

Discretionary trusts and surcharge purchaser duty and surcharge land tax in NSW

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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'. Where the trust holds an indirect interest in land through interposed entities, liability can also arise.

Broadly, a 'foreign person' includes:

- an individual who is:
 - not an Australian citizen and
 - not 'ordinarily resident' in Australia;
- a corporation or a trustee of a trust in which an individual not 'ordinarily resident' in Australia, a foreign corporation or a foreign government holds an associate inclusive interest of at least 20%;
- a corporation or trustee of a trust in which two or more persons, each of whom is an individual not 'ordinarily resident' in Australia, a foreign corporation or foreign government hold together with their associates 40% or more of the interests in the entity;
- a foreign government; or
- any person prescribed by the *Foreign Acquisitions and Takeovers Regulations 2015* (Cth).

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.

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.

Legislation currently before NSW Parliament proposes to provide:

- an exemption from and refund of surcharge purchaser duty for transactions prior to 31 December 2019, and
- an exemption from and refund of land tax for the 2017, 2018 and 2019 land tax years, where the trustee of the trust amends the trust deed, before midnight on 31 December 2019, to permanently prevent potential beneficiaries that are 'foreign persons' from receiving distributions from the trust.

Action required

If you have a discretionary trust (including hybrid trusts) that hold an interest in residential land in NSW, either directly or indirectly, you should to seek advice to determine:

1. whether their trust is impacted by the proposed legislation, and if so
2. what amendments to the trust deed, if any, are required to permanently exclude potential beneficiaries that are foreign persons from receiving distributions from the trust.

If you have any queries, or would like to discuss the above further, please contact your Fordham Business Advisors on 02 9229 9000 or info@fordhamgroup.com.au

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