

NSW property surcharges for discretionary trusts - Deadline extension

Limited time remains to amend discretionary trust deeds before unintended duties and taxes apply

13 February 2020 (Updated 31 August 2020)

Increased transfer duties on property acquisitions, and increased land tax on previously acquired property holdings, will soon be applied to trust deeds of family and other discretionary trusts unless steps are taken soon.

Changes to state impost surcharges for discretionary trusts

The *State Revenue Legislation Further Amendment Bill 2019* was introduced into the NSW Parliament on 22 October 2019 to amend legislation relating to NSW duties and land tax.

Among other measures, the Bill clarifies the liability to surcharge purchaser duty (as well as surcharge land tax) with respect to foreign trustees of discretionary trusts.

It provides that a trustee of a discretionary trust is deemed to be a foreign trustee if the terms of the trust **do not prevent** a foreign person from being a beneficiary.

If however the terms of the trust explicitly prevent a foreign person from being a beneficiary, the trustee is deemed to not be a foreign trustee for surcharge purchaser duty purposes, as well as the surcharge referable to land tax liabilities.

A further requirement, to ensure no surcharge liabilities arise, is that the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary who is a foreign person.

Transitional Arrangements

The final legislation provided transitional arrangements for surcharge purchaser duty and land tax (including the ability to obtain refunds) if the terms of a discretionary trust were amended to prevent a foreign person from being a beneficiary, **before midnight on 31 December 2020**.

This transitional arrangement arose out of earlier guidance from the Commissioner of Revenue NSW to exercise a discretion to give retrospective effect to amendments to trust deeds, such that the surcharge purchaser duty (and surcharge land tax) would not apply.

As a result of these new laws, time is running out to ensure surcharge liabilities on NSW properties do not arise and to potentially obtain refunds of land tax surcharges for example that were paid in respect of the 2017, 2018, 2019 or 2020 land tax years.

How can we help?

ShineWing Australia can assist with the review of trust deeds that may be impacted, as well as assess prior year land tax positions and eligibility for refunds.

Where a refund is available we can help clients with the drafting and submission of refund requests to Revenue NSW.

If you think that there may be a need to amend a discretionary trust deed to cater for the above ramifications, please contact us as soon as possible in order to ensure the timely review and where appropriate, amendment of impacted discretionary trust deeds.



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