



Tax changes for Discretionary Trusts after 31 December 2020

Author: [Lauren Weatherley](#)

Email: lauren@ealawyers.com.au

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If your Discretionary Trust, including some Discretionary Testamentary Trusts, holds or acquires residential land in New South Wales after 31 December 2020 then your trust will be liable to surcharge duty and surcharge land tax if you do not amend your Trust Deed before 31 December 2020.

What is a Discretionary Trust?

A Discretionary Trust is a trust where the Trustee has the discretion to determine which of the wide range of beneficiaries are to receive the capital and income of the trust and in what proportions. The beneficiaries do not have fixed entitlement or interest in the funds held by the trust.

A Discretionary Testamentary Trust is a trust created under a Will and only comes into effect upon the death of the Testator (Will-maker). The Trustee of the Discretionary Testamentary Trust can also exercise discretion in relation to the payment of capital and income to beneficiaries of the trust.

Discretionary Trusts and Discretionary Testamentary Trusts operate in a very similar manner.

What changes are needed and why?

The legislation was recently passed in NSW concerning "foreign persons" and ownership of real estate. The *State Revenue Legislation Further Amendment Bill 2019* (NSW), provides that "foreign persons" are liable for surcharge taxes in respect of transfer duty (known as stamp duty) and land tax when they acquire and hold residential land in NSW.

As a result of this legislation, Revenue NSW (the government body that governs transfer duty and land tax), take the position that each beneficiary of a Discretionary Trust is deemed to have a 100% interest in the income and property of the trust. This means that if a Discretionary Trust has 10 potential beneficiaries and 1 of those beneficiaries is a "foreign person", then the whole Discretionary Trust becomes liable for the surcharge taxes.

In order to properly supervise this legislation in respect of "foreign persons", Revenue NSW needs to ensure that there are no potential beneficiaries of a Discretionary Trust that are in fact "foreign persons".

The legislation provides that it is not enough for the Trustee of a Discretionary Trust to ensure the Discretionary Trust has no foreign beneficiaries. **A Discretionary Trust is "foreign" in respect of any residential land in NSW held in the Trust if the Trust Deed does not irrevocably exclude "foreign persons" from being beneficiaries of the Trust.**

Therefore, the Discretionary Trust must meet the following requirements in order to avoid surcharge taxes:

1. No potential beneficiary of the trust can be a "foreign person"; and
2. The terms of the Trust Deed of the Discretionary Trust cannot be capable of amendment which would allow, in the future, a "foreign person" being a potential beneficiary.

If there are named or specified beneficiaries of the Discretionary Trust that are "foreign persons", then those beneficiaries also need to be irrevocably removed from the trust as beneficiaries to avoid the surcharge taxes.

Therefore, if your Discretionary Trust currently holds, or plans to acquire, residential land in NSW, the Trust Deed for your Discretionary Trust needs to be amended before 31 December 2020 to irrevocably exclude "foreign persons" from being beneficiaries of the Trust.

What is a foreign person?

A foreign person is any person who is not:

- an Australian Citizen;
- a New Zealand citizen holding a specific type of visa; or
- a permanent resident who has lived in Australia for 200 or more days in the last 12 months from the date that the transfer duty or land tax liability arises.

There are then more complex definitions of when a company, trust or partnership (as opposed to an individual) is deemed to be "foreign".

What if I do not remove foreign person beneficiaries from my trust?

If you do not make this change to the Trust Deed of your Discretionary Trust before 31 December 2020, then your trust will be liable for surcharge purchaser duty and surcharge land tax if your trust holds or acquires residential land in NSW.

What is 'surcharge purchaser duty'?

Surcharge purchaser duty is paid in addition to standard transfer duty (known as stamp duty) upon the acquisition of residential land in NSW.

Surcharge purchaser duty is currently charged at 8% of the consideration paid or the value of the property. For example, if the trust purchased residential land in NSW for \$1,000,000.00 then the trust would be liable for standard transfer duty of \$40,335.00 (as at October 2020) **and** surcharge purchaser duty of \$80,000.00.

What is 'surcharge land tax'?

Surcharge land tax is paid in addition to any land tax the Discretionary Trust may already pay.

The current rate of surcharge land tax is 2% of the taxable value of all residential land owned by the Discretionary Trust as at 31 December each year.

Therefore, if you had a property within the Discretionary Trust with a land value of \$500,000.00, you would be required to pay, per year, \$10,000.00 in addition to the standard land tax of \$8,000.00 (as at October 2020) and assuming that no land tax threshold applies.

Get help from a Wills and Estates Lawyer

If you want to ensure that your Discretionary Trust does not become liable for further taxes from 1 January 2021, [we can assist you](#) with amending your Discretionary Trust Deed prior to 31 December 2020 to irrevocably exclude "foreign persons" from being beneficiaries of the Trust.

E&A Lawyers will:

- provide tailored advice specific to your Discretionary Trust;
- review your Trust Deed and any amendments or variations to ensure you have the ability to amend your Trust Deed;
- ascertain the changes required to your Trust Deed to irrevocably exclude foreign persons;
- draft the necessary amendments to the Trust Deed in the form of a Deed of variation; and
- arrange proper execution of the Deed of Variation of Trust Deed.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

[02 9997 2111](tel:0299972111)

info@ealawyers.com.au

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