

New duty rules for Discretionary Trusts with NSW Residential Property - take action by December 2020

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Revenue NSW are providing a final opportunity for trustees of discretionary trusts, with an interest in NSW residential property to amend the trust's deed to avoid being subject to

additional state taxes. However, the amendment must be in place by 31 December 2020.

They have also confirmed that a discretionary trust can trigger liability to these taxes not only from having direct ownership of NSW residential property, but also where the trust invests in another entity which is the actual property owner.

Background

New South Wales imposes surcharge purchaser duty on acquisitions of residential land by a 'foreign person' (currently 8% of the market value of the property). Further, surcharge land tax applies (currently 2% of the unimproved value of the land) to residential land owned by a 'foreign person'. There is no tax-free threshold available in respect of surcharge land tax.

A discretionary trust is subject to surcharge purchaser duty and surcharge land tax if potential beneficiaries of the trust include 'foreign persons'. These surcharges can also apply where the landowner is a company or unit trust, with a discretionary trust as a shareholder or unitholder, potentially deeming the landowner to be a foreign person. The rules also apply where there is a chain of interposed entities between the land-owning entity and the discretionary trust, not just a direct connection.

Broadly, a 'foreign person' is an individual who is not an Australian citizen and who is not 'ordinarily resident' in Australia. An individual is taken to be 'ordinarily resident' in Australia at a particular time if they have been in Australia for 200 or more days in the preceding 12 months period and, at that time:

- their continued presence in Australia is not subject to any limitation as to time imposed by law; or
- the person is not in Australia, but, immediately before the person's most recent departure from Australia, the person's continued presence in Australia was not subject to any limitation as to time imposed by law.

A company or trust where a foreign person has an interest of at least 20% in the entity, or two or more foreign persons have an interest of at least 40% collectively are also treated as a 'foreign person', including any interests held by associates. Where these thresholds are reached, such entities will be subject to the surcharges.

As most discretionary trust deeds define their beneficiaries broadly, a significant proportion of our clients with discretionary trusts holding interests in residential land in NSW will find potential beneficiaries of their trust include 'foreign persons'. As a result, the trust is potentially liable for surcharge purchaser duty and surcharge land tax.

The application of these surcharges can be avoided via an amendment to the discretionary trusts deed. However, the amendments must be in accordance with the Commissioner of State Revenue's requirements. An amendment that does not meet these requirements would still expose the landowner to these surcharges.

The Commissioner has provided a limited timeframe to appropriately amend discretionary trusts deed by 31 December 2020.

Where such an amendment is made, this will ensure both a direct and indirect landowner is not liable for both future and past surcharge amounts and provide the ability to have any previous surcharge paid refunded.

Action required

If you or your clients with discretionary trusts (including hybrid trusts), or companies/unit trusts where a discretionary trust has an interest in that entity (both directly and indirectly), that hold residential land in NSW, they should speak with their legal adviser to determine:

1. Whether the landowner is impacted by these surcharges, and if so
2. What amendments to the trust deed of the discretionary trust, if any, are required.

If you have any queries, or would like to discuss the above further, please contact your [Fordham Partner](#).

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