

DOES YOUR FAMILY TRUST HAVE RESIDENTIAL PROPERTY IN NSW – IF SO, READ ON!

The NSW Government passed *The State Revenue Legislation Further Amendment Act 2020* (“**Act**”) effective from 24 June 2020 that is relevant to trustees of discretionary trusts (including discretionary testamentary trusts) that own or will purchase residential property in NSW and have trust deeds that do not contain a term preventing foreign beneficiaries from benefitting under the trust.

This includes building managers who buy residential units in the name of their family trust.

The transitional provisions under the Act allow for exemptions and refunds of surcharge purchaser duty and land tax, provided that the trust deed contains terms that prevent a foreign person from benefitting.

Background

Back on 21 June 2016, ‘**foreign persons**’ in NSW became liable to pay:

- (a) a surcharge purchaser duty (currently 8% of the market value of the property) on the acquisition of residential property in NSW, and
- (b) a surcharge land tax (currently 2% of the unimproved value of the land) for any residential property in NSW owned as at 31 December each year.

Under the transitional provisions at the time, a trustee of a discretionary trust was deemed not be a foreign person if the trust deed prevented a foreign person from being a beneficiary prior to the commencement date of the Act (ie date of assent being 24 June 2020).

The Act provides that trustees of discretionary trusts who have amended their trust deeds on this basis will be entitled to an exemption from, or refund of, prior surcharge liabilities.

Trust deeds amended between 24 June 2020 and 31 December 2020

From 24 June 2020, to access the exemptions (and refunds of prior surcharge liabilities) and not be considered a foreign trustee, the amendment to the discretionary trust deed must meet both of the following requirements **by 31 December 2020**:

1. no potential beneficiary of the trust is a foreign person (the ‘**no foreign beneficiary requirement**’); and
2. the terms of the trust must not be capable of amendment in a manner that would result in a foreign person being a potential beneficiary (the ‘**no amendment requirement**’).

Opportunities before 31 December 2020

Trustees of discretionary trusts which own residential property in NSW should strongly consider whether to amend their trust deeds before 31 December 2020 to irrevocably prohibit foreign persons from benefitting. If the trust deed is not amended to irrevocably exclude foreign persons from being a beneficiary of the trust before midnight on 31 December 2020, the trustee will be considered a foreign trustee and:

- (a) surcharge purchaser duty (currently 8% of the market value of the property) will apply to the purchase of residential property in NSW;
- (b) land tax surcharge (currently 2% of the unimproved value of the land) will apply annually on the residential property in NSW held as at 31 December of each year;
- (c) land tax surcharge will apply for the 2017, 2018, 2019 and 2020 land tax years; and
- (d) there will be no entitlement to receive refunds for surcharge duty or surcharge land tax already paid in respect of the above transactions or land tax years.

Summary

If you have a family trust deed and you intend to acquire residential property in NSW in the future, act now and arrange for you solicitor to make the appropriate amendment to your trust deed before 31 December 2020.

After that date, the opportunity to avoid the substantial additional taxes will be lost!

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