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# Let's chat

Excluding foreign beneficiaries for FIRB – April 2022

With:

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*Information provided is general in nature; precise application depends on specific circumstances*



Chat Legal Pty Ltd

*Let's have a chat*

# Why?

- Discretionary trusts acquiring
  - FIRB application
  - Stamp duty surcharge
  - Land tax surcharge



# FIRB application (as at 2022)

- Need to apply to FIRB if investments above certain thresholds
- All foreign investors if more than \$0:
  - Residential land
  - Vacant commercial land
  - *National security land*
- Other rules for certain types of investors (private v Government) and depending on whether free trade agreements exist between countries
  - High thresholds if acquiring agricultural land or developed commercial property
  - \$0 threshold if acquiring mining and production tenements (unless Chile, New Zealand and the United States)
- Fees start from \$6,350 for residential land valued \$1m or less (above \$75,000)



# Stamp duty surcharge

- Stamp duty surcharge applies if 'foreigner' acquires residential property
- 8% - NSW, Vic and Tas
- 7% - Qld, SA and WA
- 1.5% surcharge if 'foreigner' acquires primary production land in Tas



# Land tax surcharge

- Land tax surcharge applies if 'foreigner' owns certain types of land
- ACT: 0.75% on residential land
- NSW: 2% on residential land
- Qld: 2% on **all** land
- Vic:
  - 1.5% on residential land in Melbourne middle and inner suburbs left vacant for 6 months or more
  - 2% on **all** land



# Many rules, same definition?

- Different definition depending on if:
  - FIRB legislation
  - State
  - Stamp duty or land tax legislation
- If wanting to acquire/hold property without worry of breaching FIRB requirements or surcharges applying – trust deed should adopt the broadest definition in limiting foreigners from benefiting
- Concern is *if* a discretionary trust can distribute to a foreign person, *then consider* that foreign person as being able to receive 100% of the income *if* there are no other restrictions



# FIRB

- Foreign person includes an individual not ordinarily resident in Australia – definition of foreign person, section 4 FATA
- Also includes a trust in which an individual not ordinarily resident in Australia holds a substantial interest – definition of foreign person, section 4 FATA
- Substantial interest means 20% (or 40% if aggregated) – section 4 FATA
- If trustee has power to distribute income/property of trust to a beneficiary, then each beneficiary is taken to hold beneficial interest in the maximum percentage able to be distributed to such beneficiary – section 18, FATA
- Effect is that if a discretionary trust *could* distribute 100% to a foreign person, a foreign person is deemed to hold a substantial interest in the trust



# FIRB

- Ordinarily resident if in Australia for 200 or more days for prior 12 month period **and** their presence is not subject to any limitations:
  - Temporary residents are foreign persons as limitations imposed on visa
  - Permanent resident visa holders may be ordinarily resident if residing for 200 days or more
  - New Zealand citizens are foreign persons unless they special category visa
  - Australian citizens living overseas could be a foreign person

*FIRB Guidance Note 2 – Key concepts (as of 9 July 2021 update)*





# FIRB

- Persons that meet certain criteria do not need foreign investment approval before purchasing real estate in Australia including:
  - Acquisitions by the trustee of a resident trust, if at the time of the acquisition, the trustee would not be a foreign person if interests directly held in it by Australian citizens living abroad, Australian permanent visa holders or New Zealand citizens (who are eligible for a special category visa) were disregarded

*Pages 65 to 66 FIRB Guidance Note 2 – Key Concepts (as of 1 July 2017 update)*

- Persons that meet certain criteria do not need foreign investment approval before purchasing residential real estate in Australia including:
  - New Zealand citizen eligible for special category visa
  - Australian permanent resident visa holders

*Pages 67 FIRB Guidance Note 2 – Key Concepts (as of 1 July 2017 update)*



# NSW

- Stamp duty and land tax:
  - Adopts meaning from FATA as modified by the NSW Duties Act
  - NSW Duties Act excludes Australian citizens from the definition of a foreign person
  - Discretionary trust must exclude foreign persons and cannot be varied to include foreign persons



# Vic

- Stamp duty:
  - Foreign natural person means a natural a person who is not an Australian citizen, permanent visa holder or New Zealand citizens who is the holder of a special category visa
  - Foreign trust defined to mean a trust in which one or more 'foreigners' hold a substantial interest
  - Substantial interest defined to be either:
    - A beneficial interest of more than 50% of the capital of the estate of the trust; or
    - If the Commissioner makes a determination
  - Adopts similar deeming provision in FATA
  - Discretionary trust must exclude foreign persons and cannot be varied to include foreign persons (Commissioner's guidelines)
- Land tax adopts a wider approach on what an 'absentee trust' if person not an Australian citizen or resident and is a specified beneficiary of a trust



# Qld

- Stamp duty and land tax
  - Takers in default of income or capital of a discretionary trust are not an Australian citizen or permanent resident



# SA

- Stamp duty
  - Foreign person is a person who is not an Australian citizen, permanent visa holder or New Zealand citizen who is the holder of a special category visa
  - Foreign trust (in the case of a discretionary trust): 1 or more of the following is a foreign person:
    - A trustee;
    - A person who has the power to appoint under the trust (arguably principal);
    - An identified object under the trust (beneficiary);
    - A person who takes capital of the trust property in default.



