

# Transactions involving foreign purchasers

“FIRB Enquiry?” “Surcharges?”

These curious notations were made on the front page of a NSW solicitor’s conveyancing file for a client’s recent property purchase. A note on the file recording the client’s instructions for the purchase carried similar notations.

Those quick notations indicate that the solicitor was aware of key risks facing a “foreign person” purchaser in NSW and gave appropriate advice, but unfortunately didn’t back that up with full file notes or written advice. A professional negligence claim ensued when the client was found to be in breach of the Foreign Investment Review Board regime and liable for NSW Surcharge Purchaser Duty (SPD). The client alleged they would have reorganised their affairs to avoid penalties and tax liability had correct advice been given.

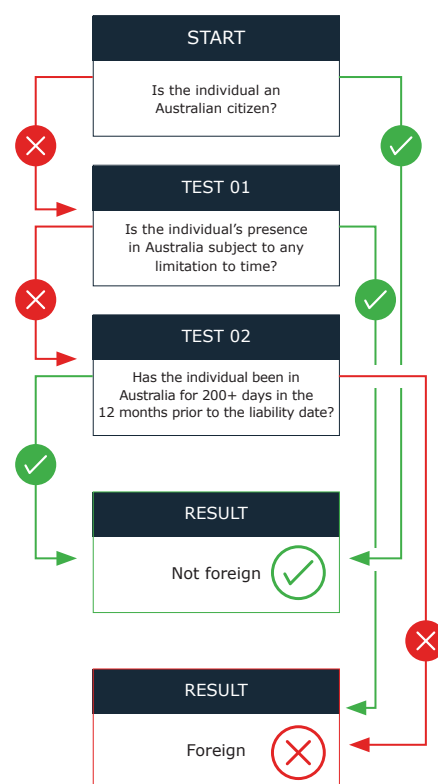
## Surcharge Purchaser Duty and Surcharge Land Tax

As most practitioners will be aware, the SPD applies where a “foreign person” purchaser is a temporary resident or, if a permanent resident, has lived in Australia for less than 200 days in the 12 months prior to purchase. The flow chart to the right,

from the Revenue NSW website, is a useful way of determining whether a client is liable to pay SPD.

In 2020, the NSW Government began conducting a compliance audit of the additional liabilities for “foreign person” clients created by the SPD and Surcharge Land Tax (SLT) regimes. Hundreds of letters, relating to transactions up to 5 years ago, have been sent to taxpayers demanding payment of the 4% (or, after June 2017, 8%) SPD plus penalties and interest. Many of the liable taxpayers have sought contribution, or complete reimbursement, for the additional charges from their solicitors or conveyancers.

The steep increase in the number of claims relating to SPD in the past six months prompted Lawcover to seek a consistent approach to the application of penalties and interest. Revenue NSW has recently indicated that penalties and interest can be



avoided in cases where taxpayers sought advice from solicitors or conveyancers. In those cases, the following penalty and interest provisions will apply<sup>1</sup>:

SPD Liability Date	Penalty Tax	Interest
On or before 19 June 2018	Nil	Market Rate
20 June 2018 to 19 June 2019	Nil	Premium and Market Rates
On or after 20 June 2019	Penalty may apply depending on the circumstances	Premium and Market Rates may apply depending on the circumstances
Voluntary disclosure	In line with Tax Administration Act	In line with Tax Administration Act

<sup>1</sup>NSW State Revenue update can be accessed [here](#)

It is important that solicitors review their files and alert clients that purchased property from 2016, and who might possibly be subject to the SPD regime, to clarify their liability for the duty.

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With appropriate management, it is possible to reduce the overall exposure for penalty duty and interest where voluntary disclosure is made by taxpayers.

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It is also possible for Lawcover to assist in reducing exposure when we are notified of potential claims early.

### Discretionary trusts

From 1 January 2021, trustees of discretionary trusts will be treated as foreign persons unless the trust deed irrevocably excludes foreign persons as potential beneficiaries, even if there are no actual foreign persons who are beneficiaries.

If the terms of the trust have been properly amended to irrevocably exclude foreign beneficiaries before midnight on 31 December 2020, the trustee of the discretionary trust will not be liable for:

- ▶ surcharge duty on transfers of dutiable property that have occurred or occur prior to 31 December 2020
- ▶ surcharge land tax in respect of the 2017, 2018, 2019 and/or 2020 land tax years.

Lawcover has received notification of claims where Revenue NSW considers that the amendments to discretionary trust deeds do not properly comply with the exclusion requirement. It is important that all practitioners in this area read Revenue NSW's Practice Note CPN 004 v2. [Click here](#) and consider applying to Revenue NSW for a private ruling if in doubt.

### Risk management tips

- ▶ There are different tests for "foreign residents" under the State and Federal tax regimes. Be aware this can involve complex issues and that it is not always obvious that a client is a foreign resident for the purpose of these regimes. Consider referring your clients for specialist tax advice where appropriate

- ▶ The increased stamp duty surcharge could impact some purchasers' ability to complete, so clarification of status is important when providing advice on new transactions
- ▶ Document your advice and instructions received by file note or, preferably, by a letter or email to the client
- ▶ If you are aware of transactions where your clients may have been liable to pay the Surcharge Purchaser Duty but did not, they are likely to be audited in the coming months. Advise them that it is possible to avoid penalties and interest
- ▶ Review all amendments to discretionary trusts to ensure that they are effective in irrevocably excluding foreign beneficiaries.