

NSW duty and land tax surcharge changes — action needed before 31 December 2019

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Upcoming changes

There are currently changes before the NSW Parliament which, if passed into law, will have an impact for any discretionary trust that holds residential property in NSW. To minimise any risk, trustees and advisers should take action to be ready for the proposed changes and ensure surcharge duty or land tax liability is not incurred unnecessarily as the current deadline is so close.

As land tax is calculated on land held as at midnight on 31 December each year, these proposed changes are expected to have an impact on discretionary trusts holding relevant property at that time despite the changes not yet being law. As outlined below, the changes may have retrospective effect. Trustees and advisers have been given very little time to deal with these changes. In light of the usual end of year work requirements and delays and the fact that the law has not yet passed, we hope that the NSW Government deals with such trusts fairly and provides more time for trustees to make any necessary changes.

The *State Revenue Legislation Further Amendment Bill 2019* (NSW) ('Bill') contains amendments relating to the surcharge purchaser duty provisions of the *Duties Act 1997* (NSW) ('DA') and the surcharge land tax provisions of the *Land Tax Act 1956* (NSW) ('LTA') and the *Land Tax Management Act 1956* (NSW) ('LTMA'). These provisions impose a surcharge duty or land tax on 'foreign persons' and 'foreign trustees' that acquire residential-related property or residential land respectively.



Broadly, the amendments contained in the Bill, if passed, will provide that a trustee of a discretionary trust is taken to be a foreign trustee if the terms of the trust do not prevent a foreign person from ever being or becoming a beneficiary. Such exclusionary provisions must be irrevocable.

The amendments also provide transitional arrangements that have retrospective effect to the time these surcharges were introduced so that trustees who may have incurred this surcharge duty or land tax may also be exempt from liability. The transitional provisions require any affected trust must be varied before 31 December 2019.

It is not yet clear how the new provisions will operate, but the transitional provisions contain language that indicates they will retrospectively apply to acquisitions that have already occurred and land tax in respect of earlier years since these surcharges were introduced. Failing to take timely action could result in the surcharge duty and/or land tax being applied to a trust for previous acquisitions and land tax years.

It is important that any trustee of a discretionary trust that holds property in NSW considers the application of these amendments and whether it should vary the terms of the trust to fall within the terms of these new provisions. The full text of the Bill can be found on the [Parliament of New South Wales website](#) and should be read in detail.

We have outlined the amendments in detail in the annexure to this article.

Surcharge liabilities overview

It should be remembered that these NSW surcharge provisions can have a huge impact on a discretionary trust. For example, a foreign trustee pays a surcharge of 8% duty on the acquisition of 'residential related property' (DA, s 104L) and will pay a surcharge of 2% land tax on 'residential land' (LTA, s 5A).

On a \$1 million residential property, this would amount to an additional \$80,000 duty on acquisition and additional land tax of \$20,000 per annum (although it should be noted that the calculations of land value under these taxes differ and these figures are indicative only).

What does this mean?

These amendments mean that where a discretionary trust deed does not specifically contain irrevocable provisions that restrict a trustee from being able to distribute any trust property to a foreign person or apply any trust property for the benefit of a foreign person, the trustee of the trust will be a foreign trustee for the purposes of the surcharge duty and land tax and the surcharge will apply.

Any discretionary trust holding property classed as residential-related property or residential land in NSW (see legislation for meanings of these terms) will need to be amended to include provisions covering the matters set out above if the trustee is to stay

outside the duties and land tax surcharge regime applying to foreign persons.

Conclusion

If you or your client has a discretionary trust holding relevant property in NSW action should be taken now if it is intended that the trustee is not to be a foreign trustee. Please contact us to discuss the options to proceed.

It should also be noted that the Bill also has implications for testamentary and potentially a range of other trusts and implements other amendments which are beyond the scope of this brief news alert.

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This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.

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Annexure to article — NSW Duty and Land Tax Surcharge Changes — Action needed before 31 December 2019

Duties Act 1997 (NSW) amendments

Section 104J(1) of the DA currently provides (emphasis added):

104J Meanings of “foreign person” and “foreign trustee”

(1) In this Chapter:

“foreign person” means a person who is a foreign person within the meaning of the Foreign Acquisitions and Takeovers Act 1975 of the Commonwealth, as modified by this section.

“foreign trustee” means a person who is a foreign person because of the person’s capacity as the trustee of a trust.

The Bill would amend the DA to insert a new s 104JA of the DA which would provide as follows (emphasis in original):

104JA Special provisions for discretionary trusts

(1) The trustee of a discretionary trust is taken to be a foreign trustee for the purposes of this Chapter unless the trust prevents a foreign person from being a beneficiary of the trust.

(2) If a discretionary trust prevents a foreign person from being a beneficiary of the trust, the trustee of the trust is not in that capacity a foreign trustee for the purposes of this Chapter.

(3) A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust if (and only if) both of the following requirements are satisfied—

(a) no potential beneficiary of the trust is a foreign person (the ***no foreign beneficiary requirement***),

(b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the ***no amendment requirement***).

Note. Under the transitional arrangements for this section in Schedule 1, the no amendment requirement does not apply to a trust that satisfies the no foreign beneficiary requirement immediately before the commencement of this section.

(4) A person is a ***potential beneficiary*** of a discretionary trust if the exercise or failure to exercise a discretion under the terms of the trust can result in any property of the trust being distributed to or applied for the benefit of the person.

