



## Stamp Duty Surcharge to Catch Many Discretionary Trusts

### Duty Surcharge

On 1 July 2016 the Victorian State Revenue Office (SRO) increased the current rate of duty imposed for foreigner purchasers of residential property in Victoria. Foreign purchasers will now have to pay a 7 per cent duty surcharge, increased from 3%. They will also pay the surcharge on land that subsequently becomes residential property even if that is many years after its acquisition.

Foreign purchasers are defined to include:

- An individual who is not an Australian citizen, not the holder of a permanent residency visa and not a New Zealand citizen who is the holder of a special category visa
- A foreign company being a company incorporated outside of Australia, or a company incorporated in Australia but has a foreign controller
- The trustee of a foreign trust

**TRUST ALERT:** Many trustee purchasers will be caught by this surcharge as the definition includes the trustee of a Trust where a beneficiary who is a foreign person has a substantial interest in the Trust. This occurs where a beneficiary has a beneficial interest in the trust capital exceeding 50%. In a Discretionary Trust, a potential beneficiary will be **deemed** to have a beneficial interest in the trust capital equal to the maximum percentage the trustee is able to distribute - even if they never intend to make such a distribution. This will catch many unsuspecting trustees where the breadth of potential beneficiaries under the trust deed includes relatives that are not Australian citizens.

**ACTION:** *Please contact us or your legal advisor if you are contemplating the purchase of residential real estate in Victoria using an existing trust or a newly formed one. Potential solutions could include restricting the trustee's ability to distribute trust capital to such persons and/or their associates NB: Other States, including NSW and Queensland, have introduced substantially similar provisions to capture land transactions in those jurisdictions.*



## Land Tax Surcharge to Catch Many Discretionary Trusts

### Land Tax Surcharge

The Victorian Government has recently increased to 1.5% (previously 0.5% for land owned at 1 January 2016) the amount of Land Tax surcharge applying to properties (residential, commercial or industrial) owned by “**absentee owners**” from 1 January 2017.

The definition of an “**absentee owner**” to which the surcharge applies is wider than the definition of “**foreign purchaser**” for duty surcharge purposes. It is defined to include:

- (a) An individual who is not an Australian citizen, not the holder of a permanent residency visa and not a New Zealand citizen who is the holder of a special category visa, and who does not ordinarily reside in Australia and who is absent from Australia on 31 December or was absent from Australia for a period or periods adding to at least 6 months in the last calendar year
- (b) A foreign company being a company incorporated outside of Australia, or a company incorporated in Australia but has absentee persons having a controlling interest (i.e. can control the composition of the board, has more than 50% of the issued shares in the company or can cast more than 50% of the votes at a general meeting of the company)
- (c) The trustee of a trust where at least one “**absentee beneficiary**” has a beneficial interest in land that is subject to a fixed trust, is a unitholder in a unit trust scheme or is a “**specified beneficiary**” of a discretionary trust

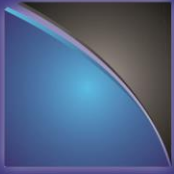
A “**specified beneficiary**” is a beneficiary that is specifically named in the trust deed (or specifically declared in writing pursuant to the trust deed) to be a beneficiary in whom the whole or a part of the trust income or property may be distributed or vested either:

- in the event of an exercise of power to do so; or
- would have such an interest in the event no discretion is exercised (commonly known as a default beneficiary)

Where a trustee of a discretionary trust has a natural person as a beneficiary that falls within the definition set out in (a) above and meets the “**specified beneficiary**” definition set out above, the trustee will be an “**absentee owner**” and potentially subject to a land tax surcharge.

**TRUST ALERT:** Many Discretionary Trusts holding land in Victoria may have a specified beneficiary who is an absentee beneficiary - potentially exposing the trustee to a Land Tax surcharge assessment. The provisions also place an onus on the Landholder to notify the Commissioner of their absentee owner status - or any changes to this status.

**ACTION:** *Please contact us or your legal advisor if you hold land situated in Victoria and are concerned that the Land Tax Surcharge provisions may apply to you. NB: Other States, including NSW and Queensland have introduced similar provisions to capture certain landholdings in those jurisdictions.*



## Buying or Selling Land - New Withholding Tax Obligations

### Selling Land - Tax Clearance Certificate Required

From 1 July 2016, sales of Australian Real Estate with a sale price in excess of \$2.0m will be subject to a 10% withholding tax unless the vendor can provide the purchaser with a Tax Clearance Certificate issued by the Australian Tax Office (ATO). These withholding obligations will also apply to certain transfers of shares in companies or interests in trusts that hold Australian Real Estate.

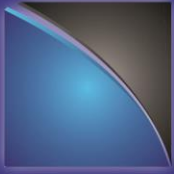
The Tax Clearance Certificate application forms are available from the ATO website and may take up to 28 days to issue. The Tax Clearance Certificate must be held before settlement in order to avoid withholding tax being payable to the ATO. Conveyancers and/or your legal representatives may apply for this as part of their service, however vendors should ensure this certificate is held otherwise they will have some of the sale proceeds paid to the ATO on their behalf. These payments can be claimed as a tax credit upon lodgment of your income tax return.

