

IS YOUR TRUST A FOREIGN TRUST FOR LAND TAX & DUTY PURPOSES?

We are currently being inundated by concerned clients who have been advised of recent changes to various State Duty Acts that now impose higher levels of land tax and purchaser duty for trusts that are considered 'foreign' trusts.

Some clients are advising they are being told **all** their trusts must be updated to exclude potential foreign beneficiaries being able to receive entitlement. We have heard stories similar to 'if any potential beneficiary is a foreign person or entity then it is a foreign trust and you will be taxed more'.

This extra duty liability on purchase and land tax liability currently arises in NSW, QLD and VIC. There are however tests for what classifies as a foreign trust.

In NSW this test is whether a foreign person has a substantial interest in the trust, for NSW this is 20% or more for a single person or 40% or more for two or more people combined. This is easily determined for fixed unit trusts, Discretionary or Hybrid Trusts would appear harder to determine.

The issue is the determination of who a foreign person is under the *Foreign Acquisitions and Takeovers Act 1975* (FATA). Section 18(3) FATA provides that each beneficiary of discretionary trust is taken to hold the maximum percentage of income or capital of the trust. Each trust with a foreign person as a potential beneficiary therefore technically may be a foreign trust – thus likely generating these comments all trusts must be upgraded.

The practical implication of this is that:

a) this would be extremely difficult for the relevant body to identify all the potential beneficiaries of a discretionary trust (most trustees don't know those!) to determine if there is a foreign person; and

b) this legal interpretation is not what we believe the intent of the new tax was to cover and, at a practical level, would not be applied by any government in that way. There are however many stranger laws that have been imposed so our job as legal advisers is to advise there is a potential risk, no matter how small the likelihood of actual application and imposition.

If you have a trust that there are clearly named foreign beneficiaries who have breached the foreign interest levels, then you must upgrade your Deed now. If you have trusts with Australian beneficiaries only and you are not aware of any foreign beneficiaries then your risk would likely be nominal. For those with circumstances in between you should have your Deed checked and possibly upgraded now.

The important thing for you is to educate yourself on the issues and rules and make an informed decision as to the risk you wish to take. If you wish to avoid all risk then we can assist in reviewing and upgrading your Deed now. If you want advice on your particular circumstances then provide your Deed and potential beneficiary list and we can comment on your risk level and whether a Deed upgrade is required.