Note. A potential beneficiary is not limited to persons named in the trust instrument and extends to the members of any class of persons to whom or for whose benefit trust property can be distributed or applied pursuant to the discretions of the trust.

(5) For the removal of doubt, a person is not a potential beneficiary of a discretionary trust if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.

(6) In this section, ***property*** includes money, and a reference to the distribution or application of property includes a reference to the payment of money.

The relevant transitional provisions to be inserted into the DA provide that:

(1) Section 104JA extends to a surcharge duty transaction that occurred before the commencement of that section.

(2) If the trustee of a discretionary trust is liable as a foreign trustee for surcharge purchaser duty on a transfer of dutiable property that occurs before the commencement of section 104JA, or after that commencement but before midnight on 31 December 2019—

- (a) the trustee is exempt from that duty if the terms of the trust have been amended, before midnight on 31 December 2019 and before the due date for payment of duty, so that the trust prevents a foreign person from being a beneficiary, or
- (b) if that duty has been paid, the trustee is entitled to a refund of that duty if the terms of the trust have been amended, before midnight on 31 December 2019, so that the trust prevents a foreign person from being a beneficiary.
- (3) A trust that satisfies the no foreign beneficiary requirement under section 104JA immediately before the commencement of that section is considered for the purposes of that section to prevent a foreign person from being a beneficiary of the trust (without having to satisfy the no amendment requirement under that section).

Land Tax Act 1956 (NSW) and Land Tax Management Act 1956 (NSW) amendments

Section 5A of the LTA currently provides the following in respect of imposing the surcharge land tax:

- (1) Land tax is payable under this section in respect of residential land owned by a foreign person (“surcharge land tax”).
- (2) In respect of the taxable value of all the residential land owned by the foreign person at midnight on 31 December in any year (commencing with 2016), surcharge land tax is to be charged, levied, collected and paid under the provisions of the Principal Act and in the manner prescribed under that Act for the period of 12 months commencing on 1 January in the next succeeding year at the rate of:
- (a) in the case of all residential land owned by the foreign person at midnight on 31 December 2016—0.75% of that taxable value as assessed under the Principal Act, and
- (b) in the case of all residential land owned by the foreign person at midnight on 31 December in any other year (commencing with 2017)—2% of that taxable value as assessed under the Principal Act.

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The Bill would amend the LTA to insert a new s 5D of the LTA which would provide as follows (emphasis in original):

5D Surcharge land tax—discretionary trusts

- (1) The trustee of a discretionary trust is taken to be a foreign person in that capacity for the purposes of section 5A if the trust does not prevent a foreign person from being a beneficiary of the trust.

(2) If a discretionary trust prevents a foreign person from being a beneficiary of the trust, the trustee is not in that capacity a foreign person for the purposes of section 5A.

(3) A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust if (and only if) both of the following requirements are satisfied—

(a) no potential beneficiary of the trust is a foreign person (the ***no foreign beneficiary requirement***),

(b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the ***no amendment requirement***).

Note. Under the transitional arrangements for this section in Schedule 2 to the Principal Act, the no amendment requirement does not apply to a trust that satisfies the no foreign beneficiary requirement immediately before the commencement of this section.

(4) A person is a ***potential beneficiary*** of a discretionary trust if the exercise or failure to exercise a discretion under the terms of the trust can result in any property of the trust being distributed to or applied for the benefit of the person.

Note. A potential beneficiary is not limited to persons named in the trust instrument and extends to the members of any class of persons to whom or for whose benefit trust property can be distributed or applied pursuant to the discretions of the trust.

(5) For the removal of doubt, a person is not a potential beneficiary of a discretionary trust if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.

(6) In this section, ***property*** includes money, and a reference to the distribution or application of property includes a reference to the payment of money.

(7) Chapter 11A (Tax avoidance schemes) of the *Duties Act 1997* applies in respect of the avoidance of surcharge land tax in connection with the operation of this section in the same way as that Chapter applies in respect of the avoidance of duty under that Act, and for that purpose—

(a) a reference in that Chapter to duty is to be read as including a reference to surcharge land tax, and

(b) a reference in that Chapter to “this Act” is to be read as a reference to the *Land Tax Act 1956* and the *Land Tax Management Act 1956*.

The relevant transitional provisions to be inserted into the LTMA provide that:

Amendments relating to discretionary trusts

- (1) Section 5D of the Land Tax Act 1956 applies to the assessment of land tax liability in respect of the 2017 land tax year and subsequent land tax years.
- (2) If the trustee of a discretionary trust is liable in that capacity as a foreign person for surcharge land tax in respect of the 2017, 2018 or 2019 land tax year—
- (a) the trustee is exempt from that land tax if the terms of the trust have been amended, before payment of the land tax is due and before midnight on 31 December 2019, so that the trust prevents a foreign person from being a beneficiary, or
- (b) if that land tax has been paid, the trustee is entitled to a refund of that land tax if the terms of the trust have been amended, before midnight on 31 December 2019, so that the trust prevents a foreign person from being a beneficiary.
- (3) A trust that satisfies the no foreign beneficiary requirement under section 5D of the Land Tax Act 1956 immediately before the commencement of that section is considered for the purposes of that section to prevent a foreign person from being a beneficiary of the trust (without having to satisfy the no amendment requirement under that section).

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