# WA

- Stamp duty
  - Foreign individual is an individual who is not an Australian citizen, permanent visa holder or New Zealand citizen who is the holder of a special category visa
  - Foreign trust (in the case of a discretionary trust) is a trust controlled by a foreign person or where 1 or more foreign persons that are takers in default, together with their associates, hold at least 50% interest in the discretionary trust
  - Control means if a foreign person is in a position to influence, either directly or indirectly, the vesting of the capital of the trust property or the income of the trust property



# The problem

- Different definitions on what it means to be a foreign trust
- Some States actually allows you to distribute to foreign persons without causing the trust to be a foreign trust because they look at the default beneficiaries
- NSW and FIRB requires no ability to distribute to a foreign person
- Often the cause to exclude foreigners start so that no application is required for FIRB
- Therefore, broadest approach must be taken (from a beneficiary perspective)
- The extreme example is ensuring no foreign person can act as principal or control the trustee (as WA/SA potentially defines that as a foreign trust)



# The problem

- Different providers adopt different approaches
- Those with bases Australia wide may adopt the most extreme approach
- I.e. some do not allow foreign persons from controlling the trust (even as an attorney under a power of attorney)
- Note though most States define foreign person as Australian citizen or permanent visa holder (with others also including New Zealand citizens with a special category visa)





# Examples

## 22. Distribution Restrictions

22.1. The Trustee shall not make a distribution or do any other act which would:

- (1) cause the Trust to become a “foreign trust” for the purpose of the *Duties Act 2000* (Vic) or the *Duties Act 2001* (Qld); or
- (2) cause the Trustee to be a “foreign person” for the purpose of the *Duties Act 1997* (NSW) or the *Land Tax Management Act 1956* (NSW); or
- (3) cause the Trustee to be a “foreign person” for the purpose of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

22.2. Clause 22.1 shall not be varied while the Trust Property includes an interest in real estate (including without limitation as purchaser under a contract for sale) in New South Wales,

Queensland or Victoria or for a period of three years following the sale or disposal of the last such interest in real estate.



# Examples

Notwithstanding any other clause in this document:

- the Trustee excludes such persons from being a beneficiary of this Trust; and
- no action, decision, discretion or power may be exercised pursuant to the terms of this document,

which would cause the Trust to be liable for:

- lodging an application required under the *Foreign Acquisitions and Takeovers Act 1975* (Cth);
- any 'foreigner' surcharge under any duty or land tax legislation in Australia; and
- any 'vacancy' fee under any State or Federal legislation.

For the avoidance of doubt, references to 'foreigner' surcharges and 'vacancy' fee includes such surcharges and fees imposed on a 'foreign person', 'foreign purchase' or a 'trustee of a foreign trust' for the purposes of the following legislation:

- Duties Act 1997 (NSW);
- Land Tax Act 1956 (NSW) and Land Tax Management Act 1956 (NSW);
- Duties Act 2000 (VIC);
- Duties Act 2001 (QLD);
- Duties Act 2001 (TAS);
- Stamp Duties Act 1923 (SA);
- Duties Act 2008 (WA); and
- Land Tax Act 2004 (ACT).

The term 'foreigner' in this clause should be used to include (but not limited to) references to terms such as 'foreign person', 'foreign purchaser' and 'absentee person' in the respective legislation and should be interpreted in a broad manner to ensure no additional surcharges or processes are required from this Trust that would not be required from any other Trust which would not have had any other legislation applying to it.

This Item 9 is irrevocable and cannot be amended by any party.



# Examples

**Excluded Person** means the following (even if any of them is named or would otherwise be or be included in a class of Beneficiary):

- (a) each person named or described in Item 14 in the Schedule or nominated by the Trustee to be an Excluded Person;
- (b) the Settlor and any Child of the Settlor who is at the relevant time under the age of 18 years;
- (c) any corporation in which a person in (a) or (b) above is a director or member or in which any of them has a beneficial interest in any share;
- (d) any trust in which a person in (a) or (b) above has a beneficial interest whether vested, contingent or otherwise; and/or
- (e) any Foreign Person;

