

## Discretionary trusts — NSW duty & land tax surcharges — act before 31 December 2020 or incur extra NSW tax

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### The changes

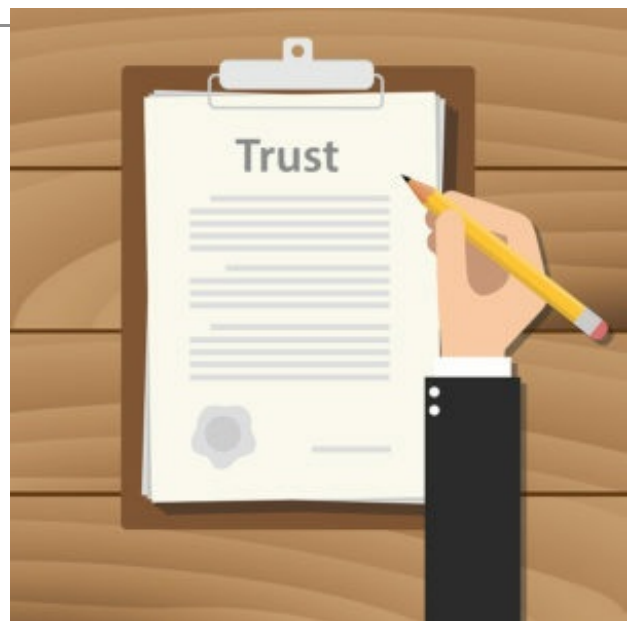
In the past few years, various jurisdictions in Australia have introduced legislation to impose duty and land tax surcharges on foreign persons, trusts and companies that purchase or hold certain types of real estate.

The State Revenue Legislation Further Amendment Bill 2020 (NSW), which became law on 24 June 2020, contains amendments relating to the surcharge purchaser duty provisions of the *Duties Act 1997* (NSW) ('DA') and the surcharge land tax provisions of the *Land Tax Act 1956* (NSW) ('LTA') and the *Land Tax Management Act 1956* (NSW) ('LTMA'). These provisions impose a surcharge duty or land tax on 'foreign persons' and 'foreign trustees' that acquire or hold residential-related property or residential land respectively.

Broadly, the amendments provide that a trustee of a discretionary trust is taken to be a foreign trustee if the terms of the trust do not prevent a foreign person from ever being or becoming a beneficiary. Such exclusionary provisions must be irrevocable, ie, the deed cannot be subsequently varied to include an excluded beneficiary.

The transitional provisions require that any affected trust deed must be varied before 31 December 2020.

These NSW surcharges can have a significant impact on a discretionary trust. For example, a foreign trustee pays a surcharge of 8% duty on the acquisition of 'residential related property' (DA, s 104L) and will pay an annual surcharge of 2% land tax on 'residential land' (LTA, s 5A). On a \$1 million residential property, this would amount to



an additional \$80,000 duty on acquisition and additional land tax of \$20,000 per annum (although it should be noted that the calculations of land value under these taxes differ and these figures are indicative only).

## Timely action needed

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This legislation will have an impact for any discretionary trust that already holds residential property or acquires any residential property in NSW. It may also have retrospective effect.

Trustees and advisers should take timely action and ensure surcharge duty or land tax liability is not unnecessarily incurred. A top level check would include:

- Determine each trust that holds ‘residential related property’ in NSW
- Check to see if these trusts have irrevocable provisions excluding foreign beneficiaries
- Have relevant deeds varied before 31 December 2020
- Have deeds with foreign beneficiary exclusion provisions checked to see if they satisfy the latest legislative criteria

We invite any clients that may be subject to these laws to contact us to discuss their options and pricing for the number of deeds they required to be varied.

Note that the foreign purchaser rules differ substantially from one jurisdiction to another and if a trust holds property in more than one jurisdiction, then appropriate exclusions may be required in each jurisdiction. We encourage you to review some of our prior newsfeed article slinked below on this topic.

## Related articles

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- [Victoria, NSW and Tasmania foreign purchaser duty update – Discretionary Trusts](#)
- [NSW duty and land tax surcharge changes – action needed before 31 December 2019](#)
- [Your discretionary trust may unwittingly be subject to extra duty or land tax](#)
- [DBA Lawyers’ discretionary trust – managing the extra duty and land tax surcharges on foreigners](#)

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This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.

Note: DBA Network Pty Ltd hold a range of SMSF CPD training online. The next live SMSF Online Update webinar is being presented on 4 September 2020. For more details or to register, visit [www.dbanetwork.com.au](http://www.dbanetwork.com.au) or call Natasha on 03 9092 9400.

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## **DBA LAWYERS**

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