

Discretionary trusts

Foreign duty and land tax surcharge

Key points

- Discretionary trusts that own land in Australia may be subject to additional foreign duty and land tax surcharges if they do not meet the specific requirements of the state or territory in which the land is owned
- The surcharges may apply to a trust even where it has no foreign controllers and has never distributed to a foreign beneficiary
- Your clients should seek advice on the structure of their land-owning discretionary trusts and whether changes to the trust are required so that it is not subject to foreign duty or land tax surcharges

Overview

1. Each state and territory in Australia has a different regime that governs the land tax and duty treatment of investment by trusts in land, including the way in which foreign duty and land tax surcharges apply.
2. If you have a discretionary trust that owns land or intends to acquire land, you should ensure that the trust deed includes the specific provisions required by the relevant state or territory so that additional duty and land tax is not payable. This should be done before signing a contract to acquire the land.
3. As the regime in each state and territory is different, it is best practice for separate trusts to be set up for the investment in each different jurisdiction, with each trust containing the restrictions necessary for that jurisdiction.
 - (a) For example, in Queensland, if each of the default beneficiaries are Australian citizens and they do not renounce their citizenship, the trust will not be liable for foreign duty or land tax surcharge in Queensland.
 - (b) However, in New South Wales, it is also necessary to permanently exclude all persons who are not Australian citizens or permanent residents, and any permanent residents who fail to satisfy an ordinarily resident in Australia test, as beneficiaries of the trust. If the trust deed does not contain those exclusions, it is deemed to be a 'foreign trust' (even if none of the current beneficiaries are foreign persons) and a foreign duty surcharge of 8% and a foreign land tax surcharge of 2% will apply. Similar deeming provisions also apply in Victoria and Tasmania.
4. We recommend against trusts that are drafted to comply with the different restrictions required by each state as they can be overly complex and restrictive.

Summary

The different foreign duty and land tax surcharge regimes applicable to discretionary trust in each state and territory as at May 2021 are summarised in the below table:

<i>State or territory</i>	<i>Property</i>	<i>Duty surcharge</i>	<i>Land tax surcharge</i>	<i>Foreign trust</i>
Queensland	For land tax, all land For duty, residential land	7%	2%	If the default beneficiaries who are entitled to 50% or more of any default distributions are foreign persons, the trust is deemed to be a foreign trust
New South Wales	Residential land	8%	2%	If any potential beneficiary is a foreign person, the trust is deemed to be a foreign trust All foreign persons must be permanently excluded as beneficiaries by way of a variation to the trust deed

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Victoria	Residential land	8%	2%	For land tax, if any specified beneficiary is a foreign person, the trust is deemed to be a foreign trust For duty, if any potential beneficiary is a foreign person, the trust is deemed to be a foreign trust
South Australia	Residential land	7%	N/A	If any trustee, appointor/principal, specified beneficiary or default capital beneficiary is a foreign person, the trust is deemed to be a foreign trust
ACT	Residential land	N/A	0.75%	If any specified beneficiary is a foreign person, the trust is deemed to be a foreign trust
Western Australia	Residential land	7%	N/A	If any trustee or appointor is a foreign person, and a default beneficiary together with their associates is entitled to 50% or more of any default distributions, the trust is deemed to be a foreign trust
Tasmania	Residential and primary production land	Residential land, 3% Primary production land, 0.5%	N/A	If any potential beneficiary is a foreign person, the trust is deemed to be a foreign trust

5. There are also additional 'related party' and 'associate' tests that can apply to deem a discretionary trust to be foreign in certain circumstances.
6. Seek specialist advice in determining how these rules apply as there are differences in each state (for example, there are differences in the definitions of 'residential land' and 'foreign person').
7. There are also some exemptions and concessions available in particular states and territories that may apply to a discretionary trust so that it will not be deemed a foreign trust.
8. If you require advice on the application of the foreign duty or land tax surcharge rules or need to amend a trust deed so that it will not be a 'foreign trust', please contact our team.

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