

# Foreign Persons Land Tax Surcharge

## What is the Foreign Persons Land Tax Surcharge?

The Foreign Persons Land Tax Surcharge (“the Surcharge”) is an additional tax that Revenue NSW has imposed on foreign owners of residential property. The Surcharge is in addition to any Land Tax that the property owner may be liable for and is charged at a flat rate of 2% of the land value of the property. The Surcharge only applies to residential property.

The Surcharge can be quite significant. For example, a property owner with a residential property with a land value of \$400,000 will pay an additional \$8,000 in Surcharge each year.

## Who is a foreign person?

A person will be a foreign person for these rules if:

- They are not ordinarily resident in Australia; and
- They hold a substantial interest (20% or more) in the residential property.

A person is ‘ordinarily resident in Australia’ if they have been in Australia for more than 200 days in the 12 months prior. There are some exclusions to this, namely those persons who are Australian Citizens or NZ Citizens who hold a special Australian migratory visa. These persons are always considered a resident of Australia for the purposes of the Surcharge

## Foreign person definition extended to Companies and Trusts

A company or trust will be a foreign person for these rules if:

- A person not ordinarily resident in Australia owns a substantial interest (20% or more) of the company or trust; or
- Two or more persons not ordinarily resident in Australia owns an aggregate substantial interest of (40% or more) of the company or trust.

For **companies and fixed trusts**, the ownership interest is readily calculated by reference to the number of shares or units held.

For **discretionary or family trusts**, there is no fixed unit of ownership, rather there is the discretion of the trustee to distribute income and/or property to a group of beneficiaries which may include a foreign person. The NSW Commissioner of Taxation has made it clear that unless a trust deed specifically removes the trustee’s ability to distribute income and/or property to a foreign person then the trust is a foreign person and the Surcharge will apply.

Please note that if a discretionary trust owns a substantial interest in a company or fixed trust, then if the discretionary trust does not exclude foreign persons the company or fixed trust will also be considered a foreign person.

## Next Steps

Where a discretionary or family trust is involved in your group structure, then provided your Trust Deed allows, it is possible to amend the Trust Deed to exclude foreign persons as a beneficiary. An application then needs to be made to Revenue NSW to exempt the trust for the Foreign Persons Land Tax Surcharge. This change must be irrevocable, so careful consideration needs to be given to the annual cost of the surcharge vs the flexibility to distribute to foreign persons. In our International World, you may need to consider the consequences of a relative (e.g. son or daughter) moving overseas and your future ability to distribute to them.

Here at Level One we have put together a package to manage this amendment for you. This package includes a review of your Trust Deed by a Lawyer who will also prepare the Deed of Amendment.

If you would like to discuss the Land Tax Surcharge, or whether your Family Trust deed requires amending, please do not hesitate to contact this office.