

Discretionary Trusts And Residential Property – Surcharge Traps

Risk Management Topic:

Property and Lending



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Since the introduction of surcharge purchaser duty (SPD) and surcharge land tax (SLT), Lawcover has seen a high number of claims relating to the failure to advise clients in relation to liability and potential liability for SPD and/or SLT.

Where clients are individuals, it is critical to determine whether or not they are foreign persons for the purposes of the duties and land tax legislation.

Where a client is the trustee of a discretionary trust, even if none of the actual beneficiaries of that trust are foreign persons, the trustee will be liable for SPD and/or SLT if the trust instrument does not irrevocably exclude foreign beneficiaries (see [Foreign surcharges and discretionary trusts | Revenue NSW](#)).

To avoid being treated as a foreign trustee, the discretionary trust must meet both of the following requirements:

1. No potential beneficiary of the trust is a foreign person (the “no foreign beneficiary requirement”); and
2. The terms of the trust must not be capable of amendment in a manner that would result in a foreign person being a potential beneficiary (the “no amendment requirement”).

Some of the claims Lawcover has received arose out of situations where a solicitor was acting for the trustee of a discretionary trust acquiring residential property and did not consider it to be part of the retainer to review the trust deed or advise on liability for SPD and SLT.

Other claims have arisen where solicitors have prepared deeds of amendment to exclude foreign beneficiaries but have failed to ensure that the terms could not be amended to allow foreign beneficiaries in future.

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Practice tips

- If you are acting for the trustee of a discretionary trust acquiring residential property, advise on liability for SPD and SLT if the trust deed does not irrevocably exclude foreign beneficiaries
- If your retainer excludes reviewing the trust deed, confirm that exclusion in writing and warn the client of the potential for liability for SPD and SLT if the deed does not satisfy Revenue NSW's requirements
- If you are reviewing the trust deed, check for both the "no foreign beneficiary requirement" and the "no amendment requirement". So as well as checking definitions of beneficiaries, you will need to review any powers of amendment and ensure that they do not allow amendment to include foreign beneficiaries
- If instructed, draft a deed of amendment to irrevocably exclude foreign beneficiaries and make sure it is executed, ideally before any residential land is acquired. The deed should exclude foreign beneficiaries and should also modify any power of amendment to ensure it does not allow amendment to include foreign beneficiaries

Of course there may be some discretionary trust vehicles where it is intended that foreign persons may benefit and amendment of the deed will not therefore be appropriate. If that is the case it is important to provide clear advice about liability for SPD and SLT if the trust is used or intended to be used to hold residential property in NSW.

Further information and resources can be found on the Revenue NSW website:

[Surcharge Purchaser Duty Guide | Revenue NSW](#)

[Surcharge land tax for foreign owners | Revenue NSW](#)