

# TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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## UPDATE 24 | Avoid Foreign Trust Status

You need to act before 31 December 2020. If you want to avoid foreign trust status by default and not pay surcharges, act fast. The issue applies to discretionary trusts holding residential property in NSW.

### Avoid Foreign Trust Status

On the 24th of June this year, the NSW [State Revenue Legislation Further Amendment Act 2020](#) received assent. This amendment act changed three things in NSW. It made amendments to the 97' Duties Act – so about the stamp duty you pay (officially called 'purchaser duty') – as well as the 1956 Land Tax Act and the Land Tax Management Act – so about the land tax you pay.

It is the effect of these amendments, that we will cover in this update. And we had to make it an update and not a regular episode, because the matter is urgent.

You only have until 31 December 2020 to avoid a foreign trust by default. So in this update Emily Pritchard of ACIS will tell you what needs to happen and why. To make sure that discretionary trusts don't start paying surcharge stamp duty and land tax on their residential property in NSW as a foreign trust.

Here is what we learned but please listen in as Emily explains all this much better than we ever could.

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### Avoid Foreign Trust Status

Foreign trusts have to pay surcharge stamp duty and land tax on residential property in NSW due to the now legislated State Revenue Further Amendment Act 2020 (NSW).

The problem is that any discretionary trust is a foreign trust by default, unless a trust deed specifically prevents a foreign person from being a beneficiary of the trust. So you need to check your deed and possibly amend it before you buy property in NSW (or any other state or territory in Australia).

However, what do you do if the trust already bought residential property in NSW? There is a way out but you need to act fast and amend the deed before 31 December. If the trust deed is amended by 31 December and then prevents a foreign person from being a beneficiary, then you will receive a refund of already paid surcharges for previous years.

But only if the trust prevents a foreign person from being a beneficiary of the trust by 31 December 2020.

### Surcharges

Discretionary trusts not excluding foreign persons in their deed pay surcharges on the acquisition and holding of NSW residential property under the Duties Act 1997 (NSW) and Land Tax Act 1956 (NSW).

The surcharges are an additional 8% of stamp duty on the purchase price. And an additional 2% each year on the land tax value.

### **Foreign By Default**

The trustee of a discretionary trust is taken to be a foreign person or foreign trustee unless the trust prevents a foreign person from being a beneficiary of the trust in its deed. So unless you specifically exclude foreign persons as beneficiary, you are a foreign trust by default.

### **Required Amendments**

To avoid foreign trust status, you must do three things.

1 – You must amend the deed to state that no foreign person can be a potential beneficiary of the trust. Let's call this the 'No Foreign Beneficiary Requirement'; and

2 – You must change the terms of the trust so that the deed can not be amended in a manner that would result in there being a potential beneficiary of the trust who is a foreign person. Let's call this the 'No Amendment Requirement'.

3 – And if the deed specifically names a foreign person as beneficiary, you must delete the name if you don't want to pay surcharges.

### **Named Foreign Beneficiary**

It is not enough to just generally exclude foreign persons if the trust deed specifically names a foreign person. You must delete the name of this foreign person from the trust deed as well.

Here is a quote of Emily Pritchard from this episode,

“The general exclusion of foreign persons is not sufficient to satisfy Revenue NSW if a person named as a beneficiary in the trust deed is foreign. In such circumstances, it is a requirement of Revenue NSW, that the person's name be deleted as a named beneficiary in addition to amending the trust deed to include the general exclusion of foreign persons.”

### **Indirect Interests**

Make sure you also consider indirect interests in residential property in NSW. A discretionary trust might not directly own property. But it might hold the shares of a company or the units in a trust that does.

Let's say a company owns residential property in NSW and a discretionary trust holds the shares in that company. In that case the discretionary trust could cause the company to be treated as foreign and assessed at surcharge rates. The same applies if a discretionary trust owns units in a unit trust that holds property.

So also review the trust deeds of discretionary trusts that hold units or shares in entities that own property.

### **Exempt**

So if you do all this, the trust will be exempt. The trust will be exempt from surcharge stamp duty and surcharge land tax for residential property in NSW.

## Refunds

If you already paid surcharges for previous years, you can receive a refund. You can apply for a refund if you amend the trust deed as discussed above. Before 31 December 2020.

So if you look after discretionary trusts holding residential property in NSW, act fast. Please make sure you get all this sorted before the 31 December 2020.

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[Declaring a Dividend](#)

[In Connection With Your Retirement](#)

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