**ALERT:** The ATO will only issue a Tax Clearance Certificate to the land owning entity as long as they are convinced the entity is not a foreign resident for income tax purposes.

**VENDOR ACTION:** *As a vendor of Australian real estate with an expected sale price in excess of \$2.0m, we recommend those persons assisting with the sale of your property obtain a Tax Clearance Certificate well before settlement. Tax Clearance Certificates can be applied for on-line and are issued by the ATO. They are valid for 12 months after issue.*

**PURCHASER OBLIGATIONS:** *If you are a purchaser of Australian real estate, ensure you withhold tax at 10% of the sale price and send to the ATO prior to becoming the owner of the property unless you are given:*

- (a) a valid Tax Clearance Certificate from the vendor prior to settlement*
- (b) a declaration from the vendor in accordance with the relevant legislation stating they are an Australian Tax resident*
- (c) a Variation Certificate issued by the ATO - in which case you will be required to pay the varied rate of withholding tax*



## Foreign Investment Approval And Reporting Requirements

### New Foreign Investment Review Board (FIRB) Requirements

Recent changes to the Foreign Acquisitions and Takeovers Act 1975 (FATA) have resulted in an increase in transactions - referred to as '**significant actions**' - that require FIRB approval prior to proceeding, or require reporting to the FIRB or the Australian Tax Office (ATO). The thrust of FATA is to give the Australian Government certain controls over acts by '**foreign persons**' affecting securities, assets or Australian land.

In line with other measures introduced by some State Governments affecting Australian real estate transactions (refer to our other property newsletter articles), the definition of foreign persons, particularly where a trust is involved, will result in obligations being imposed on unsuspecting Trustees.

Some of the significant actions by foreign persons requiring FIRB approval prior to proceeding include:

- (a) Acquiring an interest in agricultural land where the cumulative value of agricultural land, including the proposed purchase, exceeds \$15 million
- (b) Acquiring a direct interest of \$55 million or more in an agribusiness (some exceptions apply)
- (c) Acquiring residential real estate (both new and existing - some exemptions and prohibitions apply)

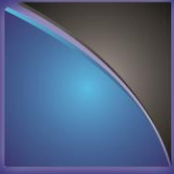
Some of the significant actions requiring notification only are:

- (d) No longer having an interest in agricultural land
- (e) Changing foreign person status - either by becoming or ceasing to be a foreign person
- (f) Changing the land or property type from/to agricultural land/residential land

In addition to the above, any interest in agricultural land held at 1 July 2015 by foreign persons was required to be registered with the ATO by 29 February 2016.

For these purposes a Foreign Person is defined to include:

- (a) an Individual who is not an Australian citizen and is not ordinarily resident in Australia; or
- (b) a Corporation in which an individual not ordinarily resident in Australia holds a substantial interest; or
- (c) a Corporation in which 2 or more persons, each of whom is an Individual not ordinarily resident in Australia hold an aggregate substantial interest; or



- (d) the Trustee of a Trust in which an Individual not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the Trustee of a Trust in which 2 or more persons, each of whom is an Individual not ordinarily resident in Australia, or a foreign Corporation hold an aggregate substantial interest

The above provisions are complex and whilst exemptions may apply to your circumstances, we recommend professional advice be received prior to undertaking any “**significant action**” outlined above as the penalties for non-compliance can be severe. The number of FIRB and ATO directions to foreign person requesting they dispose of property not able to be purchased by Foreign Persons without prior FIRB approval has increased substantially in recent times. Given the breadth of the measures we are not surprised by this trend.

**ALERT FOR TRUSTS:** For FIRB purposes, a **substantial interest** is a beneficial interest that exceeds 20% of the income or property of a Trust. For a Discretionary Trust, a potential beneficiary is deemed to have a beneficial interest in the Trust equal to the maximum percentage of income or property that is able to be distributed to them under the terms of the Trust Deed. In our experience this will result in many Trusts being foreign persons for these purposes.

**ACTION:** *If you are the Trustee of a Discretionary Trust with potential beneficiaries that are not Australian citizens, you should seek professional advice prior to acquiring any Australian real estate. If you held agricultural land as at 1 July 2015, contact our office to ascertain whether such an interest should be entered in the Land Register maintained by the ATO.*

*Foreign persons (including foreign trusts) acquiring Australian real estate at auction should consider obtaining an ‘Exemption Certificate’ approval prior to attending the auction. Such Certificates are valid for six months and enable you to purchase only new residential investment properties and other qualifying land purchases made at auction approved by the FIRB.*

*If acquiring real estate other than by auction, you should ensure the contract is made subject to the prior approval of the FIRB.*

*If you are acquiring Australian Real Estate through a trust structure, we recommend either a new trust be established that excludes beneficiaries likely to cause the trust to be a foreign trust. If you are planning on using an existing trust we recommend having its trust deed reviewed and possibly amended to ensure it is not a foreign trust.*

Should you believe any of the above recent developments impact on you, please contact our office for specific advice.