

TAX ALERT: DO YOU NEED TO UPDATE THE FAMILY TRUST DEED TO EXCLUDE FOREIGN PERSONS AS BENEFICIARIES?

With the introduction of land tax and duty surcharges on foreign persons (including discretionary trusts which have foreign persons within the class of potential beneficiaries), now is the time to review trust deeds of family trusts.

1. WHAT IS THE PROBLEM?

Retrospective surcharges apply in NSW, Victoria and Queensland for the 2017 land tax year:

NSW: From 21 June 2016, a **4% surcharge purchaser duty** applies where a foreign person acquires NSW residential land.

0.75% surcharge land tax applies for the 2017 land tax year (and 2% for 2018 land tax year onwards, with no tax-free threshold or principal place of residence exemption) where a foreign person owns NSW residential land at 31 December each calendar year.

VIC: From 1 July 2016, the **foreign investor surcharge on residential stamp duty increased to 7%**.

From 1 January 2017, the **absentee owners surcharge increased to 1.5%** and applies to all land held in Victoria.

QLD: From 1 October 2016, **3% Additional Foreign Acquirer Duty** applies where a foreign person acquires residential property.

2. HOW DOES THIS APPLY TO FAMILY DISCRETIONARY TRUSTS?

For the purposes of applying the foreign duty surcharge, the legislation in New South Wales and Victoria has deemed each beneficiary in a discretionary trust to have a 100% beneficial interest in the trust fund. This means that if a foreign person (as defined) is not excluded as a beneficiary and from receiving a benefit from the trust, then the trust may be subjected to the higher duty rates, even if none of the beneficiaries who actually receive or are likely to receive distributions of income or capital are foreign persons.

In NSW, a Variation to Statute to avoid discretionary trusts becoming inadvertently liable for surcharge purchaser duty and/or surcharge land tax takes effect retrospectively from 21 June 2016 and is in force until the legislation is amended.

In NSW, a trust may apply for a **reassessment and refund of surcharge land tax** if the trust deed has been amended to exclude foreign persons as beneficiaries. The trust has six months to amend the trust deed from the date surcharge land tax is assessed (on the notice of assessment). If the amendment complies with the Variation to Statute, the Chief Commissioner will reassess the surcharge land tax to nil and issue a refund of any surcharge land tax already paid.

3. WHAT SHOULD I DO?

Review trust deeds of discretionary trust which holds (or will acquire) land in NSW, Victoria and Queensland for potential foreign beneficiaries. Consult Hall Chadwick where there are potential foreign beneficiaries and if amendment to trust deeds are required.

Note, if a foreign person may become a beneficiary of, or benefit from, a trust, then they are deemed to control the trust and hence the surcharge applies. It is irrelevant if the foreign person never actually becomes a beneficiary or never benefits from the trust.