

February 2021

## Foreign Resident Amendments – deadline confirmed 31 December 2020

As most are now aware, the State Revenue Legislation Further Amendment Act (NSW) became law on 24 June 2020. The legislation affects:

1. **Trustees of Discretionary Trusts and**
2. **Trustees of Testamentary Discretionary Trusts,**

that own or intend to own residential property where the Trust Deed fails to exclude a foreign beneficiary.

The Act does allow for an exemption or a refund of duty and land tax but only if the Deed explicitly prevents a foreign person from benefitting under the Trust.

There are three key dates to note; pre 24 June 2020, between 24 June 2020 and 31 December 2020 and post 31 December 2020.

### **Pre 24 June 2020**

Where the Deed was amended prior to 24 June 2020 to exclude foreign beneficiaries, the transitional provisions provide the Trustee will be entitled to an exemption or refund of prior surcharge liabilities if an application is made to Revenue NSW by 31 December 2020.

### **24 June 2020 to 31 December 2020**

Where the Deed is amended during this period, Trustee's must ensure:-

1. That no potential beneficiary of the Trust is a foreign person; and
2. The Deed is not capable of being amended to cause a foreign person to benefit.

Put simply, the Deed must irrevocably exclude foreign beneficiaries.

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## **Testamentary Discretionary Trust - Post 31 December 2020**

The Trustee of a testamentary trust is not deemed a foreign person (even where the Deed fails to exclude) if:-

1. The Will is signed prior to 31 December 2020;
2. The testator died prior to 24 June 2020 (with a Will) or no later than 24 June 2022 (intestate); or
3. Where a Court Order has been made prior to 31 December 2020 varying the the relevant provision/s of the Will or rules relating to persons who die intestate.

### **When will duty or land tax apply?**

- A will signed from 1 January 2021 will need to expressly exclude a foreign beneficiary and include a 'non-amendment' clause. If it doesn't, the duty and/or tax may apply.
- From 24 June 2022, if a person dies without a Will, and a trust is created (pursuant to the laws of intestacy), the trustee may be liable for both duty and land tax.
- From 31 December 2020 if a Court Order is made resulting in a trust, the Trustee may be liable for both duty and land tax.

### **How can we help?**

No two cases are the same. For some, the existence of a foreign beneficiary is unlikely, for others, the class of beneficiaries may be entirely constituted by foreign persons, or, there may be a mix of both.

In some instances it may there may be significant taxation consequences associated with amending a deed, in particular where:

1. a named or default beneficiary; or
2. a key decision maker is a foreign person,

Careful consideration and structuring can ensure that the benefits of the trust are received by the intended beneficiaries whilst also minimizing the Trustee's risk of being liable for tax or duty. It is crucial that where a discretionary trust owns residential property, or where there is an intention to purchase residential property, Trustees have their Deed reviewed and any necessary amendments made.

**At Samaras Lawyers we are proud of the fact that we don't take a 'cookie cutter' attitude to our client's needs – all circumstances are different resulting in the need for a tailor-made approach.**

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