is taxed at individual tax rates up to the date of death</p>	<p>Tax rates for 3 financial years after death mirror individual marginal tax rate brackets, this includes the full tax-free threshold (currently \$18,200), but without the tax offsets (concessional rebates), such as the low-income tax offset and no Medicare levy is payable .</p> <p>Most estates would be fully administered within three (3) years of the date of death – especially simple estates.</p> <p>There may be some estates where disputes or delays results in the estate continuing beyond three years.</p>	<p>After the three (3) financial year period expires, different deceased estate tax rates apply (which exclude any tax free threshold). Trust rates apply from Year 3 until estate is finalised – ie all assets distributed to beneficiaries</p>

Tax rules & rates timeline



Who should finalise the deceased's tax affairs after their death?

- This is a threshold question
- Implementation of a number of simplification and red tape reduction recommendations depends in part on how the ATO can administer deceased estates - to be confirmed
- This includes notifying the ATO of the death, lodging outstanding tax returns, paying taxes and claiming refunds
- The threshold questions for tax administration purposes are:
 - Can State and Territory laws define which representatives of a deceased individual should be recognised by the Commonwealth?
 - Does the Commonwealth taxation law operate as a Code for the purpose of recognising representatives of the deceased?
 - Can federal law, such as the TAA 1953, operate to qualify or limit the application of State and Territory laws?

Who should finalise the deceased's tax affairs after their death?

- Legally, the issue can be complicated
 - What are the assets in the estate? Where are they located?
 - Is it necessary for a Court to grant Probate or Letters of Administration
- A deceased estate can be administered informally in some circumstances – that is, without any legal requirement to obtain probate or a grant of administration – especially where there is a surviving spouse.
- This has implications for both the deceased estate, its representatives and the Commissioner.

Assets at death - part of the deceased estate? How to Transfer?

Banks and building societies - Joint accounts

Life insurance

Motor vehicles

Furniture, jewellery and personal belongings

Superannuation

Real Property

Example – Beth from Brisbane

- Beth lives in Brisbane. She owns 6 rental properties, a small bank account and some personal effects.
- Beth dies. By her Will she appoints her niece Bella as her sole executor and beneficiary.
- Bella is advised that she does not need to obtain probate from the Queensland Supreme Court, which appears to be consistent with the Queensland Supreme Court website, which notes:

Do you need probate?

You should ask the organisation involved (e.g. financial institution) whether you need a grant of probate. You may not need one if:

- 1. the value of the assets is relatively small (e.g. a small bank account)*
- 2. the real estate is to be transferred to a beneficiary named in the will*
- 3. you have to sell real estate.*

You don't need a grant of probate if the asset (e.g. the family home) is in joint names because it already belongs to the surviving joint owner.

The [Land Titles registry](#) has a special procedure for 2 and 3, and you don't usually need a grant of probate.

Example – Beth from Brisbane

- Bella can transfer the properties to herself - she does not need to obtain probate to do this. However, before she does so she will need to consider her duties and obligations under succession law, including payment of liabilities of Beth's estate.
- Bella is unsure whether Beth had any outstanding tax obligations at the time of her death (i.e., unpaid tax amounts or unlodged tax returns).
- Bella wants to be sure that all outstanding tax matters have been addressed before she formally proceeds to wind up the estate.
 - Section 254(1)(e) of the *Income Tax Assessment Act 1936* makes Bella personally liable for any tax payable in respect of the income, profits or gains to the extent of any amount that he or she has retained, or should have retained, under paragraph (d) of section 254(1) of the ITAA 1936.
- Bella tries to obtain information from the ATO about Beth's tax affairs but the ATO officer requests that Bella first obtain a grant of probate of Beth's Will.

Example – Beth from Brisbane

- This example raises a number of questions for Bella:
 - *Does Bella need to obtain probate for tax purposes only?*
 - *How can Bella be confident that she knows what tax liabilities and lodgements are outstanding for Beth and her estate?*
 - *Without a grant of probate - what information could be disclosed by the ATO to Bella about Beth's affairs to assist her in lodging any outstanding returns on Beth's behalf?*
 - *should/can Bella nonetheless lodge any returns on Beth's behalf?*
 - *can Bella receive any refunds or credits owing to Beth in the absence of probate? and*
 - *what confidence does Bella have in winding up Beth's estate that there won't be any residual tax liabilities that could be recovered from her personally?*

Who should finalise the deceased's tax affairs after their death

- The tax position is reasonably clear ***after*** a grant of probate and letters of administration, this is not always required as a matter of State and Territory law or by the institutions with whom the deceased held assets
- Practically, if the deceased has indicated their intention (by their last will and testament) is to appoint a 'named' representative, should this determine who can represent the deceased to finalise outstanding tax matters?
 - Section 995-1 definition of LPR means ... an executor or administrator of an estate of an individual who has died
 - Section 6(1) definition of Trustee ... includes and executor or administrator, guardian ...
- If there is no will, should the surviving spouse or other beneficiaries be recognised for tax purposes?
- Who can engage with the ATO if there has been no grant of probate?
- What if family members and next of kin of the deceased wish to engage with the ATO to access refunds or credits due?
- When do representatives of the estate have certainty that tax matters have finalised and assets may be distributed to beneficiaries (i.e., the ATO is out of time to recover unpaid taxes from the assets of the deceased or beneficiaries)?

In the absence of probate or letters of administration...

The ATO website states:

Except in limited circumstances, we can't disclose the deceased person's information to other people. This includes family members, an individual named as executor in a will, or their nominated representatives. We'll assess any request for information on a case-by-case basis. We won't record the person or any nominated representative as an authorised contact for the deceased estate.

The 'limited circumstances' apply where disclosure can be made in the performance of the officer's duties. For example, to enable lodgement of a return, to inform the representative that returns need not be lodged or to provide access to certain refunds depending on the amount.

Summary of recommendations to the ATO



Recommendations to the ATO

1. Review, refresh and consolidate advice and guidance for deceased taxpayers, including binding guidance for lodgement of returns and Tax File Numbers (TFNs)
2. Better integrate ATO notification with existing end-of-life processes
3. Allow digital notification of death including by registered tax practitioners
4. Promote digital deceased estate TFN application channels and enable easier application by, for example, adding functionality to lodge through the Online Services for Agents system, the ATO website and/or MyGov

Recommendations to the ATO

5. Simplify tax filing requirements for a deceased taxpayer – especially simple estates and where filing is necessary to process low value franking credits and other tax refunds
6. Explore any challenges associated with applying general taxation of trusts principles to deceased estates with stakeholders and any need for legislative change

Recommendations to the ATO

7. Confirm the ATO position on the interaction between State and Territory succession laws and tax laws to confirm which ‘representatives’ of the deceased can represent the deceased for various tax purposes
 - particularly in circumstances where neither probate nor letters of administration are required by State and Territory succession laws; and
 - leverage expertise in the community and from its consultative forums to seek feedback on the position and any proposed changes to administrative arrangements or the need for legislative change to find a workable solution.

Recommendations to the ATO

8. Provide registered tax practitioners (appointed by LPRs with whom the ATO is authorised to engage) with access to any correspondence sent to the deceased taxpayer's MyGov that is not otherwise accessible through Online Services for Agents.
9. Identify key enquiries that may require escalation (through consultation with external stakeholders with expertise in succession law, wills and estates) and develop escalation channels to dedicated areas within the ATO who are trained to provide specialist advice on deceased estate issues
10. Conduct a post implementation review, in consultation with external stakeholders, within five years to assess the effectiveness of measures as implemented

Please contact us for any further enquiries