**Foreign Person** means:

- (a) a foreign person or foreign trust for the purposes of Chapter 4 of the Duties Act 2001 (Qld);
- (b) a foreign person or foreign trust for the purposes of Division 4 of Part 3 of the Land Tax Act 2010 (Qld);
- (c) a foreign natural person, a foreign corporation or a foreign trust as defined in section 3 of the Duties Act 2000 (Vic);
- (d) a person holding a controlling interest in a foreign corporation or a substantial interest in a foreign trust for the purposes of sections 3A and 3B of the Duties Act 2000 (Vic) respectively;
- (e) an absentee person as defined in section 3 of the Land Tax Act 2005 (Vic);



# Examples

- 2.8 Notwithstanding any other clause in this document, any person whose inclusion as a beneficiary of the Trust would result in the Trustee of the Trust being a foreign person or foreign purchaser under the legislation outlined in the following clause, is excluded as a beneficiary of the Trust.
- 2.9 For clarity, the Trustee must not make a distribution or do any other action which would cause the Trustee of the Trust to be a:
- (a) foreign person for the purposes of the following legislation:
    - (i) *Duties Act 2001* (Qld);
    - (ii) *Duties Act 1997* (NSW);
    - (iii) *Land Tax Act 1956* (NSW) and *Land Tax Management Act 1956* (NSW);
    - (iv) *Duties Act 2001* (TAS);
    - (v) *Duties Act 2008* (WA); or
    - (vi) *Land Tax Act 2004* (ACT);
  - (b) foreign purchaser for the purpose of the *Duties Act 2000* (Vic); or
  - (c) trustee of a foreign trust for the purposes of the *Stamp Duties Act 1923* (SA).
- 2.10 Clauses 2.8 and 2.9 are irrevocable and must not be varied by the Trustee.



# Examples

## 25. LIMITATION ON DISTRIBUTIONS TO FOREIGN PERSONS

Despite anything to the contrary in this deed, if any of the Secondary or Tertiary Beneficiaries are foreign persons within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) the percentage of the Net Income in any year or capital at any time that the Trustee may Distribute to any one of those Beneficiaries or any two or more of them must not exceed the maximum percentage that the Trustee can Distribute without breaching that Act.





# Examples

1.19 'Foreign Person' means:

1.19.1 a 'foreign person' as defined in:

- (a) the *Duties Act 1997 (NSW)* and the *Land Tax Act 1956 (NSW)*;
- (b) the *Duties Act 2001 (QLD)* and the *Land Tax Act 2010 (QLD)*;
- (c) the *Stamp Duties Act 1923 (SA)*;
- (d) the *Land Tax Act 2004 (ACT)*;
- (e) the *Duties Act 2001 (TAS)*;
- (f) the *Duties Act 2008 (WA)*; and

1.19.2 a 'foreign trustee' as defined in the *Duties Act 1997 (NSW)*; and

1.19.3 a trustee of a 'foreign trust' as defined in the *Stamp Duties Act 1923 (SA)*; and

1.19.4 a 'foreign purchaser' as defined in the *Duties Act 2000 (VIC)*;

1.19.5 a 'foreign natural person', a 'foreign corporation' and the trustee of a 'foreign trust' as these terms are defined in the *Duties Act 2000 (VIC)*;

1.19.6 an 'absentee person' as defined in the *Land Tax Act 2005 (VIC)*; and

1.19.7 any individual, entity or other body or class of individuals, entities or other bodies expressly and irrevocably added as a Foreign Person in accordance with this Deed from time to time,

and for the avoidance of doubt, this definition of Foreign Person may be expressly and irrevocably expanded from time to time in accordance with this Deed (for example, if and when additional duty and/or land tax surcharge regimes in other States or Territories are introduced in the future) but cannot be revoked or amended so as to limit its scope.



# Future questions

- If I go overseas can I still benefit?
  - If you are Australian citizens or permanent residents
- I have children overseas, can they still benefit?
  - If they are Australian citizens or permanent residents
- Can I distribute to the trusts I have?
  - Maybe, depends on if the receiving trust has exclusion of foreign provisions and if such provisions are identical or even broader reaching than those of the distributing trust



# Do we really care?

- Distributions to foreign persons may be caught by ATO data-matching
  - Example: Couple move to Japan decades ago and received an ATO letter
- Query if such persons are actually foreigners (per definition)
- Look at definition if actually able to distribute to someone not ordinarily resident in Australia
  - Wording can make a difference\*
- Data-matching gets better may link to State authorities





# Weighing of circumstances

- Advantages:
  - No need to apply to FIRB (and incur the FIRB application fee)
  - No worry of stamp duty or land tax surcharges
- Disadvantages:
  - Query ability to distribute if client moves overseas
  - Additional considerations when distributing within the group
- Consider type of asset being acquired and jurisdiction
- No guarantee on asset being acquired sometimes so adopting a uniform approach for clients

# Contact details

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